

1999

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Repository Citation

Green, Michael S., "The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State" (1999). *Faculty Publications*. 176.
<https://scholarship.law.wm.edu/facpubs/176>

BROOKLYN LAW REVIEW

Volume 65

1999

Number 3

ARTICLES

THE PRIVILEGE'S LAST STAND: THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE RIGHT TO REBEL AGAINST THE STATE*

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"I have no reason to suppose that he who would take away my liberty would not when he had me in his power take away everything else. And therefore it is lawful for me to treat him as one who has put himself into a state of war against me and kill him if I can."¹

"[T]rials by the adversarial contest must in time go the way of the ancient trial by battle and blood."²

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¹ Handwritten quotation from John Locke's SECOND TREATISE OF GOVERNMENT found in Timothy McVeigh's possession at the time he was arrested. David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 287 n.147 (1996) (quoting Nolan Clay, *McVeigh Carried Political Writings When Arrested*, DAILY OKLAHOMAN, Nov. 4, 1995); see JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, in POLITICAL WRITINGS OF JOHN LOCKE § 18 (David Wootton ed., 1993) (1689).

² Former Chief Justice Warren Burger, Address Before the American Bar Association (Feb. 12, 1984), quoted in Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1022 (alteration in original).

INTRODUCTION

A. *Two Mysteries*

Two mysteries surround the privilege against self-incrimination. The first is why it exists. Since Jeremy Bentham,³ legal academics have repeatedly argued that the privilege lacks a coherent rationale.⁴ With the possible exception of the Second Amendment, with which it may be linked conceptually,⁵ the privilege is unique among provisions in the Bill of Rights in having generated a predominately negative academic literature. This is not to say that it has not had some academic defenders. But because they offer so many different justifications, each of which is vulnerable to significant objections, they merely reinforce the idea that its purpose is a mystery.⁶

In the first half of this Article I will argue that academic defenses of the privilege have indeed failed. This lack of a

³ See 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 207-83 (1827).

⁴ See L. LEWIS MAYERS, *SHALL WE AMEND THE PRIVILEGE AGAINST SELF-INCRIMINATION?* (1959); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 888-98 (1995); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063 (1986); Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 711-18 (1988); Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-95 (1968); John McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 138, 142-51 (1960); Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L. REV. 127, 127-30 (1906); John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1891).

⁵ See *infra* Part IV.C.7.

⁶ See Dorsey Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 837-39 (1970) (privilege protects against cruelty); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 91-94 (1970) (privilege protects privacy interest in revelations of guilt); Thomas S. Schrock et al., *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1, 48-54 (1978) (privilege protects right of defendant to make an autonomous judgment about his moral culpability); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 327-33 (1991) (privilege protects innocent but nervous defendant from conviction as a result of a poor performance on the stand); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988) (privilege excuses defendant's unavoidable perjurious testimony).

coherent justification for the privilege is more than a purely philosophical or jurisprudential problem. Because the purpose of the privilege is unclear, its scope cannot be reliably drawn. The law on the privilege is an ad hoc muddle largely because no one knows why it exists.⁷ If no other justification for the privilege can be found, we should seriously entertain altering or abolishing it.

The second mystery surrounding the privilege is why the consensus of the academic literature is contrary to popular perceptions of the privilege. Whatever academics might say, most citizens, including most judges, find the privilege viscerally attractive. This dissonance has not been much discussed. Its cause, I believe, is that popular support for the privilege is based upon two intuitions that have been ignored in the academic literature, because they have been thought to be too vague, circular, or resistant to analysis. I disagree. In the second half of the Article I will argue that these intuitions can be understood as principled justifications for the privilege, both of which tie the privilege to a criminal defendant's right to rebel against the state.

But my goal in shedding light on these intuitions is to provide the foundation for a persuasive argument *against* the privilege. Since academic defenses of the privilege fail, these two intuitions are very likely the final defenses the privilege has. And since these intuitions are in fact principled justifications, they are vulnerable to principled criticism. Furthermore, such criticism, unlike past academic attacks, has the potential to influence popular supporters of the privilege. I end this Article with an indication of what such an argument against the privilege would look like.

One important caveat. Anyone who criticizes the privilege runs the risk of appearing an advocate of squad-room torture. But criticism of the privilege should not be equated with criticism of every protection accorded criminal defendants that has been found to have its source in the privilege. In particular, protections during custodial interrogation by the police that have been derived from the privilege, including a right of silence during such interrogation, might have an independent

⁷ See Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 6-10 (1986).

justification.⁸ It is the *core* protection of the privilege—the right of the criminal defendant to refuse to take the stand *during trial*—that I will suggest cannot, in the end, be successfully defended.⁹

B. *Two Vague Intuitions*

In a passage from *Murphy v. Waterfront Commission of New York Harbor*¹⁰ that is often cited in cases discussing the underlying justifications for the privilege against self-incrimination, Justice Goldberg claimed that the privilege:

reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'¹¹

Of the justifications mentioned by Justice Goldberg, the first two—the “cruel trilemma” argument and the argument from our accusatorial system of justice—are probably the most popular in judicial opinions and among lay-people.¹² Yet they are

⁸ See *infra* Part II.C.

⁹ Furthermore, abolishing a right of silence during trial does not necessarily mean a defendant compelled to speak would be vulnerable to perjury sanctions. The greatest benefit from the abolition of the privilege might result from the prosecution's ability to take advantage of the defendant's lies on the stand to discredit him in front of the jury, making punishment for perjury unnecessary.

¹⁰ 378 U.S. 52 (1964).

¹¹ *Id.* at 55 (citations omitted).

¹² See Dolinko, *supra* note 4, at 1090-91 (cruelty argument is one of the oldest and most persistent arguments in favor of the privilege); Stuntz, *supra*, note 6, at 1237 (cruel trilemma argument is the most popular argument for the privilege). Since Justice Goldberg first used the phrase in *Murphy*, the Supreme Court has referred positively or neutrally to the “cruel trilemma” argument by name 13 times. See *United States v. Balsys*, 118 S. Ct. 2218, 2231 (1998); *Bregan v. United*

also the two that are most commonly dismissed by legal academics, who tend to concentrate on arguments that the privilege fosters the truth-seeking functions of our judicial system¹³ or that it protects the defendant's right to privacy or his right to make autonomous decisions concerning his culpability.

The "cruel trilemma" argument claims that it is cruel to submit the defendant to the trilemma of self-accusation, perjury, or contempt. Academic critics of the argument usually begin by noting that sanctions for perjury or contempt are not in themselves cruel. They are, after all, something every subpoenaed witness faces.¹⁴ If the trilemma is cruel, it must be because perjury and contempt sanctions coerce the defendant to take the self-accusation horn of the trilemma. But why is *that* cruel? Certainly it is not because punishment for wrongdoing is cruel; otherwise the criminal justice system as a whole is undermined. But if punishment for wrongdoing is not cruel, how can it be that compelling the truthful testimony leading to such punishment is cruel?

Proponents of the cruel trilemma argument have a response, but it has generally been thought to be too vague to provide a persuasive rationale for the privilege. The argument usually offered is that compelling someone to act as an agent of his own destruction is inhumane.¹⁵ To those who share this

States, 118 S. Ct. 805, 810 (1998); *Pennsylvania v. Muniz*, 496 U.S. 582, 596-97 (1990); *Doe v. United States*, 487 U.S. 201, 212 (1988); *New York v. Quarles*, 467 U.S. 649, 669 (1984); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983); *Carter v. Kentucky*, 450 U.S. 288, 299 (1981); *Andresen v. Maryland*, 427 U.S. 463, 476 & n.8 (1976); *Michigan v. Tucker*, 417 U.S. 433, 445 (1974); *Couch v. United States*, 409 U.S. 322, 328 (1973); *McGautha v. California*, 402 U.S. 183, 214 (1971); *Piccirillo v. New York*, 400 U.S. 548, 566 (1971) (Brennan, J., dissenting); *Tehan v. United States*, 382 U.S. 406, 414 n.12 (1966).

For a discussion of the frequency with which the accusatorial justification of the privilege appears in judicial opinions, see JOSEPH D. GRANO, *CONFESSIONS, TRUTH AND THE LAW* 46 & nn.99-101 (1993).

¹³ For example, the privilege might foster the truth-seeking functions by reducing the incidence of coerced—and so unreliable—confessions or by protecting innocent defendants from performing poorly on the stand.

¹⁴ See GRANO, *supra* note 12, at 38; Vincent Martin Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31, 54-55 (1982).

¹⁵ See GRANO, *supra* note 12, at 39; Bonventre, *supra* note 14, at 55; Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 46 (1981); David W. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89, 95 (1965); David M. O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*,

intuition, it is visceral and self-evident. As Justice Field put it: "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought."¹⁶ One defender of the cruelty argument has mysteriously argued: "[W]e cannot demonstrate why it is 'cruel.' We feel that it is cruel. Beyond that we cannot go."¹⁷ Another writer has called "almost metaphysical" the notion "that encouraging a person to participate in his own 'down-fall,' . . . is inconsistent with the person's inherent dignity as a human being, whether or not he is guilty."¹⁸

But it is precisely this resistance to analysis that has led the cruel trilemma argument to be dismissed in the academic literature.¹⁹ To those who do not share the intuition, it is baffling.²⁰ For example, we often consider our family members, friends, and neighbors to have a duty to respond to questions grounded in reasonable (and sometimes unreasonable) suspicions, even though responding may be to their disadvantage.²¹

54 NOTRE DAME LAW. 26, 41-45 (1978).

¹⁶ *Brown v. Walker* 161 U.S. 591, 637 (1896) (Field, J., dissenting).

¹⁷ Ellis, *supra* note 6, at 838.

¹⁸ George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 333 n.214.

¹⁹ See, e.g., Dolinko, *supra* note 4, at 1092-93. There is nothing wrong with unanalyzable moral intuitions. Indeed, since moral justifications must end somewhere, some moral intuitions *must* be unanalyzable (or at least unanalyzed). Ellis argues that the cruelty intuition in favor of the privilege is genuinely foundational. See Ellis, *supra* note 6, at 851 (the privilege "is founded upon value concepts which in logic are themselves basic premises, incapable of being derived from some other 'given'"). But that is unlikely. Unanalyzable moral intuitions are usually comprehensive in applicability and are widely accepted, such that arguments in their favor do not have to be given and are not felt to be necessary. Consider, for example, the intuition that, all other things being equal, harming an innocent human being is worse than not harming him. The intuition in favor of the privilege addresses a much more concrete situation and is, as we have seen, something concerning which rational disagreement is possible. Furthermore, it seems too tied to broader issues about the relationship between the criminal defendant and the state to be unanalyzable. The intuition is not that compelling self-incrimination is cruel and humiliating in any context. It is *the state's* compelling self-incrimination that is claimed to be inappropriate. Thus, it would appear to be analyzable in terms of a citizen's broader duties to the state.

²⁰ See Amar & Lettow, *supra* note 4, at 890; Dolinko, *supra* note 4, at 1093-95; Schulhofer, *supra* note 6, at 318; Stuntz, *supra* note 6, at 1237-39.

²¹ See WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 59 (1967); Friendly, *supra* note 4, at 680; Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 222 (1956) ("Ordinary morality . . . sees nothing wrong in

If we do not believe that a right to hide wrongdoing is necessary to prevent cruelty in the private realm, why should we when establishing rules of criminal procedure?²²

The second justification, which looks to our preference for an adversarial or accusatorial rather than an inquisitorial system of justice, is usually dismissed as circular. Proponents of this argument tend to equate an adversarial system with a system that provides the privilege yet offer no argument why the adversarial system is worthy of retention.²³ In the end, the argument for the privilege on the basis of our preference for an adversarial system of justice amounts to nothing more than an argument for the privilege on the basis of our preference for the privilege.

Because the academic literature on the privilege has ignored these two justifications, it has failed to speak to the

asking a man, for adequate reason, about particular misdeeds of which he has been suspected and charged.”).

²² The trilemma argument has also been criticized because third-party witnesses can be put in no-win situations almost as discomfoting as the trilemma, if not more so. See Amar & Lettow, *supra* note 4, at 46-47; Dolinko, *supra* note 4, at 1093-95; Stuntz, *supra* note 6, at 1237-39. For example, an immunized witness can be compelled to testify against those who might harm him or his loved ones in retaliation. In addition, since civil sanctions can be as onerous as criminal penalties, the cruel trilemma argument would appear to justify a privilege in civil proceedings as well. Furthermore, the argument seems insensitive to the fact that the no-win situation in which the criminal defendant finds himself is the product of his own culpable acts. See Dolinko, *supra* note 4, at 1098-99. The criminal defendant would not be in a position to choose between self-accusation, perjury, and contempt had she not committed a crime. The cruel trilemma seems no different from the cruel dilemma of those convicted of crimes, who must either accept punishment or the dangers that attempting to escape punishment entails. We do not feel that the dilemma is cruel, because it flows from the defendant's culpability.

Of course, a defendant might be innocent and yet have genuinely self-incriminating evidence. For example, someone might have committed the *actus reus* of a crime without having the culpable *mens rea*. In such a case her cruel choice between self-accusation, perjury, and contempt would not flow from her own culpable acts. But a justification of the privilege on the basis of its ability to protect innocent defendants from cruel trilemmas is vulnerable to the criticisms of instrumentalist justifications discussed below. See *infra* Part II. If juries are likely to draw adverse inferences from silence, the best course of action for the innocent criminal defendant is probably to reveal all the facts. In addition, such a justification cannot explain our feeling that the privilege ought to protect the *guilty* as well as the innocent.

²³ See GRANO, *supra* note 12, at 47-52; Dolinko, *supra* note 4, at 1067 n.24; Ellis, *supra* note 6, at 839; Friendly, *supra* note 4, at 695; Greenawalt, *supra* note 15, at 46; Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 209.

concerns of the majority of those who support the privilege. I will argue that these justifications can be analyzed as principled arguments for the privilege, each of which is tied to the idea that the defendant is engaged in legitimate battle with the state. The "adversarial" nature of a criminal justice system is tied to a social contractarian political theory, under which the defendant owes the state no natural duty of allegiance.²⁴ Because his duties to the state have their source in his consent, he may, by challenging the state's authority, engage in warfare with the state—a form of unmediated conflict in which neither side has authority over the other and each may act according to his own moral lights. The privilege is a means of expressing this independence the defendant has from the state. To those who adhere to this theory, inquisitorial systems of justice, by imposing on the defendant a duty to participate in the state's investigation of his activities, illegitimately "subordinate [the defendant] . . . to the state."²⁵ Given that the privilege is perceived to be the embodiment of principles that "go to the nature of a free man and to his relationship to the state,"²⁶ it is not surprising that popular support for the privilege is tenacious.

Similarly, proponents of the cruel trilemma argument see the state's compelling the defendant to bring about his own destruction as cruel because they implicitly apply the *morality of warfare* to criminal procedure. Consider the analogy between the defendant's right to silence and the right to silence enjoyed by prisoners of war under international law, who need give only their name, rank, and serial number,²⁷ or the analogy between the defendant's alleged right not to participate in his own downfall, and the principle, also expressed in international law, that prisoners of war cannot be compelled to directly aid their captors, for example, by working in munitions

²⁴ See, e.g., Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. BAR ASS'N J. 91, 98 (1954); Robert Heidt, *The Fifth Amendment Privilege and Documents: Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439, 468 (1984).

²⁵ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 194 (1988).

²⁶ *United States v. Wade*, 388 U.S. 218, 261 (1967) (Fortas, J., concurring and dissenting).

²⁷ See Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, art. 17, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter 1949 Geneva Convention].

factories.²⁸ I will argue that these analogies are significant and that American criminal procedure seeks to protect the defendant against forms of cruelty and humiliation peculiar to conditions of battle. Because our adversarial system of criminal procedure treats the defendant and the state as legitimate combatants, the duties owed to combatants apply in this context as well.

My argument is that the morality of warfare and social contract theory coalesce in the popular, but vague, perception that compelling self-incrimination is a cruel and humiliating subordination of the defendant to the state. Of course, whether I have accounted for popular intuitions in favor of the privilege can be answered only by those who possess them. But this account has resonated with a sufficient number of supporters of the privilege (to whom I have presented it) that it is fair to say that it does some justice to their ideas.

If I am right, future debate over the privilege will have to tackle some unfamiliar issues in political theory and moral psychology. For example, the justifiability of the privilege will turn on whether we have merely contractual duties to the state and on the tendencies of criminal defendants to think of themselves as challenging the state's authority. In addition, defenders of the privilege will have to show why principles of respectful combat are not simply too musty and antiquated to support a rule of criminal procedure. I will argue that opponents of the privilege are likely to win these debates.

C. *Outline of the Argument*

Part I of this Article provides a brief discussion of the inability of historical accounts of the rise of the privilege to shed any light on its purpose. In Parts II and III, I argue that the cruel trilemma and adversarial arguments are the only viable rationales for the privilege remaining. To this end, I canvass and reject academic justifications for the privilege, as well as a number that have not been discussed in the past.

Justifications of the privilege are generally instrumentalist or rights based. That is, the privilege: (1) contributes to efficient enforcement of the law by aiding in the acquittal of the

²⁸ See *infra* Part V.

innocent (or, less likely, the conviction of the guilty) or (2) protects a right or interest of the criminal defendant that overrides considerations of efficient law enforcement.

Part II examines why instrumentalist justifications of the privilege fail. By focusing on protections that the privilege provides to innocent defendants, instrumentalist justifications fail to capture the view that the privilege is also intended (or perhaps *especially* intended) to protect the guilty. The argument that the privilege exists to protect the innocent suffers from other problems, most notably the fact that juries tend to draw adverse inferences from silence. That juries tend to draw such inferences despite judges' admonitions casts doubt on the idea that the privilege protects innocent defendants who might perform poorly on the stand. Part II also introduces and rejects the hitherto unexplored argument that the privilege protects the innocent by allowing jurors to draw *positive* inferences from their free choices to take the stand.

Part III examines and rejects traditional rights-based justifications of the privilege, including the arguments that the privilege exists to excuse unavoidable perjury; that it protects against the enforcement of laws regulating personal belief; that it protects the privacy of the criminal defendant; and that it protects his integrity, autonomy or personal identity. Those justifications appealing to the autonomy or the personal identity of the criminal defendant have the most promise and are the most popular in academic defenses of the privilege. But they draw upon previously unnoticed Kantian views of the self that, although plausible on their own terms, cannot be squared with common views about moral education and the state's authority to punish. In the end the privilege looks justified only because the state's authority as a whole looks unjustified. One gains the privilege at the cost of being an anarchist.

Part IV explains the adversarial justification of the privilege in terms of contractarian theories of the state. In the course of exploring whether social contract theory can justify the privilege, I look at apparent arguments for the privilege that can be found in Hobbes, Locke, and Nozick and argue that they fail. I conclude that, although the privilege cannot, strictly

speaking, be *justified* by social contract theory, it helps the privilege take on important *expressive* significance by explaining how the defendant and the state can be seen as engaged in unmediated conflict.

Finally, Part V outlines how the expressive function of the privilege is supported by the cruelty argument, which applies the morality of warfare to the interaction between the defendant and the state. I conclude the Article with a brief discussion of some of the issues that should be explored by both opponents and advocates of the privilege and a suggestion that the former are likely to prevail.

