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Recommended Citation

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CONFESSING IN THE HUMAN VOICE: A DEFENSE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

by Andrew E. Taslitz*

I. Introduction

A. *Miranda's Crumbling Foundations*

*Miranda v. Arizona*¹ famously mandates that those subjected to custodial interrogation be entitled to counsel during that process and be warned of that right and of their right “to silence.” Custodial interrogation can proceed absent compliance with these mandates only if the suspect knowingly, voluntarily, and intelligently waives his rights.² To the surprise of many commentators, the United States Supreme Court recently reaffirmed *Miranda's* constitutional status in *Dickerson v. United States*.³

Yet this supposed civil libertarian victory in *Dickerson* was a pyrrhic one. The *Dickerson* Court's reaffirming *Miranda* rested largely on stare decisis, for *Miranda* had “become embedded in routine police practice to the point where the warnings have become part of our national culture.”⁴ Yet the Court offered no serious defense of *Miranda's* inherent wisdom as a constitutional rule, indeed arguably expressing some skepticism about that wisdom, or at least pointedly steering clear of defending it. Thus, said the Court, “Whether or not we agree with

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¹ 384 U.S. 486 (1966).

² See generally ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 734-37 (3d ed. 2007) (explaining *Miranda's* waiver rule).

³ 530 U.S. 428 (2000); see TASLITZ, PARIS, & HERBERT, *supra* note 2, at 703-07 (analyzing commentators' pre-and-post-*Dickerson* theories concerning *Miranda's* viability and meaning).

⁴ 530 U.S. at 443.

Miranda's reasoning and the resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."⁵

This failure to offer a reasoned defense of *Miranda*'s constitutional logic as a matter of principle still left a cloud over *Miranda*'s legitimacy, for the Court simply failed to confront the withering and growing criticism of the case.⁶ Critics, mostly on the right of the political spectrum, have long challenged whether *Miranda* could be rooted in the Fifth Amendment's privilege against self-incrimination - - *Miranda*'s purported constitutional home - - under any acceptable theory of "legal" interpretation.⁷ These critics further questioned whether *Miranda*'s costs, in terms of suppressed confessions and lost convictions of the guilty, justified its marginal or non-existent benefits in deterring abusive police interrogations.⁸ Moreover, maintained critics across the political spectrum, there were better ways to regulate police abuses than *Miranda*, for example, by requiring the videotaping of the entire custodial interrogation process, from start to finish.⁹ Other critics, mostly on the left, maintained that *Miranda* never served as an adequate deterrent because police readily obtained "waivers" or otherwise circumvented the *Miranda* rule.¹⁰ Likewise, complained this last group of critics, *Miranda* governed only whether

⁵ *Id.* at.

⁶ See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW U.L. REV. 387 (1996) [hereinafter *Social Costs*] (arguing that *Miranda* results in the acquittal of too many serious felons for little benefit); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW U.L. REV. 1084 (1996) [hereinafter *Grand Illusion*] (responding to critics of Cassell's position); JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993) (book-length critique of *Miranda* as lacking a defensible constitutional foundation). *But see* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOL. 266 (1996) (disputing the claim that *Miranda* has lowered the confession rate); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOL. 621 (1996) (arguing that *Miranda* has had a profoundly positive impact on professionalizing police practices and educating the public about constitutional rights).

⁷ See GRANO, *supra* note 6, at 119-98.

⁸ See Cassell, *Social Costs*, *supra* note 6; Cassell, *Grand Illusion*, *supra* note 6.

⁹ See, e.g., William A. Geller, *Videotaping Interrogations and Confessions*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 303, 303-13 (Richard L. Leo & George Thomas, III, ed.s 1998) (positive view of videotaping by the then-Executive Director of the Police Executive Research Forum); Cassell, *Social Costs*, *supra* note 6, at 486-89 (arguing for replacing *Miranda* with videotaping).

¹⁰ See WELSH WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 76-107 (2001) (summarizing these police tactics).

questioning could occur, not *how* it could be done, opening the door to police tactics risking false confessions or violations of human dignity.¹¹ Those tactics, the commentators insisted, could not be remedied by other constitutional provisions, for the only other ones relevant, the due process clauses, were almost always automatically found met when *Miranda* was met as well.¹²

Whatever protection *Miranda* did provide, the Court has long been narrowing its scope, finding it inapplicable in a wide range of contexts, its waiver easy, “minor” deviations from its rule found unworthy of remedy, and suppression of fruits (such as physical evidence or witnesses) discovered from its violation unlikely.¹³ Concerns about whether *Miranda* continued to be seen by the Court as constitutionally-based were further fed by the Court’s repeated assertions that *Miranda* was a mere judicially-created “prophylactic rule,” an “exclusionary rule...[that] serves the Fifth Amendment...[but] sweeps more broadly than the Fifth Amendment itself.”¹⁴ To violate *Miranda* was thus not to violate true or “core” Fifth Amendment rights.¹⁵

Perhaps because of its lack of confidence that it could articulate a principled justification for the *Miranda* rule, the post-*Dickerson* Court continued *Miranda*’s erosion. The Court still described *Miranda* as a mere “prophylactic rule” entitled to less protection than the “core” Fifth Amendment privilege¹⁶ - - a position hard to give any determinate meaning if, as *Dickerson* concluded, *Miranda* is a constitutional rule like any other.

¹¹ See *id.* at 118-59 (analyzing *Miranda*’s failures).

¹² See *id.* at 122 (“[R]ecent decisions suggest that when the police comply with *Miranda*, it is, in fact, very difficult for a defendant to establish that the confession following the *Miranda* waiver was involuntary). White argued persuasively, however, that a more muscular interpretation of due process could do much good. See Andrew E. Taslitz, *Book Review, Miranda’s Waning Protections: Police Interrogation Practices after Dickerson*, 17 CRIM. JUST. 57 (2002) (analyzing this aspect of White’s approach).

¹³ See TASLITZ, PARIS, & HERBERT, *supra* note 2, at 716-55 (summarizing and analyzing the relevant case law on these points).

¹⁴ *Oregon v. Elstad*, 470 U.S. 298, 308-09 (1985).

¹⁵ See, e.g., TASLITZ, PARIS & HERBERT, *supra* note 2, at 745 (arguing for this reading of the Court’s recent case law).

¹⁶ Thus, in *United States v. Patane*, 542 U.S. 630 (2004), the Court held that physical evidence obtained as a result of a *Miranda*-violative unwarned confession was nevertheless admissible. Justice Thomas, writing for a three Justice plurality, including Chief Justice Rehnquist and Justice Scalia, declared that the “core protection afforded by the

Additionally the Court has held with force and clarity that physical fruits of *Miranda*-violative confessions need not be suppressed;¹⁷ that confessions that are the fruits of earlier unwarned ones may at best only *sometimes* be suppressed;¹⁸ and that *Miranda* violations not resulting in criminal charges merit no civil damages awards because *Miranda* and the core Fifth Amendment privilege are violated solely by the admission of an unwarned confession *at trial* rather than by questioning made during the interrogation itself.¹⁹ The Court now faces further pressure to cut back on *Miranda* in a political climate in which such constitutional rights are viewed as unaffordable luxuries that may cost lives in the war on terrorism.²⁰

B. The “Core” Privilege’s Non-Existent Foundations

Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.” *Id.* at 642 (plurality opinion of Thomas, J.). This core protection “cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements.” *Id.* Moreover, “a mere failure to give *Miranda* warnings does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule” because violations of the right and the rule take place only when unwarned statements are admitted at trial. Furthermore, “because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrent effect on law enforcement” because there is nothing to deter. *Id.* Although the remaining two justices who supported the Court’s judgment - - Justices Kennedy and O’Connor - - urged narrower grounds for decision, pointedly choosing not to decide whether there was indeed “nothing to deter,” they urged reliance on grounds similar to those in *Elstad*, thus implicitly accepting that latter case’s distinction between “core” Fifth Amendment protections and “prophylactic” ones like *Miranda*. *See Patane*, 542 U.S. at 645 (Kennedy, J., concurring).

¹⁷ *See Patane*, 542 U.S. 630.

¹⁸ *See Missouri v. Seibert*, 542 U.S. 600 (2004). There was no clear majority rationale in *Seibert*. Although the Court ultimately suppressed a second properly *Mirandized* confession after the police first intentionally obtained an earlier un-*Mirandized* confession, Justice Souter, writing for a four Justice plurality, articulated a multi-factor test under which a “question first and warn later” interrogation tactic might be lawful in a particular case. *See id.* at 604, 606, 611-15 (Souter, J., plurality opinion). One member of the plurality, Justice Breyer, wrote separately to urge a “good faith” of the police test. *See id.* at 617-18 (Breyer, J.). Justice Kennedy’s concurring opinion provided the fifth vote, suggesting something closer to per se exclusion of a confession that is the fruit of an *intentional* effort to circumvent *Miranda*. *See id.* at 622 (Kennedy, J., concurring). All five Justices comprising a majority of votes for the case’s outcome thus recognized that under certain circumstances a later confession that is the fruit of an earlier unwarned one will *not* be suppressed. In a dissent written on behalf of herself and three other Justices, Justice O’Connor again embraced *Elstad*, concluding, therefore, that the fruit-of-the-poisonous-tree rule never applies to *Miranda*. Accordingly, the dissenters would *never* suppress a second confession that is the fruit of even an intentionally *Miranda*-violative first confession. *See id.* at 622, 622-28 (O’Connor, J., dissenting).

¹⁹ *See Chavez v. Martinez*, 538 U.S. 760 (2003).

²⁰ *See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 183-216 (2007) (arguing for legalizing but regulating “coercive interrogation,” involving torture or cruel, inhuman, and degrading treatment, as necessary in the war on terror).

Yet the Court's ever-reducing zeal for *Miranda* may be rooted not merely in doubts about *Miranda*'s logic but also in doubts about the wisdom of the constitutional privilege against self-incrimination itself, upon which *Miranda* seemingly shakily rests.²¹ The Court's attitude arguably is that it is stuck with the privilege because it is, after all, in the Bill of Rights, but there is no reason to magnify that regrettable error by giving the privilege an unduly broad meaning.²² Still less is there reason to keep vibrant a "prophylactic rule" like *Miranda*, a hole-riddled fence meant to safeguard a decaying, archaic constitutional property.²³ To be sure, the Court does praise the privilege in grandiloquent but ultimately empty phrases, applauding its opposition to the "cruel trilemma" of self-accusation, perjury, or contempt;²⁴ its role in promoting a sense of fair play, a fair individual-state balance,²⁵ and an "accusatorial rather than inquisitorial system of

²¹ See TASILTZ, PARIS, & HERBERT, *supra* note 2, at 696-703 (discussing *Miranda*'s roots in the Fifth Amendment privilege).

²² See *id.* at 716-55 (summarizing the Court's frequently state-protective interpretation of *Miranda*), 801-48 (summarizing the Court's frequently state-protective interpretation of the "core" Fifth Amendment privilege). Justice Scalia, in a 1990 case, albeit then in dissent, may have captured the Court's implicit reasons for its frequent reluctance to give the privilege a backbone:

[I]t is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a mistake. While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, admission of guilt, if not coerced, is inherently desirable because it advances the goals of both justice and rehabilitation.... We should, then, rejoice at the "poor fool" who has made [an honest confession]; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience,

Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting). Note that I have said that the Court "frequently," not always, sides with the state on privilege issues. There are important exceptions, most notably, *United States v. Hubbell*, 530 U. S. 27 (2000), which made it difficult for prosecutors seeking to subpoena records from a suspect to do so without first granting him use and derivative sue immunity against the act of producing the documents or their contents being used against him at trial. See, e.g., Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487 (2002) (analyzing thoroughly *Hubbell*'s implications for subpoena practice); Sara Sun Beale and James Felman, *The Fifth Amendment and the Grand Jury*, 22 CRIM. JUST. 4, 5-6 5-6 (2007) (analyzing implications of *Hubbell* and its progeny).

²³ See *supra* text accompanying notes 13-16.

²⁴ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

²⁵ *Id.*

criminal justice”;²⁶ and its protection of the innocent and “respect for the human personality and of the right of each individual to a private enclave where he may lead a private life. . . .”²⁷ These noble-sounding phrases appear less often in the Court’s most recent privilege jurisprudence.²⁸

1. *Hiibel’s Halted Hopes*

Indeed, the Court has in several recent instances given the core privilege short shrift in the face of sometimes minimally countervailing state need. For example, in *Hiibel v. Sixth Judicial District Court of Nevada*,²⁹ an officer responding to a tip asked a man on the scene for identification. After the officer eleven times requested that man, later identified as Larry Dudley Hiibel, to identify himself, the officer threatened to arrest Hiibel if he still refused to answer. When Hiibel did so refuse, the officer arrested him for obstructing a public officer’s discharge of his duties. The officer relied on a statute requiring persons detained by an officer on reasonable suspicion of crime to identify themselves. The Court affirmed Hiibel’s later conviction, describing the required revelation of his name as “so insignificant in the scheme of things as to be incriminating only in unusual circumstances”³⁰ and deriding Hiibel’s refusal to answer as done simply “because he thought his name was none of the officer’s business.”³¹

Justice Stevens dissented. First, he concluded that Hiibel’s revelation of his name was “testimonial,” for a “testimonial communication” is “the extortion of information from the

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 24 J. CRIM. L. & CRIMINOLOGY 243, 246 (2004) (“Although discussion of abstract values can still be found occasionally in its opinions, the Supreme Court has shifted to a formal approach to the Fifth Amendment.”); Lance Cole, *The Fifth Amendment and Compelled Production of Documents After United States v. Hubbell - - New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 142-43 (2002) (concluding that, in *Fisher v. United States*, 425 U.S. 391, 396-97 (1976), the Court “rejected both property rights and personal privacy as rationales for protection against self-incrimination; instead, it looked to the text of the Fifth Amendment and focused on the compulsion of ‘testimonial’ communications as the touchstone for self-incrimination analysis.”).

²⁹ 542 U.S. 177 (2004).

³⁰ *Id.* at 191.

³¹ *Id.*

accused, the attempt to force him ‘to disclose the contents of his own mind.’”³² The direct questioning by the officer pursuant to threats of arrest, argued Stevens, was also compulsion.³³

Nor would Justice Stevens accept the majority’s core argument that Hiibel’s compelled disclosure of his name would not have been “incriminating,” for, in Stevens’ view, one’s name can readily provide the necessary link to inculpatory evidence:

The Court reasons that we should not assume that the disclosure of petitioner’s name would be used to incriminate him or that it would furnish a link in a chain of evidence needed to prosecute him. . . . But why else would an officer ask for it? And why else would the Nevada Legislature require its disclosure only when circumstances “reasonably indicate that the person has committed, is committing, or is about to commit a crime?” If the Court is correct, then petitioner’s refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate for the Court’s holding, the statute requires nothing more than a useless invasion of privacy. I think that, on the contrary, the Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and that the very existence of the statute demonstrates the value of the information it demands. . . .

A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person’s identity provides a link in the chain to incriminating evidence “only in unusual circumstances.”³⁴

Remember that Hiibel had been stopped because the officer claimed, based upon a tip, to have “reasonable suspicion” that Hiibel was involved in a crime. Under *Terry v. Ohio*,³⁵ the Fourth Amendment permits such reasonable suspicion stops, so long as they are brief, relatively unintrusive, and involve an effort to question a suspect to confirm or dispel the officer’s suspicion, questions that Justice White, in his *Terry* concurrence, importantly said, the suspect

³² *Id.* at 191, 194 (Stevens, J., dissenting) (quoting *Doe v. United States*, 487 U.S. 201, 211 (1988)).

³³ *See id.* at 194-95.

³⁴ *Id.* at 195-96.

³⁵ 392 U.S. 1 (1968).

was “not obliged to answer . . .”³⁶ Justice Breyer,³⁷ joined by Justices Souter and Ginsburg in dissent in *Hiibel*, insisted that this final quoted language from *White*’s concurrence in *Terry* was part of what made a brief stop so unintrusive that it would be justified on mere reasonable suspicion rather than probable cause. Indeed, in Breyer’s view, this understanding of *Terry* was longstanding, having been restated in *Berkemer v. McCarty*,³⁸ where the full Court declared that “an officer may ask the [*Terry*] detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer’s suspicions. *But the detainee is not obliged to respond.*”³⁹ Even more recently, noted Breyer, the Court in *Illinois v. Wardlow*⁴⁰ had explained that allowing officers to stop and question a fleeing person is “quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.”⁴¹ The majority’s cavalier denial of Fifth Amendment protections to *Hiibel*, therefore, argued Breyer, had grave Fourth Amendment implications, constituting a *sub silentio* overruling of *Terry* to permit far more invasive police investigatory actions:

There is no good reason to reject this generation-old statement of the law. There are sound reasons rooted in Fifth Amendment considerations for adhering to the Fourth Amendment legal condition circumscribing police authority to stop an individual against his will . . . Administrative considerations also militate against change. Can a state, in addition to requiring a stopped individual to answer “What’s your name?” also require an answer to “What’s your license number?” or “Where do you live?” Can a police officer, who must know how to make a *Terry* stop, keep track of the constitutional answers? After all, answers to any of these questions may, or may not, incriminate, depending upon the circumstances.

Indeed, as the majority points out, a name itself—even if it is not “Killer Bill” or “Rough ‘em up Harry”—will sometimes provide the police with a “link in the chain of evidence needed to convict the individual of a separate

³⁶ *Id.* at 34 (emphasis added).

³⁷ 542 U.S. at 197, 198 (Breyer, J., dissenting).

³⁸ 468 U.S. 420 (1984).

³⁹ *Id.* at 439 (emphasis in original).

⁴⁰ 528 U.S. 119 (2000).

⁴¹ *Id.* at 125.

offense.”... The majority reserves judgment about whether compulsion is permissible in such instances.... How then is a police officer in the midst of a *Terry* stop to distinguish between the majority’s ordinary case and this special case where the majority reserves judgment?⁴²

More was, therefore, at stake in *Hiibel* than might at first blush seem to be involved in the simple request for a name. Indeed, some commentators have worried that *Hiibel* opens the door to a mandatory national electronic identification card containing an array of identifying information that would have to be produced for the police upon demand.⁴³

2. *Lile’s Difficult Choice*

⁴² 542 U.S. at 199 (Breyer, J., dissenting). For a detailed analysis of *Hiibel’s* erosion of *Terry*, see E. Martin Estrada, *Hiibel and the Continuing Expansion of the Terry Doctrine*, 40 ST. LOUIS U.L.J. (2005).

⁴³ See, e.g., Arnold Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing Fourth Amendment*, 109 PENN. ST. L. REV. 929, 939, 941 (2005) (expressing the fear that *Hiibel* portends mandatory national identity cards readily to be produced for police inspection upon request); M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2004 CATO SUP. CT. REV. 357, 393 (2004) (expressing similar concerns); TASLITZ, PARIS, & HERBERT, *supra* note 2, at 342-43 (querying how much identifying information might be permissible on a national identity card in light of *Hiibel*). It is worth noting that Dudley Hiibel had in fact committed no crime other than his refusal to identify himself to the officer; that the officer refused to respond to Hiibel’s inquiries about why the officer wanted Hiibel’s name and identification papers; and that the officers, who were supposedly investigating a report of a woman being beaten, ended up throwing the only woman present, Hiibel’s daughter, Mimi, to the ground when she protested, then arresting her. See Loewy, *supra*, at 930-36, 943-45. Here is what Hiibel himself had to say about the Supreme Court’s decision in his case:

I don’t have a super-clear understanding of the Constitution. I’m not an attorney. I’ve never even read the whole thing. I only went through eighth grade. But I remember what I learned, and it seems to me that the whole idea of “your-papers-please” goes completely against the grain of the American people.

As I understood it, the state was supposed to serve us - - not that we were supposed to serve the state. Laws were supposed to protect the people against the government, not the other way around.

Maybe in Los Angeles and other places across the country, the police have browbeaten the people into more acceptance of this police state mentality than where I am. I live out on a ranch, the nearest town is 30 miles away, and it only has 7,000 or 8,000 people. I think that has an effect on our mentality.

It’s not that I’m anti-law enforcement. Criminals should be apprehended. But I don’t think we’ve got to take everybody’s rights away just so that we can be safe. If you do that, you’ve defeated your purpose. I don’t think people want to be protected to the extent that they become slaves.

I’m very disappointed by this decision. I think a basic freedom has been lost. What bothers me the most is that my children and grandchildren are going to have to live with this law. It moves us a step closer to control of the people by the government, and I don’t think that’s a step forward.

See id. at 945.

*McKune v. Lile*⁴⁴ offers a second illustration of the Court's often grudging attitude toward the privilege. There, prison officials, several years before convicted sex offender Robert Lile was scheduled to be released, ordered him to participate in a Sexual Abuse Treatment Program (SATP). The program required participating inmates to sign a form discussing and accepting responsibility for the crime for which they were sentenced and to complete a sexual history that was to extend even to activities constituting uncharged criminal offenses. These forms had to be signed and completed without either contractual or court-ordered immunity from prosecution. Prison officials told Lile that if he refused to participate, his privileged status would be reduced, curtailing his visitation rights, earnings, and work opportunities, and he would be transferred from a two-person to a four-person cell and in a likely more dangerous maximum security unit. He refused to participate, citing the privilege, and brought suit for injunctive relief. When the case ultimately reached the United States Supreme Court, it reversed the district court's grant of summary judgment in Lile's favor. The Court plurality, in an opinion by Justice Kennedy joined by Chief Justice Rehnquist and Justices Scalia and Thomas, concluded that the program was not an elaborate ruse to circumvent the privilege, nor was compulsion even present.

In reaching its conclusion, the plurality stressed the "serious threat" sexual offenders posed to the nation, their high recidivism rate, their need for clinical rehabilitative programs to manage their impulses, and the importance to program success of their accepting responsibility for *all* their actions. On the other side, the plurality characterized the threatened penalties Lile would face for not confessing his sins as not "atypical and significant hardships," a test the plurality borrowed from its due process jurisprudence.⁴⁵ Incarceration "necessarily place[s] limitations on

⁴⁴ 536 U.S. 24 (2002).

⁴⁵ *Id.* at 37.

the exercise of a defendant’s privilege against self-incrimination.⁴⁶ Lost work and television opportunities were small prices to pay given that “rehabilitation is a legitimate penological interest that must be weighed against the exercise of an inmate’s liberty.”⁴⁷ Because acceptance of responsibility via this program bore a “rational relation” to a legitimate rehabilitative objective,⁴⁸ indeed served an important social purpose, said the plurality, it “would be bitter medicine to treat as irrelevant the State’s legitimate interests and to invalidate the SATP on the ground that it incidentally burdens an inmate’s right to remain silent.”⁴⁹ Given the “de minimis” harms to Lile, the threatened penalties did not “rise to the level of unconstitutional compulsion.”⁵⁰

Justice O’Connor concurred in the judgment, rejecting the “atypical hardship” test for a more commonsense test “whether the pressure imposed in such [a] situation rises to a level where it is likely to compel a person to be a witness against himself.”⁵¹ But, even under her alternative test, Justice O’Connor agreed with the plurality that Lile’s threatened loss of privileges and transfer to maximum security did not constitute compulsion.

Interestingly, the Court made little fuss about the cost to Lile of facing additional criminal prosecutions based on supposedly therapeutic incriminating statements. Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer, partly because of this point. Not only did the majority undervalue this risk, but it also ignored the “dignitary and reputational” harms from the threatened transfer, the stigma of a punishment equal to that provided for the most serious offenses against prison rules (theft, drug abuse, and assault), the deprivation of privileges

⁴⁶ *Id.* at 38.

⁴⁷ *Id.* at 36.

⁴⁸ *Id.* at 37-38.

⁴⁹ *Id.* at 41-42.

⁵⁰ *Id.*

⁵¹ *Id.* at 48, 49 (O’Connor, J., concurring).

earned by years of good behavior, and the unreality of ignoring downward changes in baseline prison conditions as likely being experienced by Lile as forms of serious punishment.⁵² Said Stevens,

Based on an ad hoc appraisal of the benefits of obtaining confessions from sex offenders, balanced against the costs of honoring a bedrock constitutional right, the plurality holds that it is permissible to punish the assertion of the privilege with what it views as modest sanctions, provided that those sanctions are not given a “punitive” label. As I shall explain, the sanctions are in fact severe, but even if that were not so, the plurality’s policy judgment does not justify the evisceration of a constitutional right. Despite the plurality’s meandering attempt to justify its unprecedented departure from a rule of law that has been settled since the days of John Marshall, I respectfully dissent.⁵³

Stevens further chided the majority for using the wrong rod to measure compulsion. “The coerciveness of the penalty in this case,” insisted Stevens, “must be measured not by comparing the quality of life in a prison environment with that in a free society, but rather by the contrast between the favored and disfavored classes of prisoners.”⁵⁴ None of the Court’s prior opinions, Stevens concluded, “contains any suggestion that compulsion should have a different meaning in the prison context.”⁵⁵

It is not my purpose here to attack or defend the holdings in *Hiibel* and *McKune* nor indeed in any other of the Court’s Fifth Amendment privilege cases. Rather, *Hiibel* and *McKune* illustrate the Court’s ready willingness implicitly or explicitly to engage in a balancing of state against individual interests in giving the privilege meaning. I have no quarrel with balancing, indeed seeing it as unavoidable in the context of the privilege. Where I do have a quarrel with the Court, including with the dissenters in *Hiibel* and *McKune*, is the Justice’s failure to articulate with any specificity exactly what values the privilege serves. Vague, high-sounding praise for a checklist

⁵² *Id.* at 54, 60-68 (Steven, J., dissenting).

⁵³ *Id.* at 54-55.

⁵⁴ *Id.* at 67.

⁵⁵ *Id.* at 58.

of disparate but ambiguous justifications for the privilege give lower courts and the police little guidance for future cases and leave even the Justices no common ground on which to contend with difficult or novel issues. Still worse, absent a convincing justification for the privilege, the individual may too readily lose in the weighing process, leading to the privilege's slow erosion. Alternatively, even where the individual deserves to lose, the absence of a persuasive justification is inconsistent with procedural justice.⁵⁶

C. *An Alternative to the Scholarly Assault on the Privilege*

The Court's failures adequately to justify the privilege occur in an intellectual climate in which many commentators' biting critiques of any proffered justifications for the "right to silence" are widely seen as persuasive.⁵⁷ Sophisticated philosophical efforts to shore up the

⁵⁶ Procedural justice, provision of which can increase obedience to the law, includes receiving an understandable explanation for the government's action that even the loser in the courtroom can accept as legitimate. *See, e.g.*, TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND THE COURTS* 80 (2002) (noting that procedural justice is enhanced when authorities are perceived as being candid and complete in explaining their reasons for action).

