

The Law of Criminal Procedure: Of Means and Ends

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After reading this chapter, students should be able to:

- Explain the conflict between the needs of effective law enforcement and individual rights
- Explain the incorporation doctrine of the Fourteenth Amendment
- Understand the importance of Criminal Procedure Law
- Understand the challenges associated with "Means-Ends" situations and reconciling various goals of the criminal justice system
- Learn how to effectively brief a case and explore an example

1.1 THE CHALLENGES OF CRIMINAL PROCEDURE LAW

Procedural issues dominate the daily administration of criminal justice. **Criminal procedure law** comprises the legal rules and principles that regulate the administration of criminal justice. This body of law traditionally is understood as governing (1) police work, including the detection and investigation of crimes, and arrest decisions; (2) the pretrial decisions of magistrates, prosecutors, grand juries, and judges, involving such matters as bail, the preliminary review and screening of charges, and filing formal criminal charges; (3) the adjudication of charges through guilty pleas and trials; (4) the sentencing process; and (5) appeals and postconviction review of criminal convictions and sentences. This book focuses on the law governing police practices, pretrial decisions, and the adjudication process. These issues form the core of criminal procedure law. Concentrating on them allows us to give them the attention that their significance and complexity demand.

Few areas of the law are as captivating as criminal procedure. Although many state and federal rules of criminal procedure are defined by statute, the principles

animating these rules ultimately spring from the U.S. Constitution and related state constitutional provisions. The courts, especially the U.S. Supreme Court, determine the scope and limits of these constitutional principles as they decide cases involving murder, rape, armed robbery, drug offenses, and other serious crimes. Through their case decisions, the courts put the law into action.

Individual citizens suffer profoundly at the hands of criminals. Society in general is injured when criminal acts disrupt people's lives, undermine moral values, and inspire fear and insecurity.

At the same time, individuals accused of committing crimes have much at stake. Tremendous stigma, or social disapproval, accompanies a criminal accusation and conviction. Once convicted, offenders face fines, probationary supervision, prison, or even execution. Some individuals accused of committing a crime have valid defenses, in the form of excuse or justification, or they may not have been involved at all in the crime they have been accused of committing. The general public, no less than those who are directly enmeshed in the criminal justice system, have an interest in ensuring that the criminal laws are administered fairly.

Each criminal case decided by the courts potentially involves issues that transcend particular parties and crimes. These cases provide a forum for resolving the perpetual tensions involved in preserving personal liberties and maintaining order under law.

On the one hand, reliable fact finding is essential if the criminal justice system is to ensure both that the guilty are punished and the innocent remain free. The "verdict" rendered by a judge or jury at the conclusion of a trial is an announcement that literally means "speak the truth."

However, ascertaining the truth about suspected crimes cannot be the exclusive function of the criminal justice process. Few people would condone using the rack or other forms of torture to coerce confessions from suspected criminals, or countenance citizens being strip-searched at the whim of a police officer, or enthusiastically entertain a search party in their homes in the dead of night. Such activities might prove highly effective in detecting criminal activity and even in discriminating between the guilty and the innocent. Yet they illustrate that limits must be placed on fact-finding efforts, even if those limits sometimes impede an otherwise commendable search for the

truth. Safeguarding individual freedoms, checking abuses of power by law enforcement officials, and preserving basic fairness in government-citizen interactions also are important goals of the law of criminal procedure.

The law strives to maintain a balance between truth-seeking and individual liberties within a system of government based on federalism. Each of the 50 states in this country has a unique set of criminal laws and operates its own court system. The federal government also enacts laws, maintains a judicial system, and has been invested with specific, enumerated powers relative to the states and individual citizens. Giving proper respect to principles of federalism is another valid concern of criminal procedure law. Justice Brandeis observed many years ago that "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" *New York Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386–87, 76 L. Ed. 747, 771 (1932) (Brandeis, J., dissenting).

Another goal of criminal procedure law is achieving **finality**, by bringing an end to contested criminal cases. Sometimes defendants are the beneficiaries of rules designed to produce a final resolution of criminal matters. For example, double-jeopardy principles prevent the retrial of a defendant who is acquitted of a crime, even if compelling evidence of guilt surfaces after the trial's completion. Statutes of limitation and speedy-trial provisions may prohibit suspected offenders from ever being brought to trial when unjustifiable delays occur in filing or prosecuting criminal charges. In contrast, finality interests also may be asserted by the government or invoked by the courts to the defendant's detriment. Thus, for example, **appellate** courts may refuse to consider defendants' claims of error that were not preserved by a timely objection during trial, when immediate corrective action could have been taken. Similarly, federal courts may decline to review issues in state cases that were not presented on appeal to the state courts or that were not raised at the first opportunity in the federal courts through a petition for a **writ of habeas corpus**.

A federal statute, 28 U.S.C. § 2254(a), authorizes the federal courts to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation

of the Constitution or laws or treaties of the United States.” Both the Supreme Court and Congress have imposed significant restrictions in recent years on the availability of federal habeas corpus review of criminal convictions and sentences. A respect for the finality of state court judgments has been a major reason for these limitations. Curtailing repeated reviews of criminal convictions and sentences is further justified in the name of preserving scarce judicial resources and by the belief that justice is best served when an offender ultimately is required to accept the legitimacy of his or her punishment.

Criminal procedure law also is concerned with administrative issues. Rules that promote efficiency, that help preserve scarce resources and minimize costs and delay, and that are easily understood and applied may be favored over other rules. Of course, administrative concerns sometimes clash with principles that reflect other important values.

One of the principal challenges confronting criminal procedure law is reconciling the diverse objectives of the criminal justice system. It must do so amidst relevant operating constraints and mindful of the unique facts and circumstances of individual cases. This process of reconciliation requires identifying the rights and interests at stake in cases, assigning appropriate weight to the respective interests, and then balancing or prioritizing those interests to arrive at a decision of the case issues. Even if not recognized formally, these ingredients are implicit in most court decisions involving issues of constitutional criminal procedure.

1.2 CRIMINAL PROCEDURE LAW IN ACTION: A CASE STUDY

1.2A Briefing a Case

The first case presented for study, *Brewer v. Williams*, demonstrates how difficult it can be to reconcile the competing ends of the law of criminal procedure. These difficulties are vividly illustrated in the often-passionate opinions of the Supreme Court justices, who divided by a vote of 5–4 about the proper resolution of the challenging issues presented. As you read *Brewer v. Williams*, it is important to understand precisely what question(s) the Supreme Court addressed, what the Court ruled, and what reasons were offered in support of the case decision. Since not all students will have had experience reading judicial decisions, we offer a few prefatory remarks to facilitate this assignment.

Studying case opinions helps reveal the law as a principled and dynamic process. Legal rules are in constant evolution. They are refined in response to changing values, social conditions, and novel factual circumstances. It is important to appreciate the origins and history of rules of law to help understand their current form and their appropriate application. Carefully studying judicial opinions helps illuminate the legal principles that control case decisions. Although knowledge of legal rules is valuable, the analytical skills associated with identifying the premises of judicial decisions, extracting general principles from the rules announced in cases, and testing the application of these principles in different fact situations are much more reliable measures of a student’s understanding of the law.

While the payoffs from studying judicial decisions are considerable, a commensurate investment is required. Reading case law is significantly more time consuming and challenging than reading summaries or narrative accounts of case decisions. This is especially true of the first few encounters with judicial opinions. One tested method for helping to extract meaning from a case decision is “briefing” the case.

