REQUIEM FOR *MIRANDA*: THE REHNQUIST COURT'S VOLUNTARINESS DOCTRINE IN HISTORICAL PERSPECTIVE

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* J.D. University of Chicago, 1970; Associate Professor of Law, California Western School of Law. Previous publications in this field include: L. BENNER & E. NEARY, THE OTHER FACE OF JUSTICE (1973) and Benner, *Tokenism and the American Indigent*, 12 AM. CRIM. L. REV. 667 (1975). This article is dedicated to the memory of Professor Soya Mentschikoff, who taught the value of the Hohfeldian concepts. Without their insight, the distinction between privilege and right would doubtless have remained forever blurred, and the thought would never have occurred to look beyond "compulsion" to discover the historical origins of the "privilege" which was the precursor of the fifth amendment. The author also wishes to express his gratitude to Professors Michael R. Belknap and Stephen J. Schulhofer for their insightful critique of earlier drafts, and to Professor Chin Kim and the staff of the CWSL library for their generous assistance.

I. INTRODUCTION

Hailed as one of the "great landmarks"[1] in humanity's struggle to make itself civilized, the privilege[2] against self-incrimination has also been disparaged as a "mark of traditional sentimentality."[3] These disparate viewpoints, echoing from a different era, remind us that the current controversy[4] surrounding the issue of self-incrimination is not new. Indeed, as even a casual glance at history discloses, freedom from self-incrimination has been an embattled concept for centuries. Having sprung from the essential nature of accusatory Anglo-Saxon criminal procedure in the twelfth century, the privilege fell into eclipse during the religious persecutions of the sixteenth and early seventeenth centuries. With its restoration at the dawn of the eighteenth century, however, it acquired increased significance and became an established principle of justice.[5]

The reason for this historical ebb and flow is not difficult to discern. Criminal procedure is after all but a reflection of a society's system of values, and the privilege against self-incrimination stands as an important determinant that shapes the moral relationship between the state and the individual. Although sometimes endangered to the point of extinction by the inherent tendencies of governmental power, especially

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1. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

2. It is important to note at the outset that this Article treats the "privilege" against self-incrimination as an analytically distinct legal relation, separate and apart from the "right" to freedom from compelled self-incrimination guaranteed by the fifth and fourteenth amendments of the Constitution. *See infra* note 8.

3. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2251, at 317 (3d. ed. 1940). Although Wigmore is noted for his lack of sympathy for the privilege, he firmly supported its application in circumstances where a suspect is questioned before being formally charged. *See id.* at 307-10.

4. *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986) [hereinafter MEESE REPORT] recommending that the Department seek to have Miranda v. Arizona, 384 U.S. 436 (1966) overruled. Endorsed by the former Attorney General, Edwin Meese III, the report has touched off a storm of protest and a flurry of academic debate. *See* Dripps, *Against Police Interrogation*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988); Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda", 54 U. CHI. L. REV. 938 (1987); Ogletree, *Are Confessions Really Good For the Soul?*, 100 HARV. L. REV. 1826 (1987); Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Schulhofer, *The Fifth Amendment at Justice, A Reply*, 54 U. CHI. L. REV. 950 (1987); Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); *What Hogwash!*, L.A. Times, Jan. 23, 1987, Part II, at 8, col. 1; Shenon, *Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights*, N.Y. Times, Jan. 22, 1987, at 1, col. 2. This Article posits that the current debate is being conducted through a veil of ignorance because of our lack of understanding of the true origins of the privilege against self-incrimination.

5. *See infra* Part II.

when left unchecked by an indifferent (or worse, intolerant) political majority, protection against self-incrimination has nevertheless always reemerged as a fundamental part of our system of criminal justice. The fifth amendment, its stylistic elegance masking its ambiguity, captures the drama of this turbulent history in its mandate that no person shall be "compelled in any criminal case to be a witness against himself."[6] As grand statements often do, however, this phraseology obscures more than it reveals.

This Article retraces the path of history back to the origins of the privilege against self-incrimination and rediscovers a cluster of rights, embraced by the historical "privilege,"[7] which are today no longer

6. U.S. CONST. amend. V.

7. Seventy-five years ago, Professor Hohfeld recognized that the term "right" had been used as a generic concept to indiscriminately depict a wide variety of legal relations. Courts had used the words "right" and "privilege" as if they were synonymous; one court, for example, defined "privilege" as "the investiture with special or peculiar rights." United States v. Patrick, 54 F. 338, 348 (1893). In an illuminating article published in 1913, Hohfeld developed a system of fundamental jural relations which greatly facilitated more precise definition. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Under this scheme of contrasting jural opposites and reciprocal jural correlatives partially set out in the table below, the term "right" is narrowly defined to encompass only a legal relation which entails a corresponding duty:

Jural Correlatives		*Jural Opposites*	
right	: duty	right	: no-right
privilege:	no-right	privilege:	duty

The term "privilege" on the other hand signifies a relation characterized by the absence of duty. Thus, if A has a privilege with respect to B concerning the performance of particular conduct, A has no duty to B to perform the conduct and B has no right to have the conduct performed. While one can quibble about Hohfeld's use of terminology, and doubt whether the universe of legal relations can be neatly squeezed into the Hohfeldian concepts, this does not detract from the conceptual clarity and analytical precision which can be brought to bear by employing them.

If, therefore, "privilege" is the opposite of duty, as Hohfeld posits, then in the present context, the "privilege" against self-incrimination expresses a legal relationship which may be simply stated as follows: A suspect has no duty to answer incriminating questions posed by the state, and the state correspondingly has no right to an answer.

It is important to note that the Hohfeldian concept of "privilege" does not include within its parameters the right to non-interference, although such a right is often associated with it. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919). The fifth amendment "right" against compelled self-incrimination can thus be seen as an important corollary of the "privilege" against self-incrimination.

In this Article the use of the term "privilege" in its Hohfeldian sense is signified by the use of quotation marks. The term is used without quotation marks (or alternatively the expression "freedom from self-incrimination" is used) when speaking in common parlance of the cluster of rights historically associated with the "privilege."

For further discussion of Hohfeldian analysis of legal relationships see Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938). Wilson, *Hohfeld: A Reappraisal*, 11 U. QUEENSL. L. J. 190 (1980).

associated with the fifth amendment. The central thesis of this Article is that, because of our ignorance of history, we have failed to distinguish analytically between the historical "privilege" against self-incrimination and the relatively more recent right against compulsory self-incrimination. This failure has led to a one-dimensional analysis of self-incrimination issues (focusing solely upon compulsion) which has obfuscated fundamental values underlying once protected by the "privilege," engendered muddled thinking, and given rise to a confused doctrine riddled with anomalies. Indeed, the confusion of thought created by the entangling of "privilege" and "right" is apparent in the common assertion that there is a "right to silence." Where does this "right" come from? The fifth amendment does not by its terms give a suspect a "right" to silence. If it did, then it logically would follow that a corresponding duty exists on the part of the police not to ask incriminating questions at all, because such governmental activity obviously infringes upon that right.[8] The only right which literally emerges from the text of the fifth amendment, however, is the right not to be compelled to be a witness against oneself. Because our understanding of freedom from self-incrimination has been conceptually limited by the narrow confines of this picturesque language, the values that gave rise to the ancient privilege have been forced to find their expression in the concept of "compulsion." While the Supreme Court broadly defined the term "compelled" in *Miranda v. Arizona*,[9] the Court nevertheless backed away from the import of its definition and, in an unabashed compromise, left the scope of the privilege to be determined by means of an unwieldy and ill-suited tool—the *Miranda* waiver doctrine.[10] As a result, current practices in our police stations produce doctrinal absurdities, because the idea that any sane person would volun-

8. A "right" in Hohfeldian analysis implies a duty which is coextensive with the parameters of the right. Thus, if A has a legal "right" vis a vis B, then B must have a corresponding duty toward A which is fully congruent with the scope of the right. Otherwise the legal relation empowering a court to give effect to A's right, by mandating or enjoining B's conduct with regard to A, cannot by definition exist. Hohfeld, *supra* note 7, at 31-32. It then follows that if A had a right to maintain silence before B, a representative of the state, B's duty could not be limited solely to refraining from the use of compulsion, but must also encompass any conduct that would interfere with A's ability to maintain silence.

9. 384 U.S. 436 (1966).

10. *Id. Miranda* held that although custodial interrogation created a coercive environment which would be irrebutably presumed to constitute compulsion for the purposes of the fifth amendment, the right to be free from such compulsion could be waived, if the waiver was voluntarily, knowingly and intelligently made following proper police warnings. Because the waiver normally occurs in the same police-dominated environment that led the Court to find custodial interrogation violative of the fifth amendment, this anomaly has been perceived as revealing a fatal flaw in the

tarily (much less knowingly and intelligently) waive the right not to be subjected to compulsion is pure nonsense.

As this Article explains, we owe the present bankruptcy of theory in part to the careless drafting of the self-incrimination clause. The clause, in its stylish expression of a "self-evident" principle of justice, fails to elucidate either the parameters of the "privilege" or the underlying cluster of rights associated with it. As a result, subsequent interpretation has stood the historical understanding of the privilege against self-incrimination on its head, permitting what was once forbidden.

To trace the development of this flawed interpretation, this Article first examines how the origins of freedom from self-incrimination arose from the fundamental nature of the relationship between the individual and the state during the twelfth century. The essence of that relationship, still reflected today by our adversary system of criminal justice, was characterized by the inherent right of the citizen to individual dignity, self-preservation and self-determination. The fundamental guiding principle was fairness.

In its ancient form,[11] we find that the privilege against self-incrimination protected our English ancestors from any interrogation at all in the absence of a formal charge based upon sufficient cause, manifested by a complaint sworn to under oath or an indictment of twelve lawful members of the community. The "privilege" was therefore accompanied, at its earliest inception, by two corollary rights: the right to formal notice of the accusation, and the right to freedom from interrogation unless justification (probable cause) for the accusation was evidenced either by oath or indictment. The ancient privilege thus shielded one from interrogation in the absence of a reasonable basis for suspecting wrongdoing, and protected against the unfairness of being ensnared by questioning that was not limited to the parameters of a formal charge. At this stage of development, however, the "privilege" provided protection only until a formal charge had been lodged. After a proper charge was laid, the state could compel the accused (by force if necessary) to plead to the charge under oath, and could interrogate the accused upon that answer under oath.[12]

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logic of *Miranda*. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 671-72 (1986).

11. The original formulation of the privilege was embodied in the expression *nemo tenetur prodere seipsum*. *See infra* note 50 and accompanying text.

12. *See infra* note 43 and accompanying text; text accompanying notes 63-65. At that time,

During the late seventeenth century the privilege entered a second stage of development. In reaction to the abuse of royal power, the right to be free from compelled self-incrimination evolved during this stage and ultimately resulted in a bar on any questioning of an accused *at trial.* At the same time, the common law rule of evidence known as the voluntariness doctrine,[13] which had originated more than a century earlier in connection with the acceptance of guilty pleas, became entangled with the privilege and underwent a parallel development. The same underlying concern for fairness toward the individual that gave rise to the ancient privilege also caused this common law voluntariness test to evolve into a rule that virtually barred any *pre-trial* interrogation of a prisoner. Under this conception of voluntariness the slightest degree of influence exerted upon the accused to speak gave rise to a presumption of compulsion that rendered the confession inadmissible. At the end of the nineteenth century the Supreme Court, in *Bram v. United States,*[14] engrafted this common law rule onto the fifth amendment, thereby equating the two. The Court thus enveloped the privilege against self-incrimination with a rule of evidence, causing the true origins of the privilege to become lost in the shadows of history. Although the twin rights to fair notice and probable cause ultimately found expression in our fifth amendment right to a grand jury indictment and our fourth amendment right to freedom from unreasonable seizure, the intimate connection between these rights and the "privilege" against self-incrimination is now forgotten.

As a result of the failure to appreciate this historical connection, the Rehnquist Court's recent confession decisions represent an unexamined departure from the values that gave rise to the privilege against self-incrimination. This deviation is vividly demonstrated in the Court's incorrect assertion in *Colorado v. Connelly,*[15] that "[t]he sole concern of the fifth amendment, on which *Miranda* was based, is governmental coercion."[16] Indeed, the Court seems to have turned the ancient "privilege" on its head, holding in *Colorado v. Spring*[17] that a suspect has no right to

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little distinction existed between civil and criminal procedure. *See, e.g.,* Hudson, *A Treatise of the Court of Star Chamber* (circa 1635), in 2 COLLECTANEA JURIDICA 167-68 (1792).

13. See *infra* notes 232-54 and accompanying text.

14. 168 U.S. 532 (1897).

15. 479 U.S. 157, 170 (1986).

16. *Id.* As the discussion of *Colorado v. Connelly, infra* Part IX, reveals, the Court's choice of the term "coercion" rather than "compulsion" is a matter of some significance.

17. 479 U.S. 564 (1987). Federal agents arrested Spring in Missouri following the agents' un-

fair notice that he is suspected of murder when he agrees to submit to custodial interrogation regarding a separate and less serious offense. By far the most important development, however, has been *Connelly*'s renovation of the "voluntariness" concept to create a monochromatic test which now controls the determination of both due process and waiver issues.[18] The central teaching of *Connelly* is that voluntariness simply entails the absence of official coercion, and does not otherwise require ethical conduct or fairness in dealing with the accused. This position abrogates two centuries of constitutional jurisprudence and ignores the historical origins of the privilege against self-incrimination. Moreover, the Court's conception of "coercion"—now defined subjectively as what is "offensive" to the judge making the call—subverts *Miranda's* definition of compulsion[19] and opens the door to a panoply of deceptive police interrogation tactics, which create the potential for unprincipled exploitation of the poor, the uneducated and the mentally disabled. If one couples the *Connelly* voluntariness doctrine with the Court's barebones approach to waiver,[20] (which is devoid of any requirement that an accused appreciate the significance of the situation confronting her, or, after *Spring*, even know the charge upon which she is being interrogated) it becomes apparent that the Rehnquist Court's new voluntariness doctrine fashions a novel approach to confessions which threatens to sever the

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dercover purchase of stolen firearms. The informant who tipped the agents to Spring's illegal firearms dealing had also told them that Spring had killed a man named Walker in the state of Colorado. After Spring waived his *Miranda* rights and agreed to talk to the agents about the firearms charge, the agents, without telling him that they suspected him of murder, indirectly questioned Spring about the Colorado homicide and obtained an admission that he had "shot another guy once." *Id.* at 567. Spring subsequently made a full confession to Colorado authorities. At Spring's trial in state court for the Walker murder, the court excluded the admission to federal agents on the ground that it was irrelevant, but admitted the full confession made to state authorities. The defense argued, however, that the full confession was the tainted fruit of the federal interrogation which had been conducted without fair notice of the subjects to be covered. The Supreme Court held that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment *privilege.*" Id. at 577 (emphasis added).

18. *See infra* Part IX.

19. *See infra* Part IX, *C.*

20. *See* Moran v. Burbine, 475 U.S. 412 (1986):

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statement to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

Id. at 422-23.

historical link between the privilege against self-incrimination and the concept of fundamental fairness as the touchstone of due process of law.

II. REDISCOVERING THE "PRIVILEGE" AGAINST SELF-INCRIMINATION

> The life of the law has not been logic: It has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. Oliver Wendell Holmes, Jr.[21]

Perhaps the first recorded exercise of the privilege against self-incrimination occurred in Judea some two thousand years ago:

> And Jesus stood before the governor:
> and the governor asked him, Saying,
> Art thou the King of the Jews?
> And Jesus said unto him, Thou sayest
> And when he was accused of the chief priests
> and elders, he answered nothing.
> Then said Pilate unto him, Hearest thou not
> how many things they witness against thee?
> And he answered him to never a word; insomuch
> that the governor marvelled greatly.[22]

Another biblical example concerning the Apostle Paul demonstrates that a rudimentary, status-based right to freedom from compulsory self-incrimination existed during Roman times. Paul was taken into custody after a riot in Jerusalem, and the authorities commanded that he be whipped until he confessed. Paul, being a full citizen of Rome, challenged the centurion who was about to flay him, asserting that it was

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21. O.W. HOLMES, THE COMMON LAW 1 (1881). To those who with Maitland understand that the "seamless web" of history is torn by the telling of a piece of it, and that it is thus impossible for a few selected events to be extracted from that historical fabric without some inevitable distortion, Holmes' exhortation is offered by way of apology.

22. *Matthew* 27:11-14. The earliest origins of freedom from self-incrimination appear to have been derived from the ancient Scriptures of Biblical times. Under Talmudic law, which reflected ancient oral teachings concerning the laws of Moses, an accused had an absolute (and unwaivable) "right" against self-incrimination. Thus the distinction between voluntary and compelled confessions was irrelevant. No statement from the mouth of the accused could be used against him criminally. Indeed, the accused was not allowed to confess, or even plead guilty before the Sanhedrin, the criminal court. According to Maimonides, who codified the rule in the twelfth century, the principle that an accused could not be convicted upon his own admission was a "divine decree." *See* L. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 433-41 (1968).

unlawful to whip a Roman citizen. The centurion reported this to his superiors and Paul was later released unharmed.[23]

According to Sir James Stephen, although the use of torture was a regular aspect of Roman criminal procedure, it was nevertheless reserved in most cases for slaves.[24] Indeed, when an owner was suspected of an offense, it was his slaves who were often tortured in an attempt to gain evidence against him.[25] The importance of one's status as a protection against compulsory self-incrimination also appears in Europe during the Middle Ages, where high public officials, doctors and lawyers were immune from interrogation by torture.[26]

A. The First Stage of Development Under English Common Law

The English origins of the freedom from self-incrimination lie in a tangled web of obscure historical events. Wigmore saw the roots of the modern privilege as developing out of an ongoing jurisdictional power struggle between the Crown and the Church beginning in the twelfth century and culminating in the religious and political strife of the seventeenth century.[27] An undue emphasis upon such an institutional perspective, however, obscures the human values underlying this struggle, and ignores the complexity of the issues involved. As Lenard Levy points out, a multitude of political, religious and legal struggles shaped the privilege in England.[28] McCormick, building upon the research of Mary Hume Maguire, likewise suggested that Wigmore's view reflects too narrow a reading of history, and observed that early opposition to self-incrimination stemmed from "important policies of individual free-

23. *Acts* 22:24-30.

24. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 47-48 (1883).

25. *Id.* at 48.

26. J. LANGBEIN, TORTURE AND THE LAW OF PROOF 13 (1977).

27. J. WIGMORE, *supra* note 3, § 2250, at 278.

28. The English origins, so much more complex, spilled over legal boundaries and reflected the many-sided religious, political, and constitutional issues that racked England during the sixteenth and seventeenth centuries: the struggles for supremacy between Catholicism and Protestantism, between Anglicanism and Puritanism, between King and Parliament, between arbitrary rule and limited or constitutional government, between the suppression of heresy and sedition and freedom of conscience and press. Even within the more immediate confines of law itself, the history of the right against self-incrimination is emeshed in broad issues of great import: the contests for supremacy between the accusatory and the inquisitorial systems of criminal procedure, between the common law and the royal prerogative, and between the common law and its rivals, canon and civil law.

L. LEVY, *supra* note 22, at 42.

dom and dignity."[29] These values would lead to the triumph of the privilege against self-incrimination in the common law courts of England by 1700.[30]

What were the values, embodied in the privilege against self-incrimination, which our English ancestors struggled for over six centuries to preserve? It is well known that early English resistance to official interrogations by both the ecclesiastical courts and the King's Council (and later the Court of High Commission and the Court of Star Chamber) by interrogation focused upon the use of the oath *ex officio*.[31] The commentators' fascination with the compulsory aspect of the oath (*tortura spiritualis*),[32] however, has resulted in insufficient attention being

29. C. MCCORMICK, MCCORMICK ON EVIDENCE § 114 (Cleary rev. 1984); Maguire, *Attack of the Common Lawyers on the Oath Ex Officio*, in ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN (1936).

30. J. WIGMORE, *supra* note 3, at 298-99; G. WILLIAMS, THE PROOF OF GUILT 43 (1963).

31. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). The use of the oath *ex officio* originated in canon law in 1206 and became systematized in 1215 by the Fourth Lateran Council, following the abolition of the ordeals of water and hot iron (apparantly because they were too easy to pass). The use of the oath was part of a comprehensive system of inquiry (*processus per inquisitionem*) for rooting out heritics which included the use of paid informers. Maguire, *supra* note 29, at 201; Silving, *The Oath*, 68 YALE L.J. 1329, 1345 (1959).

Because the *ex officio* oath was actually an oath to tell the truth (*de veritate dicenda*) it presented an anomaly which initially troubled theologians. Theological doctrine had consistently asserted that no duty to incriminate oneself existed. Indeed, St. Thomas Aquinas (1225?-1274) had drawn a clear distinction between silence and falsehood, maintaining in the *Summa Theologica* that one who took an oath to tell the truth could remain silent in the absence of accusation (*infamia*) or express evidence of guilt. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II, qu. 69, art. 2, at 257-58 (Fathers of the English Dominican Province trans. 1918). If there was no duty to incriminate oneself then whence came the authority for demanding a suspect take the oath and answer questions? The bootstrapped answer was that the authority derived from the official's power to inquire, thus explaining the suffix *ex officio* which became attached to the oath. Silving, *supra*, at 1345.

The oath *ex officio* was made part of English ecclesiastical procedure in 1236 by Cardinal Otho, a representative of Pope Gregory IX. The oath (as preserved from a version administered by the Court of High Commission during the sixteenth century) took the following form: "You shall swear to answer all such Interrogatories as shall be offered unto you and declare your whole knowledge therein, so God help you." Maguire, *supra* note 29, at 200.

32. According to Professor Helen Silving, an oath was originally a self-curse performed by primitive man as a means for assuring that a promise would be kept. With the advent of Christianity, divine retribution became the instrument of enforcement. Thus, the devout Christian in medieval England faced a cruel dilemma when questioned under an oath to tell the truth. Assuming that a truthful answer would be incriminating, the suspect had the unhappy choice of either facing temporal punishment, or suffering everlasting damage to his soul by committing the sin of perjury. Given the devout religious beliefs of that time, the use of the oath was seen as being more cruel than bodily torture. In 1725, the Council of Rome banned the use of the oath by an accused in a criminal trial, and under subsequent British practice (which also applied in the American colonies at the time of the Revolution) a criminal defendant could not testify under oath at his trial. Silving, *supra* note 31,

paid to other equally important and well documented objections to such *ex officio* interrogations.

1. The Right to Fair Notice and Justified Suspicion Before Interrogation

As the term *ex officio* signifies, such interrogations were conducted by virtue of the authority of the interrogator's office.[33] This inquisitorial procedure was marked by the absence of any known accuser and the failure to reveal specific charges before the interrogation began.[34] One of the earliest documented objections to such *ex officio* interrogations concerned the activities of a zealous prelate Robert Grosseteste, Bishop of Lincoln (1235-1253). In 1246 the Bishop conducted a sweeping inquiry into the morals and conduct of both clergy and laity, irrespective of their station in life.[35] The resulting public outcry led to a writ of prohibition issued by Henry III.[36] As Maguire points out, no one claimed that the Bishop lacked jurisdiction over the subjects he investigated. Rather, the public objected to the Bishop's procedure, a procedure which it considered " 'repugnant to the ancient customs of our Realm' and contrary to the spirit of the common law."[37]

Was this objection merely a reaction to the use of the oath? Morgan, who made a detailed study of this event, concluded that the "offensive characteristic" of the Bishop's procedure, of which the oath was only a part, "was its requirement that a person who had not been charged by a formal presentment or accusation answer under oath all questions put to him."[38] Thus, the opposition did not focus on the soul-threatening dilemma created by the use of the oath, but rather on the omission of procedural rights which were considered essential prerequisites before one could be subjected to such a dilemma. As discussed below, events in the

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at 1343-1350. Although English judges, in their discretion, permitted defendants to make unsworn (and uncross-examined) statements from the dock, the right to give sworn testimony was not reinstituted until the passage of the Criminal Evidence Act of 1898. G. WILLIAMS, *supra* note 30, at 45-48.

33. Maguire, *supra* note 29, at 203.

34. *See id.* at 204; L. LEVY, *supra* note 22, at 39. The officer simply instituted the proceeding based upon his own suspicions, whether they be founded upon the report of a secret informant or otherwise.

35. Maguire, *supra* note 29, at 205-206.

36. *Id.*

37. *Id.*

38. Morgan, *supra* note 31, at 1.

preceding (twelfth) century that involved similar objections *prior* to the introduction of the oath *ex officio* into England buttress this conclusion.

Scholars have often remarked that the twelfth century was a "luminous age throwing light both on the past and on the future."[39] Certainly that was true of the reign of the great Plantagenet Henry II (1154-1189). Central to the Anglo-Saxon system of that time was the necessity of a precise and properly substantiated accusation. A "criminal" proceeding was initiated either by individual complaint (called an appeal) or by an accusing jury.[40] In contrast, under canon law, which followed Roman civil law, a secret informant or the judge could institute a proceeding in ecclesiastical courts based upon suspicion.[41] In 1164, Henry, who was keenly interested in the work of justice, sought to force the ecclesiastical courts to adopt the common law procedure.[42] Pollock and Maitland summarize Henry's position as follows:

> Laymen ought not to be put to answer in those courts upon a mere unsworn suggestion of ill fame. Either someone should stand forth and commit himself to a definite accusation, or else the ill fame should be sworn to by twelve lawful men of the neighborhood summoned for that purpose by the sheriff: in other words, the ecclesiastical judge ought not to proceed *ex officio* upon private suggestions.[43]

It is significant that Henry II made these efforts well before the introduc-

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39. R. C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 349, (77 Seldon Society 1959); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 672-73 (2d ed. 1951).

40. 1 F. POLLOCK & F. MAITLAND, *supra* note 39, at 151-52; 2 F. POLLOCK & F. MAITLAND, *supra* note 39, at 466, 642. The complainant who "appealed" of a felony was (with certain exceptions) required to offer to prove the truth of his claim "by his body," (i.e. trial by battle) and one who offered only a bare assertion was not even entitled to an answer from the defendant. *Id.* at 605-06. The accusing jury was, of course, the forerunner of our grand jury. *See infra* note 43. Quotation marks are used around the word criminal because at this stage there was no formal distinction between civil and criminal matters. R.C. VAN CAENEGEM, *supra* note 39, at 35-36.

41. Maguire, *supra* note 29, at 203.

42. 1 F. POLLOCK & F. MAITLAND, *supra* note 39, at 151-52.

43. *Id.* One should note that the jury of twelve lawful men did not function like a trial jury, but rather served in this instance in a manner similar to our grand jury. Bracton (circa 1250) records that even when one is accused by individual appeal, the defendant may obtain a writ for such an inquest to determine whether the appeal was lodged because of hate and spite. 2 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIEAE (ON THE LAWS AND CUSTOMS OF ENGLAND) 346-47 (S. Thorne trans. 1968).

Bracton's concern for the reliablilty of common suspicion is also noteworthy, in that he particularly cautioned the judge to question the members of the accusing jury to determine that the suspicion against the accused did not come from "some low and worthless fellow, one in whom no trust must in any way be reposed. Let the judge so inquire into matters of this kind that his glory and the

tion of the oath *ex officio* in England, and indeed even before such an oath had been incorporated into canon law.[44] Thus, at this early stage, the developing privilege against self-incrimination appears to have been founded upon ancient conceptions of fundamental fairness that gave rise to the accusatory system of Anglo-Saxon justice. A suspect was entitled to the benefit of a definite accusation,[45] to know who his accusers were, and to have recourse to a neutral determination that suspicion against him was justified, *before* he was to be put to answer. These ancient customs formed the cornerstone of the accusatorial system of early English criminal procedure and effectively precluded interrogation of a suspect in the absence of a formal charge. Indeed, a suspected thief who confessed in the absence of any "appeal" being lodged against him was not bound by that confession.[46] On the other hand, once a formal complaint, substantiated by oath or indictment, was made, the protection of the privilege ended and, at this stage in the development of the privilege, the state could compel the accused to answer.[47]

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renown of his name may increase and that it not be said 'Jesus is crucified and Barrabus delivered.' " *Id.* at 404.

Of course, if a felon was caught following the hue and cry with evidence of his crime still upon him, there was no need for accusation whether by way of appeal or presentment, for the defendant was not entitled to protest his innocence or even have any form of trial. He simply was brought before some court and promptly ordered hanged. This form of summary justice, however, gradually fell into decline during the thirteenth century. 2 F. POLLOCK & F. MAITLAND, *supra* note 39, at 579.

44. *See supra* note 31.

45. In light of the details required to be given in the appeal (for example, the year, place, day and hour which the crime allegedly occured) it seems clear that the function of a specific accusation was to give adquate notice to the suspect before he was required to answer. BRACTON, *supra* note 43, at 388.