⁵⁷ *See infra* text accompanying notes 59-60. This observation does not mean, however, that there are not well-respected supporters of the philosophical foundations for the right to silence. There are. *See, e.g.*, SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* 133-97 (2d ed. 1998) (responding to arguments that the privilege against self-incrimination primarily protects the guilty and undermines the truth-finding functions of a trial); Sheri Lynn-Johnson, *Confessions, Criminals, and Community*, 26 HARV. CIV. RTS. – CIV. LIB. L. REV. 327 (1991) (defending the privilege as one among several "voluntariness rights" that prevent sacrificing the individual in the name of community); R. Kent Greenawalt, *The Right to Silence and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 192 (Michael J. Meyer and William A. Parent eds. 1992) (justifying the privilege as protecting human dignity, defined as the absence of humiliating treatment). But each of these supporters offers some variant on a variety of standard justifications for that privilege that Akhil Amar, among other leading critics, has systematically assailed. *See* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 65-70 (1997). Here is a quick summary of Amar's critiques:

1. *Compelled Self-Accusation is Cruel*: Nonsense, says Amar, because we routinely and necessarily compel such accusation where it has sometimes devastating civil consequences. *Id.* at 65.
2. *The Privilege Protects Mental Privacy*: Wrong again, says Amar, because we routinely require witness-revelation of embarrassing, even humiliating, information in civil cases, like divorce, involving high emotional intensity. *Id.* at 65-66.
3. *Government Disrespects a Person by Using Him as an Instrument of His Own Destruction*: No it doesn't, insists Amar, because "generally, the law is entitled to every person's evidence," no matter how harmful to him, so long as he does not thereby face criminal prosecution. *Id.* at 66-67.

privilege's intellectual foundations — including on grounds other than those articulated by the Court - - are reflexively-derided by many leading authorities as well-meaning but misguided.⁵⁸ Thus Harvard criminal procedure theorist William Stuntz has explained, “It is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory.”⁵⁹ Well-known

4. *The Privilege Furthers a “Fair Balance” Between the State and Individuals and Expresses a Preference for an “Accusatorial Over an Inquisitorial System”*: “These phrases, however, are more like slogans that simply restate the rule than carefully considered rationales.” *Id.* at 67. They devolve into just making the game interesting by handicapping the state and do not explain why it is perfectly acceptable to compel a suspect to produce physical evidence. Amar offers a similar response to the argument that the privilege forces the government to “shoulder its entire burden of proof.” *Id.* at 67.

5. *The Privilege Helps to Deter Improper Police Practices*: Not so, says Amar, for those practices remain rampant.

6. *The Privilege Protects the Innocent*: No, it does not, Amar points out, because it prevents the innocent from compelling the guilty to testify. *Id.* at 68.

7. *The Privilege Promotes Reliable Evidence*: A good goal, agrees Amar, but not one he sees the current version of the privilege protecting well, partly because it is sometimes applied to exclude quite reliable evidence. *Id.* at 68.

In summary, concludes Amar:

None of the rationales typically given for the self-incrimination clause can satisfactorily explain the current scope of the privilege and its relation to the rest of our legal and moral system. Sometimes, the idea behind the given rationale is simply wrongheaded. At other times, the animating idea is valuable but proves too much or too little (or both) and thus cannot explain why the clause goes as far as it now does but no further.

Id. at 65.

⁵⁸ The best-known comprehensive critique of the varied proffered justifications for the privilege is David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063 (1986). More recent efforts to supplement the Court's stated justifications for the privilege have been described by two leading commentators as “a proliferation of scholarly emendations to the Court's explanations that uniformly fail to convince.” Allen & Mace, *supra* note 28, at 245. See also Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice System, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1015-23 (1996) (cataloguing reasons for the unconvincing nature of these efforts).

⁵⁹ William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988). These critiques of the justifications for the privilege extend to both the defenses offered by scholars and by the Court. See Allen & Mac, *supra* note 28, at 244 (describing the “fundamental values” that the Court lists as protected by the privilege as “striking in their vacuity and circularity”), 245 (assailing scholarly defenses of the privilege). Even seeming friends of the privilege have found much of its scope troubling and many of its defenses inconsistent. See, e.g., Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U.L. REV. 311, 311 (1991) (“The Self-Incrimination Clause is probably our most schizophrenic amendment.”). Important critiques of the privilege and its justifications were made by leading figures in the mid-twentieth century, see Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968), and go at least as far back as Jeremy Bentham. See EASTON, *supra* note 57, at 163-97.

constitutional scholar Akhil Amar similarly concludes thus: “Small wonder, then, that the self-incrimination clause - - virtually alone among the provisions of the Bill of Rights - - has been the target of repeated analytic assault over the course of the twentieth century from thoughtful commentators urging constitutional amendments to narrow it or repeal it altogether.”⁶⁰

In this article, I have no intention of taking on the daunting task of responding to each, or even any, of the critiques of the privilege or the cheers of its defenders. Instead, I plan to recite a theory of my own. My “new” defense does draw on elements of some older ones⁶¹ but places

⁶⁰ AMAR, *supra* note 57, at 68. Amar claims to be a friend of the privilege, offering what he sees as the first persuasive justification for it: to protect against the compulsion of the spoken word by a witness at a criminal trial. *Id.* at 46-47, 70-71. But this justification would, as Amar happily admits, allow the government to compel testimony in “grand jury rooms, legislative hearings, civil cases, criminal cases in which someone is on trial, and depositions organized by prosecutors,” even depositions of the criminal defendant himself, albeit then under the supervision of a presiding judge. *Id.* at 70. Furthermore, although Amar would bar introduction of compelled pre-trial testimony at the speaker’s own criminal trial absent his knowing and intelligent consent, Amar would readily allow into evidence the fruits of compulsion, including physical evidence and documents stemming from compulsion, such as by a subpoena. *See id.* at 70-71, 76, 84. Moreover, the overriding justification for Amar’s approach is this: “The self-incrimination clause, as best read, is designed to protect a truly innocent defendant who might be made to look guilty on the stand by a clever prosecutor skilled in technical courtroom procedure and forensics.” *Id.* at 74. Whatever the wisdom of Amar’s proposal as a matter of policy or even of constitutional interpretation, it is hardly a defense of anything that looks remotely like the current privilege.

⁶¹ For example, I ground my argument in part in a theory of “mental privacy,” albeit one tightly linked to the role of language in human social interaction, an approach different from that of other writers. *See supra* note 57 and accompanying text (summarizing others’ privacy theories). My idea of the role of compulsion under the privilege resonates with the work of other authors embracing protection of human dignity by avoiding state-imposed humiliation as a justification for the privilege, *see* Greenawalt, *supra* note 57, at 193-98, but, unlike those authors, my concern with humiliation is linked tightly to the importance of words in self-definition. *See infra* text accompanying notes 62-77 (summarizing the major components of my theory of the privilege). Amar too focuses on words but emphasizes their cognitive, rather than their social, component, embracing the truth-promoting function of the privilege and radically constricting its coverage in ways I do not. *See supra* note 58 (summarizing Amar’s argument). Allen and Mace deny that they are “justifying” the privilege at all, claiming they are merely describing theory inherent in the doctrine, a theory that, though quite different from Amar’s, again stresses narrowly-defined cognitive processes over social, linguistic ones. *See* Allen & Mac, *supra* note 28, at 247-48. Louis Michael Seidman, in a brilliant forthcoming book, praises the right to silence as essential to human expressive freedom. “A defiant silence,” his book cover explains, “demonstrates determination, courage, and will,” as when draft resisters refuse to take a military oath, their silence serving as a “manifestation of connection, commitment, and meaning.” *See* LOUIS MICHAEL SEIDMAN, *SILENCE AND FREEDOM* (forthcoming 2007). Seidman also sees the privilege as “preserving the distinction between mind and body on which human freedom depends.” *Id.* Seidman’s emphases on political expression, individual identity, and social isolation versus social solidarity hit chords harmonious with my own ideas about voice and privacy. But Seidman does not root his analysis in the social science concerning language use, social stigma, and the nature of the human personality, as I do, nor does my theory turn so much on the separation of body and mind as their linkage; the physical acts of speaking and writing, I argue, help to constitute and alter the more intangible parts of our nature. Finally, Janet Ainsworth has explored the impact of “powerless language,” but she limited her exploration to the narrow context of the interrogation room; did not place her analysis into a broader theory of privacy; did not focus on the many other linguistic forces at work beyond the powerlessness dynamic; and did not explore the nature and role of linguistic compulsion as central to the very

them into a broader overriding theme, adds never-before articulated aspects, and examines inadequately-explored implications. My hope is to start a dialogue that will either foster my embryonic theory's growth toward adulthood or quickly kill it as a monstrosity that I could not initially see.

1. *The Literal Voice*

Concisely (and perhaps therefore misleadingly) stated, my theory is this: the privilege against self-incrimination serves to protect the literal and metaphorical voice of those ensnared in the criminal process. By "literal voice," I mean the physical qualities of the human voice - -its pitch, tone, rate, and timbre - - *and* the content of its aural message, the precise words chosen and their likely perceived meaning.⁶² The literal voice plays important social functions in addition to conveying denotative information, including enabling social judgments to be made about a speaker's moral culpability and social status, his credibility, and his inclusion or exclusion from full membership in society. Audience reactions to the literal voice also help to reinforce social norms, igniting pressures to move social dissenters toward complying with, and indeed emotionally embracing, those norms. These social processes mean that the mere expression of the literal voice may subject a speaker to intense social stigma, to moral assessments of his character and culpability based upon distorted or incomplete information, and to misunderstandings of his intended message, even when, for example, in the interrogation context, he truthfully confesses his guilt.⁶³ These forces can prove still more disturbing, of course, for the innocent speaker.

definition of the privilege. See Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259 (1992).

⁶² See *infra* Part III.

⁶³ See *id.*

But it is not only protection from having one's words used by others to mis-define⁶⁴ the speaker's essential nature that the privilege protects, for the *compulsion* of such words itself forces the speaker to change his very nature without his choosing. The speaking of words has the power to shape thoughts, feelings, and character, as recent cognitive science research reveals. Such compulsion is deeply and uniquely humiliating in ways not previously recognized.⁶⁵

The criminal justice system is appropriately designed in part to provide the ultimate state expression of social norms and social stigma, rendering confessions in that context *sui generis*.⁶⁶ The right "to silence" and its corollaries enable a suspect, or even a witness, to minimize the ill social effects of compelled speaking in that context, including minimizing distortion of the speaker's message - - costs that he would otherwise bear to some degree even if he is ultimately neither convicted nor even prosecuted.⁶⁷

In sum, one powerful justification for the privilege, therefore, is this: it guards against the compelled articulation of words that raise a risk of *both* undue state intervention in the very

⁶⁴ Professor Lawrence Lessig describes a privacy theory focusing on mis-definition as solving a portion of the problem of limited attention span. See Lawrence Lessig, *Privacy and Attention Span*, 89 GEO. L. J. 2063 (2001). In other words, the problem is that observers will not take the time fully to gather all the available information about a person and process it thoroughly so as to correctly understand it. See *id.* at 2064-72. But Lessig's description is an incomplete one, at least of the mis-definition theory offered in this article. First, the privacy theory argued for here turns on the importance of having *control* over self-revelation. To lose such control is to lose command over choosing just what sort of person you are or wish to be, for, as Part IV of this article will explain, compelled self-revelation in fact changes your fundamental nature in ways you might not prefer, a grievous moral injury. Second, control matters because you may not want to reveal all of yourself to all others in all contexts, and they may not want you to do so. What you do care about is revealing those aspects of your character in a particular setting in such a way so that those aspects will be fully understood. Thus, on the job, you might want to reveal information about your punctuality and self-discipline but not your love life. Indeed, fuller revelation of more aspects of your self is a mark of intimacy, both identifying and helping to create close personal relationships. If you lose control over self-revelation, therefore, you lose control over your intimate life. Third, it is impossible to reveal sufficient information about yourself to most individuals to enable them to judge your entire nature fairly, even if they bothered to pay adequate attention, for full self-revelation takes years and is a continuing process as we ourselves change over time. If we lose control over self-revelation, therefore, we necessarily risk mis-definition of our overall being. Fourth, the act of being described itself changes our nature, so we may prefer to avoid self-revelation even if others' assessments of us are accurate. Last, the self-revelation theory here is concerned with the importance of words in a way that neither Lessig nor others has addressed. The theory here thus incorporates, but is about more than, attention span.

⁶⁵ See *infra* Part IV.

⁶⁶ See *infra* text accompanying notes 212-41.

⁶⁷ *Id.*

creation of the speaker's essential nature *and* the resulting extreme social stigma and social mis-definition of personality that result from the prospect of being judged by the criminal Justice system. Rephrased, the privilege protects against the compelled articulation of the literal voice in, or for use at, a criminal trial. Furthermore, although the spoken voice is the paradigm case, similar values are involved in protecting the compelled written word.⁶⁸ This theory's emphasis on feared social stigma at self-revelation does put it in the privacy camp of defenses of the privilege. However, it differs from other privacy theories by focusing on compelled *words*, language as not only opening a door to one's head and heart but as helping to construct them both.⁶⁹ Furthermore, unlike other privacy theories, it emphasizes the unique danger of private thoughts and feelings being exposed to a particular audience: the criminal justice system.⁷⁰ Moreover, this theory emphasizes the cognitive, emotional, and societal harms stemming from *compelled* linguistic self-revelation. Unlike other privacy theories, therefore, mine does not suffer from the problem of overbreadth - - of explaining too much.⁷¹ Other constitutional provisions protect other aspects of privacy, and many sometimes overlap with the Fifth Amendment's protection.⁷² But only the Fifth Amendment privilege guards against the specific sort of privacy invasion involved in compelled language. Moreover, because under this theory the full-scale harms of language compulsion occur whenever the compulsion takes place with the *prospect* of criminal justice involvement, the privilege retains its broad scope as operating both before and during the criminal trial.⁷³

2. *The Metaphorical Voice*

⁶⁸ See *infra* text accompany notes 403-63.

⁶⁹ See *supra* note 61 (describing others' privacy theories).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *infra* text accompany notes 466-69.

⁷³ See *supra* note 60 (describing Amar's theory, which, by contrast, limits the role of the privilege to the criminal trial of the defendant seeking to assert the privilege).

Note, however, that I have said that defense of the literal voice is *one* purpose of the privilege, and my focus in this article will solely be on that subject. But a fuller defense of the privilege also requires exploring the importance of protecting the *metaphorical* voice. The metaphorical voice is the expression of social information by a speaker's words to a political body, such as a judge or jury, carrying data relevant to the development of political norms and processes, even though conveying such data may not have been the speaker's intention.⁷⁴ That voice, it turns out, requires the presence of counsel. Without a right to counsel, the privilege is nearly useless, for an accused who chooses to remain silent has no voice with which to defend himself. He must speak or simply put himself at the court's mercy.⁷⁵ Moreover, the political message that he conveys can only be effectively presented with the aid of counsel or by counsel's speaking in the defendant's stead, that is, *as if* it were the defendant himself speaking.⁷⁶ The political nature of even a run-of-the mill trial and the political role of trial counsel are not self-evident. Without understanding them, therefore, my defense of the privilege, both in its "core" form and as it manifests itself in *Miranda*, is incomplete. Explaining the role of the literal voice is the only task I seek to complete here.

One final caveat. My goal here is to offer a sound justification for the privilege. I am not arguing that my defense of the privilege is in some sense dictated by the constitutional text or its history. Nor will I have much to say about specific doctrinal puzzles. But offering a philosophical defense can be a first step in constitutional interpretation and can overcome the

⁷⁴ See Andrew E. Taslitz, *Miranda and Metaphor: The Role of Counsel in the Privilege against Self-Incrimination* (unpublished draft manuscript 2007) [hereinafter *Miranda and Metaphor*].

⁷⁵ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. REV. 1449, 1477-79 (2005) (making similar point).

⁷⁶ See Taslitz, *Miranda and Metaphor*, *supra* note 74.

institutional ennui that stems from wrongly viewing the privilege as an unfortunate relic of a more primitive age.⁷⁷

After this Part I Introduction, Part II of this article briefly summarizes the sort of “mental privacy” that the privilege protects. Part II also explores a two-stage theory of privacy harm and the unique role of the criminal justice system. Part III analyzes the social science literature on the impact of the literal voice on a speaker’s audience, next extending that argument to handwriting, typing, e-mail, blogs, and chat rooms. Part IV completes the model by examining the harms done to the human personality from compelled speech. Finally, Part V, the conclusion, sums up the preceding arguments and briefly explores some potential implications.

II. *Mental Privacy*

A. *Privacy and Mindreading*

In common sense terms, “mental privacy” means having control over when, how, and to whom each of us reveals our thoughts and feelings in our own words.⁷⁸ Two key aspects of this definition are that we retain control over the revelation decision and that the revelation is conveyed by our own words.⁷⁹ Other people are constantly trying, and frequently succeeding, in

⁷⁷ SOTORIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 79-116 (2007) (explaining why even originalist approaches to constitutional interpretation ultimately require resolving a number of philosophical questions).

⁷⁸ Thomas Carlyle put the point this way:

A man always is to be himself the judge how much of his mind he will show to other men, even to those he would have work along with him. There are impertinent inquires made: your rule is, to leave the inquirer *un*informed on that matter, not, if you can help it, misinformed; but precisely as dark as he was!

THOMAS CARLYLE, ON HEROES, HERO WORSHIP, AND THE HEROIC IN HISTORY (1841) (*quoted in* LEONARD ROY FRANK, QUOTATIONARY 742 (2001)).

⁷⁹ *See, e.g.*, ROY F. BAUMEISTER, THE CULTURAL ANIMAL: HUMAN NATURE, MEANING, AND SOCIAL LIFE 35-38, 93-102, 138-41 (2005) (summarizing research demonstrating that the quest for control over our environment, including our social environment, is a basic human need and that our power over language use is our central means for exercising social control); BERTRAM F. MALLE, HOW THE MIND EXPLAINS BEHAVIOR: FOLK EXPLANATIONS, MEANING, AND SOCIAL INTERACTION 68-71 (2004) (explaining that the human drive for meaning requires using language to construct private, internal explanations of your own and others’ actions and public, communicative explanations to manage social impressions); DANIEL J. SOLOVE, MARC ROTENBERG, & PAUL M. SCHWARTZ,

gaining access to our minds and hearts by reading our facial expressions, body language, and tone of voice.⁸⁰ They do so in light of social conventions and of any particularized information about us that they have obtained from other sources.⁸¹ These efforts to read our minds against our will may be resented, yet they do not violate mental privacy as I have defined it here because we are not *compelled* to condemn ourselves in our own words.⁸² Indeed, it would be impossible to stop such efforts at mindreading, for it is an evolutionarily-developed skill necessary to all human social interaction,⁸³ as I will illustrate shortly.

Successful mindreading enables us to build or fend off close personal relationships, to modify our own behavior in personally beneficial ways, and to predict or influence the behavior

PRIVACY, INFORMATION AND TECHNOLOGY 38 (2006) (noting that “[a] number of theorists...conceive of privacy as a form of control over personal information,” a broader definition than the *linguistic mental privacy*, involving control over language use, that I defend here as central to understanding the right to silence).

⁸⁰ See BAUMEISTER, *supra* note 79, at 6 (defining mindreading, also known as theory of mind, as the ability to “anticipate the thought processes and emotional processes of others,” making us simultaneously “more sensitive to what others might be thinking about us,” matters “vital to enable us to participate in complex social interactions...”); MALLE, *supra* note 79, at 70-71, 155-65 (noting and illustrating primacy of language in impression management); Paul EKMAN, EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE 219-20 (2003) (explaining that, while persons vary in their ability accurately to read emotions from voice and face, most people can do so, at least if the expressions are intense and the person observed is not trying to hide the emotion).

⁸¹ Explains MALLE:

Knowledge, however, is not the only cognitive resource available. If an explainer does not actually know the agent’s reasons, he may still infer or construct them. Indications in the agent’s mannerisms or past behavior, clues from the action context, and general cultural expectations about the kinds of motives that underlie certain behaviors usually provide a sufficient basis for inducing a reason.

MALLE, *supra* note 79, at 123. Malle is defining “reasons” in a technical sense as only one sort of explanation we construct for human action, but elaborating here on those details would do little to add or subtract from my point.

⁸² Yet that resentment can sometimes be quite powerful. Says Jean Rolin, “The pretension of man to explore the conscience of others, the forcible rape of secrecy, are a diabolical parody of the all-seeingness of God.” FRANK, *supra* note 78, at 743 (quoting JEAN ROLIN, POLICE DRUGS 7.2 (transl. Laurence J. Bendit 1956)).

⁸³ See, e.g., BAUMEISTER, *supra* note 79, at 209 (“If you are going to be competent to participate in human culture, you have to be able to think in terms of social causes.”); DAVID LIVINGSTON SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND (2004) (describing the “evolutionary arms race” between detection and deception, that is, between being able to read minds versus blinding others to your own); ERIC HOFFER, REFLECTIONS ON THE HUMAN CONDITION 142 (1973) (“There are no chaste minds. Minds copulate wherever they meet.”).

of others.⁸⁴ This tool is, of course, an imperfect one, because evolution has also developed deceptive strategies designed to shield our true hearts from others.⁸⁵ Individuals vary in their skill at performing deception, and its use varies with context.⁸⁶ Moreover, the person whom we seek to read may not know his own mind.⁸⁷ Self-deception runs rampant through the human community.⁸⁸ Nevertheless, imperfect though it may be, mindreading efforts are central to the human condition,⁸⁹ and each of us knows and expects at some level that we are constantly being

⁸⁴ See BAUMEISTER, *supra* note 79, at 92-93, 97-97 (explaining that understanding of others and self furthers the human quest for control over the social sphere by enabling you to predict what others will do, influence them, build or alter relationships with them, and change yourself to fit the social environment); MALLE, *supra* note 79, at 71 (your private explanations of your own and others' actions help to satisfy your own curiosity, allay confusion, and predict or manipulate social reality, while your publicly-stated explanations of your own actions satisfy others' curiosity, lessen their confusion, manage their impressions, manipulate their behavior, combat disagreements, and coordinate joint plans or actions).

⁸⁵ See SMITH, *supra* note 83, at 65-71. Self-deception about our real motivations is one critical tool for hiding them from others:

Why did self-deception take root in the human mind? As we will see, the propensity for self-deception probably became part of our nature because it was so helpful to us in our dealings with one another. Not only does lying to oneself soothe many of the stresses of life, but, more importantly, it also helps one lie to others. One of the most important insights of modern sociobiology is that self-deception is the handmaiden of deceit: in hiding the truth from ourselves, we are able to hide it more fully from others.

Id. at 3.

⁸⁶ See *id.* at 104-11 (noting that it is hard for many people to lie effectively, to remain straight-faced while playing "social poker").

⁸⁷ See SMITH, *supra* note 83, at 50-78, 106-11 (explaining the evolutionary forces promoting widespread self-deception among the human species).

⁸⁸ See *id.*: STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 42-75 (analyzing cognitive strategies involved in self-deception); see generally Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. L. & GENDER 381 (2005) (summarizing in detail the cognitive and evolutionary psychology literature on self-deception).

⁸⁹ See *supra* text accompanying notes 78-83. Cognitive and evolutionary psychologist David Livingstone Smith put this point well:

The effective deceiver must be able to track others' responses on a moment-to-moment basis, adjusting his or her tactics based on a steady stream of perceptual feedback. An artful, wheeling-dealing species *must* have a knack for predicting, controlling, and understanding behavior. In order to do so, it must have an intuitive grasp of how to infer others' mental states and how these mental states work together to produce behavior. For this reason, we spend a good deal of our time trying to figure out the mental states of others - - their beliefs, desires, goals, and fears - - so as to manipulate their behavior in ways that serve our own interests.

Id. at 105-06. Smith continues: "A savvy social operator needs to have an excellent grasp of human self-interests, because it's impossible to beguile others unless you understand what makes them tick." *Id.*

so scrutinized and are doing the same to others.⁹⁰ What we can usually protect are the words in our hearts and minds or that we use to describe what else resides there.⁹¹ Words too can deceive,⁹² but humans give them especially powerful weight as a window into another's soul.⁹³ Some windows are seen as clear, others purposely smudged and thus requiring a more careful look and a bit of clearing away the dirt obscuring what lies beneath.⁹⁴ Yet they are both windows just the same.

Not all thoughts and feelings, of course, consist of words. Yet the only way each of us has to understand or convey the wordless feeling or fledgling thought is in words.⁹⁵ Most thought is indeed subconscious,⁹⁶ yet when we can bring such thoughts to the conscious surface, or at least when we believe we can do so, it is only by words that these thoughts become accessible.⁹⁷

⁹⁰ See BAUMEISTER, *supra* note 79, at 6 (“The ability to see ourselves as others see us, and to care about what they think, is a crucial part of what makes us human - - and it is also utterly unavoidable, indispensable, if you are going to live in culture”).

⁹¹ Although it sometimes seems that several mental speakers are competing for our attention, we each know that the “voices” in our heads - - the various questioners and answerers who participate in our inner conversations - - are actually part of us. Despite the sense that there are different voices in your head, you know that the decision that you ultimately make whether to go on a cruise or to have tea or to take the job in Seattle is *your* decision. You don't have the sense that one of the voices in your head has somehow won the day and that the others have unhappily sulked away in silence. Your ability to self-reflect allows you to realize that you are, in fact, the source of all these disparate thoughts.

MARK R. LEARY, *THE CURSE OF THE SELF: SELF-AWARENESS, EGOTISM, AND THE QUALITY OF HUMAN LIFE* 29 (2004).

⁹² See SMITH, *supra* note 83, at 110. Smith elaborates:

Language ushered in a new phase in the timeless struggle between the forces of deception and detection. Loading the dice heavily in favor of the former, it enabled human beings to misrepresent reality much more effectively than had previously been possible. The sword of language cuts two ways: it is both enlightening and bewitching, an instrument for understanding and a snare for the unwary.

Id.

⁹³ See *infra* Part III (illustrating the many ways humans judge others and make weighty decisions about them based on their voice).

⁹⁴ See *infra* text accompanying notes 260-64 (on relatively clear versus relatively ambiguous language signals and how we use them to judge others).

⁹⁵ See Andrew E. Taslitz, *A Feminist Approach to Social Science Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 15-18, 24 (1998) [hereinafter *Feminist Approach*].

⁹⁶ See Taslitz, *Willfully Blinded*, *supra* note 88, at 392.

⁹⁷ See Taslitz, *Feminist Approach*, *supra* note 95, at 24.

Words, all words, necessarily require interpretation,⁹⁸ and different interpreters will assign the same words different meanings.⁹⁹ Even the originator of a thought faces interpretive problems. If your heart beats fast and your palms sweat, are you experiencing fear, anticipation, or loss? Often you will be uncertain, struggling to decide. When you do, you will assign a label based on your prior life experience, social context, and a wide array of other factors.¹⁰⁰

Yet why should we care so deeply about having control over self-revelation? One important answer, I will argue, lies in understanding the nature and causes of individual uniqueness versus similarity and the social functions of each.

