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# Transcript, Originalism and Criminal Law and Procedure

2005 National Lawyer's Convention

# The Federalist Society for Law and Public Policy

*presents*

# ORIGINALISM AND CRIMINAL LAW AND PROCEDURE

## 2005 National Lawyer's Convention

## November 10, 2005

**PANELISTS:**

***Professor Ronald J. Allen***, John Henry Wigmore Professor of Law, Northwestern University School of Law

***Professor Carol Steiker***, Howard J. and Katherine W. Aibel Professor of Law, Harvard Law School

***Professor Craig S. Lerner***, Associate Dean for Academic Affairs and Professor of Law, George Mason University School of Law

***Hon. Christopher A. Wray***, King & Spalding litigation partner and Former Assistant Attorney General, Criminal Division, U.S. Department of Justice

***Hon. Edith Brown Clement***, United States Court of Appeals, Fifth Circuit (moderator)

**JUDGE CLEMENT:** I am Edith Brown Clement, also known as Joy Clement, from the Fifth Circuit, but actually I live in the Fourth Circuit now, thanks to Katrina. I'm glad we have a number of people here to discuss originalism and criminal procedure.

As you all realize, there are several provisions in the United States Constitution to affect criminal law, and most specifically, criminal procedure, which we will be discussing. The problem is what to do with the technology that has developed over the past 200 plus years. There are several areas that I'm sure the founders didn't contemplate, such as digital communications, heat sensors which locate lamps growing marijuana, and

the home of Black Berry/cell phone/future means of communication, which reminds me, please turn yours off or silence them. Mine just rang, so I know they're probably not all off.

We have a fascinating panel this afternoon. We have three professors and a lawyer who has a wealth of experience in the criminal law field. Our first speaker is Craig Lerner. He is a professor at George Mason University School of Law, where he has been for five years. Before that, he was associated with the Office of Independent Counsel for several years, and he practiced in the white-collar criminal field and the communications field. He was a law clerk in the D.C. Circuit, so I'm sure he was exposed a lot of criminal law there. Also, he was a teaching fellow at Harvard, which makes sense because he was an undergraduate of Harvard, and also a graduate of Harvard Law, and then in his spare time got a masters at the University of Chicago. He has published a great deal, and I like some of the titles. I will read them to you—*Reasonable Suspicion and Mere Hunches*;[1] my favorite one, because I am from New Orleans, Louisiana, is *Legislators as the American Criminal Class*.[2] I'm also curious about *The United States PATRIOT Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*.[3] There may be something we can discuss about the PATRIOT Act with respect to the separation of powers, since they now want federal judges to report to Congress anyone who's sentenced, so that they can evaluate whether it's correct or not. I think that could be a problem. He has also published two articles on probable cause and an article on joint defense agreements, which as you all know is just asking for trouble.

Our second panelist is Professor Robert Allen. He is presently at the Northwestern University School of Law. He did his undergraduate work in mathematics at Marshall University, which is helpful if you do have to deal with the sentencing guidelines, since most lawyers don't do math. Then, he went to law school at the University of Michigan. He is an internationally recognized expert in the fields of evidence, procedure, and constitutional law. He's published many books, and 90 articles and major law review articles in major law reviews. You may recognize him because he is in the national broadcast media, discussing constitutional law and criminal justice quite frequently. He's also held professorships before he went to Northwestern, at Iowa and at Duke, and he's lectured at a number of national and international laws schools. He has also been invited to give lectures to the governments of China, Mexico, Trinidad, and Tobago. He spent the past ten years of his research focused on the nature of juridical proof. He is a member of American Law Institute, and he has chaired the Evidence Sec-

1 Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006).

2 Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (2004).

3 Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L.REV. 493 (2003).

tion of the Association of American Law Schools. He was Vice Chair of the Rules of the Procedure and Evidence Committee at the ABA, and he has also served as a Commissioner of the Illinois Supreme Court.

Our third panelist is Christopher Wray, who was and is a litigator at King & Spalding. He presently is the Chairman of the Special Matters and Government Investigations Practice group, where he deals with securities and fraud matters, as well as white collar criminal issues. For two years, he worked as the assistant attorney general in charge of the Department of Justice ("DOJ") Criminal Division. During that time, there was an effort to address the wave of corporate fraud scandals, and he attempted to restore some integrity to the United States financial markets, which I think has been successful. As Head of the Criminal Division, he led investigation, prosecution, and policy development in nearly all of the fields of federal criminal law, specifically intellectual property piracy and cyber crime, and racketeering. He has played an integral part in the DOJ's response to the September 11 attacks and has played a key role in the oversight of the legal and operational actions in the continuing war on terrorism. He spent from 1997 to 2001 in Atlanta as an Assistant United States Attorney, where I'm sure he got a lot of criminal experience also, and he served as a law clerk in the Fourth Circuit. He graduated from Yale as an undergraduate, and as a lawyer.

Our fourth panelist—ladies last—is Carol Steiker. She is presently a professor at the Harvard Law School. She graduated from Harvard, Radcliffe Colleges, and Harvard Law School. She served as law clerk to Judge J. Skelley Wright, who is from New Orleans, on the D.C. Circuit, and also to Justice Thurgood Marshall of the Supreme Court, and she got most of her criminal law reality check serving as a public defender in the District of Columbia, I would imagine. She has written numerous articles on criminal law, criminal procedure, and capital punishment. Most recently, she served on the Board of Editors for the second edition of the *Encyclopedia of Crime and Justice*,[4] and she's working on two lengthy projects. One is on the changing face of capital punishment in America; the other one is on mercy and institutions of criminal justice. She served as a consultant and expert witness on issues of criminal justice for many non-profit organizations, as well as for federal and state legislatures.

I think we'll have an interesting afternoon. Please give these panelists your attention. After they address you, then the panelists will have the opportunity to cross-examine the other panelists, and we will then open the floor to questions. Thank you very much.

**PROFESSOR LERNER:** Thank you. I was asked to go first because

4 ENCYCLOPEDIA OF CRIME & JUSTICE (Joshua Dressler ed., Gale Group 2d ed. 2001) (1982).

the thought was that I would defend originalism and present an ample target to my co-panelists.

Soon after the President nominated Harriet Miers to the Supreme Court, Judge Robert Bork, as you may have seen, published a scathingly critical editorial in the *Wall Street Journal* criticizing Miers for not being an originalist.[5] According to Bork, judges who are not originalists end up legislating from the bench, and for originalists this is bad, obviously, because it's an illegitimate enterprise. Judges, as we heard repeatedly during the aborted Miers nomination, are charged with applying the law, not making it up.

Second, this enterprise is bad for functionalist reasons. Judges are not picked or trained to assess the costs and benefits of newly minted public policy rules, nor do they have staffs equipped to assist them in these endeavors. As we know, the staffs that Supreme Court justices have consist of a quartet of fawning 27-year-olds straight from the intellectual hothouses of Cambridge and New Haven.

A third argument for originalism is an aesthetic one. This is my favorite. Supreme Court justices should remain securely cosseted in their judicial robes. Originalism, as an interpretive methodology, constrains a free-wheeling, let-it-all-hang-out jurisprudence that is aesthetically very bad for the country. Criminal procedure provides many examples, I fear, of terrorist prudential deformities that do not pleasantly engage the eye. Questions about police in criminal trials seem to fire the imagination of Supreme Court justices far more than ERISA preemption issues, and they promptly abandon the tedious constitutional text to ruminate on philosophy and morality.

Let me give you one example: *Mapp v. Ohio*[6]—of course, the grandfather of modern American criminal procedure. In concluding his decision requiring the exclusionary rule in every state court in America, Justice Clark cast off his judicial robes, revealing I fear the emaciated and unsightly figure of the philosopher king. "Our decision," he intoned without the slightest hint of irony, "[is] founded on reason and truth."[7] On political legitimacy, functionalist, and aesthetic grounds, Supreme Court justices should wear traditional robes. Originalism is attractive because it provides constraints against extrajudicial ruminations on reason and truth, ruminations that many Supreme Court justices are supremely ill suited to engage in.

