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A Criminal Procedure Regime Based on Instrumental Values: A Review of 'About Guilt and Innocence: The Origins, Development, and Future of Constitutional Criminal Procedure,' by Donald A. Dripps (Prager Publishers, 2003)

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A CRIMINAL PROCEDURE REGIME BASED ON INSTRUMENTAL VALUES

ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE. By Donald A. Dripps.[1] Praeger Publishers. 2003. xix + 295 pp. $85.95.

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INTRODUCTION

To listen to those who teach and study American constitutional criminal procedure, the Supreme Court's jurisprudence in this field is a mess. Scholars from different political perspectives share the view that the Court's criminal procedure rulings are often inconsistent, out of touch with the real world of law enforcement needs, and unduly protect the rights of guilty defendants without enhancing the freedom and liberty of innocent persons.[3] This complaint is not confined to law professors who

1. Professor of Law, University of San Diego School of Law.

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3. For critical commentary on the state of Fourth Amendment law, *see, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994) ("The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. . . . Meanwhile, sensible rules that the Amendment clearly does lay down or presuppose . . . are ignored by the Justices. . . . Criminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."); Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product."). For critical comments on the Court's Self-Incrimination Clause and police interrogation cases, *see, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995) (arguing that "courts and com-

are unburdened by the responsibility of deciding cases and writing opinions that are consistent with precedents that are decades old. Justice Scalia, a member of the Court for almost twenty years, has on more than a few occasions (usually in dissenting or concurring opinions) criticized his colleagues for issuing rulings that contradict earlier cases, or are devoid of principled reasoning and common sense.[4]

Professor Donald Dripps shares the view that the law of criminal procedure "is in disarray" and "highly *dysfunctional*" (p. xiii).[5] Dripps believes that the Supreme Court's "legal doc-

mentators have been unable to deduce what the privilege is for, [and] they have failed to define its scope in the most logical and sensible way."); William J. Stuntz, Miranda's *Mistake*, 99 MICH. L. REV. 975, 976 (2001) ("As things stand now, from almost any plausible set of premises, police interrogation is badly regulated. Because of *Dickerson* [*v. United States*, 530 U.S. 428 (2000)], it will continue to be badly regulated for a long time to come."); Charles D. Weisselberg, *Saving* Miranda*,* 84 CORNELL L. REV. 109, 188 (1998) (arguing that under the modern Court's interpretation, "*Miranda* no longer will safeguard Fifth Amendment values, prevent coercive interrogations, or assist courts in avoiding more difficult determinations of voluntariness").

4. *See* Dickerson v. United States, 530 U.S. 428, 444–45 (2000) (Scalia, J., dissenting) (complaining that "Justices whose votes are needed to compose [the *Dickerson*] majority are on record as believing that a violation of *Miranda* is *not* a violation of the Constitution. And so, to justify today's agreed-upon result, the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be discarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that 'announces a constitutional rule.'") (citations omitted); California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years."); County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today's opinion reinforces that view. . . . In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.").

5. Dripps proffers three statistics to illustrate the practical failures in the criminal justice system: First, "half of all arrests don't lead to convictions." This fact, according to Dripps, must mean that "the police detect many guilty offenders the courts fail to convict, that the police arrest a great many innocent people, or that arrest is routinely used as a kind of informal punishment." Dripps believes that "some combination of these phenomena explains the nonconviction rate" (p. xiii).

Second, "25% of the conclusive DNA tests performed at the request of the police exonerate the suspect." This obviously means that a significant number of innocent people have been ensnarled in the criminal justice system. Dripps plausibly theorizes that the factors that implicate innocent persons in cases where DNA test can be performed—"misidentification, poor defense work, prosecutorial misconduct, informant perjury, and false confessions—are at work in other cases too." The upshot is that the criminal adjudicatory process "is being asked to negate far more false accusations than criminal justice professions previously believed" (*id.*).

Finally, "[a]lthough social science data suggest that black and white usage rates of

trine is in large measure responsible for the failure of the criminal-procedure revolution," and contends that "current doctrine does not reflect prevailing (and justified) values about the criminal process" (p. xiv). To prove his claim, Dripps has written a book that expertly identifies the flaws, inconsistencies and missteps of the Court's constitutional criminal procedure cases dating back to the adoption of the Fourteenth Amendment. *About Guilt and Innocence: The Origins, Development, and Future of Constitutional Criminal Procedure* is a comprehensive and thoughtful critique of the Court's criminal procedure jurisprudence. While Dripps surveys the entire field of constitutional criminal procedure, the book pays close attention to the Court's Fourth, Fifth and Sixth Amendment cases. Topics such as search and seizure, the exclusionary rule, police interrogation and the right to counsel receive scrupulous analysis by Dripps.

This book is not casual or beach reading. Dripps' legal analysis is meticulously researched. Parts of the book discuss constitutional law cases and theories that are rarely taught (or even mentioned) in a standard criminal procedure course. A firm knowledge of constitutional law is essential to understand many of Dripps' arguments.[6] Although the book is intellectually rigorous, it is not a book that should be confined to the bookshelves of law professors. The Justices of the Supreme Court should read this book. The issues discussed by Dripps are addressed by judges—both federal and state—on a regular basis. Moreover, the impact and meaning of many of the rulings discussed in the book—*Terry v. Ohio*,[7] *Miranda v. Arizona* [8] and *Strickland v. Washington*[9]—remain highly controversial among

marijuana and cocaine are roughly comparable, blacks are five times more likely than whites to be convicted of these offenses. Police decisions to stop, search and arrest, and prosecutorial decisions to charge, clearly have a massively disproportionate impact on black Americans" (p. xiv). For two thoughtful views on the role of race in the criminal process and the inequalities inherent in the criminal justice system, *see* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) and MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

6. The only frustrating part of the book was the endnotes. Professor George Thomas is right about the use of endnotes, particularly in a book like this one, where the endnotes often contain a large amount of useful information. *See* George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 808 n.4 (1995) ("Is it not late in the day for endnotes? Having become accustomed to footnotes in this computer age, the endnotes were quite frustrating, all the more so because readers will want to examine [the author's] notes carefully."). Of course, Professor Thomas' own book on Double Jeopardy, a fine piece of legal scholarship, also has endnotes. *See* GEORGE C. THOMAS, DOUBLE JEOPARDY: THE HISTORY, THE LAW (1998).

7. 392 U.S. 1 (1968).

8. 384 U.S. 436 (1966).

9. 466 U.S. 668 (1984).

the judiciary and its observers. When addressing these controversies, Dripps offers a fair and balanced presentation of the opposing legal and policy choices confronting the Court. To be sure, Dripps has specific (and pointed) opinions about the Court's jurisprudence. But he does not let his own views stand in the way of educating his readers.

My review will proceed as follows. Part I provides a general overview of Dripps' book. Dripps discusses so many cases and topics that a fair and detailed review of the book's various aspects and premises would go beyond the scope of this project. Therefore, Part I simply highlights Dripps' core arguments. Part II, in contrast, is a detailed discussion of Dripps' analysis of the Court's confession cases. This part also includes a description of Dripps' proposal to regulate police interrogation and my critique of his proposal.

PART I: THE BOOK ITSELF

A. THE ORIGINS OF CONSTITUTIONAL CRIMINAL PROCEDURE: THE FIRST BIG MISTAKE AND REJECTION OF INCORPORATION THEORY

About Guilt and Innocence discusses a wide range of criminal procedure issues and several hundred judicial decisions. Although Dripps directs most of his analysis on the Court's Fourth, Fifth and Sixth Amendment rulings, this focus is dictated as much by the Court as it is by Dripps himself. Fourth, Fifth and Sixth Amendment cases remain a staple of the Court's docket and these are the cases taught in the standard criminal procedure course in American law schools.[10]

10. Each Term, the Court decides a number of interesting cases involving criminal procedure issues. In recent years, the Court has decided several important constitutional issues in criminal cases. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005) (federal sentencing guidelines are subject to the jury trial requirements of the Sixth Amendment); Blakely v. Washington, 542 U.S. 296 (2004) (mandatory state sentencing guidelines system violated the Sixth Amendment jury trial requirements); Roper v. Simmons, 543 U.S. 551 (2005) (execution of individuals under 18 years of age at the time of their capital crimes prohibited by the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (executions of mentally retarded defendants prohibited by the Eighth Amendment). The Court has also addressed the President's authority to detain an American citizen as an "enemy combatant." *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (explaining that although Congress authorized the President to detain enemy combatants in the narrow circumstances of this case, due process principles require that a citizen held as an enemy combatant be given a meaningful opportunity to challenge the factual basis of his detention before a neutral decisionmaker). Readers of Dripps' book will not find a discussion

The book is organized in seven chapters. The first chapter is entitled "Constitutional Criminal Procedure from the Adoption of the Fourteenth Amendment to 1947: The Strange Career of Fundamental Fairness." As the title indicates, this chapter introduces the reader to the Court's initial venture into constitutional criminal procedure in the wake of the Civil War and the Reconstruction Amendments. In 1884, in *Hurtado v. California*, the Court adopted a fundamental fairness test to determine whether state criminal procedures satisfied the demands of the Fourteenth Amendment's Due Process Clause.[11] The specific issue in *Hurtado* was whether due process required a grand jury indictment to initiate a state murder criminal charge, as is required by the Fifth Amendment's Grand Jury Clause in federal prosecutions. The *Hurtado* Court held that an *ex parte* information satisfied due process requirements. Due process, according to *Hurtado*, only required those "fundamental principles of liberty and justice which lie at the base of all our civil political institutions."[12] And due process emphasizes the "substance" of fundamental rules of law, rather than the "forms and modes of attainment" dictated by the law.[13]

Dripps asserts that *Hurtado*'s embrace of substantive due process was a momentous mistake. He contends that an "instrumental theory of procedural due process offers the most appropriate doctrinal premise for constitutional criminal procedure" (p. 3). While arguing that substantive due process was the wrong tool to use in order to judge the constitutional validity of state criminal procedures, Dripps explains that a substantive due process model did not pose practical obstacles to state police investigations or trial procedures. "Quite the contrary, until 1923, the Court did not reverse a state criminal conviction because of a due process violation" (p. 15). As Dripps recognizes, the Court's consistent refusal to overturn state criminal convictions did not necessarily reflect a lack of nerve by the Court. This was the period better known by lawyers and law students as the *Lochner*

of these specific topics. As Dripps notes in his introduction, the manuscript of his book was prepared before September 11, 2001. Furthermore, no author could discuss all of the Court's many cases involving criminal procedure issues in a one hundred and eighty-eight page book. In its current edition, the most popular casebook on criminal procedure is seventeen hundred and sixteen pages in length. *See* YALE KAMISAR, ET AL., MODERN CRIMINAL PROCEDURE: CASES-COMMENTS-QUESTIONS (11th ed. 2005) [hereinafter MODERN CRIMINAL PROCEDURE].

11. Hurtado v. California, 110 U.S. 516, 536 (1884).

12. *Id*. at 535.

13. *Id*. at 532.

era,[14] in which the Court "engaged in the frequent and capricious nullification of state economic regulations on substantive due process grounds" (p. 15). This was also the same period when the Court "took a noticeably pro-defense approach to federal criminal cases" (p. 15).

According to Dripps, the *Lochner*-era Court's activist stance in federal criminal cases and economic regulation cases, but refusal to overturn state criminal convictions "was neither unprincipled nor disingenuous" (p. 20). Rather, "[t]he guiding principle under the Fourteenth Amendment due process clause was constitutional withdrawal of state power to impair *fundamental* liberties. The judicial refusal to intervene in state criminal procedure reflected a sincere belief that in criminal cases, procedural protections, except of the most basic sort, are not fundamental, as are the rights to hold private property and enter into contracts" (p. 20).

A subtle shift occurred between 1923 and 1947 when, in Dripps' view, the Court expanded the constitutional rights of the accused. "During this period, the cases in which the Court reversed state convictions on due process grounds involved either grave doubts about the reliability of the trial verdict, or the oppressive abuse of official power in obtaining evidence against the accused" (p. 23). But this period was not the start of a "criminal procedure revolution." Instead, the Court's rulings were confined to reversing especially disturbing state convictions. "The Court made no effort to reach beyond the case to be decided, no attempt to reform state criminal justice in any general way" (p. 23).