B. *The Individual as Sui Generis*

Pulitzer prize finalist, Judith Rich Harris, synthesizing the recent work being done on the human mind by both cognitive scientists and evolutionary psychologists, has articulated a persuasive explanation of why each individual is indeed in many ways unique while also sharing so much in common with many others.¹⁰¹ To be sure, Harris recognizes the impact of the usual suspects of individual heredity and the environment in explaining human variation.¹⁰² But she also finds other powerful individual and social mechanisms at work by which each of us tries to be like others in some ways, different from them in others. These mechanisms are rooted in three systems or “modules” in the brain: the socialization, relationship, and status modules.¹⁰³

1. *The Socialization Module*

⁹⁸ See *id.* at 18-21.

⁹⁹ See *id.* at 25-26.

¹⁰⁰ See *id.* at 20-23.

¹⁰¹ See generally JUDITH RICH HARRIS, NO TWO ALIKE: HUMAN NATURE AND HUMAN INDIVIDUALITY (2006) (book-length defense of this explanation).

¹⁰² See *id.* at 24-26, 40-41.

¹⁰³ See *id.* at 106-62.

The socialization module or system works to make each of us more like those in our group.¹⁰⁴ “Groupness” is an important concept for humans. Humans have a strong need to belong to a group, finding pleasure in solidarity and acceptance.¹⁰⁵ Indeed, most of us consider ourselves members of an array of groups, and part of our sense of uniqueness comes from the particular intersection of our multiple group identities, for example, as a young Jewish Northeastern heterosexual Democrat or a mature Christian Southern gay Republican.¹⁰⁶ Group membership brings not only its own psychic rewards but also the greater power and resources stemming from cooperative group, relative to mere individual, action.¹⁰⁷ Group membership can also protect us from other groups hostile to our own.¹⁰⁸ Indeed, groups struggle to distinguish themselves from one another, and, sadly, positive group identity often turns on defining members of other groups negatively, as outsiders.¹⁰⁹ So powerful are these forces of categorization that, in famous experiments, the mere labeling of groups led to violence between them, as when two groups of eleven-year-old boys at Robbers Cave summer camp went to war¹¹⁰ and college

¹⁰⁴ See *id.* at 206.

¹⁰⁵ See ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 134-35 (1999); BAUMEISTER, *supra* note 79, at 107, 377 (discussing importance of group-belongingness); DAVID BERREBY, *US AND THEM: UNDERSTANDING YOUR TRIBAL MIND* 16 (2005) (noting that group affiliation is “an absolute requirement for being human”).

¹⁰⁶ See Taslitz, *Feminist Approach*, *supra* note 97, at 23 (“[O]ur social identity - - our sense of who we are and what we are worth - - is intimately bound up with our group memberships.”); TASLITZ, *RAPE AND CULTURE*, *supra* note 105, at 135 (“Although all individuals are unique, some part of how we express ourselves draws on group self-concepts....”).

¹⁰⁷ See BAUMEISTER, *supra* note 79, at 107-09 (noting that belongingness promotes happiness, mental and physical health, and that “[g]roups can share resources, care for sick members, scare off predators, fight together against enemies, divide tasks so as to improve efficiency, and contribute to survival in many others ways.”).

¹⁰⁸ See *id.* at 378 (“People may have evolved to recognize the presence of an enemy group and to seek to form bonds and alliances for their own protection.”).

¹⁰⁹ See *id.* at 377-78 (making this point); BERREBY, *supra* note 105 (extended treatment of the dangers of “the tribal mind.”).

¹¹⁰ See M. SHERIF, ET. AL., *INTERGROUP COOPERATION AND COMPETITION: THE ROBBERS CAVE EXPERIMENT* (1961) (providing details of this experiment in which separation into groups led each of them to fistfights, theft, property destruction, and preparation for retaliatory raids aimed at the opposing group).

students labeled “guards” in a mock prison quickly began the brutal humiliation of those students labeled “prisoners.”¹¹¹

The socialization system teaches us the rules for being like others in our group.¹¹² Each of us observes the behavior of others in our group as we grow up, forming prototypes of appropriate behavior for group members by computing averages of the behaviors observed.¹¹³ This learning process includes understanding the social categories important to the group, thus necessarily involving acceptance of stereotypes about outsider groups’ members.¹¹⁴ These stereotypes are at their most powerful when we deal with strangers.¹¹⁵ Moreover, the in-group prototypes are not necessarily perfect averages of observed group behavior but may be skewed toward the behavior of the highest status members of the group.¹¹⁶

Group memberships’ hallmarks and changes in them are solidified by gossip.¹¹⁷ Membership concepts and behavior are thus marked and evolve by “anti-memes,” ideas spreading like viruses via language, the “anti” portion including ideas that “we” (the in-group) share but that “they” (the out-group) do not.¹¹⁸ In this way, groups often grow to be unique, or at least so to perceive themselves, working to distinguish their ways from others.¹¹⁹ Among the ways that groups mark

¹¹¹ See PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007) (recounting the horrifying details of this “Stanford Prison Experiment” and its broader implications for real-world group conflict and the resulting corruption of individual members).

¹¹² See HARRIS, *supra* note 101, at 193-95.

¹¹³ See *id.* at 194-95.

¹¹⁴ See *id.* at 192-93.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 195 (“Higher-status members of a group - - those who rank higher in the attention structure - - are looked at more, which means they have more opportunity to contribute data. The effect would be to shift the prototype in the direction of the higher-status members.”).

¹¹⁷ See *id.* at 193 (making this point); Robin Dunbar, *The Social Brain Hypothesis*, 6 *Evolutionary Anthropology* 178, 178-90 (1998) (recounting empirical data supporting this point). For an extended analysis of the role of gossip in individual and group life, see ROBIN DUNBAR, *GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE* (1996).

¹¹⁸ See Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 17 *B.U. PUB. INT. L. J.* 145 182-83 (2007), (analyzing the “meme” and “anti-meme” concepts); HARRIS, *supra* note 101, at 157, 196 (discussing role of anti-memes in them/us thinking).

¹¹⁹ See BERREBY, *supra* note 105, at 149 (“Human kinds are also guides to *action*. Once I’ve classed myself and the stranger as, say, employee and boss, I know which game to play and which rules apply - - how to speak, how to

their membership is via language differences, differences that in extreme situations can mark one as worthy of life or of death.¹²⁰ The Bible recounts one such story:

And the Gileadites took the passage of Jordan before the Ephraimites: and it was so, that when those Ephraimites which were escaped and said, Let me go over, that the men of Giliad said to him, Art thou an Ephraimite? If he said, Nay, Then said they unto him, Say now Shibboleth; and he said Sibboleth: for he could not frame to pronounce it right. Then they took him, and slew him at the passage of Jordan: and there fell at that time of the Ephraimites forty and two thousand.¹²¹

As Harris herself analyzed the Shibboleth story, “Forty and two thousand might have been an exaggeration, but however many there were of them, they died because they spoke with the wrong accent.”¹²²

2. *The Relationship System*

Like the socialization system, the relationship system likely had important evolutionary advantages but of an almost opposite kind.¹²³ Even without belonging to a group with many shared understandings and behaviors, there are important differences among individuals.¹²⁴ The relationship system allows us first, to identify one individual as distinct from others, second, to understand in as much depth as possible what makes that person unique.¹²⁵ Physical qualities, such as facial appearance or the sound of a voice, may serve the first goal.¹²⁶ But the second goal turns in part on our effectiveness as mindreaders.¹²⁷ That effectiveness is

dress, and how to behave toward this other person”), 170-71 (describing experiment in which the creation of two groups led the members of each group to develop distinct social norms, including linguistic ones, in order more clearly to mark their group as “us” and the opposing one as “them”).

¹²⁰ See HARRIS, *supra* note 101, at 157, 161.

¹²¹ HOLY BIBLE, *Judges* 12: 5-6.

¹²² HARRIS, *supra* note 101, at 161.

¹²³ See *id.* at 164-65.

¹²⁴ See *id.* at 8-9 (explaining that, although we exaggerate the consistency in other people’s behavior, individual differences -- character traits -- are real and have evolutionary advantages).

¹²⁵ See *id.* at 169-20, 173.

¹²⁶ See *id.* at 170.

¹²⁷ See *id.* at 174-75; *supra* text accompanying notes 78-90 (analyzing the nature of mindreading and its evolutionary advantages, including allowing us to predict others’ behavior); BERREBY *supra* note 105, at 123-25 (describing

critical to our social and material success, perhaps even to our survival.¹²⁸ Thus the relationship system's

function is to furnish answers to evolutionarily important questions like these: Will this person help me if I am in need? Does this person repay favors? Can this person be relied upon to be a fair partner in trade? Is this person a close relative? Would this person have sex with me? Would this person be a good long-term mate? Can this person beat me up? Does this person like me?¹²⁹

The relationship system is thus “a discriminator, not a generalizer - - a splitter, not a lumpner.”¹³⁰

It serves “to make fine distinction among individuals,”¹³¹ importantly including distinctions giving hints about the relative dominance and submissiveness of those interacting and of their relative status in the group, judgments that, when made accurately, can help to resolve conflict or even to avoid it in the first place.¹³² So important are these fine distinctions that we seek to make them even when we have limited information, relying on generalizations, if need be.¹³³ But we recognize the importance of maximizing our information about another individual, especially given the difficulty of mindreading and of that individual's incentives to deceive.¹³⁴ Yet again, gossip is a critical source of such information, gossip necessarily requiring naming practices so

importance of gathering information about particular individuals over time to improve our ability to mind-read them).

¹²⁸ See *supra* text accompanying notes 78-92 (on the necessity of mind-reading for individual survival and flourishing).

¹²⁹ HARRIS, *supra* note 101, at 165.

¹³⁰ *Id.* at 181.

¹³¹ *Id.*

¹³² See *id.* (“Obligations must be repaid, duplicity remembered, compatible companions sought out, obnoxious ones avoided, those with higher status deferred to.”).

¹³³ See *id.* at 182 (noting that, even after a brief encounter with another individual, we will use “whatever we have so far learned about that person” to make working models of their character, generalizing from even a small sample of their behavior to make our “best guess” that “this individual will behave in the future the way he or she behaved in the past.”).

¹³⁴ See *id.* at 164, 171-81 (noting the importance to the relationship system of gathering maximum information about individuals and illustrating how each of us goes about that task); *supra* text accompanying notes 78-90 (summarizing processes for, and significance of, mindreading and deception).

that the participants can clearly identify the subject of that conversation's gossip.¹³⁵ Gossip also helps us to update our knowledge of another with whom we have not of late had much contact because recent information is better than its stale cousins.¹³⁶

3. *The Status System*

Although each of us wants to be accepted by our group, emphasizing our similarity or equality to others members, we also want to be *better than* those others, or at least to know where we stand in the status hierarchy and how we might move up it or identify those beneath us.¹³⁷ Higher status is its own reward, but it also brings easier access to more community resources.¹³⁸ Culture can reduce status abuse and even the relative importance that we assign to status versus equality, but humans are driven to make status judgments, and the status system enables them to do so.¹³⁹

Status inheres by definition in how most members of the community view you or would view you if they knew you.¹⁴⁰ Accordingly, judging our own status requires a special sort of mindreading - - reading what status another assigns to us and why.¹⁴¹ Status is multidimensional and varies with context.¹⁴² A lousy athlete has low status on a baseball team. Yet if the same person writes unusually well, he may have high status as a journalist.¹⁴³ Knowing what status we

¹³⁵ See HARRIS, *supra* note 101, at 173-74 (making similar point); BAUMEISTER, *supra* note 79, at 139-40 (explaining the importance of gossip as a way of learning about and predicting the behavior of specific individuals).

¹³⁶ See HARRIS, *supra* note 101, at 18-20, 173-74.

¹³⁷ See *id.* at 209 ("To compete with one's groupmates is to strive for status"); TASLITZ, RAPE AND CULTURE, *supra* note 105, at 134-35 (explaining that different groups have different social status, so the status of the individual is inescapably also linked to the status of his group).

¹³⁸ See TASLITZ, RAPE AND CULTURE, *supra* note 105, at 112.

¹³⁹ See HARRIS, *supra* note 101, at 211-13 ('making this point'); cf. ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY (2006) (arguing that proper institutional design can reduce "rank abuse," though not the existence of rank or status themselves) [hereinafter ALL RISE].

¹⁴⁰ See ALAIN DE BOTTON, STATUS ANXIETY vii-viii (2004) (arguing that our status or position in society matters so much to us "because our self-conception is so dependent upon what others make of us.").

¹⁴¹ See HARRIS, *supra* note 101, at 224-26.

¹⁴² See *id.* at 212.

¹⁴³ These examples are mine but make the same point as similar examples offered by other commentators. See *id.* at 226; ROBERT W. FULLER, SOMEBODIES AND NOBODIES: OVERCOMING THE ABUSE OF RANK 15 (2003) ("But, unlike

are assigned in what setting thus not only tells us how to behave toward others but also how to move up the status hierarchy, whether in that context or in another one.¹⁴⁴ It is for this reason that the status and relationship systems interact in an important way that contributes to the development of human uniqueness.¹⁴⁵

The process works thus. Someone observing us is driven by his relationship system to use his mindreading skills and what he has learned about us from others to make judgments about our unique qualities. His status mechanism will draw on these judgments to assign us a relative status.¹⁴⁶ But we, the observed, are in turn motivated by our status system to learn what status judgments the observer has made about us and why.¹⁴⁷ What any one observer thinks about us does not give us status. Rather, we must mindread many such observers, computing an average or “generalized other’s” conception of our status and where and why we were assigned it.¹⁴⁸ Whether or not others’ assessments of us are accurate, they will make assessments that assign us some unique or unusual combination of status-altering traits. Our assessment of that assignment leads us to modify our behavior.¹⁴⁹

For example, if we are perceived as physically weak but admired for our kindness, we might more often choose settings where kindness is valued and work to emphasize what is kind about our behavior. To be sure, we also could choose to go to a gym to bulk up, but our short stature and delicate frame may make it hard for us to get much mileage out of this strategy, and it is, in

a chicken coop, modern human societies comprise thousands of different hierarchies, and a person at the bottom of one may be at the top of another. The worst bowler on the company team may be the CEO; the college dropout may be a billionaire.”)

¹⁴⁴ See HARRIS, *supra* note 101, at 239.

¹⁴⁵ See *id.* at 225.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 221, 224-25: GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 138 (1934) (first coining the term “generalized other”); Gary A. Fine, *Friends, Impression Management, and Preadolescent Behavior*, in THE DEVELOPMENT OF CHILDREN’S FRIENDSHIPS 29, 31 (S.R. Asher and J. M. Bottman ed.s 1981) (more recent use of Mead’s idea but using the term “other”).

¹⁴⁹ See HARRIS, *supra* note 101, at 225, 227.

any event, easier for us to build on what we already see as our strengths. (On another trait, such as being a poor dresser, we might have more ability to change, provided we have the money and a good source of sartorial advice).¹⁵⁰ Our kind behavior reinforces our self-image as kind, even at the subconscious level, as do the rewards we receive in praise and self-satisfaction.¹⁵¹

Repeated observations of our kindness lead to gossip about the trait, further improving our status on that score in settings where it is valued.¹⁵² In addition to our actions, an important source of whether others see us as kind is the words we use and whether they are perceived as sincere.¹⁵³

Perceptions of our kind nature can also open doors to us where skilled kindness is needed that might otherwise be closed.¹⁵⁴ Our efforts to stand out on a trait, such as kindness, the social science research suggests, tend to take root as longer-lasting aspects of our character if they persist through about age 16.¹⁵⁵ In this way are the best nurses and schoolteachers borne.

Persons who find status in physical strength and aggression, on the other hand, might become the Sumo wrestlers and other athletes of the future.

¹⁵⁰ Once again, the examples are mine, though they are inspired by others' work in this field. *See id.* at 239 (noting that the status system gathers social information that it uses "to plot a long-term strategy that will involve direct competition only in those areas of endeavor in which the individual has a hope of succeeding....").

¹⁵¹ *See* Taslitz, *Willfully Blinded*, *supra* note 88, at 438 (explaining how consistently repeated behavior changes how we think and feel, even down to the unconscious level).

¹⁵² *See* HARRIS, *supra* note 101, at 231-32 (gossip can affect your status in a way that persists for many years, though Harris's example was of negative gossip); BAUMEISTER, *supra* note 79, at 286 (noting gossip promotes social learning and alters status and behavior by providing a means for both social rewards and punishments).

¹⁵³ *Cf.* DAVID CRYSTAL, *HOW LANGUAGE WORKS: WHY BABIES BABBLE, WORDS CHANGE MEANING, AND LANGUAGES LIVE OR DIE* 278 (2005) (noting that for some speech acts, "[C]ertain *sincerity* conditions also have to be present: the speech act must be performed in a sincere manner. Verbs such as *apologize*, *guarantee*, and *vow* are effective only if speakers mean what they say; *believe* and *affirm* are valid only if the speakers are not lying) (emphases in original); DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 306 (2007) ("There is nothing more compelling in politics than a candidate who is genuine.").

¹⁵⁴ *Cf.* KIERON O'HARA, *TRUST: FROM SOCRATES TO SPIN* 14 (2004) ("What does trust buy you? It gets you out of a state of uncertainty....[I]f someone has promised to help you, and you trust her, then you can plan on that basis."); PAUL SEABRIGHT, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* (2004) (noting that humans have evolved "through selection for what is sometimes called 'reciprocity,' namely, an instinctive inclination to do unto others as they have already done unto you. If others have treated you well, you treat them well in return, but if they have hurt you, you hurt them back. An eye for an eye certainly, but also a gift for a gift.").

¹⁵⁵ *See* HARRIS, *supra* note 101, at 218-19.

Apart from the benefits to the individual, this process of differentiation brings society the benefits of diversity and specialization.¹⁵⁶ Famed Scottish philosopher Adam Smith long ago insightfully recognized the social advantages of this process in the economic realm, though its advantages extend to all other social realms as well. Explained Smith:

The difference of natural talents in different men is, in reality, much less than we are aware of; and the very different genius which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause, as the effect of the division of labor. The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education. When they came into the world, and for the first six or eight years of their existence, they were, perhaps, very much alike, and neither their parents nor play fellows could perceive any remarkable difference. About that age, or soon after, they come to be employed in very different occupations. The difference of talents comes then to be taken notice of, and widens by degrees.¹⁵⁷

This process, of course, takes place for many different personality traits and aspects of our lives. The combination of qualities we each develop, through the interaction of the socialization, relationship, and status systems, combined with genetic tendencies, current environment, life experience, multiple group memberships, and happenstance make us uniquely who we are.¹⁵⁸

That part of our uniqueness that stems from the combined effects of the socialization, relationship, and status systems turns in significant respects on the words we use, including what we say about ourselves to ourselves and to others and how we and they respectively interpret and react to those words.¹⁵⁹ Our control over self-revelation and our efforts to pierce others' control over their own revelation importantly shape our very sense of who we are, how we fit into the broader social world, and what we become. Fully understanding this point requires

¹⁵⁶ *See id.* at 238-40.

¹⁵⁷ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. 1, ch. 2, part 3 (1776) (reprinted Methuen & Co. 1904).

¹⁵⁸ *See* HARRIS, *supra* note 101, at 238-40, 247.

¹⁵⁹ *See id.* at 255-58.

understanding attribution theory¹⁶⁰ in more detail, that is, the ways in which each of us and our collectivities judge the worth of others' thoughts, actions, and nature.

C. *When We Are Judged*

Humans by nature seek meaning, a sense of interconnection among observed events, thoughts, and behaviors that make sense of our world.¹⁶¹ Part of meaning-making involves privately crafting explanations of our own perceptions, feelings, thoughts, and actions to ourselves.¹⁶² As noted previously, because such explanations occur by a form of internal conversation - - thinking with words - - and all words are chosen by and require interpretation, our efforts to explain ourselves to ourselves are necessarily interpretive.¹⁶³ We seek these private explanations to satisfy our curiosity about ourselves, allay confusion about what we do and why, and improve our ability to control ourselves and thus to manipulate reality.¹⁶⁴ Much self-deception can be involved in this process, however, sometimes to our advantage, sometimes to our disadvantage.¹⁶⁵ But the process itself is inevitable.¹⁶⁶

Correspondingly, we all seek, for analogous reasons, to develop our own *internal* explanations of others' behavior via the process of mindreading alluded to earlier.¹⁶⁷ Part of mindreading involves, however, making evaluative judgments about others, including assigning blame to them for their thoughts, feelings, or actions.¹⁶⁸ Yet each of us knows that others are

¹⁶⁰ See JENNY MCEWAN, *THE VERDICT OF THE COURT: PASSING JUDGMENT IN LAW AND PSYCHOLOGY* 10-11, 44 (2003) (defining attribution theory).

¹⁶¹ See MALLE, *supra* note 79, at 64 (defining meaning); BAUMEISTER, *supra* note 79, at 88 ("Most animals want to feel pleasure and avoid pain. In human beings, as cultural animals, that same motivation is present, but it has been transformed into the search for happiness. Happiness depends on meaning.").

¹⁶² See MALLE, *supra* note 79, at 65-69, 71.

¹⁶³ See *supra* text accompanying notes 96-100; Taslitz, *Feminist Approach*, *supra* note 97, at 15-18, 24.

¹⁶⁴ See MALLE, *supra* note 79, at 68-71.

¹⁶⁵ See *supra* text accompanying notes 844-94; Taslitz, *Willfully Blinded*, *supra* note 88, at 394-98.

¹⁶⁶ See JEROME BRUNER, *ACTS OF MEANING* 33 (1990) ("[T]he central concept of a human psychology is *meaning* and the processes and transactions involved in the construction of meanings.").

¹⁶⁷ See *supra* text accompanying notes 79-94.

¹⁶⁸ See MALLE, *supra* note 79, at 68 ("Explanations aim at identifying the factors that generated the behavior, such as reasons, emotions, specific situational factors, or traits"); MCEWAN, *supra* note 160, at 10-15, 26 (describing

also making similar culpability judgments about us.¹⁶⁹ We also know that, even in everyday situations, such judgments have short and long-term consequences, including informal sanctions like snubbing, ignoring, ridiculing, or chastising the offender,¹⁷⁰ creating a mechanism of social norm enforcement,¹⁷¹ what has been called a privately-enforced system of “law in brief encounters.”¹⁷²

Partly to avoid these sanctions, and partly to obtain other positive benefits, such as improving our social standing or manipulating others’ behavior, we are constantly generating *public* explanations for our behavior too.¹⁷³ These public explanations can also serve to satisfy others’

psychological mechanisms by which we assign responsibility and blame); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOM’S L.J. 3 (2000) (describing the process by which we separately assign blame, first, for having certain emotions, second, for acting on them).

¹⁶⁹ See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 19-20 (2000) (describing individuals’ fear of misjudgment by the “unwanted gaze” of the crowd); Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 107 (1980) (observers readily make judgments about our entire nature based on little evidence, much of it taken out of context, or by allowing their perception of one of our traits to taint their overall perception of our entire nature).

¹⁷⁰ See *supra* text accompanying notes 82-94 (describing these social consequences); ROSEN, *supra* note 169, at 21 (describing emotional consequences).

¹⁷¹ See generally SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW (Eric A. Posner ed. 2007) (collecting essays defining social norms, informal methods for their enforcement, and their connection to law); NICOLE DUBOIS, *A SOCIOCOGNITIVE APPROACH TO SOCIAL NORMS* (2002) (extended analysis of the social-psychological processes of norm creation and enforcement).

¹⁷² See W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 21-24, 42-43 (1999) (describing social sanctions for violating informal social rules, such as those governing the when, how, why, and how long of human staring and glaring). Reisman emphasizes the too often overlooked importance of recognizing how “micronorms” - - those governing the smallest of social interactions - - serve as a legal system in themselves and play a role in more formal legal rules, in the definition of the self, and in finding a life of meaning:

Micronorms and their sanctions may be significant factors in the shaping of personalities in ways that have civic impact and social importance, not to speak of effects on an individual’s autonomy, self-assurance, sense of self-worth, and capacity to develop affection for others. Knowledge of micronorms and facility in their use can empower. Most generally, microlegal systems and how we use them may influence our ability to be happy. Microlegal systems, like international law, may be near “the vanishing point of jurisprudence,” but their low visibility and hitherto disdainful recognition by scholars of the law should not obscure the effects they can have on social order, the quality of individual lives, and the formation of personalities.

Id. at 15.

¹⁷³ See MALLE, *supra* note 79, at 68-72, 74-75.

curiosity, or lessen their confusion, about us or can promote the mutual understanding necessary to coordinating joint plans and actions.¹⁷⁴ Social psychologist Bertram Malle put the point thus:

Explanations have to be formulated in language to effectively change an audience's impressions, move their emotions, or direct their actions. Clarifying one's goals, excusing one's actions, or presenting someone else's motives as virtuous all require communicating one's explanation to an audience. The social-interactive functions that are served by communicative explanations constitute...[a] major motivation for behavior explanations.¹⁷⁵

Relative social status plays an important role in determining the frequency and content of the behavior explanations a person offers. Those "lower in the power hierarchy will be inclined to preemptively offer behavior explanations but not expect the same from those above them."¹⁷⁶ The explanations offered can include whether an action was intentional or not, the reasons (the contributing beliefs and desires) for undertaking it,¹⁷⁷ the causal history or background factors that led to the rise of the reasons, and those factors that enabled the intention to be translated into action.¹⁷⁸ The degree of intentionality can vary - - for example, from negligence, to recklessness, to knowledge, to purpose - - with more intentional acts seen as more blameworthy than less intentional ones.¹⁷⁹ The existence of a perceived duty to act in the face of a preventable harm also increases blame-assessment.¹⁸⁰

On the other hand, the more that a person's reasons for action are attributed to her causal history, "such as in her upbringing, personality, culture, or in the immediate context," the less

¹⁷⁴ See *id.* at 70-71.

¹⁷⁵ *Id.* at 70.

¹⁷⁶ *Id.* at 75.

¹⁷⁷ See *id.* at 78-79, 220.

¹⁷⁸ See *id.* at 86-87.

¹⁷⁹ See Andrew E. Taslitz, *Myself Alone: Individualizing Justice through Psychological Character Evidence*, 52 MD. L. REV. 1, 14-17 (1993).

¹⁸⁰ See *id.* at 15-16; MALLE, *supra* note 79, at 89.

that her actions are viewed as truly chosen by her, thus the less culpable she appears.¹⁸¹

Personality assessments can cut both ways, moreover, for the more that a condemnable action seems to stem from a fundamental character trait definitional of the actor's nature, the more disapproving a moral assessment his actions might also be given.¹⁸²

So strong is the need to assess the moral quality of another's actions in light of her reasons, personal history, and context that observers lacking adequate information, especially about an actor's mental state, will infer it or construct it.¹⁸³ If person-specific mental state information is so scanty that it cannot be constructed, observers will search for general information about the actor's history and context and, if that quest fails, will postulate generic explanations - - "reasons for why *anybody* might act that way."¹⁸⁴

Moreover, these same processes operate in connection with groups that are seen as jointly acting, that is, as consisting of members who deliberate and act together as a unified agent.¹⁸⁵ Indeed, the behavior of such groups is even more likely to be attributed to group intentionality and reason-choosing - - that is, to the group's character and freely-made choices - - compared to the less culpable factors of its background and history than is true for individuals.¹⁸⁶ Perceptions of group unity can come from cognitive biases and from propaganda,¹⁸⁷ and the actions of individual members of stereotyped groups may partly be assessed in light of those stereotypes.¹⁸⁸

¹⁸¹ See MALLE, *supra* note 79, at 91, 107.