A **brief** is simply a structured summary of a case decision. It is prepared to enhance analysis of a court’s reasoning, as a reference to be used in class discussion, and as an aid for reviewing course materials in preparation for examinations. A brief can, and doubtlessly should, be an individualized tool for analysis, reference, and review, but some basic features should be included. A brief should begin with the case’s name and its complete citation. It is important to know which court decided the case and the year of its decision. The full citation contains this information and will enable you to look up the case in the library or on a computer and read it in its entirety if you later wish to do so. We additionally recommend that you record the page in this book at which the case you are briefing begins for easy reference between your notes and the text.

The critical components of a case brief are:

1. **facts**
2. **issue(s)**
3. **holding and rationale**

The facts of the case, of course, must be gleaned from the opinion. The facts reported in the opinion will have been condensed significantly and

sometimes transformed to the extent that they bear faint resemblance to what actually transpired at a trial. This filtering process continues as a case progresses through different appellate courts and additional layers of judicial review. Nevertheless, these are the only facts at your disposal, and you must rely on them as you read and prepare to brief the case. Since your job is to summarize the case, you should not mechanically report all of the facts supplied in the court's narrative but rather focus on the relevant facts. Facts are relevant only to the extent that they relate to the issue and, ultimately, the holding in a case. Thus, you should be selective in the facts or historical events that you record.

The judicial history of a case is usually included as a part of the facts. This history reports where the case originated and how it arrived in the court responsible for the opinion you are briefing. For example, you might note that the defendant—commonly abbreviated as “D” or “Δ” (the Greek letter delta)—was convicted of murder in a specific state trial court, that his or her conviction was affirmed on appeal by the state court of appeals and by the state supreme court, and that the U.S. Supreme Court then granted *certiorari* (exercised its discretionary authority to review the case). We discuss the typical progression of a criminal case through the state and federal court systems in greater detail in Chapter 2.

The issue is the legal question presented to the court for decision. Cases occasionally involve more than a single legal issue. Courts sometimes state the issue that they are deciding early in an opinion, and do so quite clearly. At other times, courts seem unwilling or unable to pinpoint the questions they are deciding, and you will have to frame case issues as you understand them. You should take care to state the issue concisely and accurately. Be mindful of the fact that how a court defines an issue can be crucial to the resolution of a case. There may be times when you take exception to how a court states an issue, and you should make note of your disagreement.

The statement of the issue in your brief should capture the crux of the controversy confronting the court and should always be written in the form of a question. It should be sufficiently comprehensive to inform a listener about what the case involves. A question framed along the lines of “Should the confession be admissible?” or “Should the police have secured a warrant?” is not adequate.

Consider the greater understanding of a case conveyed by issues stated in the following terms: “Does the federal Constitution require the states to appoint legal counsel for a person charged with a felony who is too poor to hire a lawyer?” “Would the capital punishment of an offender who was only 16 years old at the time he committed murder amount to cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution?”

Stating the issue presented in a case accurately and with the proper degree of precision—neither hopelessly general nor detailed and convoluted to the point of incomprehensibility—can be a true art. This is perhaps the most important step in understanding the case, so you should be prepared to devote the necessary thought and effort to defining the precise question before the court.

The holding of a case usually can be stated in the form of a complete response to the issue you have identified. For example, “The cruel-and-unusual-punishments clause of the Eighth Amendment has been interpreted to prohibit the execution of offenders who were just 16 years old when they committed a capital crime” is a statement of a case holding that resolves the issue we posed above. The holding reveals what the court decided in the case, and it also corresponds to the general rule that can be extracted from the case decision. The rule then becomes **precedent**, or the basis of future decisions in like cases. The doctrine of precedent, or *stare decisis*, plays a central role in the evolution of case law. Lawyers and judges examine the similarities and differences that exist between cases to help determine whether the rule announced in a previous decision governs the resolution of a case that later comes before a court.

The rationale is the explanation of how a court arrived at its holding. To justify their rulings, courts typically rely on precedent, the text of constitutions and statutes, history, logic, policy implications, value preferences, empirical evidence, case facts, and other analytical devices. You may not always agree with or be persuaded by the rationale offered to support a court's holding. Indeed, the regularity with which **concurring** and **dissenting** opinions are written should convince you that there is ample room for disagreement with the prevailing rationale in case decisions. Thus, you should think critically about the reasons offered in support of a court's decision as you outline them, and make note of

any questions that occur to you. Concurring and dissenting opinions can be quite helpful to suggest possible flaws or weaknesses in the majority opinion's rationale.

1.2B In the U.S. Supreme Court: *Brewer v. Williams*

You should routinely brief all of the principal case decisions that you read. This practice is not just for beginners. Make an effort to brief *Brewer v. Williams* by identifying the facts, issues, holding, and rationale of this decision. Be particularly alert to the different interests related to the criminal justice process that are implicated in this case and how they are prioritized by the different justices who express their opinions.

For example, how could “the truth” best be served in deciding *Brewer v. Williams*? If fact-finding accuracy emerges as the paramount consideration, are there corresponding sacrifices to individual liberties? The crime for which Williams was convicted

was committed almost nine years before the case was decided by the U.S. Supreme Court. Should the likely difficulties associated with retrying Williams after such a long time be considered in deciding whether he should be given a new trial? Are issues of federalism significant, in that the case was considered by the federal courts on Williams's petition for a writ of habeas corpus after the Iowa state courts had ruled against Williams on the very same claims? Will the police be able to understand, and the courts clearly administer, the rule of law resulting from the Supreme Court's decision?

Note that there may be neither easy nor consistent answers to these questions. The widely divergent opinions of the Supreme Court justices attest to this fact. For present purposes, you should study *Brewer v. Williams* by identifying the several ends of the law of criminal procedure that come into play in this case. Pay particular attention to the values that contribute to the balancing and reconciliation of these sometimes-conflicting ends.

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Mr. Justice Stewart delivered the opinion of the Court. . . .

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy “saw two legs in it and they were skinny and white.” Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 [(1966)].

The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still in the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to

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Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his Miranda rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the Miranda warnings, and told Williams:

"[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said:

"I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines.¹ Leaming then stated: "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." . . . The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After an evidentiary hearing the trial judge denied the motion. He found that "an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines," and that the evidence in question had been elicited from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request." The judge ruled, however, that Williams had "waived his right to have an attorney present during the giving of such information." The evidence in question was introduced over counsel's continuing objection at the subsequent trial. The jury found Williams

1. The fact of the matter, of course, was that Detective Leaming possessed no such knowledge.

guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court. . . .

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. . . . The District Court made findings of fact as summarized above, and concluded as a matter of law that the evidence in question had been wrongly admitted at Williams' trial. . . .

The Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed this judgment, and denied a petition for rehearing en banc. We granted certiorari to consider the constitutional issues presented.

II. . .

B. . .

. . . [T]here is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination.

It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made. Cf. *Spano v. New York*, 360 US 315, 79 S Ct 1202, 3 L Ed 2d 1265 [(1959)]. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland's memorable words for the Court 44 years ago in *Powell v. Alabama*, 287 US 45, 57, 53 S Ct 55, 77 L Ed 158 [(1932)].

"[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right.

But its basic contours, which are identical in state and federal contexts, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 US 682, 689, 92 S Ct 1877, 32 L Ed 2d 411 [(1972)].

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial:

"Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?

"A. I was sure hoping to find out where that little girl was, yes, sir.