I. THE INABILITY OF THE HISTORY OF THE PRIVILEGE TO SHED LIGHT ON ITS PURPOSE

Although it is often the case that "a page of history is worth a volume of logic,"²⁹ the history of the privilege against self-incrimination does little to illuminate the reasons for its existence. The privilege is commonly thought to have its source in seventeenth-century English resistance to the use of the *ex officio* oath by the Star Chamber and High Commission. This rise of the privilege appeared to be the triumph of the English common law over Roman and canon law.³⁰ Interestingly, the resistance to the *ex officio* oath actually had its source in Roman and canon law itself. The maxim "Nemo tenetur prodere seipsum" ("No person shall be compelled to accuse himself"), which was offered as a defense to the oath, was itself a product of the *ius commune*, a combination of medieval Roman and canon law.³¹ Furthermore, this maxim did not refer to a right to refuse to answer questions, but only to a right not to be interrogated until someone stepped forward as an accuser (or one's misdeeds were so well known that an accuser was unnecessary).³² In other words, the maxim performed the screening

²⁹ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.); see also *Ullman v. United States*, 350 U.S. 422, 438 (1956) (Frankfurter, J.) (applying Holmes's maxim to the privilege).

³⁰ See LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 5, 20, 216-18, 325 (2d ed. 1986).

³¹ See R.H. Helmholz, *The Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 974 (1990).

³² See R.H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to*

function currently performed by the probable cause requirement of the Fourth Amendment.³³ The *ex officio* oath was in conflict with the maxim, not because answers to questions were compelled, but because they were compelled in the absence of well-grounded suspicion.

Nor can a right to remain silent be found elsewhere in criminal procedure of English common law. Those common law invocations of the privilege prior to the late eighteenth century that did not concern the right not to be interrogated without probable cause merely asserted a right not to have testimony compelled, where testimony was understood to be compelled if it resulted from torture or the use of an oath.³⁴ Religious conviction at the time made the oath appear excessively coercive. Indeed, under the common law rule disqualifying parties from testifying under oath, the criminal defendant had no *right* to testify under oath, even if he wanted to.³⁵ There is little evidence of the right of an *unsworn* defendant to remain silent in the face of interrogation. Unsworn defendants were routinely questioned both in Great Britain and in its North Atlantic colonies.³⁶

Indeed, because there was generally no right to counsel in colonial criminal procedure and because the Sixth Amendment right to counsel did not take hold until the late eighteenth and early nineteenth centuries, the privilege could have no real purpose prior to that point.³⁷ It would be a privilege to offer no defense at all. It was only through the increased use of defense counsel after the ratification of the Bill of Rights that the privilege as we know it came into being. Rather than being intended by the Founders, the privilege was a creation of defense counsel well after the ratification of the Fifth Amend-

the Seventh Century, in HELMHOLZ, ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 17 (1997).

³³ See *id.* at 44; see also Albert W. Altschuler, *A Peculiar Privilege in Historical Perspective*, in HELMHOLZ ET AL., *supra* note 32, at 181, 185-89.

³⁴ See Altschuler, *supra* note 33, at 181, 190-97; Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in HELMHOLZ ET AL., *supra* note 32, at 109; John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 834 (1999).

³⁵ See Witt, *supra* note 34, at 834-35.

³⁶ See Altschuler, *supra* note 33, at 181, 190-97; Moglen, *supra* note 34, at 109.

³⁷ See Moglen, *supra* note 34, at 109.

ment.³⁸ Given its irrelevance to eighteenth-century criminal procedure, it is not surprising that the privilege was included in the Fifth Amendment with virtually no comment.³⁹ Those discussions of the privilege that did occur were limited to prohibition against torture.⁴⁰ Furthermore, neither James Madison, who proposed the Fifth Amendment, nor George Mason, who drafted its prototype in the Virginia Declaration of Rights, provides us with any information concerning the purpose or scope of the privilege.⁴¹ The same is true of the proponents of early state constitutional provisions protecting against compelled self-incrimination.⁴²

Because the history of the privilege does not shed light on its purpose, justifications for the privilege are necessarily ahistorical. We know so little about the Founders' attitudes toward the privilege that no one seeks to justify it in terms of purposes that were contemplated by the Founders.

³⁸ See Moglen, *supra* note 34; Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994) [hereinafter Moglen I]. The analogous rise of the privilege in early nineteenth century England is described in John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in HELMHOLZ ET AL., *supra* note 32, at 82, 82-100, and John H. Langbein, *The Historical Origins of the Privilege against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994).

³⁹ See *United States v. Balsys*, 118 S. Ct. 2218, 2223 (1998) ("[T]here is no helpful legislative history."); *id.* at 2241 (Breyer, J., dissenting); LEVY, *supra* note 30, at 430; Moglen, *supra* note 34, at 136-38.

⁴⁰ Consider Patrick Henry's remarks in favor of including the privilege in the Fifth Amendment:

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

3 ELLIOT'S DEBATES ON FEDERAL CONSTITUTION 447-48 (J. Elliot ed., 1836); see Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1996) (arguing that Framers understood the privilege solely to outlaw certain forms of torture).

⁴¹ See Moglen, *supra* note 34, at 133-36.

⁴² See Moglen, *supra* note 34, at 133-36; Witt, *supra* note 34, at 832-33.

II. INSTRUMENTALIST JUSTIFICATIONS OF THE PRIVILEGE AND THEIR WEAKNESSES

Instrumentalist justifications of the privilege appeal to its role in the discovery of the truth, either because it helps to acquit the innocent or convict the guilty. Such justifications of the privilege have been rejected by the Supreme Court⁴³ largely because they fail to capture the logic that the privilege is intended to protect the innocent *as well as* the guilty. In other words, the intuitions in favor of the privilege are just as strong, often stronger, when the defendant actually committed the crime. Instrumentalist justifications, by ignoring the protections that the privilege provides to the guilty defendant, seem to have missed the point. Nevertheless, even if this problem is set aside, instrumentalist justifications of the privilege fail.

A. *The Innocent-But-Nervous Defendant*

The privilege could promote truth-seeking in a trial by decreasing the probability of false negatives (the acquittal of the guilty) or of false positives (the conviction of the innocent). The most common instrumentalist justification of the privilege is that it helps prevent the conviction of innocent-but-nervous defendants who might perform poorly on the stand.⁴⁴

⁴³ See *Tehan v. United States*, 382 U.S. 406, 413-15 (1966); see also *Allen v. Illinois*, 478 U.S. 364, 375 (1986) ("The privilege against self-incrimination . . . is not designed to enhance the reliability of the factfinding determination . . .").

⁴⁴ See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (stating that "the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent'" (quoting *Quinn v. United States*, 349 U.S. 155, 162 (1955))); *Wilson v. United States*, 149 U.S. 60, 66 (1893); Alfred C. Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 548 (1956); Ellis, *supra* note 6, at 846; Schulhofer, *supra* note 6, at 327-33.

The fact that most defendants choose to take the stand⁴⁵ and the likelihood that the substantial majority of them are in fact guilty of the offense charged or some lesser offense⁴⁶ cast doubt on the idea that the privilege exists to protect the innocent. Of those who choose to assert the privilege, the guilty must be in the substantial majority. Another problem with this justification is that the scope of the current privilege is significantly broader than the justification would suggest. For example, a privilege justified in this fashion should not extend to evidence produced by compelled pretrial self-incrimination. As long as the pretrial self-incrimination itself was not presented to the jury, the innocent defendant's interests would be protected.⁴⁷

1. Adverse Inferences

Furthermore, it would be unlikely for the innocent criminal defendant to assert the privilege if jurors drew adverse inferences from the refusal to take the stand or positive infer-

⁴⁵ HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 146 (1966) (91% of criminal defendants without prior criminal histories and 74% of those with prior records chose to testify). Remarkably little recent empirical work has been done on invocations of the privilege. Steven Schulhofer's study of Philadelphia felony trials in the 1980s suggests that more defendants take the privilege than in Kalven and Zeisel's day. See Schulhofer, *supra* note 6, at 329-30. According to his study of 162 felony defendants tried before judges, 49% chose not to testify and 23% of those who remained silent were acquitted. See Schulhofer, *supra* note 6, at 329-30 (citing Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1080 (1984)). Given the size of his sample, however, not a great deal can be drawn from his findings. See KALVEN & ZEISEL, *supra*, at 33 (sampling 3,576 trials). In addition, nothing concerning the frequency with which the privilege is invoked in jury trials can be drawn from Schulhofer's study. It is much more likely that defendants and defense counsel would worry about jurors drawing adverse inferences from silence than judges doing so, since jurors are less likely to understand or apply the instruction against drawing such inferences. As a result more defendants are likely to waive the privilege in jury trials.

⁴⁶ See ALAN DERSHOWITZ, *THE BEST DEFENCE* xxi (1982); *People v. Allen*, 420 N.W.2d 499, 549 (Mich. 1988) (Boyle, J., dissenting) ("[T]he safeguards in the system assure us of that which every trial judge and lawyer knows, that 'the preponderant majority' of defendants are guilty of the charged offense or a lesser or related offense."); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 241 (1966) (observing that "most defendants are guilty of some crime").

⁴⁷ This narrower scope for the privilege is endorsed in Amar & Lettow, *supra* note 4, at 898.

ences from a willingness to take the stand. The cost of sending the bad signal or refraining from sending the good signal would probably outweigh any benefit that would result from hiding one's poor performance.⁴⁸ Adverse or positive inferences would drive out a disproportionate number of innocent defendants from the ranks of the silent, since innocent defendants' prejudicial testimony is likely to be better, on the average, than guilty defendants'.

To my knowledge, there is not any empirical evidence on whether juries draw positive inferences from a defendant's willingness to take the stand. Indeed, forgoing such positive inferences has not been conceptualized as a cost of asserting the privilege at all.⁴⁹ But there is some statistical and a good deal of anecdotal evidence that juries tend to look unfavorably upon those who choose not to testify and that, prosecutorial silence and judicial admonitions notwithstanding,⁵⁰ they tend to factor in the refusal to testify when deciding whether to convict or acquit.⁵¹ Because of these adverse inferences, defense

⁴⁸ See Dolinko, *supra* note 4, at 1075 ("[J]urors are so likely to regard a defendant's failure to testify as evidence of guilt that the innocent defendant is usually better off taking the stand.").

⁴⁹ See *infra* Part II.B. (discussing positive inferences).

⁵⁰ See *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) ("no inference from silence" instruction from the judge was required by the Fifth and Fourteenth Amendments); *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment forbids prosecutorial comments on an accused's silence).

⁵¹ See JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 250-51 (1987); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 144-45 (1986); LEWIS MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT* 21 (1959); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 677-78 (1991); Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 401 (1980); Kenneth W. Robinson, *The Defendant as Witness*, 29 *ACTA* 266, 266 (1952); D.R. Shaffer, *The Defendant's Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* (S. Kassin & L. Wrightsman eds., 1985); D.R. Shaffer & T. Case, *On the Decision Not to Testify in One's Own Behalf*, 42 *J. PERSONALITY AND SOC. PSYCHOL.* 353 (1982); Edward B. Williams, *The Trial of a Criminal Case*, 29 *N.Y. ST. B. BULL.* 36, 42 (1957) (99% of cases in 86 federal judicial districts where criminal defendants chose not to testify resulted in conviction).

The Kalven and Zeisel Chicago Jury Study suggests that jurors draw adverse inferences from silence. Ninety-one percent of those criminal defendants without criminal records and seventy-four percent of those with criminal records chose to testify, something that would be very unlikely if refusing to testify were costless. See KALVEN & ZEISEL, *supra* note 45, at 146. Although the trials on which Kalven and Zeisel relied took place in the 1950s, see KALVEN & ZEISEL, *supra* note 45, at

counsel generally advises any defendant with a plausible exculpatory story to testify, unless there is a strong reason not to do so, such as the fear that the defendant's prior criminal record will be introduced as impeachment evidence.⁵²

2. Adverse Selection

That juries draw adverse inferences from a defendant's failure to testify is more problematic than it seems. An argument can be made that jurors do not draw such inferences, since, if they did, the principle of adverse selection would lead all defendants to testify.

Adverse selection can occur when individuals interact under conditions of asymmetrical access to information.⁵³

33, before the Supreme Court held that comment on a defendant's silence was impermissible, see *Griffin v. California*, 380 U.S. 609 (1965), at the time of these trials, federal courts and at least three-quarters of the states prohibited such comment, at least by the prosecutor. See 8 JOHN H. WIGMORE, EVIDENCE § 2272, at 427-33 n.2 (McNaughton rev. 1961 & Supp. 1995) [hereinafter 8 WIGMORE]; Dolinko, *supra* note 4, at 1075 n.68. *Griffin*, therefore, is no reason to think that the percentage has changed significantly. On the paucity of more recent empirical evidence concerning criminal defendants' invocation of the privilege, see *supra* note 45.

That adverse inferences from silence are prevalent is supported by evidence from other criminal justice systems as well. When adverse inferences from silence were not legally allowed in Singapore, most criminal defendants nevertheless testified. From a sample of 185 cases, Meng Heong Yeo found that 84.3% of defendants testified and 9.2% made unsworn statements under a rule that allowed such statements to be submitted without cross-examination, for a total of 93.5% offering testimony of some form. After adverse inferences were allowed and the possibility of making an unsworn statement was removed, Yeo found from a sample of 115 cases that 89.1% of defendants testified. See Meng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, 1983 CRIM. L. REV. 89, 96-99. The fact that the change to a rule allowing for adverse inferences led to no increase in the percentage of defendants testifying suggests that fact-finders were drawing adverse inferences from silence to begin with. The Singaporean evidence is not directly applicable to the United States, however, because Singapore has had bench trials for most criminal cases since 1960 and for all criminal cases since 1969. See *id.* at 89 & n.5.

With the passage of the Criminal Justice and Public Order Act, 1994, ch. 33, §§ 34-38 (Eng.), which allowed jurors to draw adverse inferences from silence, Great Britain offers another opportunity to observe changes in the frequency with which defendants testify before and after adverse inferences from silence are allowed.

⁵² See ANTHONY G. AMSTERDAM ET AL., TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390 (1989); 1A CRIMINAL DEFENSE TECHNIQUES § 29.06, at 29-52-53 (M. Eisenstein et al. eds., 1983).

⁵³ George Akerloff examined this phenomenon in connection with the market

Such asymmetry exists between the defendant and jury when the defendant chooses to remain silent. Defendants alone are in a good position to know the value of their testimony, that is, how favorable or prejudicial it is. If juries attempt to predict the value of the withheld evidence as accurately as possible, they will estimate it to be the average value of withheld testimony. But defendants will choose silence only if the value of their testimony is less than or equal to the jury's estimate. As defendants with better (or less prejudicial) testimony waive the privilege, juries lower their estimates of the average value of withheld testimony, leading more defendants to waive. In the end, no defendant chooses to remain silent.⁵⁴

But, as we all know, *some* defendants choose to remain silent. How is this possible if jurors draw adverse inferences? The most obvious explanation is that not all jurors draw such inferences. Since unanimity is generally required to convict,⁵⁵ it would be reasonable to risk bringing about adverse inferences in some jurors' minds in order to withhold strongly prejudicial testimony from those jurors who would not draw such inferences. Another possibility is that the judge's admonitions cause juries to place an *absolute* limit on their adverse inferences that is sufficiently favorable to defendants that some still find it in their interest to exercise the privilege.

It may also be that juries are somewhat naive, that is, that they do not continually update their estimates of the withheld testimony's value on the basis of changes in defendants' strategies. The fact that jurors are typically not repeat players

for used automobiles. See George A. Akerloff, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). Such a result is what is known in game theory as a pooling equilibrium, in which uninformed players are not able to draw inferences about informed players' type as a result of the informed players' choices.

⁵⁴ The phenomenon of unraveling in connection with the privilege is discussed in DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 90-91 (1994).

⁵⁵ Unanimity is not required of a twelve-member jury under the Sixth Amendment, see *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972), although it is required of a six-member jury. See *Burch v. Louisiana*, 441 U.S. 130 (1979). Nevertheless, as of 1996, all but two states required unanimity for convictions for anything more serious than a simple misdemeanor. See Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 138 n.24 (1996).

would tend to support the notion that juries would not update their beliefs, unless information concerning the strategies of defendants were transmitted to the jury pool.⁵⁶

Yet another possibility is that juries are unaware of all of the reasons defendants might have to exercise the privilege. As a result, they would be unable to draw all available negative inferences from defendants' choices to withhold testimony. A particularly strong possibility is that juries' ignorance concerning the law of evidence leads them to ignore the fact that defendants may refuse to take the stand to prevent the prosecutor from introducing prior convictions.⁵⁷ If juries do not interpret failure to take the stand as evidence of prior convictions, defendants will continue to have an incentive to exercise the privilege as a means of keeping prior convictions from the jury.⁵⁸

It seems clear then that the fact that some defendants assert the privilege is *compatible* with jurors' drawing adverse inferences. And because they do generally draw such inferences, it is unlikely that many innocent defendants would have testimony that was so bad that they would find it in their interest to assert the privilege. Not many innocent defendants would take the chance of creating an adverse inference in a significant percentage of jurors' minds merely to withhold from

⁵⁶ Another possibility is that it is the defendants who are naive. If defendants did not take into account changes in adverse inferences, and juries knew they did not, juries would have no reason to further reduce their adverse inferences as a result of defendants' responses. But since criminal defendants and particularly criminal defense counsel are much more likely to be repeat players, this is unlikely.

⁵⁷ See FED. R. EVID. 609.

⁵⁸ Kalven and Zeisel's Chicago Jury Study suggests that prior criminal history is an important factor to criminal defendants when making the decision to take the stand. Although 91% of criminal defendants without prior criminal histories chose to take the stand, only 74% of those with prior records chose to testify. See KALVEN & ZEISEL, *supra* note 45, at 146. Defense counsel generally takes prior criminal history strongly into account when deciding whether or not to recommend that the defendant take the stand. See AMSTERDAM ET AL., *supra* note 52, § 390.

Correlating the frequency with which the privilege is asserted with the extent to which a state's evidence law allows the presentation of prior criminal history as impeachment evidence could help corroborate this theory. Another possibility would be to compare the frequency with which the privilege is asserted in federal rape, sexual assault, and child molestation cases with its frequency in other federal criminal cases. The former cases are governed by Rules 413 and 414 of the Federal Rules of Evidence, which are more liberal in allowing the presentation of the defendant's past criminal history even when he fails to take the stand.

the jury what, given their innocence, is unlikely to be highly prejudicial testimony.

3. Risk-Aversion and Innocent Defendants

In addition, there is reason to believe that the privilege often fails to benefit some of those remaining innocent defendants who exercise it. Assume that defendants do not know the value of their testimony, but, unlike juries, know more about its *expected* value. Someone who is risk averse would be more likely to choose the more certain result of the jury's adverse inference than take his chances by testifying, even if the expected value of his testimony is greater than the adverse inference. Since criminals are generally greater risk takers,⁵⁹ innocent defendants should be more likely to choose the adverse inference, all other things being equal, than the guilty. These risk-averse, but innocent, defendants would be more likely to be acquitted if they were compelled to testify. This same phenomenon is one of the reasons plea bargaining is problematic. Given equal probabilities of conviction, the innocent are less likely than the guilty to take their chances at trial and thus more likely to accept a plea bargain, leading to a misallocation of criminal punishment.⁶⁰

B. *The Privilege and Positive Inferences*

Perhaps it is by allowing the innocent defendant to *signal* his innocence by willingly taking the stand that the privilege most effectively protects the innocent. If all defendants were

⁵⁹ See Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123 (1995) (finding that criminals are less risk-averse than students). That is why certainty of punishment is probably more important for deterrence than the level of punishment. See Bruce H. Kobayashi & John R. Lott, Jr., *Low-Probability-High-Penalty Enforcement Strategies and the Efficient Operation of the Plea-Bargaining System*, 12 INT'L R. OF L. & ECON. 69, 70 (1992); Daniel Nagin, *General Deterrence: A Review of the Empirical Evidence*, in DETERRENCE AND INCAPACITATION 95-111 (Alfred Blumstein et al. eds., 1978).

