

3-19-2001

## On the Costs of Uniformity and the Prospects of Dualism in Constitutional Criminal Procedure

Donald A. Dripps  
*University of Minnesota Law School*

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Donald A. Dripps, *On the Costs of Uniformity and the Prospects of Dualism in Constitutional Criminal Procedure*, 45 St. Louis U. L.J. (2001).

Available at: <https://scholarship.law.slu.edu/lj/vol45/iss2/5>

This Respondent is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**ON THE COSTS OF UNIFORMITY AND THE PROSPECTS OF  
DUALISM IN CONSTITUTIONAL CRIMINAL PROCEDURE**

DONALD A. DRIPPS\*

There are several reasons why I am both excited and honored to offer a comment on Professor Israel's magisterial treatment of *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*.<sup>1</sup> In the first place, his meticulous and exhaustive review of the Supreme Court's due process jurisprudence reflects the highest standards of legal scholarship. Eighteen years ago Professor Israel published a painstaking analysis of how the Court had moved from a regime dominated by due process to a regime dominated by the Bill of Rights and how justices with different values managed to profoundly alter the governing law without questioning the incorporation decisions.<sup>2</sup> Today he deals with the state of due process in a post-incorporation world, bringing equal care to a much longer and more complicated doctrinal story.

In the second place, independent due process has received insufficient scholarly attention of late. The Supreme Court's decisions in *Sacramento v. Lewis*<sup>3</sup> and *Medina v. California*<sup>4</sup> have explicitly avowed what has long been implicit in the current criminal procedure regime based on the selective incorporation of the Bill of Rights; individuals challenging criminal proceedings solely on due process will be given a skeptical reception, if not short shrift.<sup>5</sup> Criminal procedure doctrine is now virtually the reverse of the

---

\* James A. Levee Visiting Professor of Criminal Procedure, University of Minnesota Law School.

1. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

2. Jerold H. Israel, *Foreword: Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 286 (1982).

3. 523 U.S. 833, 854 (1998) (holding that high-speed chase by police did not violate substantive due process because high-speed chase did not shock the conscience).

4. 505 U.S. 437, 446 (1992) (holding that state system requiring proof of competence by preponderance of the evidence did not violate due process, because state procedure did not conflict with the Bill of Rights, did not conflict with common-law tradition and was not fundamentally unfair in operation).

5. This is not to say that the Supreme Court has abandoned independent due process analysis. In fact, a large number of quite vital Supreme Court precedents rest on independent due process in the criminal context. See Israel, *supra* note 1, at 373-79. *Medina* and *Lewis* are hard

regime that prevailed forty years ago, when in state cases due process stated the dominant norm and the Bill of Rights was, for the most part, inapplicable. Yet not since Sanford Kadish's classic treatment<sup>6</sup>—a treatment that *preceded* the incorporation revolution, not to mention the administrative law due-process revolution in the entitlement cases—have we seen a thoroughgoing assessment of due process in criminal cases.

Finally, Professor Jerold Israel was one of my law school teachers, one who inspired my interest in constitutional criminal procedure issues. I am happy to report that many years later, I am still learning from him.

#### SOME NONOBVIOUS COSTS OF UNIFORMITY IN CRIMINAL PROCEDURE

I would like to focus on the most salient feature of the post-incorporation regime, which is the virtual uniformity of the constitutional standards applicable to state and federal criminal procedure.<sup>7</sup> The view that Fourteenth Amendment due process incidentally includes some features in the Bill of Rights, but nonetheless provided not just an independent, but exclusive, source of constitutional law in state cases, is a dinosaur. But even if due process were given a more robust reading, the textual identity of the Fifth and Fourteenth Amendment due process clauses means that the current regime will enforce a uniform set of constitutional standards in state and federal cases. Independent due process, however understood, cannot free the states to depart from federal standards. Much good has come from the merger of state and federal standards, but I would like to dwell briefly on some of the costs that have attended incorporation.

The first of these has been noted for a long time. The old libertarian interpretations of the Bill of Rights have, as Justice Harlan foresaw,<sup>8</sup> been diluted so as to avoid imposing on the states intolerable obstacles to the

---

to maintain given the number of the independent due process cases. Indeed, in *Cooper v. Oklahoma*, a unanimous Court relied on instrumental as well as historical factors in holding that it violates due process to assign to the defendant the burden of proving competence by clear and convincing evidence. 517 U.S. 348, 368 (1996). What *Lewis* and *Medina* may mean is that due process attacks on traditional procedures, or in favor of new unenumerated substantive rights, face an uphill climb, especially when these due process claims are motivated by the rejection of factually similar claims brought under the Fourth, Fifth or Sixth Amendments.

6. Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

7. See, e.g., Joseph H. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 67 (“Since the Revolution, the only criminal procedure law that matters on most issues—from the point of view of both state and federal courts—is federal criminal procedure law. Federal criminal procedure law has become in effect a detailed, national Code of Criminal Procedure that almost totally supersedes state law.”).

8. See, e.g., *Williams v. Florida*, 399 U.S. 117, 130 (“[I]ncorporation’ would neutralize the potency of guarantees in federal courts in order to accommodate the diversity of our federal system.”) (Harlan, J., separate opinion).

enforcement of garden-variety felonies. Nonetheless, the privilege against self-incrimination, the confrontation clause and the double jeopardy bar have made it more difficult to convict the guilty in state courts. In short, national uniformity forced the Court to choose between efficient law enforcement in state cases and vigorous protection of individual liberty in federal cases.

The Court has done some of both. It has become easier—some would say too easy—to prosecute the political offenses that are properly federal. And it has become harder—some would say too hard—to prosecute the forcible felonies that are properly within the jurisdiction of the states.

I do not look with comfort on the ability of federal prosecutors to subpoena or seize under warrants the personal diaries of prominent public officials.<sup>9</sup> Nor can I express much enthusiasm for holding that an invocation of the *Miranda* right to counsel requires suppressing a subsequent statement made after the passage of more than twenty-four hours, during which the suspected killer met with counsel, and after the suspect was again advised of his rights before speaking.<sup>10</sup>

Admittedly, *Miranda* has imposed only minor costs on law enforcement.<sup>11</sup> This proposition, however, does not do much for the case of state/federal

---

9. See Senate Select Committee on Ethics v. Packwood, 845 F. Supp. 17, 21 (1994) (enforcing subpoena for personal diary of U.S. Senator).

10. Minnick v. Mississippi, 498 U.S. 146, 156 (1990).

11. Experience has shown that *Miranda* does far less harm to law enforcement than the *Miranda* dissenters feared. Justice Harlan thought that *Miranda* would “heavily handicap questioning.” *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting). Justice White thought interrogation less coercive, and suspects more cunning, than appears to be the case, for he thought that the majority “not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel.” *Id.* at 536 (White, J., dissenting). Current research, however, indicates that eighty percent of suspects waive rather than invoke *Miranda* rights. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996). The eighty percent figure does not include non-custodial interviews in which the police need not administer the warnings, and the suspects who invoke their *Miranda* rights would be the suspects least likely to confess under questioning that complies with the due process test. Experience thus seems to have lessened the strength of the *Miranda* dissents. See Brief for the Respondent at 32, *Dickerson v. United States*, 530 U.S. 428 (No. 99-5525) (“In our view, however, the cost of *Miranda*’s exclusionary rule does not so impede or undermine law enforcement that the overruling of *Miranda* is warranted. Rather, the judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives.”).

There is extensive and contentious empirical research literature on *Miranda*’s consequences. See *id.* at 32 n.23 (citing studies). Even Paul G. Cassell, however, estimates *Miranda*’s social cost as the loss of convictions in 3.8% of all arrests. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1061 (1998). This estimate is based on the assumptions that *Miranda* caused a sixteen percent drop in the number of cases in which the

uniformity. *Miranda* does only minor harm to law enforcement because *Miranda* provides only modest protection for the Fifth Amendment privilege.<sup>12</sup> Incorporation has meant that the courts must choose between vigorous readings of the Bill of Rights and greatly impairing the enforcement of state criminal law. The belief that this choice was exercised in favor of the Bill of Rights by the Warren Court and in favor of law enforcement during the tenures of Chief Justices Burger and Rehnquist is not quite correct. As *Miranda* illustrates (and one could cite *Hoffa v. United States*,<sup>13</sup> *Alderman v. United States*,<sup>14</sup> *Warden v. Hayden*,<sup>15</sup> *Terry v. Ohio*<sup>16</sup> and *Schmerber v. California*<sup>17</sup> as well) the Warren Court itself began rolling back long-standing interpretations of the Bill of Rights as soon as the ink of the incorporation decisions had dried in the pages of the United States Reports. Judicial ideology matters, but the pressure of policy considerations has an independent force.

