

Policing Beyond the Framing Era

Author : Andrew Taslitz

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Wesley MacNeil Oliver, *The Nineteenth and Early Twentieth Century Origins of Modern Criminal Procedure: A View from the New York City Police Department* (2009); Wesley MacNeil Oliver, [The Neglected History of Criminal Procedure, 1850-1940](#), **62 RUTGERS L. REV.** (forthcoming 2010); Wesley MacNeil Oliver, [Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century](#), **81 TUL. L. REV. 777** (2007); Wesley MacNeil Oliver, [The Rise and Fall of Material Witness Detention in Nineteenth Century New York](#), **1 NYU J.L. & LIBERTY 727** (2005).

Most judicial opinions and scholarship concerning the history of criminal procedure relevant to constitutional interpretation stress colonial practices and the Framing Era response to them. A small number of scholars have addressed aspects of nineteenth century criminal procedure relevant to one criminal procedure constitutional provision or another. But no one has written a book-length treatment of the impact of the rise of professional policing from the mid-nineteenth century through modern times on the arc of constitutional law. Nor has anyone explored the theoretical implications of such history for constitutional interpretation. No one, that is, until now.

Wesley MacNeil Oliver, a newly-minted Associate Professor at Widener University School of Law, has just recently completed his dissertation – which he plans to publish in book form in the next few years, and portions of which are currently available in the form of published articles – filling this important gap in the literature. Oliver focuses his attention on the rise and evolution of the New York City Police Department. His emphasis is thus on state-level developments, but he places them in the context of broader national developments. Moreover, the N.Y.P.D.'s history is likely emblematic of the growth of police departments in major cities nationwide.

Oliver's history builds toward a three-part argument. First, despite the seeming textual breadth of some of the criminal procedural provisions of the Bill of Rights, they were prompted primarily by concerns about customs officer and other specialized colonial-era abuses, not by worries about the unbridled discretion of professionalized police forces. Law and custom during the Framing Era and the early nineteenth century discouraged police from independently investigating crime, limiting their ability to do so effectively while simultaneously also limiting their ability to engage in investigative excesses. Second, the rise of professional police forces during the mid-nineteenth century, later reinforced by Progressive Era faith in government, led to a period of growing police power and accompanying abuses without serious limitations on that power. Indeed, Progressive Era reforms emphasized ending police corruption, not limiting police authority. Only with the rise of the Prohibition Era did police abuses multiply and reach the awareness of ordinary persons sufficiently to call into question the wisdom of leaving police to self-regulation. Third, the reaction to Prohibition Era abuses is what ultimately led to the Modern Era, combining police power with constitutional and other limits on its exercise. Police power seemed needed to address modern crime, as did limits on police discretion to stop the police themselves from becoming dangerous to the People's safety and freedom.

Oliver's ultimate conclusion is that the Framing Era is the wrong place at which to look to guide modern constitutional and other criminal procedural law. Our world of policing is simply too different from theirs. The proper place to look to understand the necessities of the Modern Era is its response to the earlier rise of a period of a powerful but unregulated police force. Prohibition rather than the Boston Tea Party

thus has more relevance to today's problems.

For example, most investigation of crime during the Framing Era was done by victims or witnesses, not police. An officer, explains Oliver, "would be unlikely to arrest on mere probable cause, for he would be liable for false arrest if no crime had actually occurred." Instead, therefore, an officer would await a victim's complaint. Furthermore, "[e]ven where the law gave officers discretion to act, the limited manpower of early forces, the social standing of officers, and the lack of professional or financial incentives generally meant that officers waited for victims to identify culprits." Nor could officers usually obtain warrants themselves because the affiant was required to swear under oath that a crime had "in fact occurred," something to which ordinarily only victims could attest. For these and a variety of other reasons, officers lacked the authority and practical ability to investigate crime energetically. A perceived need for more effective means for addressing crime and disorder led to the rise of professional police forces. These forces and their political supporters became a powerful new political group, pushing for changes that eventually led to police having the power to arrest without a warrant and to obtain search warrants based upon hearsay. Police were, however, sometimes encouraged to use violence as a substitute for later judicial involvement in criminal justice. Furthermore, freedom from accountability led to graft and other corruption. A broad and serious exclusionary rule, moreover, did not originally exist, but Prohibition Era excesses, such as dragnet liquor searches, contributed to the rise of such an exclusionary rule as a way to limit police excesses for cases that did reach the courts.

Oliver's examples include not only ordinary search and seizure authority applied to suspects but also the rise (and temporary fall) of material witness warrants, the growth of police interrogation practices as a replacement for magistrate interrogation, and the viral rise of wiretapping. In each case, Oliver convincingly explains the sharp differences of the Modern Era from its Framing Era roots.

In this short space, I cannot begin to do justice to Oliver's work, and my encapsulation of it is likely therefore inevitably misleading. But a more detailed examination would do nothing to change my conclusion. Oliver's well-written, thoroughly-researched, fascinating, and persuasive book makes originalist approaches to constitutional interpretation look silly. If modern constitutional criminal procedural law is to be of any continuing relevance, it must eschew an obsession with any one period of American history, and particularly with the Framing Era. Focusing on the Framers leaves only one of two options: do bad (even dishonest) history to make the Framers seem relevant or leave most important matters of policing entirely beyond the purview of constitutional law. Oliver offers a better way: use the broad sweep of American history as a way to inform, constrain, and empower constitutional law today.

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