

4-1-1998

Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure

Margaret Raymond

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998).Available at: <http://scholarship.law.unc.edu/nclr/vol76/iss4/4>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

REJECTING TOTALITARIANISM: TRANSLATING THE GUARANTEES OF CONSTITUTIONAL CRIMINAL PROCEDURE

MARGARET RAYMOND*

Throughout the post-World War II period, judges invoked the specter of totalitarianism as part of the struggle to define the scope of constitutional limits on government authority. In this Article, Professor Margaret Raymond examines the courts' use of these totalitarian comparisons and explores the role that the comparisons played in the development of constitutional criminal procedure doctrine. She argues that, in using the comparisons to provide contemporary context for their decisions, the courts demonstrated the principle of constitutional interpretation as translation.

I. INTRODUCTION	1194
II. EXPLORING THE PHENOMENON OF TOTALITARIAN COMPARISON	1198
A. <i>World War II and Postwar Periods</i>	1203
B. <i>From Postwar to Cold War</i>	1210
C. <i>Contemporary Examples</i>	1220
III. EXPLAINING THE PHENOMENON OF TOTALITARIAN COMPARISON	1226
A. <i>Possible Rationales for Totalitarian Comparison</i>	1227
1. The Jackson Hypothesis	1227
2. Public Justification	1234
3. "Mere" Rhetoric	1241
B. <i>The Significance of Totalitarian Comparisons</i>	1243
1. Totalitarian Comparisons as Negative Models	1243
a. The Fourth Amendment	1246

* Associate Professor, University of Iowa College of Law. J.D., 1985, Columbia University School of Law. I acknowledge with thanks helpful comments and other support received from Dave Baldus, Randy Bezanson, Arthur Bonfield, Alfred Brophy, Devon Carbado, Jonathan Carlson, Marcella David, Mary Dudziak, Karen Engle, Ken Kress, Jean Love, Laurie Magid, Michael Saks, Hillary Sale, Jim Tomkovicz, Bill Treanor, Lea Vandervelde, and Jerry Wetlauffer. Thanks also to the University of Iowa for the generous support of the Old Gold Fellowship Program.

b. The Fifth Amendment	1249
2. The Translation Analogy.....	1256
IV. CONCLUSION	1261

I. INTRODUCTION

The worst thing you can say about American law enforcement officers may be that they act like fascists. The National Rifle Association's reference to agents of the Bureau of Alcohol, Tobacco and Firearms ("BATF") as "jackbooted government thugs" who wear "Nazi bucket helmets and storm trooper uniforms" and "harass, intimidate, even murder law-abiding citizens," caused an uproar.¹ The invocation of Nazism in this context is hardly unique.

1. Sam Howe Verhovek, *An Angry Bush Ends His Ties to Rifle Group*, N.Y. TIMES, May 11, 1995, at A1 (quoting Letter from former President George Bush to National Rifle Association (May 3, 1995)). The phrases were used in a National Rifle Association fundraising letter as early as 1981. *See id.* Their use prompted former President George Bush to resign from the organization, saying, "Your broadside against federal agents deeply offends my own sense of decency and honor, and it offends my concept of service to country." *Id.* (quoting Letter from former President George Bush to National Rifle Association (May 3, 1995)). Referring to a particular BATF agent killed in the gunfight at the Branch Davidian compound, he went on, "I can assure you that this honorable man, killed by weird cultists, was no Nazi." *Id.*; *see also* 141 CONG. REC. H1380 at H1382 (daily ed. Feb. 8, 1995) (statement of Rep. Dingell) ("The consequences of the behavior of the BATF . . . is [sic] that they are not trusted. They are detested, and I have described them properly as jackbooted American fascists."). *But see id.* at H1383 (statement of Rep. Lightfoot) ("Not being the boot-jacked [sic] Gestapo, as they were described earlier, they are good, hard-working Federal employees . . .").

The totalitarian metaphor has come to dominate high-stakes criminal defense. Note the use of a comparison to Hitler by attorney Johnnie Cochran during his representation of defendant O.J. Simpson:

Mr. Fuhrman had once said that he would like to place black people in a pile and burn them. "There was another man not too long ago in the world who wanted to burn people," Mr. Cochran said. "People didn't care. People said he's just crazy, he's just a half-baked painter. This man, this scourge became one of the worst people in this world, Adolf Hitler, because people didn't care, didn't try to stop him."

David Margolick, *With Tale of Racism and Error, Simpson Lawyers Seek Acquittal*, N.Y. TIMES, Sept. 29, 1995, at A1.

Defense counsel are not the only ones using these arguments in high-profile trials. In closing argument at the trial of Oliver North, the prosecution argued, "North and McFarlane are following Adolf Hitler's old strategy. He was the one who said, the victor will never be asked if he told the truth." *United States v. North*, 910 F.2d 843, 895 (D.C. Cir.), *withdrawn and superseded in part by* 920 F.2d 940 (D.C. Cir. 1990). The defense response was heated:

"[B]eyond anything I have heard in a courtroom, and outrageous to the extent that it should send a course of rage through everybody in this room, is the reference to Adolf Hitler. This marine, retired, was linked in this courtroom to Adolf Hitler. Some in this room have fought Adolf Hitler. They know what Adolf Hitler was. And this man is not Adolf Hitler and he doesn't do things like

From a time when calling someone a fascist constituted “fighting words”² through the “fascist” label of the 1960s, the term “Nazi” is now often used to signify a perceived rigidity in contexts from the blatantly political³ to the intensely ideological⁴ to the ridiculously insignificant.⁵ Along with claims that comparisons to Nazism are impermissible low blows in the particular instance come protests that the use of the terms is inappropriate because it devalues them,⁶ trivializing the suffering of Holocaust victims and the demonic nature of Nazism.⁷ The battle lines are drawn: Can the Nazi metaphor fairly

Adolf Hitler, and to suggest it indicates the extraordinary drive, the force, the power of this government to put its might on top of Colonel North, to see what they can say is a crime. You should be offended by it. And you should judge everything they say, because anyone that will link Colonel North to Adolf Hitler is not credible and should not be believed.”

Id. at 895 n.32 (quoting defense counsel). The court concluded that, while the prosecutor’s statement had been “[u]nquestionably inflammatory” and “reflected remarkably poor judgment,” the defense’s forceful reply prevented any substantial prejudice to North. *Id.* at 895.

2. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court held that Chaplinsky, in calling the City Marshal of Rochester, New Hampshire, a “damned Fascist,” had used “fighting words” so “likely to provoke the average person to retaliation, and thereby cause a breach of the peace,” *id.* at 574, that their use could be criminalized without violating the First Amendment, *see id.* at 573.

3. The term “feminazi” is sometimes used by conservative commentators, to some objection. One journalist criticized use of the term, arguing that “[a]ny time any woman behaved or spoke in a manner deemed too liberal or too controversial or just too annoying, she was labelled a ‘feminazi.’” and that it “sicken[s] [me] when I hear the word ‘feminazi.’ I’m not angry for myself as a woman because I can—and do—fight back. But I’m angry for the millions who can’t fight back because they were killed by the real Nazis.” Many Warn, *A Shout Across Gender Gap*, BUFF. NEWS, Sept. 22, 1996, at B2.

4. See, e.g., *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992). Zal, an attorney, represented seven abortion protesters who were charged with criminal trespass at a clinic. *See id.* at 925. He was ordered by the court not to use any one of 50 specific words listed by the court, including, among others, the words “holocaust,” “Nazi,” “genocide,” “Hitler,” “extermination,” and “mass destruction.” *Id.*

5. Consider, for example, the “Soup Nazi” of television’s *Seinfeld*, a character so named because of his inflexible insistence that customers follow a prescribed code of behavior in ordering soup. See Al Brumley, *One Wrong Move with Soup Nazi and You’re in Soup*, SAN DIEGO UNION TRIB., Jan. 7, 1996, at F5. Less well known, perhaps, is the “Sandwich Nazi of Buffalo,” the proprietor of a sandwich shop bearing a sign setting out the requirements for service: “‘Your [sic] only allowed three questions. You should know what you want before you enter. You have one minute to give your order.’” Janice Okun, *Attitude to Go: He’s Cranky, He’s Opinionated, and He Makes a Great Sandwich*, BUFF. NEWS, Sept. 10, 1997, at C1.

6. Whether they are devalued because of their trivialization and overuse or whether they are capable of being trivialized and overused because they have been devalued is a chicken-or-the-egg sort of question. Yet temporal distance from the reality of Nazism and the consequent inability to understand viscerally its horrors argue forcefully for the latter.

7. See, e.g., Ellen Goodman, *Hitlers Great and Small*, BALTIMORE SUN, June 6,

be used to characterize government misconduct?

What is interesting about this question is that for a long time no one asked it. Yet the idea that what we think about Nazism, or about other examples of regimes in which unrestrained police power is systematically abused, is, or should be, relevant to the legal limits on the scope of police authority is hardly new. Arguments that particular types of police conduct, if not checked by constitutional restriction, could open the door to the worst excesses of totalitarianism were at one time used extensively in addressing issues of constitutional criminal procedure.⁸

Throughout the postwar period, judges invoked the specter of totalitarianism as part of the struggle to define the scope of constitutional limits on police authority. They argued—sometimes successfully, sometimes not—that the American constitutional system could not be permitted to open the door to totalitarian abuses. Moreover, they argued implicitly that the potential for totalitarian excess itself ought to play a role in determining constitutional limits on police activity. These arguments, and the role they played in making the law of criminal procedure central to America's self-concept, helped to set the stage for the Warren Court "revolution."

Of course judges during the postwar period would feel they understood the imminent threat to the liberties of individuals, and of society as a whole, posed by centralized police authority operating without meaningful external controls. It stands to reason they would have those examples in mind as they considered challenges to police practices in their own society. The broader question is what role these examples played in the development of constitutional criminal procedure doctrine.

1995, at A11; Michael Janofsky, *U.S. Candidates Fling Increasingly Stronger Insults; Comparisons to Hitler Are No Longer Rare in Political Demonizing*, DALLAS MORNING NEWS, Oct. 29, 1995, at A8; Barbara Yost, *O.J. Lawyer Should Apologize for Hitler Hyperbole*, PHOENIX GAZETTE, Oct. 19, 1995, at B6. A cartoon expresses this best. A narrator tells us: "Feminazis would like women to have the same opportunities in life as men. 'Smoking Nazis' would rather breathe clean air than secondhand cigarette smoke. The *actual* Nazis systematically slaughtered six million men, women and children. I really hate Nazi analogies." His companion replies: "'What are you—some kind of language Nazi?'" Tom Tomorrow, *This Modern World*, in ICON, Oct. 2-8, 1997, at 3.

8. Negative comparisons with totalitarian regimes permeate postwar judicial writings in many areas. I do not purport to catalog the phenomenon systematically, only to point out its prevalence and significance in the criminal procedure area. For an ambitious attempt to explain modern constitutional law and theory as the product of anti-totalitarianism, see generally Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996).

This Article argues that American constitutional criminal procedure norms during the postwar period were defined in part in reaction to those negative totalitarian models. The use of these models cast into sharp relief the centrality of constitutional criminal procedure to the values inherent in the American system, and reflected a shared understanding about the relationship between a society's criminal procedure norms and the character of its government. If invasive police procedures were critical to the establishment and maintenance of a totalitarian government, appropriate limits on police authority must, in contrast, be critical to the underlying tenets of American society. Debates about criminal procedure norms thus reflected deeper and more fundamental questions about the nature of the American social and political community. Arguments about coerced confessions, electronic eavesdropping, or bus sweeps became larger questions about the way judges, lawyers, and legal scholars imagined the essential character of American life.⁹ Invocations of the negative model—the “totalitarian comparison”—illustrated the point: permitting certain types of police conduct foreshadowed the unmaking of a civilized and just American society. These negative models, thus deployed, were used to argue that much more was at issue in any given case than whether a particular piece of evidence was seized properly; it was “[f]reedom as the Constitution envisages it”¹⁰ that was at stake.¹¹

The use of totalitarian comparisons to develop the content of the constitutional criminal procedure amendments is an example of the broader phenomenon of “translating” constitutional guarantees to reflect the contemporary context in which they were considered. The criminal procedure amendments to the United States Constitution were drafted in response to particular examples of “tyranny.”¹² Yet “tyranny” is necessarily an evolving concept; what are perceived to be egregious abuses of government authority change over time. Totalitarian comparisons reflected the concept of police excess prevailing in the postwar period, which was based on a shared

9. See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1010 (1992) (“Questions about constitutional meaning are thus, on their face, a mixture of questions about what the United States is and what the United States ought to do in given circumstances.”).

10. *Osborn v. United States*, 385 U.S. 323, 354 (1966) (Douglas, J., dissenting).

11. This Article argues that American views of the practices of other regimes played a role in giving context to domestic constitutional norms. For a study of how external views of American segregation affected domestic policy, see generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

12. See *infra* notes 182-210 and accompanying text.

understanding of what role the police should play in a just American society. Use of these comparisons reflected the need to understand the guarantees of constitutional criminal procedure in light of the most imminent and fearsome present-day threats posed by the abuse of governmental authority. That this was a widely accepted approach to these cases suggests a broad, albeit not expressly articulated, acceptance of the "translation" principle.

Part II of this Article explores the phenomenon of totalitarian comparison, which played a significant role in addressing numerous issues of police power and authority in the wartime and postwar eras.¹³ The negative model developed from a wartime and postwar focus on Nazism¹⁴ to a Cold War concentration on the Soviet Union.¹⁵ The comparisons continue intermittently in more contemporary instances.¹⁶ Having demonstrated that totalitarian comparison was a significant phenomenon, Part III considers the multiple functions that may have been served by the comparisons, arguing that they served a substantive role by providing negative examples that assisted in developing the content of the constitutional guarantees.¹⁷

II. EXPLORING THE PHENOMENON OF TOTALITARIAN COMPARISON

Judges of the wartime era were bombarded, as were ordinary citizens, with information about the horrors of the Nazi regime. Hitler, they were told, was a "monster of wickedness,"¹⁸ and information that seeped out of those countries under Nazi rule confirmed that characterization. It was not only the militaristic tactics of the Nazis that horrified, but their domestic policies as well, including the use of police might to intimidate, browbeat, and suppress any possibility, however slight, of domestic opposition. Surveillance was common: ordinary citizens were "hounded, terrorized, exploited."¹⁹ People's "homes, their daily lives [were] pried into and spied upon by the all pervading system of secret political police."²⁰ Reports from the occupied territories told of the

13. See *infra* notes 18-114 and accompanying text.

14. See *infra* notes 48-70 and accompanying text.

15. See *infra* notes 71-100 and accompanying text.

16. See *infra* notes 101-14 and accompanying text.

17. See *infra* notes 115-247 and accompanying text.

18. Winston Churchill, *Introduction* to THE SIXTH COLUMN: INSIDE THE NAZI-OCCUPIED COUNTRIES at vii, ix (1942) [hereinafter THE SIXTH COLUMN]. This volume was published in New York in 1942.

19. *Id.* at viii.

20. *Id.* One French handbill discussed the Nazi occupation:

"third degree,"²¹ torture,²² and interrogation punctuated by violence.²³ Writings reflected the Nazis' ideological insistence on absolute control of thought and action,²⁴ as well as their strategic use of violence and brutality to effect social control.²⁵

The abuses of civilians in their communities, horrifying as they were, must have paled beside revelations of concentration camp brutality. When the War Refugee Board²⁶ issued a detailed report in late 1944 including eyewitness reports of mass murder at Birkenau and Auschwitz (the first issued by a United States government agency),²⁷ the atrocities seemed " '[s]o revolting and diabolical ...

"THEY live in your house. THEY listen at your doors. THEY watch your gestures. THEY inform against your remarks. THEY are quiet, so you don't hear the famous clack of hobnailed boots which makes you prick your ear and automatically close your mouth. Beware of all of THEM, men and women alike."

Id. at 258 (quoting handbill).

21. See, e.g., ARVID FREDBORG, *BEHIND THE STEEL WALL: A SWEDISH JOURNALIST IN BERLIN 1941-1943*, at 227-28 (1944) (describing Nazi use of drugs to compel confession); HANS BERND GISEVIUS, *TO THE BITTER END* 587 (1947) (describing Nazi use of the third degree in interrogation of participants in the Putsch of 1943). The "third degree" is defined as "the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime." ZECHARIAH CHAFEE, JR. ET AL., *THE THIRD DEGREE: REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT* 19 (1969); see also ERNEST JEROME HOPKINS, *OUR LAWLESS POLICE* 189-204 (1931) (describing the meaning of the term "third degree").

22. See Jan Masaryk, *Czechoslovakia*, in *THE SIXTH COLUMN*, *supra* note 18, at 3, 4-7; Theodore Broch, *Norway—Part II*, in *THE SIXTH COLUMN*, *supra* note 18, at 129, 130-31.

23. See, e.g., *THE GESTAPO AT WORK IN NORWAY* 29-31 (1942) (quoting a victim's description of torture techniques used by the Gestapo during interrogation).

24. See, e.g., ROBERT A. BRADY, *THE SPIRIT AND STRUCTURE OF GERMAN FASCISM* 39-44 (1937); WALLACE R. DEUEL, *PEOPLE UNDER HITLER* 135-55 (1942); WILLIAM EBENSTEIN, *THE NAZI STATE* 108-14 (1943); FRANCIS HACKETT, *WHAT MEIN KAMPF MEANS TO AMERICA* at xi-xx, 135-38 (1941); WILLIAM MONTGOMERY MCGOVERN, *FROM LUTHER TO HITLER: THE HISTORY OF FASCIST-NAZI POLITICAL PHILOSOPHY* 596-672 (1941); FRANZ NEUMANN, *BEHEMOTH* 37-38 (1942).

25. See, e.g., Terje Wold, *Introduction to THE GESTAPO AT WORK IN NORWAY* 5, 6 (1942) ("It is almost incredible, but according to the available evidence there can be no doubt that ill treatment and torture form part of the routine investigation methods employed by the Gestapo.").

26. The members of the War Refugee Board were the three highest ranking Cabinet officials: the Secretaries of State, Treasury, and War. See George Polk, *U.S. Charges Nazis Tortured Millions to Death in Europe*, N.Y. *HERALD-TRIB.*, Nov. 26, 1944, at 1.

27. While "there was a reluctance to publish atrocity stories, in view of the propaganda backfire following the First World War," George Connery, *Two Million Executed in Nazi Camps*, WASH. *POST*, Nov. 26, 1944, at M2, the Board determined that the information was accurate, concluding that there was "every reason to believe that these reports present a true picture of the frightful happenings in these camps. It is making the reports public in the firm conviction that they would be read and understood

that the minds of civilized people find it difficult to believe that [they] have actually taken place.'"²⁸ While the sheer numbers of dead, then estimated at over 3.2 million for Auschwitz and Birkenau alone,²⁹ inspired unspeakable horror, the compelling voices of individual accounts of torture, murder, and abuse personalized that horror. Reports of the now well-known tales of victims ordered to undress and led to believe they were going to bathe, only to be pushed into the gas chambers,³⁰ of torture intended to defeat the morale of prisoners,³¹ of purposeful sadism and cruelty,³² and of the institutionalized nature of the exterminations³³ were emphasized. The victims were blameless, had no trials, and posed no threat.³⁴

The horrifying example of Nazism could not help but affect the way the judiciary viewed American exercises of the police power. The month after the War Refugee Board's revelations were widely disseminated, *Malinski v. New York*³⁵ came before the Supreme Court. Malinski was suspected of participating in the murder of a

by all Americans,'"²⁸ *id.* (quoting the War Refugee Board). For an exhaustive investigation of American press coverage of the Holocaust, see generally DEBORAH E. LIPSTADT, *BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST 1933-45* (1986).

28. John H. Crider, *U.S. Board Bares Atrocity Details Told by Witnesses at Polish Camp*, N.Y. TIMES, Nov. 26, 1944, at 1 (quoting report of the War Refugee Board); see also Connery, *supra* note 27, at M1 ("In two years approximately two million persons—equal to the entire population of West Virginia—were exterminated at two German concentration camps.").

29. See Crider, *supra* note 28, at 1 (estimating that 1,765,000 Jews were killed at Birkenau and 1,500,000 at Oswiecim (Auschwitz)).

30. See Connery, *supra* note 27, at M1; Crider, *supra* note 28, at 1.

31. See Polk, *supra* note 26, at 38 ("The German policy of torture, both physical and mental, was described . . . as having been scientifically devised to reduce the morale of the prisoners so low that they killed one another as a novelty or sought an escape through hopeless charges upon machine guns or high-voltage prison fences.").

32. See *id.* ("The Germans competed with one another, according to the report, in devising new and more bestial torture for their victims. Women and children suffered the same fate—or worse—than men. Many of the Germans at the death camps and concentration pens were described as obvious pathological cases.").

33. See *id.* ("With brutality that made even Japanese atrocities seem pale by comparison, the Germans made scientific use of chemistry, electricity and gunfire to kill as many persons as possible with the least effort and expense.").

34. See *id.* The War Refugee Board's report contained no suggestion that the Germans had put their victims to death for specified reasons—except to get them out of the way. See *id.* Few if any of the prisoners were charged with any crimes, and none was given a trial. See *id.*

35. 324 U.S. 401 (1945). *Malinski* was argued on December 4 and 5, 1944, and decided on March 26, 1945. The report of the War Refugee Board, discussed *supra* in notes 26-28 and accompanying text, was covered extensively in the popular press less than 10 days before the case was argued. See LIPSTADT, *supra* note 27, at 263-65.

police officer.³⁶ Arrested on his way to work, he was taken to a hotel, where he was stripped naked.³⁷ After three hours, his shoes, socks, and underwear were returned to him, but he was kept otherwise undressed, and given only a blanket, until he confessed seven hours later.³⁸ Malinski was detained in the hotel for a total of four days before being brought to the station house, where he made another confession that was admitted against him.³⁹ At trial, the prosecutor characterized Malinski as “‘not hard to break’”⁴⁰ and described the suspect’s treatment at the hands of the police with evident enthusiasm:

“Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.”⁴¹

Malinski’s conviction was reversed by a divided Supreme Court in 1945.⁴² The vision of an American criminal suspect, cowering naked in fear of humiliation and physical violence at the hands of police, took on a new cast in light of the times.⁴³ Dissenting in part,

36. See *Malinski*, 324 U.S. at 402.

37. See *id.* at 403. The state apparently proffered two justifications for this conduct: one, that “Malinski was stripped so that he might be examined for bullet wounds,” although “[h]e remained [naked] several hours—much longer than any such physical examination could possibly justify,” *id.* at 405; and two, that he might otherwise try to escape, though that did not explain why his clothes were returned to him after the first confession, see *id.* at 423-24 (Rutledge, J., dissenting in part).