"Q. Well, I'll put it this way: You was [sic] hoping to get all the information you could before Williams got back to McKnight, weren't you?

"A. Yes, sir."⁶ . . .

The circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah v. United States*, [377 US 201, 84 S Ct 1199, 12 L Ed 2d 246 (1964)]. The **petitioner** in that case was indicted for violating the federal narcotics law. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence

6. Counsel for petitioner, in the course of oral argument in this Court, acknowledged that the "Christian burial speech" was tantamount to interrogation.

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of these statements was introduced against the petitioner at his trial, and he was convicted. This Court reversed the conviction, holding “that the petitioner was denied the basic protections of that guarantee [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.” 377 US, at 206.

That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

III

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel. They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. . . .

The District Court and the Court of Appeals were correct in the view that the question of waiver was not a question of historical fact, but one which, in the words of Mr. Justice Frankfurter, requires “application of constitutional principles to the facts as found. . . .” *Brown v. Allen*, 344 US 443, 507, 73 S Ct 397, 97 L Ed 469 [(1953)] (separate opinion).

The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law—that it was incumbent upon the State to prove “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 US [458,] 464, 58 S Ct 1019, 82 L Ed 1461 [(1938)]. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, and that courts indulge in every reasonable presumption against waiver.

This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.

We conclude, finally, that the Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining petitioner’s burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely

comprehension but relinquishment, and Williams’ consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right. . . .

Despite Williams’ express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet “[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.” *Haley v. Ohio*, 332 US 596, 605, 68 S Ct 302, 92 L Ed 224 [(1948)] (Frankfurter, J., concurring in judgment). Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all. . . .

Mr. Justice **Marshall**, concurring. . . .

The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming’s actions were perfectly proper, indeed laudable, examples of “good police work.” In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For “in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.”

Spano v. New York, 360 US 315, 320–321, 79 S Ct 1202, 3 L Ed 2d 1265 (1959).

In this case, there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination. . . .

Leaming knowingly isolated Williams from the protection of his lawyers and during that period he intentionally "persuaded" him to give incriminating evidence. It is this intentional police misconduct—not good police practice—that the Court rightly condemns. The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant. If Williams is to go free—and given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any chance a dangerous criminal will be loosed on the streets, the bloodcurdling cries of the dissents notwithstanding—it will hardly be because he deserves it. It will be because Detective Leaming, knowing full well that he risked reversal of Williams' conviction, intentionally denied Williams the right of every American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the state.

I think it appropriate here to recall not Mr. Justice Cardozo's opinion in *People v. Defore*, 242 NY 13, 150 NE 585 (1926), see opinion of The Chief Justice, post, at n. 1, but rather the closing words of Mr. Justice Brandeis' great dissent in *Olmstead v. United States*, 277 US 438, 471, 485, 48 S Ct 564, 72 L Ed 944 (1928):

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Mr. Justice **Stevens**, concurring. . . .

Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent's escape from a state mental institution. The emotional

aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Mr. Chief Justice **Burger**, dissenting. . . .

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court—by the narrowest margin—on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody, and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.¹ In so ruling the Court regresses to playing a grisly game of "hide

CASE*Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)*

and seek," once more exalting the sporting theory of criminal justice which has been experiencing a decline in our jurisprudence. . . .

(1)

The Court Concedes Williams' Disclosures Were Voluntary

Under well-settled precedents which the Court freely acknowledges, it is very clear that Williams had made a valid waiver of his Fifth Amendment right to silence and his Sixth Amendment right to counsel when he led police to the child's body. Indeed, even under the Court's analysis I do not understand how a contrary conclusion is possible. . . .

The evidence is uncontradicted that Williams had abundant knowledge of his right to have counsel present and of his right to silence. Since the Court does not question his mental competence, it boggles the mind to suggest that Williams could not understand that leading police to the child's body would have other than the most serious consequences. All of the elements necessary to make out a valid waiver are shown by the record and acknowledged by the Court; we thus are left to guess how the Court reached its holding. . . .

(2)

The Exclusionary Rule Should Not Be Applied to Non-Egregious Police Conduct

Even if there was no waiver, and assuming a technical violation occurred, the Court errs gravely in mechanically applying the exclusionary rule without considering whether that Draconian judicial doctrine should be invoked in these circumstances, or indeed whether any of its conceivable goals will be furthered by its application here.

The obvious flaws of the exclusionary rule as a judicial remedy are familiar. Today's holding interrupts what has been a more rational perception of the constitutional and social utility of excluding reliable evidence from the truth-seeking process. In its Fourth Amendment context, we have now recognized that the exclusionary rule is in no sense a personal constitutional right, but a judicially conceived remedial device designed to safeguard and effectuate guaranteed legal rights generally.

We have repeatedly emphasized that deterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal factfinding process.

Accordingly, unlawfully obtained evidence is not automatically excluded from the factfinding process in all circumstances. In a variety of contexts we inquire whether application of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society. . . .

This is, of course, the familiar balancing process applicable to cases in which important competing interests are at stake. It is a recognition, albeit belated, that "the policies behind the exclusionary rule are not absolute," *Stone v. Powell*, supra, at 488. It acknowledges that so serious an infringement with the crucial truthseeking function of a criminal prosecution should be allowed only when imperative to safeguard constitutional rights. An important factor in this amalgam is whether the violation at issue may properly be classed as "egregious." The Court understandably does not try to characterize the police actions here as "egregious."

Against this background, it is striking that the Court fails even to consider whether the benefits secured by application of the exclusionary rule in this case outweighed its obvious social costs. . . .

We can all agree on "[t]he abhorrence of society to the use of involuntary confessions," and the need to preserve the integrity of the human personality and individual free will.

But use of Williams' disclosures and their fruits carries no risk whatever of unreliability, for the body was found where he said it would be found. Moreover, since the Court makes no issue of voluntariness, no dangers are posed to individual dignity or free will. . . .

[T]he fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process. In this case, where the evidence of how the child's body was found is of unquestioned reliability, and since the Court accepts Williams' disclosures as voluntary and uncoerced, there is no issue either of fairness or evidentiary reliability to justify suppression of truth. It appears suppression is mandated here for no other reason than the Court's general impression that it may have a beneficial effect on future police

1. "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People v. Defore*, 242 NY 13, 21, 23-24, 150 NE 585, 587, 588 (1926).

conduct; indeed, the Court fails to say even that much in defense of its holding. . . .

This case, like *Stone v. Powell*, [428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976)], comes to us by way of habeas corpus after a fair trial and appeal in the state courts. Relevant factors in this case are thus indistinguishable from those in *Stone*, and from those in other Fourth Amendment cases suggesting a balancing approach toward utilization of the exclusionary sanction. Rather than adopting a formalistic analysis varying with the constitutional provision invoked, we should apply the exclusionary rule on the basis of its benefits and costs, at least in those cases where the police conduct at issue is far from being outrageous or egregious. . . .

Mr. Justice **White**, with whom Mr. Justice **Blackmun** and Mr. Justice **Rehnquist** join, dissenting. . . .

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently, the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be

deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man—the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect.

The police did nothing “wrong,” let alone anything “unconstitutional.” . . .

Mr. Justice **Blackmun**, with whom Mr. Justice **White** and Mr. Justice **Rehnquist** join, dissenting. . . .

