Against Police Interrogation--And the Privilege against Self-Incrimination

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SUPREME COURT REVIEW

FOREWORD: Against Police Interrogation—And the Privilege Against Self-Incrimination*

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I. INTRODUCTION

Not since the period separating Escobedo v. Illinois1 and Miranda v. Arizona2 have so many said so much about confessions. The past two years have witnessed a flurry of scholarly confessions articles,3 the Justice Department’s report on Miranda,4 and a new edition of the leading police interrogation manual.5 Last term’s Supreme Court decisions in Colorado v. Connelly6 and Colorado v. Spring,7 hold-

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ing, respectively, that an insane or misinformed suspect may lawfully confess, cannot help but stimulate the controversy.

Anyone familiar with the Escobedo-Miranda debate could have predicted that thoughtful people would continue to disagree about the appropriate legal doctrine regarding confessions. One might not have predicted, however, that the terms of the debate would change so little. In the eighties, as in the sixties, the protagonists appeal to three divergent values. One is the government’s interest in obtaining evidence of crime. The other two, often confused within the same category, are freedom from police abuse and personal autonomy. Courts and commentators describe the Miranda rules in the same terms they used to describe the due process voluntariness requirement, as a compromise the aim of which is to maximize the frequency of confessions consistent with some conception of the other two values.8

I believe that this basic characterization of the dispute is mistaken, because personal autonomy and the need for evidence compete in almost every case. The vast majority of confessions do not result from the suspect’s “free will and rational intellect”9 any more than they result from old fashioned and brutal third degree tactics. Instead, the bulk of confessions results from irrationality, mistake, and manipulation. Any expectation that truly voluntary confessions are available on a systemic basis depends either on unsupportable factual assumptions or on an interpretation of voluntariness that reduces that word to signifying no more than the absence of third degree methods.

We must, therefore, choose between honoring the suspect’s autonomy and forgoing the acquisition of significant and otherwise

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8 For example, in a late opinion summarizing the development of the voluntariness test, Justice Frankfurter described the test as an accommodation of two principles in polar opposition. One pole, he wrote, “is the recognition that [q]uestioning suspects is indispensable in law enforcement.... At the other pole is a cluster of convictions each expressive .... of the basic notion that the terrible engine of the criminal law is not be used to overreach individuals who stand helpless against it.... Cardinal among them .... is the conviction .... that men are not to be exploited for the information necessary to condemn them ....” Culombe v. Connecticut, 367 U.S. 568, 578-81 (1961)(plurality opinion)(footnotes and citations omitted). Miranda, too, is thought of as a compromise. See, e.g., Miranda v. Arizona, 384 U.S. 436, 481 (1966)(“This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties.”); White, supra note 3, at 10 (“The compromise reached in Miranda may not be the best means of accommodating the conflicting interests involved.”)(footnote omitted); Saltzburg, supra note 3, at 21-23; Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich. L. Rev. 662, 676 (1986)(reviewing F. Inbau, J. Reid & J. Buckley, supra note 5).

unobtainable evidence of crime. The rationale of Miranda, grounded in the privilege against self-incrimination, and the language of the due process cases equating voluntariness with freedom of the will, suggest resolving this conflict in favor of autonomy. The holdings of the cases, however, whether dealing with the voluntariness of a confession or with the "knowing and intelligent waiver" of the privilege, suggest the contrary.

This ambivalence results in the prominent anomalies in confessions law. At trial, after establishing probable cause of guilt and when the defendant enjoys the protection of a neutral bench, a personal advocate, and public scrutiny, the government may not so much as put a polite question to the defendant. But, between arrest and commitment, the police may badger, trick, and manipulate the suspect in an environment solely within their control and to which no other witness is admitted. With respect to confessions, society insists on enjoying "at one and the same time the pleasures of indulgence and the dignity of disapproval." \(^{10}\)

In this Article, I propose a general reform of confessions law. This reform program is animated by rationality and is capable of implementation without constitutional amendment. I propose resolving the tension between the demand for evidence and the desire to honor the suspect's autonomy by admitting that the need for evidence justifies compelling the suspect's testimony, just as it justifies compelling the testimony of nonparty witnesses. Outright repeal of the privilege against self-incrimination, although desirable, is impractical, and subversive interpretation is inconsistent with principled constitutionalism. But the Supreme Court could disincorporate the privilege from the fourteenth amendment's due process clause, a step that would accomplish much of what needs to be done on the level of constitutional law. This alteration would enable the states to establish humane systems of in-court interrogation.

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\(^{10}\) Yvor Winters used this phrase to describe the work of T. S. Eliot. Y. Winters, On Modern Poets 71 (1959). On the necessity of choosing between autonomy and confessions, tacitly or deliberately, see Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 883-84 (1981)(reviewing Y. Kamisar, Police Interrogation and Confessions: Essays in Law and Policy (1980))("Miranda does not, any more than the due process test, come directly to grips with the dilemma arising from our simultaneous commitment to the privilege against self-incrimination and to a law enforcement system in which police interrogation is perceived as a necessity."); Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 674-75 (1966); Grano, supra note 8, at 676 ("The tension in existing confessions law can be resolved either by rejecting the premises of Escobedo and Miranda or by taking these premises seriously and accepting their consequences.").
To say that interrogation serves an important purpose, however, is not to say that interrogation ought to be conducted by the police. The problem of coerced confessions presents a problem substantially different from the nonproblem of compelled testimony. Accordingly, I propose, as a corollary to the withdrawal of the constitutional privilege, a per se exclusionary rule for any statement obtained by the police from an arrested person. The Supreme Court could achieve this result by tightening the fourth, sixth, or fourteenth amendment limitations on police interrogation. Regrettably, the explicit command of the fifth amendment would remain fully applicable to federal agents. Any fair reading of that amendment's privilege against self-incrimination would require safeguards against invalid waivers equivalent to those available in related procedural contexts, a result that would reduce the government's ability to enforce certain federal laws. But, on the whole, the proposed regime would prevent abusive police tactics more effectively, would secure a larger quantity of probative evidence, and would foster a more principled and coherent body of law than any present alternative.

II. ARE VOLUNTARY CONFESSIONS OBTAINABLE ON A SYSTEMIC BASIS?

A confession to the police is not admissible unless, as a due process matter, it is given voluntarily. According to the Court in Mincey v. Arizona, a confession is not voluntary unless it is the product of "a rational intellect and a free will."\(^1\) If given after the police have taken the suspect into custody, a confession is not admissible unless the police administered Miranda warnings and obtained a "voluntary, knowing, and intelligent waiver."\(^2\)

Satisfaction of these standards is conceptually possible, but not on a general basis. The devout Christian may believe that God commands confession of an isolated criminal act; the sincere utilitarian may conclude that society as a whole will benefit from his punishment. But in the vast majority of cases, the confessor never achieves this sort of detached reflection; most confessions are anything but "voluntary, knowing, and intelligent." By this I mean more than the true, but trivial, statement that confessions, like other phenomena,

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\(^{1}\) 437 U.S. at 398.

\(^{2}\) Colorado v. Spring, 107 S. Ct. 851, 853 (1987). See Miranda v. Arizona, 384 U.S. 436, 475 (1966) ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").
are governed by causal laws. In a noncausal universe, confessions would not be probative of crime and could not be described as voluntary because they would not result from anything associated with the suspect's personality. Confessions would instead simply happen, and legal rules could neither encourage nor prevent them. Neither, however, do I mean that confessions typically are not voluntary, if voluntary means what it means in the substantive criminal law. A voluntary act in criminal law is any bodily movement resulting from a conscious decision. Under such a standard, even confessions obtained by torture would be voluntary.

But, as other criminal law doctrines recognize, responsibility, whose existence depends on a heuristic sense of freedom, requires more than a bodily action. Only a rational person, free from pressures inconsistent with the dignity of rational persons, is responsible. Therefore, the criminal law provides the defenses of insanity, duress, necessity, and mistake. Insanity, duress, and fraud are also defenses to civil liabilities that arise from individual choices, such as entry into contracts and the execution of wills. Of greatest rele-

13 See Grano, Voluntariness, Free Will and the Law of Confessions, 65 VA. L. REV. 859, 868-80 (1979)(discussing free will and confessions, concluding that on assumption that confessions are caused, test for admissibility should be whether reasonable person under similar pressure would confess).


In order for a person's unconstrained decision to count in the way that gives rise to moral responsibility, the decision must be made in a stable natural context. Without that, he would be like someone who wakes up in a room where there is a board of buttons to push and no indication of which button does what. He pushes a button at random, and outside the window a building blows up. He pushes another button and lilacs bloom on the flagpole. But when he pushes the second button again, the flagpole vanishes, leaving only the lilacs blooming in midair. Hard as he tries to discover a pattern, he cannot. He has a certain kind of freedom; it is up to him alone to decide which buttons to push, or whether to push any. But it is freedom in a funhouse, a nightmare in which nothing that one does can be depended on. Having stumbled on a benign situation outside the window, he resolves not to push any more buttons; but then the situation begins to change whether he pushes them or not.

Id. at 771-73 (footnotes omitted).

15 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.2 (1986).

16 See, e.g., Model Penal Code § 2.09 (duress), § 3.01 (choice of evils—necessity), and § 4.01 (mental disease).

17 See 12 S. Williston, A TREATISE ON THE LAW OF CONTRACTS § 1487, at 325 (H. Jager rev. ed. 1970)("It is undoubtedly true that wherever the circumstances are such as to warrant an action for deceit for inducing a person to enter into a contract, they will certainly warrant avoidance or recision of the bargain.")(footnote omitted); Frankel, From Private Rights Toward Public Justice, 51 N.Y.U. L. Rev. 516, 527-28 (1976)("Recognizing that people imprudently err in far slighter matters [than confession] under far slighter pressure [than custodial interrogation], we now allow the targets of door-to-door salesmen a few days of tranquil reconsideration before holding them to the purchase of a vacuum cleaner.") (citing U.C.C. § 3.502); Sutherland, Crime and Confession,
vance to confessions, which amount to de facto guilty pleas, the Supreme Court has refused to accept guilty pleas made without a complete understanding of the consequences and alternatives.\textsuperscript{18}

If positive law is evidence of positive morality, as I think it is, then our society refuses to recognize as voluntary those acts that result from personality traits or external circumstances outside the broad ambit of ordinary experience. We excuse the man who embezzles the ransom to save his kidnapped child because he is no more criminal than the rest of us. We also excuse the psychopath, whose disease, like the gangster's threat, establishes a cause for conduct external to the actor's personality.

If this is what voluntariness means, that the causes of the conduct in question are internal to the personality of a normal person, then few confessions indeed are voluntary. Most obviously, confessions are self-destructive.\textsuperscript{19} We do not speak of criminals "voluntarily" leaving fingerprints at the scene of the crime or receiving undercover agents into confidence. We may hypothesize cases in which a dedicated moralist, upon detached reflection, elects to exercise autonomy in favor of confession. But can this be so in

\textsuperscript{79}Harv. L. Rev. 21, 37 (1965)(circumstances of typical custodial interrogation would void any will under doctrine of undue influence).