38. See *id.* at 403.

39. See *id.* at 403-04.

40. *Id.* at 407 (quoting the prosecutor).

41. *Id.* (quoting the prosecutor).

42. See *id.* at 412. Malinski’s treatment outraged Justice Murphy:

The subhuman psychology applied by the police to Malinski began soon after his arrest on October 23. He was stripped, humiliated and threatened with a shellacking. He was questioned throughout the day and was denied the benefit of counsel, relatives or friends. This succeeded in breaking Malinski’s will, which the prosecutor boasted “was not hard to break,” and the police were able to extract an oral confession from him. But this was not enough; the police wanted a written confession. So they continued to hold the “broken” Malinski until such a confession was forthcoming on October 27. During this period he was illegally held without being arraigned, was questioned at frequent intervals and saw no one save his questioners. . . . The only concession made to him was the privilege of wearing all his clothes.

Id. at 432-33 (Murphy, J., dissenting in part).

43. This may have been particularly true in light of the fact that, as Justice Murphy pointed out, Malinski and his codefendant were “of Jewish ancestry,” *id.* at 433-34

Justice Murphy made explicit mention of the dangers inherent in applying such methods to criminal investigation, insisting, in his separate opinion, that the Constitution requires that coercion or fear automatically invalidate subsequent confessions absent proof beyond a reasonable doubt that the atmosphere of fear has been dispelled.⁴⁴ "Otherwise," he wrote, "we might as well discard all pretense to a civilized and humane system of criminal justice and adopt without further ado the terroristic police practices of certain past and present tyrannies in other parts of the world."⁴⁵ This proud claim to a "civilized and humane system of criminal justice," and the possibility that the police practices in *Malinski* opened the door to the creation of a terroristic tyranny, supported the conclusion that the admission of Malinski's confession violated the Due Process Clause of the Fourteenth Amendment.⁴⁶

Malinski was not the first case in which the Court suggested that tyranny in other parts of the world was relevant to the constitutionality of police practices. During the wartime and postwar period, the courts began to focus not only on the history from which the constitutional protections sprung, but also on current events, and

(Murphy, J., dissenting in part), and the prosecutor's remarks to the jury—that Malinski was a "‘jerk from the East Side’" and came from "‘the lower east side of Manhattan, where your life is not worth a pretzel,’" *id.* at 434 (Murphy, J., dissenting in part) (quoting the prosecutor), "were indicative of a desire to appeal to racial and religious bigotry," *id.* (Murphy, J., dissenting in part). These "[b]razen appeals relating to [the defendants'] race or faith," Justice Murphy noted, "are the direct antithesis of every principle of American justice and fair-play." *Id.* (Murphy, J., dissenting in part). This reaction may have flowed from Murphy's participation in the National Committee against Nazi Persecution and Extermination of the Jews (later the American Anti-Bigotry Committee), an organization of non-Jews formed in early 1944 to combat anti-Semitism. See SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 230-31 (1984); see also J. WOODFORD HOWARD, MR. JUSTICE MURPHY 353 (1968) (discussing Murphy's activity on the Committee). Murphy was active both in seeking support to save overseas Jews and in speaking and publishing broadly about the dangers of anti-Semitism. See FINE, *supra*, at 232-33. Murphy's willingness to "raise[] his voice against the Holocaust abroad and anti-Semitism at home while other prominent Americans remained silent," *id.* at 233, was especially interesting in light of his own suspicions about Jews. Murphy had been a longtime friend of the anti-Semitic Father Charles E. Coughlin, though their relations cooled after 1936. See HOWARD, *supra*, at 113 n.h. "‘I do not like Jews,’" one of Murphy's biographers quotes him as saying, "‘until some one jumps on them.’" FINE, *supra*, at 230 (quoting Justice Murphy); see also HOWARD, *supra*, at 269 (quoting similar language).

44. See *Malinski*, 324 U.S. at 433 (Murphy, J., dissenting in part).

45. *Id.* (Murphy, J., dissenting in part).

46. See *id.* (Murphy, J., dissenting in part). For a recent, thorough re-evaluation of the pre-*Miranda* coerced confession cases, see Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2221 (1996) (noting the Supreme Court's analogy between police interrogation and an "inquisitorial" system).

to consider American police conduct in light of the contemporary understanding of European fascism. The Supreme Court, in particular, began to articulate Fourth, Fifth, and Fourteenth Amendment principles based in part on the need to differentiate American justice from the totalitarian example.⁴⁷

A. World War II and Postwar Periods

At first, references to totalitarian excesses were subtle. In *Chambers v. Florida*,⁴⁸ decided in 1940, the Court overturned the admission of a confession on due process grounds.⁴⁹ Writing for the majority, Justice Black noted that “tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.”⁵⁰ The Court drew an understated parallel between English tyranny in the colonial era and modern totalitarianism.⁵¹

47. This Article focuses on Supreme Court opinions. The Court, as primary expositor of constitutional doctrine, was the most significant—and the most widely read—voice on the subject, and the Supreme Court’s extensive use of totalitarian comparisons seems to me most noteworthy. I do, however, refer to use of these comparisons in other courts from time to time.

48. 309 U.S. 227 (1940).

49. See *id.* at 241. Police arrested Chambers and his codefendants, along with a large number of other black men, after the robbery and murder of an elderly white man in a small town in Florida. See *id.* at 229. The “suspects”—between 25 and 40 in number—were moved to the Dade County jail, purportedly under fear of mob violence, and were subjected to intensive interrogation for a week. See *id.* at 229-30. The four petitioners in *Chambers* ultimately “broke” and gave numerous confessions, the last of which were satisfactory to the prosecutor. See *id.* at 231-35.

50. *Id.* at 236.

51. The Court noted that the Due Process Clause of the Fourteenth Amendment, like that of the Fifth,

was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. . . . From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the “law of the land” evolved the fundamental idea that no man’s life, liberty or property be forfeited as criminal punishment . . . until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power.

Id.

Issues of racism also permeate Justice Black’s multilayered opinion. A number of the early coerced confession cases, *Chambers* and *Brown v. Mississippi*, 297 U.S. 278 (1936), among them, stem from the Court’s evident concern about police abusing and overpowering black defendants in order to obtain confessions. See Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 412 & n.7 (1954). The concern about the accuracy of confessions that characterized the early due process

But references to Nazi tyranny, and the need to distinguish the American constitutional regime, soon became unmistakable. Justices expressed the determined view that America could not be allowed to slide down the totalitarian path, as well as the smug assurance that such abuses could not possibly happen here. In *Johnson v. United States*,⁵² Justice Jackson made such an argument to support the fundamental importance of the warrant requirement: "Any other rule," Justice Jackson argued, "would undermine the right of the people to be secure in their 'persons, houses, papers and effects' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."⁵³ The message was clear: The horrors of totalitarianism loomed large, and the Fourth Amendment played a vital role in maintaining those protections critical to life in a free society.⁵⁴

Justice Frankfurter was evidently in agreement. In *Wolf v. Colorado*,⁵⁵ he wrote:

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth

cases was related in part to the role that racism played in the actions of law enforcement. Justice Black commented in *Chambers* that

[t]he testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

Chambers, 309 U.S. at 237-38. While the rack, the thumbscrew, the wheel, and the guillotine were the tools of earlier tyrannies, solitary confinement, protracted questioning, and the hangman's noose were equally the province of sheriffs in the South. For discussion of the racism concerns that motivated the due process cases, see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838-42 (1994), and William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 438-39 (1995).

52. 333 U.S. 10 (1948). *Johnson* addressed whether officers who smelled opium coming from a hotel room were authorized to enter the room without a warrant to arrest its occupant. See *id.* at 12-13. The Court held that a warrant was required. See *id.* at 17.

53. *Id.* It has been suggested that totalitarian comparisons were used mostly by Justice Jackson after his experience as a Nuremberg prosecutor. This claim is discussed *infra* in Part III.A.1.

54. For a discussion of "calls to identity"—arguments framed by reference to the reader's identity—in Supreme Court opinions, see Eisgruber, *supra* note 9, at 968-73.

55. 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

Amendment—is basic to a free society. It is therefore implicit in “the concept of ordered liberty” and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, 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.⁵⁶

Totalitarian comparisons were not always “successful,” in the sense that their users immediately achieved the desired outcome in particular cases.⁵⁷ Indeed, the comparisons often were used most forcefully in dissent, where they were employed in ardent defense of personal dignity and individual liberty against encroaching tyranny and despotism. Their use in dissent stressed the importance of limiting police authority in maintaining the core values of American society. “[T]he protection afforded by the Fourth Amendment,” Justice Frankfurter wrote, “is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society . . . because of its important bearing in maintaining a free society and avoiding the dangers of a police state.”⁵⁸ Dissenters contrasted regimes where unfettered search and

56. *Id.* at 27-28; *see also id.* (holding that while evidence secured by *federal* actors in violation of the Fourth Amendment was inadmissible in federal court, the same rule did not apply to evidence seized in violation of the amendment by *state* actors).

57. The relationship between these comparisons and *ultimate* outcomes, however, is considerably more complicated. Many of the cases in which totalitarian comparisons were used in the dissent and rejected by the majority were later overruled. *See, e.g., Wolf*, 338 U.S. at 42-44 (Murphy, J., dissenting); *Harris v. United States*, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting), *overruled by* *Chimel v. California*, 395 U.S. 752, 768 (1969); *Goldman v. United States*, 316 U.S. 129, 142 (1942) (Murphy, J., dissenting), *overruled in part by* *Katz v. United States*, 389 U.S. 347, 353 (1967). While the comparisons may not have been immediately outcome-determinative in the majority of cases, they were part of a process of law development which resulted in outcomes more consistent with the comparisons than may have first appeared. *See* MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON 1941-1953*, at 220 (1997) (noting that the Court in the late 1940s “set the groundwork for the great due process revolution of the Warren era,” but “did so hesitatingly, and in the end it would be the dissents of Black and Douglas that would carry the day”).

58. *Harris*, 331 U.S. at 161 (Frankfurter, J., dissenting). *Harris* held that the doctrine of search incident to lawful arrest authorized the search of an arrestee’s apartment. *See id.* at 151-53. *Harris* was arrested on suspicion of mail fraud. *See id.* at 148. In ransacking his house “incident” to his arrest, agents came upon forged and altered selective service documents, for possession of which *Harris* was ultimately convicted. *See id.* at 149.

Justice Murphy’s dissent in *Harris* also relied upon totalitarian comparison: “To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but

seizure prevailed, which intimidated and damaged the spirits of their citizens in a manner fundamentally incompatible with the American way of life. Justice Jackson asserted:

Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.⁵⁹

The reference clearly invoked the totalitarian government of Nazi Germany to the reader of the time.⁶⁰

those methods cannot abide the pure atmosphere of a free society." *Id.* at 192 (Murphy, J., dissenting). He further noted:

Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. . . .

The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders. History is not without examples of the outlawry of certain political, religious and economic beliefs and the relentless prosecution of those who dare to entertain such beliefs. And history has a way of repeating itself. It therefore takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an "incident" to the arrest in an effort to uncover "anything" of a seditious nature. Under the Court's decision, the Fourth Amendment no longer stands as a bar to such tyranny and oppression.

Id. at 194 (Murphy, J., dissenting) (citation omitted). Murphy later noted in correspondence: "From now on you had better burn all your papers for once in your home on a trumped up charge the police can search from cellar to garret. . . . That is not free America to me." FINE, *supra* note 43, at 492 (quoting Letter from Justice Murphy to Joan Cuddihy (May 19, 1947)). This was consistent with views that a "notion that democracy was in a deadly contest with totalitarian isms [sic] had imbued [Murphy's] thinking." HOWARD, *supra* note 43, at 271.

59. *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). The majority in *Brinegar* rejected the defendant's claim that an automobile search was improper because it was not based upon probable cause. *See id.* at 176-77; *see also Michigan v. Long*, 463 U.S. 1032, 1065 (1983) (Brennan, J., dissenting) (quoting from *Brinegar*).

60. Justice Jackson's comment about having "dwelt and worked" among a people deprived of freedom from arbitrary search was a reference to the time he spent as a prosecutor at Nuremberg. *See infra* Part III.A.1.

The use of broad, invasive searches was one perceived characteristic of tyrannical regimes. The use of eavesdropping, wiretapping, and other forms of electronic surveillance was another. In *United States v. On Lee*,⁶¹ Judge Jerome Frank dissented from the Second Circuit's conclusion that evidence obtained by monitoring a conversation between the defendant and an informant using a radio transmitter was constitutionally admissible.⁶² He argued that such practices made possible a descent into the horrors of totalitarianism—or perhaps Orwell's 1984:

The practice of broadcasting private inside-the-house conversations through concealed radios is singularly terrifying when one considers how this snide device has already been used in totalitarian lands. Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus. Orwell, depicting the horrors of a future completely regimented society, could think of no more frightening instrument there to be employed than the "telescreen" compulsorily installed in every house Such a mechanical horror may soon be the dubious gift of applied science. My colleagues' decision, by legitimizing the use of such a future horror, invites it.⁶³

61. 193 F.2d 306 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952).

62. *See id.* at 309.

63. *Id.* at 317 (Frank, J., dissenting) (footnotes omitted). The Supreme Court, in an evident rejection of Judge Frank's impassioned opinion, affirmed *On Lee*. *See United States v. On Lee*, 343 U.S. 747 (1952). In *Goldman v. United States*, 316 U.S. 129 (1942), *overruled in part by Katz v. United States*, 389 U.S. 347, 353 (1967), the Court rejected a claim that use of a sensitive microphone to overhear conversations in a suspect's home violated the Fourth Amendment. *See id.* at 136. In vigorous dissent, Justice Murphy first discussed briefly "the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment." *Id.* at 139 (Murphy, J., dissenting). In closing, Justice Murphy transitioned to a more impassioned and contemporary brand of comparative argument:

The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live.

Id. at 142 (Murphy, J., dissenting); *see also Harris v. United States*, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting) (discussing the importance of Fourth Amendment

The use of these comparisons was not limited to Fourth Amendment cases. The comparisons seem to have been most persuasive—or at least most consistent with the immediate outcomes—in the coerced confession cases. *Malinski v. New York*⁶⁴ was one such case. *Ashcraft v. Tennessee*⁶⁵ was another. In *Ashcraft*, the Court overturned the admission of a confession given after thirty-six hours of continuous questioning,⁶⁶ clearly indicating the Court's abhorrence for governments that coerced confessions from their citizens, and its view that the Constitution did not permit such tactics. Writing for the Court, Justice Black stated:

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.⁶⁷

That this was speaking to shared context was evident: while the references to "certain foreign nations" are oblique and unsupported, the reader's understanding is assumed.⁶⁸

protections to the maintenance of a free society), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

64. 324 U.S. 401 (1945); *see supra* notes 35-46 and accompanying text (discussing *Malinski*).

65. 322 U.S. 143 (1944).

66. *See id.* at 153.

67. *Id.* at 155 (footnote omitted). Justice Black wrote the majority opinion in *Ashcraft*; Justice Jackson was a strenuous dissenter, though he used comparable arguments in other contexts. *See infra* notes 136-45 and accompanying text (discussing Jackson's arguments). Justice Stone asked Justice Black to consider changing his language in light of the "obvious comparison" to America's wartime enemy. HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION* 221 (1992) (citing Memorandum from Harlan F. Stone to Hugo Black (Mar. 22, 1944)). The request was evidently denied. Others have attributed Justice Black's views to the rise of totalitarianism. *See, e.g.,* Irving Dilliard, *The Individual and the Bill of Absolute Rights*, in *HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM* 97, 98 (Stephen Parks Strickland ed., 1967).

68. The coerced confession cases were not solely the product of anti-totalitarianism. Concern about the use of third degree tactics, particularly against African-American suspects, was a significant factor in these cases. *See supra* note 51. *Ashcraft* himself was a white businessman, a fact which Professor Catherine Hancock has argued required the

Not only judges thought these comparisons pertinent. Counsel evidently did as well, since the comparisons were invoked frequently in the advocacy of the time. The briefs in many of these cases positively dripped with anti-totalitarian hyperbole, including impassioned calls to uphold the pillars of free society against the threat of fascism. One advocate argued in the petition for certiorari in *Brinegar v. United States* that “[t]he type of conduct approved by the opinion of the Circuit Court of Appeals, if followed, [would give] rise to the establishment of an American gestapo.”⁶⁹ “The Nazi system of justice,” one attorney wrote, “with its concomittant [sic] methods of inducing confessions, has no place in our jurisprudence Important it is indeed to punish crime: but far more imperative is it that our criminal procedure be not polluted with foreign methods, alien to our concept of justice and inconsistent with our system of government.”⁷⁰ Then, as now, though, language was not used without purpose; the advocates invoked these arguments passionately because they believed them persuasive.

development of a per se rule holding excessively long interrogations inherently coercive in lieu of a test requiring a showing of “personal vulnerability” of the defendant. See Hancock, *supra* note 46, at 2223-26. Yet the two are related. Judicial unwillingness to tolerate racism was heightened in the face of the full comprehension of Nazi genocide, and attacking governmental abuse in general may have been a strategic vehicle to attack racism. For a discussion of how the racist element of European fascism inspired domestic awareness of American racism, see David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 752-59, 762-67, 778-79 (1981).

69. Petition for Writ of Certiorari at 22-23, *Brinegar v. United States*, 338 U.S. 160 (1949) (No. 12). Counsel analogized the government’s activity in *Brinegar* to historical tyranny and modern totalitarianism:

It is a reincarnation and legalization of those practices which originally gave rise to the demand for these constitutional safeguards. The soil of Europe today cries out with the blood of free men sacrificed upon an altar erected out of the degradation of the basic rights we here seek to maintain.

Id. at 23.

70. Petition for Writ of Certiorari at 35, *Malinski v. New York*, 324 U.S. 401 (1945) (No. 367). In his brief to the Supreme Court, Malinski’s attorney argued:

This nation is engaged in a titanic world-wide struggle. Its chief object is to destroy arbitrary and totalitarian governments, which arbitrarily deny ordinary natural rights, and to make the blessing of democracy secure for all the peoples of the world. Of what avail to sacrifice the flower of the youth of our country, to pour out unmeasurable treasure, to create burdens to be borne by many future generations to secure those objectives, if some of the more detestable phases of Nazism and Fascism are to be tolerated, even encouraged and approved in our own blessed land? Perish the thought! This sanctuary of freedom, liberty and democracy must be preserved inviolate. The one hope is this tribunal. Failure here, means disaster everywhere else.

Petitioner’s Brief at 44, *Malinski* (No. 367).

B. From Postwar to Cold War

While the use of totalitarian comparisons in criminal procedure jurisprudence continued into the early Cold War period, the villain invoked for the negative comparison gradually changed. Instead of Nazism, the evil comparison often became the Soviet menace—or some undefined conglomeration of “totalitarianism.”⁷¹ The argument that police tactics created the potential for fascism evolved into a claim that police abuses made us no better than our Communist enemies.⁷²

The American view of the Soviet Union made these comparisons possible. Voluminous information encouraged a uniformly negative view of Soviet police power and the Soviet justice system,

71. Some references are so obscure, so cautious, or so general that they cannot be associated with any particular regime. Instead, “totalitarian” regimes are lumped together in a single despised category. For example, Justice Brennan drew a parallel between the practices of totalitarian governments in general and American police making unannounced entries “at any hour of the day or night” into homes for “any crime involving evidence of a kind which police experience indicates might be quickly destroyed or jettisoned.” *Ker v. California*, 374 U.S. 23, 61-62 (1963) (Brennan, J., dissenting in part). He concluded that “there is . . . no logical ground for distinguishing between the stealthy manner in which the entry in this case was effected, and the more violent manner usually associated with totalitarian police of breaking down the door or smashing the lock.” *Id.* at 62 (Brennan, J., dissenting in part).

Judges may have been inclined to lump the Nazis and Communists together. Authors Lee K. Adler and Thomas G. Paterson have argued that many Americans, both before and after World War II, were inclined to view Nazi and Soviet domination as essentially similar, including, *inter alia*, the exercise of police power in the two regimes. See Lee K. Adler & Thomas G. Paterson, *Red Fascism: The Merger of Nazi Germany and Soviet Russia in the American Image of Totalitarianism, 1930's-1950's*, 75 AM. HIST. REV. 1046 (1970). As one example of the American perspective, Adler and Paterson referred to Arthur Bliss Lane who, as American Ambassador to Poland from 1945 to 1947, had once commented “that the Russian security police copied Gestapo tactics. Speaking of persons brutally beaten and tortured by police, Lane told a radio audience that ‘the same terror of a knock at the door in the dead of night exists today as it did during the Nazi occupation.’” *Id.* at 1054 (quoting Ambassador Lane). Adler and Paterson also quote President Truman as stating that “‘there isn’t any difference between the totalitarian Russian government and the Hitler government. . . . They are all alike. They are police governments—police state governments.’” *Id.* (quoting President Truman).

72. The comparisons were usually, but not invariably, to the Soviet Union. For a comparison to Castro’s Cuba, see *Estes v. Texas*, 381 U.S. 532 (1965). The Court held that televising the trial of a prominent Texas financier accused of swindling violated his right to due process. See *id.* at 535. Concurring separately, Chief Justice Warren wrote: “Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium.” *Id.* at 572 (Warren, C.J., concurring). The Chief Justice also referred to the Soviet Union, comparing *Estes’s* trial to the Soviets’ trial of American espionage suspect Francis Gary Powers. See *id.* at 575 (Warren, C.J., concurring).

engendered by the experiences of the Stalinist era.⁷³ The Soviet Union was viewed as profoundly “other,”⁷⁴ morally bankrupt,

73. See, e.g., Harold J. Berman, *Introduction to THE TRIAL OF THE U2*, at xi (1960) (noting that the trial of Francis Gary Powers, an American pilot, for espionage was in part a trial of the Soviet legal system). Professor Berman noted:

The notorious abuses of legal procedures by the Soviet leadership in the past . . . had led to a widespread belief that any Soviet court proceeding is bound to be a sham and a mere propaganda stunt. It was predicted by many American commentators that Powers would be “brainwashed” and that he would not receive a fair trial. Essays were published in leading newspapers and magazines in the West which stated that under Soviet law the accused in a criminal case is at the mercy of the prosecution, that there is no presumption of innocence, that the indictment is tantamount to a conviction, that the accused has no right to counsel, that if defense counsel is permitted he is merely an agent of the state and in effect an assistant to the prosecutor, and that the judges receive their instructions from the Communist Party. . . . Thus it was widely concluded that Powers would simply be used as a whipping-boy in order to publicize Soviet attacks upon United States policies.