Three other costs are less widely perceived but at least as real. Thoughtful observers from various ideological quarters have condemned the creeping federalization of the substantive criminal law, a process that expands federal power, burdens the federal courts and displaces a traditional state responsibility.<sup>18</sup> The Court's recent attempts to resurrect some limits on the federal commerce power have little chance of success; at least it seems highly

---

suspect confesses, and that a confession is necessary to obtain a conviction in twenty-four percent of these cases. This in turn assumes, among other things, that (1) all persons who refuse to make an incriminating statement because of *Miranda* are, in fact, guilty; (2) that *Miranda* causes the loss of confessions randomly, *i.e.*, that the police do not work more successfully to obtain waivers and statements in cases in which these appear to be necessary, or to work harder to obtain evidence other than a confession when it is known that the suspect has invoked; (3) that the confession rate can be estimated consistently by different researchers at different times; and (4) that the police and suspects would return to 1965 behavior patterns if *Miranda* were overruled. In my view each of these assumptions is false, but the 3.8% estimate, inflated as it is, is not the sort of cataclysm that *Miranda*'s contemporary critics feared.

12. See, *e.g.*, Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 680 (1992).

13. 385 U.S. 293, 311 (1966) (finding that Fourth Amendment does not apply to insinuation of informant into suspect's inner circle).

14. 394 U.S. 165, 189 (1969) (reaffirming Fourth Amendment standing doctrine).

15. 387 U.S. 294, 307-08 (1967) (abrogating mere evidence rule, thereby permitting police to seize evidence other than fruits, instrumentalities or contraband).

16. 392 U.S. 1, 30 (1968) (upholding police power to detain for investigation absent warrant or probable cause, given specific facts warranting reasonable person to believe crime is about to be committed).

17. 384 U.S. 757, 765 (1966) (holding that Fifth Amendment does not prohibit compelled surrender of nontestimonial evidence).

18. See, *e.g.*, William H. Rehnquist, *America and the Courts: The 1998 Year-End Report of the Federal Judiciary 2* (May/June 1999), available at <http://www.november.org/1222.html>; James Strazella, *The Federalization of Criminal Law*, A.B.A. SEC. CRIM. JUSTICE REP. 1998, at 24-43; Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

unlikely that the justices can cabin the federal criminal jurisdiction without throwing out the welfare-regulatory state we have lived under since the 1930s. So long as crime is feared by voters, and so long as federal officials have the money, political incentives will carry the Congress further and further in the direction of making car-jacking and rape federal offenses.<sup>19</sup> What might stem the tide is a genuine state advantage in criminal procedure, so that from the standpoint of crime control there would be a reason to rely on the states, rather than the federal government, for the prosecution of ordinary felonies.

I do not claim that incorporation *caused* the growth in federal criminal law enforcement. To cite but one counter-example, the federal government played a major role in the narcotics field even when many state courts gave local police the great advantage of admitting illegally-seized evidence. Narcotics prohibition, however, is a genuinely federal problem, at least so long as a significant portion of the prohibited drugs in the domestic market originates abroad. The trend to federalization, however, has gone far beyond federal enforcement of crimes with a foreign-commerce connection.

Prior to the revolution in constitutional interpretation during the New Deal, there was general agreement that the federal government lacked jurisdiction to prosecute the common-law felonies except as they arose on federal territory. Freed by the 1937 sea change to exercise the functional equivalent of a federal police power, it was only a matter of time before Congress turned to doing something about crime. The occasion arrived in the 1960s, when rising crime rates, riots and assassinations propelled the crime issue into presidential politics. The demand that federal officials do something about crime, recurring every election cycle, has brought us to the present state of affairs.

Without the Supreme Court's incorporation decisions these pressures would still have operated. They would, however, sooner or later have run into the genuine efficiency advantage the states would have retained under a dual system of criminal procedure. Suppose, for instance, that the Warren Court in the *Alderman* case<sup>20</sup> had recognized target standing to invoke the Fourth Amendment exclusionary rule *but only in federal cases*. Suppose further that in *Griffin v. California*,<sup>21</sup> the Court had permitted comment on the defendant's failure to testify *but only in state cases*. To take one more illustration from the Warren period, what if the Court had held that the Sixth Amendment right to

---

19. See, e.g., John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 674-75 (1999) ("Despite *Lopez*, the federalization of crime has accelerated. Congress simply amended the statute at issue in *Lopez* and continued to federalize crimes that once were the exclusive domain of the states. Between 1996 and 1998 alone, the 105th Congress passed numerous criminal statutes, adding more than a dozen criminal statutory sections to the United States Code.") (footnotes omitted).

