How Much Does it Matter Whether Courts Work Within the "Clearly Marked" Provisions of the Bill of Rights or With the "Generalities" of the Fourteenth Amendment?

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How Much Does It Really Matter Whether Courts Work Within the “Clearly Marked” Provisions of the Bill of Rights or With the “Generalities” of the Fourteenth Amendment?

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We know that it really mattered to Justice Hugo Black. As he made clear in his famous dissenting opinion in Adamson v. California¹ Black was convinced that the purpose of the Fourteenth Amendment was to apply the complete protection of the Bill of Rights to the states.² And, as he also made plain in his Adamson dissent, he was equally convinced that working with the “specific” or “explicit” guarantees of the first Eight Amendments would furnish Americans more protection than would applying the generalities of the Fourteenth Amendment.³

I. HOW MANAGEABLE IS THE FOURTEENTH AMENDMENT DUE PROCESS TEST?

Justice Black underscored the importance of “courts proceeding within [the] clearly marked constitutional boundaries” of the Bill of Rights.⁴ He disparaged working with the generalities of the Fourteenth Amendment as courts “roam[ing] at will in the limitless area of their own beliefs as to reasonableness.”⁵ The famous (or should one say, infamous) “stomach pumping” case, Rochin v. California,⁶ gave Black another opportunity to voice his unhappiness with the due process approach.

Concurring in the result, Justice Black rejected the notion that the appropriate inquiry was whether—as Justice Felix Frankfurter, speaking for the majority, had put it—the police conduct in this case (a) “shocks the conscience,”⁷ (b) “offend[s] a sense of justice,”⁸ (c) “is bound to offend even hardened sensibilities,”⁹ or (d) fails to “respect certain decencies of civilized conduct.”¹⁰ The Court, maintained Black, should have asked, rather, whether the police conduct violated the “explicit”

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2. See id at 71–72.
3. See id at 89. See also Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring).
4. Id. at 91–92.
5. Id. at 92.
7. Id. at 172 (majority opinion).
8. Id. at 173.
9. Id. at 172.
10. Id. at 173.
language of the Fifth Amendment, which forbids any person in any criminal case from being "compelled... to be a witness against himself."11

The unruliness of the Due Process approach is underscored by the fact that shortly after he wrote the majority opinion in Rochin, throwing out the evidence, Justice Frankfurter wrote an angry dissent in Irvine v. California,12 protesting the Court's decision to admit the evidence. In Irvine the police made repeated illegal entries into petitioner's home, first to install a secret microphone and then to move it to the bedroom, in order to listen to the conversation of the occupants—for over a month. (Surely I am not the only one who, if forced to choose the lesser of these two evils, would choose Rochin's experience with the police rather than Irvine's).

Astonishingly, Justice Robert Jackson, who announced the judgment of the Court in Irvine and wrote the principal opinion, conceded that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government."13 Nevertheless, "[h]owever obnoxious... the facts..., they do not involve coercion, violence or brutality to the person."14 It was clear to dissenting Justice Frankfurter, however, that the "aggravating" and "repulsive" police conduct that had occurred in the case put it squarely in the Rochin category.15

II. HOW SPECIFIC ARE THE SPECIFIC GUARANTEES OF THE BILL OF RIGHTS?

If the Due Process approach often turns out to be a murky, spongy test, is resorting to the so-called explicit language of the first Eight Amendments much better? How helpful—how "clearly marked"16—does the explicit language of the Bill of Rights prove to be when specific problems arise under a particular clause? Take, for example, the accused's Sixth Amendment right "to have the Assistance of Counsel for his defense."

11. See id. at 174–75 (Black, J., concurring).
13. Id. at 132 (majority opinion).
14. Id. at 133.
15. Id. at 145 (Frankfurter, J., dissenting).
16. See supra note 4 and accompanying text.
When does the right to counsel begin? When a person is indicted? When he or she is taken to the police station? When, to quote Escobedo v. Illinois,17 “the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession”?18

How far does the right to appointed counsel go? Does it apply to misdemeanor cases as well as felony cases? Does it apply to appeals as well as trials? Should we require court-appointed lawyers to handle indigent defendants’ appeals even though the lawyers are convinced that their clients’ appeals lack any merit? Should an indigent probationer or parolee at a revocation hearing be provided with counsel?

When judges hammer out the answers to such questions (as they have done, rightly or wrongly, over many years), do the so-called “specific” or “clearly marked” guarantees of the Bill of Rights enable them to avoid injecting their own notions of decency and justice into the language of the Bill of Rights? I think not.