Id. Professor Berman went on to argue that, while the Soviet legal system’s uses of the trial as an “instrument[] of the social and political objectives of the state” led to some inevitable conflict between individual and collective justice, “most (though not all) of the basic principles of procedural justice” were observed. *Id.* at xii.

The American view of Soviet justice which Berman addressed was evident in Powers’s testimony at his trial. Powers testified that he had been given a poisoned needle to enable him to commit suicide in the event he was captured and tortured by the Soviets:

Q. Who gave you the poison needle? A. It was given to me by Colonel Shelton

....

Q. For what purpose? A. In case I was captured, tortured and couldn’t stand the torture and would rather be dead.

....

Q. [T]hey gave you the needle to kill yourself? A. If I was tortured.

Q. You were told torture would be used in the Soviet Union? A. I don’t remember being told but I expected it.

Q. Were you tortured? A. No.

Q. How did the interrogation authorities treat you? A. I have been treated very nice.

Id. at 38.

Comparison to the Soviet Union, in turn, became a basis for critique of the American system. For example, Abraham Blumberg noted that in the Soviet judicial system, “the ‘trial’ is simply a recapitulation of the data collected by the pre-trial investigator. Notions of a trial being a ‘tabula rasa’ and presumptions of innocence are wholly alien to Soviet notions of justice.” ABRAHAM S. BLUMBERG, *CRIMINAL JUSTICE* 37 (1974). He then asked rhetorically, “How closely does ‘bureaucratic due process’ and its accompanying non-adversary system pose a discomfiting parallel to the Soviet system, wherein ‘the closer the investigation resembles the finished script, the better...’?” *Id.* (quoting GEORGE FEIFER, *JUSTICE IN MOSCOW* 86 (1964)).

74. DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 21-22 (1978). Caute noted:

In America there was an artificial straining and striving for social cohesion and national unity. In 1951, for example, the American Heritage Foundation summoned delegates from the forty-eight states to gather and draft a Re-Declaration of Faith in the American Dream. Bells were to peal not only as a symbol of high morale, but also as a “gesture of defiance to the Enemy”—

irrational, and aggressive.⁷⁵

Again, these comparisons were invoked in opposition to challenged police practices; again, the argument was made that such practices were fundamentally inconsistent with the character of American society. An example of such an argument can be found in *Berger v. New York*.⁷⁶ The Court there struck down a New York statute authorizing electronic eavesdropping without requiring adequate particularization of the material to be intercepted.⁷⁷ Justice Douglas, concurring, was vehement in arguing that gathering evidence through electronic surveillance violated the Constitution. Such tactics, he argued, would be permissible only if the Constitution were amended—"a step," he argued,

that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth Amendment, fashioned in Congress and submitted to the people, was designed to afford the individual.⁷⁸

Justice Douglas warned frequently of the dire implications of police overreaching.⁷⁹ "[M]ust everyone live in fear that every word

the Alien, the Nonconformist, the Critical Force. Here, then, was a palpable lack of trust in the Other, who he was, where he came from, what dark gods he might worship in his strange language, and whether he qualified as a good American or a dangerous "un-American."

Id. at 21.

75. See, e.g., ZEVEDEI BARBU, *DEMOCRACY AND DICTATORSHIP* 6 (1956). Barbu's book is a study of the psychology of democracy, fascism, and communism. He deemed periods of democratization as "dominated by reason," *id.* at 5, and fascism to be "[a] social structure based on emotional primitive bonds, emotional attitudes towards authority, irrational and magic ways of thinking," *id.* at 6. Thus while a "drive towards rationality [characterizes] the democratic way of life, Fascism is a symptom of regression in group behaviour." *Id.* Barbu compared Communism to Nazi fascism: "Nazism results from the irrational, Communism from the over-rational factors of contemporary civilization." *Id.* at 145. According to Barbu, "ruthlessness, aggression, submission, and, above all, a great capacity for hatred," not merely a willing adherence to Marxist economic philosophy, made an individual "eligible and valuable for the [Communist] Party." *Id.* at 207. "This shows that there are a series of other mental factors which play a greater part than the rational ones in the process of becoming a Communist and in the specific structure of a Communist group." *Id.*

76. 388 U.S. 41 (1967).

77. See *id.* at 55-59.

78. *Id.* at 67-68 (Douglas, J., concurring).

79. See *United States v. White*, 401 U.S. 745, 764-65 (1971) (Douglas, J., dissenting); *Osborn v. United States*, 385 U.S. 323, 352-54 (1966) (Douglas, J., dissenting). In *White*, the Court held that a radio transmission of a conversation with an informant was not a Fourth Amendment search. See *White*, 401 U.S. at 749. In *Osborn*, the defendant was accused of attempting to bribe the jury in Jimmy Hoffa's case. See *Osborn*, 385 U.S. at

he speaks may be transmitted or recorded and later repeated to the entire world," he asked.⁸⁰ "I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here."⁸¹

324-25. The government recorded conversations between Osborn and an informant, using the recordings to obtain Osborn's conviction. *See id.* at 326. The Court sustained the conviction on the ground that the transmissions were conducted pursuant to judicial authorization. *See id.* at 330-31. Justice Douglas was eloquent in dissent: "Once electronic surveillance . . . is added to the techniques of snooping which this sophisticated age has developed, we face the stark reality that the walls of privacy have broken down and all the tools of the police state are handed over to our bureaucracy on a constitutional platter." *Id.* at 349 (Douglas, J., dissenting). He continued:

The dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy. A free society is based on the premise that there are large zones of privacy into which the Government may not intrude except in unusual circumstances. . . .

. . . The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished.

Id. at 352-54 (Douglas, J., dissenting).

80. *White*, 401 U.S. at 764 (Douglas, J., dissenting) (footnote omitted).

81. *Id.* at 764-65 (Douglas, J., dissenting). Justice Douglas was not alone. In the same case, Justice Harlan argued in dissent that this practice was fundamentally incompatible with a democratic form of government. He noted that the Court's opinion implied that "uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, given the values and goals of our political system." *Id.* at 785 (Harlan, J., dissenting). Quoting Alan Westin, Justice Harlan wrote:

"It is obvious that the political system in each society will be a fundamental force in shaping its balance of privacy, since certain patterns of privacy, disclosure, and surveillance are functional necessities for particular kinds of political regime. This is shown most vividly by contrasting privacy in the democratic and the totalitarian state."

Id. at 785 n.21 (Harlan, J., dissenting) (quoting ALAN F. WESTIN, *PRIVACY AND FREEDOM* 23 (1967)). Westin continues with a description of the "consolidation phase" of totalitarian regimes, in which "[a]utonomous units are denied privacy, traditional confidential relationships are destroyed, surveillance systems and informers are widely installed, and thorough dossiers are compiled on millions of citizens." WESTIN, *supra*, at 23. He contrasts totalitarian societies, which require "a social balance favoring disclosure and surveillance over privacy" with liberal democratic societies, which require "a balance

Totalitarian comparisons were used in Fifth as well as Fourth Amendment cases. The Fifth Amendment cases addressed by the Court during the postwar period arose in the context of the McCarthy committee hearings and its attempts to expose purported Communist infiltration.⁸² In some people's minds, assertion of the

that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance." *Id.* at 24.

Like Justices Douglas and Harlan, Justice Frankfurter also used totalitarian comparisons in electronic surveillance cases. *See Irvine v. California*, 347 U.S. 128, 142-49 (1954) (Frankfurter, J., dissenting). In *Irvine*, police suspected the defendant of illegal bookmaking but lacked sufficient proof. *See id.* at 130-31. They had a locksmith make a key to Irvine's home, installed concealed microphones inside the home, and made two subsequent entries to reposition the microphones more optimally until they succeeded in intercepting incriminating conversations. *See id.* These conversations were used against Irvine at his trial and were held admissible because the exclusionary rule, under *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), was not then constitutionally required in state courts. *See Irvine*, 347 U.S. at 132-33. Justice Frankfurter commented:

A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. "Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."

Id. at 149 (Frankfurter, J., dissenting) (quoting J. Edgar Hoover, *Statement of Director J. Edgar Hoover*, 21 FBI L. ENFORCEMENT BULL., Sept. 1952, at 1). Similarly, Justice Douglas wrote in his autobiography:

I speak of the Fourth Amendment designed by James Otis to keep government agents from ransacking a man's home or his files. But now the ransacking can be done electronically with no physical intrusion. Must the law stand still while politicians, hungry for more power, seek to level all the necessary barricades to liquidate or destroy their opposition?

WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 179 (1980). These comments are particularly interesting in light of the new view that Douglas changed his position in the late 1940s, becoming more sympathetic to Fourth Amendment claims. *See, e.g., BALL & COOPER, supra* note 67, at 211 (1992); Leon D. Epstein, Justice Douglas: A Case Study in Judicial Review 231 (1948) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Iowa College of Law library).

82. Between 1945 and 1957, over 3000 witnesses testified in public hearings before the House Committee on Un-American Activities. *See CAUTE, supra* note 74, at 96. In one poignant passage, Caute describes the Committee's hostility to witnesses' invocation of their Fifth Amendment rights:

The Committee often refused to accept the Fifth Amendment; or persisted with the same line of questioning even after the witness had invoked it; or insisted that to take it was tantamount to confessing guilt. Said [Rep.] Kit Clardy in Lansing, Michigan, in 1954, "I don't know of any innocent man that has ever appeared before this Committee and invoked the Fifth Amendment . . ."

Id. at 95. Not infrequently, committee members made known their disdain for witnesses who sought to invoke their constitutional rights. On one occasion, when testimony was interrupted by a witness's conference with his attorney, Representative J. Parnell Thomas declared, "The rights you have are the rights given you by this Committee. We will

Fifth Amendment privilege against self-incrimination at the Congressional hearings carried with it the clear inference of guilt.⁸³ In light of this interpretation of invocations of the Fifth Amendment, discussions of the privilege and its importance to a free society were impassioned.

Opponents of the Fifth Amendment privilege against self-incrimination, Judge Jerome Frank noted in *United States v. Grunewald*,⁸⁴ disregard its importance

as a safeguard of the individual's "substantive" right of privacy, a right to a private enclave where he may lead a private life. That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions. We should know by now that their vaunted efficiency too often yields unjust, cruel decisions, based upon unreliable evidence procured at the sacrifice of privacy. We should beware of moving in the direction of totalitarian methods, as we will do if we eviscerate any of the great constitutional privileges.⁸⁵

determine what rights you have and what rights you have not got before the Committee.' " *Id.* at 97.

83. From this inference came Senator McCarthy's use of the term "Fifth Amendment Communist." See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 82 (1957); Erwin N. Griswold, *The Individual and the Fifth Amendment*, *NEW LEADER*, Oct. 29, 1956, at 20, 21.

84. 233 F.2d 556 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957).

85. *Id.* at 580 (Frank, J., dissenting) (footnotes omitted). The issue in *Grunewald* was whether a defendant who asserted the privilege against self-incrimination before the grand jury, but who chose to testify at trial, could be asked on cross-examination about his earlier assertion of the privilege. See *id.* at 571 (Frank, J., dissenting). The Second Circuit held that he could. See *id.* at 568-69. The Supreme Court reversed, in an opinion by Justice Harlan. See *Grunewald*, 353 U.S. at 424. Neither the majority opinion nor Justice Black's concurrence invoked the totalitarian comparisons articulated in Judge Frank's Second Circuit dissent.

George Orwell's *1984* plainly embodied American fears of totalitarianism. Historians Adler and Paterson note:

Orwell's *1984*, appearing at the time when American fears of totalitarianism had become obsessive, did much to shape American thought and opinion. For serious scholars and casual readers alike, the image of totalitarianism presented in *1984* has been a model, as unreal and probably as significant as that created by American leaders and the mass media from the war's end to the book's publication in America in 1949.

Both as a matter of principle and persuasion, the argument that in the absence of the privilege we would become the oppressor we most feared was articulated repeatedly.

Courts were not the only ones employing this comparative approach. Legal scholarship also addressed the constitutional issues in the context of the potential for totalitarianism inherent in unfettered police power. Dean Erwin Griswold,⁸⁶ who used the comparisons in a series of lectures about the Fifth Amendment delivered in the evident shadow of the House Un-American Activities Committee,⁸⁷ may have been the comparisons' most prominent expositor.⁸⁸ Dean Griswold's arguments reflected the tension of speaking out to support the Fifth Amendment privilege in

Adler & Paterson, *supra* note 71, at 1063. The novel's capacity to horrify continues. In *Florida v. Riley*, 488 U.S. 445 (1989), Justice Brennan, dissenting from the Court's holding that helicopter surveillance from 400 feet was not a Fourth Amendment search, *see id.* at 452, used 1984 to graphic effect:

I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's: "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows."

Id. at 466 (Brennan, J., dissenting) (quoting GEORGE ORWELL, 1984, at 4 (1949)).

86. Griswold was dean of the Harvard Law School from 1946-67. *See* Erwin Nathaniel Griswold, 1904-1994, Program, A Service in Thanksgiving for the Life of Erwin Nathaniel Griswold, Harvard University (Mar. 10, 1995) [hereinafter Griswold Program].

87. These three lectures, directed specifically at abuses of legislative committees, given in February, March, and October of 1954, were published in a volume, ERWIN N. GRISWOLD, *THE 5TH AMENDMENT TODAY* (1955) [hereinafter GRISWOLD, *THE 5TH AMENDMENT*]. The last lecture refers to the "great contributions which have been made in recent months by such persons as, in the first instance, Joseph N. Welch, and later, Senator Watkins and his associates." *Id.* at 73. Griswold's autobiography describes his preparation of the speeches and the enthusiastic response his first speech received. *See* ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH-CENTURY LAWYER 192-94* (1992). The speeches must have taken some courage in light of the FBI's investigation of Griswold because, *inter alia*, of his contributions to Alger Hiss's defense fund. *See id.* at 190; Griswold Program, *supra* note 86, at 8 (remarks of Dean Robert C. Clark) ("[Griswold] was an outspoken champion of the Fifth Amendment at a time when such outspokenness could lead to virulent attack.").

88. *See* Sidney Hook, *Logic and the Fifth Amendment*, NEW LEADER, Oct. 1, 1956, at 12, 14 (noting that Griswold's book had "enormous influence not only on the lay public but on recent legal decisions"); *see also* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 671 (1968) ("In the mid-1950's it was necessary to vindicate the privilege against self-incrimination . . . against the opprobrium that Senator Joseph McCarthy and others sought to heap on many who properly invoked it . . . and Dean Griswold earned the nation's gratitude by speaking out as he did.").

a climate in which it was perceived as a mere technical impediment to the eradication of the Communist menace.⁸⁹ Griswold's countermeasure was to invoke the privilege as a symbol of individualistic democratic values, using Communism as the negative comparison. The Fifth Amendment, he argued, reflected the Founding Fathers' experience of tyranny, and

our belief in the importance of the individual, a symbol of our highest aspirations. As such it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by communists, and thus it may well be regarded as one of the signs which sets us off from communism.⁹⁰

The comparisons enabled Griswold to take a relatively strong stance in support of the privilege while expressing demonstrably negative views of Soviet totalitarianism.⁹¹

89. The June 6, 1954 episode of Edward R. Murrow's *See It Now* television series featured two law professors debating basic questions about the privilege, including whether persons ought to be permitted to assert the privilege when testifying before legislative committees and whether those asserting the privilege could properly be fired from their jobs. *See See It Now* (CBS television broadcast, June 6, 1954).

90. GRISWOLD, *THE 5TH AMENDMENT*, *supra* note 87, at 81. The political maneuvering at the heart of Griswold's speeches was manifest. He began by making clear that while opposition to Communism was important, it was even more important not to deviate from the constitutional values that distinguished the American system:

A method of anti-communism may be wholly contrary to our constitution and to the rights and liberties which we have inherited from our forefathers and which are one of the chief things which distinguish us from the communists today. We will gain nothing in this country if we adopt the methods of the communists to protect ourselves against communists.

Id. at 69-70. Griswold continued:

We usually think of the privilege against self-incrimination either in historical terms, in the light of past tyrannies, or in terms of the embarrassment that a witness at a Congressional hearing may experience as a result of the exposure of political mistakes. Let us look, though, at the reverse side of the coin in terms of the standard operating procedures of the police states which have brought the medieval techniques up to date. If we are not willing to let the Amendment be invoked, where, over time, are we going to stop when police, prosecutors, or chairmen want to get people to talk? Lurking in the background here are really ugly dangers which might transform our whole system of free government.

Id. at 75. Griswold distinguished the "totalitarian mind" and that of the political democrat:

"The totalitarian mind accepts all the means which promise the achievement of its ends. A political democrat is ready to compromise some of his ideal ends for the sake of renouncing means which would involve the sacrifice of human lives or freedom. This is the major moral issue, dividing any totalitarian, be he Communist or Fascist, from a genuine democrat."

Id. at 70 (quoting W.W. KULSKI, *THE SOVIET REGIME: COMMUNISM IN PRACTICE* 3 (4th ed. 1963)).

91. For other scholarly references, see Monrad G. Paulsen, *The Fourteenth*

As in the earlier cases, views that totalitarian comparisons required a more expansive reading of constitutional limitations on police practice did not always prevail. In *Gallegos v. Nebraska*,⁹² the Court rejected the defendant's claim that his confession should be excluded as the product of excessive pre-arraignment detention.⁹³ Justice Black invoked the comparisons in his dissent: "Americans justly complain when their fellow citizens in certain European countries are pounced upon at will by state police, held in jail incommunicado, and later convicted of crime on confessions obtained during such incarceration."⁹⁴ Yet the Court, Justice Black pointed out, sustained the defendant's conviction though he, a Mexican citizen who could not read or understand English, had been convicted based on his confession.⁹⁵ Justice Black wrote: "There are countries where arbitrary arrests like this, followed by secret imprisonment and systematic questioning until confessions are obtained, are still recognized and permissible legal procedures. . . . My own belief is that only by departure from the Constitution as properly interpreted

Amendment and the Third Degree, 6 STAN. L. REV. 411, 412 (1954) ("American police practices are sometimes even strikingly parallel to those reported from totalitarian countries."), and H. Frank Way, Jr., *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53, 66-67 (1963) ("We have pointed to our nation as one in which men are free from arbitrary arrest and illegal detention by the state. We are a nation, unlike Franco Spain or the Soviet Union, where men do not live in terror of a knock on the door in the middle of the night.").

That these comparisons were perhaps the best offense for persons taking a critical view of the witch-hunts is suggested by the October 20, 1953 broadcast of Edward R. Murrow's *See It Now* television series, the opening salvo of Murrow's attack on Senator McCarthy. The episode concerned an Air Force reservist who had been discharged as a "security risk" based on allegations, contained in a sealed envelope which he was not allowed to see, regarding his associations with members of his own family. *See SEE IT NOW* 31, 33 (Edward R. Murrow & Fred W. Friendly eds., 1955). The discharged reservist's lawyer expressed outrage about the way his client had been treated:

"Now, this whole theory of guilt by relationship is something that was adopted back in the thirteenth and fourteenth century [sic], and then abandoned as being inhuman and cruel. It was later revived in Germany under Hitler and Himmler, and it died when they died. Now the Air Force, for some unknown reason, has revived this intolerable guilt by relationship, and this whole country is shocked by reason thereof."

Id. (quoting *See It Now* (CBS television broadcast, Oct. 20, 1953)).

92. 342 U.S. 55 (1951) (plurality opinion).

93. *See id.* at 65-68.

94. *Id.* at 73-74.

95. *See id.* at 74 (Black, J., dissenting). For a discussion of the majority position in *Gallegos*, see *infra* note 145. Justice Black noted that the Texas authorities, at the request of federal immigration officials, had arrested Gallegos and kept him in an eight-by-eight foot cell with no windows, known as the "punishment room," until he confessed to the murder of his paramour. *See Gallegos*, 342 U.S. at 74 (Black, J., dissenting).

can America tolerate such practices.”⁹⁶ Again counsel raised these comparisons, calling on the Court to distinguish American police practice from that in the Soviet Union⁹⁷ and arguing that the principles at issue threatened “[t]he American way of life.”⁹⁸

During the early Cold War period, then, the object of the comparison shifted from Nazism to Soviet communism. Nonetheless, the perceived excesses of totalitarianism, and the need to distinguish a free America, were still asserted frequently⁹⁹ in addressing whether

96. *Gallegos*, 342 U.S. at 74-75 (Black, J., dissenting). In support of his assertion that there were “countries” where these objectionable procedures were permitted, Justice Black cited Robert A. Vogeler & Leigh White, *The Trap Closes: “I Was Stalin’s Prisoner,”* SATURDAY EVENING POST, Nov. 3, 1951, at 36, 36. The article discussed the arrest and initial interrogation of Robert Vogeler, an American representative of IT&T, at the hands of Hungarian officials in 1949. See *id.* The multi-part article included extensive discussion of “third degree” interrogation techniques, including bright lights, dunking in cold water, and sleep and food deprivation. See, e.g., Robert A. Vogeler & Leigh White, *Why I Confessed*, SATURDAY EVENING POST, Nov. 10, 1951, at 29, 29 (claiming that the author was subjected to 65 hours of interrogation and drugged by Hungarian authorities); *id.* at 135-36 (claiming deprivation of food and sleep); *id.* at 136 (noting that the author could overhear the torture of others and had inadequate food and sleep); *id.* at 137 (describing physical torture); see also Robert A. Vogeler & Leigh White, *My Day in Court*, SATURDAY EVENING POST, Nov. 17, 1951, at 29, 29 (“The Reds stood Vogeler in a crowded courtroom, before microphones and cameras, diplomats, newsmen and newspapermen, to parrot his false confession.”); *id.* at 184 (noting that Vogeler was threatened with being crippled for life if he refused to answer questions at trial); *id.* at 186 (“It was the classical game of communists everywhere: Heads I win, tails you lose.”).