\textsuperscript{18}Henderson v. Morgan, 426 U.S. 637 (1976). In Henderson, the Court invalidated a plea of guilty to second degree murder because the indictment charged first degree murder, and, in pleading to the lesser charge, the defendant was never apprised that the state could not prove second degree murder without proving an intent to kill. Under these circumstances, "the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Id. at 645 (citation omitted).

\textsuperscript{19}See H. Silving, Essays on Criminal Procedure 258-59 (1964). Professor Silving states:

As there are special situations in which a "guilty plea" is advantageous to a defendant, so there are also instances in which it is rational for him to confess. But in the vast majority of cases a confession is highly damaging to him, even allowing for the fact that, notwithstanding affirmance to the contrary in law, a confession may result in mitigation of a sentence. In fact, in capital cases a confession is often a form of suicide. The Roman rhetorician Quintilianus pertinently observed that "such is the nature of confession that one who confesses may be regarded as insane." If we substitute for "every confession" the phrase "every confession in which no objective or otherwise rational advantage to the defendant can be shown to obtain" and for "insane" the term "neurotic," the proposition would be clearly valid today. Hans Gross implied this when saying as regards confessions other than those induced by objective advantage, by hallucinations or religious influences, that he "knew of no analogy in the inner nature of man, in which anybody with open eyes does himself exclusive harm without any contingent use being apparent." Clearly, in this type of case man confesses to satisfy some irrational inner need. Psychoanalysts explain the confession phenomenon as a product of a confession compulsion, overriding any rational desire for self preservation.

Id. (footnotes omitted).
thousands of cases involving people who have never hitherto expressed any morality different from self-interest?

The psychological explanations for confessions suggest otherwise. Guilt and a desire to be punished, a desire to shift responsibility to others, and the need for love are the subconscious pressures impelling confessions. Generally, these pressures operate unseen, but the few cases allowing access to the suspect’s mental processes suggest that when a confession occurs a “free will and a rational intellect” are not at work.

In People v. Heirens, for example, the police arrested a teenage burglary suspect. At the hospital to which he was taken, doctors, at the behest of the police, administered sodium pentathol. In the resulting confession, Heirens admitted his involvement, but ascribed primary responsibility to “George,” a thoroughly wicked person under whose influence Heirens had selected apartments to be burglarized. “George” always frustrated Heirens’ efforts to prevent the planned crimes. When asked for a description of “George,” Heirens described himself exactly.

Standing alone, this might be interesting theory and an eerie case. The police tactics taught in interrogation manuals, however, appear to be effective precisely because they play upon such psychological pressures. The interrogator sympathizes with the guilt-ridden suspect, suggesting that real responsibility lies with the victim, an accomplice, or the suspect’s family. The alienated, insecure suspect is flattered with compliments to his criminal prowess. And, the most effective method of all, the notorious good cop/bad cop routine, clearly has the effect of stimulating the suspect’s associated needs for love on the one hand and punishment on the other.

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20 See T. Reik, The Compulsion to Confess 251-53 (1959) (interesting discussion of transferrence and the need for punishment); O. Rogge, Why Men Confess 224-30 (1959); Schoenfeld, A Psychoanalytic Approach to Plea Bargains and Confessions, 9 J. L. & Psychology 463, 465-67 (1975). From the psychoanalytic perspective, the moral attitudes internalized during childhood demand reconciliation with authority. The suspect impelled by such attitudes desires both empathy (as a signal that authority has forgiven him) and punishment (because the subconscious mind associates punishment with the expiation of childhood offenses).


22 See Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42 (1968); Grano, supra note 8, at 672-75 (“[T]hose police ‘tactics designed to increase the suspect’s anxiety... are intended to increase the pressure—the compulsion— on the suspect to confess.’”).

23 See, e.g., F. Inbau, J. Reid & J. Buckley, supra note 5, at 106-18.

24 Id. at 118-20.

25 Id. at 151-53. The authors believe that the good cop/bad cop routine is most effective when performed by a single interrogator. The psychoanalytic approach would predict the same conclusion; if a confession results from the associated needs for love
Presumably, the manuals commend these strategies because of their general effectiveness, not because the psychological pressures they play upon are rare or unusual among those suspected of crime.

Those suspects who are neither vulnerable to psychological pressure nor inclined to abandon self-interest can still be baited to confess with police deception. The suspect's rational fear is aggravated by heavy-handed threats and promises of future lenience or severity, which are, in turn, always conditioned by equally heavy-handed disclaimers that no promises are being made. The suspect's rational despair is exploited by the fabrication of extrinsic evidence.

The claims of prominent police spokespersons, that unless the police have a substantial period of unfettered control over the suspect for the purpose of employing these tactics suspects would choose not to confess, confirm the notion that most confessions are obtained in violation of the suspect's autonomy. Very few people confess spontaneously; but, as one might expect from this discussion, such persons typically suffer from identifiable mental impairments. A leading police manual counsels that many are not guilty of the crimes they confess. Indeed, a recent study of such cases describes those who confess spontaneously as "persons who have committed crimes [who] are compelled to confess and accept punishment.”

Finally, granting the theoretical possibility of autonomous confessions, which cases fit into this category? The inaccessibility of the police tactics and the suspect's mental processes means that, despite the possibility of a truly voluntary confession, we lack the magic net to catch the unicorn.

and punishment, the dispensing of love and punishment alternately from a single source would be comparatively more effective. A male/female team of interrogators might prove more effective still.

26 See Grano, supra note 8, at 668-70 (discussing deceptive tactics recommended by F. Inbau, J. Reid & J. Buckley, supra note 5.

27 See, e.g., Inbau, Police Interrogation: A Practical Necessity, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 17-18 (1961) (“Self condemnation and self destruction not being normal behavior characteristics, human beings ordinarily do not utter unsolicited, spontaneous confessions. They must first be questioned regarding the offense.”).

28 F. Inbau, J. Reid & J. Buckley, supra note 5, at 197 (A spontaneous confession "is very likely to be false. It may be the product of a mentally ill person, or it may stem from an otherwise normal person's effort to incur a temporary police detention in order to gain some other deliberately conceived objective.").


Taken together, these considerations suggest that judicial dicta about voluntariness are inapt descriptions of doctrines designed to restrain abusive police tactics without preventing the extraction of confessions. The old due process cases clearly had this flavor, and the Court has taken the same approach this term in two cases decided under *Miranda* and the fifth amendment.

In *Colorado v. Connelly,* the Court held that, absent police abuse, a person who is incompetent due to clinically identifiable insanity may voluntarily confess and knowingly and intelligently waive *Miranda* rights. Connelly, incompetent at the time due to untreated severe schizophrenia, walked up to an off duty uniformed policeman and confessed a homicide. The startled officer administered *Miranda* warnings. After the arrival of detectives, Connelly purported to waive his *Miranda* rights, made incriminating statements, and directed police to the scene of the killing.

The Colorado Supreme Court suppressed the evidence, reasoning that the initial statements to the off duty officer were involuntary and that the subsequent statements to the detectives, made after they had taken Connelly into custody, were obtained without an effective waiver under *Miranda.* The Supreme Court reversed, holding that, for due process purposes, a confession is not involuntary without police misconduct and that waiver of *Miranda* rights is determined by a standard no stricter than the standard governing the voluntariness of a confession. Whether with respect to due process

31 See Kamisar, *What is an Involuntary Confession?*, in POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY 1, 23, (Y. Kamisar ed. 1980) (Supreme Court has never considered relatively strong resistance of suspect as justifying more intense police pressures); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966); Herman, supra note 29, at 457.


34 107 S. Ct at 523 (“There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context.”). This reasoning appears to suggest that the police could obtain a valid *Miranda* waiver by any tactic the fruits of which would not be deemed involuntary as a matter of due process. Thus, prolonged detention incommunicado punctuated by physical violence might not invalidate a subsequent waiver. See Stein v. New York, 346 U.S. 156 (1953) (detention incommunicado and marathon questioning; confession held voluntary); Stroble v. California, 343 U.S. 181 (1952) (defendant kicked and threatened with blackjack one hour before questioning; confession held voluntary); Lisenba v. California, 314 U.S. 219 (1941) (twelve days of detention incommunicado, including slapping of defendant; confession held voluntary). Coupled with the holding in *Spring,* the language in *Connelly* equating due process voluntariness and a fifth amendment waiver may also imply that police deception to induce a waiver after the administration of the warnings is constitutional. See supra notes 30-31 and accompanying text. In *Miranda,* the Court took a different view. 384 U.S. at 476 (“any evidence that the accused was
or to Miranda, Connelly's "perception of coercion flowing from the 'voice of God' . . . is a matter to which the United States Constitution does not speak."\(^{35}\) Four Justices dissented from the Miranda holding,\(^{36}\) and Justices Brennan and Marshall dissented from the voluntariness holding as well. According to Justices Brennan and Marshall, "[w]hile . . . police overreaching has been an element of every confession case to date, it is also true that in every case the Court has made clear that ensuring that a confession is a product of free will is an independent concern."\(^{37}\)

Along the same lines as the decision in Connelly, in Colorado v.

threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."\(^{35}\) More recently, in Michigan v. Mosley, 423 U.S. 96 (1975), the Court reversed the exclusion of evidence obtained from a suspect who invoked the right to silence when questioned about the crime for which he was arrested but then made an incriminating statement several hours after the first interrogation terminated, in response to questions about another crime. The second interrogation was initiated after a fresh set of warnings. In holding that Miranda does not "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the subject in custody has indicated a desire to remain silent[,]" the Court noted that to "permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." 423 U.S. at 102-03 (footnote omitted). The test under Mosley is whether the suspect's "right to cut off questioning" is "scrupulously honored." 423 U.S. at 103 (quoting Miranda). This, of course, is inconsistent with the marathon incommunicado interrogation approved of in some voluntariness cases. Even more clearly inconsistent with the Connelly dictum is Edwards v. Arizona, 451 U.S. 477 (1981), in which the court held that no fruit of interrogation is admissible if obtained after the suspect invokes the right to counsel, as opposed to the right to silence, unless counsel has conferred with the suspect in the meantime. To say that there is "obviously no reason" to scrutinize confessions more closely under Miranda than under the due process test ignores the failure of the voluntariness test to either prevent police abuse or protect individual autonomy in the majority of cases. See Kamisar, A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, in POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS ON LAW AND POLICY 41. If the fifth amendment applies to police interrogation, it seems far more "obvious" to apply the same standard for waiver that would be applied to any other proceeding. None of the Justices, I suspect, would consider valid a waiver of the privilege by one detained incommunicado for days before a grand jury or by a defendant at trial who takes the stand in response to perjured testimony orchestrated by the prosecution and recanted after the defendant is cross-examined. The only reason for applying a different standard during interrogation is to obtain evidence that the privilege is designed to shield. In my view, this approach is subversive of constitutionalism. Although I think the privilege is a serious mistake, the Justices have no commission to restrict its scope because they, too, think it is a mistake.

