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## CRIMINAL LAW

### ARISTOTLE'S PARADOX AND THE SELF- INCRIMINATION PUZZLE

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Law both punishes and protects what our culture defines as choice. The importance of choice as an organizing metaphor in our moral and legal culture has been recognized for centuries. Plato attributed to humans "an element of free choice, which makes us, and not Heaven, responsible for the good and evil in our lives."<sup>1</sup> Aristotle devoted a book of his *Ethics* to choice and blameworthiness.<sup>2</sup> The criminal law follows Plato and Aristotle by presupposing that members of society are autonomous actors who can be punished for

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Although this paper was at all times a collaborative effort, the authors wish to describe their respective contributions, in accordance with a recent "Statement on Multiple Authorship" from the American Association of University Professors. See *ACADEME*, September-October 1990, at 41. The "choice" metaphor around which the paper is organized grew out of an independent study project conducted by Bilder, directed by Thomas, and conceived as a way of explaining the Supreme Court's self-incrimination jurisprudence. Thomas developed the philosophical and historical dimensions of "choice" that appear in the finished product.

Many people patiently read and commented upon any one of a large number of previous drafts. We thank them and apologize for our inability to take full advantage of their insights or to name them all here. Some readers were so helpful, however, that we wish to identify them: Richard Boldt, Bill Bratton, Kathy Brickley, Harry Frankfurt, Joseph Grano, David Haber, Lawrence Herman, Doug Husak, Jon Hyman, Yale Kamisar, Frank Miller, Eric Neisser, John Payne, Louis Michael Seidman, Richard Uviller, and Alan Wertheimer. Donald Dripps made several helpful observations about an earlier version of our paper, which he has now published. See Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329.

<sup>1</sup> PLATO, *THE REPUBLIC* 250 (F. M. Cornford trans. 1945).

<sup>2</sup> See ARISTOTLE, 3 *ETHICS* § 1 (A. Wardman & J. Creed trans. 1963) [hereinafter ARISTOTLE].

choosing to act in certain ways.<sup>3</sup> Conversely, criminal law does not assign blame for unchosen conduct.

The classic example of unchosen conduct is when the actor's volition is not involved in any way—for example, P pushes S. Since the criminal law has long provided that S commits no crime in the absence of a volitional act,<sup>4</sup> he would not be criminally responsible for any harm resulting from P's push. Exempting nonvolitional acts from liability is not controversial,<sup>5</sup> but extending this exemption to compelled volitional acts<sup>6</sup> is more problematic.

The concept "compelled volitional act" is, at one level, a paradox. "Compelled" implies that the act is not the product of the actor's will, yet "volitional" presumes an exercise of will.<sup>7</sup> One solution to the paradox is to reject the premise that "compelled" necessarily means that the actor's will is completely uninvolved. One might decide to commit a self-harming act in order to avoid a greater harm, and still make a valid claim that the act was against one's will.<sup>8</sup> As Aristotle noted, however, this distinction is itself paradoxical: "Such acts, then, are voluntary; but perhaps in a general way they are involuntary, since no one would choose any such act of itself."<sup>9</sup> Where is the line at which a volitional act becomes compelled? Consider Don Locke's view that there is "some reason to insist" that a bank teller acts freely when he surrenders the bank's money to a robber in order to avoid being shot. "It is his decision and his decision alone whether to hand over the funds or risk his life, and which he does will depend on him, his wishes and prefer-

<sup>3</sup> See, e.g., R. POUND, INTRODUCTION TO SAYRE, CASES ON CRIMINAL LAW (1927) (noting that criminal law historically "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong") (quoted in *Morrisette v. United States*, 342 U.S. 246, 250 n.4 (1952)). See also 4 W. BLACKSTONE, COMMENTARIES \*20-21 ("the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable").

<sup>4</sup> See, e.g., MODEL PENAL CODE § 2.01. To be sure, the MODEL PENAL CODE also creates criminal liability for the failure to act in certain narrow circumstances. See *id.* at § 2.01(1) & (3). But this is irrelevant to the point in the text because the failure to act must also be "volitional"—one must be physically capable of performing the omitted act. See W. LAFAYE & A. SCOTT, CRIMINAL LAW 208-09 (2d ed. 1986).

<sup>5</sup> See D. HUSAK, PHILOSOPHY OF CRIMINAL LAW 90-93 (1987) (noting that the controversy arises in deciding whether the theory of denying liability comes from the lack of *actus reus* or *mens rea*).

<sup>6</sup> See, e.g., MODEL PENAL CODE § 2.09 (creating defense of duress for volitional acts).

<sup>7</sup> The MODEL PENAL CODE, for example, implicitly defines "volitional act" as a "bodily movement" that is "a product of the effort or determination of the actor." MODEL PENAL CODE § 2.01(2)(d).

<sup>8</sup> See, e.g., Gert, *Coercion and Freedom*, in NOMOS XIV COERCION, 32 & 34 (J. Pennock & J. Chapman ed. 1972) (arguing that the only unfree choices are those that avoid evil).

<sup>9</sup> ARISTOTLE, *supra* note 2, at § 1.

ences, not on anyone else, not even on the [robber]."<sup>10</sup>

Compulsion is at the heart of the self-incrimination clause of the fifth amendment, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."<sup>11</sup> Because testimony is inherently volitional, Aristotle's paradox applies here to create interpretive problems that are insurmountable if "volitional" and "compelled" are both given robust meanings. Dean Wigmore illustrated the interpretive difficulty with a colorful example: "As between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is nonetheless voluntary."<sup>12</sup> Yet how can a choice to avoid the rack or a robber's bullet be voluntary?

Perhaps there are "clear" cases of compulsion and equally "clear" cases of free choice. The threat of the rack may be a clear case of compulsion despite the theoretical existence of a choice. Conversely, a person would seem to have made a free choice when, without prompting, he walks into a police station and confesses. Moving away from these clear cases, however, the question of testimonial choice becomes hopelessly entangled in Aristotle's paradox.<sup>13</sup> Yes, the police (P) pressured suspect (S) to answer questions; yes, S was influenced by P's pressure; but S chose to answer when she could have remained silent. The paradoxical nature of volitional-but-compelled testimony explains why the self-incrimination clause continues to puzzle courts and commentators.<sup>14</sup>

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<sup>10</sup> LOCKE, THREE CONCEPTS OF FREE ACTION: I, in *MORAL RESPONSIBILITY* 97, 109 (J. Fischer ed. 1986).

<sup>11</sup> U.S. Const. amend. V.

<sup>12</sup> See 2 J. WIGMORE, A TREATISE ON EVIDENCE at § 824 (2d ed. 1923) [hereinafter WIGMORE ON EVIDENCE]; see also *id.* ("[a]ll conscious utterances are and must be voluntary"); Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 882 (1979) ("[r]egardless of the severity of tortures" officials cannot "obtain a confession without defendant's choice to confess").

<sup>13</sup> Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 522 (6th ed. 1986) (noting that, in one sense, all confessions are voluntary and, in another sense, almost none are).

<sup>14</sup> See Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 25 (1980) (exhorting courts to "scrap the 'voluntariness' terminology altogether"); Dripps, *Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988) (concluding that "[n]ot since the period separating *Escobedo v. Illinois* and *Miranda v. Arizona* have so many said so much about confessions") (footnotes omitted). See also Gerstein, *Punishment and Self-Incrimination*, 16 AM. J. JURIS. 84, 84 (1971) (noting that Supreme Court opinions "when they do make an effort in the direction of a justification for the privilege, generally offer a grab-bag of diverse reasons and vaguely articulated principles which do no more than suggest the existence of some more fundamental unarticulated major premise"); Grano, *supra* note 12, at 863 (noting "intolerable uncertainty . . . of the due process voluntariness doctrine in the law of confessions"); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-72 (1981)

Aristotle's view that volitional acts take on the characteristics of non-volitional acts when "no one would choose any such act of itself"<sup>15</sup> is one way of identifying volitional-but-compelled conduct. Indeed, "choice" seems a particularly good metaphor for the protection of the self-incrimination clause;<sup>16</sup> testimony is one of the most carefully considered of all human actions.<sup>17</sup> We thus begin this paper with the premise that testimony is compelled when S does not choose to testify. Two problems immediately arise. First, defining compulsion as lack of choice does not provide self-evident answers to Aristotle's paradox. Second, a complex of social, political, philosophical, and psychological forces produced the self-incrimination clause; any explanation limited to only the philosophical dimension of this complex is likely to be unsatisfying in some respects. Thus, we do not consider "choice" a self-evident "deep structure" that explains everything about the self-incrimination clause.

Instead, we will present a "choice" explanation of the self-incrimination clause as a way of thinking about what the clause should protect. Our definition of choice will avoid Aristotle's paradox by rejecting a robust reading of "volitional." We will argue that some decisions to speak are unchosen because they result from desires created by external forces, desires that are not part of internally-derived volition. This requires maintaining a distinction between volition and desire.<sup>18</sup> It may be that humans choose their volition but not their desires.

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(cataloguing "six defects in the due process voluntariness test," *id.* at 869); Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 6 (1986) (recent explanations "often rehash old arguments and positions rather than propose new ideas or solutions.").

<sup>15</sup> ARISTOTLE, *supra* note 2, at § 1.

<sup>16</sup> Although other commentators have identified choice as the essential value protected by the self-incrimination clause, no one has (to our knowledge) sought to describe the clause's protection solely as that of choice. See, e.g., Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 48-56 (1982); Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 289 (1988); Grano, *supra* note 12, at 879; Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 989 & n.55 (1986); Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1153 (1987); Westen & Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521, 521 (1982).

<sup>17</sup> To be sure, the focus of this paper is on statements made in the course of police interrogation, and "testimony" made to a police officer may not be as carefully chosen as courtroom testimony. Still, if suspects know they have been arrested for a crime, their responses to police questions about that crime would (in the absence of compulsion) likely be much more carefully chosen than most of the words we speak.

<sup>18</sup> See H. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT* 47-57 (1988).

## I. CHOICE IDEOLOGY

Like all concepts, the meaning of choice is neither static nor positively determined by the word itself. Instead, human understanding of choice is contingent on the metaphors used to represent reality.<sup>19</sup> We will refer to these metaphors as "ideologies."<sup>20</sup> In the context of choice and compulsion, the ideologies are deeply imbedded in our culture and are quite invisible in our ordinary discourse about the process of making choices. As James Boyle has noted, "[T]he most powerful ideological constraints are those that are invisible; people are unaware that they believe anything at all—it appears to them that 'things have to be that way.'"<sup>21</sup>

Consider again S who walked into the police station and confessed. While we posited this as a "clear" case of free choice, is it still a free choice if S believes God has given him a choice between confessing and committing suicide?<sup>22</sup> There can be no empirical answer to this question, for the answer requires an ideological judgment about what choice means. Hundreds of articles and notes have been written about the self-incrimination clause; the debate has been often heated and sometimes hostile.<sup>23</sup> One reason for these deep divisions is that the thinking of the commentators is usually bounded by a particular ideology, making communication across the ideological gulf almost impossible.

Even to posit the existence of compulsion is an ideological judgment. As Louis Michael Seidman has observed, compulsion entails the premise that there is a difference between "internal hopes, desires, and beliefs" and "external facts about the world."<sup>24</sup> Under

<sup>19</sup> See Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1202 (1985).

<sup>20</sup> Some readers cautioned that "ideology" has negative connotations from its use to describe political theories. We do not use the term in that manner; we use it instead as a short-hand, value-neutral way to describe cultural assumptions about the process of making choices. See, e.g., Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 761-64 (1987) (applying Jacques Derrida's deconstructive theories to explain ideological thinking); Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 977 n.42 (1986) (discussing K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936)); Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 359 n.1 (1970).

<sup>21</sup> Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 769 (1985).

<sup>22</sup> See *Colorado v. Connelly*, 478 U.S. 157 (1986), discussed *infra* notes 83-102.

<sup>23</sup> See, e.g., Frankel, *From Private Fights Toward Public Justices*, 51 N.Y.U.L. REV. 516, 526 (1976) (describing *Miranda v. Arizona*, 384 U.S. 436 (1966), as "at best a tense, temporary, ragged truce between combatants"); Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 210 (1987) (noting "storm of controversy" created by *Miranda*).

