

# Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice

Tracey L. Meares\*

*The Warren Court's work is justly celebrated, for who would not support the right to counsel for indigent defendants or the requirement that an arrested person be informed of her right to counsel, including appointed counsel if she could not afford one? Nonetheless, it is useful to recall the regime replaced by selective incorporation, the method by which the Warren Court established its body of constitutional criminal procedure. In the early days of constitutional criminal procedure, the Supreme Court relied upon notions of fundamental fairness in the Due Process Clause of the Fourteenth Amendment to review state court criminal judgments. While it is true that those early decisions were too weak to engineer widespread reform of the state criminal justice processes, it is also true that fundamental fairness jurisprudence had notably positive features. In particular, fundamental fairness jurisprudence was replete with references to what I call a "public-regarding" vision of fairness. This notion importantly includes the public, as well as the defendant, in the articulation of constitutional values relevant to the fair operation of criminal justice. Moreover, the decisions articulating these views considered racial injustice as part and parcel of constitutional review. While the Warren Court's approach led to reform of state criminal justice, that reform came at a cost. The Warren Court's selective incorporation approach did not admit of the candid evaluation of various aspects and practices of the states that fundamental fairness analysis did. The focus on fundamental fairness captured society's normative aspirations and provided a primer on fair treatment of citizens. To illustrate the potential of fundamental fairness analysis to address lingering vestiges of racial injustice in the criminal justice system, I focus on two problem areas that often implicate race—petit jury composition and selective prosecution claims.*

In a retrospective of the Warren Court's work one must first celebrate. Under Chief Justice Earl Warren's leadership the Supreme Court rewrote the corpus of constitutional law—especially in the criminal procedure arena. Leaving aside for the moment the particular doctrinal foundations of the Warren Court's work, the *outcomes* of the Court's decisions are justly applauded, for who would not support

---

\* Max Pam Professor and Director of the Center for Studies in Criminal Justice, The University of Chicago Law School; Senior Research Fellow, American Bar Foundation. Thanks go to George Thomas and to Paul Garcia for comments. I am especially indebted to my colleague Adam Samaha for helping me to work through some of the issues raised in this paper. Financial support was provided by the Dwight P. Greene Fund.

the right to counsel for indigent defendants<sup>1</sup> or the requirement that an arrested person be informed of her right to counsel prior to any interrogation, including appointed counsel if she could not afford one?<sup>2</sup> So here and now let me join the chorus of those who claim that the Warren Court's creative work rivals that of the eighteenth century Marshall Court's in scope and in vision.

A retrospective is also, however, a moment for analysis, introspection, criticism, and speculation. These tasks are not obviously inconsistent with celebration, but might be seen as paying inadequate homage to a Court whose deeds are considered so great. I want to be clear now that my aim in this essay is not about "what should have been," but rather it is about "what ifs" and "perhaps." Most particularly, though, the essay is about the way in which an analysis of history can provide new prospects and pathways for the future.

With this brief preface, I begin my work. My goal is to discuss the relationship between the Warren Court's criminal procedure decisions and modern perceptions of the legitimacy of the criminal justice system. This discussion will unfold in three parts. First, I will sketch some work in social science firmly establishing what so many of us know intuitively to be true—that perceptions of fairness are critical to the proper operation of the criminal justice system and that such perceptions of legitimacy have important instrumental benefits. Second, I will delve into some history of constitutional criminal procedure. Early criminal procedure decisions were grounded in an interpretation of fundamental fairness demanded by the Due Process Clause of the Fourteenth Amendment. These decisions were replete with references to what I call the "public-regarding" vision of fairness.<sup>3</sup> Third, I will tie parts one and two together by exploring the implications for public legitimacy of the criminal justice system of the Warren Court's choice to develop a code of criminal procedure through incorporation of the Bill of Rights as opposed to fundamental fairness. In particular, I believe the prospects for addressing race-related perceptions of criminal justice system unfairness were limited, somewhat ironically, by the Warren Court's reliance on selective incorporation as the mechanism for criminal justice system reform.

There is irony here because the Warren Court's criminal procedure cases are rightly viewed as a branch of "race law."<sup>4</sup> The context that gave rise to modern criminal procedure was institutionalized racism.<sup>5</sup> From the close of

---

<sup>1</sup> Gideon v. Wainwright, 372 U.S. 335 (1963).

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>3</sup> See Tracey L. Meares, *What's Wrong With Gideon*, 70 U. CHI. L. REV. 215 (2003); *infra* text accompanying notes 29–41.

<sup>4</sup> Harvard professor Charles Ogletree has suggested that much of the Warren Court's "criminal procedure" reform more properly should be understood as constituting a branch of race law. Professor Charles Ogletree, Lecture at the American Association of Law Schools Annual Meeting (Jan. 1990).

<sup>5</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997).

Reconstruction to the modern civil rights revolution, law enforcement played a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life. When suspected, however remotely, of wrongdoing, these citizens became the targets of sweeping and invasive tactics of investigation. And even when not targets, they remained subject to relentless official intimidation, particularly when they dared to take actions that challenged the white establishment's stranglehold over political power. Nearly all the landmark criminal procedure cases of the 1960s and early 1970s arose from this context.<sup>6</sup> Although rarely acknowledged by the Court, the racial dimension of these cases was not lost on contemporary observers. "The Court's concern with criminal procedure," one wrote, "can be understood only in the context of the struggle for civil rights."<sup>7</sup> At a time when attacking racial discrimination in public and private institutions occupied a central place on both the Court's and Congress's agendas, "[i]t would have been . . . anomalous for [the] Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity"<sup>8</sup> as well.

The fact that the racial dimension of the Warren Court's cases was rarely mentioned is critical to my argument here. The selective incorporation approach allowed the Court to effect a revolution without having to pass judgment on state criminal justice practices, a point about which I will say more below. If the Court *had* said more, might there be a more developed jurisprudence of fundamental fairness today? I cannot answer that question, but I will speculate a bit in part three about how I believe a beefed-up fundamental fairness doctrine might address two areas of criminal justice functioning that often implicate race—petit jury composition and selective prosecution claims.

