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I. INTRODUCTION

Picture this scenario: The police have a suspect to a heinous crime in custody. During questioning of the suspect, the police appeal to the suspect's religious beliefs in order to obtain a confession. The particular religious beliefs of the suspect may vary significantly to include: the need for a confession to obtain personal salvation; the need to somehow benefit the victim of the crime (e.g., Christian burial); a commitment to arrive at nirvana through respect for the life force of all sentient beings; a sense of social morality, divine justice, or of ultimate responsibility; a fear of hellfire and damnation; or some other belief or value. The nature of the police appeal to the suspect's religious beliefs may also be many things: exhorting with words alone, reading or reciting from the Bible or other scripture, conducting the interrogation in a chapel or church, interrogating with the help or in the presence of a religious leader, adorning the interrogation room with religious symbols or icons, representing either truthfully or falsely to have religious authority to absolve sin upon confession, etc. The police officers themselves may or may not share the suspect's religious beliefs and may even falsely represent their own religious convictions to the suspect.

Imagine further that the suspect indeed confesses. To keep it simple, assume that there are no other factors that might taint the confession. The arrest was legal; the suspect was not mentally or physically incapacitated; there was no other form of trickery or deception; no improper promises were made or implied; there was no physical violence or intimidation; the suspect was advised of her rights and exercised them as she saw fit. Is the confession constitutionally admissible as evidence?

There are at least two hurdles which such a confession must overcome in order to pass constitutional muster. First, the confession must qualify as admissible under the doctrine of constitutional "voluntari-

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ness."[1] Second, the state's use of religious belief must satisfy potential first amendment and other constitutional barriers to the exploitation of religion for secular/state purposes.[2]

The use of religion or the religious beliefs of an accused by police during custodial interrogation has been examined under a variety of doctrines including the sixth amendment right to counsel,[3] fifth amendment right to silence,[4] fifth and fourteenth amendment due process/totality of circumstances,[5] and the constitutional right to privacy.[6] Although results have gone both ways,[7] the common thread running through most of these doctrines is "voluntariness."

The thesis of this article is that under the voluntariness standard, confessions induced by appeal to religious belief alone are voluntary and admissible. There are a small number of cases in which confessions induced in part by appeals to the suspect's religious beliefs were found to be involuntary. These cases can be distinguished, however, on both factual and doctrinal grounds.

Courts have not fully developed the first amendment and privacy doctrines in this area. Nevertheless, these doctrines do raise questions about the proper relationship between religion and the state, particularly in terms of state exploitation of religion to induce confessions. At a minimum, these doctrines merit perfunctory consideration, if not in-depth analysis, to guard against infringement of the fundamental liberties protected by the Constitution.

II. CONSTITUTIONAL VOLUNTARINESS

A. Establishing a Voluntariness Standard for Confessions

1. Common law and the fifth amendment

The United States Supreme Court long ago established the rule that the Constitution requires a confession to be made voluntarily or it

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1. *See infra* section II-A.

2. *See infra* section III. A related issue is whether certain otherwise criminal behavior is constitutionally protected as the free exercise of religious belief. It rarely is. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (religious belief defense to the practice of polygamy rejected); Walker v. Superior Court, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988) (prosecution of Christian Scientist parent who treated child's illness with prayer rather than medical care, thus resulting in death of child).

3. Brewer v. Williams, 430 U.S. 387 (1977) ("Christian burial speech").

4. United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979).

5. *See, e.g.*, Welch v. Butler, 835 F.2d 92 (5th Cir. 1988); Stawicki v. Israel, 778 F.2d 380 (7th Cir. 1985); Gessner v. United States, 354 F.2d 726 (10th Cir. 1965) (interrogation of mentally ill suspect by chaplain).

6. *See* Ramie v. City of Hedwig Village, 765 F.2d 490 (5th Cir. 1985).

7. *See infra* section II-B.

will be inadmissable.[8] The Court first articulated "voluntariness" as an actual test for confessions in 1884 in *Hopt v. Utah*.[9] Rather than focusing on police tactics, which is generally the policy concern today, the Court initially appropriated the English common law rationale that voluntary confessions are trustworthy and reliable. In fact, the Court regarded voluntarily-made confessions as "among the most effectual proofs in the law."[10] Although the Court was aware of the need to protect individuals from coerced confessions,[11] the original aim of the rule excluding an involuntary confession from evidence was primarily to exclude false evidence, not to protect the rights of the accused.[12]

The Court first considered police conduct and the fifth amendment privilege against self-incrimination in 1897 in *Bram v. United States*.[13] The Court concluded that the Constitution's privilege against self-incrimination went no further than to codify the common law doctrine of voluntariness in order to avoid false confessions.[14] This view has been vigorously criticized.[15] Nevertheless, *Bram* opened the door for the Court to expand the voluntariness test nearly three decades later to include express consideration of "the circumstances of the interrogation."[16] This eventually led to the adoption of a due process/fundamental fairness approach.[17] However, throughout this early period, even though police conduct and the fifth amendment privilege were factors to be considered, the basic doctrine underlying the voluntariness test remained the essential unreliability of coerced confessions.

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8. Bram v. United States, 168 U.S. 532 (1897); Boyd v. United States, 116 U.S. 616 (1886); Hopt v. Utah, 110 U.S. 574 (1884).

9. 110 U.S. 574 (1884). "Voluntariness" was mentioned and at least indirectly considered by the Supreme Court 92 years earlier in Commonwealth v. Dillon, 4 U.S. 116 (1792). In this case, the court was concerned with the influence of certain threats and inducements made to a twelve year-old arson suspect who eventually confessed. However, the ultimate test was not why the confession was given or how the confession was obtained, but the reliability of the confession, i.e., whether the threats and inducements rendered the confession untrue.