Chapter Two of the book outlines the Court's initial reluctance to apply the Bill of Rights' procedural safeguards to the

14. *Lochner*, of course, stands for Lochner v. New York, 198 U.S. 45 (1905). Legal scholarship analyzing *Lochner* and its impact is abundant. For a recent and informative reappraisal of *Lochner* itself and legal commentary on *Lochner*, *see* David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 325 (Michael C. Dorf ed., 2004). While the *Lochner*-era Court upheld a robust version of freedom of contract under the Fourteenth Amendment for bakers in New York, that Court "was unwilling to protect (or, more precisely, to authorize the federal government to protect) liberty of person and freedom of contract when it came to black Americans in the South—the original intended beneficiaries of Reconstruction." Pamela S. Karlan, *Contracting the Thirteenth Amendment*: Hodges v. United States, 783, 784–85 (2005) (discussing history and ruling in *Hodges v. United States*, 203 U.S. 1 (1906), which ruled that Congress did not have the authority pursuant to the enforcement clause of the Thirteenth Amendment to criminalize physical violence designed to intimidate black lumbermen into breaching labor contracts).

states' criminal justice procedures. The start of the chapter has a lengthy and scholarly discussion on the adoption and ratification of the Fourteenth Amendment, with a special focus on whether the amendment intended to apply the Bill of Rights to the states. In this section, Dripps considers debates in Congress, as well as the work and arguments of nineteenth century jurists, lawyers and legal academics. Like many scholars before him, Dripps is skeptical of the claim that the Fourteenth Amendment makes the Bill of Rights binding on the states. He notes that the ratification process "apparently never considered the incorporation question" (p. 33). Dripps' research also reveals that lawyers and judges in the post-Reconstruction period "recoiled from equating the Bill of Rights criminal-procedure provisions with 'privileges or immunities' or with 'due process'" (p. 34). The most that can be said in favor of the total incorporation theory is that it "has not been disproved or refuted" (p. 34). In Dripps' view, it is "fair to say that the thesis that a majority of those involved in framing and ratifying the Fourteenth Amendment intended to apply the Bill of Rights to the states has not been proved and seems on the whole very doubtful" (p. 34).

Putting aside the intent of the Fourteenth Amendment's framers, Dripps explains that by the start of the 1960's, the Court had not yet embraced incorporation theory as a remedy for the problems some saw in the states' criminal justice systems. Although *Wolf v. Colorado* ruled in 1948 that the Fourth Amendment was a fundamental right, and was thus binding on the states,[15] Dripps appears to side with the view that *Wolf*'s refusal to impose the exclusionary rule on the states made the Fourth Amendment a dead letter in state police investigations. The subsequent rulings in *Rochin v. California* and *Irvine v. California* confirmed that a fundamental rights regime would not impose any obstacles for state police officials determined to ignore or skirt Fourth Amendment protections that *Wolf* held were binding on the states.[16] The same was true for state police interroga-

15. 338 U.S. 25 (1949).

16. In *Rochin v. California*, 342 U.S. 165 (1952), police officers illegally and forcibly entered Rochin's home. The officers found Rochin sitting partly dressed on a bed, where his wife was also lying. After Rochin swallowed several capsules that were located on a table, a struggle ensued between the officers and Rochin. Rochin was taken to a hospital and the officers ordered a doctor to pump Rochin's stomach. The stomach pumping induced vomiting and produced two capsules, which proved to be morphine. The Court held that admission of the capsules as evidence to convict Rochin of morphine possession violated the Due Process Clause of the Fourteenth Amendment. Due process was violated because the Court found that the officers' conduct "shock[ed] the conscience." *Rochin*, 342 U.S. at 172. In *Irvine v. California*, 347 U.S. 128 (1954), officers made repeated

tion practices and the provision of counsel for indigent defendants facing state felony charges. The author closes Chapter Two with a brief discussion on why, during its early years, the Warren Court did not use the Equal Protection Clause to combat the obvious racial discrimination routinely practiced by police officers, prosecutors and judges. "[D]iscrimination in the criminal justice system, in contrast to education and public facilities, was *de facto*, not *de jure*. There was no statute commanding police abuse or unjust conviction of blacks that could be struck down by a stroke of the judicial pen" (p. 43).[17]

illegal entries into Irvine's home and secretly installed a microphone, and then used the microphone to obtain knowledge of his gambling activities. Although Justice Jackson's opinion for the Court conceded that "[F]ew police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment," 347 U.S. at 1132, the Court nevertheless concluded that this police conduct did not violate due process norms, and held that the evidence thus obtained was admissible at Irvine's trial. The *Irvine* Court distinguished *Rochin* by explaining that the facts in *Irvine* did not involve any coercion, violence or brutality. For a sharp criticism of the Court's reasoning and logic in *Wolf*, *Rochin* and *Irvine*, see Yale Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1123, 1127 (1959) ("*Wolf* teaches us that . . . some 'fundamental' rights are less 'fundamental' that others, less 'immutable' than others, less 'basic' than others. That evidence is not to be excluded unless it was obtained in violation of sub-minimal standards. . . . And *Irvine* teaches us that some 'incredible' and 'flagrant' violations of due process are less 'incredible' and 'flagrant' than others and only when such violations are sufficiently 'incredible' and 'flagrant,' do we exclude their fruits. . . . [T]he reasoning in *Irvine* is about as unpalatable as the result. To exclude the evidence on the ground that it involved a more serious and more shocking violation than did *Wolf* 'would leave the rule so indefinite that no state court could know what it should rule to keep its processes on solid constitutional ground.'") (footnote omitted).

17. Professor Dripps is correct to note that the criminal justice system was plagued by *de facto* discrimination, which was much more difficult to combat judicially, especially after the Court's 1976 decision in *Washington v. Davis*, 426 U.S. 229 (1976) (establishing that a racially disproportionate impact is not enough, by itself, to declare a law unconstitutional under the Equal Protection Clause). Other scholars have argued, however, that the Warren Court was undeniably influenced by equal protection concerns when deciding a number of its criminal procedure decisions. *See, e.g.*, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1969) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . If the Court's espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime."); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 386 (2000) (explaining that the Warren Court took seriously its commitment to equality for African-Americans, who "were disproportionately affected by whatever abuses or inequities there were in the criminal justice system"); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 13 (1970) ("Having outlawed Jim Crow, the Court had to humble John Law. Many of its landmark decisions on behalf of criminal defendants involved Negroes, often after they had been caught up in that ultimate of racial trials, a prosecution for raping a white woman. Thus, it was apparent that a moving force behind the Supreme Court's effort to safeguard criminal suspects was its commitment to protect the rights of Negroes.").

B. ANOTHER MISTAKE: MAKING THE BILL OF RIGHTS BINDING ON THE STATES, AND THE CONSERVATIVE REACTION TO INCORPORATION

Scholars who closely follow the Court's criminal procedure cases will especially enjoy the third and fourth chapters of the book. Chapter Three is entitled "Revolution and Reaction," and is written in a "summary fashion, ranging widely but necessarily not comprehensively over the entire field" of criminal procedure (p. 69). Chapter Four is a detailed discussion and assessment of the Court's interrogation cases. Both chapters are well-written and persuasive in their critiques.

In Chapter Three, Dripps describes the Warren Court's dissatisfaction with fundamental rights analysis and its move to incorporate most of the Bill of Rights' procedural safeguards to the states. But this chapter also explains the reactions of the Burger and Rehnquist Courts to the perceived activist rulings of the Warren Court. The more conservative Justices of the Burger and Rehnquist Courts—utilizing what Dripps calls "conservative balancing"—curtailed (and in some cases eliminated) the consti-

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Although Dripps notes that the Warrant Court did not use the Equal Protection Clause to address the racism that pervaded the criminal justice systems of many jurisdictions, he does not deny that, in the *past*, the Court generally and the Warren Court specifically, did pay close attention to racial concerns when constructing criminal procedure doctrine. Recent legal scholarship has identified a direct link between the Court's criminal procedure jurisprudence and concerns about racist criminal justice practices. *See, e.g.*, Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) ("the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity"); KimForde-Mazrui, *Learning Law Through the Lens of Race*, 21 J. LAW & POL. 1, 12 (2005) (assessing the Court's criminal procedure cases "requires understanding their racial implications"). Indeed, Professor Corinna Barrett Lain has argued that:

> [O]ne thing the burgeoning civil rights movement did was give the Supreme Court a reason to distrust the states, especially on matters of criminal procedure. Yet the nation's growing interest in protecting black Americans did something else too: it gave the Court a reason to take an interest in criminal defendants. Whether or not the Supreme Court was consciously thinking about racial discrimination under the facts of *Mapp*, it knew from prior cases that the most egregious abuses of police power were perpetrated against blacks, and that to the extent its ruling corrected an injustice, it would have the most impact there.

Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Roe in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1388 (2004) (footnotes omitted); *id.* at 1396 (asserting that the Court was "no doubt" thinking about the plight of black defendants in Southern courts when it decided *Gideon v. Wainwright*, 372 U.S. 335 (1963): "Gideon happened to be white, but the fact that only Southern states had refused to provide an attorney to indigent felony defendants made the connection impossible to ignore"). *See also* Carol S. Steiker, *Introduction*, *in* CRIMINAL PROCEDURE STORIES viii (Carol S. Steiker ed., 2006) ("The most striking theme that emerges from the stories behind the [Court's criminal procedure] cases—far more than the opinions themselves suggest—is the intersection of the criminal procedure revolution and the struggle for racial equality, especially in the South.").

tutional protections of criminal suspects and defendants, without expressly overruling the landmark decisions of the Warren Court. As Dripps nicely describes it, "[t]he current model in criminal procedure is conservative balancing, in which the Bill of Rights procedural safeguards are applicable to both state and federal cases but are qualified at every turn by the felt necessities of law enforcement" (p. 49).

The first half of Chapter Three summarily describes how the Fourth, Fifth and Sixth Amendments have been interpreted, first by the Warren Court, and then by the Burger and Rehnquist Courts. A few examples illustrate the incisiveness of Dripps' analysis. On the Fourth Amendment, Dripps asserts that "the Warren Court basically disincorporated the Fourth Amendment in *Terry v. Ohio*" when it approved stop and frisk police tactics on less than probable cause (p. 51).[18] Another instance of the Warren Court's favoring of law enforcement interests concerned the government's use of informants. In a series of cases, the Court ruled that no search occurs under the Fourth Amendment when secret spies are planted in homes and other private places to monitor conversations, although one year later the Court would rule that telephone wiretapping is a search. If the use of informants without probable cause or warrants is not a search rests on the theory "that speakers assume the risk that their words will be repeated, why does the fact that the interlocutor is a spy make any difference? If the *risk* that one's audience includes a spy suffices to make conversations unprivate, the government should have the right to tap telephones at will, for there is always the chance that one party may betray the other" (p. 52).

Later, the Burger and Rehnquist Courts narrowed the definition of probable cause and confined application of the exclusionary rule to a few discrete types of intentional violations of the Fourth Amendment. In Dripps' words, "in effect [*United States v.*] *Leon* [19] holds that the Constitution can be violated

18. *Terry v. Ohio*, 392 U.S. 1 (1968), held that where an officer had reasonable suspicion that a suspect was contemplating a robbery, it was reasonable to frisk the suspect to determine whether he had a weapon on his person; this type of search was permissible on less than probable cause because it promoted officer safety and was limited in scope and duration.

19. United States v. Leon, 468 U.S. 897 (1984) (holding that the Fourth Amendment's exclusionary rule does not bar the admission of evidence in the prosecution's case-in-chief obtained by officers relying in good faith on a search warrant issued by a neutral magistrate which is ultimately found to be invalid).

without any sanction or remedy whatsoever" (p. 53), and "when the nearly toothless jaws of the exclusionary rule do threaten a conviction in serious cases, a tolerant attitude toward police perjury can still save the day for the government" (p. 48). In sum, incorporation of the Fourth Amendment and the exclusionary rule has, according to Dripps, produced "the worst of all Fourth Amendment worlds, in which the Amendment is hard to trigger, harder to violate when it applies, virtually impossible to enforce when it is violated, and yet is thought of as the Constitution's primary, almost exclusive, regulation of the police" (p. 54).