\(^{35}\) 107 S. Ct. at 524.

\(^{36}\) 107 S. Ct. at 524 (Blackmun, J., concurring)(refusing to join the Court's holding that preponderance of the evidence standard governs judicial determination of waiver issues); 107 S. Ct. at 524 (Stevens, J., dissenting in part); 107 S. Ct. at 525 (Brennan and Marshall, JJ., dissenting).

\(^{37}\) 107 S. Ct. at 527 (Brennan, J., dissenting)(footnote omitted).
the Court held valid the waiver of *Miranda* rights by a suspect who expected to be questioned about federal firearms violations but who made incriminating statements when asked about a Colorado homicide. This decision appears to extend to the *Miranda* waiver context the standard of *Frazier v. Cupp*, a 1969 Supreme Court decision holding that, by itself, police fabrication of an accomplice's confession does not render the suspect's own confession involuntary.

Whatever rhetoric may grace the opinions, holdings such as these elevate the acquisition of evidence above the suspect's autonomy. Statements made by a patently insane suspect are not intelligent, and statements made in response to police deception are not knowing.

The Court's willingness to admit these confessions suggests the misleading nature of the verbal focus on autonomy. Most suspects cannot be rationally persuaded to confess, only tricked, conditioned, or forced to do so. As a compromise, we may compel the confession of one suspect in three and leave two alone. We are, however, unable to compel a suspect and not to compel him at the same time. But, that is what the Court and defenders of police interrogation purport to approve. And any compromise of the former sort, among suspects rather than between values, begs the question of whether and under what circumstances compelling suspects to confess is justifiable.

The most sophisticated defense of the voluntariness test illustrates the incongruity of admitting confessions on the basis of the suspect's autonomous decision. Writing thirteen years after *Miranda*, Professor Grano proposed to recognize the test's separate concerns with mental freedom, undue influence, and reliability. Reasoning from premises which differ little from those in this Article, Grano advocated an objective reasonable person standard to govern the mental freedom aspect of the inquiry. A confession would not be held involuntary unless "a person of ordinary firmness, innocent or guilty, having the defendant's age, physical condition, and relevant mental abnormalities (but not otherwise having

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40 See Y. Kamisar, Police Interrogation and Confessions, Prepared Remarks at U. S. Law Week's Constitutional Law Conference 59-60 (Sept. 13, 1986)("the question presented [in Connelly] . . . is not whether the Court should adopt a new constitutional rule but whether it should rid itself of—not take seriously, if you will—the terminology of an old rule, language that for a long time has not usefully explained what the Court has actually been doing.")(emphasis in original).
41 Grano, supra note 13.
the defendant's personality traits . . . ), and strongly preferring not to confess, would find the interrogation pressures overbearing."

At face value, this standard would require excluding almost every confession not spontaneously rendered by the perpetrator. Given that confession is, from the standpoint of self interest, irrational, that police manipulation is its "but for" cause, that the "mental abnormalities" impelling confessions are to be taken into account, what "person of ordinary firmness" "strongly preferring not to confess" would do so unless he found the "interrogation pressures overbearing"?

Responding to this concern, Professor Grano conceded that "police bent on obtaining a confession usually [ordinarily?] prevail," but he then denied that, under his formulation, "most confessions will have to be suppressed." He explained that the "'person of ordinary firmness' test reflects a moral standard prescribing the effort and resistance that reasonably can be expected of suspects in custody." "[T]he objective of the interrogation . . . is to succeed," and, therefore, "due process principles only limit the means" toward that end.

Like the Court before him, Professor Grano cares not at all for autonomy itself; he cares only about the methods by which autonomy is overborne. Like the Court before him, Professor Grano phrases the test in terms of what rational persons would choose under the circumstances and immediately admits that the test must mean something else if confessions are to be obtained. So it is not surprising that in a recent essay Professor Grano argues that personal autonomy, the legal relevance of which he ascribes to Escobedo and Miranda, is inconsistent with police interrogation as practiced and as it must be practiced if it is to succeed.

42 Id. at 906 (footnote omitted).
43 Id. at 907 (footnote omitted).
44 Id.
45 Id.
46 Grano, supra note 8. Professor Grano argues that police interrogation is inconsistent with the suspect's autonomous choice. I agree with this contention. Professor Grano claims further that obtaining evidence of crime is more important than honoring a suspect's autonomy, as long as police methods do not rise to an unspecified level of offensiveness. He admits that this judgment is inconsistent with Escobedo and Miranda and claims that for this reason those cases should be overruled. This, I believe, is only an argument against the privilege against self-incrimination, for it is also true that the obtaining of evidence is inconsistent with and more important than shielding the accused from relevant questions at trial. As long as the privilege applies, Miranda is subject to cogent criticism only for not going far enough to provide effective enforcement of fifth amendment rights. All attempts to exempt police interrogation from the privilege or to defend a lesser standard of waiver during interrogation are based on hostility to the very existence of the constitutional provision and, therefore, are unconvincing.
What we know about police interrogation and confessions strongly suggests that autonomous confessions are not obtainable on a general basis. This conclusion suggests the central question, one from which the confusion of autonomous choice with freedom from police cruelty has deflected analysis. That question is whether, and, if ever, when, compelling a confession is justifiable?

III. SHOULD WE HAVE THE PRIVILEGE AGAINST SELF-INCrimINATION?

Treating the Constitution as a religious, rather than a political, text invites two easy errors. The first is to read into the Constitution's ambiguous provisions our own visions of political morality, thereby elevating legislative preferences to the unjustifiably exalted status of natural law. The parallel temptation is to treat the clear provisions of the Constitution as reflecting incontestable and holy moral judgments.

Anyone who has argued about the meaning of due process knows the former tendency. Whoever openly assails the privilege against self-incrimination quickly discovers something of the second. Even Jeremy Bentham, accustomed to unreflective resistance to argument and without the impediment of a venerated text, was astonished at the reverence otherwise thoughtful people held for the privilege.47

Bentham's argument against the privilege is simple: the privilege denies the court the best available evidence regarding the defendant's conduct with respect to the crime charged. But the great force of his passage on self-incrimination is not the positive argument for admitting the evidence; it is, rather, his thorough and devastating survey of the reasons for keeping it out.

There is, Bentham acknowledged, always "the old woman's rea-

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47 See 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 229 (1827)("In the minds of some men . . . if you set about proving the truth of a proposition, you rather weaken than strengthen their persuasion of it. Assume the truth of it, and . . . you do more towards riveting them to it than you could do by direct assertion, supported by any [of] the clearest and strongest proofs."). Given the extensive reliance on Bentham that follows, I should point out that Bentham was more than a strong thinker and active reformer. He also helped to shape modern liberal criminal law and the law of evidence and, indeed, liberal democratic society in general. Wigmore wrote that "[r]emembering that in less than three generations nearly every reform which Bentham advocated for the law of evidence has come to pass, we might almost regard his condemnation of any rule as presumptively an index of its ultimate downfall." J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 3092 (1st ed. 1904).
son” that “tis hard upon a man to be obliged to criminate himself.” This, we might note, is the Supreme Court’s “cruel trilemma of self accusation, perjury or contempt.” Dean Griswold and Professor Greenawalt also have endorsed this argument. Yes, answered Bentham, “[h]ard it is upon a man . . . to do anything that he does not like. . . . What is no less hard upon him, is, that he should be punished: but did it ever yet occur . . . to propose a general abolition of all punishment, with this hardship for a reason for it?” “Suppose, in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his own mouth . . . or out of another’s?”

We might balk a little at this and insist that it is at least marginally more cruel to compel persons to convict themselves than to convict them with independent evidence. But is this marginal cruelty enough to justify foregoing the evidence? It is not enough to justify foregoing testimony of nonparty witnesses that incriminates loved ones or exposes personally ruinous but nonincriminating facts. By the same token, the marginal cruelty of questioning the accused in open court after the appointment of counsel does not seem great enough to justify abandoning such an important source of evidence.

Two related arguments link the privilege to the prevention of torture and similar abuses. Justice Frankfurter argued that the privilege “was aimed at . . . a recurrence of the Inquisition and the Star Chamber,” a greater evil than any loss of evidence. “The privilege against self-incrimination,” he wrote, “is a specific provision of which it is peculiarly true that a ‘page of history is worth a volume of logic.’” The privilege, in Justice Frankfurter’s view, had a historical justification and should be historically interpreted. Similarly, but with a more prospective emphasis, Wigmore, although deeply skeptical about the privilege’s justification, maintained that, without it, any system of justice would degenerate because of the invitation to take brutal and oppressive shortcuts. On the basis of this under-

48 J. BENTHAM, supra note 47, at 230.
52 J. BENTHAM, supra note 47, at 230.
53 Id. at 231.
55 Id. at 438 (citation omitted).
56 In an early article, Wigmore urged abolition. See Wigmore, Nemo Tenetur Seipsum Prodere, 5 HARV. L. REV. 71 (1891).
57 J. WIGMORE, supra note 47, § 2251.
standing, the privilege is itself a prophylactic against abusive interrogation.

But the inconsistency of the existence of the privilege with abusive tactics does not establish that the privilege is necessary to prevent them. As Bentham pointed out, a question is not a thumbscrew. By the same association of evil institutions with any of their practices, he wrote, it would do as well to forbid the judges to sit in a room with stars adorning the roof. Many legal systems permit judicial examination of the accused and the drawing of adverse inferences from silence without appearing to tolerate more abusive interrogation than exists in the United States. As a historical matter, torture in England declined prior to the legal recognition of the privilege. This experience suggests that the privilege reflects, rather than causes, the legal determination to eradicate investigative brutality. If this is so, rules aimed directly at abusive questioning suffice as long as the political will exists to enforce them.