46. *Id.* at 425. The rule was otherwise if the defendant had been caught red-handed in possession of stolen property. *Id.*

47. No doubt much of the confusion that has precluded a clear understanding of the original scope of the "privilege" prior to formal charge has been caused by a misunderstanding of the post-charge practice known as *peine forte et dure* by which an accused could be compelled to answer the charge lodged against him. As Langbein has documented, this practice, which continued into the eighteenth century, came about as a result of the transition from trial by ordeal to trial by jury. Because use of the jury was initially seen as a protection to be requested by the defendant, the idea that a defendant must choose to be tried by a jury persisted when jury trial became the dominant mode of proceeding. This presented a dilemma for the state, for if the defendant refused to plead to the charge and accept trial by jury, it could not convict him. Legislation soon authorized the indefinite imprisonment of anyone refusing to plead, and the custom developed (to speed things along) of feeding the defendant only bread and water, while placing increasingly heavy stones upon his chest, until he either agreed to plead or was crushed to death. The purpose of this torture, however, was not, as commonly misunderstood, to obtain a confession prior to trial, but to force the defendant to answer the charge (i.e. plead guilty or not guilty) so proceedings could commence. The practice persisted because of the rule that convicted felons forfeited their estates to the sovereign. By suffer-

2. *Eclipse of the Privilege in the Prerogative Courts*

Notwithstanding the enlightenment of Henry II and his grandson Henry III, the commitment to fairness embodied in the accusatorial system of criminal justice they promoted was constantly in danger of dissolving. Because the powerful inquisitorial method of the canon law was tremendously efficient in compelling conformity and stifling dissent, it tended to come loose from its moorings in the ecclesiastical world and drift into the political realm. Evidence from the reign of Edward III (1327-1377) shows that inquisitorial procedures gradually crept into the practice of the King and his Council. Parliament, in an effort to combat these procedures, enacted a statute which made reference to Magna Charta and declared that:

> from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his Council, unless it be by indictment or presentation of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law.[48]

The respect paid to the Magna Charta, however, was momentary for England was soon engulfed in the flames of religious persecution which reduced such parchment guarantees of individual rights to ashes during the next several centuries. In the reign of Henry IV (1399-1413) a zealous Parliament enacted a statute authorizing bishops to arrest and imprison anyone "evidently suspected" of heresy and to determine the matter according to canonical decree. This, of course, reestablished the use of the oath *ex officio*.[49] In 1532 John Lambert, a priest and fellow at Queens College, Cambridge, was one of the first to resurrect the common law attack on such inquisitorial procedures. Under interrogation for he-

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ing death under *peine forte et dure* there was no conviction and an accused could thereby preserve his estate. J. LANGBEIN, *supra* note 26, at 74-76.

48. 1 STATUTES OF THE REALM 319, 321 (25 Edward III, c. 4, 1351-52). The reference to Magna Charta (1215) was undoubtably to Chapter 39 which provides that "No free man shall be taken or imprisoned or disseised, outlawed or banished or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A. HOWARD, MAGNA CHARTA: TEXT AND COMMENTARY (1964). As Pollock & Maitland point out, the phrase "by the lawful judgment of his peers" could not have referred to the right to jury trial (which did not yet exist in its modern form), but rather referred to the accusing jury. The passage therefore reflected the requirement that the King could not proceed in any manner against a free citizen in the absence of a specified accusation either by way of indictiment by an accusing jury or by private complaint issuing in accordance with the common law. 1 F. POLLOCK & F. MAITLAND, *supra* note 39, at 173, n.3.

49. Maguire, *supra* note 29, at 208; Morgan, *supra* note 27, at 5.

retical beliefs, he refused to answer, citing the Latin maxim which was later made famous by Coke: *Nemo tenetur prodere seipsum.*[50] The following year, after petitions to King Henry VIII (1509-1547) and much debate, the Parliament repealed the statute of Henry IV. The Parliament then provided that: "every person and persons being presented or indicted of heresy or duly accused or detected thereof by two lawful witnesses at the least . . . shall and may after every such accusation or presentment *and none otherwise* . . . be committed . . . to answer in open court."[51] Like the Edwardian statute before it, this act illustrates that the right to freedom from interrogation in the absence of a duly substantiated formal accusation was repeatedly confirmed as the law of the land, even in the face of infringement by royal power. On the other hand, those attacking the inquisitorial procedures sought protection from self-incrimination only until a proper charge had been brought. Indeed, Lambert had refused to answer only incriminating questions regarding matters as to which he had not been duly accused.[52]

With the fusion of Church and state by the Act of Supremacy,[53] any jurisdictional clash between spiritual and temporal worlds became irrelevant. Religious matters became political matters. Conformity to the established religion became a patriotic duty, and freedom of expression was stifled, since it was feared that disunity would result if "men may be tolerated to think as they please and publicly speak what they think."[54]

Queen Elizabeth I established the Court of High Commission for ecclesiastical affairs to enforce religious conformity and maintain the ecclesiastical supremacy of the Crown.[55] The Court of High Commission quickly adopted inquisitorial procedures. Upon mere rumor of heresy, the Commission would bring the suspect before it, force him to take the

50. Literally: no one is bound to bring forth (i.e. accuse) himself. *Compare* L. LEVY, *supra* note 18, at 3; Morgan, *supra* note 31, at 8; and Silving, *supra* note 31, at 1367.

51. 3 STATUTES OF THE REALM 454, 455 (25 Henry VIII, c. 14, 1533) (emphasis added and spelling modernized). Maguire, *supra* note 29, at 212.

52. See 5 J. FOXE, THE ACTS AND MONUMENTS OF JOHN FOXE 184-250 (Cattley ed. 1838) for a detailed description of the *Lambert* case. Several years later Lambert again was accused of heresy for disbelieving that the bread and wine used in the sacrament changed into the body of Christ. In a trial before King Henry VIII himself, Lambert debated the doctrine of transubstantiation with the bishops, and refused to recant. Lambert was condemned by the King and burned at the stake in 1538.

53. Enacted in the first year of the reign of Elizabeth I (1558-1603), the Act of Supremacy made the monarch the head of the church of England. Morgan, *supra* note 31, at 6-7.

54. Maguire, *supra* note 29, at 212-13.

55. *Id.* at 213-15.

oath *ex officio* and then subject him to interrogation without giving him any details of the charge or the identity of his accuser.[56] Indeed, under the infamous twenty-four articles, designed by John Whitgift for use against the Puritans, the Commission would issue a standard general accusation against the suspected heretic and demand that he confess to the particulars under oath.[57] As Levy points out, the results were devastating for a Puritan:

> The Commission might have only the vaguest suspicions about his religious convictions and activities. . . . Yet once summoned, he was ruined. He could refuse the oath and rot in jail, or having taken it, refuse to answer and meet the same fate. If he took the oath and lied, he committed the unpardonable and cardinal sin of perjury which was simply not an option for a religious man: he was incapable of foreswearing God and damning his soul. If he took the oath and told the truth, he foreswore himself, supplying his enemy with legal proof of his guilt. . . . The sole route of escape from all personal punishment was unthinkable: to repudiate one's conscience, apostatize by becoming a conformist, and in earnestness of repentance play Judas by turning state's evidence. . . . The only honorable choice for a decent God-fearing Puritan was some form of martyrdom. . . .[58]

It is thus not surprising that the focus of the attack against such procedures fell upon the hated oath *ex officio*. The High Commission relied on the oath as a central tool both in investigating and in proving religious crimes.[59] The oath also placed its victims in the intolerable dilemma of either "cutting one's throat with one's tongue"[60] or suffering eternal damnation. Thus, at this point in history attention shifted from the right to fair notice and justified suspicion associated with the privilege against self-incrimination, and focused instead upon the compulsion created by the use of the oath.[61] The subsequent blending of the "privilege" with

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56. *Id.*; L. LEVY, *supra* note 22, at 131-35.

57. One article, for example, stated: "We do object, assert, and declare . . . [t]hat within the time aforesaid you have advisedly and of set purpose preached, taught, declared, set down, or published by writing, public or private speech, matter against the said Book of Common Prayer, *or of some thing therein contained*." L. LEVY, *supra* note 22, at 134-35 (emphasis added and spelling modernized).

58. *Id.* at 133-34.

59. In contrast to the common law, conviction under ecclesiastical law was much more difficult because it required proof by two witnesses unless the defendant confessed. *Id.* at 133.

60. *Id.* at 330.

61. A contributing factor no doubt was the uncertainty at that time as to whether the common law was applicable to a court created by royal prerogative. Coke, both as an advocate and as Chief Justice of the King's Bench, subsequently championed the supremacy of the common law. Maguire, *supra* note 29, at 220-25. As Maguire notes, however, this presented not merely a problem of legal

the development of this new corollary "right" against compulsory self-incrimination has resulted in a tangled confusion of thought ever since.

Toward the middle of the seventeenth century the battleground of the continuing struggle expanded to include the other prerogative court, the Court of Star Chamber. This notorious body, holding legislative, executive and judicial power in one fist, was a powerful instrument for political oppression.[62] Although the Court of Star Chamber also administered the oath *ex officio*, remarkably little opposition to its use existed prior to 1637.[63] Refusal to take the oath in Star Chamber was virtually unknown because, in contrast to High Commission practice, the Court of Star Chamber normally presented the accused with a written bill of complaint before interrogating him.[64] Indeed, Star Chamber ordinarily gave a defendant eight days in which to frame a written answer.[65] Defendants were permitted the advice of counsel in drafting their response and counsel could demurrer on a number of technical legal grounds.[66] After the defendant filed his answer Star Chamber examined him upon it under oath.[67] However, according to William Hudson (a clerk of the Court of Star Chamber [circa 1635] and its foremost historian) a defendant was protected from examination concerning any crime not charged in the bill of complaint.[68] Indeed, one of the grounds for demurring to the com-

interpretation, but an issue of constitutional dimension which ultimately was resolved only by the Glorious Revolution of 1688. *Id.*

62. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 220-21 (H. Fisher ed. 1963). The membership of the court was defined by statute as the Lord Chancellor, Treasurer, Keeper of the Privy Seal, a bishop, a member of the King's Council, and the Chief Justice of Common Pleas and Kings Bench. *Id.* at 261. However, at the time of James I (1603-1625) its membership included all members of the Council and the King himself occasionally sat and passed sentence. *Id.* at 262. While the statute of 1487 limited the court's jurisdiction to specified offences (e.g. riot, unlawful assembly, bribery of jurors and misconduct by sheriffs, etc.) Star Chamber exercised broad jurisdiction over the full range of criminal offenses, specializing in political crimes and dealing with mischiefs for which the common law had as yet perfected no means of punishing. *Id.* at 261-62.

63. L. LEVY, *supra* note 22, at 256.

64. *Id.* at 275. Levy reports that many, however, had refused to take the High Commission Oath.

65. Hudson, *supra* note 12, at 161, 167-68; I.S. LEADAM, SELECT CASES IN THE COURT OF STAR CHAMBER, xxviii (16 Seldon Society 1902).

66. Hudson, *supra* note 12, at 164.

67. *Id.* at 168.

68. *Id.* at 170. Hudson's treatise reveals that during the reign of Henry VIII the examination was conducted by the Lord Chancellor and generally consisted of only six or seven short questions. *Id.* at 168-69. At some point, however, Hudson notes that plaintiff's lawyers began submitting interrogatories and abuses occurred

> this advantage of examination was used like a Spanish Inquisition, to rack men's consciences, nay to perplex them by intricate questions, thereby to make contrarieties, which

plaint was that "the matter in charge tendeth to accuse the defendant of some crime which may be capital; in which case *nemo tenetur prodere seipsum. . . .*"[69] Thus even Star Chamber recognized that a defendant was entitled to the protection of the common law rights associated with the privilege against self-incrimination.

True, an emergency procedure, called *ore tenus* existed in which a suspect could be orally examined without these safeguards.[70] According to Hudson, however, this "extraordinary" type of proceeding applied only in cases that threatened "the very fabric of government."[71] Even *ore tenus* required that probable cause exist to believe that the suspect was guilty.[72] Hudson also states that any confession had to be voluntarily given.[73] Amazingly, under the strict voluntariness test of that time, the defendant could repudiate his confession thus requiring the court to proceed as though he had denied his guilt.[74]

Against this background of general compliance with orderly common law procedure, established during Coke's tenure as Chief Justice of Common Pleas and then Kings Bench (1606-1616), one can more fully understand the subsequent reaction to the case of Freeborn John Lilburne. Certainly no individual did more to launch the right against compulsory self-incrimination than Lilburne.[75] In 1637 Lilburne, a Puritan, was ar-

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may easily happen to simple men, and men were examined upon one hundred interrogatories, nay, and examined of the whole course of their lives. . . .

Id. at 169. To prevent such abuse the number of interrogatories was limited by order, and sanctions imposed upon plaintiffs for asking questions which violated the privilege against self-incrimination or were otherwise irrelevant. Id. at 170.

69. *Id.* at 164. (No one is bound to bring forth himself. *See supra* note 50 and accompanying text).

70. *Id.* at 126-27. *See also* I.S. LEADAM, *supra* at 65, at lxvii; L. LEVY, *supra* note 22, at 274.

71. Hudson, *supra* note 12, at 126-27.

72. *Id.*

73. *Id.* One should note that Hudson's reference is to the rule of evidence known as the voluntariness doctrine (*see infra* note 150 and accompanying text) and not to the privilege against self-incrimination, which had not yet entered its second stage of development. Although Star Chamber's reputation for torture has been largely overstated—since torture never became a regularized part of English criminal procedure—it is nevertheless true that defendants were tortured in exceptional cases involving sedition, treason, or crimes against the established religion. Therefore, an unfruitful *ore tenus* proceeding could conceivably have been followed by a respite upon the rack in the Tower of London.

See J. LANGBEIN, *supra* note 26, at 73, 82, 94-118; F. MAITLAND, *supra* note 62, at 221; Morgan, *supra* note 31, at 15.

74. Hudson, *supra* note 12, at 127. *See also* J.LANGBEIN, *supra* note 26, at 15-16. Part IV *infra* discusses the development of this medieval voluntariness doctrine and its conflation with the privilege against self-incrimination.

75. L. LEVY, *supra* note 22, at 272-3. As Levy observes, while his ideas were ahead of his time,

rested for smuggling certain heretical and seditious books into England in violation of a Star Chamber decree banning the importation of unlicensed books.[76] The Attorney General examined Lilburne while he was in prison, and Lilburne denied the charge. When the interrogation proceeded to other similar offenses, Lilburne refused to answer saying:

> I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more.[77]

Two weeks later Lilburne was brought before the Court of Star Chamber, and ordered to take the oath *ex officio*. The Court did not present a bill of complaint specifying the charges against him and did not provide Lilburne an opportunity to consult with counsel or to prepare a written response.[78] Lilburne refused to take the oath, asserting: "before I swear, I will know to what I must swear."[79] Returned to prison, Lilburne was twice more brought before Star Chamber where twice again he refused the oath, each time reiterating his claim that the Star Chamber was adopting the practices of the High Commission (recently declared illegal by Coke) in an attempt to "ensnare" him.[80] The walls of Star Chamber echoed with Lambert's argument, made a century earlier, that such interrogations were against the law of the land.

The Court of Star Chamber found Lilburne in contempt for refusing to

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he appeared at the right moment in history. With the accession of Charles I (1625-1649) to the throne and the investiture of the ambitious William Laud as Archbishop of Canterbury, the campaign against the Puritans escalated while the rights of British subjects declined. Charles's contempt for Parliament, the common law and human rights is well known. Taxes and forced loans were imposed by royal fiat, dissenters were imprisoned without stated charges, and the writ of habeas corpus was suspended. *Id.* at 262.

76. *Id.* at 273. The basis for the arrest was a sworn affidavit by one of Lilburne's accomplices who had turned state's evidence. *Id.*

77. 3 STATE TRIALS 1315, 1318 (1637) (emphasis added). This description of the examination is based upon Lilburne's own written account.

78. L. LEVY, *supra* note 22, at 274.

79. 3 STATE TRIALS 1320.

80. L. LEVY, *supra* note 22, at 273-75. Coke, while Chief Justice of the Kings Bench, had declared in *Burrowes and Others v. The High Commission*, 81 Eng. Rep. 42 (1616), that the High Commission could not imprison for the refusal to take its oath. One of the reasons given in support of this position was the High Commission's failure to furnish the defendants with a copy of the charges against them. Coke, himself a member of the Court of Star Chamber while Chief Justice, however, did not oppose the use of the oath in its proceedings which at this time apparently conformed to the common law as described by Hudson. *See supra* text accompanying note 64.

answer its interrogatories and ordered him imprisoned indefinitely.[81] In addition, the Court fined him 500 pounds and sentenced him to be whipped and placed in the pillory.[82] Lilburne's whipping during the two mile march from Fleet prison to the pillory was a public spectacle. Almost beaten to death by over 200 strokes of the lash, he arrived at the pillory and gave an impassioned speech condemning the oath *ex officio*.[83] This event helped to spark a public outcry against the oath *ex officio* that ultimately led to the prohibition of the oath and the abolition of both the High Commission and the Court of Star Chamber in 1641.[84] Yet as Lilburne himself wrote: "[I]f I had been proceeded against by a bill, I would have answered."[85]

B. The Second Stage of Development: The Right Against Compulsory Self-Incrimination

The abolition of the High Commission and the Court of Star Chamber carried with it a momentum that radically changed criminal procedure in England. By the dawn of the eighteenth century the practice of questioning the accused under oath at trial had died out[86] and a limited right to counsel at trial developed.[87] Wigmore attributes the growth of this protection from self-incrimination simply to "one indiscriminate and radical

81. L. LEVY, *supra* note 22, at 276-77.

82. *Id.*

83. *Id.*

84. *Id.* at 281-82.

85. 3 STATE TRIALS 1332. Lilburne was freed in 1640 in response to the maiden speech of the new member from Cambridge, Oliver Cromwell, shortly after the Long Parliament convened. Lilburne subsequently became disillusioned by the Puritan-dominated Parliament's religious intolerance, however, and wrote tracts criticizing the government for religious persecution and censorship of the press. As a result he was twice put on trial for his life, and died in exile in 1657. The fascinating story of his continuing struggle for the freedom of thought, religion and the press is eloquently told in L. LEVY, *supra* note 22, at 284-312.

86. L. LEVY, *supra* note 22, at 321, 323. It should be noted that for different reasons the rule also developed that defendants could not take the stand and give evidence under oath in their own defense. *See* 1 J. STEPHEN, *supra* note 24, at 441.

87. An act of Parliament in 1695 granted full right to counsel in cases of treason. *Id.* at 416. With respect to other felonies, the right to counsel at trial developed slowly during the eighteenth century as judges began permitting counsel for the defense to cross-examine prosecution witnesses. A full right to counsel at trial was not made uniform by statute until 1836. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 157-61, & 157 n.4 (1898). The right to have counsel conduct the defense was important in protecting the self-incrimination privilege, because the accused who conducted his own defense was subject to questions and comments from both the prosecutor and the bench. L. LEVY, *supra* note 22, at 375-76.

condemnation" of all Stuart practices.[88] Sir James Stephen, somewhat more philosophically, supports the view that as a result of the oppression and abuse of power at the hands of the royal prerogative, an enlightened concept of the law became less positivistic and more deontological. Writing toward the end of the nineteenth century, Stephen observed, "the line between what was legal, in the strict sense of the word, and what was morally just was then far less strongly drawn than it is now."[89]

1. Miranda's Heritage: The End of Pre-Trial Examination Under the Marian Statutes

Although the privilege against self-incrimination established itself relatively quickly at the trial stage, protection from self-incrimination developed more slowly at the pre-trial stages of the criminal justice process. Several factors contributed to this delay. First, the Marian statutes (1554-55) which had authorized the pre-trial examination of complaining witnesses *and* the accused by a justice of the peace, remained in effect, continuing a procedure antithetical to this new stage in the development of the privilege.[90] Second, except in the larger cities and boroughs, the justices of the peace were part-time, unpaid laymen, with little knowledge of the law, who acted more in a law enforcement than a judicial capacity.[91] Third, the manuals or guidebooks that had been written for the local justices of the peace advised only that the accused should not be examined under oath.[92] Because the magistrate did not conduct the pre-trial examination under oath, the implication arose that no restrictions applied to an interrogation pursuant to these statutes.[93]

The degeneration of the Marian preliminary examination into an engine of abuse provides a telling example of the need for vigilance in protecting the privilege against self-incrimination from the pressures which constantly assault it. Many commentators have assumed or implied that

88. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 636 (1902).

89. 1 J. STEPHEN, *supra* note 24, at 359. A case making this point in eloquent fashion is Attorney General v. Mico, 145 Eng. Rep. 419 (1658) decided less than two decades after the fall of Star Chamber. There Chief Justice Widdrington declared that the *nemo tenetur* maxim (*see supra* note 50 and accompanying text) was based upon the law of God, and the law of nature as well as the law of the land. *Id.* at 420-21. *Mico* is discussed *infra* at page 537.

90. 1 & 2 Phil. & M. ch. 13 (1554) and 2 & 3 Phil. & M. ch. 10 (1554); 4 STATUTES OF THE REALM 259, 286.

91. 1 J. STEPHEN, *supra* note 24, at 228-29.

92. *See* M. DALTON, THE COUNTRY JUSTICE 273 (1618).

93. L. LEVY, *supra* note 22, at 325; Maguire *supra* note 29, at 203.

the legislative policy behind the enactment of the Marian statutes was to obtain a confession from the accused for later use at trial.[94] Langbein's detailed historical analysis of this legislation, however, convincingly demonstrates that this was not so.[95] Rather, the legislative purpose was initially to prevent unscrupulous justices of the peace from corruptly releasing suspected felons on bail, thus permitting them to flee. This purpose was accomplished by requiring the justices of the peace to record the evidence of the complaining witness against the accused, thereby providing the trial court with a basis for review.[96] The statutory duty to also examine the defendant, in addition to the witnesses against him, probably was based upon the accused's fundamental right to be heard.[97] Far from creating a scheme for preserving evidence of an accused's statements for later use against him, contemporary accounts following the enactment of The Marian Statutes indicate that an accused's confession before a justice of the peace did not constitute sufficient evidence to convict him at trial.[98] That the preliminary examination later came to center upon the accused, despite the fact that this was not the intent of Parliament nor

94. *See, e.g.*, G. WILLIAMS, *supra* note 30, at 44 (1963); L. LEVY, *supra* note 22, at 325. The Meese Report also seeks to justify present day police interrogation by asserting that the Marian practice of pre-trial examination "provides the proper historical counterpart to the practice of custodial police interrogation." *See* MEESE REPORT, *supra* note 4, at 4.

95. J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 22 (1974).

96. *Id.* at 6.

97. This right indeed appears in the full Latin maxim: "*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*" (No one is bound to accuse himself; but when exposed by common suspicion (fama), he is held and *permitted to show, if he can,* his innocence and purge himself.) I have largely followed Silving's translation which refutes that of Wigmore. *Compare* Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 83 n.2 (1892) *with* Silving, *supra* note 32, at 1367. *See also* Morgan, *supra* note 31, at 8-9.

According to Langbein, who examined actual transcripts of pre-trial proceedings held both before and immediately after the passage of the Marian statutes, the typical procedure was to have witnesses first give their testimony under oath and then take the response of the defendant without oath. J. LANGBEIN, *supra* note 94, at 84. The Meese Report not only neglects to mention this fact, but also fails to even note that the Marian statutes required the taking of testimony of complaining witnesses. MEESE REPORT, *supra* note 4, at 11-12. The reader thus erroneously receives the distorted impression that the sole purpose of the statute was to authorize the pre-trial examination of the accused. *See* MEESE REPORT *supra* note 4.

98. J. LANGBEIN, *supra* note 95, at 26-30. Apart from the bail review function, the recorded notes of the the justice of the peace were used primarily as reminders to organize witnesses and testimony, and were not regularly preserved as part of the records of the case. *Id.* at 25, 31. *See also* M. Dalton, *supra* note 92, at 268 who observed in 1618: "[A]nd yet the confession of the offendor, upon his examination before the Justice of the Peace shall be no conviction of the offendor, except he shall after confess the same againe upon his tryall or arraignement, or be found guiltie by verdict of twelve men, etc."

the practice when the statutes were passed, demonstrates how easily the inquisitorial method is spawned when an avenue is left open to it.

From the Elizabethan period through the Restoration, it became common practice to conduct these examinations in secret.[99] Justices of the peace often withheld from defendants the nature of the evidence against them. They were bullied and abused to such an extent that Stephen was compelled to remark: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations."[100] Professor Langbein attributes the sporadic manner in which the Marian preliminary examination devolved into an interrogation of the accused, and later came to acquire evidentiary value, to "convenience" and also to frustration at seeing offenders escape punishment should a witness die or become unavailable at trial.[101]

By the end of the eighteenth century, however, the influence of the common law had gradually transformed proceedings at the local level, causing magistrates to change their practice to accommodate the privilege against self-incrimination.[102] Indeed, Bentham (1748-1832) complained against the sympathetic magistrates of his day whom he considered overly "cautious of extracting from the defendant any testimony the tendency of which may be to his prejudice; and even, lest any such testimony should escape him unawares, to give him warning to keep his lips well closed."[103] Lord Denman, in laying down "the proper course of proceeding" in *Queen v. Arnold*[104] likewise demonstrated the high degree of respect which the privilege ultimately attained:

> A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of Magistrates to receive it; but Magistrates, before they do so, ought entirely to get rid of any impression that may have before been on the prisoner's mind, that the state-

99. L. LEVY, *supra* note 22, at 325.

100. 1 J. STEPHEN, *supra* note 24, at 225. The Meese Report cites this period of inquisitional aberration as the historical foundation for its justification of custodial interrogation. MEESE REPORT, *supra* note 5, at 5. By taking only that slice of history which served its purpose, however, the report ignored three centuries of prior development of the privilege against self-incrimination.

101. J. LANGBEIN, *supra* note 95, at 27.

102. As Williams observes: "The exclusion of interrogation at the trial naturally had its effect on the preliminary inquiry, and by Bentham's day some magistrates were making a habit of nullifying the enquiry so far as the accused himself was concerned, by telling him that he was not bound to answer." G. WILLIAMS, *supra* note 30, at 45.

103. 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 256 (1827).

104. 173 Eng. Rep. 645, 8 C. & P. 622, (1838).

> ment may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial.[105]

Despite Bentham's criticism, the judicial practice of giving the accused a warning advising him of his privilege against self-incrimination was formalized by statute in 1848 and as Stephen observed, a prisoner was thereafter "absolutely protected against all judicial questioning before or at trial."[106] The seed having sprung from the common law, a legislatively authorized forerunner of the *Miranda* warning thus existed more than a century ago.[107] The Meese Report's conclusion that *Miranda* was "a decision without a past [having]. . .no basis in history or precedent" is thus either a product of unbelievable ignorance or the result of a "willful disregard" of the English heritage from which our accusatory system of criminal justice arose.[108]

2. *The Legacy of Star Chamber*

In the aftermath of Star Chamber, historians, not surprisingly, pointed to the oath *ex officio* and its diabolical compulsion as the chief evil overcome in 1641. The abolition of the oath and the prerogative courts was thus viewed as marking the birth of the right against compulsory self-incrimination. What has remained obscured, however, is that this right

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105. *Id.*

106. 11 & 12 Vict. ch. 42. (1848); 1 J. STEPHEN, *supra* note 24, at 441.

107. The practice under the statute, as described by Stephen, was to examine the witnesses in the presence of the accused and allow the accused an opportunity to cross-examine. When all witnesses had been examined, the justice then said to the accused, "Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you at your trial." 1 J. STEPHEN, *supra* note 24, at 220. For a description of current British practice, see Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L. J. 2 (1986).

108. MEESE REPORT, *supra* note 4, at 114. The full passage reads as follows:

> *Miranda v. Arizona* was a decision without a past. Its rules had no basis in history or precedent but reflected, rather, a *willful disregard* of the authoritative sources of law. In frank terms, it stood on nothing more substantial than Chief Justice Warren's belief that general use of the FBI warnings and other rules he had devised would be socially beneficial . . . .

Id. (emphasis added). The Meese Report purports to comprehensively examine:

> the development of the law relating to self-incrimination and pre-trial interrogation from its origin in the sixteenth [sic] century to the time of the *Miranda* decision . . . includ[ing] the development of self-incrimination law in England and the American colonies; the understanding of the right against self-incrimination and the practice of pre-trial interrogation at the time of the ratification of the Constitution and the Bill of Rights. . . .

Id. at "i" (Introduction).

grew out of the struggle to establish a cluster of rights associated with the "privilege" against self-incrimination long before the oath even existed in England. As discussed above, the evil that Henry II (and later Parliament, during the reign of Edward III and Henry VIII) acted against was interrogation in the absence of a formal charge. The evil that Lilburne protested against was likewise the unfairness of being "ensnared" by an interrogation not limited to a precisely known charge. That charge, moreover, had to be substantiated (i.e. based either upon a sworn complaint supported by an offer of proof, or an indictment sworn to by twelve reputable members of the community) before one could be held to answer. These twin rights to formal notice and probable cause before interrogation involved a conception of fundamental fairness which both fueled the struggle and formulated the framework for the common law decisions supporting the privilege against self-incrimination. While not forgotten (indeed they form the basis for the probable cause and grand jury indictment requirements of the fourth and fifth amendments) these rights are today no longer associated with the fifth amendment's self-incrimination clause. Yet, like the history from which it arose, the fabric of the Constitution is also a seamless web and a just interpretation of the fifth amendment, (and our conception of due process in criminal interrogations), cannot be formulated in isolation without them.

III. RECEPTION OF THE PRIVILEGE IN AMERICA

A. Early Colonial Evolution

In the 1606 charter of the Virginia Company, establishing the first successful British colony in America, King James I granted the colonists the right to "enjoy all liberties, franchises and immunities [sic] . . . as if they had been abiding and borne within this our realm of England."[109] Although the colonists clearly intended English rights and liberties to cross the ocean with them, the initial reception of the privilege against self-incrimination is difficult to trace because of the paucity of data from the early colonial period.[110] It is likewise difficult to generalize about the reception of the privilege because of the vast diversity among the colonies.[111] Some colonies, like Virginia and the New England colonies, were

109. The Three Charters of the Virginia Company of London (1957), *reprinted in* A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA app. B, at 397-98 (1968).