¹⁸² See Taslitz, *Myself Alone*, *supra* note 179, at 110-13; MCEWAN, *supra* note 160, at 13 (defining the "fundamental attribution error," the tendency of observers in many circumstances unduly to attribute the observed's behavior to fundamental character traits rather than the situation; however, the more the observer knows about the circumstances facing the actor, particularly those affecting his ability to do otherwise, the more the effect of the fundamental attribution error may be mitigated).

¹⁸³ See MALLE, *supra* note 79, at 123.

¹⁸⁴ See *id.* at 124.

¹⁸⁵ See *id.* at 200.

¹⁸⁶ See *id.* at 206-07.

¹⁸⁷ See *id.* at 209.

¹⁸⁸ See *id.* at 213.

Add into the mix the facts that observers are often willing to make sweeping judgments about actors' character based upon limited information; that such observers allow their perception of one bad character trait to infect their overall assessment of the actor's moral worthiness; and that actors and observers often interpret the same behavior differently, and it becomes clear that each of us faces the constant danger of suffering social sanctions upon being morally judged by others with whom we interact.¹⁸⁹ Those sanctions can be severe, even involving material deprivation (e.g., by being fired from a job), when those others have more power and social status than we do.¹⁹⁰ These fears are terrifying when realized, even if we think that our judges have gotten the facts right. But the emotional pain is still more severe when we believe that they have gotten it wrong, misreading our intentions, character, and personal history or evaluating aspects of them out of context.¹⁹¹

Apart from the righteous anger at being unfairly sanctioned for misjudgments, such misjudgments are inherently painful even if little in the way of concrete penalties results. Remember that each of us is driven to see ourselves as unique. This self-perception of uniqueness is central to self-definition.¹⁹² Being misjudged as being different from whom we (in our lights) truly are is thus experienced as an assault on our personhood, an attack on our soul.¹⁹³ Remember too that our unique self-identity arises in significant part from how we believe others see us.¹⁹⁴ After a certain age, core parts of our self-identity become more resistant to, but likely not impossible to, change.¹⁹⁵ Others' assessment of our nature is thus always important to us,

¹⁸⁹ See Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROB.S 125, 154 (2002) [hereinafter *Human Emotions*] (making these points in the context of analyzing the nature of *Fourth Amendment* privacy).

¹⁹⁰ See *id.* at 155.

¹⁹¹ See *id.* at 154-58.

¹⁹² See *supra* text accompany notes 101-60.

¹⁹³ See Taslitz, *Human Emotions*, *supra* note 189, at 155.

¹⁹⁴ See *supra* text accompanying notes 137-59.

¹⁹⁵ See *supra* text accompanying notes 155-56.

always to some extent continuing to affect our character's evolution, while social misunderstandings of who we are feel like rejection of a lifetime of self-shaping and seem to reflect an ignorance of the experiences and situational constraints from which we benefited or suffered.¹⁹⁶

Yet the risk of being mis-defined is enormous, for the self is a multiple rather than a unitary concept - - we each have many sides.¹⁹⁷ We may reveal selected aspects of ourselves in certain contexts where we want to be judged by that portion of our character, such as when we convey an image of professional competence, control, and reliability on the job.¹⁹⁸ Yet to truly be known for all of our many sides requires much time and experience and must occur slowly lest we be misjudged, a part of our nature being taken for the whole.¹⁹⁹ Accordingly, trust and commitment are required for two people to know each other well, so we reserve relatively unbridled self-revelation for intimate others. That self-revelation indeed becomes a marker of intimacy.²⁰⁰ As Professor Jeffrey Rosen explains:

True knowledge of another person...requires the gradual setting aside of social masks, the incremental building of trust, which leads to the exchange of personal disclosure. It cannot be rushed....True knowledge of another person, in all his or her complexity, can be achieved only with a handful of friends, lovers, or family members. In order to flourish, the intimate relationships on which true knowledge of another person depends need space as well as time: sanctuaries from the gaze of the crowd in which slow mutual self-disclosure is possible.²⁰¹

¹⁹⁶ See Taslitz, *Human Emotions*, *supra* note 189, at 155-57.

¹⁹⁷ *See id.* at 153-54.

¹⁹⁸ *See id.* at 153-55.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 153-54.

²⁰¹ ROSEN, *supra* note 169, at 8.

Others' assessments of our desires, beliefs, and actions in even a single instance will have some impact on their assessment of our overall character.²⁰² Strong empirical and moral arguments have indeed been mounted that our culpability assessments about another person are and should be made based upon the extent to which a single bad action is seen as reflective of a bad character.²⁰³ Yet being mis-defined, including by judging all of who we are based upon a single perceived bad choice, causes us humiliation, indignity, and mental distress.²⁰⁴ There are, Jeffrey Rosen again explains, "few experiences more harrowing than being described: [T]o be described is to be narrowed and simplified and judged out of context."²⁰⁵ Consequently, "there are few acts more aggressive than describing someone else."²⁰⁶

Now we can see what mental privacy is and why we hold it so dear. It is not so much necessarily the content of any particular thought or feeling that we fear revealing as the risk that it will be misunderstood or taken out of context and, especially, that we lose control over when, how, and to whom it is revealed.²⁰⁷ That control helps us to avoid mis-definition; to maintain our sense of being a unique, bounded personality, separate from the herd; and to manage our social status and interpersonal relationships.²⁰⁸ Moreover, extensive revelations of many sorts

²⁰² See Taslitz, *Myself Alone*, *supra*, note 179, at 107; see generally LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES ON SOCIAL PSYCHOLOGY* (1991).

²⁰³ See Taslitz, *Myself Alone*, *supra* note 179, at 68-69 (using the "Paula" example).

²⁰⁴ See Taslitz, *Human Emotions*, *supra* note 189, at 155.

²⁰⁵ ROSEN, *supra* note 169, at 205-06.

²⁰⁶ *Id.*

²⁰⁷ See, e.g., *United States v. White*, 401 U.S. 745, 786, 787-89 (1971) (Harlan J., dissenting) (noting that privacy importantly includes the right to make a "disclosure protected by the very fact of a limited audience" and the likelihood that a listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record); *Smith v. Maryland*, 442 U.S. 735, 748-49 (1979) (Marshall, J., dissenting) ("Privacy is not a discrete commodity possessed absolutely or not at all"); Taslitz, *Human Emotions*, *supra* note 189, at 153 (explaining that, because the "self" has many sides, control over which portion of ourselves is exposed to which persons for what purposes, that is, over which social masks we wear on particular occasions, is important to us in establishing some degree of control over how others judge us and over guarding against the risk that this necessarily incomplete self-disclosure will result in mis-definitions of our essential nature).

²⁰⁸ See Taslitz, *Human Emotions*, *supra* note 189, at 155-58 (explaining how privacy is the solution to being mis-defined).

are generally reserved for our most intimate others.²⁰⁹ Forced revelations to those outside this small circle of friends and family can feel like forced intimacy with those for whom such a relationship is neither desired nor intended.²¹⁰ It is through language that we primarily express to others our private thoughts and feelings. The sense of forced speech about ourselves and our actions to strangers is, therefore, experienced as an invasion of the person and a betrayal of our sacred relationships with our truly intimate others, degrading our social status and our sense of equal worth.²¹¹

D. *Criminal Justice*

The ultimate culpability assessor is the criminal justice system.²¹² The material consequences of blame by that system are, of course, potentially far more severe than is the case for more informal social systems: imprisonment or even death.²¹³ Future job consequences are diminished, and imprisonment especially can result in marriages killed, other family ties strained, children abandoned, friends lost.²¹⁴ Apart from these consequences, the fact of

²⁰⁹ *See id.* at 153.

²¹⁰ *See id.* at 153-54, 157-58.

²¹¹ *See supra* text accompanying notes 162-84 (discussing the relationship between language and social responsibility judgments); Taslitz, *Human Emotions*, *supra* note 189, at 152 (explaining that one function of privacy is to foster “a set of metaphorical boundaries that enables each of us to safeguard a sense of self”); *infra* text accompanying notes 242-402 (explaining in more detail how language use affects character judgments); *infra* text accompanying notes 464-560 (explaining why the act of *compelling* speech is an additional invasion and distortion of the self separate from that accomplished by audiences hearing our words and judging them).

²¹² *See* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 306, 313-55 (2001) [hereinafter *Civil Society*] (explaining the role of the criminal versus the civil justice system).

²¹³ *See* RICHARD G. SINGER, *CRIMINAL PROCEDURE II: FROM BAIL TO JAIL* 255-300 (2005) (summarizing the sentencing options available in the criminal justice system).

²¹⁴ *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer ed. 2002). (collecting essays outlining the harms done to the defendant, his family, friends, neighborhood, and society at large that were not part of his announced sentence but necessarily accompany it).

conviction, especially in modern American society, marks the convicted as an outsider to the political community, a lesser being in fact if not formally so in law.²¹⁵

Moreover, the condemnation represented by a conviction is far more extensive than, and of a different nature from, that stemming from lesser wrongs. It is one thing to be blamed by one's spouse, children, or friends, or even by one's church or neighborhood, for letting them down. It is another thing entirely to also be blamed by the entire political community, yet that is just what a criminal conviction represents.²¹⁶

In practice, those subjected to the criminal law are also most often members of despised groups or individuals otherwise already weak in social status and power.²¹⁷ They also have the fewest resources for painting what they see as an accurate picture of their essential nature and of their life circumstances for them to be fairly judged by the courts.²¹⁸

The public condemnation involved in a criminal conviction also helps to shape social influences and social meanings, in turn affecting the meanings that individuals give to their own and others' actions.²¹⁹ The law also sends signals that "can shape the emotions of the citizenry," for "[p]eople have some choice in forcing themselves to consider another person's point of view

²¹⁵ See Taslitz, *Civil Society*, *supra* note 212, at 356 ("The exclusion of the offender from being a full member of the moral-political community (literal exclusion as well in the case of imprisonment) has a powerful impact in reaffirming social norms.")

²¹⁶ See *id.* at 313-55 (defending this very point but also noting that even tortious civil liability is, unlike criminal liability, more about blame being placed by individuals than by the entire community).

²¹⁷ MICHAEL K. BROWN, ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 132-60 (2003) (summarizing the extent and causes of race and class disparities in the criminal justice system).

²¹⁸ See AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, THE REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS* 79-91 (2006) (detailing ineffective assistance of counsel and other resource constraints facing indigent criminal defendants).

²¹⁹ See, e.g., Amartya Sen, *Normative Evaluation and Legal Analogues*, in *NORMS AND THE LAW* 247, 264 (John N. Drobak ed. 2006) (making the broad point that the law both influences, and is influenced by, social norms); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349 (1997) (examining this broader point and the narrower one of the *criminal law's* influence on social norms); ERIC POSNER, *LAW AND SOCIAL NORMS* 150 - 60 (2000) (analyzing specifically the inter-relationship between the criminal law and social norms).

or in directing their attention to other issues.”²²⁰ Whether the law treats spousal killing in revenge for adultery lightly or harshly affects public perceptions about the acceptability of certain emotions and of acting upon those emotions.²²¹ But assessments of emotions and resulting actions are closely linked to our overall assessment of another’s character.²²² As two leading social psychology specialists on culpability assessment put it, “[T]he law delivers a message about what is acceptable, understandable, forgivable, or not. The law is part of the system of cultural norms that influences how to behave, and therefore it is, in principle, impossible to consider the effects of emotion on behavior as if they were independent of the Law.”²²³

Unfortunately, the categories of the law do not always make room for the complexity of human experience.²²⁴ For example, conflicting social norms can tear at an accused in a way that cries out for mitigation.²²⁵ Yet the rules of law may not easily accommodate this reality. A

²²⁰ NORMAN J. FINKEL & W. GERROD PARROTT, *EMOTIONS AND CULPABILITY: HOW THE LAW IS AT ODDS WITH PSYCHOLOGY, JURORS, AND ITSELF* 87 (2006).

²²¹ See Dan Kahan & Martha Nussbaum, *Two Concepts of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 317-18 (1996).

²²² See Taslitz, *Two Concepts*, *supra* note 221, at 45-63 (illustrating this point in the context of the laws and practices governing date rape).

²²³ See FINKEL & PARROTT, *supra* note 220, at 87. Finkel and Parrot elaborate:

Our proposal is that the effect of laws that address emotions is not merely to accommodate human frailties and punish human vices, but to influence behavior through social influence and social meaning. This view of emotions and the Law is most consistent with the psychological theory of social constructionism, which holds that social practices influence human psychology....In the case of emotions and the law, the constructionist thesis is that the effects of emotions, such as the degree to which people find that their emotions overwhelm their ability to obey the law, will to some extent be determined by the laws themselves. Human nature is not an invariant that the Law must accommodate; rather, the Law’s accommodations can actually shape human nature and thereby facilitate the very crimes that the Law mitigates or excuses.

Id. at 87-88.

²²⁴ See *id.* at 228 (critiquing the Model Penal Code’s *mens rea* scheme and definition of intent, for the latter “fails to reflect the full array of determinative elements that constitute our complex psychological nature, failing, for example, to integrate emotions within its theoretical ambit.”).

²²⁵ Sometimes the criminal law does recognize and struggle to resolve such conflicts:

defense lawyer can, however, help to present an accused's story in a way that fits into the pre-existing legal categories, pulling the law in practice closer to what the common sense justice of folk wisdom demands. Emotion theorist J.R. Averill offered this example:

By attributing his response to anger (or temporary insanity), an accused killer is in effect asking the jury to judge him not by the standards that prohibit the deliberate taking of life, but by the standards (sometimes called the "unwritten law") that encourage protection of home and honor. There is a problem, however. The proscription against homicide does not allow many exceptions. The killing must therefore be redefined: No longer is it the act of a normal human being; rather, it is the result of an irrational, animal-like impulse (anger) or the symptom of a disease (temporary insanity).²²⁶

The point is not necessarily that legal categories departing from folk ones are therefore wrong. Rather, what matters is that the two categories often diverge, creating a risk of mis-defining who the killer is and what he has done. From his perspective, the killing was done for the sake of honor, but that is not a defense the law will allow. The killer is, of course, likely ignorant of the specifics of the law.²²⁷ But this observation is no surprise because laypersons do generally view the law as speaking a technical, priest-like language, divorced from everyday understandings.²²⁸

[P]eople's sympathy toward crimes of passion is aroused not by the uncontrollability per se of the emotion, but by the values that give rise to the emotion. Society and the Law want people to value human life, but also to value marital fidelity, personal honor, and so on, and these additional values require accommodation. From this perspective, the reasons why the Law allows them mitigation or excusing of crimes of passion is that the community has sympathy for the person who is torn between important values that are both endorsed by the community.

Id. at 88.

²²⁶ J.R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION 124 (1982).

²²⁷ See, e.g., James R.P. Ogloff & V. Gordon Rose, *The Comprehension of Jury Instructions*, in PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE 407, 408 (Neil Brewer & Kipling D. Williams ed.s 2005) (noting that, given jurors' ignorance of the law, they must be instructed in it at trial, but "[g]iven the complexity of the law, concern has been expressed that jurors are unable to comprehend adequately the judge's instructions.").

²²⁸ See PETER M. TIERSMA, LEGAL LANGUAGE 3 (1999) (noting that lawyers' "unusual vocabulary may alienate those who are not part of the profession and may be difficult for them to understand.").

At some gut level, therefore, even the most truthful of suspects must understand the grave risk that his words will be misunderstood or misused, with potentially tragic consequences.²²⁹

A second source of potential miscommunication in the law comes from its conception of narrative. Narratives of course play a crucial role in any trial.²³⁰ But the criminal law usually seeks to cabin those narratives, to limit them in time and space.²³¹ Yet “[n]arratives exert a strong influence over the perception of responsibility and culpability.”²³² Emotions play a central role in story-creation, yet emotions too have a narrative structure.²³³ Folk assessments of emotions and culpability in fact have complex narrative structures that evolve over time and space.²³⁴ We crave to know the history leading up to an emotional episode and ensuing action, sometimes a quite extended history that examines childhood, school, and adolescence, work and play experiences, and pivotal life events.²³⁵ Emotions themselves, cognitive psychologists have come to recognize, are more processes developing over time than discrete responses.²³⁶ Yet the law looks to a narrow frame of time and circumstances, emphasizing, for example, whether the

²²⁹ But that risk does not necessarily, or even usually, stop a suspect from talking, particularly in light of police tactics designed to overcome speaker reticence, tactics that can even result in confessions by the innocent. *See, e.g.*, LAWRENCE M. SOLAN & PETER TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* 87-95 (2005) (explaining how the *Miranda* warnings as currently administered can in fact confuse and mislead suspects into talking); *see generally* Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatological Term*, 75 TEXAS TECH. L. REV. 145 (forthcoming 2007) (explaining how psychological forces and police tactics that distort suspects’ understanding of their rights lead the latter to talk); Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006) (analyzing the factors that can promote false confessions).

²³⁰ *See* NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 63-78 (1995) (explaining how jurors and lawyers jointly construct trial narratives to reach a verdict).

²³¹ *See* Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 *Hastings L.J.* 1039 (1998) [hereinafter *Abuse Excuses*] (illustrating how this narrowing process works in the context of expert testimony).

²³² FINKEL & PARROTT, *supra* note 223, at 105.

²³³ *See id.* at 96-97 (“We would conclude that everyday folk theory (does not distinguish focused emotional reactions from the extended narrative in which they take place.”); Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in *NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT* 3, 11 (Theodore R. Sarbin ed. 1986) (“Our planning’s, our rememberings, even our loving and hating, are guided by narrative plots.”).

²³⁴ *See* FINKEL & PARROTT, *supra* note 223, at 96-97.

²³⁵ *See* W. Gerrod Parrott, *The Emotional Experiences of Envy and Jealousy*, in *THE PSYCHOLOGY OF JEALOUSY AND ENVY* 3 (P. Salovey ed. 1991) (illustrating this point via the narrative structure of jealousy and envy); Taslitz, *Abuse Excuses*, *supra* note 231 (urging law’s recognizing this wider folk narrative conception of human psychological reality).

²³⁶ *See* FINKEL & PARROTT, *supra* note 223, at 96-97.

shooter pleading self-defense feared imminent serious bodily injury *at the precise moment of the shooting* over the extended life histories that may have brought the two parties to that fateful moment.²³⁷ As psychology professors Norman J. Finkel and Gerrod Parrott conclude:

A potential conflict between folk and academic conceptions, on the one hand, and the Law's views, on the other, can already be foreseen. The Law, with its typically narrow focus on the moment of the act, tends to see emotions statically and as simplistic stories rather than as complex narrative episodes in which appraisals develop and change across time, situations and circumstances, and in which the very emotion may transform into another emotion.²³⁸

The law thus raises the risk of mis-definition by simply narrowing the social framework and breadth of individual life experiences that ordinary folks consider important in making culpability assessments. It is again likely that persons ensnared in the criminal justice system intuitively understand the miscommunication that may result from everyday culpability assessments being strained through the filters of evidence and substantive criminal law.²³⁹ The conflict between the widened vision of the everyday and the narrowed vision of the criminal law has been well-captured, again by professors Finkel and Parrott, who explain:

Thus, in moral philosophy as in folk psychology, the moral significance of emotions is bound up in the particularities of their context. In everyday life, people think of emotions in narrative episodes because they are concerned with what emotions say about events, responsibility, and character, and when ordinary people enter the courtroom as jurors, they frame evidence in narrative episodes (often in emotional episodes) because they are concerned with assessing culpability in the context of the "story" in which it occurs.²⁴⁰

²³⁷ See Taslitz, *Abuse Excuses*, *supra* note 231, at 1054-65.

²³⁸ FINKEL & PARROTT, *supra* note 223, at 97.

²³⁹ Who has not witnessed a movie in which lawyers' objections prevent a witness from telling his whole story? See, e.g., PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (2006) (summarizing plots of leading films about trials); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 6-7 (1995) (noting that consistency between a community's moral rules and its criminal justice system rules promotes legitimacy, deterrence, moral credibility, and community cooperation, while conflict between the two types "engenders resistance and subversion," for a rule that is strongly and persistently supported by the community as accurately reflecting moral blameworthiness but that is not followed by the criminal justice system raises...destructive possibilities.").

²⁴⁰ FINKEL & PARROTT, *supra* note 223, at 107.

In sum, the criminal justice system raises special and heightened risks of mis-description with unique and dramatically more severe potential consequences. It may be good for the soul to choose to confess to one's priest in the isolation of the confessional box knowing that your secrets go no further than the clergyman's ears. It may even be redemptive to confess to a narrow circle of friends and family, recognizing the risk that they may spread your tale beyond its intended audience.²⁴¹ But compelled confessions in the context of the criminal justice system are of a wholly different order. They are *sui generis* and should be treated as such.

III. *The Literal Voice*

As mentioned earlier, by the "literal voice" I mean those aspects of the sound and content of our voices that, often unconsciously, influence our self-concept and our relationships with other persons and groups. The concept of the literal voice includes the content of our words for the overt information that they purport to transmit but also includes their covert or meta-information - - information about our social status, personality, emotions, geographical location, group affiliations, gender, and intelligence.²⁴² It is the meta-information that I emphasize here because it is that aspect of the literal voice that courts and legal commentators so often ignore.

American culture tends to emphasize the eye over the ear, the written over the spoken.²⁴³ Yet the spoken word is the more fundamental form of communication.²⁴⁴ It is speech that evolved first, our brains developing into high-speed computers for extracting social information from spoken words.²⁴⁵ Every culture develops categories associating certain speech qualities with

²⁴¹ See generally SCOTT HAHN, *THE HEALING POWER OF CONFESSION* (2003) (cataloguing the benefits of confession in personal and religious contexts).

²⁴² See *infra* text accompanying notes 264-402 (addressing these points).

²⁴³ See ANNE KARPf, *THE HUMAN VOICE: HOW THIS EXTRAORDINARY INSTRUMENT REVEALS ESSENTIAL CLUES ABOUT WHO WE ARE* 3, 13 (2006).

²⁴⁴ See CLIFFORD NASS & SCOTT BRAVE, *WIRED FOR SPEECH: HOW VOICE ACTIVATES AND ADVANCES THE HUMAN-COMPUTER RELATIONSHIP* 1 (2005).

²⁴⁵ See *id.* at 2-3.

certain social characteristics, such as social status or power.²⁴⁶ Humans seek to identify each person's voice as a mark of a unique individual, an essential component part of what makes each of us different from one another, while also using the voice as a way to identify or create commonalities.²⁴⁷ Gossip in particular evolved partly to promote social bonding.²⁴⁸ The written word necessarily functions differently - - lacking, for example, tone, volume, and pitch - - from the spoken.²⁴⁹ Yet writing is ultimately derivative of speaking, another medium for the expression of voice, a point to which I will return later.²⁵⁰

Sociologist Anne Karpf has summarized the importance of the human voice this way:

Throughout our lives we make decisions, often unwittingly, on the basis of the sound of a person's voice: lovers as well as political candidates get selected for vocal reasons. Our lilt, twang, or tremor is eloquent beyond words. The voice can also make sentences do somersaults. "I don't think so" might be an innocent expression or withering sarcasm - - the voice tells us which. "Not bad" - - given the right tone - - can glow with praise. Yet signal oddly with your voice - - by transgressing the normal codes of volume, pause, and pitch - - and you can entirely sabotage conversation, turning sense into nonsense.²⁵¹

²⁴⁶ See *infra* text accompanying notes 338-402.

²⁴⁷ See NASS & BRAVE, *supra* note 244, at 1-3 (making this point); D.R. Van Lancker & J. Kreiman, *Voice Discrimination and Recognition as Separate Abilities*, 25 NEUROPSYCHOLOGIA 829 (1987) (offering supporting empirical data).

²⁴⁸ See Robert F. Goodman, *Introduction*, in GOOD GOSSIP 3 (Robert F. Goodman & Aaron Ben-Ze'ev ed.s 1994) (summarizing social functions of gossip); see generally DUNBAR, *supra* note 117 (arguing that the need to gossip was the primary force in the evolution of human language). Goodman explains that:

[G]ossip promotes friendship and group cohesion [G] helps to sustain group norms, and often serves to effectively communicate important information. Social scientists also emphasize that gossip may be important to the extent that it provides bases for the comparison of an individual's experiences, feelings, and beliefs with those of others; contributes to one's sense of self-esteem by revealing other people's failings; and enhances status among peers.

Goodman, *supra*, at 3.

²⁴⁹ See *infra* text accompanying notes 403-63.

²⁵⁰ See *infra* text accompanying notes 403-63.

²⁵¹ KARPf, *supra* note 243, at 1.

The voice can convey information about ourselves that we choose to reveal, many of us “code-switching,” having different voices for different situations or audiences.²⁵² “From teachers to receptionists to lawyers, around a quarter of the total labor force is in a vocally demanding profession, or uses their voice as their primary tool of trade.”²⁵³ Yet the Wall Street lawyer who chooses to convey confidence and a sense of *noblesse oblige* with his corporate clients may lapse into the relaxed street slang of his Bronx roots when returning to the old neighborhood, baby talk when alone with his lover, or use soft, high-pitched tones when reading fairy tales to his four year old child.²⁵⁴ But merely by speaking we can also convey much that we might prefer to hide. The sound of our voice can reveal illness, intoxication, and exhaustion, social class, education, and sexual desire.²⁵⁵ Our voice can encourage intimacy or distance, instill confidence or fear, undermine or support an opponent or friend, frequently without our conscious awareness or willingness to do these things.²⁵⁶ Voice is essential to the development of healthy emotional ties, empathy, and social skills but can unwittingly erode all those things.²⁵⁷ Even if all we are doing is reading sewage disposal regulations aloud, “our voice is doing something terrifyingly intimate - - leaking information about our biological, psychological, and social status. Through it, our size, height, weight, physique, sex, age and occupation... can be detected.”²⁵⁸ As voice specialist Anne Karpf again explains, the voice:

Bridges our internal and external worlds. Traveling from our most private recesses into the public domain, revealing not only our deepest sense of who we are, but also who we wish we weren't. It's a superb guide for fear

²⁵² See JENNIFER COATES, WOMEN, MEN, AND LANGUAGE 151 (2d ed. 1993) (“code” or “style-switching” means “learning which [language] styles are appropriate in which contexts”).

²⁵³ KARPf, *supra* note 243, at 18-19.

²⁵⁴ These are examples of a kind of code-switching done to achieve different social goals in different contexts. See COATES, *supra* note 252, at 151 (defining code-switching).

²⁵⁵ See KARPf, *supra* note 243, at 10-11.