20. 394 U.S. 165 (1969).

21. 380 U.S. 609, 615 (1965) (holding that judicial comment on the defendant's failure to testify violates the Fifth Amendment privilege against self-incrimination).

counsel applies to pretrial identification procedures (whether pre- or post-indictment, whether corporeal or photographic),<sup>22</sup> but that due process permitted the states to proceed with fair procedures absent defense counsel.

What if, more recently, the Court had limited the requirement of physical “confrontation” under the Sixth Amendment, and permitted the states to employ televised testimony so long as the accused enjoyed full cross-examination?<sup>23</sup> If *Michigan v. Mosley*<sup>24</sup> governed the consequences of invoking counsel as well as silence in state, but not federal, *Miranda* cases? If state, but not federal, officers could claim the benefit of the good-faith exception set forth in *United States v. Leon*<sup>25</sup>?

I am not endorsing every one of these possible dualities. They indicate, however, that the political pressures to federalize crime could be counterbalanced by state procedural advantages. Why federalize the prosecution of sexual assault, if the states enjoyed an advantage regarding confrontation? Why federalize drug prosecutions, if the states worked under a more circumscribed exclusionary rule than the federal authorities?

A third cost is that the expense and risks of a trial that complies fully with the eighteenth century standards set out in the Bill of Rights have meant that almost nobody gets a trial. Rather than hazard a time-consuming trial, at which the dereliction of the witnesses or some fluke reaction among the jurors might defeat a meritorious charge, with no chance of retrial, prosecutors are inclined to seek guilty pleas rather than go to trial. The more draconian penalties authorized by elected legislatures are rarely imposed, but serve as the basis for coercive offers by prosecutors who cannot afford the kind of trial envisioned by the Bill of Rights.<sup>26</sup> It is not unusual for a serious crime to be

---

22. *Cf. United States v. Wade*, 388 U.S. 218, 237 (1967) (holding that right to counsel attaches to pretrial, post-indictment lineup because lineup is critical stage of criminal process).

23. *Cf. Maryland v. Craig*, 497 U.S. 805, 857 (1990) (holding that confrontation clause permits closed-circuit televised testimony only given case-specific finding that in-court testimony would traumatize child witness).

24. 423 U.S. 96, 105-06 (1975) (holding that police may obtain valid waiver subsequent to suspect’s invocation of right to silence). Under *Edwards v. Arizona*, 451 U.S. 477, 487 (1981), and its progeny, the invocation of the right to counsel, as distinct from the right to silence, raises a bar to future questioning in the absence of some affirmative initiation by the suspect.

25. 468 U.S. 897, 918 (1984) (holding that exclusionary rule does not require suppression of evidence obtained by police acting in objectively reasonable reliance on warrant erroneously issued by judge).

26. *See, e.g.,* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1965 (1992) (“[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining.”). The prosecutor’s ability to make the defendant “an offer he can’t refuse” is, however, not limited to broad statutes with mandatory minimum sentences. So long as typical criminal transactions can be charged out in various ways with substantial disparities in the corresponding penalties, the prosecutor can impose a heavy sanction on the defendant’s decision

bargained down to a suspended sentence of one sort or another, with the defendant later committed to prison after an administrative law type hearing for violating the various and intrusive conditions of probation or parole. We have invited, if not virtually forced, legislatures and law enforcement officials to exploit the constitutionally unregulated substantive criminal law as a threat to those who refuse to waive the constitutional right to a trial society has concluded it cannot afford. One can describe this arrangement in many ways, but trial by jury is not one of them.

A previous qualification is in order here as well. Incorporation did not *cause* plea bargaining any more than incorporation caused the trend toward federalization.<sup>27</sup> But if the Supreme Court had worked at identifying the most rigorous trial system society could be expected to pay for at any given point in our history, and insisted on that minimum and nothing more, alternatives to plea bargains might have become far more attractive. The inquiry might be expressed in a different way; what procedural safeguards should the accused be permitted to insist upon *without* running the risk of a more onerous sentence? At the moment, the answer to that question is the advice of an overworked, underpaid public defender followed by a brief plea colloquy in court.