110. L. LEVY, *supra* note 22, at 377.

111. *See generally* L. LEVY, *supra* note 22, at chs. 11 & 12.

established before the fall of Star Chamber. New York was established by the Dutch. Given the differing political and religious influences, the rural character of the early settlements, and the absence of lawyers and law books, it would not be surprising to find initial recognition of the privilege unevenly established during the seventeenth century. Indeed, that is precisely what the sparse evidence available indicates. One can find examples during this early period of colonial development in which the privilege was honored, and other examples in which it was ignored.[112] As the colonies matured, however, the unifying influence of the common law gradually brought about full recognition of the privilege. Thus Levy concludes: "When the Revolution began, colonies and mother country differed little, if at all, on the right against self-incrimination."[113]

The development of the law in Massachusetts illustrates this gradual progress toward establishing freedom from self-incrimination. Indeed, the first invocation of the privilege against self-incrimination on American soil was apparently made in that colony by the Reverend John Wheelwright in 1637—the same year that John Lilburne raised his claim. Suspected of heresy, Wheelwright was brought before a closed session of the provincial legislature and questioned concerning Antinomian ideas expressed in one of his sermons.[114] Wheelwright refused to answer. When one of the members sympathetic to him claimed that the authorities "went about to ensnare him, and to make him to accuse himself," Deputy-Governor John Winthrop vigorously denied any such intent.[115] No attempt was made to compel Wheelwright to incriminate himself after his refusal. Instead Winthrop proceeded with a public trial. There Wheelwright freely acknowledged his sermon and defended his beliefs. He was found in contempt of civil authority and banished.[116]

In the better known trial of Anne Hutchinson, which also resulted in banishment that same year for religious unorthodoxy, the defendant, like Wheelwright, also did not attempt to invoke the privilege at trial. Rather, she chose to debate with her judges, and freely answered incrimi-

112. *Id.*

113. *Id.* at 404.

114. The colony of Massachusetts Bay was a theocratic commonwealth, and the legislative body, sitting as the General Court, also exercised judicial authority. The Antinomians rejected the mainstream Puritan belief that good works were necessary for salvation, believing that faith alone was sufficient, and Wheelwright's sermon had caused great disturbance in the community. *Id.* at 340-41.

115. *Id.* at 342.

116. *Id.*

nating questions.[117] The Supreme Court, more than two and one-half centuries later, erroneously concluded in *Twining v. New Jersey*,[118] that the record of Hutchinson's trial showed that Deputy-Governor Winthrop, a lawyer, "was not aware of any privilege against self-incrimination or conscious of any duty to respect it."[119] The Court failed to understand, however, that even in England in 1637 the "privilege" only protected one against self-incrimination until a formal charge had been made by known accusers or an indictment.[120] Wheelwright's privilege, while tread upon, had nevertheless been honored before trial. Neither Wheelwright nor Hutchinson claimed any right to protection from self-incrimination at the trial stage itself.

In 1641, the same year that the High Commission and the Star Chamber were abolished, the Massachusetts legislature adopted the Body of Liberties. An early predecessor to our Bill of Rights, the Body of Liberties provided a rudimentary guarantee against compulsory self-incrimination. Liberty 45 provided that "[n]o man shall be forced by Torture to confess any Crime against himself. . . ."[121] In 1642 Winthrop records that upon asking the magistrates and elders of Plymouth, Massachusetts Bay, New Haven and Connecticut what means a magistrate could use in extracting a confession from an accused, the prevailing view was that although examination by oath or torture was forbidden, the judge could examine the accused "strictly" in a capital case if the evidence against him was strong. If there was only "light suspicion," however, the accused had a right to remain silent.[122] The frailty of this "privilege" was demonstrated just fifty years later, however, when the Salem witchcraft trials ran rough shod over any form of freedom from self-incrimination. There, it will be recalled, the judges resorted to physical torture and

117. *Id.* at 343.

118. 211 U.S. 78 (1908).

119. *Id.* at 103-04. The *Twining* majority, indicted by Levy as being "unbelievably ignorant" of English history, L. LEVY, *supra* note 22, at 334, also erroneously concluded that the privilege was not "part of the law of the land of Magna Carta" and thus was not entitled to inclusion within the concept of due process under the due process clause of the fourteenth amendment. 211 U.S. at 105. *Twining* was overrruled in Malloy v. Hogan, 378 U.S. 1 (1964).

120. *See supra* notes 62-68 and accompanying text.

121. L. LEVY, *supra* note 22, at 345. Following conviction, however, torture that was not "[b]arbarous and inhumane" was permissible for the purpose of discovering other co-conspirators. *Id.*

122. *See Id.* at 346-47 for a detailed account of this event. Although Levy questions whether Winthrop's recorded summary is accurate, *Id.* at 347-48, the general theme that the privilege protected one from self-incrimination in the absence of probable cause (i.e. "strong" suspicion) nevertheless appears even at this early date.

hung nineteen "witches" who refused to confess.[123]

Thus, just as the privilege had been eclipsed at times in England, so too it fell into eclipse in Massachusetts. However, during the eighteenth century, several factors operated to promote the establishment of the privilege, not only in Massachusetts, but in all the colonies. As commerce expanded and became more complex, the demand for lawyers increased and the legal profession grew in power and prestige.[124] As the colonies looked to England both for legal training and precedent, the common law gradually became more and more entrenched and so did the privilege against self-incrimination. English treatises such as the works of Coke (many of which were republished in the late 1670s), Hawkins' *Pleas of the Crown* (1716), Gilbert's *Law of Evidence* (1754), and Blackstone's *Commentaries* (1765) also communicated the principles of the privilege to bench and bar alike.[125] Emblematic of the growing import of the privilege, in 1754 the Governor of Massachusetts refused to sign a liquor excise bill on the ground that its provisions violated "natural Rights" by compelling citizens to disclose to the tax collector, under oath, how much liquor they had purchased.[126] Moreover, when the author of a pamphlet critical of the legislature for passing the same excise bill was prosecuted for seditious libel, he refused to confess his authorship, proclaiming that: "A Right of Silence was the Privilege of every Englishman."[127] In 1780 both the common law "privilege" not to be subjected to interrogation prior to a substantiated formal charge, and the common law right to be free at all times from compulsory self-incrimination, whether by means of an oath or torture, were firmly established beyond any dispute by the following provision of the Massachusetts Declaration of Rights: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself."[128] This provision, drafted by John Adams, one of the most learned

123. *Id.* at 362-63. Fifty others who confessed (one must presume falsely) to being witches were spared the death penalty. *Id.*

124. *Id.* at 368-69.

125. *Id.* at 368-75.

126. *Id.* at 386.

127. *Id.* at 386-87. The phrase no doubt would have amused Professor Hohfeld. *See supra* notes 7-8.

128. A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts (1970), *reprinted in* A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA, app. K, at 458.

common law lawyers of his day,[129] precisely defines the parameters of both the original historic "privilege" and the later "right" against compulsory self-incrimination.[130]

B. The Text of the Fifth Amendment: The Ambiguity of Elegance

The fifth amendment, however, was not as precise as the Massachusetts Declaration of Rights. James Madison, who proposed the amendment, modeled it after the Virginia Declaration of Rights, a document drafted in haste when fighting broke out in 1776. Its author, George Mason, like Madison, was not a lawyer.[131] Curiously, the Virginia Declaration failed to secure several fundamental rights, among them the right to counsel—a right that even Star Chamber recognized and which existed in the colonies as early as 1669.[132] It also failed to protect freedom of speech, freedom of assembly, and the right to petition; and failed to ensure that criminal defendants retained the right to grand jury indictment and the writ of habeas corpus. The literal text of the Virginia Declaration's wisp of an anti-self-incrimination clause ("nor can he be compelled to give evidence against himself. . ."), was buried in the midst of a laundry list of protections for the criminally accused, and expressed only a "stunted version" of the full panoply of rights associated with the common law privilege against self-incrimination.[133] Madison's proposed amendment altered this version only slightly by changing it to read: "nor shall be compelled to *be a witness* against himself. . . ."[134]

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129. *Id.* at 207-11.

130. Section 14 of the Declaration of Rights secured the right to freedom from unreasonable seizure of one's person, and provided that "[a]ll warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation . . . and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." *Reprinted in id.* at app. K, 458-59. This antecedent to the fourth amendment thus subsumed the right associated with the privilege against interrogation in the absence of probable cause, under the broader right to be free from unreasonable seizure. This vital link between the fourth amendment and the privilege against self-incrimination still exists today. *See* Dunaway v. New York, 442 U.S. 200 (1979) (reaffirming, after two centuries, the rule that seizing a person for the purpose of custodial interrogation on less than probable cause constitutes an unreasonable seizure).

131. Both Virginians, Madison and Mason had served on the committee that was responsible for drafting the Declaration of Rights. George Mason, however, produced the draft that was adopted. *See* C. COLLIER & J.L. COLLIER, DECISION IN PHILIDELPHIA 334 (1986).

132. *See supra* note 66. Levy records Rhode Island as the first colony to recognize the right to have the assistance of counsel. L. LEVY, *supra* note 22, at 356.

133. *Id.* at 405-07.

134. Speech of James Madison, 1 ANNALS OF CONG. 434 (June 8, 1789) (emphasis added). Madison's version, which would have applied to any proceeding, was subsequently limited in its application to criminal cases by the Committee of the Whole. The Committee apparantly did this to

Thus, the privilege against self-incrimination became constitutionalized in highly stylistic and picturesque phraseology. This phraseology, in contrast to John Adam's more practical style, failed to state with any precision the cluster of rights it encompassed. As Levy has noted, however, for the founders who drafted and voted for the Bill of Rights, freedom from self-incrimination was such an accepted principle that:

> [I]ts constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no further explanation. The clause itself, whether in Virginia's [Declaration of Rights] or the Fifth Amendment, might have been so imprecisely stated, or misstated, as to raise vital questions of intent, meaning and purpose. But constitution-makers, in that day at least, did not regard themselves as framers of detailed codes. To them the statement of a bare principle was sufficient, and they were content to put it spaciously, if somewhat ambiguously, in order to allow for its expansion as the need might arise.[135]

Unfortunately, neither George Mason, who drafted the Virginia Declaration of Rights, nor James Madison, who submitted the proposed Bill of Rights in 1789, left behind any evidence of their understanding of the scope of the privilege against self-incrimination or its underlying policy rationale.[136] Early state and federal cases that dealt with the privilege, however, indicate that their contemporaries viewed freedom from self-

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allow federal courts to compel civil litigants to produce books and papers containing relevant evidence. L. LEVY, *supra* note 22, at 424.

135. L. LEVY, *supra* note 22, at 430. One cannot doubt that our revolutionary founders considered freedom from self-incrimination an important right. Four states (North Carolina, New York, Rhode Island and Virginia) specifically singled out this freedom during their state ratifying conventions, and called for an amendment to the Constitution to guarantee it from federal encroachment. 4 ELLIOT'S DEBATES ON FEDERAL CONSTITUTION 243 (J. Elliot ed. 1836) (N.C.); 1 *id.* at 328 (N.Y.); *id.* at 334 (R.I.); 3 *id.* at 658 (Va.). Eight of the twelve states which drafted state constitutions following the declaration of independence from England included protection against self-incrimination. These provisions, with some variations, were modeled after § 8 of the Virginia Declaration of Rights. New York and New Jersey (in what was labeled a terse bill of rights) expressly incorporated the protection of the common law of England into their constitutions. Thus, only Georgia and South Carolina drafted new constitutions containing no provision to secure freedom from self-incrimination. L. LEVY, *supra* note 22, at 409-10.

136. Perhaps the most extensive discussion of the subject, is found in the records of the Virginia ratifying convention when Patrick Henry objected to the lack of protection from self-incrimination, stating:

> Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthing the arm of government, that they must have a criminal equity, and extract confession by torture, in order to punish with still more relentless severity.

3 ELLIOT'S DEBATES, *supra* note 135, at 447-48. Whether Patrick Henry's reference to the common

incrimination as encompassing much more than just rudimentary protection from torture.

Two of the most notable of these cases pertaining to the scope of the privilege involved Chief Justice John Marshall. First, in *Marbury v. Madison* [137] it will be recalled that a question arose as to what had become of Marbury's commission as a justice of the peace. The commission had never been delivered to Marbury, although it had been signed by the outgoing President John Adams and sealed by John Marshall himself as Secretary of State. The new Acting Secretary of State under Jefferson, Levi Lincoln (the Attorney General at the time of the law suit), was called as a witness. He objected to answering any questions, claiming executive privilege and the privilege against self-incrimination.[138] The Court overruled the first objection, but both Chief Justice Marshall and Marbury's counsel agreed that Lincoln could refuse to disclose information that might incriminate him. The Court then gave Lincoln a day to answer a list of written questions. He subsequently answered all questions fully save one; the Court permitted him to decline to answer the question of what had been done with the commission.[139] No mention of or reliance upon the fifth amendment appears in the report of the proceedings. Second, in the trial of Aaron Burr, Marshall again recognized the right of a witness not to incriminate himself, noting (again without reference to the fifth amendment) that: "It is a settled maxim of law that no man is bound to criminate himself."[140]

Early state decisions also demonstrate that freedom from self-incrimination as embodied in English common law was considered part of our own common law, separate and apart from the more narrowly drawn provisions of the state constitutions. The trial of Benjamin Gibbs in 1802 provides an excellent case in point. During an election in Philadelphia, the election judges, on their own initiative, questioned certain voters whose loyalty had been suspect during the Revolution. The questions, which were required to be answered under oath or affirmation, were

law suggests a wider concern than simply a ban on the rack and the thumbscrew is mere conjecture; the object of his speech was to persuade rather than elucidate.

137. 5 U.S. (*1* Cranch) 137 (1803).

138. *Id.* at 143-44.

139. *Id.* at 145. See also L. LEVY, *supra* note 22, at 429, who suggests that Lincoln probably burned the commission.

140. United States v. Burr (*In re* Willie) 25 F. Cas. 38, 39 (1807) (No. 14692e) To "criminate" includes exposing oneself to condemnation and censure, as well as criminal guilt. WEBSTER'S NEW WORLD DICTIONARY, 348 (college ed. 1960).

designed to reveal whether the prospective voter had joined the British forces, sworn allegiance to the King, or been attainted and pardoned for treason. Refusal to answer precluded the otherwise qualified elector from voting. As a result of this inquisitorial procedure, a great tumult arose and Gibbs, having behaved in a violent and intemperate manner by cursing and shaking his fist at the election judge, was indicted for obstructing the election and assaulting an election official.[141]

The trial was removed to the Supreme Court of Pennsylvania and elaborately argued. The defense contended that the election judges had acted illegally because they had no right to ask a person questions which, while not incriminating, would tend to bring them into disgrace.[142] The state constitution's self-incrimination provision, like the fifth amendment, however, clearly protected only against disclosure of matters that could result in criminal prosecutions. Nevertheless, in his charge to the jury, Chief Justice Shippen declared that the *nemo tenetur maxim* was "an established principle of law . . . [which] founded on the best policy . . . runs throughout our whole system of jurisprudence."[143] The court then instructed the jury that irrespective of the potential for criminal punishment, no one was obligated to answer questions that would involve him in shame or reproach.[144] The Chief Justice, who had studied law in England, expressed the rationale for the rule as follows:

> It is considered cruel and unjust to propose questions which may tend to criminate the party. And so jealous have the legislature of this commonwealth been, of this mode of discovery of facts, that they refused their assent to a bill brought in, to compel persons to disclose on oath, papers as well as facts, relating to questions of mere property.[145]

It thus appears from these contemporary accounts that at the time the

141. Respublica v. Gibbs, 3 Yeates 429, 430 (Pa. 1802).

142. The election judges' questioning could not have resulted in a criminal prosecution of Gibbs because the treaty of peace between the United States and Great Britian stipulated that no prosecutions would be commenced against any person on account of any actions taken during the war. 1 U.S. Law 483.

143. *Gibbs*, 3 Yeates at 437.

144. *Gibbs*, 3 Yeates at 437-38. *Accord* State v. Bailly, 2 N. J. 396 (1807); People v. Herrick, 13 Johns. 82 (N.Y. 1816); Miller v. Crayon, 2 S.C.L. (1 Brev.) 108 (1806). This was also the apparent common law rule in England at that time. Rex v. Lewis, 170 Eng. Rep. 700 (1802); Macbride v. Macbride, 170 Eng. Rep. 706 (1802); *but see* T. PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE, 143-44 (4th ed. 1813). In Brown v. Walker, 161 U.S. 591 (1892) the U.S. Supreme Court held that the fifth amendment does not protect against compelled self-infamy.

145. *Gibbs*, 3 Yeates at 437. Other early state cases also adopted an extremely broad view of the common law privilege, extending it to disclosure of matters which could prejudice one's interest civilly. *See* Simons v. Payne, 2 Root 406 (Conn. 1796); Cook v. Corn, 1 Tenn. (1 Overt.) 340 (1808).

Bill of Rights was approved the understanding of freedom from self-incrimination was the same whether one stood on English or American soil. Such was the common bond of the common law.

IV. A RULE OF EVIDENCE SWALLOWS THE PRIVILEGE: THE COMMON LAW VOLUNTARINESS DOCTRINE

As discussed previously, by the time the Bill of Rights was drafted and voted upon, the privilege against self-incrimination had experienced two stages of development. The first stage established the rights to notice and justification by requiring a formal charge, substantiated by oath or indictment, before one could be held to answer. Until the state satisfied these prerequisites the "privilege" protected one who was under suspicion, and no duty to answer ensnaring questions arose. At this first stage, however, as soon as the state observed the twin rights of notice and justification, the "privilege" terminated and the court could compel the accused to answer the charge under oath and could also interrogate him.

During the last half of the seventeenth century, however, the privilege entered a second stage of development. In this stage the right not to be "compelled" to incriminate oneself at the trial stage sprang from the ashes of Star Chamber and the High Commission in response to the universal condemnation of their use of the hated oath *ex officio* (requiring the accused to take an oath to tell the truth and then answer questions). The unsworn preliminary examination of an accused, authorized by the preceding century's Marian statutes, did temporarily continue a practice antithetical to this new development. Yet the momentum of the common law increasingly expanded the parameters of the privilege so that ultimately, regardless of the use of the oath, an accused was "absolutely protected against all judicial questioning before or at the trial."[146] This victory was then codified by legislation which even required the court to warn an accused of the existence of his or her privilege. This warning was not given as a prelude to judicial interrogation, but rather to ensure that defendants clearly understood that while they had a right to speak in their own defense, they were under no obligation to respond.

How then did the original understanding of the privilege against self-incrimination become so distorted that some could view *Miranda* as a revolutionary decision more than a century later? As discussed below, the root cause has been the confusion created by the parallel develop-

146. 1 J. STEPHEN, *supra* note 24, at 441.

ment of the "voluntariness" doctrine.[147] This Part examines how this common law rule of evidence, which pre-dated the second stage of development of the privilege, became entangled with it, and ultimately came to dominate the jurisprudence of confessions, thus obscuring the true origins of the privilege altogether. As a result, fifth amendment theory has failed to encompass the totality of values that gave birth to the privilege against self-incrimination. Instead, it has been obsessed with "compulsion" and the problem of its definition.

A. The Medieval Origins of the "Voluntariness" Concept

The earliest origins of the "voluntariness" concept are found in both Roman-canon law and the German code of criminal procedure, the Constitutio Criminalis Carolina of 1532. Both of these Continental systems relied heavily upon confessions as proof of guilt and used torture to obtain them.[148] While the *Carolina*, which promulgated elaborate rules governing the use of torture, did have a probable cause requirement,[149] neither system respected any other semblance of a right against self-incrimination. Rather, the concern with "voluntariness" stemmed from the recognition that a tortured confession might be false.[150] The *Carolina* provided, for example, that the admissions of a tortured suspect should not be recorded while he was being tortured. Instead, his statement was made and recorded only after release from torture.[151] The distrust of confessions produced by torture was so great that the *Carolina* provided an additional precaution; two days after such a statement was tran-

147. One must distinguish between the common law voluntariness doctrine, which is a rule of evidence governing the admissibility of a confession at trial, and the due process voluntariness test, which was initially developed by the Supreme Court as a substitute for the fifth amendement in state criminal prosecutions prior to Malloy v. Hogan, 378 U.S. 1 (1964). As the Supreme Court recently acknowledged in the due process context, the use of the term "voluntariness" has been condemned as "useless," "perplexing" and "legal doubletalk." Miller v Fenton, 474 U.S. 104, 116 n.4. The same could also be said regarding the misapplication of this term to issues which properly should be analyzed in terms of the cluster of rights associated with the privilege against self-incrimination.

148. The necessity of relying upon the confession arose because of difficulty in meeting the strict burden of proof requirement. Based upon scripture, canon law required the testimony of at least two eye-witnesses in order to convict a defendant who denied his guilt. J. LANGBEIN, *supra* note 95, at 187. *See also* L. LEVY, *supra* note 22, at 435; *Deuteronomy* 17:6.

149. J. LANGBEIN, *supra* note 95, at 179. Article 20 of the Carolina provided: "When legally sufficient indication of the crime which it is desired to investigate has not been produced and proven beforehand, then no one shall be examined; and should, however, the crime be confessed under torture, it shall not be believed nor shall anyone be condemned upon that basis." *Id.* at app. B, 273.

150. J. LANGBEIN, *supra* note 95, at 183-86.

151. *Id.* at 185.

scribed, the prisoner was brought before a judge, the statement read, and the prisoner again asked whether it was true.[152]

The earliest origins of the English version of the voluntariness rule appear in connection with the court's acceptance of defendant's plea at arraignment. One of the earliest statements of the rule appears in Staunford's *Pleas of the Crown*, published in 1607:

> If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; *provided, however, that the said confession did not proceed from fear, menace, or duress*; which if it was the case, and the judge has become aware of it, he *ought not to receive or record this confession*, but cause him to plead not guilty and take an inquest to try the matter.[153]

At this time the accused unquestionably could be compelled to plead his answer to the indictment under oath. Thus the rule that the confession of guilt must not be the product of duress was not concerned with self-incrimination. Rather, like the *Carolina* and canon law, it reflected a concern with the reliability of such a confession.[154]

William Hudson recorded that Star Chamber also observed the voluntarines rule. Even in the extraordinary *ore tenus* proceeding, in which the accused, in matters of state emergency, could be examined privately without a formal charge, any confession obtained still had to be voluntary.[155] Thus, while the Star Chamber could ignore the privilege on the ground of necessity, the law of evidence ensured that a confession was trustworthy.

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152. *Id.* Of course as Langbein points out, if the defendant recanted, he could again be ushered to the torture chamber, so he soon learned that only a "voluntary" confession would save him from future suffering. *See also* J. LANGBEIN, *supra* note 26, at 12-16.

153. 2 W. STAUNFORD, PLEAS OF THE CROWN ch. 51 (1607) (emphasis added).

154. One should not assume, however, that there was necessarily an English "reception" of the Continental voluntariness rule. As Langbein has demonstrated with respect to the Marian statutes, see *supra* note 95 and accompanying text, English criminal procedure was an indigenous development. *See* J. LANGBEIN, *supra* note 95, at 187.

155. If [the prisoner] shall deny the accusation, then cannot the court proceed against him *ore tenus*; but if he confess the offence freely and voluntarily, without constraint, then may he be brought to the bar; at which time his confession is shewed him; and if he acknowledge it, then who can doubt but that the court may justly proceed *ex ore suo* and give judgment against him.

Hudson, *supra* note 12, at 127.

B. *The Conflation of Voluntariness and the Privilege Against Self-Incrimination*

How this "trustworthiness" rationale came to be confused with the privilege against self-incrimination and transmitted to America can be traced back to a popular treatise on the law of evidence by Sir Geoffrey Gilbert. Gilbert's treatise contained the following passage:

> The voluntary confession of the party in interest is reckoned the best evidence . . . but then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation; and therefore *pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.*[156]

In this passage Gilbert conflates the *nemo tenetur* maxim with the rationale for the common law evidentiary rule which requires that confessions be voluntary in order to be admissable. The merger of these two distinct concepts was to work a subtle yet profound change in the rationale underlying the privilege against self-incrimination. From a concern for individual dignity and fairness (which focused upon procedural rights encompassing notice and justification) attention shifted to the reliability of the confession.

The sole authority Gilbert cited for this proposition of law was *Attorney General v. Mico*[157], decided in 1658, seventeen years after the abolition of the oath *ex officio* and the fall of Star Chamber. In that case the Attorney General suspected Mico, a merchant, of bribing customs officers and importing goods without paying duty. The Attorney General brought a bill in equity "for relief and discovery of the truth." Apparently, the evidence was insufficient to obtain an indictment because the Attorney General stressed in argument that without the requested discovery the truth of the matter could not be determined. Therefore, he urged that the court order the defendant to answer as a matter of public policy, in order to preserve the revenue from frauds and deceits. The defendant, however, successfully demurred on the ground that because the bill concerned criminal offenses, the court could not compel him to answer it because "it is against law and reason to oblige any man to

156. G. GILBERT, THE LAW OF EVIDENCE 99 (1754) (emphasis added). The treatise was written some time prior to 1726 and published posthumously.

157. 145 Eng. Rep. 419 (1658).

accuse himself."[158]

In granting judgment for the defendant, Chief Justice Widdrington declared the demurrer consistent with the law of God, the law of Nature and the law of the land. He devoted much of the opinion to establishing that because the wrongs alleged in the bill constituted common law crimes, they should be proceeded against by way of information or indictment. The opinion also stated that this "very incongruous way of proceeding" violated Magna Charta. Gilbert's treatise, however, refers only to the following portion of the opinion where the Chief Justice declared that the *nemo tenetur* maxim reflected the law of both God and Nature:

> 1. For the law of God. That not only allows but rather commands every man to preserve himself from hurt or damage; as appears by the case of St. Paul. . .[a]nd when Pontius Pilate asked our Savior some questions, he answered nothing; whence it appears what the law of God and the God of law allows of in such cases of crime.
> 2. For the law of Nature. That is of the same stamp; hence the rule *nemo tenetur seipsum prodere, vel accusare* and upon that rule it is, that if a man will prefer a bill to compel me to answer what trespasses I have committed upon his land, or what other injury I have done him; I shall not be compelled to answer to such a bill [as this] because it is matter of crime and tort; for which I am finable and punishable in another court, over and above what damages the party is to recover against me. Upon this ground, though the party's own confession of a crime be the clearest proof in the law, yet if such confession proceed from dread, or be extorted by any compulsion, it ought not to be received against him. . .If a prisoner disclose any thing to the court which makes him a felon, yet the court will not take advantage of it but suffer him to plead not guilty; and these cases depend upon the formed rule, viz. that a man is not obliged to condemn himself. Now if this be the law and choice of Nature, then is it superior to all positive laws, and is called *lex aeterna*, or the moral law. It is the law that was infused into the heart of man at his first creation; and whatever positive laws are contrary to this law of Nature and reason, they are void in themselves.[159]

In this passage the Chief Justice was responding to the Attorney General's argument that, notwithstanding the *nemo tenetur* maxim, since a statute of Henry VIII gave the court jurisdiction to determine the matter in the bill, the court had power to order the defendant to answer it. By

158. 145 Eng. Rep. at 419-20.
159. *Id.* at 420-21.

establishing that the *nemo tenetur* maxim was part of the law of Nature, the Chief Justice was able to hold such an interpretation void under Calvin's case[160] and Dr. Bonham's case.[161] It is therefore clear that this rambling passage simply meant that it was against the law of God and Nature for a man to be the means of his own punishment.[162] Despite the inclusion of a phrase depicting the voluntariness rule,[163] the remarks were directed at the fact that compelling the defendant to answer the bill under oath resulted in the defendant's self-destruction through self-incrimination. This compulsion thus violated the law of nature. The Chief Justice did not suggest that such a confession might be false. Indeed, the implication was just the opposite.

Gilbert, writing almost three-quarters of a century later, thus distorted Chief Justice Widdrington's natural law rationale for the *nemo tenetur* maxim. By taking the phrase "extorted by any compulsion" out of context and applying it to the use of physical torture, however, one can easily see how Gilbert logically deduced his new rationale: a desire for self-preservation from the "pain and force" of such torture quite naturally could lead one to incriminate oneself *falsely* in order to avoid such suffering. Indeed, it was precisely such distrust of tortured confessions that led Roman-canon law and the *Carolina* to exclude them unless they were voluntarily repeated in court at a later time. However logical Gilbert's deduction, it nevertheless ignored English history and the moral origins of the rule against self-incrimination.[164]

The next accretion to the voluntariness doctrine appears in *King v. Warickshall*,[165] an opinion of two justices arising out of a trial in the Old Bailey in 1783, where it was said:

160. 77 Eng. Rep 377 (1608). Calvin's case held that the law of Nature was part of the law of England. *Id.* at 392.

161. 77 Eng. Rep. 646 (1612).

162. *See* L. LEVY, *supra* note 22, at 328 n.41.

163. "[I]f such confession proceed from dread, or be extorted by any compulsion, it ought not to be received", 145 Eng. Rep. at 420.