On the protections provided by the Fifth Amendment's Self-Incrimination Clause and the Sixth Amendment's Right to Counsel Clause, Dripps notes that the Warren Court's rulings in *Escobedo v. Illinois* [20] and *Gideon v. Wainwright* [21] initially indicated that the Court was prepared to impose significant reforms on state police practices and adjudicatory procedures. *Escobedo* suggested that the Court was ready "to live with the loss of confessions that would have accompanied extending the right to counsel to the process of police interrogation" (p. 55). But the result in *Miranda* ultimately showed that the Warren Court was not willing to pay such a high cost. Indeed, "as a matter of Sixth Amendment law, *Miranda* marked a major victory for the government. Police interrogation was saved from the jaws of *Escobedo*" (p. 57).

Dripps also has some unkind words for *Gideon*,[22] a ruling that "aroused wide support, and even enthusiasm, almost from the moment it was announced in 1963."[23] What was controversial about *Gideon* was not the result—"only a few Southern states still refused to appoint counsel for indigent defendants in felony cases" (p. 56)—but how far the Court was prepared to go to ensure that an indigent defendant received more than merely someone with a law degree to provide "the Assistance of Counsel for his defense"[24] as guaranteed by the Sixth Amendment.

20. 378 U.S. 478 (1964) (emphasizing the specific facts, holding that suspect had been denied Sixth Amendment right to counsel when, during police interrogation, suspect was not warned of right to silence and was denied opportunity to consult with a lawyer).

21. 372 U.S. 335 (1963) (holding that states must provide free defense counsel to indigent criminal defendants charged with felonies).

22. *Id*.

23. Michael B. Mushlin, Gideon v. Wainwright *Revisited: What Does The Right To Counsel Guarantee Today?*, 10 PACE L. REV. 327, 327 (1990). Professor Mushlin notes that even former Attorney General Edwin Meese III, a noted critic of the Warren Court's criminal procedure revolution, has praised the result in *Gideon*. *Id*. at 328 n.4.

24. U.S. CONST. amend. VI.

Strickland v. Washington,[25] decided in 1984, showed that the Burger Court was not willing to go very far. To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must prove that counsel's mistakes caused a "breakdown in the adversary process that renders the result unreliable."[26] As Dripps explains, *Strickland*'s "demanding test" seems purposefully designed to deter successful effective assistance of counsel claims:

> How is an indigent convict supposed to show on appeal that his overworked public defender could have won the case by a more thorough investigation? If such a convict had the resources to mount a thorough post-conviction investigation and support the appeal with affidavits, he wouldn't have been represented by the public defender in the first place. And if the investigation *were* inadequate, there would be no way to prove exculpatory theories based on the very record alleged to be incomplete or misleading. *Strickland* simply presumes that the defendant convicted without a thorough investigation by the defense is guilty (p. 58).

The reaction of the "law-and-order" Justices of the Burger and Rehnquist Courts was not confined to cutting back the protections afforded by the Bill of Rights. The first section of Chapter three shows that "the Bill of Rights now totally dominates the criminal procedure landscape" (p. 48), and the closing section of the chapter convincingly argues that, under the Rehnquist Court, "due process and equal protection have fallen into virtual desuetude" (p. 48). The atrophy of due process and equal protection norms in criminal cases was not accidental.

In theory, substantive due process offers criminal suspects and defendants protection for their "liberty" that is independent of the rights guaranteed by the Bill of Rights. In *Schmerber v. California*, the Warren Court left open whether certain police practices might violate substantive due process.[27] Dripps notes, however, that since *Schmerber* the Court has not overturned a conviction on substantive due process grounds. "In effect, free-standing substantive due process analysis in criminal cases has ceased" (p. 59).

25. 466 U.S. 668 (1984).
26. *Id.* at 687.
27. *See* Schmerber v. California, 384 U.S. 757, 760 n.4 (1966).

Nor has the modern Court been willing to seriously scrutinize state criminal trials under a procedural due process model. Under the "instrumental" procedural due process model envisioned by Dripps, judges would have the power to invalidate "antiquated [criminal trial] procedures that run a high risk of error," and could mandate additional "procedural safeguards beyond those known at common law" (p. 60). An instrumental due process approach would follow the three-part test announced in *Mathews v. Eldridge* for determining the amount of process that is required before a constitutionally protected interest can be terminated by state officials.[28] Thus, an instrumental approach would require the judiciary "to consider the weight of the individual's interest, the risk of error, and the cost to the government of additional procedural safeguards" (p. 60).

Besides the ruling in *Ake v. Oklahoma*, which Dripps contends "openly consulted the *Mathews* factors,"[29] the Rehnquist Court has not been overly concerned with enforcing procedural due process norms in criminal cases, let alone embracing the type of instrumental due process model proposed by Dripps. "Despite all the conservative rhetoric about criminal procedure being about guilt and innocence, judicial restraint has proved more valuable to the current Court than reliability in criminal cases" (p. 61). The irony in the Court's position is that in criminal cases instrumental concerns, such as reliability of outcome and the dignity interests of suspects and defendants, are discounted, while in "administrative cases involving far lesser liabilities—such as suspension from public school or discharge

28. Mathews v. Eldridge, 424 U.S. 319 (1976). In *Mathews*, the Court explained that "due process generally requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedures; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335 (citation omitted).

29. 470 U.S. 68 (1985). *Ake* was a capital case in which the sanity of the defendant was a significant aspect of the trial, and the state presented evidence of the defendant's future dangerousness to society during the sentencing proceeding to determine whether the death penalty should be imposed. The Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id*. at 83. Commentators have agreed with Dripps that the result in *Ake* is grounded on procedural due process norms. *See, e.g.*, MODERN CRIMINAL PROCEDURE, *supra* note 10, at 108 ("Although one might maintain that a right to a court-appointed psychiatrist under certain circumstances is implicit in the right to counsel or implements or effectuates that right, *Ake* is not written that way. It is a free-standing procedural due process decision. . . ."), citing DRIPPS (p. 143).

from public employment—*Mathews* controls and the focus is on instrumental reliability" (p. 62).

Finally, the Equal Protection Clause has not required any fundamental changes in state adjudicatory procedures. The main reason is the Court's narrow interpretation of the equal protection clause. Disparate racial impact alone does not violate the Constitution. Defendants who are affected by racial bias in the system must prove purposeful discrimination by state officials. Because of this judge-made impediment, "[t]he practical difficulty with claims of racial discrimination in criminal justice is the inherently difficult problem of distinguishing disparate impact from invidious discrimination" (p. 63).

Dripps does acknowledge one bright spot in the modern Court's equal protection jurisprudence—*Batson v. Kentucky*.[30] In that case, the Court held that prosecutors could no longer use their peremptory challenges to remove blacks from juries. The result in *Batson* was prompted by at least two factors: First, overwhelming and persuasive evidence apparently convinced the Justices that pre-*Batson* law "had the effect of imposing all-white juries on a great many black defendants. The justices surely appreciated how much damage this practice did to the appearance of justice" (p. 65). Second, the ruling in *Batson* did not require the exclusion of probative evidence of the defendant's guilt, nor did it result in releasing a guilty defendant.

Putting *Batson* aside, successful equal protection claims by criminal suspects and defendants are as rare as a three dollar bill. *United States v. Armstrong* [31] typifies the Court's deliberate indifference to claims of racial injustice. In *Armstrong*, a group of black defendants claimed that they had been subject to selective prosecution, and sought discovery from the federal prosecutor to support their claim. After the Court of Appeals ruled that the defendants were entitled to pursue discovery, the Supreme Court reversed and held that discovery was permissible only where the defendants had proven (*before* discovery) the essential elements of a selective prosecution claim.[32] "How the defense

30. 476 U.S. 79 (1986).

31. 517 U.S. 456 (1996).

32. Under the Court's analysis, the defense must show *both* a discriminatory effect and purpose by governmental actors. *Id.* at 465. Under *Armstrong*, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id*. at 457. Magnanimously, the Court reserved the question of whether a criminal defendant must satisfy the similarly situated

is supposed to discover evidence of discrimination without discovery is, of course, a bit of a mystery" (p. 65).

In sum, Dripps laments that modern criminal procedure does very little, if anything, to guarantee "decent and reliable police investigations, fair trials, and equal justice" (p. 50). As he sees it, "[s]ubstantive due process review is a virtual dead letter under the 'shock the conscience' test; procedural due process is more concerned with history than with reliability; and [outside of the circumscribed area protected by *Batson*], the equal protection clause imposes practically no restraint on police and prosecutors" (p. 69). At the same time, conservative balancing by the Burger and Rehnquist Courts "has reduced the Bill of Rights provisions to flexible notions of reasonable police practices or fair adjudicatory procedures" (p. 69). Finally, Dripps believes that the existing jurisprudence "still does too much to protect the guilty" (p. 69).

C. THE COURT'S CRIMINAL PROCEDURE JURISPRUDENCE IS UNPRINCIPLED CONSTITUTIONAL LAW

In Chapters Three and Four, Dripps summarizes the contradictions and doctrinal flaws in the modern Court's criminal procedure cases. In Chapters Five and Six, Dripps' target is constitutional theory. Specifically, in Chapter Five he provides a theoretical critique of the fundamental fairness, selective incorporation and conservative balancing models utilized by the Court over the last century. Dripps asserts that the Court's current criminal procedure doctrine "is not, *as a regime*, characterized by the principled consistency required of an enduring body of constitutional law" (p. 99). He evaluates the Court's jurisprudence using a conventionalist theory of constitutional interpretation and instrumental concerns, such as proportionate police investigative practices[33] and reliable adjudicatory procedures. Dripps argues that a properly functioning criminal justice system would "institutionalize the instrumental theory of criminal procedure" (p. 110). Unless forced to do so by other constitutional

requirement in a case where the prosecutor *admits* a discriminatory purpose. *Id*. at 469 n.3.

33. According to Dripps, "[i]nvestigative practices that injure individuals can be justified by the positive purposes of the criminal law, but only to the extent that the investigative practice is likely to prevent an imminent or continuing offense or to punish an offense through the adjudication process. *Which* investigative practices implicate the exclusivity principle, and *how likely* they must be of securing a conviction, are important questions that may depend on other values. The instrumental theory, however, has the virtue of framing the issue appropriately" (p. 107).

provisions, an instrumental model of criminal procedure would "not place obstacles in the way of punishing the guilty except to the extent that those obstacles protect the innocent" (p. 110). Finally, an instrumental approach "should serve rule-of-law values by expressing the governing law as clearly and comprehensively as circumstances permit" (p. 110).

The following is a summary of Dripps' numerous arguments. First, Dripps believes that a fundamental fairness regime was both too vague and heavy-handed. A fundamental fairness model was too open-ended because:

> The Court never narrowed the scope of the normative inquiry into fundamental fairness. Fundamental fairness could be a matter of minimizing errors, or of minimizing erroneous convictions, or of preserving individual dignity. Neutral principles could not possibly have emerged from such an open-ended inquiry. Similarly situated defendants would inevitably be treated differently. Law enforcement officers and lower court judges would not have the guidance they need to deal with the steady volume of criminal cases implicating constitutional standards (p. 112).

The fundamental fairness regime of the early twentieth century also "amounted to a constitutional chancellor's foot" to strike down state convictions at the apparent whim of a majority of the Justices.

> The vacuity of the fundamental fairness approach made it as unjust as it was illegitimate. By permitting all values to compete in every case, the fundamental fairness standard neglected the dominant value in criminal procedure—the avoidance of erroneous punishment. At least through mid-century, American criminal process was in many states characterized by arbitrary arrest and search, third-degree interrogation tactics, and unreliable trial procedures. Racism was pervasive. It was unexceptional for an indigent black to be tried without counsel, or by all-white jury, or convicted on the force of a confession secured by a long bout of secret questioning.
>
> The assumption underlying the Court's approach, however held that state criminal process worked serious injustice only in rare cases. . . . But the assumption was false; and as a result, the Court became ever-more involved in reviewing state convictions, failed to achieve any meaningful reform of the criminal justice system, and could reverse the occasional suspect

> conviction only by leaving many indistinguishable ones undisturbed (p. 115).