Why so? Because when a particular issue arises all too frequently the oft-called specific language of the first Eight Amendments turns out to be insufficiently specific—indeed sometimes not much clearer than the generalities of Fourteenth Amendment Due Process.19

More than forty years ago, Judge Henry Friendly warned that “[t]here is grave risk of self-delusion in the reiterated references to the declarations of fundamental principles in the Bill of Rights as

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18. Id. at 492. On recently rereading Henry Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CAL. L. REV. 929 (1965), written on the eve of Miranda, I was struck by how concerned Judge Friendly was “that the Court may hold the assistance of counsel clause of the sixth amendment to require exclusion of admissions to policemen on the street or freely made after arrival at the station house, unless counsel was present or the right to counsel had been clearly waived.” Id. at 941. See also Arnold Enker & Sheldon Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 60–61 (1964), voicing apprehension that the Warren Court might be in the process of shaping “a novel right not to confess except knowingly and with the tactical assistance of counsel.”

As it turned out, Miranda does not go that far. The police may advise suspects of their rights, not defense lawyers, and counsel need not be present when the police do give the Miranda warnings. Moreover, the warnings need not be given unless the suspect is both (a) in custody (which is rarely the case when suspects are on the street or in their cars) and (b) about to be interrogated.

19. As Professor Farber and Sherry have recently reminded us, DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 77 (2009), James Madison once observed that “[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation are considered as more or less obscure and equivocal, until their meaning be . . . ascertained by a series of particular discussions and adjudications.” To quote Farber and Sherry again, id. at 22, “[a]s anyone who has served on a document drafting committee knows, the final product represents various compromises, often deliberately evading particularly sensitive questions or adopting positions that command no support but also spark no opposition.”
More than fifty years ago—at a time when the Warren Court’s “revolution” in American criminal procedure had not yet gotten underway—Professor Sanford Kadish observed:

The changing contours of and the vigorous divisions of the Court concerning the meaning of and freedom from religion, double jeopardy, cruel and unusual punishments, the privilege against self-incrimination and unreasonable searches and seizures, belie the notion that the literal language of these provisions directs and confines judicial inquiry along specific lines.

* * *

The shift from a due process broadly conceived to one tied to the Bill of Rights . . . is hardly a triumph of fixed meanings over flexible ones.

III. HOW HELPFUL IS THE EXPLICIT LANGUAGE OF THE FIFTH AMENDMENT’S PROTECTION AGAINST COMPelled SELF-INCrimINATION?

That focusing on the “specific guarantees” of the Bill of Rights can turn out to be most unrewarding is demonstrated by two cases involving the taking of a blood sample from a person suspected of drunken driving. One, Breithaupt v. Abram, was decided some years before the Court ruled that the Fourteenth Amendment “incorporated” the privilege against compelled self-incrimination. The other case, Schmerber v. California, was handed down two years after “incorporation” of the privilege had taken place. To put it mildly, the “incorporation” of the privilege did not affect the outcome.

Because Breithaupt was decided at a time when the protections of the Fourteenth Amendment were not deemed to embrace the Fifth Amendment privilege, that case summarily rejected the argument that the Fifth Amendment privilege protected the defendant. But in Schmerber—decided at a time when the Fifth Amendment was deemed to apply to the states in its entirety—the Court rejected an argument based on the Fifth Amendment privilege fairly easily:

20. Friendly, supra note 18, at 937.
The privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and the withdrawal of blood and the use of the analysis in question in this case did not involve compulsion to these ends.

Justice Black, joined by Douglas, dissented in Schmerber (as both had in Breithaupt), expressing amazement at the majority’s conclusion that—

compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself...26

* * *

The sole purpose of this project... was to obtain “testimony” from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly “communicative” in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.27

* * *

It is a strange hierarchy of values that allows the State to extract a human being’s blood to convict him of a crime because of the blood’s content but proscribes compelled production of his lifeless papers.28

Chief Justice Warren, who had dissented in Breithaupt (relying on Rochin), dissented again in Schmerber. He deemed it sufficient to reiterate the views he had expressed in Breithaupt.29 Five of the six Justices who had voted with the majority in Breithaupt were still on the Court when Schmerber was decided. They all voted with the majority.30

To use language from Justice Black’s dissent in Adamson in a way he would probably disapprove, would it be fair to say of Schmerber that, although both the dissenters and the members of the majority may have read the applicable language in the Bill of Rights, they provided their “own concepts of decency and fundamental justice”31 and “their own beliefs as to reasonableness”?32