10. *Hopt*, 110 U.S. at 585.

11. "We are unwilling to subject those suspected of crime to the 'cruel trilemma' of self-accusation, perjury or contempt." Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J., dissenting).

12. *See* Lisenba v. California, 314 U.S. 219 (1941) *reh'g denied*, 315 U.S. 826 (1942).

13. 168 U.S. 532 (1897) (confession obtained through coercive interrogation by police of foreign state not admissible).

14. *See id.*

15. *See, e.g.*, Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1831 n.23 (1987) and accompanying text [hereinafter cited as Ogletree].

16. Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

17. *See infra* notes 18-22 and accompanying text.

2. *Due process*

Not until 1936, in *Brown v. Mississippi*,[18] did the Court introduce a due process approach, based on the fifth and fourteenth amendments. Under this new approach, the Court expressly considered the fairness of how the confession was obtained rather than merely its reliability.[19] The Court still retained the voluntariness standard, however, and in scores of cases that followed *Brown*, the Court's case-by-case analysis alternated between the voluntariness/reliability approach and the due process/fairness approach.[20] The result was a somewhat imprecise blend of reliability of confessions, voluntariness, and due process analysis.[21] This often led to confusion and uncertainty, particularly for law enforcement officials trying to determine what was acceptable and for lower courts attempting to provide guidance.[22]

3. *Sixth amendment right to counsel*

During the 1960s, the admissibility of confessions came under attack from another quarter—the sixth amendment right to counsel.[23] When examining the admissibility of confessions, the Court began to consider additional policy concerns such as the protection of the innocent from conviction as a result of poor performance on the witness

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18. 297 U.S. 278 (1936).

19. *Id.* at 285-87.

20. For a discussion of these cases, see Ogletree, *supra* note 15, at 1826.

21. To ultimately make its case, the state must also verify the confession with corroborative evidence. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 489 n.15 (1963); Smith v. United States, 348 U.S. 147, 154 (1954); United States v. Calderon, 348 U.S. 160 (1954). However, even if the confession is verified, a conviction will still be reversed if the confession was coerced and admitted at trial. Payne v. Arkansas, 356 U.S. 560, 568 (1958) (the rationale is that no one knows whether the conviction was based on the corroborating evidence or on the wrongly admitted confession). "A confession is not voluntary simply because it is the product of sentiment choice. Conduct under duress involves a choice, and conduct . . . not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." *Id.* (quoting Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918)). The choice must be a "voluntary product of a free and unconstrained will." Haynes v. Washington, 373 U.S. 503, 514 (1963). The assessment of voluntariness requires "more than a mere color-matching of cases." Reck v. Pate, 367 U.S. 433, 442 (1961). The "question . . . is whether the defendant's will was overborne at the time that he confessed, [and] if so, the confession cannot be deemed the product of rational intellect and free will." Lynumn v. Illinois, 372 U.S. 528 (1963). The test of admissibility of a confession was whether "the confession was made freely, voluntarily, *and* without compulsion or inducement of any sort." *Haynes*, 373 U.S. at 513 (citing Wilson v. United States, 162 U.S. 613, 623 (1896)) (emphasis added). This determination must look to the totality of circumstances as well as to the established significance of each individual circumstance. *See* United States v. Yeager, 336 F. Supp. 1287 (1971).

22. *See generally* Ogletree, *supra* note 15, at 1833-44.

23. Massiah v. United States, 377 U.S. 201 (1964) (limiting the use of incriminating statements made by an indicted person); Escobedo v. Illinois, 378 U.S. 478 (1964) (extending the sixth amendment right to counsel to pre-indictment stage).

stand, a general preference for the accusatorial rather than the inquisitorial system of justice, the need to deter improper police and state practices, and the necessity of balancing the rights of the individual against the powers of the state.[24] The basic rationale for the sixth amendment approach remained the questionable credibility of coerced confessions.[25]

4. *The bright line* Miranda *rule*

The sixth amendment approach, which recognized that custodial interrogations can be coercive without an attorney present, set the stage for the landmark case *Miranda v. Arizona*.[26] In the *Miranda* analysis, which focused on the fifth amendment privilege against self-incrimination rather than due process, the Court declared that a defendant's constitutional rights are violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity, even if there is ample evidence aside from confession to support conviction.[27] The policy focus expressly shifted from the intrinsic risk of untruthfulness of involuntarily made statements to the inherently coercive nature of in-custody interrogations by the police[28] and the helplessness of suspects under such circumstances.[29] The Court hoped to get beyond the need for case-by-case judicial examination of voluntariness by laying a bright line rule for admissibility.[30]

To eliminate the burdensome need for case-by-case judicial intervention, *Miranda* laid down a bright line minimum requirement that police officers inform the accused of their right to remain silent and to have an attorney.[31] Thus, the Court in *Miranda* essentially rejected the due process analysis which balanced the accused's due process rights against the states' interest in effective law enforcement. As a result of *Miranda*, much of the judicial dialogue regarding the "voluntariness" of confessions has shifted to the accused's right to remain silent and

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24. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

25. The Court noted that it had 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. *Escobedo*, 378 U.S. at 488-89.

26. 384 U.S. 436 (1966).

27. *Id.*

28. *Id.* at 455-57, 461. This was a reversal of prior cases that held that interrogation alone is not so inherently coercive, as is physical violence, to render a confession involuntarily and inadmissible. *See, e.g.*, Stein v. New York, 346 U.S. 156 (1953).