⁶⁰ See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948-49 (1992). For the view that, when differential defense costs are taken into account, plea bargaining does not produce significant adverse sorting, see Kobayashi & Lott, *supra* note 59.

routinely compelled to testify, innocent defendants could not transmit this information to the jury.

Criminal defense attorneys certainly encourage juries to draw positive inferences from their clients' willingness to testify. Although forgoing this positive inference can be thought of as a cost of exercising the privilege, and therefore as the practical equivalent of an adverse inference, its constitutional permissibility has been questioned only in the context of trials in which there is a silent co-defendant who might be directly harmed through such inferences.⁶¹ We can assume that juries do not feel any compunction about drawing positive inferences from the defendant's willingness to testify. But is it reasonable to do so?

We have understood a defendant's choice to testify as a response to *the value* of his testimony rather than a response to his *actual innocence or guilt*. Innocent defendants with testimony of low value are disinclined to testify, and guilty defendants with testimony of high value are inclined to testify. If this is the case, the choice to waive the privilege should reveal only that the defendant has testimony that was better than the adverse inference—something that the jury will be able to see by examining the testimony itself. The information about the defendant communicated to the jury would be the same as in a system of compelled testimony.

But perhaps it is not true that defendants look only to the value of their testimony when deciding whether to take the stand. Perhaps the innocent have a natural tendency to want to express their innocence. If that were the case, juries might find that a testifying defendant is innocent to a greater degree than would be justified solely by the value of his testimony.

Testifying might also justify positive inferences if the guilty habitually underestimated or the innocent habitually overestimated the value of their testimony. For example, the innocent might generally think that their testimony appears more credible than it actually does. If the jury realized this and so drew a positive inference from the choice to testify, an

⁶¹ See, e.g., *United States v. Petullo*, 709 F.2d 1178, 1182 (7th Cir. 1983); *United States v. Hines*, 455 F.2d 1317, 1334-35 (D.C. Cir. 1972); *United States v. Blue*, 440 F.2d 300, 302-03 (7th Cir. 1971); *United States v. Hutul*, 416 F.2d 607, 621-22 (7th Cir. 1969); 8 JAMES MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 14.04[3] (2d ed. 1981).

incredible but innocent testifier would be more likely to be acquitted in a system with the privilege than in one in which all defendants' testimony was compelled.

But if any positive inferences did exist, they would likely be small, since the value of the testimony would surely remain the dominant factor in the defendant's choice to take the stand. More importantly, if there were an evidentiary link between testifying and innocence that led juries to draw positive inferences from a defendant's taking the stand, there would be no reason why guilty defendants could not take advantage of them as well by copying the signal.⁶²

Because no significant correlation between the choice to take the stand and innocence is likely and because any correlation that would exist would create a signal that could be copied by the guilty, it is very unlikely that juries do draw positive inferences from taking the stand.⁶³ Positive inferences cannot justify the privilege.

C. *Torture and Probable Cause*

Some have argued that the privilege is justified because it protects the innocent against the admission of coerced (and so unreliable) confessions.⁶⁴ Clearly the privilege is not necessary to exclude a confession that the defendant can demonstrate was coerced. The exclusion of such confessions as unreliable has existed under the common law since the mid-eighteenth century and would have adequate constitutional grounding (via due process) without the invocation of the privilege.⁶⁵ It may be, however, that the state's ability to rely upon

⁶² An analogous situation occurs in plea bargaining. Since the innocent are more likely to prevail at trial than the guilty, one would expect them to be more likely to hold out during plea bargaining. But the prosecution cannot treat the tendency to hold out as a signal of innocence (by offering benefits to holdouts) without encouraging the guilty to copy the signal. The guilty can hold out (at least in the beginning of plea bargaining) at little cost to themselves, so there is little reason for them not to copy the signal.

⁶³ Because such inferences are unlikely, the lack of constitutional scrutiny of positive inferences is understandable, even if forgoing them can be understood as a cost of asserting the privilege.

⁶⁴ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (stating that privilege reflects "our fear that self-incriminating statements will be elicited by inhumane treatments and abuses"); see also Schulhofer, *supra* note 6, at 325-27.

⁶⁵ 3 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 819, at 17 (McNaughton rev.

the defendant as a source of evidence can tempt it to use its power to coerce incriminating testimony. A right of silence might force the state to look for independent and more reliable forms of evidence.⁶⁶

Even assuming that the privilege does perform this prophylactic function—which could be questioned, since one probably can be coerced into waiving the privilege just as easily as one can be coerced into confessing⁶⁷—such an argument would justify only a right of silence during pre-trial interrogations. Torture in the courtroom is very unlikely and the state will not be encouraged to rely solely upon the defendant's testimony if it will not know what that testimony will be until trial.

The argument that the privilege discourages the state from engaging in fishing expeditions⁶⁸ fails for similar reasons. First of all, the Fourth Amendment provides protection against interrogation without probable cause.⁶⁹ Furthermore, even if the state's ability to rely upon the defendant as a source of evidence against him encourages it to interrogate without probable cause (in the hope that the defendant will confess to a crime) such a worry can be addressed fully by a right of silence before trial.

1961 & Supp. 1995). The Supreme Court explicitly accepted this common law requirement as a matter of federal evidence law in *Hopt v. Utah*, 110 U.S. 574 (1884). Although the Court later held the voluntariness requirement to be derived from the privilege itself, see *Bram v. United States*, 168 U.S. 532, 542 (1897), it continued to apply it to the states via the Due Process Clause of the Fourteenth Amendment, at the time when this clause was not taken to have incorporated the privilege. See *Brown v. Mississippi*, 297 U.S. 278 (1936). Later the state voluntariness standard too was held to fall under the privilege. See *Davis v. North Carolina*, 384 U.S. 737, 740 (1966). The privilege was incorporated in the Due Process Clause of the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁶⁶ See, e.g., Schulhofer, *supra* note 6, at 325-27.

⁶⁷ See Dolinko, *supra* note 4, at 1078. Amar and Lettow suggest that judicial supervision of the interrogation process would do much more to prevent police intimidation than the privilege. See Amar & Lettow, *supra* note 4, at 894.

⁶⁸ See O'Brien, *supra* note 15, at 33.

⁶⁹ Kent Greenawalt argues that the "private moral analogue" to the privilege is one's right to refuse to answer questions about one's conduct when only a slender basis for suspicion exists. Greenawalt, *supra* note 15, at 26-27. But this private right serves to justify only the Fourth Amendment public right against unreasonable searches and seizures.

D. *The Privilege Helps Restore a Balance of Advantages Between the Criminal Defendant and the State*

Sometimes the privilege is claimed to contribute to the truth-seeking process by counter-balancing the state's advantages in resources, thereby ensuring a "fair fight" between the criminal defendant and the state.⁷⁰ This fairness might be understood in terms of the morality of warfare or the individualistic and contractarian principles standing behind the adversarial system. Such arguments will be dealt with in Parts IV and V. But it might also be understood as requiring some equality of strength between prosecution and defense as a means of fostering the truth-seeking functions of the trial.

But so understood, this argument for the privilege is weak. Given that the state must pursue a large number of cases and the defendant only one, it is not clear that the state does enjoy an advantage in resources,⁷¹ particularly since the defendant is usually much more motivated than the prosecution. In addition, the mere fact that a distribution of power in favor of the prosecution exists in one area does not mean that, all things considered, the balance of power between defense and prosecution is not even.⁷² For example, the prosecution bears the special burden of proving its case beyond a reasonable doubt to the satisfaction of all jurors.

Let us assume that the state does have some advantage. How does this advantage thwart the truth-seeking aspects of the trial? The rules of evidence assure that only relevant evidence of the defendant's guilt may be presented by the prosecution. Accordingly, it would appear that the greater the prosecution's ability to present evidence, the greater the chance that the guilty will be convicted. Indeed, since the prosecution is required to turn over to the defense all exculpatory evidence in advance of trial,⁷³ a good deal of the resources of the state will end up benefiting the innocent defendant.

⁷⁰ See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); EDWARD CLEARY ET AL., MCCORMICK ON EVIDENCE § 118 (3d ed. 1984); 8 WIGMORE, *supra* note 51, § 2251, at 317-18; O'Brien, *supra* note 15, at 37; Silver, *supra* note 2.

⁷¹ See William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707, 1712-13 (1993).

⁷² See *United States v. Turkish*, 623 F.2d 769, 774-75 (2d Cir. 1980).

⁷³ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Relevant evidence of guilt can be found concerning innocent defendants as well. As a result, the material advantages of the state will also increase the chances of the conviction of the innocent. Still, since more evidence of guilt must be available against the guilty than against the innocent, increased state resources will not increase the innocent's chances of conviction to the same extent as the guilty's. Furthermore, if one really wished to increase the innocent's chance of acquittal, enabling the defendant to discover and present exculpatory evidence, which would benefit the innocent more than the guilty, would be the most reasonable method.⁷⁴ Finally, even if one did decide to limit the state's ability to present evidence as a means of ensuring that more defendants, both innocent and guilty, are acquitted, why is the privilege the appropriate limitation? Why not limit prosecutors' budgets or require that they work no more than 40 hours a week? An argument for hamstringing prosecutors is not yet an argument for the particular limitations in the privilege against self-incrimination.

E. *The Privilege and the Presumption of Innocence*

Although often ignored by legal academics, many jurists and lay-people hold the view that the privilege flows from the presumption of innocence,⁷⁵ which is itself thought to contribute to the truth-seeking function of the trial by establishing a

⁷⁴ See Dolinko, *supra* note 4, at 1076-77.

⁷⁵ See Editorial, *The Right to Silence*, *ECONOMIST*, Jan. 29, 1994, at 17 (noting perceived connection between privilege and "the hallowed rule that a suspect is not required to prove his innocence"). The European Court of Human Rights has found the privilege "closely linked to the presumption of innocence contained in Article 6 § 2 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms]." *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313, 337 (1996). Article 6(2) guarantees that charged persons "shall be presumed innocent until proven guilty according to law." European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 213 U.N.T.S. 221, 228 (Nov. 4, 1950); see also *Quinn v. United States*, 349 U.S. 155, 162 (1955).

For examples of legal academics who have suggested that there is a relationship between the two, see William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 340-41 (1995); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 403 (1994); and Barton L. Ingraham, *The Right to Silence, The Presumption of Innocence, The Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 560 (1996).

proper balance between the goals of convicting the guilty and acquitting the innocent.⁷⁶

Although the presumption of innocence has been universally praised,⁷⁷ there is a longstanding controversy over just what it means. One interpretation treats it as a proxy for the rules that proof of guilt must be established beyond a reasonable doubt and that the state has the burden of proof throughout the trial.⁷⁸ Clearly, compelling the defendant to answer truthfully questions directed to him is not in conflict with the reasonable doubt standard. One can require the jury to convict only if it has no reasonable doubt concerning the defendant's guilt without thereby restricting sources of evidence against the defendant.

The privilege also cannot be derived from the rule that imposes the burden of proof on the state. Nothing about the state's bearing the burden of proof puts a limit on whom the state may call to fulfill this burden. Since the state may satisfy this burden by calling third-party witnesses and compelling non-testimonial evidence from the defendant,⁷⁹ there appears to be no reason why it cannot do so by calling the defendant as a testimonial witness.⁸⁰ The state would still be bearing the burden of proof because *it* would have to call the defendant as a witness and present evidence through the defendant, and other sources, sufficient to satisfy this burden. Although the plaintiff in a civil case generally bears the burden of proof, he may meet this burden by calling the defendant as a testimonial witness.

⁷⁶ See Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 459-61 (1989).

⁷⁷ See *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Coffin v. United States*, 156 U.S. 432, 453 (1895); George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 880 (1968); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 337-38 (1995).

⁷⁸ See, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 491 (1978) (Stevens, J., dissenting); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 460.

⁷⁹ See *United States v. Dionisio*, 410 U.S. 1 (1973) (requiring defendant to give voice exemplar not in violation of the privilege); *Gilbert v. California*, 388 U.S. 263 (1967) (same for writing sample); *Schmerber v. California*, 384 U.S. 757 (1966) (same for blood sample).

⁸⁰ See Dolinko, *supra* note 4, at 1084.

Another understanding of the presumption of innocence concerns what posture the jury must have when it begins to assess the evidence presented during the trial.⁸¹ The state could be saddled with a meaningful burden of proof even if all juries began trials believing that the defendant was not a credible witness and was probably guilty of the offense charged. Even under these circumstances, the state would still have to present evidence of every element before the guilt of the defendant could be entertained by the jury, and this evidence would have to be sufficient to overcome all reasonable doubts before conviction could occur. But the actual burden of the state would certainly be made easier if the jurors were predisposed to convict. Under this second interpretation, the presumption of innocence is meant to ensure that the jury begins deliberation with its beliefs weighted in favor of the defendant's innocence.

The privilege might appear to follow from the presumption of innocence in this second sense when one considers the consequences of a refusal to testify if the privilege were abolished. If the jury were legally permitted to draw adverse inferences from the defendant's refusal to testify, then, one might argue, the silent defendant would go through the trial presumed guilty, in violation of the presumption of factual innocence.⁸²

But the presumption of factual innocence concerns the jury's *ex ante* beliefs; it does not mean that the jury must ignore information concerning guilt presented to it during the trial. For example, if the prosecution places the defendant at the scene of the crime and the defendant offers no alibi, it is not contrary to the presumption of innocence for the jury to hold the defendant's failure to offer an explanation of his whereabouts against him. Likewise, the defendant's failure to testify on his own behalf during trial is itself a new datum that can suggest guilt. Indeed it is precisely because the jury presumes that the defendant is innocent that his silence provides unfavorable information about him. If the jury assumed he was guilty, his silence would not appear unusual and so would not be a reason to increase the probability of his guilt.⁸³

⁸¹ See generally Laufer, *supra* note 75.

⁸² See Ingraham, *supra* note 75, at 562-65; O'Reilly, *supra* note 75, at 445-51.

⁸³ Cf. BENTHAM, *supra* note 3, at 46.

If the consequence of a refusal to testify were a contempt sanction rather than an adverse inference, then the absence of a connection between the privilege and the presumption of innocence would be even clearer. A contempt sanction has no relationship to the jury's belief about the defendant's guilt. And once the defendant, as a result of the threat of contempt sanctions, took the stand, the jury could assess his testimony in accordance with the presumption of innocence. The jury could begin its assessment with the assumption that he is innocent and is a credible witness.

F. *The Privilege and the Exculpatory Witness*

Some have argued that the privilege aids in the acquittal of the innocent, because it encourages exculpatory third-party witnesses to come forward, by removing the fear that they might be compelled to incriminate themselves.⁸⁴ But third-party witnesses who take advantage of the privilege still risk providing authorities with notice that they are worthy of investigation. In general, it is only the possibilities of immunity from prosecution or prosecution only for a lesser offense, possibilities that would exist even if the privilege were abolished, that motivate such witnesses to come forward.

Indeed, the ability of an exculpatory witness to exercise the privilege is more likely to keep an innocent defendant from mounting an adequate defense.⁸⁵ The witness's right to silence is in tension with the defendant's right to compulsory process.⁸⁶ Although the burden that the privilege puts on in-

⁸⁴ See 8 WIGMORE, *supra* note 51, § 2251, at 311.

⁸⁵ See Amar & Lettow, *supra* note 4, at 861-64; see also Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1 (1989).

⁸⁶ A witness's invocation of the privilege has been held to override a criminal defendant's right to compulsory process. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 444 (1972); *Gleason v. Welborn* 42 F.3d 1107, 1109 (7th Cir. 1994).

If the criminal defendant were able to admit the exculpatory witness's invocation of the privilege or call him to the stand to force him to exercise his privilege in front of the jury, then the conflict between the Fifth and Sixth Amendments would be less than it seems, since such invocations would very likely create a reasonable doubt in jurors' minds. But because jurors in a criminal case are not allowed to draw adverse inferences against a witness (and in favor of the defendant) from the witness's assertion of the privilege, see *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976) ("The defendants have no right to have the jury

nocent defendants' ability to mount an adequate defense might be remedied by allowing defendants or judges to compel the prosecution to grant immunity,⁸⁷ neither currently has this power.⁸⁸ Furthermore, it is questionable whether they could

draw inferences from the witnesses' exercise of [the Fifth Amendment] right."); *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) (neither side has the right to benefit from witness's invocation of privilege); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *Billeci v. United States*, 184 F.2d 394, 398 (D.C. Cir. 1950), invocations of the privilege by nonparty witnesses are not admissible in criminal cases and courts do not give criminal defendants the right to call a nonparty witness solely for the purpose of having the witness assert his privilege in front of the jury, unless there is a special relationship between the defendant and the witness, such as an agency relationship. *See United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993); *United States v. George*, 778 F.2d 556, 562-63 (10th Cir. 1985); *United States v. Vandetti*, 623 F.2d 1144, 1147-49 (6th Cir. 1980); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978); *United States v. Ritz*, 548 F.2d 510 (5th Cir. 1977); *United States v. Bolts*, 558 F.2d 316, 324 (5th Cir. 1977); *Royal v. Maryland*, 529 F.2d 1280, 1281 (4th Cir. 1976) (per curiam); *United States v. Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976); *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975); *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *United States v. King*, 461 F.2d 53, 57 & n.4 (8th Cir. 1972); *Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970) (en banc); *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970). *But see* *FDIC v. Fidelity & Deposit Co.*, 45 F.3d 969, 978 (5th Cir. 1995).

For arguments in favor of giving the criminal defendant a general right to present a witness's invocation of the privilege, see Aaron Van Oort, Comment, *Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination*, 65 U. CHI. L. REV. 1435 (1998); Michael Cook, Comment, *Denying a Criminal Defendant the Opportunity to Call a Witness Who Will Invoke His Fifth Amendment Privilege Against Self-Incrimination*, 54 DENV. L.J. 205 (1977).

⁸⁷ Pursuant to 18 U.S.C. § 6002, a witness can be compelled to testify despite his invocation of the privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case" 18 U.S.C. § 6002 (1999). This "immunity statute" was held constitutional in *Kastigar v. United States*, 406 U.S. 441 (1972).