This was a brutal, tragic, and heinous crime inflicted upon a young girl on the afternoon of the day before Christmas. With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent necessarily will go free. That, of course, is not the standard by which a case of this kind strictly is to be judged. But, as Judge Webster in dissent below observed, 509 F2d, at 237, placing the case in sensible and proper perspective: “The evidence of Williams' guilt was overwhelming. No challenge is made to the reliability of the fact-finding process.” I am in full agreement with that observation.

Notes and Questions

1. Is there any doubt that Williams was, in the words of Chief Justice Burger, “guilty of the savage murder of a small child”? If his guilt is clear, what possible social interests can justify upsetting his conviction? In this regard, which sentiments do you find more convincing: those expressed by Judge (later, Justice) Cardozo in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), as quoted in Chief Justice Burger's dissent at n. 1, or those of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 430, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (dissenting), as quoted in Justice Marshall's concurring opinion?
2. What do you make of Chief Justice Burger's implicit concession that the conclusion reached by the majority opinion would be justifiable if the police misconduct were classified as being “outrageous or egregious”? Since the evidence discovered in this case undoubtedly would remain reliable, why should it matter if Williams's rights were violated by egregious misconduct? If a cost-benefit analysis should precede a decision to exclude evidence following a violation of rights, would it matter if Williams had been suspected of shoplifting rather than kidnapping and murder? Precisely how should the “costs” and “benefits” of a rule resulting in

the suppression of potentially probative evidence be measured?

3. If Williams had not pointed out the location of his victim's body to the police but instead had been returned to Des Moines and had been given the opportunity to confer with his lawyer, Mr. McKnight, what do you suppose the lawyer would have advised Williams to do? If McKnight knew that Williams in fact was guilty, or if Williams had told him the location of the body, would the lawyer have been legally or ethically obliged to disclose this information to the police? Why or why not? Would your answer change if Williams had told McKnight that he had released the girl alive, scantily clad, in a wooded area near Mitchellville? What, exactly, do you perceive defense counsel's role to be in defending a client like Williams, and why does the Court place such great importance on Williams's right to the assistance of counsel? (See Chapter 8 for further discussion of these issues.)
4. The majority opinion refrains from ruling that “Williams could not . . . have waived his rights” but instead declares that under the circumstances of this case “he did not.” If Williams repeatedly was advised that he did not have to talk to the police, and if he was not coerced into doing so, why don't the facts support a waiver? What should it take before a waiver of rights becomes effective?

5. What constitutional rights are at stake in this case? Which provisions of the U.S. Constitution are involved?
6. Is the general rule derived from *Brewer v. Williams* that a suspect cannot make a confession to the police without a lawyer? Is the police conduct in this case, and in particular “the Christian burial speech,” important to the result? If so, how would you describe, in general terms, what the police did to secure Williams’s incriminating statements and

cooperation? Are any facts relating to Williams or his situation important to the general rule to be extracted from this case? Does it matter that Williams may be mentally ill? That he had spoken to a lawyer? That his lawyers had instructed the police not to question him? That he was taken in front of a judge in Davenport and “arraigned” before making his incriminating statements? In this context, what does it mean for a suspect to be “arraigned”? (See Chapter 2, at 27.)

1.3 ADDITIONAL MEANS-ENDS PROBLEMS

ARTICLE 1.3A Carl B. Klockars, “The Dirty Harry Problem”

.....

The Dirty Harry problem draws its name from the 1971 Warner Brothers film *Dirty Harry* and its chief protagonist, antihero Inspector Harry “Dirty Harry” Callahan. The film features a number of events which dramatize the Dirty Harry problem in different ways, but the one which does so most explicitly and most completely places Harry in the following situation. A 14-year-old girl has been kidnapped and is being held captive by a psychopathic killer. The killer, “Scorpio,” who has already struck twice, demands \$200,000 ransom to release the girl, who is buried with just enough oxygen to keep her alive for a few hours. Harry gets the job of delivering the ransom and, after enormous exertion, finally meets Scorpio. At their meeting Scorpio decides to renege on his bargain, let the girl die, and kill Harry. Harry manages to stab Scorpio in the leg before he does so, but not before Scorpio seriously wounds Harry’s partner, an inexperienced, idealistic, slightly ethnic, former sociology major.

Scorpio escapes, but Harry manages to track him down through the clinic where he was treated for his wounded leg. After learning that Scorpio lives

on the grounds of a nearby football stadium, Harry breaks into his apartment, finds guns and other evidence of his guilt, and finally confronts Scorpio on the 50-yard line, where Harry shoots him in the leg as he is trying to escape. Standing over Scorpio, Harry demands to know where the girl is buried. Scorpio refuses to disclose her location, demanding his rights to a lawyer. As the camera draws back from the scene Harry stands on Scorpio’s bullet-mangled leg to torture a confession of the girl’s location from him.

As it turns out, the girl is already dead and Scorpio must be set free. Neither the gun found in the illegal search, nor the confession Harry extorted, nor any of its fruits—including the girl’s body—would be admissible in court. . . .

The Dirty Harry problem asks when and to what extent does the morally good end warrant or justify an ethically, politically, or legally dangerous means to its achievement? In itself, this question assumes the possibility of a genuine moral dilemma and posits its existence in a means-ends arrangement which may be expressed schematically as follows:

		MEANS	
		Morally good (+)	Morally dirty (-)
E N D S	Morally good (+)	A	B - + The Dirty Harry Problem
	Morally dirty (-)	C + -	D - -

Source: C.B. Klockars, *The Dirty Harry Problem*, *The Annals of the American Academy of Political and Social Sciences*, Vol. 33, pp. 33–50 © 1980.

It is important to specify clearly the terms of the Dirty Harry problem not only to show that it must involve the juxtaposition of good ends and dirty means, but also to show what must be proven to demonstrate that a Dirty Harry problem exists. If one could show, for example, that box B is always empirically empty or that in any given case the terms of the situation are better read in some other means-ends arrangement, Dirty Harry problems vanish. At this first level, however, I suspect that no one could exclude the core scene of Dirty Harry from the class of Dirty Harry problems. There is no question that saving the life of an innocent victim of kidnapping is a "good" thing nor that grinding the bullet-mangled leg of Scorpio to extort a confession from him is "dirty."²

There is, in addition, a second level of criteria of an empirical and epistemological nature that must be met before a Dirty Harry problem actually comes into being. They involve the connection between the dirty act and the good end. Principally, what must be known and, importantly, known before the dirty act is committed, is that it will result in the achievement of the good end. In any absolute sense this is, of course, impossible to know, in that no acts are ever completely certain in their consequences. Thus the question is always a matter of probabilities. But it is helpful to break those probabilities into classes which attach to various subcategories of the overall question. In the given case, this level of problem would seem to require that three questions be satisfied, though not all with the same level of certainty.

In *Dirty Harry*, the first question is, Is Scorpio able to provide the information Dirty Harry seeks? It is an epistemological question about which, in *Dirty Harry*, we are absolutely certain. . . .

Second, we must know there are means, dirty means and nothing other than dirty means, which are likely to achieve the good end. One can, of course, never be sure that one is aware of or has considered all possible alternatives, but in *Dirty Harry* there would appear to be no reason for Scorpio in his rational self-interest to confess to the girl's location without being coerced to do so.