25. Id. at 761.
26. Id. at 773 (Black, J., dissenting).
27. Id. at 774.
28. Id. at 775.
29. See id. at 772 (majority opinion).
30. The only change in the voting was caused by newly appointed Justice Abe Fortas. He dissented, maintaining, inter alia, that “petitioner’s privilege against self-incrimination applies.” Id. at 779 (Fortas, J., dissenting).
31. Adamson, 332 U.S. at 89 (Black, J., dissenting).
32. Id. at 92.
A year after \textit{Schmerber} was decided, the Court handed down a famous lineup case, \textit{United States v. Wade}.\footnote{33} It was also a case that raised some interesting self-incrimination issues. Mr. Wade, a suspect in a bank robbery, had been placed in a lineup in which each person (a) wore strips of tape on his face (as the robber had allegedly done) and (b) as instructed to do so by the police, said something like “put the money in the bag” (the words allegedly uttered by the robber).\footnote{34} The most troublesome self-incrimination issue was compelling the lineup participants to speak “put the money in the bag.”

A 5-4 majority, per Brennan, J., author of \textit{Schmerber}, ruled that the police had not violated the privilege against self-incrimination because the privilege “‘... offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification . . . , to assume a stance . . . , or to make a particular gesture.””\footnote{35} As for being compelled to say something like “put the money in the bag,” this, too, did not amount to a violation of the privilege because Mr. Wade had only been “required to use his voice as an identifying physical characteristic, not to speak his guilt.”\footnote{36}

Dissenting Justice Black reiterated the views set forth in his \textit{Schmerber} dissent. It seemed “quite plain” to him that—

the Fifth Amendment’s Self-Incrimination Clause was designed to bar the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood . . . So here, the Government forced [Wade] to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal.\footnote{37}

Although not entirely clear, Black appears to have taken the position that even if Mr. Wade had \textit{not} been required to speak the words the robber was supposed to have used, the police conduct still would have been objectionable. He seemed to say that forcing a person to stand in a lineup and/or wear strips on his face \textit{without more} would have been prohibited by the Fifth Amendment guarantee.

\footnote{33} 388 U.S. 218 (1967). \textit{Wade} held that the Sixth Amendment guarantees a defendant the right to counsel at a critical pretrial proceeding such as a lineup identification.
\footnote{34} See \textit{id.} at 220.
\footnote{35} \textit{Id.} at 223 (quoting \textit{Schmerber}, 384 U.S. at 764).
\footnote{36} \textit{Id.} at 222–23.
\footnote{37} \textit{Id.} at 245.
On the other hand, the only feature of the identification proceeding Justice Fortas objected to was requiring the lineup participants to speak the words the robber was supposed to have uttered.\textsuperscript{38} Schmerber, maintained Fortas, was distinguishable; the police in the instant case had gone a good deal further:

[The] accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. . . . It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination.\textsuperscript{39}

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. . . Schmerber . . . authorized the forced extraction of blood from the veins of an unwilling human being, [but it] did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court.\textsuperscript{40}

For our purposes we need not resolve the disagreement over the meaning and scope of the privilege against self-incrimination. Suffice to say that in \textit{Wade}, too, the so-called specificity of a provision of the Bill of Rights did not afford the accused any more protection than would have the generalities of the Fourteenth Amendment. And here, too, the so-called specificity of a Bill of Rights guarantee did not prevent the Court from splitting badly over its meaning.

\textbf{IV. WHY LIBERALS FAVOR THE “INCORPORATION” OF THE FIRST EIGHT AMENDMENTS}

A primary reason many liberals favor the Fourteenth Amendment’s “incorporation” of the Bill of Rights is that because in some notable instances the Court has read a particular provision of the Bill of Rights generously or expansively before deciding whether to apply that provision to the states. Thus it read the Fourth Amendment protection against unreasonable search and seizure to require the exclusion of evidence obtained in violation of that guarantee\textsuperscript{41} half a century before it applied that guarantee in its entirety to the states.\textsuperscript{42} And it interpreted the Sixth Amendment right to the assistance of counsel to require the

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\textsuperscript{38} Fortas’s dissent was joined by Chief Justice Warren and Justice Douglas. \textit{Id.} at 259 (Fortas, J., dissenting).
\textsuperscript{39} \textit{Id.} at 260.
\textsuperscript{40} \textit{Id.} at 261.
\textsuperscript{41} \textit{Weeks v. United States}, 232 U.S. 383, 398-99 (1914).
\end{flushleft}
appointment of counsel in those instances where a criminal defendant could not afford to hire a lawyer 43 a quarter-century before applying that provision in its entirety to the states. 44

But this is hardly a tribute to the specificity or clarity of the Fourth and Sixth Amendments. The Fourth Amendment only entitles people to be secure against unreasonable searches and seizures. It has nothing to say about admitting or excluding evidence obtained in violation of its command. And it would be hard to argue that the Founding Fathers contemplated an exclusionary rule. 45