97. See, e.g., Closing Brief at 4, 7, *Irvine v. California*, 347 U.S. 128 (1954) (No. 12) (arguing that “secret police of totalitarian countries could do no more” than had been done to invade the defendant’s privacy and that “[w]e cannot complain of the acts of spying, invasion of privacy, and ordered liberty in totalitarian countries, if we . . . allow the procedure used here to receive the approval of this court as our basic concept of ordered liberty”); Petition for Writ of Certiorari at 12, *On Lee v. United States*, 343 U.S. 747 (1952) (No. 543) (comparing “actions of the Government agents and employees in this case” to activities “we hear as now occurring in those countries beyond the ‘Iron Curtain’ ”); *id.* (noting that the federal officers’ activities “certainly do not conform to the concepts within this Country of those ‘certain inalienable rights’ ” with which “the second paragraph of our Declaration of Independence informs the world all men are endowed”).

98. Petition for Rehearing at 2, *Irvine v. California*, 347 U.S. 128 (1954) (No. 543) (comparing police conduct with widespread clandestine electronic surveillance in Russia and arguing that “[t]he example of this case, insignificant in its effect upon the defendant, will have world-wide repercussion as an example of American justice or injustice,” and that “[o]ur boast of our home inviolability is demonstrated in reverse”).

99. This included some areas only peripherally related to criminal procedure, such as the quasi-criminal area of deportation. In *Jay v. Boyd*, 351 U.S. 345 (1956), for example, the Court held it appropriate to deny suspension of deportation to a former member of the Communist Party based on undisclosed confidential information. See *id.* at 360. The dissent considered this an unacceptable parallel to the perceived excesses of the Soviet legal system:

No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country. Unfortunately

police practices ought to be constitutionally acceptable.¹⁰⁰

C. Contemporary Examples

Since the early Cold War period, totalitarian comparisons have been used intermittently. But the more recent uses are less consistent and less broadly adopted. Moreover, there is less tendency toward a single, uniformly invoked negative example, in the way that Nazi or Soviet comparisons dominated earlier references.¹⁰¹ The broader, less specific invocations of negative models may reflect the absence of a single dominant, contemporary negative model with sufficient currency and consensus to serve as a template for the translation of constitutional values. Yet judges still ask the same

there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny. One technique which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by government against those who are obnoxious to the rulers.

Id. at 367 (Black, J., dissenting); *see also id.* at 369 n.12 (Black, J., dissenting) ("The destruction of judicial protections for fair and open determinations of guilt is an essential to maintenance of dictatorships.").

100. Perhaps the most intriguing example is *Abel v. United States*, 362 U.S. 217 (1960). Abel, a KGB colonel convicted of espionage in New York in 1957, was "grilled ceaselessly by the FBI for five days without sleep, and then daily for three weeks," Berman, *supra* note 73, at ii, but refused to confess to acting as a Soviet agent, *see id.* The Supreme Court sustained admission of evidence against Abel seized during an INS search of his belongings pursuant to an administrative arrest warrant. *See Abel*, 362 U.S. at 222. Justice Brennan's dissenting opinion discussed the solitary interrogation of Abel. *See id.* at 252 (Brennan, J., dissenting). Justice Brennan used totalitarian comparisons in objecting to the defendant's treatment:

[T]he Court's attitude here must be based on a recognition of the great possibilities of abuse its decision leaves in the present situation. These possibilities have been recognized before . . . "Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country. . . . The progress is too easy from police action unscrutinized by judicial authorization to the police state."

Id. at 254 (Brennan, J., dissenting) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting)). Abel was ultimately exchanged in 1962 for Francis Gary Powers, an American U-2 pilot convicted of espionage in the Soviet Union. *See Abel for Powers*, TIME, Feb. 16, 1962, at 15, 15.

101. A court may even use a sequence of negative comparisons, suggesting, for example, that a particular practice "reek[s] of the police state tactics known to exist in Hitler's Germany, Communist China and the Soviet Union, and totalitarian South Africa." *People v. Jones*, 545 N.E.2d 1332, 1350 (Ill. App. Ct. 1989) (Pincham, J., dissenting); *see also* *Thompson v. State*, No. CV-95-7385, 1997 WL 723166, at *4 (Ala. Civ. App. Nov. 21, 1997) (reversing a forfeiture of money found in the defendant's car when he was arrested for driving under the influence of marijuana and commenting that "unlike in Hitler's Germany or Stalin's Soviet Union, in the United States mere suspicions of illegal activity cannot support the state's decision to confiscate an individual's property").

critical questions as in earlier eras: Can particular police practices coexist with their vision of America?

Cases involving the constitutionality of suspicionless questioning of bus passengers provide the strongest recent examples.¹⁰² While the practice was ultimately sustained by the Supreme Court in *Florida v. Bostick*,¹⁰³ judges in passionate opposition, from state trial courts all the way to the Supreme Court, viewed these encounters as typical of totalitarian societies.¹⁰⁴ They argued that suspicionless encounters

102. See, e.g., *United States v. Lewis*, 728 F. Supp. 784, 785 (D.D.C.), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990). Excluding the fruits of a search arising out of a purportedly "consensual" encounter with the defendant, a passenger on an intercity bus trip, the court expressed alarm at the lengths to which the government would go to suppress the "drug scourge." See *id.* at 791. The court noted that "[i]t seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms." *Id.* at 788; see also *id.* at 787 n.3 (noting that the justices of the Florida Supreme Court, "like myself, believe that there are limits beyond which a free society cannot allow its police to go").

For comparable language in state cases, see *Jones*, 545 N.E.2d at 1350 (Pincham, J., dissenting). *Jones* held that a suspicionless stop did not violate the Fourth Amendment. See *id.* at 1336. In a forty-page dissent, Justice Pincham complained that "[t]he police tactics in the case at bar and their approval by the trial court and this court promote and advance the despicable oppressions known to exist in totalitarian police states in which cherished civil liberties are enjoyed by only the privileged and powerful few." *Id.* at 1337 (Pincham, J., dissenting). The dissent noted that police had no information regarding the defendant or his companion but nonetheless "these American citizens, alighting from a public conveyance, in a public place, were stopped, interrogated and required to produce and present to law enforcement officers their identification and explain their itinerary to them." *Id.* at 1349-50 (Pincham, J., dissenting). Justice Pincham objected that "[t]hese police state tactics and inquisitions, of stopping and grilling two American citizens, and requiring them to justify their travels to the officer," resembled the tactics of totalitarian governments, "where citizens are prohibited from traveling except by police permission in the form of police issued traveling passes." *Id.* at 1350 (Pincham, J., dissenting). He noted that an officer had testified in the case that police do not pursue someone on a suspicionless stop in the train station "IF THEIR PAPERS ARE IN ORDER," *id.* at 1359 (Pincham, J., dissenting), and drew a totalitarian comparison: "I additionally parenthetically note traveling citizens in totalitarian nations are likewise permitted to resume their travel when the Gestapo, Cheks, NKVD, MVD, OGPU and the KPG similarly determine that, 'THEIR PAPERS ARE IN ORDER,'" *id.* (Pincham, J., dissenting).

103. 501 U.S. 429 (1991). The Court concluded that it was necessary to consider the totality of the circumstances and remanded for a determination whether police had "convey[ed] a message that compliance with their requests was required." *Id.* at 437. If not, the encounter was voluntary and consensual and therefore implicated no Fourth Amendment concerns. See *id.* at 439-40.

104. See, e.g., *United States v. Felder*, 732 F. Supp. 204, 209 n.7 (D.D.C. 1990). The *Felder* court held that a suspicionless "stop" of a bus passenger constituted a Fourth Amendment "seizure" and suppressed the fruits of that seizure. See *id.* at 209. "[T]he police practice of boarding buses and randomly approaching passengers to question and search them without any articulable suspicion" was, the court concluded, repugnant to the First, Fourth, and Fifth Amendments, and the Interstate Commerce Clause. *Id.* at 209. In

"burden[ed] the experience of traveling by bus with a degree of governmental interference to which, until now, our society has been proudly unaccustomed."¹⁰⁵ Justice Marshall noted that such stops were frighteningly reminiscent of despotic regimes:

" ' "The evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'être*—is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa." ' "

a footnote, the court quoted Justice Douglas:

"Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interests of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States. . . . This freedom of movement is the very essence of our free society setting us apart. Like the right of assembly and the right of association, it makes all other rights meaningful."

Id. at 209 n.7 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 519-20 (1964) (Douglas, J., concurring)).

105. *Bostick*, 501 U.S. at 442 (Marshall, J., dissenting).

106. *Id.* at 443 (Marshall, J., dissenting) (quoting *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting *Florida v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 1987) (quoting trial court order))). This language enjoyed a long journey to Justice Marshall's dissent. The words were first used by the trial court, were quoted by the Florida District Court of Appeal in *Florida v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 1987), and then quoted again by the Florida Supreme Court in *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989), *rev'd*, 501 U.S. 429 (1991), before Justice Marshall recited them. The Florida Supreme Court had taken this view even further:

The intrusion upon privacy rights caused by the Broward County policy is too great for a democracy to sustain. Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing tendency to *become* the end result.

Bostick v. State, 554 So. 2d 1153, 1158-59 (Fla. 1989), *rev'd*, 501 U.S. 429 (1991); *see also* *Snider v. State*, 501 So. 2d 609, 610 (Fla. Dist. Ct. App. 1986) (Glickstein, J., dissenting) (objecting to court's sustaining bus search as consensual).

The reference to white supremacist South Africa reflected Justice Marshall's view that so-called "suspicionless" encounters are based not on random criteria but at least in part on the race of the individuals subjected to such searches. "[A]t least one officer who

That the parties themselves cast the case in such terms is evident from their submissions to the Court.¹⁰⁷

One interesting exchange on this subject suggests the beginning of a breakdown regarding the acceptability of the comparisons.¹⁰⁸ In reversing two pre-*Bostick* holdings that suspicionless questioning of bus passengers violated the Fourth Amendment, the District of Columbia Circuit mocked the use of the comparisons, noting that the judges in the district court had concluded that “[a] police officer who questions and searches consenting passengers aboard a bus . . . commits a per se violation of the Constitution that is reminiscent of abuses under George III, Hitler, and Stalin,”¹⁰⁹ and accordingly had suppressed the evidence seized in those searches. While another

routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach. . . . Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.” *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting) (citation omitted). Amici before the Court had, considerably earlier, invoked the comparison with South Africa in addressing the use of informants. See Brief and Motion of American Civil Liberties Union, Amicus Curiae at 6, *Osborn v. United States*, 385 U.S. 323 (1966) (No. 29).

107. One party’s brief suggested that:

The facts of this case strike a familiar chord with most Americans, not because they have personally experienced this scenario, but precisely because they have not. The image of police officers asking for their “papers,” and subjecting them to ad hoc inquiries, is one that we have been fortunate to regard as an abhorrent creature of authoritarian regimes. These encounters are unreasonable, most fundamentally, because they do not fit with most Americans’ sense of how they are supposed to be dealt with by their Government.

Brief of Respondent at 17-18, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717). The United States, as amicus curiae, felt the need to respond to the totalitarian comparisons used by the court below, noting that, “[b]ecause law enforcement officers in this country must respect an individual’s right to be left alone, the ‘police state’ images invoked by the Florida Supreme Court . . . miss the mark.” Brief for the United States as Amicus Curiae Supporting Petitioner at 24-25, *Bostick* (No. 89-1717). Yet the amicus brief of Americans for Effective Law Enforcement, Inc., which had, according to respondents, filed 85 previous amicus briefs with the Court, all supporting the position of law enforcement, see Brief of Respondent at 18 n.19, *Bostick* (No. 89-1717), actually urged affirmance of the Florida Supreme Court’s ruling suppressing the search, arguing that, while the drug epidemic required law enforcement to seek expansion of search opportunities, “it is equally important that any extension of the Fourth Amendment must proceed in ways that protect our nation’s citizens against the arbitrary and often abusive techniques employed in totalitarian societies.” Motion to File Brief and Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., in Qualified Support of Affirmance of Petition Below at 9, *Bostick* (No. 89-1717).

108. While the comparisons did not always inspire agreement, the propriety of using the comparisons and their pertinence to larger questions about the character of American society had not been significantly challenged.

109. *United States v. Lewis*, 921 F.2d 1294, 1296 (D.C. Cir. 1990), *rev’g* 728 F. Supp. 784 (D.D.C. 1990), and *United States v. Cothran*, 729 F. Supp. 153 (D.D.C. 1990).

judge later criticized the belittling tone of this opinion,¹¹⁰ the suggestion by the court of appeals that references to the practices of known tyrannies somehow overstepped the bounds of permissible or appropriate argument marked an abrupt departure from the era when these comparisons—hyperbole though they may have been—were widely accepted by those of different ideologies.

Judges have addressed other police practices using these arguments, again, in both Fourth¹¹¹ and Fourteenth Amendment¹¹²

110. Judge Oberdorfer noted:

I take the liberty of expressing my dismay at the Court of Appeals' disparaging description of the District Court opinions in *Cothran* and *Lewis* . . . In my view the War on Drugs and the activities of the Metropolitan Police Department's dedicated drug interdiction officers make timely and relevant reminders of the Eighteenth Century origins of the Fourth Amendment and of more contemporary events which evidence the vulnerability of the liberties it is designed to protect. Disparagement of these reminders disserves the common enterprise of federal courts.

United States v. Alexander, 755 F. Supp. 448, 453 (D.D.C. 1991) (denying motion to suppress fruit of suspicionless stop), *aff'd*, 961 F.2d 964 (D.C. Cir. 1992).

111. See, e.g., *Florida v. Riley*, 488 U.S. 445, 467 (1989). *Riley* held that aerial observations by a police officer hovering in a helicopter 400 feet above a suspect's greenhouse did not constitute a Fourth Amendment "search." See *id.* at 449-51. Justice Brennan's dissent quoted extensively from a passage in George Orwell's 1984 involving helicopter surveillance and then asked, "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?" *Id.* at 467 (Brennan, J., dissenting); see *supra* note 85 (discussing Brennan's dissent and reference to Orwell).

112. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 383 n.19 (1986) (addressing the use of testimony compelled during psychiatric examination). The *Allen* Court upheld a commitment under the Illinois Sexually Dangerous Persons Act notwithstanding that the defendant was ordered to submit to two psychiatric examinations and the resulting psychiatric opinions were admitted at the subsequent commitment proceeding. See *id.* at 375. *Allen* protested that his statements had been elicited from him in violation of his privilege against self-incrimination, see *id.* at 366, but the Court concluded that the sexually dangerous person's proceeding was not criminal in nature and that therefore the privilege did not apply, see *id.* at 368-69. In protesting the Court's holding that the privilege against self-incrimination was inapplicable to the "sexually dangerous persons" proceeding, Justice Stevens, in dissent, objected to the potential for tyranny inherent in such a ruling. He noted the use of commitment in the Soviet Union:

In the Soviet Union, "[t]wo procedures are most commonly used to commit individuals to mental hospitals against their will: the civil and the criminal. . . . The criminal procedure for compulsory confinement is applicable to those who have been accused of a criminal offense, and whose mental health is called into question. . . . Under this procedure the accused loses virtually all of his or her procedural rights and is left only with the passive right to an honest psychiatric examination and a fair court hearing."

Id. at 383 n.19 (Stevens, J., dissenting) (quoting Amnesty International, Political Abuse of Psychiatry in the USSR, in *Hearing Before the Subcomm. on Human Rights and Int'l Org. of the Comm. on Foreign Affairs and the Comm'n on Sec. and Cooperation in Europe*, 98th Cong. 72-73 (1983)).

This equation of totalitarianism with misuse of the process of civil commitment was

contexts.¹¹³ This comparative approach is also sometimes revisited as state courts consider imposing higher state constitutional thresholds in areas where a federal constitutional challenge will not lie. As state courts consider constitutional limits on police authority, the character of American society and its fundamental inconsistency with totalitarian police practices remains meaningful.¹¹⁴

invoked more recently in oral argument in *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). See Transcript of Oral Argument, *Hendricks*, (Nos. 95-1649, 95-9075), available in 1996 WL 721073. In addressing whether commitment for sexually violent predators was constitutionally acceptable, one member of the Court noted that the state could avoid the problem by imposing a life sentence for a first conviction of child molestation and asked defense counsel why the state could not choose the "gentler and kinder" remedy of treatment and potential release. See *id.* at *37. Justice Scalia commented, "[m]aybe the State has to take the harsher course because the harsher course is the only one that is less manipulable. . . . I mean, isn't there some fear about—you know, totalitarian regimes don't put people in jail for crimes. They commit them for mental treatment." *Id.* at *38; see also *Arguments Heard*, 60 Crim. L. Rep. (BNA) at 3138, 3140 (Jan. 8, 1997) (summarizing oral argument regarding alternatives to commitment).

113. Sometimes the recitation even includes past American practices. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting) (noting that the Fifth Amendment privilege against compelled self-incrimination is "the specific provision that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by 'the Germans of the 1930's and early 1940's,' and by some of our own police departments only a few decades ago" (footnotes omitted) (quoting Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 14 (1964))).

114. For example, holding that warrantless electronic eavesdropping on a suspect by use of a body bug worn by an undercover officer violated Article I, Section 12 of the Florida Constitution, the Florida District Court of Appeal stated:

We are unwilling to impose upon our citizens the risk of assuming that the uninvited ear of the state is an unseen and unknown listener to every private conversation which they have in their homes. That is too much for a proud and free people to tolerate without taking a long step down the totalitarian road. . . . No free society can long remain free which places such private conversations in the home entirely beyond any constitutional protection.

Sarmiento v. State, 371 So. 2d 1047, 1051 (Fla. Dist. Ct. App. 1979), *aff'd*, 397 So. 2d 643 (Fla. 1981), *superseded by state constitutional amendment as stated in State v. Ridenour*, 453 So. 2d 193, 193-94 (Fla. Dist. Ct. App. 1984); see also *Commonwealth v. Schaeffer*, 536 A.2d 354, 376 (Pa. Super. Ct. 1987) (holding that the use of a body wire on an undercover informant to record and transmit a person's conversation in his house without a warrant violated the Pennsylvania Constitution), *overruled by Commonwealth v. Brion*, 652 A.2d 287, 289 (Pa. 1994) (holding that the state constitution prohibits only surreptitious warrantless recording of a person's conversations in his home). In *Schaeffer*, the court noted: "The most apocalyptic vision of the practice of participant monitoring is that, unconstrained by constitutional limitations, it threatens to become a police-state tool of a type totally inconsistent with the free democratic traditions of the American people." *Schaeffer*, 536 A.2d at 370; see also *Commonwealth v. Blood*, 507 N.E.2d 1029, 1034 (Mass. 1987) (prohibiting warrantless one-party consent monitoring of in-home conversations pursuant to Article 14 of the Massachusetts Declaration of Rights); cf. *State v. Brooks*, 601 A.2d 963, 970 (Vt. 1991) (Morse, J., dissenting) (noting that "widespread and unrestricted use of government informants is surely one of the basic characteristics of a totalitarian state," and that warrantless electronic monitoring

III. EXPLAINING THE PHENOMENON OF TOTALITARIAN COMPARISON

Part II demonstrates that the courts invoked totalitarian comparisons frequently in criminal procedure decisions during the postwar and Cold War periods. It reflects, moreover, some tacit agreement in the legal community that these concerns were relevant to issues of constitutional limits on police authority. Lawyers asserted them on behalf of their clients. Judges invoked them. Scholars used them. Part II.C indicates that the practice continues, though in a fractured and inconsistent fashion that may suggest a fundamental shift in the way the concepts are taken into account.

These comparisons were probably not meant literally, in the sense that their users genuinely viewed the conduct at issue, whatever it was, as equivalent to totalitarian abuses. Individual instances of police misconduct, however egregious, could not equate with such heinous comparisons. Furthermore, while some of the cases may have had their roots in persistent systemic biases, the comparisons were not typically used to challenge those biases.

Nor was it seriously contended that the challenged practices would lead directly to the development of American totalitarianism. The police tactics may have represented stops along the pathway to an undesired result, but no one contended seriously that these practices amounted to Nazism. Instead, the comparisons were typically used to provide contrast with what the writer perceived as the core principles of a free society. They functioned to define the values their users thought were central to the American system.

That this is how the comparisons were used tells us little about why they were used. The possibilities lie on a continuum of sorts. At one extreme, it could be argued that the comparisons, or more generally the existence of totalitarianism that gave rise to the comparisons, were dispositive of the case outcomes in some sense—that they drove the development of the law in this area and were, consequently, reflected in the opinions of the time. At the other extreme, the use of the comparisons could be almost meaningless—the words were chosen, perhaps, because they would attract attention or seemed contemporary, even though they were substantively irrelevant. Along this spectrum lie many other possibilities attributing differing degrees of substantive importance to the use of the comparisons.

eliminates “two checks or controls provided by [the Vermont Constitution], probable cause and judicial warrant” (quoting *Brooks*, 601 A.2d at 965)).

While we cannot know for certain why the comparisons were used in any particular case, we can reject certain general assumptions. If, for example, the totalitarian model had been strictly outcome-determinative, if it had caused an abrupt shift in criminal procedure jurisprudence, we might have expected to see the anti-totalitarian view prevailing more often. As noted above, however, totalitarian comparison was used frequently in dissent. In many areas it took the law years to arrive at the result initially suggested by the users of totalitarian comparison, and in at least one category of cases—those dealing with participant monitoring—it never did.