Absent that will, the coexistence of the privilege with the legitimated desire to obtain the evidence has done a great deal to en-

58 See J. Bentham, supra note 46, at 240-41.
59 Id. at 241-47.
60 See G. Mueller & F. Le Poole Griffiths, Comparative Criminal Procedure 41-42 (1969). Under the Continental system, the suspect is not, and indeed may not be, sworn as a witness and, thus, subjected to perjury. Nor may any sanction other than the drawing of adverse inferences be applied to silence. If questioning brings suspicion to bear upon a witness, as opposed to the accused, the witness may demand to be charged with an offense. The system is therefore not as different from our own as sometimes supposed, but, in both theory and practice, it brings to bear much greater pressure on the accused to give evidence than is brought in an American trial. Id. See also Bratholm, The Privilege Against Self-Incrimination in American and French Law, 19 CRIM. L. BULL. 34, 43-47 (1983); Clemens, The Privilege Against Self-Incrimination Under Foreign Law—Germany, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 172 (1960); Mendelson, Self Incrimination in American and French Law, 19 CRIM. L. BULL. 34, 43-47 (1983). While Talmudic law once forbade any form of self-incrimination, voluntary or otherwise, Israel appears now to follow English practice. See Cohn, Police Interrogation Privileges and Limitations Under Foreign Law—Israel, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 63 (1961); Cohn, The Privilege Against Self-Incrimination Under Foreign Law—Israel, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 175 (1960). Even in England, the judges can and often do comment on the prisoner's failure to give evidence. Williams, The Privilege Against Self Incrimination Under Foreign Law—England, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 166 (1960). Only Japan among the free societies provides a broader privilege than does the United States. See S. Dando, Japanese Criminal Procedure 280-81 (B. George trans. 1965)(privilege applies to witnesses as well as defendants; privilege extends to incrimination of relatives). The upshot is that the questioning of the defendant and the holding of incredible answers or silence against him is consistent with political democracy and the dignity of the individual.

courage abusive police tactics. Precisely because the privilege bars humane interrogation under legal supervision, subterranean interrogation has known tolerance and even encouragement. Miranda’s critics never go so far as to claim that the police have legal power to compel the suspect to answer. Yet implicit in criticisms

62 According to the Wickersham Commission:

The constitutional privilege that no man shall be compelled to be a witness against himself in a criminal case, often is a serious obstacle to the detection of crime. There is much evidence that despite this constitutional declaration, and because of the obstacles thus presented, confessions of guilt frequently are extorted by the police from prisoners by means of cruel treatment, colloquially known as the third degree. National Commission on Law Observance and Enforcement 3 (1931) (Wickersham Commission Report No. 11)(emphasis added). See also J. McGuire, Evidence of Guilt § 2.02, at 13 (1959)("Deprived of assurance that the prosecutor can probe for a suspect's information by decent, orderly questioning, police are tempted to bully their prisoner into admissions suggesting lines of investigation usable to turn up other evidence of guilt. The privilege may encourage torture rather than the reverse.")(footnote omitted) (emphasis in original); Kamisar, Equal Justice in the Gatehouses and Mansion of American Criminal Procedure, in Police Interrogations and Confessions: Essay in Law and Policy 34 ("One cannot but wonder how often the availability of the privilege . . . once the accused reaches the safety and comfort of the mansion [i.e., the courtroom], only furnishes the state with an additional incentive for proving the charge out of his own mouth before he leaves the gatehouse [i.e., the police station]."); Kauper, Judicial Examination of the Accused: A Remedy for the Third Degree, 30 Mich. L. Rev. 1224, 1238-39 (1932)("It is not strange that judges are reluctant to compel the police, whose coercive methods are productive of confessions, to observe the rule requiring prompt presentment before a magistrate in whose presence the prisoner can bask in privileged silence."); McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 299, 278 (1946)("Abstinence from third degree abuse will still depend on the ability of the police to protect society without resort to them.")(footnote omitted). I do not claim that in the absence of the privilege abusive police interrogation would disappear. Indeed, "as regards possible police station abuses, the continent on the whole is no better and no worse off than we are." G. Mueller & F. Le Poole Griffiths, supra note 60, at 20. But, I do claim that in the absence of the privilege effective controls on police interrogation would become politically feasible. The exclusion at trial of any statement obtained by police, whether for impeachment purposes or otherwise, would leave only the investigative utility of admissions as a rational incentive for police interrogation. Irrational incentives, such as mere sadism, racism, or the like, must be coped with through civil or criminal prosecution and administrative discipline. But given an effective substitute for police extracted confessions and a refusal by the judiciary to admit such evidence, offensive police tactics would surely diminish significantly. See Kauper, supra, at 1242-44.

63 See Escobedo v. Illinois, 378 U.S. 478, 499 (1964)(White, J., dissenting)("Cases in this court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him."). Recent attacks on Miranda similarly refuse to endorse police power to compel incriminating answers. See Inbau, Over-Reaction—The Mischief of Miranda v. Arizona, 73 J. Crim. L. & Criminology 797 (1982); Caplan, supra note 3, at 1445-58. Both articles condemn the advising of the suspect of the right to remain silent and both condemn the offering of a lawyer to the suspect because a lawyer may induce the suspect to exercise the right to silence. Neither article urges abolishing the right to silence in the face of police questioning nor denies its existence in positive law. This, surely, is an untenable position; the privilege cannot be both good and bad with respect to a single defendant in a single prosecution.
of *Miranda* is the judgment that the police ought to have this power, or at least ought to appear to have it, because the courts do not, and society needs it. This anti-constitutional attitude, in practice, created the problem of coerced confessions. Interrogation fled from the privilege, but it did not die, and in its more bestial form extracted from generations of suspects many confessions that mere compelled testimony would never have produced.

Modern defenders of the privilege have recognized the failure of its traditional rationales, and have struggled to devise a convincing replacement. In his study of the privilege, for example, Dean Griswold concluded that, although a "good many efforts have been made to rationalize the privilege, to explain why it is a desirable or essential part of our basic law[,] . . . [n]one of the explanations is wholly satisfactory."64 Dean Griswold's own justification for the privilege, however, turns out to be a quick recitation, without improvement, of the arguments Bentham justly scorned, such as the argument from self-evidence, the "old woman's reason," and the "association with unpopular institutions."65 Dean Griswold adds that the privilege might protect the innocent as well as the guilty,66 a claim that followed by seventeen years a critic's challenge to show one case in which the privilege protected an innocent person.67 Dean Griswold did not acknowledge the previous challenge, but he did offer hypothetical cases in which the privilege, as a revolution or an earthquake, might protect the innocent. His argument did not confront the previous demand for an actual case; but, after a powerful response along the same lines, he withdrew his defense of the privilege based on the protection of the innocent.68

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64 E. Griswold, *supra* note 50, at 7.
65 *Id.* at 7-9 (alleging that self-incrimination is cruel; that the privilege is self-evidently good; and that the privilege prevents persecution based on political or religious beliefs).
66 *Id.* at 9-14.
67 Carman, *A Plea for Withdrawal of Constitutional Privilege From the Criminal, 22* Minn. L. Rev. 200, 204 (1938)("Let the most ardent advocate of constitutional privilege to the criminal point out a single case in all the annals of American jurisprudence where an innocent man has been, or could have been, convicted because compelled to answer questions about the crime of which he was accused."). Forty-nine years before Dean Griswold's book appeared, another critic asserted that "I have never known or heard of a case where an innocent person suffered any disadvantage from [taking the stand]. It stands to reason. The truth is consistent with itself, and everyone who is speaking the truth can tell in the main a straight story." Terry, *Constitutional Provisions Against Forcing Self-Incrimination, 15* Yale L.J. 127 (1906). It is illuminating that after five decades no such case could be found; and, even more illuminating is the fact that, in spite of this, the best defense that could be offered for the privilege at a time of crisis was the appeal to the protection of the innocent.
68 See S. Hook, *Common Sense and the Fifth Amendment* 32 (1957)(if accused is
Indeed, I entertain little doubt that the privilege has caused the convictions of more innocent persons than it has prevented. One may hypothesize cases in which an innocent person might benefit by withholding apparently incriminating evidence for which some unlikely innocent explanation turns out to be true. But, are there any who could not escape conviction by providing a complete account, incriminating and exculpatory evidence together? Against the purely hypothetical risk to the innocent that the privilege combats, its availability to nonparty witnesses often denies substantial exculpatory testimony to the defense. Although this may not be so frequent or so dangerous as to justify defense witness immunity, there are real cases in which the privilege denies exculpatory evidence to the accused, and no real cases in which the privilege protects an innocent defendant.

The one powerful argument for the privilege maintains that, without it, the government would be able to harass its foes with be-

\[\text{innocent by hypothesis, any exclusionary rule might protect the innocent); Griswold, The Right To Be Left Alone, 55 Nw. U.L. Rev. 216, 223 (1960)(privilege is not justified by protection of the innocent but by right of privacy). At some point, one is entitled to wonder how many bad arguments for the privilege must be taken seriously before it becomes fair to conclude, pending some startling innovation, that the privilege is simply a mistake.} \]

\[69 \text{See J. BENTHAM, supra note 47, at 209.} \]

\[70 \text{See S. Hook, supra note 68, at 54.} \]

\[71 \text{As Judge Friendly asserts:} \]

\[\text{In contrast to the rare case where it may protect an innocent person, it often may do the contrary. A man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit; if the former is brought to trial, the best he can do is call the latter as a witness and hope the jury will draw the inference from the witness' assertion of the privilege which the jury cannot be told it may do with respect to his own.} \]

\[\text{Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 680-81 (1974). Judge Friendly offered as an example In re Gault, 387 U.S. 1 (1967), which extended the privilege to state juvenile court proceedings. Gault was accused of making an obscene telephone call but alleged that he had dialed the telephone and then handed it to a companion who made the obscene comments. The extension of the privilege to juvenile court proceedings prevents a suspect in Gault's position from summoning and questioning the allegedly guilty party. The frequency with which demands for defense witness immunity are raised and rejected suggests that the problem is not exotic. See United States v. Turkish, 623 F.2d 769, 772-73 (2d Cir. 1980)(collecting cases), cert. denied, 449 U.S. 1077 (1981).} \]

\[72 \text{See Turkish, 623 F.2d at 772-73; Note, The Case Against a Right to Defense Witness Immunity, 83 Colum. L. Rev. 139 (1983).} \]

\[73 \text{See, e.g., United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979). In Herman, one defendant was a magistrate charged with taking kickbacks from a bail bond agency as consideration for improperly dismissing certain cases. The defense attempted to call court employees as witnesses who allegedly would have testified that they had not shared with the magistrate the kickbacks given to them by the bail bond agency. Rather than so testify, the court employees interposed a claim of privilege, and the Court of Appeals for the Third Circuit refused to order immunity.} \]
lief probes and fishing expeditions. A first amendment privilege for political and religious beliefs, however, would adequately prevent the first evil.\(^{74}\) A fourth amendment right not to respond to compulsory official inquiries unless a court determines that reasonable grounds exist to believe that a crime has been committed and that the person summoned has evidence regarding it would adequately respond to the second.\(^{75}\)

Other arguments for the privilege, as Bentham foresaw, are implausible.\(^{76}\) Invocation of our adversary system, in which "the government [must] shoulder the entire load" of proving guilt,\(^{77}\) merely adds a pejorative label to a doubtful value preference for sport over justice in criminal prosecutions.\(^{78}\) The claim that the privilege helps

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\(^{74}\) See McNaughton, The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d’Être and Miscellaneous Implications, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 138, 145-46 & 166 (1960); Friendly, supra note 71, at 696-97; W. SCHAEFER, THE SUSPECT AND SOCIETY 75-76 (1967) ("the argument for the privilege against self-incrimination as a protection of First Amendment freedoms is diminishing in significance. It is my belief that the proper place for devising solutions to abuses of freedom of speech and association is the amendment which is primarily intended to protect against them.").