29. *See Miranda*, 384 U.S. at 448-55; *see also* Brewer v. Williams, 430 U.S. 387 (1977) (Christian burial speech).

30. *See Miranda*, 384 U.S. at 468-69.

31. *See id.* at 436.

have an attorney in addition to the mere "voluntariness" and/or the "totality of circumstances" surrounding custodial interrogation.[32] However, the voluntariness doctrine did not simply disappear. Traditional standards of voluntariness continue to apply,[33] and merely giving the *Miranda* warning does not automatically render an interrogation non-coercive. The voluntariness of a confession is still analyzed under the "totality of circumstances" test first articulated in 1957.[34] Likewise, voluntariness remained vital in post *Miranda* cases, particularly on the issue of whether the accused's waiver of right to silence or counsel was voluntary.[35]

5. *Blurring the bright line* Miranda *rule*

Since *Miranda*, the Court has recognized enough exceptions to the bright line test that the line is no longer so clear.[36] In 1974, the Court held that *Miranda* warnings were not constitutional rights in and of themselves, but merely prophylactic devices designed to safeguard the fifth amendment privilege against self-incrimination.[37] This opened the door to narrow the application of *Miranda* and/or to apply a due process balancing test rather than the strict bright line rule initially proposed by *Miranda*. The Court has held that *Miranda* does not apply to custodial statements initiated by the suspect,[38] to confessions made by suspects who are not in police custody,[39] or to interrogation by probation officials.[40] Otherwise inadmissible confessions may be allowed in for impeachment purposes[41] or where the confession was obtained under circumstances that threaten the public safety.[42]

In the recent case *Colorado v. Connelly*,[43] the Court ruled that confessions are constitutionally "involuntary" only if coerced by the

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32. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519 (1968); Spano v. New York, 360 U.S. 315 (1959).

33. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978).

34. *See* Fikes v. Alabama, 352 U.S. 191 (1957).

35. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (whether defendant advised of right to remain silent as required by *Miranda* is a significant factor in considering voluntariness of statements later made).

36. In response, some have proposed the draconian approach that any and all statements obtained by police before a suspect consults with counsel should be automatically inadmissible as evidence. *See* Ogletree, *supra* note 15, at 1842.

37. *See* Michigan v. Tucker, 417 U.S. 433, 433-45 (1974).

38. *See* Rhode Island v. Innis, 446 U.S. 291 (1980).

39. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976).

40. *See* Minnesota v. Murphy, 465 U.S. 420 (1984).

41. *See* Harris v. New York, 401 U.S. 222, 225 (1971).

42. *See* New York v. Quarles, 467 U.S. 649, 655-58 (1984).

43. 479 U.S. 157 (1986).

government, even if compelled by mental illness.[44] Further, the Court stated that the constitutionally based exclusionary rule should only be used when it will deter future constitutional violations.[45] Returning to a due process analysis, the Court in *Connelly* held 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."[46] According to the majority, police coercion has been the "crucial element" in confession cases for fifty years.[47] Therefore, the defendant's mental condition alone, although relevant, is not dispositive or preclusive of the due process analysis.[48] The fifth amendment's sole concern is government coercion, not moral and psychological pressures to confess emanating from other sources.[49] This view of voluntariness is not necessarily inconsistent with *Miranda*, which excluded involuntary statements but not volunteered statements.[50] The Court in *Connelly* also noted that the most outrageous conduct by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible; state conduct is the key.[51] The Court also held that since due process voluntariness of a confession need only be proved by a preponderance of the evidence,[52] the minimum standard for proving voluntary waiver of *Miranda* rights should be no higher.[53]

Because all suspects bring their religious convictions and propensities with them to an interrogation, under *Connelly*, confessions induced by appeal to these attributes will be admissible, assuming there is no other form of misconduct or coercion on the part of the state. However, the cases that seem most likely to provide a basis for determining such an additional form of state misconduct are those involving trickery and psychological coercion.

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44. *Id.* at 164.

45. *Id.* at 157.

46. *Id.* at 167.

47. *Id.* at 164-65.

48. *Id.*

49. *Id.* at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)).

50. *See* Miranda v. Arizona, 384 U.S. 436, 478 (volunteered statements of any kind not barred by the fifth amendment).

51. *Connelly*, 497 U.S. at 165; *but see* Brulay v. United States, 383 F.2d 345, 349 n.5 (9th Cir. 1967), *cert. denied*, 389 U.S. 986 (1967) (confessions coerced by private parties not admissible); United States v. Wolf, 601 F. Supp. 435, 442 n.4 (N.D. Ill. 1984). In at least one case the defendants argued (unsuccessfully) that a minister present during questioning became an agent of the state. *See* United States v. Brierley, 381 F. Supp. 447 (M.D. Pa. 1974), discussed *infra* note 88.

52. The state may set higher standards if it chooses. *See* Lego v. Twomey, 404 U.S. 477 (1972). Some states have opted for a higher standard of proof. *See, e.g.*, People v. Jiminez, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); State v. Gullick, 118 N.H. 912, 396 A.2d 554 (1978); State v. Verhasselt, 83 Wis. 2d 647, 266 N.W.2d 342 (1978).

53. *Connelly*, 497 U.S. at 169-70.