Before turning to the significance of totalitarian comparison to the development of the law, we need to address some plausible, but ultimately unsatisfying, explanations. First, it has been suggested that totalitarian comparisons were used largely by Justice Jackson and reflect his experience as a Nuremberg prosecutor. Part III.A.1 rejects this explanation.¹¹⁵ Second, the comparisons may be used to justify to the public certain kinds of pro-defendant results. Part III.A.2 argues that this is unlikely because the comparisons are used widely both in dissents and in legal scholarship.¹¹⁶ Third, one might argue that the comparisons are purely rhetorical. Part III.A.3 suggests that concluding the comparisons have rhetorical value does not address why they are compelling and adds little to our understanding of the phenomenon.¹¹⁷

A. Possible Rationales for Totalitarian Comparison

1. The Jackson Hypothesis

It has been suggested that, at least on the Supreme Court, the use of totalitarian comparisons was a product of Justice Jackson's service as Chief of Counsel at the first of the Nuremberg war crimes trials.¹¹⁸ This theory suggests that by virtue of his experience, Jackson

115. See *infra* notes 118-45 and accompanying text.

116. See *infra* notes 146-61 and accompanying text.

117. See *infra* notes 162-76 and accompanying text.

118. See *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) ("[P]articularly in the period immediately after World War II and particularly in opinions authored by Justice Jackson after his service as a special prosecutor at the Nuremberg trials—the Court has recognized the importance of [the warrant requirement] as a bulwark against police practices that prevail in totalitarian regimes."); see also Steiker, *supra* note 51, at 842-43 (discussing Jackson's role in criminal procedure cases after his return from Nuremberg). Jackson took leave from the Court to lead the American prosecution team at Nuremberg, serving as special prosecutor from May 2, 1945, to October 7, 1946. See *Justice Jackson's Final Report to the President Concerning the*

was uniquely positioned to comprehend the existence¹¹⁹ and significance¹²⁰ of Nazi abuses. Evidence of unfettered abuse of police authority was apparent from the records of those prosecutions in which Jackson served as Chief of Counsel, although they did not emphasize criminal procedure.¹²¹ Jackson's exposure to this

Nurnberg War Crimes Trial, 20 TEMP. L.Q. 338, 338 (1946-47) [hereinafter *Final Report*]; see also THE NÜRNBERG CASE at xiv-xviii (Robert H. Jackson ed., 1947) (containing several documents concerning the Nuremberg trials).

119. Jackson later identified as one of his accomplishments "the historical documentation of the development of totalitarian dictatorship in the Nazi era." Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 510 (1955). The documentation, which was obtained from German sources, provided descriptions of "the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future." *Final Report*, *supra* note 118, at 343-44. Jackson noted that:

[T]he Nazis themselves with Machiavellian shamelessness exposed their methods of subverting people's liberties and establishing their dictatorships. The record is a merciless expose of the cruel and sordid methods by which a militant minority seized power, suppressed opposition, set up secret political police and concentration camps. They resorted to legal devices such as "protective custody," which Goering frankly said meant the arrest of people not because they had committed any crime but because of acts it was suspected they might commit if left at liberty. They destroyed all judicial remedies for the citizen and all protections against terrorism. The record discloses the early symptoms of dictatorship and shows that it is only in its incipient stages that it can be brought under control.

Id. at 343-44.

120. The opinion that Jackson's perspective on "civil liberties" was altered by his time at Nuremberg was contemporaneous as well. See Paul A. Freund, *Individual and Commonwealth in the Thought of Mr. Justice Jackson*, 8 STAN. L. REV. 9, 17-19 (1955); Louis L. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940, 982 (1955). Others have posited less coherent bases for Jackson's decisions. One biographer noted that "[a]ll judges, like all people, have idiosyncratic variations in their constellations of values; for Jackson, one of the most conspicuous of these personal attitudinal biases seemed to be a relatively soft spot for defendants who protested against allegedly illegal searches and seizures." GLENDON SCHUBERT, *DISPASSIONATE JUSTICE: A SYNTHESIS OF THE JUDICIAL OPINIONS OF ROBERT H. JACKSON* 107-08 (1969).

There is as yet no complete contemporary biography of Justice Jackson, and one is "long overdue." See *For Further Reading*, 1 J. SUP. CT. HIST. 119 (1996).

121. For a summary of the evidence, see generally WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* (1954). Harris discussed police abuses. See *id.* at 436-42 (discussing use of torture in interrogation); *id.* at 53 (discussing protective custody and deprivation of the right to counsel); *id.* at 54 (discussing monitoring of individuals). Harris noted:

The [Nazis], operating furtively through a vast network of informants, spied upon the German people in their daily lives, on the streets, in the shops, and even within the sanctity of the churches. In this atmosphere of suspense and terror the German citizen learned to pull down the blinds against the glances of the passer-by, to listen to footsteps in the hall outside his door, and to speak in whispers. His casual remark, repeated to the police, might lead to the call in the night, the terror of Gestapo inquisition, and the horror of the concentration camp. In the Nazi government, where the rule of law was replaced by a

information was unparalleled on the Supreme Court. He is, moreover, the source of some very potent totalitarian comparisons.¹²² While Jackson's pride in his Nuremberg role was evident¹²³ and its impact on him profound,¹²⁴ the notion that this form of argument

tyrannical rule of men, the Gestapo and the SD were primary instrumentalities of oppression.

Id. at 54; *see also id.* at 45-47 (discussing the suppression of constitutional protections for, inter alia, freedom of speech and the press and inviolability of the home). That Harris's book reflected Jackson's view of the evidence is suggested by Jackson's introduction, in which he noted that the prosecution's "record of forty-two volumes is too vast, detailed, and disjointed for general study," and that the book was "a factual summary of the evidence that is objective, accurate, and comprehensive." Robert H. Jackson, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* at xxix, xxx (1954).

122. *See, e.g.,* *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting); *Johnson v. United States*, 333 U.S. 10, 17 (1948); *see also supra* notes 52-53 and accompanying text (discussing *Johnson*); *supra* notes 59-60 and accompanying text (discussing *Brinegar*).

123. Jackson himself later wrote: "[T]he hard months at Nuremberg were well spent in the most important, enduring, and constructive work of my life." Jackson, *supra* note 121, at xxxvii. Nuremberg may have taken on even greater significance for Jackson in light of the possibility that he felt it cost him an opportunity to become Chief Justice. *See* Whitney North Seymour, *Introduction* to MR. JUSTICE JACKSON, *FOUR LECTURES IN HIS HONOR* 1, 89 (1969). For discussions of Jackson's widely reported intemperate outburst against Justice Black from Nuremberg after Fred M. Vinson was appointed to replace Chief Justice Stone, *see* DOUGLAS, *supra* note 81, at 28-32, WESLEY MCCUNE, *THE NINE YOUNG MEN* 165-70 (1947), and C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 26-29 (1948).

124. This is reflected in Jackson's writing in other areas as well, most notably on the First Amendment, where he demonstrated his impassioned concern about the way National Socialism had risen in Germany and the importance of avoiding such a result here. His experience made him deeply concerned with the dangers of inflammatory speech:

There are many appeals these days to liberty, often by those who are working for an opportunity to taunt democracy with its stupidity in furnishing them the weapons to destroy it as did [Nazi Joseph] Goebbels when he said: "When democracy granted democratic methods for us in the times of opposition, this [Nazi seizure of power] was bound to happen"

Terminiello v. Chicago, 337 U.S. 1, 35 (Jackson, J., dissenting) (quoting Goebbels); *see also* Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2070 (1993) ("For Justice Jackson, one lesson of Nuremberg was that rabble-rousing hatemongers could be dangerous—after all, Hitler and Streicher were merely obscure street-corner speakers in the early 1920s—and so local officials might prohibit or punish such speech consistent with the First Amendment."); *id.* at 2078 (noting that Jackson's views toward communist conspirators "were shaped by the perceived threat that determined organizations can pose to liberal democracies—in other words, by the lesson he brought home from Nuremberg and from the fall of the Weimar Republic").

The Justice's experience affected him in other ways. One foreign diplomat observed: "My last memory of Bob is of lunching in his room at the Supreme Court with Felix Frankfurter during the height of the McCarthy horror. There were the four flags from the Nuremberg Court room behind Bob's desk with the Hammer and Sickle of the Soviet flag unashamedly exposed." Lord Shawcross, *Lecture 4*, in MR. JUSTICE JACKSON, *FOUR*

derived solely from him is unconvincing. While Jackson used totalitarian comparisons, other Justices did as well,¹²⁵ including, among others, Justices Black,¹²⁶ Douglas,¹²⁷ Frankfurter,¹²⁸ and Murphy,¹²⁹ who were his contemporaries, as well as later Justices Brennan,¹³⁰ Fortas,¹³¹ Marshall,¹³² and Stevens.¹³³ The comparisons were used, at least in isolated instances, before Justice Jackson departed for Nuremberg¹³⁴ and persisted after Jackson's relatively short tenure on the Court.¹³⁵

LECTURES IN HIS HONOR 136 (quoting a letter from the then-Attorney General of England).

125. I attribute the opinions to the Justices notwithstanding the role that law clerks may have played in the preparation of some opinions. "To recognize that law clerks frequently draft opinions seems to me to prove little, for the ultimate responsibility is that of the Justices, not of the law clerks." Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 23 (1979).

126. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944); see also *supra* notes 65-68 and accompanying text (discussing *Ashcraft*). While Justice Black conceded that the provisions of the Bill of Rights "were designed to meet ancient evils," he also noted that "they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many." *Adamson v. California*, 322 U.S. 46, 89 (1947) (Black, J., dissenting). Thus, Justice Black refused to "consider the Bill of Rights to be an outworn 18th Century 'strait jacket.'" *Id.* (Black, J., dissenting).

127. See, e.g., *Berger v. New York*, 388 U.S. 41, 67-68 (1967) (Douglas, J., concurring); see also *supra* text accompanying note 78 (quoting Justice Douglas's concurrence in *Berger*).

128. See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949); see also *supra* text accompanying note 56 (quoting Justice Frankfurter's opinion in *Wolf*); *supra* note 81 (discussing Justice Frankfurter's opinion in *Irvine v. California*, 347 U.S. 128 (1954)).

129. See, e.g., *Harris v. United States*, 331 U.S. 146, 194 (1947) (Murphy, J., dissenting); *Malinski v. New York*, 324 U.S. 401, 433 (1945) (Murphy, J., dissenting); see also *supra* note 58 (discussing Justice Murphy's dissent in *Harris*); *supra* notes 44-46 and accompanying text (discussing Justice Murphy's dissent in *Malinski*).

130. See, e.g., *Florida v. Riley*, 448 U.S. 445, 466 (1989); *Ker v. California*, 374 U.S. 23, 61-62 (1963) (Brennan, J., dissenting in part); see also *supra* note 85 (discussing Justice Brennan's dissent in *Riley*); *supra* note 71 (discussing Justice Brennan's opinion in *Ker*).

131. See, e.g., *Alderman v. United States*, 394 U.S. 165, 202 (1969) (Fortas, J., concurring in part and dissenting in part) ("It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law. We do not subscribe to the totalitarian principle that the Government is the law, or that it may disregard the law even in pursuit of the lawbreaker.").

132. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting); see also *supra* notes 105-06 and accompanying text (discussing Justice Marshall's dissent in *Bostick*).

133. See, e.g., *Allen v. Illinois*, 478 U.S. 364, 383 n.19 (1986) (Stevens, J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting); see also *supra* notes 112-13 and accompanying text (discussing Justice Stevens's dissents in *Allen* and *Elstad*).

134. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944); see also *supra* notes 65-68 and accompanying text (discussing *Ashcraft*). As noted *supra* in note 118, Jackson did not go to Nuremberg until 1945; *Ashcraft* was decided in 1944.

135. Justice Jackson served from 1941 to 1954. See EUGENE C. GERHART, LAWYER'S

Moreover, Jackson's use of totalitarian arguments seems in large part to support and reflect his pre-Nuremberg views. Jackson used the comparisons persuasively in at least one Fourth Amendment case involving a home invasion.¹³⁶ Yet Jackson's hostility to home invasions and his sympathy to Fourth Amendment claims could have been anticipated before Nuremberg.¹³⁷ On the other hand, Jackson

JUDGE 21 (1961). While analogies to Nazi abuses were no longer prevalent by 1954, arguments warning of the dangers of totalitarian excess and references to the Soviet Union continued well beyond that time. *See supra* Parts II.B and II.C.

136. *See Johnson v. United States*, 333 U.S. 10, 14 (1948). *Johnson* actually involved the invasion of a hotel room, but Jackson treated it as a home invasion, referring to the room as "defendant's living quarters," *id.* at 13, and noting that "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance," *id.* at 14.

137. It is hard to tell much about Jackson's pre-Nuremberg views of the Fourth Amendment from his early record on the Supreme Court, because Jackson seems to have recused himself from Fourth Amendment cases early in his tenure. *See, e.g., Goldman v. United States*, 316 U.S. 129, 136 (1942), *overruled in part by Katz v. United States*, 389 U.S. 347, 352-53 (1967). Jackson recused himself in *Goldman* because, as Attorney General, a position Jackson held from January 4, 1940 until his appointment to the Court in 1941, the prosecution was conducted under his authority. *See HOWARD, supra* note 43, at 283.

However, an incident reflected in Jackson's confirmation hearings suggests his pre-Nuremberg view of home invasions. During his tenure as Attorney General, he recommended dismissal of indictments pending against a number of defendants charged with conspiring to induce Americans to enlist in the Spanish Civil War. *See Nomination of Robert H. Jackson to Be an Associate Justice of the Supreme Court: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong. 9-16 (1941) (statement of Sen. Norris). Evidence leading to the indictments was alleged to have been obtained through improper search tactics. *See id.* At Jackson's confirmation hearing, a witness, whose son had fought and died in the Spanish Civil War, testified with outrage to Jackson's ordering the dismissal of the indictments. *See id.* at 1-9. Senator Norris intervened to indicate that the case involved defendants—evidently middle-class professionals—whose "rights as citizens of the United States were violated in the manner of their arrest." *Id.* at 10. He described the circumstances of the arrest of one, a doctor and former president of the State Medical Association:

About 4 or 5 o'clock in the morning the telephone rang, and his wife got up out of bed—she was in bed sleeping with her husband, the doctor—and answered the phone. She was told over the phone by someone down at the entrance to the apartment house that they had a man that was either crippled or sick or wounded in some way, . . . and they needed medical assistance . . .

She told them to come up, and that was the way they got into the apartment. The doctor hadn't yet gotten up, he was in bed. They arrested him and handcuffed him while he was in bed. They went through the room, opened all the dresser drawers, examined their clothing, and wouldn't permit them to go to the telephone to call up and get legal advice.

. . . They tore up their apartment. . . .

. . . .

. . . It was a barbarous treatment, it seems to me.

I didn't care whether they were Communists, or what they were, there

appears to have found claims of psychologically coerced confessions equally unpersuasive¹³⁸ before and after Nuremberg.¹³⁹ In 1944,

was no reason why anybody should be treated, it seemed to me, the way they were treated.

....

Now, Attorney General Jackson, who was then in office, after I had investigated these affidavits I communicated with him and told him that in my judgment the treatment of these people was inhuman, the methods used were un-American, and that it was a denial of the constitutional rights that every citizen had, regardless of what the charge was, and that there was no cause for the treatment that those people had been accorded.

Afterwards the Attorney General, then Mr. Jackson, dismissed all those indictments.

Id. at 10-11.

138. *But see* Bush, *supra* note 124, at 2053 (noting that in the criminal procedure area, Jackson "seemed to leapfrog to the left, and his approach to certain Fourth Amendment and federal due process issues represents perhaps the flood tide of Supreme Court liberalism in that area"). Given Jackson's ongoing rejection of the notion that admission of a confession produced as the result of psychological coercion could violate the Due Process Clause, *see infra* notes 140-45 and accompanying text, I reject Professor Bush's wholesale characterization of Jackson's criminal procedure record as overwhelmingly "liberal."

139. The apparent inconsistency between Jackson's positions on the Fourth and Fourteenth Amendments was noted contemporaneously. *See* Jaffe, *supra* note 120, at 977-81. Professor Jaffe noted that Jackson was "in the forefront of those who would give the most thoroughgoing effect to the fourth amendment prohibition against unreasonable search and seizure. Yet he has been the boldest and most vigorous opponent of federal review of confessions in state trials." *Id.* at 977 (footnote omitted); *see also id.* at 977-78 ("Jackson sees Everyman at the wheel of Brinegar's car but not in the little room in the police station where Watts sits, under floodlights, undergoing his agony."). Professor Jaffe argued that Jackson believed a search was more likely than a coerced confession to be the product of central government regulation, *see id.* at 978, and that the Justice was logically unable to draw a line between permissible and impermissible coercion, making his position the product of "intellectual distress," *id.* at 979-80. Jaffe also posited that Justice Jackson did not believe that forced interrogation increased the sum total of lawlessness and brutality in society, and that "Jackson thus identified Everyman with the victim of the unreasonable search and seizure," but did "not identify Everyman with the usual third-degree victim." *Id.* at 980. Jaffe concluded: "There is, I think, little doubt that he was not in sympathy with the progressive refinement of rules protecting criminal defendants. He probably believed that the Court was making a fetish of procedural protection at the expense of law enforcement." *Id.* at 981 (footnote omitted); *see also* Freund, *supra* note 120, at 22 (noting that "[i]t would be an overstatement to say that the Justice was concerned with procedure in all its aspects" and observing that in state court criminal cases, "he tended to focus on the reliability of the evidence and not on the procedures by which it was obtained" (footnote omitted)).

One author suggested that Jackson's views depended on the severity of the crime charged. *See* Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 470 (1955). Fairman argues that Justice Jackson's statement in *Brinegar* to the effect that judicial exceptions to the Fourth Amendment should "'depend somewhat upon the gravity of the offense,'" is "the key to understanding Justice Jackson's record in the 'third-degree' cases, where, notably, he tolerated serious invasions of rights as a means to solving crimes of violence." *Id.* at 470 (quoting *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting)). In support of this view, *see Watts v.*

before his stint at Nuremberg, Jackson dissented strongly in *Ashcraft v. Tennessee*.¹⁴⁰ In *Ashcraft*, the defendant sought to suppress a confession given after thirty-six hours of continuous questioning; there it was the majority—not Justice Jackson—that used totalitarian comparisons in suppressing the confession.¹⁴¹ Justice Jackson also found the claims in *Malinski v. New York*¹⁴² unconvincing, voting to affirm the defendant's murder conviction,¹⁴³ notwithstanding that during five days of pre-arraignment detention, Malinski had been

Indiana, 338 U.S. 49 (1949), in which Jackson noted that American protections for criminal defendants “represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself,” but that, in light of the severity of the crime at issue (murder) and the limits the protections impose on society's power to solve crimes, we should not indulge in any “unnecessary expansion” of them. *Id.* at 61 (Jackson, J., concurring in the result). This approach has been noted recently; Professor Akhil Amar deemed it an example of “common-sense reasonableness.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801-02 (1994).

140. 322 U.S. 143, 156-74 (1944) (Jackson, J., dissenting); see also *supra* text accompanying notes 65-68 (discussing *Ashcraft*).

141. See *Ashcraft*, 322 U.S. at 155; see also *supra* text accompanying note 67 (quoting *Ashcraft*). Justice Jackson's opinion rejected the comparison:

This questioning is characterized as a “secret inquisition,” invoking all of the horrendous historical associations of those words. Certainly the inquiry was participated in by a good many persons, and we do not see how it could have been much less “secret” unless the press should have been called in. Of course, any questioning may be characterized as an “inquisition,” but the use of such characterizations is no substitute for the detached and judicial consideration that the court below gave to the case.

Ashcraft, 322 U.S. at 168 (Jackson, J., dissenting). He then went on:

At what point in all this investigation does the Court hold that the Constitution commands these officers to send Ashcraft on his way and give up the murder as insoluble? If the State is denied the right to apply any pressure to him which is “inherently coercive” it could hardly deprive him of his freedom at all. I, too, dislike to think of any man, under the disadvantages and indignities of detention being questioned about his personal life for thirty-six hours or for one hour. In fact, there is much in our whole system of penology that seems archaic and vindictive and badly managed. Every person in the community, no matter how inconvenient or embarrassing, no matter what retaliation it exposes him to, may be called upon to take the witness stand and tell all he knows about a crime—except the person who knows most about it. Efforts of prosecutors to compensate for this handicap by violent or brutal treatment or threats we condemn as passionately and sincerely as other members of the Court. But we are not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination, although we admit them to be “inherently coercive,” are denied to a State by the Constitution, where they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer.

Id. at 169-70 (Jackson, J., dissenting).

142. 324 U.S. 401 (1945); see also *supra* notes 35-46 and accompanying text (discussing *Malinski*).

143. See *Malinski*, 324 U.S. at 434.

stripped naked and subjected to intentional humiliation and fear of a beating to persuade him to confess.¹⁴⁴ After Nuremberg, Jackson was similarly unmoved by claims of psychological coercion induced by excessive detention.¹⁴⁵ Jackson's limited and category-specific use of totalitarian comparisons in criminal procedure cases, and the breadth and timing of their use by others, suggest that the comparisons cannot be attributed solely to him.

2. Public Justification

One possible perspective is that totalitarian comparisons were offered to justify to a sometimes skeptical public the constitutional limitations on police authority. Imagine that you are a judge in the postwar period preparing an opinion upholding the suppression of otherwise probative evidence because of a Fourth Amendment violation.¹⁴⁶ The violation is egregious and, to you, somewhat alarming. Yet the crime was also alarming, and you anticipate the public will be hostile towards a decision that will cause the dismissal of an otherwise valid criminal prosecution against an admittedly guilty suspect. You, yourself, may find this aspect of the case troubling.

This problem reflects a broader contextual concern. The constitutional protections were motivated by a profound suspicion of government authority¹⁴⁷ that the public may no longer feel. The

144. *See id.* at 421 n.1 (Rutledge, J., dissenting in part).

145. *See, e.g., Gallegos v. Nebraska*, 342 U.S. 55, 69-71 (1951) (Jackson, J., concurring). The Court held that detaining Gallegos, a Mexican migrant worker who spoke no English, for a total of 25 days without arraignment on suspicion of homicide did not violate the then-prevailing due process standard applied to the states. *See id.* at 56-68. Justice Jackson, writing separately in concurrence, concluded that because the lengthy detention followed a confession made by the defendant, the detention could not have been intended to coerce a confession, *see id.* at 69 (Jackson, J., concurring), and that an earlier confession, given in Texas, was not the product of coercion because the only threats made to Gallegos—that he might be turned over to the Mexican authorities—were true, *see id.* at 70-71 (Jackson, J., concurring). Use of totalitarian comparisons to argue that admission of these confessions violated the Constitution was made in this case, but not by Justice Jackson. *See id.* at 73-75 (Black, J., dissenting); *see also supra* notes 94-96 and accompanying text (discussing Black's dissent). In the words of one commentator, "Jackson saw no abridgement of the Fourteenth Amendment in practices whereby the police subjected suspects to the third degree, with varying degrees of sophistication short of direct physical torture and literally beating a confession out of a suspect—and not necessarily even then." SCHUBERT, *supra* note 120, at 130 (footnote omitted).