Next, according to Dripps, the Court's selective incorporation cases of the mid-century were flawed for several reasons. "In a nutshell, fidelity to incorporation . . . meant betraying instrumental reliability concerns, prompting the Court (as we have seen) to compromise incorporation to the point where the amendments lost most of their distinctive meaning" (p. 116). To prove his point, Dripps criticizes *Gideon*, a case that enjoys the "unqualified and unanimous approval [of] judges, scholars, and ordinary citizens" (p. 116). As we all know, *Gideon* ruled that indigent defendants shall be provided free counsel when facing state felony charges.

Concededly, "the constitutional right of indigent defendants to appointed counsel announced in *Gideon* provides a critical safeguard against unjust convictions, and a noble symbol of our commitment to equal justice" (p. 117). But Dripps asserts that *Gideon* "is as written both illegitimate and unwise" (p. 117). *Gideon* is illegitimate because its holding is not supported by the text of the Sixth Amendment. The text of the amendment provides that "[i]n *all* criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense."[34] Dripps explains that the text "doesn't say anything about providing indigent defendants with publicly paid counsel" (p. 117). In his view, "*Gideon* stretches the amendment to cover subsidizing counsel for the poor," while at the same time restricting the scope of the amendment (p. 117). "Where the amendment says 'all,' *Gideon* reduces the amendment to covering felony cases" (p. 117). Dripps wonders whether the Court—contrary to the framers' intent—would ever "uphold a federal statute that forbade a misdemeanor defendant from appearing through privately retained counsel?" (p. 117).

To be sure, Dripps believes that the result in *Gideon* is sound constitutional law. But *Gideon* is better supported by an instrumental due process model rather than "a formalistic focus on the textually referenced 'assistance of counsel'" (p. 117).

> The incorporation approach necessarily failed to describe Gideon's constitutional right with appropriate generality. There is nothing *intrinsically* valuable about lawyers; that is why subsequent cases have developed the idea, if not the real-

34. U.S. CONST. amend. VI.

> ity, that defense counsel's assistance must be *effective*. Instead, counsel is valuable to an accused because counsel is an essential safeguard against unjust conviction. Gideon's right was not to a lawyer, but to a trial that ran no more than some practically irreducible risk of falsely convicting him. . . . [C]ounsel is constitutionally required because without counsel the risk of unjust conviction rises beyond the irreducible (p. 117).

Practically speaking, the incorporation model neglected the constitutional interests of indigent defendants in another way:

> The Sixth Amendment says nothing about private investigators, expert witnesses, discovery against the prosecution, or any of a number of other safeguards against unjust conviction that may very well be at least as important as counsel in particular cases. The Court has yet to recognize that without these safeguards, a trial can be as wanting in due process as a trial without counsel. The delay in this recognition is at least partly attributable to selective incorporation (p. 118).

Finally, *Gideon*'s reliance on the text of the Sixth Amendment "has crippled serious scrutiny of *how well* counsel performs the constitutionally relevant function of defending the accused" (p. 118). The quality of indigent defense counsel is notoriously poor in many jurisdictions. Moreover, when errors occur at the pre-trial stage—whether through inadequate investigations, mistaken or suggestive identification procedures, or poor plea bargaining skills—Sixth Amendment law does little to aid the defendant. "[S]o long as counsel plays the losing hand well at the trial, there will be not finding of ineffectiveness" (p. 118).

Dripps' criticism of the "conservative balancing" of the Burger and Rehnquist Courts is just as biting as his criticism of fundamental fairness and incorporation theory. Conservative balancing "combines the worst aspects, respectively, of fundamental fairness and selective incorporation. The interests of the suspect are seen through the narrow lens of the Bill of Rights, while the interests of the government are as wide as the horizon of a sympathetic judiciary" (pp. 124-25). The work product of the Burger and Rehnquist Courts has given us a constitutional criminal procedure regime "shot through with arbitrary distinctions" (p. 125). Moreover, the pro-police and pro-government choices made by the "law-and-order" Justices do not promote the appropriate values. "[T]he conservative justices never recognized that innocent people can be punished in the investigation

process even if they are never charged. Nor did they honor the preference for false negatives over false positives in the process of adjudication" (p. 127).

Dripps offers several examples to support his critique, one being the Court's application of the exclusionary rule in Fourth Amendment cases. With the ascendancy of the Burger Court, the exclusionary rule was characterized as a "judicially-created remedy," rather than "a personal constitutional right of the person aggrieved" by an illegal search and seizure.[35] The Court has also repeatedly stated that the purpose of the rule is deterrence, and typically concludes that suppression of illegally obtained evidence has a "speculative" impact on deterring police illegality.

For Dripps, the Court's analysis "is illegitimate because it counts violations of the Constitution as desirable" (p. 127). If no illegality had occurred, there would be no evidence to suppress. Under the Court's analysis, however, the product of unconstitutional behavior is given a higher value than police obeying the law of the land. "To view the 'loss' of the evidence as a 'cost' treats the acquisition of the evidence as a gain" (p. 127).

The illegitimacy of the Court's reasoning "reached embarrassing" (p. 127) heights when the Court created the "good faith" exception to the exclusionary rule in *United States v. Leon*. The Fourth Amendment expressly requires that "no warrants shall issue, but upon probable cause."[36] *Leon* addressed the admissibility of evidence obtained via a warrant that was not supported by probable cause. The Court ruled the evidence was admissible if the police acted in good faith. The result in *Leon* contradicts a lesson law students learn on the first day of their Constitutional Law course: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[37] According to Dripps:

> Because good-faith reliance on an illegal warrant also immunizes the police from damage actions, the Court in effect eliminated all remedies for a conceded violation of the Constitution. The costs of the warrant process may make the exclusionary rule redundant in the warrant context; but the elevation of a policy preference for evidence over a constitutional

35. United States v. Leon, 468 U.S. 897, 906 (1984).
36. U.S. CONST. amend. IV.
37. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

> preference for privacy is clearly illegitimate (pp. 127-28, footnotes omitted).[38]

D. FIXING THE PROBLEMS OF CRIMINAL PROCEDURE: AN INSTRUMENTAL DUE PROCESS MODEL WILL HELP SOLVE MANY OF THE FUNDAMENTAL FLAWS OF CURRENT DOCTRINE

Chapter Six outlines Dripps' framework for reforming constitutional criminal procedure. The Fourteenth Amendment provides the foundation for his constitutional theory. Although equal protection norms noticeably influence Dripps' thinking, "the heart of the theory is the connection between the traditional meaning of due process and the instrumental theory of procedure" (p. 131). While portions of Dripps' thesis are mentioned throughout the book and developed and refined over many pages of analysis, there are two main components to his framework for deciding constitutional criminal law cases. First, there is a substantive element. "[T]he theory holds that the police may not deprive individuals of their liberty in the name of law enforcement unless the severity of the deprivation bears a reasonable relationship to the prospect of preventing or punishing an offense" (p. 131). The second element is a wide-ranging procedural requirement. "[T]he theory holds that those accused of crime be given the opportunity for an instrumentally reliable trial" (p. 131). Dripps' proposal follows the *Mathews v. Eldridge* test for framing the proper inquiry for instrumental reliability during adjudicatory procedure. But the procedural element would also regulate police investigations "because the reliability of the trial often turns on the reliability of the antecedent investigation" (p. 132).

Dripps is not deterred by the obvious fact that his theory represents a significant departure from the way the Court currently decides constitutional criminal law cases. He asserts that the upshot of the Court's preoccupation with the Bill of Rights' procedural provisions has "very much narrowed the meaning of the Bill of Rights," while also causing "a grave disservice to innocent suspects" (p. 138). Dripps convincingly notes:

38. For an interesting and lively debate on *Leon* and its impact on police officers see Donald A. Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986); Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405 (1986); and Donald A. Dripps, *More on Search Warrants, Good Faith, and Probable Cause*, 95 YALE L.J. 1425 (1986).

> Pretrial procedure can leave the criminal defendant facing erroneous but now entrenched identification testimony, without the benefit of exculpatory physical evidence the police neglected to collect or preserve, defended by an overworked lawyer with no time to conduct a new investigation. This can (and does) happen, without any unreasonable searches, without any compelled testimony, and without any denial of counsel. The distinction between investigation and adjudication is far less palpable than current doctrine admits (pp. 138-39).

Nor is Dripps troubled by the claim that his instrumental model discounts historical practices and federalism concerns. He concedes that the Rehnquist Court's current emphasis on "founding-era common-law practice" and "delicate attitude toward state prerogatives" may be appropriate when litigants bring substantive due process challenges against state legislation in civil proceedings (p. 141). But Dripps insists that these concerns are inapt in a procedural due process analysis. "If criminal procedure should be about correctly determining guilt and innocence, constitutional doctrine should speak the language of procedural due process" (p. 141). Finally, he opines that "there is really a much stronger case for applying *Mathews* in criminal case than in administrative cases" (p. 141). While legislatures possess the political authority to create administrative entitlements, they have "no discretionary power to create or to destroy constitutional liberty" (p. 142). Put simply, judges owe no deference to police investigation practices and state adjudicatory procedures that threaten or extinguish an individual's "liberty."[39]

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39. Later in Chapter Six, Dripps argues that:

> [L]egislative work in the criminal-procedure field deserves more distrust than deference. The legislative record on preventing false convictions and police abuse is embarrassing. Legislatures have not adopted even minimal regulations of identification procedures, have not provided anything like adequate support for indigent defense, and have, in the great majority of jurisdictions, even now not yet required the recording of interrogations or consent searches. Yet legislatures have repeatedly conferred broad powers on police, and, by constantly increasing already severe penalties, have given prosecutors enormous discretionary power (p. 150).

The political bottom line is that:

> [P]ro-government criminal-procedure legislation injures members of groups with relatively little political power, and it benefits groups with relatively strong political power. Legislatures have repeatedly demonstrated their sensitivity to these incentives. Instead of deferring to legislative choices made against this background, the federal courts should, consistently with the *Carolene Products* footnote and the representation-reinforcing theory of judicial review, face up to reality. If the federal courts tolerate unreliable trial procedures or police abuse, nobody else is going to stop it (pp. 150–51).

For a detailed account of Dripps' views on why legislatures intentionally neglect the civil liberties of criminal suspects and defendants, *see* Donald A. Dripps, *Criminal Procedure,*

How would Dripps' theory differ from the other constitutional theories he criticizes? His instrumental approach would differ from the fundamental fairness model in three ways. First, Dripps is less concerned with whether a claimed liberty or procedural safeguard is "fundamental" to our government's system of order liberty; instead, his focus is on procedural due process. "With respect to adjudicatory procedure this focus is easy to maintain, but complications arise when procedural due process analysis confronts police investigations" (p. 143). The instrumental model would evaluate police practices like search and seizures by asking: is the intrusion "justified by the prospect of preventing and/or prosecuting criminal offenses?" (p. 144). If the police intrusion is motivated as a freestanding social control measure, the question becomes: is the restraint "narrowly tailored to serve a compelling state interest?" (p. 144).

Second, Dripps' instrumental model "would be far more determinate, far more sharply focused, than the inquiry into fundamental fairness" (p. 145). For example, police practices would be judged by determining whether the police "deprived the suspect of liberty without a sufficient expectation of exposing or preventing crime," or whether the police "conducted the investigation in a way that prevented the suspect from having a fair trial" (p. 145). If an adjudicatory procedure was challenged, "the issue would be simply whether the state procedure exposed the defendant to an unnecessary risk of false conviction" (p. 145). The third and final difference between Dripps' theory and a fundamental fairness regime is that an instrumental model "would not proceed on a case-by-case basis." Instead, following the examples of *Miranda* and *Terry v. Ohio*, "the general requirements of procedural due process would be translated into constitutional doctrine as general rules" (p. 145).

Dripps' model would mark a significant change from the selective incorporation approach of the last fifty years. An instrumental model would be far more circumspect in its use of the Bill of Rights. It would accentuate the provisions that promote fair trial values. "To the extent that those provisions frustrate

Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 SYRACUSE L. REV. 1079, 1089 (1993) (arguing that "legislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim, rather than the perspective of a suspect or defendant").

the ends of justice without protecting the innocent against false conviction, they should not be enforceable against the states under the Fourteenth Amendment" (p. 146).[40] On the other hand, Dripps' model is likely to mean greater regulation of the pretrial and adjudicatory phrases for both state and federal procedures. "For example, due process might provide the predicate for at long last imposing some sensible regulations on the process of developing eyewitness identification evidence" (p. 146).