## I. SOCIAL SCIENCE OF THE LEGITIMACY OF THE CRIMINAL JUSTICE SYSTEM

It goes almost without saying that the legitimacy of the criminal justice system is critical to the system's proper functioning. We can see this by examining the criminal trial. We use the criminal trial in order to accurately ascertain whether the accused in fact committed an act deserving of punishment. It is sometimes said that constitutional criminal procedure guarantees represent a preference for more accuracy in criminal judgments, as rules that tend to favor the

---

<sup>6</sup> See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 843–44 (1994). Indeed, race also played a critical role in many of the landmark due process "fundamental fairness" cases decided earlier in the century. See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (due process right to counsel); *Brown v. Mississippi*, 297 U.S. 278 (1936) (due process right against coerced confession). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 94–107 (1997); Bennett Boskey & John H. Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266, 283–86 (1946).

<sup>7</sup> A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

<sup>8</sup> *Id.*

defendant are likely on average to reduce false positives.<sup>9</sup> But, it is also true that this sorting function is not the only, or even the primary, goal of the procedures that make up a criminal trial.<sup>10</sup> For example, Peter Arenella has noted that criminal procedure can insure that a suspect is treated with dignity and respect in ways that capture “society’s normative aspirations embodied in its positive laws, customs, religions, and ideologies and the proper relationship between the individual and the state.”<sup>11</sup>

Fair process norms are typically promoted as ethical imperatives to be pursued as goods in and of themselves set apart from their value in reducing outcome error. Importantly, however, even if procedure is disconnected from the objective of accurate sorting, fair process norms still can lead to instrumental benefits. Public confidence in the criminal justice system is one such obvious benefit. The public is much more likely to support and participate in the criminal justice process and support those officials who run it when the public believes that the process is run fairly. If the American public does not perceive its criminal justice system to be fair, negative consequences can result. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law.<sup>12</sup>

Social science researchers have demonstrated that a person’s evaluation of whether a criminal trial is fair does not depend entirely upon the relationship between the procedures that make up the trial and the outcome of the trial. It turns out that people do not typically emphasize the extent to which a procedure leads to accurate results when assessing whether the procedure is fair. Instead, people are more likely to evaluate trial procedures as messages to them from the authorities controlling the procedures. The primary proponents of this view, E. Alan Lind and

---

<sup>9</sup> Of course, this is accuracy of only one type. The same rules that tend to reduce false positives clearly increase another type of error. They create a higher likelihood that defendants who are guilty will be acquitted. See Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 859–80 (making this point and explaining its relevance to institutional design of criminal justice systems).

<sup>10</sup> The seminal work in this tradition is HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968). Packer divides the criminal justice world into two simplified camps with different inherent values, which were given effect in two models of justice: the Due Process Model and the Crime Control Model. The Crime Control Model promotes the importance of making accurate determinations of guilt or innocence, while the Due Process Model promotes the importance of observing procedures, even at the expense of allowing guilty defendants to go free.

<sup>11</sup> Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983); see also Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the “Search for Truth” in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1272 (1996) (“[C]riminal trials are a form of civic theater that allows us to define who we are as a people . . . and provides us with an opportunity to foster our self-confidence in the fundamental morality of our society.”).

<sup>12</sup> See Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000).

Tom Tyler, call this model the “group value” theory of procedural justice.<sup>13</sup> The basis of the group value model is that people “belong to social groups and that they are very attentive to signs and symbols that communicate information about their status within their groups.”<sup>14</sup> Thus, Lind and Tyler assert that relational concerns, such as whether a person is treated with *dignity*, whether the decision-maker is perceived as *neutral*, and whether the person subjected to a procedure has *trust* in a decision-maker, convey information to the evaluator about her standing in a group or society.<sup>15</sup> Other researchers have explained that people may rely heavily on the evaluation of procedures independent of outcomes because procedures are more “trait-like”<sup>16</sup> than outcomes. Outcomes often are variable, or they may be extremely indeterminate in any particular case. While it may not be obvious how a particular case should come out, it is almost always clear how parties should proceed and be treated in that particular case. At the extreme, individuals may ignore outcomes completely, and focus entirely on the procedures that make up a trial when evaluating whether the trial is “fair.”<sup>17</sup>

This last point drives the relational view of procedural justice. Individuals care about how they are treated by government authorities because treatment provides important indicators to individuals about how the authority in question views the group to which the individual evaluator perceives herself belonging. In order to make this assessment, individuals key in on three factors: standing, neutrality and trust.<sup>18</sup> By standing, researchers are referring to indications that the authority recognizes an individual’s status and membership in a valued group, such as polite treatment, and treatment that accords dignity and respect, such as concern for rights.<sup>19</sup> Neutrality refers to indications from an authority’s decisions to a perceiver that do not make the perceiver feel less worthy than others because of bias, discrimination, and incompetence.<sup>20</sup> Finally, trust refers to the extent to

<sup>13</sup> See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>14</sup> See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115, 140–41 (Mark P. Zann ed., 1992).

<sup>15</sup> See *id.* at 141.

<sup>16</sup> Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 390, 404 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

<sup>17</sup> Note, however, that in pointing to the “trait-like” aspects of procedures, it is possible that the preference is not as divorced from outcome as the researchers claim. That is, people may prefer procedures as a signal of good outcomes. Assuming people aren’t sure of the right outcome in the particular case, good procedures might help them to have more confidence in that outcome. In this way the procedure is a form of outcome control. Tyler and Lind, by focusing on group value, do divorce procedure assessment from its effect on outcomes.

<sup>18</sup> See Tyler & Lind, *supra* note 14, at 158–59.