164. *See also* M. HALE, PLEAS OF THE CROWN 225-26 (1847) (published posthumously). Lord Hale observed that while an indicted defendant could confess to the indictment at arraignment, (i.e. plead guilty) the usual practice of the judges (circa 1676, the date of Lord Hale's death) was to "advise the party to plead and put himself upon his trial, and not presently to record his confession." Moreover, this was the practice even "where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony (for) tho upon the fact thus shown it appear to be felony, the court will not record his confession , but admit him to plead to the felony *not guilty*." *Id.* The rationale for this practice obviously was not one concerned with the reliability of the confession.

165. 168 Eng. Rep. 234 (1783).

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the *flattery of hope*, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[166]

In *Warickshall* an accessory after the fact confessed when given promises of leniency, and revealed the location of stolen property concealed in her bed. There was apparently no dispute that the promise rendered the confession itself inadmissable.[167] The issue was whether the prosecutor could use as evidence the fact that the stolen property had been found in her bed, since that information was the fruit of an improperly obtained confession. Relying upon the trustworthiness rationale, the trial court ruled that the voluntariness rule did not apply to "facts" which existed independently of whether or not a confession was true or false, and the evidence was admitted.[168]

In 1787 the sixth edition of Hawkins' well-known treatise, *Pleas of the Crown*, cited both Gilbert's *Law of Evidence* and *Warrickshall* for the following rule of evidence:

> The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different adjitations may prevail A confession, therefore whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, . . . is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.[169]

This statement of the rule thus contained both the Gilbert rule (confessions extorted by pain and force are not dependable) and the *Warickshall*

166. *Id.* at 235 (emphasis added).

167. *Id.* The court cited no authority for this conclusion, but a note following the above-quoted passage referred to a trial in which the court had refused to admit a confession to murder obtained by promise of pardon. The note indicates that although the defendant had confessed to murdering a missing man, the "deceased" later turned up alive and well. *Id.* at 235 n.1. *See also* King v. Rudd, 168 Eng. Rep. 160, 168 (1775) where Lord Mansfield, C.J. commented that the exclusion of confessions obtained by threats and promises was a frequent practice.

168. *Warickshall*, 168 Eng. Rep. at 235. This remains the rule in England today. *See* Van Kessel, *supra* note 107, at 29.

169. 2 W. HAWKINS, PLEAS OF THE CROWN, ch. 46, § 3 (Leach ed. 1787). Leach, the editor of this edition, was also the reporter of the *Warickshall* case. Ironically, the last sentence of the above-quoted section was actually lifted from defense counsel's eloquent but unsuccessful argument in that case.

rule (confessions induced by promises are not dependable) and from this point forward the discussion of self-incrimination issues increasingly revolved around these two prongs as the touchstones of "voluntariness."[170]

In reliance upon such British authorities, the voluntariness test quickly came to dominate the landscape in America. In 1813, in *United States v. Charles*,[171] the defendant was indicted for arson and brought before a magistrate. The magistrate told him that there was enough evidence to commit him and that he would probably be better off if he told the whole truth. The defendant thereupon confessed. At trial, however, the court refused to allow admission of the confession into evidence, citing the following passage from a treatise on the law of evidence by Thomas Peake, Esq., a Barrister of Lincoln's Inn: "[B]ut if any threats or promises have been made to induce [the defendant] to confess, no evidence of such confession is admitted."[172] This statement accurately expresses the core of the common law voluntariness rule which came to control the admissability of confessions and thus shape the parameters of freedom from self-incrimination for the next century.[173]

By the mid-1850s, ignorance of both history and the original rationale underlying the privilege against self-incrimination was apparent. *People v. McMahon*,[174] a leading New York confession case still cited today,[175]

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170. Logically, it is unclear why voluntariness should be limited to consideration of only these two prongs. The absence of pain (or threats thereof) and the absence of inducement by promise are but two examples of a general rule, not the rule itself. Surely a confession induced by deceit, falsehood or trickery is not more voluntarily given than one induced by a promise of favor. *See* Queen v. Johnson, 15 Ir. R. C. L. 60, 130 (1864) (discussion by Lefroy, C.J.).

171. 25 F. Cas. 409, (C.C.D.C. 1813) (No. 14,786).

172. T. PEAKE, *supra* note 144, at 13. The trial court in *Charles* did allow subsequent admissions, made the day following the confession to the magistrate, and the defendant was convicted. However, the court granted a motion for a new trial after defense counsel argued that where a prisoner had been induced to confess by threat or promise, it was common practice to reject any subsequent confession to the same or like facts, though made at a subsequent time. *Charles*, 25 F. Cas. at 410 (citing 2 E. EAST, CROWN LAW, c. 16, § 94 (1806), a treatise by a Barrister of the Inner Temple). *But see* Oregon v. Elstad, 470 U.S. 298 (1985) (establishing the opposite rule with respect to subsequent admissions made following a confession which was improperly obtained in violation of *Miranda*).

173. The common law voluntariness rule, of course, is distinct from due process "voluntariness" which is a legal, rather than a factual, question. *See supra* note 147; Miller v. Fenton, 474 U.S. 104, 115 (1985).

174. 15 N.Y. 384 (1857).

175. *See In re* Simpson, 481 N.Y.S.2d 293 (Fam. Ct. 1984) (holding that the common law voluntariness test was available in a civil proceeding to challenge the admissability of statements made during custodial interrogation concerning infant's death).

provides a striking example of such ignorance. In *McMahon*, Judge Seldon opined:

> It may well be doubted whether that celebrated maxim *nemo tenetur prodere se ipsum* [sic], has itself any other substantial foundation than the uncertainty and doubt which must ever attend all extorted confessions, . . . But whatever may be the truth on this subject, I hold it to be clear, that when the law rejects a disclosure made under oath by a person charged with crime, it does so, not because any right or privilege of the prisoner has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt.[176]

In 1897, the United States Supreme Court, in *Bram v. United States*[177] placed its imprimatur upon this veil of ignorance, by engrafting the common law voluntariness rule onto the fifth amendment and virtually equating the two.[178] Citing the above-noted passages from Gilbert and Hawkins, the Court declared that it was "certain that the rule as stated by Hawkins, Gilbert and Hale was considered in the English courts . . . as one of the fundamental principles of the common law."[179] As if apologizing for the fifth amendment's lack of detail and the Court's reliance upon evidence textbooks for its meaning, the Court commented:

> The well settled nature of the rule in England at the time of the adoption of the Constitution and of the 5th amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment.[180]

The Court stated that the language of the fifth amendment "was but a crystallization of the doctrine as to confessions . . . and hence . . . the statements on the subject by the text writers and adjudications but for-

176. *McMahon*, 15 N.Y. at 390. The court cited *Warickshall* as evidence of "a strong test of this doctrine." *Id.* at 386.

177. 168 U.S. 532 (1897).

178. Several earlier Supreme Court decisions had addressed the voluntariness of confessions under the common law test, but none had tied the common law rule to the fifth amendment or addressed the confession issue as one of constitutional dimension. *See* Wilson v. United States 162 U.S. 613 (1896) (admission of statements resulting from questioning by magistrate upheld because there was no evidence of any threat or promise); Sparf v. United States, 156 U.S. 51 (1895) (custody does not by itself render confession involuntary); Hopt v. Territory of Utah, 110 U.S. 574 (1884) (government not required to call custodian of defendant, there being no allegation that custodian made any threat or promise which induced confession). All of these cases appear to embrace the trustworthiness rationale as the basis for the voluntariness rule.

179. 168 U.S. at 547.

180. *Id.* at 548.

mulate the conceptions and commands of the amendment itself."[181]

Thus did a mere evidentiary rule usurp the dimly perceived common law roots of the privilege against self-incrimination. Because it was a "self-evident" and "well settled" principle of law, the *nemo tenetur* maxim had needed no elaboration of its underlying rationale in 1789. By the nineteenth century, however, memory of the historical origins of the privilege had faded from view. As discussed in the next section, following the engrafting of the voluntariness doctrine onto the fifth amendment, the rationale for the privilege against self-incrimination underwent a subtle metamorphosis. During this transformation the rationale shifted from a deontological basis grounded in the nature of the relationship between the individual and the state, to a more narrow, utilitarian basis concerned only with the trustworthiness of the incriminating statement. The eventual dominance of this new rationale cast the privilege against self-incrimination adrift from its historical heritage, and separated it from the cluster of rights with which it had been so closely associated.

V. VOLUNTARINESS AND THE FIFTH AMENDMENT: THE *BRAM* TEST FOR COMPULSION

In order to understand more fully the actual holding in *Bram*, and the test it established for defining "compulsion" for purposes of the fifth amendment, it is necessary to explore the continuing development of the common law voluntariness test in England following *Warickshall*.

A. The Definition of Voluntariness Prior to Bram

In 1848, the reader will recall, Parliament sanctioned and made uniform the evolving judicial practice of advising a defendant at her preliminary examination that she need not make any statement.[182] This legislative act thus formally rendered extinct the sixteenth century practice of judicial interrogation. The enlightened attitude of the English judiciary by the mid-nineteenth century is succinctly captured in the following statement of Chief Justice Wilde:

> [M]agistrates have no right to put questions to a prisoner with reference to any matters having a bearing upon the charge upon which he is brought before them. The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is

181. *Id.* at 543.

182. *See supra* note 106 and accompanying text.

> not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, *who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol.* The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible.[183]

This expression represented the full flowering of the second stage of development of the privilege and demonstrates that custodial interrogation was deemed to violate the privilege more than a century before *Miranda*. At about the same time, however, a new development was taking place—the growth of an organized police force.

B. Early Prohibition of Police Interrogation: The British Experience

Law enforcement in early times was a function of the citizenry. The rural constable, whose nominal duties primarily consisted of making arrests and serving notices, was a part time, unsalaried member of the community who probably spent his days working in the fields.[184] Paid watchmen guarded the towns at night, but the pay was so low that often only superannuated men would accept such employment. By the end of the eighteenth century small groups of constables directed by a magistrate began to appear in various parts of London. In 1796, for example, there were eight constables at Bow Street (called the Bow Street runners).[185] That the function of this traditional constable, was extremely limited and did not encompass investigation by interrogating an accused is vividly revealed in one reported instance where a constable, asked at trial whether the defendant had said anything when arrested, replied: "No, he was beginning to do so; but I know my duty better, and I prevented him."[186]

In 1829 an act of Parliament created a Metropolitan Police District for the London area and similar legislation established organized police constabulary units for all parts of England by 1856.[187] With the advent of the new "police-constable" who was devoted to law enforcement full time, confessions in response to police questioning increasingly began to

183. Regina v. Pettit, 4 Cox C.C. 164, 165 (1850) (emphasis added). The Chief Justice excluded admissions made after a magistrate had put only one or two questions to defendant.

184. *See* 1 J. STEPHEN, *supra* note 24, at 194-200.

185. *Id.* at 195-96.

186. W. FORSYTH, HORTENSIUS THE ADVOCATE 292 (3d ed. 1879).

187. 1 J. STEPHEN, *supra* note 24, at 194-200.

appear in the trial courts. The judiciary immediately perceived these confessions as being inconsistent with the principle that a defendant could not be interrogated before the court. Moreover because the law required a magistrate at a preliminary examination to caution the accused before receiving any statement from him (even one in his own defense) the judiciary thought it anomalous to suggest that a policeman, being an inferior officer of justice, could avoid such a requirement. Thus as early as 1854, the trial court in *Regina v. Berriman* [188] refused to admit an uncautioned statement made to a policeman. In *Berriman*, a policeman went to the defendant's house and questioned her, without any caution, on the basis of mere rumors afloat in the neighborhood that she had murdered her newborn infant. Apparently, the defendant was not even in custody. Nevertheless, the officer's conduct brought strong condemnation from the court, which laid down the following guidelines for the police:

> If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to. But here there was nothing whatever to show that any offence had been committed by any one—no finding of any body—no sign of delivery—no marks of blood—not the slightest indication in fact to point to crime, and then it is sought, by questioning the prisoner on the subject, to establish from her own lips, the crime itself, as well as her guilty connection with it. What has been done here I have every reason to believe was done from no improper motive. It was, doubtless an error of judgment, but I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law.[189]

In *Regina v. Mick*,[190] almost a decade later, the trial court reproved the police for the practice of questioning defendants in custody even though the police gave a caution prior to hearing the defendant's response.[191]

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188. 6 Cox C.C. 388 (1854).

189. *Id.* at 389.

190. 176 Eng. Rep. 376 (1863).

191. *Id.* at 376. In *Mick*, following the defendant's arrest for felonious assault, the superintendant at the police station said to him: "At the time when you were taken into custody you stated that you had done no harm to any one. I am now told you have made a different statement." When the defendant then said "Yes sir, I will tell the truth," the superintendant said, "Stop, you must understand you need not say anything unless you like, and it may be given in evidence against you." The defendant thereupon confessed to stabbing a man during a disturbance in a public house. *Id.*

The trial court admitted the confession made following a caution, but stated to the policeman who had just testified:

> I think the course you pursued in questioning the prisoner was exceedingly improper. I have considered the matter very much: many Judges would not receive such evidence. The law does not intend you, as a policeman, to investigate cases in that way. I entirely disapprove of the system of police officers examining prisoners.[192]

Such expressions from individual justices (who also made up the Court of Criminal Appeal) continued to cast doubt upon the validity of custodial interrogation by the police even with an appropriate caution. Apart from a split decision by the Irish Court of Criminal Appeal,[193] however, no British appellate decision had authoritatively ruled on the issue of custodial interrogation prior to *Bram*.[194]

192. *Id. See also* Regina v. Reason, 12 Cox C.C. 228, 229 (1872) ("after the prisoner is taken into custody it is not the duty of the police-constable to ask questions").

193. The Queen v. Johnston, 15 Ir. R.-C.L. 60 (1864). In *Johnston* a divided Irish Court of Criminal Appeal upheld the admission into evidence of a statement made in response to brief on the street questioning of a suspect before she was formally arrested. The court held that even though a police-constable elicted the statement without a caution, this did not render the statement per se involuntary. One justice opined that the statement was admissible because the defendant was not in custody at the time he made it. Curiously , if the case were to arise today under *Miranda*, the resolution of that issue would not be entirely free of doubt.

194. But see Wigmore who erroneously assumed the contrary, asserting: "It was for a long time the clear unquestioned law in England that the mere circumstance of arrest, even when combined with the circumstance that the confession was made in answer to questions put by the custodian, did not exclude the confession." 1 J. WIGMORE, *supra* note 3, § 847, at 965. This statement remains unchanged in the current edition, 3 J. WIGMORE, *supra* note 3, § 847, at 502 (Chadbourn rev. 1970). Wigmore cited four cases as authority for this statement. In the first, Rex v. Lambe, 168 Eng. Rep. 379 (1791), there was no claim that the confession was involuntary. The question reserved for decision was simply whether a voluntary confession made to a magistrate, and transcribed by a clerk, was inadmissible because it had not been signed by either the defendant or the magistrate. In Gilham's Case, 168 Eng.Rep. 1235 (1828), the second authority relied upon, the issue was whether a chaplain's urging the defendant to confess in order to be reconciled with God tainted the defendant's subsequent confession to his gaoler and the mayor. No evidence of any interrogation by either the gaoler or the mayor existed, and indeed, the mayor cautioned the defendant before receiving his statement. The third decision, Wild's Case, 168 Eng. Rep. 1341 (1835) involved a confession which the defendant made to a neighbor following a direct question. Only Thornton's Case, 168 Eng. Rep 955 (1824) involved actual questioning by a police officer. In *Thornton* a fourteen year old boy, charged with arson, was illegally detained, kept without food for six hours, and called a liar by the officer. The judges split seven to three in favor of admissibility.

One must note, however, that no opinion was delivered giving the reasons for the judges' views in *Gilham*'s, *Wild*'s and *Thornton*'s cases. In the latter two cases the issue was not even argued by counsel. This departure from the normal judicial decision-making process is emblematic of the fact that these cases (which occurred before the creation of the Court for Crown Cases Reserved and its successor the Court of Criminal Appeal) were not decisions by a regularly constituted tribunal. As Stephen has explained, because there was no automatic right of appeal in criminal cases during this

In *Regina v. Baldry*,[195] it is true, the court had upheld the admission of a confession to a police-constable, made after a caution. In that case, however, there was no evidence of any interrogation.[196]

Thus, at the time of the *Bram* decision, while it was common practice for the police to caution suspects in England, the validity of custodial interrogation by police (i.e. going beyond merely asking the defendant if he wished to say anything in his defense) was itself in doubt under contemporary voluntariness standards.[197] In addition, when the *Bram*

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period, an informal practice developed among the judges for handling issues in areas where the law remained uncertain. In such cases the judges heard arguments in the informal atmosphere of Serjeant's Inn, and if they believed that the prisoner had been convicted unjustly, they recommended a pardon. No formal opinion or statement of reasons was given, nor any judgment delivered. 1 J. STEPHEN, *supra* note 24, at 311. Wigmore's reference to two of these "decisions" (*Thornton*'s and *Gilham*'s Cases) as "two landmarks" of a "clear" rule that custodial questioning was permissible without a caution is thus unjustified. None of the four cases cited by Wigmore specifically addressed the question whether a police officer could question an accused in custody (with or without a caution). The issue was ultimately resolved by adoption of the Judges Rules which provided that a defendant in custody was to be cautioned prior to making any statement, and that police were not to interrogate a defendant even when he elected to make a statement. *See infra* note 197.

195. 169 Eng. Rep. 568 (1852).

196. The defendant in *Baldry* was charged with murdering his wife by poison. The police-constable who received his confession testified:

> I went to the prisoners's house. . . .I told him what he was charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him. *Id.*

The defendant's confession occurred immediately thereafter and does not appear to have been made in response to any questioning on the part of the officer. Indeed, during the argument of that case Lord Campbell, C.J. had let fall the dictum: "Prisoners are not to be interrogated. By the law of Scotland they may be; but by the law of England they cannot." *Id.* at 573.

The sole issue in *Baldry*, as incredible as it may seem today, was whether the above-described caution itself constituted an inducement to confess because, contrary to the statutory warning required of magistrates, this caution had said, in effect, that any statement the defendant made "would" be used as evidence rather than "may" be used as evidence. The court found that this discrepancy did not transform the caution into a promise of benefit, and overruled prior cases which had so held, noting that the rule had been "extended quite too far," resulting in justice and common sense being "sacrificed at the shrine of mercy." *Id.* at 574.

197. In 1912, fifteen years after *Bram*, the judges of the King's Bench Division of the High Court adopted what came to be known as the "Judges Rules." These unofficial guidelines, amended in 1918 and clarified in 1930 by a Home Office Circular, provided *inter alia* that police must caution a person in custody before receiving any statement from him, and that a person who elected to make a statement could not be questioned or cross-examined except for the purpose of clarifying an ambiguity in what he said. These rules were amended again in 1964 and finally replaced by an elaborate Code of Practice in 1986, which sets down detailed requirements for cautioning suspects, providing access to counsel and limiting the circumstances in which an accused can be questioned after arrest. The new Code also requires that the police caution a person upon whom suspicion has focused, even though that person is not in custody. See 1 G. VAN KESSEL, THE SUSPECT AS A SOURCE OF TESTIMONIAL EVIDENCE: A COMPARISON OF THE ENGLISH AND AMERICAN APPROACHES 36 (1986) for

Court looked back to the era immediately preceding the adoption of the fifth amendment, it found the English common law voluntariness test of the late eighteenth century provided an extremely high degree of protection against self-incrimination. As the commentators of that period asserted, even the slightest influence of hope or fear operated to render a confession inadmissable.[198] Indeed, as Baron Hotham observed in *Rex v. Thompson*,[199] just seven years before the adoption of the Bill of Rights: "Too great a chastity cannot be preserved on this subject. . . ."[200] In *Thompson*, the Receiver-General for the county, traced a stolen bank note to the defendant, confronted him and after hearing his rather dubious explanation stated: "[U]nless you give me a more satisfactory account I shall take you before a Magistrate."[201] The defendant then made a full confession. The trial court ruled the confession inadmissable, stating: "It is almost impossible to be too careful upon this subject: This scarcely amounts to a threat, but it is certainly a strong invitation to him to confess . . . . The prisoner was hardly a free agent at the time."[202] American cases decided just two years before Madison submitted the fifth amendment to Congress were of similar stamp. In *State v. Phelps*[203] a Connecticut court refused to permit the state's attorney to testify regarding disclosures made to him by the prisoner, and in *State v. Thomson*[204] the court precluded unidentified witnesses from testifying concerning anything the prisoner had said to them when he attempted to improve his position by agreeing to testify against his accomplices.[205]

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a discussion of the historical evolution of the "Judges Rules" and a comparative analysis of the new Code with the *Miranda* rules. The text of the original rules and circular can be found in Culombe v. Connecticut, 367 U.S. 568, 596 n.41 (1961).

198. For an example, see the previously quoted statement in Hawkins's *Pleas of the Crown* declaring that a confession "obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted is not admissable evidence." *See supra* note 169 and accompanying text.

199. 168 Eng. Rep. 248 (1783).

200. *Id.* at 249.

201. *Id.* at 248.

202. *Id.* at 249. *See also* Cass's Case, 168 Eng. Rep. 249 (1784) (reported in a note appended to *Thompson*, 168 Eng. Rep. 248 (1783)). In *Cass*'s case the defendant stole iron bars from a pub. The bars were used to secure the pub's windows and the publican, anxious to recover the bars, told the defendant, who was under arrest, that he would "be favorable" to him if he told him where the bars were hidden. Justice Gould held the resulting confession inadmissible, stating that "the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession." *Id.*

203. 1 Kirby 282 (1787).

204. 1 Kirby 345 (1787).

205. The court stated: "When disclosures of that kind have been made to the authority examin-

C. *The* Bram *Holding*

In equating the "compulsion" proscribed by the fifth amendment with the English common law voluntariness test, the United States Supreme Court in *Bram v. United States* therefore established a strict standard for the admissibility of confessions. Acknowledging that the decided cases had created great perplexity and confusion in determining the admissibility of confessions, the Supreme Court set forth a detailed description of how the fifth amendment voluntariness test should operate. The Court observed first that the determination of voluntariness was primarily a question of fact.[206] Because the facts by which compulsion might manifest itself would invariably be different in each case, the Court sought to achieve uniformity by focusing, not upon whether the conduct producing the compulsion was improper, but rather upon whether the conduct's "resultant effect upon the mind" produced "hope or fear."[207] The test, moreover, was not whether such hope or fear actually existed, but whether the conduct "ordinarily operated" to create this condition of the mind.[208] Finally, the Court held, because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner" a confession must be deemed involuntary "if any degree of influence has been exerted."[209]

Thus, under the *Bram* test, any interrogation tactic which ordinarily would have the effect of producing either hope or fear in the mind of the suspect rendered the confession involuntary without regard to the degree of influence exerted or whether that influence was sufficient to overcome the suspect's "will." This test, the Court declared, was in harmony with the common law doctrine as expressed by the various commentators and a multitude of English and American cases.[210]

The facts of *Bram* did not involve any overt threat or promise. A brutal triple murder had been committed aboard an American vessel abroad upon the high seas. The victims were the captain, his wife and

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ing, or to the state's attorney, under such circumstances, that the person disclosing considered himself as a witness, the court have never allowed it to be given in evidence against him. . . ." *Id.* at 345.

206. 168 U.S. 532, 549 (1897).

207. *Id.* at 548.

208. *Id.*

209. *Id.* at 565 (quoting 3 W. RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS 479 (6th ed. 1896)). I am indebted to Professor Stephen J. Schulhofer for bringing the significance of this passage to light in his thoughtful article, Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 446 (1987).

210. *Bram*, 168 U.S. at 543.

the second mate. No evidence linked anyone to the crimes, but the crew, suspecting Bram and another seaman, had placed them in irons and returned to Halifax, Nova Scotia. While the Halifax police detained the two men pending action by U.S. authorities, a Halifax police detective interviewed Bram in his office.[211] According to the detective's testimony:

> When Mr. Bram came into my office I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown [the other suspect] in this office, and he made a statement that he saw you do the murder." [Bram] said: "He could not have seen me. Where was he?" I said: "He states he was at the wheel." "Well" he said, "he could not see me from there."[212]

The prosecution offered Bram's statement in evidence as an implied admission of guilt and Bram was convicted. The Court, however, held that this brief interrogation rendered the statement involuntary, stating:

> [T]he situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action . . . It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason can it be said that the answer which he gave and which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect.[213]

One could thus view *Bram* as holding that the act of questioning itself creates compulsion violative of the fifth amendment. However, such a

211. The fifth amendment by itself limits only the powers of the federal government. The Court made no determination and did not discuss whether this foreign official was somehow acting as an agent of the United States government. Indeed, the Halifax detective appears to have been acting totally on his own even though Canadian authorities had no jurisdiction in the matter. Therefore, implicit in the *Bram* holding is the underlying premise that the *reception* of compelled evidence by a federal court constitutes a violation of the fifth amendment regardless of the source of the compulsion. This analysis is of course consistent with the *Bram* approach to voluntariness, which focuses upon the mind of the suspect rather than the cause of the compulsion. *But see* Colorado v. Connelly, 479 U.S. 157 (1986) discussed *infra* in part IX at note 311, which repudiates this position.

212. 168 U.S. at 562.

213. *Id.* at 562-63.

view misperceives the entire thrust of *Bram's* methodology, for the Court declined to employ a conduct-based categorical approach. The focus of *Bram's* analysis was upon the mind of the defendant, rather than the conduct of the interrogator. The *Bram* test nevertheless was heavily weighted in favor of the accused. As the Court candidly admitted, it was beyond its competence to gage the effect of the influence of hope or fear upon the mind of an accused. Therefore the Court concluded a confession must be deemed involuntary if "any degree of influence" was exerted.

Bram thus established a presumption of compulsion. The presumption applied if an objective assessment of the attendant circumstances surrounding the making of a confession revealed the existence of pressure upon the accused to speak. If an interrogation tactic, objectively viewed, was sufficient to engender hope or fear in the mind of the accused and thus exert influence, however slight, upon his decision to speak, then it violated the fifth amendment prohibition against compelled self-incrimination. This presumption lay at the heart of the *Bram* test, yet it became obscured by the subsequent misreading of *Bram*. In part this occurred because such a presumption was fundamentally inconsistent with the trustworthiness rationale, which, like unwanted baggage, had quietly accompanied the common law voluntariness doctrine when it became interwoven with the fabric of the fifth amendment.

D. The Subsequent Interpretation of Bram

In *Ziang Sung Wan v. United States*,[214] the Supreme Court adopted a broad reading of *Bram* regarding the types of pressure sufficient to render a confession involuntary. In that case the defendant, ill and in pain, confessed after "persistent, lengthy and repeated" questioning over a seven day period. Although the police did not use physical force, or make threats or promises, Justice Brandeis, writing for a unanimous court, found that this continued interrogation, over defendant's repeated requests to be left alone constituted compulsion. The Court refused to limit *Bram* to a mere "threats and promises" test, and held that "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion."[215]

214. 266 U.S. 1 (1924).

215. *Id.* at 14-15. The Court mentioned, without elaboration, that the defendant was held incomunicado in a hotel room without formal arrest during this lengthy period of time. *Id.* at 11.

For a quarter of a century following *Bram*, lower federal courts scrupulously followed its carefully crafted methodology for determining compulsion under the fifth amendment.[216] In *Sorenson .v United States*,[217] for example, the mere assertion by a postal inspector that he had a "good case" against the defendant rendered the ensuing admissions involuntary because it had the effect of producing "hope or fear" in "the mind of the accused."[218]

Chaffing under the severity of the *Bram* test, and perhaps encouraged by Wigmore's criticism of the decision,[219] the federal judiciary nevertheless began diluting *Bram*.[220] By the 1930s jurists such as Learned Hand openly ignored the decision. In *United States v. Lonardo*,[221] Hand was

216. *See* Davis v. United States, 32 F. 2d 860 (9th Cir. 1929); Perrygo v. United States, 2 F.2d 181 (D.C. Cir. 1924); Purpura v. United States, 262 F. 473 (4th Cir. 1919); Sorenson v. United States, 143 F. 820 (8th Cir. 1906).

217. 143 F. 820 (8th Cir. 1906).

218. *Id.* at 824. The court stated:

> The confessions in the case before this court were made to an inspector while the defendants were prisoners under his control. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the [federal] court, and the matter would probably be over-looked in the state court. Tried by the decision of the Supreme Court in *Bram's* Case, *either* of these statements was legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged, and *each* of them rendered the subsequent confession involuntary and inadmissible in evidence.

Id. (emphasis added).

219. Wigmore scathingly attacked *Bram* for merging the common law confession rule on voluntariness with the privilege against self-incrimination, declaring: "That the two rules should be supposed to have something of a common principle or spirit is a not unnatural error. But that history should be rashly tampered with by asserting any common origin is inexcusable." 3 J. WIGMORE, *supra* note 3, at § 823 (3d ed. 1940).

220. *See* Brown v. United States, 13 F.2d 298 (D.C. Cir.1926); Murphy v. United States, 285 F. 801 (7th Cir.1923); Pass v. United States, 256 F. 731 (9th Cir. 1919). After suppressing the confession the trial judge in *Murphy* complained:

> "I don't know what a post office inspector is going to do in the enforcement of law in dealing with criminals . . . . It is not with any particular enthusiasm that I sustain this objection, but I do sustain it; there being no discretion left to me from the decision in the *Bram* Case.