6. *Trickery and psychological coercion*

Regardless of which standard is employed, the Court has consistently reversed convictions where trickery or deception was employed in obtaining the confessions.[54] The Court has long recognized that coercion is not limited to physical force or brutality. Excessive psychological influence or "mental ordeal" can also constitute coercion.[55] "Trickery" of any kind will receive considerable scrutiny from the courts.[56] Such "trickery" or psychological coercion could include such things as lengthy and sustained interrogation,[57] threats of third-party violence,[58] rewards and inducements,[59] and the use of trained psychiatrists to extract a confession through skillful questioning.[60] The doctrinal basis for the Court's rejection of confessions obtained under such circumstances is virtually always the lack of voluntariness. That is, the ability of the accused to freely make the confession is somehow impaired. A confession, in order to be admissible, must be free and voluntary and cannot be the result of *any* direct or implied promises, however slight, or by exerting *any* improper influence.[61]

These holdings raise questions as to whether *any* promise includes something like a promise of salvation and whether *any* improper influence includes interrogation by a minister or other exploitation of religious authority. Such "trickery" doctrines seem to provide the best hope to defendants for excluding confessions made by appeals to their religious beliefs. Indeed, in the few cases that have obtained relief on the basis of a confession coerced in part by appeal to religious belief, elements of trickery or coercion were present.

B. *Applying a Voluntariness Standard for Confession*

The courts have reached different results on the issue of whether an appeal to a suspect's religious beliefs was sufficiently coercive as to render the resulting confession involuntary.[62] The conflict began with

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54. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) (a police officer who was a friend of the accused misrepresented facts and encouraged a confession).

55. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963) (exclusion of drug induced confession); Watts v. Indiana, 338 U.S. 49, 53 (1949); *see also* Garrity v. New Jersey, 385 U.S. 493 (1967) (mental as well as physical coercion).

56. *See* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

57. *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944).

58. *See* Payne v. Arkansas, 356 U.S. 560 (1958).

59. *See, e.g.*, Hopt v. Utah, 110 U.S. 574 (1884).

60. *See* Leyra v. Denno, 347 U.S. 556 (1954).

61. Malloy v. Hogan, 378 U.S. 1 (1964); Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963).

62. Coerced confessions: Gessner v. United States, 354 F.2d 726 (10th Cir. 1965); United States v. Yeager, 336 F. Supp. 1287 (D.N.J. 1971); *see also* Brewer v. Williams, 430 U.S. 387

two decisions rendered one year apart: *Gessner v. United States*,[63] a Tenth Circuit case holding that a confession induced in part by appeal to the suspect's religious inclinations was coerced,[64] and *Davis v. North Carolina*,[65] a Fourth Circuit case holding that appeal to the suspect's religious beliefs did not render a confession involuntary.[66]

1. Coerced confessions

In all of the cases where the courts have found confessions induced by appeal to religious beliefs involuntary, there have been numerous other aggravating circumstances.

In *Gessner*,[67] the suspect, who was alone, without counsel, and mentally ill, was subjected to extended and prolonged questioning by a military interrogation team and a military chaplain who was not a member of the interrogation team. These interrogators traded off over a period of several hours so that the examiner was always fresh. Also, the techniques used by these examiners included half-truths and hints of lenience. Eventually, the suspect was worn down and upon a religious admonishment confessed to the military chaplain and the other interrogators. The court found that the suspect's mental condition rendered him incapable of making a voluntary confession and that he was essentially tricked into talking with the chaplain when he became too tired to resist the questioning.[68] In this case, although the religious appeal was an obvious element of the interrogation, there was sufficient coercion that even without the use of religious devices the confession would probably have been inadmissible.

In *United States v. Yeager*,[69] the police committed a host of wrongs, including but not limited to, failing to give *Miranda* warnings, intentionally frustrating attempts to reach an attorney, interrogating non-stop for ten-and-a-half hours, interrogating in a physically abusive manner, performing a strip search, conducting an incommunicado examination, and preconceiving a scheme to trap the accused that in-

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(1977). Voluntary confessions: Welch v. Butler, 835 F.2d 92 (5th Cir. 1988); Barrera v. Young, 794 F.2d 1264 (7th Cir. 1986); Stawicki v. Israel, 778 F.2d 380 (7th Cir. 1985); United States v. Boyce, 594 F.2d 1246 (9th Cir. 1979); Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964); United States v. Brierley, 381 F. Supp 447 (M.D. Pa. 1974); *see also* Garrity v. New Jersey, 385 U.S. 493, 498 n.5 (1966).

63. 354 F.2d 726 (10th Cir. 1965).

64. *Id.* at 731.

65. 339 F.2d 770 (4th Cir. 1964).

66. *Id.* at 776.

67. 354 F.2d 726 (10th Cir. 1965).

68. *Id.* at 731.

69. 336 F. Supp. 1287 (D.N.J. 1971).

cluded an appeal to his religious beliefs.[70] The court found that the circumstances warranted granting habeas corpus relief.[71] Again, the appeal to the suspect's religious beliefs was only one of many coercive acts.

The Supreme Court case that most closely touches upon the issue of appeal to religious beliefs is the famous "Christian burial speech" case, *Brewer v. Williams*.[72] The suspect in *Brewer* was a man known by the police to have "quixotic religious convictions" and a history of mental disorders.[73] The police had agreed not to interrogate the suspect while transporting him because he had not yet spoken with his attorney. However, during the drive, which lasted several hours, one of the police officers gave what is known as the "Christian burial speech." The officer addressed the suspect as a "reverend" and spoke at length about a variety of subjects including religion. As part of the dialogue, the officer lamented about how snow would soon conceal the body of the victim and prevent a Christian burial. He made an emotional appeal to the suspect to show them where the body was hidden. The suspect then told the police where the victim's body was located. The Court relied on a sixth amendment right to counsel analysis to affirm a writ of habeas corpus.[74] The Court found that the entire setting was conducive to psychological coercion and that there was no evidence of a knowing and voluntary waiver of right to counsel.[75]

In *People v. Adams*,[76] the California Fifth District Court of Appeals found that coercive police tactics—which included conduct constituting overwhelming and calculated appeal to the defendant's emotions and religious beliefs with particular focus on areas where the defendant was vulnerable—rendered the resulting confession inadmissible. In particular, the police focused on the defendant's fear of being placed in a mental institution because of mental illness caused by guilt. The defendant, who was suspected of shooting her live-in boyfriend, was interrogated by a sheriff who had known her for a number of years. The sheriff conducted a lengthy monologue in which he gave Biblical reference and preached to the defendant about people who became mentally

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70. *Id.* at 1290-97.