Yet, one cannot leave it at that. Of course, an obvious response to Judge Bork in this argument so far is that I have posited a choice between originalism and letting-it-all-hang-out jurisprudence between the two. Of

5 Robert H. Bork, *Slouching Towards Miers*, WALL. ST. J., Oct. 19, 2005, at A12.
6 Mapp v. Ohio, 367 U.S. 643 (1961).
7 *Id*. at 660.

course, originalism is preferable. But more commonly, a choice confronting a judge today is not originalism versus letting it all hang out, but originalism—at least as some pedant might discover it—and following decades of precedent that might have strayed far from the Constitution. To the extent that my aesthetic objection to non-originalism is a reaction to Arian empty philosophizing, it might seem that a precedent-bound jurisprudence is preferable to originalist recourse to first principles.

I think the issue is starkly posed in the criminal procedure context, where you have a number of cases like *Mapp*,[8] *Miranda*,[9] and *Katz*,[10] that have essentially replaced the Constitution as guiding principles. Justice Scalia has said that almost every originalist would adulterate the strong medicine of originalism with a doctrine of *stare decisis*, but when does the originalist hearken to the originalist voice of the Constitution, and when does he follow meekly in the footsteps of his predecessors, however wayward their path? That is the question, and I don't think Justices Scalia and Thomas agree on that.

I don't think there's a simple algorithm, a scientific solution to that problem. I don't think this, however, is an irrefutable problem. These disagreements notwithstanding, originalism I think might most be modestly cast as an interpretive tool to assist judges when considering how much deference is owed to prior decisions, and the appropriate level of caution or enthusiasm and extent of the examining or limiting those precedents. That's the argument for originalism.

The basic criticism originalism, of course, in bare bones, is that the cultural, technological, legal environment has been so transformed over the past 210 years that the original meaning of the Constitution does not and should not provide any or much guidance. My first reaction to this criticism is always to conceive it: if courts, and particularly the Supreme Court, were in the business of fashioning policy solutions for all the ills that afflict us, the Constitution, its text and its meaning, would indeed supply inadequate guidance. But if the Supreme Court's role were more modestly cast to be judges, I'm not so certain the Constitution is radically deficient.

On the descriptive claim that originalism does not play a significant role in modern criminal procedure, it might be sufficient to note the remarkable uptake in references to 18th-century English and American police and trial practices and treatises in Supreme Court criminal procedures over the past 15 years. Of course, skeptics of originalism might counter that all these references to *Entick v. Carrington*,[11] Camden, Storey, Cooke—these are all simply rhetorical parsley. There they are for show to satisfy aesthetes like me. Under this view, Justice Scalia is doing exactly what Wil-

8 *Id*. at 643.
9 Miranda v. Arizona, 384 U.S. 436 (1966).
10 Katz v. United States, 389 U.S. 347 (1967).
11 Entick v. Carrington, 95 Eng. Rep. 807 (1765).

liam Brennan and Earl Warren did; he's following his moral intuition, but he's simply covering up better. I am not persuaded by this criticism.

There is ample evidence that originalism is doing independent work, that it is driving many recent opinions. Academic critics who once mocked what they called to Scalia's Law and Order originalism[12] have been proven wrong again and again in recent years as he has voted on originalist grounds to extend protections for criminal defendants. The case last term, *Crawford v. Washington*, in which Justice Scalia overruled a 24-year-old precedent and expanded the reach of the Confrontation Clause on originalist grounds, held that the Sixth Amendment required the exclusion of testimonial evidence, however reliable, unless the defendant was permitted to cross examine him.[13] Of course, the *Apprendi*[14] line of cases were all designed to ensure, consistent with the original meaning of the Constitution or what at least has been alleged to be the original meaning of the Constitution—I'm not so certain about the historical materials here—that juries, not judges, make factual findings that justify conviction and punishment.

Another remarkable example of Justice Scalia as an originalist civil libertarian is his concurring opinion in *Minnesota v. Dickerson*,[15] in which he suggested that the uncertainty about the constitutionality of risks during brief interrogatories stopped, because he frankly doubted "whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity."[16]

Or finally, consider Justice Scalia's dissenting opinion in *County of Riverside v. McLaughlin*, where the Court considered the constitutionality of a local practice of waiting as long as 48 hours before providing an arrested person with a judicial determination of probable cause.[17] Scalia noted Storey's claim that the Fourth Amendment was "little more than an affirmance of a great constitutional doctrine of the common law."[18] He lectured the majority that the Court should balance law enforcement interests and privacy concerns only when confronted with novel issues of reasonableness.[19] No balancing was appropriate in resolving these questions on which a clear answer already existed in 1791 and has been generally adhered to by traditions of our society ever since.

Well, not surprisingly, given Scalia's view of the Fourth Amendment,

12 Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002).

13 Crawford v. Washington, 541 U.S. 36 (2004).

14 Apprendi v. New Jersey, 530 U.S. 466 (2000).

15 Minnesota v. Dickerson, 508 U.S. 366 (1993).

16 *Id*. at 381 (1993) (Scalia, J., concurring).

17 County of Riverside v. McLaughlin, 500 U.S. 44, 59–71 (Scalia, J., dissenting).

18 *Id*. at 71.

19 *Id*. at 59–71.

he has ridiculed many modern criminal procedure opinions, and perhaps no decision has received more derisive abuse from him than *Katz v. United States*.[20] That was the case, of course, that involved a wiretap on a public telephone booth. The Court, or at least Justice Harlan, held that the Fourth Amendment protected—this was wonderful—actual subjective expectations of privacy that society recognizes as reasonable, or something along those lines.[21] As Scalia noted, this test is self-indulgent.[22] It lacks any plausible foundation in the text of the Fourth Amendment. And, "unsurprisingly, those 'actual (subjective) expectation[s] of privacy' that society is prepared to recognize as 'reasonable,' . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[23]

Now, *Katz*, according to the familiar story, uprooted decades of perhaps already withering precedent, which had premised the Fourth Amendment on protection of property rights, not privacy interests. Chief Justice Taft's opinion in *Olmstead v. the United States*[24] is the classic originalist statement of this view. Government agents in that case tapped Olmstead's telephone lines, outside his home.[25] And Taft, relying on what he regarded as the original meaning of the Fourth Amendment, found no constitutional violation, the simple reason being that there was no physical trespass on Olmstead's property.[26] Now Taft's view, I don't think, was a frivolous one. It would seem to hew closely to Lord Camden's statement in *Entick v. Carrington*, that "our law holds the property of every man so sacred that no man can set foot upon his neighbor's close without his leave."[27]

Also, the text of the Fourth Amendment, with its references to person, houses, papers, and effects, arguably suggests that physical intrusion is a necessary predicate for a Fourth Amendment violation. That was, I think, Justice Black's view, dissenting in *Katz*.[28] The story typically told in law schools today is that this absurd, hypertextual connection between property rights and the Fourth Amendment has been thankfully interred by cases such as *Katz*, where the Supreme Court replaced the antiquated originalist property paradigm with an updated modern privacy paradigm. It's a nice story. It's actually something of a fable, as Professor Orin Kerr, who's here, and may want to distance himself from everything I say, has written.[29]

Doctrinally, to a remarkable extent, the Fourth Amendment is still about protecting property rights, not privacy interests. Police can fly over

20 Katz v. United States, 389 U.S. 347 (1967).
21 *Id*. at 361 (Harlan, J., concurring).
22 Kyllo v. United States, 533 U.S. 27 (2001).
23 Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).
24 Olmstead v. United States, 277 U.S. 438 (1928).
25 *Id*.
26 *Id*.
27 Entick v. Carrington, 95 Eng. Rep. 807, 817 (1765).
28 Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting).
29 Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

your land in helicopters. They can insert undercover agents in your midst, wearing wires. You can search your friend's house and car, finding stuff that you own, none of which would violate your Fourth Amendment rights. So even muddled with cases like *Katz*, the originalist echoes can still be heard in Fourth Amendment jurisprudence.