²⁵⁶ See *id.* at 4.

²⁵⁷ See *id.* at 3.

²⁵⁸ *Id.* at 10.

and power, anxiety and subservience, to another person's vitality and authenticity as well as our own.²⁵⁹

This invasion of the self can be unsettling, therefore, even when the judgments made based upon our voice are accurate.²⁶⁰ But the human drive to make such judgments is so strong that others will do so even when they are often wrong or their voice sample and other contextual information is limited.²⁶¹ Accordingly, having control over when and how we talk is central to our efforts to control what sides of ourselves we reveal, in what contexts, and for what purposes. Yet this control is limited. By speaking at all, we reveal much we might rather not and face the risk that judgments, fair and unfair, accurate or not, will be made about our essential nature.²⁶² These judgments have psychic impacts, affecting our self-esteem and self-identity, and having social and material impacts, affecting whether others trust us, open themselves up to us, offer us educational or employment opportunities, invite us into their groups, or welcome us into their homes.²⁶³ Control over our voice is thus critical to maintaining our mental privacy. At some level, conscious or not, we understand this power of the voice, and we both celebrate and fear it. This section III of this article seeks to elaborate why this is so, exploring the voice's power in the illustrative areas of emotion-reading, personality judgments, relative social status generally, group belonging and exclusion, and gendered relationships. Next this section considers the implications of the written word and technology and their implications for better understanding

²⁵⁹ *Id.* at 4.

²⁶⁰ *Cf. supra* text accompanying notes 181-209 (addressing the broader problem of fear of mis-definition, of which mis-definition in response to one's voice is a subset).

²⁶¹ *See* NASS & BRAVE, *supra* note 244, at 3 (“The ability quickly to classify others and use those judgments to guide behavior predicts success in all aspects of life. The ancestors of current humans - - those who won the evolutionary battle - - were equipped to learn and apply the social rules of voice.”); *infra* text accompanying notes 310-35 (illustrating this phenomenon of making quick character judgments based upon a stranger's voice). This tendency to judge personality based on limited voice data is, of course, also a subset of our broader tendency toward snap judgments about character. *See supra* text accompanying notes 182-89 (discussing the “fundamental attribution error.”).

²⁶² *See* NASS & BRAVE, *supra* note 244, at 3 (noting that each society's rules about how to use categories of voices and words “provide systematic guidance for determining gender-, personality-, and emotion-specific actions. These rules also advise people whom to like, whom to trust, and with whom to do business.”).

²⁶³ *See id.* at 3.

the privilege against self-incrimination, before turning, in the article's penultimate section, to the idea of linguistic compulsion as at the heart of the Fifth Amendment privilege.

A. *Voicing Emotions*

Emotions focus our attention on whatever causes them. The more intense the emotion, the more focused is our attention.²⁶⁴ Voices can powerfully convey, both by their sound and content, emotions, while simultaneously eliciting them in others.²⁶⁵ "Turn, here now! Oh, my God!" screamed in terror by a car passenger, for example, tends to elicit fear, intense concentration, and immediate aversive action by the driver.²⁶⁶

Emotions also alter how we filter experience, including concerning matters unrelated to the event that originally elicited the emotion.²⁶⁷ A happy person is simply more likely than a sad one to interpret experiences in a positive rather than a negative fashion.²⁶⁸ Positive emotions also improve, on the one hand, much thinking flexibility and efficiency, making it easier to find creative solutions to difficult problems.²⁶⁹ Simultaneously, on the other hand, positive emotions, perhaps paradoxically, increase reliance on stereotypes, making their bearer more likely to be "influenced by labels, such as the gender, accent, and personality [believed to be revealed

²⁶⁴ See DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 14-15 (2006) (noting that one of the central organs for processing emotions, the amygdala, "acts as a radar for the brain, calling attention to whatever might be new, puzzling, or important to learn more about."); GEORGE MARCUS, ET AL., *AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT* 1 (2000) (arguing that emotions determine when citizens pay serious attention to political issues rather than relying on political habits); NASS & BRAVE, *supra* note 244, at 77 ("Emotions direct and focus people's attention on those objects and situations that have been appraised as important to people's needs and goals").

²⁶⁵ See NASS & BRAVE, *supra* note 244, at 77 (illustrating how voices can activate emotions); GOLEMAN, *supra* note 264, at 14-17 (describing how voices and body language can cause "emotional contagion," the spread of emotions from one person to others).

²⁶⁶ See NASS & BRAVE, *supra* note 244, at 77 (using similar example).

²⁶⁷ See *id.* at 77-78 (making similar point); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 410-18 (1996) (discussing "epistemology filters" and how they operate to alter perceptions of reality).

²⁶⁸ See NASS & BRAVE, *supra* note 244, at 77-78.

²⁶⁹ See *id.*

by]...the voice.”²⁷⁰ Positive emotions also make their bearers more risk averse.²⁷¹ But our voices can often reveal our emotions in very subtle ways. Meanwhile, listeners are primed to try to read emotions from our voices, sometimes doing so accurately, sometimes not.²⁷² Yet what listeners perceive in speakers’ emotions can and does alter the listeners’ own feelings.²⁷³ Frequently this happens because listeners mimic the emotions that they perceive in speakers, including in their voices.²⁷⁴ Emotions can thus become contagious.²⁷⁵

Voices convey emotions by variations in speech rate, pitch average, pitch range and intensity, voice quality, pitch changes and their speed, and the precision and nature of articulation.²⁷⁶ Depression is notably readily identifiable via the voice, which becomes quieter, less inflected, and “has a dull, lifeless quality,”²⁷⁷ trailing off at the end of a sentence, “as if the speaker is sighing while talking.”²⁷⁸ Writer William Styron recalled that his depression resulted in “the lamentable near-disappearance of my voice. It underwent a strange transformation, becoming at times quite faint, wheezy and spasmodic - - a friend observed later that it was the voice of a 90-year old.”²⁷⁹ The voices of manic-depressives in their manic phase, by contrast, are vigorous,

²⁷⁰ *Id.* at 78.

²⁷¹ *Id.* (“[A]lthough people in a positive mood are more risk-prone when making *hypothetical* decisions, they tend to be more cautious when presented with an actual risk situation.”).

²⁷² *See id.* at 95 (“Because the brain tightly integrates the emotion of voice and the emotion of words, consistency between them is critical, even when they are generated by a clearly synthetic, unemotional machine).

²⁷³ *See* GOLEMAN, *supra* note 264, at 13-20.

²⁷⁴ *See id.* at 18.

²⁷⁵ *See id.* at 13 (“[E]motions are contagious. We ‘catch’ strong emotions much as we do a rhinovirus - - and so can come down with the emotional equivalent of a cold.”).

²⁷⁶ *See* NASS & BRAVE, *supra* note 244, at 95 (charting how these voice qualities operate together to convey emotion).

²⁷⁷ KARPf, *supra* note 243, at 136-37.

²⁷⁸ *Id.* at 137.

²⁷⁹ WILLIAM STYRON, DARKNESS VISIBLE: A MEMOIR OF MADNESS (2001). The voice also differs among types of depression and mental illness. *See* Julian Leff & Evelyn Abberton, *Voice Pitch Measurements in Schizophrenia and Depression*, 11 PSYCHOLOGICAL MEDICINE (1981); *See* SPEECH EVALUATION IN PSYCHIATRY (John K. Darby ed. 1981).

with glides, frequent emphases, and wide pitch variation.²⁸⁰ Yet voices convey emotions not merely for the mentally ill but in every human encounter.²⁸¹

This observation does not necessarily mean, however, that we are as accurate as with these extreme situations in judging more subtle emotional cues in voices. Judgments about another's emotions are initially made very quickly, and we are most likely to judge correctly with those we know best.²⁸² Indeed, vocal sensitivity to another's emotions is one important hallmark of an intimate relationship, a reflection of one person's more complete knowledge of another's habits and behavior.²⁸³ Voice-reading is thus "a form of empathy: we tune into what another person is thinking and feeling...."²⁸⁴ We supplement our judgments about another's emotions with observations about their facial expressions and about the social context in addition to the sound and content of their voices.²⁸⁵ Nevertheless, errors in our judgments may lead to miscommunication and conflict, especially between intimates, whom we expect to do better.²⁸⁶ There is also some evidence of gender variation in the ability to detect emotions from voice, women doing the better job, and of parenting styles influencing children's development of this skill.²⁸⁷ Less powerful or lower status people are also more likely to be "finely attuned to

²⁸⁰ See KARPf, *supra* note 243, at 137.

²⁸¹ See *id.* at 138 (noting that simple boredom, anxiety, happiness, contempt, anger, grief, surprise, and scorn may each have their own distinctive vocal signatures); Tom Johnstone & Klaus R. Scherer, *Vocal Communication of Emotion*, in HANDBOOK OF EMOTIONS (Michael Lewis & Jeannette M. Haviland-Jones eds. 2d ed. 2000) (analyzing contempt, anger, and stress).

²⁸² See KARPf, *supra* note 243, at 140-45 (making and illustrating this point).

²⁸³ See *id.* at 141-42; Marylous Pauswang Gelfer & Shannon Ryan Young, *Comparisons of Intensity Measures and their Stability in Male and Female Speakers*, 11 J. OF VOICE (1997) (explaining how voice reading is an exercise in empathy).

²⁸⁴ KARPf, *supra* note 243, at 142.

²⁸⁵ See GOLEMAN, *supra* note 264, at 97-100.

²⁸⁶ See KARPf, *supra* note 243, at 142-45.

²⁸⁷ See *id.* at 143-45.

nuances in the voices of those people with authority over them,” such as children’s sensitivity to the vocal nuances of parents and teachers, “a form of protection against adult fiat.”²⁸⁸

A listener believing that he has perceived a speakers’ emotions will often subconsciously physically react in a similar fashion, a way of building empathy, which in turn increases the accuracy of the listener’s judgments in reading emotions.²⁸⁹ The listener’s subjective experience, partly because of these physiological changes, will also often change to match the speaker’s feelings.²⁹⁰ In these ways, among others, speakers’ emotions “infect” listeners.²⁹¹ Yet, remember, changed emotions mean changed perceptions, attitudes, and reasoning styles.²⁹² Moreover, emotional contagion by voice can happen to groups as well as individuals.²⁹³ Furthermore, voice can influence listeners’ moods - - their sustained emotions - - as well as their more fleeting feelings.²⁹⁴ Vocal emotional contagion is manipulated by movie producers, loudness, screaming, and crying, for example, being ways to transmit powerful emotions or moods that rivet the audience’s attention to the source of their reaction.²⁹⁵ Vocal emotional and mood manipulation, because it alters perception, reasoning, and attention, is also a powerful tool

²⁸⁸ See *id.* at 143. For a summary of the impact that vocal indicators of status can have in the courtroom, see Andrew E. Taslitz, *Forgetting Freud: The Court’s Fear of the Subconscious in Date Rape (and Other) Cases*, 17 B.U. PUB. INT. L. REV. 145 (forthcoming 2007).

²⁸⁹ See GOLEMAN, *supra* note 264, at 25 (noting bodies mimic others’ emotions, better enabling accuracy in reading them); Karpf, *supra* note 243, at 141-42 (reading emotions from voices requires shifting to the others’ style of expressiveness to attain understanding.).

²⁹⁰ See *id.* at 18, 20 (discussing contagious nature of emotions, including those conveyed by voice via loudness or emotional intensity like that involved in screaming or crying).

²⁹¹ See *id.* at 13.

²⁹² See *supra* text accompanying notes 266-73; Taslitz, *Two Concepts*, *supra* note 221, at 9-12, 48-58.

²⁹³ See GOLEMAN, *supra* note 264, at 16 (“Such a contagion can occur with many people at a time, as visibly as when an audience mists up at a tragic movie scene, or as subtly as the tone of a meeting turning a bit testy.”).

²⁹⁴ See NASS & BRAVE, *supra* note 244, at 74-75 (making this point); Tanya L. Chartrand, et al., *Beyond the Perception-Behavior Link: The Ubiquitous Utility and Motivational Moderators of Nonconscious Mimicry*, in THE NEW UNCONSCIOUS 334, 335-37, 341-44 (Ran R. Hasin, et al. ed.s 2005) (discussing speech mimicry and emotional mood contagion, including via the voice).

²⁹⁵ See GOLEMAN, *supra* note 264, at 20.

of persuasion, including as used by politicians or social activists seeking to motivate political enthusiasm in their supporters or to expand the size of the supporter pool.²⁹⁶

Inconsistency between voice content and tone can be perceived as insincerity - - “I am so sorry” said flatly or mockingly, for example - - and can be jarring.²⁹⁷ Consistency between the two makes the speaker better liked by listeners.²⁹⁸ Our ability to judge others’ emotions vocally and to react with vocal appropriateness also affects their feelings toward us.²⁹⁹ Thus listeners generally prefer speakers conveying happy emotions.³⁰⁰ But the expression of negative emotions can sometimes elicit valuable responses, such as when we vocally convey vulnerability, leading a listener to protect us, or when a listener becomes more trusting of us when we are willing to expose to them an attitude of submission - - much like the reaction a dog seeks in exposing its belly.³⁰¹

This last example emphasizes two roads for emotions - - the “low” road of the unconscious and the “high” road of the conscious mind.³⁰² Many of the emotions we vocally convey or perceive happen rapidly and unconsciously.³⁰³ But our slower, more deliberative, conscious assessments of a situation - - frequently made in the form of an internal mental self-conversation

²⁹⁶ See generally, DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007) (giving numerous illustrations of such manipulation as part of a wider study of the role of emotions in political persuasion).

²⁹⁷ See NASS & BRAVE, *supra* note 244, at 87-88.

²⁹⁸ See *id.* at 86; M. Argyle, et al., *The Communication of Friendly and Hostile Attitudes by Verbal and Non-Verbal Signals*, 1 EUROPEAN J. SOC. PSYCH. 285 (1971).

²⁹⁹ See NASS & BRAVE, *supra* note 244, at 85-88.

³⁰⁰ See *id.* at 91-92 (“Humans are built with ‘hedonic preference’ - - the tendency to experience, express, and perceive more positive emotions than negative ones. In social interactions, people like others who display positive emotions more than those who display negative emotions”); P.A. Bell, *Affective State, Attraction, and Affiliation: Misery Loves Happy Company Too*, 4 PERSONALITY & SOC. PSYCH. BULL. 616 (1978) (a person showing positive emotions is perceived as more attractive and a more likeable colleague).

³⁰¹ See NASS & BRAVE, *supra* note 244, at 92; H.S. Friedman, et al., *Nonverbal Skill, Personal Charisma, and Initial Attraction*, 14 PERSONALITY & SOC. PSYCH. BULL. 203 (1988) (discussing value of “opening up” and conveying vulnerability or submission).

³⁰² See GOLEMAN, *supra* note 264, at 15-17 (using “high” and “low” road terminology).

³⁰³ See *id.* at 15-16.

- - can alter our assessments of a situation, such as whether we were correct in perceiving danger or fear in another's voice.³⁰⁴ Altered assessments in turn alter emotions and moods.³⁰⁵

But here is the rub. Speakers can also make conscious assessments, permitting them to attempt to alter their vocal expressions to convey emotions by conscious choice. Sometimes these efforts may be sincere ones to communicate feelings more clearly, other times calculated efforts to mislead a listener about our true emotions.³⁰⁶ People vary in their ability successfully to feign emotions.³⁰⁷ Combine this observation with variation in individuals' ability accurately to read emotions and a real risk arises of a good faker's taking advantage of a poor judger.³⁰⁸ Add to the mix the reality that the *content* of our words - - such as reporting a dangerous event - - can, separate and apart from the pitch, volume, and other aspects of the *sound* of our words - - alter listener's emotions, and it becomes clear, in ways both large and small, how the emotional voice can be a conscious tool of political power as well as a means for promoting intimacy or distancing.³⁰⁹ The power of the emotion-laden and emotion-inducing voice, the often unconscious processes that may leak what we wish kept secret, the risk of misunderstanding and resulting ill consequences, and the dangers of manipulation all make the simple acts of speaking and listening as dangerous as they are advantageous.

B. *Personality*

³⁰⁴ See *id.* at 75-77 (illustrating the reassessment process and its effect).

³⁰⁵ See Taslitz, *Forgetting Freud*, *supra* note 288, at 169-76 (analyzing the connection between cognitive assessments and emotions); Taslitz, *Two Concepts*, *supra* note 221, at 9-12 (analyzing this same connection in greater depth).

³⁰⁶ See KARPf, *supra* note 243, at 145-46 (discussing vocal deception).

³⁰⁷ See *id.* at 146. (Strangely, "the detection rates of most professional lie-catchers are modest, and the people trained to look for non-verbal clues to deceitful behaviour often do less well than ordinary, untrained listeners").

³⁰⁸ See *id.* at 146 (noting individual variation in ability to decode emotion accurately from voice).

³⁰⁹ See NASS & BRAVE, *supra* note 244, at 86-88 (explaining how voice tone and content interact); *supra* text accompanying notes 282-88 (explaining how interpretations of events alter emotions); see generally WESTEN, *supra* note 296 (collecting numerous illustrations of how voice content and tone, combined with other factors, contribute to political manipulation); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 24-31 (1990) [hereinafter *DON'T UNDERSTAND*] (explaining how the voice can be used to promote distancing or intimacy).

People are frequently drawn to others whom they perceive as having similar personalities.³¹⁰ Simultaneously, people are most comfortable with other persons about whom clear personality judgments can be made. Ambiguity or inconsistency in indicators of personality causes discomfort, dislike, and confusion.³¹¹ The relative influence of these drives toward similarity-attraction and consistency itself varies with the judger's personality. Persons who are more outwardly-oriented toward social relationships care more about similarity to others, while inner-oriented persons give greater weight to consistency.³¹²

Similarity and consistency matter to judgers because of the resulting perceived social benefits.³¹³ If one person has a clear image of another person's having a similar personality, that makes the latter's behavior and thoughts more predictable to the first person.³¹⁴ This perceived predictability occurs because he can imagine how he would behave or think in similar situations.³¹⁵ Furthermore, less cognitive effort to make such predictions is required than would be true were the first person facing someone of an ambiguous or very different personality.³¹⁶ Predictability promotes a sense of safety, while similarity both implies familiarity, which leads to liking, and social support, which leads to sharing, including of such things as food, shelter, rituals, and language.³¹⁷

³¹⁰ See NASS & BRAVE, *supra* note 244, at 57.

³¹¹ See *id.*

³¹² See *id.*

³¹³ See *id.* at 10.

³¹⁴ See, e.g., H. H. Kelley, *Attribution Theory in Social Psychology*, in 15 NEBRASKA SYMPOSIUM ON MOTIVATION 192 (D. Levine ed. 1967); H.H. Kelley, *The Processes of Casual Attribution*, 28 AM. PSYCHOLOGIST 107 (1973); L.Z. MacArthur, *The How and What of Why: Some Determinants and Consequences of Causal Attribution*, 22 J. PERSONALITY AND SOC. PSYCH. 171 (1972).

³¹⁵ See NASS & BRAVE, *supra* note 244, at 10.

³¹⁶ See *id.*; H.A. SIMON, *SCIENCES OF THE ARTIFICIAL* (3d ed. 1996) (arguing that humans prefer "cognitive economy").

³¹⁷ See NASS & BRAVE, *supra* note 244, at 10; B. Monin, *The Warm Glow Heuristic: When Liking Leads to Familiarity*, 85 J. PERSONALITY & SOC. PSYCH. 1035 (2003); A.M. Colman, W.M. Best, & A.J. Austen, *Familiarity and Liking: Direct Tests of the Preference-Feedback Hypothesis*, 58 PSYCH. REPORTS 931 (1986); K.W. Kerber & R. Singleton, *Trait and Situational Attributions in a Naturalistic Setting: Familiarity, Liking, and Attribution Validity*, 52 J. PERSONALITY 205 (1984).

This need for predictability contributes to the “fundamental attribution error,” our willingness to make confident and global character judgments about others - - even those others very different from ourselves - - based upon very limited evidence.³¹⁸ Predictability also helps to explain why, if we know little of another’s personality, we prefer those people behaving like extroverts because expressive people are seen as more predictable than reticent ones.³¹⁹

The voice is often viewed as a window into another’s soul. Several paralinguistic features of voice are taken as personality indicators, at least in American culture.³²⁰ Notably, volume alone implies character: “compare the booming voice of a person who loves socializing to the soft voice of someone who prefers to read books.”³²¹ How high or low is one’s pitch also affects personality perceptions, such as the high voice of the “hyperactive comedian” versus the “deep voiced news anchor.”³²² Pitch range matters too, as in the wide pitch swings of the “animated story teller” compared to the “monotone delivery of the technical presenter.”³²³ Likewise, those whose intonation rises at the end of an assertion are viewed as tentative while those whose tone falls appear self-confident.³²⁴ Speech rate conveys an exuberant nature for the fast talker and a calm one for the more deliberate speaker.³²⁵ These four indicators of volume, pitch, pitch variation, and speech rate may have an even more powerful impact on personality assessment than does speech content.³²⁶ Moreover,

³¹⁸ See MCEWAN, *supra* note, 160, at 10-15, 33, 44, 102, 165, 170.

³¹⁹ See NASS & BRAVE, *supra* note 244, at 42. *But see* RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY...AND WHY* 47-78, 111-36 (2003) (explaining that there are on-average cultural differences between Asians and Westerners about what cognitive and personality traits are valued).

³²⁰ See NASS & BRAVE, *supra* note 244, at 34-45.

³²¹ *Id.* at 34.

³²² *Id.*

³²³ *Id.*

³²⁴ See *id.*; ROBIN LAKOFF, *LANGUAGE AND WOMEN’S PLACE* (1975).

³²⁵ NASS & BRAVE, *supra* note 244, at 34.

³²⁶ See *id.* (making this point); Clifford Nass & K. M. Lee, *Does Computer-Synthesized Speech Manifest Personality? Experimental Tests of Recognition, Similarity-Attraction, and Consistency – Attraction*, 7 J. EXPERIMENTAL PSYCH. APPLIED 171 (2001) (offering supporting empirical data.).

Each of these voice characteristics tells us something about a person, but in combination they become particularly influential. For example, when people meet someone who speaks loudly and rapidly, in a high pitch, and with a wide voice range, they feel confident that they are dealing with the life of the party. Conversely, when people hear a soft, deep, monotone voice speaking slowly, they feel equally confident that this person is shy.³²⁷

High-pitched, rapid voices with wide frequency range are also perceived as warm and sympathetic, those with the opposite voice characteristics being “hermits and misanthropes, who have contempt for others but don’t actively attack or defend....”³²⁸ Perhaps more importantly, however, loud, deep voices of limited range (think John Wayne) convey dominance - - persons who control their environments - - while soft, high voices of wide range are apparent submissives, “buffeted by events and people and...essentially actionless.”³²⁹ Dominance brings with it high social status, while submissiveness is associated with low social status.³³⁰

Voice content, albeit perhaps to a lesser extent, also conveys personality signals. For example, words urging others to action rather than requesting it mark extroverts, as do words demonstrating confidence rather than insecurity.³³¹ More specific, concrete descriptions of events may lead to a more positive evaluation of the speaker than do vague, cursory ones.³³² If content cues and paralinguistic ones conflict, that conveys an ambiguity of personality, with all

³²⁷ NASS & BRAVE, *supra* note 244, at 34.

³²⁸ *Id.* at 43.

³²⁹ *Id.* at 43-44.

³³⁰ See TANNEN, DON’T UNDERSTAND, *supra* note 309, at 24-25.

³³¹ See NASS & BRAVE, *supra* note 244, at 49.

³³² *Cf. id.* at 48 (“The woman throws the ball’ conveys a different image than ‘The gray-haired, seventy-year-old woman throws the green, ovoid ball at blisteringly high speed’”); *Old Chief v. United States*, 519 U.S. 172, 187-88 (1997) (“There lies the need for evidence in all its particularity to satisfy the jurors’ expectations about what proper proof should be.”); MCEWAN, *supra* note 160, at 124 (“The desire for detail could induce an expectation in the jury that certain items of evidence will be produced; if they are not forthcoming, the party who would be responsible for producing it may be regarded with suspicion.”).

the ill consequences of that confusion described above.³³³ Consistency, by contrast, makes a speaker more likeable.³³⁴

Yet there is little empirical evidence suggesting that our voice-based personality assessments are accurate. What little research there is often suggests the opposite.³³⁵ So, once again, the mere act of speaking - - which always activates quick, automatic, unconscious personality judgments - - risks grave misunderstanding of the speaker's nature by his audience, potentially leading them to dislike him, distrust him, dismiss him, or dominate him.³³⁶ But, above all, is his fear that they will misjudge him, or at least rob him of the chance to control the evidence upon which these judgments are made.³³⁷

E. *Status Generally*

Paralinguistic features of speech both reflect and help to create our position in the social hierarchy - - our "social status" - - and our social connection to, or distance from, socially salient groups.³³⁸ Social roles are those conventional modes of behavior society expects to be adopted by persons of a certain status, conventions that pointedly include linguistic features.³³⁹ Each person plays a variety of roles in her life, each correlated to a different status within and between

³³³ See NASS & BRAVE, *supra* note 244, at 9-51; *supra* text accompanying notes 313-17.

³³⁴ See NASS & BRAVE, *supra* note 244, at 54.

³³⁵ See *id.* at 39 ("[W]hile people perceive voices to be good indicators of personality and respond accordingly, voice characteristics may be deceptive); KARPF, *supra* note 243, at 136, 138-40 (arguing much of the research on divining emotions from voice says more about our ability to spot theatrical or staged emotions accurately than subtle ordinary ones).

³³⁶ See *supra* text accompanying notes 310-31.

³³⁷ See *supra* text accompanying notes 161-211.

³³⁸ See KARPF, *supra* note 243, at 187 ("In fact, quite fine distinctions of status are discernible through the voice, even to listeners who don't understand the language of the speakers.") (emphasis in original), 278 ("In fact you can almost read off status or dominance from the degree to which one speaker accommodates [to the speaking style of] another."); DAVID CRYSTAL, HOW LANGUAGE WORKS: HOW BABIES BABBLE, WORDS CHANGE MEANING, AND LANGUAGES LIVE OR DIE 310-11 (2005) (discussing the connection between linguistic conventions and social status).

³³⁹ See CRYSTAL, *supra* note 338, at 309-10.

various social groups.³⁴⁰ For example, a man who is an apprentice at work may hold a low social status there but a higher one at home if his spouse and children perceive him as the head of the family. Accordingly, his speech loudness, intonation, tempo, rhythm, and other linguistic features will vary between those two settings.³⁴¹ Although different roles elicit linguistic differences, such differences are themselves understood by listeners as markers of social roles or status, even if the audience knows nothing else about the speaker but his words.³⁴² Thus a man using a standard accent (the one most prized by his society), speaking quickly and fluently, with few hesitations, is seen by his audience as more competent, dominant, and dynamic than those who lack these features.³⁴³ On the other hand, a person using regional or ethnic accents, disfluent and halting speech, is more likely to be seen as relatively incompetent and submissive, of a low social status, yet may also be seen by many hearers as more approachable and likeable than his imposing high status counterpart.³⁴⁴

One important indicator of solidarity with, or distance from, members of various social groups is geographic: do speaker and listener hail from the same home territory?³⁴⁵ Although Americans are geographically mobile, the place of their youth may always hold a powerful psychic pull on them, as may, in a different way, their current place of residence.³⁴⁶ Ex-New Yorkers may proudly identify themselves as such, Tennesseans may boast of their Southern charm and hospitality, and naturalized American citizens may wear clothes or join social clubs

³⁴⁰ *See id.* at 310-11.