The Sixth Amendment has nothing to say about assigned or appointed counsel. It speaks only of the accused’s rights “to have the assistance of counsel for his defense.” Moreover, as a matter of history, the Court that construed the Sixth Amendment to require the appointment of counsel seems to have gotten it wrong. As a leading commentator on the right to counsel has recently noted, “it seems highly probable that the Sixth Amendment was designed to grant a legal representative of one’s own choosing,” thereby rejecting the restricted British approach, “but no right to have counsel provided by the government.” 46

The view that all the “specific guarantees” of the Bill of Rights are binding on the states is not helpful when the Supreme Court has not yet told us what the particular guarantee means for the federal government, i.e., when the Court is deciding how the guarantee applies to the states and the federal government at the same time. This was the situation when it came to Miranda.

To be sure, Malloy v. Hogan 47 had announced that the privilege against self-incrimination applied to the states in its entirety. But what this meant was not at all clear. For example, did the privilege apply to the interrogation room in state or federal cases?

46. James Tomkovitz, The Right to the Assistance of Counsel 21 (2002). This view is strengthened by the fact that at the time the Nation ratified the Constitution, not a single state guaranteed the right to appointed counsel. See id. at 11–13. See also Donald A. Dripps, About Guilt and Innocence: The Origins, Development, and Failure of Constitutional Criminal Procedure 117 (2003).
47. 378 U.S. at 3.
The prevailing view was that it did not. The reason often given was that interrogation did not involve any kind of judicial process for the taking of testimony. Thus, in none of the dozens of federal or state confession cases decided in the decades before *Miranda* had the privilege been the basis for deciding the admissibility of confessions—certainly not as the privilege applied to judicial proceedings.\(^{48}\)

True, a person brought into the interrogation room for questioning is threatened neither with perjury for testifying falsely nor contempt for refusing to testify at all. But (at least until *Miranda* was handed down) did not many custodial suspects assume—or were they not led to believe—that there were legal (or, for that matter extralegal) sanctions for "refusing to cooperate" with the authorities? That did not seem to matter. Since the police had no legal authority to make a suspect answer their questions, the argument ran, the suspect had no legal obligation to answer to which a privilege in the technical sense could apply.\(^{49}\)

"The theory that the Fourteenth Amendment incorporates the Bill of Rights," Professor Donald Dripps points out in a paper he has written for this conference, "established the foundation for the Warren Court’s ‘criminal procedure revolution.’"\(^{50}\) That may be, but as noted above, the Warren Court’s most famous criminal procedure case, *Miranda*, did not "incorporate" any existing general understanding that the privilege applies to custodial interrogation in federal cases. Indeed, the prevailing view was that it did not. That is why, dissenting in *Miranda*, Justice White could say that the majority opinion "has no significant support in the history of the privilege or in the language of the Fifth Amendment."

V. COULD THE COURT HAVE WRITTEN MIRANDA WITHOUT RELYING ON THE FIFTH AMENDMENT’S PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION (OR THE SIXTH AMENDMENT’S RIGHT TO COUNSEL)?

As everybody is now aware, *Miranda* did hold that the privilege applies to custodial interrogation and that "without proper safeguards" (the *Miranda* warnings or "other procedures which are at least as

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\(^{49}\) See supra note 48.

\(^{50}\) Donald J. Dripps, The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution Conference on the Fourteenth Amendment and the Bill of Rights, 18 J. Contemp. Legal Issues 469 (2009).

\(^{51}\) 384 U.S. at 526 (White J., joined by Harlan and Stewart, JJ., dissenting).
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effective")“the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak . . .”

But did the Miranda Court have to rely so heavily on the “incorporated” privilege against compelled self-incrimination? I venture to say it did not have to rely on the privilege at all.

As Donald Dripps points out, on the eve of Miranda it was “quite clear” that the Warren Court “was engaged in an extraordinary project; not just to resolve some difficult cases, but to establish general rules to guide police and lower courts in handling confessions.” But suppose at the time Miranda was decided the Fourteenth Amendment had not “incorporated” the privilege against compelled self-incrimination. Could the Court have reached essentially the same result it did in Miranda by traveling down other roads?

For one thing, the Sixth Amendment right to counsel would have been available. In fact, on the eve of Miranda that seemed to be where the Court was going. Indeed some years later, the lawyer who argued the case for Mr. Miranda in the Supreme Court confessed that he and his colleagues had decided that the Miranda briefs “should be written with the entire focus on the Sixth Amendment [right to counsel] because that is where the Court was headed after Escobedo.”