<sup>24</sup> Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J. L. & HUMANITIES 149, 151 (1990).

this view, humans have internal preferences that “exist prior to and independent of social interaction.”<sup>25</sup>

But another view locates preferences within the community rather than the individual. In Seidman’s words,

Much of modern social science, political theory, philosophy, and literary theory attempts to demonstrate that desires and beliefs are inevitably intersubjective and social. It is not meaningful to talk about disembodied preferences. These mental states are always situated within a culture and molded by forces that make various choices more or less attractive.<sup>26</sup>

According to this “intersubjective” ideology, S’s preferences “are socially constructed, [and] the distinction between internal hopes and desires and external facts in the world becomes much more difficult to maintain.”<sup>27</sup> An “extreme” version of the intersubjective model would posit that S’s internal preferences are indistinguishable from the external facts in the world. S’s preferences would be wholly contained within any particular social interaction, and her conduct during the interaction would necessarily represent her preferences.<sup>28</sup> Indeed, it could be that cultural forces simultaneously create human actors and “represent them to the community as reality.”<sup>29</sup> Thus, the extreme version denies the possibility of compulsion as traditionally defined—the overbearing of S’s will—because S’s will (indeed, S) does not exist independently of the social interaction.<sup>30</sup> The extreme version of the intersubjective model also denies moral responsibility. If S does not exist independently of the social interaction, then it is incoherent to blame (or praise) S for her conduct.<sup>31</sup>

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<sup>25</sup> See *id.* at 173.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> This assumes that S is the physical source of her conduct. If X moves S’s hand without S’s participation, the motion does not represent S’s preference.

<sup>29</sup> See Boldt, *supra* note 20, at 1012 (arguing that law “creat[es] social actors who can be held ‘responsible’ for their ‘choices’”).

<sup>30</sup> One could change the definition of compulsion, of course. Perhaps compulsion means the shaping of preferences. For example, Seidman argues that the now-famous *Miranda* warnings are the Supreme Court’s effort to construct preferences that are in accord with the self-incrimination clause. See Seidman, *supra* note 24, at 174. But the clause does not prohibit confessions; it only prohibits compulsion. If compulsion is the shaping of preferences by intersubjective interaction, the *Miranda* warnings are compulsion equally as much as police interrogation. Indeed, the difficulty with the “shaping” definition of compulsion is that every aspect of social interaction would qualify as a necessary but not sufficient ground for compulsion. (Seidman also concludes, for different reasons, that the intersubjective reading of *Miranda* is unsatisfactory. See *id.*)

<sup>31</sup> That is not to say that it is irrational; rather, it is arational. If S does not exist independently of the social interaction, none of us does either. Thus, we “choose” to punish S as if she (and we) existed independently. But none of us can do any differently,

But this is not the ideology that underlies criminal law. Instead, as Richard Boldt has observed, criminal law ideology "teaches each community member to view himself or herself as 'the author of his [or her] actions.'"<sup>32</sup> To be sure, this general description of the free will premise underlying criminal law requires modification to explain how compulsion can exist. Just as the intersubjective ideology can imply that no choices are free, an extreme free will model can imply that all choices are free. Under either of these ideologies, compulsion could not exist.

Compulsion can exist only if some choices are free and some are not. The criminal law recognizes compulsion because it has developed a modified free will premise. S is the author of her conduct in most cases, but not when her conduct manifests the will of another person—for example, when S commits a crime or confesses under a threat of death. At some point the modified free will premise demands that law treat the resulting conduct as belonging to the actor who applied the pressure rather than the one who engaged in the conduct. Determining whether S's choice to confess belonged to her or to the state is, therefore, central to the compulsion inquiry.<sup>33</sup>

This is not to say that a concern with choice is the only rationale that would explain why judges were reluctant to admit confessions during the eighteenth and nineteenth centuries.<sup>34</sup> Judicial reluc-

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and the effort of judges and academics to justify punishment is simply irrelevant. A less extreme version of the intersubjective model posits that most (or all) human preferences are formed by external forces but that humans then have a choice to identify with these externally-created preferences. See, e.g., H. FRANKFURT, *supra* note 18, at 47-57. In that case, moral responsibility would exist for the instances when S identified with a preference created by other forces. See *id.* at 57; *Introduction*, MORAL RESPONSIBILITY 12 (Fischer ed. 1986).

<sup>32</sup> Boldt, *supra* note 20, at 979 (quoting R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM 77 (1978) (brackets added by Boldt)).

<sup>33</sup> See Seidman, *supra* note 24, at 173 (describing confessions law as presupposing that suspects have a "fixed preference for silence" and that the "police, representing the community, have invaded a private, preexisting space that is properly under the domain of the individual").

<sup>34</sup> On early judicial reluctance to admit confessions, see WIGMORE ON EVIDENCE, *supra* note 12, at §§ 844-45; Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 280; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 246 (1946). See also *infra* notes 41-51, and accompanying text. Today, quite to the contrary, confessions are viewed as the best evidence. See, e.g., Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting); Uviller, *supra* note 16, at 1139 (characterizing the confession, "[d]espite its hidden frailty" as "the queen of the evidentiary chessboard"). A confession has the practical value of linking the defendant to the crime and the metaphysical value of proving the crime by means of the defendant's decision to "tell the truth." See Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law* (Book Review), 84 MICH. L. REV. 662 (1986).



tance to admit confessions requires explanation since truthful accounts by the suspect are the best evidence of guilt or innocence. That only truthful accounts are valuable evidence suggests a "reliability" justification for the common law confessions rule. If a confession is unreliable, it does not advance the truth-seeking function of the criminal justice system and should not be used, quite apart from whether it was the choice of the suspect.

Thus, the common law confessions rule could have developed to prevent pressures that might (by some standard of probability) lead to untrue confessions.<sup>35</sup> Defining this level of pressure is, of course, difficult. Consider a hypothetical: P arrests S for murder and then states, "X told me that she saw you kill the victim; if you tell me the truth now, before this gets more complicated, the district attorney will be inclined toward leniency." If P is lying about X identifying S as the killer, P creates some probability of a false confession; whether it is a sufficient probability to justify suppression under a reliability rationale requires a further judgment.

A third reason to suppress confessions has nothing to do with choice or reliability. It focuses, instead, on the morality of the pressure applied to S. Under this rationale, confessions collected by means that society finds abhorrent would be excluded, without inquiring into whether S made a free choice or gave a reliable confession. The normative justification overlaps to a considerable degree with the reliability justification. For example, everyone would likely consider torture an improper interrogation technique.<sup>36</sup> But since torture would produce a confession that is unreliable in every case, a normative standard that focused only on the conduct of P would be quite unnecessary. The difficulty of making a normative judgment in more routine cases, where it would offer a standard different from the reliability standard, can be illustrated in our hypothetical. Should a court suppress S's confession under a normative rationale if P falsely states that X said she saw S commit the crime? We suggested that the answer was unclear under a reliability rationale. It might be somewhat more certain here—lying is wrongful, perhaps even in pursuit of a noble goal such as solving a crime. But what if P is telling the truth yet has reason to doubt X's credibility? What if P

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<sup>35</sup> See, e.g., Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452 (1964) (arguing that the only value advanced by common law confessions rule was to "increase the accuracy of the guilt-determining process"); McCormick, *supra* note 34, at 246.

<sup>36</sup> See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 34 (1968) (noting that torture was illegal in England under the common law).

is almost, but not quite, certain that X is lying?<sup>37</sup>

The reliability and normative justifications for a self-incrimination principle are rational ways to impose order on the historical data, but they are no more persuasive than a choice explanation. In 1651, Thomas Hobbes stated that humans have "the Liberty to disobey" the sovereign when it commands even a "justly condemned" person to "kill, wound, or mayme himselfe."<sup>38</sup> From this statement of the law of self-preservation, Hobbes derived the self-incrimination principle: "If a man be interrogated by the sovereign, or his Authority, concerning a crime done by himselfe, he is not bound, without assurance of Pardon, to confesse it; because no man . . . can be obliged . . . to accuse himselfe."<sup>39</sup>

Hobbes' philosophical position does not seem to entail a concern with either reliability or morality. Indeed, he posits that the person is "justly condemned" and grants the right to refuse to answer questions in general, not just when the interrogation is improper. Perhaps Hobbes' ideology is part of the ideology of autonomy—viewing humans as separate from the state and thus entitled to choose not to obey the state.<sup>40</sup>

In any event, Hobbes' position found its way into the common law at least by 1658 when a court based the right against self-incrimination squarely on the "Law of Nature" that every man should "preserve himself from hurt and damage."<sup>41</sup> Twenty years later, Matthew Hale's Pleas of the Crown noted that an in-court confession admitting the truth of the indictment was equivalent to a con-

<sup>37</sup> See Grano, *supra* note 12, at 917 ("With respect to police interrogation, society's judgment on lying and trickery remains unsettled.").

<sup>38</sup> T. HOBBS, *LEVIATHAN* ch. 21. The limitation of the self-preservation principle to self-imposed harm explains, for example, why it does not justify a soldier disobeying an order to charge an enemy position.

<sup>39</sup> *Id.*

<sup>40</sup> A law of self-preservation is not necessarily limited to choice protection. The right to be free from self-imposed harm could entail the right not to confess or plead guilty under any circumstances, which is the Talmudic rule. See Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U.L. REV. 955, 1048 (1988) (noting that the "Talmudic rule is simple; it is absolute; it is profound" and "[w]e could do worse that to look to it for guidance"). See also Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 28 (1981) (suggesting "strongest version" of self-preservation principle treats "an individual's self-harming behavior as actually being immoral"). But Hobbes' formulation of the law of self-preservation gives the individual the "liberty to disobey" the sovereign's command to injure himself, suggesting that choice was the value being protected. Moreover, that other entailments are possible does not discredit choice protection as a plausible entailment.

<sup>41</sup> See Attorney General v. Mico, 1 Hardes 137, 139, 145 Eng. Rep. 419, 420 (1658) (referring to this as the "law of God"). See also G. GILBERT, *THE LAW OF EVIDENCE BY A LATE LEARNED JUDGE*, 139-40 (1756) (English law "follows[s] that Law of Nature, which commands every Man to endeavour his own Preservation").

viction, "but it is usual for the court . . . to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead."<sup>42</sup> Hale viewed out-of-court confessions with even more skepticism: "the court will not record his confession, but admit him to plead to the felony not guilty."<sup>43</sup>

Hale's rules thus prohibited the use of out-of-court confessions, but only discouraged in-court confessions. The effect of these rules was that the accused could repeat an out-of-court confession if he chose to confess in court. Hale's rules seem to manifest Hobbes' choice ideology more than the normative and reliability justifications for a self-incrimination principle. The rules are overinclusive as a way of excluding unreliable confessions or deterring improper forms of questioning; an out-of-court confession could be both reliable and the product of normatively fair state conduct.

The English courts often mirrored Hale's reluctance to admit even reliable confessions obtained by fair methods. In 1783, the King's Bench suppressed a confession because an official told the suspect that if he did not provide "a more satisfactory account," the official would take him before a magistrate.<sup>44</sup> Observing that "[t]oo great a chastity cannot be preserved on this point" and that "[i]t is almost impossible to be too careful upon this subject," the court concluded that "[t]he prisoner was hardly a free agent at the time" he made the statement.<sup>45</sup>

The "free agent" concept suggests a choice ideology and also underlies Parliament's decision in 1848 to codify the nascent common law rule requiring magistrates to inform defendants that they need not make any statement at the preliminary examination.<sup>46</sup> The prescribed warnings explicitly manifest a concern with choice: "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 upon your trial."<sup>47</sup> Since there were few police at this time,<sup>48</sup> the magistrate's examination functioned as an investi-

<sup>42</sup> M. HALE, HISTORY OF THE PLEAS OF THE CROWN 225 (1847) (first published 1678).

<sup>43</sup> *Id.*

<sup>44</sup> *Rex v. Thompson*, 1 Leach 291, 291, 168 Eng. Rep. 248, 248 (1783).

<sup>45</sup> *See id.*, 1 Leach at 293, 168 Eng. Rep. at 249.

<sup>46</sup> *See* 11 & 12 Vict. c.42 (1848). For a description of the common law rule, see L. LEVY, *supra* note 36, at 328; Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 82 (1989).

<sup>47</sup> 11 & 12 Vict. c.42 (1848). Compare the *Miranda* warnings: "[you have] the right to remain silent, any statement [you do] make[ ] may be used as evidence against [you], [you have] the right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>48</sup> *See* Comment, *The Right to Counsel During Police Interrogation: The Aftermath of Esco-*

gation. As we will discuss in more detail later, this suggests that the function of *Miranda v. Arizona* in requiring similar warnings prior to police interrogation was to modernize, rather than revolutionize, the self-incrimination concept.<sup>49</sup>

Indeed, as police assumed investigative responsibilities, English courts drew no distinction between police questioning and the magistrate's examination. Statements taken outside the courtroom were inadmissible in "every case where a man is not a free agent in meeting an inquiry" because "[t]he mind in such a case would be likely to be affected by the very influences which render the [in-court] statements of accused persons inadmissible."<sup>50</sup> The statement by a police officer, "I think it would be better if you made a statement and told me exactly what happened" typically caused the English courts to suppress a resulting confession.<sup>51</sup> It is difficult to conclude that this type of police questioning is normatively unfair or likely to elicit an unreliable response.