71. *Id.* at 1305.

72. 430 U.S. 387, 392-93 (1977).

73. *Id.* at 412 (Powell, J., concurring).

74. *Id.* at 401-06.

75. *Id.* The voluntariness of the confession itself was not at issue in *Brewer*. The Court found that the sixth amendment right to counsel had already "attached" and that as a result, any interrogation without counsel present, even a non-coercive one, would violate the Constitution. This right to counsel may be waived, however, and the Court's discussion regarding voluntariness in *Brewer* pertained to the voluntariness or lack of voluntariness of such a waiver. *See id.*

76. 143 Cal. App. 3d 970, 983-84, 192 Cal. Rptr. 290, 298 (1983).

ill as a result of the "sin factor" arising from guilt over adulterous relationships. The court found that the "cumulative effect" of the sheriff's reliance on his friendship with the defendant, his knowledge and use of her religious beliefs, and his suggestion that she may end up insane and in a mental institution if she did not tell the truth rendered the confession involuntary.[77] While other courts have recognized that an appeal to religious beliefs may be coercive, they have not always held that such an appeal should render the suspect's confession inadmissible.[78]

2. *Voluntary confessions*

Constitutional challenges to confessions induced by appeal to the religious beliefs of the accused are relatively recent. This is probably because appeal to religious beliefs has historically been regarded as not only acceptable, but desirable.[79] One court recently relied on the fact that there was no appeal to religion to induce a confession by a minor to find that the confession was voluntary.[80] However, the trend is for the courts to regard appeals to the suspect's religious convictions a normal, non-coercive, and in some respects, unavoidable element of custodial interrogation.

In one of the earliest cases to raise the issue, *Davis v. North Carolina*,[81] the Fourth Circuit observed that "[r]eligious influence and religious exhortation preceding a confession have been thought not only unobjectionable but indicative of the trustworthiness of the confession."[82] In this case, the suspect and a police officer prayed vocally together. It was the next day that the suspect, having been moved by the prayer, came forward and confessed. In holding that the confession was voluntary, the court relied on Wigmore's assessment of English

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77. *Id.*

78. *See* Arizona v. Adams, 145 Ariz. 566, 571, 703 P.2d 510, 515 (Ct. App. 1985) (religious exhortations can reach the point of being intimidating and coercive, making confessions inadmissible, but did not do so in this case). This is generally consistent with Arizona courts' previous recognition that confessions in response to an appeal to religious or moral sentiment are not necessarily inadmissible. *See* Roman v. State, 23 Ariz. 67, 78-79, 201 P. 551, 554-55 (1921) (statement that telling the truth would save innocent men from accusation was an appeal to conscience and not coercive).

79. *See, e.g.*, United States v. Carignan, 342 U.S. 36, 40-41 (1951).

80. *See* Wilson v. Zimmerman, No. 85-1614 (E.D. Pa. August 21, 1986).

81. 339 F.2d 770 (4th Cir. 1964).

82. *Id.* at 776 (citing 3 WIGMORE ON EVIDENCE § 840 (3d ed. 1940)). This seems inconsistent with modern rules of evidence which prohibit admitting evidence of beliefs or opinions of a witness on matters of religion for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. FED. R. EVID. 610. This prohibition does not extend to inquiry for the purpose of showing bias or interest. FED. R. EVID. 610 advisory committee's note.

common law (which is doctrinally-based upon the reliability of the confession, not its voluntariness)[83] that "religious exhortations ha[d] never been regarded as vitiating a confession."[84]

One year after the first indication that appeal to religion as part of custodial interrogation may be problematic,[85] the Supreme Court—which has never specifically addressed the issue of confessions induced by resort to the religious beliefs of the accused—indirectly addressed (in dicta) the significance of an accused's religious beliefs and hinted that there may not be a constitutional bar to such tactics.[86] In a lengthy footnote discussing the fifth amendment right against self-incrimination and certain parallels in Jewish Talmudic law, the Court reiterated that the constitutional doctrine on self-incrimination is concerned only with forced confessions (usually through torture), and implied that appeal to the religious beliefs of a suspect would not constitute such force.[87]

In *United States v. Brierley*,[88] the suspect, at his own request, was allowed to speak with his minister.[89] Shortly thereafter, apparently in the presence of the minister and the police, he spontaneously confessed. The suspect later challenged the confession on the grounds that the minister was an agent of the state. The minister would not disclose the details of their conversation. The court found that the presence of the minister actually served to make the interrogation less coercive and held that the confession was voluntary.[90]

In *United States v. Boyce*,[91] the petitioner claimed his confession was involuntary on the grounds that FBI agents used psychological pressure to get him to waive his right to silence. The petitioner argued that the FBI agents' appeals to his loyalty to his country and family were analogous to the famous "Christian burial speech" case, *Brewer v. Williams*.[92] The court found no similarity between the cases and held that the confession was voluntary. The court reasoned that, unlike the suspect in the "Christian burial speech" case, Boyce was intelligent and answered questions selectively, exercising his right to silence when

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83. *See supra* note 9 and accompanying text.