Lastly, an instrumental model differs from conservative balancing. Dripps believes that the current Court's pro-government position in criminal procedure cases is "a hangover from substantive due process adjudication" (p. 150). A shift to a procedural due process regime would eliminate the "legitimacy" problem of judges overruling legislative choices on nothing more than the type of "fundamental" rights analysis used in cases like *Lochner* and *Roe v. Wade*.[41] At the same time, Dripps envisions his approach as promoting federalism.

> In at least one respect a procedural due process regime, even one applied with a rigorous scrutiny by the federal courts, would greatly strengthen the structure of federalism. A procedural due process regime could free the states from those Bill of Rights provisions that do nothing to prevent unfair trials or police excesses. This would restore a considerable degree of state autonomy over criminal procedure. Fair trials and proportionate police practices can take different forms. As it stands, criminal-procedure law is now a monolith (p. 151).

PART II: DRIPPS ON POLICE INTERROGATION AND CONFESSIONS

This part of the review focuses on police interrogation and the Court's efforts to regulate it. Dripps has some provocative views on the subject. This section describes the problems Dripps sees in the confession cases, his proposal for solving some of

40. The apparent neutrality of his model is impressive:
> If the individual can show that his trial ran a needless risk of false conviction, or that the police investigation punished him independently of any conviction, the state should not be heard to plead compliance with the Bill of Rights as an excuse. If, by contrast, the individual fails to show anything unfair about his trial, or any unjustified restraint or violence during the investigation, the Bill of Rights should not be converted into a loophole (p. 147).

41. Roe v. Wade, 410 U.S. 113 (1973).

those problems, and my response to Dripps' alternative constitutional vision of confession law.

A. CONFESSION LAW IS "DYSFUNCTIONAL AS WELL AS INCOHERENT"

An entire chapter of the book—Chapter Four—is devoted to examining how the Supreme Court has shaped (and misshaped) police interrogation practices and the law of confessions. In Chapters Five and Six, Dripps describes how his instrumental due process model would apply to police interrogation, an area of law which has occupied the Court's attention and generated enormous controversy for the Court since the 1930's.[42] This is a fascinating part of the book, particularly in light of the author's previously published views on police interrogation and the Fifth Amendment's privilege against self-incrimination. In an earlier article, well-known among criminal procedure professors, Dripps explains that he is *against* police interrogation as it is currently practiced in America, *and* against the privilege against self-incrimination.[43] In his book chapter, Dripps skillfully identifies the many flaws and contradictions that plague confession law. Indeed, Dripps finds little to praise about the Court's cases and concludes that "current law is dysfunctional as well as incoherent" (p. 97). Three examples highlight Dripps' criticism:

First, under the fundamental fairness regime, the admissibility of a state criminal defendant's confession was governed by a due process "voluntariness" test, rather than the Fifth Amendment's Self-Incrimination Clause. From 1936 to the early 1960's

42. Although many of the Court's confession cases over the decades have been subjected to harsh and penetrating criticism from both the right and left, *compare* JOESPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993), *with* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980), ironically, the Court's first case to reverse a state criminal conviction because the confession was coerced has generally received high praise. That case was *Brown v. Mississippi*, 297 U.S. 278 (1936). For praise of *Brown*, see Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996).

43. Donald A. Dripps, *Foreword: Against Police Interrogation – And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988) [hereinafter, Dripps, *Foreword*]. Dripps has analyzed the Fifth Amendment privilege and police interrogation in other articles. *See, e.g.*, Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Miranda, Dickerson, *and the Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1 (2001); Donald A. Dripps, *Is the* Miranda *Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19 (2000); Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329 (1991).

the "voluntariness" test mandated consideration of the all of the circumstances surrounding the confessions, including the suspect's subjective characteristics as well the willingness of police to use violence. Such an open-ended standard, according to Dripps and many others, left "[l]ower courts, police officers, and commentators . . . never sure of which foci of the test was more important—the subjective capacity of the suspect to resist police pressure, or the objective tendency of the police methods to cause a typical suspect to confess" (p. 71). Under this test, "even physical violence to the suspect was never declared *per se* unconstitutional" (p. 72, footnote omitted).

Second, *Escobedo*'s reliance on the Sixth Amendment's right to counsel to protect a suspect's constitutional rights during interrogation, in effect, "implied the end of police interrogation" (p. 75). If a suspect could consult with defense counsel at his will, police interrogators could no longer count on the psychological pressure and the secrecy that made pre-trial questioning an effective tool for the police and prosecutors. "Only the extraordinary decision in *Miranda*, accepting an uncounseled waiver of counsel in a situation where the suspect needs counsel, saved police interrogation from the jaws of *Escobedo*" (p. 76, footnote omitted). Although *Miranda* removed "the fangs of *Escobedo*," according to Dripps, *Miranda* itself contained an inherent contradiction:

> The *Miranda* Court's waiver doctrine is plainly at odds with the rest of the opinion. As Justice White demanded in dissent, "if the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?" The majority made no answer (p. 81).[44]

44. While other scholars agree with Dripps that *Miranda*'s waiver theory is incoherent, *see, e.g.*, H. RICHARD UVILLER, TEMPERED ZEAL 195–97 (1988) (arguing that "if a confession given in police custody is necessarily coerced, so is a waiver"); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 454 (1987) (asserting that the "notion that police-initiated warnings can 'dispel' the compulsion [of police interrogation] seems dubious at best"), at least one scholar takes a positive view of the way in which the *Miranda* Court discusses the issue of waiver. According to Professor John Parry:

> The availability of waiver—effectively a limit on the remedy created by the warnings—allows a reading of *Miranda* that deemphasizes the right to remain silent and to be free in general of the compulsion inherent in interrogation. With waiver, the Court concluded police interrogation is constitutionally permissible despite the fact that compulsion is inherent in it, and it may even have

Third, the conservative Justices of the Burger and Rehnquist Courts displayed their own contradictions when it came to interpreting *Miranda*. Although the conservative Justices believed that *Miranda* was wrongly decided, "one index of the conflict between conservative criminal procedure and conservative judicial method is that until the year 2000 *no justice* had *ever* issued an opinion that urges overturning that decision" (p. 86). In the interim, the Burger and Rehnquist Courts issued opinions like *Harris v. New York*,[45] *Michigan v. Tucker*,[46] *New York v. Quarles*,[47] and *Oregon v. Elstad*,[48] that could not be reconciled with *Miranda*, and rested on the premise that the result in *Miranda* was not constitutionally compelled.[49]

The best example of the Court's "judicial hypocrisy" (p. 88) in the confession cases is *Dickerson v. United States*,[50] which "has done more to confirm, than to dispel, the impression that the *Miranda* cases are irreconcilable" (p. 95). In that case, the Fourth Circuit Court of Appeals seized on holdings and statements from cases like *Harris*, *Tucker*, *Quarles*, and *Elstad*, indicating that *Miranda* was not compelled by the Constitution, to uphold the constitutionality of Title II of the 1968 Crime Control Bill, which had purported to overrule *Miranda* by statute. That statute, 18 U.S.C. §3501, had made the admissibility of a confession turn solely on whether a statement was voluntary. Writing for a seven-Justice majority, Chief Justice Rehnquist overruled the Court of Appeals, held that *Miranda* was a constitutional ruling, and that *Miranda* controlled the admissibility of statements made during police interrogation in state and federal courts. But the Chief Justice's opinion also made clear that rulings like *Harris*, *Tucker*, *Quarles* and *Elstad* were still good law. According to Dripps, the Chief Justice's opinion "is utterly conclusory" (p.

> believed that some compulsion is desirable. *Miranda* thus implements, perhaps imperfectly, a broad conception of fairness in criminal investigation—a better atmosphere for suspects but without hamstringing legitimate police attempts to solve crimes.

John Parry, *Constitutional Interpretation and Coercive Interrogation after* Chavez v. Martinez, 39 GA. L. REV. 733, 812–13 (2005) (footnote omitted).

45. 401 U.S. 222 (1971).

46. 417 U.S. 433 (1974).

47. 467 U.S. 649 (1984).

48. 470 U.S. 298 (1985).

49. *See also* DRIPPS (p. 126) ("A Court that was truly bound by *Miranda* would not have decided *Harris*, [*Michigan v.*] *Mosley*, and *Quarles*.").

50. 530 U.S. 428 (2000).

96), and there is no sign that a future opinion will remove the contradictions and tensions in confession law.

B. APPLYING INSTRUMENTAL PROCEDURAL DUE PROCESS TO POLICE INTERROGATION

How would Dripps solve the problems that plague confession law? In Chapters Five and Six, Dripps provides an alternative framework for fixing the problems he sees. First, Dripps notes that the "most difficult challenge to any critic of *Miranda* is to overcome all the bad arguments other critics have made against that decision" (p. 119). *Miranda*'s critics incessantly argue that police interrogation, free of judicial obstacles, can help solve violent crimes and identify and convict perpetrators that might otherwise go unpunished. "Undoubtedly this point is true, but those who make it never face up to the contradiction, implicit or explicit, in squaring the objection with the Constitution. . . . [C]ritics of *Miranda* fail to reconcile the desire for evidence with the right to remain silent" (p. 119).

On the other hand, *Miranda*'s defenders fail to come to grips with the inconsistency in *Miranda* itself which "inexplicably allows the accused to make a 'knowing, intelligent, and voluntary waiver' of the right to silence under the very same pressures that are thought to constitute compulsion in the first place" (p. 119). According to Dripps, waiver is so common that "*Miranda* has not diminished significantly the effectiveness of police interrogation" (p. 119, footnote omitted). Ultimately, the crucial issue raised by *Miranda* "is how to prevent police brutality without giving up confessions" (p. 120).

Dripps' instrumental procedural due process model would permit "rational regulation of police questioning—recording requirements, time limits, and so on" (p. 147). Interestingly, his model would also allow lawyers in the interrogation room.

> Lawyers obviously impair the ability of the police to obtain *Miranda* waivers. The bottom-line reasoning for not recognizing the right to counsel until the commencement of formal proceedings is that the Fifth Amendment privilege means that the only practical window for interrogation is the period following arrest but preceding the appointment of counsel. . . .Once the suspect's rights are defined in terms of instrumental procedural considerations—that is, calculated to protect the innocent but not to shield the guilty—the fear of lawyers would abate (p. 148).

Dripps acknowledges the need to close the "window of virtual lawlessness—between the arrest and the filing of charges" (p. 181), and understands that counsel's presence is an effective way to do so. But there is a price for counsel's presence. Under Dripps' model a suspect could be questioned—either by a judge or the police—in counsel's presence, and even retain the right to remain silent, subject, however, to a permissive adverse inference at trial (pp. 148, 181).

Obviously, the holding in *Griffin v. California* [51] is an obstacle to implementing Dripps' reform of confession law. *Griffin* ruled that the privilege against self-incrimination barred adverse comments from either the judge or prosecutor to a jury about a defendant's failure to testify at trial. As Dripps explains, *Griffin* rested on at least two concerns. One, "an innocent defendant may refuse to testify at trial because of the fear of impeachment with prior convictions" (p. 181). Second, the Court felt certain innocent defendants—the timid or the nervous—if forced to testify at trial, might do themselves more harm than good when attempting to explain on the witness stand "transactions of a suspicious character" or some prior offense.[52]

Dripps' rebuttal to *Griffin*'s concerns is two-fold. First, he would ban prosecutors' use of prior offenses for impeachment purposes when defendants testify at trial. The defense would also enjoy "the right to introduce . . . pretrial testimony *without* opening the door to impeachment with prior convictions" (p. 181). Second, he believes that the problems associated with timid and nervous innocent defendants will be diminished if their testimony is taken *before* trial. "If the accused makes a misstep out of confusion or ignorance, there is time to take corrective action. For example, a motion might be made to exclude the pretrial statement as unreliable, or to reopen the pretrial proceeding so the defendant could put in additional clarifying testimony" (p. 182). Dripps contends that police interrogation under his proposal would "greatly reduce the risk of innocent suspects falsely incriminating themselves," and "end the ability of sophisticated offenders to permanently insulate themselves from humane questioning" (p. 182).[53]

51. 380 U.S. 609 (1965).