Early United States Supreme Court cases followed the English cases. In *Bram v. United States*,<sup>52</sup> the first Supreme Court case to decide the applicability of the fifth amendment to an out-of-court confession,<sup>53</sup> the Court initially noted the English analogy between a magistrate questioning a criminal defendant in court and police

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*bedo*, 53 CALIF. L. REV. 337, 347-48 (1965); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1040-42 (1964).

<sup>49</sup> See Y. KAMISAR, *supra* note 14, at 44 (noting that *Miranda* was "hardly a thunderbolt from the blue"); *infra* notes 161-73 and accompanying text. *Miranda*'s detractors, including former Attorney General Ed Meese, have argued that *Miranda* rejected hundreds of years of steady, stable confessions law that manifested a reliability rationale. See U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986). But this is simply inaccurate, as Benner has demonstrated in more detail. See Benner, *supra* note 46, at 80-83 & 95-101.

<sup>50</sup> See *Regina v. Petit*, 4 Cox C.C. 164, 165 (1850). Indeed, English judges in the middle part of the nineteenth century stated vigorous disapproval of the "system of police officers examining prisoners" even when the police warned the suspects that they need not answer. See *Regina v. Mick*, F. & F. 822, 823, 176 Eng. Rep. 376, 376 (1863). See also *Regina v. Gavin*, 15 Cox C.C. 656 (1885); *Regina v. Baldry*, 2 Den. 430, 169 Eng. Rep. 568 (Crim. App. 1852); *Regina v. Kerr*, 8 C. & P. 176, 173 Eng. Rep. 449 (1837); *Regina v. Wild*, 1 Moody C.C. 452, 168 Eng. Rep. 1341 (1835); *Regina v. Thornton*, 1 Moody C.C. 27, 168 Eng. Rep. 1171 (1824). This judicial attitude was, in the early twentieth century, codified in a Royal Recommendation on Police Powers and Procedures. See McCormick, *supra* note 34, at 258. The English reluctance to admit confessions continued at least until the passage of the Police and Criminal Evidence Act of 1984. See Van Kessel, *supra* note 14, at 15-24.

<sup>51</sup> See ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES § 15-36, at 1098-99 (42d ed. 1985).

<sup>52</sup> 168 U.S. 532 (1897).

<sup>53</sup> The earliest confession case, *Hopt v. Utah*, 110 U.S. 574 (1884), used federal evidence law to decide admissibility.

questioning outside of court.<sup>54</sup> This analogy implies that any police questioning was sufficient to deprive Bram of the choice protected by the fifth amendment unless it were preceded by a warning that Bram did not have to answer.

Although the Court concluded that this per se rule was inconsistent with its precedents,<sup>55</sup> it did find coercive Bram's relatively benign interrogation. The detective stated that Bram's situation was "rather an awkward one. I have had [another suspect] in this office, and he made a statement that he saw you do the murder."<sup>56</sup> The Court concluded that there was no "possible implication that [Bram's] reply to the detective could have been the result of a purely voluntary mental action; that is to say . . . that it must necessarily have been the result of either hope or fear, or both, operating on the mind."<sup>57</sup>

A concern with choice (and the influence of English cases) can be seen in the Court's framing of the issue: whether Bram's statements were "made by one who, in law, could be considered a free agent."<sup>58</sup> This suggests that "[r]eliability concerns alone cannot have been at the heart of [the self-incrimination] doctrine, for we know now what they must surely have known then—rules may be fashioned which, for the most part, assure truthfulness" of compelled testimony.<sup>59</sup> And the *Bram* Court did not question the fairness of the police tactics but, rather, "their resultant effect upon the

<sup>54</sup> *Bram*, 168 U.S. at 556-57.

<sup>55</sup> See *id.* at 558 (citing *Hopt v. Utah*, 110 U.S. 574 (1884), and *Sparf v. United States*, 156 U.S. 51 (1895)).

<sup>56</sup> *Id.* at 562. The only physically coercive aspect of Bram's interrogation was that the officer "stripped the defendant, and examined his clothing." *Id.* at 538. But the Court did not comment on whether this aspect made the interrogation more coercive. Compare *Malinski v. New York*, 324 U.S. 401, 403 (1945) (noting coerciveness of keeping suspect naked for three hours and in a state of semi-dress for another seven hours); *id.* at 407 (prosecutor argued that Malinski was kept naked "to humiliate him . . . let him sit in the corner, let him think he was going to get a shellacking").

<sup>57</sup> *Bram*, 168 U.S. at 562. The Court's "hope/fear" concern was that a suspect would simultaneously hope to deflect guilt by responding and fear a negative inference from silence. See *id.* But this hope/fear dilemma would seem to be present whenever a police question seeks to uncover the facts of a crime, thus suggesting that a similar result might obtain whenever interrogation causes a confession. See *Benner*, *supra* note 46, at 108-09 (noting but rejecting this reading of *Bram*). *Miranda* developed a similar rule several decades later. See *infra* Part III.

<sup>58</sup> *Bram*, 168 U.S. at 564.

<sup>59</sup> See *Rosenberg & Rosenberg*, *supra* note 40, at 1044-45 (making this observation about the development of the Talmudic rule against self-incrimination) (footnotes omitted). If reliability were the primary concern, confession law would require indicia of reliability as a condition for admission. See *Seidman*, *supra* note 24, at 152. *Bram* mentioned reliability only twice and then only indirectly by quoting others. See *Bram*, 168 U.S. at 546 (quoting GILBERT, *THE LAW OF EVIDENCE* 140 (1760)); *id.* at 547 (quoting 2 W. HAWKINS, *PLEAS OF THE CROWN* ch. 46 § 3 (Leach ed. 1787)).

mind" of the suspect.<sup>60</sup> The Court also discussed more than two dozen English and American state cases in which the bare suggestion that it would be better for the accused to confess was held sufficient to render a subsequent statement compelled.<sup>61</sup>

Wigmore later condemned the *Bram* Court for its "sentimentalism, a false tenderness to guilty [defendants], and an unnecessary deviation from principle"—the principle being the reliability justification for the confessions rule.<sup>62</sup> Wigmore did, however, acknowledge that the reliability principle had been declining in importance since the beginning of the nineteenth century. In Wigmore's opinion, the early 1800s saw a change in "the whole attitude of the judges" that resulted in "a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext."<sup>63</sup> Wigmore saw these cases as "absurdities" that "disfigured the law of confessions," and he looked for explanations in the structure of English society, the organization of the judiciary, and the disadvantages posed to the accused by the criminal procedure of the era.<sup>64</sup>

Wigmore's analysis is, of course, but one reading of the historical data.<sup>65</sup> The crucial question—whether the confession should be attributed to the witness or to the interrogator—is ultimately ideological, and its answer will depend on the prevailing ideology. Indeed, the very existence of the self-incrimination principle must

<sup>60</sup> *Bram*, 168 U.S. at 548; Benner, *supra* note 46, at 107.

<sup>61</sup> See *Bram*, 168 U.S. at 552-56 (English cases) & 558-61 (American cases).

<sup>62</sup> WIGMORE ON EVIDENCE, *supra* note 12, § 865 at 225. For a statement of Wigmore's reliability test, see *id.* at § 819. *Bram* is, to be sure, "fundamentally inconsistent with the trustworthiness rationale." See Benner, *supra* note 46, at 109.

<sup>63</sup> WIGMORE ON EVIDENCE, *supra* note 12, at § 820.

<sup>64</sup> *Id.*, § 865 at 221-25.

<sup>65</sup> See Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107, 117 n.39 (1988) ("Wigmore misinterpreted history" with respect to the English law of confessions). Wigmore also ignored Blackstone's 1769 comment that confessions "are the weakest and most suspicious of all testimony." See 4 W. BLACKSTONE, COMMENTARIES \*357. Wigmore quite incorrectly wrote that confessions in Blackstone's era "were thought of in general as 'the highest evidence of guilt'; and there was no general sentiment against them." See WIGMORE ON EVIDENCE, *supra* note 12, § 819 (source of quoted material not given). Wigmore quotes Blackstone's skeptical comments in a later footnote but cryptically dismisses the reference as "merely the reproduction of a classical predecessor's language." See *id.* § 866 and n.2. Finally, Wigmore ignored state statutory limitations on police interrogation. See generally McCormick, *supra* note 34, at 251-54 (discussing statutory limitations on police interrogation in selected states). One statutory limitation was the Kentucky Anti-"Sweating" Act of 1912 that prohibited a person having lawful custody of any person charged with a crime to "attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions," KY. REV. STAT. ANN. § 422.110 (Michie/Bobbs-Merrill 1986 & Supp. 1990).

satisfy some essential ideological function.<sup>66</sup> Otherwise, the pressure arising from the need to accurately determine guilt or innocence<sup>67</sup> would have weakened or negated it.<sup>68</sup>

The modern descriptions of the clause underscore its choice-based ideological function. Robert Gerstein argues that the clause protects what, more than anything else, makes each of us unique: "the inner-most recesses of conscience."<sup>69</sup> Richard Uviller notes that "the self-destructive act is so grave that it is deemed invalid unless undertaken with full consciousness of its dire consequences, and in the untrammelled exercise of personal determination."<sup>70</sup> Abe Fortas wrote, "A man may be punished, even put to death by the state; but . . . he should not be made to prostrate himself before its

<sup>66</sup> See Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 851 (1970) (self-incrimination clause embodies a "basically non-rational" concept). While American commentators quarrel endlessly about how (or if) the clause limits police interrogation, only a handful of commentators have called for abolition of the clause. See Carman, *A Plea for Withdrawal of Constitutional Privilege from the Accused*, 22 MINN. L. REV. 200, 204-05 (1938); Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127 (1906); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1891). The proposal of a 1970's law reform commission in England to limit the scope of the right to pre-trial silence "failed after heated debate." Greenawalt, *supra* note 40, at 40. See also Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979).

<sup>67</sup> Many of the Bill of Rights criminal procedure guarantees can be explained as furthering (or at least not impeding) the accurate determination of guilt and punishment—for example, the sixth amendment requires a speedy, public and impartial trial; notice of the charges; the right to confront witnesses; and the assistance of counsel. Only the fourth amendment's prohibition of unreasonable searches and seizures and the self-incrimination clause are directly inconsistent with accurate determinations of guilt. Although the Supreme Court has recently reduced the scope of fourth amendment protection, Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984), the self-incrimination clause has escaped the recent surge of crime control sentiment relatively unscathed. Compare Wasserstrom, *supra*, with *Baltimore Dept. of Social Services v. Bouknight*, 110 S. Ct. 900, 908-09 (1990) (suggesting that competing societal interests may limit the self-incrimination clause's protection only in very narrowly-defined categories).

<sup>68</sup> See Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (arguing that the self-incrimination clause cannot be justified on consequentialist terms); Dripps, *supra* note 14, at 711-18 (same). But cf. Ellis, *supra* note 66, at 851-56 (1970) (concluding, that given our present knowledge, compelling defendants to testify would likely produce only a small net increase in the number of convictions); Greenawalt, *supra* note 40, at 29-31 (arguing that the self-incrimination clause may produce a long-term net social benefit from building character that "strenuously avoids self-destructive actions").

<sup>69</sup> Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 92 (1970). See also *id.* at 90 (arguing that individuals "ought to have absolute control over the making of such revelations as these").

<sup>70</sup> Uviller, *supra* note 16, at 1146. See also Westen & Mandell, *supra* note 16, at 522 (clause designed "to protect persons from having to choose between serving as instruments of their own criminal condemnation or suffering alternative sanctions for refusing to do so").

majesty. Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority."<sup>71</sup>

Fortas also wrote, for the Supreme Court, that "the roots of the privilege . . . tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state."<sup>72</sup> In a world in which the state and the individual are equal, the state must respect a choice not to testify.<sup>73</sup> It also must not seek to create a preference to testify, for that determination would lie within individual autonomy.

We do not seek to justify, in normative terms, the existence of the self-incrimination clause. The world described by Fortas in which the individual and the state are truly equal may be morally unacceptable because it sacrifices the good of the collective on the altar of autonomy. Our point is more modest. Beginning with Hobbes, the descriptions of the self-incrimination principle have embodied an ideology in which human autonomy and choice are paramount values. Thus, we believe the clause owes its existence to this choice ideology. Viewing the clause as an embodiment of choice ideology has different ramifications than the alternative views that stress the reliability of the confession or the morality of P's actions. We now wish to explore those ramifications.