285 F. at 807. The court of appeals, however, restricted *Bram* to its facts and reversed the trial court. The court distinguished *Bram* on the ground that in *Bram* the Canadian detective had stripped *Bram* of his clothing thus intimating that "a flogging would be inflicted if the statement was not satisfactory." *Id.* at 813. Nothing in the *Bram* opinion, however, even remotely justifies such an inference; the officer's stated purpose was to search Bram's clothing. Moreover, a careful reading of the opinion shows that the reason the Court emphasized this factor was to underscore its argument that Bram perceived himself to be under the complete control and authority of the Canadian officer, and thus felt compelled to respond when the officer told him that a co-defendant had accused him of being the murderer. *See Bram*, 168 U.S. at 563.

221. 67 F.2d 883 (2d Cir. 1933).

presented with a case that appears to have been on all fours with *Bram*. The defendant in *Lonardo* had persisted in denying any involvement in a conspiracy to pass counterfeit notes. During interrogation, however, an assistant district attorney told him that a co-defendant had already implicated him and that courts took into consideration the fact that a defendant pled guilty when imposing sentence. Ignoring the pressure created by the co-defendant's accusation (which was of critical importance in *Bram*) Judge Hand treated the case as involving only an implied promise of leniency. Hand acknowledged that under the English cases relied upon in *Bram*, "the inducement here used would have thrown out the confession."[222] Nevertheless, the learned judge concluded:

> [W]e do not believe that [the *Bram* Court] meant to commit itself to the doctrine that the mere hope of a lighter punishment would exclude a confession . . . . Our conclusion is that we are free to decide that the inducement of a possibly lighter punishment is not ordinarily enough *to impugn the verity of a confession*, and that there were here no added circumstances to make a difference.[223]

The issue under the *Bram* test, however, was not whether the influence exerted was sufficient to impugn the statement's trustworthiness. On the contrary, the issue was whether "any degree" of influence had been exerted upon the accused to speak.[224] True, a concern for trustworthiness had given rise to the common law voluntariness rule which *Bram* engrafted onto the fifth amendment, but *Bram* had virtually ignored this evidentiary rationale in formulating its test. Moreover, to transform "trustworthiness" into the standard for voluntariness is to confuse one reason for the rule with the rule itself. Nevertheless, by such sleight of hand did the *Bram* test for compulsion become distorted.

In *Lisenba v. California*[225] the Supreme Court put its own imprimatur upon this distortion of its *Bram* holding, declaring:

> The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false . . . . This Court has formulated those which are to govern in

222. *Id.* at 885.

223. *Id.* (emphasis added). It is noteworthy that Lonardo had been formally admonished before making any statement "that he need not speak, but that if he did what he said would be used against him." *Id.* at 884.

224. *See supra* notes 206-13 and accompanying text.

225. 314 U.S. 219 (1941).

trials in the federal courts.[226]

Two years later, however, the Supreme Court shifted its entire approach to the confession problem in *McNabb v. United States*.[227] Exercising its supervisory power over the administration of criminal justice in federal courts, the Court moved toward a bright line rule, later known as the *McNabb-Mallory* rule. This rule excluded confessions regardless of their trustworthiness if they were obtained during a period of unnecessary delay in bringing the defendant before a magistrate following arrest. The Court founded this new rule upon congressional legislation that required prompt arraignment.[228] Clearly the underlying purpose for judicial enforcement of this procedural requirement by means of the exclusionary rule, however, was to stop custodial interrogations conducted by police behind closed doors.[229] This attempt at a bright line solution ultimately faded, however, when its foundation, built upon the shifting sands of mere legislation, was swept away upon the tide of the Omnibus Crime Control and Safe Streets Act of 1968.[230] Under that Act, Congress purported to eliminate the *McNabb* per se exclusionary rule, and relegated unlawful delay to the status of a mere factor in deter-

226. *Id.* at 236 (citing *Bram*, 168 U.S. 532). The *Bram* test, however, did not depend upon the Court's determination that the statement was likely to be false. In fact, the *Bram* Court eschewed the very attempt to make such a determination because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner." 168 U.S. at 565. This honest and straightforward recognition of the Court's limited ability to determine psychological facts formed the heart of *Bram* 's approach to determining voluntariness. Because the *Bram* Court concluded that "any doubt as to whether the confession was voluntary must be determined in favor of the accused," it had thus perforce established a rule of exclusion if "any degree" of influence was exerted. *Id.* Ironically, Judge Hand recognized the anomoly between this strict standard and the trustworthiness rationale when he observed in *Lonardo* "unless we are to clutch at straws, we cannot reconcile much of the law with the theory which it professes to follow." United States v. Lonardo, 67 F.2d 883, 884-85 (1933). The failure of theory was of course traceable directly back to *Bram* and its use of a mere rule of evidence to attempt to resolve constitutional issues involving fundamental fairness in the relationship between the individual and the state.

227. 318 U.S. 332 (1943).

228. *Id.* at 342. The relevant provision is currently Rule 5(a) of the Federal Rules of Criminal Procedure which provides that a person arrested is to be taken "without unnecessary delay" before the nearest available commissioner or other officer empowered to commit persons charged with federal offenses. The *McNabb-Mallory* rule was never made applicable to state criminal prosecutions because it was not constitutionally required. Gallegos v. Nebraska, 342 U.S. 55 (1951).

229. The Court stated that, "this procedural requirement [of prompt arraignment] checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogations of persons accused of crime." *McNabb*, 318 U.S. at 344.

230. 18 U.S.C. § 3501 (1982).

mining the "voluntariness" of any confession obtained after arrest.[231]

VI. THE FOURTEENTH AMENDMENT DUE PROCESS "VOLUNTARINESS" TEST

This Article now addresses the adjudication of confession issues in state criminal cases. This Part discusses the distinct and separate "voluntariness" doctrine developed under the due process clause of the fourteenth amendment and shows how this form of "voluntariness" also became intertwined with the privilege against self-incrimination.

In *McNabb*, Justice Frankfurter declared that the Supreme Court's power of superintending control over the administration of criminal justice in federal courts implied a duty to maintain "civilized standards of procedure and evidence," and asserted "[s]uch standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."[232] This less "civilized" standard to which Frankfurter referred was the nascent version of procedural due process with which the Court had begun its attempt to control the blatant brutality of state law enforcement officials in extracting confessions.[233] Having initially held, in 1908, that the fifth amendment did not apply to the states,[234] the Court had turned to the due process clause of the fourteenth amendment in 1936 when confronted with the spectre of capital murder convictions based solely upon confessions obtained by the savage beating and torture of three black suspects.[235]

Under this early conception of due process, the Court did not view the

231. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 6.3 (1984). *But cf.* United States v. Robinson, 439 F.2d 553, 563-64 (D.C. Cir. 1970) (indicating that the per se exclusionary rule has only been restricted). Singer and Hartman suggest that congressional modification of the *McNabb-Mallory* rule may be an impermissible infringement upon a judicial prerogative. *See* S. SINGER & M. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK, 12.11 (1986).

232. 318 U.S. at 340.

233. *See* IV NAT'L COMM. ON L. OBSERVANCE AND ENFORCEMENT, REP. No. 11, LAWLESSNESS IN LAW ENFORCEMENT (1931) (known popularly as the Wickersham Commission Report).

234. Twining v. New Jersey, 211 U.S. 78 (1908).

235. Brown v. Mississippi, 297 U.S. 278, 286 (1936). The Court in *Brown* held: "The due process clause requires 'that state action. . .shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and *the use* of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286 (citations omitted) (emphasis added). *But see* Colorado v. Connelly, 479 U.S. 157 (1986) discussed *infra* at Part X *A.1.(b),* holding that the use of a confession made under the "compulsion" of mental illness does not constitute state action.

fourteenth amendment as "incorporating" the fifth amendment's protection against compelled self-incrimination.[236] Rather, the due process inquiry focused upon whether the defendant had been subjected to "a hardship so acute and shocking" that it violated "fundamental principles of liberty and justice" rooted in the traditions and conscience of the American people.[237] Over the next three decades, however, the Court gradually moved beyond this primitive "shocks the conscience" standard. In twenty-nine confession decisions in state cases from 1936 to 1964, the Court progressively civilized the meaning of due process until the clause forbade not only physical force, but also psychological coercion.[238]

Under this evolving standard, which became known as the due process "voluntariness" test,[239] the Court indeed tilted so far toward the compulsion standard under the fifth amendment that the two sometimes appeared virtually indistinguishable.[240] Thus, in 1964, when the Court overruled *Twining* in *Malloy v. Hogan*[241] and applied the fifth amendment directly to the states nothing seemed incongruous in the Court's assertion that it was simply recognizing what implicitly had already occurred:

> [T]oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897,

236. See Palko v. Connecticut, 302 U.S. 319, 327 (1937) where Justice Cardozo explained that Powell v. Alabama, 287 U.S. 45 (1932), which held that states must provide effective assistance of counsel to illiterate defendants accused of capital offenses, "did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court" but rather turned upon the "particular situation" which disclosed special circumstances making counsel essential to a fair trial. *See also* Scott v. Illinois, 440 U.S. 367 (1979) and Gagnon v. Scarpelli, 411 U.S. 778 (1973) (reflecting an apparant return to this view).

237. *Palko*, 302 U.S. at 325-28 (citations omitted).

238. *See* Lynumn v. Illinois, 372 U.S. 528 (1963)(barring use of mother's confession obtained after threats that her children would be taken away from her if she failed to cooperate); Haynes v. Washington, 373 U.S. 503 (1963)(barring confession obtained by threats to continue incommunicado detention and promises to allow communication with spouse). For a compilation of cases see D. NISSMAN, E. HAGAN & P. BROOKS, LAW OF CONFESSIONS (1985) app. B.

239. *See generally* Kamisar, *What is an "Involuntary" Confession?* 17 RUTGERS L. REV. 728 (1963); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981); Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

240. See for example, Culombe v. Connecticut, 367 U.S. 568 (1961) where Justice Frankfurter, in an elaborate exposition attempting to define "voluntariness" stated that "[t]he line of distinction [between voluntary and involuntary] is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." *Id.* at 602.

241. 378 U.S. 1 (1964).

> when in *Bram v. United States* . . . the Court held that "the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be exacted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ."[242]

The due process "voluntariness" test, however, had not been synonymous with the *Bram* test for compulsion. Under the due process test, the Court actually made the attempt to determine, as a matter of "'psychological' fact," whether the defendant's will had been overcome.[243] *Bram* had rejected such an attempt, and had instead established a presumption of compulsion if any degree of influence had been exerted upon the suspect's decision to speak.[244]

Due process "voluntariness" also represented a broader "complex of values" than just a concern over mental freedom. As Chief Justice Warren observed in *Blackburn v. Alabama*:

> But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake . . . The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual

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242. *Id.* at 7 (citing Bram v. United States, 168 U.S. 532, 542-43 (1897)).

243. See *Culombe*, 367 U.S. at 602-03, which stated the test as follows:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, *if his will has been overborne* and his capacity for self-determination critically impaired, the use of his confession offends due process.

Id. (citation omitted) (emphasis added).

244. *See supra* text accompanying notes 209-10. Significantly, *Malloy* omitted the following passage establishing this presumption when it quoted from the *Bram* opinion:

> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted. 168 U.S. at 542-43.

By omitting this passage, *Malloy* and subsequent decisions purporting to reaffirm *Bram* have silently ignored the methodology for determining compulsion which lay at the heart of the *Bram* test. *See, e.g.*, Hutto v. Ross, 429 U.S 28, 30 (1976); Brady v. United States, 397 U.S. 742, 753 (1970). *Miranda*, however, remained faithful to the original test for compulsion established by *Bram*, holding that the pressures inherent in the incommunicado detention and interrogation of an arrested suspect establish a presumption of compulsion. *See* Schulhofer, *supra* note 208 at 446.

> criminals themselves. . . . Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.[245]

Because due process voluntariness represented a "complex of values" the trustworthiness rationale never attained a position of dominance in state confession cases. Indeed, at an early date in its development, the Court distinguished the due process test from the fifth amendment voluntariness test, stating: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[246] Although the matter was placed in doubt by a contrary assertion in *Stein v. New York*,[247] the Court in *Rodgers v. Richmond* again expressly rejected trustworthiness as the exclusive standard for determining due process violations.[248] Two years later, in *Shotwell v. United States*[249] the Court stated in dicta: "We agree that the rule of [*Rodgers v. Richmond*] involving a state trial, is equally applicable in a federal prosecution."[250] Thus the long reign of the trustworthiness rationale as the exclusive test for determining the admissibility of confessions in federal courts finally came to an end.[251]

While the due process "voluntariness" test thus dethroned the trustworthiness rationale, it also obscured the issue of "compulsion" by submerging it within an ad hoc balancing test based upon the totality of the circumstances. Professors Kamisar and Schulhofer have exhaustively detailed the defects of this ad hoc approach.[252] Its Alice in Wonderland journey into the metaphysical realm of broken human "wills" defied both scientific views of human behavior and common sense. Its most serious flaw, however, lay in the fact that it was a value-laden method of constitutional adjudication that created vague, unpredictable standards which failed to provide clear guidance to police and made judicial review a morass of subjectivity.[253] The Court itself openly complained of the difficul-

245. 361 U.S. 199, 207 (1960) (citing Spano v. New York, 360 U.S. 315, 320-21 (1959)).

246. Lisenba v. California, 314 U.S. 219, 236 (1941).

247. 346 U.S. 156, 192 (1953).

248. 365 U.S. 534 (1961).

249. 371 U.S. 341 (1963).

250. *Id.* at 350 n.10.

251. For evidence that the influence of the trustworthiness rationale still lingers on, however, see Brady v. United States, 397 U.S 742, 758 (1970); New York v. Quarles, 467 U.S 649, 672-73 (1983) (O'Connor, J., concurring).

252. *See* Kamisar, *supra* note 239; Schulhofer, *supra* note 239.

253. *See* Schulhofer, *supra* note 239 at 869-72.

ties in drawing the line between an acceptable police tactic and a violation of due process particularly when the Court must make "fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of the accused."[254]

VII. TOWARD A BRIGHT-LINE SOLUTION: THE SIXTH AMENDMENT RIGHT TO COUNSEL

The problem of determining where the line should be drawn between society's interest in efficient law enforcement and the constitutional mandate to protect the individual's privilege against self-incrimination became increasingly intractable as police interrogation techniques became more sophisticated in employing deception and psychological pressure.[255] Dissatisfied with the difficulties inherent in the ad hoc due process voluntariness approach, the Court in 1964 boldly experimented with the emerging sixth amendment right to counsel, hoping it could be used as a tool to fashion a bright-line solution.[256] In *Massiah v. United States*[257] the Court held that the government violated an indicted defendant's sixth amendment right to counsel when it arranged for his co-defendant (turned informant) to surreptitiously elicit incriminating statements from him while defendant was free on bond. Testimony of a federal agent who had listened in on the incriminating conversation by means of a hidden radio transmitter was therefore held inadmissable under the sixth amendment exclusionary rule.[258]

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254. Haynes v. Washington, 373 U.S. 503, 515 (1963).

Bram had of course avoided this problem by establishing a presumption of compulsion if any degree of influence on the decision to speak had operated upon the accused.

255. *See* F. INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed., 1986) for detailed instruction in such techniques. Originally published in 1962, this work became the leading police manual on methods of interrogation and contributed significantly in influencing law enforcement to eschew the more brutal "third degree" tactics of an earlier era.

256. Just one year earlier, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Warren Court had held that the sixth amendment's guarantee of counsel applied to state court proceedings. A "right to counsel" approach had previously been stated by Chief Justice Warren and Justices Black, Brennan, and Douglas dissenting in Crooker v. California, 357 U.S. 433 (1958) and Cicenia v. LaGay, 357 U.S. 504 (1958). Justice Stewart, concurring in Spano v. New York, 360 U.S. 315, 326 (1959) would have made the necessary fifth vote supporting a right to counsel solution in that case, but Chief Justice Warren, who wrote the majority opinion, struck down the confession on traditional due process voluntariness grounds.

257. 377 U.S. 201 (1964).

258. *Id. Massiah* held that the confrontation between the defendant and his co-defendant was a critical stage of the proceedings against him at which he was entitled to the assistance of counsel. The government's implication in the deception of the defendant and exploitation of his ignorance of

In *Escobedo v. Illinois,* [259] also decided in 1964, the Court extended the sixth amendment right to counsel to the police station interrogation room. In *Escobedo* the police arrested the defendant and were questioning him prior to the initiation of formal charges while defendant's attorney stood outside demanding to see him. Acknowledging that access to counsel during the period between arrest and indictment would diminish significantly the number of confessions produced, the Court nevertheless concluded that "the right to counsel would indeed be hollow if it began at a time when few confessions were obtained."[260] Although its opinion portended a sweeping right to counsel during interrogation, the court circumspectly declared: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[261] The "circumstances" in *Escobedo* included the fact that the defendant, while under custodial interrogation, had asked to see his retained counsel. The police, however, prevented him from having access to his counsel and continued his interrogation without advising him of his right to remain silent.[262] *Escobedo* thus left state

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the true status of his co-defendant as a government informer thus violated defendant's sixth amendment rights. *Massiah* was recently reaffirmed in *Maine v. Moulton,* 474 U.S. 159 (1985) where the Court explained:

> The Sixth Amendment protects the right of the accused not to be confronted by an agent of the State regarding matters as to which the right to counsel has attached without counsel being present. This right was violated as soon as the State's agent engaged [defendant] in conversation about the charges pending against him.

474 U.S. at 178 n.14. *See also* Michigan v. Jackson, 475 U.S 625 (1986); Brewer v. Williams, 430 U.S. 387 (1977).

259. 378 U.S. 478 (1964). The substance of *Escobedo*'s sixth amendment analysis has subsequently been disavowed by the Court in Moran v. Burbine, 475 U.S. 412 (1986).

260. *Escobedo,* 378 U.S. at 488-89. The Court in justifying this conclusion stated:

> There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination .... If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.
>
> ....
>
> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Id.

261. *Id.* at 492.

262. *Id.* at 480.

courts in a quandary as to which of these circumstances were controlling. Did an accused have to request counsel? If not, and police gave warnings regarding the right to silence, must counsel nevertheless be provided to give advice before any interrogation? Did the accused have to waive this new right to counsel before any interrogation could take place? Did the rule extend to suspects who were not in custody?

The decision attracted intense scrutiny.[263] It was attacked by those who, echoing Justice White's dissent, feared that the Court had created an "impenetrable barrier" to any interrogation once the accused became a suspect. At the same time the decision was derided as "satanic" by so prominent a jurist as the Chief Justice of the California Supreme Court, Roger Traynor, who queried: "When does an investigation cease to be a 'general inquiry into an unsolved crime' [and] begin 'to focus on a particular suspect'? There is more of Lucifer than of luciferousness in a rule that compels a police officer, even under emergency conditions, to make so finespun a determination."[264]

VIII. THE COMPROMISE

Just two months after Chief Justice Traynor delivered these remarks, the Court acknowledged the "spirited legal debate" that had arisen regarding the scope and desirability of the *Escobedo* rule, and retreated from the path it had taken.[265] First, the Court limited the *Escobedo* "right to counsel" to custodial interrogations.[266] Then, capitulating to the demands of law enforcement, the Court declared that it was establishing "concrete constitutional guidelines" that would permit waiver of both this newly created "right to counsel" and the fifth amendment right to freedom from the compulsion inherent in such interrogations.[267] That

263. *See, e.g., Developments in the Law-Confessions*, 79 HARV. L. REV. 935, 999 (1966). For a compilation of articles see Miranda v. Arizona, 384 U.S. 436, 440 n.2 (1966).

264. HON. R. TRAYNOR, THE DEVILS OF DUE PROCESS IN CRIMINAL DETECTION, DETENTION, AND TRIAL 21 (1966) (the twenty-third annual Benjamin N. Cardozo lecture delivered before the association of the bar of the city of New York, April 19, 1966).

265. Miranda v. Arizona, 384 U.S. 436, 440-442 (1966) (Chief Justice Warren's introductory remarks). *See also* Y. KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS 87-88 (1980) (characterizing *Miranda* as a compromise).

266. *Id.* at 444. After defining the term "custodial interrogation" the Court dropped an explanatory footnote declaring: "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Id.* at 444 n.4.

267. *Id.* at 442. The current Court does not perceive the *Escobedo* "right" to counsel as a full fledged constitutional right emanating from the sixth amendment. *See* Moran v. Burbine, 475 U.S. 412, 429 (1986).

landmark decision of course was *Miranda v. Arizona*.[268]

With the advent of *Miranda*'s waiver approach to self-incrimination, both the *Bram* fifth amendment voluntariness test and the due process voluntariness test fell into the shadows.[269] The jurisprudence of confessions began instead to focus upon working out the mechanics of applying the *Miranda* rules, defining "custody" and "interrogation" and carving out exceptions to *Miranda*'s exclusionary rule.[270] More recently, however, litigation has centered upon the standards for determining the validity of an accused's waiver of his or her *Miranda* "rights." The *Miranda* Court held that when a statement is taken in the absence of counsel, "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."[271] The Court also declared that "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not *voluntarily* waive his privilege."[272] In *Michigan v. Tucker*,[273] however, then Justice Rehnquist signaled the demise of these high standards for determining waiver, declaring that the "rights" referred to in the *Miranda* warnings were only "procedural safeguards [that] were not themselves rights protected by the Constitution but were instead meas-

268. 384 U.S. 436 (1966). In *Miranda* the Court held that prior to custodial interrogation, the police must first inform suspects that they have a right to remain silent, that any statement they make may be used as evidence against them, and that they have a right to have an attorney, retained or appointed free of charge, present to advise them before and during any interrogation. *Id.* at 444.

269. While the Court acknowledged the continuing existence of the *Bram* voluntariness test in Hutto v. Ross, 429 U.S. 28 (1976) (per curiam), the opinion's cryptic restatement of the rule seems to have relegated it to a mere threats and promises test reminiscent of Peake's abridged version of the common law voluntariness test cited in United States v. Charles over a century ago. *See supra* note 171 and accompanying text. For a confused attempt to marry the *Bram* test and the due process voluntariness doctrine, see Miller v. Fenton, 796 F. 2d. 598 (3d Cir. 1986) (holding that "despite the seemingly plain meaning of the *Bram* rule," a course of conduct by the interrogator that engendered a false hope of leniency (including a promise to help the accused get psychiatric help because he was "not a criminal") did not render the confession involuntary because, under the totality of the circumstances, the defendant's will was not overborn. *Id.* at 608-13.).

270. *See* Inbau & Manak, Miranda v. Arizona—*Is it Worth the Cost?*, 24 CAL. W. L. REV. 185 (1988); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

271. 384 U.S. at 475 (citing *Escobedo*, 378 U.S. at 490 n.14). The Court applied that standard in two of the cases decided in *Miranda*. *See id.* at 494-99.

272. *Id.* at 476 (emphasis added). The three pronged test requiring that waiver be made "voluntarily, knowingly and intelligently" was established in Johnson v. Zerbst, 304 U.S. 458 (1938). *Johnson* dealt with waiver of the right to counsel at trial. *Id. But see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (establishing voluntary consent as the *sole* standard for determining waiver of fourth amendment rights).

273. 417 U. S. 433 (1974).

ures to insure that the right against compulsory self-incrimination was protected."[274]

Dean Geoffrey R. Stone was one of the first to recognize the "potentially devastating" implications of Rehnquist's view upon the continuing viability of *Miranda*. He predicted over a decade ago that although the Court would not overrule the decision because of sensitivity to the political overtones of a direct attack, it would nevertheless "gradually dismantle *Miranda* piecemeal."[275] The notoriety surrounding former Attorney General Edwin Meese's assault upon *Miranda*,[276] while confirming Dean Stone's astute political analysis, has all but obscured the accuracy of his prediction with respect to the silent burial of the decision by the Rehnquist Court. Just as *Bram* became distorted and its methodology discarded, so too *Miranda* has seen the subversion of its rationale and the dismantling of its carefully crafted methodology for determining valid waivers. In a trilogy of waiver decisions, two of which were authored by Chief Justice Rehnquist, the Court has lowered the burden of proof for waiver,[277] held that the invocation of the right to counsel with respect to written statements does not invoke the right for purposes of oral statements,[278] and upheld the waiver of *Miranda* rights even though police deceived the accused about the subject matter of the interrogation.[279] These decisions have drastically altered the parameters of the compromise struck in *Miranda*.

Clearly the most significant of these developments, however, has been the Rehnquist Court's renovation in *Colorado v. Connelly*[280], of the old due process "voluntariness" test utilized prior to *Miranda* for determining the validity of confessions.[281]

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274. *Id.* at 444.

275. Stone, *supra* note 270 at 123, 169.

276. MEESE REPORT, *supra* note 5.

277. Colorado v. Connelly, 479 U.S. 157 (1986) (Brennan, J., dissenting).

278. Connecticut v. Barrett, 479 U.S. 423 (1987).

279. Colorado v. Spring, 479 U.S. 564 (1987).

280. 479 U.S. 157 (1986) (Brennan, J., dissenting).

281. The reader will recall that due process voluntariness is distinct from the common law voluntariness test engrafted onto the fifth amendment by *Bram*. The due process voluntariness test was developed as an alternative mechanism for protecting the privilege (through the due process clause of the fourteenth amendment) after Twining v. New Jersey, 211 U.S. 78 (1908) held that the fifth amendment did not apply to state criminal prosecutions. *Twining* was subsequently overruled in Malloy v. Hogan, 378 U.S. 1 (1964). *See supra* Part VI.

IX. *COLORADO V. CONNELLY* AND THE NEW VOLUNTARINESS DOCTRINE

In *Colorado v. Connelly* the Court held that a psychotic defendant suffering from hallucinations which created an overpowering compulsion to confess could nevertheless voluntarily waive his *Miranda* rights and make a voluntary confession.[282] The practical effect of the Court's voluntariness holding was to establish that custodial interrogation of a person known to be a mental patient and use of his delusionally induced confession to secure a conviction did not offend due process. The unique facts in *Connelly* involved two different statements: an unsolicited admission made prior to custody and a full confession obtained during custodial interrogation. The first statement occurred when Connelly walked up to a uniformed police officer in downtown Denver and stated that he had killed someone. The officer initially thought that Connelly was "some sort of a crackpot."[283] Because Connelly did not appear to be under the influence of drugs or alcohol, however, the officer dutifully advised him of his *Miranda* rights and placed him in handcuffs. Having a "feeling" that Connelly had been in a mental institution before, the officer asked him if he had ever been treated for any mental disorders.[284] Connelly, who suffered from a longstanding severe mental disorder, replied that he had been in five different mental hospitals.[285] The officer then transported Connelly to Denver Police Headquarters where he again was given his *Miranda* rights, waived them, and submitted to interrogation. He thereupon confessed to having killed a female travelling companion some eight months earlier and then led officers to the spot where a young woman's unidentified body had previously been discovered.[286]

282. 479 U.S. 157 (1986) (Brennan, J., dissenting).

283. Joint Appendix, 4.

284. *Id.* at 8.

285. *Id.* at 9.

286. 479 U.S. at 160-61. The record disclosed no motive for the killing and no evidence linked Connelly to the crime other than his confession. *Id.* at 183 (Brennan, J. dissenting). Although his knowledge of the body's location might seem at first glance to implicate him in the crime, that knowledge alone does not establish that he was the killer. Someone with Connelly's mental problems, might, for example, have witnessed the killing by another, been overcome by feelings of guilt for having failed to prevent it, and through the distortion of reality created by his mental illness, have fantasized that he was responsible for her death and thus deserved to be punished. Compare the apparent fantasy confession of subway vigilante Bernard Goetz who, having no history of psychosis or mental illness, nevertheless "confessed" that he fired an additional, unnecessary shot at a seated black youth, saying: "You seem to be doing all right, here's another." The jury doubted

The Colorado state court initially found Connelly incompetent to stand trial on second degree murder charges. Following six months of hospitalization and treatment with antipsychotic medications, he was deemed sufficiently recovered to be able to understand the nature of the proceedings against him. At his preliminary hearing Dr. Metzner, an expert in forensic psychiatry appointed by the court, testified that Connelly suffered from "chronic paranoid schizophrenia" and "command auditory hallucinations."[287] The psychiatrist then disclosed the bizarre story of Connelly's confessional pilgrimage to Denver. While living in Boston, Connelly had experienced psychotic delusions in which the "voice of God" commanded him to go to Denver and confess. If he did not, the voice commanded, he must commit suicide with a razor blade.[288] According to Dr. Metzner, Connelly's behavior in taking a plane from Boston to Denver, walking up to the first policeman he saw and confessing was the result of his mental illness. He testified further that because Connelly was in a psychotic state at that time, he lacked the capacity to make a free and intelligent decision to waive his *Miranda* rights.[289] The prosecution offered no evidence to dispute this testimony.

The court excluded, on traditional due process grounds, the initial statement made to the officer. The court found that the statement was not "voluntary" because: "He was compelled by his illness to do that which he did and he did so in a manner which is not unusual for people who suffer schizophrenia."[290] The court also excluded all subsequent

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the accuracy of Goetz's purported admission because it was inconsistent with the physical evidence and the testimony of other witnesses. *See* G. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 116-25, 196-97 (1988).