<sup>19</sup> See *id.* at 153 (collecting studies); Tom R. Tyler, *What is Procedural Justice? Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC’Y REV.* 103, 129 (1988) (discussing importance of recognition of citizens’ rights).

<sup>20</sup> See Tyler & Lind, *supra* note 14, at 157.

which a perceiver believes that the authority in question will act fairly and benevolently in the future.<sup>21</sup> Of course, individuals making assessments do not disaggregate their assessments in terms of these factors; rather, they reach conclusions about authorities by considering information that is relevant to these factors. Researchers have been able to disaggregate the various factors for purposes of analysis.

In an extension of this work on procedural justice, Tom Tyler has demonstrated that individual perceptions of legitimacy are importantly connected to compliance with the law.<sup>22</sup> Tyler points to normative bases for compliance rather than instrumental ones. For example, his research looks to the extent to which an individual's belief that an authority enforcing the law has the right to do so (Tyler's notion of legitimacy) can predict whether that individual will obey the law.<sup>23</sup> Such a framework is considered normative because an individual who complies with the law for normative reasons does so because she feels an *internal* obligation.<sup>24</sup> It is "[t]he suggest[ion] that citizens will voluntarily act against their self-interest [that] is the key to the social value of normative influences."<sup>25</sup> In contrast, the individual who complies with the law because she is responding to externally imposed punishments does so out of fear.

Regulation based on these principles of legitimacy is called "process-based regulation."<sup>26</sup> The aim of process-based regulation is to encourage the public to develop trust in the motives of legal authorities. The argument is that when authorities, through fair and respectful behavior, gain cooperation and consent from the public, the compliance that follows is more durable than the compliance obtained through deterrence-enhancing threats.<sup>27</sup> The "psychological jurisprudence" that underlies process-based regulation "begins by taking the subjective experience of members of the public seriously," as opposed to targeting wrongdoers whose behavior is to be controlled.<sup>28</sup> Developing laws and procedures of general applicability, then, is the preferred approach to sustained public confidence. Criminal procedure concerned with legitimacy necessarily will be public-regarding.

---

<sup>21</sup> See Tom R. Tyler, *Trust and Democratic Governance*, in 1 TRUST AND GOVERNANCE 270 (Margaret Levi & Valerie Braithwaite eds., 1998).

<sup>22</sup> See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

<sup>23</sup> See *id.* at 3–4.

<sup>24</sup> See *id.* at 24.

<sup>25</sup> *Id.*

<sup>26</sup> TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 204–08 (2002).

<sup>27</sup> See *id.* at 204.

<sup>28</sup> See *id.* at 213.

## II. LEGITIMACY AND SUPREME COURT DOCTRINE

The social science of criminal justice system legitimacy dovetails nicely with the origins of the Supreme Court's constitutional criminal procedure doctrine. A quick review of the early cases reveals the Court's preoccupation with public perceptions of the fairness of judicial proceedings.

Beginning in the late 1920s and continuing throughout the 1930s, the Court began to interpret the Due Process Clause of the Fourteenth Amendment to invalidate state criminal convictions. For example, in *Tumey v. Ohio*,<sup>29</sup> decided in 1927, the Court invalidated a conviction of a defendant accused of violating the Prohibition Act of the State after a trial by a mayor who was paid for his services only when he chose to convict. In *Powell v. Alabama*,<sup>30</sup> decided in 1932, the Court found after reviewing the entire record of the case, that factors such as the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the nature of the crime with which they were charged (the gang rape of two white girls), the inflamed sentiment of the community, and the failure of the court to appoint counsel resulted in an unfair trial.<sup>31</sup> And in 1936, the Supreme Court invalidated the defendants' convictions by a Mississippi court because the convictions rested almost entirely on confessions extracted through torture.<sup>32</sup>

In each of these cases the Court made clear that it regarded public perceptions of the fairness of proceedings as serving a critical function in establishing the constitutional standards for due process in criminal trials. For example, the Court found irrelevant in *Tumey* that the evidence demonstrated quite clearly that the defendant was guilty of the charge against him; he was nonetheless entitled, the Court concluded, to an impartial judge in order to satisfy the requirements of due process.<sup>33</sup> An independent adjudicator clearly advances a perception of fairness even when accuracy is not served in the individual case.<sup>34</sup> In procedural justice terms, an independent adjudicator serves neutrality and trust interests that an individual before a court, as well as those *not* currently before the court, might have. In *Brown*, the incredible level of physical coercion detailed by the Court makes concern about the accuracy of the confessions in the case unavoidable. Still, concern for public-regarding justice is evident in the opinion—a point soon

---

<sup>29</sup> 273 U.S. 510 (1927).

<sup>30</sup> 287 U.S. 45 (1932).

<sup>31</sup> *Id.* at 71.

<sup>32</sup> See *Brown v. Mississippi*, 297 U.S. 278 (1936). The deputy sheriff who obtained the confessions admitted at trial to beating the defendants. He defended his actions on the ground that the horrific beatings were “[n]ot too much for a Negro.” *Id.* at 284.

<sup>33</sup> *Tumey*, 273 U.S. at 535.

<sup>34</sup> See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483–84 (1986) (evaluating non-instrumental values served by due process and proposing that the appearance of fairness value demands a truly independent adjudicator).

made more clear in later cases.<sup>35</sup> Torture of a defendant is hardly consistent with standing values. It does not accord a person dignity, respect or concern for the person's rights. In *Powell*, the Court held that Alabama was required to appoint counsel for the defendants because the right to a lawyer was a "fundamental principle of liberty and justice which lie[s] at the base of all our civil and political institutions."<sup>36</sup> The Court went on to hold that the "ends of public justice" required the trial court to appoint counsel for the defendants "however guilty."<sup>37</sup> Again, while an accurate determination of guilt clearly constituted an aspect of fair treatment for the defendants in these cases, that important instrumental goal was not the only goal to be served by due process. By the Court's lights, the criminal defendant was not the only relevant stakeholder in determining whether or not a trial was "fair." In these early cases, the Court deemed the public as well as criminal defendants to have a critical interest in the fundamental fairness of the criminal justice system. These ideas are congenial to the procedural justice literature.

Justices Cardozo and Frankfurter were the greatest proponents of the public-regarding notion of due process in the criminal procedure context. On several occasions, Justice Cardozo wrote compellingly about a public-regarding due process. For example, he noted that a procedure violates due process when its use violates "a principle of justice so rooted in traditions and conscience of our people as to be ranked fundamental,"<sup>38</sup> and when the procedure subjects a person to "a hardship so acute and shocking that our polity would not endure it."<sup>39</sup> Similarly Justice Frankfurter in later cases noted that due process includes procedures required for the "protection of ultimate decency in a civilized society,"<sup>40</sup> and "a system of rights based on moral principles so deeply embedded in the tradition and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."<sup>41</sup> This heady and inspiring language helped to form the basis of modern criminal procedure.

Inspiring language was not enough to produce wholesale change in the operation of criminal justice by the states, however. While the values articulated in the opinions were weighty, the actual regulation of state criminal procedure at the end of the day was quite light. The due process standards developed by the Court typically specified a case-by-case review based upon constitutional norms as

---

<sup>35</sup> See, e.g., *Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949) (citing *Lisenba v. California*, 314 U.S. 219, 236-37 (1941), for the proposition that a coerced confession is "inadmissible under the Due Process Clause even though statements in it may be independently established as true").

<sup>36</sup> *Powell*, 287 U.S. at 67. The same language had previously been quoted in *Brown*, 279 U.S. at 286.

<sup>37</sup> *Powell*, 287 U.S. at 52, 72.

<sup>38</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>39</sup> *Id.* at 328.

<sup>40</sup> *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

<sup>41</sup> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).



opposed to prophylactic rules. Additionally, the Court's somewhat open-ended standard-based approach led to criticism that the fundamental fairness doctrine was simply another name for the personal predilections of individual justices. Justice Black was an especially emphatic critic, and his criticism provided the groundwork for major change by the Warren Court with respect to constitutional criminal procedure.<sup>42</sup>

As is well-known, one of the most important legacies of the Warren Court is its abandonment of fundamental fairness as the primary vehicle for the regulation of criminal procedure. Rather than relying on the Due Process Clause's guarantees of "ordered liberty" to review state criminal justice procedures, the Warren Court utilized selective incorporation—the theory that holds that the Due Process Clause of the Fourteenth Amendment incorporates and makes applicable to the states those guarantees of the Bill of Rights deemed to be fundamental.<sup>43</sup>

It is not difficult to see why the Bill of Rights was an attractive vehicle for Chief Justice Warren's vision. By adopting selective incorporation of particular text-based guarantees in the Bill of Rights, the Court was able to project the Bill of Rights as a code.<sup>44</sup> Codes have a clear advantage over standards if one's goal is to achieve reform. Codes specify rules, not norms. If one is suspicious of judicial actors who may be quick to justify established practices in terms of open-ended fundamental fairness norms, then one might naturally look to lists of sharp-edged prophylactic prohibitions and requirements that can bring on reform of these actors' practices.<sup>45</sup>

Note, however, that while the prophylactic and formalistic features of the Bill of Rights as a code can be an advantage to the reformer, these features can also be a curse. Rules can be inflexible and crude. Their very prophylactic nature may create costs in terms of under- and over-inclusiveness. We might conclude that these costs are justified by the value of reform, but they are costs nonetheless. Consider the "code" of criminal procedure that the Warren Court established (and subsequent Courts extended). While the Warren Court's initial decisions purported to incorporate only the principles of the incorporated guarantee to the states, in later cases the Court also began to apply the relevant provision to the states in the same way the provision was interpreted for federal criminal cases.<sup>46</sup>

---

<sup>42</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

<sup>43</sup> See generally William Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961).

<sup>44</sup> See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965) (presenting a mostly critical view of this vision of the Bill of Rights).

<sup>45</sup> See David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 542–43 (1992) (explaining how large-scale reform efforts can be facilitated by code-like rules as opposed to standard-based norms).

<sup>46</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. 45 (1968); *Miranda v. Arizona*, 384 U.S. 436 (1966); see also George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) (arguing that the

This approach does not readily take into account the real differences between the federal and state systems and fails to account for “for growth and vitality, for adaptation to shifting necessities, for wide differences of reasonable convenience in method.”<sup>47</sup>

Formalism, too, has advantages and disadvantages. As my colleague David Strauss has explained, one benefit of formalism to reformers is that the method can provide judges with a cover under which to engineer reform.<sup>48</sup> If the Bill of Rights creates a set of rules, and if the rules prohibit a practice, then judges can mandate that a challenged practice must cease simply by applying the rules. Period. A judge or justice can come to such a conclusion without condemning or praising the practice at issue because she is simply relying on the rules to dictate the outcome in a particular case. *She* is not responsible. Reform under these circumstances is much more palatable than the world in which a decision-maker must take more personal responsibility for overturning a regime.

This benefit of formalism, like the benefit of prophylaxis, may also be costly. The text of the provisions mandating rules rarely provides the easy answers that its proponents claim that it does, for the language to be relied upon is rarely determinate. In the process of construing relevant texts, formalists can become susceptible to the identical criticisms that they freely lobbed at their anti-formalist foes. But the Warren Court formalists claimed that their method was different. Formalism was supposedly superior to the Frankfurter/Cardozo method of constitutional interpretation because it was simply rule-interpretation—something judges are supposed to be good at doing—as opposed to judicial judgments regarding broad concepts of “ordered liberty.”

Another cost of the Warren Court approach is that it left little room for explicit evaluation of racially-discriminatory and unfair criminal justice practices. Given the context in which the Court was operating, its failure to be more forthcoming about the racial dimension of its criminal procedure cases is not surprising. The Court’s strategy in this respect was not limited to criminal procedure. Harry Kalven, in his classic *The Negro and the First Amendment*, documented the contribution that this strategy made to modern free speech jurisprudence.<sup>49</sup> The Court’s death penalty jurisprudence in the late 1960s and

---

Court’s method of applying Bill of Rights provisions to the states and to the federal government in equal measure has resulted in an unnecessarily cramped interpretation of rights applicable to defendants in *federal* criminal cases).

<sup>47</sup> Friendly, *supra* note 44, at 954 (quoting Felix Frankfurter, *The Supreme Court Writes a Chapter on Man’s Rights*, N.Y. TIMES, Nov. 13, 1932, reprinted in FRANKFURTER, LAW AND POLITICS 192–93 (1939)).

<sup>48</sup> See Strauss, *supra* note 45, at 546.

<sup>49</sup> HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965). Kalven saw the positive influence of the civil rights movement on the Court’s First Amendment jurisprudence as counteracting the negative influence of McCarthyism on it. See *id.* at 6 (“[W]e may come to see the Negro as winning back for us the freedom the Communists seemed to have lost for us.”).

early 1970s, including its decisions in *Furman v. Georgia*,<sup>50</sup> and *Coker v. Georgia*,<sup>51</sup> likewise reflected a (largely) unspoken concern with race.<sup>52</sup> The Court reached outcomes to be admired in many of these cases, but it is not clear that the text of the Bill of Rights mandated its conclusions. One problem with the formalist conception of the Bill of Rights as a code is that “it raises the question of the extent to which manipulatively false rhetoric is permissible in public life.”<sup>53</sup>

This last point brings me back around to the arguments about public-regarding justice that I offered above. I think it is fair to say that the Court’s emphasis on formalism in its interpretation of the Bill of Rights distracted it from specifying normative constitutional values in the criminal procedure arena relevant to addressing racial injustice. In the early criminal procedure cases, attention to racial injustice was fairly central to the due process determination. Over time and because of the selective incorporation approach, discussions of public-regarding justice that were a regular feature of the Court’s early fundamental fairness decisions, became rarer and even, at least according to the Court, disfavored.<sup>54</sup> This is not to say that the Supreme Court relegated analysis of fundamental fairness in due process to the trash bin. In an important class of cases, the Court has continued to rely on the Due Process Clause to specify fair procedure in both the pre-trial and post-trial context.<sup>55</sup> Indeed, examination of the corpus of these cases makes it quite difficult to conclude that free-standing due process has only the most narrow applicability, as the Court has stated.<sup>56</sup> What *is* different today is that the Court has tended to emphasize adjudicatory fairness<sup>57</sup>—the value of procedure as a sorting mechanism—to the exclusion of the robust and vigorous assertions of the values of public-regarding justice that characterized the Frankfurter and Cardozo era. Moreover, and importantly, the Court has failed to utilize the fundamental fairness doctrine in cases implicating racial injustice in the criminal justice system when it would make sense to do so.

---

<sup>50</sup> 408 U.S. 238 (1972).

<sup>51</sup> 433 U.S. 584 (1977).

<sup>52</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 330–32 (1987) (Brennan, J., dissenting) (suggesting that race played a role in *Furman* and *Coker* decisions); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 376 (1995).

<sup>53</sup> Strauss, *supra* note 45, at 548.

<sup>54</sup> See Jerold H. Israel, *Freestanding Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 389 (2001) (noting that the Court has stated explicitly its desire to narrow the category of infractions to which fundamental fairness analysis can apply).

<sup>55</sup> See *id.* at 389–99 (providing a detailed catalogue of relevant decisions).

<sup>56</sup> See *id.* at 398.

<sup>57</sup> See *id.* at 397 n.549 (listing cases).

### III. ASSESSING THE WARREN COURT'S LEGACY IN LIGHT OF LEGITIMACY— EVERYTHING OLD IS NEW AGAIN?

I want to emphasize at this point that I believe that concern for the rights of a criminal defendant is critical to evaluating the constitutionality of the group of procedures that make up the process by which we identify, charge, convict, and punish an offender. I also believe that that this conclusion ought not crowd out the fact that the body politic has interests—indeed rights—to due process in criminal justice operations. When we focus inordinately on criminal defendants, we lose sight of the other participants in the theater of criminal justice—the audience. The public is critical to the system's proper function, but a focus on the individual rights of the defendant to the exclusion of the interests of other participants belies the public's critical role.

Elsewhere, in an analysis of the criminal defendant's right to self-representation, I have explained how promoting the interests of the criminal defendant to the exclusion of the public's interest in a fundamentally fair criminal trial process has led to a state of affairs that neither defendants nor observers find fair.<sup>58</sup> Here, I'd like to return to a theme I set out early in that other piece. I hope to show that an application of the Court's pre-Warren Court fundamental fairness jurisprudence would likely have allowed the Court to more transparently and effectively address issues of race in two areas of criminal justice in which race is commonly implicated—petit jury composition and selective prosecution claims.

#### A. *Jury Composition*

The Supreme Court's earliest review of practices governing state criminal trials concerned race discrimination in jury selection.<sup>59</sup> However, this is not to say that the Supreme Court created a scheme in these early cases to regularly enforce its prohibition against race discrimination in jury selection. That is why *Batson v. Kentucky*<sup>60</sup> is recognized as a watershed case. In *Batson*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges to exclude potential jurors on the basis of race, and that evidence of race-based jury selection from a single case is sufficient to establish a constitutional violation.<sup>61</sup>

---

<sup>58</sup> See Meares, *supra* note 3.

<sup>59</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Carter v. Texas*, 177 U.S. 442 (1900).

<sup>60</sup> 476 U.S. 79 (1986).

<sup>61</sup> It is the second part of *Batson*'s holding that is important. *Id.* at 84–89. *Swain v. Alabama*, 380 U.S. 202 (1965), which was overruled by *Batson*, maintained that an equal protection violation could not be demonstrated unless there was evidence that a prosecutor engaged in race-based jury selection in several cases over time.

In *Batson*, an African-American defendant challenged the exclusion of African-American jurors from the jury that was to decide his case. Although the interests of the excluded jurors were not explicitly on the table, the Court nonetheless pointed out:

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . .

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.<sup>62</sup>

*Batson* was not the first case in which the Court made prominent the interests of the public in juries composed with procedures free from discrimination. A little more than a decade before *Batson*, the Court addressed a similar issue in *Peters v. Kiff*.<sup>63</sup> *Peters*, unlike *Batson*, was not an equal protection case. While the constitutional foundations of *Peters* are somewhat muddy, the best explanation of the result in *Peters* is that it was mandated by due process considerations.

In *Peters*, the defendant, who was white, challenged his conviction for burglary based on the fact that African-Americans were excluded from both the grand jury that indicted him and the petit jury that convicted him. Justice Marshall and Justice White, each writing for a three-member plurality, clearly agreed on one aspect of the case: The problem with upholding *Peters*' conviction was not that the failure to include Blacks on the juries somehow biased the outcome in the case; rather, the problem with the conviction was the illegality of the selection process.<sup>64</sup>

Justice Marshall's opinion notes:

The essence of the petitioner's claim is this: that the tribunals that indicted and convicted him were constituted in a manner that is prohibited by the Constitution and by statute; that the impact of that error on any individual trial is unascertainable; and that consequently any indictment or conviction returned by such tribunals must be set aside.<sup>65</sup>

This conclusion is not obvious. Typically a petitioner must assert some cognizable harm in order to seek relief before the Court. This is the essence of the Court's standing doctrine. Because *Peters* was white, he could not claim that his own

<sup>62</sup> *Batson*, 476 U.S. at 87 (citations omitted).

<sup>63</sup> 407 U.S. 493 (1972).

<sup>64</sup> See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 739 (1992) ("illegality, and not partiality, was the defect identified by both factions in the majority").

<sup>65</sup> *Peters*, 407 U.S. at 496-97.

equal protection rights were infringed by the prosecutors' actions. Justice Marshall had an answer to this conundrum. He pointed to the interests of the excluded class of black jurors, and concluded that they were denied "the privilege of participating equally . . . in the administration of justice" and were stigmatized by the government's actions in the case.<sup>66</sup> Most importantly for our purposes here, in making these arguments Justice Marshall relied upon cases such as *Tumey*,<sup>67</sup> which established the importance of the appearance of a just tribunal grounded in due process. Justice Marshall asserted in *Peters* that "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."<sup>68</sup> Justice Marshall's plurality did not require *Peters* to identify a specific way in which the illegal jury composition affected the outcome in his case. It was enough that the illegal composition called into question whether a fair tribunal decided his case.

While Justice White wrote separately for a different three-member plurality, his opinion, too, exhibits concern about the illegality of the jury composition.<sup>69</sup> As Barbara Underwood has argued, while several commentators have concluded that Justice White's decision has statutory rather than constitutional underpinnings, a better reading of the opinion is that it, like Justice Marshall's, sounds in due process.<sup>70</sup> Justice White's invocation of the federal statute barring race discrimination in jury composition followed his citation of specific *constitutional* language from *Hill v. Texas*: "Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained."<sup>71</sup> This is due process language.

Given that the Supreme Court ultimately held in *Powers v. Ohio*<sup>72</sup> that criminal defendants have the right to raise the equal protection interests of excluded jurors as third parties, one might ask whether it makes sense to focus at all on *Peters* and its rationale. The answer is that the approach to race-based juror exclusion that *Peters v. Kiff* lays out forthrightly presents a vision of a constitutional guarantee that has more than one class of beneficiaries, and that is more consistent with the promotion of public-regarding justice than the *Powers* Court's third party standing approach. *Peters*' construction of the violation at issue in the case as illegal jury composition inconsistent with constitutional procedure, and without regard for the particular outcome that such defective

---

<sup>66</sup> *Id.* at 499.

<sup>67</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>68</sup> *Peters*, 407 U.S. at 502–03.

<sup>69</sup> *Id.* at 506.

<sup>70</sup> See Underwood, *supra* note 64, at 740 (arguing that Justice White agreed with Justice Marshall's due process holding but invoked federal law in order to limit the holding to race).

<sup>71</sup> *Peters*, 407 U.S. at 506 (quoting *Hill v. Texas*, 316 U.S. 400, 406 (1942)).

<sup>72</sup> 499 U.S. 400 (1991).

composition could produce, makes the *Powers* Court's third party standing analysis unnecessary. The *Peters* Court's approach importantly suggests that the petitioner was simply asserting a first party right to be governed by a valid rule<sup>73</sup>—a rule that, when broken, creates a structural defect that *all* members of the public have an interest in correcting. This characterization sounds in due process.<sup>74</sup> It is an argument that rests solidly on public-regarding fundamental fairness. It is, moreover, an argument that is congenial to the social science of procedural justice.

### B. *Selective Prosecution*

Now that I have laid out the case for a *Batson* claim as a due process argument, the contours of a similar argument for selective prosecution should be apparent. Selective prosecution claims have long been considered under the Equal Protection Clause of the Fourteenth Amendment.<sup>75</sup> However, the structure of my argument here is similar to the argument I made above with respect to race-based jury exclusion. Selective prosecution claims present issues of interest to the general public as well as to the defendant.

---

<sup>73</sup> See generally Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (explaining that many third party standing cases are more properly conceptualized in first party terms because the litigant is simply seeking to be regulated according to a constitutionally valid rule).