84. *Id.*

85. *See supra* note 67 and accompanying text.

86. Garrity v. New Jersey, 385 U.S. 493 (1967).

87. *See id.* at 497 n.5.

88. 381 F. Supp. 447, 458 (M.D. Pa. 1974).

89. *See also* United States v. Carignan, 342 U.S. 36, 42-43 (1951) (confession made after conferring with priest called at defendant's request was not coerced).

90. *Brierley*, 381 F. Supp. at 459-60, 471.

91. 594 F.2d 1246 (9th Cir. 1979).

92. 430 U.S. 387 (1977), discussed *supra* at note 72 and accompanying text.

he wanted.[93] Further, *Boyce* was a fifth amendment right to silence case, not a right to counsel case like *Brewer*.[94]

Six years later the "Christian burial speech" defense was unsuccessfully attempted again in *Stawicki v. Israel*.[95] In this case, the suspect had neither the mental incapacity nor the "quixotic religious inclinations" of the suspect in *Brewer*.[96] Rather, he was highly intelligent and thought the police officer's religious beliefs were "stupid."[97] The court found that appeals to religious belief alone do not automatically render a confession or a waiver of *Miranda* rights involuntary and that other circumstances surrounding the confession or waiver must be considered.[98] In this case, the arrest was legal and the suspect was advised of his *Miranda* rights. That, combined with the intellectual abilities and religious disposition of the suspect, led the court to find that the suspect's will was not overcome.[99]

According to the Seventh Circuit, even if the suspect had sympathized with the religious appeal and had not believed the police officer's religious beliefs were "stupid," the confession may still have been voluntary.[100] In *Barrera v. Young*,[101] the court focused on the suspect's knowing, voluntary, and willful submission to skilled examination. The suspect had voluntarily submitted to a polygraph examination, he was psychologically prepared for the examination, and his lawyer was readily available. During the questioning, the examiner appealed to the suspect's religious beliefs and truthfully told him that a codefendant had implicated him in the crime.[102] The petitioner claimed the discussion of religion tipped the balance because "that's my weak spot . . . because I really love God."[103]

In holding that the confession was admissible as evidence, the court reasoned that only pointed and unexpected questions by a polygraph examiner will generate the physiological changes that the poly-

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93. *Boyce*, 594 F.2d at 1251.

94. 430 U.S. 387 (1977); *see also Boyce*, 594 F.2d at 1249.

95. 778 F.2d 380 (7th Cir. 1985).

96. *Id.* at 382-83.

97. *Id.* at 383.

98. *Id.*

99. *Id.* at 383-84.

100. *Id.*

101. 794 F.2d 1264 (7th Cir. 1986).

102. The petitioner also claimed the confession was involuntary on the grounds that the questioner told him he had been implicated by someone else. The court held that the questioner may accurately reveal other evidence in his possession, including implication by someone else. The truth may make a confession more likely, but it does this by enabling the suspect to make an informed choice, not by overbearing the will. *Id.* at 1270.

103. *Id.*

graph records.[104] According to the court, "[i]t is difficult to describe an appeal to religious beliefs as unacceptable in our society; such appeals are common parts of [everyday] life and need not cease at the door of the jail."[105] The suspect could have cut off the appeal to religion or called for his attorney but instead found the appeal "compelling."[106]

The court in *Barrera* did not consider that there are many other "common parts of everyday life" that must cease at the door of the jail because they are in fact coercive. The foundation of the Supreme Court's "trickery" holdings, for example, is that even if deception and cunning are a part of common everyday experience, when these devices are exploited by the state to induce confessions, the confessions are not voluntary.[107] The holding in *Connelly* makes it clear that the key is not how ordinary the compulsion is, but whether or not it is proper for the state or agents of the state to employ it.[108] The use of appeals to religion cannot be justified simply because they are "ordinary." If religious appeals are justifiable at all, it must be on some other basis.

In the most recent case on this issue, *Welch v. Butler*,[109] the Fifth Circuit found such an alternative basis for justifying appeals to the suspect's religious beliefs by defining the coercion as being strictly religious, not secular, and therefore not something that was or could have been improperly employed by the state. The court in *Welch* found that the use of a murder suspect's religious beliefs with respect to salvation was not employed by police to coerce a confession in violation of fifth and fourteenth amendment due process rights. At most, the police set up a situation that allowed the suspect to focus for some time on his concern for salvation and divine forgiveness in hope that his desire to be saved would lead him to confess.[110]

According to the court in *Welch*, the voluntariness standard is not satisfied by the suspect's voluntarily yielding to the "will of God," but rather by the suspect's confession being "voluntary" within the meaning of the due process clauses.[111] Voluntariness in the constitutional sense is ultimately a legal question. To be voluntary, the person must make an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures

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104. *Id.* at 1270.

105. *Id.*

106. *Id.* Apparently, even though the appeal to religious belief was "compelling," the resulting confession was not coerced but voluntary.

107. *See supra* note 43 and accompanying text.

108. *See supra* note 46 and accompanying text.

109. 835 F.2d 92 (5th Cir. 1988).

110. *Id.* at 95.