I should briefly note that Scalia's originalism in the Fourth Amendment context is not the same as Taft's. He seems more willing to translate the Fourth Amendment to modern conditions, finding Fourth Amendment violations even in the absence of physical trespass. This was of course illustrated in the *Kyllo* case, where Scalia found that the use of a thermal detection device to measure heat discharged from a home constituted a search, and in the absence of a warrant violated the Fourth Amendment.[30]

*Kyllo*, for me, was a disappointing opinion because it seems that Scalia, I think, abandoned a principle of rigorous originalism and seemed to ground his decision incredibly on *Katz*—yes, the much mocked *Katz*. And second, because Scalia did not, I think, give sufficient credence to Justice Stevens's dissenting objections on pragmatic grounds that perhaps it is best to leave to the legislatures the responsibility of monitoring emerging technologies. It might have been possible to craft something along the lines of an originalist opinion there, that a thermal detection device was in effect invading Danny Kyllo's castle, and if the ratifiers of the Fourth Amendment could be brought back and asked, what do you think of thermal detection devices, they would say this is as horrifying as a physical intrusion on a home. Frankly, I must say I don't find this particularly persuasive. I couldn't care less if police directed thermal detection device at my home. Other people might feel differently, and I urge them to lobby Congress and state legislatures to convince them. I am just unsure why courts are involved in this enterprise.

The sky won't fall if the Fourth Amendment were restricted to property; that is, if we returned to originalist cramped vision of the Fourth Amendment. *Katz*, for all the non-originalist flowery rhetoric, has been a meaningless decision, as Professor Kerr suggested.[31] On the narrower issue confronted, Congress responded almost immediately by enacting Title III, which actually extends even more protections than what is guaranteed by the Fourth Amendment with respect to wiretaps.[32]

Very briefly, two originalist agenda items/pure fantasies—one, maybe it's time to revisit the issue of incorporation. You know, for a century after the adoption of the Fourteenth Amendment, it was not thought that the Fourteenth Amendment applied each of the Bill of Rights protections

30 Kyllo v. United States, 533 U.S. 27 (2001)

31 *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 307 (2005).

32 Criminal Resource Manual, 27 Electronic Surveillance, Title III, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00027.htm.

against the state exactly as they applied to the federal government. I think this would be a very useful development, although perhaps unlikely.

Second, circuit riding—let's bring it back. It didn't stop existing until the mid-19th century. You look at the Supreme Court today; God knows what the percentage of their docket is for criminal cases: a quarter, half? None of them have any experience adjudicating criminal law trials. I mean, to some extent Justice Breyer, but typically not. I think it would be very useful for them to actually have to spend some summer months, instead of going to Salzburg, traveling the country and actually having to hear criminal trials and see what it's like to apply the *Miranda* rules they dreamed up, with all their permutations, with all their exemptions. And best of all—and here is where I think Judge Clement would appreciate this—maybe it would be nice for them to have decisions that can be ruled upon by the people who are generally in the business of being ruled upon by them.

Thank you.

**JUDGE CLEMENT:** Thank you, Professor Lerner. You relax while they shoot at you.

Professor Allen.

**PROFESSOR ALLEN:** Thank you, Judge Clement. It's a great pleasure and honor to be here—the honor from the fact that I'm a great enthusiast for the work done by the Federalist Society, although I've never been a member. I shouldn't confess this, but I will correct this deficiency, I promise, as soon as we are done with this panel tonight—at least, unless you will to the contrary by the time we are done.

I am very much also in the debt of the Federalist Society not only because of the tremendously valuable work that you do but because you produced three of my favorite people, my colleagues. Steve Calabrese and Gary Lawson have been long-time colleagues of mine at Northwestern—Gary unfortunately decided to go to that team that won the World Series last year—and John McGinnis, who is presently at Northwestern. These are wonderful people, and they reflect all the best values of the Federalist Society. They're always open to new ideas. They're attentive to what you have to say. They respond in interesting and helpful ways, and keep balance, which is what the Federalist Society, from my point of view as an outsider, soon to be rectified, does.

Now, the issue of originalism is interesting, and you can see the attraction of originalism, or textualism, or literalism in lots of ways. And I think Craig identified the most important of which, which is all of these are mechanisms or searches for ways to constrain judicial decision-making, which otherwise to be unbounded and both unprincipled and inconsistent with

democratic decision-making and the like. There is also a related, much more general point. There is an attraction to theorizing of any kind. Theorizing allows a mass of information or a complicated situation to be reduced to a manageable size. It often allows you to control that complex problem or process; to predict its outcome; and to change things as you go along. So all of these, I think, at both the discrete level, why originalism itself is attractive and why theorizing more generally, are very critically important.

The difficulty, though, is that what you arise—I'm going to return to this at the end of my remarks—when you theorize, you have to have a model that captures the reality appropriately; not exactly, not precisely at all respects, but appropriately for your purposes. And I think there's a serious question about whether any relatively simplistic theory of constitutional interpretation does that with respect to the modern society in which we live.

Now having said that, let me be clear about something. You can ask three questions about anything, but certainly originalism. You can ask the what, the why, and the should questions. You ask questions about descriptive accuracy. You can ask questions about if it isn't or is descriptively accurate, why it is or isn't descriptively accurate. And then you can ask the should or the justificatory question, you know, what's justified, originalism or as alternative, and so on.

My self-conception, my self-conceit, if you will, is not that of a philosopher; it is that of a scientist. What interests me is how the system actually operates, statements that have truth value. I want to describe accurately the legal process, predict it and so on, not attempt to engage in a normative debate about justification. So I'm going to address the first two of those points, the "what" and the "why" questions, and leave for others the more normative question about "should."

One of the reasons this question is interesting today is because of two important decisions, and Craig mentioned them both—*Crawford* on the one hand and *Apprendi* through *Blakely*[33] to *Booker*[34] on the other. And I think this puts on the table a question of whether we're seeing a resurgence of interest in originalism or increasing significance and so on. I have to tell you, I think the answer to that question is absolutely not. It's as clear as a bell that there is not much to be said about the significance of originalism for constitutional criminal procedure. Even the two cases in which you might plausibly make an argument that you see the influence of it—and by the way, I want to be clear about something. When I say "the influence of it," I'm talking about the work product of the Court, not individual statements by justices. I mean, there obviously are justices who make claims

33 Blakely v. Washington, 542 U.S. 296 (2004).

34 United States v. Booker, 543 U.S. 220 (2005).

along these lines with some regularity, but the issue is when they command a majority of the Court in a way that seems actually to solidify the significance of originalism.

*Crawford v. Washington* is a good example.[35] That's the only case, the only clear-cut case, in which you have a majority of the Court seeming to adopt an opinion that does, in fact, employ a very strong originalist language. And I think that's true. On the other hand, what you need to be aware of is that *Crawford* is one of a long series of the Court struggling with the relationship between the Hearsay Clause and the Confrontation Clause. Now, it may turn out tomorrow or two years from now or ten years from now that this really was the beginning of the originalist revolution in criminal procedure. I have to tell you, given the complexities of that relationship, I think we have to hold our breath and wait, and indeed the Court has already taken two cases this term in which I predict that they will make clear that the parameters of *Crawford* are quite constricted. I may be right; I may be wrong. We'll see. But you do have to realize that is one of a series of cases struggling with this relationship. Nonetheless, it is the one case in which there is a clear majority adopting this originalist perspective.