⁸⁸ Courts have generally rejected the idea that the Compulsory Process Clause could be violated by a prosecutor's refusal to grant immunity. *See, e.g., United States v. Paris*, 827 F.2d 395, 399 (9th Cir. 1987). An exception to the rule against court-ordered immunity is when such immunity is used as a remedy for prosecutorial misconduct. *See United States v. Smith*, 995 F.2d 662, 676 (7th Cir. 1993); *United States v. Bahadar*, 954 F.2d 821, 826 (2d Cir. 1992); *United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992); *United States v. Mohny*, 949 F.2d 1397, 1401-03 (6th Cir. 1991); *United States v. Montoya* 945 F.2d 1068, 1078 (9th Cir. 1991); *United States v. Anguillo*, 897 F.2d 1169, 1190-03 (1st Cir. 1990); *United States v. Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989); *United States v. Graveley*, 840 F.2d 1156, 1160 (4th Cir. 1988); *United States v. Chalan*, 812 F.2d 1302, 1310 (10th Cir. 1987); *United States v. Morrison*, 535 F.2d 223 (3d Cir.

be given this power without seriously prejudicing prosecutors' effectiveness.⁸⁹

G. Conclusion

In sum, the privilege is not likely to protect the innocent. And no one has seriously tried to justify the privilege on the grounds that it aids in the conviction of the guilty. Because it prevents the government from obtaining or making use of evidence of guilt, the privilege must decrease the probability that the guilty will be convicted.⁹⁰

III. TRADITIONAL RIGHTS-BASED JUSTIFICATIONS OF THE PRIVILEGE AND THEIR WEAKNESSES

It is undoubtedly because of the weakness of instrumentalist justifications that most defenders of the privilege appeal to those rights or interests of criminal defendants that might trump the state's interest in efficient law enforcement.

1976). *But see In re Grand Jury Proceedings*, 995 F.2d 1013, 1017 (11th Cir. 1993); *United States v. Pratt*, 913 F.2d 982, 991 (1st Cir. 1990); *United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989). The Third Circuit has entertained the possibility of more expansive use of court-ordered immunity to allow defendants to exercise fully their right to compulsory process however. *See Virgin Islands v. Smith*, 615 F.2d 964, 969-72 (3d Cir. 1980); *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978).

⁸⁹ A judicial grant of immunity for a defense witness conflicts with prosecutorial interests because granting such immunity will mean that the prosecution will have to prove that none of its case against the witness was derived from her testimony. This can be a substantial burden. *See James F. Flanagan, Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME L. REV. 447, 461-63 (1981). In addition, the prosecution has reason to worry that one criminal defendant will use defense witness immunity to give his accomplices an immunity bath. One may wonder whether courts are in as good a position as prosecutors to assess the likelihood of such consequences. *See United States v. Turkish*, 623 F.2d 769, 775-77 (2d Cir. 1980). *But see Peter Westen, Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 766-67 (1981) (criticizing this argument). Those who argue for defense witness immunity tend to downplay the disadvantages to the prosecution. *See Peter Westen, The Compulsory Process Clause*, 73 MICH. L. REV. 71, 169-70 (1974).

⁹⁰ *See Dolinko, supra note 4*, at 1074.

A. *The Impossibility Argument*

A common argument, similar to the cruel trilemma argument, in favor of the privilege is that self-incrimination runs counter to the natural human instinct for self-preservation. One cannot be expected to override this instinct, thus one is excused from having to try.⁹¹ This argument, however, proves too much. Should we not, for the same reason, refuse to condemn defendants for attempting to cover up their wrongdoing by destroying evidence or for attempting to resist arrest or to escape punishment?⁹² Furthermore, since civil sanctions can often be as onerous as criminal penalties, the impossibility argument would appear to justify a privilege in civil as well as criminal proceedings.

In addition, by punishing the silent or perjurious, it is possible to make confession in the criminal defendant's self-interest. Indeed, this is the whole point of *compelling* self-incrimination. It may be that self-incrimination cannot be compelled, in the sense that defendants will always choose contempt or perjury no matter what, but this question cannot be answered by pointing to the fact that self-incrimination is strongly against the defendant's self-interest: The consequences of contempt or perjury may weigh even more strongly in the balance.

Even if it were the case that defendants would simply refuse to speak on the stand or, what is more likely, would lie in response to the questions placed to them, it does not follow that compelling the defendant to take the stand would be useless. Even a defendant's lies are useful to the prosecution, and if the criminal defendant categorically refused to respond, giving the jury the opportunity to observe his demeanor while being questioned could still be useful.

Furthermore, the fact that the defendant could not but violate the duty to speak truthfully does not mean that silence or perjury should not be punished. Even if it is the case that one can be sanctioned only for failing to perform those duties

⁹¹ See CLEARY ET AL., *supra* note 70, § 118, at 287; Stuntz, *supra* note 6; Lane V. Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond*, 15 WAKE FOREST L. REV. 171, 179-82 (1979).

⁹² See Dolinko, *supra* note 4, at 1097.

that one could have successfully discharged,⁹³ the defendant's inability to satisfy his duty to testify truthfully is only apparent. He could have satisfied this duty had he not committed a crime.⁹⁴ It is for this same reason that we consider the person who freely makes two conflicting promises to have breached the one he chooses not to fulfill. Although breach of a promise is inevitable, it is so only because of an earlier choice that could have been avoided and that he had a duty to avoid. The impossibility argument ignores the free choices that placed the defendant in a situation where truthful testimony is to his disadvantage.

B. *The Privilege Protects Against Bad Laws*

The privilege has been celebrated most when employed by defendants in response to unjustified, immoral, or unconstitutional state action, for example, state-sponsored religious orthodoxy or McCarthyism.⁹⁵ Could the privilege exist to put a check on improper action by the state? Is the privilege a final defense against bad laws? Indeed, the privilege appears tailored to frustrate a particular type of bad law, namely, one

⁹³ This requirement is by no means self-evident. First of all, there is the comprehensive question of whether anyone can do otherwise than what he does, given the causal necessitation of human action. Such necessitation need not be understood in terms of physical laws. Action in accordance with the laws of empirical psychology can give rise to the same worries about causal determinism. See DAVID HUME, *AN INQUIRY CONCERNING HUMAN UNDERSTANDING* 90-111 (Charles W. Hendel ed., 1955) (1748). If one's actions are necessitated by one's beliefs and desires according to the laws of empirical psychology and one does not choose these laws or one's beliefs and desires (or chooses beliefs and desires in a manner necessitated by other beliefs and desires one does not choose), then arguably one cannot choose what actions one performs. Unless one is willing to deny that anyone is culpable for his acts, one must, it seems, admit that a person can be culpable for acts he could not but perform.

Even assuming that free action is possible, there are many situations where moral culpability depends upon events beyond one's control in a philosophically unproblematic sense. See, e.g., Bernard Williams, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1971-1980* 20 (1981); Kenneth W. Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1105-19 (1997).

⁹⁴ See Dolinko, *supra* note 4, at 1097-1100.

⁹⁵ See Fortas, *supra* note 24, at 98, 101-04.

that penalizes unpopular opinions.⁹⁶ Such laws are often enforceable only through the defendant's own testimony.

But, so understood, the privilege is grossly over-inclusive, since it also thwarts the enforcement of *all* laws, good and bad.⁹⁷ In addition, the privilege is under-inclusive, because it provides very limited protections against the enforcement of bad laws, by preventing only evidence gathering concerning them (and only one avenue of evidence gathering at that). Constitutional provisions, such as the First Amendment, that entirely prevent enforcement of offending statutes would be a method better tailored to address such concerns.⁹⁸ Indeed, there appears to be something contradictory about this theory of the privilege. If the laws are offensive, they should be made constitutionally void. If they are not offensive, then there is no reason to frustrate their enforcement at all.

C. *The Privacy Argument*

Is compelled self-incrimination wrong because it invades the defendant's privacy?⁹⁹ If the privilege protects the right of privacy, however, it should also reasonably extend to testimony in civil cases and nontestimonial evidence in criminal cases, both of which often involve very private and embarrassing matters.¹⁰⁰ In addition, privacy would apparently be violated by compelled self-incrimination whether or not one is given immunity: The privacy argument cannot explain immunity statutes.¹⁰¹ It is also unclear why incursions into one's private sphere are any worse when proceeding through compelled self-incrimination than when proceeding through other forms of discovery. Indeed, the privilege can encourage the police to pursue avenues of investigation that are even more detrimental to one's own and others' privacy.

⁹⁶ See Alan Donagan, *The Right Not to Incriminate Oneself*, 1 SOC. PHIL. & POL'Y 137, 143-44 (1984).

⁹⁷ See BENTHAM, *supra* note 3, at 195-99; Dolinko, *supra* note 4, at 1085-87.

⁹⁸ See Dolinko, *supra* note 4, at 1085-87.

⁹⁹ See *Couch v. United States*, 409 U.S. 322, 327 (1973); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

¹⁰⁰ See Amar & Lettow, *supra* note 4, at 47.

¹⁰¹ See Amar & Lettow, *supra* note 4, at 47; Stuntz, *supra* note 6, at 1234.

D. *The Argument from Autonomy*

Although couched in terms of privacy, some arguments in favor of the privilege are less concerned with shielding facts from disclosure than with protecting the criminal defendant's moral psychology. Compelling self-incrimination is claimed to interfere with the defendant's moral assessment of his actions:¹⁰² "The fifth amendment, standing for the high value placed on personal responsibility, rebukes government when, by omission or commission, it inhibits, stultifies, or interrupts the process by which the accused decides what to do about whatever criminal responsibility rests at his doorstep."¹⁰³ Compelled self-incrimination is objectionable because it amounts to a form of "self-condemnation on command."¹⁰⁴

It appears that compelled self-incrimination could interfere with the defendant's moral psychology only if it inspired some expression, whether genuine or feigned, of a moral attitude. Otherwise, it would have no connection with the moral psychology of the defendant at all. But in most cases the defendant would be required to give only very specific facts—for example, where he was on the night of the third—the revealing of which would not be sufficient in itself to express a violation of the law, much less moral self-condemnation.¹⁰⁵

A second problem is that civil law, especially tort law, contains a strong moral dimension. Accordingly, a privilege in civil cases would appear to be justified. In addition, the self-condemnatory aspect of self-incrimination seems unrelated to whether one is a defendant or merely an immunized witness. Autonomy arguments cannot explain immunity statutes.

Setting aside these problems to get to the heart of the argument, why is inspiring self-condemnation through self-incrimination a bad thing? If, as Gerstein claims, criminal defendants self-condemn because they "feel themselves to be part of the same moral community with those whose interests

¹⁰² See Gerstein, *supra* note 6; Robert S. Gerstein, *Punishment and Self-Incrimination*, 16 AM. J. JURIS. 84 (1971); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343, 345-56 (1979) [hereinafter Gerstein, *Demise*]; Schrock et al., *supra* note 6.

¹⁰³ Schrock et al., *supra* note 6, at 49.

¹⁰⁴ Gerstein, *Demise*, *supra* note 102, at 349.

¹⁰⁵ See Dolinko, *supra* note 4, at 1130-37.

they have injured,"¹⁰⁶ then it would appear that they are simply becoming sensitive to the commitments they have always held, rather than having their attitudes interfered with. If so, what is wrong with providing a setting for the criminal defendant to reflect on what he really thinks of his acts? Indeed, the entire process of prosecution cannot help but provide the defendant with such opportunities.

1. Autonomy and Integrity

Perhaps what is objectionable about compelled self-incrimination is that the expression of self-condemnation is out of step with the defendant's actual moral commitments. Encouraging such feigned self-condemnation interferes with the defendant's moral psychology by inducing hypocrisy or opportunism. The defendant's *integrity* would be protected by the privilege.¹⁰⁷ Integrity is a virtue that even someone who has improper moral commitments should nevertheless possess.

This argument is vulnerable on a number of fronts. First, it is questionable whether a significant number of criminal acts are motivated by consistent and coherent sets of moral principles that are contrary to those principles standing behind criminal laws. Those committing criminal acts who attempt to justify their actions are far more likely to rely upon the misapplication of doctrines, such as excuse or mitigation, that are generally accepted by the broader community.¹⁰⁸ If the defendant has no moral outlook contrary to that of the state, then he cannot suffer a loss of integrity.

¹⁰⁶ Gerstein, *supra* note 6, at 91.

¹⁰⁷ Integrity can be understood to include the disposition to act in accordance with and honestly state one's primary values and principles even if it is costly to do so. See MARTIN BENJAMIN, *SPLITTING THE DIFFERENCE* 51 (1990); STEPHEN L. CARTER, *INTEGRITY* 7 (1996); Cheshire Calhoun, *Standing for Something*, 92 J. PHIL. 235 (1995).

¹⁰⁸ See Dolinko, *supra* note 4, at 1135-36. Of course, if the criminal defendant had a principled and consistent moral outlook under which these doctrines should be expanded beyond their normal scope, then to compel him to say or imply otherwise might still undermine his integrity. But excuse or mitigation is more likely to be *misapplied*, in the sense that the criminal defendant does not apply these doctrines consistently to similar criminal actions outside of his own case (and in particular would not apply them to similar criminal actions when doing so would disadvantage him).

Second, the right to integrity does not appear to be sufficiently strong to trump the efficient enforcement of criminal laws. Is it so important that the defendant not express attitudes out of keeping with his own moral views that we should set up barriers to the prosecution of murders and rapes?

Finally, there is ample opportunity within the context of the trial for the defendant to express his opposition to the law.¹⁰⁹ And if there is not, the state could easily expand the opportunities. Indeed, it is hard to see how integrity is fostered by allowing the defendant to be silent about his actions. If anything, a right of silence allows the defendant to escape integrity's demand that he be honest about his moral views and the actions that he believed followed from them.¹¹⁰

2. Autonomy and Unconditionality

Perhaps the problem is not that the moral self-condemnation is feigned but that it is the expression of new attitudes that are somehow inadequate. Compelled self-incrimination might be improper because it fails as a form of moral education.

The problem with compelled self-incrimination might be the state's assertion of *moral authority* over the defendant. A Kantian intuition resonates in this idea. As Kant famously argued, one who abides by his duty because of divine command acts heteronomously rather than autonomously.¹¹¹ This individual does not recognize the moral law as categorical because the justification for his actions appeals to a will other than his own. If he keeps his promises only because God commands it, he does not treat promise-keeping as having value in itself. That is, if he were later convinced that God thought promise-breaking was good, he would do that instead. According to Kant, genuine moral reasoning involves recognizing obligations that are not contingent upon any authority.¹¹²

¹⁰⁹ Examples can be found in the trial of the character Moosbrugger in ROBERT MUSIL, *I THE MAN WITHOUT QUALITIES* 74-85 (Eithne Wilkins & Ernst Kaiser trans. 1953) (1930).

¹¹⁰ See Richard Dein Winfield, *Rethinking the Legal Process*, 39 AM. J. JURIS. 153, 161 (1994).

¹¹¹ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 110-11 (H.J. Paton trans. 1964) (1791).

¹¹² See JOHN RAWLS, *A THEORY OF JUSTICE* 459-61 (1971) (outlining Kantian

Contingency of obligation is also the reason that Kant thought abiding by one's duty out of fear of retaliation is not autonomous.¹¹³ Those who abide by their duty for this reason will not be motivated to do their duty when all threats of retaliation are gone. Recognition of one's duty is supposed to provide a motive for action that will not depend upon such contingent events.

Can one argue that compelled self-incrimination motivates self-condemnation in a manner that is heteronomous, because the defendant responds to the state's authority or a fear of retaliation when he incriminates himself? Does compelled self-incrimination fail to inspire a recognition that one's actions were categorically wrong?¹¹⁴

Criticisms of compelled self-incrimination on the grounds that it cannot morally educate are similar to common criticisms of shaming sanctions.¹¹⁵ Shame depends upon an appreciation of others' opinion of oneself, and so might encourage merely contingent reasons to abide by one's duties. If one is hidden from view or one's actions no longer receive a negative response from others, then shame no longer provides a reason to abide by one's duties. Guilt, in contrast, is a moral attitude toward breach of one's duties that is properly unconditional.¹¹⁶

theory of moral education).

¹¹³ See KANT, *supra* note 111, at 108-10.

¹¹⁴ One problem with this argument is that even if the criminal defendant acts heteronomously on the stand, it is hard to see how he is made *more* heteronomous than he was before. Presumably self-incrimination leads to self-condemnation because the authorities with which the defendant identifies shift from his criminal subculture to society as a whole. But if so, then he was equally heteronomous before the state compelled him to self-incriminate.

¹¹⁵ For an example of the advocacy of shaming sanctions, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

¹¹⁶ See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 765-67 (1998); James Q. Whitman, *What is Wrong with Inflicting Shaming Sanctions?*, 107 YALE L.J. 1055, 1079-82 (1998). Shaming punishments have also been criticized on the grounds that they are least likely to be effective (or may even be counterproductive) in connection with those who fail to identify with the general community, that is, with precisely those most likely to commit crimes, see Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1918-19 (1991), and that modern culture lacks the type of repeated interaction between individuals or emphasis on social conformity that allow for shaming to be effective. See *id.* at 1921-28; Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 673-85 (1997).

Although such Kantian arguments for the privilege have an undeniable appeal, they prove too much, because they undermine the legitimacy of *all* moral education by the state. If the state's attempt to inspire moral judgment by relying on authority or the threat of sanctions is indeed incompatible with the defendant's autonomy, what is one to make of the penal system's goal of rehabilitating the prisoner or deterring crime through the threat of punishment? Both rehabilitation and deterrence, by employing threats and rewards, also provide merely contingent reasons for action.¹¹⁷

¹¹⁷ See Dolinko, *supra* note 4, at 1128-29 (advocacy of rehabilitation is incompatible with arguments that compelled self-incrimination impedes defendant's ability to arrive at independent moral judgment).

In fact, the Kantian has difficulty making sense of how moral education by *anyone* is possible. Moral education, for example of children by their parents, must make use of the educated's fears (most notably fear of punishment), loves (of one's teacher or parents), the desire to imitate, and so on. Kantianism makes it a mystery how such influences could ever bring about the autonomous act of recognizing the moral law. What passes for moral education seems to make the pupil do something only for contingent reasons, but not because he recognizes that it is his duty.

How is it then that one can educate someone to recognize unconditional duties? Presumably those who routinely do something for a contingent reason have a tendency to internalize the goal until it becomes a commitment that persists even when the contingent reason disappears. The preference for the act becomes uncontingent, such that the individual will suffer a direct psychic cost from failing to perform it. Although I may initially do what my parents say out of love or fear of them, in the end their command becomes my own. This is shown by the fact that I will stand by the command even if my parents say something different in the future. If this process is possible with children, then it should be possible with adults as well, including during compelled self-incrimination by the state.

Of those who seek to introduce norms into the economic analysis of the law, Robert Cooter most emphasizes the role of internalization in the creation and sustaining of norms. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661-68 (1996) (explaining the process of internalization of norm and arguing that social norms can come into existence only when a sufficient number of people internalize them sufficiently to bear the costs of enforcement); Robert D. Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 588-89 (1998) (describing process of internalization); see also GARY S. BECKER, ACCOUNTING FOR TASTES 225 (1996) (presenting an internalization theory of norms). In contrast, others treat behavior in accordance with norms as heteronomous, in the sense that some cost independent of the frustration of a direct desire to perform the action required by the norm is what motivates compliance. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-75 (1997) (norms may be costlessly enforced on others without internalization merely by withholding the esteem of others that they desire).

It is not surprising that Kantians have had difficulty explaining the moral role of the state. On the one hand, the content of the state's laws appears, to a great extent, to be informed by moral considerations. On the other hand, the very means that the state uses to bring about enforcement of those laws—punishment—appears incompatible with genuinely moral motivation.¹¹⁸ Because the state acts upon its citizens as heteronomous beings, its activities appear unrelated to citizens' moral development. The state appears concerned, not with a recognition of duty, but with arriving at a reconciliation of citizens' *de facto* desires in a manner that will minimize conflict.¹¹⁹

¹¹⁸ Some have thought, however, that punishment of the "eye-for-an-eye" (*lex talionis*) form, can inspire a recognition of unconditional obligation. For the view that Kant thought that eye-for-an-eye punishments can morally educate because they make concrete the rational principle of the categorical imperative, see Samuel Fleischacker, *Kant's Theory of Punishment*, in *ESSAYS ON KANT'S POLITICAL PHILOSOPHY* 191 (Howard Lloyd Williams ed., 1992). See also Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25, 29 (1992). For contemporary arguments that *lex talionis* can morally educate, see Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208 (1984); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 *U. CHI. L. REV.* 733 (1998); and Waldron, *supra*.