## II. COMPELLED SELF-INCRIMINATION

What does it mean to be "compelled" to give self-incriminating testimony? Is compulsion synonymous with lack of choice? Is it appropriate to use the same definition for self-incrimination compulsion that philosophers use when identifying coercion that avoids moral responsibility for compelled acts? These questions are the concern of this section. One issue we will not address is whether "coercion" and "compulsion" have precisely the same meaning. The standard usage, which we accept, is that these terms are interchangeable.<sup>74</sup>

<sup>71</sup> Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 91, 100 (1954).

<sup>72</sup> *In re Gault*, 387 U.S. 1, 47 (1967).

<sup>73</sup> See *Faretta v. California*, 422 U.S. 806, 834 n.45 (1975) ("Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding. For example, '[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.'") (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

<sup>74</sup> Linguistic usage is somewhat different. While one would not say the sun coerced S into wearing a hat, see Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 560, one could quite comfortably say that the sun compelled S to



The paradigmatic example of compelled testimony is forcing the defendant to take the witness stand and answer questions under the threat of contempt of court. Despite the language of the clause that prohibits compelling someone "in any criminal case to be a witness against himself," it does not appear that the framers intended to limit the protection of the clause to this situation. So limited, the clause would have been a "meaningless tautology" in 1792 because the common law already prohibited criminal defendants from testifying in their own trial.<sup>75</sup> More significantly for our purposes, nothing suggests that S's choice is constrained any less by pressure that occurs outside the courtroom.

Virtually everyone has given up trying to limit the prohibition of compelled self-incrimination to courtroom testimony.<sup>76</sup> But it is more difficult to identify and quantify pressure that occurs outside the formal procedures of courtroom testimony. After all, there is no legal penalty for failure to answer police questions. And, presumably, some guilty suspects will want to confess to police at least in part because of a Raskolnikov-like desire to be punished.<sup>77</sup>

The lack of a workable test for compulsion in the police interrogation room has left the field clear for ideologies to operate as unseen, unspoken roadmaps of thought that produce necessary answers to questions that may be empirically unanswerable.<sup>78</sup> For example, Aristotle drew a distinction between external and internal causation of conduct; conduct was compelled when "the principle of action is external" and the actor "contributes nothing of his own."<sup>79</sup> But deciding whether the "principle of action" is external or internal is surely an ideological judgment when P interrogates S, involving, as it does, a determination of the unknowable—whether the will

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wear a hat. Thus, perhaps "compel" requires less purpose on the part of the compeller than does "coerce." Perhaps it requires no purpose at all; the sun, after all, lacks purpose.

<sup>75</sup> Corwin, *The Supreme Court's Construction of the Self Incrimination Clause*, 29 MICH. L. REV. 1, 12 (1930). See also L. LEVY, *supra* note 36, at 409.

<sup>76</sup> See Grano, *supra* note 12, at 867 (conceding that "pursuit of this argument, exhaustively presented by others, would be unproductive"); *id.* at 927 (noting that "[I]ittle would be gained at this point by rehearsing once again" these arguments).

<sup>77</sup> See F. DOSTOEVSKY, *CRIME AND PUNISHMENT* (1866). Dostoevsky wrote, in a letter to his publisher, "that the legal punishment inflicted for a crime intimidates a criminal infinitely less than lawmakers suppose, in part because the criminal himself *morally demands that punishment.*" *Id.* at xiii (Editor's Introduction to 1963 Washington Square Press edition) (emphasis in original).

<sup>78</sup> As Alan Wertheimer has observed, "while philosophers worry about what to say about coercion claims, judges must decide what to do about them." A. WERTHEIMER, *COERCION* 13 (1987).

<sup>79</sup> ARISTOTLE, *supra* note 2, § 1.

of S or of P prevailed.<sup>80</sup>

#### A. INTERNAL AND EXTERNAL FORCES DISTINGUISHED

Although Aristotle's external/internal distinction fails to provide an empirical solution to most coercion problems,<sup>81</sup> it does remove one category of potential cases from consideration. If only external action constitutes coercion, coercion cannot exist in the absence of an external constraint. Much of the confession literature ignores this potential limitation and fails to distinguish between the influence of internal and external forces. Some commentators thus conclude that it is impossible to measure the pressure on suspects and, from there, conclude that "either all statements are coerced or none are."<sup>82</sup> But an account of compulsion that attempts to measure the influence of external forces need not become impaled on the horns of this dilemma. To be sure, other influences exist: the suspect's moral or religious background, his current state of health, his perception of his success or failure in life, his intelligence, and so on. The difficulty is that any attempt to measure the coercive effect of these internal influences is incoherent because the influences are part of the human personality rather than forces that act on it.

For example, consider again S who "freely" confessed to a murder because of God's threat, a hypothetical based on *Colorado v. Connelly*.<sup>83</sup> Connelly approached a uniformed police officer on the street and confessed to a murder despite the officer's diligent recitation of the *Miranda* warnings and an additional warning that Connelly "was under no obligation to say anything."<sup>84</sup> Connelly stated that he would talk to the officer "because his conscience had been bothering him," and he "openly detailed" a story in which he killed a young woman about a year earlier.<sup>85</sup> A psychiatrist testified later that Connelly had been following the "voice of God" and that God

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<sup>80</sup> See A. WERTHEIMER, *supra* note 78, at 292 ("The view that external causes render action involuntary depends less on this protean spatial metaphor than on the significance attributed to placing a certain cause under the internal or external rubric.").

<sup>81</sup> Professor Wertheimer believes that an empirical solution may be unattainable. See *id.* at 288 (empirical theories of coercion "seem to either collapse into moralized theories or be unable to distinguish the coercion that bars the ascription of responsibility from the coercion that does not").

<sup>82</sup> Grano, *supra* note 34, at 685 n.101. See also Dripps, *supra* note 14, at 700 (arguing that "[a]ny expectation that truly voluntary confessions are available on a systemic basis depends either on unsupportable factual assumptions or on an interpretation of voluntariness that reduces that word to signifying no more than the absence of third degree methods").

<sup>83</sup> 479 U.S. 157 (1986).

<sup>84</sup> *Id.* at 160.

<sup>85</sup> *Id.*

had given him the choice "either to confess to the killing or to commit suicide."<sup>86</sup>

The Colorado Supreme Court held Connelly's statement inadmissible because he "was incapable of making an intelligent and free decision with respect to his constitutional right of silence."<sup>87</sup> Although he was not constrained by other humans, the state court wrote, "One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure."<sup>88</sup> A more extreme version of this principle holds that "[g]uilt and a desire to be punished, a desire to shift responsibility to others, and the need for love" are forces operating outside a "free will and a rational intellect."<sup>89</sup>

But the crucial question is whether protection from compulsion entails a minimum "capacity for rational judgment" or any other internal capacity. The United States Supreme Court rejected this "positive liberty"<sup>90</sup> entailment when it overruled the Colorado Supreme Court, noting that Connelly's claim could be sustained "[o]nly 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."<sup>91</sup> The Court's rejection of this reading of the clause is consistent with Aristotle's distinction between external and internal causation of conduct.

Many have criticized the Court's holding in *Connelly*.<sup>92</sup> Justice Brennan stated in his *Connelly* dissent that the Court had "upheld the admission of a confession that does not reflect the exercise of free will."<sup>93</sup> But to argue that Connelly's free will was contravened assumes that internal human forces somehow impair, rather than are a part of, the human personality. For example, Donald Dripps argues that one should not be held responsible for confessions resulting "from personality traits" that are "outside the broad ambit of ordinary experience."<sup>94</sup> This argument depends on discriminat-

<sup>86</sup> *Id.* at 161.

<sup>87</sup> *People v. Connelly*, 702 P.2d 722, 729 (Colo. 1985)).

<sup>88</sup> *Id.* at 728.

<sup>89</sup> See Dripps, *supra* note 14, at 705.

<sup>90</sup> The "positive" liberty concept is borrowed from Isaiah Berlin. See I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118-72 (1969).

<sup>91</sup> 479 U.S. at 166; Tomkovicz, *supra* note 16, at 1049 (noting that the "policies of the fifth amendment privilege do not demand rationality, intelligence, or knowledge, but only a voluntary choice not to remain silent").

<sup>92</sup> See, e.g., Benner, *supra* note 46, at 127 (arguing that *Connelly* "repudiates the concept of 'free will' as an independent element of voluntariness").

<sup>93</sup> 479 U.S. at 178 (Brennan, J., dissenting).

<sup>94</sup> Dripps, *supra* note 14, at 704.

ing between "normal" and "abnormal" internal forces. Presumably the latter, but not the former, poison free choice.

The question is put in perspective if one assumes Connelly wrote a letter to the police containing the same details that he orally told the officer.<sup>95</sup> Should the self-incrimination clause bar introduction of the letter? If the answer is no, it supports Aristotle's "external action" view of compulsion and thus the result the Court reached in *Connolly*. Connelly's volunteered confession cannot be distinguished from the hypothetical letter because the officer did nothing to encourage him to confess.<sup>96</sup> If the self-incrimination clause bars admission of the letter, the clause must forbid internal compulsion—at least when the internal forces are "abnormal."

There are a number of practical and theoretical problems in separating "normal" internal forces from abnormal forces, not the least of which is defining what is normal. For example, how does one differentiate between the voice of conscience and the voice of God? But the most significant problem is the assumption itself. Many external forces become internalized as part of our conscience, ranging from parents to religion to Girl/Boy Scouts to school to peer groups. It is not clear why choice should be rendered less free by internal forces that are labelled abnormal.<sup>97</sup> An internal force is an internal force whether it is shared by most of us or only a few. Indeed, what does it mean to be "compelled" by one's own personality? As Alan Wertheimer has cogently observed, "Those who argue . . . that socialization limits freedom would do well to remember that not *everything* about a person or his condition can be said to limit his freedom without devouring the self who is capable of being constrained and whose freedom is to be valued."<sup>98</sup> If a conscience-motivated confession is viewed as compelled, little is left of the self

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<sup>95</sup> We thank Yale Kamisar for the hypothetical. Telephone conversation with Kamisar (June 27, 1990).

<sup>96</sup> There was a second confession which poses a somewhat more complex problem because it followed interrogation. See *Connolly*, 479 U.S. at 172-75 (Stevens, J., concurring in the judgment in part and dissenting in part) (arguing that the first confession was admissible, because volunteered, but the second was inadmissible, because Connelly was legally incompetent and thus incapable of waiving his *Miranda* rights). See also Benner, *supra* note 46, at 137; Dix, *supra* note 16, at 276-82; Dripps, *supra* note 14, at 709. For our resolution of the "second confession" issue, see *infra* note 171.

<sup>97</sup> Compare A. WERTHEIMER, *supra* note 78, at 290 (arguing that a psychological account of coercion is not the only "interesting explanation" of "the way coercion undermines voluntariness") with Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 56-59 (1968) (surveying social and psychological pressures to speak created by arrest and detention).

<sup>98</sup> A. WERTHEIMER, *supra* note 78, at 261 (emphasis in original).

of the confessor.<sup>99</sup>

Aristotle's observation that compulsion entails an "external principle of action" avoids having the individual self devoured by disregarding internal forces and accepting human conduct at face value—absent an external principle of action, every choice must be that of the individual. While this might not be so in fact,<sup>100</sup> Aristotle presumed it, and some presumption is inevitable.<sup>101</sup> This "external principle of action" cannot differentiate between conscience and mental illness—they are all internal forces unique to the individual and could never constitute coercion. Connelly's confession was, under this conception of freedom, freely given if one assumes the voice of God was an internal force.<sup>102</sup> In cases in which an external force acts on S, the question becomes, in Aristotle's words, whether "the actor contributes nothing of his own" to the subsequent confession,<sup>103</sup> and we now turn to that question.

#### B. MEASURING THE EFFECT OF EXTERNAL FORCES

Aristotle's notion that coercion exists only when the actor "contributes nothing of his own" cannot be taken literally without reinstating what we termed Aristotle's paradox—at least when defining compelled testimony. When P physically shoves S into the path of a bullet, everyone agrees that this act of physical or "occurrent"<sup>104</sup> coercion substitutes P's will for S's. Because this definition of coercion is not controversial, it is rarely discussed.<sup>105</sup> But confessions

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<sup>99</sup> Cf. *Connelly*, 479 U.S. at 172 (Stevens, J., concurring in the judgment in part and dissenting in part) (comparing Connelly's initial statements with those of Lady Macbeth during her guilt-ridden nightmare; see W. SHAKESPEARE, *MACBETH*, Act V, scene 1, lines 41 & 47); Dix, *supra* note 16, at 280 (suggesting that "at some point, the reasonable effectiveness of the law reaches its limits, and suspects must assume some responsibility for protecting their own interests"). But see Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L. J. 1, 29 (1970) (suggesting that confessions motivated by guilty conscience might not be valid waivers of *Miranda* rights).