The third question which must be satisfied at this empirical and epistemological level concedes that dirty means are the only method which will be effective, but asks whether or not, in the end, they will be in vain. We know in *Dirty Harry* that they were, and Harry himself, at the time of the ransom demand, admits he believes that the girl is already

dead. Does not this possibility or likelihood that the girl is dead destroy the justification for Harry's dirty act? Although it surely would if Harry knew for certain that the girl was dead, I do not think it does insofar as even a small probability of her being saved exists. The reason is that the good to be achieved is so unquestionably good and so passionately felt that even a small possibility of its achievement demands that it be tried. For example, were we to ask, If it were your daughter would you want Harry to do what he did? It would be this passionate sense of unquestionable good that we are trying to dramatize.

Once we have satisfied ourselves that a Dirty Harry problem is conceptually possible and that, in fact, we can specify one set of concrete circumstances in which it exists, one might think that the most difficult question of all is, What ought to be done? I do not think it is. I suspect that there are very few people who would not want Harry to do something dirty in the situation specified. I know I would want him to do what he did, and what is more, I would want anyone who policed for me to be prepared to do so as well. Put differently, I want to have as police officers men and women of moral courage and sensitivity.

But to those who would want exactly that, the Dirty Harry problem poses its most irksome conclusion. Namely, that one cannot, at least in the specific case at hand, have a policeman who is both just and innocent. The troublesome issue in the Dirty Harry problem is not whether under some utilitarian calculus a right choice can be made, but that the choice must always be between at least two wrongs. And in choosing to do either wrong, the policeman inevitably taints or tarnishes himself. . . .

Dirty Harry problems arise quite often. For policemen, real, everyday policemen, Dirty Harry problems are part of their job and thus considerably more than rare or artificial dramatic exceptions. . . .

Although the exclusionary rule is the manifest target of Dirty Harry, it more than anything else, makes Dirty Harry problems a reality in everyday policing. It is the great virtue of exclusionary rules—applying in various forms to stops, searches, seizures, and interrogations—that they hit directly upon the intolerable, though often, I think, moral desire of police to punish. These rules make the very simple point to police that the more they wish to see a felon punished, the more they are advised to be scrupulous in their treatment of him. Put differently, the best thing Harry could have done for Scorpio was to step

2. "Dirty" here means both "repugnant" in that it offends widely shared standards of human decency and dignity and "dangerous" in that it breaks commonly shared and supported norms, rules, or laws for conduct. To "dirty" acts there must be both a deontologically based face validity of immorality and a consequentialist threat to the prevailing rules for social order.

ARTICLE

on his leg, extort his confession, and break into his apartment. . . .

If Dirty Harry problems can be shown to exist in their technical dimensions—as genuine means-ends problems where only dirty means will work—the question of the magnitude and urgency of the ends that the dirty means may be employed to achieve must still be confronted. Specifically, it must be shown that the ends of dirty means are so desirable that the failure to achieve them would cast the person who is in a position to do so in moral disrepute.

The two most widely acknowledged ends of policing are peace keeping and law enforcement. . . .

An interpretation of law enforcement which is compatible with empirical studies of police behavior (as peace keeping is) and police talk in America (which peace keeping generally is not) is an understanding of the ends of law enforcement as punishment. There are, of course, many theories of punishment, but the police seem inclined toward the simplest: the belief that certain people who have committed certain acts deserve to be punished for them. What can one say of the compelling and unquestionable character of this retributive ambition as an end of policing and policemen? . . .

The alternative the Dirty Harry problem leads us to is ensuring that the craftsman regards his dirty means as dirty by applying the same retributive principles of punishment to his wrongful acts that he is quite willing to apply to others! It is, in fact, only when his wrongful acts are punished that he will come to see them as wrongful and will appreciate the genuine moral—rather than technical or occupational—choice he makes in resorting to them. . . .

If under such conditions our craftsman police officer is still willing to risk the employment of dirty means to achieve what he understands to be unquestionably good ends, he will not only know that he has behaved justly, but that in doing so he must run the risk of becoming genuinely guilty as well.

In urging the punishment of policemen who resort to dirty means to achieve some unquestionably good and morally compelling end, we recognize that we create a Dirty Harry problem for ourselves and for those we urge to effect such punishments. It is a fitting end, one which teaches once again that the danger in Dirty Harry problems is never in their resolution, but in thinking that one has found a resolution with which one can truly live in peace.

Notes and Questions

1. Is it possible to reconcile Professor Klockars' conclusions about Inspector Callahan's (Dirty Harry) torturing Scorpio to attempt to learn the whereabouts of the girl Scorpio had kidnapped—"I know I would want him to do what he did"—with his "urging the punishment of policemen who resort to dirty means to achieve some unquestionably good and morally compelling end"?
2. Do you think that Inspector Callahan's tactics were justified under the circumstances? Does your answer to this question dictate what should be done with evidence uncovered as a result of these tactics? That is, if Harry justifiably broke into Scorpio's apartment and stood on Scorpio's "bullet-mangled leg" to find the kidnapped child, does it necessarily

follow that the resulting evidence should be admitted at a later trial? Conversely, even if Harry was wrong in his actions, is it inevitable that the evidence must be excluded at a later trial? What ends of criminal procedure law are in conflict in this particular Dirty Harry problem?

3. Professor Klockars suggests that Dirty Harry problems occur often in everyday police work. The vast majority of such dilemmas doubtlessly are resolved without ever coming to the attention of the courts. Nevertheless, some means-ends problems eventually are considered judicially, allowing judgment to be rendered dispassionately and long after the questionable law enforcement practices took place. Consider the following cases, the first of which bears more than a passing similarity to Inspector Callahan's fictional interaction with Scorpio.

CASE

1.3B *Leon v. State*

Leon v. State, 410 So. 2d 201 (Fla. App.), rev. den., 417 So. 2d 329 (Fla. 1982)

Schwartz, Judge.

Leon was convicted of kidnapping Louis Gachelin and the possession of a firearm in the commission

of that felony. The only point on his appeal which deserves discussion is the claim that his formal confessions should have been suppressed as the product of police threats and physical violence which had admittedly been asserted against him. We do not agree.

The issue arises from a highly unusual sequence of events. For our purposes, it began when Leon arrived at a shopping center parking lot for a prearranged meeting to collect a ransom from Gachelin's brother, Frank. At that time, the victim was being confined at gunpoint in an unknown location by Leon's co-defendant, Frantz Armand. After an inconclusive confrontation, Leon drew a gun on Frank, whereupon the defendant was at once taken into custody by a number of officers who had accompanied Frank to the scene. For the very good reason that Louis' life was in grave danger from Armand if Leon (or the officers) did not return within a short time, the police immediately demanded that the defendant tell them where he was. When he at first refused, he was set upon by several of the officers. They threatened and physically abused him by twisting his arm behind his back and choking him until he revealed where Louis was being held. The officers went to the designated apartment, rescued Louis and arrested Armand.

In the meantime, Leon was taken to the police station. There, he was questioned by detectives who had not been involved in the violence at the scene of his arrest, in the presence of none of the officers who had. After being informed of his rights and signing a Miranda waiver form which stated—as confirmed by the interrogating officers, who themselves employed no improper methods—that he did so understandingly, voluntarily, and “of [his] own free will without any threats or promises,”² Leon gave full oral and written confessions to the crime. This process was concluded some five hours after his arrest.

Before trial, the defendant moved to suppress the police-station statements on the ground that they resulted from the allegedly improper police activity which occurred when he was arrested. (The prosecution announced that it would not seek to introduce testimony as to what he was forced to say at that time.) The court denied the motion essentially because the later confessions were given independently of the earlier events. . . .