³⁴¹ *See id.* at 311.

³⁴² *See id.*

³⁴³ *See id.* at 287.

³⁴⁴ *See id.* at 287.

³⁴⁵ *See id.* at 290, 293-94 (discussing accents as markers of geographic brother and sisterhood); NASS & BRAVE, *supra* note 244, at 67-68 (noting accent is a means of social identification).

³⁴⁶ *See* CRYSTAL, *supra* note 339, at 293-94 (noting that, despite growing geographic mobility, there is no evidence to suggest that accents “are losing their role as markers of identity in society....If we want to display to others where we are from,...[s]peech is the most universal way of expressing our regional identity.”).

that draw on customs of the “old country.”³⁴⁷ Each person may vary in the intensity with which geographic ties matter to him or her, but for many people those ties are strong. They matter because they are one basis for a sense of group-solidarity, which also often means a sense of distinctiveness and separation from other, perhaps opposing, groups.³⁴⁸ Linguistic features, particularly accent (distinctive ways of pronunciation) and dialect (distinctive forms of grammar and vocabulary), are powerful indicators of geographic ties.³⁴⁹ When anyone wishes to emphasize his connection to a geographic group, he tries to speak like that group’s members, and not like those of other groups. The Mississippian migrant to New York City who years later retains a heavy Southern drawl, peppering her conversations with “y’all,” is making a conscious or unconscious statement of Southern pride.³⁵⁰ Linguistics professor David Crystal made the point this way:

It seems totally natural to speak like the other members of our own group and not to speak like the members of other groups. The tendency, well recognized in modern sociolinguistics, is called *accommodation*. It is an ability which probably emerged early on in the evolution of the human race because it had considerable survival value. When primitive people heard voices outside a cave, did they go outside to greet them with a smile or proceed cautiously with a club? Recognizing the Cro-Magnon equivalent of an accent would have made all the difference.³⁵¹

Group membership is partly an individual’s choice concerning with which group to identify.³⁵² Actual or feigned accent or dialect can be a way to announce or share group

³⁴⁷ Cf. *id.* at 293 (noting clothing, badges, and the like are other ways to express ethnic pride); TANNEN, DON’T UNDERSTAND, *supra* note 244, at 201, 205, 208 (discussing with pride the New York Jewish conversational style).

³⁴⁸ See CRYSTAL, *supra* note 339, at 293-94 (discussing accents and dialects as means of group identification and connection); NASS & BRAVE, *supra* note 244, at 68-70 (discussing how accents activate status-stereotypes).

³⁴⁹ See CRYSTAL, *supra* note 339, at 289-94 (defining “accent” and “dialect” and explaining their social significance).

³⁵⁰ See *id.* at 294 (making similar point but at a higher level of generality).

³⁵¹ *Id.*

³⁵² See generally LAWRENCE FRIEDMAN, THE HORIZONTAL SOCIETY (1999) (presenting an extended defense of just this point).

membership based on ethnicity, religion, or innumerable other traits rather than on geography.³⁵³

As someone born in America to American-born Jewish parents whose own parents were immigrants from the Ukraine, I can offer this example: my friends and family members often lapse among themselves into exaggerated Eastern European accents, periodically filling our speech with Yiddish phrases. We do so as a way of social bonding and expressing ethnic and religious pride, even though most of us ordinarily have New York accents more than Eastern European ones, do not know the meaning of most Yiddish words, and are not particularly observant of religious ritual. Language use of this sort is an effective means of ethnic bonding because it is a widespread feature of community life, offers a link with a shared imagined past, and acts as a natural demarcation line among cultural groups.³⁵⁴

Socioeconomic class is also often assumed to be indicated by speech patterns.³⁵⁵ Each of us perceives some features of vocabulary and grammar as associated with intelligence and education, others with intellectual weakness and ignorance.³⁵⁶ These common perceptions were well illustrated in the play “My Fair Lady,” in which the lead male character, a professor, can turn his charge, Eliza Dolittle, into a lady only by purging her of her lower-class Cockney accent and dialect.³⁵⁷ A real world American illustration comes from the dropping of “g”s at the end of words, a pronunciation typical of much of the speech of the modern American working class.³⁵⁸

³⁵³ See CRYSTAL, *supra* note 339, at 302 (noting these other bases for linguistic group membership); cf. NASS & BRAVE, *supra* note 244, at 70-71 (noting that people will even create new social categories and accompanying linguistic markers, as illustrated by recent developments on the internet, thereby creating *psuedoscommunity*, an artificial bond between a diverse set of people.”) (emphasis in original).

³⁵⁴ See *id.* at 303-04.

³⁵⁵ See *id.* at 309-10.

³⁵⁶ See NASS & BRAVE, *supra* note 244, at 68-70 (discussing and illustrating this point in the contexts of class, race, age, and ethnicity).

³⁵⁷ See GEORGE BERNARD SHAW & ALAN JAY LERNER, PYGMALION AND MY FAIR LADY (2006) (combining the text and score of the musical, *My Fair Lady*, an adaptation of George Bernard Shaw’s play, *Pygmalion*, with the text of the latter).

³⁵⁸ See CRYSTAL, *supra* note 339, at 309-10.

This feature might be combined with slurred pronunciation of adjacent words. Thus “Whatcha doin’?” is associated with the lower classes and “What are you doing?” with the higher ones.³⁵⁹

Race is not correlated with any distinctive speech patterns, but race/class sub-groups are often perceived by those higher in the social hierarchy as displaying such patterns.³⁶⁰ Thus African-American English Vernacular (AAEV) is a form of non-standard English most often studied among economically lower-class African-Americans in urban areas.³⁶¹ AAEV includes such features as dropping the final “s” in the third person singular (“he walk,” “she go”) and using the “invariant be” (“Sometimes they be walking round here”).³⁶² These same features are, however, found in many white English dialects, particularly in the Southern United States.³⁶³ This observation has led some commentators to conclude that AAEV arose from white dialects but then became associated with race as a result of Southern Black immigration to the North.³⁶⁴

As one author put it:

The association with blacks is then explained as a result of their emigration to the northern cities, where those features were perceived as a distinctive marker of ethnic, as opposed to regional, identity. With the development of urban ghettos, the contrast became more marked over time.³⁶⁵

Other commentators instead conclude that AAEV arose primarily from a Creole English spoken by the first Blacks on American shores, though mixed with white dialects’ influence.³⁶⁶

³⁵⁹ Anyone who has ever watched *The Spornos* or grown up, as I did, in the South Bronx, recognizes these two forms of pronunciation (slurred and clear) and the status differences between them. See also ROBERT HODGE & GUNTHER KRESS, *SOCIAL SEMIOTICS* 87-88 (1987) (distinguishing higher and lower status language forms).

³⁶⁰ See CRYSTAL, *supra* note 334, at 306-08; NASS & BRAVE, *supra* note 244, at 66-67.

³⁶¹ See CRYSTAL, *supra* note 339, at 306-07.

³⁶² See *id.* Further background on African-American vernaculars can be found in JAMES HASKINS & HUGH BUTTS, *M.D., PSYCHOLOGY OF BLACK LANGUAGE* (1993); THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981); Geneveva Smitherman, *Testifying, Sermonizin’ and Signifying: Anita Hill, Clarence Thomas, and the African-American Verbal Tradition*, in *AFRICAN-AMERICAN WOMEN SPEAK OUT ON ANITA HILL-CLARENCE THOMAS* 224, 224-41 (Geneva Smitherman ed. 1995) (analyzing the “African-American Verbal Tradition”).

³⁶³ See CRYSTAL, *supra* note 39, at 306-07.

³⁶⁴ See *id.*

³⁶⁵ *Id.* at 307.

³⁶⁶ See *id.* at 306-07.

Whatever AAEV's origin, middle class Whites may hear that dialect as a sign of intellectual inferiority and a marker of danger.³⁶⁷

Gender matters too. Some feminist theorists have long posited a “women’s language,” a set of linguistic features characteristic of how women speak in most settings.³⁶⁸ Among the posited features are the use of “meaningless particles” like “my goodness”; “empty adjectives” expressing entirely emotional assessments, as in “It’s adorable!,” and use of hedges like “I guess” or “I think,” conveying uncertainty.³⁶⁹

Research has failed to confirm, or disconfirm, the existence of a women’s speech constant across contexts.³⁷⁰ Nevertheless, research has revealed some linguistic forms that women are more likely to use than men in a wide variety of settings. These forms include more expressions of positive politeness, sympathy, and understanding; fewer commands and threats; more phrases like “you know,” which show an effort to engage the addressee’s attention; and more statements

³⁶⁷ See *id.* Professor Clifford Nass and Scott Brave explain:

In addition to social identification, accents [and dialects] in voice interfaces are likely to elicit stereotypes...Particular accents are associated with particular characteristics, whether those stereotypes are grounded in socialization processes or not. For example, in the United States, people with British accents are perceived as more intelligent than average, whereas people with Brooklyn accents are perceived as less intelligent than average, even though, as described by accent prestige theory, there is no formal basis for these stereotypes. Similarly, people with...Southern U.S. accents are perceived as more egalitarian (*although there are racist stereotypes associated with Southern accents*).

BRAVE & NASS, *supra* note 244, at 68. There is some reason to believe that race *alone* is not an independent factor of much significance in social categorization based on voice. See *id.* at 69. However, the AAEV and other African-American vernaculars reflect the intersection of race, class, and geography. See *supra* text accompanying notes 355-67. Moreover, once a speaker’s race is known, it is hard to believe that, barring any more salient indicators of status, race will not have a significant impact on an observer’s status judgments. See, e.g., SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE (D.B. Grusky ed. 2000) (collecting essays showing race to be among the most powerful predictors in the sociological literature).

³⁶⁸ See ELIZABETH ARIES, MEN AND WOMEN IN INTERACTION: CONSIDERING THE DIFFERENCES 102-46 (1996) (summarizing the literature on this point, including the work of its originator, Robin Lakoff); ROBIN TOLMACH LAKOFF, TALKING POWER: THE POLITICS OF LANGUAGE 202-06 (1990) (summarizing concisely Lakoff’s work in this area).

³⁶⁹ See sources cited *supra* note 368.

³⁷⁰ See MARY CRAWFORD, TALKING DIFFERENCE: ON GENDER AND LANGUAGE 28-40 (1995).

of self-reference, such as “It seems to me,” which show respect.³⁷¹ Moreover, when women use imperatives, they are more likely to do so in question form and with qualifiers, as in “Would you get me that report by Monday, if at all possible?”³⁷² Many of these observed differences are, however, more likely due to setting, topic, role, and status. For example, those in lower-status positions (as are many women) use such politeness strategies toward those of higher status.³⁷³

Even when women do not use “women’s language,” however, they are perceived as doing so.³⁷⁴ This perception arises because our stereotypes or “folklinguistic” beliefs about how women speak closely track the descriptions of women’s language.³⁷⁵ Stereotypes lead us to ignore contrary evidence while attending to confirming evidence.³⁷⁶ Furthermore, these biases are magnified by the “fundamental attribution error,” our tendency to attribute behavior more to personality than context.³⁷⁷ Consequently, when we see many women in low-status roles speaking politely, we attribute that behavior to women’s essential nature rather than to their role.³⁷⁸ The resulting linguistic stereotypes resist change, as they have in American culture for more than twenty years.³⁷⁹

One effect of perceiving women’s language where it does not exist and of viewing it as typical female behavior is the self-fulfilling prophecy.³⁸⁰ Women learn that they will be ignored

³⁷¹ See ARIES, *supra* note 368, at 104-29, 138-46 (summarizing research).

³⁷² See *id.*

³⁷³ See *id.*

³⁷⁴ See *id.* at 163-94 (summarizing and evaluating research).

³⁷⁵ See DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 44 (2d ed. 1992) (describing Lakoff’s theory of a women’s language as consistent with “folklinguistics”); JENNIFER COATES, WOMEN, MEN, AND LANGUAGE 16-37 (2d ed. 1993) (defining “folklinguistics”).

³⁷⁶ See LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 15-19, 49-81 (2006) (defining stereotypes and explaining and illustrating the psychological processes by which they work).

³⁷⁷ MCEWAN, *supra* note 160, at 13 (defining “fundamental attribution error”).

³⁷⁸ See ARIES, *supra* note 368, at 163-94.

³⁷⁹ See *id.*

³⁸⁰ See *id.* at 184-88.

or disliked if they violate stereotypical norms, so they try not to deviate too much from those norms.³⁸¹

Although other factors, such as age, race, and class, can reduce the effects of stereotypes, the effects are greatest where gender is most salient.³⁸² But gender is most salient in initial encounters or where women are in the minority.³⁸³ Our gendered cognitive biases lessen, however, as we get to know individuals better.³⁸⁴

The effect of the real or imagined use of women's language can be devastating to a woman's credibility. Anyone using women's language is evaluated as more caring but less credible, competent, and intelligent.³⁸⁵ These evaluations are magnified when women, rather than men, are the speakers.³⁸⁶ Furthermore, the indirectness supposedly characteristic of women's language may be seen as insecurity, apology as weakness.³⁸⁷ Additionally, women's language speakers' use of shorter, less aggressive responses in public settings commands less attention.³⁸⁸ Similarly, their giving reasons for their suggestions and arguing from their personal experience rather than from abstract principle, two "feminine" strategies, are relatively unpersuasive to men.³⁸⁹ These effects are much larger in laboratory settings than in the few studies involving

³⁸¹ *See id.*

³⁸² *See id.* at 186, 190-93, 203.

³⁸³ *See id.*

³⁸⁴ *See id.*

³⁸⁵ *See id.* at 178-84; JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 64-66 (2d ed. 2005).

³⁸⁶ *See* ARIES, *supra* note 368, at 181-82.

³⁸⁷ *See* TANNEN, *DON'T UNDERSTAND*, *supra* note 309, at 91-92, 156-58; DEBORAH TANNEN, *TALKING FROM 9 TO 5: HOW WOMEN'S AND MEN'S CONVERSATIONAL STYLE AFFECTS WHO GETS HEARD, WHO GETS CREDIT, AND WHAT GETS DONE AT WORK* 70, 98, 117-20, 122, 177, 279-80 (1994) [hereinafter, TANNEN, 9 to 5].

³⁸⁸ *See* TANNEN, *DON'T UNDERSTAND*, *supra* note 309, at 91-92, 156-58; TANNEN, 9 to 5, *supra* note 387, at 70, 98, 117-20, 122, 177, 279-80.

³⁸⁹ *See* TANNEN, *DON'T UNDERSTAND*, *supra* note 309, at 91-92, 156-58; TANNEN, 9 to 5, *supra* note 387, at 70, 98, 117-20, 122, 177, 279-80.

naturally occurring speech, but even modest effects can be decisive in criminal cases.³⁹⁰ There, defense victory requires only “reasonable doubt.”³⁹¹

Yet women face a double bind if they violate stereotypical speech norms.³⁹² Most men simply do not like aggressive women. “There is a sense in which every woman is seen as a receptionist—available to give information and help, perennially interruptible.”³⁹³ Women who violate stereotypes may seem unlikable or unworthy to many men.³⁹⁴ Furthermore, men resist receiving information from those, like women, whom men perceive as of lower status because being lecturer rather than listener is the superior (i.e., men’s) role.³⁹⁵

In sum, women may be perceived as using women’s language when they are not, a perception marking them as stupid, incompetent, and incredible. Yet too masculine a style means they will be disliked or ignored. For a woman to be seen as credible, she must walk a fine line between opposed stereotypes.

This discussion of gender also highlights the broader importance of such contextual features as setting (the time and place of speaking, for example, in church or at work); the number of participants and the relationship among them (such as bystander versus intimate or superior versus subordinate); and the activity, notably cross-examining or debating, lecturing or dialoguing.³⁹⁶ Lower status persons speaking in public settings like courtrooms will often find

³⁹⁰ See ARIES, *supra* note 368, at 178-84.

³⁹¹ See Larry King, *Do Juries See Beyond a Reasonable Doubt?*, in BEYOND A REASONABLE DOUBT iii-xx (Larry King ed. 2006) (analyzing the meaning and significance of the beyond a reasonable doubt standard of proof).

³⁹² See ARIES, *supra* note 368, at 183-84.

³⁹³ TANNEN, 9 to 5, *supra* note 387, at 117.

³⁹⁴ See *id.*

³⁹⁵ See *id.*

³⁹⁶ See, e.g., LAWRENCE M. SOLAN & PETER TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 23-26 (2005) (analyzing the importance of context); CONLEY & O’BARR, *supra* note 385, at 2-4 (summarizing various ways in which the number of participants, the relationship among them, and the activity in which they engage alter linguistic analysis and power distribution).

themselves speaking a more “powerless language,” akin to that of the posited women’s language just discussed; facing frequent interruptions from higher status figures like lawyers; and struggling to hold the floor and tell their complete story.³⁹⁷ Their testimony will more likely be perceived as less credible than those using higher-status linguistic forms.³⁹⁸ In short, though many factors affect victory or defeat at trial, lower status witnesses start with the linguistic deck stacked against them.

Other legal settings that can prove to be problematic for laymen and lower-status speakers are conversations with undercover officers or interrogations by badge-carrying officers.³⁹⁹ Linguists have extensively documented how undercover agents can encourage ambiguous but arguably inculpatory suspect statements; cut off suspect efforts to explain or more clearly specify those statements; camouflage the illegal nature of agent offers made to the suspect, while later arguing that that criminal nature was obvious; and use leading questions, misinterpreting minimal suspect responses (e.g., Uh-huh”) as signs of agreement with the agent’s implied statements rather than discomfort with their ambiguity or potential criminal nature.⁴⁰⁰ These strategies are rarely apparent to juries, who often give the resulting statements unfairly inculpatory explanations and undue weight.⁴⁰¹ Other researchers have extensively documented similar strategies in police interrogation practices.⁴⁰²

³⁹⁷ See CONLEY & O’BARR, *supra* note 385, at 65-66.

³⁹⁸ See *id.*

³⁹⁹ See ROBERT W. SHUY, *CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGES* 109-70 (2005) (illustrating this point, primarily concerning undercover agents, in a wide variety of settings) [hereinafter *LANGUAGE CRIMES*]; see generally ROGER W. SHUY, *THE LANGUAGE OF CONFESSION, INTERROGATION, AND DECEPTION* (1998) (doing the same for interrogations).

⁴⁰⁰ See SHUY, *LANGUAGE CRIMES*, *supra* note 399, at 167-73 (summarizing and analyzing these strategies); *id.* at 67-85; 109-66 (illustrating these strategies).

⁴⁰¹ See *id.* at 173-75 (explaining why expert linguistic testimony is necessary to educate jurors).

⁴⁰² See, e.g., SOLAN & TIERSMA, *supra* note 396, at 53-94 (analyzing linguistic strategies in *Miranda* waivers and other aspects of interrogation); WELSH, WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2001) (summarizing much of the psychological literature on the impact of police interrogation practices and analyzing their mechanisms of operation).

None of these observations are meant to suggest that these police and prosecutor tactics are illegitimate (they may or may not be). Rather, the points to be made are first, that suspect statements to criminal justice system actors necessarily expose the suspect to being mis-judged and mis-defined based on only partial and ambiguous evidence of his fundamental nature; and, second, that the criminal justice system creates particularly grave dangers that a suspect will lose control over the timing, degree, and content of self-revelation. In both respects, therefore, the suspect faces significant incursions upon his mental privacy.

D. *Written and Internet Communications*

Do written and internet communications also involve mental privacy concerns given that such communications lack the paralinguistic cues found in face-to-face speech? The answer is “yes,” though the nature, emphasis, and degrees of privacy may vary among these three media.

Writing differs from face-to-face oral communication (speech) in numerous ways. Speech is usually time-bound (it occurs only at a particular moment in time), dynamic, transient, with all parties present and specific addressees in mind.⁴⁰³ Writing, at least before the advent of the computer, was and often still is space-bound (but it can be read at a variety of times), static, permanent, with great distance between speaker and recipient and often unknown addressees (e.g., those among the pool of readers who choose, though their identity is unbeknownst to the author, to pick up his book).⁴⁰⁴ Writing deprives recipients, in particular, of contextual signals to meaning, such as tone of voice, pitch, accent, body language, facial expressions, and eye contact.⁴⁰⁵ These cues allow for efforts immediately to be made to clarify ambiguities and fill in

⁴⁰³ See CRYSTAL, *supra* note 338, at 149.

⁴⁰⁴ *Id.*

⁴⁰⁵ See *id.* at 150.

gaps.⁴⁰⁶ Moreover, conversation is negotiated in the sense that a speaker receiving a poor reception can quickly alter how and what he says.⁴⁰⁷ Furthermore, apart from monologues and formal speeches, most oral communication is instantly interactive, a ready exchange among parties, an on-the-spot dialogue or even multi-logue.⁴⁰⁸ Additionally, these aspects of speech seem to encourage greater intimacy, where desired, than does writing, and paralinguistic clues can soften verbal blows, promote empathy, and encourage agreement, at least if the parties want to achieve these results.⁴⁰⁹ Writing, at least in laymen's hands, by contrast can appear cold, mechanical, unyielding, and incomplete.⁴¹⁰ Writing may also seem more easily subject to deception because of the great faith many of us have in our ability to judge others' demeanor, to read their minds from their face and body.⁴¹¹

Yet the human need to give meaning to communications, including inferences about the parties' essential character, is so strong that readers will make quick, definite judgments on these matters though lacking the usual informational resources offered by speech.⁴¹² "The desire to form impressions of other people," explained internet psychologist Patricia Wallace, relying upon the work of famed sociologist Erving Goffman, "and to manage our own impressions in

⁴⁰⁶ See *id.* at 150-51.

⁴⁰⁷ See WALTER ONG, ORALITY AND LITERACY 104 (1982) ("To make yourself clear without gesture, without facial expression, without a real hearer, you have to foresee circumspectly all possible meanings a statement may have for a possible reader in any possible situation.").

⁴⁰⁸ See MARJORIE HARNESS GOODWIN, HE SAID, SHE SAID, TALK AS SOCIAL ORGANIZATION AMONG BLACK CHILDREN 1-2 (1990) (noting that face-to-face *interaction*, particularly via conversation, "provides the primary environment for use of the ability that sets human beings apart from all other animals: language.").

⁴⁰⁹ See KARPF, *supra* note 243, at 204 ("In certain quarters the voice has become more and not less important...Between parents and children, couples and friends it also remains...central."); PATRICIA WALLACE, THE PSYCHOLOGY OF THE INTERNET (1999) (noting that simple "uh-huh"s can promote understanding and agreement); NASS & BRAVE, *supra* note 244, at 82 (explaining that paralinguistic cues in the voice can promote caring, empathy, and agreement while minimizing conflict).

⁴¹⁰ See WALLACE, *supra* note 409, at 15 ("The cues people use to form some impression of your warmth are mainly nonverbal."), 16-19 (noting how writing, as on the internet, can thus make the speaker/author seem cold, partly because a written message is too easily phrased so as to convey incomplete emotional information).

⁴¹¹ See *id.* at 50-51 (making similar point in the context of the internet).

⁴¹² This observation once again follows from the "fundamental attribution error" and related phenomena. See MCEWAN, *supra* note 160, at 13.

social settings, are fundamental human characteristics. . . .”⁴¹³ If necessary, therefore, readers will rely on stereotypes, biases, and heuristics, globalizing from what little information they have, filling in gaps in their mind’s picture of another person on the flimsiest of evidence.⁴¹⁴ A post-World War II experiment by psychologist Solomon Asch illustrates the point. Asch gave his experimental subjects a list of words describing a person, then asked the subjects to describe their image of this person’s character in ways other than those listed.⁴¹⁵ He repeated this experiment numerous times, changing one word at a time.⁴¹⁶ Asch discovered that changing a single word - - the word “warm” to “cold” - - changed the positive reactions to the person described to sharply negative ones, making him an unlikable, unpopular, disagreeable cheapskate.⁴¹⁷ Readers also form impressions about character from a writer’s handwriting and its neatness or sloppiness, size, slant, and aesthetic appeal.⁴¹⁸ The dangers of misjudging another person who communicates only by writing are large.

Yet, precisely because of these dangers, conventions have developed enabling writers to mimic much of the paralinguistic information conveyed by speech. Spelling variations can indicate dialect (e.g., “color” for Americans, “colour” for the British) and accent, such as writing “sez,” rather than “says,” to indicate a non-standard accent.⁴¹⁹ Punctuation can also indicate the

⁴¹³ See WALLACE, *supra* note 409, at 36. Wallace relied on the work of Erving Goffman, “the father of impression management theory,” *id.* at 28, who described that process as “an information game - - a potentially infinite cycle of concealment, discovery, false revelation, and rediscovery.” ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 26 (1959).

⁴¹⁴ See WALLACE, *supra* note 409, at 15-28 (illustrating this observation in written internet communication); WANG, *supra* note 376, at 15-19 (describing analogous process of “discrimination by default”); GERD GIGERENZER, *GUT INSTINCTS: THE INTELLIGENCE OF THE UNCONSCIOUS* 8-13, 47-48 (2007) (defining cognitive “heuristics” and explaining their operation and significance, which can be positive as well as negative).

⁴¹⁵ See Solomon E. Asch, *Forming Impressions of Personality*, 41 *J. ABNORMAL & SOCIAL PSYCH.* 258, 259-63 (1946).

⁴¹⁶ See *id.* at 264-74.

⁴¹⁷ See *id.* at 275-90.

⁴¹⁸ Cf. CRYSTAL, *supra* note 338, at 101-02 (noting various handwriting characteristics and professional efforts made to infer “all kinds of normal and pathological psychological and physiological states” from these characteristics”).

⁴¹⁹ See *id.* at 116.

rhythm and color of speech.⁴²⁰ Question marks indicate a rising intonation at the end of a sentence, while exclamation points and italics suggest differing degrees of emphasis.⁴²¹ Quotation marks create the sense of verbatim speech, while letter repetition (“ye-e-es”) can indicate hesitation or confusion.⁴²² In fiction or in informal non-fiction writing, colloquialisms, unfinished sentences, and long strings of uninterrupted clauses can also create the feel of live speech.⁴²³ Moreover, the mark of an excellent writer is often said to be his unique command of written stylistic features, giving him his own “personal voice.”⁴²⁴ Of course, no literal voice in the sense of sounds is involved, for writing is more about the eye than the ear.⁴²⁵ Yet the voice metaphor seems apt to describe an author’s writing style. Although such a style may be most obvious in fiction (who cannot recognize a favorite author’s style?), unique style marks the best non-fiction writing too.⁴²⁶ Where the writer is someone whom the reader has heard speak before, the writer’s cadences may particularly come alive. I often write to my nephew, Jason. When I point out an apparent hole in some argument he has made, he always begins his response with a single word: “True.” He then proceeds to make a different argument nevertheless intended to

⁴²⁰ See *id.* at 118.