In the *Apprendi* to *Blakely* to *Booker* line, Scalia's opinion does try to tie its results to an originalist argument. The originalist argument has virtually no evidence to support it. Indeed, in the opinion itself, basically the argument is that although our originalist position has very little evidence, your—in particular, O'Connor's—alternative has none. So, it's like a relative plausibility theory. We have a psalm; you have none. This is not a very robust originalist methodology.

Moreover, what's often neglected when thinking about originalism in *Apprendi* line of cases, in particular, *Booker*, is this is presented as the federal guidelines that haven't been struck down on originalist grounds. In fact, what the Court probably did in *Booker* was uphold the guidelines. There are two opinions. The second is more important than the first. The second is the remedial opinion. In that opinion, the Court concluded that you could indeed—the guidelines may not be mandatory, but they could be advisory and you can have appellate review of reasonableness of deviations from the guidelines.[36] There's no reason why Congress can't give teeth to the standard of review. If they do, essentially you end up with the guidelines in a somewhat different vocabulary. So, that's not very strong support for any kind of a robust originalism.

If you get away from these two cases and you look at the general lay of the land, what you see are vast provinces in this territory that have virtually no connection to originalist points of view. Again, Craig mentioned some of them. A *Mapp* and *Katz* regime in the Fourth Amendment is very

35 Crawford v. Washington, 541 U.S. 36 (2004).

36 *Booker*, 543 U.S. at 268.

distant from it. One of the cornerstones, really, the real cornerstone, I think, is not *Mapp* but *Gideon*.[37] That's actually the real cornerstone as to interpretations of the meeting of *habeas corpus*, which—I won't get too technical here, but if we put aside *habeas corpus*, it's *Gideon* which gave rise to modern constitutional criminal procedure. You cannot justify the *Gideon* line of cases in any remotely originalist way, and one of the important areas—not the entire area, but one of the important areas—of the Fifth Amendment is *Miranda*. It's the same thing. I mean, it's about as far from originalism as one can possibly get.

Nonetheless, to test this hypothesis, I decided to actually go through the last two terms and look all the decisions again. I read them when they came out, but some of them aren't in my area of significant interest, so I went back and looked at them all. But what you get is a long list of cases, in many of which there could have been originalist arguments and not a single one was made. By far the most striking of these on the counter side, on the counterbalance of the non-originalist, is *Roper v. Simmons*[38]—to my eyes it is a shocking opinion, and why were you not more up in arms?—maybe you were and maybe I missed it; I was out of the country. But you were not up in arms about this, the conclusion by a majority of the court with at least three members actually signing off on this, that it is up to them personally to decide the appropriateness of punishment under the Cruel and Unusual Punishment Clause.[39] Now, I cannot imagine anything more like what Professor Graglia was railing against earlier today and more inappropriate from an originalist position.

Now, I have two pages of notes, because one page is nothing but a listing of the cases from the last two terms in which originalist arguments might plausibly have been made—Fourth Amendment cases, confrontation cases, discovery cases, all kinds of stuff—and in not one of those was there a serious originalist argument. I am happy go through them if anyone is interested, but I will not at this point. But just to mention a couple of those, there are whole areas again that just have no relationship to any plausibly originalist position. Think about the *Brady* line of cases. There are constantly *Brady* cases, discovery cases—that have nothing to do with what was in anybody's mind 200 years ago.

Think of the terror decisions, the three terror decisions—*Hamdi*,[40] *Padilla*,[41] and *Guantánamo Bay*.[42] Again, not much there—there could have been—but not much there are about originalist perspectives. Or, the *Miranda* decisions of two terms ago, *Patane*,[43] *Seibert*,[44] and to a lesser extent

37 Gideon v. Wainwright, 372 U.S. 335 (1963).
38 Roper v. Simmons, 125 S.Ct. 1183 (2005).
39 U.S. CONST. amend. VIII.
40 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
41 Rumsfeld v. Padilla, 542 U.S. 426 (2004).
42 Rasul v. Bush, 542 U.S. 466 (2004).
43 United States v. Patane 542 U.S. 630 (2004).

*Fellers*.[45] *Fellers* is really a Sixth Amendment decision—again, no connection here. And I could—if in our discussion you want to talk about them - give you some more examples. But if you look not at these two opinions, only one of which is plausibly originalist, and that's *Crawford*; that's it. So, in terms of the what, there isn't much there to suggest that originalism is of any great significance, at least in terms of the decisions being reached now. Now, the issue can be more complicated than that. Maybe some issues are settled, and they're settled because of originalist positions and so on, so I mean, there are some interesting things to talk about here.

All right, so that's the "what" question. What about the "why" question? Well, you know, there's a theory out there that the fields I'm interested in, constitutional and criminal procedure and evidence, are kind of insulated from larger currents of constitutional law, in particular, and we suffer from it. I have the exact opposite view. Now, I guess that's not a surprise. I think you constitutional theorists out there suffer from not having engaged with constitutional criminal procedure and evidence. Why? Because these cases make you deal with the nitty-gritty of real life. You know, in separation of powers cases, you can also often abstract away from what the real issues are. It's really hard to do that in the criminal cases, the evidentiary cases, and so on.

And what am I getting at? Well, when you look at it from this bottom of the heap perspective, which criminal procedure and evidence questions make you look at—you know, what's really going on? Who did what there for a man, what's going on? You see a couple of interesting things. One you see—and there are two I want to make—one is how dramatically the world has changed, and two, the implications of that for theorizing, the point I said I'd come back to at the end.

First of all, obviously some things are decided consistent with what you might claim to be an originalist position. But a lot of what matters to the criminal process exists in a world that simply was not contemplated either 200 years ago, or if you want to talk about the Due Process Clause, 150 or so years ago. My favorite example is wiretapping. No one, not even Ben Franklin flying his kite in rough weather, was thinking about wiretapping. So now, what to do with an originalist position when a problem simply was not contemplated?

Appeals and the right to counsel—there were some appeals in some states in various ways, and very odd modern points of view, but there's no view that appeals were a necessary part of a criminal process. The old Western slogan, "give them a fair trial and hang them," is right. There were no appeals. You gave them a fair trial, and you hanged them. In the

44 Missouri v. Seibert, 542 U.S. 600 (2004).

45 Fellers v. United States, 540 U.S. 519 (2004).

late 1880s, criminal appeals were allowed in federal court for the first time. Now, there were some peculiar ways you can sometimes get a review and some states did different things and so on. But now much of the world centers on appeals. No one was thinking about this.

What about the police? The police didn't exist in the United States until the late 1800s. So now you have an investigative body that simply didn't exist, but at the time, these procedural protections were created in the body in the Bill of Rights. Organized criminality was not an issue. What about the distinction now that is pressing so much public policy between criminality and terror, or between terror and war? The tripartite relationship between those three was not really well thought out and contemplated.

Well, in any event, I could give other examples—organized criminality; that was not what people were thinking about when they were thinking about the criminal process. It just was not on anybody's radar screen. And the world we now deal with is just not the world we had then. And more importantly, there has been not just a change, which is a common factor in these discussions, but in fact, things exist now that *literally were not conceived of*. Now at that point, you can start analogizing, and that's what you do with respect to wiretapping. Some people respond by saying, well, reasonable this, reasonable that. Well, you can start an analogy, but you can't formalize analogy. You can analogize in one way; I can analogize in another. And there is no formal means of adjudicating over those analogies. That means you are divorced from any algorithmic conclusions driven by your methodology.