So phrased the test has another edge to it, *i.e.*, the judges would feel much better about prohibiting the prevailing practice of punishing the exercise of constitutional rights if the constitutional rights were such that every innocent defendant would want them and every state could afford them. Constitutional doctrine might regulate the legislature's authorization of draconian minimum sentences under the Eighth Amendment, or prohibit functionally coercive offers under the due process clause. That has not happened, at least in part because of the perceived cost of providing trial by jury to every defendant.

Finally, a regime dominated by the Bill of Rights is likely to give insufficient regard not just to due process, but to equal protection. The disparate impact of investigation and prosecution on African-Americans poses a disturbing challenge to our system of justice.<sup>28</sup> The natural doctrinal response lies in the Fourteenth Amendment, not the Bill of Rights. Incorporation does not logically preclude a vigorous role for the equal protection clause in criminal cases. The preoccupation with the Bill of Rights, however, has deflected attention from the very real problem of discretionary decisions with racially disproportionate effects.

---

to stand trial. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1991-93 (1992).

27. George Fisher, in an impressive recent study, dates the dominance of plea bargaining, roughly speaking, to the final decades of the nineteenth century. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

28. See, *e.g.*, DAVID COLE, *NO EQUAL JUSTICE* (1999); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).



In spite of this long list of liabilities, the current regime makes sense from a historical standpoint. The strongest reason the Warren Court had for turning to the Bill of Rights (and that the Court still has for continuing to concentrate on the Bill of Rights) is that the approach the Court took to independent due process analysis in the years before the incorporation decisions was unsuccessful. The two key rulings were *Hurtado v. California*,<sup>29</sup> which equated due process with “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” and *Betts v. Brady*,<sup>30</sup> which required courts to assess fundamental fairness on a case-by-case basis taking account of the totality of the circumstances.

Prominent scholars<sup>31</sup> of late have noted the congruity of *Boyd v. United States*<sup>32</sup> and *Lochner v. New York*,<sup>33</sup> but *Lochner* shares at least as much with *Hurtado* as with *Boyd*. The insistence that fundamentally unjust legislation is not law, and the trust in the courts to identify departures from fundamental principles, is essential to the reasoning in both decisions. *Lochner* is dead; *Boyd* is dead; but *Hurtado* is still with us. Witness the *Medina* Court’s continued use of the substantive due process standard to test procedural fairness, reflected in the *Medina* opinion’s treatment of “‘fundamental fairness’ in operation.”<sup>34</sup> Witness also the *Lewis* Court’s insistence that anything that shocks the conscience must be unconstitutional, but that nothing short of that violates substantive due process in the administration of criminal justice.

Coupled with *Betts*, the fundamental fairness test gave the Court sweeping power to reverse convictions it found offensive, but virtually no power to regulate the behavior of police and lower courts. One case could supply no guidance about another, and the Supreme Court never heard enough criminal cases (and never could have heard enough of the them) to give content to the standard by illustrative examples. Minute changes in the facts lead to different outcomes. Little wonder that realists like Warren and Douglas could agree with a formalist like Black to turn to the rule-like text of the Bill of Rights as a way to reform the criminal process without resort to unenumerated rights.

---

29. 110 U.S. 516, 535 (1884).

30. 316 U.S. 455, 473 (1942).

31. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419-433 (1995); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573-81 (1995).

32. 116 U.S. 616, 638 (1886) (invalidating under Fourth and Fifth Amendments federal statute that conclusively presumed facts supporting forfeiture from failure of claimants to surrender business records bearing on the facts at issue).

33. 198 U.S. 45, 50 (1905) (invalidating state wage-and-hour legislation on substantive due process grounds).

34. 505 U.S. 437, 448 (1992) (emphasis added).

Before the Court begins to qualify incorporation so as to restore a dual system of criminal procedure, the justices are likely to demand a coherent due process theory that (a) fits the text and history tolerably well, (b) accords with widely shared value judgments about the criminal process and (c) supplies tolerably clear guidance for law enforcement officers and the lower courts. Professor Israel shows in great detail how the Court's basic approach has evolved over time, reflecting a permanent albeit shifting dissatisfaction with the legitimacy, morality or determinacy of prior due process approaches. What I would like to do in the remainder of this Comment is to suggest that we really have learned some important lessons from the criminal procedure revolution, and that what we have learned can help us to build a general due process theory that satisfies the criteria of legitimacy, morality and determinacy.