<sup>100</sup> Leiken, for example, argues that attributing choice to persons who know their rights "is to rely on a fiction that is questionable in light of the actual decision-making process." See Leiken, *supra* note 99, at 29.

<sup>101</sup> Cf. A. WERTHEIMER, *supra* note 78, at 292 ("Internality, as it were, is not a locational feature of a motivation. It is part of its *description*.") (emphasis in original).

<sup>102</sup> To be sure, mental illness could render a confession unreliable and thus inadmissible under a due process principle that forbids a conviction based on false evidence. Cf. *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that prosecutor's knowing use of perjured evidence requires reversal of the conviction); *Mooney v. Holohan*, 294 U.S. 103 (1935) (same).

<sup>103</sup> ARISTOTLE, *supra* note 2, § 1.

<sup>104</sup> See Bayles, *A Concept of Coercion*, in *NOMOS XIV COERCION*, *supra* note 8, at 17.

<sup>105</sup> See A. WERTHEIMER, *supra* note 78, at 10 (describing physical coercion as a non-standard case of coercion); Bayles, *supra* note 104, at 17 (concluding that non-physical coercion occurs more frequently).

are not susceptible to physical compulsion; S's volition will always be involved in some manner. Thus, Aristotle's paradox leads to the bizarre result that all testimony is noncompelled. Because this result makes the self-incrimination clause meaningless, the framers must have contemplated a category of volitional-but-compelled testimony.

One way to isolate compelled volitional conduct is to draw a distinction between a free choice and a constrained choice; the latter would constitute compulsion.<sup>106</sup> It is easy to conclude that some choices are constrained—for example, the choice between the rack and confessing or the choice between giving over the bank's money and being shot. But by what standard would one determine whether S's choice was constrained in close cases?<sup>107</sup> Is S's choice constrained when she has no attractive alternative? No meaningful alternative? No plausible alternative? When P tells S that X saw her commit a murder, does this constrain S's choice? If the answer is yes—because P has made S's choice more difficult—it raises the possibility that every effort to encourage S to confess constrains S's choice. If the answer is no—because S had an alternative—the paradox is reinstated (S always has an alternative to confessing).

Drawing on Kant's theory of reason, it is possible that S's choice is constrained any time she chooses inconsistently with her internal law of reason.<sup>108</sup> Because an internal law of reason presumably would not produce a false statement,<sup>109</sup> one could conclude that all false confessions are compelled. But the converse—all truthful confessions are noncompelled—cannot be true. The shadow of the rack is an important part of the clause's history<sup>110</sup> whether or not it explains everything about the self-incrimination principle.

<sup>106</sup> See A. WERTHEIMER, *supra* note 78, at 10.

<sup>107</sup> Stephen Markman posits the proper standard as "actual compulsion," but fails to define it. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938, 947-48 (1987). If he means to suggest that "actual compulsion" is a self-defining concept in the context of non-physical coercion, we strongly disagree. See *supra* notes 7-14 and accompanying text.

<sup>108</sup> Robert Nozick characterizes Kant's "tradition" as holding "that we are free when our acts are done in accordance with reason, when a law of reason determines them." R. NOZICK, *PHILOSOPHICAL EXPLANATION* 353 (1981). See, e.g., I. KANT, *CRITIQUE OF PURE REASON* 633 (N. Smith trans. 1965); I. KANT, *PROLEGOMENA TO ANY FUTURE METAPHYSICS* § 53 (P. Carus trans. 1985). Professor Michael Moore has argued, in a different context, that "compulsion involves interference with practical reasoning." Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1129 (1985) (discussing compulsion as part of common law defense of duress).

<sup>109</sup> See R. NOZICK, *supra* note 108, at 355.

<sup>110</sup> See L. LEVY, *supra* note 36, at 34-35; WIGMORE ON EVIDENCE, *supra* note 12, § 818 at 131 (noting use of torture until mid-1600s to produce confessions that were "employed evidentially without scruple").

One can hardly conclude that a confession given after hours or days of intense pain, and the promise of more, is freely given because true.

Perhaps, then, S's choice has been constrained when "associated with an attraction too strong to resist."<sup>111</sup> If the pressure to confess reaches this "irresistible" level, it is, by definition, impossible for S to do otherwise than confess. As Wigmore put it in the early part of this century, "[U]nder the violent pain of the rack," a suspect would "think[ ] of nothing but the present relief from agony which his confession will gain him."<sup>112</sup> In this situation, S would confess whether or not the confession were true. The "irresistible" concept of coercion is thus consistent with Kant's law of reason (false confessions are compelled) without also implying that all truthful confessions are freely given. Under Wigmore's analysis, the rack-induced confession is compelled whether or not it is true because the rack creates irresistible pressure.<sup>113</sup>

To determine what forces are irresistible requires either a window into the particular mental process of S or a presumption about how humans react to various forces.<sup>114</sup> How else could one ever know whether it was impossible for S to do otherwise? Wigmore presumed that certain interrogation methods would likely produce false confessions—unkept promises of pardon and threats of pain and physical deprivation<sup>115</sup>—and, from there, he presumed that any confession induced by these methods was involuntary.<sup>116</sup> The corollary presumption is that S's response to all other interrogation methods is a free will response motivated by "internal mental forces—such as remorse, the psychic pressure of guilt, or the belief, however unwise, that one should try to provide an explanation."<sup>117</sup>

The narrowness of Wigmore's reliability test<sup>118</sup>, however, is inconsistent with the historic application of the self-incrimination

<sup>111</sup> See WIGMORE ON EVIDENCE, *supra* note 12, § 824 at 145. See also H. FRANKFURT, *supra* note 18, at 49.

<sup>112</sup> WIGMORE ON EVIDENCE, *supra* note 12, § 833 at 159.

<sup>113</sup> See *id.* (noting that this question "was apparently never judicially decided" but that the inadmissibility of a rack-induced confession "is of course unquestioned to-day").

<sup>114</sup> Cf. *Miranda v. Arizona*, 384 U.S. 436, 535 (1966) (White, J., dissenting) (objecting to the majority's conclusion that "custodial questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will").

<sup>115</sup> See WIGMORE ON EVIDENCE, *supra* note 12, at §§ 833-34.

<sup>116</sup> *Id.* § 865 at 225.

<sup>117</sup> Grano, *supra* note 12 at 898 (footnote omitted).

<sup>118</sup> See *id.* at 919 ("That few defendants will succeed in suppressing confessions under these limitations cannot be a legitimate basis for complaint").

clause to the courtroom. One certainty about the self-incrimination clause is that it permits S to refuse to testify if faced with a choice of answering or the penalty of contempt of court. Yet S's incriminating testimony made under threat of contempt is not likely to be false. The threat of contempt hardly seems the kind of threat that would make S abandon her will and confess falsely.<sup>119</sup>

Indeed, if the threat of contempt typically produced false testimony, it would not be very useful to prosecutors. While Wigmore's abstract conception of compulsion is conceptually unflawed—S is compelled when it is impossible for S to do otherwise<sup>120</sup>—the mechanism Wigmore used to implement this conception seems too narrow to explain even the historic function of the self-incrimination clause. If this assessment is accurate, one would expect courts to reject the "reliability" test for coercion. The courts began to do this in the 1930s and 1940s as they moved to embrace a normative test.

### C. WRONGFUL EXTERNAL FORCES

Not long after Wigmore published his treatise, courts began to shift the focus from the suspect's will to the police conduct.<sup>121</sup> By the mid-1940's, "disciplining of state law enforcement officers became a principal purpose of the . . . confessions rule."<sup>122</sup> The rationale for this change was never clearly expressed. One explanation is that some police conduct should be prohibited simply

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<sup>119</sup> See Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 443 (1987). To be fair to Wigmore, he argued that the rule prohibiting admission of involuntary confessions was independent of the fifth amendment self-incrimination bar against compelled courtroom testimony. 4 J. WIGMORE, A TREATISE ON EVIDENCE, at § 2266. The rule prohibiting admission of involuntary confessions, he argued, was a evidentiary rule; the fifth amendment self-incrimination bar against compelled courtroom testimony, a constitutional privilege. *Id.* Today, however, the two doctrines have merged. The fifth amendment prohibits compelled self-incriminating testimony; it would necessarily also bar admission of involuntary self-incriminating statements. Whatever formal distinctions might exist in raising these claims, *see id.*, the substance of each claim is that the speaker was forced against his will to give incriminating testimony. Whether one calls the testimony "compelled" or "involuntary" seems irrelevant. Thus, to argue, as Wigmore does, that some involuntary confessions would not be compelled and vice-versa, *id.*, seems quite bizarre today.

<sup>120</sup> See WIGMORE ON EVIDENCE, *supra* note 12, at § 824. Harry Frankfurt articulates essentially the same standard: S acts unfreely only when S's "inclination to avoid the undesirable consequence he faces is irresistible; it is impossible for him to bring himself to accept that consequence." H. FRANKFURT, *supra* note 18, at 49.

<sup>121</sup> *Miranda v. Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (noting the Court's "initial emphasis on reliability" which was later "supplemented by concern over the legality and fairness of the police practices in an accusatorial system of law enforcement.").

<sup>122</sup> Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 419 (1954).



because it is normatively unfair and thus denies suspects the fairness guaranteed by the fourteenth amendment due process clause.<sup>123</sup> Under this normative approach, the famous "Christian burial speech"<sup>124</sup> would be equally wrongful when directed to an atheist as when directed, as it was, to a minister. But the link between normatively unfair police conduct and coercion as defined by Aristotle is far from self-evident.

Commentators use "normative" in different ways to describe coercion accounts. For example, Joseph Grano argues that the coercion inquiry requires a "normative judgment about impairment of mental freedom."<sup>125</sup> Used in this manner, "normative" entails a decision about how much impairment of mental freedom constitutes coercion; virtually all accounts of coercion, from Wigmore's to *Miranda*'s, would qualify as normative in this sense. Alan Wertheimer uses "normative" in two ways, both of which are distinct from Grano's usage. First, Wertheimer contrasts "normative" and "empirical" accounts of coercion.<sup>126</sup> Empirical accounts (like Wigmore's) seek to determine as an empirical fact whether S's will was overborne. Normative accounts, by contrast, have at their core a judgment that certain immoral conduct by P will always render S's response coerced.

But if protecting the will of the individual is not the goal, if the goal is to deter certain police methods, why identify the goal as prohibiting "compulsion"? Once the link between police conduct and the subject's will becomes irrelevant, one does not need to know whether S or P was the source of S's conduct. Courts could simply rely on the due process clause to regulate the state's treatment of suspects.

Wertheimer's second use of "normative" is more narrow. Assuming that a particular level of pressure causes S to act involuntarily (as an empirical fact), a link may exist between the wrongfulness of P's conduct and the empirical fact of S's involuntariness.<sup>127</sup> Because our paper is committed to assessing when P overbears S's will,

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<sup>123</sup> U.S. CONST. amend. XIV. See, e.g., Y. KAMISAR, *supra* note 14, at 21 (suggesting "that were the appropriate case to arise, one with a sufficient degree of offensive or deliberate and systematic police misconduct, the Supreme Court would exclude the confession as a matter of due process even though neither the particular defendant nor anybody else were at all likely to confess falsely under the circumstances").

<sup>124</sup> See *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977).

<sup>125</sup> Grano, *supra* note 12 at 866.

<sup>126</sup> See A. WERTHEIMER, *supra* note 78, at 6-10.

<sup>127</sup> *Id.* at 288-90. Wertheimer uses "coercion" to signify a legal conclusion that S is entitled to deny responsibility for her acts and "involuntariness" to mean an empirical determination that S's will was overborne. We use both terms in the empirical sense.

rather than whether the police acted in accord with general standards of due process, normative accounts justify separate discussion only in Wertheimer's second sense of the term. The immorality of P's conduct is relevant to the empirical question only if immoral techniques add to the pressure on S because of their immorality. Does S somehow find an immoral constraint more difficult to resist than a moral constraint? It is important to be clear about this point. The rack is both immoral and irresistible. Wigmore believed the rack was coercive because it was irresistible, not because it was immoral. Threatening to bring in S's ailing wife for questioning when there are no grounds to detain her is immoral; it may or may not be irresistible.<sup>128</sup> If P's threat is irresistible because it is immoral, it must be because its immorality somehow affects S's will to resist.

The argument goes as follows: if P's constraint is morally right, then S's decision to accede would be noncompelled because she would concur in the morality of P's constraint (even though she does not want to be constrained).<sup>129</sup> But since S expects moral treatment, if P's constraint is wrongful, it goes "against [S]'s will through to [S]'s action."<sup>130</sup> In the confession context, this account holds that the will of the individual is impermissibly constrained if the state applies pressure it has no right to apply.