Now the last point, if I could have one more minute —

**JUDGE CLEMENT:** Yes.

**PROFESSOR ALLEN:**—one more minute. A cautious and hesitating one more minute, but—

**JUDGE CLEMENT:** You're the math major.

**PROFESSOR ALLEN:**—one more minute because I think this is really the most important point from my point of view, again, as a self-conceited scientist. Why do these theories seem to have so little bite, even though you argue about them so vociferously? I think it is because they misconceive the object of their theorizing.

Again, those of you who know about the literature in evidence, in particular, we know a fair amount about the relationship between complexity and decision-making. And you can say some systematic things about what

can be captured by deductive algorithmic top-down theories and what resists them. Issues like ambiguity, unpredictability, the significance of common sense, actually describe or predict the extent to which areas of law are capture-able, or at least have been captured, by algorithms, like, for example, microeconomics, which does capture antitrust but does not capture negligence.

Now, when you look at the constitutional interpretive process, it is highly ambiguous, very unpredictable, and probably requires common sense. So I would predict as a scientist that this is exactly the area that is going to avoid algorithmic solutions. So, I think in fact what you do when you start trying to reduce constitutional interpretation to a relatively straightforward or simple theory is that you are neglecting that it simply does not capture the reality of the object being theorized, and as a result, it resists it.

So, I think from my point of view, from my own professional point of view, that is the most interesting thing about this. From your point of view, it is probably uninteresting entirely, and we can go on after this and talk about normative questions about originalism and so on. But I did want to emphasize it because what I predicted that no matter how much we talk about this, you are going to continue to see exactly what I went through. The Court has done it the last two terms, and it captures 50 years of their jurisprudence, that it is going to raise these kinds of arguments as tools when they are appropriate. But the idea that any particular tool, whether it's originalism, strict construction, textualism, whatever, will be a dominant theme and a dominant determinant of outcomes, is simply going to be falsified by the facts.

Thank you.

**JUDGE CLEMENT:** I'm not sure you answered the "should" question, but you're out of time. But you can use it in your rebuttal.

**PROFESSOR ALLEN:** Sorry.

**JUDGE CLEMENT:** Mr. Wray—Assistant Attorney General.

**HON. MR. WRAY:** Not anymore. I just saw some of my former colleagues in the Criminal Division, and I am busy frantically thinking whether I am about to repudiate some position I took, and so I am sure that they will tell me I am being inconsistent with my own original understanding. But I think when you start talking about something like originalism, to set it up the way the Federalist Society always does, and which I think makes it more interesting, is a pro-con kind of debate. It is probably sort of decep-

tively simple because I do not think anybody who is a proponent of originalism, which I consider myself to be, advocates using originalism to the exclusion of every other is interpretive tool, like textualism, looking at the landscape of precedent, and so on so forth. So it has to be considered as one of many tools, and not the only tool.

The second thing I guess I would say is that, if you are going to be against it, then the obvious question comes up, well, what are you going to propose instead? Craig went over that little bit at the beginning, and trying to keep things within time limits went over it pretty quickly. But I think the points that he summarized quickly are important, because as hard as it may be sometimes to figure out what the original understanding was, if you do not look at something like that, then I think you end up looking at something like what side of the bed the judge got up on that morning, and which newspaper he likes to read the most, and which editorial page he subscribes to the most and worries about getting hammered in the most. And that starts to become, at least to my mind, a little bit more like the finger to the wind judicial interpretation, which if you are trying to promote stability and predictability and consistency, if you're trying to have a limited role for the judiciary, I think you have to look at things like originalism. So I would say to the critics of originalism, if not that, what else? And I would like to hear the defense of what that would be.

But to say that using originalism in this arena in particular is a good idea, does that mean that doing that by itself will answer the question before any given court in any given case? No, I think not. And does it mean that you are even able to find the original understanding in every case? I do not think so, either. But not being able to find something and just not looking for it are two very different things. Like I said, if you are not going to look for it, then you have got to wonder what else you are going to be looking at.

The third thing I would say is that just to say that looking at the original meaning in the context of criminal procedure, does that mean that you are necessarily going to only be looking at criminal enforcement techniques, investigative techniques, processes and procedures and so forth that were in existence at the time of the framing, or at least contemplated at the time of the framing? Again, I think not. I think the answer is somewhat like what now Chief Justice Roberts said in his confirmation hearing, which is where there are very broad terms reflecting broad principles that the framers chose, I think I prefer to assume they did that deliberately knowing that they were not going to be able to anticipate techniques and technologies and so forth, but that they wanted to have some level of consistency in the principals in terms of how they were going to be applied for all those unforeseen facts.

So, that to me starts to come down to what is it you are going to draw from the historical evidence? Do you just look at it and say, well, they

didn't contemplate heat-seeking sensors, so forget all the original understandings of the Fourth Amendment? Well, I do not think so. But it does make it a lot harder to figure out what you can draw. And there are things, to take the *Kyllo* case as an example, where I think the original understanding helps limit just how far afield the court can get. It does not get you all the way there; it does not get you to the final answer of the question. But things like the sanctity of the home, the notion that the home is the sort of quintessential protected location for search purposes, is a principle that you can glean from that is historical evidence and keeps the Fourth Amendment jurisprudence that the Court engages and from getting, I would argue, way adrift.

I share some of the disappointment that some of the others have articulated, that the Court did not take that historical analysis as far as it could in *Kyllo*. But I would argue the way to reconcile *Kyllo* with some of the other cases in the same arena is that it is, in fact, based in part on original understanding of the Fourth Amendment.

For example, that very principle—the idea that a man's home is his castle, and so on and so forth—if you put the *Kyllo* case and the heat-seeking device used they are up against cases like *Caballes*,[46] which involved detection dogs on things like cars, or the cave, the *Dow Chemical*[47] case that was referenced earlier involving flyovers, the way to understand those cases as being consistent with each other is based, I think, on that principle that the home is different. There is obviously a lot more to it, but I don't think saying that the original understanding does not get you all the way there is the same thing as saying it is irrelevant or inappropriate to use.

Another example in the Fourth Amendment context might be in the context of seizure. Justice Scalia, I think, wrote a pretty persuasive opinion for the Court in the *Hodari D*. case, in which he looked to the original meaning to say that seizure can't be understood to include a guy who sees a cop walking towards him and runs away with no physical force, not even any physical touching, that that is not a seizure.[48] It seems to me pretty logical, and maybe they would have gotten that way without looking at the original meaning, but I have to believe that doing so helped in that particular case.

That does not mean that original meaning is not messy, and some of the cases you have heard about today illustrate that point. The sentencing cases are a classic example. Although the Court purported to ground its rejection of the sentencing guidelines as then written on historical evidence—I am no historical scholar, but from what I have seen—the historical record is a lot murkier and a lot more unclear than the Court would suggest, and

46 Illinois v. Caballes, 543 U.S. 405 (2005).

47 Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

48 California v. Hodari, 499 U.S. 621, 626 (1991).

that right around the time of the framing, courts were moving away from determinant sentencing into sentencing within a range. And essentially, the criminal procedure in that very area was in flux at the time of the framing.

Therefore, you have to sort of look at, well, what was not in flux at the time of the framing? Well, what was not in flux were certain things that I think all the members of the Court seemed to agree on. One, a jury has to find beyond a reasonable doubt the elements of the offense; fine. But two, the judges had pretty broad discretion to look at certain facts, to impose a sentence within the range, whether that's zero to whatever the penalty was. At least most of the members of the Court profess not to disagree with that proposition.

So then, the question becomes the issue that was actually presented in the case, which was if it is okay for a judge to sentence based on facts that he or she alone finds at sentencing as aggravating or mitigating the defendant's conduct, anywhere from a range of, say, zero to life, it seems pretty clear that that is constitutional. All the guidelines do, in effect, is structure or shape that discretion within the range. Is there any reason to think the historical evidence suggests that that suddenly transforms what would otherwise be constitutional scheme into an unconstitutional one? And I did not see anything in any of the opinions that bore on that point. So, again, does that mean that the historical evidence is irrelevant? No, it just means that it did not get the Court all the way to the answer. In that particular case it left a morass that those of us who are on either side of the criminal justice system are still unraveling.

