Democratic Policing Before the Due Process Revolution

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ABSTRACT. In 1952, Jerome Hall gave a series of lectures on “Police and Law in a Democratic Society.” Applying the methodology of cultural history, this Essay traces how Hall’s concept of democratic policing shifted from self-rule, 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 constrained entirely by law. That is, Hall modified his ideas of democracy to accommodate the police, rather than the other way around, with the police having to change in accordance with democratic principles. By placing the lectures within the context of the Cold War, the Essay argues that due process was not just a legal norm, but also a cultural value that rationalized discretionary policing at a time when it smacked of totalitarianism and, at the same time, served to distinguish two competing systems of government that both relied on discretionary authority. The Essay concludes by exploring how the cultural meaning of due process necessarily revises prevailing interpretations of due process as a restraint on police discretion, thus bringing new light to the Warren Court’s due process revolution.
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.


Introduction

In 1952, Jerome Hall, a prominent legal scholar at Indiana University, gave a series of public lectures at the University of Chicago Law School titled “Police and Law in a Democratic Society.” To demonstrate how the rule of law applied in the police context, Hall rendered a conceptual flow chart in which “due process,” a constitutional provision readily accepted as having the force of law, imputed legality to statutes enacted under that general principle. The legitimacy of those statutes then coursed down to rules and standards set forth in judicial decisions. The rule of law was manifested, in the final step, in the officer who acted pursuant to those rules and standards. But the end point came down to more than police submission to laws. According to Hall, the officer became an abstraction: “the living embodiment of the law,” “the concrete distillation of the entire mighty, historic corpus juris,” “the living expression of democratic law.” These figures of speech were remarkable, coming as they did from a self-professed “rule of law person” and conservative critic of the discretionary powers of administrative bureaucrats. Within a single lecture and with the facility of metaphor, Hall had cloaked the most discretion-wielding, law-enforcing arm of the twentieth-century state with the legitimacy of law.

One could explain away the contradictions in Hall’s analysis as mere wordplay, political spin, or cognitive dissonance. Instead, taking him on his own terms, inconsistencies and all, might offer a starting point for a cultural and intellectual history of fundamental principles in American law. The methodology of cultural history in particular makes productive use of

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1 The lectures were published the following year. See Jerome Hall, *Police and Law in a Democratic Society*, 28 *Indiana L.J.* 133 (1953). Reflecting Hall’s stature, the Maurer School of Law at Indiana University now offers a postdoctoral fellowship named in his honor.

2 *Id.* at 144-45.

3 Letter from Jerome Hall to Hans Zeisel (July 9, 1981) (on file with UC Hastings Law Library Special Collections, Jerome Hall Papers, Box 2, Folder “Correspondence Z”) [hereinafter Jerome Hall Papers].
paradoxical thinking, untangling it to reveal a world of values and symbols. The creation of such meaning is inherent in legal norms. As Paul Kahn has explained, “the function law performs is constitutive as well as regulatory.” In other words, law forms communities and informs identity. The reverse is also true: the motivation to understand the self and one’s community in the world often finds expression in law. Thinking about law as culture raises a different question than the legal inquiry, for example, of which procedural rights are due or the normative inquiry of which rights should be due. It instead asks, what did those rights mean, and what purpose did those meanings serve? 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.

This Essay examines one prominent scholar’s efforts. In important ways, Jerome Hall was both singular and representative of his generation’s views on the subject of his lectures. He was singular in that most elite law professors at the time were occupied with the study of administrative and judicial discretion, not police discretion. So Hall’s writings offer a rare source for gleaning how a legal theorist thought about policing in a democratic society. At the same time, Hall was representative in that his thoughts fell un-controversially within the mainstream of acceptable views in the age of consensus. He did not unsettle any respectable notions on police in American society; rather, his lectures strode in step with majority sentiments expressed in judicial opinions and popular presses on the need for robust policing. No one,

4 ROBERT DARNTON, THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY 5 (1984) (“When we cannot get a proverb, or a joke, or a ritual, or a poem, we know we are on to something. By picking at a document where it is most opaque, we may be able to unravel an alien system of meaning.”). I approach culture as a system of meaning. See CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 9 (1973) (“Analysis, then, is sorting out the structures of signification … and determining their social ground and import.”). 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 MOVEMENT CONFLICT AND CONSTITUTIONAL CHANGE: THE CASE OF THE DE FACTO ERA, 94 CAL. L. REV. 1323 (2006).

5 PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 9 (1999). See also LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION 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.”), 7 (“nowhere is law … without its place within a system that gives meaning to its people’s life”) (2006); Naomi Mezey, LAW AS CULTURE, 13 YALE J. OF LAW & HUM. 36, 37 (defining culture “as a set of shared signifying practices that are always in the making and always up for grabs”) (2001).


7 On consensus, see, e.g., WENDY L. WALL, INVENTING THE “AMERICAN WAY”: THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT (2008).
moreover, called him out on what we can recognize today as a breathtaking articulation of police as the embodiment of the rule of law.

Jerome Hall in 1952, the year he gave his lecture on “Police and Law in a Democratic Society.”

Box 12, Jerome Hall Papers.

A cultural study of law can help to make sense of Hall’s lectures by contextualizing them within a larger struggle 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 dictatorial power.8 This Essay shows that the resolution of that struggle entailed a redefinition of the concept 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 so that it conforms to traditional democratic principles.9 While David Sklansky has shown that shifting theories of democracy from the 1950s to the late 1960s shaped evolving ideas of democratic policing, the reverse trend has also been true: people sometimes modify abstract concepts to rationalize their social reality.10 This Essay argues that the resort to due process reflected two contradictory commitments at midcentury.


9 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). I show how Jerome Hall held both understandings at the same time without acknowledging the tension between the two.

Due process allowed the police to exercise tremendous discretion and, at the same time, symbolized the difference between two competing systems of governance that both relied on discretionary authority. The disconnect between the reality of policing on the ground and the ideals associated with due process lies at the heart of Hall’s seeming contradictions. Historicizing due process will illuminate how the concept served to rationalize police discretion in response to the Cold War imperative to distinguish American police from totalitarian police.