So defined, the normative standard explains the courtroom application of the self-incrimination clause. The phrasing of the clause and its history reveals that the state is not permitted to call the defendant to the witness stand. Because this violates the normative standard contained in the fifth amendment itself, it is easy to say that it compels the resulting testimony—the state places a constraint on the defendant it has no right to place.<sup>131</sup> But neither the explicit language of the amendment nor its history implies a standard by which to judge whether police techniques used to elicit information

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<sup>128</sup> See *Rogers v. Richmond*, 365 U.S. 534 (1961) (holding such threats were coercive under the facts of that case).

<sup>129</sup> See A. WERTHEIMER, *supra* note 78, at 301.

<sup>130</sup> See *id.* at 302.

<sup>131</sup> Indeed, as noted earlier, it is difficult to make a non-normative finding of compulsion when S chooses to testify in court rather than endure a penalty for contempt. This testimony does not seem unreliable when measured by Wigmore's "likelihood of falsity" test. Moreover, it seems unlikely to meet any test that has, at its core, the requirement that compulsion render impossible S doing otherwise. S could have refused to testify and accepted the penalty. While this is not a choice S wanted to have, most people would consider it possible to defy the threat of contempt. See, e.g., H. FRANKFURT, *supra* note 18, at 48-49. Thus, the only satisfactory explanation of compulsion in its historic, courtroom context may be the normative explanation. As this paper is about police interrogation, however, we will not pursue further the courtroom application of the clause.

from an arrestee are improper.<sup>132</sup> Although a few easy cases exist (such as threatening to question S's ailing wife), the possibility of developing a standard that does more than reflect an ad hoc judgment seems quite remote.<sup>133</sup>

Indeed, the difficulty in formulating standards is a feature of all normative accounts of coercion, not just those that seek to explain the self-incrimination clause.<sup>134</sup> But it is particularly difficult to draw a normative line beyond which police interrogation becomes wrongful because police conduct that attempts to solve a crime is morally worthy.<sup>135</sup> Thus, the normative standard for wrongful pressure in the interrogation context ranges from "practices which are repellent to civilized standards of decency" to practices "which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice."<sup>136</sup> The wide range of potential standards is not the only problem here; since the narrow normative account of coercion presupposes that the wrongfulness of P's conduct somehow makes it more coercive, what are we to do when S is unaware that P is acting wrongfully—for example, if P lies about X stating that she saw S kill the victim?

Another problem with the narrow normative account is that it does not seem plausible. Why should the immorality of P's conduct make it more difficult to resist? If P had probable cause to bring in

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<sup>132</sup> See Greenawalt, *supra* note 40, at 55 (noting that the language of the clause "reflects no clear judgment about informal pressures to speak").

<sup>133</sup> See, e.g., Schulhofer, *supra* note 14, at 869-70 (criticizing the pre-Miranda voluntariness test because "conscientious trial judges . . . were virtually invited to give weight to their subjective preferences"). Professor Uviller has argued that judges decide confession cases by applying "community norms of acceptable police conduct in the acquisition of evidence." Letter from Richard Uviller to authors (June 28, 1990) (on file with editors of J. CRIM. L. & CRIMINOLOGY). While this is clearly right, it remains true that each case entails an ad hoc judgment. For example, to what extent is it fair for the police to "take advantage of the ignorance or vulnerability of particular criminal suspects"? See Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 CRIM. L. REV. 303, 308 (1987) (arguing that it is fair in all cases).

<sup>134</sup> Bernard Gert, for example argues that coercion entails the presence of "unreasonable incentives." Gert, *supra* note 8, at 32. "An incentive is unreasonable if it would be unreasonable to expect any rational man in that situation not to act on it." *Id.* at 34. The only incentive that is always unreasonable, in Gert's view, is avoiding evil "for all rational men must seek to avoid any evil—unless they have a reason." *Id.* But "not all consequences that involve the avoiding of an evil will be unreasonable incentives. The evils must be significant; usually only death, severe and prolonged pain, serious disability, and extensive loss of freedom will be unreasonable incentives." *Id.* at 34-35. The lack of practical standards here is quite apparent.

<sup>135</sup> Grano, *supra* note 12, at 902.

<sup>136</sup> Bator & Vorenberg, *Arrest, Detentions, Interrogation and the Right to Counsel*, 66 COLUM. L. REV. 62, 73 (1966).

S's ailing wife for questioning, the threat would presumably be morally justified and thus non-coercive under the narrow normative test. But would S not find that threat equally difficult to resist?

Moreover, normative tests have a tendency to collapse into tautology. Note, for example, what Alan Wertheimer has to say about his own normative account of coercion: "We typically say that B should not be held responsible because B has been coerced, and yet, on my account, we can determine that B has been coerced only when we have, in effect, already determined that B should not be held responsible."<sup>137</sup>

In sum, the normative account potentially provides more expansive protection against police pressure than Wigmore's empirical account based on a reliability justification. The cost, however, is a lack of standards by which to judge coercion. This lack of standards explains the disparate approaches to confession law that preceded the Court's 1966 decision in *Miranda v. Arizona*.<sup>138</sup> But all accounts considered to this point fail to describe *Miranda* because the Court held there that any custodial police questioning in the absence of warnings constitutes compulsion.<sup>139</sup> It is difficult to conclude that a single police question produces an unreliable confession or is morally wrongful when the police have probable cause to suspect a person of a crime. We must look elsewhere for an ideology that explains *Miranda*.

#### D. RECONCILING INTERNAL AND EXTERNAL FORCES: HARRY FRANKFURT'S SECOND-ORDER VOLITION ACCOUNT

If the normative accounts are an unsatisfying alternative to Wigmore's empirical account of coercion, what is left? Perhaps courts were too quick to reject Wigmore in favor of normative accounts. Perhaps the problem with Wigmore was not the empirical causation premise on which he relied but the narrow mechanism by which he sought to infer external causation of confessions.

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<sup>137</sup> A. WERTHEIMER, *supra* note 78, at 309. Wertheimer concludes that while his test is tautological, an objection on that ground is "unimportantly correct" because it "rests, to a considerable extent, on a false hope that precise conceptual analysis and careful empirical investigation will resolve important moral issues that ostensibly turn on coercion claims." *Id.* While we agree that many theories of coercion contain hidden normative premises, we do not agree that coercion can be satisfactorily identified only by a normative analysis.

<sup>138</sup> 384 U.S. 436 (1966). "While the voluntariness rubric was repeated in many instances, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values." *Id.* at 507 (Harlan, J., dissenting)(citations omitted).

<sup>139</sup> *Id.* at 458.

Wigmore concluded that coercion occurred only when an external force overbears S's will to the extent that it is likely S confessed falsely. In these cases, it is fair to say that S's will is not manifested in the outcome; if she would confess falsely, her will has been thoroughly subjugated. But perhaps P can displace S's will—and thus cause S's confession—even when S's will is somehow manifested in the outcome.

This brings us to the crucial difficulty that has caused many commentators to reject empirical accounts of fifth amendment coercion. How can S be said to act against his will if his will is manifested in the outcome? That is, if S decides to confess because some part of him wants to confess, why is that act of will not always a free choice? One explanation is Harry Frankfurt's idea that humans have two kinds of will.<sup>140</sup> S has a first-order desire that causes him to act and a second-order volition that represents what he wants his first-order desire to be. These wills can conflict; S may want his volition to be different from the desire that actually motivates him to act.<sup>141</sup> In this situation, S acts based on his first-order desire, but "the desire that moves him" causes him to act "against the will he wants."<sup>142</sup> Thus, S acts according to his will (first-order desire), but it is not the will he wants to have (second-order volition). Frankfurt concludes that S acts unfreely in this situation.

Frankfurt's explanation does not mean that humans have a first-order desire and then a second-order desire that is different only in that it is more powerful in some strictly hierarchical sense and then a third-order desire and so on. Rather, a second-order volition is different generically from a first-order desire. Second-order volition represents a point at which a person "identifies himself *decisively* with one of his first-order desires."<sup>143</sup> Second-order volition is more than a transient wish; it is a relatively permanent part of the individual's personality. It is, therefore, human "will" in the sense that term is typically used.<sup>144</sup>

To take one of Frankfurt's examples, an addict has a first-order

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<sup>140</sup> H. FRANKFURT, *supra* note 18, at 47-57. For a similar account of autonomy, see Dworkin, *Acting Freely*, *Nous* (November 1970).

<sup>141</sup> H. FRANKFURT, *supra* note 18, at 48 (identifying this as a category of unfree acts).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 21 (emphasis in original). *But see* Watson, *Free Agency*, in *MORAL RESPONSIBILITY* 94 (J. Fischer ed. 1986) (criticizing this aspect of Frankfurt's theory).

<sup>144</sup> As such, second-order volition appears similar to Kant's internal law of reason, *supra* note 108, and to David Hume's view that we are not free when our conduct is caused by external forces that act independently of our will and preferences rather than through them. *See* D. HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* § VIII (1748).

desire to take drugs and then a second-order volition that either identifies with that first-order desire or rejects it because he does not want that desire to be his will. The addict's second-order volition does not change from day to day as his need for the drug waxes and wanes. It remains what he wants his will to be, regardless of what his first-order desire might be at any given moment. If the second-order volition is contrary to this first-order desire, but the addict acts according to the first order desire anyway (takes the drug), then Frankfurt contends that this act is unfree.

This is, we think, a broader view of what it means to act against one's will than that which Wigmore held. It may reflect nothing more than a late twentieth century conception of the power of external forces in displacing human will. But it is particularly appropriate as a measure of coercion in the context of police interrogation. Wigmore's idea that coercion must exclude S's will may be appropriate when considering the philosophical question of whether S is to be relieved of moral responsibility for her conduct.<sup>145</sup> But we read the self-incrimination clause to have an altogether different purpose: to protect the individual's choice to confess guilt or remain silent.<sup>146</sup> This means that S must be free to not answer. If S is unfree in this regard, it does not matter that his first-order desire may be manifested in the outcome; his choice was denied—he did not want that desire to be his will—and choice is the heart of the self-incrimination clause.<sup>147</sup>

We thus conclude that Frankfurt's category of unfree acts should be taken to define the category of compelled testimony. So construed, the self-incrimination clause protects S's second-order volition, and the state is forbidden from doing anything that causes S to make a statement when her second-order volition is to want her will to be not to want to answer questions that might incriminate her. The potential conflict between second-order volition and first-order desire explains why S can legitimately believe that she was compelled to confess even when she knew she was not required to

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<sup>145</sup> See, e.g., H. FRANKFURT, *supra* note 18, at 27. To be sure, Frankfurt rejects a stricter definition of coercion even when determining whether S is morally responsible for her acts. He concludes that S is relieved of moral responsibility whenever she acts unfreely. *Id.* at 48.

<sup>146</sup> See *supra* Part I.

<sup>147</sup> See *Culombe v. Connecticut*, 367 U.S. 568, 583 (1961) (stating that confessions, to be admissible, must be the product of the individual's "own free choice"); Rosenberg & Rosenberg, *supra* note 40, at 1043-44 (noting that "[i]nability to choose freely whether to assist the prosecution in securing one's own conviction . . . is by any other name coercion").

do so.<sup>148</sup> It justifies what is an intuitive distinction between “coercion” and “persuasion”<sup>149</sup>—the latter implies that S had no contrary second-order volition and was convinced by P to act on a first-order desire; the former implies that S acted on a first-order desire that was not her second-order volition.

One answer to Aristotle’s paradox, then, is that one can act volitionally and yet unfreely. All volitional choices are free in the sense that they represent S’s first-order desire, but to act on a first-order desire does not mean that one has acted freely. Whether one acts freely cannot be known until the relationship between first-order desire and second-order volition is understood. This explanation not only avoids Aristotle’s paradox but also seems intuitively correct. It is part of the human condition sometimes to do something that one immediately regrets. Without some division of volition, however, this, too, seems paradoxical. Why would one do something and then immediately regret it? One solution to this paradox is that while I wanted to do X, I did not want my will to be to want to do X. So when I did X against my second-order volition, I immediately regretted it. Perhaps I regretted X while I was doing it.<sup>150</sup> But I was unfree with respect to doing X and thus had no choice.

This second-order volition account provides a satisfactory theoretical construct in which to locate compelled volitional acts, and it avoids the normative question of what interrogation constraints are permissible. But it cannot avoid the difficult question of whether particular conduct is against S’s second-order volition. Thus, the second-order volition solution is no better at providing practical guidance than any of the other solutions that seek to uncover the will of the suspect. External observers have no measure of the internal human will.<sup>151</sup> The only reliable indication of the actor’s will is

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<sup>148</sup> See Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967) (summarizing experience of faculty and students at Yale who were interviewed by the FBI about their draft resistance activities after being told by the law faculty that they were legally entitled to say nothing).

<sup>149</sup> See Gert, *supra* note 8, at 43-45 (distinguishing coercion from persuasion); Johnson, *supra* note 133, at 303 (arguing that compulsion is not same as encouragement); Van Kessel, *supra* note 14, at 146 (arguing that Kamisar “strains” the term “compulsion” when he equates it with “persuade”). Cf. A. WERTHEIMER, *supra* note 78, at 293 (arguing that manipulation is more likely to produce involuntary conduct than persuasion because the latter (but not the former) is an external force that has become “thoroughly internalized”).

<sup>150</sup> See ARISTOTLE, *supra* note 2, at § 1 (concluding that “[t]hose who act under compulsion and involuntarily do so with pain”).

<sup>151</sup> See D. Hume, *supra* note 144, at § 8 (Part I) (“internal principles and motives may operate in a uniform manner,” but it is “not easily discoverable by human sagacity and inquiry”).

the conduct in which she engages, but that indication is subject to the confounding influence of external forces.

Consider S's confession made after P told her that X had seen her kill the victim and that the prosecutor might be inclined to leniency if she confessed. S did not choose to confess until P made these statements, suggesting that her second-order volition is inconsistent with wanting to answer P's questions. Moreover, by raising the cost of not confessing (if S believes P, S believes there is powerful evidence against her), and decreasing the cost of confessing (the promise of possible leniency), it is plausible that P has caused S to have a first-order desire to confess and to act on this desire that conflicts with her second-order volition.

But this analysis assumes that S has a continuing second-order volition that is inconsistent with confessing. Part of this assumption is that the sum total of P's influence is to cause S to have a first-order desire to confess. Perhaps P also causes S to change her second-order volition.<sup>152</sup> If that is true, S has not been coerced.<sup>153</sup> Another part of our assumption is that S began the interrogation with a second-order volition not to be moved by P's actions. While this is a plausible presumption under the facts of the hypothetical, it remains a presumption.<sup>154</sup> And, as Professor Dripps has noted, if one presumes that all suspects want to not answer questions, any police-induced confessions must be compelled.<sup>155</sup> Although Dripps offers this observation as evidence of why one should not make such a presumption, his conclusion is open to question.

Consider an interrogation in which P says nothing about the evidence against S and makes no mention of leniency; instead, P engages in questioning S about her whereabouts, and S confesses two hours into the interrogation. Again, S's failure to confess earlier suggests that she wanted her will to be not to want to answer P's questions. And the interrogation is a powerful influence on the

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<sup>152</sup> Even though a second-order volition is a relatively permanent part of the human personality, it can, of course, change. An addict, for example, might change his second-order volition toward taking the drug after a particularly bad experience. Several readers pressed us on this point, but Harry Frankfurt made the most persuasive case. Letter from Harry Frankfurt to authors (March 6, 1991) (on file with editors of *J. CRIM. L. & CRIMINOLOGY*).

<sup>153</sup> Of course, one might prefer a system in which P is not permitted to cause S to change her second-order volition. See *infra* notes 183-88 and accompanying text.

<sup>154</sup> Grano makes the same presumption for his "reasonable person" against whom coercion is measured. See Grano, *supra* note 12 at 905-06.

<sup>155</sup> See Dripps, *supra* note 14, at 710 ("[W]hat 'person of ordinary firmness' 'strongly preferring not to confess' would do so unless he found the 'interrogation pressures overbearing?'). See also Y. KAMISAR, *supra* note 14, at 159-60.



mind of S that is proximate in time and place to the confession.<sup>156</sup> Because human instinct is to avoid serious harm to self,<sup>157</sup> and because P has physical control over S, it seems fair to conclude that S's confession is against her second-order volition.

The situation is altogether different, of course, if S approached the police and volunteered a statement. In that situation, no external forces are acting on S, and her conduct must manifest her second-order volition.<sup>158</sup> This, then, brings us to the hard case posed by Justice White in his *Miranda* dissent: S is under arrest and confesses after P first asks, "Do you have anything to say?"<sup>159</sup> What kind of presumption concerning S's second-order volition should we make in this situation? If the answer is that we should presume that she wanted her will to be to want to answer P's question, what if the police asked ten questions first? Fifty? Five hundred?

It is clear that the second-order volition account of coercion offers no window into the actual will of a suspect. What it does offer, however, is a coherent explanation of *Miranda*'s approach to custodial police interrogation.<sup>160</sup>

### III. *MIRANDA*'S IDEOLOGY

We noted earlier three rationales that could support a prohibition of compelled self-incrimination. Wigmore's view that compulsion entails P displacing (virtually) all of S's will led to a reliability test for compulsion, a narrow view of fifth amendment coercion inconsistent with its historic courtroom application. The concern with the fairness of police techniques produced normative tests for ascertaining coercion, tests that often focus entirely on P's conduct rather than S's will and, in any event, offer few standards beyond the subjective impression of an observer. The choice rationale, by contrast, privileges S's second-order volition not to want her will to be to

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<sup>156</sup> See Dripps, *supra* note 14, at 710 (noting "that police manipulation" is always the "but for" cause of confessions that are not "spontaneously rendered").

<sup>157</sup> Even Fred Inbau, a foe of *Miranda*-type restrictions, concedes this much. See Inbau, *Police Interrogation: A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 17 (1961) (noting that "human beings ordinarily do not utter unsolicited, spontaneous confessions. They must first be questioned regarding the offense.").

<sup>158</sup> This is, in essence, what the Court held in *Colorado v. Connelly*, 479 U.S. 157 (1986), discussed *supra* notes 83-102.

<sup>159</sup> *Miranda v. Arizona*, 384 U.S. at 533 (White, J. dissenting).

<sup>160</sup> In this paper, we discuss only application of the second-order volition account to police interrogation; thus, we express no opinion about other applications—for example, the plea bargaining cases. See Dripps, *supra* note \*\*, at 347 (discussing choice protection and plea bargaining).

want to answer questions that might harm her. This ideology produced *Miranda*.

*Miranda* was no revolution in self-incrimination theory. Justice Frankfurter had developed an "overbear the will" test a few years prior to *Miranda*.<sup>161</sup> In explaining this test, he wrote that, "The line of distinction is that at which the governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."<sup>162</sup> Frankfurter's focus on the loss of "governing self-direction" by means of police interrogation is consistent with a definition of compulsion as causing S to act in a way that is contrary to her second-order volition. Thus, Frankfurter's "overbear the will" test, while not successful as a practical solution to the compulsion problem,<sup>163</sup> paved the way for the *Miranda* solution.

What does a court do when faced with real cases that must be decided and with a definition of compulsion that depends on the unknowable—the will (or second-order volition) of the suspect? The answer is that courts create presumptions about the unknowable. One way to read *Miranda* is that the Court created the presumption that S's second-order volition, when faced with police interrogation, is a continuing volition to want her will to be not to want to answer questions that might incriminate her. But the Court's presumption is rebuttable; if S understands that she need not answer questions and the consequences of answering—information provided by the required warnings<sup>164</sup>—one could then presume that if S answers, she wanted (or now wants) her will to be to want to answer.<sup>165</sup>

<sup>161</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961).

<sup>162</sup> *Id.* at 602 (emphasis added).

<sup>163</sup> In Frankfurter's most ambitious attempt to define his "overbear the will" test, his opinion for the Court attracted only Justice Stewart's vote. See *id.* at 568. Four members of the Court concurred by noting that the case was simpler than Frankfurter implied. See *id.* at 637 (Douglas, J., concurring in the judgment) (joined by Black, J.); *id.* at 640-41 (Brennan, J., concurring in the result) (joined by Warren, C.J., & Black, J.). Joseph Grano has tried to improve Frankfurter's test by making it objective rather than subjective; Grano asks whether persons of "ordinary firmness . . . would find the interrogation pressures overbearing." See Grano, *supra* note 12, at 906. But this does not solve the essential problem of how to define "overbearing" pressures.

<sup>164</sup> For content of the warnings, see *supra* note 47.

<sup>165</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444; Y. KAMISAR, *supra* note 14, at 88 (*Miranda* did not try to "kill confessions"); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 71 (1966) ("minimum condition for the exercise of autonomous choice is to tell the suspect that he has a choice, that there is no legal obligation to talk"); Schrock, Welsh, & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 53 (1978) (silence notification is "necessary condition to free and rational choice").

*Miranda* is normally read to create a legal presumption that all confessions made to police interrogators in the absence of warnings are coerced.<sup>166</sup> Our reading is that it indulges a presumption about S's second-order volition and then creates a mechanism—the warnings—by which the presumption can be rebutted. This may seem like a small difference but it minimizes Joseph Grano's powerful critique of *Miranda*. Grano has argued that the Supreme Court lacks the power to force state courts to apply *Miranda* because it is an overinclusive legal presumption; if there is no coercion in a particular interrogation, the argument goes, the Supreme Court cannot force a state court to reach the legal conclusion that coercion did occur.<sup>167</sup>

But a presumption about second-order volition is not a legal conclusion. It is, instead, a presumption about a fact that can never be known. This kind of presumption is inevitable if the self-incrimination clause is to be kept separate from due process fairness—without some mechanism for courts to be able to determine when P displaces S's will it is meaningless to talk about compelled self-incrimination. Assumptions ultimately must be made either about S's will or about the legal consequences of what P does. Grano understands *Miranda* to make the latter assumption, but it is possible that the Court made the former.

Our reading of *Miranda* also makes its "waiver" aspect more satisfying. Some have criticized *Miranda* for creating a legal presumption that police interrogation is inherently coercive and yet permitting uncounseled suspects to waive the *Miranda* rights in response to a police request.<sup>168</sup> Under our view of *Miranda*, there is no inconsistency. When S answers questions after receiving warnings, she is not "waiving" anything;<sup>169</sup> rather, the warnings assure that she is acting in accordance with her second-order volition; thus, her response is not compelled.

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<sup>166</sup> See Schulhofer, *supra* note 119, at 446-53 (approving presumption); Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 42 (1979) (noting "legally dubious underpinnings" of *Miranda*'s "inherent compulsion rationale"); Markman, *supra* note 23, at 215 (characterizing the *Miranda* presumption of coercion as "simply a fiction").

<sup>167</sup> See Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985).

<sup>168</sup> See, e.g., *Miranda*, 384 U.S. at 536 (White, J., dissenting) (asking "how can the Court ever accept [S's] negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?"); Burt, *Loving Big Brother: Comments on Seidman, Police Interrogation, and the Fifth Amendment*, 2 YALE J.L. & HUMANITIES 181, 187-88 (1990).

<sup>169</sup> Indeed, how could one ever "waive" the right not to be compelled? See Benner, *supra* note 46, at 153 n.416.

Action that is in accord with second-order volition is not compelled even when inherently coercive forces are present. To use one of Frankfurt's examples, a pilot who complies with a hijacker's demand to fly to Cuba may, in fact, fly to Cuba because he wants to see his mistress rather than to avoid being shot. If that is true, Frankfurt concludes that the pilot acts freely.<sup>170</sup> Similarly, S acts freely while in police custody if the reason he talks to the police is that his second-order volition is not inconsistent with wanting to want to talk to them.<sup>171</sup>

*Miranda's* strength is that it returned the focus to what necessarily must be at the heart of a compulsion inquiry—the will of the suspect. It rejected both the reliability of the confession and due process fairness as tests of coercion. *Miranda* is thus the natural outgrowth of the 1897 *Bram* focus on the suspect's choice to confess. Indeed, the *Bram* choice ideology began to appear in the due process cases prior to *Miranda*;<sup>172</sup> this is significant because a guarantee of due process does not inevitably entail free choice. That the *Bram* ideology survived Wigmore's attack and manifested itself in the due process cases suggests that its free choice "principle captures important underlying values which the 'reliability' and [fairness] tests do not . . ." <sup>173</sup>

To conclude that *Miranda* is consistent with second-order volition ideology is not, of course, to conclude that it was correctly decided. The empirical evidence, while sketchy and sometimes based on questionable methodology,<sup>174</sup> suggests only a slight decrease in

<sup>170</sup> See H. FRANKFURT, *supra* note 18, at 52.

<sup>171</sup> This would be true even if S is legally incompetent to stand trial. S can want his volition to be to want to confess regardless of his competency. Thus, under this account of coercion, Connelly could waive his *Miranda* rights and freely confess as long as he understood that he did not have to talk. *Colorado v. Connelly*, 479 U.S. 157, 161-62 (1986). *Contra id.* at 172-75 (Stevens, J., concurring in part and dissenting in part).