146. This hypothetical assumes a violation by a federal official, which would have required suppression even in the pre-incorporation era. The hypothetical could be fashioned to set forth a violation of the Fifth Amendment privilege against self-incrimination as well.

147. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L.

power of the American "state" as an entity may be viewed by a substantial sector of the public as largely benevolent,¹⁴⁸ making it more difficult to argue convincingly for the need to limit police authority. As a judge, you thus face an uphill battle in struggling to put the opinion in terms that will persuade a public, concerned more about the concrete benefits of crime prevention than the theoretical values of constitutional liberty, of the importance of the underlying constitutional values.

One option would be to set the opinion in historical context. The tyranny of eighteenth-century English or colonial rule is plainly a plausible benchmark against which police conduct ought to be judged. First, these were the Framers' acknowledged contexts for developing the Fourth Amendment.¹⁴⁹ Second, there is a track record to follow; judges have regularly contrasted American procedural protections with the historical examples upon which the Amendment

REV. 349, 400 (1974). This has been called "our deeply rooted national skepticism toward police and indeed all public authority." Burger, *supra* note 113, at 4.

148. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 296 (1993). Friedman wrote:

Of course, the revolutionary generation, when they thought about the "state," thought about George III, a tyrant from their point of view, and his autocratic government in Westminster. They wanted at all costs to avoid something similar here at home. In the twentieth century, George III was a distant and unimportant memory The focus of attention had shifted. Government was not the enemy, at least not in *this* area of life; the enemy was the bad people, the criminals, the "dangerous classes."

Id. Similarly, Professor Amsterdam has noted:

[T]he framers appreciated the need for a powerful central government. But they also feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual. When I myself look back into that variegated political landscape which no observer can avoid suffusing with the color of his own concerns, the hues that gleam most keenly to my eye are the hues of an intense sense of danger of oppression of the individual.

I find that sense of danger all the more striking because so many of us in this country today have lost it. It is largely left to "those accused of crime" and to the dwellers of the ghettos and the barrios of this land to view the policeman as "an occupying soldier in a bitterly hostile country." For the rest of us, the image of the policeman is the friendly face of the school crossing guard. From childhood we are reared to see government and law and law enforcement as benign. They pose no threat to *us*. But the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it.

Amsterdam, *supra* note 147, at 400 (footnotes omitted).

149. There is little disagreement that the source of the Fourth Amendment was three cases: *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763), and the *Boston Writs of Assistance Case*, see Stuntz, *supra* note 51, at 404-09. There is, however, some difference of opinion about the relative importance of these three cases. See *infra* note 188 and accompanying text.

was based.¹⁵⁰ This approach must be acceptable, for generations of judges have already used it.¹⁵¹

150. See, e.g., *Boyd v. United States*, 116 U.S. 616, 630-32 (1886). The Court in *Boyd* combined discussions of the English precedents and the writs of assistance, making it hard to separate out their distinct influences. The Court first discussed the writs of assistance. See *id.* at 625. Then the Court noted: "[T]he events which took place in England immediately following the argument about writs of assistance in Boston were fresh in the memories of those who achieved our independence and established our form of government." *Id.* at 625. The Court discussed *Wilkes* and *Entick* at length, concluding:

Can we doubt that when the Fourth and Fifth Amendments were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures The struggles against arbitrary power in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

....

And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id. at 630-32. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court stated:

[The Fourth Amendment] took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the Government by which there had been invasions of the home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies.

Id. at 390; see also *Goldman v. United States*, 316 U.S. 129, 137 (1942) (Murphy, J., dissenting) (citing *Entick* in discussion of importance of Fourth Amendment), *overruled in part* by *Katz v. United States*, 389 U.S. 347, 353 (1967); *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (citing *Entick*), *overruled* by *Katz v. United States*, 389 U.S. 347, 352-53 (1967).

151. For contemporary examples, see the following: *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-68 (1990); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Illinois v. Krull*, 480 U.S. 340, 362-63 (1987) (O'Connor, J., dissenting); *Dow Chemical Co. v. United States*, 476 U.S. 227, 245 (1986) (Powell, J., concurring in part and dissenting in part); *Steagald v. United States*, 451 U.S. 204, 220 (1981); *Payton v. New York*, 445 U.S. 573, 583-84 (1980); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-12 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-9 (1977); *Stanford v. Texas*, 379 U.S. 476, 481-84 (1965); *Lopez v. United States*, 373 U.S. 427, 454-56 (1963) (Brennan, J., dissenting); *Monroe v. Pape*, 365 U.S. 167, 208-09 (1961) (Frankfurter, J., concurring in part and dissenting in part), *overruled* by *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658, 665 (1978); *Frank v. Maryland*, 359 U.S. 360, 363-66 (1959), *overruled in part* by *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); and *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting), *overruled in part* by *Chimel v. California*, 395 U.S. 752, 768 (1969).

There is only one problem with relying on the historical examples. While these historical events may have been well-known and significant to the Framers and the citizenry of their time,¹⁵² the public in the present day is unlikely to know or care much about eighteenth-century history and its role in developing the Framers' fear of centralized police authority. Ancient, unfamiliar concerns about customs searches or pamphleteers will seem foreign to anyone still reading after the first paragraph. The opinion will seem remote, dispassionate, and static; no sense of currency, immediacy, or drama will make it convincing to the public audience.

But if you believe that most Americans share a common abhorrence of Nazism or (depending on the era in which you write) dislike and distrust for the Soviet Union, that may provide an alternative approach. Members of the public may not know or care whether they want their society to be like colonial America, but they know they don't want it to resemble Nazi Germany. Consequently, a court might use these arguments to justify strict constitutional limitations on police authority in a way that a skeptical public might not appreciate otherwise. Such an instrumental approach might not have been used to derive constitutional norms but simply to sell them, providing a high-minded, principled basis to persuade the public that these protections, however troubling in microcosm, were essential to maintain America's position as a uniquely free society.

This thesis may certainly have been operative in some cases.¹⁵³ This may, however, be an unduly narrow way to view the use of the comparisons. First, the comparisons were not used exclusively—or even primarily—to support outcomes in favor of defendants. As Part II discusses, they were used perhaps more frequently in dissenting

152. See *infra* note 200 (collecting authorities establishing the familiarity the colonial public had with these events).

153. For a contemporary example, see *People v. Davis*, 460 N.Y.S.2d 260 (N.Y. J. Ct. 1983). A local judge released on his own recognizance a burglary suspect who had been detained for more than the statutorily permitted 72 hours without being allowed a hearing. See *id.* at 261-62. The suspect later failed to appear, and the press criticized the judge for releasing him. See *id.* at 262. Evidently feeling the need to respond, the judge wrote an opinion justifying his release of the suspect. The judge fell back on passionate invocation of the values of American society, arguing that "the lifeblood of individual rights is found in the procedure available to effectuate these rights. Substantial compliance with procedural rights is necessary to prevent a society from sliding into the darkness of totalitarianism. Police power rightfully exercised protects the public. Police power wrongfully used is the dictator's weapon." *Id.* The opinion then explained the more mundane statutory basis for the defendant's release. See *id.* at 263-64. Finally, the judge wrote: "Holding a prisoner incommunicado for seven days is something that simply should not happen in a democratic society." *Id.* at 264.

opposition to rulings sustaining government action against constitutional challenge.¹⁵⁴ This was the case even if the long-term development of the law was, ultimately, more consistent with the arguments in which the comparisons were employed than the short-term outcomes suggested. The arguments are political, certainly, but they are not necessarily invoked to help the public swallow the bitter pill of constitutionalism more easily.

This approach also suggests an unnecessarily narrow view of opinion writing. It presumes that judges write opinions for the public and fashion those opinions with an eye towards how the public will perceive their decisions. This underlying assumption is open to some question. While opinions handing down particular decisions that will have substantial political impact may be conceived as exercises not only in jurisprudence, but in public relations,¹⁵⁵ judicial opinions are not directed exclusively towards the public. Most scholars suggest that judges write for themselves, or their colleagues, or the broader legal community, rather than solely for the public audience.¹⁵⁶ This is

154. See *supra* notes 57-60, 92-96 and accompanying text.

155. Certainly the literature regarding the fashioning of the opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), suggests that the opinion was prepared with a focus on how it would be understood by the public. See, e.g., BERNARD SCHWARTZ, *SUPREME COURT 97* (1983) (revealing that Chief Justice Warren thought that the opinion should be "written in understandable English and avoid legalisms" because he "said he wanted an opinion that could be understood by the layman"); see also *id.* ("The draft . . . was 'prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, nonaccusatory.'") (quoting Memorandum from Chief Justice Earl Warren to the United States Supreme Court (May 7, 1954))).

156. See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1622 (1997) ("I think that courts write more to persuade themselves, and other lawyers, than they do to reassure citizens; judges need most of all to convince themselves and their colleagues that they have the authority and the responsibility to stand up for what they believe is right."); see also THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS* 110-11 (1978) (noting that half of the judges surveyed said they do not care, when writing opinions, about impressing anyone but themselves, and that they consider their most important audience to be their colleagues). Surely the current trend in Supreme Court opinions supports this argument. For an example of an important decision in the form of a lengthy and complex exegesis not written with an eye towards public comprehension or acceptance, see *Printz v. United States*, 117 S. Ct. 2365 (1997).

For a different view, see WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 88 (1996). Domnarski asserts, without support, that "the [judicial] opinion, when used effectively, is a vehicle of communication between the Court and the people. In other words, the Justices see the people as their audience." *Id.* Domnarski identifies a "canon" of Supreme Court decisions (including, among others, *Miranda v. Arizona*, 384 U.S. 436 (1966), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Brown v. Board of Education*, 347 U.S. 483 (1954)) and argues that, at least with regard to these decisions, "the Justices are writing not just for the litigants but for all those who are to be affected by the rights and principles they are resolving and declaring. They are writing for the People writ large and

a generalization, and one might expect criminal procedure to be one area where the political rhetoric of judicial decisionmaking would spill over substantially into the public arena, involving as the cases do the rights of the individual as against the government, in situations familiar and readily comprehensible to lay persons. Yet newspaper coverage of the cases involving totalitarian comparison do not seem to suggest any greater focus on these cases than others. While the coverage sometimes includes salient quotes from the cases,¹⁵⁷ it would be hard to argue that they are treated differently than other categories of cases.¹⁵⁸

This is not to say that judicial opinions are not quintessentially political. They are. Moreover, the political character of the courts' disposition of criminal procedure matters is self-evident. The question is whether judges use the language in opinions purely as a means of convincing the public or whether they use the language as part of a more complex process of convincing colleagues, the legal community, the parties, and even themselves of the justice and propriety of the result.

If, moreover, these arguments were directed primarily at creating broad popular understanding and acceptance of constitutional restrictions on police authority, one might not expect

they adopt strategies to reach them." *Id.* at 89. Even Domnarski does not suggest that this is universally true of Supreme Court opinions.

157. See, e.g., *Restriction on Searches Tightened*, WASH. POST, Feb. 3, 1948, at 12 (discussing *Johnson v. United States*, 333 U.S. 10 (1948), and quoting Justice Jackson's majority opinion, which stated that "[a]ny other ruling . . . would wipe out one of the big differences between our Government, 'where officers are under the law, and the police state, where they are the law' " (quoting *Johnson*, 333 U.S. at 17)); Lewis Wood, *Search Is Allowed Under Arrest Writ*, N.Y. TIMES, May 6, 1947, at 1 (reporting decision in *Harris v. United States*, 331 U.S. 145 (1947) and quoting Justice Murphy's dissent: "The principle established by the Court today can be used . . . easily by some future government determined to suppress political opposition under the guise of sedition" (quoting *Harris*, 331 U.S. at 194 (Murphy, J., dissenting))). In *Crime Hides Principle*, WASH. POST, May 7, 1947, at 12, an editorial on *Harris v. United States*, the author noted: "Protection of the individual's right to be secure in his home is a greater light in our democratic galaxy than freedom of the police in bringing criminals to justice." *Id.*

158. The totalitarian comparison cases do not appear to get more press attention than other cases. See, e.g., John P. MacKenzie, *High Court Eases Curb on Bugging*, WASH. POST, Apr. 6, 1971, at A1 (article on *United States v. White*, 401 U.S. 747 (1971), appearing next to an article about *Rogers v. Bellei*, 401 U.S. 815 (1971), and leading off article about numerous court decisions); *Restriction on Searches Tightened*, *supra* note 157, at 12 (single-column article about *Johnson v. United States* appearing next to a lengthier article about Supreme Court's decision in *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948)); see also *A Summary of Supreme Court Actions*, N.Y. TIMES, Apr. 6, 1971, at 28 (list of Supreme Court decisions including *White* appearing on the same page as a full article about *Bellei*).

to see them used extensively in legal scholarship, which has rarely been accessible or compelling to popular readers. While at least some judicial opinions are channeled through the press into popular understanding, legal scholarship rarely has been, and is more properly viewed as "insider" discourse.¹⁵⁹ Yet totalitarian comparisons are evident in legal scholarship¹⁶⁰ as well as judicial opinions, though some of the scholarship, delivered in public lectures, may have had an impact on the public as well.¹⁶¹ A theory that courts

159. One notable exception is the recent press treatment of the development of critical race theory. See, e.g., Patricia Cohen, *One Angry Man*, WASH. POST, May 30, 1997, at B1; Neil A. Lewis, *For Black Scholars Wedded to Prism of Race, New and Separate Goals*, N.Y. TIMES, May 5, 1997, at B9; Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27. This is, I would argue, the exception that proves the rule; it is critical race theory's rejection of traditional legal scholarship that makes it newsworthy, while its methodology may make it more interesting and accessible to a mainstream audience than more traditional scholarship.

160. For later scholarly sources, see generally Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1193. Stone notes the importance of restraint in the use of "spies and informers . . . For in the absence of restraint, the practice could all too easily jeopardize the very foundation of personal privacy and security upon which a free society must ultimately rest." *Id.* at 1195. A footnote refers readers to sources "[f]or descriptions of the use of secret agents and informers in Nazi Germany and Stalinist Russia." *Id.* at 1195 n.3.

161. For example, in an article originally delivered as part of a series of public lectures at the University of Chicago Law School, Professor Jerome Hall drew a comparison between police in America and police in totalitarian regimes. See Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 133 n.* (1953). Professor Hall wrote:

If we wish to understand and improve police service, we must first recognize that the limitations and abuses in law enforcement which alarm and challenge us are neither novel nor peculiarly American. . . .

. . . Only a decade ago millions of defenseless human beings were murdered by the German police in a calculated revival of all the diabolical instruments of torture that twisted ingenuity has contrived. Far exceeding even these abominations are the scientific tortures and enslavement of literally millions of human beings by the NKVD in Russia and Siberia, beside which the limitation of civil liberties in democratic states pales into insignificance.

Id. at 133. Hall further notes:

At no time in history has it been easier to compare the police of democratic societies with that of dictatorships. The fascist dictatorships of Italy and Germany are fresh in our memory and the Iron Curtain cannot conceal the ugly facts of Communist tyranny. The refugees from these countries, bearing the horrible scars of police violence, are living witnesses of the character of the dictator's police. The concentration camps operated by the Gestapo achieved systematic proficiency in the degradation of the human spirit. It does not require any eloquence to portray Gestapo and NKVD torture of human beings in a way that would revolt any decent person and persuade him that there is no limit to the depravity to which human nature is capable of descending.

However, it is a 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. Certainly the torture of Negroes by the

used the comparisons to justify pro-defendant holdings to the public thus cannot tell the whole story.

3. "Mere" Rhetoric

Another approach might be to view totalitarian comparisons as a rhetorical device, an attempt to align a disliked result with the most loathsome possible association. This would explain the movement from the Nazi comparison to the Soviet comparison rather handily: as another regime became the "bad guy," its abhorrence became the negative example to which all that was abhorrent could best be compared.

Certainly the comparisons are used to strong rhetorical advantage. They suggest to complacent readers that techniques of law enforcement, seemingly of little concern to law-abiding citizens, contain in them the seeds of tyranny. More than that, they are poetry. Justice Jackson's argument that uncontrolled search and seizure is "effective in cowing a population, crushing the spirit of the individual and putting terror in every heart,"¹⁶² is intensely evocative. Justice Black's description of governments with the power to "seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture," and his majestic assertion that, "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government,"¹⁶³ seem accompanied by a fanfare of trumpets. A resounding validation of American values inheres in the frightening invocation of the possible alternatives and the proud assurance that the Constitution simply will not permit these abuses.

police in some communities rivals the barbarism of the Gestapo and NKVD. . . . It is, of course, true that the brutality of American police falls short of the calculated barbarism of the secret police of modern dictators, and that it is relatively infrequent. But these are matters of degree.

Id. at 139-40 (footnotes omitted). Similarly, Professor Amsterdam used totalitarian comparison in an article, writing:

I have no doubt a court should say that any type of surveillance which can be averted only by this drastic discipline, characteristic of life under totalitarian regimes, is altogether too destructive of privacy and of the "right of the people to be secure in their persons [and] . . . houses" to escape the fourth amendment's regulation.

Amsterdam, *supra* note 147, at 403 (quoting U.S. CONST. amend. IV). While Professor Amsterdam's article was delivered initially as a public lecture at the University of Minnesota Law School, the lengthy and technical exegesis of the Fourth Amendment was plainly intended not for the lay public, but for an audience of lawyers, academics, and students.

162. *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

163. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

To deny that these arguments served a rhetorical function would be impossible.¹⁶⁴

This explanation might also suggest why the comparisons are less pointed and more subtle in cases in which there was substantial agreement. Take, for example, *Rochin v. California*,¹⁶⁵ the classic "shocks the conscience" case. Surprised in his room by the police, Rochin grabbed two capsules lying on a nightstand and swallowed them.¹⁶⁶ Police took Rochin to the hospital and directed a physician to force an emetic solution into his stomach to induce vomiting.¹⁶⁷ Rochin vomited up the capsules, which were seized and found to contain morphine.¹⁶⁸ The government charged him with possession of that morphine and used the evidence forcibly seized from his stomach against him.¹⁶⁹

These facts (including the enlistment of the medical profession to assist the police in invading the physical integrity of the suspect) would have permitted the most blatant totalitarian comparison.¹⁷⁰ The author of the majority opinion, Justice Frankfurter, was familiar with the comparisons, having used them in other contexts.¹⁷¹ He did draw comparisons, but subtly. Justice Frankfurter noted simply that "to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."¹⁷² To readers in 1951, "brutalizing the temper of a society" must have

164. One scholar of Justice Jackson has suggested that much of Jackson's writing should be understood primarily as rhetoric. See Dennis J. Hutchinson, *Justice Jackson and the Nuremberg Trials*, 1 J. SUP. CT. HIST. 105, 113 (1996). Hutchinson notes:

There is a danger . . . in overreading Jackson's eloquence, before or after Nuremberg. Remember that first and foremost, Jackson was an advocate. His judicial opinions tend to be neither measured assessments of competing positions nor authoritative pronouncements. They are rhetorical exercises, relying on detailed narratives, or vivid imagery or paired contradictions, all designed to arrest or move the reader. They are designed to convince readers, not to create rules.

Id. at 113.

165. 342 U.S. 165 (1952).

166. See *id.* at 166.

167. See *id.*

168. See *id.*

169. See *id.*

170. The Court did note that the police methodology here was "too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172.

171. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); see also *supra* notes 55-56 and accompanying text (discussing Justice Frankfurter's opinion in *Wolf*).

172. *Rochin*, 342 U.S. at 173-74.

had a self-evident association with totalitarianism. But the reference undoubtedly was understated. Because the Court was largely in agreement in *Rochin*, there was no need to wheel out, metaphorically speaking, the big guns.

Of course judges are rhetoricians. How could they fail to be? Not only do they for the most part come from the ranks of advocates,¹⁷³ they become advocates for the decisions they have made and must defend.¹⁷⁴ True, these expressions may reflect the rhetoric of politics more than traditional dispassionate legal rhetoric.¹⁷⁵ But to say that these comparisons are "rhetoric" is to fail to address the underlying question: Why are they persuasive? The mere fact that arguments are impassioned or compelling tells us nothing about the source of their persuasive force, or why they were relevant to the opinions they enhanced.¹⁷⁶

Moreover, if the sole objective were to taint a particular position with negative associations, it would be hard to explain the selectivity with which the comparisons are used. Far from being indiscriminately scattered through any case in which there was a disgruntled loser, the comparisons are used in those areas—coerced confessions, home searches, electronic surveillance—that most closely recalled totalitarian abuses.

B. *The Significance of Totalitarian Comparisons*

1. Totalitarian Comparisons as Negative Models

Part III.A discusses some plausible explanations for the use of

173. See Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561 (1990).

174. See *id.* Gerald Wetlaufer notes:

Like the lawyer-advocate, the judge has a number of audiences she must persuade that she is right and that the losing party's lawyer is wrong. These audiences include the appellate courts, the legal community, the losing party (who the judge hopes will leave the courtroom quietly and decide not to appeal the case), and the public at large. At this point, the judge has a series of client-like commitments—to her own decision, to her reputation for getting matters right, to the winning party, and to the reputation of the courts and the rule of law. The reputation of the courts and the rule of law, of course, will be sustained or enhanced by decisions that are perceived as fair, right, and legitimate—and diminished by those that are not.

Id. (footnote omitted).

175. See *id.* at 1562-63.

176. If opinions are viewed as "evidence that rational procedures were used to reach a decision," MARC A. FRANKLIN, *THE DYNAMICS OF AMERICAN LAW* 266 (1968), the idea that language in the opinions should be viewed primarily as emotional hyperbole rather than proof of logical reasoning seems unsatisfying.

totalitarian comparisons. No one explanation is likely to have been operative in every circumstance, and these reasons may explain some uses of the comparisons. The comparisons, however, played a larger role in identifying and shaping the content of American constitutional principles by negative example. Judges shaped their *positive* view of what intrusions the Constitution permitted the government in the criminal procedure area in part by considering the *negative* examples of totalitarianism.¹⁷⁷ This was not simply an instance in which judges, bereft of true standards, imposed their own will as a matter of constitutional fiat.¹⁷⁸ There were standards to apply, though they required recognition of the principle that positive rules can be derived by reference to negative information.¹⁷⁹

The conclusion that particular examples are negative is itself subjective. That conclusion in the postwar era was founded on a broadly based social consensus about the evils of totalitarian models and their fundamental inconsistency with the American system. Faced with models that presented starkly the extents to which American police authority could not be permitted to go and, perhaps,

177. See J.L. Austin, *A Plea for Excuses*, in J.L. AUSTIN: PHILOSOPHICAL PAPERS 175, 177-80 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979). Professor Austin approaches the study of excuses by positing that studying excuses helps define conduct "as so often, the abnormal will throw light on the normal." *Id.* at 179-80. Thus freedom of action actually means only the absence of circumstances which preclude freedom of action: "[F]ree' is only used to rule out the suggestion of some or all of its recognized antitheses. . . . In examining all the ways in which each action may not be 'free' . . . we may hope to dispose of the problem of Freedom." *Id.*

178. Nor was it an example of "perfect constitutionalism." See Mark A. Graber, *Our (Im)Perfect Constitution*, 51 REV. POL. 86, 98 (1989) ("[P]erfect constitutionalists claim that the Constitution must reflect their notion of the best possible human society . . ."); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (arguing that perfect constitutionalists hold the view that, "properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens" (emphasis omitted)).