¹¹⁹ See IMMANUEL KANT, *CRITIQUE OF PURE REASON* A316/B373 (Norman Kemp Smith trans. 1965) (1787) (Legislation should be guided by the Idea of "a constitution allowing the greatest possible human freedom in accordance with laws by which the freedom of each is made to be consistent with that of all others."). Such a reading of Kant's political philosophy can be found, for example, in George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 *COLUM. L. REV.* 533 (1987). For contrary views, see ALLEN D. ROSEN, *KANT'S THEORY OF JUSTICE* 82-114 (1993) (Kant's theory of justice concerns a subset of moral duties); Peter Benson, *External Freedom According to Kant*, 87 *COLUM. L. REV.* 559 (1987) (criticizing Fletcher and arguing that Kant's concept of Right concerns the external embodiments of moral will in relationships between persons, for example, in contract); J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 *COLUM. L. REV.* 433 (1987) (arguing that view of external freedom as concerning only subjective preferences cannot explain Kant's advocacy of outlawing victimless crimes).

The contrast between the apparently utilitarian and positivist character of Kant's political theory and his radically anti-utilitarian and anti-authoritarian ethics appears to be a weakness in his thought, one often explained by the fact that Kant's political theory was written in his dotage. But in an exemplary article, Jeremy Waldron argues that the utilitarian and positivist aspects of Kant's political theory follow from the reasonable assumption that honest disagreement about principles of justice will occur, requiring an external coercive authority to bring about reconciliation and coordination. See Jeremy Waldron, *Kant's Legal Positivism*, 109 *HARV. L. REV.* 1535 (1996). Although Kant has his own theory of justice, which he thinks follows from reason alone, there is no contradiction in his recognizing that honest disagreement about justice will nevertheless exist. The moral

The tendency of the argument from autonomy to undermine the state's authority is represented by those writers, such as Robert Paul Wolff and William Godwin, who have used autonomy to argue for the anarchist position that there is no duty to obey the law and that the state's coercive power is illegitimate.¹²⁰ Thus, unless the privilege is an inconsistent recognition by the state of its own lack of authority, one that if consistent would apply to punishment and rehabilitation as well, the argument from autonomy cannot provide a justification for the privilege.

3. Autonomy and Personal Identity

Finally, one might argue that compelled self-incrimination violates the *personal identity* of the criminal defendant. For philosophers in the Kantian tradition, moral commitments are closely associated with the self. Because desires are contingent and fleeting, only a recognition of one's duty, which allows for reflection upon one's changing desires, can provide the self with a unifying project.¹²¹ Accordingly, interference with these commitments is a profound interference with the self.

duty to avoid war over principles of justice trumps even the duty to abide by principles of justice.

Although this might seem an odd position given Kant's insistence on the ability of duty to trump utilitarian considerations, for Kant, the absence of a univocal authority does not merely make the world a worse place, it undermines other duties. For example, Kant thought that one does not have a duty to respect property rights if one was not assured that one's own property rights were going to be respected in turn. Thus, the duty to make respecting rights *possible* requires that one give up one's power to enforce the moral law to a univocal authority.

¹²⁰ See ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 18-19 (1970); WILLIAM GODWIN, *AN ENQUIRY CONCERNING POLITICAL JUSTICE* (K. Codell Carter ed., abridged ed. 1971) (1793).

¹²¹ The association of personal identity with moral commitment has a long history. For example, Plato took contemplation of the good to be the product of an eternal rational soul and identified acting on desire with losing oneself in the world of chance and contingency.

One need not understand this relationship between morality and personal identity in cognitivist terms. Rather than understanding the unity to the self that is provided by moral reflection in terms of a persistent cognitive self existing over and above one's desires, the emotivist can understand it in terms of patterns of *affective* concern that the individual has for aspects of himself. Rawls is an example of someone who holds a Kantian view of the unity of the self in terms of moral commitments while naturalizing the patterns of concern by means of which this unity comes into being. See RAWLS, *supra* note 112, at 563-54.

The reeducation of a defendant who has a moral outlook contrary to that of the state would involve changing her identity in a manner akin to murder.¹²²

I am sympathetic to these arguments. But, as we have seen, one has good reason to be skeptical about whether criminal defendants have moral outlooks genuinely contrary to those of the state. It is far more likely that the murderer or rapist either has *no* commitments or has the commitments of the general community *but is insensitive to them*.¹²³ If, by morally reeducating, the state is building a self out of nothing, or making the defendant aware of the self he always had, then there is less reason to be worried about interference with his personhood.

Furthermore, can such concern over personal identity override all other considerations, most importantly the duty to protect others against wrongs? Doesn't our belief in the appropriateness of rehabilitation show this to be false?¹²⁴ Indeed, doesn't the state attempt to influence the moral outlooks of all its citizens through the threat of punishment?¹²⁵

¹²² See Fortas, *supra* note 24, at 98 (privilege exemplifies view that "authority [of the state] was not absolute: that it stopped short of the point where it might invade [one's] mind and take dominion of his will"). Arguments that appear to appeal to one's right to keep *information* about one's commitments private might also be understood as appealing to one's right to keep one's commitments themselves free from intrusion:

Because of the significance of exclusive control over our own thought and feelings, the privilege against self-incrimination can be seen to rest, ultimately, upon a concern that confessions never be coerced or required by the state [T]he fundamental point is that required disclosure of one's thoughts by itself diminishes the concept of individual personhood within the society.

Richard A. Wasserstrom, *Privacy: Some Arguments and Assumptions*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY 317, 322-23 (Ferdinand D. Schoeman ed., 1984); see also Gerstein, *supra* note 6.

¹²³ There is a tendency in the literature on the privilege to concentrate on those cases in which the criminal defendant does have a clearly articulated contrary moral vision. For example, Fortas speaks of the struggle against religious orthodoxy and McCarthyism in his justification of the privilege. See Fortas, *supra* note 24, at 98, 101-04.

¹²⁴ See Dolinko, *supra* note 4, at 1128-29 (advocacy of rehabilitation is incompatible with arguments that compelled self-incrimination impedes defendant's ability to arrive at independent moral judgment).

¹²⁵ One might argue, however, that the threat of punishment does not involve the same invasion into one's personal identity as reeducation. When I change my behavior to avoid criminal sanctions, the only desires that need be changed are my instrumental desires. A desire that a state of affairs occur is *instrumental* if

E. Conclusion

Traditional rights-based arguments for the privilege fail. The most promising of these arguments, which appeal to the autonomy of the criminal defendant, fail in the end because they threaten the legitimacy of the state. Although the moral psychology presupposed by such arguments has some plausibility, its consequences appear anarchistic. It is now safe to say that the only remaining arguments with any promise are those that have been ignored or dismissed in the literature: the cruel trilemma argument and the argument from the adversarial nature of our system of criminal justice.

IV. THE PRIVILEGE AND SOCIAL CONTRACT THEORY

If an argument for the privilege on the basis of our preference for an adversarial system of justice is to amount to more than circular arguments for the privilege on the basis of our preference for the privilege, an adversarial system will have to be justified in terms of principles or policies that have merit in their own right. A promising possibility is the individualist and

that state is desired because of its tendency to bring about other states of affairs that one desires. For example, I desire to brush my teeth instrumentally, because I desire tooth-brushing only because of its tendency to bring about other states of affairs (for example, social acceptance) that I desire. A desire is non-instrumental if it is desired independently of its tendency to bring about other states of affairs one might desire. Although I might have moral commitments that lead me to non-instrumentally desire to kill, if I find that killing is criminally sanctioned I may nevertheless instrumentally desire not to kill. One's instrumental desires and so one's behavior will change due to the threat of criminal sanctions, but one's underlying motivation make-up—one's selfhood—remains the same. Thus a state that attempted merely to deter conduct would not violate the personhood of its citizens.

But it is difficult to envisage a state that sought merely to alter behavior without influencing the underlying commitments of its citizens, if only because it would be too costly to secure compliance with the law through changes in instrumental desires alone. A state would find the desire to engage in affective engineering as a means of ensuring more stable compliance overwhelming. Furthermore, it is almost impossible for criminal prohibitions not to have an effect on underlying commitments, either indirectly, through the tendency of instrumental desires to become non-instrumental, *see supra* note 117, or more directly, through their symbolic or expressive effect. And the state intends that they do so. The argument from personal identity succeeds only at the cost of threatening the state's authority.

contractarian principles common in the Anglo-American political tradition.

Understanding the adversarial system of justice in terms of contractarianism is plausible for two reasons. First, there appears to be a correlation between the adversarial nature of a country's criminal justice system and the level of contractarianism in its political traditions.¹²⁶ Anglo-American criminal procedure is more adversarial than criminal procedure on the European Continent,¹²⁷ and Anglo-American political traditions are more contractarian than Continental traditions.¹²⁸ Second, contractarianism seems a promising way to explain why a criminal defendant may have the moral right to take an adversarial stance toward the state. If, as contractarians claim, citizens have no natural duties to the state, they might also have the right to refuse to participate in criminal investigations of themselves.

A relationship between a duty to testify against oneself and natural duties to the state is apparent in John Griffiths' article, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*.¹²⁹ Griffiths offers what he calls a "Fam-

¹²⁶ See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 8-15, 71-180 (1986).

¹²⁷ In fact, there is a privilege against self-incrimination throughout western continental Europe, in the sense that a criminal defendant cannot be compelled to speak (usually even during pretrial investigations). See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 526-27 (1973); Gordon Van Kessel, *European Perspective on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 804-08 (1998). But the criminal defendant remains a primary source of evidence against him, see Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 423 (1992), for a number of reasons:

1) The criminal defendant is required to take the stand and must assert the privilege in response to questions by the judge. Thus the pressure to speak is much greater under continental systems. See Damaška, *supra*, at 527-28; Van Kessel, *supra*, at 833-35.

2) The criminal defendant can be brought before the court before the prosecution has established a prima facie case, and so is at a disadvantage in determining whether he should exercise the privilege because he will make the choice in ignorance of the prosecution's case. See Damaška, *supra*, at 528-30.

3) Protections against adverse inferences from silence are anemic. See Van Kessel, *supra*, at 821-23.

¹²⁸ See DAMAŠKA, *supra* note 126; see also *infra* Conclusion.

¹²⁹ See John Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

ily Model"¹³⁰ of criminal procedure and contrasts it with the "Battle Model" that he believes has dominated past discussions of criminal procedure.¹³¹ The Battle Model relies upon "the conception of the criminal as a special kind of person who is the 'enemy' of society, and of the trial as a battle in which (if guilty) he is vanquished."¹³² Under the Family Model, neither the state nor the criminal defendant may dissolve their duties to the other; the relationship between citizen and state is nonconsensual. While the state has a duty to rehabilitate the defendant and reintegrate him into the political community, the defendant has a duty to participate in this reintegration by testifying against himself.¹³³

A number of writers have indicated that the privilege might have its source in contractarianism.¹³⁴ In an article published in 1954 in the *Cleveland Bar Association Journal*, Abe Fortas briefly suggested that the privilege

was a part of the seventeenth century's compact theory of government which a little later received its classic expression by John Locke The state was merely an instrument created by contract in which rulers and the ruled were parties on equal terms; and the state's authority was limited by the terms of the compact.¹³⁵

Fortas claimed that it follows from such views that

[The individual has] the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit; and to defend himself by all means within his power—including the instrument of silence.

. . . .
... A sovereign state has the right to defend itself, and within the limits of accepted procedure, to punish infractions of the rules

¹³⁰ *Id.* at 371-73.

¹³¹ *Id.* at 367-71.

¹³² *Id.* at 379.

¹³³ Characteristically, Griffiths argues that the reintroduction of the privilege into juvenile justice proceedings, in *In re Gault*, 387 U.S. 1, 42-55 (1967) (Fortas, J.), was the result of an unjustified reliance on the Battle Model. See Griffiths, *supra* note 129, at 399-404. In a family, there is no privilege against self-incrimination.

¹³⁴ Some writers who have suggested a relationship between the privilege and contractarianism are David Luban and Robert Heidt. See LUBAN, *supra* note 25, at 194-97; Heidt, *supra* note 24, at 468.

¹³⁵ Fortas, *supra* note 24, at 98.

that govern its relationships with its sovereign individuals. But it has no right to compel the sovereign individual to surrender or impair his right of self-defense.¹³⁶

But if the state may defend itself, why can it not do so by putting to bear on the defendant inducements to testify? Simply appealing to the defendant's right of self-defense, even if such a right exists, is not enough. The defendant might defend himself by escaping from state custody if he could. But the state, exercising its own right of self-defense, will not allow it. Why should the defendant's attempts to be silent be treated any differently?

Fortas appears to appeal to the fact that a defendant always has the *ability* to defy the state through silence as a justification for the privilege. This argument, however, which is similar to the argument from impossibility,¹³⁷ is not persuasive. Certainly the state cannot do anything about someone who intransigently refuses to speak. But it is quite another thing for the state to make such silence *easy* by refusing to sanction it. The question remains why the state should make silence costless.

A. Damaška's Paradox

Although Fortas is surely right that there is some connection between the privilege and contractarianism, he, like most who suggest this relationship, fails to spell out in detail the connection between the two. One exception is Mirjan Damaška, who, in his *Two Faces of Justice and State Authority*, attempts to give a systematic explanation of the relationship between the common law adversarial system of justice and individualistic political principles commonly held in common law countries. With respect to the *organization* of the judiciary, Damaška argues that common law countries generally take a *coordinate* approach. Whereas judges in Continental countries are clearly professional civil servants having a place within an administrative hierarchy, common law adjudicators exercise greater autonomy.¹³⁸ What is more important for the privilege, with

¹³⁶ Fortas, *supra* note 24, at 98-99.

¹³⁷ See *supra* Part III.A.

¹³⁸ See DAMAŠKA, *supra* note 126, at 16-70.

respect to the *purposes* of adjudication, common law systems see adjudication as a form of *dispute resolution*. This approach depends upon a *reactive* theory of the state, in which the state exists solely to mediate conflict between individuals, rather than playing a role as a promoter of a particular conception of the good. The activist state, in contrast, views adjudication as the implementation of state policies that help realize its conception of the good life.¹³⁹

Indeed, Damaška argues that in a reactive state the law itself is conceived of as mediating between individuals in conflict, because it brings into effect actual or hypothetical contracts between the citizens of a state.¹⁴⁰ Once again, this approach can be contrasted with that of the activist state, under which law "springs from the state and expresses its policies."¹⁴¹

Under the reactive theory, adjudication is a form of dispute resolution even when an individual and the state come into conflict in criminal proceedings and the state plays the dual role of combatant and adjudicator.¹⁴² In contrast, the inquisitorial system sees no parity between the interests of the state and the criminal defendant. The conflict between the two is not one in need of resolution within a neutral forum. Rather the forum is the means by which the state implements its goals concerning the population as a whole: "The state interest is lexically superior, indeed supreme, rather than on the same plane with individual interests wherein the two could be balanced."¹⁴³

Damaška then argues that a conflict-resolving proceeding requires that each party have control over his activities in the suit:

[T]he reactive state, reluctant to embrace any philosophy of the good life, allows individuals to be sovereign in the management of their

¹³⁹ See *id.* at 73 ("The task of the reactive state is limited to providing a supporting framework within which its citizens pursue their chosen goals. Its instruments must set free spontaneous forces of social self-management.").

¹⁴⁰ See *id.* at 76 ("The only legitimate role the law can take is to try to determine how citizens would have agreed to resolve a matter had they anticipated it Accordingly, even state law is affected by the imagery and hermeneutic of agreement, albeit in a somewhat subterranean fashion.").

¹⁴¹ *Id.* at 82.

¹⁴² See *id.* at 78.

¹⁴³ DAMAŠKA, *supra* note 126, at 86.

own concerns. Transposed to the administration of justice, this sovereignty requires that a party be recognized as the master of his lawsuit (*dominis litis*), entitled to conduct it as he pleases . . .¹⁴⁴

This right to control one's role in litigation in the reactive state expresses itself in the privilege against self-incrimination.¹⁴⁵ On the other hand, "[b]ecause the activist state expects all to participate in common endeavors, it also requires citizens to cooperate with authorities in the administration of justice."¹⁴⁶

Damaška's argument for the privilege seems to be that, because the interests of the defendant and the interests of the state are in some sense morally equivalent, each party is given freedom to express these interests in a neutral forum during litigation. If the state could compel the criminal defendant to be an informational resource, the proceedings would not be neutral—instead the state's interests would be represented as superior.

Does this explanation of the privilege work?¹⁴⁷ There is a tension in Damaška's argument between the reactive state's view that *the law* is the result of binding agreements between individuals, each of whom possesses interests of equivalent moral weight, and its view that the interests of the criminal defendant and the state *during trial* are in some sense morally equivalent. The problem is that giving the criminal defendant freedom to pursue his interests during trial might be contrary to promises he made when the law was brought into being.¹⁴⁸

¹⁴⁴ *Id.* at 104.

¹⁴⁵ *See id.* at 126.

¹⁴⁶ *Id.* at 164.

¹⁴⁷ One problem is that the absence of a privilege in civil cases does not appear plausible under Damaška's account. If anything the conflict-resolving approach to procedure should be stronger in civil than in criminal proceedings. After all, in a criminal case the purity of conflict is muddled by the fact that the state is both participant and adjudicator. But Damaška admits that procedure in both common law and Continental countries is rarely purely conflict-resolving or policy-implementing. Indeed, he notes that Continental civil procedure, by providing civil litigants with greater protection against compelled testimony, is closer to the conflict-resolving paradigm than common-law civil procedure. *See id.* at 127-28, 209-10.

¹⁴⁸ Another problem is that, since the social contract, at least of the Lockean form, takes place within a realm of natural rights and duties, the interests of the criminal defendant and the interests of the state may not be on the same moral plane even before the criminal defendant has entered into the social contract. The criminal defendant cannot set up his interests as a murderer against the interests of the state as vindicator of the murdered, even if the state lacks the monopoly

Consider, for example, a social contract under which each citizen, in the interest of mutual security, promises to testify truthfully and gives the state the power to compel truthful testimony if he becomes a criminal defendant. It is very probable that individuals entering into the social contract would agree to such restrictions on their behavior.¹⁴⁹ Allowing a criminal defendant to escape these obligations during trial in order to ensure that his interests and those of the state are treated as morally equivalent would appear to undermine rather than give effect to the theory that his relationship with the state is contractual.

This point becomes even clearer when one considers interests of the criminal defendant during trial that are *not* respected by the state. Consider, for example, the defendant's interest in escaping detention or violating the rules of evidence by introducing prejudicial facts concerning the prosecutor's private life. Why isn't the defendant allowed to satisfy *these* interests as well? Presumably the reason the reactive state would give is that the defendant, when entering into the social contract, gave up these strategic interests because if each defendant were allowed to pursue them, the enforcement of the criminal law would be frustrated. It was reasonable for him to give them up, because adequate enforcement of the criminal law is something that everyone, including the defendant himself, benefits from. Furthermore, he had no reason to reserve these interests in order to protect some important value that might trump the value of the efficient enforcement of the law, the way the Fourth Amendment right against unreasonable searches and seizures might be reserved by one entering into the social contract because it protects the right of privacy.