⁴²¹ See *id.* at 120.

⁴²² See *id.* at 119, 151.

⁴²³ See *id.* at 138-39.

⁴²⁴ See *id.* at 139; KARPf, *supra* note 243, at 203. Explains Karpf:

Even the most resolutely visual and literate societies retain traces or residues of the oral tradition...The writing of James Joyce and Gerard Manley Hopkins, with its spoken rhythms, is another example of oral residue, as is the defence of the doctoral dissertation in some universities, in person and orally, and the way that children like to hear story cassettes over and over again.

KARPf, *supra* note 243, at 203. Karpf continues, however, to note that these are not merely residues, for “we use our voices in daily life just as much as our ancestors did,” though “we don’t recognize the fact.” *Id.*

⁴²⁵ See CRYSTAL, *supra* note 338, at 122-26 (noting, however, that there is some dispute on this point and that, in his view, both the eye and the ear play a role in learning to write).

⁴²⁶ Who cannot tell the difference between, for example, conservative commentator Ann Coulter’s acerbic style and politically moderate law professor Cass Sunstein’s more measured style? See, e.g., ANN COULTER, GODLESS: THE CHURCH OF LIBERALISM (2007); CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).

demolish my position and fill the hole in his own. I laugh whenever he does this because it is a hallmark of his informal non-fiction writing and his speech. Jason seems almost to be in the room with me, speaking face-to-face.

Writing is useless, of course, without reading, and the connection between the two often involves some kind of voice. As the example of my nephew Jason reveals, most of us *hear a voice* in our heads when we read.⁴²⁷ Interestingly, indeed, most people read silently at about the same pace as they would read out loud.⁴²⁸ Children likewise learn to read by reading aloud, and many forms of writing, from plays, to poetry, to political speeches, are meant to be orally performed in public.⁴²⁹ Even fluent readers facing new or different words might move their lips or sub-vocalize to become familiar with the *sound* of the new words.⁴³⁰

None of these observations show that writing makes up entirely for the advantages of face-to-face conversation. But writing has some advantages of its own. The very process of writing aids and clarifies thought, indeed, “Full meaning does not always exist prior to writing; often the process works in reverse.”⁴³¹ Writing requires more planning and precision than speaking to avoid miscommunication precisely because there is no immediate opportunity to judge audience reaction and because the audience may be large, diverse, and its members and their preconceptions unknown to the author.⁴³² Writing’s permanence allows repeated reading and close analysis of text in a way that the ephemeral words of a conversation cannot.⁴³³ The resulting debate can thus often be more informed and sophisticated. Writing also encourages wider debate than face-to-face oral communication because writing extends over time and space,

⁴²⁷ Cf. THOMAS SZASZ, *THE MEANING OF MIND: LANGUAGE, MORALITY, AND NEUROSCIENCE* 1-20 (1996) (arguing that, for all practical purposes, the conscious mind is an internal conversation).

⁴²⁸ See CRYSTAL, *supra* note 338, at 124.

⁴²⁹ See *id.* at 123-24.

⁴³⁰ See *id.* at 123-26.

⁴³¹ See *id.* at 128.

⁴³² See *id.* at 127, 149-50.

⁴³³ See *id.* at 150-51; KARPF, *supra* note 243, at 201-02.

reaching persons who would otherwise be locked out of discussion.⁴³⁴ Writing's permanence aids memory, allowing ideas to have more lasting impact.⁴³⁵ For many of these reasons, some legal obligations can be created only in writing, and some religions center upon a *written* sacred text.⁴³⁶ Specialized forms of writing can also identify those sharing it as "in-group" members - - witness the special form of experimental reports in the field of psychology - - and can serve to build group solidarity and cohesion, as some commentators argue is true for lawyers using the unique style of legal writing.⁴³⁷ Writing can also be a way of self-understanding, helping you to clarify your feelings via internal dialogue, a function served by diaries, detailed calendar entries, and psychotherapeutic checklists of "flawed thoughts" that cause depression.⁴³⁸ Writing is, therefore, a mixed bag. It is a less natural skill than speaking, is harder to do well, and lacks the warmth and immediacy of face-to-face voice communication. But writing conventions, the need for pre-planning, and its aid in thinking may in some ways make its message more truly from "us." Anyone who has experienced the pain of having his or her writing critiqued understands how deeply our writing can seem to be a part of us, an extension of ourselves.⁴³⁹

⁴³⁴ See CRYSTAL, *supra* note 338, at 149-50 (writing extends over both time and space to often unknown audiences); see generally SCOTT GANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE (2007) (writing via the internet allows for such wide debate that bloggers, chatroom participants, and other internet users expressing political viewpoints should receive the same constitutional and statutory speech protections as we now extend to the press),

⁴³⁵ See KARPF, *supra* note 243, at 201.

⁴³⁶ See *id.* at 201 (noting print confers official legal status); CRYSTAL, *supra* note 338, at 150-51 (similar, plus discussing the nature of sacred writings in religious traditions).

⁴³⁷ See PETER M. TIERSMA, LEGAL LANGUAGE 51-55 (1999) (discussing lawyers' language and in-group cohesion); CRYSTAL, *supra* note 338, at 150-51 (writing is usually more formal than speaking and provides society's linguistic standard).

⁴³⁸ See, e.g., CRYSTAL, *supra* note 338, at 133, 136-37 (writing and reading enable clearer formulations of thoughts to ourselves and internal reflection on their meaning, and writings can even be directed to yourself as the audience, as is true with diaries, personal notes, and first drafts); MATTHEW MCKAY, ET. AL., THOUGHTS & FEELINGS: TAKING CONTROL OF YOUR MOODS AND YOUR LIFE (WORKBOOK) (2007).

⁴³⁹ Cf. CRYSTAL, *supra* note 338, at 128 (noting that writing "is not a merely merely mechanical task, a simple matter of putting speech down on paper. It is an exploration in the use of the graphic potential of a language - - a creative process, an act of discovery.").

Although much of this article has discussed the paralinguistic features of the spoken word, writing reminds us that the semantic content of the words themselves are important means by which we express aspects of our nature. Linguistic sociologist Anne Karpf makes this point eloquently in de-bunking the public understanding of the work of UCLA psychology professor Albert Mehrabian.⁴⁴⁰ Mehrabian, created “an entire theory about human communication based on [experiments involving] three women saying one word, followed by two women reading eight words - - reading, not even spontaneously saying - - and two women listeners ‘imagining’ these words being spoken to someone else, and speculating about what feeling was being suppressed.”⁴⁴¹ From these few, small-sample, highly flawed experiments, Mehrabian suggested, or at least those popularizing his work have suggested, that “only 7 percent of meaning in human communication comes from words, the rest from the voice and face.”⁴⁴² But, insists Karpf, “It’s palpably absurd to suggest that in human conversation words play such an insignificant role, and the face such a major one: it clearly depends on who is talking to whom, when, where, and why.”⁴⁴³ This observation is even more apt for written communication, in which there is no face to observe. Words can explicitly (“I’m sad”) and implicitly (from tone) convey both thoughts and feelings, whether the words are spoken or written.⁴⁴⁴ The written word is thus one very

⁴⁴⁰ The most well-known of Mehrabian’s works on this subject are Albert Mehrabian & Susan R. Ferris, *Inference of Attitudes from Nonverbal Communication in Two Channels*, 31 J. CONSULTING PSYCH. 3 (1967); Albert Mehrabian & Morton Wiener, *Decoding of Inconsistent Communications*, 6. J. PERSONALITY & SOC. PSYCH. 113 (1967); ALBERT MEHRABIAN, *NONVERBAL COMMUNICATION* (1972).

⁴⁴¹ KARPf, *supra* note 243, at 210.

⁴⁴² *Id.* at 209.

⁴⁴³ *Id.* at 210.

⁴⁴⁴ Even writing can convey tone, albeit less fully than in speech. For example a writer might describe a speaker as “dripping with sarcasm” or “sneering his words.” That writing can convey emotion should be no surprise to anyone who loves novels, from tragedies, to comedies, romances, adventure stories, or the magic of Harry Potter. See also CRYSTAL, *supra* note 338, at 152 (noting that “the relative permanence of writing makes it ideally suited for such functions as recording facts and communicating ideas” and that it increasingly serves social functions, such as the well-wishes on birthday cards, the granting of certain social privileges as occurs with the driver’s license, or the reporting of examination results that open or close doors to societal institutions and benefits.).

effective way to convey those portions of ourselves that we choose to disclose.⁴⁴⁵ Furthermore, precisely because of the heightened risks from ambiguity, the written word may expose us to a heightened risk of mis-definition.⁴⁴⁶ The damage done to our sense of identity can be magnified still more by the permanence and ease of wide distribution of writings, quickly expanding the circle of the community mis-judging us.⁴⁴⁷ For the state to compel a written communication from a potential or actual criminal suspect is thus as invasive of mental privacy as is compelling an oral communication, albeit in a subtly different way.

Nor does modern technological change undermine this conclusion. The phone creates distance between the speaker and listener in an oral communication but retains most of the other advantages of the spoken word.⁴⁴⁸ The computer makes the written word more easily deleted or altered but also makes preserving and disseminating it easier as well.⁴⁴⁹ The internet is perhaps the most significant technological tool, constituting, in the view of some commentators, an entirely new medium, neither true writing nor speaking but a combination of both and of some new features.⁴⁵⁰

⁴⁴⁵ See *supra* text accompanying notes 192-211 (discussing the nature of privacy as including control over self-disclosure).

⁴⁴⁶ See *supra* text accompanying notes 192-211 (discussing the social significance of the risk of mis-definition).

⁴⁴⁷ See *CRYSTAL*, *supra* note 338; at 149-51 (describing the ways that writing and speaking differ, including the former's greater permanence and the distance it creates between writing and a perhaps diverse group of unknown readers).

⁴⁴⁸ See *id.* at 152.

⁴⁴⁹ See *id.* at 156.

⁴⁵⁰ See *id.* at 157-58. Crystal explains:

Netspeak... is more than an aggregate of spoken and written features. Because it does things that the other mediums do not do, it has to be seen as a new species of communication. It is more than just a hybrid of speech and writing, or the result of contact between two long-standing mediums. Electronic texts, of whatever kind, are simply not the same as other kinds of texts. They display fluidity, simultaneity (being available on an indefinite number of machines) and non-degradability in copying; they transcend the traditional limitations on textual dissemination; and they have permeable boundaries (because of the way one text may be integrated within others or display links to others). Several of these properties have consequences for language, and these combine with those associated with speech and writing to make electronic communication a genuine "new medium."

For example, instant messages have the immediacy of face-to-face conversation but without face or voice. E-mail is routinely deleted or altered yet uses the form of writing.⁴⁵¹ E-mail creates its own challenges in conveying paralinguistic cues similar to the voice but has developed its own compensating conventions. Thus using all capital letters means to shout (to “flame”), usually in anger;⁴⁵² abbreviations like IMHO (“in my humble opinion”) and BTW (“by the way”) soften words that might otherwise seem imperious; and “emoticons,” such as smiley-faces, portray sadness, happiness, or confusion.⁴⁵³ Though in written form, however, most e-mails lack the pre-planning and care of the written article, book, report, or even the personal letter.⁴⁵⁴ Conversations can also be more complex, as when multiple recipients join in “framing,” each responding only to certain portions of a document, with responses to responses to responses bouncing back-and-forth, creating a multi-voiced text.⁴⁵⁵ Hyper-links allow one document⁴⁵⁶ instantly to become many, joining many communicators rapidly across time and space.⁴⁵⁷ The internet also creates its own unusual social dangers, such as the phenomenon of “group polarization.”⁴⁵⁸ People of similar minds gravitate to the same websites, list serves, and chat rooms. But persons who hear only echoes of their own views tend to hold them in a more

Id. at 158. Even if Crystal is right, however, many of the features of this new medium (e.g., its easy and wide dissemination, its frequently involving less planning than in traditional writing) magnify the risks of ambiguity, miscommunication, and mis-definition.

⁴⁵¹ *See id.* at 156-57.

⁴⁵² *See* WALLACE, *supra* note 409, at 119.

⁴⁵³ *See id.* at 18-19.

⁴⁵⁴ *See* CRYSTAL, *supra* note 338, at 157.

⁴⁵⁵ *See id.*

⁴⁵⁶ *See id.*

⁴⁵⁷ *See id.*

⁴⁵⁸ *See* CASS SUNSTEIN, REPUBLIC.COM 65-77 (2001) (describing the group polarization phenomenon and how it plays out on the internet) [hereinafter REPUBLIC.COM]; CASS SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 17, 75, 92-98, 163, 186-88, 203-05, 215-16, 220-24 (2006) (similar, while also noting some circumstances under which group polarization can promote positive social goods).

extreme and intolerant fashion. They become polarized.⁴⁵⁹ On the other hand, under certain conditions, the internet permits seemingly anonymous communication.⁴⁶⁰ This can encourage freer exchange of ideas and more extensive experimentation with identity because personal reprisals are impossible.⁴⁶¹ But, for similar reasons, it can also encourage readier insults, more spontaneous outbursts, and greater cruelty of expression.⁴⁶² In sum, the internet raises the risk of ill-planned and ambiguous text lacking contextual cues being disseminated to a wide and intolerant audience that will nevertheless readily make globalized judgments about the author of the communication.⁴⁶³ Compelled internet communications would, therefore, like compelled

⁴⁵⁹ See SUNSTEIN, *REPUBLIC. COM*, *supra* note 458, at 65-77 (explaining why this occurs); WALLACE, *supra* note 409, at 73-80.

⁴⁶⁰ See SUNSTEIN, *INFOTOPIA*, *supra* note 458, at 208-09.

⁴⁶¹ See *id.*

⁴⁶² See WALLACE, *supra* note 409, at 126 (“It is easier to attack someone if they are out of sight and far away. We can’t see the injured and pained expression on their faces, and we feel safer and more immune to counterattack.”), 239 (“People can act in very uninhibited ways when they think no one can find out who they really are. In the environments that offer this, or at least offer some measure of it, people tend to let loose in both positive and negative ways.”).

⁴⁶³ I am by no means suggesting that internet communications necessarily infringe on privacy. Indeed, there is reason to believe that some internet users under certain conditions well short of complete anonymity are nevertheless *more willing* to engage in self-disclosure than they would in other media. See *id.* at 151. But this is partly so because many of these communications are to discrete groups of trusted individuals with whom one has developed an on-line relationship, thus still being perceived as granting *relative* anonymity. John Hopkins University technology professor Patricia Wallace put this point thus:

You sit at a computer screen feeling relatively anonymous, distant, and physically safe and you sometimes feel closer to the people on the other side of your screen whom you have never seen than to the people in the next room. You may reveal more about yourself to them, feel more attraction to them, and express more emotions - - even when all you have is an ASCII keyboard. At the keyboard, you can concentrate only on yourself, your words, and the feelings you want to convey. You don’t have to worry about how you look, what you’re wearing, or those extra pounds you want to shed...You can also endlessly idealize those persons with whom you are interacting. Someone you know only as “Moonbeam” who has told you many intimate details of her life - - but not her name, address, or phone number - - is like a canvas with just a few iridescent brush strokes. You can fill in the rest of that minimalist art work with your imagination.

Id. at 151. Greater self-disclosure on the net thus turns often on a perceived relative anonymity that partially shields you from the full consequences of others’ judging eyes, thus offering a degree of protection of the self, but the risk of mis-definition is still there and is greater still in the many situations where the writer has no privacy at all. That *risk* is what triggers an entitlement to some measure of privacy-recognition.

oral and written ones, wound personal identity, invading mental privacy in deeply disturbing ways.

IV. *Compulsion*

The risk of mis-definition by others when we lose control over expressive self-revelation is an incomplete explanation, however, for what is distinct about the privilege against self-incrimination. Suppose that A is talking to his friend B in the privacy of A's home. Unbeknownst to either person, the police have planted a bug in A's living room, a bug installed without probable cause or a warrant. The bug records A confessing a crime to B, without any prompting by B, who is thoroughly surprised. A's verbal confession of his guilt is meant to be private in the sense of being something shared only with B. The Fourth Amendment protects this privacy, and the confession, being overheard only because of the illegally-implanted bug, will be suppressed at trial.⁴⁶⁴ But neither the state, nor, in this example, anyone else *compelled* A to reveal what was on A's mind. Accordingly, although the police did violate one constitutional provision, they did not violate the Fifth Amendment's protections.⁴⁶⁵

The privilege thus protects only against the compelled linguistic expression of thoughts or feelings. Of course, compelled expression may conceivably violate both the privilege and the Fourth Amendment, at least if, as at least one commentator has argued, the Fourth Amendment's privacy protections extend to confessions, thus requiring "interrogation warrants."⁴⁶⁶ This position is, however, one that the United States Supreme Court has never accepted.⁴⁶⁷ Thus, if

⁴⁶⁴ See *Berger v. United States*, 388 U.S. 41 (1967) (Fourth Amendment privacy protections extend to eavesdropping if done without the consent of any of the parties to the conversation); TASLITZ, PARIS & HERBERT, *supra* note, 2 at 515-21 (analyzing *Berger* and its progeny).

⁴⁶⁵ See TASLITZ & PARIS, & HERBERT, *supra* note 2, at 683-84, 699-703 (noting that there is no Fifth Amendment violation without compulsion).

⁴⁶⁶ See Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867 (2005).

⁴⁶⁷ See *id.* at 1879-93.

the police compelled someone into confessing in a public place, that would violate the privilege but, under current doctrine, not the Fourth Amendment.⁴⁶⁸ Compulsion, and not just by anyone but by the state, is thus one key feature distinguishing the Fifth from the Fourth Amendment's privacy protections.⁴⁶⁹

But what is "compulsion," and how can we detect its presence or absence? Those are in fact not questions that I plan to answer here, and many other scholars have articulated their own responses.⁴⁷⁰ What matters for my purposes is understanding *why* the Fifth Amendment requires compulsion, for that is part of accomplishing my overriding task of justifying the Fifth Amendment privilege's existence in the first place. Why the Amendment requires compulsion can indeed be answered without knowing precisely how its presence can be determined in any individual case. There are three reasons: first, compelled expression involves the state in actively changing the very thoughts and feelings that persons seek to keep private; second, though relatedly, the words we speak or write shape our character; and third, state-compelled confessions are degradation ceremonies that violate the proper boundaries between the state and the individual in a decent, liberal society. State-compelled expression of thought and feeling, in

⁴⁶⁸ This conclusion follows directly from the Court's theory that, under the "assumption of risk" doctrine, there is no privacy in a public place; certainly not privacy protection against observation of what one says or does in public. See Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 L. & CONTEMP. PROBS 125, 134-43 (2002). Of course, if the police used physical force or its threat to compel the public confession, then, even in this hypothetical, the Fourth Amendment might also be implicated. See TASLITZ, PARIS & HERBERT, *supra* note 2, at 304-14.

⁴⁶⁹ See TASLITZ, PARIS & HERBERT, *supra* note 2, at 683-84, 699-703. I thus disagree with Covey's assertion that the "Self-Incrimination Clause is not well-suited to protect individual privacy," Covey, *supra* note 466, at 1868, though he is right that that Clause has not currently been interpreted to serve that function. See *id.* Moreover, Covey also states that several constitutional provisions, including the Self-Incrimination Clause, "[i]n theory...could have been the basis for an expansive constitutional interrogation doctrine that effectively protected individual privacy." *Id.* Here I seek to articulate just such a theory.

⁴⁷⁰ The most interesting recent such effort is Mark Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2006) (arguing for defining compulsion as a state alteration of a person's status quo by removing any of the rights assumed in his "baseline" set of circumstances existing just before government intervention). I do, however, plan to resolve some very specific privilege doctrine conundrums in the in-progress companion piece to this article. See Andrew E. Taslitz, *Miranda and Metaphor: The Role of Counsel Under the Privilege Against Self-Incrimination* (unpublished draft manuscript 2007).

at least these three respects, thus undermines the independence and uniqueness of human personality as well as exposing us to mis-definition by others. Once again, under the privilege, “[i]t is what a defendant may do with his lips - - what may issue from his mouth - - that is considered worthy of special protection.”⁴⁷¹

A. *Expression Changes Thoughts and Feelings*

The commonsense notion that expression is only about representing the information residing in our minds is wrong. The very act of speaking or writing also changes the very thoughts and feelings that we seek to express. Expression is thus usually, though not always, a creative act.⁴⁷²

Dictionaries and custom give individual words their meaning.⁴⁷³ But each of us must choose which words to speak, in what order and emphasis, with what purpose and tone.⁴⁷⁴ We seek to convey complex concepts and emotions, and, in doing so, we may find that our words fail us, for the words spoken then themselves become subject to our thoughts.⁴⁷⁵ Once a person speaks, her words may reveal to her the fuzziness with which she holds her ideas or even the absence of any coherent idea whatsoever when she initially thought that she had some great insight.⁴⁷⁶ Speaking aloud may draw her attention to the ambiguity, or a confused listener may do so.⁴⁷⁷ She must

⁴⁷¹ PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 29 (2000).

⁴⁷² See TIMOTHY MACKLEM, *INDEPENDENCE OF MIND* 2-6 (2006) (noting also that “[l]anguage is not a vessel for ideas; it also constitutes their very fabric.”).

⁴⁷³ See TIERSMA, *supra* note 437, at 115-20 (analyzing the roles of dictionaries and custom in defining words as they are generally used and in the specialized context of the law).

⁴⁷⁴ See, e.g., CRYSTAL, *supra* note 338, at 137-39 (making similar point in the context of writing).

⁴⁷⁵ See MACKLEM, *supra* note 472, at 3, 5 (noting that “language, once in existence, becomes a subject of thought itself.”).

⁴⁷⁶ See *id.* at 6 (making this point as to both the spoken and written word); CRYSTAL, *supra* note 338, at 127 (emphasizing the value of rewriting as part of a process of clarifying and correcting thoughts).

⁴⁷⁷ See MACKLEM, *supra* note 472, at 2 (discussing some of the advantages of speaking aloud), 7-9 (analyzing how we fill in “expressive gaps,” that is, how we can find difficulty searching for the words to express our nascent thoughts and feelings, difficulty that can reveal to us the need to clarify or modify our understanding of the matter involved).

then abandon or refine the thought or find another in its place.⁴⁷⁸ This process may begin with internal self-conversation, but it eventually requires some utterance, whether to one's self or to an imagined or real audience. New words are required.⁴⁷⁹

Words can also help us to understand that which silence only confounds. We may feel grief but cannot fully know its meaning for our lives, its portents for the future, or how to cope with it until we speak it aloud or share it with others.⁴⁸⁰

Writers may be acutely aware of these processes. Words put down on paper can reveal gaps (to author and reader) in previously inchoate arguments or reveal gaps in what at first seemed to be airtight syllogisms.⁴⁸¹ Typing or handwriting a particular word may reveal its ambiguity or its status as a poor choice to convey a point, requiring the author to wrestle seriously with just what is his point.⁴⁸² The act of writing may reveal the poverty of a position or send an intellectual inquiry or emotional journey into new, unexpected directions.⁴⁸³ The words we write can also reveal the incompleteness in our thoughts and feelings or their expression, sending us on a quest

⁴⁷⁸ See *id.* at 7-9.

⁴⁷⁹ See *id.* at 8-13.

⁴⁸⁰ See *id.* at 5 (Without language we would still feel grief, but in the absence of tears, gestures, or words we would not be able to express that grief, even to ourselves, and our inability to comprehend it.”). Physical expression alone is never enough, for, for example, in order fully to “see” an inspiration, to “know its rational contours,” we “have to put it in language. Otherwise the answer will remain an intuition.” *Id.* Anyone who has seen a therapist, confided in a friend, kept a diary, or struggled with finding just the “right word” to put down on paper intuitively understands the insight that even internal self-conversations in words are different in kind from the impact of externally expressing those words. Furthermore, there are some conscious thoughts that we simply do not even entertain until someone asks us to express them, such as when a friend poses a novel question about your motivations for a certain action or when a professor asks you to write a paper on a subject of whose existence you were previously unaware.

⁴⁸¹ See *id.* at 7-9 (analyzing “expressive gaps”).

⁴⁸² See *id.* at 2 (noting that a person trying to write down even a thought previously spoken aloud may find at first that it is “difficult to reproduce the clarity that he thought he had already achieved.”), 3 (“Even the choice of writing instrument seems to make a difference: he finds that pen and paper are often the best for the most difficult passages; the cramped nature of the technique goes well with the density of the thought.”).

⁴⁸³ See *id.* at 3 (noting, concerning the writing process, that, “The choice of certain words, phrases and images inevitably triggers new trains of thought that lead in new directions that are at once more concrete and specific than purely mental images, and more complex and literary than the spoken language in which he has already rehearsed them.”); CRYSTAL, *supra* note 338, at 127 (analyzing the writing process).

to fill the gaps.⁴⁸⁴ A thought is an embryonic word, a word an infant thought.⁴⁸⁵ British legal philosopher Timothy Macklem summarized these points:

When we put our thoughts and feelings into words and phrases, and so turn them into spoken or written language, whether for our own benefit or for the benefit of some other, when we sketch our response to a scene before us and so turn that response into line and shading, when we whistle or when we hum, we are necessarily, if modestly, creative. We start to say something, as an attempt to capture some aspect of what we think or feel, and as we say it our speech gains a suggestive momentum of its own, so that what begins as a limited perspective upon a richer thought soon acquires a life that outstrips the bounds of the original thought, inspiring new thoughts that depart from the original in ways that were neither foreseen nor foreseeable in advance.⁴⁸⁶

Words have inherent value too. Merely choosing to speak to another can be a heartening victory for a shy man. A writer recognizing that he has chosen the perfect word to capture a thought rejoices. In both instances, the pleasure comes from the talking or the writing independently from the content of the words chosen.⁴⁸⁷

Even our memory is partly constituted by our words.⁴⁸⁸ Memories are not photographs of events but reconstructions of them.⁴⁸⁹ Our biases, self-interest, intervening life experiences, and myriad other factors combine to create our memories.⁴⁹⁰ Ample research shows that what we say can alter this creative process.⁴⁹¹ For example, an eyewitness describing an assailant becomes more likely to identify someone from a lineup as the offender if he matches that description than would be the case if the witness were asked to identify the true offender's face when the witness

⁴⁸⁴ See MACKLEM, *supra* note 472, at 3, 7-11.

⁴⁸⁵ See *id.* at 14 (noting that “thoughts are like partly formed embryos” until expressed).

⁴⁸⁶ *Id.* at 6.