111. *Id.*

and circumstances swirling around him. The petitioner's concern with salvation existed prior to his conversations with the police. "What coercion existed was sacred, not profane."[112]

In one sense, the fact that the petitioner's concern with salvation existed prior to his interrogation brings *Welch* closer to the *Connelly* doctrine, which states that it is the coercive acts of the state which are dispositive rather than the pre-existing conditions of the suspect.[113] However, in another sense, the holding in *Welch* ignores the great significance of the state's affirmative role in coercion and disregards the real significance of an individual's particular susceptibility to religious coercion. Although under *Connelly* it is the state's actions, not external influences, that render a confession either voluntary or coerced, the state still takes its suspects as it finds them. For example, ordinarily a hand shake is a normal and non-coercive part of everyday life. However, if a suspect suffers from a severe arthritic condition, this same hand shake could have a very coercive effect. Similarly, an individual's mental and/or emotional susceptibility to the coercive effects of an appeal to religion should certainly be a factor to consider.[114]

Perhaps an even more fundamental issue alluded to by the Court in *Connelly* is the significance of the state's exploitation of religion under the religion clauses.[115] None of the cases discussed deal with these issues. The results of these cases, which reject the argument that confessions derived from appeal to religious belief are inadmissible, are probably correct for the reasons to be discussed in the next section. However, the judiciary's analysis, in terms of the significance of the coercive effect of appeals to religious belief and the propriety of such action by a state, is incomplete and superficial.

3. *Distinguishing doctrine and circumstances*

The fact that the courts have reached different results in cases that deal with the issue of appeals to a suspect's religious beliefs is not par-

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112. *Id. See also* State v. Roman, 23 Ariz. 67, 78-79, 201 P. 551, 554-55 (1921) (appeal to conscience or religious sentiment is an inducement that is not of a temporal or worldly nature). The concept of distinguishing between religious coercion and secular coercion raises a question as to whether the establishment clause was violated by an agent of the state exploiting religion for state interests. For the court to define what is or is not religious by declaring that one form of coercion is sacred and another is not may also impinge upon the free exercise right of people to set their own parameters as to what religion is or is not.

113. *See supra* note 46 and accompanying text.

114. *See* Brewer v. Williams, 430 U.S. 387 (1977), discussed *supra* note 72 and accompanying text. This case was decided on sixth amendment right to counsel grounds. However, the suspect's individual susceptibility to the coercive nature of the "Christian burial" speech was of great concern to the Court.

115. *See infra* section III-C.

ticularly meaningful, except to show that appeals to religious belief alone make little if any doctrinal difference. Since the very first two cases to consider this issue, the courts have relied on a totality of circumstances rationale. The appeals of a state to a suspect's religious beliefs have not been the deciding factors, but have merely been one part of the totality. In *Gessner v. United States*,[116] the suspect's confession was coerced because, in addition to the fact that coercive techniques were employed, the suspect was insane and did not have the capacity to make a voluntary confession in any event. In *Davis v. North Carolina*,[117] the confession was voluntary because the suspect had counsel and had at least a day, away from any pressure of the interrogation, to consider confessing.

Since the doctrinal basis of the holding in the "Christian burial speech" case, *Brewer*, is the sixth amendment right to counsel, it is not at all dispositive on the issue of the significance, if any, of the police officer's appeal to the suspect's religion in and of itself. The appeal was as much based on the emotion of the situation as on the suspect's religion.[118] The result would have been the same even without an appeal to religion.

The cases in which a confession has been held to be involuntary have included "something more", or other elements of psychological coercion besides appeals to religion, that put them closer to the trickery cases. That "something more" has included mental illness of the suspect,[119] half-truths and hints of lenience,[120] extended and prolonged interrogations,[121] failure to give *Miranda* warnings,[122] an incommunicado examination and/or intentional frustration of attempts to reach an attorney,[123] and a physically abusive and naked examination.[124] In most instances, appeals to religious belief and other potentially coercive acts were cumulative and part of a preconceived scheme or plan to trap the accused.[125] The argument and holding in *Connelly* also indicate that whether appeal to religion is regarded as coercive is not only just external appeal to religious belief but also the government's role in exploiting the religious beliefs of the suspect.[126] In other words, the

116. 354 F.2d 726 (10th Cir. 1965).
117. 339 F.2d 770, 776 (4th Cir. 1964).
118. *See Brewer*, 430 U.S. 387 (1977).
119. *See id.* at 390; Gessner v. United States, 354 F.2d 726, 729 (10th Cir. 1965).
120. *Gessner*, 354 F.2d at 731.
121. *Id. See also* United States v. Yeager, 336 F. Supp. 1287, 1303 (D.N.J. 1971).
122. *See id.*
123. *Id.*; *Brewer*, 430 U.S. at 398-99.
124. *Yeager*, 336 F. Supp. at 1203.
125. *Id.*; People v. Adams, 143 Cal. App. 3d 970, 988-99, 192 Cal. Rptr. 290, 302 (1983).
126. *See* Colorado v. Connelly, 479 U.S. 157, 164-65 (1986); Oregon v. Elstead, 470 U.S.

"something more" must come from or be a result of police conduct or state action, not private action.

III. First Amendment and Other Constitutional Barriers to Admissible Confessions

In addition to the arguments based on fifth and fourteenth amendment right to counsel, right to silence, and due process that were raised in the cases discussed above, certain other constitutional principles have the potential to become significant on the issue of whether or not a state can use religion to advance its own purposes.

A. Privacy

Presumably, before the police can make an effective appeal based upon a suspect's religious beliefs, they must know what those beliefs are. Of course, the police may make presumptions as to the suspect's religious inclinations and may obtain an admissible confession, even if their presumption was mistaken.[127] Nevertheless, it is at least theoretically possible that a constitutional right to privacy would bar or limit police presumption about or inquiry into a person's religious beliefs and thereby frustrate appeals to religion as a means of inducing confessions. Because the right of privacy is only implicit within the Constitution, its scope and application is subject to even greater debate and confusion than express rights. However, what little court action the right of privacy has had in the area of appealing to religious beliefs to induce confession indicates that the scope of the right will probably not extend to such practices.