52. Id. at 467 (majority opinion).
53. 384 U.S. at 467. See also id. at 461:
An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described [in various police manuals quoted earlier in the opinion] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.
54. Dripps, supra note 46, at 78.
55. John J. Flynn, Panel Discussion on the Exclusionary Rule, 61 F.R.D. 259, 278 (1972). Then, added Mr. Flynn, “in the very first paragraph [of the Miranda opinion] Chief Justice Warren said, ‘It is the Fifth Amendment to the Constitution that is at issue today.’ That was Miranda’s effective use of counsel.” Flynn’s reference is to Escobedo v. Illinois, supra note 17.

The Miranda Court probably switched from a “right to counsel” base to a self-incrimination base because a right to counsel approach seemed to have almost no “stopping point.” If the Court had adopted the view that once a suspect became “the accused” or the “focal point,” the right to counsel was triggered, even the admissibility of “volunteered” statements might be threatened. On the other hand, the reach of the privilege against self-incrimination was limited by the need for the suspect’s statement to be “compelled.” This may explain why, dissenting in Escobedo v. United States, 378 U.S. at 497 (White, J., dissenting), three
In *Escobedo*, the most recent pre-*Miranda* confession case—and up to that point in time the most significant one—the Court had told us that when Mr. Escobedo had been denied an opportunity to consult with his lawyer "the investigation had ceased to be a general investigation of ‘an unsolved crime’ and the suspect had become the accused." The *Escobedo* Court concluded its opinion with the comment that it was "hold[ing] only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate and, under the circumstances here, the accused must be permitted to consult with his lawyer.

To be sure, "the circumstances here" were that after being taken to police headquarters for questioning, Mr. Escobedo had made several unsuccessful requests to see his lawyer and his lawyer, who was elsewhere in the building, had made several unsuccessful efforts to see his client. But there is sweeping language in the Court's opinion that would have enabled it to say in the next confession case that once a suspect is brought to the station house for questioning that in and of itself makes him "the accused" or "the focal point," triggering certain rights.

If *Miranda* had rested on a right to counsel base rather than a self-incrimination one, the first of the now familiar warnings might have to be revised, but the basic message would be the same. The revised warning might read something like this: We cannot make you answer any questions we ask; police officers have no lawful authority to compel any answers.

The other warnings could remain the same. Whether or not the privilege against compelled self-incrimination applies in its entirety to the states, any statements custodial suspects make to a police officer can (and will) be used against them in a court of law and they should be told that. As critics of the right to counsel approach to confessions, Justice White, joined by Clark and Stewart, JJ., turned to the privilege as a less restrictive alternative:

> It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth amendment, which is now applicable to the States. Malloy v. Hogan, 378 U.S. 1.

That amendment addresses itself to the very issue of incriminating admissions of an accused and resolves it by prescribing only compelled statements.

> 56. *Escobedo*, 378 U.S. at 485 (majority opinion).

> 57. *Id.* at 492.

> 58. On the other hand, the Court could have limited the reach of the right to counsel approach in one respect, thereby removing a major objection to this approach (see the discussion in notes 18 and 55 supra), by making it clear that under the "focal point" test "volunteered" statements would still be admissible, i.e., the custodial suspect would only become "the accused" or "the focal point" when he was *questioned* by the police.
for the remaining two warnings, they deal with the right to retained and appointed counsel.

Suppose that on the eve of the *Miranda* case neither the Fifth Amendment privilege nor the Sixth Amendment right to counsel were deemed applicable to the states. Still another route remained open—the old due process/"voluntariness"/totality-of-the-circumstances test.\(^{59}\)

If, as seems to have been the state of affairs at the time of *Miranda*, a majority of the Court had become (a) frustrated by its "inability to articulate a clear and predictable definition of 'voluntariness',"\(^{60}\) (b) disheartened by "the apparent persistence of state courts in utilizing the ambiguity of the [voluntariness] concept to validate confessions of doubtful constitutionality,"\(^{61}\) and (c) determined to replace the prevailing test for the admissibility of confessions with a more meaningful and manageable one, I very much doubt that the five Justices who made up the *Miranda* majority would have allowed the inaccessibility of the "specific language" of the Fifth and Sixth Amendments to have thwarted them. Instead, I believe, the Justices would have turned to the old "voluntariness" test and reinforced it, making it a more protective test.

For example, the Court might have said, after discussing the "interrogation environment" at considerable length (which it actually did do in *Miranda*), that "coercion" is present in any police interrogation of a person taken into custody, no matter how brief the questioning. Or it

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59. Quite recently a leading commentator on police interrogation and confessions has maintained that "it would do some good to abolish *Miranda*’s warning and waiver requirements. At a minimum, it could clear the way for full assessments of voluntariness, without false reliance on warnings and waivers." Charles Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1596 (2008). I hasten to add that I disagree.