52. *Id.* at 613 (quoting Wilson v. United States, 149 U.S. 60, 66 (1893)).

53. Dripps opines that his proposal "might be sustainable" under *Griffin*, but does not elaborate why. He does, however, emphasize the benefits of his proposal for both the defense and prosecution. The accused would benefit because "the right to counsel could

C. DRIPPS' MODEL FOR POLICE INTERROGATIONS WILL BENEFIT THE PROSECUTION WHILE DISADVANTAGING THE DEFENDANT

Critiquing this proposal would be a lot easier if one could characterize Dripps as a "law-and-order" guy, hell-bent on eliminating the few remaining restrictions that currently apply to police interrogations. But Dripps' skeptical views on police interrogation practices and confessions are well-known. For example, he has noted "[a]ny expectation that truly voluntary confessions are available on a systemic basis depends either on unsupportable factual assumptions or on an interpretation of voluntariness that reduces that word to signifying no more than the absence of third degree methods."[54] He has also opined that "[t]ypical police interrogation surely constitutes compulsion in any sense of that word,"[55] and that confessions amount to "de facto guilty pleas" absent the "complete understanding of the consequences and alternatives" that the Court requires for *de jure* guilty pleas.[56] Furthermore, Dripps has convincingly argued that "*Miranda* does no more (indeed, it does significantly less) than take the Fifth Amendment seriously. Every argument against *Miranda* applies with greater strength to the privilege in general."[57] Many of these views are repeated in his book.

Finally, if applied to the law of confessions, Dripps' instrumental model would provide greater protections for suspects than previous proposals for judicially supervised interrogation, a concept that has often been proposed to cure the abuses associated with police-dominated interrogation.[58] And Professor Yale Kamisar, *Miranda*'s strongest and most articulate defender, has characterized proposals for judicially supervised interrogation *less* protective than the one outlined by Dripps "as inherently stronger than the *Miranda* requirements, at least as the latter have generally been applied."[59]

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be extended to the moment of arrest" (p. 182). The government would benefit because it could afford to file charges promptly, and would be allowed to "to take prompt, cross-examined, videotaped depositions from the witnesses" (*id.*).

54. Dripps, *Foreword*, *supra* note 43, at 700.

55. *Id*. at 725 (footnote omitted).

56. *Id*. at 704.

57. *Id*. at 728.

58. Proposals for judicially supervised interrogation have been around since the late 1800's. *See* Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 15 n.3 (1974).

59. *Id*. at 37. Because Dripps' proposal incorporates many of the concerns of *Miranda*'s defenders, Professor Kamisar's comments are worth quoting in full:

Assuming arguendo that the comment on the suspect's silence authorized by

Although Dripps is no fan of police interrogation (or the Fifth Amendment), he does believe that interrogation is an essential police practice that society cannot do without.[60] He believes that an instrumental due process regime would permit fair and reasonable interrogation without tolerating lawless discretion or police abuse. Generally speaking, under a model that focuses on procedural values, "a very powerful case can be made for requiring the taping of interrogations, including the administration of the *Miranda* warnings and the suspect's waiver" (p. 185). Specifically, as already noted, Dripps would permit access to counsel from the moment of arrest, and permit a suspect to refuse to answer police questions, conditioned on a trial court's authority to draw an adverse inference of guilt from the accused's refusal to speak during any pretrial confrontations with the police or prosecutor. Ultimately, Dripps model is designed to have police interrogations practices "calculated to protect the innocent but not to shield the guilty" (p. 148).

I agree with many of Dripps' conclusions about the Court's criminal procedure doctrine. I also share his skepticism that existing police interrogation methods routinely produce "voluntary" confessions, and wholeheartedly endorse his critique of the modern Court's *Miranda* rulings, particularly his criticism of *Dickerson*. That said, I cannot embrace his alternative vision for confession law.

> [previous proposals for judicial interrogation] exerts significantly greater "compulsion" to speak than that allowed to operate under *Miranda*—the informal pressure to "avoid looking guilty" when confronted by anyone in authority under any circumstances and the additional "compulsion" inherent in police custodial surroundings—the comment feature should not be judged and condemned in a vacuum. It is only a small part of an attractive package whose provisions for judicial warnings, judicial supervision of any ensuing interrogation, and objective recording of the entire proceeding seem inherently stronger than the *Miranda* requirements, at least as the latter have generally been applied. Not only [do previous proposals for judicial interrogation] go a considerable distance toward investing the interrogation proceedings with the "protective openness and formalities of a court trial," but [they] "tend to promote the speedy production of the suspect before a magistrate," offer[ ] "the most efficient way of providing legal counsel upon arrest," and "meet the equal protection argument; the rich man and the professional criminal could no longer remain silent without adverse consequences."

Id. (footnotes omitted).

60. DRIPPS (p. 120) (noting that "in *Miranda* the central question is how to prevent police brutality without giving up confessions"); Dripps, *Foreword*, *supra* note 43, at 724 ("What we are looking for is an interpretation of the Constitution that *allows interrogation* but that does not depend on rejecting constitutional value judgments.") (emphasis added).

For starters, Dripps' proposal creates a serious strategic dilemma for criminal defense lawyers. If a suspect has access to counsel from the moment of arrest—a reform Dripps recognizes as necessary to close "a window of virtual lawlessness" that currently exists between the arrest and the filing of charges—no competent lawyer will advise her client to talk with the police, even assuming that the lawyer believes a client's claim of innocence.[61] A skilled lawyer is going to conduct her own investigation before she allows her client to speak with law enforcement officials, and even after such an investigation, some lawyers *never* permit their clients to talk with the police. But under Dripps' proposal, such a strategy has a significant cost—an adverse inference at trial. From a lawyer's perspective, this is a "damned if you do, damned if you don't" choice. Nor will the accused be better positioned to second-guess his lawyer's advice, whatever the lawyer advises him to do. The only side that benefits is the government. In the unlikely event that the lawyer advises her client to speak, the police may obtain an incriminating statement or evidence that can later be used against the accused.[62] And if the accused refuses to answer any questions, an adverse inference can later be raised at trial.

Of course, under Dripps' proposal, the innocent accused could refuse to answer questions, go to trial subject to an adverse inference, and then take the stand to explain why he did not talk to the police at an earlier occasion. This too, is a very risky strategy. Professor Stephen Schulhofer has cogently detailed some of the practical reasons why a lawyer would not put her client on the witness stand:

61. *See*, *e.g.*, F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUES § 1:12, at 1–17 (2002) ("The most important discussion you will ever have with your client in a criminal case will be the initial interview. . . . You cannot emphasize enough the absolute necessity that your client not speak with anyone, *particularly law enforcement agents*.") (emphasis added).

62. Dripps contends that securing the accused's statement *before* trial advantages the defense. "If the accused makes a misstep out of confusion or ignorance, there is time to take corrective actions. For example, a motion might be made to exclude the pretrial statement as unreliable, or to reopen the pretrial proceeding so the defendant could put in additional clarifying testimony" (p. 182). Such an opportunity to clarify the record may provide cold comfort for lawyers and their clients. If the accused talks to the police and makes an incriminating statement, or makes a statement that leads to incriminating evidence, query whether such statement can be later excluded as "unreliable." Certainly any physical evidence obtained as a result of the statement will not be considered "unreliable." Further, if the accused "makes a misstep out of confusion or ignorance" during a pretrial confrontation with the police, why would his lawyer run the risk of returning her client to the stand to provide "clarifying testimony"? And even if other witnesses could provide additional clarifying information, wouldn't the judge or jury want to hear from the accused himself to explain what he meant during his initial statement to the police?

> There are likely to be suspicious transactions or associations that your innocent client will have to explain. But he may look sleazy. He may be inarticulate, nervous or easily intimated. His vague memory on some of the details may leave him vulnerable to a clever cross-examination. Most ordinary citizens find that being a witness in any formal proceeding is stressful and confusing. The problems are bound to be heightened when the witness happens to be on trial for his life or his liberty. Some people can handle this kind of situation, but others, especially if they are poor, poorly educated or inarticulate, cannot. They may handle the trial experience poorly whether or not they are guilty.[63]

Furthermore, assume that a lawyer advises a client to speak with the police. What steps may the police or prosecutor then take to elicit a statement from the accused? Would the police be permitted to exert greater pressure on the accused because he has spoken with counsel and counsel is present? "What if the suspect started to show signs of weakening? Should the [interrogator] keep up the pressure, to get a confession? Or should he ease off so that he would not overbear the suspect's will? The due process approach in effect instructed the officer to do both."[64] Furthermore, what types of police trickery are permissible under an instrumental procedural regime? Can the police lie to the accused? The same issues and conflicts that existed (and still exist)[65] under the due process voluntariness test will surface *whenever* the police interrogate the accused, with or without counsel being present.

To be sure, Dripps' proposal cannot be dismissed because it fails to anticipate every factual scenario that might arise in the interrogation context. The pace and direction of an interrogation, just like the factual issues that may arise during police questioning, are not likely to be anticipated by the accused (or his counsel). The key point is that a police interrogation, with or without counsel, is not designed to be a "fair hearing" for the accused. In fact, there is nothing at all "fair" about police interro-

63. Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 330 (1991) [hereinafter Schulhofer, *Some Kind Words*].

64. *Id*. at 326 (footnote omitted).

65. *See, e.g.*, Miller v. Fenton, 796 F. 2d 598 (3d Cir. 1986), *cert. denied*, 479 U.S. 989 (1986) (finding that a police interrogation was not coercive and incriminating statements given by defendant were voluntary under due process even though interrogation ended when the defendant collapsed into a catatonic state and was transported to the hospital).

gation, at least from the accused's perspective.[66] It is a confrontation where the police hold all the cards but one, which is why lawyers always advise their clients not to talk. Silence is the one card that the accused retains.

Second, Dripps' entire instrumental due process theory is based on the premise that criminal procedure rules should seek to punish the guilty and protect the innocent. As he puts it, "[u]nless constrained to do so by constitutional authority, criminal procedure should not place obstacles in the way of punishing the guilty except to the extent that those obstacles protect the innocent" (p. 110). This premise is evident in his proposal on police interrogation. Surely an *innocent* person will talk with the police, particularly in the presence of counsel. After all, what does an innocent person have to lose by talking with the police? Only the guilty will have an incentive not to talk. And that incentive will be lessened by the ability of the judge or prosecutor to draw an adverse inference at trial about the defendant's pretrial silence.

An innocent person, however, can lose his liberty by talking to the police. Silence can protect the innocent, as well as the guilty. As recent empirical studies show,[67] and countless stories in the national press reveal, innocent people sometimes do confess to crimes they did not commit.[68] Admittedly, Dripps ac-

66. Dripps is well aware of this fact: "It should be remembered . . . that police interrogation is not a deposition. It is, as the case may be, manipulative, confrontational, or fraudulent" (p. 129).

67. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005) (finding that between 1989 and 2004, fifty-one defendants confessed to crimes they had not committed: "[o]ne defendant falsely confessed to larceny; nine falsely confessed to rape; and forty-one . . . falsely confessed to murder"). *See also*, Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 478 (1998) (analyzing the consequences of false confessions on defendants in a study of sixty cases where the police induced confessions out of suspects later proven innocent, and where the confession was otherwise unsupported by any reliable evidence; "In practice, criminal justice officials and lay jurors often treat confession evidence as dispositive, so much so that they often allow it to outweigh even strong evidence of a suspect's factual innocence."); Steven A. Drizin & Richard A Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 892 (2004) (examining 125 cases of false confessions induced by police interrogation and concluding that "the problem of interrogation-induced false confession in the American criminal justice system is far more significant than previously supposed").