\(^{75}\) See Dolinko, supra note 61, at 1081-84; McNaughton, supra note 74, at 146-47. The barrier to such an approach is United States v. Dionisio, 410 U.S. 1, 8-16 (1973), in which the Court held that a grand jury subpoena is not a seizure within the meaning of the fourth amendment. Yet both arrest and subpoena amount to the threat of legal violence to compel attendance at a judicial proceeding. See Hale v. Henkel, 201 U.S. 43, 76-77 (1906) (subpoena duces tecum is a seizure). Surely as a fourth amendment matter, the Supreme Court could hold that, before a witness must respond to official inquiries under threat of institutional violence, there must be reasonable suspicion that a crime has taken place and that the witness has evidence of the crime. The police may not do more, Terry v. Ohio, 392 U.S. 1 (1968), and it seems anomalous to allow a prosecutor to command the police to do what they are not permitted to do themselves. See In re Kelly, 453 A.2d 704 (D.C. 1981) (en banc) (court invokes supervisory power to require reasonable suspicion before admitting fruits of identification procedure in which defendant’s presence was secured by subpoena rather than arrest).

\(^{76}\) Others have reached similar conclusions. See W. SCHAEFER, supra note 74, at 61 (privilege is “a doctrine in search of a reason”); McKay, Self-Incrimination and the New Privacy, 1967 SUP. CT. REV. 193, 214 (“Honesty demands recognition that many of these reasons, faithfully and solemnly repeated year after year, are nothing but pretentious nonsense.”). Most recently, David Dolinko, in an exhaustive article, analyzed the privilege with more sympathy than it deserves, but he nonetheless concludes that it has no accessible justification. See Dolinko, supra note 60.

\(^{77}\) Miranda, 384 U.S. at 460 (citation omitted).

\(^{78}\) There is nothing dispositive about the adversary or the inquisitorial label. See W. SCHAEFER, supra note 74, at 70 (“Our system of civil procedure is adversary,” but that has not barred the introduction of discovery procedures designed to aid in the difficult job of ascertaining the truth.”); J. Grano, supra note 3, at 6 (“It is inquisitorial to require the defendant to stand in a lineup, to yield his blood for testing, to provide handwriting samples, and to provide pretrial discovery of an intended trial defense to the prosecutor. Certainly the investigative grand jury is an inquisitorial institution. . . . [O]ur system contains both accusatorial and inquisitorial characteristics.”) (footnotes omitted). Bentham called the argument based on the government’s duty to “shoulder the whole load” the “fox hunter’s reason,” according to which “[t]he fox is to have a fair chance for his
defeat bad laws is misdirected unless, as seems unlikely, the evil of crime varies with its susceptibility to discovery through interrogation. Thought crimes can be investigated only through interrogation, but so too can many homicides. Claims about the self-evident value of autonomy are inconsistent with the unavailability of the privilege when the witness must incriminate dear ones or reveal ruinous noncriminal facts. It seems also to ignore that crime victims are individuals too; putting one citizen in a state of psychic tension to protect another against homicide or rape is the only defensible value judgment when circumstance forces the choice. In short, the privilege against self-incrimination is a constitutional mistake.

IV. IS THERE A DIFFERENCE BETWEEN COMPELLED TESTIMONY AND A COERCED CONFESSION?

There is a difference between compelled testimony and a coerced confession. At the threshold, it is useful to recall that the Court's antipathy toward confessions had not, until Miranda, drawn any energy from the privilege against self-incrimination. Until its life: he must have (so close is the analogy) what is called law: leave to run a certain length of way, for the express purpose of giving him a chance for escape.” J. Bentham, supra note 47, at 238-39 (emphasis in original).

Bentham stated that the privilege might be justified if the aggregate body of the laws were so constituted, that the mischief resulting from such as are mischievous, outweighs, upon the whole, the good resulting from such as are of a beneficial character. But . . . the supposition . . . seems altogether improbable: for, on this supposition, a state of anarchy would be less mischievous than, would be preferable to, such a state of government.

Today, it might be asked whether, taking modern experience on the whole, the evasion of criminal responsibility by the securities manipulators of the 1930's, the leftists of the 1950's, the figures in the political scandals of the 1970's and 1980's, and the gangsters, price fixers, drug dealers, and tax cheats known to every decade, has made a positive or a negative contribution to society.

The coerced confession cases are the progeny of Brown v. Mississippi, 297 U.S. 278 (1936). In Brown, the state relied on Twining v. New Jersey, 211 U.S. 78 (1908), but the Court held that “the question of the right of the State to withdraw the privilege against self-incrimination is not here involved . . . Compulsion by torture to extort a confession is a different matter.” 297 U.S. at 285. None of the subsequent cases invoked the fifth amendment as authority. As Justice Frankfurter wrote in Malinski v. New York, the question is not whether . . . [the defendant] by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.” 324 U.S. 401, 416 (1945)(Frankfurter, J., concurring). References to the privilege in pre-Escobedo cases can be found, but only in dissenting opinions. See W. Schaefer, supra note 74, at 15 n.41. In Bram v. United States, 168 U.S. 532 (1897), the Court suppressed a confession in a federal prosecution on fifth amendment grounds. Bram surely means that the privilege applies to custodial interrogation. But, in conflating the privi-
1964 decision in *Malloy v. Hogan,* the Court did not apply the privilege to the states as a matter of due process. But constitutional law regulating the extraction of confessions by state officers began thirty years before in *Brown v. Mississippi.*

It is wise as well, when *Miranda* is under attack and much is said about the extravagance of preventive constitutional rules, to recall that the Supreme Court did not just awaken in unison one morning and decide to make war on law and order. Brown confessed after being physically tortured, whipped, as the deputy in charge testified in open court, but “[n]ot too much for a Negro; not as much as I would have done, if it were left to me.” As the Wickersham Commission report suggested, the Mississippi deputy was scarcely less progressive than his contemporary metropolitan colleagues in New York and Chicago.

The Court set out on the course of one who desires neither to tolerate abuse nor forgo the utility of confessions. Unfortunately, the Court described the constitutional test as an inquiry into voluntariness, although, in practice, the test turned on police methods and not on the suspect’s autonomy. As previously pointed out, the test could not turn on the suspect’s autonomy if it were to permit the use of confessions on any significant basis. The holdings of the old voluntariness cases reflect the judgment that evidence is more important than the personal autonomy of suspects, but not as important as the prevention of abusive police tactics.

Is this a defensible ranking of the competing values? I have argued that the privilege is a mistake; that the need for evidence justifies compelling suspects to talk. Excluding notions of individual

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378 U.S. 1 (1964). Not until *Malloy* did the Court retroactively identify the confessions cases as self-incrimination cases, holding in the process that the fifth amendment applies to the states, which is a conclusion that, according to the argument, is necessary for the premise. It is little wonder that this “might have seemed to some a shotgun wedding of the privilege to the confessions rule.” Herman, *supra* note 230, at 465 (footnote omitted).

297 U.S. 278 (1936).

Id. at 284.


autonomy, then, what is wrong with a little torture to extract the evidence? If confessions may not, except in rare cases, be voluntarily obtained, and if evidence is more important than autonomy, why tarry over how the evidence is obtained? Because, again with Bentham, we condemn suffering that is gratuitous.\textsuperscript{86} If summons, contempt, and cross-examination effectively protect the relevant values, every iota of additional suffering spent for the same end is wrong. Torture, moreover, is a special problem for utilitarianism because it represents an especially attractive case for rejecting utilitarianism's "failure to take seriously the distinction among persons."\textsuperscript{87} A slight benefit to all from the total suffering of one is the nightmare, corner solution challenge intuition offers Bentham, and, while he might not have shrunk from it, we certainly will\textsuperscript{88} and should, so long as less dreadful methods might secure the same return.\textsuperscript{89}

\textsuperscript{86} "[A]lthough it has been too frequently forgotten, . . . the delinquent is a member of the community, as well as any other individual . . . and . . . there is just as much reason for consulting his interest as any other. His welfare is proportionately the welfare of the community—his suffering the suffering of the community." J. Bentham, Works 398 (1843).

\textsuperscript{87} J. Rawls, A Theory of Justice § 5, at 27 (1971). Rawls objects to utilitarianism primarily because utilitarianism tolerates, indeed celebrates, a net increase in benefits even if the increase accrues to the wealthiest at the expense of the poorest. \textit{Id.} The objection is far more compelling in the interrogation context, in which one person might be put in complete agony, rather than simply denied some benefit in exchange for a slight enhancement of the personal security enjoyed by all other individuals in the community.

\textsuperscript{88} Bentham was not of one mind on the proscription of torture. In a paper published only recently, he suggested that, in rare instances, torture might be the lesser of two evils, and proposed a system of strict regulation for its lawful employment. \textit{See} Twining & Twining, Bentham On Torture, in Bentham and Legal Theory 39 (M. H. James ed. 1973). Yet, Bentham did not publish the essay and concluded it with the statement that "[i]t is with a trembling hand I enter upon this difficult and invidious task." \textit{Id.} at 54. Bentham relied on a hypothetical involving two arsonists, one of whom is captured, but refuses to turn on his accomplice. Bentham also stressed that the threat of torture might often suffice in such a situation, thus minimizing the actual suffering required. Today, more compelling hypotheticals may be devised. Nonetheless, I doubt the law's ability to cabin institutional torture within the bounds of its hypothetical justification. At any rate, the problem is a serious one, and no one justly may accuse Bentham of sadism; his agitations played an important role in restricting the death penalty, as well as moderating other forms of punishment and produced the first statutory proscription of cruelty to animals. \textit{See} C. Phillipson, Three Criminal Law Reformers 232-33 (1923).

\textsuperscript{89} The strongest case for lawful torture is a paradox: suppose the prisoner has information relating to a gang of sadists that tortures innocents to death. In such a case, I have grave doubts that the absolutist position may be defended even in categorical terms. In utilitarian terms, the case against official torture depends on skepticism about the extent of the need for torture on the one hand and the difficulty of limiting torture to cases of genuine necessity on the other. Consider, for example, Leon v. State, 410 So. 2d 201 (Fla. App.), \textit{rev. denied}, 417 So. 2d 329 (Fla. 1982). The brother of a kidnap victim delivered the ransom to one of the kidnappers, a confrontation ensued, and the kidnapper drew a gun. Police then arrested the kidnapper, and,
A defendant in a civil case, even a serious one threatening social and financial ruin, must answer any otherwise lawful question. But the manner of asking such questions is regulated by law and is not left to the police. No one suggests a privilege against testifying contrary to interest in civil cases. Neither does anyone urge a system in which a doctor charged with malpractice could refuse to answer questions in court but in which the court would receive in evidence a statement obtained after agents of the plaintiff kidnapped the defendant, held her in a secret safehouse for a week or two and questioned her without relent. Tacking Miranda onto such a system—warning the kidnapped doctor that she need not answer and that she may consult a lawyer before further questioning—sounds like comedy. But comedy often has a tragic point.

The problem is not with adding Miranda; the doctor is in a dangerous environment and will be better protected with counsel than without. The problem is the need to kidnap the doctor to obtain her evidence in the first place. My example is bizarre, but it illustrates how the privilege against self-incrimination injures the system. If honored in spirit as well as form, the privilege defeats the search for truth in an extremely serious way. If honored in form only, the privilege invites coercion by driving the search for truth underground.