Ever since the Warren Court disbanded, subsequent Courts, with a few exceptions, have weakened *Miranda* in many ways. At the very least, most of the Justices have shown little or no unhappiness with these developments. Professor Weisselberg voices "hope for meaningful development of the voluntariness doctrine." *Id.* at 1599. But what basis is there for such hope? Why would a Court that has experienced the decline of *Miranda* and done little or nothing to resuscitate it want to fortify the voluntariness test so custodial suspects would receive greater protection?

Four decades ago we had a very different Supreme Court—one that was greatly concerned about the many inadequacies of the prevailing test for the admissibility of confessions (the due process/ "voluntariness" test) and determined to do something about it. If that Court had been unable to base a new approach to police interrogation and confessions on a Fifth or Sixth Amendment right, it might very well have proceeded by invigorating the "voluntariness" test. But why would the current Court do so?


61. *Id.*
might have said that any incriminating statement obtained from someone subjected to the "interrogation environment" must be deemed "involuntary." And it might have added (to paraphrase what the Court actually did say in *Miranda*) that unless adequate safeguards, such as warnings, were utilized to dispel the compulsion inherent in custodial surroundings, no statement obtained from someone in those surroundings could be considered "voluntary."

By falling back on the "voluntariness" test and shoring it up, not only could the Warren Court have reached essentially the same result it did in *Miranda*, but it could have used much of the same language that appears in the *Miranda* opinion. Consider, for example, the following language from *Miranda* (with italicized and bolded language replacing the Court's references to the privilege against self-incrimination):

> Even without employing brutality, the "third degree" or the specific stratagems described [in the policies interrogation manuals], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.62

* * *

In each of the cases before us, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures . . .

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner . . .

The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it and that people taken into police custody are not to be exploited for the information necessary to condemn them before the law.63

* * *

An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under great pressure to speak. As a practical matter, the coercion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.64

* * *

62. 384 U.S. at 455.


64. Cf. id. at 461.
We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently coercive pressures which work to undermine the individual's will to resist and to pressure him to speak where he would not otherwise do so freely...65

* * *

Therefore... unless we are shown other procedures which are at least as effective in preventing police interrogators from pressuring or forcing custodial suspects to speak, the following safeguards must be observed...66

If, instead of turning to the specific guarantees of the Fifth or Sixth Amendments, the Miranda Court had significantly strengthened the due process/"voluntariness"/totality-of-the-circumstances test the now familiar warnings would have needed to be revised. As discussed earlier, however, the first two warnings could have been quite similar to those built on a right to counsel base.67

As for the other two warnings, it would not have been difficult for a fortified "voluntariness" test to require Miranda-type right to counsel warnings. After all, on the eve of Miranda whether a suspect had been told he had the right to see a lawyer or whether his request to see a lawyer had been honored or rebuffed were already factors to be weighed in determining the voluntariness of a confession.68 If, at the time of Miranda, five Justices had been bent on furnishing defendants significantly more protection than the traditional "voluntariness" test provided, and if for some reason the Fifth and Sixth Amendment routes were blocked, the Justices would have had little difficulty achieving their objective by building upon the "voluntariness" test and, inter alia, making advice about the right to counsel and about compliance with assertions of that right prominent features of a new, fortified voluntariness test.
VI. THE ELASTICITY OF THE SIXTH AMENDMENT
RIGHT TO COUNSEL

If one had to choose between (a) a Fourteenth Amendment that included all the “specific guarantees” of the first Eight Amendments but nothing else, i.e., a Fourteenth Amendment that had no independent function at all or (b) a Fourteenth Amendment that “incorporated” none of the Bill of Rights provisions in their entirety but had an independent potency—and thus could respond to “abuses [that] reveal themselves in the course of time,”69 not just “those which had become manifest in 1791”70—which Fourteenth Amendment should one choose? It is fairly clear, I believe, that Professor Dripps would choose the second version. As he recently observed:

[Fidelity] to incorporation would have 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 content. Due process values ultimately determined the shape of doctrine; indeed it would be considerably easier to derive Gideon, Miranda, and Terry from the due process clause than from the Fourth, Fifth, and Sixth Amendments. Incorporation, however, had the effect of confining the operation of due process values within the arbitrary confines of the amendments.71

At another point, Dripps charges that “Gideon’s focus on the constitutionality irrelevant language of the Sixth Amendment has crippled serious scrutiny of how well counsel performs the constitutionally relevant function of defending the accused. . . . [B]ecause each defendant has ‘counsel’—no matter how overworked, inexperienced, lazy or incompetent—the constitutional minima appear to be satisfied.”72

Ake v. Oklahoma,73 Dripps tells us, “exemplifies the approach” he has in mind.74 Ake held that when an indigent defendant has made a preliminary showing that his sanity at the time the crime occurred is likely to be a significant factor at trial, Fourteenth Amendment Due Process requires a state to provide access to “the psychiatric examination and assistance necessary to prepare an effective defense based on the defendant’s mental condition.”75 Moreover, when, as in Ake, the state

69. See Adamson, 332 U.S. at 67 (Frankfurter, J., concurring).
70. Id.
71. Dripps supra note 46, at 116.
72. Id. at 118.
74. Dripps, supra note 46, at 142.
75. Ake, 470 U.S. at 70.
presents psychiatric evidence of the defendant’s future dangerousness at a capital sentencing proceeding, the Fourteenth Amendment requires access to psychiatric assistance.76

Professor Dripps comments:

The Ake Court described the appropriate inquiry as to whether the defense has access to “the basic tools” of an effective defense.... [I]t is an illuminating comment on the power of doctrine that even a conservative majority could be moved to order the expenditure of public funds when faced with the prospect that a criminal trial ran a gratuitous risk of error, despite compliance with every specific safeguard in the Bill of Rights.77

I doubt that Ake is nearly as significant as Professor Dripps makes it out to be. First of all, unlike the search and seizure exclusionary rule, or even many Miranda cases, the Ake case went to the guilt or innocence of a defendant (albeit an indigent one). Thus, even a police-friendly Justice could be quite comfortable supporting the decision. Secondly, Dripps’s assertion that “there is nothing in the Bill of Rights [about] ... expert witnesses”78 is debatable.

It strikes me that it turns on what meaning one attributes to the Sixth Amendment right to counsel. As long ago as 1942, the Supreme Court ruled in a federal case that the Sixth Amendment was violated when defendants were denied their “right to have the effective assistance of counsel.”79

The great majority of lawyers are neither able nor trained to provide psychiatric services. Nor is there any indication Mr. Ake’s lawyer was an exception. Has not a defendant (and a capital defendant to boot) who is denied the services of a psychiatrist even though he has demonstrated the need for one been deprived of an effective defense?

Judging from the opinion of the Court, the Ake majority was quite distressed that Mr. Ake had been denied the assistance of a psychiatrist.80 Suppose the Fourteenth Amendment incorporated the provisions of the first Eight Amendments but nothing else. Suppose further that the Court was convinced (to use the language it actually used in Ake) that——

76. See id. at 78–79.
77. Dripps, supra note 46, at 142.
78. Id. at 61.
80. See text at note 81 infra.
without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, . . . and to assist in preparing the cross-examination of a State's psychiatric witness, the risk of an inaccurate resolution of sanity issues is extremely high. . . . When the defendant is able to make an ex parte threshold showing [that] his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success.  

Does anybody really believe that having arrived at these conclusions about the need for a psychiatrist in Ake-type circumstances, the Supreme Court would have denied Mr. Ake the relief he sought because (a) legal doctrine prevented the Justices from writing an opinion based on the generalities of the Fourteenth Amendment and (b) legal doctrine prevented them from resorting to the Sixth Amendment? I submit that legal doctrine does not have that much power.

VII. WHY SOMETIMES THE GENERALITIES OF THE FOURTEENTH AMENDMENT HAVE A LIMITED REACH

Although the defendant gained the protection of Fourteenth Amendment Due Process in Ake, she failed to do so in Lassiter v. Department of Social Services.  

The question presented in Lassiter was whether an indigent parent had an unqualified right to counsel in a parental termination proceeding.

There are limits to the elasticity of the Sixth Amendment guarantees. The Amendment applies in "all criminal prosecutions" and it would be hard to argue that a proceeding to terminate parental rights is a "prosecution." So Ms. Lassiter's only real hope was to avail herself of Fourteenth Amendment Due Process.