68. *See, e.g.*, *Charges Dropped After no DNA Match: Police Will Try to Find Killer*, BELVILLE NEWS DEMOCRAT, Jun. 20, 2005, at B3 (Police say father of murdered girl admitted to staging her death to look like an abduction after killing her accidentally. The father was released from custody after DNA evidence fails to link him to the crime); Sharon Begley, *Interrogation methods can elicit confessions from innocent people*, WALL

knowledges that "[s]ome innocent persons confess under [the] pressures" of interrogation, and that "many more are needlessly subjected to them" (p. 129, footnote omitted).[69] And he suggests that his proposal "would greatly reduce the risk of innocent suspects falsely incriminating themselves" (p. 182). But the best guarantee against false confessions is silence.[70] If suspects do not talk to the police, they greatly reduce the chances that a false confession will be admitted into evidence at a subsequent trial.[71]

ST. J., Apr. 15, 2002, at B1 ("of the first 130 exonerations that the New York-based Innocence Project obtained via DNA evidence, 85 involved people convicted after false confessions"); Fred Grimm, *Another failure of justice system,* MIAMI HERALD, Jun. 8, 2003, at 1 (man spends 12 years in prison based on false confession and is later exonerated by DNA evidence); Tim McGlone, *Judge wants new suspect in killing identified; DNA cleared man convicted of '82 crime but implicated another, whose identity is secret*, VIRGINIAN-PILOT & STAR LEDGER, Aug. 22, 2003, at B4 (mildly retarded man who was convicted and received death sentence based on his false conviction was exonerated based on DNA evidence); Jean M. Templeton, *Shutting Down Death Row*, AMERICAN PROSPECT, Jul. 1, 2004, at A8 (mentally ill man gave a videotaped confession to his mother's murder. He was later released after DNA testing pointed to another suspect); Christopher Wills, *False Confessions: Taping interrogations won't protect suspects from themselves*, ASSOCIATED PRESS ALERT, July 17, 2005 (man who confessed to a hit and run that killed his girlfriend released after a year in jail when physical evidence proved that he could not have committed the crime; expert says innocent suspects often give realistic confessions because they are able to glean facts from those the police give during prolonged interrogations).

69. *See also* DRIPPS (p. 97) (noting that at "least a few [suspects] who waive their [*Miranda*] rights end up confessing to crimes they did not commit"). Apparently, Dripps has retreated from his earlier view that the privilege merely protects against a "purely hypothetical risk to the innocent" defendant, and that there are "no real cases in which the privilege protects an innocent defendant." Dripps, *Foreword*, *supra* note 43, at 716.

70. *Cf.* Schulhofer, *Some Kind Words*, *supra* note 63, at 329 ("Supporters of the privilege never claim that it is essential for most innocent defendants or that it helps the innocent more than the guilty. The claim is only that the privilege helps many innocent defendants and that acquitting these innocents is more important than convicting an equal or somewhat larger number of guilty defendants.").

71. Of course, even when suspects choose *not* to talk with the police, they run the risk that the police will manufacture fake evidence and induce guilty pleas for crimes the suspects did not commit. The LAPD Rampart Scandal became a prime example of the way in which innocent people are often pressured into confessing to crimes they did not commit. *See, e.g.*, Erwin Chemerinsky, *The Role of Prosecutors in Dealing With Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 306 (2001) (due to the corruption of LAPD officers who fabricated evidence and gave false testimony, "[i]nnocent men and women plead guilty to crimes they did not commit and were convicted by juries on the basis of fabricated cases."); Valerie Alvord, *Police scandal in LA puts convictions in doubt*, USA TODAY, Nov. 12, 1999, at A4 (Lawyer advised his client to plead guilty despite the client's protests that he had been falsely accused—the man was convicted, but later proclaimed innocent when it was found that he was a victim of the LAPD Rampart corruption scandal); Peter J. Boyer, *Bad Cops*, NEW YORKER, May 21, 2001, at 60, 70–72 (Noting that LAPD "bad cop" turned informant, Rafael Perez, provided investigators with information about how LAPD officers had framed suspects and falsified information which led to the arrests and convictions of over a hundred innocent men, most of whom plead guilty); Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1,

The innocent suspect who chooses silence, however, will pay a price under Dripps' proposal. The suspect who refused to speak with the police will be confronted with his silence, and his judgment to remain silent will be used against him. At trial, such a defendant will be compelled to counter the judge or prosecutor's[72] use of his prior "testimony":

> Compulsion arises directly from the trial court's willingness to use the defendant's own testimony against him, against his will. The "testimony" is the defendant's communicative act (like a nod or a shrug), his physical response to the implicit question, "How do you explain this evidence against you?" In effect, the defendant's implicit response is placed in evidence to support an inference about his own knowledge and state of mind.[73]

Ironically, though intended to protect innocent persons, application of Dripps' proposal might actually hurt the innocent suspect. Empirical data plainly shows that innocent suspects have harmed themselves by talking with the police. Because they chose to talk with the police, some of these suspects have been charged, convicted and imprisoned for crimes that they did not commit. Although a competent attorney would not advise her

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2000, § 6 (Magazine), at 32, 36 (Commenting on how he and others had framed innocent people, Officer Rafael Perez claimed "that in Rampart Crash it was commonplace to set up gang members on weapons and drug charges. He added that such tactics had the approval of his commanding officer . . . In his interviews with police investigators, Perez made clear that he saw nothing wrong with setting up gang members."); Linda Deutsch, *Man framed by LAPD Freed; Scandal: DA's Office Says as many as 40 cases under review*, LONG BEACH PRESS-TELEGRAM, Nov. 19, 1999, at A18 (Man who pleaded no contest to possession for sale of cocaine base and controlled substances was proclaimed innocent and released from jail after LAPD officers were found to have planted evidence on the man); Ted Rohrlich, *Scandal shows why innocent plead guilty*, L.A. TIMES, Dec. 3, 1999, at A1 ("In offering criminal defendants these kinds of . . . choices [between pleading guilty and receiving a lesser sentence and risking trial and getting the maximum sentence], prosecutors and judges did not set out to induce innocent men to plead guilty—although that is what they did. The prosecutors and judges merely accepted the word of the Los Angeles police that the men were guilty.").

72. It is not clear whether Dripps would permit both judge *and* prosecutor to comment at trial on the suspect's pretrial silence (pp. 148, 181). The distinction is not trivial. As Professor Peter Arenella explains with regard to a defendant's *trial* silence:

> [O]nce one grants that the defendant's trial silence constitutes probative evidence that the jury may consider, the prosecutor should be permitted to comment on such evidence during her closing argument. The only argument for prohibiting prosecutorial comment—that the jury may give such silence undue weight after listening to the prosecutor's summation—is less than compelling. Erroneous eyewitness testimony probably is responsible for most convictions of the factually innocent, but such a reliability problem does not generate a rule that only the court can comment on its probative value.

Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1245 n.28 (1996).

73. Schulhofer, *Some Kind Words*, *supra* note 63, at 334–35.

client, innocent or not, to talk with the police without conducting her own investigation, Dripps' proposal burdens the attorney and client with the difficult task of rebutting the client's earlier silence. As Professor Schulhofer has explained, an innocent defendant will often choose silence at trial "because *his* judgment is that testifying will increase the chances of conviction."[74] The same is true for the innocent defendant who chooses silence at a pretrial confrontation with the police. Dripps' proposal, however, will inevitably compel some innocent defendants to testify at trial. And the innocent defendant who is forced to testify at trial to explain his pre-trial silence will be in the same risky position already described by Professor Schulhofer. "A decision to compel their potentially unreliable testimony involves not only the ever-present risk of convicting the innocent, but also a serious problem of fairness. . . . [T]he concern is with the predicament of an innocent defendant who fears he will be manipulated, intimidated or misunderstood."[75]

Finally, if fairness (or fair procedure) is a legitimate value to promote, why focus only on the innocent suspect? Dripps readily acknowledges that police interrogation can be "manipulative, confrontational, or fraudulent" (p. 129), that under current doctrine "[r]ecording requirements, time limits, and the prohibition of particularly *sub dolis* interrogation tactics have proved the road not taken" (p. 97), and that "*because of the privilege against self-incrimination*, there is a gap—a window of virtual lawlessness—between the arrest and the filing of charges" (p. 181).

I suspect that Dripps would also agree that the current system of police interrogation does little to protect the interests of innocent suspects, other than to inform them of their right to remain silent and the right to have counsel present during an interrogation. Putting that fact aside, however, are guilty suspects not equally entitled to the concerns acknowledged by Dripps? From an instrumental perspective, why should guilty suspects be subjected to "manipulative, confrontational, or fraudulent" interrogation practices? If "[r]ecording requirements, time limits, and the prohibition of particularly *sub dolis* interrogation tactics" are important features under an instrumental regime, shouldn't these safeguards be equally available to guilty suspects? Finally, why should guilty suspects be subjected to "a

74. *Id.* at 331.
75. *Id.* at 332.

window of virtual lawlessness—between the arrest and the filing of charges"?

Dripps' instrumental procedural due process model would disincorporate the privilege as applied to the states, but would retain (and add) crucial procedural safeguards of modern confession law, including *Miranda* warnings, the right to refuse to answer questions, and the requirement that a suspect knowingly and voluntarily waive his rights. Dripps insists that his procedural model would significantly reduce the chances of false confessions by innocent suspects and "end the ability of sophisticated offenders to permanently insulate themselves from humane questioning" (p. 182). To be sure, Dripps' discussion of his proposal does not contain the disdain some scholars and commentators have shown for the Court's interpretation of the privilege.[76] Nevertheless, Dripps' proposal to reform confession law, like others before him, has a tone that suggests that guilty suspects are less deserving of constitutional protection than innocent suspects.

Although he would no longer make the privilege applicable to the states, interestingly, Dripps does not disavow a suspect's right to refuse to answer police questions during interrogation. In fact, he appears to endorse the right, subject to an adverse inference at trial. As I have already explained, that position makes the right to silence meaningless. Dripps' proposal would also effectively eliminate the right to stop custodial interrogation, another crucial, but often ignored, component of *Miranda*. But assuming Dripps does not intend to make the right to silence pointless, aren't guilty suspects equally entitled to a meaningful interpretation and application of a right that Dripps does not deny them?

Put another way, if all persons, the guilty and innocent alike, have a right to remain silent, should not that right count for something when the state brings criminal charges against them? The right to silence deserves respect, at both the pretrial and trial stages. This means that guilty suspects will be able to "insulate themselves from humane questioning" if they so choose.[77] It also means that guilty defendants who choose silence

76. *See, e.g.*, Akhil Reed Amar, *Taking the Fifth Too Often*, N.Y. TIMES, Feb. 18, 2002, at A15; Mickey Kaus, *The Fifth Is Now Obsolete*, N.Y. TIMES, Dec. 30, 1986, at A15. For a detailed discussion of Professor Amar's views on the Fifth Amendment, see Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

77. Professor Richard Leo's empirical work indicates that experienced criminals are

at trial will be rolling the dice in terms of what the jury may infer from their silence.[78] But respect for the right to silence, whether asserted at a pre-trial confrontation with the police or at trial, does not permit a court to "solemnize[] the silence of the accused into evidence against him."[79]

If Dripps agrees with me (as I suspect he does) that the right to silence is worthy of respect,[80] then respect must be afforded to all suspects, both innocent and guilty, who confront police interrogation. Dripps' proposal for judicial or "humane" police questioning of the accused provides for access to counsel, *Miranda* warnings, and a meaningful waiver of the right to silence. Dripps believes that such a system will provide an effective mechanism for interrogation without the manipulation, coercion, and abuse that currently plagues the system. But Dripps' proposal, with these safeguards, assumes a right to silence, which, of course, is the core protection provided by the Fifth Amendment's privilege. Over a time, such a system *might* have developed from principles derived from the Due Process Clause (particularly if five Justices had Dripps' attitude toward police interrogation and confessions), but the Fifth Amendment privilege is a more direct way to the same endpoint.

On the other hand, one can imagine a pro-police critic of Dripps' proposal arguing that a principled interpretation of the Due Process Clause would not have supported the "detailed code of interrogation rules" favored by Dripps.[81] While I agree

less likely to talk with the police during custodial interrogation. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) ("[A] suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record.").

78. Of course, *Carter v. Kentucky*, 450 U.S. 288 (1981), held that a trial judge, when requested to do so by the defendant, must give a cautionary instruction to the jury not to draw an adverse inference from the defendant's refusal to testify.

79. Schulhofer, *Some Kind Words*, *supra* note 63, at 335.

80. In an earlier article, Dripps brought to my attention an important fact that I had overlooked in many years of studying *Miranda*. He pointed out that two of *Miranda*'s harshest critics, Professors Fred Inbau and Gerald Caplan, in articles condemning *Miranda*, had never "urge[d] abolishing the right to silence in the face of police questioning nor denie[d] its existence in positive law." Dripps, *Foreword*, *supra* note 43, at 714 n.63. *See* Fred E. Inbau, *Over-Reaction—The Mischief of* Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985).