⁴⁸⁷ Cf. *id.* at 13-14 n. 13 (“Verbal language is also intrinsically valuable, partly on aesthetic grounds (language can have distinctive aesthetic appeals, musicality for example) and partly because it is constitutive of certain goods and activities (such as poetry, wordplay, Scrabble, crosswords, spelling bees).”).

⁴⁸⁸ See TAsLITZ, *Feminist Approach*, *supra* note 97, at 19 (“Memory itself is an assertion, a self-report, which we play an active role in constructing.”).

⁴⁸⁹ See *id.* at 19-20.

⁴⁹⁰ See TAsLITZ, PARIS, & HERBERT, *supra* note 2, at 869-70 (discussing the nature of human memory as a constructive process and problems of encoding, storage, and retrieval).

⁴⁹¹ See AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 36-38 (2006).

had given no description at all.⁴⁹² There is also evidence that confessing can itself alter the confessor's recollection of events.⁴⁹³

Words can also constitute parts of our social world. Entreaties, promises, denials, admissions *consist of* words or their equivalent.⁴⁹⁴ But the very act of bringing these social facts into existence changes the social world we inhabit and our feelings about it.⁴⁹⁵ One to whom a promise is made on an important matter, for example, often expects its fulfillment and plans for the future accordingly, a matter of grave consequence if the promise-maker is a police officer, the promise-taker a suspect.⁴⁹⁶

More broadly, words alter our relationships with others.⁴⁹⁷ Lengthy conversations involving self-disclosure create an intimacy between former acquaintances, who now slowly mutate into friends.⁴⁹⁸ Words of comfort turn a distant co-worker into a respected colleague, words of

⁴⁹² See *id.* at 31-35.

⁴⁹³ See, e.g., Solomon M. Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 163-170-72 (G. Daniel Lassiter ed. 2004) [hereinafter CONFESSION AND ENTRAPMENT] (reviewing research suggesting that the mentally retarded are highly suggestible to police interrogation, meaning that they accept *as true* the words they come to recite as a result of leading questions, thus raising the risk of false confessions); Alison D. Redlich, *The Police Interrogation of Children and Adolescents*, in CONFESSIONS AND ENTRAPMENT, *supra* at 107, 115-16 (discussing research on "imagination inflation," in which participants "are asked to systematically imagine false events," as a consequence of which they "become more confident that the event occurred" and further noting that, "In several cases of false confession, similar techniques (e.g., asking suspects to make up how they would have committed the crime) have been used and highly criticized as the main contributing factor to wrongful arrests or convictions....").

⁴⁹⁴ See MACKLEM, *supra* note 472, at 13-14 n. 13 (noting words are constitutive of some practices); JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 1-70, 95-145 (1995) (arguing that at least some facts cannot exist without the human institution of language).

⁴⁹⁵ See SEARLE, *supra* note 494, at 1-70, 95-145 (illustrating this point).

⁴⁹⁶ See, e.g., IAN AYRES & GREGORY KLASS, INSINCERE PROMISES 8-9 (2005) (analyzing promissory reliance generally); WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 204-09 (2001) (arguing that police promises made to obtain confessions induce such strong suspect reliance as to risk even an innocent person's confessing).

⁴⁹⁷ See, e.g., CONLEY & O'BARR, *supra* note 385, at 42-46 (explaining how language practices in mediation can, at their best restore civility and promote agreement).

⁴⁹⁸ Taslitz, *Twenty-First Century*, *supra* note 468, at 152 ("Complete revelation of ourselves requires time and trust and is reserved only for our most intimate relationships."); cf. MACKLEM, *supra* note 472, at 55 ("[A] person's character and commitments are not simply given, but are artefacts that develop over time, sometimes through an exchange with others (which isolation prevents), and sometimes through seclusion from them (which isolation defines and secures).").

advice turn a teacher into a mentor.⁴⁹⁹ Words can turn relationships unpleasant too. An angry tirade by a lover can break bonds of trust, by a boss can intimidate, just as words of boasting can sometimes raise the speaker's status at the expense of the listener's.⁵⁰⁰

A "room of one's own,"⁵⁰¹ the isolated privacy of one's mind, is necessary to fostering creativity and distinctiveness, for, without fear of scrutiny or knowledge of all social expectations, we can let our mind and heart wander where they will.⁵⁰² But a life of endless isolation is impoverished, missing others' perspectives, new information, and the bonds to other individuals, families, groups, institutions, and nations that combine to become important parts of the unique persons we are.⁵⁰³ When the state plays too active and large a role in interfering with our choices about what to reveal, when, how, and why through our words, they alter the very thoughts and feelings that make us who we are.⁵⁰⁴ Each individual and group is always to some extent molded by the law and by other acts of the state.⁵⁰⁵ But when the state actively intervenes on a very personal level to prompt us to speak, it invades and commandeers our personalities in a

⁴⁹⁹ Cf. MICROSOFT ENCARTA COLLEGE DICTIONARY 903 (2001) (defining a mentor as "somebody, usually older and more experienced, who provides advice and support to, and watches over and fosters the progress of, a younger, less experienced person").

⁵⁰⁰ See, e.g., TANNEN, 9 TO 5, *supra* note 387, at 185-86, 204-41 (analyzing jockeying for status on the job).

⁵⁰¹ See VIRGINIA WOOLF, A ROOM OF ONE'S OWN 160 (1967) (creating the image of a room of one's own as necessary to independence of thought, further declaring, "five hundred a year stands for the power to contemplate...a lock on the door means the power to think for oneself.").

⁵⁰² See MACKLEM, *supra* note 472, at 36.

⁵⁰³ See *id.* at 35 (describing one privacy theory in which "privacy is a matter of restricting the potential range of one's human contacts, so as to form deeper connections with a more limited number of people, people such as spouses, lovers, and children"); JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION (1992) (originating this theory of privacy as intimacy); SUNSTEIN, REPUBLIC.COM, *supra* note 458, at 75-77 (stressing the importance of diverse relationships to achieving new perspectives).

⁵⁰⁴ See Andrew E. Taslitz, *A Feminist Fourth Amendment: Consent, Care, Privacy, and Social Meaning in Ferguson v. Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 16 (2002) [hereinafter *Feminist Fourth Amendment*] (summarizing this argument, which is based on the work of Kevin Crotty and Philosopher Michael Foucault); KEVIN M. CROTTY, LAW'S INTERIOR: LEGAL AND LITERARY CONSTRUCTIONS OF THE SELF 100-02 (2001) (originating this argument). Crotty applies Foucault's theory to the specific context of police interrogation. See *id.* Although Jurgen Habermas has a more positive view of the social value of confession than does Foucault, both thinkers recognize that the "self" can be significantly shaped by the state, and both their theories recognize that compelled confessions "are powerful ways to undermine the individual's autonomy and uniqueness that are purported to be central to the modern liberal state." Taslitz, *Feminist Fourth Amendment*, *supra*, at 17.

⁵⁰⁵ See Taslitz, *Feminist Fourth Amendment*, *supra* note 504, at 16.

way that makes that speech and what it says about who we are far less than it otherwise would have been a matter truly of our own choice.⁵⁰⁶

B. *Words Shape Character*

If thoughts and feelings are components of who we are, their combination and evolution over time help to constitute our character, our more enduring ways of experiencing and acting upon the world.⁵⁰⁷ The sum of who we are is, however, more than the combination of these parts, for together we turn them into a unique, defining, individual life story, a tale that is us.⁵⁰⁸

A person who is thus ten years old today will, in twenty years, have different attitudes, beliefs, goals, and desires. He may have fewer organs, such as the removal of his gall bladder, may be fatter or thinner, more or less energetic. Even at the molecular level, the precise molecules constituting his body will have changed. Yet he and others will still think of him as the same person, as “Hank Jones” and not suddenly “Clay Smith.”⁵⁰⁹

What explains this sense of individual continuity is the narrative coherence of human lives. We each tell ourselves stories that link together the different phases of our lives.⁵¹⁰ Our sense of self largely consists of these stories.⁵¹¹ “Our plannings, our rememberings, even our loving and hating, are guided by narrative plots.”⁵¹² Narratives, of course, move through time, having a beginning, a middle, and an end.⁵¹³ One cannot, therefore, be a person at a single moment in

⁵⁰⁶ See *id.* at 16-17.

⁵⁰⁷ See Taslitz, *Myself Alone*, *supra* note 169, at 7-14.

⁵⁰⁸ See *id.* 14-30.

⁵⁰⁹ See JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 131-42 (2001) (making similar point).

⁵¹⁰ See Taslitz, *Feminist Approach*, *supra* note 97, at 34-36.

⁵¹¹ See *id.*; JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 63-89 (2002) (discussing the narrative creation of the self).

⁵¹² Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology*, in NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3, 11 (Theodore R. Sarbin ed. 1986).

⁵¹³ See RUBENFELD, *supra* note 509, at 137; accord Bruner, *supra* note 511, at 15 (“[W]e know that narrative in all its forums is a dialectic between what was expected and what came to pass.”).

time.⁵¹⁴ To be a person is to be the combination of what you were, are, and will be.⁵¹⁵ The narrative nature of personhood does not make it a fiction. The narrative is who you are.⁵¹⁶

Every act of expression affects each person's life story. What we say or not, how we say it or instead convey silence, when, and to whom is a choice about how each of us sees ourselves and wants others to see us.⁵¹⁷ Though sometimes made quickly, we do not make these choices lightly. In part, we are what we do, and words are a form of action.⁵¹⁸ If we lie, that may reinforce our self-image as a liar or undermine our image as a truth-teller. Even if we start out as generally truthful, repeated lies makes us more comfortable with deceit until it becomes integral to our character.⁵¹⁹ If we challenge authority, that makes us defiant. Every word uttered or not is another chapter in our story, an expressive choice that makes us, in some significant way, the authors of our lives. These choices, explains one legal theorist:

become creative if and when they are, prospectively or retrospectively, made part of the story of a life, where the idea of a story is understood, not simply as a factual record, but as the narrative of a personal encounter with value, the development, recollection, and recounting of which has become a source of value in its own right. People typically aspire to be at least part authors of their own lives, and the metaphor of authorship is an apt one, not because people often function creatively in making the decisions that govern the shape and direction of their lives, but also because in doing so they are very often conscious of the narrative implications of their decisions, sufficiently so as to take those implications to be elements of great weight in

⁵¹⁴ See RUBENFELD, *supra* note 509, at 137.

⁵¹⁵ *Id.*

⁵¹⁶ *See id.*

⁵¹⁷ Macklem thus explains the importance of freedom of expression:

Freedom entails choice, choice shapes character, and character helps to shape the role of incommensurable values in human well-being, for it establishes which values are in our interest and which are not, in the face of the manifold values we otherwise have reason to pursue.

MACKLEM, *supra* note 472, at 19-20.

⁵¹⁸ See Taslitz, *Willfully Blinded*, *supra* note 88, at 436-37 (noting that what we consistently do shapes our thoughts, feelings, and character even down to the subconscious level); *supra* notes 398-407 (explaining that some actions and institutions *consist of* the words we speak).

⁵¹⁹ *Cf.* Taslitz, *Willfully Blinded*, *supra* note 88, at 394-403, 436-37 (explaining similar concept in the context of self-deceit).

the assessment of their reasons for action. They decide the course of their life at any given moment in much the same way that authors do with respect to fictional lives, so as to develop the character, style, and plot of their particular life story.⁵²⁰

To be compelled to speak certain sorts of words at a certain time, in a certain setting is to lose control over your own life's tale in a profound way, to make you something you were not and did not originally choose to be. You become the state's creature more than your own. You cease to write the tale that is you, passing authorship to your interrogators. You are *re-defined*.⁵²¹

C. *Confession as a Degradation Ceremony*

One argument often made in favor of interrogation by the state is that confession is good for the soul.⁵²² The police are doing little more than appealing to conscience, and to confess because one's conscience is pricked is to cleanse the soul, a rational, free choice and the first step on the road to redemption.⁵²³

But what is a conscience? A conscience is a personal commitment to a set of reasons meant to be given special weight in guiding our actions.⁵²⁴ Because a conscience involves commitment, it cannot be readily tossed aside or altered.⁵²⁵ Moreover, were it to change too

⁵²⁰ MACKLEM, *supra* note 472, at 30.

⁵²¹ See *supra* notes 504-05 and accompanying text.

⁵²² Justice Scalia forcefully stated this position:

[I]t is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a mistake. While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, admission of guilt, if not coerced, is inherently desirable because it advances the goals of both justice and rehabilitation.... We should, then, rejoice at the "poor fool" who has made [an honest confession]; and we should regret the attempted retraction of that good act rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience.

Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

⁵²³ See *id.*

⁵²⁴ See MACKLEM, *supra* note 472, at 101-02.

⁵²⁵ See *id.* On the nature of commitment, see RUBENFELD, *supra* note 509, at 91-102; R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 50 (2001).

rapidly, it would fail to give us the stability and continuity in behavior necessary to achieving certain longer-term life goals, including the person we wish to be in the future.⁵²⁶ The dictates of conscience stem from a combination of our upbringing, close personal attachments, long-term goals, and accumulated rational choices about our life's direction.⁵²⁷ Conscience reminds us, in the face of more tempting and immediate reasons, of our longer and deeper goals.⁵²⁸ Yet conscience must nevertheless be subject to slow change and periodic re-evaluation, to making informed choices about its wisdom and content.⁵²⁹ Otherwise, it is no longer *our* commitments but the commitments of others, or of some old and temporally-isolated version of ourselves, that governs our actions.⁵³⁰ Moreover, we must be alert to when our conscience degenerates into a mere concern for the image of who we are rather than the reality or becomes a source of bias or empty standards.⁵³¹ Nor is our conscience always our best guide, for it may in some situations conflict with other compelling reasons for action or reveal the inadequacy or incompleteness of the code our conscience embodies in addressing the strange or the extreme.⁵³² Above all, therefore, conscience must be of our own making, and we do not truly act from conscience

⁵²⁶ See MACKLEM, *supra* note 472, at 103; RUBENFELD, *supra* note 509, at 96,100.

⁵²⁷ See MACKLEM, *supra* note 472, at 98-102 (describing the sources of conscience in both experience and reason).

⁵²⁸ See *id.* at 112. Macklem put it this way:

We call upon conscience only in cases of moral permission, where we seek to imagine the future without much guidance from the past, and further seek to structure and be true to the demands of that future, and make our choice among options as to its direction and course, by reference to an image of ourselves as the person we have thereby committed ourselves to becoming.

Id.

⁵²⁹ Cf. RUBENFELD, *supra* note 509, at 96-100 (making similar point in connection with the cognate concept of commitments).

⁵³⁰ Cf. *id.* (again making similar point in the context of the cognate concept of commitments); see MACKLEM, *supra* note 472, at 98 (“conscience is a special kind of rational commitment”).

⁵³¹ See MACKLEM, *supra* note 472, at 114.

⁵³² See *id.* 108-10, 112-13. Adds Macklem, “Conscience [sometimes]...calls upon us to attend to our attachments as a matter of duty, when there may be good reason to do otherwise. By attending to the claims of conscience in such a situation we may honour our self-image at the expense of our obligations to others....” *Id.* at 113.

unless it is we who instigate action.⁵³³ Where others seek to appeal to our conscience, particularly in ways designed to manipulate us for their own ends, they can injure our conscience, turning its virtue into vice.⁵³⁴

Jean Jacques Rousseau's story of the "stolen ribbon" in book 2 of his *Confessions* illustrates the point.⁵³⁵ Rousseau and a young kitchen maid had once been servants in the home of Madame de Vercellis. Upon her death, Rousseau stole one of her ribbons to give to the kitchen maid as a sign of affection. The executor of the estate, Comte de la Roque, discovered the ribbon missing, it being found among Rousseau's things. Comte de la Roque publicly summoned Rousseau to explain how the ribbon came into his possession. Rousseau accused Marion, the very kitchen maid who was the object of Rousseau's affection, of being the thief, insisting it was she who gave the ribbon to him. When she denied the charge, Comte de la Roque fired them both, uncertain of the truth, in the hope that the conscience of the guilty one would avenge the plight of the innocent. Rousseau's conscience did plague him, but it did not prod him to tell the truth at the time, and it is partly this that tortures him. "She was present in my thoughts; I excused myself on the first object that came to hand,"⁵³⁶ wrote Rousseau. "I accused her," he continued, "of having done what I wanted to do and of having given me the ribbon since

⁵³³ See *id.* at 108 ("Accumulated wisdom only becomes a matter of conscience when we commit ourselves to it personally, so as to make adherence to that wisdom part of our self-understanding..."). Macklem further notes, therefore, that "when conscience reminds us to be moral it is not only for the sake of the reasons that conscience embodies, but for the sake of the self-image and self-respect that adherence to the claims of our conscience gives rise to." *Id.*

⁵³⁴ Cf. *id.* at 118 ("We enjoy freedom of conscience as and when we develop our conscience in such a way as to make the exercise of freedom distinctively our own...," an injunction that would seem to be inconsistent with individual conscience becoming a mere tool for others to achieve their own goals rather than a way for the conscience-holder to become the person that he, in making his own choices about how to live his life, truly wants to be); PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 16 (2000) (arguing that the privilege against self-incrimination was partly historically rooted in the beliefs that matters of conscience need not be spoken if that can lead to serious condemnation of the content of the conscience).

⁵³⁵ See JEAN JACQUES ROUSSEAU, *CONFESSIONS* (transl. 1962); BROOKS, *supra* note 534, at 19-231 (articulating similar reading of Rousseau's episode of the "stolen ribbon").

⁵³⁶ ROUSSEAU, *supra* note 535, at 23.

it was my intention to give it to her.”⁵³⁷ Nor did Rousseau confess his guilt to anyone, not even to family or friends, until many years later, when writing the *Confessions*.⁵³⁸ Rousseau further bemoaned the way that de la Roque’s actions had blocked Rousseau’s conscience from operating as it should. One commentator summed up Rousseau’s reasoning:

Thus we have a problem in desire which, thwarted in its intent, gives way to its apparent opposite, the wish to punish. If only his accusers had given him time to repent, and the opportunity to confess privately, he would have told the truth. But public exposure, the risk of being publicly declared a thief and a liar, is too strong for him to perform on the spot the confession he wants to make - - and now makes so many years later.⁵³⁹

Conscience needs time and a modicum of privacy to do its work rightly. The public nature of the accusation and the implicit threat of penalties make Rousseau into just what he feared the truth would reveal: an informant, a liar, a disloyal would-be lover, a selfish hypocrite motivated by fear rather than courage, vice rather than virtue. Rousseau was, of course, already a thief, but public questioning by those more powerful than he, followed by an appeal to conscience, made him into something far worse. If we are, to a large extent, what we do, Rousseau’s later guilt pangs did little to erase the stain from his cowardly actions, a character wounded by the compulsion to make him confess. It is hard to see how modern interrogation by the police is any better on this score. Although the suspect is alone with the police,⁵⁴⁰ that is not the sort of privacy that conscience requires, for the police are themselves a symbol and arm of the public, charged with doing its will.⁵⁴¹ A confession under such circumstances is not a private revelation

⁵³⁷ *Id.*

⁵³⁸ See BROOKS, *supra* note 534, at 19-21.

⁵³⁹ *Id.* at 20.

⁵⁴⁰ See *Miranda*, 384 U.S. at 448-52.

⁵⁴¹ See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROB.S 221, 291-94 (2003); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 15, 47-50 (2003); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 73-83 (2006).

by a criminal to the one he has wronged but an effort to degrade the subject's will to the service of his tormentors.⁵⁴²

Even had Rousseau told the truth, his interrogation would still have been a degradation ceremony. As the Court detailed, albeit in other words, in *Miranda*, the very purpose of interrogation is to degrade the suspect, to make him less, his questioners more.⁵⁴³ If autonomy is central to making us the author of our own stories, the interrogator's goal is to compromise that autonomy, writing the next chapter for us. Placed in a situation where the suspect is dependent upon his interrogators, then asked to confess, his motives for speaking will be different from the sincere penitent. Even if sincerity is part of what drives the interogatee, the risk of his motives being "aberrant,"⁵⁴⁴ of speaking in significant part out of hopelessness, confusion, or fear, is great.⁵⁴⁵ Justice Jackson, in his dissent in *Ashcraft v. Tennessee*,⁵⁴⁶ albeit writing about the due process clause, took this argument to its extreme:

It probably is the normal instinct to deny and conceal any shameful or guilty act. Even a "voluntary confession" is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him. The term "voluntary confession" does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt. "Voluntary confessions" in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial. To speak of any confessions of crime made after arrest as being "voluntary" or "uncoerced" is somewhat inaccurate, although traditional.

A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is

⁵⁴² Cf. *Miranda* 384 U.S. at 457-58.

⁵⁴³ See *id.* at 457-59.

⁵⁴⁴ See BROOKS, *supra* note 534, at 25.

⁵⁴⁵ *Id.* at 24.

⁵⁴⁶ 322 U.S. 143 (1944).

custody and detention for one hour. Arrest itself is inherently coercive, and so is detention.⁵⁴⁷

Jackson here dissents from the majority's finding of coercion, arguing that the legal concept tolerates much more pressure than does the commonsense concept.⁵⁴⁸ But the commonsense concept of "coercion" that he so aptly describes is much akin to the *Miranda* Court's definition of "compulsion," using similar reasoning to conclude that custodial interrogation, absent warnings and the opportunity to consult with counsel, was "inherently compelling."⁵⁴⁹

Confession has long been the "queen of proofs" in our culture.⁵⁵⁰ Police seek confessions even when there is ample independent evidence of guilt.⁵⁵¹ Words, in our culture, perhaps all cultures, have power.⁵⁵² They can be sacred or profane, rousing or soothing. But, whatever they are, we need them. The interrogation ritual seeks to compel the suspect to part with his words, both because they can be a window into his soul and because, by confessing, he is marked with a status as a lesser being.⁵⁵³ To be humiliated or shamed is to be changed. "To participate in a

⁵⁴⁷ *Id.* at 160 (Jackson, J., dissenting).

⁵⁴⁸ *See id.*

⁵⁴⁹ *See Miranda*, 384 U.S. at 461-67. For an analysis of the difference between prevailing views of "coercion" under the due process clauses and "compulsion" under the Fifth Amendment, *see* TASLITZ, PARIS, & HERBERT, *supra* note 2, at 699-702.

⁵⁵⁰ *See* BROOKS, *supra* note 534, at 9.

⁵⁵¹ *See* ABA, *ACHIEVING JUSTICE*, *supra* note 491, at 11-12 (noting risks of false confessions even where this is independent evidence); THE CONSTITUTION PROJECT, *MANDATORY JUSTICE: THE DEATH PENALTY REVISITED* 40-41 (2006) (similar); BROOKS, *supra* note 534, at 4 ("Western culture, most strikingly since the Romantic era to our day, has made confessional speech a prime mark of authenticity...."), 9 ("Confession has for centuries been regarded as the 'queen of proofs' in the law: it is a statement from the lips of the person who should know best.").

⁵⁵² *See* CONLEY & O'BARR, *supra* note 385, at 204.

⁵⁵³ *See* BROOKS, *supra* note 534, at 5 ("If we have been taught that confession, the self-examination and the inwardness that confession both reflects and maybe creates, is essential to our psychic and moral health and our very definition as unique individuals, are we sure that we want the law to be able to use the confessional gesture so freely as it does?") Brooks continues

If contemporary culture appears to insist on a generalized transparency, in which each of us is fully open to all others without dissimulation, doesn't the generalized confessional requirement also constitute a tyranny, a policing of the very privacy that selfhood requires? And if confession implies a penitential state that may involve disgrace, even abjection, doesn't it often appear a violation of human dignity?

Id. at 9.

ritual that is personally repugnant”⁵⁵⁴ is indecent, a hallmark of an illiberal, “uncivilized” society.⁵⁵⁵ To be the sort of person who bows in subjection to the state is to abandon the defiant character that a republic requires.⁵⁵⁶ When it is the state doing the humiliating, it invades the “private” in a very important way, for it erodes the boundaries of personhood to let in the power of the state.⁵⁵⁷ It is the state’s act of compelling words that does this damage to the self, a *re-definition* and normalizing of the unique self.⁵⁵⁸ Yet, even when these words include “factual truth,” they provide only a partial perspective on the speaker’s full and complex nature, and they once again subject the speaker to mis-definition by the crowd.⁵⁵⁹

None of these comments are made to suggest that interrogations should never be permitted, nor even that state compulsion must flatly be barred. There are always competing, often weightier, interests, and, no matter the express language of the Fifth Amendment, the Court frequently and properly balances the values served by the privilege against competing needs.⁵⁶⁰ Nor do I mean to glorify offenders, many of whom are less than admirable human beings, some of whom commit truly heinous crimes, and the bulk of whom probably merit some punishment. But state compelled revelation of our thoughts and feelings in words does do violence to the soul and to the political culture that permits it. Even if such violence is sometimes necessary, it should be avoided, or at least minimized, whenever possible, and that is the reason for being for the Fifth Amendment privilege against self-incrimination’s compulsion requirement.

V. Conclusion

⁵⁵⁴ See HAIG BOSMAJIAN, *THE FREEDOM NOT TO SPEAK* 196 (1999).

⁵⁵⁵ See *id.* at 197.

⁵⁵⁶ See, e.g., Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 75 TEXAS TECH. L. REV. 1, 57-65 (forthcoming 2007) (draft manuscript) (discussing the Jeffersonian theory of a “spirited” republican people).

⁵⁵⁷ See CROTTY, *supra* note 504, at 100-02.

⁵⁵⁸ See *supra* text accompanying notes 192-207.

⁵⁵⁹ See *supra* text accompanying notes 171-207.

⁵⁶⁰ See TASLITZ, PARIS & HERBERT, *supra* note 2, at 752-54, 798, 806-12, 817-20.

The Fifth Amendment privilege against self-incrimination, I have argued here, is best understood as being central to promoting the human voice. In this article, I have centered on one of the two sorts of voices that matter - - the literal voice - - leaving discussion of the metaphorical voice for another day. Only once the metaphorical voice is more fully explained will I be ready to resolve many of the conundrums raised by the privilege.⁵⁶¹ Nevertheless, this article has, I hope, laid the first brick in the foundation. Preventing compelled speech via the literal voice protects against the distortion of human character caused by loss of control over our own words and protects the reluctant speaker from thereby being mis-defined by his audience. To lose control over self-definition is a drastic interference with human autonomy and a grave insult to human worth. The privilege is not so much about the privacy of our thoughts as of our words and, in ways too often unappreciated, our words define our very nature.

⁵⁶¹ I therefore recognize that I have not yet expressly explained how producing documents can (or should be) protected by the privilege or why immunity, guilty pleas, and other seeming forms of compelled words can be squared with the privilege. Once it is recognized, however, that the privilege is not absolute but is subject to balancing, each of these instances can be understood as judgments that countervailing needs outweighed those served by the privilege. Still, the argument here suggests that such balancing in favor of the state should be rare, and my companion piece's analysis of the metaphorical voice will complete the tools needed for critiquing current law on these and other matters in a more fine-grained way.