The record amply supports this determination. It is well settled that, under appropriate circumstances, the effect of an initial impropriety, even a coercive one, in securing a confession may be removed by

intervening events, with the result that a subsequent statement is rendered “free of the primary taint” and thus admissible into evidence as the expression of a free and voluntary act.

We hold that the trial judge properly found that the threats and violence which took place at the scene of the arrest did not constitutionally infect the later confessions and that this rule is therefore applicable here.

In reaching this conclusion, we have considered the effect of numerous factors. Among the most important is that the force and threats asserted upon Leon in the parking lot were understandably motivated by the immediate necessity to find the victim and save his life. Unlike the situation in every authority cited by the defendant, and while it may have had that collateral effect, the violence was not inflicted in order to secure a confession or provide other evidence to establish the defendant's guilt.

Several decisions—and none which hold otherwise have been cited or discovered—have determined that a confession is not invalidated merely because persons other than those who obtained it have, for their own reasons, previously inflicted even unjustified force upon the defendant.³ . . .

Although the rationale has not previously been spelled out, the fact that any coercion was not employed to get a confession is highly significant. In terms of the basic issue with which the “taint” decisions are all concerned: whether the ultimate confession is a product of or is caused by the force, or by an exercise of the defendant's own will. When it appears—and it is known to the defendant—that the force is unrelated to whether he confesses or not, it is impossible, on the face of it, to say that a later statement has been caused by the effect of that coercion or fear of its repetition. This observation applies with particular force to the present case. It must have been obvious to Leon that the arresting officers attacked him only to learn the victim's whereabouts, and that his revelation of that location entirely satisfied their wishes. Thereafter, there was no basis to believe that any force would be used for any other reason—specifically, to secure a confession. Indeed, this is therefore the perhaps unique

2. At the hearing on his motion to suppress, the defendant contrarily stated that he had spoken to the detectives only “because I was scared, because they [the arresting officers] told me they would kill me.” While this testimony may be disregarded in the face of the contrary evidence, it is noteworthy that Leon never suggested that he was influenced by a concern that he had already irretrievably incriminated himself by the first statement that he knew where the victim was. Hence, we do not consider, and it is not argued, that the so-called “cat out of the bag” analysis of the admissibility of subsequent confessions is applicable or helpful in resolving the present case.

3. . . . We do not attempt to resolve the moral and philosophical problem of whether the force used on Leon in the emergency, life-threatening situation presented to the arresting officers was “justified” or “proper.”

CASE

Leon v. State, 410 So. 2d 201 (Fla. App.), rev. den., 417 So. 2d 329 (Fla. 1982)

case in which, by its cathartic effect, the very making of the defendant's initial utterance was itself an important factor in dissipating the effect of the coercive influence which produced it. Because he had already told the police what they wanted to know, and the reason the force was asserted had therefore vanished, the effect of the violence may be deemed to have entirely passed when Leon gave the confessions now in question.

The elimination of any causative effect of the coercion is shown also by the more commonly discussed elements that a complete set of *Miranda* warnings was meticulously given, understood, and waived before the subsequent statements; that over five hours transpired between the violence and the formalization of those statements; and that the confessions were secured by entirely different officers than those who employed the coercive tactics.

For these reasons, we find no basis to disturb the trial judge's conclusion that, considering the totality of the circumstances, the challenged confessions were freely and voluntarily made. . . .

Ferguson, Judge (dissenting). . . .

For the first time in history, and the majority concedes as much, there is articulated a distinction between violent police conduct, the purpose of which is to gain information which might save a life, and such conduct employed for the purpose of obtaining evidence to be used in a court of law. The majority holds that where the illegal conduct is motivated by the first consideration no coercive taint will attach so as to render inadmissible evidence subsequently obtained for the purpose of securing a conviction.

In essence, evidence of the whereabouts of a victim may be obtained using "rack and pinion" techniques if the officer on the scene determines the situation life-threatening, and after the information sought has been extracted the status is "deemed" as if the illegality had never occurred—an eerie proposition which should be rejected outright for all too obvious reasons. This rationale would dispose of the requirement imposed upon the State to show that an accused, at the time of giving a subsequent confession, was free from external pressures associated with an earlier illegality. . . .

The circumstances here during and following the arrest were oppressive. There was no break in the stream of events following the initial physical abuse, the taking into custody, and the confession. . . .

After this defendant was arrested he was taken from the scene to other locations and not transported to police headquarters for more than one hour. Approximately two hours after arrival at the station he had signed a written waiver of his constitutional rights. Contrary to the trial court's finding, defendant, for the entire period beginning with the violent apprehension to the confession, was continually in custody of the same authority and the same officers who were present at the scene of the apprehension, some of whom had taken an active part in it. No reweighing of the evidence is necessary to reach the conclusion that the state failed in its burden of showing by a preponderance of the evidence that defendant voluntarily and intelligently waived his constitutional rights. The confession should have been suppressed.

Notes and Questions

1. How would you characterize the police conduct that initially resulted in Leon's revealing the whereabouts of his kidnap victim? Do you suppose that this is the type of behavior that Chief Justice Burger would consider "outrageous and egregious?" That Professor Klockars would affirm that "I know I would want [them] to do what [they] did?" Consider footnote 3 in the majority opinion in *Leon*.
2. It is important to observe that Leon made two sets of statements, the first in the shopping center parking lot when the police accosted him (S1) and

the second when he later was taken to the police station (S2). Which statements were admitted into evidence at his trial? Under the majority opinion's analysis, is the court confronted with a true Dirty Harry problem in *Leon*? What if Leon had not confessed at the police station and if only S1 were at issue: Should those statements be admissible in evidence?

3. After his conviction was affirmed by the Florida state courts, Leon sought a new trial by petitioning the federal courts for habeas corpus relief. The federal courts agreed that Leon's constitutional rights had not been violated. See *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

Next, consider the facts of *Brown v. Mississippi*, which was decided by the U.S. Supreme Court in 1936. These facts are quoted from a dissenting opinion written by a judge on the Mississippi

Supreme Court. The state supreme court had approved admitting the defendants' confessions into evidence and had affirmed their convictions and death sentences.

1.3C *Brown v. Mississippi***CASE**

Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936)

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"The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs

were cut to pieces with a leather strap with buckles on it, and they were likewise made by the deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from the last stated, the perpetrators of the outrage would administer the same or equally effective treatment. . . .

"The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the injury as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' . . .

The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding." . . .

Notes and Questions

1. What action would you take if you were a federal court judge confronted with the facts in *Brown v. Mississippi*? Should it matter that a state court had already reviewed the defendants' claims and found no constitutional error?

2. What new concern arises in connection with the defendants' confessions in *Brown v. Mississippi* that was not an issue in *Brewer v. Williams*, *Leon v. State*, or the hypothetical Dirty Harry problem? Would your resolution of the issues presented in *Brown* be any different if, after having been subjected to the deputy sheriff's course of conduct,

the defendants had led the deputy to a hidden grave in which the murder victim was buried?

3. The Supreme Court unanimously reversed the Mississippi Supreme Court's judgment in *Brown v. Mississippi*. Chief Justice Hughes explained that:

the State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in doing so it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674, 677 (1934).

He concluded that "it would be difficult to conceive of methods more revolting to the sense of

justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the bases for conviction and sentence was a clear denial of due process."