The interest the defendant has in remaining silent at trial seems no different from his interest in bringing up the prosecutor's sex life. Both seem to be merely strategic interests in avoiding conviction. If so, why respect one and frustrate the other?

This is not to say that Damaška has not identified an important part of the ideology of criminal procedure in com-

powers that it would have had the criminal defendant entered into the social contract.

¹⁴⁹ See *infra* Part IV.C.4.

mon-law countries. He is quite right that these countries treat some strategic interests of the criminal defendant during trial as, in some sense, of equivalent moral worth to the state's interest in accurately adjudicating and punishing violations of the law. But rather than flowing obviously from a contractarian theory of the state, this approach to criminal procedure appears to be in conflict with contractarianism, because it appears able to release the criminal defendant from obligations to the state that would have been created under the social contract.

Indeed, the adversarial system of criminal procedure appears deeply paradoxical. On the one hand, that state's engaging in criminal investigation, prosecution, and punishment appears to rest on the state's authority over the defendant. Yet in many respects the strategic interests of the defendant during trial are treated as having equivalent moral weight to the state's interests, indicating that neither has authority over the other.¹⁵⁰

More is needed, therefore, to show that the privilege follows from social contract theory. The most promising argument is that one cannot make a binding promise to the sovereign that gives it the right to coerce testimony should one become a criminal defendant. Something like this argument appears in Hobbes's *Leviathan*.

B. Hobbes's Argument for the Privilege

In *Leviathan*, Hobbes argued: "If a man be interrogated by the Sovereign, or his Authority, concerning a crime done by

¹⁵⁰ It is perhaps because of this tension in Damaška's account that he finds it necessary to reinforce his explanation of the privilege with other arguments not obviously related to contractarianism. He goes on to say the following:

But even more serious is the subversion of the requirement that each contestant prove his own claims and sustain his own evidentiary burden. It is a curious burden indeed that can be sustained by one side's forcing the opponent to carry the load. As Roman-canon legal scholars liked to say, a party to a contest should not be compelled to become *telum adversarii sui*, that is, an offensive weapon of his adversary.

DAMAŠKA, *supra* note 126, at 126. Damaška ends up suggesting that the privilege has its source in the presumption of innocence, an argument that has already been rejected above, *see supra* Part II.E., and in a right not to be made *telum adversarii sui*—an argument that I will argue below is dependent upon the morality of warfare. *See infra* Part V.

himself, he is not bound (without assurance of Pardon) to confesse it; because no man . . . can be obligated by Covenant to accuse himself."¹⁵¹ Such promises are not binding, it seems, because one will receive no benefit from abiding by the promise at the time of performance: "A man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any Good to himself."¹⁵² Faced with certain punishment if one confesses, taking one's chances by refusing to confess will always seem the lesser of two evils:

For though a man may Covenant thus, *Unlesse I do so, or so, kill me*; he cannot Covenant thus, *Unlesse I do so, or so, I will not resist you, when you come to kill me*. For man by nature chooseth the lesser evill, which is danger of death in resisting; rather than the greater, which is certain and present death in not resisting. And this is granted to be true by all men, in that they lead Criminals to Execution, and Prison, with armed men, notwithstanding that Criminals have consented to the Law, by which they are condemned.¹⁵³

A number of courts have pointed to this argument in Hobbes as a potential defense of the privilege.¹⁵⁴

1. Impossibility

It is not clear how to interpret this argument. One possible interpretation is that Hobbes is offering the argument from impossibility.¹⁵⁵ Because no one could be expected to abide by a duty to confess, we should be excused from performance. If this is Hobbes's argument, criticisms of the impossibility argument discussed above should apply here too.¹⁵⁶ By punishing silent or perjurious defendants, the sovereign *can* make confession a psychological possibility for the defendant. The argu-

¹⁵¹ THOMAS HOBBS, *LEVIATHAN* 269 (C.B. MacPherson ed., 1968) (1651); see also *id.* at 199.

¹⁵² *Id.* at 192.

¹⁵³ *Id.* at 99.

¹⁵⁴ See *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 180 (1961) (Douglas J., dissenting); *Phelps v. Duckworth*, 772 F.2d 1410, 1418 (7th Cir. 1985) (Posner, J., concurring).

¹⁵⁵ Cf. *supra* Part III.A. This is the interpretation offered in R.E. EWING, *VIRTUES AND RIGHTS: THE MORAL PHILOSOPHY OF THOMAS HOBBS* 81-83 (1991).

¹⁵⁶ See *supra* Part III.A.

ment from impossibility appears to have *prima facie* plausibility only in cases in which those who confess are put to death—something that is rare precisely because no incentive to confess is thereby created. But even without such incentives, confession is not psychologically *impossible*. Many criminals repent. Furthermore, even if it were psychologically impossible, we often require someone to discharge duties that we admit we would not be able to discharge were we in his shoes, particularly if the duties exist as a result of something, like the commission of a crime, that he *could* have avoided and indeed had the duty to avoid.¹⁵⁷

2. Contract Interpretation

Another interpretation of Hobbes's argument looks not to the impossibility of performance but to one's probable motivations when entering the social contract to interpret the extent of the promisor's duty to the state. That is, no one with self-interested motivations would rationally enter into a contract that created a duty to confess. Because a person enters the social contract in the interest of self-preservation, the promises he makes could not involve duties to help bring about his own death or the loss of his liberty.¹⁵⁸ To make such a promise is a conclusive sign that one's promise was not voluntary or that one was insane.¹⁵⁹

This argument also fails. Just because one *enters* a contract with the belief that it will be in one's interest does not mean that his contractual obligations can *never* end up being to his disadvantage. The fact that someone will lose money on a contract does not make his contractual obligations void. To explain why one would have bound himself by contractual obligations that end up to his disadvantage, all one has to do is explain why binding himself in such a manner might have been to his advantage *ex ante*. It is entirely plausible that, in

¹⁵⁷ See *id.*

¹⁵⁸ See EWING, *supra* note 155, at 78-81; Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 642 (1982); Richard Dien Winfield, *Rethinking the Legal Process*, 39 AM. J. JURIS. 153, 161 (1994).

¹⁵⁹ See A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* 137 n.83 (1993).

the interest of self-preservation, all citizens would promise not merely to abide by the law but to relinquish their right of self-preservation if they violated the law. The duty to confess and submit to punishment, by furthering the enforcement of the criminal law, might make everyone more secure.¹⁶⁰

3. Duties and Rational Self-Interest

But it is not clear that Hobbes's argument is about moral duties or rights, as these are normally understood, at all. For example, Hobbes considered all the promises in the social contract to be invalid without a means of enforcement.¹⁶¹ Our usual understanding of the duties created by a promise is that they are binding even in the absence of a method of enforcement. Enforcement is relevant only to whether it is in one's interest to abide by one's duties. Accordingly it may be that Hobbes was concerned, not with moral obligation, but with individuals' rational self-interest.¹⁶² Rather than speaking of moral duties arising from a social contract, Hobbes was really speaking of external constraints on our choices that we willingly bring into being as a means of avoiding the conflict and uncertainty of the state of nature.

If so, Hobbes's claim that one cannot alienate one's right to self-defense, and so cannot promise to confess, might mean only that one threatened with punishment by the state no longer has a rationally self-interested reason to submit to the sovereign. But even if that is true, there is no reason to believe that he has no *duty* to cooperate as a result of prior promises or indeed as a natural duty.

4. Hohfeldian Privileges, Moral and Legal

Even if Hobbes *had* shown that we cannot create a duty to the sovereign to confess our crimes to him, this would nevertheless only go so far as to give the criminal defendant a

¹⁶⁰ See Posner, *supra* note 158.

¹⁶¹ See HOBBS, *supra* note 151, at 196.

¹⁶² This is a matter of considerable debate among Hobbes scholars. For the view that Hobbes's "laws of nature" are ultimately derivable from considerations of what will be conducive to self-preservation, see GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 349-68 (1986).

*Hohfeldian*¹⁶³ privilege against self-incrimination. Refusal to self-incriminate would not violate the rights of others. But it would require more to give the defendant a right against the sovereign to noninterference in the exercise of his privilege. A further argument is needed that the *sovereign* has promised or otherwise has a duty not to *compel* self-incrimination. It appears that the most Hobbes could ever show is that the defendant and the sovereign are at war with one another, and that either side may use whatever means are at his disposal to prevail without violating the rights of the other. As we have seen, Hobbes thought it followed from the inalienability of the privilege of self-defense that one also had the privilege to resist arrest. But that did not mean the sovereign had no privilege to punish resisting arrest.¹⁶⁴ Indeed, Hobbes thought the sovereign had *no* duties—it could not be accused of injustice even for putting the innocent to death.¹⁶⁵

The distinction between a Hohfeldian privilege and what we can call a *claim*, that is, a privilege combined with a right against interference with one's privilege, is useful outside of Hobbes exegesis. Perhaps those who favor the privilege are confusing Hohfeldian privileges and claims. Assume that the defendant has a Hohfeldian privilege against self-incrimination, in the sense that he will have violated no duty to others in refusing to testify. This feeling can easily be confused with the idea that the state has a duty not to interfere in the defendant's exercising his privilege. This is because in most areas the law seeks to reduce conflict by assigning privileges in conjunction with rights against interference. For example, property rights include privileges of use and rights to exclude others from use. But it is not true that Hohfeldian privileges never exist without rights against interference. Particularly in areas of economic competition, bare privileges may be all there

¹⁶³ See WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 39 (1919) (privilege is "mere negation of a *duty* . . . having a content or tenor precisely *opposite* to that of the privilege in question").

¹⁶⁴ See SIMMONS, *supra* note 159, at 152 & n.16.

¹⁶⁵ See HOBBS, *supra* note 151, at 264-66. This is a further reason to question whether Hobbes actually offered an impossibility argument for the privilege. For the impossibility argument would work only if the sovereign had a duty not to enforce commands with which individuals were psychologically unlikely to comply. But since Hobbes saw the sovereign as having no duties at all, there is no reason to think that he would impose this duty on the sovereign.

is. For example, a company's privilege to use non-union labor may coexist with a union's privilege to organize.¹⁶⁶ To say that two individuals have Hohfeldian privileges that conflict is legally meaningful, since the legal consequence of these privileges is that if either sues for protection in the exercise of his privilege, he would lose.¹⁶⁷

The tendency to confuse privileges and claims is particularly strong when one is speaking of a relationship between the individual and the state. Indeed, *if the state's interference with an individual's privilege can include making the privileged act illegal*, then no *legally* (as opposed to a morally) meaningful Hohfeldian privilege is possible. The individual's bare privilege can no longer express itself legally in the fact that the state would lose if it attempted to bring legal methods to bear against the privileged individual. The state, in exercising its privilege, may declare the defendant's privileged act illegal. The defendant can possess only a moral privilege against the state under such circumstances.

Still, in the moral realm the assignment of such a Hohfeldian privilege against the state can be meaningful. In areas that are intrinsically combative, for example, in warfare, it is not meaningless to say that someone has a privilege against a state without a right against non-interference. A combatant might have the privilege to struggle against a state without having the right to do so unimpeded. And criminal procedure might be another area where such moral privileges against the state exist.

As we shall see, it is possible that the attempt to find *legal* expression for the defendant's purely *moral* Hohfeldian privilege not to self-incriminate is the source of many people's intuitions in favor of the Fifth Amendment privilege against self-incrimination.¹⁶⁸ However, we have yet to find an argument that the criminal defendant has even a Hohfeldian privilege against self-incrimination, much less a right against interference in the exercise of this privilege.¹⁶⁹

¹⁶⁶ See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 988-90.

¹⁶⁷ See *id.* at 990-92.

¹⁶⁸ See *infra* Part IV.C.7.

¹⁶⁹ From now on, in order to distinguish the Fifth Amendment privilege against self-incrimination from a Hohfeldian privilege that would carry with it no right

C. *Lockean Social Contract Theory*

Because it normatively limits the state's powers according to the consent of the governed, Lockean social contract theory is a better candidate for justifying a right of silence. Furthermore, it is more likely that Lockean theory stands behind such a right, since it is Locke, not Hobbes, who was the primary source of the prevailing Anglo-American contractarian theory of the state.¹⁷⁰ But, as we have seen, Lockean social contract theory appears unable to justify a right of silence, because one entering the social contract would willingly give to the state the power to compel truthful testimony.

Nevertheless, a principled argument for a right of silence *can* be drawn from the Lockean tradition. It is not, however, a *direct justification* of such a right. A contractarian state would recognize that the criminal defendant who challenged its authority and asserted his innocence has a *Hohfeldian* privilege to struggle against it. This privilege is insufficient to argue directly for a legal right to remain silent. However, the Lockean state might provide the defendant with a right of silence for *expressive* reasons—in order to give concrete legal meaning to what otherwise would be a merely extra-legal privilege to resist the state.

My argument for this expressive justification of the privilege will proceed as follows. After outlining Locke's account of the state of nature and the social contract,¹⁷¹ I explore whether those in the state of nature who are being investigated and adjudicated for rights violations might have a Hohfeldian privilege to remain silent that would be recognized by their adjudicators. I will argue that because an innocent criminal defendant in the state of nature would have a right to refuse to testify, adjudicators would recognize that the criminal defendant who *took himself* to be innocent would have a Hohfeldian privilege to struggle against them by remaining silent.¹⁷²

But someone entering civil society would give up the right to struggle against the state if he was innocent. Therefore, the

against the state to non-interference, I will call the Fifth Amendment privilege a *right of silence*.

¹⁷⁰ See *infra* Conclusion.

¹⁷¹ See *infra* Parts IV.C.1. and IV.C.2.

¹⁷² See *infra* Part IV.C.3.

state, it seems, would not recognize that he had even a Hohfeldian privilege to enter into conflict with it.¹⁷³ For an expressive justification to work, the state must allow the criminal defendant to escape the social contract sufficiently for him to engage in subjectively legitimate conflict, but not so much that the state ceases to see itself as legitimate. We must justify precisely that paradoxical relationship between criminal defendant and state that we saw in Damaška's account of the adversary system.

There are indeed some good arguments that all of us, not merely criminal defendants, have always been in the state of nature with respect to the state.¹⁷⁴ These arguments tend to undermine *any* possibility of the state having authority, however, and are therefore unlikely to be recognized by the state. But a contractarian state would recognize that a citizen always retains sovereign rights of resistance against a state whose actions exceed the scope of the citizen's consent. Although the retention of these rights of resistance might appear to eviscerate the social contract, I argue that such a position misinterprets the role of the social contract in bringing about social stability.¹⁷⁵ Thus, even a Lockean state that took itself to be legitimate would recognize that a criminal defendant could have a Hohfeldian privilege to struggle against it by remaining silent. I then explain the expressive justification for the right of silence in terms of this Hohfeldian privilege.¹⁷⁶

1. The Lockean State of Nature

For Locke, unlike for Hobbes, individuals do not have complete freedom to act as they see fit in the state of nature. Rather, each person has a natural duty not "to harm another in his life, health, liberty, or possessions."¹⁷⁷ In addition, individuals in the state of nature have the natural executive privilege "to punish transgressors of [the natural] law to such a degree as may hinder its violation."¹⁷⁸

¹⁷³ See *infra* Part IV.C.4.

¹⁷⁴ See *infra* Part IV.C.5.

¹⁷⁵ See *infra* Part IV.C.6.

¹⁷⁶ See *infra* Part IV.C.7.

¹⁷⁷ LOCKE, *supra* note 1, § 6.

¹⁷⁸ LOCKE, *supra* note 1, § 7. This is not a *right* to punish, because others may

If people were accurate judges of rights-violations, the existence of this natural executive privilege would be unproblematic. But because people are often not accurate, the state of nature can devolve into an unending state of war. An individual who perceives his rights to have been violated will seek to exercise his natural privilege to punish, creating what the punished party perceives to be a rights-violation allowing *him* to punish.¹⁷⁹ Because there is no authority to resolve the dispute, an unending state of war will likely result.¹⁸⁰

Locke provides each person in the state of nature with something like a Hohfeldian privilege to act upon his fallible perceptions concerning violations of natural rights when deciding whether to punish.¹⁸¹ Indeed, without such a privilege, one would never be allowed to engage in punishment at all, since actual rights-violations can always diverge from what one thinks are rights-violations. As a result, Locke's state of nature

engage in competitive interference. Someone else may preempt my privilege to punish by exercising *his* privilege first. See A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 154-56 (1992). Others may not engage in other forms of interference, however, for example, by erecting barriers to my punishing.

¹⁷⁹ It appears that for Locke the executive privilege in the state of nature is one to punish only *actual*, not *perceived*, rights violations: "[I]f he that judges, judges amiss in his own, or any other case, he is answerable for it to the rest of mankind." LOCKE, *supra* note 1, § 13. Erroneous punishments are violations of natural law even if they were *reasonable* at the time that they were made. See SIMMONS, *supra* note 178, at 145. Locke speaks of the privilege to punish that exists in the state of nature in an epistemically unforgiving form. Whether one has actually punished a rights violator or, by punishing, has himself violated a right is an issue that can be answered only by God. See LOCKE, *supra* note 1, § 21. This is not to say that there are no natural epistemic or procedural duties to use due care when judging and punishing rights-violations. It may be that one violates natural rights when one punishes unreasonably, even if the person one punishes is guilty. But punishing reasonably does not protect one from having violated natural rights.

The fact that reasonable punishment can still be a rights violation helps the state of nature descend into a state of war. If erroneous but reasonable punishments were not rights violations, then fewer punishments would merit—and would be perceived as meriting—retaliation. Only disagreements about whether a punishment was reasonable should lead to feuding. It is probable, however, that the number of disagreements concerning the reasonableness of punishment would be sufficient to allow the state of nature to descend into a state of war.

¹⁸⁰ See LOCKE, *supra* note 1, § 20.

¹⁸¹ Once again, there may be natural epistemic or procedural duties to use due care when judging and punishing rights-violations. But in the end the punisher must have a subjective Hohfeldian privilege to act on his fallible perception that these duties have been satisfied.

is, in the end, much like Hobbes's, in the sense that people within it have privileges to enter into conflict. But it differs from Hobbes's in two respects. First, these *subjective* privileges to battle are overlaid with *objective* natural rights and duties, even if these objective rights and duties are able to influence action only through perceptions of their existence. Just because I have a subjective privilege to do something does not mean I am not violating objective rights by doing so. Second, because such objective rights and duties exist, and people know they do, people attempt to act, albeit fallibly, in accordance with them. As a result, conflict is less likely to occur in the Lockean state of nature than in the Hobbesian, where people have broader privileges to act in accordance with their self-interest.

What does it mean for someone *not* to have this subjective Hohfeldian privilege to enter into conflict? The best example is someone, like one's young child, who has a natural duty to submit to one's authority. The young child cannot legitimately set up his own moral judgment against our own and so cannot enter into legitimate conflict with us.