But if the voluntariness cases ranked the relevant values in their proper order, they also placed too much emphasis on factual conclusions governed by police testimony and erroneously described the key concern as freedom of the will rather than police abuse. The Miranda Court saw the privilege as a solution to the defects of the
due process approach. The substitution of a rule actually, for one only nominally, based on autonomy, given enforcement, would indeed prevent police abuse. But it would also prevent confessions to the same extent that autonomy and confession are incompatible, namely, almost completely.

Miranda's fundamental doctrinal failure, then, is the confusion of police abuse with violations of the privilege against self-incrimination. If the privilege has chased violence and trickery from the courthouse to the police station, then the privilege will pursue the violence and trickery. From the station, violence and trickery must flee either to rampant perjury or to the elicitation of waivers.

The Miranda majority never explained how a suspect could make a "knowing and intelligent waiver" while under the influence of the same inherently compelling environment that justified the warnings. The available evidence, as one might suspect, suggests that coercion now focuses upon the obtaining of waivers. The

90 See Miranda, 384 U.S. at 536 (White, J., dissenting). Justice White stated:

But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the Court will appoint?

Id. (White, J., dissenting).

91 See Special Project, Interrogations In New Haven: The Impact of Miranda, 76 YALE L.J. 1519 (1967); Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1447 (1968); Seeburger & Wetrick, Miranda in Pittsburgh: A Statistical Study, 29 U. Pitt. L. Rev. 1 (1967). The New Haven and District of Columbia studies found that the warnings had little effect; in Pittsburgh, the confession rate, but not the conviction rate, declined significantly. Additional data are canvassed by White, supra note 38, at 19 n.99. Professor White concludes: "The great weight of empirical evidence supports the conclusion that Miranda's impact on the police's ability to obtain confessions has not been significant." Id. See also Frankel, supra note 16, at 528-29 ("multitudes of waivers are found to have occurred each year, despite the fact that any person who knows what he is doing ought to volunteer nothing") (footnote omitted)). The Justice Department's Report on Pre-Trial Interrogation, supra note 4, has not shaken the conclusion that Miranda has not greatly impeded law enforcement. Besides the Pittsburgh study, the Report relies primarily on before-and-after comparisons of confession rates compiled by three prosecutors: Arlen Specter, Aaron Koota, and Frank Hogan. See id. at 57-60. Mr. Specter's data were collected through February of 1967, seven months after Miranda; Mr. Koota's data were collected through September 1966, three months after Miranda; and Mr. Hogan's data were collected through December 1966, six months after Miranda. Controlling Crime through More Effective Law Enforcement, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 201, 223, 1121 (1967) [hereinafter Hearings]. Police unfamiliarity with the new rules is the most likely explanation for the difference between the bulk of empirical data and the immediate before-and-after comparisons. As now-Senator Specter stated recently, "Whatever the preliminary indications were 20 years ago, I am now satisfied that law enforcement has become accommodated to Miranda, and therefore I see no reason to turn back the clock." Kamisar, Landmark Rulings Had No Detrimental Effect, Boston Sunday Globe, Feb. 1, 1987 A27 (Focus Section)(quoting Arlen Specter). There are other defects with the before-
warnings, in this respect, have failed, and I know of only a few extreme critics of police interrogation who want them to work. If every suspect in America took the warnings seriously and immediately invoked the right to counsel, the horde of criminals hitherto confined to the rhetoric of right wing ideologues would indeed be loosed upon us.

From Brown to Miranda to Connelly and Spring, the Court has groped its way toward a legal regime that permits the extraction of confessions but forbids doing so with needless brutality. The privilege against self-incrimination is the chief legal obstacle to achieving such an accommodation. For the privilege means that what interrogation there is must be conducted by the police. So long as the police conduct interrogation, judicial inquiries into actual coercion will prove inadequate to secure the goal of preventing needless brutality. If the courts follow Miranda to its logical conclusion and enforce the privilege fully in the interrogation context, then autonomy will prevail over the need for evidence.

Questions must be asked, but they could be asked by people other than the police, in a public place, under rules of law. We have to live with constitutional mistakes, but, if there is an interpretation of the Constitution that would permit such an arrangement, the Court ought not to overlook it. I turn now to the search for such an interpretation.

V. THE MATTER OF LAW

A. CAN THE CONFLICT BETWEEN THE PRIVILEGE AND THE NEED FOR EVIDENCE BE AVOIDED THROUGH INTERPRETATION?

The Constitution does guarantee the privilege against self-incrimination. Those who believe that constitutions have the function less of advising than of governing political behavior may not ignore

and-after comparisons. The Hogan data were based on the number of confessions introduced before the grand jury, a procedural phase that comes after arrest and arraignment. Hearings, supra, at 1121. The Hogan data, therefore, probably include many cases in which the arrest and interrogation took place before Miranda, so that any statement obtained without the warnings would not be used before the grand jury. All three before-and-after comparisons measure only the frequency of any statement by the suspect, not the frequency of statements by guilty suspects useful in establishing guilt. None of the comparisons demonstrated any effect on the conviction rate, much less the crime rate. Mr. Koota's own statement expressly admitted that the "decisions of the Court in Mapp v. Ohio, Miranda, Escobedo and others, have not caused an increase in the crime rate." Id. at 226. Indeed, Mr. Koota concurred with the observation of Nicholas deB. Katzenbach that the idea that the Court's rulings had increased the crime rate was "unutterable nonsense." Id.

92 See, e.g., Ogeltree, supra, note 3, at 1842-45 (advocating a non-waivable right to counsel during interrogation).
this plain provision of our fundamental positive law. If we are to have fundamental law, we may not pick and choose which of its provisions we are willing to obey.

This concern, I believe, excludes Wigmore's idea of construing the privilege to death because we think its basic policy is mistaken. Grudging constitutionalism eventually will yield to the temptations inspiring it and will altogether nullify the constitutional command. From the fifth amendment, we need to look no further than the present status of the fourth for proof of Wigmore's error. If an interpretation of the privilege were available that allowed humane interrogation for some reason independent of any extrinsic conclusion that the privilege is a mistake, then the extrinsic conclusion might justify selecting that interpretation over another which is equally plausible but more expansive. What we are looking for is an interpretation of the Constitution that allows interrogation but that does not depend on rejecting constitutional value judgments.

For more than a century, the courts have tolerated police interrogation as a way of circumventing the privilege against self-incrimination. Stated so openly, is there any question that, fairly read to secure its objects, the fifth amendment forbids police interrogation for evidentiary purposes?

The privilege cannot be confined to judicial proceedings; the constitutional language, history, and policy, as well as nearly a

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93 See III J. WIGMORE, supra note 46, at 3102 ("The privilege therefore should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached.").


95 The fifth amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself[.]") U.S. CONST. Amend. V. If being "a witness" is limited to taking the stand, then the privilege would not forbid the compulsion of statements outside the courtroom. But, the sixth amendment's confrontation clause provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]") U.S. CONST. Amend. VI. If an out-of-court declarant were not a "witness," this provision would be meaningless. If "witness" means the same thing in both provisions, and there is no reason for thinking otherwise, then the fifth amendment forbids using compelled pretrial statements as evidence of guilt.

96 In 1791, the common law rule held the defendant incompetent, due to interest, to testify at trial. See Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 11-12 (1930). It follows that the privilege applies to the use at trial of out-of-court statements, for in no other way could the accused be made a witness against himself. See KAMISAR, supra note 34, at 49-55.

97 Professor Salzburg acutely points out:

The honest question that is never addressed by the Miranda dissenters is the follow-
century of Supreme Court precedents, all support the application of the privilege to statements obtained outside the courtroom. Typical police interrogation surely constitutes compulsion in any sense of that word. If, as the Supreme Court has held, it is accepted that comment on the failure to take the stand or the denial of public employment constitute forbidden compulsion, the contrary proposition borders on frivolity.

If the privilege applies to police interrogation and interrogation involves compulsion in the great majority of cases, then the use at trial of interrogation’s fruits in the great majority of cases is unconstituting one: If the drafters of the fifth amendment’s privilege against self-incrimination intended that, as long as the possibility of incrimination in a criminal case exists, no magistrate, judge or court of the United States could compel a person to answer questions even though the person is given a lawyer, the proceedings are public and recorded and scrupulously fair—could they possibly have intended to permit other officials (police and prosecutors) to compel the same answers in secret sessions, most often unrecorded, without the suspect having counsel, and with no judicial protection against the nature and manner of questioning? Such an honest question deserves an honest answer; the answer is Miranda. Saltzburg, supra note 3, at 14-15. See also Kamisar, supra note 34, at 45-46 (“Given Counselman v. Hitchcock and McCarthy v. Arndstein, Miranda appears to be an a fortiori case; that is, unless one is prepared to rekindle the Twining-Adamson-Malloy debate.... Assuming a ‘first amendment privilege’ which would relieve the fifth amendment of its burden in ‘belief probes,’ most, if not all, that can be said for the privilege applies in spades to police interrogation.”)(footnotes omitted)); McNaughton, supra note 74, at 151-52 (“Both policies of the privilege which I accept, as well as most of those which I reject, apply with full force to insure that police in informal interrogations not have the right to compel self-incriminatory answers.”).


As Kamisar states:

Dwell for a moment on the reasoning that because police officers have no legal authority to compel statements of any kind, there is nothing to counteract, there is no legal obligation to which a privilege can apply, and hence the police can elicit statements from suspects who are likely to assume or be led to believe that there are legal (or extralegal) sanctions for contumacy. Is it unduly harsh to say, as those who do not use strong words lightly have, that such reasoning is “casuistic”—“a quibble”?

Kamisar, supra note 34, at 46 (footnotes omitted)(quoting Judge Traynor and Professor McNaughton). The aspects of police interrogation discussed supra notes 20-28 and accompanying text suggest an affirmative answer to Professor Kamisar’s question. See also infra note 105.


In an attempt to deny the compulsion inherent in custodial interrogation, the Department of Justice Report offered as an example the questioning of Senator Edward Kennedy following the Chappaquiddick incident. See Report to the Attorney General on the Law of Pre-Trial Interrogation, supra note 4, at 46. If this does not border on frivolity, then the defenders of Miranda might, with straight faces, concede the desirability of a “senatorial exception” to the Miranda rules.
stitional. *Miranda* squarely holds as much. On reason and authority, then, the fifth amendment appears to prohibit the use at trial of any statement secured through custodial interrogation.

*Miranda*, I believe, is vulnerable, but only with respect to its further holding that the warnings and the offer of counsel dispel the otherwise unconstitutional compulsion of custodial interrogation. The same pressures that "compel" the suspect to become

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103 384 U.S. at 461.