<sup>172</sup> See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (noting suspect's right to a "freely self-determined" confession); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (test is whether suspect retained "mental freedom" to decide whether to confess).

<sup>173</sup> See A. WERTHEIMER, *supra* note 78, at 120-21. See also Van Kessel, *supra* note 14, at 17-19 (noting English courts' similar substitution of "free will" test for reliability test). This is precisely how an ideology maintains itself—by influencing the thinking at a level of unquestioned assumption. If one begins with the premise that second-order volition must be respected, then the "mental freedom" focus of the due process cases, is an inevitable result. But it would not be so for Wigmore.

<sup>174</sup> One problem for the time studies that measure the confessions rate before and after *Miranda* is the small size of the sample of suspects who were given substantially complete *Miranda* warnings. Moreover, most studies measured *Miranda's* impact by interviewing the group of interrogated suspects and categorizing their responses. These studies require us to assume the accuracy of the information provided the researcher and the accuracy of the categorization. Other studies assume that the police gave effective warnings in all cases. When coupled with a small sample size, any of these method-

confessions in the wake of *Miranda*.<sup>175</sup> Indeed, one of the peculiarities of the debate over *Miranda* is that its proponents often argue that the effect on confessions is minimal and thus that it is not very costly.<sup>176</sup> While this argument might be "good politics" in the sense that it makes *Miranda* easier for the Wigmoreans to swallow, it threatens to make *Miranda* internally incoherent. If suspects do not have a second order volition that is inconsistent with answering questions during custodial interrogation, then *Miranda*'s warnings are unnecessary. But if interrogation-room confessions are inconsistent with the second-order volition of many suspects, then a "solution" to this choice denial that fails to produce different choices is to be decried rather than extolled.<sup>177</sup>

A second-order volition account facilitates understanding why *Miranda* might be ineffective. Empirical evidence suggests that some suspects do not understand the warnings;<sup>178</sup> in that case, the presumption that they want their will to be not to want to answer is not rebutted. This implies a defect in the remedy that could be cured by clarifying or expanding the warnings.<sup>179</sup> Similarly, it may

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ological problems is quite serious. See Griffiths & Ayres, *supra* note 148 (22 suspects); Leiken, *supra* note 99 (50 suspects); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968) (26 suspects); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967) (75 in one sample and 173 in another); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1550-51 (1967) [hereinafter Project, *Interrogations*] (50 suspects).

<sup>175</sup> See Driver, *supra* note 97, at 60-61 (drawing conclusion of ineffectiveness from two empirical studies); Leiken, *supra* note 99, at 47 (concluding that "the impact of *Miranda* . . . seems to have been effectively neutralized"); Medalie, Zeitz & Alexander, *supra* note 174, at 1373 (showing almost identical percentage of statements pre- and post-*Miranda*); Seeburger & Wettick, *supra* note 174, at 12 & 13 (declines of 16% and 21% in confession rate); Project, *Interrogations*, *supra* note 174, at 1565 (warned suspects in sample confessed more frequently than unwarned suspects).

<sup>176</sup> See, e.g., Schulhofer, *supra* note 166, at 455-60 (noting, *id.* at 460, the "irony" in making this argument on behalf of *Miranda*).

<sup>177</sup> The *Miranda* dissents darkly predicted that many suspects would exercise the choice given them by the warnings. See *Miranda v. Arizona*, 384 U.S. 436, 505 (Harlan, J., dissenting); *id.* at 542 (White, J., dissenting). See also 1957 HOUSE COMMITTEE HEARINGS 37 (statement of Police Chief Murray) (if a suspect is warned, "I don't think he is going to tell us very much"). Some continue to believe that effective *Miranda* warnings would mean an end to confessions. See Grano, *supra* note 12 at 914 ("The most sophisticated defendant, aware of his prerogatives and capable of assessing accurately the benefits and costs of his choices, obviously will choose not to confess.").

<sup>178</sup> See Leiken, *supra* note 99, at 14-16 (although all suspects read or were read the rights warnings, 45% thought that an oral statement could not be used against them in court, and 7% thought that a suspect "must tell the police everything about the alleged offense and answer all of their questions").

<sup>179</sup> Far from expanding the warnings, the Rehnquist Court seems prepared to weaken them. See *Duckworth v. Egan*, 492 U.S. 195 (1989) (upholding warnings that can be read as promising advice of counsel only if the accused goes to court).

be that suspects do not benefit from the information contained in the warnings because the police deliver them in an ineffective manner or because police are perceived as adversaries who will not honor the promises in the warnings.<sup>180</sup> The requirement that police give the warnings has been justifiably criticized because the interests of the police are always contrary to S's second order volition not to want her will to be to want to answer.<sup>181</sup> If this somewhat quirky aspect of *Miranda* can be empirically demonstrated to be a substantial factor in causing suspects to ignore the warnings, it would require a solution because the original problem would have been recreated—ineffective warnings would not rebut the *Miranda* second-order volition presumption.

It remains true, we believe, that some presumption must be made about the will of a suspect who is undergoing interrogation. *Miranda* made one kind of presumption, but the opposite presumption could be made—that suspects have (or easily acquire) a second-order volition to want their will to be to want to answer questions. This volition might be part of a more general will to want to tell the truth. Or it could be that suspects typically ignore *Miranda* warnings because they believe they can outsmart the police interrogator;<sup>182</sup> in these cases, S's second-order volition is to want her will to be to want to provide answers, albeit not to confess, and the act of answering questions is not compelled. If these categories encompass most suspects, S's response to non-abusive interrogation could manifest a second-order volition to want her will to be to want to answer questions. We could then agree with Wigmore that almost all responses to police interrogation are freely given.

On the other hand, the fundamental problem may be that *Miranda* did not go far enough, that the flaw lies in its choice ideology assumption that S has (or is capable of acting on) a preference about answering questions.<sup>183</sup> Indeed, suspects may have a fixed third-or-

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<sup>180</sup> See Ellis, *supra* note 66, at 856; Medalie, Zeitz & Alexander, *supra* note 174, at 1374; Rosenberg & Rosenberg, *supra* note 40, at 959; Project, *Interrogations*, *supra* note 174, at 1571-72.

<sup>181</sup> See, e.g. Driver, *supra* note 97, at 59-61 (arguing that the warnings may even encourage confessions); Griffiths & Ayres, *supra* note 148, at 309-10 (observing that *Miranda* may "require a capacity for schizophrenia as a qualification for the job [of police interrogator]").

<sup>182</sup> A classic example of this attitude is given in Medalie, Zeitz & Alexander, *supra* note 174, at 1378: "I wouldn't want a lawyer [in the interrogation room]. That's the *worst* place to have a lawyer because the police play it straight then. I *wanted* them to make a mistake." (Emphasis in original.)

<sup>183</sup> Compare Medalie, Zeitz and Alexander, *supra* note 174 at 1370 (*Miranda* presupposes that humans will act in their own self-interest as John Stuart Mill posited) with Dix, *supra* note 16, at 237 (concluding that "the Court's approach in *Miranda* was seriously,

der volition that overcomes any second-order volition not to want to want to answer questions.<sup>184</sup> For example, suspects may answer because silence is “highly dysfunctional for a person in an ambiguous situation such as that presented by arrest.”<sup>185</sup> Police, after all, represent authority, and most suspects may be incapable of defying authority regardless of their volition about answering questions.<sup>186</sup> If the typical suspect does not have or cannot act on a volition to not want to want to answer, it is incoherent to talk about choice denial in police interrogation. Instead, we must talk about the normative question of whether police should be permitted to create second-order volition or capitalize on third-order volition that leads to confessions. This is not a coercion inquiry at all if coercion is understood to mean the displacing of S’s will.<sup>187</sup>

One could conclude that police “preference creations” are wrong under a due process fairness rubric or even under an expanded, normative theory of coercion.<sup>188</sup> If easily-manipulated suspects are to be protected from police “preference creations,” the interrogation environment would have to be radically changed. It would not be enough to facilitate exercise of the suspect’s volition—as *Miranda* sought to do—for this ideological position presupposes that suspects are manipulated into having a volition consistent with confessing. If this position is accepted, and a remedy thought necessary, courts could require the presence of counsel during police interrogation or simply forbid the introduction of any statement obtained by the police through interrogation.

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perhaps fundamentally, flawed” because “the Court did not foresee that suspects would fail to cooperate in its attempt to bring lawyers into the interrogation process”). See also Griffith & Ayres, *supra* note 148, at 318-19 (concluding that the warnings are “only a palliative” that are “an unhappy way-station and decidedly inadequate as a journey’s end”).

<sup>184</sup> H. FRANKFURT, *supra* note 18, at 21 (“a person may have, especially if his second-order desires are in conflict, desires and volitions of a higher order than the second”).

<sup>185</sup> Driver, *supra* note 97, at 57. See also Jayne, *The Psychological Principles of Criminal Interrogation*, in F. INBAU, J. REID & J. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS*, 327, 332-45 (3d ed. 1986) (describing unconscious internal anxiety created by denial of guilt in the face of police interrogation).

<sup>186</sup> Burt, *supra* note 168, at 187 (noting “intricate blend of dominance and nurturance” that “stacks the deck toward ‘willing’ (though often ‘resentful’) submission”); Driver, *supra* note 97, at 44 & 59-61 (1968) (noting environmental control of interrogators and lack of self-confidence and self-assertiveness of typical suspect); Griffiths & Ayres, *supra* note 148, at 315-16 (describing middle-class susceptibility to psychological pressure to answer questions to avoid being perceived as “uncooperative” or “rude” and noting that *Miranda* “states legal, not social, rules”); Leiken, *supra* note 99, at 21 (concluding that “a large part of our decisionmaking” is controlled by factors over which we lack rational control).

<sup>187</sup> See A. WERTHEIMER, *supra* note 78, at 287-90.

<sup>188</sup> *Id.*

Thus, *Miranda* is vulnerable from both sides of the ideological spectrum. Suspects may have preferences regarding interrogation that are contrary to the *Miranda* presumption, reinstating Wigmore's ideology. Or suspects may lack the ability to act on preferences that the warnings seek to create or maintain, thus rendering the warnings ineffective. Because the available, albeit problematic, empirical evidence suggests little effect from *Miranda*, it is important to obtain more satisfactory evidence to determine why it has been ineffective. In the meantime, *Miranda* stands as a shining (if somewhat empirically fragile) testimonial to the right to make a choice about self-condemnation.<sup>189</sup>

#### IV. CONCLUSION

The self-incrimination clause is premised on a model of human conduct that views us as free will actors with fixed, pre-existing preferences—actors capable of exercising choice in the absence of coercion. Thus, it provides a defendant the right to choose whether to take the witness stand in his criminal case. But the right is broader than that, for it also forbids the use of out-of-court statements when the choice to speak was sufficiently constrained. How to find that point is susceptible to no precise solution, as Aristotle's analysis of voluntary conduct implies.

We have argued that Frankfurt's second-order volition account of coercion explains *Miranda* and that this is a plausible account of compulsion in the context of police interrogation. Wigmore's narrow view of compulsion is also plausible, as are the explicitly normative accounts of coercion. However, two reasons exist to prefer *Miranda*'s solution. First, the normative tests provide less specific guidance for evaluating confessions than *Miranda* because they depend on identifying standards of moral conduct in the often morally ambiguous enterprise of solving crime. Second, if the *Miranda* ideology is even barely plausible, if it is possible that custodial police interrogation routinely causes a suspect to confess when that is inconsistent with her highest-order volition, the universe of all statements produced by irresistible pressure (as Wigmore defined it) could be much smaller than the universe of coerced statements. Thus, to adopt the Wigmore ideology would be to risk admitting many coerced statements. Adherence to the *Miranda* ideology, in sum, makes it less likely that courts would inadvertently admit coerced statements under a vague normative test or a narrow Wig-

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<sup>189</sup> See Rosenberg & Rosenberg, *supra* note 40, at 1045 ("*Miranda*, whatever its original imperfections, was intended to be the guarantor of free choice").



more test.<sup>190</sup>

The *Miranda* ideology seeks a broad protection from external influences that cause suspects to act contrary to their second-order volition in the interrogation room. Whether its underlying presumption about the second-order volition of suspects can be maintained in the face of the empirical evidence of *Miranda*'s ineffectiveness is a question yet to be answered.

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<sup>190</sup> See *Bram v. United States*, 168 U.S. 532, 565 (1897) (noting that "any doubt as to whether the confession was voluntary must be determined in favor of the accused"); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 135-36 (noting that difficulty of proving coercion requires a rule that prevents inadvertent admission of involuntary confessions).