Another example is the radically evil person who aggresses against us, not because he is a misguided moralist retaliating for what he thinks is a rights violation, but because he simply likes harming us. This person would have no subjective Hohfeldian privilege to aggress against us. It is true that we struggle against the radically evil in pretty much the same way that we struggle against the misguided moralist. Furthermore, we will say to each that if he would simply recognize natural rights, he would stop fighting with us. But we accept that, in some sense, natural rights themselves are responsible for our conflict with the moralist, because they failed to make themselves apparent to someone who attempted to abide by them. It is the problem of the misguided moralist that makes the social contract necessary. In contrast, the epistemic limits of natural rights are not responsible for our conflict with the radically evil. Natural rights alone are sufficient to deal with him. Because we see no route to his conflict with us that is compatible with an appreciation of natural rights, we are likely

to treat him differently from other combatants, for example, by denying him the (albeit limited) respect that we generally accord to those with whom we feud.¹⁸²

2. The Social Contract and the Absence of a Natural Duty to Join the State

Locke understands there to be two steps in the creation of the authority of the state. The first is the creation of a political *community* under which each member surrenders his privilege to punish to the majority.¹⁸³ The second is the creation of a *government* which is entrusted to carry out the will of the political community¹⁸⁴ and to exercise discretionary authority as long as its actions are in the interest of the community.¹⁸⁵ The first has been called the *popular* social contract and the second the *rectoral* social contract.¹⁸⁶

Under the popular social contract, the citizen has a duty to refrain from private retribution against those who have wronged him. He has a duty to submit to the majority's decisions concerning rights violations, even if he thinks these decisions are wrong. He therefore gives up even his subjective privilege to enter into conflict with others.

The creation of a political community can put an end to feuding. For Locke, however, this fact does not put upon one a natural duty to enter into civil society. Although the existence of an authority with a monopoly on the adjudication and punishment of rights violations benefits everyone (or almost everyone), the state's monopoly exists only because of the consent of the governed and is limited by the extent of that consent. I cannot be forced to give up this private right to the state. This absence of a natural duty to enter into the state is foundational to Locke's contractarian approach.¹⁸⁷ The state's exclusive

¹⁸² Many questions remain, however. Just how far does this subjective Hohfeldian privilege to act on the basis of one's moral perceptions extend? What if someone harms us on the basis of the moral view that harming others is *good*? Or do subjective Hohfeldian privileges apply only to those who have largely correct moral views but have misapplied them due to empirical errors?

¹⁸³ See LOCKE, *supra* note 1, §§ 94-99.

¹⁸⁴ See LOCKE, *supra* note 1, §§ 136, 211, 221-22.

¹⁸⁵ See LOCKE, *supra* note 1, §§ 159-168.

¹⁸⁶ See EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 109 (1988).

¹⁸⁷ See JOHN HODSON, *THE ETHICS OF LEGAL COERCION* 117 (1983); LOCKE,

right to adjudicate and punish rights violations is artificial, created by the consent of its citizens.

On the other hand, Locke takes the promise to enter civil society to be irrevocable and absolute. A citizen is "perpetually and indispensably obliged to be and remain unalterably a subject to it, and can never be again in the liberty of the state of nature."¹⁸⁸ But tacit consent to join a political community, by "possession, or enjoyment, of any part of the dominions of any government," obliges one to "obedience to the laws of that government, during such enjoyment"¹⁸⁹ only and leaves that person with the right to withdraw subsequently from the political community.¹⁹⁰

3. A Right of Silence in the State of Nature

Assume that the criminal defendant and the adjudicator of guilt are in the state of nature with respect to each other. I will, following Robert Nozick, call such a criminal defendant an *independent*.¹⁹¹ Could an independent legitimately assert a right not to testify during trial? Despite the fact that Locke sees the problems of private enforcement of justice within the state of nature to be the motivation for entering civil society, he gives little in the way of details concerning what procedures for the enforcement of justice are allowable in the state of nature. Indeed, as Nozick has noted, "[t]he notions of procedural rights, public demonstration of guilt, and the like, have a very unclear status within state-of-nature theory."¹⁹²

Let us distinguish between two burdens on the independent during trial. The first is his exposure to the risk of punishment as a result of the adjudicative procedures used at trial. The second is the burden of his participation in trial, which might include the burden of compelled testimony.

We already know that the innocent independent has a right not to suffer punishment and has a right to struggle and

supra note 1, § 122; SIMMONS, *supra* note 178, at 123-24, 163 n.77.

¹⁸⁸ LOCKE, *supra* note 1, § 121; see also LOCKE, *supra* note 1, § 243.

¹⁸⁹ LOCKE, *supra* note 1, § 119.

¹⁹⁰ LOCKE, *supra* note 1, §§ 121-122.

¹⁹¹ See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 96 (1974).

¹⁹² *Id.* at 96.

retaliate against the punisher.¹⁹³ It also should be clear that the *guilty* independent has a duty to submit to punishment. It may be that in a Hobbesian state of nature the guilty can set up his self-interest against those who seek to punish him. But insofar as the Lockean approach assumes that relations in the state of nature are imbued with natural rights and duties, the guilty independent has no such privilege.¹⁹⁴

The question remains, however, what level of risk of improper punishment the innocent independent may be subjected to during trial. Nozick himself argues that natural rights concerning proper adjudicative procedures can be derived from more general natural rights against being subjected to excessive or unreasonable risks. Because individuals have duties not to engage in excessively risky activities, the executive privilege to punish rights violations that individuals have in the state of nature is limited by a duty to use reliable procedures.¹⁹⁵ Thus

¹⁹³ This is true even if it was the result of reasonable procedures.

¹⁹⁴ The only exception might be in extreme cases of impossibility, for example the prisoner being taken to the gallows who struggles against his captors.

¹⁹⁵ See NOZICK, *supra* note 191, at 102. The existence of this procedural limitation is crucial to Nozick's justification of the state's monopoly on law enforcement. Because of the costs of private enforcement of justice and the benefits from economies of scale, a dominant protective association ("DPA"), to which the substantial majority of individuals have surrendered their executive privileges, is likely to arise. This DPA, like any individual in the state of nature, may prevent the application of procedures that are excessively risky, since the application of these procedures is itself a violation of natural rights. See *id.* at 108-10. Although the DPA does not have a right to *exclusive* punishment, its dominance will mean that it has the actual final word on whether procedures used by "independents"—those who have refused to assign their right to adjudicate and punish rights violations to the DPA—are acceptable. See *id.* at 54. This final word is a *de facto* monopoly on adjudication. And because the DPA is validly exercising the executive privileges delegated to it by its subscribers, it is not violating anyone's rights. Because this process occurs without violating anyone's rights, it provides a justification for the state's *de facto* monopoly on enforcement. See *id.* at 52, 118-19.

It would appear, however, that Nozick has shown only how the state can prohibit independents from using unreliable methods, not why it can control all private enforcement of justice by independents. See SIMMONS, *supra* note 159, at 164 n.78. One might also wonder why the existence of procedural rights and duties are not sufficient on their own to create a natural duty to enter into the state, thus rendering Nozick's invisible hand explanation of the state's legitimate authority superfluous. If the state is a more effective enforcer of rights-violations, then a natural procedural duty to effectively and fairly enforce rights might require one to cede one's right of enforcement to the state. David Schmidtz has argued, for example, that, since one has a right to punish only by the least risky acceptable method, those remaining in the state of nature have to let the state punish for them. See DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT: AN ESSAY ON THE PUB-*

an innocent independent has a right not to be submitted to procedures that create an unreasonable risk of improper punishment and has the right to struggle and retaliate against such unreasonable risk-imposition.¹⁹⁶

Nozick's conclusion is odd. Why does the innocent independent have a duty to accept *any* risk of improper punishment, particularly since, if he is found guilty, he is unlikely to ever be compensated for the error?¹⁹⁷ A system of rights enforcement in which each person submits to the risk of erroneous punishment if the risk is reasonable may aid the enforcement of justice. But why can't the innocent independent say that his being exposed to a risk of punishment is a nonconsensual tax upon him in order to bring about this public good? Any appeal to social usefulness to compel him to submit to this tax would stand at odds with the libertarian aspects of Lockean social contract theory. After all, appeals to the social usefulness of the state's monopoly on punishment were insufficient to create a nonconsensual duty to enter into the state.¹⁹⁸

Furthermore, there will probably be great disagreement concerning what procedures create an unreasonable risk of erroneous punishment. If the probability of punishment is increased, the number of natural rights violations (including those in which one is a victim) will be reduced, but the number of improper punishments (including those in which one is punished) will increase. It is very unlikely that natural rights theory could settle the question of how much weight each of these interests should get.¹⁹⁹

LIC GOODS ARGUMENT 38 (1991).

¹⁹⁶ It is unclear whether the *guilty* defendant has a right against being exposed to unreliable procedures. See NOZICK, *supra* note 191, at 103. But because the person applying the procedures will not know the defendant is guilty, the fact that the guilty has no such right would not change everyone's duty to submit defendants to only reasonable risk imposition.

¹⁹⁷ Nozick argues that those who submit others to reasonable risks have a duty to compensate them if the risk materializes in harm. See NOZICK, *supra* note 191, at 54-87.

¹⁹⁸ One might argue, however, that a defendant who himself has exposed others to a comparable risk of punishment when determining whether they had violated natural rights has consented to this risk of punishment being imposed upon him. Cf. George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 548-50 (1972).

¹⁹⁹ See NOZICK, *supra* note 191, at 97.

A right of the innocent to struggle against the imposition of any risk of punishment could ground a right of silence. If the innocent has no duty to submit to the risk of punishment, then he would have the right to reduce that risk, which could include refusing to testify against himself or lying to investigators. This right not to be exposed to a risk of punishment is one that would not be recognized by anyone investigating the innocent independent's actions, however, since the investigator would not *know* that the independent was innocent. For the investigator to recognize such a right would mean he could engage in no adjudication of guilt at all. But the investigator would recognize that the independent who claimed he was innocent would have a subjective privilege to remain silent.

Nozick himself suggests a similar argument for a right on the part of the innocent not to submit to the burdens of adjudication, including testimony at trial.²⁰⁰ The innocent independent, Nozick argues, has no duty to benefit the overall administration of justice by participating in trial. Compelling his participation is like taxing him to create a public good. Although everyone might benefit *ex ante* from a policy of imposing this tax, including the innocent independent himself, this fact is insufficient to justify its imposition in the state of nature.

Can the *guilty* independent complain about paying this tax? Although Nozick is unclear on this issue, the argument is undoubtedly that anyone who violates natural rights bears responsibility for all costs reasonably necessary to effectuate his punishment. The refusal to bear these costs would itself be a rights violation that merits sanction. Thus the guilty would appear to have no right of silence in the state of nature. The Lockean would assume, as most critics of the privilege have

²⁰⁰ See *id.* at 102. ("If [the independent] chooses not to, he need not participate in the process whereby the system determines his guilt or innocence. Since it has not been established that he is guilty, he may not be aggressed against and forced to participate. However, prudence might suggest to him that his chances of being found innocent are increased if he cooperates in the offering of some defense."). It is interesting to note that in the final sentence Nozick appears to assume that adverse inferences from silence would be appropriate, even though they would effectively compel participation in trial.

noted, that wrongdoers have a duty to respond to questions grounded in reasonable suspicion.²⁰¹

The independent has one final argument for a right of silence. If the adjudicator were investigating an illegality that was not a *malum in se*, but rather one of those restrictions on liberty to which only those who have willingly entered the state may be subjected, then all independents, including the factually "guilty," would have a right to refuse to participate and to resist all imposition of a risk of punishment. The clearest example of this would be the prosecution of an independent for refusal to pay income tax to the state.²⁰²

Thus, the independent would have a number of grounds for refusing to testify if he was innocent (that is, if he did not commit the crime charged or if he was charged with something that was not a *malum in se*). First, he would have a right to reduce his risk of conviction by refusing to provide self-incriminatory testimony and indeed by lying to investigators. Second, he would have a right to resist the burden of testifying. Of course, neither of these rights would be recognized by the adjudicator. The adjudicator would, however, recognize that the independent who asserted these rights would be subjectively privileged to act as he does, since the independent never gave anyone the authority to determine whether he violated natural rights.

4. The Rights and Duties of Criminal Defendants Within Civil Society

The independent, on entering into civil society, would very likely give up these rights to silence. As a result, the innocent citizen would no longer have the right to struggle against the

²⁰¹ See *supra* notes 20-22.

²⁰² Cf. *McLaughlin v. Commissioner*, 832 F.2d 986, 987 (7th Cir. 1987) (per curiam) (petition brought by taxpayer arguing absence of liability for income tax on the ground of his withdrawal from his contractual relations with the United States); *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984) (imposition of penalty for frivolous return challenged on ground that plaintiffs "are exempt from federal taxation because they are 'natural individuals' who have not 'requested, obtained or exercised any privilege from an agency of government'"); *United States v. Drefke*, 707 F.2d 978, 981 (8th Cir. 1983) (per curiam) (defendant appealed conviction for tax evasion on ground that he had not contracted with the United States government for the provision of goods and services).

risk of erroneous punishment, at least as long as the risk was reasonable. Citizens would willingly put upon themselves a duty to submit to a reasonable risk of erroneous punishment in order to aid in the efficient enforcement of the criminal law. For the same reason, they would also put upon themselves a duty to aid the criminal justice system by testifying as defendants even if they were innocent, and to do so without compensation. Furthermore, knowing that they might not want to testify, they would very likely give to the state a right to compel them to act in accordance with their duties. The ability of the state to compel testimony would improve the accuracy of its investigation into crimes and so contribute to the security of all.²⁰³

This duty to testify should extend beyond what the defendant takes to be natural rights violations. Locke emphasizes that those who enter civil society can no longer set their judgment concerning what are rights violations against that of the state.²⁰⁴ Furthermore, although regulatory laws substantially restrict the liberty one had in the state of nature, Locke allows that the state may restrict liberty in this fashion, provided that public goods are created.²⁰⁵ If the regulatory law promotes the public good, then so should compelled self-incrimination concerning its violation.²⁰⁶ Because those entering civil society give up their rights to struggle against the state if they are innocent, they would, it seems, not have even Hohfeldian

²⁰³ Like Hobbes, Locke argued that one would not give to the state authority that would put one in a situation worse than the state of nature. One gives powers to the state "only with an intention . . . the better to preserve himself his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse)." LOCKE, *supra* note 1, § 131. But as we have noted in our discussion of Hobbes, *see supra* Part IV.B.2., one's duties to the state do not dissolve whenever they are to one's disadvantage. For it might have been to one's advantage *ex ante* to create a duty that is subsequently to one's disadvantage. One example could be the duty to testify truthfully as a defendant. *See A. John Simmons, Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFF. 175, 201-04 (1983).

²⁰⁴ *See* LOCKE, *supra* note 1, § 94 ("[No one can,] by his own authority, avoid the force of the law when once made, nor by any pretense of superiority plead exception, thereby to license his own, or the miscarriages of any of his dependents.").

²⁰⁵ *See* LOCKE, *supra* note 1, § 129.

²⁰⁶ *See A. John Simmons, Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311, 328-29 (1991).

privileges on the basis of which an expressive justification for the privilege could be constructed.

Would the innocent defendant have a duty to submit to punishment in civil society? It is one thing for the citizen to accept a risk of erroneous punishment or the burdens of testifying at trial. It is quite another thing for him to give up to the state his right to struggle against erroneous punishment itself. Consider the case of Julius Krause, who was convicted of first-degree murder and sentenced to life imprisonment. In 1940, Krause escaped from prison and found the actual murderer, who was later tried and convicted. Could Krause have been permissibly punished for escape?²⁰⁷

If the spotty case law on the issue is any indication, he could have been.²⁰⁸ Social contract theory suggests why this might be right. Putting on citizens a duty to accept erroneous punishment would appear to help law enforcement, by reducing the number of escape attempts by those who felt themselves to be innocent. Certainly the person entering civil society would accept the duty to submit to erroneous punishment if it amounts to a fine or a small amount of jail time, although it is possible that he might reserve his right to struggle against serious punishment, such as life imprisonment or death, if he was innocent.²⁰⁹ In any event, individuals' reserving this right is insufficient to give the innocent defendant the rights to reduce the *risk* of punishment during trial or to refuse to participate in the trial.

²⁰⁷ Krause returned to prison voluntarily. Incredibly, rather than being released, as he had expected, he was kept in prison until 1951, when he was paroled. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 135 (1987).

²⁰⁸ Only if the conviction is wholly without law and so void does the escapee have a defense. See *People v. Ah Teung*, 28 Pac. 577 (Cal. 1891); *State v. Brown*, 571 A.2d 1367 (N.J. Super. Ct. App. Div. 1990). But see *State ex rel. Robinson v. Boles*, 142 S.E.2d 55 (W. Va. 1965) (denial of right to counsel during trial is defense of escape); MODEL PENAL CODE § 242.6(3) (1998).

²⁰⁹ The fact that the individuals entering the social contract reserved this right will express itself in two ways. First, the state will not punish those who escape from long jail terms or death row if the person is subsequently found to be factually innocent of the crime of which he was convicted. Second, the state will recognize that those who claim to be innocent and are sentenced to long jail terms or death have a subjective privilege to struggle against the state (a privilege that does not, of course, prohibit the state from keeping the convicted person behind bars or putting him to death).

5. Are Criminal Defendants in the State of Nature with Respect to the State?

The only arguments the defendant might make for a Hohfeldian privilege to be silent require him to escape the authority of the state. Can he simply withdraw? Although Locke argues that one who freely and explicitly consents to join a political community cannot subsequently withdraw,²¹⁰ it is hard to see why one's consent could not be qualified by a right of exit. Although they are not always well informed or even consistent, the attitudes of radically libertarian groups can be instructive here. Some members of the separatist Patriot Movement, which explicitly relies upon a contractarian theory of political obligation,²¹¹ believe that personal unilateral rescission of the social contract is possible, through the renunciation of the benefits of citizenship (for example, by revoking their Social Security accounts, drivers licenses and automobile registrations).²¹²

Could any citizen assert a right of silence by withdrawing from the state? Probably not, if asserting the right were contrary to duties created while one was a member. One who joins civil society probably would put upon himself a duty to participate as a criminal defendant even after having withdrawn, provided the prosecution concerns events occurring while he was a member. Indeed it is hard to see how a promise to assist in prosecutions against oneself or to submit to a reasonable risk of erroneous punishment could be meaningful without its applying even after one has withdrawn from the political community. Otherwise criminal defendants could escape the promise simply by exiting at the moment of indictment.²¹³

The most promising argument may be the most direct. Perhaps most of us never consented to join civil society to

²¹⁰ See LOCKE, *supra* note 1, § 121; see also LOCKE, *supra* note 1, § 243.

²¹¹ See Daniel Lessard Levin & Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9, 22-27 (1999); Thompson Smith, Note, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 32 VAL. U. L. REV. 269, 301-02 (1997).

²¹² See Smith, *supra* note 211, at 302.