This Essay begins in Part I with Jerome Hall’s attempt to accord professionalized, twentieth-century police forces with the traditional democratic principle of self-government. Reflecting his difficulty, twice he changed his definition of democratic policing within the same lecture, without perceiving his own conceptual shifts, and without noting the tensions among the different definitions. Part II examines the first modification, that of democratic police as bound by the rule of law, which Hall described as an anti-discretion norm. But Hall’s efforts to characterize police officers as mere law enforcers who did not exercise discretion stretched his own understandings 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. Although due process did not always ensure that officers would conform to the law, its observance, even if pro forma, nonetheless reinforced the message that the United States had democratic policing. This legacy of due process perpetuated the meaning that even if Americans were not free from discretionary policing, and even if due process did not guarantee substantive justice, they lived in a free society.

The conclusion in Part IV situates this midcentury perspective as prelude to the due process revolution, which will necessarily refine the prevailing interpretation of “modern” criminal procedure as a project to constrain the discretion of individual police officers. Most assessments of the Warren Court compare it with the subsequent Burger Court, but we can also gauge its legacy by comparing it with what came before. In the postwar years and even through the 1960s, jurists sought not just to rein in the police’s discretionary authority, but also to allow it. This social need informed the Warren Court’s decisions that relied primarily on judicial proceedings, particularly the warrant requirement, to govern policing. While the choice of procedural rights over substantive rights can become meaningless when theorized, it mattered in the real world. Choosing procedure over substance reflected an a priori choice to accept a great

11 See ROSEN, supra note 5, at 8 (describing the cultural study of law as an examination of “the ways in which facts are created for purposes of addressing differences”).


13 See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 210-12 (2011) (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 “detailed law of procedure”
deal of policing. Due process not only functioned to discredit or limit police discretion, but also to legitimize it, sometimes even when it amounted to lawless policing.

I. “Self-rule on the police level”

When Jerome Hall read about what was going on around the world—refugees arriving from the “fascist dictatorships of Italy and Germany” as well as 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 to the same degree but certainly in kind, to “American third degrees” and “the torture of Negroes by the police in some communities.” “At no time in history,” Hall admitted, “has it been easier to compare the police of democratic societies with that of dictatorships.” Recent and current events forced him to grapple with “the unavoidable question, what essential differences, if any, are there between American police and the Gestapo or NKVD?”

When he set aside actual incidents of police brutality, articulating the theoretical differences came easier. Although Hall acknowledged that “wholesale torture and democracy obviously cannot co-exist,” he argued that the “essential criteria of the police in a democratic society” was not the absence of abuse. Rather, its fundamental character was “self-rule on the police level,” or “self-policing.” Just as the difference between democracy and totalitarianism lay in rule by the people versus rule by autocrat, in a free society, the police answered to the public, not to those in political power.

Notwithstanding the clarity of this distinction, Hall struggled to account for the reality that in the twentieth-century United States, policing had become a government service in which citizens played a very small role and, if police chiefs had their way, the people would also have very little say. In other words, self-policing hardly existed in America. This development had come about largely from the efforts of the professionalization movement, beginning in the Progressive Era, to unify and centralize police functions. As police scholar Samuel Walker has written, by the late 1930s, policing had acquired the basic elements of professionalism, namely, a regulating law enforcement); William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. CONTEMP. LEGAL ISSUES (1996).

14 All quotes in this paragraph from Hall, supra note 1, at 139-40.

15 Id.

16 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 678 (1912) (noting that for the past twenty-six years, “the Boston police have been under state control,” and acknowledging that it “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 Samuel Walker, Popular Justice: A History of American Criminal Justice 113-14 (1998) (discussing the “expanding professional-managerial class”).
monopoly on specialized knowledge, autonomy and the right to exclude others, and a commitment to public service.\textsuperscript{17} Although localization remained typical of policing in the United States, progressive police reforms marked a shift away from ward influences and towards bureaucratic centralization.\textsuperscript{18} In many municipalities, reformers replaced the spoils system with civil service exams and required specialized training.\textsuperscript{19} Some cities even prohibited officers from living in the beats they patrolled.\textsuperscript{20} Police chiefs also vociferously opposed citizen review boards.\textsuperscript{21} Having to answer to civilians diverged from the goals of professionalization, which sought to make the police more independent and less vulnerable to the vagaries of public opinion.\textsuperscript{22} All of these developments made plain that self-rule did not exactly describe the police function in the United States.\textsuperscript{23}

To be sure, the meaning of self-government had also evolved. Leading theories of democracy at midcentury rejected the town-hall paradigm for the mass market, in which average citizens did not participate in day-to-day governance and instead enjoyed—consumed—the

\textsuperscript{17} SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM ix-x, 167-68 (1977). On how police professionalization claimed autonomy for the institution of policing, see also SKLANSKY, supra note 10, at 34-38.

\textsuperscript{18} 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.”).


\textsuperscript{20} ARCHBOLD, supra note 18, at 34; WILSON, supra note 19, at 336-37.


\textsuperscript{22} See also BRUCE SMITH, THE STATE POLICE: ORGANIZATION AND ADMINISTRATION 260 (1925; 1969) (arguing against “division of responsibility” over police forces and for unified control of police executives).

\textsuperscript{23} See also id. at 253 (“the 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”); SKLANSKY, supra note 10, at 35 (“Police professionalization meant politically insulated police departments organized along hierarchical, quasi-military lines, with strong commitments to ... centralized command ...”), 36. On the views of “sympathetic critics of the New Deal” concerned about “the relationship between expertise and democracy,” see ANNE M. KORNAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970, at 55 (2015) (see especially Chapter 2, “Democracy and Accountability in the Administrative State”).
benefits of a democratic system. Lay involvement was limited to electing officials who specialized in governing. By the twentieth century, democracy had become more efficient.

Hall’s historical explanation for the “specialization of police functions” reflected this consumerist conception of democracy. 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.” Within a paragraph, Hall had 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. By 1829, Hall explained, organized gangsters and riots had struck more terror in Londoners than “the fear of tyrannical police.” 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.” What Hall took away from this history was 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.” 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 police force does not in the least alter that duty” of every citizen to do police work, “but only facilitates its skillful discharge.” The common notion that policing “belongs exclusively to the publicly employed police officers” was a “misapprehension,” “fallacy,” and “myth.” The truth, Hall maintained, was that “police work rests on every citizen.” American police were simply undertaking the “full-time performance of the duties of all citizens.” Put simply, the specialization of police work was merely an efficient allocation of the obligations of citizenship.

24 SKLANSKY, supra note 10, at 13-14, 18-19, 21-23.
25 Hall, supra note 1, at 134.
26 Id. at 135.
27 Id. at 136.
28 Id. at 135. Hall’s historical foray may have been brief, in part, because the history was generally understood. In 1953, E. W. Roddenberry, a researcher with the Los Angeles Police Department, lectured on “Early Police Systems,” which was essentially identical to Hall’s account. E. W. Rodenberry, Early Police Systems, THE LOS ANGELES POLICE BEAT 18-21 (Dec. 1953) (on file with Los Angeles City Archives, Erin W. Piper Technical Center, Box B-2283).
29 Hall, supra note 1, at 136.
30 Id. at 143. See also Rodenberry, supra note 28, 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”).
31 Hall, supra note 1, at 135.
32 Id. at 135.
33 Id. at 139.
Notwithstanding Hall’s account of the long tradition of self-policing, many people were beginning to view the police as one of the most authoritarian figures in American society. In 1950, a group of Berkeley researchers published the influential book, *The Authoritarian Personality*, which seemed to describe police officers precisely. The unification of the duty to maintain social order, combined with the authority to take away a person’s liberty in pursuit of that duty, struck many as too similar to autocratic rule for comfort. Fears about what police abuse in the United States could portend also recalled European upheavals in the minds of American jurists. In a 1955 case in which the police entered and searched a home without a warrant, Justice Traynor of the California Supreme Court wrote in his opinion that such practices could turn a “democratic society” into “the police state.” This was not an abstract worry. Traynor observed that it was “[t]oday one of the foremost public concerns” in 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.”

But for these same jurists, the solution to police lawlessness did not entail abolishing the institution of police. Hall identified the specialization of police functions as the “greatest obstacle to understanding the police problem” because he, as did most Americans, could not imagine society without it. In 1936, Hall wrote that “until quite modern times police duties were the duties of every man,” but by the early 1950s, he emphasized the timelessness and “universality” of police by normalizing, even naturalizing, their enforcement of criminal laws. In his lectures, Hall explained that it was “very likely that in every society disorder has been a threat to 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.” 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.” Given the unquestioned need for police law enforcement, the challenge was to articulate how twentieth-century police forces accorded with traditional democratic principles. It was a difficult endeavor when held against a pure concept of self-rule.

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34 T. W. Dorno, et al., *The Authoritarian Personality* (1950); see also Sklansky, *supra* note 10, at 17, 29-30 (discussing the midcentury fear of the authoritarian personality and its association with police officers).

35 *People v. Cahan*, 44 Cal. 2d 434, 447 (1955). For an example in a U.S. Supreme Court opinion, see, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (stating 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”).

36 Hall, *supra* note 1, at 134.


38 Hall, *supra* note 1, at 138-39.
II. “The police aspect of rule of law”

In the middle of his lecture, Hall offered another definition of democratic policing. In dictatorial states, he continued, the police acted with “sheer physical force unlimited by law,” which was “the antithesis of the rule of law” found in a democratic society. This, Hall now argued, was the essential difference between the two systems. It is notable that Hall introduced the new definition without any notice or transition marking the idea of legal constraints on policing as different from self-policing. Indeed, Hall seemed unaware that he had shifted emphasis from self-rule to the rule of law even though they conveyed distinct ideas. Rule by the people requires some form of public involvement or control while, at its most basic, the rule by law means police conformity to all laws, whether legislatively enacted or judicially decreed. In any case, the rule of law informed Hall’s understanding of how the police in a democratic society performed their duties. For Hall, 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, according to Hall, that did not involve the exercise of discretionary authority.

By mid-career, Hall had developed strong opinions about official discretion. He started out in the early 1930s by embarking on the progressive path that Roscoe Pound had forged. Indeed, Pound later remembered Hall as “one of my most esteemed former students.” Academics of their ilk had deflated the notion that law was natural or “a brooding omnipresence in the sky” and argued that doctrinal formalism could not prevent judges from deciding cases based on personal or political reasons. Rather than try to restrain this power of choice, reformers sought to use this reality for progressive purposes. They were hopeful 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.” But by the early 1940s, 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.” The association of “the dictator” with positivist governance provides a clue to

39 Id. at 143.
41 Letter from Roscoe Pound to Jerome Hall (Oct. 15, 1963) (on file with Jerome Hall Papers, Box 1, Folder “Correspondence P”).
42 Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
43 Jerome Hall, Social Science as an Aid to Administration of the Criminal Law, 3 DAKOTA L. REV. (1931).
44 JEROME HALL, LIVING LAW OF DEMOCRATIC SOCIETY 64 (1949). Pound himself had a change of heart by 1938 and began warning against the dangers of “administrative absolutism.” See also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 219-22, 225 (1992); MICHAEL WILLRICH, CITY OF COURTS:
Hall’s apostasy. By the late 1930s, the collapse of constitutional regimes and the rise of totalitarianism in Europe highlighted the dangers of the administrative state. 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.” As Hall later recalled, he “was interested to separate [him]self from the extremes of Legal Realism.”

It was in this vein that Hall presented his lectures in 1952. When he gestured to the “vast literature discuss[ing] rule of law in many of its phases and applications,” Hall probably had in mind the political reverberations of Frederick von Hayek’s *The Road to Serfdom*, which reached American readers in translation in 1944 and then in cartoon form in *Look* magazine in 1945. In the postwar context when every western society, including the United States, had adopted some aspects of a “welfare state,” the Austrian’s magnum opus had renewed discussions about an idea that many Americans came to associate with the long-cherished phrase, “government of laws and not of men.” Of course, “government of laws” meant something different to John Adams who

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46 Hall to Zeisel, supra note 3.

47 Hall, supra note 1, at 144. See also Ernst, supra note 9, at 1-2.


coined the phrase in 1780.\footnote{\textit{Cf.} NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 15 (2013) (identifying shift during 1810s to 1840s in “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”).} Indeed, one can trace the concept of rule of law even farther back, with scholars reaching as early as fifth-century Greece.\footnote{See BRIAN Z. TAMANAH, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (see Chapter 1, “Classical Origins,” and Chapter 2, “Medieval Roots”).} Even in mid-twentieth-century United States, rule of law meant different things to different people.\footnote{Jones, supr\textsuperscript{a} note 49, at 145 (“It is difficult to define the term, even as understood in the United States.”).} But at least since A. V. Dicey’s 1885 \textit{Law of the Constitution}, the legalist tradition was marshaled as a critique of administrative regulation, and this was the context in which Hayek and American legal scholars at midcentury invoked the term.\footnote{See, e.g., Jeremy Waldron, \textit{Thoughtfulness and the Rule of Law}, 18 BRITISH ACADEMY REV. 1, 3 (2011); HORWITZ, supr\textsuperscript{a} note 44, at 219-22, 225-26; ERNST, supr\textsuperscript{a} note 9, at 2-3, 30-33.} Hayek offered the purest definition of “Rule of Law” in \textit{The Road to Serfdom}, insisting that the concept required pre-established rules to constrain all government action.\footnote{F. A. HAYEK, \textit{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.”). \textit{See also} HORWITZ, supr\textsuperscript{a} note 44, at 225-30.} In this exposition, rule of law was fundamentally incompatible with administrative discretion, the very fuel that ran the regulatory state.

Dicey’s and Hayek’s formulation took root in American political and legal thought. Even scholars who remained within the New-Deal fold fixated on the seemingly inherent tension between discretion and rule of law, which had not worried them much in their heyday. In their optimistic fervor, neither progressives nor legal realists had set forth principled limits to discretionary authority, which had real consequences.\footnote{Hall to Zeisel, supr\textsuperscript{a} note 3 (“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 Shaw, supr\textsuperscript{a} note 6, at 709; BERNSTEIN, supr\textsuperscript{a} note 45, 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.”), 42 (“This opposition to constitutional protection of natural rights and support for judicial deference to legislation never became a full-fledged intellectual movement . . . .”). See also ERNST, supr\textsuperscript{a} note 9, at 7-8, 19-20 (on Felix Frankfurter’s understanding of the external and internal checks on administrative action), 33, 36, 71 (on Charles Evans Hughes and his transformation of Dicey’s “rule of law” into “rule of lawyers” to legitimate the administrative state); Jeremy K. Kessler, \textit{The Administrative Origins of Modern Civil Liberties Law}, 114}
justified sterilization on women charged, even if not yet convicted, with prostitution or public immorality. In the postwar aftermath of fascism and Nazism, pro-welfare-statists found themselves on the defensive, in search of a theory that might legitimate 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, which had become 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 legitmate.”

Still, the Oxford legal philosopher H. L. A. Hart would reminisce that “[t]hrough English Eyes,” American jurisprudence “oscillated between two extremes,” the “nightmare” of unconstrained discretion and the “noble dream” of complete legal determinacy. Hart had personally witnessed the difficulty Americans had with thinking outside of this dualism. In 1956, he had visited Harvard Law School at the invitation of the legal process theorists. 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 inherent to law itself. A year later, he expressed frustration that his ideas seemed “repellent” to his Harvard audience.

Within this larger discourse on 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.” The emphasis on this most important level of all belied a self-justification for the topic of his lectures, but it also hinted at a lacuna in legal process theory. Public law scholars focused on

COLUM. L. REV. (2014) (arguing that federal War Department lawyers embraced civil libertarianism as a tool of state-building).


57 Shaw, supra note 6, at 677 (internal citations omitted). See also Michael Willrich, Criminal Justice in the United States, in III CAMBRIDGE HISTORY OF LAW IN AMERICA 213-16 (Michael Grossberg & Christopher Tomlins eds., 2008) (contextualizing the model penal code project, undertaken by 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”).


59 Shaw, supra note 6, at 726 (“As Hart saw it, discretion is deeply implicit in the concept of the rule of law.”).

60 Id. at 711 (quoting Hart).

61 Hall, supra note 1, at 144.

62 A 7-page letter from Hall to Lon Fuller in 1948 outlining the reasons why Harvard Law School should not cut criminal law from the first-year curriculum suggests some anxiety on Hall’s part about the status of criminal law in legal academia. Hall ended the letter by remarking:
judges and state bureaucrats; the police never entered their discussions. Hall 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.” 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 to dictatorial power.

Evoking Hayek, Hall stated that the “antithesis of the rule of law” was “domination by sheer physical force unlimited by law.” When eliminating the negatives in his definition, rule of law required legal limitations on police action. Like Hayek, Hall did not accommodate 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.” 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. They were mere law enforcers.

Indicative of Hall’s thinking is his 1948 letter to Lon Fuller outlining the reasons why Harvard Law School ought not to reduce the hours devoted to criminal law in the first-year curriculum. Fourth on the list 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.” 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.” 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.

“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.” Letter from Jerome Hall to Lon L. Fuller (Jan. 6, 1948) (on file with Jerome Hall Papers, Box 1, Folder “Correspondence – Lon Fuller”).

Hall, supra note 1, at 139, 140. 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.”).

Hall, supra note 1, at 143.

Id.

Hall to Fuller, supra note 62.

Id.

Id.
Paradoxically, Hall’s exposition became less clear with “specific concrete applications.” Hall demonstrated the rule of law “in action” by 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.” Implicit in this example was dependence on the officer’s reasoned judgment—the officer must reasonably think. The rule assumed that the arresting officer would determine for himself, on the spot, whether circumstances justified a warrantless arrest.

Missing in Hall’s explanation was 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. To be sure, Hall understood warrantless arrests to conform with the rule of law because it contained a limiting principle, that is, reasonableness (a police officer must “reasonably think” before acting). But in fact, the felony exception expanded the scope of police action by narrowing 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. To put it differently, warrantless arrests transferred part of the judicial function of determining reasonable or probable cause, at least in the first instance, to individual officers. Of course, courts maintained that the probable-cause inquiry was ultimately a judicial question. But just as reasonableness functioned as a deferential safeguard against states’ legislative authority, it has tended to be as accommodating of police authority. In many routine cases throughout the country, courts ceded much of their judicial responsibility by deferring to the police’s justification. In countless scenarios that unfolded daily between individuals and police officers with only the nebulous reasonableness standard to govern their encounters, rule of law appeared

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69 Hall, supra note 1, at 144.
70 Id.
72 See, e.g., People v. Case, 220 Mich. 379, 392-393 (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?”).
73 See, e.g., Brinegar v. State, 97 Okla. Crim. at 313.
74 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); Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 WM. & MARY L. REV. 197, 199-200, 210 (1993) (likening the Fourth Amendment’s reasonableness standard to the rational basis standard, both of which are deferential to state action); Lee, supra note 71, at 1147 (“reasonableness review as currently applied in the Fourth Amendment context is highly deferential, resulting in decisions that usually uphold the challenged governmental action”).
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.

Certainly, Hall was aware that some degree of rational thinking on the part of the police was necessary. Law enforcers were not automatons. But for Hall, the reasoning involved in police work was limited to determining which laws governed a particular situation. Hall’s passage on how the police should handle riots reflected this understanding. “The first insight into which legal controls to apply in such serious situations,” Hall explained, “is the perception that there are different kinds of mob disorder.”  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. It could be simply demanding that the mob disperse, pursuant to the Riot Act. It might be summoning citizens to assist in 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.”  Hall did recognize that “the police must be selective in making arrests since it is physically impossible to arrest all offenders.”  But even at this point, the closest that Hall came to recognizing discretion inherent in police work, he stopped short of calling this discretion and instead concluded that the “situation therefore demands realistic decisions guided by democratic goals and knowledge of the facts.”  The policeman was not so much a discretion-exercising official, but a law enforcer who now and then required some judgment to determine how best to implement the laws’ commands.  Hall failed to perceive that dispersing riots or even averting one from forming required more than guidance from democratic ideals.

Just as striking is his failure 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. More commonly, the criminal laws authorized

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75 Hall, supra note 1, at 147 (emphasis added).

76 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 (1988).

77 Hall, supra note 1, at 149.

78 Id. at 150. See also Hall, supra note 44, 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.”).

79 See also Frank J. Remington, Book Review, 36 U. CHI. L. REV. 884, 891 (1969) (“For some agencies, police, for example, it has traditionally been assumed that they merely ‘enforce the law’ and thus did not exercise discretionary power.”) (reviewing DAVIS, supra note 63).

80 Hall, supra note 1, at 150.
police to arrest for solicitation, incitement, and conspiracy to commit a breach of the peace, which “were designed to check criminal conduct in its incipient stages.” Hall continued by discussing the peace bond, which was less commonly known “as a control of incipient symptoms of serious disorder.” In several states, 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 suggested that law enforcement could use peace bonds for “preventive justice” since the “statutes [were] broad enough to include the issuance of orders for recognizance against almost any threatened breach of the peace.” He saw potential in “the peace bond as a technique to check incipient criminal behavior” because it offered legal provision 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.

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.” 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 flouted existing laws. In contrast, 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, like many others at midcentury, did not view the police as officials who exercised discretion to fill gaps in legal rules. In their minds, 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, but 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 survey study of the entire criminal justice system, “from the time a crime is committed until the convict is released from prison.” Justice Robert Jackson, as 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.” No one had conclusive answers for why crime was increasing and why law enforcement proved ineffective. In fact, what the legal reformers found particularly problematic was the police’s

81 Id. at 151.
82 Id.
83 Id. at 141.
84 Id. at 140.
85 AMERICAN BAR FOUNDATION, THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PLAN FOR SURVEY, prepared by Arthur H. Sherry 6 (1955), University of Wisconsin Law Library, Madison, WI.
86 Id. at 9.
87 Id. at 6.
decision “not to report crimes,” which meant that they were not fulfilling their role as law enforcers.\textsuperscript{88}

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.”\textsuperscript{89} To that end, “professional field representatives” observed and tabulated every moment of an officer’s working day. These meticulously gathered reports, they hoped, would provide a larger picture of the “deficiencies in a system of criminal justice.”\textsuperscript{90} Each field report compiled over months and years added up to something of greater importance; Justice Jackson envisioned them as “building a cathedral to testify to our faith in the rule of law.”\textsuperscript{91}

By the late 1950s, as researchers began to pore over the field reports, they were stunned by the realization 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 \textit{ Arrest: The Decision to Take a Suspect Into Custody}.\textsuperscript{92} Herman Goldstein, who began his career as a field reporter in the police study, declared in his seminal book \textit{Policing a Free Society}, published in 1977, that “it was only approximately fifteen years ago that the existence of discretion in police work was first openly recognized.”\textsuperscript{93} By “discovering” discretion in 1960, police scholars had come to acknowledge that pre-established rules and laws could not possibly dictate the entire domain of policing as the rule of law required.\textsuperscript{94} Police officers, like judges and administrators, had the power of choice. Tellingly,


\textsuperscript{90} AMERICAN BAR FOUNDATION, \textit{supra} note 85, at 9.

\textsuperscript{91} Harno, \textit{supra} note 88, at 523.

\textsuperscript{92} Joseph Goldstein, \textit{Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice}, 69 YALE L.J. (1960); \textit{WAYNE LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY} (1965). \textit{See also} Remington, \textit{supra} note 79, at 889 (“it has only been recently that there has been any study of the exercise of discretion by police”). Still, even for the “discretionary justice” advocate Kenneth Culp Davis, the inevitability of discretionary authority appeared difficult to accept. See \textit{id.} at 898-99; see also \textit{DAVIS, supra} note 63.

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

once police reformers discovered police discretion, they sought to apply the same methods that structured the discretion of every other regulatory agency: administrative rule-making.\(^95\)

But back in 1952, not only did Hall fail to comprehend that officers do, in fact, exercise discretion, he also did not recognize 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.\(^96\) To account for the discretion that he could not name, Hall relied on metaphor. It was here that Hall wrote of the law-abiding officer as becoming “the living embodiment of democratic law,” that the democratic police became “the concrete distillation of the entire mighty, historic corpus juris, representing all of it, including the constitution itself.”\(^97\) Rather than discretion, democratic inspiration aided police officers in making reasoned judgments in the pursuit of their duties. 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.

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.\(^98\) This conflation is worth noting. In *The Road to Serfdom*, Hayek had 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.\(^99\) This was a direct challenge to latter-day progressives such as Harlan Fiske Stone who had articulated rights in the language of standards. In 1936, Stone wrote that the “great constitutional guarantees of personal liberty and

\(^95\) See, e.g., GOLDSTEIN, supra note 93, at 115; DAVIS, supra note 63, at 222-23.

\(^96\) This is a curious oversight on Hall’s part. After the Supreme Court established the automobile exception in *Carroll v. United States* in 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). 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 v. United States*, 267 U.S. 132, 155-56 (1925). 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.

\(^97\) Hall, supra note 1, at 144.

\(^98\) Id.

\(^99\) HAYEK, supra note 53, 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 9, at 9.
of property … are but statements of standards,” and that the “chief and ultimate standard which they exact is reasonableness of official action.”

Hall’s proposition that “[r]ules of law are certain standards and commands” evoked this progressive vision of rights. This is puzzling given that by the 1950s, he had left behind his early progressive optimism and embraced a more traditional outlook on rights. Hall was undoubtedly aware of rule-of-law criticisms against standards. 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. One could describe Hall’s explanation of warrantless arrests as a conceptual sleight of hand that began with a constitutional principle and ended with a standard. The maneuver allowed Hall to invoke a less than traditional view of rules and standards to justify the powers of the most authoritarian figure in American society.

Reflecting the incongruity between the reality of discretionary policing and the principle of rule of law as the absence of discretion, Hall often fell into a tautology: the “policy to guide the police of a democratic society,” he asserted, was “to maintain order in ways that preserve and advance democratic values.” But how, exactly, did democratic police do so? Figures of speech and conceptual maneuvers offered a way out of the circularity. They 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, which is also what Hall did. The rule of law as the absence of discretion became the rule of law as due process. Without explanation (again), Hall’s definition of democratic policing changed (again). Democratic policing now meant policing pursuant to procedures, specifically trial procedures. At the time of the 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

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100 Harlan F. Stone, The Common Law in the United States, 50 Harv. L. Rev. 23 (1936).
101 Hall, supra note 1, at 144 (emphasis added).
102 Greene, supra note 40, at 151-57, 189-95.
103 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 ICON 280-82 (2010). On freedom of contract, see, e.g., William M. Wiecek, The Lost World of Classical Legal Thought (1998), 181; Horwitz, supra note 44, at 131; Stone, supra note 100, at 23.
104 Hall, supra note 1, at 146.
over which procedures counted as fundamental to due process. To this debate, Hall contributed his own thoughts that 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.”

The modulation in Hall’s explication of democratic policing may well have reflected his attempt to resolve the inescapability that police duties like controlling riots and preventing crime required them to venture beyond the bounds of the law. Indeed, the section on riots and peace bonds was where Hall most fully developed the idea of due process as a requirement of democratic policing.

Another place where this shift occurred was in the felony-arrest illustration. Seeking to demonstrate the “police aspect of rule of law,” Hall identified the “relevant constitutional provision” that governed the police as due process. One could interpret this conflation of concepts as intentional, i.e., that Hall meant, similar to Jeremy Waldron’s more recent argument, that due process constitutes a set of legal norms that manage state power, including the police’s power. Hall certainly detected a connection between the rule of law and due process. But he distinguished what he called the “substantive” manifestation of the former with the procedural aspect inherent in the latter: “so long as the police in a democratic society obey the law, they do not decide that an arrestee is guilty of any crime.”

The rule of law concerned legal compliance, while due process ensured that the police did not determine individual guilt, a duty that fell strictly within the judicial domain.

This ultimately became the most important point for Hall. A free society with democratic policing maintained the segregation of judicial and law enforcement functions. Hall 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.” 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.” This separation of powers was necessary because it was “the dictatorial police who sit as judges, decide cases, and enforce their decisions,” Hall explained. It was precisely this perspective that also motivated the American Bar Foundation’s police study. Reports of widespread non-enforcement 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.

Significantly, the separation of functions seemed paramount over any substantive limits on police action. To be sure, Hall believed that laws themselves were important and that the

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106 Hall, supra note 1, at 145.
107 Id. at 144 (internal quotation marks omitted).
109 Hall, supra note 1, at 144.
110 Id. at 155.
111 See Harno, supra note 88, at 523. 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 94, at 193.
police had to enforce and themselves obey all laws. He recognized that police lawlessness posed “a very serious matter in a democratic society” because it tended to breed lawlessness on the part of citizens as well, which undermined the first principle of democracy, that is, self-government.\footnote{Hall, \textit{supra} note 1, at 154.} He was also concerned that only a handful of lawsuits were filed against the police each year, compared to the several millions of such cases that could be brought. This suggested that damage claims—at the time, the only viable remedy for violations of individual rights—hardly acted as a deterrence. But as disconcerting as these trends were, Hall nonetheless asserted that most illegal arrests and detentions, which he recognized as the main issue for racial minorities and the poor, were not “vicious or brutal,” but “well motivated and [served] a social need,” namely, dealing with “vagrants, drunkards, and derelicts.”\footnote{Id. at 156-57.} 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.\footnote{Id. at 156.} “More serious than the millions of illegal arrests that occur annually,” Hall claimed, were “illegal imprisonments and releases \textit{without judicial determination}.”\footnote{Id. at 154 (emphasis added).} According to Hall, the greatest police problem in the United States was neither recurring police lawlessness nor the lack of adequate remedies that could encourage lawfulness; rather, it was the fact that the police were determining the final outcomes of their actions.

Hall’s proposals further indicated that he had little issue with police authority as currently exercised. He wrote that because “the present police practice, crude as it is, [could] hardly be avoided” because of the social value of preventing crime and imposing order, potential lawsuits “for the legal harms can be avoided by requiring waivers to be signed on release from prison.”\footnote{Id. at 156-57.} 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. That way, the task of providing prompt judicial hearings “would begin to assume manageable proportions.”\footnote{Id. at 157.} The solution that Hall preferred most was legal reform that would “enlarg[e] the right of arrest,” which would “eliminate vast numbers of presently illegal arrests and detentions.”\footnote{Id. at 158.} As Hall explained, in their efforts to investigate suspicious characters or circumstances, the police often questioned individuals and frisked them. But these actions, because they involved a short detention, amounted to an arrest under the common law, which required the police to have more than mere suspicion; they needed probable cause. Accordingly, 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.\footnote{Id. at 159.} This occurred when, to get around the “archaic law,” police officers had to technically “arrest” suspicious persons to ask a few questions, and then release them after confirming their innocence. To correct this situation, Hall endorsed the adoption of the 1942 Uniform Arrest Act, which not only relaxed the standard for warrantless arrests, but also legitimized police practices that violated “the archaic law of arrest.”\footnote{Id. at 159; see generally id. at 157-60. Cf. Herbert L. Packer, Two Models of the Criminal Process, 113 U. PENN. L. REV. 1, 8 (1964) (noting the general perception that the Uniform Arrest Act amounted to a “substantial expansion of police power”).} It did so, first, by defining stops, frisks, and police questioning as not arrests and, second, by lowering the standard that the police had to meet to justify these actions, from probable cause to reasonable suspicion.\footnote{Sam Bass Warner, The Uniform Arrest Act, 28 VIRGINIA L. REV. 315, 315-47 (1942).} In short, 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.