4. What principles of justice are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"? If the police went too far in *Brown v. Mississippi*, what about the police taking a suspected seller of illegal drugs to the hospital to have his stomach pumped after observing the suspect swallow what appeared to be drugs? Should such methods be disapproved? Would it matter if the police were in a position to observe the suspect swallow the substance only after they had illegally entered his home?

CASE

1.3D *Rochin v. California*

Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952)

Mr. Justice **Frankfurter** delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff [sic] in this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" . . . Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. . . .

We are compelled to conclude that the proceedings by which this conviction was obtained do more

than offend some fastidious squeamish or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to

ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend

the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and therefore to brutalize the temper of a society. . . .

Notes and Questions

1. If clarity of rules and the related ability of the police and courts to follow and apply those rules are legitimate concerns of the law of criminal procedure, how successful is Justice Frankfurter's explanation that the police conduct in *Rochin* "shocks the conscience"? What sort of guidance does a "shock-the-conscience" test provide for future cases? Whose conscience? How far must conduct go before it becomes shocking? Because the sheriff deputies escorted Rochin to a hospital for procedures supervised by a physician, precisely what did the Court find shocking to the conscience in this case?
2. Note that the Court relied on the Fourteenth Amendment's due process clause to invalidate the convictions in both *Brown v. Mississippi* and *Rochin v. California*. "Due process of law" is an inherently imprecise standard. You may have wondered why, in *Brown*, the justices did not base their decision on the more specific prohibition against compelled self-incrimination that is found within the Fifth Amendment or in *Rochin* why the Court did not invoke the Fourth Amendment's protection against unreasonable searches and seizures. The answers largely lie in the dates these cases were decided (1936 and 1952, respectively) and the Court's position at those times on whether rights specified in the Fifth Amendment, the Fourth Amendment, and elsewhere in the Bill of Rights directly applied to criminal proceedings in the state courts. We elaborate on this issue in Chapter 2.

3. Justice Frankfurter acknowledged elsewhere in *Rochin* that giving meaning to a concept such as due process of law "is a function of the process of judgment, [and] the judgment is bound to fall differently at different times and differently at the same time through different judges." Nevertheless, he insisted that:

the vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.

342 U.S., at 170–71 72, S. Ct., at 208–209, 96 L. Ed. at 189.

When standards are so imprecise, is there any doubt that, try as they might to avoid it, the general life experiences and values that inform judges' reason will influence the decision of cases? Isn't this inevitable? Is it altogether bad?

Value judgments undeniably play a role in constitutional adjudication and in the law generally. The following excerpt is from a classic writing that describes how different value orientations can have significant implications for how criminal justice is administered and for criminal procedure law.

1.3E Herbert L. Packer, "The Limits of the Criminal Sanction"

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The kind of criminal process we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning. The kind of model we need is one that permits us to recognize explicitly the value choices that underlie the details of the criminal process. In a word, what we need is a normative model or models. It will take more than one model, but it will not take more than two. . . .

I call these two models the **Due Process Model** and the **Crime Control Model**. . . .

Crime Control Values. The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order

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and thence to the disappearance of an important condition of human freedom. If the laws go unenforced—which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process—a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. The claim ultimately is that the criminal process is a positive guarantor of social freedom. In order to achieve this high purpose, the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.

Efficiency of operation is not, of course, a criterion that can be applied in a vacuum. By “efficiency” we mean the system’s capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known. . . .

The model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited. There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. It follows that extra-judicial processes should be preferred to judicial processes, informal operations to formal ones. But informality is not enough; there must also be uniformity. Routine, stereotyped procedures are essential if large numbers are being handled. . . .

The criminal process, in this model, is seen as a screening process in which each successive stage—pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea conviction, disposition—involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion.

What is a successful conclusion? One that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit. By the application of administrative expertness, primarily that of

the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out. Those who are probably guilty are passed quickly through the remaining stages of the process. The key to the operation of the model regarding those who are not screened out is what I shall call a presumption of guilt. . . .

The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the “suspect” becomes a “defendant.”

The presumption of guilt is not, of course, a thing. Nor is it even a rule of law in the usual sense. It simply is the consequence of a complex of attitudes, a mood. If there is confidence in the reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt, as it operates in the Crime Control Model, is the operational expression of that confidence. . . .

In the presumption of guilt this model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency (as previously defined), because of the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. Indeed, the model takes an even stronger position. It is that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to

such as enhance reliability, excluding those designed for other purposes. . . .

In this model, as I have suggested, the center of gravity for the process lies in the early, administrative fact-finding stages. The complementary proposition is that the subsequent stages are relatively unimportant and should be truncated as much as possible. This, too, produces tensions with presently dominant ideology. The pure Crime Control Model has very little use for many conspicuous features of the adjudicative process, and in real life works out a number of ingenious compromises with them. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening process has resulted in a determination of probable guilt. The focal device, as we shall see, is the plea of guilty: through its use, adjudicative fact-finding is reduced to a minimum. It might be said of the Crime Control Model that, when reduced to its barest essentials and operating at its most successful pitch, it offers two possibilities: an administrative fact-finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty.

Due Process Values. If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process. Its ideology is not the converse of that underlying the Crime Control Model. It does not rest on the idea that it is not socially desirable to repress crime, although critics of its application have been known to claim so. Its ideology is composed of a complex of ideas, some of them based on judgments about the efficacy of crime control devices, others having to do with quite different considerations. . . .

The Due Process Model encounters its rival on the Crime Control Model's own ground in respect to the reliability of fact-finding processes. The Crime Control Model, as we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error. People are notoriously poor observers of disturbing events—the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up

hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). Considerations of this kind all lead to a rejection of informal fact-finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. Even then, the distrust of fact-finding processes that animates the Due Process Model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, in case facts have been overlooked or suppressed in the heat of battle. How far this subsequent scrutiny must be available is a hotly controverted issue today. In the pure Due Process Model the answer would be: at least as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context. The demand for finality is thus very low in the Due Process Model.

This strand of due process ideology is not enough to sustain the model. If all that were at issue between the two models was a series of questions about the reliability of fact-finding processes, we would have but one model of the criminal process, the nature of whose constituent elements would pose questions of fact not of value. . . .

It still remains to ask how much weight is to be given to the competing demands of reliability (a high degree of probability in each case that factual guilt has been accurately determined) and efficiency (expeditious handling of the large numbers of cases that the process ingests). The Crime Control Model is more optimistic about the improbability of error in a significant number of cases; but it is also, though only in part therefore, more tolerant about the amount of error that it will put up with. The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping, or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this view, reliability and efficiency are not polar opposites but rather complementary characteristics. The system is reliable because efficient; reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency. All

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of this the Due Process Model rejects. If efficiency demands short-cuts around reliability, then absolute efficiency must be rejected. The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty. . . .

The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual. Furthermore, the processes that culminate in these highly afflictive sanctions are seen as in themselves coercive, restricting, and demeaning. Power is always subject to abuse—sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to controls that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, although no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

The most modest-seeming but potentially far-reaching mechanism by which the Due Process Model implements these anti-authoritarian values is the doctrine of legal guilt. According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competencies duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect; the tribunal that convicts him must have the power to deal with his kind of case (“jurisdiction”) and must be geographically appropriate (“venue”); too long a time must not have elapsed since the offense was committed (“statute of limitations”); he must not have been previously convicted or acquitted of the same or a substantially similar offense (“double jeopardy”); he must not fall within a category of persons, such as children or the insane, who are legally immune to conviction (“criminal responsibility”); and so on. None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offense against him; yet favorable answers to any of them will mean that he is legally innocent.