287. Dr. Metzner's testimony described Connelly's illness in the following terms:

> Schizophrenia is a chronic illness that often is manifested by psychoses. . . .Psychoses is a form of a mental disorder that's characterized frequently by significant personality disorganization, often bizarre behavior, withdrawn behavior, difficulty being in contact with reality, and also frequently is associated with auditory or visual hallucinations. . . .Mr. Connelly . . . has experienced intermittently on a fairly chronic basis auditory hallucinations; that is hearing voices that are not really there . . . [A] command hallucination is, it's a type of hallucination in which the person experiencing it feels as if they have to act on whatever the voice is telling them . . . that really affects his volitional abilities; that is, his ability to make free and rational choices.

Joint Appendix, 24-5.

288. Joint Appendix, 18-19.

289. Dr. Metzer testified with respect to the defendant's signing a written waiver form: "It's my opinion that Mr. Connelly felt that he didn't have a choice about making a confession . . . . it was that his command from God was that, you go tell the police, . . . and if you have to sign things, you sign things, but you have to tell them . . . ." Joint Appendix, 29.

290. Joint Appendix, 46-47. In the court's view:

> The essence of the admission of [a] confession is based upon . . . the fact that there is an

statements Connelly made during custodial interrogation, finding that the prosecution had failed to meet its burden of showing a voluntary, knowing and intelligent waiver of his *Miranda* rights.[291]

On appeal, the Colorado Supreme Court upheld both rulings.[292] The prosecution sought certiorari only with respect to the due process issue concerning Connelly's initial spontaneous and unsolicited statement made when he first approached the Denver police officer on the street. However, in an unprecedented action, the Supreme Court requested the parties to also brief and argue the *Miranda* waiver issue. The Court broadly phrased the question for review as follows: "Did respondent's mental condition render his waiver of *Miranda* rights ineffective?"[293] *Connelly* was thus specifically tailored to permit the Court to chart a new course for "voluntariness" in a sweeping decision that would cut across both fourteenth amendment due process and fifth amendment waiver issues.

A. The Due Process "Voluntariness" Claim

Throughout the state court proceedings, counsel for Connelly had re-

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element of self-direction in the giving of the statements. I believe this is an overflow of the basic Judeo-Christian ethic of self-determination and free will . . . . The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make.

Id.

291. *Id.* at 48.

292. People v. Connelly, 702 P.2d 722 (Colo. 1985). Regarding the waiver issue, the Colorado Supreme Court specifically found that the defendant's mental condition "was such that he was incapable of making an intelligent and free decision with respect to his constitutional right of silence while in custody and his constitutional right to confer with a lawyer before talking to the police." *Id.* at 729.

293. 474 U.S. 1050 (1986) (Brennan, J., dissenting). This prompted a bitter dissent from Justices Brennan and Stevens who accused the Court of having lost sight of its primary role as the protector of the citizen rather than the prosecutor:

> In asking the parties to address issues that the State chose not to present in the petition of certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm of the prosecution.
>
> . . . .
>
> I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers recognized that limitless state power afflicts the innocent as well as the guilty, even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen—guilty or innocent—is treated fairly and accorded dignity and respect by the State . . . . Ours is the duty to prevent encroachment on these principles . . . . This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us.

Id. at 1052-53.

lied upon established Warren Court precedents in which the lack of free will alone appeared to render a confession inadmissible under the due process voluntariness test. In *Blackburn v. Alabama*[294] the defendant, like Mr. Connelly, suffered from schizophrenia. His confession was held involuntary because it "most probably was not the product of any meaningful act of volition."[295] Chief Justice Warren, writing for the Court, concluded:

> Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.[296]

In *Townsend v. Sain*[297] the defendant alleged in a habeas corpus petition that immediately prior to his confession he was suffering from narcotic withdrawal symptoms and had been given a drug by a police physician which allegedly had the effect of a truth serum. The Court held that this allegation alone was sufficient to entitle the defendant to an evidentiary hearing. If established, the drug's effect upon the mind of the accused was deemed sufficient to render the confession involuntary even though the police were unaware of the drug's side effects. Thus, while the drug's alleged properties were seen by the Court as "vital to whether his confession was the product of a free will and therefore admissible," the Court viewed the lack of evidence of police wrongdoing as irrelevant.

> It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum" if these properties exist. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible . . . .[298]

1. Due Process and Deterrence: The Legacy of Leon

In rejecting Connelly's identical claim that the decision to confess

294. 361 U.S. 199 (1960).

295. *Id.* at 211.

296. *Id.* at 207. This statement represented the view of eight members of the Court. Justice Clark concurred in the result without opinion.

297. 372 U.S. 293 (1963).

298. *Id.* at 308-09. The Court cited *Blackburn* noting that it also "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers." *Id.*

must be made with a sane mind, Chief Justice Rehnquist's opinion for the majority discloses the extent to which the present Court's preoccupation with deterrence as the singular justification for the exclusionary rule has allowed its "sense of justice" to atrophy in the quarter of a century since *Blackburn*. The Chief Justice began his analysis by observing that coercive government misconduct had been the catalyst for the Court's first use of the due process clause in *Brown v. Mississippi*[299] in 1936. Asserting that the sole purpose of the exclusionary rule was to deter violations of the Constitution, the Chief Justice then limited the due process voluntariness test accordingly, holding that: "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the due process clause of the fourteenth amendment."[300]

Because Connelly's confession did not result from any coercive police misconduct, the Chief Justice then logically concluded that no deterrent purpose could possibly be served by suppression of Connelly's confession. According to the logic of the Court's new definition of voluntariness, compulsion flowing from mental illness became "a matter to which the United States Constitution does not speak."[301] The Court also summarily concluded that the admission of Connelly's confession would not violate due process. Apparently, the fact that the police deliberately interrogated Connelly, in the face of clear evidence that he had been repeatedly hospitalized for mental illness, did not offend due process because they employed no official coercion. Similarly, the trial court's use of Connelly's delusionally induced confession to convict him could not offend due process, because the "essential link" between coercive police activity and the resulting confession was absent.[302]

Connelly therefore, has charted a new course in a direction 180 degrees from *Bram*. This new tack eliminates any consideration of the defendant's mental state, and reduces voluntariness to a single cipher: the absence of official coercion. This Article submits, however, that *Connelly*'s central premise—that the absence of coercive police conduct is synonymous with due process—ignores history, is contrary to precedent, and cannot be justified by the deterrence rationale upon which it is founded.

299. 297 U.S. 278 (1936). *See supra* note 235.

300. *Id.* at 167.

301. 479 U.S. at 170-71.

302. *Id.* at 165.

a. The Lost Right to Self-Determination: History Revisited

> "[T]he law will not suffer a prisoner to be made the deluded instrument of his own conviction."[303]

Perhaps the first thing one recognizes about *Connelly*'s new test is that it repudiates the concept of "free will" as an independent element of voluntariness.[304] In justifying this redaction, Chief Justice Rehnquist made the remarkable claim that such a requirement would force the Court to create "a brand new constitutional right."[305] As we have seen in Part II, however, the citizen's right to individual self-determination when confronted by the state in an adversary relationship has ancient roots which were fully developed in English common law by the seventeenth century.[306] In the context of *Connelly*, this right finds apt expression in the above-quoted passage from Hawkins's *Pleas of the Crown*. That passage, written just two years prior to Madison's submission of the Bill of Rights, manifests the traditional fairness and respect for human dignity which, until *Connelly*, had characterized the relationship between State and citizen. Just three decades after the adoption of the fourteenth amendment, this passage was cited by the Court in *Bram* as expressing "one of the fundamental principles of the common law."[307] Its impressive historical pedigree finds further support in an unbroken line of precedent supporting the right to self-determination in the due process voluntariness cases from 1936 to 1966. Justice Frankfurter concisely expressed the distillation of those decisions in *Culombe v. Connecticut*:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker: . . . *The line of distinction is that at which governing*

303. Johnson v. New Jersey, 384 U.S. 719, 729 (1966) (citing 2 HAWKINS, PLEAS OF THE CROWN, 595 (8th ed. 1824)). The same statement appeared in the 6th edition published in 1787.

304. *See* Perlin, Colorado v. Connelly, *Farewell to Freewill?* 14 SEARCH AND SEIZURE L. REP. 121 (1987).

305. *Connelly*, 479 U.S. at 166. "Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained." *Id.* The frightening reach of *Connelly* appears in the logical inverse of this statement, which can be stated as follows: Irrational confessions and confessions induced by admittedly improper methods are constitutionally admissible so long as the police conduct involved in obtaining them does not rise to the level of coercion.

306. *See* Attorney Gen. v. Mico, 145 Eng. Rep. 419 (1658), discussed *supra* note 157.

307. 168 U.S. 532, 547 (1897). Although *Bram* was not decided as a fourteenth amendment case, its determination regarding the parameters of the common law voluntariness doctrine was essential to its holding. *See supra* text accompanying note 210.

self-direction is lost and compulsion, *of whatever nature, or however infused,* propels or helps to propel the confession.[308]

As Justice Brennan observed in his eloquent dissent in *Connelly*, the Rehnquist Court's refusal to consider self-determination as a "value of constitutional consequence" flies in the face of two centuries of constitutional jurisprudence.[309] By redefining voluntariness solely in terms of police conduct, the Court has thus drained much of the traditional meaning from the conception of due process as fundamental fairness.

b. Redefining the Concept of State Action

It is of course elementary that some form of state action is necessary to sustain a due process claim under the fourteenth amendment.[310] A second aspect of *Connelly*'s new voluntariness test lies in its reshaping of the parameters of this requirement. The Colorado Supreme Court found the state action requirement satisfied when a state court permits the prosecution to use an insane person's statement as evidence of his guilt. In so holding, the Colorado court relied upon *Blackburn v. Alabama*, which held that ". . . the use of [such] evidence . . . transgressed the imperatives of fundamental justice which find their expression in the due process clause of the fourteenth amendment. . . ."[311]

Distinguishing *Blackburn*, on the tenuous, if not disingenuous, ground that "police overreaching" had been an "integral element" in that case,[312] the Chief Justice declared that the difficulty with the Colorado Supreme Court's approach to state action was its failure to "recognize the essential link between coercive activity of the State . . . and a resulting confession."[313] Under this double-pronged test, it appears that to constitute state action, official misconduct must be both a coercive[314] and a causal agent responsible for producing the confession.

i. The Causal Nexus Requirement

One may readily agree that a causal relationship must exist between state action and fundamental unfairness to the defendant. Why, how-

308. 367 U.S. 568, 602 (1961)(emphasis added).

309. 479 U.S. at 176 (Brennan, J., dissenting).

310. "No *state* shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV (emphasis added).

311. 361 U.S. 199, 211 (1961).

312. 479 U.S. at 164. *See* text at note 329 refuting this interpretation of *Blackburn*.

313. 479 U.S. at 165.

314. *See* Part I *X(c)* for further discussion of the meaning of "coercive" police conduct.

ever, must this causative link be to the defendant's act of confessing? The essence of the unfairness (as the Court correctly perceived in *Blackburn*) lies in "incarcerating a human being upon the basis of a statement he made while insane." Does not the prosecutor's use of such a statement to obtain a conviction therefore involve sufficient state action? Why indeed does not a judge's sentence of imprisonment, empowered by a guilty verdict resting in whole or in part upon a confession induced by insanity, suffice as causally related state action? The Court's opinion fails to provide satisfactory answers to these questions. Indeed, it ignores them.

ii. The Requirement that State Action be Coercive

Even if one concedes that a causal connection must exist between official conduct and the making of a confession before the due process protections of the fourteenth amendment will apply, this threshold requirement still disposes of only the initial, unsolicited admission by Connelly. It does not rule out fourteenth amendment application to Connelly's statements made during custodial interrogation. In *Townsend v. Sain*[315], the Court observed that police questioning alone constituted sufficient causal nexus, declaring that "[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible."[316] *Connelly*, however, adds an additional requirement: the causal nexus must also be coercive. The Chief Justice advanced no theoretical foundation to explain why state action must be "coercive" in order to violate the fourteenth amendment. Perhaps this is because any effort at theoretical justification would have produced a less than satisfactory result. The following analysis of two possible approaches makes this evident.

The first approach follows Justice Black's position, articulated in his dissenting opinion in *Adamson v. California*.[317] It asserts that because only the specific provisions of the Bill of Rights are incorporated into the fourteenth amendment's due process clause, due process in state criminal interrogations is governed solely by the text of the fifth amendment. Because (in the current Court's view) the sole concern of the fifth amendment is coercive governmental misconduct, it therefore follows that the reach of due process must likewise be so limited. However, this so-called "reverse incorporation" theory has never commanded a majority of the

315. 372 U.S. 293 (1963).
316. *Id.* at 308-09. (emphasis by the Court).
317. 332 U.S. 46, 69 (1947).

Court, and was clearly rejected in *Griswold v. Connecticut*.[318] In addition, this limited conception of due process seems inconsistent with the Founders' view of the Constitution and its relationship to fundamental law. As Professor Tribe has pointed out:

> The ninth amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," . . . *at least* states a rule of construction pointing away from the reverse incorporation view that only the interests secured by the Bill of Rights are encompassed within the fourteenth amendment, and *at most* provides a positive source of law for fundamental but unmentioned rights.[319]

Justice Black's view thus presents theoretical difficulties as a basis for restricting the definition of due process in criminal interrogations to the literal text of the fifth amendment. In addition, as discussed above, the ambiguous imagery of the fifth amendment's textual language hardly presents a convincing showing that the Framers intended to restrict the fifth amendment only to the prohibition of coercion.[320] Assuming that this strict literalist position was taken, however, would it not follow that the concept of "coercion" would then necessarily be governed by the chaste voluntariness test of the 1780s which predominated when the Framers drafted the Bill of Rights? Yet this historical view of voluntariness, which focused upon the mind of the accused and rendered a confession inadmissible if the slightest degree of influence had been exerted upon her decision to speak,[321] is completely at odds with the Rehnquist Court's new version of voluntariness. Moreover, as Part II of this article has explained, a proper understanding of the historical forces that gave rise to the privilege against self-incrimination reveals that the essence of freedom from self-incrimination lies in its conception of the relationship between the state and the individual as one characterized by fairness. The absence of coercion is therefore a necessary, but never a sufficient, basis for that relationship.

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318. 381 U.S. 479 (1965). *Griswold* held that a Connecticut statute prohibiting the use of contraceptives by married couples violated the due process clause of the fourteenth amendment. Only Justices Black and Stewart dissented, arguing that although the law was "silly," it violated no specific provision of the Constitution or the Bill of Rights.

319. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 11-3, at 774-75 (2d ed. 1988) (emphasis in original). *See also* Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

320. Compare John Adam's self-incrimination provision in the Massachusetts Declaration of Rights, discussed *supra* note 128.

321. *See supra* Part V.

A second approach to providing a foundation for a coercive state action requirement follows Justice Frankfurter's opinion in *Rochin v. California*.[322] This approach makes the more familiar argument that only state action that is coercive "shocks the conscience" and is therefore "fundamentally" unfair under the fourteenth amendment. The Court expressly followed this approach in *Moran v. Burbine*[323] holding that police deception of the defendant's attorney regarding whether the defendant would be interrogated did not offend due process. The Court stated that it would intervene under the due process clause only when police misconduct "so shocks the sensibilities of civilized society as to warrant federal intrusion into the criminal processes of the States."[324] The problem with this approach, however, lies in its inability to provide a theoretical framework capable of generating neutral principles that transcend the result in the immediate case at hand.[325] Even when a proper concern for federal-state relations is added, it cannot mask the fact that the "shocks the conscience" approach ransoms due process to the personal values of five members of the Court.[326]

The lack of uniformity that would inevitably attend the results of such judicial subjectivity would create unpredictable constitutional standards in an area that demands clarity. As Professor Tribe has admonished, it is an "illusion" to suppose that such an approach "can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are . . . 'fundamental' under our Constitution and why."[327] Although ultimately one suspects that the conscience of the *Connelly* majority simply was not sufficiently pricked by the prospect of convicting a mental patient upon the basis of a confession made with a delusional mind, the Court eschewed any attempt to justify its holding along this line. Instead, it obscured what, if any, theoretical approach to

322. 342 U.S. 165 (1952).

323. 475 U.S. 412 (1986).

324. *Id.* at 434.

325. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961).

326. *Compare* Rochin v. California, 342 U.S. 165 (1952), which held that the use of the stomach pump to retrieve swallowed narcotics violated due process, *with* Breithaupt v. Abram, 352 U.S. 432 (1957), which upheld the withdrawal of blood to be tested for the presence of intoxicants. The dissenters in *Breithaupt* accused the majority of building upon the "shifting sands" of personal value judgments, arguing that only one's personal reaction to the stomach pump and the hypodermic needle could serve to distinguish the two cases.

327. L. TRIBE, *supra* note 319, at 77-78.

due process it may have had in mind and purported to justify its conclusion regarding coercive state action on the basis of precedent.

2. Precedent Revisited

Admittedly, the vast majority of the due process voluntariness cases since 1936 involved some form of coercive police misconduct. However, this coincidence is hardly surprising because the Court had been forced to employ the due process clause as a vehicle for controlling such misconduct.[328] The explicitly stated rationale underlying both *Blackburn* and *Townsend*, on the other hand, clearly established, quite apart from the issue of police misconduct, that our system of law enforcement should not operate so as to take advantage of a person who lacked the capacity for self-determination.[329] The Court in *Connelly*, however, mischaracterized these precedents, and then obfuscated the central issue of fundamental fairness by transforming the discussion into a simple cost-benefit analysis focused upon the exclusionary rule. Taking language from the *Blackburn* opinion out of context, the Court purported to distinguish that decision on the ground that police in that case had exploited the defendant's insanity by using coercive tactics:

> Blackburn had a history of mental problems. The police exploited this weakness with coercive tactics: "the eight to nine hour sustained interrogation in a tiny room which was on occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; [and] the composition of the confession by the Deputy Sheriff rather than by Blackburn." 361 U.S. at 207-208. These tactics supported a finding that the confession was involuntary.[330]

When the quoted language from *Blackburn* is read in context, however, a totally different understanding of the case is revealed:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent cir-

328. *See supra* text accompanying note 235.
329. *See supra* notes 294-98 and accompanying text.
330. *Connelly*, 479 U.S. at 164-65.

> cumstances are considered—the eight-to nine hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession's having been *the product of a rational intellect and a free will* become *even more* remote and the denial of due process *even more* egregious.[331]

As the full passage demonstrates, the issue in *Blackburn* was not whether there had been "coercive" police misconduct, but rather, whether Blackburn had the capacity for free and rational choice in light of his insanity. Indeed, in *Townsend*, decided just three years after *Blackburn*, Chief Justice Warren, the author of both opinions, expressly stated that *Blackburn* did not rely on police coercion.[332]

Having established the "strongest probability" that Blackburn was insane, the Court's reference to the circumstances surrounding his interrogation therefore simply served to bolster its conclusion that Blackburn lacked the capacity for self-determination. These additional comments thus only demonstrated that "the chances of the confession's having been the product of a rational intellect and a free will [were] even more remote." The *Connelly* opinion, however, deletes this concluding clause from its quotation of *Blackburn*.[333]

As a final note to *Blackburn*, it is interesting to compare the "tactics" employed by the police in that case with the tactics upheld in *Moran v. Burbine*,[334] decided the same year as *Connelly*. The factors that the *Connelly* Court expressly found to be "coercive tactics" in *Blackburn* can be summarized as follows: (1) The interrogation began at about one o'clock in the afternoon and continued, after an hour's break for dinner, until ten or eleven o'clock in the evening; (2) most of the interrogation was conducted in a small room, occasionally with as many as three officers present; (3) the interrogation was conducted in the absence of friends,

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331. *Blackburn*, 361 U.S. at 207-08 (emphasis added).

332. [I]n Blackburn v. Alabama . . . we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.

372 U.S. at 309 (Warren, C.J.).

333. The Court also fails to explain why it is correct in placing a construction upon *Blackburn* which is precisely the opposite of the construction placed upon it by Chief Justice Warren, in his subsequent opinion in *Townsend*. *See supra* note 332.

334. 475 U.S. 412 (1985).

relatives or counsel; (4) the confession was composed by the Deputy Sheriff rather than by Blackburn.[335]

The facts surrounding the interrogation of Burbine, on the other hand, reveal: (1) Defendant was interrogated off and on over a twenty-one hour period and given no food until after his first confession, approximately seven hours after being taken into custody;[336] (2) the interrogation occurred in both an interrogation room and a larger room in which five officers from two police departments were present; (3) defendant, who had only a fifth grade education, was not only isolated from friends and relatives, but police deception prevented his attorney from contacting him; (4) the written confession was produced by the interrogating detective typing his questions as he asked them and then typing Burbine's answers.[337]

During his questioning Blackburn was described as being "clear eyed," and giving "sensible answers,"[338] but officers present at Burbine's confession described Burbine as being "shaky, in tears"[339] and at times "incoherent."[340] If the tactics in *Blackburn* were "coercive," why then were similar tactics in *Burbine* not equally offensive?

The *Connelly* opinion's attempt to distinguish *Townsend v. Sain*[341] is likewise unconvincing. According to Chief Justice Rehnquist, the police in *Townsend* were guilty of "wrongdoing" because they questioned the defendant after they "knew that [he] had been given drugs."[342] This argument does not serve to distinguish *Connelly*. If police knowledge of a defendant's susceptible condition makes interrogation wrongful, it follows that the police in *Connelly* were similarly guilty of wrongdoing.

335. 361 U.S. at 204.

336. The defendant was arrested around 3:00 p.m. in the afternoon. He signed a first confession at 10:20 p.m. He signed a second confession at 11:20 p.m. and made further admissions the following morning. 475 U.S. 412, 445-449 (1986).

337. 475 U.S. 445-449 and 753 F.2d 178, 179-181 (1985). The specific misconduct complained of in *Burbine* was that a detective falsely told a public defender (contacted by Burbine's sister) that Burbine would not be questioned. Officers then proceeded to interrogate Burbine while concealing from him that an attorney was immediately available and had offered to come to the station to provide advice and assistance. A violation of due process is, of course, determined under the totality of the circumstances, Miller v. Fenton, 474 U.S. 104 (1985), and the Court, having previously canvassed the facts in its discussion of the defendant's waiver claim, held that "on these facts" there was no violation. 475 U.S. at 433.

338. 361 U.S. 199, 204 (1960).

339. 753 F.2d at 181.

340. 475 U.S. at 448 (Stevens, J., dissenting).

341. 372 U.S. 293 (1963).

342. 479 U.S. at 165.

They interrogated Connelly after they knew he was a mental patient who had been hospitalized at least five times.[343] The cryptic statement that the police knew Townsend had been given "drugs," moreover, distorts the facts and completely obfuscates the issue decided in *Townsend*. There was no evidence that the questioning officers in that case "knew" that the medication given to the defendant to relieve narcotics withdrawal symptoms might affect his will to resist questioning.[344] Furthermore the *Townsend* Court held this lack of improper motive irrelevant.[345]

As the state Supreme Court in *Connelly* correctly perceived, both *Townsend* and *Blackburn* stand for the proposition that even when no police misconduct is evident, the use of a confession as evidence offends due process if it has been obtained from a defendant whose capacity for self-determination is substantially impaired. The *Connelly* opinion's attempt to manufacture police misconduct in those cases and to further find that such "wrongdoing" was the basis for those decisions therefore is, to say the least, less than candid. Furthermore, the Court's claim that the police involvement in those cases constituted improper coercive tactics is inconsistent with the fact that it upheld similar if not more egregious tactics in *Burbine*. When one recognizes that the Court offers no theoretical justification for its requirement that state action be coercive, its attempt to ground its decision upon a distortion of past precedent reveals that the Court has erected an edifice with feet of clay.

3. The Deterrence Rationale: Wagging the Dog by its Tail

With such maneuvering the Court side-stepped the central issue of fundamental fairness upon which both *Blackburn* and *Townsend* had been premised, and substituted in its place a convenient whipping boy, the exclusionary rule, which it predictably sacrificed upon the alter of deterrence. Drawing upon its recent decision in *United States v. Leon*,[346]

343. Joint Appendix 9. The *Connelly* opinion glosses over this fact, referring to the number of hospitalizations as "several." 479 U.S. at 160.

344. Indeed the inference drawn by the Court was just the opposite. 372 U.S. at 308. There was never any suggestion that the police acted improperly in giving the defendant medication to relieve the pain of narcotics withdrawal. Yet the Court's truncated statement of facts in *Connelly* entirely omits the reason for the medication and leaves the reader with the false impression that the police deliberately plied the defendant with drugs so they could extract a confession from him. 479 U.S. at 165.

345. *See supra* notes 297-98 and accompanying text; *supra* note 332.

346. 468 U.S. 897 (1984).

which created a "good faith" exception to the fourth amendment exclusionary rule, the Court reaffirmed its view that the mission of the exclusionary rule was concerned only with deterring future violations of the Constitution.

In *Leon*, the Court found that no deterrent purpose would be served by excluding evidence seized pursuant to a defective search warrant where police had reasonably relied upon the warrant's validity. The Court therefore concluded that because the cost entailed in excluding relevant evidence outweighed any benefit, the exclusionary rule should not apply even though defendant's fourth amendment rights were violated.[347] In *Connelly* the Court similarly concluded that in the absence of coercive police misconduct "suppressing [Connelly's] statements would serve absolutely no purpose in enforcing constitutional guarantees."[348] From this narrow premise, the Court then leaped to the broad conclusion that the use of Connelly's deranged statements as evidence against him did not violate the due process clause.

But surely this is the (exclusionary) tail wagging the (due process) dog, for the upshot of the Court's position is that unless exclusion will deter someone in an official capacity, there can be no due process violation no matter how unjust the result.[349] By allowing the deterrence rationale for the exclusionary rule to control the nature of the due process inquiry, the

347. *Id.* at 906-13.

348. 479 U.S. at 166.

349. Indeed, the Court cites Burdeau v. McDowell, 256 U.S. 465 (1921), for the proposition that "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." 479 U.S. at 166. But *Burdeau*, which involved the federal government's receipt of private papers stolen from the defendant by his employer, was decided under the fourth amendment, not the due process clause of the fourteenth amendment. In *Burdeau* the defendant sought the return of his property, arguing unsucessfully that the federal government's posession was tainted by the illegal seizure. The case therefore did not involve a trial at which such evidence had been admitted. The other two cases cited by the Court, Walter v. United States, 447 U.S. 649 (1980), and Coolidge v. New Hampshire, 403 U.S. 443 (1970) are neither on point nor do they involve outrageous conduct. In *Walter*, obscene films were mistakenly delivered to the wrong address, opened and turned over to the FBI. The Court held that the FBI could not view the films without a warrant. In *Coolidge*, the defendant's wife simply cooperated with the police by turning over her husband's belongings, and no fourth amendment violation was found. These cases, therefore, provide no authority for the Court's position. Moreover, they involve the seizure of physical evidence, not the extraction of a confession. Does the Court mean to imply that if private parties beat and tortured a defendant suspected of crime, that the court could admit the resulting confession and not offend due process? As Justices Brandeis and Holmes, dissenting in *Burdeau* observed: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." *Burdeau*, 256 U.S. at 477.

Court thus permits the logic of deterrence to shape the actual content of due process itself. Under this formula any concern for justice is excluded from the equation. Indeed, any attempt to develop a coherent theory of justice under the due process clause is precluded.

Connelly justifies its refusal to extend constitutional doctrine beyond the limited confines of the deterrence rationale on the ground that the effort involved would be too time consuming and costly. According to the Court, such an endeavour would "deflect a criminal trial from its basic purpose" and "require sweeping inquiries into the state of mind of a criminal defendant."[350] The Court does not explain why this "sweeping" inquiry would be more burdensome than similar constitutionally required inquiries into a criminal defendant's competency to stand trial,[351] to waive her right to counsel,[352] or to be executed.[353] In *Dusky v. United States*,[354] the Court held that a defendant who is tried must have the capacity to have a "rational as well as factual understanding of the proceedings against him." This standard is also the prevailing view with respect to a defendant who pleads guilty.[355] Connelly was found incompetent to stand trial immediately following the making of his custodial confession. Indeed, the trial court found that at the time of his confession he was experiencing a psychotic break with reality and suffering from hallucinations. Does it not therefore appear incongruous that Connelly could not have pled guilty in open Court, on the same day he sealed his fate with a confession obtained within the precincts of the Denver police headquarters?

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350. 479 U.S. at 166-67. Again, the Court exaggerates and mischaracterizes the nature of the inquiry. The Court asserts that it would entail "a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that government conduct coerced his decision." *Id.* at 165-66. One commentator has agreed with this conclusion, adding: "Without police coercion, a court would have to engage in the hairsplitting task of finding the exact reason why a defendant confessed." Comment, *Defining the Protections of the Fifth and Fourteenth Amendments Against Self-incrimination for the Mentally Impaired*, 78 J. CRIM. L. & CRIMINOLOGY 877, 908 (1988). But this is simply not so. The task is not to determine why a defendant confessed, but rather whether he or she had the capacity to exercise a "free and rational choice." Mincey v. Arizona, 437 U.S. 385, 401 (1978). In this regard, the inquiry is essentially no different from that of determining a defendant's competency to stand trial, or his capacity to waive his right to counsel.

351. Pate v. Robinson, 383 U.S. 375 (1966).

352. Westbrook v. Arizona, 384 U.S. 150 (1966). *See also* Faretta v. California, 422 U.S. 806 (1975).

353. Ford v. Wainwright, 477 U.S. 399 (1986).

354. 362 U.S. 402 (1960).

355. *See* 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 20.4(b) (1984).