What exactly have we learned? First, we have learned that the Court has the capacity to formulate constitutional doctrine in categorical rules, sufficiently determinate to guide the police. Illustrative here are the seemingly disparate *Miranda* rules announced by the Warren Court to govern custodial interrogation<sup>35</sup> and the Fourth Amendment bright-line rules announced by the Burger Court to govern searches incident to arrest.<sup>36</sup> In both cases, general constitutional text was given concrete meaning in a specific recurring factual context. In both contexts, some residual uncertainty remains (What is custody? Does the search-incident power under *New York v. Belton* extend to passengers? etc.), but nonetheless both sets of rules provide functionally effective guidance to the police and the lower courts.

Second, we have learned something about shared values in the criminal process. Despite the shifts in judicial ideology, there is widespread agreement that the investigation should burden individuals only in proportion to the probability of a successful prosecution, and that the adjudication of charges should promote accurate fact-finding. The development of the Fourth Amendment balancing test reflects the first area of broad agreement;<sup>37</sup> cases as diverse as *Brady*,<sup>38</sup> *Strickland v. Washington*,<sup>39</sup> and *Ake v. Oklahoma*<sup>40</sup> reflect the second.

---

35. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Court recently reaffirmed *Miranda*, relying in part on the advantages of a relatively clear rule to govern the interrogation situation. See *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000).

36. *New York v. Belton*, 453 U.S. 454, 461 (1981) (incident to lawful arrest of occupant of automobile police may search passenger compartment and any containers therein); *United States v. Robinson*, 414 U.S. 218, 234 (1973) (incident to lawful arrest police may search the person of the arrested individual without case-by-case inquiry into presence of probable cause or ability to obtain warrant).

37. On the development of the balancing test, see, for example, WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.1 (3d ed. 1996).

38. *Brady v. Maryland*, 373 U.S. 83, 90 (1963) (holding that due process requires disclosure, on request, of exculpatory evidence). The Court has not called *Brady* into question, although it

A substantive due process test that forbids deprivations of liberty out of rational proportion to the strength of the antecedent suspicion would incorporate the Fourth Amendment cases but extend their principle beyond the narrow orbit of searches and seizures. Such a test would translate a widely accepted value judgment into constitutional doctrine, conforming as well as any other substantive due process approach with text and history. The *Lewis* opinion's shock-the-conscience test is utterly ahistorical; as a test of substantive due process rights it dates only to 1966.<sup>41</sup> Prohibiting the executive from punishing without trial in the guise of investigation follows far more faithfully from text and history. A procedural due process test based on the *Mathews v. Eldridge*<sup>42</sup> inquiry into instrumental reliability would likewise translate shared values into constitutional doctrine.

The standard counter to the *Mathews* analysis in criminal cases is that history informs constitutional analysis more fully in criminal than in

---

has required a showing that a *Brady* violation prejudiced the defendant before requiring a new trial. *United States v. Bagley*, 473 U.S. 667, 677 (1985).

39. 466 U.S. 668, 692 (1984) (holding that showing of unprofessional error by defense counsel, coupled with prejudice to the defendant, requires new trial on grounds of ineffective assistance of counsel).

40. 470 U.S. 68, 83 (1985) (holding that due process may require court-appointed expert witness for indigent defendant).

41. The Court first used the shock-the-conscience formula at a time when the Fourth Amendment, but not the exclusionary remedy, applied to the states as a matter of due process. At that time, shocking Fourth Amendment violations, but not others, called for suppression under the due process clause. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (finding warrantless entry without probable cause followed by arrest and stomach-pumping of suspect to be a shocking violation of Fourth Amendment and therefore calling for suppression under due process clause); *Irvine v. California*, 347 U.S. 128, 137 (1954) (repeated warrantless entries to install hidden microphone, including eavesdropping on marital bedroom, violated Fourth Amendment, but were not shocking; exclusion not required by due process). After the Court extended the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), it borrowed the conscience-shocking rhetoric to describe the independent scope of substantive due process. *See Schmerber v. California*, 384 U.S. 757, 766 (1966). In this case, the police enlisted a doctor to draw blood from an unconscious accident victim suspected of DUI. The Court rejected Schmerber's Fourth Amendment claim, because the smell of liquor and the crash supplied probable cause and the imminent metabolization of the evidence created exigent circumstances justifying proceeding without a warrant. In rejecting Schmerber's independent due process claim, the Court stated that "the withdrawal [of blood] did not offend that 'sense of justice' of which we spoke in *Rochin*." *Id.* at 760 (citations omitted). Thus, the remedial test of exclusion under the pre-*Mapp* law morphed into a test of substantive due process rights. For a fuller treatment, see Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 267-269.