We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion [described in the police manuals] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. *Id.* (footnote omitted). The Court "concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

104 There can be little quarrel with the necessity, as opposed to the sufficiency, of the warning and offer of counsel. As Professors Bator and Vorenberg wrote, at a time when they were described as figures in "an interlocking directorate of criminal law institutes with a decided Harvard flavor and a plan to preserve the police's authority to interrogate," F. Grahm, THE SELF-INFECTED WOUND 173 (1970)(emphasis added), "for reasons too obvious to explore at length, [warning the suspect] is absolutely essential. Certainly the minimum condition for the exercise of autonomous choice is to tell the suspect that he has a choice, that there is no legal obligation to talk." Bator & Vorenberg, *supra* note 31 at 71. Since administrative practice before grand juries typically includes a warning, the Supreme Court has not yet had to decide whether a warning is constitutionally required. United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976)(plurality opinion). The *Mandujano* plurality cogently points out, however, that police interrogation is more compelling than are grand jury proceedings, and, accordingly, stronger safeguards are appropriate in the police interrogation context. *Id.* at 579-80. Moreover, a grand jury witness has time before appearing to consult with counsel, who might advise the witness of the privilege's availability. *Miranda's* offer of counsel is consistent with the Court's other self-incrimination cases. Counsel, of course, is available at trial. The witness summoned to testify before a grand jury has the option of consulting counsel before any questioning. The Court also has held that the fifth amendment requires the availability of counsel before the privilege holder must comply with a contempt order compelling the production of evidence in a civil case. Maness v. Meyers, 419 U.S. 449 (1975). In *Maness*, a state trial court ordered production of documents believed by their custodian, but not the court, to be privileged. The court, in an order reviewable only by taking a contempt citation, ordered production, and the custodian's attorney advised him not to comply with the order. The court held the attorney in contempt as well, and the Supreme Court reversed the contempt sanction against the lawyer. Since the underlying litigation was civil in character, the privilege holder had no sixth amendment right to counsel. Instead, the fifth amendment of its own force required the procedural safeguard of legal advice.

The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, could be penalized for advising his client in good faith to assert it. The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in
“a witness against himself” bear equally on the decision to take advantage of the warning.\textsuperscript{105} The same secrecy that clouds the inquiry into the voluntariness of a confession obscures the inquiry into the effectiveness of a fifth amendment waiver.\textsuperscript{106} For these reasons, strong advocates of police interrogation concede that, if \textit{Miranda}'s legal underpinnings are, as I think they fairly clearly are, correct, then any evidentiary use of interrogation’s fruits, even when warnings were given, is per se unconstitutional.\textsuperscript{107} If hypocrisy is the compliment that vice pays to virtue, \textit{Miranda} is the compliment that the public interest pays to the fifth amendment.

The Court’s efforts to enforce the fifth amendment necessarily entail a morally unjustifiable loss of evidence, while its efforts to preserve police interrogation because of its evidentiary value necessarily entail a legally unjustifiable derogation of the constitutional

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the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.
\end{quote}

\textit{Id.} at 465-66 (footnotes omitted). As with grand juries and \textit{Miranda} the Mannes Court recognized that the option of consulting counsel is essential to the enforcement of the fifth amendment right. To be distinguished from all overt confrontations between a suspect and state agents are situations in which the government secretly records or observes statements that evidence a crime, as in cases of undercover agents and electronic surveillance. In such situations, there is no compulsion, because the state action is not the but for cause of the suspect’s statement, only of its discovery. In these situations, the suspect would have made similar statements even in the absence of the microphone or government agent. A person’s innermost thoughts may be committed to writing in a diary; but, if the diary is seized consistently with the fourth amendment, its recitation of incriminating statements does not implicate the fifth amendment, because the declarant is not the conduit of the information. \textit{See} Fisher v. United States, 425 U.S. 391 (1976) (subpoena directing attorney to produce documents that incriminate client does not offend client’s privilege against self-incrimination). Of course, as the government’s presence becomes more overt, difficult lines must be drawn, \textit{e.g.}, Rhode Island v. Innis, 446 U.S. 291 (1980), since state action that is the but for cause of a statement is not necessarily unlawful compulsion. But, this does not undermine the gross distinction between listening to a person talk and causing a person to talk, the distinction that separates mere surveillance from interrogation.

\textsuperscript{105} \textit{See supra} notes 8, 90.


\textsuperscript{107} \textit{See} Grano, \textit{supra} note 8, at 689 (“with unexacting waiver requirements, . . . professional interrogation can coexist with a right of counsel, but only intellectual dishonesty can make such coexistence theoretically compatible.”); Kuh, \textit{Interrogation of Criminal Defendants: Some Views on Miranda v. Arizona}, 35 \textit{Fordham L. Rev.} 233, 235 (1966) (“Had the United States Supreme Court recognized what I think is clear—at least the improbability, if not the impossibility, of an intelligent waiver of the fifth amendment privilege—the justices might have squarely wrestled with the issue and said: ‘Confessions are no longer usable in our adversary system.' ”). The argument is: (1) Major Premise: Any police interrogation, whether with warnings or without, is inherently compelling. (2) Minor Premise: Police interrogation is too useful to be banned. (3) Conclusion: Police interrogation without warnings is not inherently compelling.
decision to include the privilege in our fundamental law. *Miranda* does no more (indeed, it does significantly less) than take the fifth amendment seriously. Every argument against *Miranda* applies with greater strength to the privilege in general. In any situation, some factual difference can be converted into a distinction, with antipathy to the privilege as a policy justification. But each such limitation is subversive of constitutional law, for each elevates a conceded contemporary policy preference over a conceded constitutional value judgment.

Forced to choose between the loss of some evidence and admitting a judicial power to nullify constitutional rights I consider extravagant, I would elect to surrender the evidence rather than the enforcement of constitutional rights. This conclusion supports stronger, not weaker, restrictions on police interrogation, pending some change in the constitutional status of the privilege. In part, this conclusion reflects the belief that a few more criminals, one way or the other, is not a prize worth a wager of constitutionalism. But it also reflects the belief that, to a greater degree than is widely supposed, a change in the constitutional status of the privilege could be achieved by the Supreme Court through a principled exercise in constitutional interpretation.

B. DOES THE CONSTITUTION MAKE THE PRIVILEGE A NECESSARY EVIL?

The fifth amendment plainly imposes the privilege on the federal government. The privilege, however, is binding on the states, not by an express constitutional command, but by judicial decision. In *Malloy v. Hogan*,108 the Court, overruling *Twining v. New Jersey*109 and *Adamson v. California*110 and casting aside dicta from *Palko v. Connecticut*,111 held that the fourteenth amendment’s due process clause incorporates the privilege against self-incrimination. This conclusion is not essential to constitutionalism; if the predicate for incorporation is fundamental fairness, reasons to regard the privilege as no more than a windfall to lucky criminals provide a principled basis for rejecting incorporation. Surely the case against the privilege at least takes it out of the category of those rights that constitute “the very essence of a scheme of ordered liberty.”112 Among the great

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109 211 U.S. 78 (1909).
110 332 U.S. 46 (1947).
112 The *Palko* Court used this lanugage to describe the test of fundamental fairness
jurists who at one time or another classified the privilege as something less than essential to fundamental fairness, in addition to Bentham and Wigmore, are Justices Holmes, Cardozo, Brandeis, Stone, Hughes, Black, Frankfurter, and the second Justice Harlan.\(^\text{113}\)

Against their authority and the arguments inspiring it, Malloy appears to be an extraordinarily weak opinion. The state did not even contest the incorporation issue but claimed only that the scope of the privilege should be decided by state rather than federal standards.\(^\text{114}\) The Court cites the voluntariness cases, which explicitly excluded the privilege from their rationale;\(^\text{115}\) the exclusionary rule cases, whose connection to the privilege is now viewed as utterly untenable;\(^\text{116}\) and Dean Griswold’s rather idiosyncratic statement that the privilege is "a symbol of the America which stirs our hearts."\(^\text{117}\) The quotation accurately captures the tenor of the opinion.

The Court should overrule Malloy and reinstate Twining and Adamson. While the case might stand differently if incorporation were, as Justice Black sometimes maintained, an all-or-nothing proposition,\(^\text{118}\) the Court has long refused to incorporate the provi-

governing the incorporation of items in the Bill of Rights into the fourteenth amendment’s due process clause. See Palko, 302 U.S. at 325.

\(^\text{113}\) Justice Holmes signed the judgment in Twining. Justice Cardozo wrote Palko, and Justices Stone, Hughes, Brandeis, and Black joined his opinion. Justice Frankfurter wrote a concurring opinion in Adamson, rejecting total incorporation and praising Justice Moody’s opinion in Twining. Justice Harlan dissented in Malloy. In addition to these justices, the great lower court judges of the last generation either forthrightly denied, or remained studiously agnostic about, the ultimate value of the privilege. See W. Schaefer, supra note 74, at 59-76; Friendly, supra note 71; Traynor, supra note 10, at 674-75.

\(^\text{114}\) 378 U.S. at 9-10. Indeed, counsel for the state argued that the voluntariness doctrine really rested on the privilege against self-incrimination as support for the incorporation of the fifth amendment privilege. Id. at 10 n.8.

\(^\text{115}\) See supra note 80.

\(^\text{116}\) Malloy, 378 U.S. at 8-9. In Mapp v. Ohio, 369 U.S. 643 (1961), the Court extended the fourth amendment exclusionary rule to the states; Justice Black provided the fifth vote for the Mapp holding. In Justice Black’s view, the exclusionary rule is a corollary of the privilege against self-incrimination, because the privilege entitles the victim of an illegal search to refuse to come forward with evidence of crime. But basing the fourth amendment exclusionary rule on the fifth amendment fails to account for the limitation of the privilege to testimonial evidence, or for the government’s right to introduce even testimonial evidence so long as the defendant is not the conduit of the information. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 414-15 (1971)(Burger, C.J., dissenting); Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 MINN. L. REV. 1083, 1088-90 n.16 (1959). Justice Brennan, the author of Malloy, does not predicate the exclusionary rule in search and seizure cases on the fifth amendment, but instead views it as an essential part of the search victim’s fourth amendment rights. See also United States v. Leon, 468 U.S. 897, 939 (1984)(Brennan, J., dissenting).

\(^\text{117}\) Malloy, 378 U.S. at 9 n.7 (quoting E. Griswold, supra note 49, at 7).

\(^\text{118}\) See, e.g., Adamson, 332 U.S. at 68 (Black, J., dissenting).
sions in the Bill of Rights providing for grand jury presentment and civil jury trial. The Court openly picks and chooses based on a sense of natural justice, and, by that standard, the privilege ought to be disincorporated. This would free the states to develop humane systems of in-court interrogation and would simultaneously enable the Court to tighten restrictions on police interrogation.

The states might retain their own versions of the privilege. State constitutions, however, are easier to change than is their federal counterpart, and developments such as California's adoption of proposition eight suggest that the political will exists to reform state constitutions.