The extension of the Court's fourth amendment exclusionary rule doctrine to the due process clause is also flawed in its application to *Connelly*. *Leon* is premised upon the good faith conduct of the police. Even in cases where a magistrate has issued a warrant, if the police acted with reckless disregard for the truth in preparing their affidavit, or otherwise failed to harbor "an objectively reasonable belief" in the existence of probable cause, exclusion is still appropriate.[356] In *Connelly*, the Court stressed that the state court found that the police had "committed no wrongful acts,"[357]—a statement analogous to finding "good faith". As previously noted, however, the record reveals that the police who initially encountered Connelly testified that he thought Connelly was a "crackpot" and had a "feeling" that he had been in a mental institution before.[358] Furthermore, the officer immediately confirmed these suspicions, when Connelly admitted his prior hospitalizations for mental illness.[359] Connelly was thus subjected to custodial interrogation by police who were, at a minimum, reckless in disregarding the probability that he suffered from severe mental illness. The *Leon* "good faith" exception should therefore be inapplicable.[360] If the police in *Townsend* were guilty of "wrongdoing" simply because they questioned a suspect after they knew he had been given medication for narcotics withdrawal symptoms (even though there was no evidence that the police knew of the medication's alleged side effects) then, the police in *Connelly* were likewise guilty for clearly they were put on notice that Connelly was not mentally competent.[361]

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356. United States v. Leon, 468 U.S. 897, 926 (1984).

357. *Connelly*, 479 U.S. at 165. While the trial court found no wrongdoing (i.e. coercion) by the officers, the issue of "good faith" in the sense contemplated by *Leon* was of course never litigated.

358. *See supra* notes 283-86 and accompanying text.

359. *See supra* text at note 285.

360. The good faith exception could of course apply to the initial, unsolicited statement "I killed someone" which Connelly uttered upon approaching the officer on the street. The Court's failure to deal with the spontaneous statement and the confession resulting from custodial interrogation as analytically separate and distinct entities has obscured this important difference between them.

361. Note that the forgoing discussion does not mean that the police are necessarily precluded from questioning those they have reason to believe are mentally ill. The fifth amendment is not violated by the act which compells an answer to a question. It is the use of compelled statements as evidence in a criminal proceeding (thus causing the maker to "be a witness against himself") that is the object of protection. Kastigar v. United States, 406 U.S. 441 (1972); Ullmann v. United States, 350 U.S. 422, 430 (1956) (reaffirming Brown v. Walker, 161 U.S. 591 (1896)). Similiarly, the Court should view the *use* of statements made by the mentally impaired as violative of due process. As the Court said in a slightly different context in Massiah v. United States, 377 U.S. 201, 207 (1964):

> We do not question that . . . it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the

Not only did *Connelly* present a situation in which the good faith requirement of *Leon* was lacking, but the purported "costs" of exclusion in Connelly also were clearly insufficient to justify application of the *Leon* rationale. The exclusionary rule is costly in direct proportion to the extent that it deprives the jury of "truthful and probative" evidence.[362] In *Leon* the cost was high because the evidence sought to be excluded was a large quantity of narcotics. Such physical evidence cannot fabricate or distort the truth and is indisputably relevant. In *Connelly*, however, the Court conceded that a confession rendered by one in Connelly's mental condition "might be proved to be quite unreliable."[363] In light of this admission, where then is the "substantial cost" incurred by excluding such doubtful evidence?[364]

Careful analysis of the Court's attempt to import the logic of its fourth amendment jurisprudence into the realm of due process in criminal interrogations thus discloses fundamental defects in the premises necessary to support its deterrence-based argument. Not only is good faith reliance, the cornerstone of *Leon*, missing in *Connelly*, but the cost of exclusion is negligible, given the lack of reliability inherent in confessions made by the mentally ill. These flaws in the logic of its argument, however, seem insignificant when one realizes that the Court has removed the issue of reliability altogether from the constitutional agenda, leaving the trustworthiness of a confession "to be governed by the evidentiary laws of the forum."[365]

4. The Demise of Trustworthiness

It will be recalled that the paramount concern of the English common law voluntariness doctrine was trustworthiness.[366] If the confession was

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> defendant had already been indicted. All we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.

(emphasis in original).

362. 479 U.S. at 166 (citing Lego v. Twomey, 404 U.S. 477, 488-89 (1972)).

363. *Id.* at 167. The court-appointed psychiatrist who found Connelly initially incompetent to stand trial testified that at the time of his first examination, shortly after Connelly's arrest, "he was coming in and out of psychoses, so I wasn't very confident that he could consistently relate accurate information." Joint Appendix 35.

364. "[T]he exclusionary rule imposes a *subtantial cost* on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." 479 U.S. at 166 (quoting United States v. Janis, 428 U.S. 433, 448-49 (1976)) (emphasis added).

365. *Id.* at 167.

366. *See supra* Part IV A.

made under the influence of either fear of reprisal or hope of leniency, there was no guarantee of its truthfulness. Such involuntary confessions were therefore inadmissible at common law because they provided an unsafe basis for conviction. This "fundamental principle of the common law" was engrafted onto the fifth amendment in *Bram v. United States*.[367] Despite *Bram*'s strict (no psychological influence) standard for admissibility, the logic of the trustworthiness rationale subsequently reasserted itself and reliability alone became the touchstone for admitting confessions in federal courts.[368]

Until the fifth amendment was made applicable to state criminal proceedings in 1964, the admissibility of confessions in state courts was governed by a parallel voluntariness doctrine developed under the fourteenth amendment.[369] It is significant that physical evidence, illegally seized in violation of a suspect's constitutional rights, was not excluded during this period.[370] Confessions found to be involuntary, however, were excluded. This exclusionary rule was not employed because the Court saw its role as deterring constitutional illegality by punishing errant policemen, but rather because fundamental fairness required that guilt be reliably determined.[371] The fourteenth amendment's voluntainess doctrine, therefore, did not develop as a "rigid exclusionary rule of evidence" but rather as "a guarantee against conviction on inherently untrustworthy evidence."[372]

In *Rogers v. Richmond*[373] the Court rejected the view that the trust-

367. *See supra* text at note 178.

368. *See supra* text at note 224.

369. *See supra* text at note 233.

370. See Wolf v. Colorado, 338 U.S. 25 (1949), which had held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33. *Wolf* was overruled by Mapp v. Ohio 367 U.S. 643 (1961).

371. As Justice Jackson explained in Stein v. New York, 346 U.S. 156 (1953):

> Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction. . . .

Id. at 192 (subsequently overruled in Rodgers v. Richmond, 365 U.S. 534 (1961)).

372. *Id.* It is curious that Chief Justice Rehnquist, who clerked for Justice Jackson in the same year that *Stein* was argued has championed the first proposition while apparantly forgetting the latter.

373. 365 U.S. 534 (1961). *Rodgers* involved a confession obtained as a result of police deception. Police engaged in the pretense of ordering that the suspect's wife be arrested and brought in for questioning. The suspect then agreed to confess to prevent this from happening. The trial court had

worthiness rationale was the sole determinate of the due process voluntariness test in state cases.[374] The thrust of this position, however, was not that the reliability of a confession was no longer a concern of due process, but rather that police misconduct was now an additional, independent concern.[375] Thus, after *Rodgers* it was no longer necessary to establish untrustworthiness in order to show a due process violation. Even though the confession might be demonstrably true, the Court still excluded it under the due process clause if the methods used to obtain the confession were improper. Viewed from the perspective provided by the historical development of the due process voluntariness doctrine, a lack of trustworthiness should therefore remain a sufficient, but not a necessary condition precedent to a due process violation.[376]

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admitted the confession on the ground that the deception "had no tendency to produce a confession that was not in accord with the truth." *Id.* at 541-42. In his charge to the jury the trial court had also declared: "The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible . . . ." *Id.* at 542. Although this jury instruction was not at issue, the Supreme Court quoted it because it "enunciated the reasoning which had guided [the trial court] in admitting the confessions. . . ." The Court then expressly held: "This is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." *Id.* at 543-44. Thus *Rodgers* expressly rejected the premise that unfair interrogation tactics are permissible unless they are "apt to make an innocent person confess." *See* F. INBAU, J. REID & J. BUCKLEY, *supra* note 255 at xvii.

374. *See also supra* note 243 and accompaning text (contrasting fifth and fourteenth amendment approaches).

375. *See supra* note 245 and accompaning text. In Blackburn v. Alabama, 361 U.S. 199 (1960), decided one year before *Rogers*, the Court held that the exclusion of confessions under the due process voluntariness doctrine was based upon a "complex of values" which now included abhorence of illegal police methods. Therefore, "neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the *sole* interest at stake." *Id.* at 207 (emphasis added).

376. *See* Jackson v. Denno, 378 U.S. 368, (1964) where Justice White, writing for the Court declared:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will' Blackburn v. Alabama, 361 U.S. 199, 206-207, and because of "the deep rooted feeling that the police must obey the law while enforcing the law; that in the end *life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals* as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-321.

Id. at 385-86 (emphasis added). As the italicized portions demonstrate, the danger of convicting the innocent on the basis of unreliable evidence was still very much a concern of the due process clause. Justice White apparantly forgot these words, however, when authoring the plurality opinion in Lego v. Twomey, 404 U.S. 477 (1972). In *Lego*, he wrote: "[T]he purpose of a voluntariness hearing is designed to serve has nothing *whatever* to do with improving the reliability of jury verdicts. . . ." *Id.* at 486 (emphasis added). *Lego*, a 4 to 3 decision, upheld the admission of a confession based only

In *Connelly*, however, the Court obliterated trustworthiness altogether, holding that the reliability of a confession was no longer a matter of constitutional concern, and should therefore be left to the vagaries of state law governing the admission of evidence.[377] Thus, the long-reigning trustworthiness rationale, which *Rogers* dethroned, was now exiled as well by *Connelly*. Having obscured the true origins of the privilege against self-incrimination, and dominated the jurisprudence of confessions for centuries, trustworthiness today is no longer even a factor in the totality of the circumstances under the Court's new due process analysis. In its place the deterrence rationale reigns supreme and the right to a reliable determination of guilt is left to the states to guarantee rather than the Constitution.

Can the Court seriously mean that there is no due process right to a reliable determination of guilt? Yet, this is the clear import of the holding in *Connelly*. As Justice Brennan noted in dissent:

> There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession. Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence . . . . To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.[378]

The majority's easy reliance upon state law to ensure that untrustworthy confessions are not admitted is disturbing. Controversial cases which

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upon a preponderance of the evidence that it was voluntary, and was reaffirmed in *Connelly*, 479 U.S. at 168.

377. 479 U.S. at 167.

378. *Id.* at 530-31 (Brennan, J., dissenting). As an evidentiary matter, the general rule states that a defendant "may not be convicted upon his uncorroborated confession." Smith v. United States, 348 U.S. 147, 152 (1954). 145 MCCORMICK ON EVIDENCE (3d ed. 1984). Although *Smith* was not decided on constitutional grounds, the Court noted that the purpose of the corroboration requirement was to prevent erroneous convictions based solely on confessions that may be untrue or admissions that are inaccurate. *Id.* at 153. Significantly, the Court in *Smith* noted that although a statement may not be "involuntary" within the meaning of the due process voluntariness test: "Still it's reliability may be suspect if it is extracted from one who is under the pressure of a police investigation whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of the past." *Id.*

In Opper v. United States, 348 U.S. 84, 93 (1954) the Court held, as a matter of federal law, that the corroborative evidence does not have to independently establish the *corpus delicti*. The corroborative evidence is sufficient if it "supports the essential facts admitted sufficiently to justify a jury inference of their truth." This "reasonable inference" standard is of course much lower than the preponderance standard required for admission under the due process voluntariness test.

whip up public emotions can bring substantial pressure to bear upon a mere rule of evidence—a transitory law that can be changed at the whim of the legislature.[379] As Justice Jackson wrote, with respect to the first eight amendments to the Constitution: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles . . . ."[380] Certainly those words are equally applicable to the due process clause of the fourteenth amendment.

B. The Miranda *Waiver Issue*

In addition to eroding constitutional standards for the admission of confessions, the *Connelly* decision also lowered standards for determining the validity of a suspect's waiver of his right to remain silent and his right to have the advise and assistance of counsel under the *Miranda* doctrine. The reader will recall that the Court specially tailored the prosecutor's petition for certiorari by adding the following issue: "Did respondent's mental condition render his waiver of *Miranda* rights ineffective?"[381] This broadly phrased question thus encompassed all three

379. See for example the recent amendment to Rule 704 of the Federal Rules of Evidence which restricted the use of expert testimony in presenting an insanity defense. This amendment followed in the wake of the attempted assassination of President Reagan and the verdict finding John Hinckley not guilty by reason of insanity.

That the *Connelly* case itself generated hostile public pressure was graphically illustrated by a newspaper clipping (incredibly attached as an appendix to the prosecutor's petition for certiorari) which demonstrated the depth of intolerance, misunderstanding and prejudice that exists toward the mentally ill. Attacking the Colorado Supreme Court for "judicial eccentricity" and implying that Connelly was faking insanity, the article, by Vincent Carroll, assistant editorial page editor, sarcastically observed:

> When God talked to Joan of Arc in the 15th century, all she got for the privilege was death at the stake. But the future has brightened. After God talked to Francis Connelly, current resident of the Denver County Jail, Connelly found the visitation far more useful. Why it may even help him to beat a murder charge. And they say miracles don't happen any more. . . . You might well wonder how the Supreme Court can be sure Connelly lacked free will . . . . Silly you. The court knows because a psychiatrist says so, and the psychiatrist knows because Connelly says so. . . .Perhaps next time the Supreme Court should find an expert who will go the distance—someone who will contend that no confession is ever the product of free will . . . . Surely the court should find that notion appealing: It's simple but abstract, and it's a bold departure in legal theory. Best of all, though, it helps the guilty go free.

Petition for Certiorari, Exhibit "E", Colorado v. Connelly, 479 U.S. 157 (1986).

380. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

381. *See supra* note 293 and accompanying text.

prongs of the *Johnson v. Zerbst*[382] waiver standard which requires that waiver of *Miranda* rights be knowingly, intelligently and voluntarily made. The Court in *Connelly*, however, only addressed the voluntariness aspect of Connelly's waiver, therefore giving only a partial answer to its own question. The Court treated the issue of voluntainess as being the same whether it arose in the context of a waiver or a due process analysis. Applying its newly formulated standard for due process voluntariness—the absence of official coercion—the Court superimposed its due process test upon the voluntariness prong of the *Johnson* waiver standard. Thus, despite the fact the Connelly's behavior was being compelled by internal psychological forces resulting from mental illness, the Court nevertheless found that Connelly's waiver of his right to remain silent and right to have the advise and presence of a lawyer during interrogation were voluntary because the compulsion did not emanate from any official source. *Connelly* thus appears to be the capstone to the renovation of the *Miranda* waiver standard which was begun in *Moran v. Burbine.*[383]

382. 304 U.S. 458 (1938). *Johnson* held that a waiver of the sixth amendment right to counsel must be voluntarily, knowingly and intelligently made in order to be valid. *Miranda* expressly endorsed *Johnson* as the standard to be applied to determine the validity of waivers of fifth amendment rights. 384 U.S. at 475.

383. 475 U.S. 412 (1986). *See supra* note 20. The Court also took advantage of this opportunity to declare that the burden of proving waiver need only be met by a preponderance, although this issue was neither raised nor briefed. *See Connelly*, 479 U.S. at 168. But see Justice Blackmon's concurring opinion for the view that this portion of the Court's opinion was "not necessary to the decision." *Id.* at 171. Prior to *Connelly*, Johnson v. Zerbst had noted that " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." 304 U.S. at 464, and *Miranda* had declared that the government shouldered a "heavy burden" in establishing waiver, 384 U.S. at 475. The *Connelly* majority, however, relied upon the deterrance rationale to justify its lowering of the standard of proof, declaring:

> '[E]xclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in . . . supression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.' 479 U.S. at 169 (quoting Lego v. Twomey 404 U.S. 477, 489 (1972)).

Apart from the fact that the same logical flaws in its due process argument, *see supra* text following note 365, reappear here, this represents an amazing extention of the deterrance rationale. Given the Court's treatment of voluntariness, one can see the connection between deterrance and proof of a voluntary waiver. However, no connection whatsoever exists between deterrance and a suspect's capacity or lack of capacity to knowingly and intelligently waive his rights.

Furthermore, the Court broadly phrased its purported holding, stating: "Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the state need prove waiver only by a preponderance of the evidence." 479 U.S. at 168. As the Eleventh Circuit has recognized in Miller v. Dugger, 838 F.2d

The Colorado Supreme Court had held that Connelly's mental condition rendered him "incapable of making an intelligent and free decision" with respect to waiver of his right to remain silent and his right to counsel.[384] Chief Justice Rehnquist concluded, however, that the Colorado court "erred in importing into this area of constitutional law notions of 'free will' that have no place there."[385] In the Court's eyes, Connelly's deranged mind was capable of voluntarily waiving the auxiliary protections established in *Miranda* because there was "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."[386] What should be obvious, however, is that waiver does require more because waiver (unlike the Court's new conception of voluntariness) requires rationale choice. Even those who advocate streamlining the concept of waiver, such as Professor George Dix, have recognized

1530 (11th Cir.) *cert. denied*, 108 S.Ct. 2832 (1988), however, *Connelly* dealt only with the voluntariness prong of the waiver standard. The Court remanded the case to the Colorado Supreme Court for reconsideration of other waiver issues. Therefore it did not address the question of whether Connelly had made a *knowing* and *intelligent* waiver. *Connelly's* implicit application of the preponderance standard to these issues is thus clearly dicta. Nevertheless, as Professor Kamisar has observed in remarking on *Connelly*: "[W]hen all is said and done, the *high* standard and *heavy* burden of proving waiver by *Miranda* rights turns out to be the *lighest* heavy burden and the *lowest* high standard to be found." Y. Kamisar, Prepared Remarks at the U.S. Law Week's Constitutional Law Conference, 17, Septemeber 12, 1987, Washington D.C. on file at the law libraries of CWSL and the University of Michigan.

384. *See supra* note 292 and accompanying text.

385. 479 U.S. at 169. As Professor Michael Perlin has noted, this statement appears to reflect the unacknowledged influence of the amicus brief filed by the American Psychological Association (A.P.A.) which argued that the voluntariness test should be overhauled because it did not conform to "scientific" views of human behavior. From the behavioral science point of view, according to the A.P.A., all behavior is determined by genetic, physiological and environmental antecedents, and there is no place for concepts such as "free will." Brief of Amicus Curiae A.P.A in Support of Petitioner at 6, Colorado v. Connelly, 479 U.S. 157 (No. 85-660). Because the behavioral scientist looks at human behavior in terms of stimulus and response, the A.P.A. urged the Court to abandon the legal fiction of "voluntariness" and focus only on whether the police conduct in question was a "stimulus" which should be condoned or condemned. This is precisely what the Court did. As Professor Perlin has pointed out, the view of the A.P.A. is "clearly not unanimous" and it is curious that the Court makes the unabashed conclusion that "free will" (and therefore the right to self-determination) has no place in the administration of criminal justice, without stating its reasons. *See* Perlin, Colorado v. Connelly, *Farewell to Free Will?*, 14 SEARCH AND SEIZURE LAW REPORT 121, 126 (1987). For an excellent analysis of the Supreme Court's pre-*Connelly* treatment of the interplay between *Miranda* and mental disability see Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?* 29 ARIZ. L. REV. 1, 22 (1987).

386. 479 U.S. at 169-70.

that its essential nature involves "conscious choice."[387] Professor Dix explains that "[t]he definition of waiver as conscious choice implies that a person waiving a right must have *consciously perceived* that he had a choice among different courses of action."[388] In *Connelly*, however, Dr. Metzner's undisputed expert testimony disclosed that Connelly's mental illness rendered him incapable of perceiving that he had a choice.[389] Dr. Metzner also testified that although Connelly "probably had the capacity to know that he was being read his *Miranda* rights, and [that] he had certain rights . . . he wasn't able to use that information because of the command hallucinations."[390]

If the state can place a citizen in a situation in which he must exercise a choice affecting life and liberty, then surely any civilized system of justice must presuppose that he have the "capacity to appreciate his position and make a rational choice."[391] As Professor Dix has thoughtfully observed: "Minimal respect for a defendant's interest in self-determination requires no less."[392] Furthermore, if the Constitution requires that a citizen be given certain information before making that choice, it follows that the Constitution must also presuppose a reasonable capacity to utilize that information.[393] To suggest otherwise is to exalt form over substance, and blind the administration of criminal justice to the human reality that exists outside of intellectual constructs created by the judicial mind.

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387. *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 205 (1977) (defining waiver as, and only as, conscious contemporaneous choice).

388. *Id.* at 221 (emphasis added).

389. *See* Dr. Metzner's testimony *supra* note 289.

390. Joint Appendix 26.

391. Rees v. Peyton, 384 U.S. 312, 314 (1966). *Rees*, decided just two weeks before *Miranda*, involved a unique situation in which a defendant, convicted of murder, moved to withdraw his petition for certiorari. On the suggestion of counsel that the defendant was mentally ill, the Court directed the district court to determine: "Whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* For a discussion of *Rees*, see Dix, *supra* note 387, at 261.

392. Dix, *supra* note 387, at 263-64.

393. *See* Dix, *supra* note 387, at 260-268. Justice Stevens, dissenting from the Court's treatment of the waiver issue in *Connelly*, found the Court's position "incomprehensible" and concluded that "[s]ince it is undisputed that respondent was not then competent to stand trial, I would also conclude that he was not competent to waive his constitutional right to remain silent." 479 U.S. at 173 (Stevens, J., dissenting). Although this conclusion seems undoubtedly correct on the facts of *Connelly*, it does not automatically follow that competency to stand trial and competency to waive are the same. *See* Dix, *supra* note 387, at 263-64 (suggesting that the standard for competency to waive constitutional rights may be higher).

If Connelly had been indicted, and had thereafter waived counsel and pled guilty as a result of compulsion produced by the same hallucinations, had waived counsel and pled guilty, would the result be the same? If not, how do we justify the disparity between the standards applied to the interrogation rooms of the "gatehouse" and those employed within the courtrooms of the "mansion"?[394]

C. *The Final Assault Upon* Miranda*: Coercion Versus Compulsion*

The ultimate impact of the Rehnquist Court's new voluntariness test upon the proceedings at the "gatehouse" will depend upon how the Court develops the contours of its coercion requirement as the "necessary predicate" for a finding of involuntariness. Under *Bram*, the early test for voluntariness employed a presumption whereby a confession was deemed involuntary if the interrogator had exerted "any degree" of influence because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner."[395] Under *Connelly*, however, the focus of attention is upon the offensiveness of the police conduct involved, rather than the impact of that conduct upon the mind of the accused. The Court candidly acknowledged that "[e]ven where there is causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been

394. *See* Y. KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME, 1 (A. Howard ed. 1965). It goes without saying that anyone writing in the field of confessions merely tills the soil that was first broken by Professor Kamisar, as evidenced by the continuing vitality of the following passage written over two decades ago:

> The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.
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> . . . .
>
> In this "gatehouse" of American criminal procedure . . . the enemy of the state is a depersonalized 'subject' to be 'sized up' and subjected to 'interrogation tactics and techniques most appropriate for the occasion', he is game to be stalked and cornered. Here ideas are checked at the door 'realities' faced and the prestige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion'—if he evers gets there—the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated . . . . Society doesn't want to know about criminals, but it does want them put away, and it is incurious how this can be done provided it is done. Thus society, in giving the policeman power, and wishing to ignore what his techniques must be, has made over to him part of its own consicence.

Id. at 19-20; (quoting MACINNES, *The Criminal Society*, in THE POLICE AND THE PUBLIC 101 (C.H. Ralph ed. 1962)).

395. *See supra* text accompanying notes 209-10.

a violation of the due process clause."[396] Although the Court did not attempt to define the meaning of "coercion" in *Connelly*, it clearly signaled that only interrogation techniques that are "so offensive to a civilized system of justice that they must be condemned" would constitute "coercive government misconduct."[397]

Because the Court equated "voluntariness" for the purpose of a waiver of *Miranda* rights with due process "voluntariness," the test for coercion is thus presumably the same in each context. This parallel raises several significant problems. The standards for determining waiver of fifth amendment rights have always been high.[398] The standards for setting a minimum due process threshold, however, have gravitated toward the other end of the spectrum.[399] This lower standard, in large part reflects the federal judiciary's understandable reluctance to impose its policy choices upon the states by means of such an open-textured provision as the due process clause. The Court's holding in *Burbine* that police deception of the defendant's attorney did not violate due process illustrates this point, the Court there declaring that: "[T]he challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[400]

But the determination of whether a federal constitutional right has been waived is a proper federal function which can hardly be called an intrusion upon the processes of the states. By importing the due process "shocks the sensibilities" test to define "coercion" (the new measuring rod for determining the voluntariness of fifth amendment waivers) the Court will bring along the unnecessary baggage of federal/state relations. Such concerns over federalism have no place in the analysis of waiver issues, and will only serve to further confuse doctrinal development and

396. 479 U.S. at 164 n.2.

397. *Id.* at 163 (quoting Miller v. Fenton 474 U.S 104, 109 (1985)). Although *Miller* implies that a technique may be offensive because it has been applied to a particularly susceptible suspect, its test is still clearly one involving a value judgment in which the suspect's capacity to withstand the technique is only a factor for subjective assessment rather than a standard upon which to base the determination of voluntariness.

398. At least this was true until *Connelly*. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

399. Justice Frankfurter once characterized the due process standards as only "those minimal historic safeguards for securing trial by reason . . . below which we reach what is really trial by force." McNabb v. United States, 318 U.S. 332, 340 (1943).

400. 475 U.S. 412, 433-34 (1986).

precipitate an unnecessary lowering of standards for determining when a suspect has validily surrendered a constitutional right.

In addition, by infecting the voluntariness prong of the waiver standard with the problems of its due process counterpart, the test for validating waivers becomes undeniably subjective. By what standard is the offensiveness of an interrogation technique to be judged? By what neutral principle will it be determined that a civilized system of justice requires the condemnation of a particular technique? What is the measure of a "civilized" system of justice? Judge Robert Bork has written:

> [T]he Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution . . . . If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates . . . that alone justi[fy] its power.[401]

Writing more than a century earlier, in what has been described as "one of the great masterpieces of constitutional opinion-writing"[402] Justice Benjamin Robbins Curtis similarly admonished in *Dred Scott v. Sandford*: "[W]hen . . . opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[403]

Personal value judgments concerning what is "offensive" police conduct should not be allowed to determine the scope of the fifth amendment right to be free from compulsion. Neither should they control the validity of waivers of that right under the guise of determining voluntariness. For when a citizen claims the protection of a constitutional right which the state asserts he has waived, there can be no question that the judicial resolution of the waiver controversy determines the scope of protection, and thus the meaning of that constitutional provision.

In holding that Connelly made a voluntary waiver of his fifth amend-

401. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3 (1971). The Chief Justice himself has also written condemning such methods of constitutional interpretation. *See* Rehnquist, *A Living Constitution*, 54 TEX. L. REV., 693, 699 (1976) (The court cannot act as the "conscience" of society, because "however socially desirable the goals sought to be advanced . . . advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.").

402. D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 273 (1985).

403. 60 U.S. 393, 621 (1857).

ment rights, the Court necessarily determined that the police conduct in the case was not coercive. The facts of *Connelly* hardly conjure up the image of the type of coercive police misconduct condemned by the old due process voluntariness cases as the "third degree"[404] and perhaps the Court thought the answer obvious. In any event, the Court did not clearly address and determine the issue of coercion and thus gave no reasoned explanation for its implicit holding.[405] Past decisions, however, clearly show that the degree of coercion acceptable under the due process voluntariness standard is substantially higher than the degree of pressure permitted under the definition of compulsion in *Miranda*.[406] This creates

404. *See supra* note 235 and accompanying text.

405. The majority opinion does mention in its due process discussion that the Colorado trial court had found that "the police committed no wrongful acts and that finding has been neither challenged by the respondent nor disturbed by the Supreme Court of Colorado." 479 U.S. at 165. But, as Miller v. Fenton, 474 U.S. 104, (1985) clearly holds, due process voluntariness is not a factual question, but a *"legal* question" requiring *"independent"* federal determination. *Id.* at 115 (emphasis added). *Connelly* did not address the issue of whether voluntariness in the waiver context is a legal or a factual question. The Court's passing reference to the trial court's factual "finding" therefore adds a new layer of confusion to the analysis, if that finding was intended to serve as the ground for the Court's implicit holding that there was no coercion. Because the concept of coercion plays a central role in the Court's new voluntariness test, one would have expected explicit treatment of the determination of this issue. The failure to do so suggests that the Court simply made a subjective assessment that no coercion was present.

406. *Miranda* held that "[u]nless adquate protective devices are employed *to dispel the compulsion inherent in custodial surroundings,* no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. 436, 458 (1966) (emphasis added). Thus, the Court believed that custodial surroundings created an atmosphere that "carri[ed] its own badge of intimidation." *Id.* at 457. Based upon this premise, the posing of a single question under such circumstances therefore violated the right against compulsory self-incrimination.