42. 424 U.S. 319, 348 (1976).

administrative cases.<sup>43</sup> The standard counter is not particularly persuasive. In 1791, the Bill of Rights criminal procedure provisions would have followed from the *Mathews* factors. Some of the Bill of Rights safeguards, such as grand jury presentment, no longer promote instrumental goals. Other procedures, such as reliability-based regulation of police identification procedures, might now be required by the *Mathews* test. The failure of the framers of the Bill of Rights to include such procedures ought not to immunize police investigation from constitutional scrutiny. After all, the modern municipal police force was not invented for half a century following the ratification of the Bill of Rights.<sup>44</sup> And whatever support the history of the Fourteenth Amendment may give to the idea of including the Bill of Rights in the rights protected by the Fourteenth Amendment, the historical record does not support *limiting* the scope of Fourteenth Amendment due process to the provisions in the Bill of Rights.<sup>45</sup>

Of course strong disagreement remains when the general principles of proportionality and reliability are applied to particular cases. Whether close contact with a drug-sniffing dog imposes a major or minor invasion of liberty is open to reasonable dispute. So is the constitutionally minimal support for indigent defense attorneys, investigators and experts. Many bodies of constitutional doctrine, however, leave room for principled disagreement. They are thought successes so long as they properly frame the issues for decision. The fundamental fairness doctrine failed that test. The approaches I have suggested might very well pass.

Putting the lessons of history together, the federal courts could develop bright-line due process rules to deal with issues not dealt with by the Bill of Rights. Eyewitness testimony and informants are excellent examples, where the inapplicability of the Fourth, Fifth and Sixth Amendments has left the police essentially unregulated, with baleful consequences. Informants, for example, invade the liberty of association by gaining trust through treachery, defrauding the innocent into friendship. Informants, moreover, pose a threat to the reliability of the trial, for their testimony is typically motivated by self-

---

43. See *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975). Post-*Gerstein* cases have sometimes neglected the point, but it remains the strongest argument against instrumental analysis in the criminal cases. See Israel, *supra* note 1, at 405-07.

44. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1233-36 (1993) (explaining how development of modern police forces requires translation of Fifth Amendment privilege in light of changed circumstances).

45. For example, Michael Kent Curtis, in an influential defense of the incorporation theory, argues that "there was a consensus among Republicans in the campaign of 1866 that the amendment would protect rights of American citizens, and . . . leading Republicans *numbered among those rights* the right not be deprived of Bill of Rights liberties by the states . . ." MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 218 (1986) (emphasis added).

interest, pecuniary or penal. Requiring reasonable suspicion before insinuating a spy into the intimate circle of the target illustrates a substantive due process approach founded on the proportionality principle. Excluding informant testimony uncorroborated by electronic recording, absent exigent circumstances, illustrates a procedural due process approach based on instrumental reliability.

If experience with due process rules as a supplement to the incorporated amendments turned out well, confidence in due process might lead the judges to allow the states some freedom from the incorporated amendments. In short, incorporation resulted from the absence of a viable alternative founded on due process, and will remain at least as long as no such alternative emerges. If such an alternative does emerge, incorporation itself, which evolved more out of desperation than design, would be ripe for reconsideration.

There is of course the claim that text and history affirmatively require incorporation. That claim has attracted new support in the last twenty years,<sup>46</sup> support that deserves to be considered in full on some other occasion. Thoughtful students of the historical record, however, might well agree that whatever the best resolution of the textual and historical arguments might be, the record is mixed enough to permit the play of pragmatic considerations. I hasten to add that if due process means fundamental fairness applied on a case-by-case basis in light of the totality of the circumstances, pragmatic considerations very strongly support incorporation. The burden quite properly lies on proponents of due process to articulate and defend a better theory than the one the Court rejected in the 1960s. I know we ought to try, and I think we can succeed.

---

46. *See, e.g., id.*