<sup>74</sup> One might ask why the Court didn't adopt *Peters* in *Batson*. A straightforward answer is that the case was not argued that way. The petitioner and supporting *amici* pushed a Sixth Amendment violation—that the Sixth Amendment guarantees a right to a jury that is as representative of the community as possible—as opposed to an argument calling for *Swain* to be overruled. Interestingly, the petitioner's Sixth Amendment arguments reveal the cost of formalism to which I alluded above. At oral argument, J. David Niehaus, on behalf of James Batson, characterized the Sixth Amendment claim in this way:

[Lower federal courts have] talk[ed] about fairness between the parties, and that it does tend to diminish the perceptions of fairness in the eyes of the public, and those courts have perceived a—I guess you would say a right emanating, although not specifically stated, out of the Sixth Amendment, wherein the courts may impose the same rule on the defendant in order to bring out the confidence necessary for . . .

Oral Argument, *Batson v. Kentucky*, 476 U.S. 79 (1986) (J. David Niehaus for Petitioner).

The Court ultimately emphasized equal protection by itself, however. It could just as easily have emphasized the Due Process Clause. Why equal protection? I have several thoughts, all of them speculative. The Court could have simply thought that as a race discrimination case, equal protection was more suited to the problem. Certainly, there was a long history of addressing claims of race discrimination outside of the criminal justice context through the Equal Protection Clause of the Fourteenth Amendment. A more complicated version of the last point is that the Court may have believed that equal protection limited the reach of *Batson* in a way that a due process argument would not. In other words, had the Court simply characterized the problem in *Batson* the way that I have above, it is not clear that the violation could be confined to race. Indeed, by the terms of the argument, it should not be so confined.

<sup>75</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

At first glance it might appear that my conclusion is less straightforward than the jury composition argument. After all, when a criminal defendant accuses a prosecutor of unconstitutional selection, it is not obvious that the prosecutor has engaged in conduct that directly affects a third party participant of the criminal process. That impact obviously takes place when a prosecutor excludes a juror because of her race. That said, one can argue that a selective prosecution claim presents a clearer case of public-regarding justice than a *Batson* claim does. This is because jury exclusion can implicate the outcome of a case in ways that suggest that the *Batson* problem is about biased deliberation as opposed to merely illegal composition. Some have argued that a juror's racial identity potentially affects the outcome of a case because it is possible that jurors are more likely to acquit defendants of their same race (or convict someone of a different race).<sup>76</sup> Or, we might think that racially heterogeneous juries will produce different outcomes than more homogenous ones.<sup>77</sup> In contrast, when a person raises a selective prosecution claim, the success of the petitioner's argument does not depend on a connection between the prosecutor's selection and the ultimate harm—the conviction. There is nothing about the argument that implies that the prosecutor, say, will concoct evidence to insure that the chosen offender will be prosecuted. The harm is in the process itself. *Notwithstanding* the defendant's guilt, the argument goes, the prosecution is defective because the methods and procedures the prosecutor used to single out the particular defendant are unfair.

Note the similarities between this argument and the procedural justice literature summarized above. Selective prosecution might be inconsistent with procedural justice because the decision-maker has selected an offender to charge in a way that is not perceived as neutral. If a prosecutor selects someone for prosecution, even someone who is guilty, on the basis of an irrelevant factor such as race, observers might conclude that she cannot be counted on to act fairly and benevolently in the future. Simply put, the public does not want prosecutors to be the “architect[s] of injustice”<sup>78</sup> at the inception of the criminal process.

---

<sup>76</sup> Social psychologists refer to this phenomenon as “ingroup-outgroup bias.” If a juror has a common bond with the defendant, such as race, in-group bias suggests she is more likely to view him positively than someone who does not share this bond. In fact, someone of a different race from the defendant is likely, due to out-group bias, to view him negatively. See William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 129–30 (explaining ingroup-outgroup bias, its application to race-based peremptory challenges, and citing relevant social science research). Also consider the controversy over the jury composition of the first so-called “Rodney King” trial—the state trial of the officers who beat Rodney King. For an especially pointed critique of the verdict produced by the mostly white jury, consider Steve Greenberg's editorial cartoon depicting a black man surrounded by white, blindfolded Ladies Justice beating the man with their scales. Steve Greenberg, *The Rodney King Verdict*, SEATTLE POST-INTELLIGENCER, May 2, 1992, available at <http://www.greenberg-art.com/Toons/Toons,%20favorites/RodneyKing.html>.

<sup>77</sup> See, e.g., Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1988 U. CHI. LEGAL F. 161, 166 (citing studies).

<sup>78</sup> The phrase is a shortened version of a phrase from *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (“A prosecution that withholds evidence on demand of an accused which, if made available,



Concerns about selective prosecution may be especially acute when prosecutors exercise their discretion in ways that people perceive to be racially biased. Studies have consistently reported that minority communities perceive higher levels of bias in the legal system than non-minority communities.<sup>79</sup> Tyler and Huo's fine-grained analysis of minorities and procedural justice shows that minority respondents were more likely to say that they had received unfair outcomes in their experiences with authorities, to say that the procedures used by authorities were unfair, and to express low levels of trust in the motives of authorities.<sup>80</sup> Despite these findings, Tyler and Huo's analysis points to the conclusion that minorities care deeply about process issues.<sup>81</sup> That is, the evaluations of both minority and non-minority groups of police and courts (and presumably prosecutors) depend a great deal on the fairness of the treatment that they feel people receive from these authorities as opposed to outcomes.<sup>82</sup>

How does this work help to reconceptualize selective prosecution claims? Consider *United States v. Armstrong*.<sup>83</sup> The case concerns five black defendants who were charged in federal court for distribution of cocaine base, or "crack." At the time these defendants were indicted in the Central District of California, federal law provided for a minimum penalty of ten years in prison with a maximum penalty of life if a defendant was convicted of distributing more than fifty grams of crack. Simultaneously, California law punished the identical conduct with a three to five year prison term. The defendants in *Armstrong* contended that federal prosecutors in the Central District of California targeted them for prosecution because of their race. They argued that had they been of a different race, they would have been prosecuted in state court. The case reached the Supreme Court after the Court of Appeals for the Ninth Circuit ordered the prosecutors to respond to the defendant's discovery request seeking the criteria by which the U.S. Attorney's Office for the Central District of California chose crack cases for prosecution in federal court.