Some states might decide upon one or another of the various proposals for preliminary judicial examination of the accused. But retention of the privilege would convert such proposals into the effective abolition of interrogation. A suspect, warned of his right to silence, advised by counsel, and protected by a magistrate from police bullying, will not confess. Every step in the direction of making the suspect confess, whether by dispensing with counsel, warnings, or by threatening to comment on the refusal to make a statement, is a form of compulsion at war with the privilege.

These proposals accept the logic of nullifying the privilege, without countenancing police interrogation. To the extent such proposals would not succeed in nullifying the privilege, important and humanely obtainable evidence would be forgone, and a corresponding incentive would exist to circumvent the privilege by admitting the fruits of out-of-court interrogation. If preliminary

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119 Walker v. Sauvinet, 92 U.S. 90 (1875)(due process does not require civil jury trial); Hurtado v. California, 110 U.S. 516 (1884)(due process does not require grand jury review in state criminal proceedings); Israel, Foreword: Selective Incorporation Revisited, 71 Geo. L.J. 253, 290-301 (1982)(surveying incorporation decisions).

120 See W. Schaefer, supra note 74; Frankel, supra note 17; Kauper, supra note 62; Pound, Legal Interrogation of Persons Accused or Suspected of Crime, 24 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1014 (1934). Each of these proposals provides for the questioning of the suspect before trial by the magistrate, the prosecutor, or the police at the initial appearance or a preliminary hearing.

121 Griffin v. California, 380 U.S. 609 (1965), bars comment on the defendant's failure to take the stand at trial. Doyle v. Ohio, 426 U.S. 610 (1976), bars comment at trial on the silence of an arrested person after the administration of Miranda warnings. Under Kirby v. Illinois, 406 U.S. 682 (1972), the sixth amendment right to counsel attaches with the commencement of formal proceedings. See also White v. Maryland, 373 U.S. 59 (1963)(per curiam)(admission as evidence of guilt at trial of uncounseled guilty plea made at preliminary hearing violates right to counsel); Counselman v. Hitchcock, 142 U.S. 547 (1892)(privilege against self-incrimination applies before investigative grand jury). If these rulings apply, as it seems they must, to preliminary judicial examination, a suspect subjected to examination would have no incentive to make incriminating statements and would not be likely to believe otherwise.
examination would nullify the privilege, I do not see the point of keeping the privilege on the books.

This is not to say that preliminary judicial examination would not be far superior to police interrogation. But, I would prefer a system of preliminary examination, backed by the trial court's right to consider refusals to answer and, perhaps, with a contempt sanction enforceable by a different judge. At trial, the defendant should be subject to compulsory process like any other witness and subject to impeachment with his prior statement or prior silence. This would secure, without brutality, a far greater quantity of probative evidence and would also provide the police with a strong incentive to comply with prompt presentment requirements.

Although the states might move in the direction I suggest, the Court could virtually ensure such progress by imposing stricter constitutional limits on police interrogation. Accordingly, I propose that statements obtained by the police from persons under arrest be made inadmissible, whether for impeachment or otherwise, at any subsequent trial. At least three constitutional avenues are open to such a rule.

First, the Supreme Court might impose this exclusionary rule as a matter of fourteenth amendment due process. Independently of the privilege against self-incrimination, due process forbids extracting confessions with third degree methods. Surely the level of police cruelty has declined, but, just as surely, enough remains to justify constitutional scrutiny. Even in this relatively enlightened era, members of the nation's largest police force allegedly have interrogated petty criminals with the aid of an electric stun gun. Just as in the days of the Wickersham Commission, such abuse is difficult to measure or to prove. Just as in 1966, when Miranda

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122 The foremost critic of police interrogation, for example, has expressed significant, if not unequivocal, support for the judicial examination proposals. See Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later: Some Comments on a Remarkable Article, in POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY 77.

123 See supra note 80.

124 N.Y. Times, Apr. 25, 1985, at 1, col. 2. The incident may be less exotic than I like to believe. More recently, a unanimous Illinois Supreme Court has held that the state did not carry its burden of showing that injuries, proven to have been suffered by a suspect in the custody of the Chicago police, were not inflicted by the police to extract a confession. The defendant claimed that he confessed only after police beat and kicked him, choked him with a plastic bag, and burned him against a radiator. See People v. Wilson, 116 Ill. 2d 29, 506 N.E.2d 571 (1987).

125 See National Commission on Law Observance and Enforcement, supra note 62, at 48 ("It is conservative to say that for every one of the cases which do by a long chance find a place in the official reports there are many hundreds, and probably thousands, of instances of the use of third degree in one form or another.") (quoting A.B.A. Committee on Lawless Enforcement of Law) (footnote omitted). By now, the multiplier is proba-
was decided, case-by-case adjudication cannot provide an effective remedy. An effective prophylactic against police coercion, therefore, would be at least as justifiable as *Miranda*'s prophylactic approach to the prevention of compelled testimony.\(^{126}\)

Second, the Court could revive *Escobedo* and extend the right to counsel to the time of arrest. This could be coupled with rejection of any waiver that allegedly takes place before the suspect actually consults with an attorney. Many judges and commentators have advocated the first extension,\(^{127}\) and the New York courts have moved

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\(^{126}\) Indeed, the legitimacy objection to *Miranda* is directed against the Court's positive prescription of warnings and counsel, rather than against its negative pronouncement that police interrogation as previously conducted violated the fifth amendment. See Schulhofer, *supra* note 3, at 453-55. In requiring warnings and the offer of counsel, the Court did not so much promulgate legislative rules as declare through judicial dicta a prospective unwillingness to admit confessions in future cases unless certain procedures are followed. The political branches may, of course, elect to interrogate without warnings, but the courts will hold statements so obtained inadmissible. More generally, prophylactic constitutional rules—rules that forbid constitutional state conduct that is practically indistinguishable from unconstitutional state conduct—are recognized and uncontroversial in many areas other than confessions. An example of a prophylactic rule that protects fourteenth amendment due process is the requirement of proof by clear and convincing evidence of dangerousness before the state may commit a mental patient. *Addington v. Texas*, 441 U.S. 418 (1979). This rule prevents the states from committing some individuals who are in fact dangerous; any less stringent rule would permit the states to commit many persons who are not dangerous. Although this approach is controversial, see Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100 (1985); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117 (1978), the alternative is tolerance of state action that does not demonstrably violate constitutional rights. Since most violations of constitutional rights can not be demonstrated with anything approaching certainty, the argument against prophylactic rules depends on the judgment that it is better to tolerate unconstitutional state action than to prevent constitutional state action. The Court always has repudiated this judgment. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.), (the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). For further discussion, see Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 Cal. L. Rev. __, __ n.113 (1987) (forthcoming). Hostility to prophylactic rules often varies with the particular rule under consideration. For example, Professor Caplan, a leading defender of police interrogation, urges a constitutional prophylactic rule requiring proof beyond a reasonable doubt that a confession was obtained voluntarily to enforce the due process voluntariness test. See Caplan, *supra* note 3, at 1473.

\(^{127}\) In a pronouncement later rendered inoperative by *Kirby v. Illinois*, 406 U.S. 682
in the direction of the second. With the demise of a constitutional privilege, the Court could take both steps at once.

Third, the Court could constitutionalize, on fourth amendment grounds, the old McNabb-Mallory rule. Interrogation typically requires more time than it takes to simply bring the arrested person before a judge for commitment. In theory, arrest has no purpose other than enabling presentment to a judge, but, in practice, it is often used for investigative interrogation. The Court could hold any statement obtained during a period of unnecessary delay before presentment the fruit of an unreasonable detention which is, therefore, inadmissible. Indeed, the chief obstacle to constitutionalizing the McNabb-Mallory rule is the need for confessions. It follows that, with the demise of the privilege, this approach could contribute significantly to the elimination of police interrogation.

Under any of these approaches, the states could be counted on to respond to the overruling of Malloy. Regrettably, no principled interpretation of the Constitution can enable parallel federal reforms until the fifth amendment privilege is repealed. Moreover, if the privilege, unlike the due process voluntariness test, is ultimately concerned with autonomy, then something far stronger than Miranda would be required to protect the privilege against pretrial in-

(1972), a majority of the Escobedo Court opined that the fact that “[t]he interrogation here was conducted before petitioner was formally indicted ... should make no difference.” 378 U.S. at 485. See also Crooker v. California, 357 U.S. 431, 443-48 (1958) (Douglas, J., dissenting); In re Groban, 352 U.S. 330, 344 (1957) (Black, J., dissenting) (“The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.”) (footnote omitted); Herman, supra note 30, at 490-95; Ogeltree, supra, note 3, at 1842-45.

128 See People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (once suspect has requested counsel or counsel has attempted to see suspect, suspect may not effectively waive until after consulting with counsel).

129 For a strong defense of this construction of the right to counsel, even given the availability of the privilege against self-incrimination, see State v. Wyer, 320 S.E.2d 92, 106-12 (W. Va. 1984) (Harshbarger, J., dissenting).


131 See Y. KAMISAR, W. LAFAYE & J. ISRAEL, supra note 106, at 525, (“many hoped (and many others feared) that some day the Court would apply the rule to the states as a matter of Fourteenth Amendment due process.”). Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1982), effectively overruled McNabb and its progeny, because, unlike Miranda, which the statute also purports to overrule, McNabb rested on the Supreme Court’s federal supervisory power rather than on the fourth or fifth amendment.

132 See Watts v. Indiana, 338 U.S. 49, 57 (Douglas, J., concurring); W. Schaefer, supra note 74, at 26 (“Since police interrogation has ordinarily been conducted prior to the presentation of the suspect before a magistrate, it is usually argued that a rule requiring prompt hearing on probable cause would bring police interrogation to an end.”) (footnote omitted).
This drawback, however, is likely to prove less serious than it at first appears. Federal prosecutors are adept at employing the investigative grand jury and granting immunity to overcome the obstacles to law enforcement that the privilege poses. The outstanding record of federal agents with respect to humane interrogation, a record that goes back to the Wickersham Commission, strongly suggests that, unlike their state counterparts, federal officers have little need to extract confessions outside of court. Those federal crimes that raise the need, such as bank robbery, are punished concurrently by the states. At any rate, enforcement of unambiguous constitutional judgments simply is not an issue governed by contemporary policy preferences. If effective enforcement of the privilege at the federal level allows some criminals to go unwhipped of justice, so be it.

VI. Conclusion

As long as society struggles to protect itself from crime, self-incrimination will be with us. The only question is: how will society go about inducing individuals to incriminate themselves? Very few will ever do so autonomously, and none should do so in response to needlessly cruel pressures. *Miranda* represents a valiant judicial effort to reconcile these judgments, but, as long as obtaining confessions is seen as legitimate and even necessary, any serious restriction on police interrogation is socially unacceptable.

That leaves giving up the privilege against self-incrimination. No acute argument or memorable phrase will lead us to do that—witness Bentham. Yet, ironically, we do not really need to be persuaded that the privilege is a mistake. The institution of police interrogation proves our practical rejection of the privilege. Regarding the values we hold, rather than those we celebrate, that institution speaks more eloquently than any slogan, any argument.

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133 *See supra* notes 106-07 and accompanying text.