81. *See, e.g.*, GRANO, *supra* note 42, at 120:

> Although the rights that *Miranda* created were unprecedented in federal constitutional law, the Court's conclusion that the Fifth Amendment's protection from compulsory self-incrimination is "fully applicable during a period of cus-

with Dripps that a due process model could support the procedural safeguards he favors, I do wonder why such safeguards are mandatory on the states if the Fifth Amendment privilege does not require them.[82]

Fundamentally, Dripps and I agree that there is an "inevitable tension that exists in the simultaneous commitment to police interrogation and to the privilege against self-incrimination."[83] *Miranda* did not resolve this tension.[84] If anything, *Miranda* highlighted the conflict between the privilege and police interrogation, and initially left one side of the debate—police officials and their political defenders—angry at the Court for interfering in the first place. Because Dripps believes that confessions and police interrogation are necessary components of a well-functioning criminal justice system, he would resolve the tension between interrogation and the privilege by making the privilege no longer binding on the states.

The Fifth Amendment should remain binding on the states not because "guilty" suspects should be immune from "humane" questioning. Rather, the Fifth Amendment should bind state officials because there is a need to restrain police interrogations directed at both guilty and innocent suspects.[85] A constitutional

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todial interrogation" was perhaps even more significant from a jurisprudential standpoint. By thus leaving the due process "totality of circumstances" approach behind, the Court enabled itself to fashion a detailed code of interrogation rules that due process jurisprudence could never have supported. Moreover, by shifting constitutional gears from Fourteenth Amendment due process to Fifth Amendment self-incrimination, the Court avoided the need formally to overrule decades of due process precedent that had rejected litmus tests for the admissibility of confessions.

82. *See* Schulhofer, *Some Kind Words*, *supra* note 63, at 327 (noting that critics of the Fifth Amendment privilege who favor a regime of judicial questioning of the accused under oath, but also favor restraining or prohibiting outright police interrogation of the accused, "never quite explain how that result could be achieved without the Fifth Amendment in place, or why it *should* be achieved if the Fifth Amendment is basically unsound").

83. Thomas, *supra* note 6, at 823. I believe Dripps agrees with this assertion because he has previously recognized the conflict that exists between the Fifth Amendment and police interrogation. Dripps, *Foreword*, *supra* note 43, at 727–28 ("The Court's efforts to enforce the Fifth Amendment necessarily entail a morally unjustifiable loss of evidence, while its efforts to preserve police interrogation because of its evidentiary value necessarily entail a legally unjustifiable derogation of the constitutional decision to include the privilege in our fundamental law.").

84. *See* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 883–84 (1981) ("*Miranda* does not, any more than the due process test, come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self-incrimination and to a law enforcement system in which police interrogation is perceived as a necessity.").

85. A noted critic of the Fifth Amendment privilege, Professor David Dolinko, also seems unwilling to abolish the privilege, in part, because "*Miranda* and its progeny have

standard or rule based on due process, as applied by the current Court, will not protect against the same abuses, trickery, manipulation, and "compelled" choices that the Fifth Amendment bars.

Applying the privilege to the states may have been a "radical break" from precedent,[86] but the Warren Court's shift from a due process model to a Fifth Amendment model to regulate police interrogation was intended, *inter alia*, to provide greater protection for suspects, because the due process regime was not working. "*Miranda* had brought Fifth Amendment standards into the stationhouse under the expressly stated assumption that those standards provided more protection than the traditional Fourteenth Amendment protections."[87] The due process model barred confessions that were "coerced" or "involuntary," while the Fifth Amendment barred "compelled" statements. Although the current Court often treats these terms as interchangeable,[88] they have very different meanings under the law of confessions. As Professor Kamisar explains:

> When we talk about a "coerced" or "involuntary" confession, we mean a confession that is inadmissible under the pre-*Miranda* due process/totality of circumstances test because, as the courts usually put it when they apply such a test, taking into account the totality of circumstances, the confession was not a "product of free choice" or "free will" but one where the defendant's will was "overborne" or "broken." More oppressive methods were needed to render a confession "coerced" or "involuntary" under the pre-*Miranda* test for the admissibility of confessions than are necessary to make a confession "compelled" within the meaning of the self-

made the privilege the principal basis for constitutional limitations on police interrogation practices." David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063, 1064 (1986).

86. Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence Of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 949 (2001) [hereinafter, Schulhofer, *Fifth Amendment Exceptionalism*]. Professor Schulhofer also notes that "no member of the Court, Justices Scalia and Thomas included, shows any inclination" to disincorporate the privilege. *Id*. *See also* GRANO, *supra* note 42, at 122–23 (responding to Dripps' earlier proposal to disincorporate the privilege, noting that such a proposal "is likely to be perceived as too radical, or too late in the day, to garner majority support on the Court"). Justice Scalia, however, has questioned the historical pedigree and logic of *Griffin*, and Justice Thomas has stated that "*Griffin* and its progeny . . . should be reexamined." Mitchell v. United States, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting); *id*. at 341–42 (Thomas, J., dissenting).

87. Schulhofer, *Fifth Amendment Exceptionalism*, *supra* note 86, at 950.

88. Letter from Professor Yale Kamisar to Tracey Maclin, May 4, 2005 (on file with author).

> incrimination clause. That, at least, is the premise of *Miranda*. And that, at least, appears to have been the understanding of everyone involved in the case.[89]

Miranda, of course, significantly changed the constitutional calculus by bringing the privilege into the stationhouse. *Miranda* meant greater protection for suspects facing custodial interrogation because, as Professor Schulhofer explains, the "*Fifth Amendment itself* sweeps more broadly than the due process rule against involuntary statements."[90] And, as Schulhofer goes on to note, the Fifth Amendment protects against the use of a compelled statement "even when the compelled statement is *not* involuntary within the meaning of the Fourteenth Amendment."[91]

If adopted by the courts, Dripps' instrumental due process model will most likely result in a return to the involuntariness-totality of the circumstances test that existed pre-*Miranda*, albeit with the presence of counsel at judicially supervised interrogation sessions. Although never expressly stated, Dripps must believe that if his proposal was adopted, a few lawyers *would* advise their clients to speak with the police during a pre-trial interrogation session. And in order to secure the continued participation of police and prosecutorial officials, a certain amount of aggressive and/or deceptive questioning would have to be permitted. Certainly law enforcement officials would not continue participating in an investigative procedure dominated by defense counsel or one in which their questions were met with a refusal to respond. Otherwise, why would law enforcement officials participate? Under Dripps' proposal, however, the Fifth Amendment would no longer be the benchmark for judging the constitutional validity of statements and evidence obtained during a pre-trial interrogation session. The admissibility of any statement or evidence would be measured by the due process clause.

In sum, from the perspective of the accused, *Miranda* is no panacea. But *Miranda* affords significantly more protection than

89. *Id*. *See also* Schulhofer, *Fifth Amendment Exceptionalism*, *supra* note 86, at 950 ("Starting with [*Michigan v.*] *Tucker*, [417 U.S. 433 (1974)], the Court took the teeth out of incorporation by asserting that compulsion meant nothing different from involuntariness after all. If valid, that claim leaves one to wonder what all the fuss was about in *Malloy v. Hogan*, 378 U.S. 1 (1964) and why Justices Harlan and Clark so passionately argued, in dissent, that *only* Fourteenth Amendment involuntariness, *not* freedom from Fifth Amendment compulsion, should be required of the states.").

90. Schulhofer, *Fifth Amendment Exceptionalism*, *supra* note 86, at 946.

91. *Id*.

that provided by the Due Process Clause. If the Fifth Amendment privilege no longer applied to state officials, and police interrogation was judged by an instrumental due process model, criminal defendants would have less protection than they have today. True, defense counsel would be available at the moment of arrest. But counsel would face the Catch-22 of letting her client talk with the police, or endure an adverse inference at trial. Under such a regime, the right to silence would mean very little, if anything. The admissibility of statements or evidence obtained pursuant to custodial interrogation would be determined by due process standards. If the reasoning and result in *Colorado v. Connelly* is an indication of how the Court would apply due process norms, then someone like Dripps, who is concerned with the reliability of confessions, is not likely to be pleased with the Court's application of instrumental due process.[92]

92. Colorado v. Connelly, 479 U.S. 157 (1986), held, *inter alia*, that the Due Process Clause does not require the suppression of a confession given by a person who suffered from chronic schizophrenia, "command hallucinations," and was in a psychotic state at the time he made his confession. *Connelly* explained that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." The Court conceded that Connelly's confession might be "quite unreliable," but explained that reliability is a matter of state evidentiary laws, and not a concern of the Due Process Clause. 479 U.S. at 164.

Connelly reveals the type of results conservative Justices are willing to tolerate. Suppression of incriminating evidence should be avoided at all costs, even if it means the admission of unreliable evidence. As Professor Laurence Benner has perceptively explained:

> [S]urely this is the (exclusionary) tail wagging the (due process) dog, for the upshot of the Court's position is that unless exclusion will deter someone in an official capacity, there can be no due process violation no matter how unjust the result. By allowing the deterrence rationale for the exclusionary rule to control the nature of the due process inquiry, the Court thus permits the logic of deterrence to shape the actual content of due process itself. Under this formula any concern for justice is excluded from the equation. Indeed, any attempt to develop a coherent theory of justice under the due process clause is precluded.

Laurence Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. Q. 59, 136–37 (1989).

The two most recent *Miranda* rulings from the Court, decided after Dripps' book was published, United States v. Patane, 542 U.S. 630 (2004) and Missouri v. Seibert, 542 U.S. 600 (2004), will also give cold comfort to those who think a due process regime, applied by conservative Justices, will be a better method to regulate police misconduct. In *Patane*, a plurality held that a failure to provide *Miranda* warnings does not require the suppression of the physical fruits of the suspect's unwarned but voluntary statements. *Seibert* ruled that when police deliberately fail to give *Miranda* warnings at the outset of interrogation, obtain an incriminating statement, and then later give the warnings, a "second" statement from the suspect, which is essential a replay of the earlier statement, is inadmissible. While space limitations preclude a full critique of *Patane* and *Seibert*, it is sufficient to note the following: "The obvious danger of *Patane* is that the Court created a new incentive for police officers to violate *Miranda*. After *Patane*, rational police officers will ignore *Miranda* whenever the large and immediate benefits of obtaining in-

CONCLUSION

Professor Dripps closes his book expressing the hope that his book has provided his readers with something to think about. Dripps quotes H.L.A. Hart: "Of [Jeremy] Bentham, Hart wrote that even where he 'fails to persuade, he still forces us to think.' If I have achieved this much, this study will have succeeded beyond my fondest hopes" (p. 189).[93] After giving his book two careful readings, I can say without hesitation that Dripps has successfully accomplished that mission. Dripps' book is essential reading for anyone interested in constitutional criminal procedure. Whatever one's political persuasion, reading Dripps' book will force them to think anew about how the Supreme Court constructs constitutional criminal procedure.

criminating physical evidence outweigh the possible harm to some future prosecutor of exclusion of a statement (but not the physical evidence) in the unlikely event that the case goes to trial." Joelle Anne Moreno, *Faith-Based* Miranda?: *Why The New* Missouri v. Seibert *Police "Bad Faith" Test is a Terrible Idea*, 47 ARIZ. L. REV. 395, 395–96 (2005). Nor will *Seibert*, in the long run, act as a restrain on deliberate misconduct during police interrogations. Justice Kennedy's concurrence in *Seibert*, which provided the fifth vote in that case, made plain that he would have admitted Seibert's second confession had the police undertaken certain "curative measures." 542 U.S. at 622 (Kennedy, J., concurring in the judgment). There is no hint in either *Patane* or *Seibert* that the defendants' statements would have been deemed "involuntary" for purposes of due process. In fact, the *Patane* plurality repeatedly emphasized that Patane's statement was "voluntary," and Justice Souter's opinion for the Court in *Seibert* specifically left unaddressed "the actual voluntariness" of Seibert's second statement. 542 U.S. at 617 n.8. For an excellent critique of *Patane* and *Seibert*, *see* Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert, *the 2004* Miranda *"Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004).

93. Quoting H.L.A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 39 (1982).