*Crawford*,[49] which was also mentioned, is another example of where it gets pretty messy. But again, messy and irrelevant are not the same thing. It is pretty clear that from the historical evidence that is recited in that opinion that the *Roberts*[50] case, which essentially allows the admission of out-of-court testimonial statements, based solely on a judge's finding of reliability, trustworthiness, and so on. But to take it to the next step and sort of categorically exclude all such statements is not so clear, and if you look at those opinions, one of the things that I think is interesting is there is a pretty lengthy historical debate between Justice Scalia writing for the Court, and Chief Justice Rehnquist on the other side also pointing to historical evidence. The fact that there is a debate, I would suggest, means that—let me step back. The fact that there is a debate over the historical evidence does not mean that that evidence is irrelevant. It just means that it is harder.

But again, I come back to the point that I made at the beginning, which is just because something is hard does not mean it is irrelevant, and if you are not going to use something like originalism along with other

49 Crawford v. Washington, 541 U.S. 36 (2004).

50 Ohio v. Roberts, 448 U.S. 56 (1980).

tools like textualism, then you have to ask, what are people going to be using instead. And I think the reality is you pretty quickly degenerate into judges using their own subjective policy preferences to fill the gaps that they would otherwise be able to fill using originalism. So I would argue that it is relevant, it is appropriate, but like anything else, it has its caveats and qualifiers and limits to its utility.

Thank you.

**JUDGE CLEMENT:** Thank you, Chris.

I think Professor Steiker is about to answer Chris's question: if not originalism, what else?

**PROFESSOR STEIKER:** Actually, I was not planning to do that, but I can try. I will. Ask me anything.

I am very happy to be here to participate in this event. I always admire and enjoy the events that the local and the national chapters of the Federalist Society put on, and I am very pleased to be here.

What I plan to do—though I will accept the Judge's challenge to a certain extent—was something a little bit narrower, perhaps either correctly or incorrectly interpreting the point of this particular panel. The conversation thus far has been at a very abstract level about the virtues and vices in general of originalism as an interpretive methodology. And I think we've had a very interesting discussion that's pointed out most of the main things that originalism has to say for itself and what people, the proponents of it, seek to achieve by it and some of the concerns and the limitations of it. I guess the question that I had in mind was, is there anything in particular about the context of criminal procedure that would suggest that originalism is either a more or less appropriate tool in the toolbox of interpretive moves.

I guess I was going to make a somewhat more modest point that, at least in a certain large part of the context of criminal procedure—that is, the context of the regulation of police practices generally, which is the entire scope, pretty much, of the Fourth Amendment, and part of the scope of the Fifth and Sixth amendments as well, there are a lot of reasons to be more skeptical about originalism than just generally as an interpretive methodology. I was going to point out three reasons why we might, in that context, have more concerns about originalism as a tool than in others. But I will also try to answer—in my twelve minutes or so—what, if not originalism, then what? Because I think the "then what" has been implicit in what has been said, and I will just try to make it a little more explicit.

So, what are the three reasons why I think the criminal procedure context is not welcoming soil for originalism as a methodology. One has to do with a point that was in fact Chris's point, and in fact Chief Justice Ro-

berts' point during his confirmation hearings, which is that not all parts of the Constitution speak at equal levels of generality, and sometimes it seems positively clear that the framers themselves were not seeking to constrain future generations. Now, many people have sought to make this point generally about originalism. The framers themselves were not originalists and didn't seek to bind future generations to their particular conceptions of the shape of constitutional prohibitions and rights.

But in the Fourth Amendment context, in particular, it is very hard to think that the framers meant to bind future generations because it is one of the few provisions of the Constitution that actually adverts to the idea of reasonableness, or actually unreasonableness. But the proscription of unreasonable searches and seizures without further definition positively invites future generations and future constructions of reasonableness. A lot of the debate in originalism is whether we ought to look at the common law at the time of the founding, and there is some debate about which founding. Is it the actual founding of the Constitution in 1789 or 1791? Or, is it the later founding of the Fourteenth Amendment Due Process Clause, through which the Fourth Amendment was incorporated? So was it 1868, or was it 1791? But in either case, the question is what were the particular things that were thought to be reasonable or unreasonable then, or do we take the concept of unreasonableness and try to apply it to new—are we to think of ourselves as bound by the particular things that were thought to be reasonable or unreasonable at the time? That is the first argument.

And it is somewhat ironic that—I had not thought about this in these terms, but Ron's comments made me think that it is somewhat ironic that a bigger bite of originalism has been in the Fourth Amendment area, where we have seen a lot of Fourth Amendment originalist opinions, at least at the Supreme Court level, and fewer in areas where the text of the Constitution, at least, seems to invite that much less, in the Sixth Amendment and all criminal prosecutions. It is amazing the contortions the Supreme Court has gone through to interpret "all" as meaning, "well, some, but not every single one." So it is a little bit ironic that some of the parts of the Constitution that least invite broader conceptualization have gone the non-originalist route, and the provision that seems to most invite it has been the object of a lot of work of originalism.

In a piece that I wrote[51] responding to an essentially originalist approach to the Fourth Amendment by Akhil Amar, who I know is here today, I said that there were two important changes in historical context from the 18th to the 20th century that should really inform our idea of what things are reasonable or unreasonable—searches and seizures under the Fourth Amendment—and one of the two that I pointed out, which was pointed out by Ron, is the development of police as a social institution.

51 *See* Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

At the time of the founding, there was no such thing as professional police forces. It was all an informal, unprofessional constabulary and the duty of "watch and ward" and the *posse comitatus* and the "hue and cry" in the marketplace, there was no professional law enforcement. And the development of professional police forces in the mid-1800s, I argued in this piece, necessitated a change in the way we thought about what kinds of searches and seizures were reasonable and unreasonable.

The other change, a big change certainly from the 18th century, and a change that precipitated the Due Process Clause, is the problem of racism in the United States and having large populations of different races that lived in cities and that were disproportionately or differently policed by professional police forces also led to different concerns. These are somewhat different points that I made my article, but since almost no one here probably has read that article, I have no hesitation with diverging from my own prior views.

But the two more pragmatic points that I wanted to make that you could generate from those differences have to do with the fact that the police provisions of the Constitution have audiences that are unique, and for whom originalism is going to be very unhelpful as a way for them to figure out either their constitutional duties or their constitutional rights. So, constitutional duties—who is the primary audience of the Fourth Amendment? It is law enforcement. And it is a really serious problem to have an originalist methodology that tells law enforcement agents and institutions that the way to figure out what your duties are is to get some staff historians and find out what was permitted exactly at common law in, you know, the middle of the 18th century. I think this is really a problem, and you can see it in many of the debates about individual provisions about what exactly the history of the late 18th century showed.

How in the world are police departments supposed to train their forces and predict the future trends in the Supreme Court, if originalism is the methodology? I would like to add a friendly amendment to Craig Lerner's suggestion that the Supreme Court justices ride circuit. I would like them to go on police patrol ride-alongs. Have them ride with the police and rule from the back seat. You know, what can you do without being able to call down to the Supreme Court librarian and have them bring up the common law of 1782 for them to consult? So I think that is a real problem.

And the other problem is a more abstract version of the same problem, which is that in order for law enforcement to be able to predict future cases—the way we do it now, the way we train as law professors, the three of us here, what we drill and what you all will remember from your own days from law school—happily, I hope, but perhaps not—is that the primary methodology that we teach is analogy. Now Ron criticizes theory, high theory, as a general rule because he says analogy, deciding things by analogy, is insufficiently—what is the word he used? Algorithmic; I just like

that as an adjective—insufficiently algorithmic.