While Hall discussed the due-process implications in routine cases of public order maintenance, judges confronted the tension between the principles of due process and the mandate of security in more criminal matters – and often affirmed the police’s unlawful actions within their understanding of due process. One of the most high-profile cases was the “Hollow Nickel Case,” which began in 1953 when a newsboy found a hollowed-out nickel containing a micro-photograph of a coded message.\footnote{JAMES B. DONOVAN, STRANGERS ON A BRIDGE (Scribner 2015) (1964). See also Jeffrey Kahn, The Case of Colonel Abel, 5 J. NAT’L SEC. L. & POL’Y 263, 282 (2011).} After the defection of a dissolute Russian intelligence officer who had sensed his usefulness to Moscow coming to an end, FBI agents nabbed the head of the entire Soviet espionage network in North America.\footnote{DONOVAN, supra note 122, at 2.} They stormed Colonel Abel’s hotel room and carted off all of its contents without a warrant—“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.\footnote{Id. at 56. The government did have an administrative warrant that authorized immigration officers to arrest Abel for violating immigration laws for the purpose of deportation. Donovan argued that this was insufficient to arrest Abel and search his hotel room for the purpose of criminal proceedings.} According to Donovan, the illegal search and seizure lay “at the very heart of [the] case” precisely because the charges against Abel, one of which was punishable by death, rested on spy paraphernalia found in the room.\footnote{Id. at 296.}

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, Nuremberg prosecutor, and once General Counsel of the Office of Strategic
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Services—he had lost at every step.\(^{126}\) 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.”\(^{127}\) The judge edified Donovan that “it is the job of the FBI to bring to light information concerning violations of the law, and [he did not] think it is part of the Court’s duty to tell them how to function.”\(^ {128}\) Donovan’s argument for excluding evidence, the judge asserted, was an “extreme attitude.” 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.”\(^ {129}\) He clearly prioritized security over not only the Fourth Amendment guarantee, but also an open hearing. Donovan raised and lost 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 of the nation’s highest bench 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.”\(^ {130}\) The Supreme Court rejected his Fourth Amendment claim and upheld the conviction.\(^ {131}\)

Editorials, if they can serve as a barometer of public opinion, suggested that many Americans held national security against communism more essential than individual security against unreasonable searches and seizures. “In protecting the life of a great nation against Communism,” one commentary insisted, “officers cannot be expected to be too technical.”\(^ {132}\) “If they had waited to get a search warrant they might not have secured the evidence to convict the spy.” Another cautioned that it was “a dangerous situation indeed when a Soviet spy

\(^ {126}\) About James B. Donovan, JAMES B. DONOVAN: A LEGACY OF IDEALS AND ACTION, jamesbdonovan.com/about; DONOVAN, supra note 122, at 55.


\(^ {128}\) DONOVAN, supra note 122, at 130-31.

\(^ {129}\) Id. at 58.


\(^ {131}\) The issues before the Supreme Court centered on the use of evidence in a criminal proceeding when those items were seized in a search that was undertaken pursuant to an administrative warrant for the purpose of commencing deportation proceedings. The majority found no problems with the cooperation of two separate agencies, the Immigration and Naturalization Service and the Federal Bureau of Investigation, so long as there was no evidence of bad faith. The dissenting justices, however, cried foul, arguing 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.” Abel v. United States, 362 U.S. 217, 242 (1960) (Douglas, J., dissenting).

\(^ {132}\) Id. (internal quotation marks omitted).
apprehended with the materials of his trade in his possession[,] can almost be freed on a technicality.”

After the Supreme Court had 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.” He believed simultaneously that Abel’s Fourth Amendment rights had been violated and that Abel had received the full benefits of due process. Donovan’s statement, along with judicial pronouncements and lay opinions on the case, suggested that for many midcentury Americans, due process did not necessarily mandate the right legal outcome. This was Hall’s perspective as well when he characterized the essential point of due process as the separation of functions, which was unmoored from any substantive notions of justice or limits on policing. The view that due process was not intended primarily to achieve just results was not an exceptional position. When, in 1955, McGeorge Bundy, the 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.” Dean Bundy continued, asserting that “[v]erdicts, in such a view, need not be right; they need only be, on the average, substantially less wrong than what would have happened without legal process.” If due process did not require correct verdicts, then what was it for?

The context of Hall’s lectures and Abel’s case offers an explanation. Both took place during the most paranoid spell of the Cold War. When recent history proved that a government of laws could easily slide into arbitrary authoritarianism when officials began wielding discretionary power, it became imperative to articulate what differentiated a democratic society that relied on discretionary policing from a totalitarian police state. Even more, the need to demonstrate the advantages of democratic self-rule gave new meaning to the rule of law and new purchase to the meaning of due process.

During Colonel 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.” These claims of supremacy became increasingly common during the Cold War, which involved many different competitions, 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. Which system offered the greatest freedom? This rivalry measured not only economic flourishing and equality before the law, but also the rights of individuals in the

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133 Id.
134 DONOVAN, supra note 122, at 339.
135 McGeorge Bundy, A Law View of Due Process, in SUTHERLAND, supra note 48, at 374.
136 Id. at 366.
137 DONOVAN, supra note 122, at 26 (quoting letter from Ray Murphy).
138 On economic flourishing, see HAYEK, supra note 54. On equality and nondiscrimination, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000).
criminal justice system. This, Donovan maintained, was “our strongest defensive weapon” against the forces of totalitarianism. 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.” Associating due process as an American value 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.” To the jurors, the lawyer emphatically called them to uphold “the tradition of a fair American trial.” To the public, Donovan carefully reminded them of “our principles … engraved in the history and the law of the land.” To claim due process as distinctly American was, at bottom, a comparison.