²¹³ It is probably for this reason that Locke made the individual's promise to join civil society irrevocable.

begin with and so do not need to exit to assert rights of silence. It is undoubtedly true that few of us have *explicitly* consented to join any state.²¹⁴ Even those who do appear to consent explicitly, such as those who undergo naturalization, often do not have the choice about whether and where to emigrate and so consent in circumstances that could be characterized as coercive.²¹⁵ Even when one's choice to go to the naturalizing state is discretionary, no one can choose to be a citizen of no state at all. Therefore, no one can be said to make a free choice to take on the general burdens of citizenship. Since we are compelled to join *some* state, the idea of free consent to join *a* state is empty. It is not surprising that members of the libertarian common law court movement argue that the social contract with the United States government constitutes a "contract of adhesion," that is voidable at will.²¹⁶

Because one cannot help but be a member of a state, the Lockean argument that those who have benefited from the protections of a state have *implicitly* accepted its restrictions is also weak.²¹⁷ For one had no choice but to receive these benefits.²¹⁸

²¹⁴ This point has been repeatedly emphasized by critics of consent theories of political obligation, see, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 239 (1979); David Hume, *Of the Original Contract*, in HUME'S *ETHICAL WRITINGS* 255 (Alisdair MacIntyre ed. 1965), and by those who, although accepting consent theories, draw anarchistic conclusions from them. See A. John Simmons, *Tacit Consent and Political Obligation*, 5 J. PHIL. & PUB. AFF. 274, 278 (1976).

²¹⁵ See Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3, 12-13 (1981); A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 796-97 (1984). For a criticism of the view that choices to join the state are made under duress, see Jeffrie G. Murphy, *Consent, Coercion, and Hard Choice*, 67 VA. L. REV. 79 (1981).

²¹⁶ See Levin & Mitchell, *supra* note 211, at 23. Arguments that one has consented to join the state as a result of asserting one's voting rights are also weak. We certainly cannot be said to have consented on the basis of our not having voted to alter or dissolve our government. For we do not have the individual power to do so. Only majorities do. It is precisely this power of the majority to coerce that was to be explained on the basis of individual consent. See SIMMONS, *supra* note 159, at 218-24.

²¹⁷ See LOCKE, *supra* note 1, § 119. H.L.A. Hart argued analogously that anyone benefiting from others' restraint on their liberty may be similarly restrained. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185 (1955); see also RAWLS, *supra* note 112, § 18.

²¹⁸ See NOZICK, *supra* note 191, at 90-95. One might argue that if someone *would* have paid for the benefits had he been asked, then the mere fact that he was not asked should not mean that he is under no obligation to pay for them.

Never having entered into the social contract is one way of escaping the authority of the state.²¹⁹ But because it undermines the very possibility of the authority of the state, it is not likely to be an argument that would be recognized by the state. Another argument is available, however. Locke also provides citizens with the ability to put themselves *back* into the state of nature by asserting a right of resistance against tyranny. Furthermore, this argument is one that can be accepted by a state that considers itself legitimate.

See SIMMONS, *supra* note 159, at 254-56. This seems particularly true if the benefits are public goods, such that keeping people from receiving them is impossible. This argument from counter-factual consent appears to allow for a voluntarist account of political obligation, because such obligation is still based on the psychological acceptance of the bound party. Compare Richard Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616 (1982), which argues for a nonvoluntarist obligation not to free ride on the cooperation of others. It therefore still appears to be within the Lockean contractarian tradition.

But, as a practical matter, such an argument threatens to erase the distinction between natural and consensual duties to the state. Since an actual choice to accept the benefits of citizenship is usually impossible (because the benefits cannot but be provided), all that is ever practically required to establish a duty to the state is the fact that the existence of the state is in one's interest. But this fact was held to be insufficient to create a duty to the state for the Lockean. See *supra* Part IV.C.2. The ability to reject the state even if such rejection is to one's disadvantage is essential to the Lockean voluntarist approach.

One might attempt to explain why someone would have accepted the state's benefits had he been asked on the basis of more specific psychological characteristics that he possesses, rather than the mere fact that it is in his interest. But such an approach would erect an insurmountable epistemic barrier to justifying the state.

²¹⁹ Accepting such an argument would not mean one had a license to bring about anarchy. For if an illegitimate state is in general just in its actions, one's natural duties may strongly limit what one may do in response to its illegitimacy. As A. John Simmons, who is most often associated with this position, has stated:

Lockean anarchism . . . insists that persons in existing societies are by no means free to do as they please, but rather that they have a wide range of moral duties that will overlap considerably . . . their nonbinding legal duties. And in most societies these moral duties overlap the most central and important legal duties, prohibiting physical harming and most serious disruption of others' lives.

SIMMONS, *supra* note 159, at 262-63. For example, a murderer would have no right to struggle against an illegitimate state that punished him for murder.

6. The Criminal Defendant and the Right to Resist the State

Under the popular social contract, citizens give up to the majority their power to punish and retaliate against improper punishment. As a result, the majority possesses the sole authority to determine and punish rights violations. This authority, by closing off one's subjective privilege to enter into conflict with others, is intended to end feuding.

The majority's power to punish, plus the power to act with discretion for the common good, is then delegated under the rectoral social contract to a government. But there is a limit to the authority that the political community gives to the government. If it acts arbitrarily or violates its trust, it may be legitimately opposed.²²⁰

But if citizens possess the right to resist an illegitimate state, then they will have the subjective privilege to resist the state when they *perceive* that the state is illegitimate. Thus even within the social contract there remains a subjective privilege to enter into conflict. When there is conflict between the people and its government over whether the government has violated its trust, the government does not have the authority to determine who is correct. The people cannot give up to the government their privilege to determine whether the government's exercise of its power is justified or not. For giving the government this authority would mean giving it the license to be a tyrant. Although, as a practical matter, the government may have the final word on the issue of whether it is a tyrant, the people have the privilege to struggle against it.²²¹ Be-

²²⁰ See LOCKE, *supra* note 1, §§ 202-204. This right of resistance against tyrannical government is a cornerstone of the American political tradition. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (asserting "right of the people to alter or abolish" tyrannical government); *Scales v. United States*, 367 U.S. 203, 268 (1961) (Douglas, J., dissenting) ("Belief in the principle of revolution is deep in our traditions."); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992) (discussing the natural law philosophers who influenced the Founders' belief that it is man's right and duty to engage in self-defense against tyranny). This is not, however, a right to rebel against the state. Locke understands rebellion to be a morally impermissible use of force. See LOCKE, *supra* note 1, § 226; Simmons, *supra* note 203, at 189-90. If the government has not violated its trust, the citizens have no right to resist it.

²²¹ As Locke put it:

[T]hough the people cannot be judge . . . yet they have, by a law ante-

cause there is no ground for appeal in the conflict between the people and the tyrant, the two stand in the state of nature with respect to one another concerning the issue. Each has the subjective privilege to act according to his own moral lights concerning whether the trust has been violated.²²²

Furthermore the same points must apply to the *individual's* right to resist an illegitimate state. The individual does not give absolute authority to either his political community or its government. One enters into civil society "only with an intention . . . the better to preserve himself his liberty and property." As a result, "the power of the society, or legislative constituted by them, can never be supposed to extend further than the common good."²²³ Because the rights the individual gives over to the state are limited, he cannot but reserve the

cedent and paramount to all positive laws of men, reserved that ultimate determination to themselves, which belongs to all mankind, where there lies no appeal on earth, viz. to judge whether they have just cause to make their appeal to heaven. And this judgment they cannot part with, it being out of a man's power so to submit himself to another as to give him liberty to destroy him; God and nature never allowing a man so to abandon himself as to neglect his own preservation; and, since he cannot take his own life, neither can he give another the power to take it.

LOCKE, *supra* note 1, § 168.

²²² See LOCKE, *supra* note 1, § 91 ("[S]uch a man, however entitled—Czar, or Grand Signor, or how you please—is as much in the state of nature with all his dominion as he is with the rest of mankind. For whenever any two men *are* who have no standing rule and common judge to appeal to on earth for the determination of controvercies betwixt them, there they are still within the state of nature . . ."). Locke subsequently suggests that *the people* should be the judge on the issue. See LOCKE, *supra* note 1, §§ 240-242. But this is not a claim about political authority, as if the government has given to the people the right to determine this issue (although such an agreement could be imagined). Indeed, he inconsistently says in the same passage that the only real judge is God, and that each man (including, presumably, the members of the government) must exercise his judgment on this issue. See LOCKE, *supra* note 1, § 241. Of course, given that the government's trust is to act for the common good, the fact that the political community as a whole revolts against it is a fairly sure sign that the government's trust has been violated.

Locke tends to speak in terms of the conflict between the political community and a *tyrant*. But just as there is no authority to determine these issues with respect to a tyrant, there is no authority with respect to a legitimate government as well. Determining whether the government's trust has been exceeded is not something that can be given over even to a legitimate government. Accordingly, when the people rebel against the government *unjustly*—that is, when it has not violated the rectoral social contract—they still put themselves into the state of nature with respect to the government concerning that issue.

²²³ LOCKE, *supra* note 1, § 131.

subjective privilege to exercise his judgment concerning whether these rights have been exceeded by the state.²²⁴ Because the individual citizen has a right to resist an illegitimate state, he has the subjective privilege to resist even the legitimate state, provided that he perceives it to be illegitimate.²²⁵

Thus, when the individual challenges the state, for example, on the grounds that it has exceeded his consent or that he never entered into a social contract in the first place, the individual and the state are thrown into the state of nature concerning that issue. Although the state will disagree about whether it has legitimate authority over him and indeed will struggle against him concerning the issue, it must recognize that it does not have the authority to decide the issue that it would have if the individual had a natural duty to the state.

But doesn't the existence of this subjective Hohfeldian privilege to rebel mean that the social contract is illusory? Can't one escape the social contract state simply by *asserting* that it has been violated or that it never existed? Such worries would appear to justify a Hobbesian approach, under which security is established by giving to the sovereign an absolute authority. In response to such worries, Locke argues:

Nor let anyone think [the right of resistance to tyranny] lays a perpetual foundation for disorder: for this operates not, till the inconvenience [from the tyranny] is so great that the majority feel it and are weary of it, and find a necessity to have it amended. But this the executive power, or wise princes, never need come in danger of²²⁶

The existence of an individual's privilege to resist the state appears to leave individuals without any constraint only if one

²²⁴ See LOCKE, *supra* note 1, §§ 135, 168.

²²⁵ This claim is not dependent upon the existence of inalienable rights. For an argument that Locke never believed in such rights, see Simmons, *supra* note 203. The point is merely that if one does subject the authority one gives to the state to conditions, then one must retain the subjective privilege to enter into conflict with the state if one perceives that these conditions have been violated. This point does not depend upon the idea that there are certain rights, for example, the right of self-protection, that one cannot give over to the state. If there is any inalienable right at issue here, it is an inalienable right to make one's own judgments concerning the existence and extent of authority. See Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271, 274-77 (1984) (outlining idea of inalienability of one's own moral judgment and attributing this view to Locke).

²²⁶ LOCKE, *supra* note 1, § 168.

ignores the influence that the perception of the rights and duties in the social contract will have on individuals' actions. Anarchy will result only if a large number of people *perceive* the state to be illegitimate. And if the state is not illegitimate this will generally be recognized by a majority of its citizens, who will submit to its authority.

In other words, social contract theory does not explain how one can end the state of nature—for the existence of disagreement without any adjudicative authority (except God) can exist just as much after the social contract has come into existence as before. All social contract theory does is explain the *normative possibility* of the state's authority. And it is the psychological fact that most people recognize this authority when it exists that explains how the state of nature is avoided. What creates civil society out of the state of nature is the stability brought about by people's *perceptions* of their duties to the state.

In contrast, one who believes in citizens' natural duty to the state will not accept that a citizen can put himself into the state of nature simply by challenging the state's authority. Because the state has authority over the citizen independent of his consent, there is no condition upon the state's authority, concerning which the individual can exercise his independent judgment. As a result, there is no route by which the citizen may legitimately enter into conflict with the state. Thus, although both the contractarian and the "natural" state will fight against the rebellious citizen, the natural state will treat him more like the radically evil or the child and deny him the respect accorded someone with whom one can engage in morally permissible conflict. The only example of such morally possible conflict for the natural state is warfare against another sovereign state.

This is not to say that the criminal defendant receives no benefits from being a member of the natural state. As in John Griffiths' "Family Model" of criminal procedure,²²⁷ the natural state is also more likely to provide the rebellious citizen with a level of concern that is denied combatants. The citizen's privilege to rebel against the contractual state also provides

²²⁷ See *supra* Part IV. (discussing John Griffiths' "Family Model" of criminal procedure).

the state with the privilege to treat the criminal defendant as an enemy to whom it owes no duty to reintegrate into society.

7. Does the Right of Silence Have an Expressive Function?

We can now see how a state that took itself to have legitimate authority over a defendant could recognize that the defendant nevertheless had a subjective privilege to remain silent. A contractarian state would grant such a privilege to a criminal defendant who both challenged its authority and claimed to be innocent of any natural rights violation. But this is not a direct justification for a right of silence. Even if the state must recognize the defendant's subjective privilege to struggle against it, the state retains its subjective privilege to act according to its own moral lights and put upon the criminal defendant the burdens of citizenship. To require the state to give preference to the criminal defendant's views on the matter would appear to involve a confusion between a privilege and a right against non-interference in one's assertion of the privilege.

What then is the adversarial argument for the privilege? It has its source, I believe, in the attempt on the part of the contractarian state to distinguish itself from its natural counterpart. The manner in which the contractarian and the natural state may struggle against the rebellious defendant is largely the same. Indeed, the contractarian state, like the natural state, may call the defendant's resistance *illegal*. Since the contractarian state may use the law in aid of its subjective privilege, the fact that the defendant has a contrary subjective privilege does not have direct *legal* consequences.²²⁸ It is tempting, therefore, for the contractarian state to want to express the fact that it recognizes the defendant's contrary privilege to struggle against it by providing him with a legal right that citizens of the natural state do not have, despite the fact that providing him with this right might free him from obligations that, by the contractarian state's moral lights, the defendant willingly took on when entering into the state.

²²⁸ See *supra* Part IV.B.4.

A right of silence, as well as other aspects of the adversarial system, may play this expressive role.

This conception of the right of silence captures well the tension in Damaška's account of the ideology of common-law criminal adjudication. On the one hand, the state asserts moral authority over the defendant during the trial in innumerable ways, for example, by detaining him, extracting nontestimonial evidence from him, and, if he is convicted, by punishing and seeking to rehabilitate him. On the other hand, in particular areas of the trial the state cedes its authority over the defendant by allowing the defendant the liberty to express his competing interests in a neutral forum, as if the state had no authority over him and these competing interests were, by the state's own lights, of equivalent moral worth.

Much academic discussion of whether one has a natural or a contractual duty to one's political community has arisen in the literature on the meaning and scope of the Second Amendment, which is often taken to be connected to the right to resist illegitimate government.²²⁹ Like the right of silence, an *individual* right to bear arms may depend upon whether the individual has merely contractual duties to the state. Those who emphasize the civic republicanism of the Founders tend to deny the existence of an individual right to bear arms. Although the civic republicans had a consent theory concerning the *rectoral* social contract, allowing for a right on the part of the political community as a whole to rebel against a tyrannical government, they did not believe that an individual's moral obligation to his political community had its source in his consent.²³⁰ The political community instead played the essential

²²⁹ For this "insurrectionist" theory of the Second Amendment, see Colonel Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 645-46, 653-56 (1995); Sanford Levison, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 645-52 (1989); and Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 111-21 (1987). But see Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991).

²³⁰ See David C. Williams, *The Militia Movement and the Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 904-23 (1996) (relying upon the allegedly civic republican views of the Founders to argue that there is only a right of the People acting for the common good to revolt against tyrannical government).

moral role of providing the context within which an individual's virtue could be fostered. As a result, they argue, the individual cannot legitimately rebel against the state and limits can be put on his ownership of arms as long as the possibility of rebellion by the political community as a whole would not be reduced.²³¹ The right to bear arms would be possessed by a popular militia,²³² but not by private militias, such as the Freemen, who seek to withdraw from the political community and assert their individual rights.²³³

The notorious difficulty of determining the scope of the right to bear arms and the right of silence may be a consequence of the fact that both rights exist in tension with the state's natural and inescapable claim to legitimacy. Consider what happens if the privilege to struggle against the state is given full priority over the state's assertion of its legitimacy. Private citizens should be able to maintain standing armies and criminal defendants should have the right not merely to refuse to speak but also to hide evidence, bribe witnesses, escape detention, and lie on the stand. On the other hand, if the state's assertion of legitimacy is given full priority, then it is hard to see how there should be *any* individual right to bear arms or right of silence, since these rights could be exercised only against an illegitimate state.

²³¹ See *id.*; David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 586-96 (1991) [hereinafter Williams I].

²³² The right to bear arms would not, however, be possessed by a *governmental* militia, such as the National Guard.

²³³ Williams claims that those who argue for a more individualistic right to bear arms on the grounds of the Founders' belief in an individual's right to rebel inevitably redescribe individual rebellion in collectivist terms. In the end, it is always the civic republican idea of a rebellion of the People, acting for the common good, that is appealed to. See Williams, *supra* note 230, at 911-15. But he makes civic republicanism appear more popular than it should by characterizing an individual's right to rebel in Hobbesian terms as a right to aggress for self-interested purposes. See *id.* at 904-09. This ignores the extent to which natural rights and duties limit one's actions in the state of nature. Once the individual right to rebel is understood as limited by natural rights, it is harder to distinguish it from civic republicanism. The fact that someone rejects naked aggression by private individuals against the state does not make him a civic republican.

8. Earlier Arguments for the Privilege Reconsidered

The expressive theory of a right of silence has the potential to rehabilitate some of the rights-based justifications discussed in Part III. Consider the argument that a right of silence exists to protect the criminal defendant's right to make autonomous moral judgments concerning his own culpability.²³⁴ Although arguments from autonomy had a good deal of persuasiveness, their Achilles' heel was the fact that they argued not merely against compelled self-incrimination, but against the state's authority in general. But if the right of silence is merely the legal expression of the criminal defendant's subjective privilege to challenge the state's assertion of moral authority over him, then a state could recognize the right of silence while continuing to exercise its authority. In giving the defendant the right to refuse to testify, the state would not be giving up its authority over the defendant or its power to punish and morally educate him. It would merely be recognizing that the defendant can have a subjectively legitimate contrary view of the matter.

The same point can be made concerning the argument that the right of silence is a protection against bad laws.²³⁵ This argument, too, suffered from its anarchistic premises. If the laws against which this right is asserted are indeed bad, then why should they be enforced at all? On the other hand, if they are good, then why allow the defendant to frustrate their enforcement? Here too an expressive account can make sense of this apparent incoherence.

Indeed, the idea that the right of silence aids the truth-seeking function of the trial can be rehabilitated to an extent. From the perspective of the defendant, who seeks to reduce the risk of what he believes is erroneous punishment, the right of silence does contribute to the acquittal of the innocent.

²³⁴ See *supra* Part III.D.

²³⁵ See *supra* Part III.B.

D. *The Trial as Anarchy and the Fox-Hunter's Justification for the Privilege*

The expressive argument for the right of silence is closely related to what Jeremy Bentham derided as the "fox-hunter's" justification.²³⁶ This justification sees the right as analogous to the head start given to the fox in the interest of sportmanship: "The fox is to have a fair chance for his life: he must have . . . leave to run a certain length of way for the express purpose of giving him a chance for escape." Bentham rejected the fox-hunter's argument, because he could see no reason why sportmanship was a legitimate value in the context of criminal procedure.

But under the expressivist justification of the right of silence, the contractarian state has a reason to cede control in a trial. It does so in order to express the fact that the defendant's resistance to the state, although wrong by the state's own moral lights, is a form of morally legitimate conflict. To show that the struggle between the defendant and the state is genuinely anarchic rather than the product of the defendant's simple blindness to the state's natural authority, the state withdraws in order to create an anarchic space within which the defendant can determine the contours of his conflict with the state. