

THE BILL OF RIGHTS AS A CODE OF CRIMINAL
PROCEDURE:

JUDGE HENRY FRIENDLY'S PRESCIENT PREDICTION

JOHN J. DAVIS¹
LESLEY B. GLADDEN²

INTRODUCTION

In October 1965, Judge Henry Friendly, then a judge on the United States Court of Appeals for the Second Circuit, published what would become one of the most widely cited law review articles in the field of criminal law: *The Bill of Rights as a Code of Criminal Procedure*.³ The article made several prescient predictions, many of which are vividly illustrated in the fictitious case of Joe Doak who Friendly used as an example of the consequences of the Warren Court's recent decisions in the area of criminal procedure at that time.⁴ This article analyzes the case of Joe Doak under today's legal framework, and explains the significance of Judge Friendly's timeless article by demonstrating that Friendly's article was far more

¹ John J. Davis is an Assistant Attorney General assigned to the Criminal Appeals Division in the Office of the Attorney General for the State of Alabama. He has practiced in the field of appellate law for twenty years and while attending law school served as a paralegal in the Appeals Division of the Attorney General's Office. During his career, he has filed hundreds of briefs on behalf of both the State of Alabama and clients while engaged in the private practice of law before the U.S. Supreme Court, the 11th Circuit Court of Appeals, all of the Federal District Courts in Alabama as well as all of Alabama's appellate courts. Mr. Davis graduated with a B.S. in Justice and Public Safety from Auburn University Montgomery in 1988 and received his law degree from Jones School of Law in 1994.

² Lesley B. Gladden currently serves as a career law clerk for the Honorable Harwell Davis, United States Magistrate Judge for the Northern District of Alabama (Huntsville). After three years in private practice, Gladden served as a career law clerk for Magistrate Judge Paul W. Greene of the Northern District of Alabama and for the last sixteen years has served as the career law clerk to the Honorable Harwell Davis. Ms. Gladden received her B.S. Degree in General Management from the University of Alabama in 1982 and received her law degree in 1985. Upon graduation from law school, she clerked for the Honorable E.B. Haltom, Jr., United States District Judge for the Northern District of Alabama.

³ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

⁴ See *id. passim*.

influential than most observers credit it. This article makes a strong case that Friendly's article was a turning point in the Warren Court's judicial revolution in the 1960s. The impact of Judge Friendly's article is due to its prescient predictions which were suggested by a jurist whom many believe to have been the greatest judge of his era.

A TRULY REMARKABLE MAN

Henry Jacob Friendly was born to a middle class family in upstate New York in 1903.⁵ While attending Harvard Law School, he compiled one of the best academic records in the history of the school.⁶ Not surprisingly, Friendly served as president of the Harvard Law Review.⁷ While at Harvard, Friendly was selected to study, teach, and perform research for future Supreme Court Justice Felix Frankfurter.⁸ Upon graduation from Harvard Law School, Friendly began a clerkship for Justice Louis Brandeis of the United States Supreme Court.⁹ After his clerkship, Friendly entered private practice where he became a Wall Street lawyer.¹⁰ After three decades of private practice, where he served as general counsel for Pan American Airways, Friendly joined the bench in 1959.¹¹

Appointed by President Eisenhower to the Second Circuit Court of Appeals, Friendly wrote some 1,000 opinions over the next twenty-seven years along with several law review articles that made significant contributions in their respective fields.¹² Seven of his law

⁵ Aaron P. Brecher, *Some Kind of Judge: Henry Friendly and the Law of Federal Courts*, 112 MICH. L. REV. 1179, 1180 (2014).

⁶ *Id.* Students who had averages substantially less than Friendly's earned magna cum laude degrees. See DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 26 (2012). Friendly's average at Harvard, according to his biographer David Dorsen, equated to an A++ average. *Id.*

⁷ DORSEN, *supra* note 6, at 25.

⁸ *Id.* at 26. During Friendly's third year of law school, Frankfurter asked Friendly to work under him for a year following graduation, but Friendly rejected the offer. *Id.*

⁹ *Id.* This pairing was ironic because of the debate at Harvard as to whether Friendly or the legendary Supreme Court Justice had the highest average in the history of the school. *Id.* at 27.

¹⁰ Adam J. White, *Ahead of His Class: How a Judge Who Never Served on the Supreme Court Quietly Shaped American Law in the 20th Century*, WALL ST. J. (April 2, 2012, 10:30 AM) <http://online.wsj.com/news/articles/SB10001424052702304537904577279432126691786>.

¹¹ Frederick T. Davis, *On Becoming a Great Judge: The Life of Henry J. Friendly*, 91 TEX. L. REV. 339, 342 (2012) (reviewing DORSEN, *supra* note 6).

¹² See Brecher, *supra* note 5, at 1181–82 (“Friendly was particularly famous for his contributions to administrative law, federal jurisdiction, securities law, and criminal procedure.”). For discussions related to Friendly's contributions in specific

clerks later became federal judges, the most famous being Chief Justice John Roberts.¹³ Henry Friendly also received an honor while living that very few Americans, much less federal judges, receive: The Presidential Medal of Freedom, the nation's highest civilian honor.¹⁴ At the time of his death in 1986, Chief Justice Warren Burger praised Friendly as the most qualified judge eligible to be appointed to the United States Supreme Court; furthermore, Justice Thurgood Marshall called Friendly "a man of the law."¹⁵ Erwin Griswold, former Dean of Harvard Law School and a former Solicitor General of the United States, lauded Judge Friendly as the "ablest lawyer of [his] generation."¹⁶ Judge Richard Posner of the Seventh Circuit described Friendly as "the greatest federal judge of his time."¹⁷ Judge Posner further noted that Friendly's judicial opinions "exhibited greater staying power than that of any of his contemporaries on the federal courts of appeals."¹⁸ In fact, Henry Friendly is almost certainly the only federal jurist to have a law review article written about his suicide, perhaps the most unique tribute to his life.¹⁹ As a final measure of how Judge Friendly's character and reputation continue to be revered in the legal establishment, Justice Antonin Scalia hosted a book party for author David Dorsen upon the publication of his superb biography of Friendly in May of 2012.²⁰ Chief Justice John Roberts, along with

areas of law, see David P. Currie, *On Blazing Trails: Judge Friendly and Federal Jurisdiction*, 133 U. PA. L. REV. 5 (1984); Frank I. Goodman, *Judge Friendly's Contribution to Securities Law and Criminal Procedure: "Moderation is All,"* 133 U. PA. L. REV. 10 (1984); A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1 (1999); Margaret v. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of Judicial Reputation*, 50 SMU L. REV. 777 (1997).

¹³ See Brecher, *supra* note 5, at 1183.

¹⁴ See Erwin N. Griswold, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1720, 1721 (1986).

¹⁵ Kirk Johnson, *A Solemn Tribute to Henry Friendly, A Quiet Giant of the Appeals Bench*, N.Y. TIMES, June 10, 1986, available at <http://www.nytimes.com/1986/06/10/nyregion/a-solemn-tribute-to-henry-friendly-a-quiet-giant-of-the-appeals-bench.html>.

¹⁶ Griswold, *supra* note 14, at 1720.

¹⁷ Richard A. Posner, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1724, 1724 (1986).

¹⁸ *Id.*

¹⁹ See Paul Gerwitz, *Commentary, A Lawyer's Death*, 100 HARV. L. REV. 2053, 2053-54 (1987) (rationalizing Friendly's March 1986 suicide, which was the result of his despair at his failing health and the recent death of his wife of fifty-four years).

²⁰ The Reliable Source, *A Truly Exclusive Washington Party: Antonin Scalia Hosts Justices to Toast New Henry Friendly Bio*, WASH. POST, June 12, 2012, http://www.washingtonpost.com/blogs/reliable-source/post/a-truly-exclusive-washington-party-antonin-scalia-hosts-justices-to-toast-new-henry-friendly-bio/2012/04/30/gIQAR2vYsT_blog.html.

Justices Stephen Breyer, Samuel Alito, Anthony Kennedy, and Sonia Sotomayor, attended the party.²¹

One way in which Henry Friendly was unique as a jurist was his willingness to share his beliefs and philosophy of judging in an era when most of his peers did not.²² In 1961, Friendly published the law review article, “Reactions of a Lawyer–Newly Become Judge.”²³ In that article, Friendly opened with the admission that perhaps the most striking thing about becoming a judge was that signing his name put forth “‘the whole power of the state’ . . . to carry out his will.”²⁴ Friendly further described the optimal judge as one who was disinterested in the dispute, experienced, and wise.²⁵ At the core of Friendly’s judicial philosophy was his belief that a judge should maintain stable rules; as one of his former clerks put it, “he understood the need for predictability and for protecting reliance.”²⁶ Those that knew Friendly described him as “a great chess player” who could foresee remote dangers that might result from a decision.²⁷ Friendly’s reputation for academic brilliance complemented his reputation as a moderate jurist who essentially possessed no political or even ideological agenda.²⁸ Though Friendly remains to this day one of the most prominent critics of what many view as the most expansive decisions of the Warren Court, Friendly was no conservative activist.²⁹ Friendly insisted on the right of defendants to receive evidence that was exculpatory in nature and their right to effective cross-examination.³⁰ Indeed, even in his most influential law review article challenging the Warren Court’s criminal justice jurisprudence, Friendly lauded the Court’s many decisions in the field of criminal procedure by stating that “there are few brighter pages in the history of the Supreme Court.”³¹ It is

²¹ *Id.*

²² *Cf.* Henry J. Friendly, *Reactions of a Lawyer–Newly Become Judge*, 71 *YALE L.J.* 218 (1961) (discussing judicial philosophy and general impressions of judgeship).

²³ *Id.* at 218.

²⁴ *Id.* (quoting Oliver Wendell Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 167 (1920)).

²⁵ *See id.*

²⁶ Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 *U. PA. L. REV.* 1, 4 (2010); *see also* Michael Boudin, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/michael-boudin> (stating that Judge Boudin clerked for Judge Friendly after Boudin’s graduation from Harvard Law School).

²⁷ Michael Boudin, *Friendly, J., Dissenting*, 61 *DUKE L.J.* 881, 888 (2012).

²⁸ *Id.* at 882–85, 895–96.

²⁹ *Id.* at 889, 896.

³⁰ *Id.* at 889.

³¹ *See* Friendly, *supra* note 3, at 929–31.

from this perspective that Friendly's criticism and analysis flowed,³² and why, to this day, his concerns are still considered relevant by legal scholars, attorneys, and jurists.³³

ESCOBEDO V. ILLINOIS AND THE STATUS OF CRIMINAL PROCEDURE IN 1960

On January 20, 1960, police arrested Danny Escobedo without a warrant and brought him to the station house for interrogation.³⁴ Escobedo was a suspect in the death of his brother-in-law who died the day before after a fatal gunshot.³⁵ Escobedo made no statement to the investigating officers and police held him until 5:00 pm when he was released pursuant to a writ of habeas corpus served by his attorney.³⁶ On January 30, police arrested Escobedo and his sister after an alleged co-conspirator confessed to police that Escobedo fired the fatal shots that killed his brother-in-law.³⁷ Escobedo requested to speak with his attorney.³⁸ In fact, Escobedo's attorney was attempting to contact his client, but was denied all access by the police except for a fleeting glance he was able to exchange with Escobedo while he was being questioned.³⁹ It would later turn out that Escobedo asked for his attorney on several occasions, but police told him that his attorney did not want to see him.⁴⁰ That is not all that occurred at the police station that fateful night. A Spanish-speaking police officer was sent in to speak with Escobedo and told him that if he and his sister gave statements implicating their alleged co-conspirator, then they would be allowed to go home.⁴¹ Eventually, Escobedo did just that and, unfortunately for Escobedo, implicated himself in the murder.⁴²

³² See *id.* at 930–31 (“In an effort to place my remarks in proper setting, let me proclaim at the outset the belief that there are few brighter pages in the history of the Supreme Court than its effort over the past forty years to improve the administration of criminal justice.”).

³³ See, e.g., Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 557 (2013) (noting Judge Easterbrook's contemporary agreement with Judge Friendly's past concerns regarding criminal procedure and its interpretation under the Bill of Rights).

³⁴ See *Escobedo v. Illinois*, 378 U.S. 478, 479 (1964).

³⁵ See *id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 480.

⁴⁰ *Escobedo*, 378 U.S. at 481.

⁴¹ *Id.* at 482.

⁴² *Id.* at 483.

The State convicted Escobedo of murder, and his conviction was later reversed by the Illinois Supreme Court.⁴³ The court, however, later withdrew that decision on rehearing.⁴⁴ The United States Supreme Court found in its groundbreaking decision that when a process shifts from being investigative to accusatory, the right to counsel attaches.⁴⁵ To hold otherwise, the Court concluded, would make a trial nothing more than an appeal from a confession and place many criminal defense attorneys in the position of being able to do effectively nothing for their clients.⁴⁶ The court seemed to go out of its way, in the opinion of some observers, to scold the police for not using better law enforcement tactics and for not relying more on investigation than simply trying to exact confessions from those suspected of committing a crime.⁴⁷

The uproar over the court's *Escobedo* decision was immediate. Justice Stewart's dissent rebuked the majority for converting a police investigation into a trial.⁴⁸ Justice Byron White went even further by speculating that the Court's decision would require police cars to have public defenders riding along with them to advise criminal suspects of their rights.⁴⁹ The sweeping language that the court used, along with the broad implications of its decision, alarmed both the courts and the police.⁵⁰ *Time* magazine went so far as to put Escobedo's mug shot on its cover along with the headline "Moving the Constitution into the Police Station."⁵¹ It was in this legal and political environment that Friendly went about his work in challenging the basis of the Supreme Court's decision in *Escobedo*. It was, and still is, a "great debate" over the role of the courts and the legislature in forming this nation's rules of criminal procedure.⁵²

⁴³ *Id.* It is perhaps not a well-known fact that not only was Escobedo's conviction reversed by the state court, but the actions of the police in denying Escobedo his right to counsel violated Illinois law at the time. *See id.* at 481 n.2 (quoting the Illinois statute in effect at the time of Escobedo's arrest).

⁴⁴ *Id.* at 483-84.

⁴⁵ *Escobedo*, 378 U.S. at 492.

⁴⁶ *Id.* at 487-88.

⁴⁷ *See id.* at 485.

⁴⁸ *Id.* at 494 (Stewart, J., dissenting).

⁴⁹ *Id.* at 496 (White, J., dissenting).

⁵⁰ *E.g.*, Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L.J.* 1, 10 (1995) ("The sweeping language and broad implications of *Escobedo* greatly troubled, one might even say alarmed, most law enforcement officials and many members of the bench and bar.").

⁵¹ *TIME*, April 29, 1966, at cover.

⁵² *See* Friendly, *supra* note 3, at 929.

THE BILL OF RIGHTS AS A CODE OF CRIMINAL
PROCEDURE

Friendly began his article by noting with approval that the American Bar Association and the American Law Institute's model penal code of pre-arraignment procedure recently acted to put forth new standards for the field of criminal justice in this country and expressed concern that the court's decisions in these areas might actually harm efforts at meaningful reform.⁵³ Friendly then quickly turned to what he saw as the real issue: the desirability of detailed rules of criminal procedure being set out by the Supreme Court.⁵⁴ Friendly noted that because the court was implementing these detailed rules of criminal procedure, the only option left for those who disagreed with the court's decisions were either through constitutional amendment or changes in the court's membership.⁵⁵ One need look no further than the issue of abortion to see how Friendly's concerns have played out in the area of privacy and sexual freedom. While efforts to overturn *Roe v. Wade* have subsided as far as opponents seeking a constitutional amendment to overturn it, confirmation hearings for Supreme Court justices have been turned into contentious events that often result in public spectacles, reflecting poorly on all involved.⁵⁶

⁵³ *Id.* at 929–30.

⁵⁴ *Id.* at 930.

⁵⁵ *Id.*

⁵⁶ See generally, e.g., Ralph Chester Otis V, *The Supreme Court Confirmation Process and its Implications* (May 6, 2014) (unpublished thesis, Bucknell University) (on file with Bucknell Digital Commons), available at http://digitalcommons.bucknell.edu/cgi/viewcontent.cgi?article=1277&context=honors_theses (discussing contention in the U.S. Supreme Court confirmation process and presenting empirical data to support theories of increased contention and political division in recent years). Friendly addresses some of these concerns in more detail in another substantial article, *The Gap in Lawmaking—Judges Who Can't and Lawmakers Who Won't*. See generally Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Lawmakers Who Won't*, 63 COLUM. L. REV. 787 (1963) (discussing growth of administrative law and congressional oversight, and noting the judiciary's diminished capacity to carve out clear legal principles). With regard to the issue of abortion, Friendly authored a decision that would have most likely decided the issues in *Roe v. Wade* in 1970. See A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1035, 1043 (2006). The abortion case in question was mooted by the legislature. *Id.* at 1043 n.32 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 385 n.81 (1985) (quoting Judge Friendly's remarks on the case)). Friendly correctly forecast the controversy that would follow if the court became involved in the issue. *Id.* at 1040. Friendly's draft opinion in the case became public after his death due to the efforts of his law clerk at the time, Judge A. Raymond Randolph, who now sits on the United States Court of Appeals for the

Friendly's article next employed the hypothetical case of Joe Doak, a criminal defendant in a narcotics case, to illustrate his concerns.⁵⁷ The case begins with a policeman who sees a man carrying a brown paper bag while emerging from a building.⁵⁸ This man is a well-known drug addict who informs the officer that he just bought heroin from Doak at apartment number three in the building.⁵⁹ This heroin addict does not have a proven record of reliability as an informer for the police, but the policeman, having heard from others about Doak's drug dealing, goes to the apartment to confront Doak.⁶⁰ Upon gaining entrance to the apartment, the officer sees Doak handing a "glassine envelope" which, of course, the policeman seizes and promptly arrests Doak.⁶¹ The prosecutor files an information⁶² and a magistrate sets Doak's bail at \$5,000, which Doak is unable to make.⁶³ At Doak's trial, the police officer testifies that Doak made an admission and the state introduces the "glassine envelope" as well as a report from a chemical laboratory about its contents as evidence.⁶⁴ Doak declines to take the stand in his own defense but does offer the testimony of a relative that Doak only sold drugs to "minister to his addiction."⁶⁵ The prosecutor asks the judge to charge the jury that they can draw an inference from Doak's silence, while the defense seeks a jury instruction for the jury not to consider Doak's silence.⁶⁶ The trial court refuses to give either instruction.⁶⁷ The jury convicts Doak by a 10–2 margin due to the fact that this jurisdiction permits non-unanimous jury verdicts, and Doak receives a one-year prison sentence.⁶⁸

Friendly, writing his analysis of the above facts in 1965, found no less than ten separate points of error that Doak could claim on appeal: (1) the arrest was unlawful because of the lack of evidence as to the informant's reliability and the failure of the officer to se-

District of Columbia Circuit. *Id.* at 1035 n.1. Judge Randolph's address at a memorial lecture in 2005 was published shortly thereafter. *Id.* at n.1.

⁵⁷ Friendly, *supra* note 3, at 931.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² An information is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶³ Friendly, *supra* note 3, at 931.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.*

cure an arrest warrant;⁶⁹ (2) the search of Doak's residence was illegal;⁷⁰ (3) the use of Doak's admission made to the officer violated his right against self-incrimination since he was not advised of his right to remain silent;⁷¹ (4) the use of Doak's admission to the officer violated his Sixth Amendment right to counsel;⁷² (5) the admission of the chemist's report concerning the contents of the envelope seized from Doak deprived him of his Sixth Amendment right to confrontation;⁷³ (6) Doak's prison sentence was cruel and unusual because he was compelled to commit his crime by his addiction, which violated his Eighth Amendment rights;⁷⁴ (7) the Fifth Amendment required the trial court to instruct the jury to "draw no inference from Doak's failure to testify;"⁷⁵ (8) "[p]roceeding by information rather than by indictment violated the [F]ifth [A]mendment";⁷⁶ (9) the state statute that allowed for less than a unanimous verdict violated the Sixth Amendment's guarantee of a jury trial;⁷⁷ and (10) the excessive bail imposed by the trial court impaired Doak's ability to consult with his attorney and thus violated his rights under the Sixth and Eighth Amendments.⁷⁸ Despite these arguments, Friendly concluded his analysis by noting that he could find nothing offensive or unconstitutional regarding the behavior of the police or the rulings by the trial court in Doak's case.⁷⁹

Under the jurisprudence at the time Judge Friendly's article was published in 1965, the case against Doak could withstand each of the ten proffered attacks. However, beginning in 1966 with the Supreme Court decision in *Miranda v. Arizona*,⁸⁰ the outcome of Joe Doak's case started to change dramatically. The Warren Court ac-

⁶⁹ Friendly, *supra* note 3, at 932 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

⁷⁰ *Id.* (citing *Ker v. California*, 374 U.S. 23 (1963)).

⁷¹ *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring); *Rochin v. California*, 342 U.S. 165, 174, 177 (1952) (Black, J. concurring)).

⁷² *Id.* (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).

⁷³ *Id.* (citing *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965)).

⁷⁴ *Id.* (citing *Robinson v. California*, 370 U.S. 660 (1962)).

⁷⁵ Friendly, *supra* note 3, at 932 (citing *Griffin v. California*, 380 U.S. 609, 615 n.6 (1965)).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.* at 932-33. "I see nothing in Doak's case which would suggest, even remotely, that the state contravened a scheme of 'ordered liberty' or acted in a manner 'repugnant to the conscience of mankind.'" *Id.* at 933 (quoting *Palko v. Connecticut*, 302 U.S. 319, 323, 325 (1937)).

⁸⁰ 384 U.S. 436 (1966).

celerated the process of judicial declaration of constitutional rights in criminal cases, and the Burger and Rehnquist Courts continued the imposition of the rule of law in the criminal procedure context.⁸¹ Since Chief Justice Roberts assumed the role of Chief Justice in 2005, the decisions expanding, contracting, and refining the criminal procedure jurisprudence have created some confusion and left the lower federal courts to discern the Supreme Court's will on some matters of constitutional construction.⁸²

This article revisits Judge Friendly's ten points of contention in Doak's case and to see how the Bill of Rights has been interpreted in the criminal procedure context since 1965. Accordingly, in the following sections this article will analyze the legal points of Mr. Doak's case and the Supreme Court's cases that have altered the ultimate fate of the case against Mr. Doak.

i. Lawfulness of Arrest, Search and Seizure

To reintroduce our factual scenario, a policeman encounters a known addict carrying a brown paper bag, but the addict has not been established as a reliable informant.⁸³ The addict identifies Joe Doak as his supplier and states that Doak is temporarily selling drugs from an apartment.⁸⁴ Is this enough probable cause to allow the policeman to go to the apartment without a warrant?⁸⁵ The

⁸¹ See generally Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 (2002) (comparing judicial approaches to criminal procedure questions during the Warren Court, Burger Court, and Rehnquist Court eras).

⁸² See generally Erwin Chemerinsky, 43 TEX. TECH L. REV. 13 (2010) (discussing the Roberts Court's approach to criminal procedure questions and noting that the Court is willing to make drastic changes to the law in this area).

⁸³ Friendly, *supra* note 3, at 931.

⁸⁴ *Id.*

⁸⁵ In a similar case, the Supreme Court held that probable cause to search the defendants' apartment was established by an affidavit based principally on an informant's tip. See *Jones v. United States*, 362 U.S. 257, 271-72 (1960), *overruled on other grounds by* *United States v. Salvucci*, 448 U.S. 83 (1980). The informant claimed to have purchased narcotics from the defendants at their apartment, and the affiant stated that he had been given correct information from the informant on a prior occasion. *Id.* at 271. This, and the fact that the defendants had admitted to police officers on another occasion that they were narcotics users, sufficed to support the magistrate's determination of probable cause. See *id.* at 268-69, 271-72. However, *Jones* differs from Doak in that the officer had not previously received correct information from the informant and did not seek a warrant first. Compare Friendly, *supra* note 3, at 931 (informant did not have a history as a reliable informant and officer did not seek a search warrant), with *Jones*, 362 U.S. at 268-69 (informant was known as a reliable informant and officers sought a search warrant based off informant's testimony).

Supreme Court has fine-tuned the concept of probable cause over the years, ultimately leaving the lower courts determine whether probable cause is established in a particular case largely on a case-by-case basis.⁸⁶

The Supreme Court set out the definition of probable cause in *Illinois v. Gates*,⁸⁷ which abrogated the two-part test originally set out in *Aguilar v. Texas*.⁸⁸ In determining whether probable cause to issue a warrant exists, the Court noted:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.⁸⁹

The standard for a warrantless arrest also is probable cause, defined in terms of facts and circumstances “sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.”⁹⁰ “[A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.”⁹¹

Under current law, it is unlikely that the informant’s tip would establish probable cause for Doak’s warrantless arrest. For an informant’s tip to provide probable cause, the informant should be

⁸⁶ See generally Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789 (2013) (discussing application of U.S. Supreme Court precedent in judicial probable cause analysis and noting various probable cause methodologies employed in state courts and lower federal courts); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. TECH L. REV. 951 (2003) (discussing the development of probable cause in the American legal system, the application of probable cause by the courts in various situations, and a contemporary need for reasonableness in the probable cause standard); Marc Zamsky, *Criminal Procedure—Inconsistent Application of Good Faith: A Circumvention of Fourth Amendment Rights—United States v. Taxacher*, 902 F.2d 867 (11th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991), 64 TEMP. L. REV. 801 (1991) (noting diverse application of probable cause doctrine in lower federal courts).

⁸⁷ *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

⁸⁸ *Id.* at 238. *Aguilar v. Texas* created a two prong test for every case which must be independently satisfied to sustain a determination of probable cause: 1) the “veracity” prong required sufficient facts to determine the informer’s credibility and reliability of his information, and 2) the “basis of knowledge” prong required a showing of the particular means by which the informer obtained the information in his report. 378 U.S. 108, 114–15 (1964); see *Illinois*, 462 U.S. at 228–29.

⁸⁹ *Illinois*, 462 U.S. at 238.

⁹⁰ *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

⁹¹ *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975).

known so that his reputation can be assessed and he can be held responsible if the allegations turn out to be fabricated.⁹² However, “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.”⁹³ Nonetheless, there are situations in which an anonymous tip, suitably corroborated, exhibits “sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.”⁹⁴ In Doak’s case, the informant was not anonymous; however, he had not provided previous tips which turned out to be correct.⁹⁵ Further, the corroboration of the tip was only provided by entry into the apartment which, as discussed below, was impermissible under the circumstances.⁹⁶

Justice Thomas’s dissent in *Groh v. Ramirez*,⁹⁷ joined by Justice Scalia, captures some of the pitfalls awaiting the unwary or uninformed police officer: “The Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. The Court has most frequently held that warrantless searches are presumptively unreasonable, but has also found a plethora of exceptions to presumptive unreasonableness.”⁹⁸ A warrantless search or seizure may be permissible if probable cause supports the search and seizure and exigent circumstances exist.⁹⁹ Exigent circumstances that would be relevant to Doak’s case in-

⁹² See *Adams v. Williams*, 407 U.S. 143, 146–47 (1972). *But see* *Ng Pui Yu v. United States*, 352 F.2d 626, 631 (9th Cir. 1965) (court held that knowledge of defendant’s residence, prior narcotics convictions, and the fact that crewman had gone to the defendant’s residence and returned with narcotics was sufficient to establish probable cause for a warrantless arrest).

⁹³ *Alabama v. White*, 496 U.S. 325, 329 (1990).

⁹⁴ *Id.* at 326–27.

⁹⁵ Friendly, *supra* note 3, at 931.

⁹⁶ See *id.*; see also *infra* text accompanying notes 99–102.

⁹⁷ 540 U.S. 551, 571 (2004).

⁹⁸ *Id.* at 572 (Thomas, J., dissenting) (citations omitted) (comparing examples of presumptively unreasonable warrantless searches in *Katz v. United States*, 389 U.S. 347, 357 (1967) and *Payton v. New York*, 445 U.S. 573, 586 (1980) with exceptions to presumptive reasonableness in *California v. Carney*, 471 U.S. 386, 390–94 (1985) (mobile home searches); *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (inventory warrantless searches are *per se* unreasonable, except, of course, when they are not); *United States v. Ross*, 456 U.S. 798, 800 (1982) (automobile searches); *United States v. Biswell*, 406 U.S. 311, 315–17 (1972) (searches of “pervasively regulated” businesses); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (searches incident to arrest); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534–39 (1967) (administrative searches); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (exigent circumstances)).

⁹⁹ *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (finding warrantless entry into a home unlawful unless both probable cause and exigent circumstances are present).

clude imminent destruction of evidence¹⁰⁰ or the likelihood that Doak would have fled before a warrant could be obtained.¹⁰¹ As discussed above, it is questionable that a warrant could have been obtained based on the informant's tip alone.¹⁰² Nonetheless, the fact that the informant advised that Doak was temporarily selling drugs from the apartment¹⁰³ would weigh in favor of a determination that Doak would have left the apartment before police could obtain a warrant.

Even if the policeman deemed the informant reliable enough to establish probable cause, the policeman entered the apartment without first obtaining permission.¹⁰⁴ In *Payton v. New York*,¹⁰⁵ the Supreme Court noted that searches and seizures inside a home without a warrant are presumptively unreasonable.¹⁰⁶ However, it is unknown whether the apartment from which Doak was selling drugs was his apartment or that of another person.¹⁰⁷ Nonetheless, police should obtain permission from the resident to enter, absent exigent circumstances.¹⁰⁸ Whether the apartment was Doak's or another's, permission to enter is generally required.¹⁰⁹ In *Wilson v. Arkansas*,¹¹⁰ the Supreme Court held that whether or not officers knock and announce their presence and authority before entering a dwelling, as required by common law, it is a factor to be considered in determining the reasonableness of a search under the Fourth Amendment.¹¹¹ However, *Wilson* left the circumstances under which an unannounced entry is reasonable under the Fourth Amendment for the lower courts to determine, noting that "law

¹⁰⁰ See *Kentucky v. King*, 131 S. Ct. 1849, 1856–58 (2011) (finding police-created exigent circumstances do not violate the Fourth Amendment so long as the police did not create the exigency by violating or threatening to violate the Fourth Amendment). In *Kentucky v. King*, exigent circumstances were found when the police smelled marijuana, knocked and announced "police," and heard noises inside which led them to believe evidence was being destroyed. *Id.* at 1853–54, 1863–64. This differs from Doak's case in that the policeman did not have an independent basis, apart from the drug addict's tip, for entering the apartment and did not knock and announce before entering. See Friendly, *supra* note 3, at 931.

¹⁰¹ See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

¹⁰² See *supra* notes 92–96 and accompanying text.

¹⁰³ Friendly, *supra* note 3, at 931.

¹⁰⁴ *Id.*

¹⁰⁵ 445 U.S. 573 (1980).

¹⁰⁶ *Id.* at 586.

¹⁰⁷ See Friendly, *supra* note 3, at 931.

¹⁰⁸ See *Payton*, 445 U.S. at 587–88.

¹⁰⁹ See *id.*

¹¹⁰ 514 U.S. 927 (1995).

¹¹¹ *Id.* at 929.

enforcement interests may also establish the reasonableness of an unannounced entry.”¹¹² Knocking and announcing is not necessary when “circumstances presen[t] a threat of physical violence,” if there is “reason to believe that evidence would likely be destroyed if advance notice were given,”¹¹³ or if knocking and announcing would be “futile.”¹¹⁴ Police need only “have a reasonable suspicion . . . under the particular circumstances” that one of these grounds for failing to knock and announce exists, and the Supreme Court has acknowledged that the bar to “[t]his showing is not high.”¹¹⁵

Once the officer enters the apartment, the “plain view” doctrine comes into play with regard to the seizure of the drugs in the apartment, although an illegal entry bars the plain view doctrine’s application in most circumstances.¹¹⁶ Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.¹¹⁷ However, “[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”¹¹⁸ If the initial entry and arrest were violative of the Fourth Amendment, the seizure of the drugs found in the apartment was also a violation of the Fourth Amendment.¹¹⁹

Under the exclusionary rule, evidence obtained in violation of a defendant’s Fourth, Fifth, or Sixth Amendment rights may not be introduced at trial as evidence of a defendant’s guilt.¹²⁰ The purpose of the exclusionary rule, a judicially created remedy, is to deter police misconduct.¹²¹ If a court permits the introduction of evi-

¹¹² *Id.* at 936.

¹¹³ *Id.*

¹¹⁴ *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

¹¹⁵ *Id.*

¹¹⁶ *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971) (“It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.”).

¹¹⁷ *Id.*; *Ker v. State of California*, 374 U.S. 23, 42–43 (1963).

¹¹⁸ *Horton v. California*, 496 U.S. 128, 136 (1990).

¹¹⁹ *See id.* at 135–37; *see also Wong Sun v. United States*, 371 U.S. 471, 485–86 (1963) (discussing evidence obtained as fruits of official illegality and unwarranted intrusion).

¹²⁰ *See United States v. Wade*, 388 U.S. 218, 239–41 (1967); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 206, 211 (1960).

¹²¹ *See United States v. Leon*, 468 U.S. 897, 916 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

dence in violation of the exclusionary rule, the court must be reversed unless the error was harmless beyond a reasonable doubt.¹²²

In Doak's case, had the police obtained a warrant before entering the apartment without knocking and announcing, the drug evidence found would not necessarily have been rendered inadmissible, in accordance with the "good faith" exception set out in *United States v. Leon*.¹²³ However, no warrant was obtained; therefore, the drug evidence would not be admissible in Doak's prosecution absent a finding of harmless error.

ii. *Use of Doak's Admission*

After being arrested and while en route to the police station, Doak makes a confession or admission to the policeman, which is later used against him at trial.¹²⁴ Prior to *Miranda v. Arizona*, such an admission would likely have been competent evidence.¹²⁵ However, *Miranda* fundamentally changed the landscape in this area. The Supreme Court held that the Fifth Amendment privilege against self-incrimination is applicable to the states through the Fourteenth Amendment and prohibits use of a confession unless the confession meets certain safeguards.¹²⁶ Now, upon arrest, police must inform a defendant of his right to remain silent, that anything he says may be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.¹²⁷ In present times, any statement by Doak would only be excluded if the statement was the result of express ques-

¹²² *Chapman v. California*, 386 U.S. 18, 22–24 (1967); see also *Arizona v. Fulminante*, 499 U.S. 279, 303 (1991) (applying the rule discussed in *Chapman* in holding that the admission of an allegedly coerced statement was harmless error when the defendant gave a second confession that was not coerced).

¹²³ See *Leon*, 468 U.S. at 919–23; see also *Hudson v. Michigan*, 547 U.S. 586, 591–92, 594 (2006).

¹²⁴ Friendly, *supra* note 3, at 931.

¹²⁵ Cf. *Crooker v. California*, 357 U.S. 433, 435–41 (1958), *overruled in part* by *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²⁶ *Miranda*, 384 U.S. at 444. The Supreme Court rested its holding in *Miranda* not only on the Fifth Amendment but also made a reference to a defendant's Sixth Amendment right to counsel. *Id.* at 466 n.35.

¹²⁷ *Id.* at 444. The Supreme Court explained that "[w]hile a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score." *Id.* at 473 n.43.

tioning by the officer or its “functional equivalent.”¹²⁸ Furthermore, as long as the statement was voluntary in the Sixth Amendment sense, a defendant *can* be questioned about his statement on cross-examination if he takes the stand and offers testimony that contradicts what was said in a non-Mirandized statement.¹²⁹

While *Miranda* requires that a defendant be advised of his constitutional rights to remain silent and to have an attorney present before any questioning, this warning is required only when the defendant is both in custody and subject to state interrogation.¹³⁰ In *Rhode Island v. Innis*,¹³¹ the Supreme Court held that “interrogation” is express questioning by police or “words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.”¹³² Doak was clearly “in custody” when he made the incriminating statement, but the facts provided by Judge Friendly do not clearly indicate whether Doak was being “interrogated” by the policeman en route to the station.¹³³ Such a determination would have to be made after a hearing on a motion to suppress.

Since *Miranda*, the Supreme Court has identified circumstances in which a defendant may be considered to have waived the privilege against self-incrimination.¹³⁴ For instance, if a defendant voluntarily makes statements to law enforcement after being advised of his *Miranda* rights, such statements are admissible.¹³⁵ However, prosecution must establish the voluntariness of the statement.¹³⁶

¹²⁸ *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (defining functional equivalent as “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect”).

¹²⁹ *See, e.g., Harris v. New York*, 401 U.S. 222, 224 (1971) (noting that a statement which is inadmissible during the prosecution’s case in chief because the defendant had not been advised of a right to counsel and to remain silent is properly usable for impeachment purposes during cross-examination as long as other legal standards of trustworthiness are met). Doak, however, did not take the stand; therefore, the statement could not have been used as part of the State’s case-in-chief unless the court determined that it was not the result of questioning by the officer or its functional equivalent. *See Friendly, supra* note 3, at 931.

¹³⁰ *See Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

¹³¹ 446 U.S. 291 (1980).

¹³² *Id.* at 301 (citations omitted).

¹³³ *See Friendly, supra* note 3, at 931.

¹³⁴ A suspect may partially waive *Miranda* rights. *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

¹³⁵ *Perkins*, 496 U.S. at 297.

¹³⁶ *See Miranda v. Arizona*, 384 U.S. 436, 462 (1966). The Due Process Clause of the Fourteenth Amendment prohibits the Government’s use of involuntary confessions. *Blackburn v. Alabama*, 361 U.S. 199, 210 (1960).

Whether a suspect has validly waived his *Miranda* rights is based on the totality of the circumstances.¹³⁷ For example, if an arrestee is under the influence of drugs or alcohol or has other mental or physical impairments that might affect the voluntariness of the statement, the statement must be excluded.¹³⁸ Likewise, the clarity of the invocation of the right to counsel should be determined according to a reasonable police officer under the circumstances.¹³⁹ However, if a suspect is in custody and subject to interrogation, and no *Miranda* warning is given, no voluntary waiver of rights can take place.¹⁴⁰

The other possible ground for challenge mentioned by Judge Friendly was that the admission by Doak would violate his Sixth Amendment right to counsel because he was neither given an attorney at the scene nor advised of his right to have one.¹⁴¹ While it was not and is not required that Doak be given an attorney at the scene of his arrest,¹⁴² the failure to inform him of his right to counsel or failure to provide counsel upon his request would violate *Miranda*.¹⁴³

iii. *Excessive Bail*

In Doak's case, the court received evidence that Doak had a bad criminal record and fixed his bail at \$5,000.¹⁴⁴ The case of *Stack v. Boyle*¹⁴⁵ noted that "federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense [Sixth Amendment], and serves to prevent the infliction of punishment prior to conviction [Eighth Amendment]." ¹⁴⁶ "Since the function of bail is limited, the

¹³⁷ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

¹³⁸ *See Colorado v. Connelly*, 479 U.S. 157, 170 (1986); *see also Beecher v. Alabama*, 389 U.S. 35, 37–38 (1967).

¹³⁹ *See Davis v. United States*, 512 U.S. 452, 459 (1994).

¹⁴⁰ *See Miranda*, 384 U.S. at 470–71.

¹⁴¹ Friendly, *supra* note 3, at 932.

¹⁴² *See Brewer v. Williams*, 430 U.S. 387, 398 (1977) (finding "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (citation omitted)).

¹⁴³ *See Miranda*, 384 U.S. at 470–74.

¹⁴⁴ Friendly, *supra* note 3, at 931. In today's terms, \$5,000 is equivalent to approximately \$35,000. *See* Coinnews Media Group LLC, US INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (last visited Oct. 20, 2014).

¹⁴⁵ *Stack v. Boyle*, 342 U.S. 1 (1951).

¹⁴⁶ *Id.* at 4 (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)).

fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”¹⁴⁷ The Court stated that “[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”¹⁴⁸ In *Schilb v. Kuebel*,¹⁴⁹ the Supreme Court stated that “[b]ail . . . is basic to our system of law . . . and the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.”¹⁵⁰ The Court cited *Pilkinton v. Circuit Court of Howell County, Missouri*,¹⁵¹ in which the appellate court stated: “We take it for granted . . . that the prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States.”¹⁵² While Doak’s attorney could argue that bail was excessive,¹⁵³ there is not enough information from which we may determine if it was higher than necessary to ensure his presence at trial.

iv. Indictment vs. Information

The case against Doak proceeded by an information rather than an indictment.¹⁵⁴ The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁵⁵ This right to counsel generally accrues when “adversary judicial criminal proceedings” are initiated—“whether by way of formal charge, preliminary hearing, indictment, *information*, or arraignment.”¹⁵⁶ However, the Supreme Court has held that the states are free to proceed on an information since the indictment clause of the Constitution is not applicable to the states.¹⁵⁷ This holding has not been overruled in the state criminal context.¹⁵⁸ Therefore, today, no constitutional

¹⁴⁷ *Id.* at 5.

¹⁴⁸ *Id.*

¹⁴⁹ 404 U.S. 357 (1971).

¹⁵⁰ *Id.* at 365 (citations omitted). *See also* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

¹⁵¹ 324 F.2d 45 (8th Cir. 1963).

¹⁵² *Id.* at 46 (citations omitted).

¹⁵³ *See supra* note 148 and accompanying text.

¹⁵⁴ Friendly, *supra* note 3, at 931.

¹⁵⁵ U.S. CONST. amend. VI.

¹⁵⁶ *See* Kirby v. Illinois, 406 U.S. 682, 688–89 (1972) (emphasis added).

¹⁵⁷ *See* Gaines v. Washington, 277 U.S. 81, 86 (1928); *Hurtado v. California*, 110 U.S. 516, 538 (1884).

¹⁵⁸ *But see* FED. R. CRIM. P. 7(a), (b) (an offense punishable by death or imprisonment for a term exceeding one year must be prosecuted by indictment, but a de-

challenge could be levied at Doak's prosecution by information only.

v. Admission of Chemist's Report

In Doak's case, the prosecution introduced a chemist's report into evidence to establish the contents of the glassine envelope.¹⁵⁹ The Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,"¹⁶⁰ is applicable to the States via the Fourteenth Amendment, as found in *Pointer v. Texas*.¹⁶¹ In *Crawford v. Washington*,¹⁶² the Supreme Court held that the Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him.¹⁶³ A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.¹⁶⁴ After *Crawford*, the Supreme Court expanded the scope of the Confrontation Clause in *Melendez-Diaz v. Massachusetts*¹⁶⁵ and *Bullcoming v. New Mexico*,¹⁶⁶ ruling that scientific reports cannot be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation.¹⁶⁷ In each case, the Court considered whether introduction of testimonial certificates in order to prove a fact at a criminal trial violates the Confrontation Clause.¹⁶⁸ In *Melendez-Diaz*, the Court determined that, under *Crawford*, statements provided by forensic analysts were testimonial in nature, and the analysts were "'witnesses' for purposes of the Sixth Amendment."¹⁶⁹ Therefore, "[a]bsent a showing that the analysts were unavailable to testify at trial and that [Melendez-Diaz] had a prior opportunity to cross-examine them, [Melendez-Diaz] was entitled to be confronted with

defendant charged with an offense punishable by imprisonment for more than a year may be prosecuted by information if the defendant waives prosecution by indictment in open court and after having been advised of the nature of the charge and his rights).

¹⁵⁹ Friendly, *supra* note 3, at 931.

¹⁶⁰ U.S. CONST. amend. VI.

¹⁶¹ 380 U.S. 400, 403 (1965).

¹⁶² 541 U.S. 36 (2004).

¹⁶³ *Id.* at 51 (citation omitted).

¹⁶⁴ *Id.* at 53–54.

¹⁶⁵ 557 U.S. 305 (2009).

¹⁶⁶ 131 S. Ct. 2705 (2011).

¹⁶⁷ *Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 557 U.S. at 324.

¹⁶⁸ *See Bullcoming*, 131 S. Ct. at 2713; *Melendez-Diaz*, 557 U.S. at 308–09.

¹⁶⁹ *Melendez-Diaz*, 557 U.S. at 311.

the analysts at trial.”¹⁷⁰ Therefore, in today’s fictional Doak case, unless Doak had the opportunity before trial to cross-examine the chemist who prepared the report, the report would not be admissible to establish the contents of the glassine envelope absent the chemist’s testimony at trial.

vi. Jury Instruction on Defendant’s Failure to Testify

In the Doak case, the State asked the judge to charge the jury that it could draw an inference of guilt from Doak’s failure to take the stand, while defense counsel asked for an instruction that the jury was not to consider his silence for any purpose.¹⁷¹ The court refused both requests.¹⁷² In *Griffin v. California*,¹⁷³ the Supreme Court found that the self-incrimination clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment and held that the trial court’s and the prosecutor’s comments on the defendant’s failure to testify violated the self-incrimination clause of the Fifth Amendment.¹⁷⁴ The Court again considered the Fifth Amendment and jury instructions in *Lakeside v. Oregon*¹⁷⁵ when considering whether the issuance of a no-inference instruction over a defendant’s objection violated the Constitution.¹⁷⁶ The Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant’s failure to testify, and that “a judge’s instruction that the jury must draw *no* adverse inferences of any kind from the defendant’s exercise of his privilege not to testify is ‘comment’ of an entirely different order.”¹⁷⁷ The purpose of such an instruction, the Court stated, “is to remove from the jury’s deliberations any influence of unspoken adverse inferences” and thus eliminate “the pressure on a defendant found impermissible in *Griffin*.”¹⁷⁸ The issue was revisited in *Carter v. Kentucky*,¹⁷⁹ in which the Supreme Court held that a state trial judge has a constitutional

¹⁷⁰ *Id.* (citations omitted) (internal quotation marks omitted).

¹⁷¹ Friendly, *supra* note 3, at 931.

¹⁷² *Id.*

¹⁷³ 380 U.S. 609 (1965);

¹⁷⁴ *Id.* at 615; *see also* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment protection against self-incrimination against the states through the Fourteenth Amendment).

¹⁷⁵ 435 U.S. 333 (1978).

¹⁷⁶ *Id.* at 334.

¹⁷⁷ *Id.* at 338–39.

¹⁷⁸ *Id.* at 339.

¹⁷⁹ 450 U.S. 288 (1981).

obligation, upon proper request by the defendant, to give a no adverse inference instruction.¹⁸⁰

Accordingly, the judge in Doak's case properly refused the prosecutor's jury charge request but impermissibly refused defense counsel's request for a no adverse inference instruction.

vii. Right to Unanimous Jury Verdict

In Doak's case, he was convicted in state court by a less-than-unanimous, 10–2 vote of the jury.¹⁸¹ In *Johnson v. Louisiana*,¹⁸² the Supreme Court analyzed the constitutionality of state law permitting less-than-unanimous jury verdicts in certain criminal cases.¹⁸³ Specifically, the Louisiana Code and Constitution provided that the vote of nine of the twelve jurors was sufficient to return either a guilty or not guilty verdict in criminal cases in which punishment is necessarily at hard labor.¹⁸⁴ The Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment do not require unanimous jury verdicts in state criminal trials and upheld the state law.¹⁸⁵ In *Apodaca v. Oregon*,¹⁸⁶ the Supreme Court found that a state court conviction of a crime by a less than unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment.¹⁸⁷ The decision in *Apodaca* was issued by Justice White, joined by then-Chief Justice Warren, Justice Blackmun, and Justice Rehnquist, with Justice Powell concurring in the judgment.¹⁸⁸ Alternatively, in federal criminal trials the Supreme Court has held a unanimous jury verdict is required by the Sixth Amendment.¹⁸⁹ Here, in Doak's present day state criminal proceedings, the less-than-unanimous jury verdict would not violate the Fourteenth Amendment.

¹⁸⁰ *Id.* at 305.

¹⁸¹ Friendly, *supra* note 3, at 931.

¹⁸² 406 U.S. 356, 357 (1972).

¹⁸³ *Id.* at 357–58.

¹⁸⁴ *Id.* at 357, 357 n.1.

¹⁸⁵ *Id.* at 363–65. *But see* *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding provisions of Louisiana Constitution and Code of Criminal Procedure that sanctioned conviction of a non-petty offense by a non-unanimous jury of six unconstitutional).

¹⁸⁶ 406 U.S. 404 (1972).

¹⁸⁷ *Id.* at 406.

¹⁸⁸ *Id.* at 405; *see also Johnson*, 406 U.S. at 366, 369 (Powell, J., concurring) (arguing that all elements of a jury trial required under the Sixth Amendment are not part of the Due Process Clause of the Fourteenth Amendment).

¹⁸⁹ *See Richardson v. United States*, 526 U.S. 813, 817 (1999); *Johnson*, 406 U.S. at 371 (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748 (1948).

viii. *Sentence as Cruel and Unusual*

Even before the fictional Doak case, the Supreme Court held in *Robinson v. California*¹⁹⁰ that to prosecute a defendant solely for being a drug addict was cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment.¹⁹¹ The testimony of Doak's relative—that he sold drugs only to support his own habit¹⁹²—arguably could support an extension of *Robinson*. However, in Doak's case, he committed a crime by selling drugs, not merely by being an addict.¹⁹³ Rather than preventing his prosecution on constitutional grounds, the testimony of the relative might operate merely as an affirmative defense to the charge or grounds for a lighter sentence. In *Powell v. State of Texas*,¹⁹⁴ the Supreme Court rejected the defendant's assertion that he could not be prosecuted for public drunkenness merely because he was a chronic alcoholic.¹⁹⁵ The Court explained:

The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'¹⁹⁶

The Court stated it was unable to conclude that chronic alcoholics suffer from such an irresistible compulsion that they are utterly unable to control their actions and thus cannot be deterred at all from public intoxication.¹⁹⁷ However, the Supreme Court has recognized the general rule that the definition of both crimes and defenses is a matter of state law.¹⁹⁸ As applied to Doak's case, a court or jury could conclude that Doak was not utterly unable to control his drug-selling just because of his drug addiction.

¹⁹⁰ 370 U.S. 660 (1962).

¹⁹¹ *Id.* at 667. The Court characterized the statute as one which "makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" *Id.* at 666.

¹⁹² Friendly, *supra* note 3, at 931.

¹⁹³ *Id.*

¹⁹⁴ 392 U.S. 514, 530 (1968) (plurality opinion).

¹⁹⁵ *Id.* at 530.

¹⁹⁶ *Id.* at 533 (alteration in original).

¹⁹⁷ *Id.* at 535.

¹⁹⁸ *See Patterson v. New York*, 432 U.S. 197, 210 (1977).

ix. *The Intent and Import of Friendly's Joe Doak*

It would be a mistake to read Friendly's analysis of the case against Joe Doak as a parade of hypothetical horrors designed to inflame the opposition to the Warren Court's jurisprudence. In fact, such a reading would be far from Friendly's intent. Indeed, Friendly wrote the basis of his concerns in a letter to a young law professor that,

[O]nce the protections of the self-incrimination clause and the right to assistance of counsel are moved back beyond the beginning of the criminal prosecution, we enter an area where things are not black and white and there is need for reasonable compromise—unless the interests of criminal defendants are to be put beyond those of society.¹⁹⁹

More importantly, Friendly agreed with the Court that defendants brought in by the police for the purpose of extracting a confession should either be prohibited from being questioned without an attorney present or given a warning that would make it clear that the defendant had the right to speak with an attorney before deciding whether to talk with the police.²⁰⁰ Many credit Friendly's article and lecture on the same topic as prompting the Supreme Court to shift its reliance from the Sixth to the Fifth Amendment when it issued its much anticipated decision in *Miranda v. Arizona*.²⁰¹

THE AFTERMATH

In June of 1966 the Warren Court issued perhaps the most well-known and controversial decision of its tenure when it decided *Miranda v. Arizona*.²⁰² Ernesto Miranda was questioned by police officers after being arrested for rape.²⁰³ The officers failed to advise him of his right both to remain silent and to consult with an attorney.²⁰⁴ Not surprisingly, the police officers emerged from the interrogation room with a signed confession after an interrogation that lasted several hours.²⁰⁵ The uproar and fallout from this decision was shriller than that from *Escobedo*. Like *Escobedo*, the immediate uproar appeared first in the dissent. That dissent, authored by Justice John Harlan, referenced Friendly's article and noted that the

¹⁹⁹ DORSEN, *supra* note 6, at 167.

²⁰⁰ *Id.*

²⁰¹ *See id.* at 167–68.

²⁰² 384 U.S. 436 (1966).

²⁰³ *Id.* at 491–92.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

court implicitly agreed with Friendly that the Sixth Amendment was not the basis for its decision.²⁰⁶ Justice Byron White perhaps captured Friendly's concerns about the court's jurisprudence in this area by observing that the main problem with the rule adopted in *Miranda* was "that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved."²⁰⁷ Such rules were the antithesis of Friendly's philosophy.²⁰⁸ Friendly was often more disturbed by the Court's opinions than its decisions, which he described as lacking in analysis and restraint.²⁰⁹

It was not apparent at the time of *Miranda* that it would be the high watermark of the Warren Court's expansion of criminal rights in this country. Noted constitutional scholar Yale Kamisar noted that, "[i]n its final years, the Warren Court was *not* the same court that handed down *Mapp* or *Miranda v. Arizona*."²¹⁰ One need only look at the subsequent decisions of the Warren Court to see how valid Professor Kamisar's observation is. Just one year after *Miranda*, the court found that even errors of a constitutional magnitude were subject to harmless error analysis.²¹¹ Most importantly, in its last major decision in the field of criminal justice, the court issued its opinion in *Terry v. Ohio*, which established the doctrine of "stop and frisk."²¹² Most court observers viewed this decision as a dramatic departure from the views the court initially expressed in *Mapp v. Ohio*.²¹³

Unlike many critics of the Warren Court, Friendly was not content that the issue could only be resolved by overturning *Miranda*. In a follow-up article in 1968, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, Friendly warned that the situation the court was confronted with in *Miranda* was "disturbing" and that those who criticize the decision have some obligation to search for an alternative, as opposed to simply returning the law to where it existed before *Miranda*.²¹⁴ Friendly attempted to set out a case for a

²⁰⁶ *Id.* at 514 (Harlan, J., dissenting).

²⁰⁷ *Id.* at 544 (White, J., dissenting).

²⁰⁸ See Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 681 (1968).

²⁰⁹ DORSEN, *supra* note 6, at 165.

²¹⁰ Kamisar, *supra* note 50, at 3.

²¹¹ *Chapman v. California*, 386 U.S. 18, 22 (1967); see also Kamisar, *supra* note 50, at 3.

²¹² *Terry v. Ohio*, 392 U.S. 1, 27 (1968); see also Kamisar, *supra* note 50, at 5 (stating that the *Terry v. Ohio* case was an important demonstration of the change in the Warren Court).

²¹³ See Kamisar, *supra* note 50, at 5.

²¹⁴ Friendly, *supra* note 208, at 711-12; see also Kamisar, *supra* note 50, at 50.

constitutional amendment that would permit questioning of criminal suspects without violation of the Fifth Amendment when a suspect has not been charged or taken into custody.²¹⁵ The amendment would also have allowed a judge to comment on a defendant's invocation of his Fifth Amendment right before a grand jury or investigative body, provided the person was represented by counsel at the proceeding.²¹⁶

THE LEGACY OF HENRY FRIENDLY AND HIS PRESCIENT PREDICTION

While Henry Friendly is rightly revered for his achievements and intellect, he is best remembered in the field of criminal law as perhaps the most prominent critic of the Warren Court's criminal justice jurisprudence.²¹⁷ To the extent that prominence is the result of his opposition to the merits of some of that court's decisions, the authors believe that appreciation of Friendly's lectures and writings is misplaced.²¹⁸ The point of Friendly's criticism was two-fold: 1) the Supreme Court invites trouble by using broad provisions in the Constitution and the Bill of Rights to fashion specific remedies in the context of criminal law, and 2) it is the responsibility of the legislative branch of government to address the specifics of criminal law and procedure.²¹⁹ This is due primarily because it is the only process that allows for a "reasonable difference of judgment" or "play in the joints."²²⁰ Friendly believed in "workable rules" developed by the states as opposed to those developed by five justices of

²¹⁵ Friendly, *supra* note 208, at 721.

²¹⁶ *Id.* at 721–22.

²¹⁷ Cf. Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking about Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69, 87 (2004) ("Judge Henry Friendly, probably the nation's most eminent critic of *Miranda* (and the Warren Court's criminal procedure cases generally), may have been the first commentator to argue that the fruits of *Miranda* violations should be admitted into evidence.").

²¹⁸ As stated previously, it was Friendly's record of achievement, both on and off the bench, along with his superior intellect and reasoning ability that caused his pronouncements to be so widely accepted and respected on both sides of the legal community. As noted by his biographer, David Dorsen, every Supreme Court justice who served on the court for at least five years after the publication of Friendly's landmark article mentioned Friendly by name in an opinion. DORSEN, *supra* note 6, at 354. Only the legendary Learned Hand had more opinions in which the justices mentioned him by name. *Id.* The same is true for the number of law review articles that mention judges by name. *Id.* at 355.

²¹⁹ See Friendly, *supra* note 3, at 954–56 (discussing Judge Friendly's views on jurisprudence and legislative functions).

²²⁰ See Friendly, *supra* note 3, at 954.

the Supreme Court, usually based on a record containing facts that many regard as extreme.²²¹ Friendly concluded his landmark 1965 article with a warning: societies that allow their constitutions to “degenerate” into codes are societies that are “unsure of [themselves] and seeking protection against [their] own misgivings.”²²²

One need look no further than the Supreme Court’s recent decisions in *Missouri v. Frye*²²³ and *Lafler v. Cooper*²²⁴ to see Henry Friendly’s prescient prediction playing itself out in today’s criminal justice system. These cases addressed the right to effective assistance of counsel during the plea bargaining process and, in the opinion of many observers, elevated that right to a free-standing one—no longer conditioned on whether or not a defendant received a fair trial.²²⁵ The Supreme Court noted that our criminal justice system has become more attuned to pleas than trials, as “ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”²²⁶ This is just the kind of observation with which Judge Friendly would not take issue; rather, he likely would believe this issue is one to be addressed by a legislative body, or as Judge Frank Easterbrook of the 7th Circuit has opined, “[w]hat’s happening now, just as it was in the days of the Warren Court, is that the Sixth Amendment, a generality, is being used as a fount of details that cannot plausibly be imputed to it.”²²⁷

In *Frye* and *Lafler*, the Supreme Court found that two separate criminal defendants received ineffective assistance of counsel during pre-trial plea bargaining negotiations between their counsel and the prosecutor.²²⁸ *Frye*’s attorney did not bother to tell him about the State’s plea bargain offer that would have allowed him to serve sentences that ranged from three years with ten days in jail to a misdemeanor plea with a ninety-day sentence.²²⁹ *Frye*, who complicated matters by getting arrested on new charges, pleaded guilty with no agreement and received a three-year prison sentence.²³⁰

²²¹ *Id.* at 954–55 (footnote omitted).

²²² *Id.* at 954 (footnote omitted).

²²³ 132 S. Ct. 1399 (2012).

²²⁴ 132 S. Ct. 1376 (2012).

²²⁵ John J. Davis & Barr D. Younker, Jr., *Frye and Lafler: New Rights or Old Responsibilities*, 75 ALA. LAW. 183, 185 (2014).

²²⁶ See, e.g., *Frye*, 132 S. Ct. at 1407; see also Davis & Younker, *supra* note 225, at 185 (footnotes omitted).

²²⁷ Easterbrook, *supra* note 33, at 557 (footnote omitted).

²²⁸ Davis & Younker, *supra* note 225, at 185; see *Frye*, 132 S. Ct. at 1411; *Lafler*, 132 S. Ct. at 1391.

²²⁹ *Frye*, 132 S. Ct. at 1404.

²³⁰ *Lafler*, 132 S. Ct. at 1391.

Lafler was advised of the State's plea agreement in his case, one of which would have given him a sentence of between fifty-one and eighty-five months for shooting a woman in her lower body.²³¹ Lafler rejected the State's offer due to the fact that his attorney told him, incorrectly, that he could not be convicted of intent to murder his victim because he shot her below the waist.²³² Lafler received a prison sentence that ranged from 185–360 months imprisonment.²³³ What would surely be frustrating to Friendly, as it is to many Court observers, is that the Supreme Court left unclear what remedies were available to Frye and Lafler. The Court refused to order specific performance of the original plea offer in *Lafler* but instead ordered the State to reoffer the plea and gave the trial court the discretion to choose between the original plea offer, the sentence imposed on conviction, or something else.²³⁴ In *Frye*, the court remanded the case to determine the questions of state law as to whether the prosecutor would have had discretion to cancel the plea offer once it had been accepted and whether the trial court had discretion to reject the plea.²³⁵

As pointed out by Justice Scalia in his scathing *Lafler* dissent, the Court created a new field of constitutional law without providing any standards for defense counsel and gave such expansive discretion to trial courts so as to allow them to deny a remedy for the very violations of the constitutional right they just created.²³⁶ It is just this sort of broad sweeping shift in criminal justice that Friendly identified and warned against in his writings and lectures.²³⁷

There is no doubt that the performance of defense counsel in these cases would have appalled Friendly, but, in searching for a workable solution, Friendly likely would not have written an opinion that expanded the law so dramatically without attempting to provide some “real world” guidance for the parties involved. As noted by Friendly's former clerk, distinguished federal appeals court judge Michael Boudin, one of Friendly's qualities as a jurist that set him apart from his peers was his attention to the probable effects his decision would create in a lower court once remand was determined to be necessary.²³⁸ That is what one would expect from a distinguished jurist, a man of great intellect and achievement,

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012).

²³⁶ *Lafler*, 132 S. Ct. at 1391–97 (Scalia, J., dissenting).

²³⁷ See Friendly, *supra* note 3, at 929–31, 953–54.

²³⁸ Boudin, *supra* note 27, at 893.

and one of the few lawyers who could claim Albert Einstein as a client.²³⁹

CONCLUSION

In October of 1965, Henry Friendly published a law review article as timeless as his own reputation of achievement and wisdom. Friendly's warnings against the dangers of turning the Bill of Rights into a detailed code of criminal procedure continues to hold significance after nearly 50 years of jurisprudence by a Supreme Court that still wrestles with the dilemma he so presciently predicted almost a half century ago.

²³⁹ DORSEN, *supra* note 6, at 68.