Although a majority rejected Ms. Lassiter's argument, it did not deny that few deprivations are more grievous than the loss of parental rights. The loss, the Court recognized, is both total and irrevocable. (Indeed, I would go so far as to say that most people would rather be found guilty of a criminal offense and incarcerated for thirty days (in which event, if they were indigent, they would be provided counsel) than lose permanent custody of their children.) However, as dissenting Justice John Paul

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81. Ake, 470 U.S. at 82-83.
83. See id. at 39 (Blackmun, J., dissenting).
Stevens observed, "the Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty."^{85}

Ms. Lassiter made out a strong case for appointed counsel. The majority, per Stewart, J., agreed that (1) the loss to the indigent parent is quite serious, (2) the proceeding to terminate parental rights is quite formal, (3) a parent's qualifications will frequently turn on psychiatric testimony, which is difficult for most lay persons to comprehend and to rebut, (4) the cost to the state of furnishing counsel in these proceeding is relatively small, (5) every other state court that had addressed the same question had decided it in favor of the indigent parent, and (6) a long list of studies had urged adoption of the rule Ms. Lassiter was seeking.^{86} Nevertheless, employing the Matthews v. Eldridge "balancing test,"^{87} the Court concluded that the Eldridge factors (the private interests at stake, the government's interest, and the risk that the procedure used will lead to erroneous decisions) did not suffice to rebut "the presumption that an litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."^{88}

In Lassiter, the Court made an argument that I never expected it to make again once the famous Gideon case^{89} had been decided. The Lassiter Court maintained that "the case presented no specially troublesome points of law, either procedural or substantive,"^{90} and that "the presence of counsel" for Ms. Lassiter "could not have made a determinative difference."^{91}

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85. Lassiter, 452 U.S. at 59 (Stevens, J., dissenting).
87. The issue in Mathews v. Eldridge, 424 U.S. 319 (1976), was whether a worker had a due process right to an evidentiary hearing before his social security disability benefits were terminated on the ground that he was no longer disabled. After taking various factors into account, such as the "private interest . . . affected by the official action," "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards," and the "fiscal and administrative burdens that the additional or substitute procedural requirements would entail," the Court concluded that due process did not require an evidentiary hearing. Id. at 335.
88. Lassiter, 452 U.S. at 26-27 (majority opinion).
90. Lassiter, 452 U.S. at 32.
91. Id. at 32-33.
As I commented at the time *Lassiter* was decided:

I cringe a bit when a court says, as the *Lassiter* Court did—on the basis of a record made without the assistance of counsel—that “the case presented no specially troublesome points of law...” [A] record made without the assistance of counsel cannot establish that. It can only fail to establish on its face that the defendant was seriously disadvantaged. What does it prove that the record reads well? How would it have read if the defendant had counsel? What facts might have been uncovered if competent investigations had been made? What defenses might have been advanced if competent legal research had been done? We do not know—at least we cannot be sure. That was the trouble with the old *Betts* rule.92

I believe that the Court should have ruled that Fourteenth Amendment Due Process afforded an indigent person in Ms. Lassiter’s circumstances an unqualified right to appointed counsel. The problem, I suspect, was that too many members of the Court were concerned about where or how to draw the line. Too many felt they were moving into uncharted waters. If Ms. Lassiter had prevailed, would the next case have raised the question whether in a child custody case growing out of a divorce action, an indigent spouse has a right to appointed counsel? Or would the issue in the next case be whether the state has to provide counsel in eviction proceedings, when an indigent person is about to lose her house or apartment?93 Concerns such as these, I venture to say, are why a majority of the court did not invoke the generalities of Fourteenth Amendment Due Process on behalf of Ms. Lassiter.

VIII. DO JURORS HAVE TO BE UNANIMOUS FOR THE DEATH SENTENCE TO BE VALID?

As I was in the midst of writing this paper, the press reported that some Georgia legislators were hard at work trying to eliminate the requirement that state jurors have to be unanimous for a death sentence to be valid. If these legislators were to prevail, Georgia would become the only state to allow non-unanimous juries to sentence defendants to death.94 When asked to comment on this proposal, Professor Carol Steiker is reported to have said that it might violate both Fourteenth

92. Choper & Kamisar, *supra* note 86, at 174–75. The reference is to *Betts* v. *Brady*, 316 U.S. 455 (1942), the case that was overruled by *Gideon*.

93. Although these cases can be plausibly distinguished, see Choper & Kamisar, *supra* note 86, at 177–78, I still believe they troubled the Court a great deal.

Amendment Due Process *and* the Eighth Amendment’s prohibition against “cruel and unusual punishments.”

If Georgia does enact legislation requiring say, only nine jurors to vote for the death sentence, the crucial issues will not be whether the Eighth or Fourteenth Amendments (or both) govern the case. It will be rather whether five or more Justices are strongly offended by Georgia’s attempt to make it easier for prosecutors to obtain the death penalty or are convinced that the severity and finality of the death penalty make it so unique that the states cannot dispense with juror unanimity.

If, in the hypothetical case posed, the defendant convinces five or more Justices that the need to strike down the law is compelling, the Court will not have much trouble finding the necessary legal doctrine to write an opinion in his favor. On the other hand, if the defendant fails to convince five or more Justices of the pressing need to invalidate the new law, legal doctrine is not likely to be of much help to him.