179. The model that explains this best is a children's game, the object of which is to determine which of a number of cards with pictured characters on them the other child has chosen. In order to guess the identity of the other child's card, each player asks a series of yes-or-no questions which narrow down the possible categories of the chosen picture. A question like, "Does your character have glasses?" or "Does he have curly hair?" provides information as to the true identity of the chosen card. The point is that negative information is often as meaningful as positive information in deriving the positive, descriptive characteristics needed to win the game.

Broader claims have been made for the role of negative difference in the area of literary theory in, for example, the work of Ferdinand de Saussure, who argued that language is based on differences and that the content of any term is determined by the words that stand in opposition to it. See Ferdinand de Saussure, *Course in General Linguistics*, in MODERN LITERARY THEORY: A READER 6, 8 (Philip Rice & Patricia Waugh eds., 3d ed. 1996).

a messianic view of the need for America to take the lead in demonstrating the power of good government,¹⁸⁰ judges used the comparisons to set forth the protections essential, in their view, to the free and fair American system of justice.¹⁸¹ Opinions challenging the denial of such protections charged angrily that allowing such activities on the part of government would open the door to comparable abuses here.

This approach—deriving the content of constitutional principles by reference to negative example—is entirely consistent with the derivation of the Fourth and Fifth Amendments, both of which were framed in reactive terms.¹⁸² Not based on some abstract series of criteria or a theoretical construct of the optimal society, these amendments were, like many constitutional, legislative, or regulatory provisions, responsive to then-recent historical events, and were designed to ensure that the types of invasions and indignities that concerned the Framers did not happen again. The Framers knew about certain, particularized circumstances of abuse of government authority. Those abuses defined “tyranny” for them, not because they represented the only ways that government could abuse its power, but simply because those were the examples with which they were familiar. Totalitarian comparisons reflected a redefinition of “tyranny” in light of current perceptions.

Suppose a person dines in a restaurant with terrible service. The waiter ignores him, spills hot soup in his lap, and brings him the wrong order. If the patron is shortly thereafter in a position to prepare a formal declaration of rules for waitpersons, he could proceed in two ways. One would be to start from first principles, which would require him to devise an aspirational code of ideal

180. See CAUTE, *supra* note 74, at 21-22. Caute explains:

By 1945 America's patriotic imperative had acquired a truly imperialistic and even messianic image of its own mission in the world. This kind of imperialism, particularly rooted in the liberal intelligentsia, is not essentially economic, but rather cultural, idealistic, self-righteous, moral. . . . As Professor Robert E. Cushman (a strong civil libertarian, incidentally) put it in 1948: "It has been given to us, as the world's greatest democracy, a post of leadership in the all-important task of establishing our doctrines of civil liberty throughout the world as working principles by which the lives of free nations are to be governed."

Id. (quoting Prof. Robert E. Cushman).

181. See *Monroe v. Pape*, 365 U.S. 167, 209 (1961) (Frankfurter, J., dissenting in part) ("Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man."), *overruled by* *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658, 665 (1978).

182. See *infra* notes 184-210 and accompanying text.

behavior for service personnel, one which might begin, perhaps, "Good service is characterized at all times by concern for the customer, a high degree of skill, and, of course, common courtesy." The other way to approach this situation would be to compile a list of "don'ts" directly responsive to his negative experiences. Such a list might say, "Do not spill food on a customer. Do not ignore a customer. Do not serve customers food they did not order." In these circumstances, the neglected patron would be very likely to draft the second kind of code of conduct rather than the first. But it is not necessary to accept that this will always be the case to recognize that it was what the Framers did when drafting the Fourth and Fifth Amendments.¹⁸³

a. The Fourth Amendment

The historical origins of the Fourth Amendment are noncontroversial. Most scholars attribute the Amendment to a particular sequence of cases:¹⁸⁴ the English cases of *Wilkes v. Wood*¹⁸⁵

183. The Fourteenth Amendment coerced confession cases can be viewed somewhat differently. Because the standard the courts were applying there, which defined those rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 794-95 (1969), required development and application of standards of fairness, *see id.* at 325-26, the appropriateness of considering contemporary experiences and understandings that would shape the changing concept of "ordered liberty" was manifest. Due process was by definition an evolving concept. Notwithstanding the protestations that the concept of due process was determinate and not "arbitrary or casual," *id.* at 326, the concept was evanescent and inevitably changed over time, *see, e.g.,* *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The *Wolf* Court, for example, stated:

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Id. at 27. Justice Walter V. Schaefer wrote that "due process speaks for the future as well as the present, and at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities." Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956). Thus, he noted that "the due process clause . . . is the statement of an ideal for the future rather than a blueprint of the past." *Id.* It was, of course, precisely this uncertainty and the resultant potential for inconsistent and subjective application that subjected the doctrine to extensive critique. *See, e.g.,* *Rochin v. California*, 342 U.S. 165, 175-77 (1952) (Black, J., concurring).

184. For some of the classic expositions of this argument, *see* JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 27-40 (1966), NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT* 22-50 (photo. reprint

and *Entick v. Carrington*¹⁸⁶ and the *Writs of Assistance Case* in Massachusetts.¹⁸⁷ Scholars disagree about the relative importance of these cases,¹⁸⁸ but this point is not critical to the analysis here.

It is, however, important to understand that the Amendment was responsive to these recent events. *Wilkes v. Wood* was a suit brought in 1762 by a member of the English parliament who had been subjected to an extensive search of his home pursuant to a general warrant to seize seditious material.¹⁸⁹ His victory in the resulting civil suit brought against the undersecretary who had supervised the warrant's execution and the opinion of Chief Justice Pratt affirming the freedom of English subjects from the oppression of such searches¹⁹⁰ were widely known and broadly acclaimed.¹⁹¹ *Entick v. Carrington* was a suit brought by John Entick, an author, when papers belonging to him were seized pursuant to a general warrant in 1762.¹⁹² Chief Judge Pratt, who had by then become Lord Camden, delivered the opinion for the Court of Common Pleas in 1765 holding that there was no statutory authority for the issuance of such warrants.¹⁹³

1986) (1937), TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19 (1969), Amar, *supra* note 139, at 772, Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362-66 (1921), and Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 282-89 (1984). For a brief summary of the history, see Stuntz, *supra* note 51, at 396-411.

185. 98 Eng. Rep. 489 (K.B. 1763); see also LASSON, *supra* note 184, at 43-47 (discussing *Wilkes*).

186. 95 Eng. Rep. 807 (K.B. 1675).

187. For a discussion of this case, see generally M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978). While the decision in the case was unreported, notes of the hearings were kept by John Adams and Josiah Quincy and are reproduced as appendices I and K. See *id.* apps. I, K.

188. There is some dispute about the relative significance of the *Writs of Assistance Case*. Professor Amar argues that it was *Wilkes v. Wood* "whose lessons the Fourth Amendment was undeniably designed to embody," and that the "1761 Boston writs of assistance controversy . . . went almost unnoticed in the debates over the federal Constitution and Bill of Rights," Amar, *supra* note 139 at 772, while Professor Maclin contends that warrantless searches conducted pursuant to the writs of assistance were significant governmental intrusions that angered "the people," writ large, and were significant in developing the fundamental meaning of the Amendment, see Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 218 (1993).

189. See *Wilkes*, 98 Eng. Rep. at 489-90.

190. See *id.* at 498-99.

191. Professor Lasson notes: "'Wilkes and Liberty' became the byword of the times, even in far-away America." LASSON, *supra* note 184, at 45-46.

192. See *Entick v. Carrington*, 98 Eng. Rep. 807, 807 (K.B. 1675).

193. See *id.*; LASSON, *supra* note 184, at 47-48.

The *Writs of Assistance Case* arose in Massachusetts in 1761.¹⁹⁴ The writs of assistance authorized customs officers to search any place where they suspected uncustomed goods might be.¹⁹⁵ The writs expired six months after the death of the sovereign, so when George II died in 1760,¹⁹⁶ a group of Boston merchants petitioned the court for a hearing on the subject of granting new writs.¹⁹⁷ Although the new writs were ultimately granted,¹⁹⁸ the birth of the revolutionary spirit was attributed to James Otis's speech challenging them in 1761. John Adams would later write:

"Mr Otis's oration against the Writs of Assistance breathed into this nation the breath of life. Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."¹⁹⁹

While this characterization—written decades after the event—may be revisionist history, it is fairly contemporary revisionism and suggests that these events were significant to at least one of the Framers.

The Framers focused on these examples and the recent types of abuse of governmental authority with which they—and the larger public—were intimately familiar.²⁰⁰ To the Framers, these events

194. See LASSON, *supra* note 184, at 57.

195. See SMITH, *supra* note 187, at 531-32 (reprinting writs of assistance).

196. See *id.* at 130.

197. See LASSON, *supra* note 184, at 57-58. Smith notes that the occasion for the hearing was an application by James Cockle, the Salem collector of customs, for a writ of assistance, an application that predated the death of the King but decision on which was postponed until afterward. See SMITH, *supra* note 187, at 134-36, 142, 223-25.

198. See LANDYNSKI, *supra* note 184, at 35; SMITH, *supra* note 187, at 412.

199. LASSON, *supra* note 184, at 59 (quoting JOHN ADAMS, 10 WORKS OF JOHN ADAMS 247-48, 276 (1856) with minor punctuation and word changes).

200. At least this is the scholarly and judicial interpretation given these events. See Stuntz, *supra* note 51, at 397 (stating that the *Writs of Assistance Case*, *Entick v. Carrington*, and *Wilkes v. Wood* "were not only well known to the men who wrote and ratified the Bill of Rights, but famous throughout the colonial population"); see also Amar, *supra* note 139, at 772 ("[T]he facts of the 1763 case, *Wilkes v. Wood*, [its] plot and cast of characters were familiar to every schoolboy in America . . . *Wilkes* . . . was the paradigm search and seizure case for Americans. Indeed, it was probably the most famous case in late eighteenth-century America, period." (footnotes omitted)). The Court in *Boyd v. United States*, 116 U.S. 616 (1886), agreed:

As every American statesmen [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [*Entick*], and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in

were as recent as Watergate is to present-day Americans and probably remained in their consciousness longer, in a world of delayed information. The Fourth Amendment was their response to their understanding of "tyranny." It was framed in reactive mode, a response to the abuses they themselves understood and perceived as the most likely dangers posed by a government unrestrained.

b. The Fifth Amendment

The Fifth Amendment presents a more complex case than the Fourth Amendment. First, the origins of the Fifth Amendment privilege against self-incrimination are considerably more controversial. The classic argument that the Amendment simply memorialized a privilege already well-recognized in English criminal procedure in the mid-seventeenth century²⁰¹ has been contested hotly by recent scholars who claim different provenance for the privilege.²⁰²

the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id. at 626; see also *Draper v. United States*, 358 U.S. 307, 317 (1959) (Douglas, J., dissenting) ("These words [the statements of John Wilkes] and the complaints against which they were directed were well known on this side of the water."). Professor Amar suggests that the prevalence of cities named after Lord Camden stems from recognition of Camden's role in these cases. See Amar, *supra* note 139, at 772 n.54.

201. See LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 313-21 (2d ed. 1986); see also John H. Wigmore, *The Privilege Against Self-Incrimination; Its History*, 15 HARV. L. REV. 610, 633 (1902). Wigmore notes that the abolition of the ex officio oath in ecclesiastical courts was "immediately communicated, naturally enough, to the common law courts." Wigmore, *supra*, at 633. In those courts, "[i]t [was] . . . claimed, flatly, that no man is bound to incriminate himself, on any charge." *Id.* "[T]his claim [came] to be conceded by the judges," until "there [was] no longer any doubt" of the existence of the privilege. *Id.*; see also *id.* at 633-34 n.7 (citing cases decided from 1660 to 1700 and noting that "by 1688 . . . the courts had for a decade ceased to question" the privilege). The Levy volume has been termed "the most influential account of the origins of the privilege," R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 963 (1990), though it has been rebuffed by the contemporary scholarship, see, e.g., John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 82, 91-92, 100-01 (1997); M.R.T. MacNair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66, 68-69 (1990); Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in HELMHOLZ ET AL., *supra*, at 109, 120, 138-39.

202. See, e.g., John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1068 (1994). Professor Langbein argues that the modern privilege could not have existed without defense counsel, which was prohibited in all English criminal cases until 1696 and "remained a relative trickle" until the 1780s. *Id.* As long as defendants were required to conduct their own defenses—

For our purposes, it is not necessary to resolve this debate. Whether the privilege meant the protection of the individual against being compelled to make statements for later use at trial, or whether it meant a much narrower protection against being compelled to respond to questioning under oath, and when the privilege became commonplace, are not critical to the point here: that the perceived need for the privilege had its origins in relatively recent history, though not as recent as the Fourth Amendment's.²⁰³ The Amendment looked backward, to the use of the "oath ex officio" by English ecclesiastical courts in the seventeenth century to compel sworn testimony from defendants accused of religious offenses²⁰⁴ and to the tortures of the Star Chamber.²⁰⁵ Like the Fourth Amendment, the Fifth Amendment was directed at government oppression of citizens.²⁰⁶ It was designed to prevent the tyrannical outcomes of

the model Langbein denominates the "accused speaks" trial—defendants simply could not remain silent and simultaneously defend themselves. *Id.* at 1054; *see also* Langbein, *supra* note 201, at 82, 96-97 (arguing that the privilege "is an artifact of the adversary system of criminal procedure," which did not develop until the 1780s); MacNair, *supra* note 201, at 69-70, 84 (arguing that the common-law right postdates the Revolution of 1688). Professor Helmholz argues that the source of the privilege is the continental law of *ius commune* and that "focusing, as Levy does, exclusively on the opinions of the seventeenth-century common law judges and reading them against the backdrop of subsequent developments has resulted in a narrow and misleading account of the origin of the privilege." Helmholz, *supra* note 201, at 964. The development of the scholarly record is well outlined in Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087-88 (1994). The Helmholz volume compiles these articles and other recent scholarship on the origins of the privilege. For an intriguing attempt to reconcile these contrasting views of the privilege based on the argument that assertions of procedural unfairness really couched objections to the substantive offenses charged, *see* Stuntz, *supra* note 51, at 411-19.

203. Wigmore commented on this:

It is a little singular that the [Framers], who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down as taught by their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure.

Wigmore, *supra* note 201, at 636.

204. The oath ex officio is discussed in Helmholz, *supra* note 201, at 965-67. Being compelled to speak under oath—which required a guilty party to confess or, literally, be damned—may have been perceived as particularly oppressive in an era when many believed violation of the oath to have serious consequences for their immortal souls. *See* Stuntz, *supra* note 51, at 412 (noting that the complaint that the oath ex officio was torture for the conscience had some significance, "especially in a time when people took oaths and swearing a good deal more seriously than they might today").

205. *See* LEVY, *supra* note 201, at 372 (citing a treatise available in prerevolutionary New York referring to the Star Chamber).

206. *See id.* at 430-31. Levy noted:

those procedures known to the Framers. The privilege was, again, reactively drawn,²⁰⁷ in fear of what known abuses might be imposed²⁰⁸ in its absence.²⁰⁹

Thus the Fourth and Fifth Amendments were each shaped in reliance on particular examples of tyranny, generally understood and uniformly rejected by those who drafted the amendments.²¹⁰ Almost by definition, then, the Amendments set out prescriptive rules based on historical models of practices that the Framers wanted to preclude. The guarantees were defined in positive terms but conceived of almost entirely in negative ones.

Not only is this approach consistent with the history of the amendments, the notion that the content of positive constitutional guarantees may be derived partly by relying on negative models is not unique. In other areas, looking to comparative context has provided a basis for constitutional interpretation. Consider the Eighth Amendment's proportionality jurisprudence, for example, as set out for the first time in *Weems v. United States*.²¹¹

By stating the principle [of the privilege against self-incrimination] in the Bill of Rights, which was also a bill of restraints upon government, they were once again sounding the tocsin against the dangers of government oppression of the individual

....

... The framers understood that without fair and regularized procedures to protect the criminally accused, there could be no liberty. They knew that from time immemorial, the tyrant's first step was to use the criminal law to crush his opposition. . . . The Fifth Amendment was part and parcel of the procedures that were so crucial, in the minds of the framers, to the survival of the most treasured rights.

Id.

207. See Moglen, *supra* note 202, at 1121 ("Compulsory self-incrimination was what happened in Star Chamber or in France . . ."). Professor Moglen notes statements from the anti-Federalists in Massachusetts and New York warning that "Congress might institute 'the Inquisition' or the Star Chamber. *Id.* at 1122 (footnotes omitted). Professor Moglen deems these examples of "Richard Hofstadter's 'Paranoid Style' (Protestant variant)." *Id.*

208. See *id.* at 1120-21. Professor Moglen notes: "Among the elements of that fundamental law history was a belief in *nemo tenetur prodere seipsum*, for if a future legislature or tyrannical executive could impose ex officio oaths or judicial torture then the constitutional function of jury trial . . . could not be preserved." *Id.*

209. It was thus "expected to inhibit future tyrannical innovations." *Id.* at 1124.

210. See, e.g., Maclin, *supra* note 188, at 201 ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion.").

211. 217 U.S. 349 (1910). Actually, the *Weems* Court was applying not the Eighth Amendment but a provision of the Philippine Bill of Rights identical to the Cruel and Unusual Punishment Clause of the Eighth Amendment. See *id.* at 383 (White, J., dissenting). *Weems* has been consistently viewed as an Eighth Amendment decision. See *Thompson v. Oklahoma*, 487 U.S. 815, 823 n.4 (1988); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987). *Weems* continues to be a significant precedent in the proportionality area.

Weems was a harbormaster in the Philippines employed by the "United States Government of the Philippine Islands."²¹² Convicted of making two false entries on a public document,²¹³ he was sentenced, under the Penal Code of the Philippine Islands, to fifteen years of "*cadena temporal*," a punishment that included hard labor in chains²¹⁴ as well as the perpetual loss of certain civil liberties.²¹⁵ The Supreme Court of the Philippines affirmed Weems's sentence, so he sought review in the United States Supreme Court. There, for the first time, Weems contended that his sentence constituted cruel and unusual punishment under the Philippine Bill of Rights,²¹⁶ the language of which was identical to that of the Eighth Amendment.²¹⁷ Weems's counsel was quick to inform the Court that Weems, a native-born American, would be subjected to this alien and bizarre punishment unless the court found it constitutionally impermissible.²¹⁸ The court agreed.²¹⁹

See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 18-19 (1992) (Thomas, J., dissenting) (citing *Weems* in support of argument against expanding the scope of the Eighth Amendment); *Solem v. Helm*, 463 U.S. 277, 287 (1983) (describing *Weems* as "leading case"), *overruled* by *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion).

212. *Weems*, 217 U.S. at 357 (quoting prosecution's complaint).

213. See *id.* at 357-58.

214. See *id.* at 358, 364.

215. See *id.* at 364-65 (describing accessory penalties of civil interdiction, perpetual absolute disqualification, and subjection to surveillance for life, which attached to persons sentenced to *cadena temporal*).

216. See Brief for Plaintiff in Error at 5, 14-15, *Weems v. United States*, 217 U.S. 349 (1910) (No. 20).

217. The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

218. See Supp. Brief for Plaintiff in Error at 13-14, *Weems v. United States*, 217 U.S. 349 (1910) (No. 20). The defendant's brief was directed squarely at eliciting this nativist sentiment, making clear that Weems, a *native-born* American, would be subjected to the excessive punishments of Philippine justice. See *id.* The brief noted that, unless the Court acted, "this plaintiff in error for the offense of taking credit in his record for a little over two hundred dollars more than he had actually paid," would pay a large fine, suffer lengthy imprisonment and subsequent disabilities and that "[h]e cannot even come back to the United States, where he was born and reared, unless some now unknown and undesigned official chooses to give him that liberty." *Id.*

219. See *Weems*, 217 U.S. at 377. The Court's primary objection to the punishment was that its severity was inexplicable and its source alien and bizarre: "[T]he sentence in this case, excite[s] wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime." *Id.* at 365. The law, the Court said, had "no fellow in American legislation," came from "a government of a different form and genius from ours," and was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment." *Id.* at 377. Noting that the Philippine Commission legislation imposed a punishment of not more than 15 years for counterfeiting or forging government obligations, which the Court viewed as a substantially more serious offense, the Court overturned the punishment. See *id.* at 380-81.

It is hard to find any textual basis for the decision. Indeed, to facilitate its result, the Court itself had to devise the principle, often quoted since, that constitutional text must adapt to changing circumstances: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."²²⁰ The punishment, while severe, was not particularly shocking in light of the ready availability of severe state sentences.²²¹ *Weems* reflects the Court's reading the term "cruel and unusual punishment" in negative reaction to the circumstances presented by what was to them an unacceptable example of excessive punishment. The Justices were not sure what "cruel and unusual" meant, exactly, but they knew it when they saw it.

Weems is not a perfect metaphor. The Court did not look outside the four corners of the case for the negative models that gave content to the constitutional provision. The "negative model" the Court considered was not some hypothetical comparison, but *Weems*'s own treatment under Philippine law. Nonetheless, the case demonstrates that the use of negative examples to give content to constitutional guarantees is not unique to the postwar period.²²²

Thus, the argument that totalitarian comparisons played a role in the postwar development of constitutional criminal procedure by serving as the negative example that defined positive values is consistent with the history of the relevant amendments and practice in other areas. The question that might still be asked is whether consideration of other, contemporary objects of comparison is legitimate. The constitutional criminal procedure guarantees were derived in reaction to a specific set of "formative events," and it could be argued that the privilege of determining the appropriate objects for comparison belonged to the Framers alone. Indeed, the

220. *Id.* at 373; *see also id.* at 378 ("The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").