Wherever the competence to make adequate factual determinations lies, it is apparent that only a tribunal that is aware of these guilt-defeating doctrines and is willing to apply them can be viewed as competent to make determinations of legal guilt. The police and the prosecutors are ruled out by lack of competence, in the first instance, and by lack of assurance of willingness, in the second. Only an impartial tribunal can be trusted to make determinations of legal as opposed to factual guilt. . . .

The possibility of legal innocence is expanded enormously when the criminal process is viewed as the appropriate forum for correcting its own abuses. This notion may well account for a greater amount of the distance between the two models than any other. In theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like. What it cannot tolerate is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance. And the Due Process Model, although it may in the first instance be addressed to the maintenance of reliable fact-finding techniques, comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative fact-finder convinced of the accused person’s guilt. Only by penalizing errant police and prosecutors within the criminal process itself can adequate pressure be maintained, so the argument runs, to induce conformity with the Due Process Model.

Another strand in the complex of attitudes underlying the Due Process Model is the idea—itself a shorthand statement for a complex of attitudes—of equality. This notion has only recently emerged as an explicit basis for pressing the demands of the Due Process Model, but it appears to represent, at least in its potential, a most powerful norm for influencing official conduct. Stated most starkly, the ideal of equality holds that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” The factual predicate underlying this assertion is that there are gross inequalities in the financial means of criminal defendants as a class, that in an adversary system of criminal justice an effective defense is largely a function of the resources that can be mustered on behalf of the accused, and that the very large proportion of criminal defendants who are, operationally speaking, “indigent” will thus be denied an effective defense. . . .

There is a final strand of thought in the Due Process Model that is often ignored but that needs to be candidly faced if thought on the subject is not to be obscured. This is a mood of skepticism about the morality and utility of the criminal sanction, taken either as a whole or in some of its applications. . . .

In short, doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised. . . .

There are two kinds of problems that need to be dealt with in any model of the criminal process. One is what the rules shall be. The other is how the rules shall be implemented. The second is at least as important as the first. As we shall see time and again in our detailed development of the models, the distinctive difference between the two models is not only in the rules of conduct that they lay down but also in the sanctions that are to be invoked when a claim is presented that the rules have been breached and, no less importantly, in the timing that is permitted or required for the invocation of those sanctions.

As I have already suggested, the Due Process Model locates at least some of the sanctions for breach of the operative rules in the criminal process itself. The relation between these two aspects of the process—the rules and the sanctions for their breach—is a purely formal one unless there is some mechanism for bringing them into play with each other. The hinge between them in the Due Process Model is the availability of legal counsel. This has a double aspect. Many of the rules that the model requires are couched in terms of the availability of counsel to do various things at various stages of the process—this is the conventionally recognized aspect; beyond it, there is a pervasive assumption that counsel is necessary in order to invoke sanctions for breach of any of the rules. The more freely available these sanctions are, the more important is the role of counsel in seeing to it that the sanctions are appropriately invoked. If the process is seen as a series of occasions for checking its own operation, the role of counsel is a much more nearly central one than is the case in a process that is seen as primarily concerned with expeditious determination of factual guilt. And if equality of

operation is a governing norm, the availability of counsel to some is seen as requiring it for all. Of all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one's model of the process looks like, and the least susceptible of resolution unless one has confronted the antinomies of the two models. . . .

What assumptions do we make about the sources of authority to shape the real-world operations of the criminal process? Recognizing that our models are only models, what agencies of government have the power to pick and choose between their competing demands? Once again, the limiting features of the American context come into play. Ours is not a system of legislative supremacy. The distinctively American institution of judicial review exercises a limiting and ultimately a shaping influence on the criminal process. Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution. To the extent that tensions between the two models are resolved by deference to the Due Process Model, the authoritative force at work is the judicial power, working in the distinctively judicial mode of invoking the sanction of nullity. That is at once the strength and the weakness of the Due Process Model: its strength because in our system the appeal to the Constitution provides the last and the overriding word; its weakness because saying no in specific cases is an exercise in futility unless there is a general willingness on the part of the officials who operate the process to apply negative prescriptions across the board. It is no accident that statements reinforcing the Due Process Model come from the courts, while at the same time facts denying it are established by the police and prosecutors.

1.4 CONCLUSION

The issues introduced in this chapter illustrate many of the fundamental tensions inherent in criminal procedure law. Few other areas of law require the resolution of such dramatically opposed interests, with such compelling consequences to both individual citizens

and organized society. The operating rules of criminal procedure law must prioritize and often resolve conflicts between deeply significant constitutional and policy objectives. These rules must be effective in the uncompromising context of the investigation and trial of criminal cases in which individuals

and entire communities may have suffered grievous wrongs. As Justice Frankfurter once observed, “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz*, 336 U.S. 56, 69, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (dissenting opinion).

One of the objectives of criminal procedure law is to promote **reliable fact finding**, or the ascertainment of the truth. This goal occasionally must be tempered to protect the individual liberties cherished by Americans, including rights to be free from overreaching police, prosecutorial, and judicial action. Respecting the sovereignty of the states within this country’s federalistic governmental system and helping to resolve cases finally and efficiently are additional ends of the law of criminal procedure. Assigning those interests weight and then balancing the competing interests is largely the task of the courts through their interpretation and application of statutes and constitutional principles.

We have stressed in this chapter that the study of criminal procedure law appropriately focuses on

the reasoning and analysis employed by the courts in justifying their decisions. It is far more important to understand how and why a court decided a case as it did than simply to be able to recite the case holding. We strongly urge that you “brief” cases in the course of your studies to promote your understanding of the reasoning used by the courts and your ability to apply relevant legal principles in different contexts. There is no better tool for critically analyzing judicial rationale than the briefing process.

Value judgments often influence the resolution of criminal procedure issues. Professor Packer’s description of the “crime control” and “due-process” models of criminal procedure is a helpful summary of the dominant competing values in this area of law. You undoubtedly will notice the clash between the crime-control and due-process schools of thought in the cases that lie ahead. Indeed, justifying preferences for the principles represented by these different models, in the context of deciding individual cases, is perhaps the principal recurring challenge in criminal procedure law.

Key Terms

Appellant	Dissenting Opinion	Precedent
Appellee	Due Process Model	Rationale
Brief	Facts	Respondent
Concurring Opinion	Holding	<i>Stare Decisis</i>
Crime Control Model	Issue	Writ of Habeas Corpus
Criminal Procedure Law	Petitioner	

Review Questions

1. Is the law stable and constant, or is it a more dynamic process? If the latter, what influences these changes?
2. What are the main challenges associated with the application of criminal procedural law?
3. What is the issue in *Brewer v. Williams*? The holding and rationale? Were there any concurring or dissenting opinions? Summarize them.
4. What do scholars mean when they refer to the “Dirty Harry Problem”?
5. What two contrasting principles are the bases for the development of criminal procedural law?
6. What is the purpose of the exclusionary rule, despite its tendency to exclude reliable and probative evidence from trial?
7. In the case of *Leon v. State*, what was the court’s rationale in ruling that the confession given by Leon was, in fact, admissible?
8. Of the two criminal justice models presented by Herbert L. Packer, which model prioritizes individual liberties? How does this model attempt to do so?

Oral Arguments

- *Brewer v. Williams*: http://www.oyez.org/cases/1970-1979/1976/1976_74_1263/argument