But here, I would like to borrow a little bit from Chris. What is the alternative? When you consider what the alternative to deciding by analogy is, each particular question requires that call down to the Supreme Court library to find out what the practice exactly was here, in that particular context, in the 1700s. And if all we can do is fill in little points on the map, one by one, by reference to historical practice, there is absolutely no way to predict the future in any particular way. Right now, we can try to predict by analogy.

So, the Supreme Court says you need a warrant to search a home. You do not need a warrant to search a car. Do you need a warrant to search a Winnebago? This was actually a question until the Supreme Court decided it.[52] But in deciding whether you need a warrant to search a Winnebago, did you have to try to find out what the thought was about Winnebagos, or shall we say, covered wagons that people lived in back in the 1790s? Or could you try to reason by analogy: why was it that you needed a warrant to search a home and why was it that you did not need a warrant to search a car? And it is only if you allow decision by analogy that you can have this kind of predictability, which is what I urge that in police practices is a much more important value—it is always an important value, but it has the supreme importance, unique importance, in the context of police practices that make originalism truly more problematic.

The other audience—this is my third point, and I think I may have to stop here—but my third point is that the other audience of police practices, aside from the police, is the policed—the people with whom the police have the most and interaction. And the concern so far, one of the main attractions of originalism, and it is an attraction to me as well as to any thinking person, is the idea of constraint—constraint of judicial authority, of democratic accountability, and the idea that we would have a written constitution that would constrain judges is of course a kind of legitimacy that is extremely attractive.

But there is a flip side to legitimacy, and that is that constitutional adjudication appears to take seriously the concerns of the moment and the concerns of people. And so, this is where the issue of race comes in. It is impossible without some kind of normative discussion about what the real problems are, as opposed to simply what the particular conceptions of the framers were in 1791, that is necessary for the evolution of constitutional rights to have legitimacy in the eyes of the people whose rights it delineates.

And I guess in this context, I think of the recent events in France over the last few weeks, and the images on television of gangs of minority youth

52 California v. Carney, 471 U.S. 386 (1985).

out of control and burning police departments and attacking police officers, partly out of a sense of outrage that their concerns and their rights, if you will, have not been taken sufficiently seriously, and that to have a kind of constitutional discourse that refuses, eschews any talk of a normative basis for rights, I think runs the risk of lack of legitimacy in this other way.

So, I am going to close with an example, and then ten seconds of response—I think I have implicitly answered the "what's the alternative" question. The example is the Supreme Court's decision in *Atwater*.[53] That is what I refer to as the soccer mom case, the woman with her two kids in the pickup, who was stopped by a police officer because they didn't have their seatbelts on, and the police officer did a full custodial arrest and took her away in handcuffs.[54] And the question was, is it a reasonable or unreasonable search and seizure for the police to conduct a full custodial arrest for a merely fineable misdemeanor offense?[55]

This goes all way up to the Supreme Court, and judges and justices all along the way disagree about whether or not this would have been considered reasonable in 1789. Ultimately, the Supreme Court decides that the history does not render it unreasonable,[56] but the lack of the ability of all these judges, with all their law clerks, with all of their libraries, to come to any definitive answers should give us pause as to whether or not that's really a good way to decide that question.

And then after the Supreme Court decides—Justice Souter for the majority decides, you know, we really cannot decide based on the history that this was unreasonable, so what do we have to look at? We have to look at, he says—and it is clear that the Court really wants to look at this—is this a really big problem? Are there a lot of cops out there who are conducting custodial arrests of people for merely fineable, non-jailable misdemeanors? And the answer is no, it does not seem to be a very big problem. And he basically said, call me if it gets to be a big problem and we will talk about it then.

But the "call me if it gets to be a big problem," the idea that somehow the bigness of the problem, the extent to which this is a concern that this should be something we should be concerned about, the inability of originalism to ask that question at all or to answer it, I contend is a problem. Granted, it opens the door to what Chris might call policy preferences, but it is only through frank discussion of the normative underpinnings of the nature of constitutional rights can a certain kind of legitimacy attend to decisions of this kind.

So the question is, what is the alternative? The alternative, I have to

53 Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
54 *Id*. at 323–24.
55 *Id*. at 326.
56 *Id*. at 355.

say, is not a complete disregard of the constitutional text and saying, you know, the Constitution says something about searches and seizures, and allows you to judge—I am not a judge, but if I were—allows me, the judge, to decide whatever I want. It is rather a displacement of particular conceptions with a broader level of generality, with the idea of concepts and conceptions.

A lot of this work has been done up at the level of theory by people like Ronald Dworkin, but I think that is the counter-originalist move, the idea to move to a level of generality, at which the paticular conceptions of the framers about reasonableness give way to a broader concept of reasonableness, which requires some normative underpinnings, some frank discussion of the "shoulds," the things that Ron wanted to avoid, but I think that constitutional adjudication cannot and should not avoid.

Thank you.

**JUDGE CLEMENT:** The last I heard—I admit I have not heard the news this afternoon since we were driving in from Charlottesville—was that in France they had immediately arrested, convicted, and were deporting these people. So that is a whole other constitutional procedure that we will not be faced with, I have a feeling, since we do have a constitution.

Would any of the panelists like to give a very short rebuttal before we open the floor to questions and answers?

Ron.

**PROFESSOR ALLEN:** Very briefly. I agree with Professor Steiker that the police are one of the intended audiences of the Supreme Court. But I guess the message is what police hear is not necessarily the message the Supreme Court wants them to hear. And this is the functionalist point that they are not equipped to monitor any of this. So take *Miranda*.[57] *Miranda* is not a bad rule in terms of monitoring the police and regulating them. It is not a bad legislative rule; of course, it was not enacted by legislature. So here is the problem. The Supreme Court is now in the business of sort of evolving *Miranda*.

My favorite case is *Oregon v. Elstad*.[58] This is this case in which they had a non-Mirandized confession, then they gave the guy *Miranda* rights, and then they get another confession.[59] And so, the Supreme Court says, you know, "this is okay."[60] This is 1985. Little did they know that for the next 20 years, this was in police manuals; this is exactly what they taught:

57 Miranda v. Arizona, 384 U.S. 486 (1966).
58 Oregon v. Elstad, 470 U.S. 298 (1985).
59 *Id*. at 300–01.
60 *Id*. at 309.

get a guy in, jam him up, get him to confess, then Mirandize him, then get another confession. It happened for 20 years before the Supreme Court knew about this in the *Siebert* case[61]—so the whole point is that if this is done legislatively, there is probably a better equipment for monitoring and checking it.

And finally, on the reasonableness point, I agree; reasonableness seems to invite a kind of balancing of privacy interests versus law enforcement needs. It is, I think, checked by this person's papers, houses, and effects, so I think that is a cabining of what is being talked about. And also, I think reasonableness, to me—since it involves this balancing, again returning to my corporation point—to me, it raises the question of why is the Supreme Court dictating a uniform police manual given the fact that reasonableness might differ in Utah and in inner-city Washington, DC. I mean, it seems to me this is crying out for local jurisdictions to evolve differently. And so, I will leave it at that.

**JUDGE CLEMENT:** Thank you.

Yes, Chris.

**HON. MR. WRAY:** I guess I wanted to respond to the same point, but in a slightly different way, which, as I said before, if the question is not originalism, then what, and what I heard was normative underpinnings, Dworkin, the concerns of the moment, and as somebody who has actually spent a good part of my career as a prosecutor working with the police and law enforcement, sometimes in the process of training them, I would not suggest for a minute that studying the common law and Blackstone and everything else is something I would recommend for the local police officer. But most of them learn from lawyers working with them in their jurisdictions, and most of those lawyers, and the police who work with them, would feel far more comfortable trying to figure out and predict where they can go with something like originalism as part of the calculus, rather than worrying about whether they draw this judge or that judge, or are they going to be in Los Angeles or Richmond? And so I guess I would say at the end of the day, is it perfect? No. But is it superior? I would say yes.