The Supreme Court overturned the Ninth Circuit's decision, stating that the defendants had "failed to show that the Government declined to prosecute similarly situated suspects of other races,"<sup>84</sup> and therefore failed to clear the

---

would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . .").

<sup>79</sup> See Richard R. W. Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249, 251 n.7 (2001) (collecting cases).

<sup>80</sup> See TYLER & HUO, *supra* note 26, at 148-49.

<sup>81</sup> See *id.* at 155-56 ("White respondents are especially likely to rely on their assessments of the process, in comparison to minority respondents. . . . [However,] as with whites, the favorability of outcomes is not the most important determinant of the willingness to accept decisions in either of the two minority groups.").

<sup>82</sup> See *id.*

<sup>83</sup> *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>84</sup> *Id.* at 458.

threshold showing for discovery. The defendants had presented the district court with affidavits summarizing evidence that white offenders were prosecuted in state court rather than federal court, but the Court held that this evidence was insufficient to entitle the defendants to discovery.

What is important for my argument is the extent to which the *Armstrong* Court's decision not to allow the defendants to have discovery is inconsistent with promoting procedural justice. I will argue that greater attention to public-regarding justice grounded in fundamental fairness could provide a foundation for ruling in favor of the claimants in *Armstrong*.

One of the key aspects of procedural justice is its attention to procedure, not outcomes. Accordingly, with respect to *Armstrong*, the issue of importance in the case is not whether the *Armstrong* defendants should have ultimately succeeded on their substantive claim; rather, the issue is whether they should have been allowed access to the kind of information that would have made their pursuit of the claim possible. The *Armstrong* Court set the bar for access to discovery very high. After *Armstrong*, to obtain discovery, a defendant must provide some evidence of similarly situated unprosecuted people. This requirement for access to prosecutorial information is incredibly—possibly unattainably—high.

Richard McAdams has offered one defense of the Court's requirement. It might make sense to limit discovery to those cases in which there is a reasonable basis for inferring that race and the decision to prosecute are correlated.<sup>85</sup> If a petitioner can establish a reasonable basis for success, then it is easier to justify the cost to prosecutors of providing defendants with information to substantiate their selective prosecution claims. Even if Professor McAdams is correct about the importance of correlations to the Court, the most elementary student of statistics knows that satisfying the *Armstrong* test still makes it impossible to determine that race and prosecutions are correlated.<sup>86</sup> One cannot determine whether race and prosecution are correlated simply by knowing how many Blacks and Whites are prosecuted. One also needs to know how many in each group are *not* prosecuted. The *Armstrong* Court required the claimants to provide information about similarly situated white defendants who were not prosecuted—only one of the necessary groups.<sup>87</sup> If all of this is correct, then it is difficult to understand why the Court would require defendants to produce evidence that is so hard to obtain to garner discovery when the discovery would not prove very helpful.

The most likely explanation for the *Armstrong* Court's high discovery bar is its desire to radically limit selective prosecution claims. I submit that this desire misconceives the importance of promoting public-regarding justice. The perception of selective prosecution is a real problem regardless of the actual incidence of the offense, as the studies cited above suggest. In light of such

---

<sup>85</sup> See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 629–30 (1998).

<sup>86</sup> See *id.*

<sup>87</sup> See *id.* at 634.

perceptions, prosecutors could do well by promoting transparency by turning over the evidence selective prosecution claimants seek.<sup>88</sup> Being open would communicate to the public that they have nothing to hide.<sup>89</sup>

In order to promote public perceptions of fairness, the *Armstrong* Court could have drawn on the Court's fundamental fairness jurisprudence to recognize that more was at stake than the particular defendant's interest in being singled out by the prosecutor. A Court concerned with public-regarding justice would have more readily required the trial judge in *Armstrong* to allow discovery.

#### IV. CONCLUSION

I am a great admirer of the Warren Court. Its goals were righteous, and many of its outcomes are justly celebrated. My goal here is not to undermine the work, but to reflect on it. In particular, I have emphasized the gradual weakening of fundamental fairness analysis in due process as a mechanism for the creation of constitutional criminal procedure. In the old days, fundamental fairness was used to establish procedures protective of criminal defendants. Importantly, though, the Court, in relying on fundamental fairness recognized that the Due Process Clause is a constitutional guarantee that includes the interests of all of us, not just defendants. Fundamental fairness promoted a vision of public-regarding justice. Today these public-regarding ideas are more dim than they used to be because the Bill of Rights has become the central mechanism for the articulation of constitutional criminal procedures.

It is true that the fundamental fairness jurisprudence likely was not well-suited to produce rapid and widespread reform of state criminal justice practices compared to selective incorporation. However, we obtained reform at a cost. The Warren Court's selective incorporation approach did not admit of the candid evaluation of various aspects and practices of the states that fundamental fairness analysis did. That analysis captured society's normative aspirations and provided a primer on fair treatment of citizens. We are in dire need of a remedial course. Despite the Warren Court's work, racial injustice still appears to pervade the operation of criminal justice systems around the country. Attention to the appearance of injustice, social science research has shown, is one of the most important ways for a criminal process to achieve public trust, participation, and compliance. Perhaps, in pursuit of these goals, we should allow the old to become new again.

---

<sup>88</sup> Compare Justice Stevens' statement in *Armstrong*: "Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that 'they have properly discharged their official duties.'" 517 U.S. at 476 (Stevens, J., dissenting) (citations omitted).

<sup>89</sup> Note the similarity between this argument and arguments prosecutors might make (at least want to make) concerning whether or not a criminal defendant testifies at trial.