By contrast, the Court has always permitted extended custodial interrogation under the due process voluntariness test unless in combination with other factors it operated to overbear the suspect's will. *See* Lisemba v. California, 314 U.S. 219 (1941) (confession of experienced, educated businessman held voluntary despite repeated and persistent interrogation over a period of several days). *See also* Schulhofer, *Confessions and The Court,* 79 MICH. L. REV. 865, 871 (1981). The concept of coercion under due process voluntariness also permits a wide variety of deceptive police practices. *See* Frazier v. Cupp, 394 U.S. 731 (1969) (custodial interrogation for over an hour, by means of lies and false plays to sympathy, did not make the ensuing confession involuntary). *See also* Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986). In *Miller* the defendant confessed after almost an hour of continual pressure and then collapsed into a catatonic state and had to be hospitalized. The confession was held voluntary despite false statements of fact, devious psychological ploys, and implied promises that the defendant would be given proper psychiatric help rather than punishment.

For an example of what Chief Justice Rehnquist may find as an acceptable level of pressure, see Mincey v. Arizona, 437 U.S. 385, 407 (1978) (Rehnquist, J., dissenting). In *Mincey* the defendant was in an intensive care unit after being shot by police. "Tubes were inserted into his throat to help him breathe, and through his nose into his stomach to keep him from vomiting; a catheter was inserted into his bladder. He received various drugs, and a device was attached to his arm so that he could be fed intravenously." *Id.* at 396. Despite the defendant's repeated requests that he be left

a final anomaly which, upon reflection, reveals that *Connelly* has dealt a devastating blow to *Miranda*'s central holding regarding compulsion. Because the fifth amendment right to be free from compulsion can now be waived under a standard permitting greater pressure than *Miranda* itself would allow, *Miranda*'s definition of compulsion has thus been undone by an end run.

The following illustration easily demonstrates this undermining of *Miranda*. Suppose that one could measure the pressure upon an arrested suspect in degrees from one to one hundred. Assume that the law created a right to be free from pressure greater than ten degrees. Assume also that the law provided that the suspect could waive that right. If the amount of pressure that police could exert upon the suspect to waive this right was less than ten degrees, there would be no anomaly. But suppose the law permitted the police to exert thirty degrees of pressure upon a suspect in order to persuade him to waive his right. The result is nullification of the original right not to be subjected to more than ten degrees of pressure, and a substitution of a new thirty degree limit.

In a like manner the core holding of *Miranda*—that the pressure created by custodial interrogation, no matter how brief, constitutes compulsion prohibited under the fifth amendment—has now been overridden by the new voluntariness test established in *Connelly*. Stripped of any requirement that focuses upon the mind of the accused, this new streamlined version of voluntariness (characterized as simply the absence of police misconduct which offends the Court's sensibilities) opens the door to a wide variety of police interrogation techniques which, through deception, trickery and surprise, can produce compelling pressure upon a person in custody to speak. The Court, moreover, has put forward no principled basis for deciding which, if any, of these tactics should be prohibited.

Arizona v. Mauro,[407] which ostensibly deals only with the definition of "interrogation" under *Miranda* and its progeny, provides a case in point. In addition to illustrating how the Court has subverted *Miranda*'s understanding of the level of pressure sufficient to constitute compulsion,

alone, a detective interrogated him from 8:00 p.m. until midnight, ceasing his interrogation only when the defendant lost consciousness or received medical treatment. Eight members of the Court agreed that admissions made by the defendant under these circumstances were involuntary. Dissenting, then Justice Rehnquist observed that none of the "gross abuses" that had led the Court to find confessions involuntary in prior cases were present in this case. Therefore he concluded that not withstanding Mincey's medical condition his statements should have been admissible. *Id.* at 410.

407. 107 S. Ct. 1931 (1987).

Mauro also provides telling insight into how the Court will define "coercion" and shows how quickly the Court has already moved beyond the confines of *Connelly* to infect other aspects of the *Miranda* doctrine with its new understanding of compulsion as coercion.

In *Mauro* the defendant, in custody for killing his son, requested a lawyer after receiving the *Miranda* warnings. Under the rule established in *Edwards v. Arizona*[408] after a defendant has invoked his right to counsel under *Miranda*, the police cannot subject him to further "interrogation."[409] When the defendant's distraught wife (who was also being subjected to custodial interrogation as a suspected accomplice) asked to see him, police exploited the situation by bringing her, without warning, into the room where the defendant was being held. The officer then stated that they could speak together only if he were present. When his wife began to speak, the defendant twice told her to "shut up." The officer then intervened to reopen the conversation by asking the defendant's wife whether she knew a priest who could conduct religious rites for their murdered child[410]—a question calculated to play upon her already obvious feelings of guilt. The defendant then told his wife not to answer any questions without an attorney.[411] At trial a tape recording of this confrontation was admitted in evidence against the defendant to rebut his insanity defense. Mauro was convicted of murder and sentenced to death.

Had this case been decided under the *Bram* voluntariness test there is no question that a court would have found Mauro's statements involuntary because this confrontation was (to use the dissent's characterization) a "powerful psychological ploy" to induce the defendant to speak. Clearly, this custodial confrontation likewise produced more pressure upon the defendant than is permitted by *Miranda*'s understanding of compulsion.[412] Instead of grappling with this issue head on, however, the Court resolved the case under the *Edwards* rule, holding that the defendant had not been "interrogated." By framing the issue in this

408. 451 U.S. 477 (1981).

409. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Court defined "interrogation" to encompass not only direct questioning, but also its "functional equivalent" including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. The concept of "incriminating response" of course includes any statement which can be used in evidence against the suspect, regardless of the nature of the statement or its content. Miranda v. Arizona, 384 U.S. 436, 476-77 (1966).

410. *Mauro*, 107 S. Ct. at 1933 n.1.

411. *Id.*

412. *See supra* note 406.

manner the Court was therefore able to decide *Mauro* within the framework of the deterrence rationale which, under *Rhode Island v. Innis*,[413] focuses upon whether the police conduct was objectively reasonable. Although the Arizona Supreme Court and four Justices of the United States Supreme Court found that Mauro had been subjected to the functional equivalent of interrogation, a bare majority of the Court found that he had not. The majority took pains to note that the purpose of the *Edwards* rule was to prevent the police from using the "*coercive* nature of confinement to extract confessions that would not be given in an unrestrained environment" and summarily concluded that the officer's conduct in *Mauro* did "not implicate this purpose in any way."[414] This is an incredible statement when viewed in light of *Miranda*'s understanding of compulsion. Had the officer asked Mauro a single question his response would have been deemed compelled. Mauro, trapped in a room from which he was not free to leave, was certainly subjected to much greater pressure through the surprise confrontation with his distracted wife. The Court, however, did not view this tactic as being "in any way" coercive. *Mauro* thus provides a glimpse of the type of tactics the Rehnquist Court does not consider to be "coercive" and more importantly, demonstrates how the Court has silently and without fanfare used its subjective conception of "coercion" to replace *Miranda*'s understanding of compulsion.

In *Michigan v. Mosley*,[415] Justice White predicted that in the final analysis, the Court would depart from the rule-like character of the *Miranda* approach and return to voluntariness as the sole standard by which to determine whether a properly informed defendant had waived his fifth amendment "right to silence".[416] As *Mauro* illustrates, the impact of the Court's new understanding of voluntariness upon the definition of "interrogation" suggests that Justice White's prophecy is in the process of being realized. As shown below, moreover, it is a return to "voluntariness

413. 446 U.S. 291 (1980). *See supra* note 409.

414. 107 S. Ct. at 1936-37 (emphasis added).

415. 423 U.S. 96 (1975).

416. *Id.* at 108. (White, J., concurring) ("I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of a right to silence by a properly informed defendant."). The fifth amendment of course does not give a defendant the "right" to silence. It only guarantees the right to be free from compelled self-incrimination. Because it is anomalous to suggest that suspects may properly waive their right to be free from compulsion, however, the phrase "right to silence" has emerged as a substitute and obscured proper analysis. The import of White's statement, properly understood, is that the Court should return to voluntariness as the standard for defining compulsion.

with a vengeance."[417]

X. FROM FAILED PRAGMATISM TO PIOUS FRAUD

"[T]he effective administration of criminal justice hardly requires disregard of fair procedures."[418]

In his entertaining and insightful analysis of the Burger Court era, Professor Alschuler observed that while the Burger Court never overruled *Miranda*, it so abased it that a police training manual could legitimately advise police not to give *Miranda* warnings.[419] As a result of the Rehnquist Court confession decisions, this hypothetical police manual might now be expanded upon as follows:

> If you do not have probable cause to arrest a suspect, do not be deterred. It is permissible to deceive the suspect and trick him into "voluntarily" coming down to the police station. If he is unsophisticated, uneducated, mentally retarded or even a little crazy, so much the better. Because you did not create that condition you may exploit it. Do not give the suspect any *Miranda* warnings. They do not apply. Because you have tricked the suspect into coming "voluntarily" into the interrogation room, he thus is not in custody for the purposes of *Miranda*.

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417. Miranda v. Arizona, 384 U.S. at 505 (Harlan, J., dissenting). Justice Harlan, of course, used the phrase in a different context, to characterize his complaint that *Miranda*'s understanding of voluntariness meant the negation of virtually all pressure, and thus discouraged the making of any confessions at all.

418. Justice Frankfurter in McNabb v. United States, 318 U.S. 332, 347 (1943).

419. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987).

> Upon arresting a suspect, do not give him the *Miranda* warnings. When the public safety requires it, you may question this suspect without advising him of his rights, and his answers will be admissible. In the absence of a special public need, however, you should not question an arrested, unwarned suspect. If the suspect does make a statement, it will be a "volunteered" statement of the sort that *Miranda* makes admissible. Moreover, if the suspect remains silent, his silence may be used to impeach any defense that he offers at trial.
>
> . . . .
>
> After an hour or two (during which your suspect will have provided either a statement or a potentially useful period of silence) you should advise him of his rights. If the suspect waives these rights, his statement will be admissible. If he indicates that he wishes to remain silent or to consult a lawyer, however, continue to interrogate him without a lawyer. Although the prosecutor will be unable to introduce as part of the state's case-in-chief any statement that the suspect makes, the suspect's statement will become admissible to impeach his testimony if he later takes the witness stand to say something different from what he told you. Indeed, if the suspects testimony on direct examination fails to contradict his earlier statement, the prosecutor may cross-examine him about facts reported in the earlier statement and may introduce the statement if the suspect fails to confirm what he said to you.

Id.

> Once you have the suspect in your environment, do not tell him the real reason you wish to interrogate him or indicate the seriousness of the offense for which he is suspect. Only when you have gained enough admissions so that the cat is out of the bag should you turn on the tape recorder, advise the suspect of his rights and take his full confession. He will probably repeat what he has just told you. If you have any reason to believe that the suspect is mentally deficient or insane, however, come back later for a third round of interrogation and press him in such a manner that he will refuse to talk further and ask for a lawyer. Impressing upon him the seriousness of the charge is a good way to engender such a response. This invocation can then be used to show that he was cognitively aware of his *Miranda* rights and made a valid waiver when he made his earlier confession.

The forgoing scenario is not fantasy. It is taken from *State v. Carrillo*,[420] a 1988 decision of the Supreme Court of Arizona, which, in upholding the confession taken there, demonstrates the consequences of coupling the *Connelly* voluntariness test with *Colorado v. Spring*[421] and previous Burger Court decisions undermining *Miranda*'s definition of custody.[422]

Hector Carrillo was mentally retarded. The only apparent ground for police suspicion that he was involved in a murder was the fact that he was a gardener for the deceased and it was possible he had been at the deceased's home on the day of the killing. The police were aware, from their own records, of Hector's "severely mentally retarded" condition. In order to interrogate Hector, the police used a misdemeanor traffic warrant as a pretext to visit him, and persuaded him to come down to the police station to clear up this matter.[423] The detective in charge of the case testified that, "I felt that by taking him from his house to the police department . . . by taking him from there into my environment it helped my advantage out a little bit."[424]

Upon arrival Hector was finger printed and photographed like any arrestee. No request for permission to do this was made. Police then placed Hector in a small interrogation room and began questioning him. They did not advise Hector of his *Miranda* rights or tape record the initial interrogation. The interrogating officer later admitted, however, that it was "independently obvious to him at that point that Hector was

420. 156 Ariz. 125, 750 P.2d 883 (1988).

421. 479 U.S. 564. *See supra* note 17 for a discussion of *Spring*.

422. *See* Berkemer v. McCarty, 468 U.S. 420 (1984); California v. Beheler, 463 U.S. 1121 (1983).

423. The Tucson Police Department policy was not to arrest on a misdemeanor warrant in this type of situation. 156 Ariz. at 127, 750 P.2d at 885.

424. *Id.* at 132, 750 P.2d at 890.

indeed mentally deficient."[425] Although the interrogation lasted ninety minutes, there is no way to reconstruct with certainty what actually occurred during most of that time because the tape recorder was turned off. According to the interrogator, after fencing around with Hector on a number of topics he eventually "dropped it on him" that they were investigating a murder and asked if he had killed the deceased. Hector then admitted that he had stabbed the deceased but did not mean to. Only after this admission did the officer turn on the tape recorder and carefully advise Hector of his *Miranda* rights "in simplified form to ensure that he understood them."[426] Hector then dutifully gave a tape recorded confession. A short time thereafter a different detective came in for a third round of questioning and apparently told Hector to take off his pants.[427] Hector, however, stated that he would not remove his underwear, asked "where is my lawyer" and refused to speak further.[428]

Two mental health experts found Hector Carillo incompetent to stand trial. Two other experts, however, found him competent, and the trial court sided with these two prosecution witnesses. Carillo was convicted of second degree murder. The Arizona Supreme Court held that because Carillo was expressly told that he was not under arrest, he was not in custody for the purposes of the *Miranda* warning requirement.[429] Therefore the officer's calculated refusal to give *Miranda* warnings at the beginning of the interrogation session did not taint the subsequent taped confession. The court then turned to the issue of voluntariness and, relying upon *Connelly*, observed: "[T]he question of voluntariness is to be determined by an objective evaluation of police conduct and not by defendant's subjective perception of reality."[430] Discovering no objective evidence that the conduct of the police was either intimidating or coercive, the court could find no "legal grounds" for concluding that either the confession or the waiver of *Miranda* rights were involuntary. Finally, the court ruled that Carillo made a knowing waiver despite his

425. *Id.* at 127, 750 P.2d at 885.

426. *Id.*

427. *Id.* at 130, 750 P.2d at 888. Apparently the pants were wanted for examination.

428. *Id.* at 129, 750 P.2d at 887-88.

429. The test is how a reasonable man in the suspect's position would have understood his situation. Berkemer v. McCarty 468 U.S. 420, 436-38 (1984). The court admitted that given Carrillo's diminished mental capacity he may have thought that he was in custody, but stated: "we deal with *objective* criteria only in determining whether the interrogation was custodial." 156 Ariz. at 133, 750 P.2d at 892 (emphasis added).

430. 156 Ariz. at 135, 750 P.2d at 895.

mentally retarded condition. In an ironic twist, the court used Carillo's belated exercise of his *Miranda* rights as evidence against him. According to the court, Carillo's request for a lawyer and refusal to speak after being told to remove his pants, was "persuasive evidence" which demonstrated that he understood his rights under *Miranda*.[431]

What has been vividly demonstrated, however, is the tragic irony of *Miranda*'s failure to protect the "privilege" against self-incrimination and the cluster of rights that historically surrounded it. Historically, the "privilege" protected a criminally suspect person from interrogation by one in authority in the absence of a substantiated formal accusation. Our English ancestors considered this the essence of fair procedure, and whenever it was disregarded it was just as stubbornly reasserted as the law of the land. For Hector Carrillo, however, such a privilege did not exist. He was interrogated without probable cause, without notice of the charge against him, and in an environment that was calculatedly designed to make him feel obligated to respond.

In his dissenting opinion in *Miranda*, Justice Harlan focused precisely upon the Achilles heel of the *Miranda* opinion, when he observed that in holding that a presumption of compulsion arises from custodial interrogation, the Court "failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits."[432] As cases like *Carrillo* demonstrate, the failure to resolve that contradiction has been the fatal flaw that has led to the unraveling of the *Miranda* doctrine. The *Miranda* Court's fundamental error, however, was in failing to understand the true nature of the privilege—both historically and analytically. As a result it perceived the issue in terms of "compulsion" and attempted to preserve the values protected by the historical privilege by redefining that term, much as the Court in *Bram* had done three-quarters of a century earlier. Like *Bram*, the effort has again failed for want of a solid theoretical foundation.

In reflecting upon the treatment of *Miranda* by the Burger Court Professor Jerold H. Israel suggested more than a decade ago that at least *Miranda* still served as a symbol of respect for the privilege against self-incrimination.[433] When the *Miranda* doctrine becomes so distorted, however, that the invocation of its protection can become a weapon in

431. *Id.* at 135, 750 P.2d at 889.

432. Miranda v. Arizona, 384 U.S. 436, 513 (1966) (Harlan, J., dissenting).

433. *See* Israel, *Criminal Procedure, The Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977). Professor Israel asserted that "what may be the most significant feature

the hands of the state to be used against the accused, it is time to recognize that *Miranda* has ceased to serve even a symbolic function and has become instead a pious fraud.[434]

XI. CONCLUSION

Although its origins can be traced to Biblical scripture, freedom from self-incrimination, as received in America, arose out of the English common law development of our accusatory system of criminal justice. Part II of this Article demonstrated that during the first stage of development of the "privilege" against self-incrimination, the suspect was not obligated to answer questions posed by those in authority absent fair notice and justified suspicion regarding the alleged offense. These twin rights defined the parameters of the "privilege" in its Hohfeldian sense[435] and protected one against being subjected to interrogation in the absence of a formal charge substantiated by a sworn complaint or indictment. Once these rights were observed, however, the "privilege" came to an end and the defendant could be compelled to truthfully answer the allegations against him under oath. With the introduction of the hated oath *ex officio* and the use of torture during the religious persecutions of the sixteenth century, the privilege fell into eclipse. It reasserted itself, however, after the fall of Star Chamber in 1641 and entered a second stage of development which recognized the corollary right to be free from compelled self-incrimination.

In drafting the Bill of Rights, it was inevitable that the fabric of the common law would be torn apart by the effort to catalogue particular rights. This caused the twin rights of fair notice and justified suspicion to be treated as discrete concepts. As a consequence of the ambiguous phrasing of the fifth amendment, the intimate connection between these rights and the "privilege" against self-incrimination was obscured. Thus, the fifth amendment came to be viewed as simply expressing a right against compelled self-incrimination. In addition, this truncated right became entwined with the common law rule of evidence known as the

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of *Miranda* from a civil libertarian viewpoint [is] the symbolic impact of the *Miranda* warnings as a formal recognition of the self-incrimination privilege of the interrogated suspect." *Id.* at 1387.

434. "Unless Miranda produces lawyers in the station house instead of waivers, Miranda may turn out in practice to be a pious fraud." Hon. J. Skelly Wright, *A Fresh Approach to the Law*, in A NEW LOOK AT CONFESSIONS: ESCOBEDO- THE SECOND ROUND 250, (Institute of Continuing Legal Education Specialty Handbook No. 20, (B. James George, Jr. ed. 1967)).

435. *See supra* note 7.

voluntariness doctrine, which emerged to dominate the jurisprudence of confessions.

During the eighteenth and nineteenth centuries the same concern for fairness toward the individual which gave rise to the ancient privilege also caused the voluntariness doctrine to evolve into a rule virtually barring any interrogation of a prisoner. Subsequent interpretation in the early twentieth century, however resurrected the trustworthiness rationale (which had been the underlying justification for the common law evidence rule) to limit the scope of protection. By the Prohibition era, the privilege had yielded to the perceived necessities of law enforcement to such an extent that a confession was considered involuntary only if the pressure exerted was so great that it created a fair risk that the confession was false.[436]

By the 1940's, concern with the abuses that had developed under such a lax standard[437] led the Court to severely restrict interrogation by federal law enforcement under the *McNabb-Mallory* rule.[438] At the same time the Court acted to enforce fundamental fairness in state interrogations by means of the due process clause of the fourteenth amendment. When the due process "voluntariness" approach proved incapable of providing a workable solution, the Court moved toward a bright line solution under the sixth amendment, establishing an accused's right to have counsel present during custodial interrogation in *Escobedo v. Illinois*.[439]

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436. *See supra* Part V(D); J. WIGMORE, EVIDENCE § 824 at 252 (3d ed. 1940).

437. *See* IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (Wickersham Report) (1931); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936).

438. See text at note 228.

439. 378 U.S. 478 (1964). *Escobedo* was premised upon the conclusion that our adversary system of criminal justice commenced once the investigatory process had focused upon an accused with the purpose to obtain a confession. The right to counsel was therefore grounded upon traditional sixth amendment doctrine that required "the guiding hand of counsel" at every critical stage of the adversarial process. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). *Miranda* later re-affirmed this holding, but clarified the concept of "focus," by limiting the right to counsel to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444 n.4. (1966). In Moran v. Burbine, 475 U.S. 412 (1986) the Court acknowledged that *Escobedo* had been decided as a sixth amendment case, but refused to follow its holding, choosing instead to follow Justice Stewart's plurality opinion in Kirby v. Illinois, 406 U.S. 682 (1972). *Kirby* had developed the idea that the sixth amendment right to counsel did not "attach" until adversarial judicial criminal proceedings had been initiated by way of indictment or formal charge. *Id.* at 689. The *Burbine* Court thus found that no sixth amendment violation had occurred where, prior to formal charges being filed, police interrogated the defendant over a period of 21 hours, despite telling his attorney that no interrogation would take place.

for the fair administration of criminal justice, the Court could have developed *Escobedo* into a doctrine consistent with the historical understanding of the "privilege" against self-incrimination by mandating that no waiver of rights would be accepted unless the accused had first consulted with counsel.[440] Counsel's role under such a doctrine would have envisioned three major functions. First, the provision of counsel would have ensured that probable cause existed to detain the suspect regarding the offense for which interrogation was sought. The ancient right not to be subjected to interrogation without justified suspicion could thus have been protected and enforced by means of the writ of habeas corpus where appropriate.[441] Second, as a necessary consequence of performing the first function, counsel would have discovered and communicated to the accused the nature of the accusation against her, thus implementing the accused's right to fair notice. Finally, counsel would have been present at any interrogation session to provide advice, ensure fairness and protect against overbearing. Such a doctrine arguably would have been compatible with permitting the police or prosecutor to put questions to an accused, even though the accused indicated that he desired to remain silent. Indeed, *Miranda* left the door open to this possibility, noting:

> If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.[442]

More accurately there simply would be no "privilege" to waive, since the protection afforded by the historical "privilege" against self-incrimination came to an end once the accused received fair notice by a formal charge based upon probable cause. While the corollary right to be free

440. See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE, PROVIDING DEFENSE SERVICES, 7.3 (Acceptance of Waiver) (1974) which provides: "If a person who has not seen a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with him. No waiver should be accepted unless he has at least once conferred with a lawyer." *Id.* at 153-54. The Advisory Committee which drafted this standard was chaired by then circuit judge Warren E. Burger, who served from the committee's inception in 1964 until his appointment as Chief Justice in 1969. *Id.* at Appendix F. The standard was widely circulated in tentative draft form and ultimately was approved by the House of Delegates in February, 1968.

441. Indeed, Escobedo's lawyer had filed such a writ and had initially obtained his client's release when police attempted to interrogate him without probable cause. *See* 378 U.S. at 479.

442. 384 U.S. at 474 n.44.

from "coercion" would continue, the presence of counsel, as *Miranda* suggested, would serve to negate any per se compelling influence arising from custodial interrogation. Therefore, further development of *Escobedo* could have fostered a practice of routine questioning of a represented accused which would have been entirely consistent with the historical understanding of the privilege against self-incrimination.[443]

The Court did not develop such an *Escobedo* doctrine, however. Confronted with the storm of controversy that the decision created, the Court retreated in *Miranda*, and struck a compromise. This compromise permitted police to obtain uncounseled waivers of both the right to have counsel's advice and assistance, and the right to be free from the compelling influence of custodial interrogation. The *Miranda* retreat therefore transformed the debate about self-incrimination into a debate about waiver. Instead of grappling with the fundamental question of what the proper ethical relationship between state and citizen should be, the Bur-

443. Obviously, the traditional *Miranda* warning that the accused has a "right" to silence would not be given under this view of the "privilege," and Doyle v. Ohio, 426 U.S. 610 (1976) (prohibiting on due process grounds the prosecution's use of an accused's silence as evidence after accused received warnings) would be inapplicable.

Some nevertheless may object that any lawyer worth her salt would advise the accused not to answer any questions posed by the police and that the doctrine therefore would have resulted in making any interrogation futile. This would be true, however, only if there was no cost associated with the refusal to answer. The admission into evidence of the accused's refusal to answer, or alternatively, giving the trial judge discretion to comment unfavorably upon such refusal, could have provided an appropriate countervailing incentive. Under both an historical and a Hohfeldian analysis, the "privilege" against self-incrimination would not bar the use of an accused's silence where there was a deliberate refusal to answer after an accused had been formally charged on the basis of probable cause. Whether the accused's silence in the face of such questioning could be admitted, where relevant, as evidence against him would, of course, have remained problematic in light of Griffin v. California, 380 U.S. 609 (1965). However, because *Griffin* dealt only with a prosecutor's comment on a defendant's silence at trial, the Court could have conceivably distinguished *Griffin*. *See* United States v. Robinson, 108 S. Ct. 864 (1988) (indicating that *Griffin* is no longer sacred and can be quite narrowly construed). Therefore, it is by no means a foregone conclusion that *Escobedo* would have developed into a dead end in which counsel would routinely advise defendants not to answer any questions. Whatever problems may have attended such an approach, at least their resolution would have been undertaken by addressing the "privilege" on its merits. Most importantly, the presence of counsel would have eliminated the bag of dirty tricks from the policeman's repertoire and fostered an ethical system of interrogation.

A similar proposal was in fact previously put forward over half a century ago by the Wickersham Commission. Concerned with police abuses in the 1930s, the Commission's proposed remedy contemplated judicial interrogation of an accused who had first been provided with counsel and advised of the charge against him. *See* Wickersham Commission Report, *supra* note 234, at 5. *See also* Kamisar, *supra* note 266, at 84-90 (proposing that police or prosecutors be allowed to question an accused in the presence of judicial officer, once that officer has determined that probable cause exists for the detention and had made counsel available to the accused).

ger Court substituted the deterrence rationale for constitutional theory and channeled the debate into a one-sided utilitarian discussion concerning whether policemen, in particular circumstances, should be "punished" for violating the nonconstitutional "rules" by which the waiver game was played. In this manner, the Burger Court continued the retreat, gradually cutting back the *Miranda* doctrine and at the same time reducing the concept of waiver to a formalistic ritual.

In *Colorado v. Connelly* the Rehnquist Court continued this assault by transforming the voluntariness test into a monolith, eliminating the "complex of values" which once guided the determination of due process in criminal interrogations. In its continuing passion to reduce the scope of the federal exclusionary rule, the Court once again substituted the logic of deterrence for theoretical analysis and provided convenient, simplistic answers to questions that present difficult underlying problems of constitutional theory. As a result of this deterrence-based approach, an a historical, myopic view of voluntariness as simply the absence of coercion has emerged. Limited solely to the Court's subjective assessment of what constitutes "coercive" police conduct, this monochromatic voluntariness test now controls both the meaning of due process and the validity of waivers of fifth amendment rights under *Miranda*. *Connelly* reflects the shallowness of current fifth amendment jurisprudence and demonstrates a profound ignorance of history. More importantly, however, *Connelly* has abrogated *Miranda*'s definition of compulsion and opened the door to a broad spectrum of deceptive and unethical police practices which threaten to nullify the premise of fundamental fairness upon which the privilege against self-incrimination was founded. If, to convict the suspected criminal, we permit the police to sink to a "lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs" we also subject our own liberty and personal security to that mentality.[444] Yet, if the history of the embattled privilege against self-incrimination has demonstrated anything, it has shown that whenever restrictions on the power to extract answers to questions

444. F. INBAU, J. REID & J. BUCKLEY, *supra* note 255. These authors maintain that necessity dictates that the police lower themselves to the moral plane of the criminal. Therefore "both fair and unfair interrogation practices are permissible [so long as] nothing shall be done or said to the suspect that will be apt to make an innocent person confess." *Id.* Apart from the practical difficulties inherent in this approach, which requires a court to play psychologist, it would also appear to condone the practice of policemen disguising themselves as a priests or even lawyers in order to deceive alleged criminals into making admissions. Such deception clearly would not make an innocent person confess. If one finds such practices unacceptable, however, how does one draw the line?

posed by those in positions of authority have been relaxed, such license has been abused.[445] The Court has offered no principled basis for drawing the clear lines necessary to guard against abuse and thus has failed to provide uniform guidelines for the police. This in turn poses what perhaps may be the greatest danger—the loss of respect for the law which inevitably follows a loss of confidence in the even-handed fairness and integrity of law enforcement. While it is in no way suggested that the Court in *Connelly* condoned or contemplated the potential for abuse, as Justice Frankfurter once observed, it would "not be the first time that results neither desired nor foreseen by an opinion have followed."[446] We must now recognize that *Miranda* has been silently buried, pay our respects, and in the spirit that *Miranda* envisioned, begin to rethink the privilege against self-incrimination anew.

445. Indeed, perhaps the most telling example of abuse of power has come from those thought least likely to abuse it—the judiciary. *See supra* text accompanying notes 93-101 (discussing the practice of judicial examination of an accused under the Marian statutes).

446. Stein v. New York, 346 U.S. 156, 203 (1953) (Frankfurter, J., dissenting).