As to the discussion of the situation in France, I guess I just cannot help but remark that it reinforces my view that that is why we should not be looking at French law.

**PROFESSOR LERNER:** Are you done, Chris?

61 Missouri v. Seibert, 542 US 600 (2004).

**HON. MR. WRAY:** I am.

**PROFESSOR LERNER:** I would like to just sharpen this discussion a little bit with four quick points. I may be the outlier here, but these kinds of conversations seem to make sense to me only if the theory that is been advanced has a sharp edge to it. That is, originalism or textualism or whatever it is that you are talking about dominates over other things, because if the issue is instead, is originalism or textualism or whatever a variable to be taken into account in a judgmental process, that is banal. Of course it is. No one is going to deny those points. It becomes uninteresting.

Second, I just do not understand an argument that says something along the following lines: "the first five steps of the argument can be deductive and the last two can be non-deductive," which sounds to me like what one is saying when it says originalism takes us part of the way but not all the way. I mean, that sounds like you have assumptions, you deduce things from them, you get to step four in the argument, but then step five and step six are not deductive. Well, if they are not deductive, you have no reason to think the conclusion bears any relationship to those assumptions that began that deduction. So I am literally mystified by what that might mean.

Third, to be clear, I was not attacking analogy—not that anybody thought I was—I was describing analogy. You cannot formalize it. That does not mean it is not useful. Analogical reasoning is terribly useful. So are conventions, so is common sense, in a judgmental process. But when you shift from judgmental terms to analytical terms, back to deduction and hard edges, you have a different story, a different problem.

And fourth—this leads me to just my last point—no one is claiming that things like originalism should be completely disregarded. To say it is not an entire story is not to say the opposite, that it is completely irrelevant. Again, in a judgmental context, of course original meaning and all these other things plausibly can matter. Maybe you want to say they should matter. It is okay with me. To me, the interesting question is, how do you go about regulating this complex process?

**JUDGE CLEMENT:** Thank you. If you have a question, you need to get in line. We have two people lined up. And let me remind you, the focus is on the question, not the statement.

Yes sir.

**AUDIENCE PARTICIPANT:** My name is Ken Bishop. My question is simple. What does "the people" in the Fourth Amendment mean? With regard to the French situation, are those members of "the people," if it

were in the United States? With regard to illegal aliens, undocumented workers, people who do not contribute to the society in the United States, should they be protected by the Fourth Amendment? This issue is raised by Chief Justice Rehnquist in the *Verdugo*[62] case. I think it was about a 1995 case. And I would like the members of the panel to address the meaning of "the people."

**JUDGE CLEMENT:** By inclusion or exclusion?

**AUDIENCE PARTICIPANT:** Whichever way it pleases them.

**PROFESSOR LERNER**: When I used to teach criminal procedure, I loved that because I remember in that case, Chief Justice Rehnquist says "people" is a term of art,[63] and we see it first in the Preamble, so it gives me an opportunity to sing what I learned. "WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish justice"[64]—and so I think his point there is that the people obviously means us, Americans here. So that is the argument that we should not extend the Fourth Amendment rights to outsiders, I suppose. But I am not sure if others on the panel would agree with that.

**HON. MR. WRAY:** Do you remember the facts of *Verdugo*?

**AUDIENCE PARTICIPANT:** I confess, not.

**HON. MR. WRAY:** A drug trafficker was arrested by the DEA in Mexico and brought to the United States and incarcerated.[65] He was raised in the United States. It was an unreasonable search and seizure issue, and the U.S. Supreme Court found that he was not "a member of the people," and therefore he had no Fourth Amendment rights. I think that might be a good way of handling undocumented aliens.

**JUDGE CLEMENT:** Did you have a comment, Ron?

Thank you, sir. Next.

62 United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
63 *Id*. at 265.
64 U.S. CONST. pmbl.
65 *Verdugo-Urquidez*, 494 U.S. at 262–63.

**AUDIENCE PARTICIPANT:** With respect to search and seizure, do you see probable cause warrant requirements as consistent with originalism? And do you view originalism with respect to reasonableness as a question of determining what was thought to be reasonable at the time under historic circumstances, or reasonableness as an issue to be determined by juries in civil damages actions without immunity?

**PROFESSOR ALLEN:** Let me answer that one—

**JUDGE CLEMENT:** All right, Ron.

**PROFESSOR ALLEN:** —because I can say a good word for originalism. Well, I could look at the text and see probable cause in warrants there, so I am pretty sure they were thinking about probable cause and warrants. Of course, that answers very little as to what they thought that meant and how we should construe the clause, but sure, they were there.

**JUDGE CLEMENT:** Carol.

**PROFESSOR STEIKER:** Well, I mean, this is actually the subject of the article, the debate,[66] that Akhil Amar and I had these many years ago because he argues that although warrants and probable cause are in the Constitution, they actually are in there to limit the use of warrants, not to enshrine warrants as the gold standard for constitutional reasonableness, because what courts have done is read the two clauses together: there shall be no unreasonable searches and seizures, *and* no warrants shall issue but upon probable cause. So, Professor Amar, who took an essentially originalist approach, argued that probable cause and warrants were actually a way of limiting the warrant; the warrant was a bad thing; and the Fourth Amendment limited the use of warrants as opposed to enshrine to them as the ultimate standard.

I actually—there are many other historians who have disagreed with him on that and there is a range historical debate about what—this goes to my point about, if historians cannot agree, this is one of the problems of originalism because there is a huge debate among historians about the relationship of the two clauses of the Fourth Amendment. I argued that there were reasons of changed circumstance, that the conception of reasonableness should let us consider things like professional police forces and problems of racism, something that originalism, that the whole originalist de-

66 *See generally* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Steiker, *supra* note 51.

bate has to elide because it is just not relevant to the question of the tionship between warrants and probable cause.

**JUDGE CLEMENT:** Thank you.

Yes, sir.

**AUDIENCE PARTICIPANT:** I am wondering if an originalist perspective in criminal procedure should perhaps incorporate a *Michael H*.[67] approach to the level of generality question, which would then set the preference towards the lowest level of generality in order to achieve a more restrained judicial interpretive method.

**JUDGE CLEMENT:** Any comments?

**PROFESSOR LERNER:** I think that's my position, but—I embrace that, yes.

**HON. MR. WRAY:** I mean, all these questions are good questions, but they are just reiterating the problem. There are lots of ways to constrain or to liberalize judgment, right? That might get one good one. And it is hard to imagine how you would think systematically about that without being pragmatic from beginning to end. You would ask questions—"what would the consequences of that be? What would be the consequences of the alternatives?"—and so on. And as soon as you start doing that, unless I am missing something, you give up any claim to originalism, not that I heard you arguing for it, but you give up any claim to originalism.

**PROFESSOR ALLEN:** I thought the point was that originalism is "look at the plain text through the original meaning," and I think the argument would be that if you are doing that, you discover that the Constitution does not cover as many things as perhaps now the Supreme Court has interpreted it to mean. So it would effectively result in greater judicial restraint. I mean, it is not inconsistent with originalism.

**HON. MR. WRAY:** I did not say it was inconsistent with originalism. I said it was not derivable from it or driven by it. It is consistent with lots of theories.

67 *See* Michael. H. v. Gerald D., 491 U.S. 110 (1989).

**JUDGE CLEMENT:** All right. Can we have a round of applause for our excellent panelists.

(Panel concluded.)