221. The Court in *Weems* mentioned a number of grievous state punishments which state courts had sustained: whipping as a punishment for wife beating, *see id.* at 378 (citing *Foot v. State*, 59 Md. 264 (1882)), 39 lashes and being sold into slavery as a punishment of a person of color for grand larceny, *see id.* (citing *Aldridge v. Commonwealth*, 2 Va. Cas. 447 (1824)), and the death penalty for a person "who should make an assault upon any railroad train . . . for the purpose and with the intent to commit murder, robbery, or other felony upon a passenger or [employee]," *id.* at 379 (quoting *Territory v. Ketchum*, 10 N.M. 718 (1901)).

222. The author's views about the appropriateness of this conclusion are not essential to the point here: that in other areas the content of constitutional values has been derived in reaction to negative example.

courts have referred freely to the original formative events, using them to argue that particular types of police conduct should be considered in light of the oppressive circumstances the Framers had in mind as they drafted the amendments.²²³ Did the courts have any business invoking any events other than the "formative events" that had been in the Framers' contemplation? Would an originalist conception not properly require the courts to focus more single-mindedly on the historical antecedents of the amendments²²⁴ and

223. For a discussion of cases invoking the origins of the Fourth Amendment, see *supra* notes 150-51 and accompanying text. Discussing the origin of the Fifth Amendment in *Brown v. Walker*, 161 U.S. 591 (1896), the Supreme Court noted:

The maxim *nemo tenetur seipsum accusare* [no one held under sway to incriminate himself] had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England.

Id. at 596; see also *Bram v. United States*, 168 U.S. 532, 544-45 (1897) (quoting *Brown*). In *United States v. Remington*, 208 F.2d 567 (2d Cir. 1953), the Second Circuit considered a case of perjury arising out of the defendant's denial, at a prior trial, that he had ever been a member of the Communist Party. See *id.* at 568. The court affirmed the conviction, see *id.* at 570-71, but Judge Hand objected, finding misconduct in the government's handling of the case—primarily in the persistent and, to him, ultimately coercive questioning of the defendant's wife before the grand jury, see *id.* at 571 (Hand, J., dissenting). He wrote:

The privilege against self-incrimination itself arose because of the abuses of the "ex officio examination" in the 17th century in the Star Chamber and the Ecclesiastical Commission, where there was no judge, and which was *in camera* after the model of the Holy Office itself. Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination. . . . [T]he Supreme Court has shown itself extremely sensitive to the opportunities for oppression that such examination offers; and the present time is hardly a propitious season to abate that vigilance.

Id. at 573 (Hand, J., dissenting) (footnote and citations omitted). While relying on seventeenth-century history, the reference to the McCarthy-era witch hunts is unmistakable.

Implications to the contrary were vigorously rejected. Rejecting an argument that the privilege against self-incrimination was not based on the Framers' experience, Dean Griswold asked, "Was there no Writ of Assistance case? Were there no courts of admiralty? Were not [John] Lilburne and [William] Bradford and many others, and the Star Chamber, a vivid part of the tradition and thus of the experience of the founding fathers?" Griswold, *supra* note 83, at 20. He concluded, "to say that these events were not known to and did not play an important part in the experience of the founding fathers is a clear misconception of history." *Id.* at 22.

224. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-87 (1989) (arguing that constitutional interpretation "requires immersing oneself in the political and intellectual atmosphere of the time [of the Framers]—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day"); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication*, 82

reject the use of totalitarian comparisons as irrelevant?

Current originalist scholarship increasingly acknowledges the appropriateness of moving beyond the strict literal application of text to account for changing circumstances.²²⁵ Even from the originalist perspective, then, there is some consensus that the interpretation of open-ended constitutional language may sometimes reflect the circumstances of a changed society,²²⁶ and some argue that the stricter view of originalism is on the wane.²²⁷

Moreover, the task it suggests is daunting, if not impossible. The historically accurate reading it requires, which demands that “[w]ords be read with the gloss of the experience of those who framed them,” and that those words “receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary,”²²⁸ is certainly a challenge. To understand the experience

NW. U. L. REV. 226, 230 (1988) (arguing that originalism “calls for judges to apply the rules of the written constitution in the sense in which those rules were understood by the people who enacted them”). Professor Lawrence Lessig has deemed this “one-step” originalism. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1183-85 (1993) [hereinafter Lessig, *Fidelity in Translation*].

225. See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1448 (1997) (“[A]ll originalists agree that application of the text to changing circumstances in many of the circumstances [Lessig] describes is quite unremarkable.”); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (“[N]o reputable originalist . . . takes the view that the Framers’ ‘assumptions and expectation about the correct application’ of their principles is controlling. . . . Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”); see also Colloquy, *Fidelity as Translation*, 65 FORDHAM L. REV. 1507, 1511 (1997) (suggesting that “sophisticated originalism” requires adherence to specific texts but that open-ended constitutional language creates “the potential for growth and accommodation of change in the meaning of the word over time”). Professor Calabresi attributes this view to the citizenry as well: “The American people understand that constitutional commitments do grow over time and that there is open-ended language in the text that may sometimes take on new meanings in modern contexts.” Calabresi, *supra*, at 1454-55; see also Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 681-86 (1991) (discussing the concept of “sophisticated originalism”).

226. Or, these may be simply what Justice Scalia calls “fainthearted” originalists. Scalia, *supra* note 224, at 864.

227. See Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1627 (1997) (arguing that the “strong version of originalism,” which holds that “contemporary constitutional problems must be resolved by strict adherence to the intent of the Constitution’s Framers or the understanding of its Ratifiers,” is “hardly reputable today,” and receives the attention it does because of its “provocative conclusions and the fact that law journals are run by students”).

228. *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

of the Framers is one thing. To appreciate the vividness and significance of that experience in a visceral sense is quite another. Indeed, to appreciate it fully suggests the need for a vehicle to apply constitutional principles to contemporary situations. One approach is Professor Lessig's "translation" analogy,²²⁹ which suggests that, by relying on totalitarian comparisons, the courts were striving for constitutional fidelity by translating the guarantees of constitutional criminal procedure to take account of the changed circumstances of police power and governmental authority they faced.²³⁰

2. The Translation Analogy

Professor Lessig has argued that the process of "interpreting" the Constitution might more appropriately be viewed as a process of "translation."²³¹ Our goal as modern constitutional readers, he contends, is not simply to determine how the Framers²³² would have applied a particular constitutional provision and then to enforce that determination. Such an approach, Lessig argues, actually might fail to preserve the original meaning of the underlying constitutional provision, because of changes in the context in which those provisions are understood.²³³ True fidelity to the constitutional document, he contends, may require more than the literal enforcement of its terms as originally understood. A constitutional interpreter may, instead, need to identify the values underlying the constitutional provision, and then apply those values to the changed context to determine the

229. The author is indebted for the translation analysis to the work of Professor Lessig. See Lessig, *Fidelity in Translation*, *supra* note 224; Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365 (1997) [hereinafter Lessig, *Fidelity and Constraint*]. For additional discussion of translation analysis, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 218 (1980) (noting that constitutional interpreters "must often 'translate' the adopters' concepts and intentions into our time and apply them to situations that the adopters did not foresee").

230. See Lessig, *Fidelity in Translation*, *supra* note 224, at 1165-66, 1171-73.

231. See, e.g., *id.* at 1171-73 (noting that "there can be fidelity in interpretation even if there is a change in a text's readings").

232. The Framers are not the only group whose perspective could be relevant to an originalist approach; the Ratifiers' thoughts might be useful as well. See, e.g., Michael C. Dorf, *A Comment on Text, Time and Audience Understanding in Constitutional Law*, 73 *WASH. U. L.Q.* 983, 984 (1995) (advocating that the Ratifiers' understanding should be relied upon instead of the conflicting intent of the Framers); Kay, *supra* note 224, at 247 (suggesting that the ratifying majority is the proper group from which to discern original intent). But see Monaghan, *supra* note 178, at 375 n.130 ("Although the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it.").

233. See Lessig, *Fidelity in Translation*, *supra* note 224, at 1176.

effect that change of context may have had on the meaning of the constitutional text.²³⁴ This process of applying identified values to a contemporary context is what Professor Lessig calls "translation," which, he argues, has an "extremely strong claim to constitutional fidelity."²³⁵

The translation model is only one of many theories of how constitutional interpretation can accommodate changed circumstances.²³⁶ It is also a highly malleable interpretive instrument. Constitutional "values" can be defined broadly or narrowly;²³⁷ the

234. See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 872-73 (1996) [hereinafter Lessig, *Cyberspace*]; see also Lessig, *Fidelity in Translation*, *supra* note 224, at 1177 ("If context matters to meaning, and if contexts may change, then the reader focused on fidelity needs a way to *neutralize* or *accommodate* the effect that changing context may have on meaning. Fidelity, that is, needs a way of reading that preserves meaning despite changes in context.").

235. Lessig, *Cyberspace*, *supra* note 234, at 873. Professor Lessig offers as an example Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting). See Lessig, *Cyberspace*, *supra* note 234, at 872-73 (noting that Justice Brandeis expanded the original scope of a Fourth Amendment violation to include technological advances such as wiretapping).

236. Ronald Dworkin's theory of integrity, for example, might model the use of totalitarian comparison as effectively as the translation theory. Integrity in law, in Dworkin's view, requires decisionmakers to "assume, so far as this is possible, that law is structured by a coherent set of principles about justice and fairness and procedural due process" and to decide cases that come before them by deriving and applying those underlying principles. RONALD DWORKIN, *LAW'S EMPIRE* 243 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]. This is particularly the case, Dworkin argues, with regard to individual rights as against the government. See *id.* at 368; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977) (arguing that interpretation of the Bill of Rights "must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be . . . prepared to frame and answer questions of political morality"). The ultimate goal, in Dworkin's view, is to articulate "an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future." DWORKIN, *LAW'S EMPIRE*, *supra*, at 227-28.

This provides another way to understand totalitarian comparisons. Decisionmakers deriving the underlying principles from the text and prior interpretation of the criminal procedure amendments surely would have incorporated ideas of "justice and fairness," or "political morality," which developed in light of their exposure to European totalitarianism. The incorporation of the comparisons in the opinions simply demonstrates the centrality of those experiences to their vision of what rights an individual accused of a crime ought to have to be protected from the reach of an angry government.

The phenomenon of totalitarian comparison might fit effectively into a number of theories of constitutional interpretation. There are too many to catalog systematically here; but the utility of the phenomenon as a concrete example of the application of theory suggests its significance.

237. See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 150 (1990) (arguing that Justice Brandeis's approach in *Olmstead* was that interpretation of the Constitution

resulting range of potentially faithful "translations" is accordingly broad.²³⁸ The model therefore lacks much in the way of predictive power; interpreters with an expansive view of a particular constitutional guarantee will define the underlying "values" broadly, enabling an expansive translation. It would be difficult to describe any of a wide range of plausible results as more faithful to the Constitution than any other.

As a descriptive model, however, the translation concept has real value in helping us understand the uses of totalitarian comparison.²³⁹ The criminal procedure amendments can be seen narrowly, as tailored responses to particular grievances, or, more broadly, as bulwarks against governmental tyranny. This underlying value had then to be considered in light of the modern context. That context, in the postwar period, included the understanding of totalitarianism, which reflected a profound shift in the concept of what tyranny was. Not simply a way to target particular categories of opponents of the regime, as the Framers might have seen it,²⁴⁰ the abuse of police authority came to symbolize the abusive power of repressive regimes, "police states," whose very existence threatened open and

should not be limited to an understanding of the specific "evils and mischiefs which gave rise to the language in the first place . . . but should be guided by an understanding of the general evils, or goods, of which these are local examples").

238. The problem is endemic to constitutional interpretation. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 790-91 (1983).

239. Some consider this very enterprise invalid. See Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 411 (1997). Professor Klarman critiques at some length the "translation enterprise," challenging in particular its application to the "criminal procedure provisions of the Bill of Rights," which "were almost certainly designed with the objective of protecting religious and political dissenters, rather than the sort of criminals (murderers, rapists, robbers) they protect today." *Id.* (footnote omitted). Relying on Professor Stuntz, he argues that "criminal procedure protections initially were a mechanism for limiting the government's substantive regulatory agenda—a supplement to the free speech and free exercise notions enshrined simultaneously in the First Amendment," and asks plaintively, "[h]ow can one possibly translate concepts from such a world into our own and make any pretense that we are deriving answers from the Framers' intent rather than smuggling in our own?" *Id.* Professor Klarman has fallen prey to his own critique, however; he has "selected an arbitrarily low level of generality at which to translate." *Id.* at 398. While I appreciate Professor Stuntz's thesis and do not quarrel with his conclusions either about the nature of the history that inspired the need for the criminal procedure amendments or their immediate perceived effects, the intent behind those amendments can still be conceived at several levels of generality. To argue for the more general—the need to limit tyranny, which is the use of the awesome power of the government to invade the very core of the individual—is to see the appropriateness of translation. To argue the contrary would suggest the illegitimacy of the use of the comparisons in the context in which they are discussed in this Article.

240. See Stuntz, *supra* note 51, at 439-41, 447.

democratic society.

What changed circumstances required the guarantees of constitutional criminal procedure to be addressed in light of their contemporary context? The tools and capacities of abusive government—and, with them, the nature of tyranny—had changed irrevocably. Those activities that posed, to the Framers, the greatest threat of government invasion and police abuse were those activities possible and widely engaged in at the time: broad and unparticularized searches, freely authorized, for seditious material (the English precedents) or goods held in violation of customs laws (the writs of assistance). By contrast, the postwar world had to acknowledge the use of widespread electronic surveillance as a routine tool of governmental control, the use of torture not only as a means of securing confession, but also as a means of subduing and intimidating the civilian population, and the use of police authority directed at the control of thought and the manipulation of mass psychology.²⁴¹

Moreover, the threats to individual freedoms posed by totalitarianism differed from the historical threats precisely because of their perceived imminence to the postwar judges. Those threats invoked a visceral and passionate response rather than a purely intellectual one. In that sense, they resembled the Framers' view of the criminal procedure amendments better than a dispassionate retelling of warmed-over history.

This is not, of course, translation in its narrowest sense. The courts were not confronted with a word or phrase of commonly understood meaning that had come over the passage of time to include other commonly understood members of its category,²⁴² or a situation in which technological innovation had placed within the appropriate purview of the amendments something that simply did not exist in the Framers' era.²⁴³ In those situations, the "translation" metaphor is self-evident; it suggests a reinterpretation of narrow and

241. Professor Lessig would call this a problem of "forward" translation—reading the text so that it has the same meaning in the present as the original text in its original context, with an eye towards carrying the text forward to us, rather than carrying us back to the world of the text. See Lessig, *Fidelity and Constraint*, *supra* note 229, at 1371.

242. One example of this would be interpreting the terms "army" and "navy" to include the Air Force, even though at the time of the Framers there was no such thing as an air force. See *id.* at 1377.

243. For example, the Court has concluded that the Fourth Amendment applies to telephone conversations, although they are not "persons, houses, papers or effects." See *Katz v. United States*, 389 U.S. 347, 359 (1967); Lessig, *Fidelity and Constraint*, *supra* note 229, at 1378-79.

precise language in light of changed circumstances.

But a more profound and more complex problem confronted courts in the postwar era: they now understood the most imminent and most frightening threats of abuse of governmental authority differently than the constitutional drafters had perceived them. To understand the constitutional criminal procedure guarantees properly, they had to be viewed from the perspective of the most imminent and frightening contemporary examples of police overreaching.

Because the template from which the postwar jurists drew their concept of police overreaching differed strikingly from the vision of the original Framers and Ratifiers, they interpreted the constitutional protections in light of the threat posed by particular types of police conduct they viewed as the most imminent and dangerous to them, and therefore critical for constitutional redress.²⁴⁴ These jurists sought to apply the constitutional provision as the Framers had: in the face of the most imminent threats they perceived to individual dignity and personal autonomy.

Ironically, this may be consistent with "original intent" in more ways than one. While the historical examples of tyranny may be intellectually useful in understanding the Framers' intentions, they are not compelling or meaningful to contemporary constitutional interpreters.²⁴⁵ Even if they are familiar with the history underlying the Fourth and Fifth Amendments, they do not care about it very much. The historical antecedents of the amendments lack immediacy and pose no threat to a contemporary jurist. Any commitment they engender is intellectual rather than passionate. Use of totalitarian comparisons, by contrast, put the judiciary very much in the Framers' positions. To understand the Framers' perspective on police authority, it made sense to contextualize the dispute—to consider threats posed by police power to individual liberty in the light of those threats that seemed most immediate *to them*—and to interpret the rule in light of that context. The recency of the cases upon which the Fourth Amendment was based imbued it with a certain amount of what can only be described as passion. The postwar judges sought

244. See Monaghan, *supra* note 178, at 363 (referring to "a set of provisions characterized by the need for ongoing interpretation and application not to the views of contemporary society, but to the contemporary manifestations of problems identified by the Framers" (emphasis omitted)).

245. Everyone in the colonial era remembered them—or at least that is the assumption on which contemporary Fourth Amendment scholars have operated. See *supra* note 200 and accompanying text.

to read the Amendment that way as well.²⁴⁶ The invocation of totalitarian comparisons evidenced “the vulnerability of the liberties [the Constitution] was designed to protect”²⁴⁷ in a way that musty history could not.

IV. CONCLUSION

The impulse to compare is natural. Confronted with the perennial conflict between the need for effective law enforcement and the need for effective limits on police power, judges in the postwar era considered that balance in light of what they perceived as profound, imminent threats to individual autonomy and the social order. Their opinions reflected these contemporary concerns by making express reference to totalitarianism, contrasting American constitutional values with the negative models that were most current at the time they wrote. They viewed the issue of what our Constitution permits the police to do as central to what kind of society America would be, and treated the examples they included as modern equivalents of those examples of tyranny the Framers confronted. The incorporation of totalitarian comparisons reflects this process of “translating” the constitutional criminal procedure guarantees in light of their contemporary context. That these comparisons were widely and routinely used without comment suggests an unconscious acceptance of this contextual model of constitutional interpretation. What made this possible was the shared consensus about that context. Abhorrence of the police state practices associated with Nazism and, later, Soviet totalitarianism was generally shared and profoundly felt. Such widespread consensus informed the context and enabled it to play a significant role in constitutional adjudication.

Where does this leave us with regard to the question with which we began? Is the current tendency to invoke Nazism in criticizing abuses of police authority the outrage some would make it, or is it part of a strong and lasting constitutional tradition? Neither is

246. Professor Lessig would call this “backward translation.” Lessig, *Fidelity and Constraint*, *supra* note 229, at 1375. “Forward translation carries meaning into this context; backward translation lets us travel back to the meaning in an original context.” *Id.*

247. *United States v. Alexander*, 755 F. Supp. 448, 453 (D.D.C. 1991), *aff’d*, 961 F.2d 964 (D.C. Cir. 1992); *see id.* (“[T]he War on Drugs and the activities of the Metropolitan Police Department dedicated drug interdiction officers make timely and relevant reminders of the Eighteenth Century origins of the Fourth Amendment and of more contemporary events which *evidence the vulnerability of the liberties it is designed to protect.*” (emphasis added)).

correct. The development of contemporary totalitarianism profoundly shaped American thought about the power of the police and made this issue central to the question of the nature and character of American society. That particular police practices, if permitted, will open the door to totalitarianism remains a potent argument. The argument is not, however, as potent as it used to be. Symbols that are the subject of casual epithets or television humor are unlikely to continue to reflect profound and deeply felt commitments.

Have recent events provided an example of sufficient immediacy and consensus that totalitarian comparison can figure meaningfully in constitutional interpretation? None yet seems to have presented itself, and indeed the reverse argument—that threats to the social order present a context requiring a less, rather than more, restrictive reading of the criminal procedure amendments—seems more frequently articulated.²⁴⁸

Almost by definition, context is the product of a particular moment. In the postwar period, the horror engendered by fascism's potential offered a shared, immediate, and critically important context for understanding and articulating the necessity of limits on police authority. Fifty years later, totalitarian comparisons run the risk of losing the weight and immediacy that characterized their contemporaneous use. Today's users understand them but do not feel their imminence and importance the way the postwar writers did. Our comprehension of the totalitarian comparisons of the postwar period, like our understanding of the eighteenth century, may be

248. "Terrorism" might be the next shared "context" on which background the criminal procedure amendments are interpreted. Note recent suggestions by the Secretary of Defense that "[t]errorism is escalating to the point that Americans soon may have to choose between civil liberties and more intrusive means of protection." Patrick Pexton, *Terrorism Threatens Americans' Civil Liberties, Defense Chief Says*, SACRAMENTO BEE, Sept. 15, 1997, at C2 (paraphrasing Secretary of Defense William Cohen); see also Robert Shogan, *Civil Liberties, Paranoia Among Costs of Anti-Terrorism War*, L.A. TIMES, June 24, 1997, at A5 (noting the increasing cost and lack of privacy "as a result of . . . anti-terrorism measures"). The contention that terrorism poses a profound threat to the democratic way of life suggests an obvious parallel with the rhetoric of anti-totalitarianism. See Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 122-23, 143-44. Professor Porras's argument that rhetoric is used to construct the concept of "terrorism" to define the terrorist as a monstrous "other" requiring extraordinary means to suppress, supports this possibility. See *id.* at 121. Professor Porras notes that "[t]he terrorist is transformed . . . from an ordinary deviant into a frightening, 'foreign,' barbaric beast at the same time that extra-normal means are called for to fight terrorism" and that "[s]ince terrorists are never imagined as anything other than terrifying, blood-thirsty barbarians, ordinary law is understood to be deficient or insufficient to deal with them." *Id.*

distant or even second-hand; the comparisons have become part of the historical recitation of tyranny rather than its contemporary context. They run the risk of becoming the “writs of assistance” of the next century—events invoked to stand for a passionate insistence in the individual’s right to autonomy in the face of police authority, which the speaker no longer recalls and can no longer express with the fervor that characterizes a true believer. They run the risk of joining a rote recitation, part of a list of distant outrages. They run the risk of becoming mere words.