In *Ramie v. City of Hedwig Village*,[128] the plaintiff alleged that police investigation and inquiry into her gender, religious beliefs, and lifestyle violated her constitutional right to privacy.[129] Ramie, a female who suffered from a congenital condition giving her certain male characteristics, found the inquiry offensive. The court, however, found no evidence to support claims that her constitutional right to privacy was violated.[130] Preventing police inquiry into religious beliefs would probably be better accomplished, if at all, under first amendment doctrine.

298, 305 (1985).

127. *See* Stawicki v. Israel, 778 F.2d 380, 383 (7th Cir. 1985). Under the voluntariness doctrine used by the court, the confession was admissible not only in spite of the fact that the police were mistaken about the suspect's religious inclinations but also because of the mistaken presumption.

128. 765 F.2d 490 (5th Cir. 1985).

129. *Id.* at 493-94.

130. *Id.* at 494.

B. *Freedom of Religion*

Discussion of the first amendment issues raised by exploitation of religious beliefs of a suspect is completely absent from the case law on the issue. This may be a result of the fact that such confessions have not been challenged on the basis of first amendment principles. Nevertheless, doctrinally, a number of significant questions may be raised, particularly in light of the current trend of viewing "voluntariness" as a function of state coercion rather than private or so-called "sacred" coercion.[131] There must be some point at which the state exploitation of private or "sacred" coercion becomes impermissible. This point may or may not be clearly ascertainable from doctrines of "voluntariness" alone. The point at which many instances of state exploitation of private coercion become impermissible probably lies at the intersection of "voluntariness" and other constitutionally protected rights such as religious freedom. Religious freedom may include the right not to be interrogated with questions concerning religion. A recognized policy concern behind the protection against self-incrimination is the first amendment rationale that the privilege affords "a shelter against government snooping and oppression concerning political and religious beliefs."[132]

C. *Free Exercise Clause*

Where does the point of intersection between voluntariness and religious freedom lie? Would it be a violation of the free exercise clause to prohibit law enforcement personnel from advocating their own earnestly held religious belief that God mandated confession of certain acts? Would it be a violation of the free exercise clause to prohibit the accused from exercising his religious belief that confession was essential to salvation? What about allowing the accused to counsel with clergy to determine the appropriateness of confession? Would the use of clergy be the acts of private parties or could the clergy become an agent of the state?[133] Even if the state must allow its police officers to advocate confession under the free exercise clause, is it still better to exclude the evidence of the confession because it is involuntary? Does the exploita-

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131. *See* Colorado v. Connelly, 479 U.S. 157, 164-65 (1986) (state coercion prohibited, but private coercion not prohibited); Welch v. Butler, 835 F.2d 92, 95 (5th Cir. 1988) ("sacred" coercion not prohibited).

132. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 679, 696 (1968). The Court has implicitly recognized that the first amendment is the appropriate vehicle for dealing with the problem of state intrusion into political and religious beliefs through coerced confessions. *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958).

133. United States v. Brierley, 381 F. Supp. 447, 459-60, 471 (M.D. Pa. 1974) (clergy was not an agent of the state but served to make the confession even more voluntary and reliable).

tion of religion by the police pose any establishment clause problem? For instance, would such exploitation be an example of state funds and resources being used to further private religious beliefs and interests? What about instances where the police actually employ religious materials or symbols such as Bibles or crosses? Does the fact that the police officer and the accused share the same religious beliefs alter the analysis?[134] Is the state paying police to be evangelical advocates of the religious necessity of confession? Is there a de facto state religion based upon the tenet that confession is good for the soul?

Free exercise clause limits on the state exploitation of religious beliefs will occur, if at all, if the government intrusion into and exploitation of religion has the effect of "chilling" free exercise of religion by creating incentives for some activities and disincentives for others.[135] Potential establishment clause limits on the state adoption of religion to achieve its purposes would be analyzed under the *Lemon* test, particularly the "secular purpose" and "excessive entanglement" forks of the *Lemon* test.[136] These issues also raise important questions about the tension and balance between the religion clauses and the significance of what is meant, constitutionally, by the term "religion."

These issues concerning the potential constitutional limits on the exploitation of religion in state efforts to extract criminal confessions merit detailed analysis, at least for the sake of doctrinal continuity. Absent excessive abuse of religion by the state and the resulting consideration of these issues by the courts, this doctrinal dialogue may remain in the province of law journals and academic theorizing. The purpose for raising the first amendment issues here is not to provide an exhaustive examination of the topic, but rather to pose certain questions and theoretical possibilities in order to explore and perhaps expand the horizon of "voluntariness" analysis.

IV. CONCLUSION

Appeal to religious beliefs may be one element of the total circumstances that render a confession constitutionally involuntary. However, appeal to religion alone will not vitiate a confession. There must be something more. This "something more" could be any one of the many things that would otherwise render a confession not "voluntary" even without appeal to religious beliefs—trickery, deception, mental incapac-

134. *See* Mikulovski v. State, 54 Wis. 2d 699, 715, 196 N.W.2d 748, 756 (1972) (since the defendant and the examining detective were of the same religious belief, praying together did not constitute psychological coercion).

135. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987).

136. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

ity of the suspect, prolonged and/or physically abusive interrogation, or absence of counsel. At least theoretically, the "something more" may also be the violation of other constitutionally protected rights.