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 Francis Gary Powers for the exact same charge: spying. On May Day 1960, Powers had been captured when his U-2 spy plane, which the Russians referred to as the “Black Lady of Espionage,” had crashed during a covert mission to take aerial photographs of missile sites in Russia. Donovan took the occasion to offer his thoughts on the differences between the American and Soviet criminal

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139 DONOVAN, supra note 122, at 310.
140 Id. at 28 (emphasis added); see also id. at 16 (“I told him that he should have confidence in the basic American devotion to fair play.”).
141 Id. at 124 (emphasis added); 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.”).
142 Id. at 64.
143 Id. at 348-49.
justice systems. In the United States, procedural rights were “well designed to achieve abstract justice,” a concept that Donovan did not define.\textsuperscript{144} Soviet laws, in cases that did not affect the security of the state, provided “a reasonable attempt … to achieve abstract justice” as well. But the difference became clear in cases that involved state security, which was “given a value transcending the natural and constitutional rights which a defendant always has in a free society.”\textsuperscript{145} Absolute dictatorships, as found in Russia, “suppressed or obliterated” “human rights” in these cases “to the degree believed to be required by national interests.”

Even if Donovan were right that manifest differences existed between Soviet trials and American ones, he still failed to miss 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’ trial in the Soviet Union when Donovan had always maintained that the “seizure of Abel and all his effects at the Hotel Latham unquestionably violated the United States Constitution”?\textsuperscript{146} He had argued before the U.S. 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.”\textsuperscript{147} But Abel had lost! To be sure, Justice Frankfurter’s opinion for the Court disavowed that “the nature of the case, the fact that it was a prosecution for espionage, [had] no bearing whatever upon the legal considerations.”\textsuperscript{148} But Justice Douglas saw through the disclaimer, pointing out that “[c]ases of notorious criminals … are apt to make bad law.”\textsuperscript{149}

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’s and Powers’ fates came to the same substantive result, but for Donovan, the mere existence of due process made all the difference between liberty and oppression. Procedural justice, even without substantive justice, was sufficient for American freedom. The outcome did not matter because the point of due process—the cultural work that it did—was to differentiate. In this light, Donovan was not so different from his editorializing peers. Even as newspaper columnists sighed a collective 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.”\textsuperscript{150} But when a conviction at the conclusion of trial seemed foreordained, as Abel had believed all along,

\begin{itemize}
  \item 144 \textit{Id.} at 356.
  \item 145 \textit{Id. See also} PURCELL, supra note 45, at 136 (on the midcentury American understanding of totalitarianism).
  \item 146 DONOVAN, supra note 122, at 55 (emphasis added); \textit{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.”).
  \item 147 \textit{Id.} at 308.
  \item 149 \textit{Id.} at 241 (Douglas, J., dissenting).
  \item 150 \textit{Id.} at 33 (quoting San Francisco Chronicle).
\end{itemize}
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.

As Hall’s lectures and Abel’s case suggest, when confronted with aggressive policing to the point of lawlessness, mainstream Americans found reassurance in the idea of due process instead of questioning the extent of their reliance on the police. 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 policing. To be sure, they 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 rule of law changed from an anti-discretion principle to due-process values. Valuing due process conveyed the meaning that even though Americans were not free from police forces that wielded tremendous authority, they were free.

IV. 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 idea of due process that rationalizes police discretion preceded the Court’s decisions that we have long celebrated as limiting their discretion. This historical context may bring new light to the Warren Court’s criminal procedure decisions and offer new clues to some longstanding puzzles. It is now undisputed that the Warren Court granted more procedural rights to criminal defendants in an effort to protect individuals, especially racial minorities, from the police, while there has more debate about the revolution’s conclusion. Did it effectively end in 1968 with the Warren Court in Terry v. Ohio, which authorized stops and frisks, or did it meet its demise with the more conservative Burger Court in 1969? Even more puzzling is the observation of Professor Yale Kamisar, who believes that the revolution ended by 1968, that the “Warren Court’s performance in the field of criminal procedure does not fall into neat categories. The defense did win some victories in the late 1960s, but then it had lost some important cases earlier, when the revolution was supposed to be at its peak.”151 If anything, Kamisar’s acknowledgement suggests that a general theory that adheres to a dichotomy of pro-rights/anti-police has failed to provide a coherent synthesis of all of the Warren Court’s criminal procedure decisions.

A different understanding of due process, that of midcentury Americans, may refine our perspective of the Supreme Court’s decisions during those revolutionary years. Perhaps the Court’s intention was not simply to limit police action, but to allow it so long as they did not encroach on judicial functions. The three cases that occupy the pantheon of the revolution—Mapp v. Ohio in 1961, Gideon v. Wainwright in 1963, and Miranda v. Arizona in 1966—all extended rights in ways that preserved the separation of magisterial and law enforcement roles. In Mapp, the police searched a home without getting a warrant from a judge, and the Court ruled that violations of the Fourth Amendment—and a court would determine whether a violation had occurred—would result in the exclusion of evidence, even in state cases. The probable-cause determination for warrants and their issuance were, of course, long-established duties of judges, and incorporating the exclusionary rule was intended to make sure that they would remain so.

Both *Gideon* and *Miranda* extended the right to counsel, first by providing a lawyer to indigent defendants and then by providing one during custodial interrogations. Without such assistance, an officer’s untested testimony or heavy-handed interrogation tactics that compel a confession may effectively seal a defendant’s fate. Defense counsel’s role in these proceedings would ensure that a fair trial, not the police’s stratagems, would determine an individual’s guilt.

It is also significant that these cases did not try to cut back the police’s authority in substantive ways. *Mapp v. Ohio* did not establish a First Amendment right to possess obscene literature in one’s home, as ACLU lawyers had sought, which would have prohibited the police from going into homes to look for such materials in the first place. *Miranda* did not invalidate police custodial interrogations even though the Court concluded that coercion was an inherent part of the practice. Moreover, *Terry v. Ohio*’s legitimation of stop-and-frisks was consistent with the midcentury view that proactive policing provided a social benefit, even if it harmed minorities more, and the Court’s opinion adopted the 1942 Uniform Arrest Act’s standards as Jerome Hall had advocated in the 1950s. With this perspective, *Terry* was not so much a break from the Warren Court’s earlier decisions, and those earlier decisions did not present such a hard break from midcentury understandings of due process. The landmark cases themselves suggest more continuity from the 1950s through the 1960s than we have previously recognized.

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. The Court 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 as reining in the police. And it is true that their decisions did so in important ways. Making the police get a warrant lest they lose key evidence or requiring them to give the *Miranda* warning before conducting an interrogation did place some boundaries on how they carried out their investigations. This narrative has become so powerful that it has shaped a dominant, consensus interpretation of due process as a limit on police discretion while obscuring the ways that due process allowed 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.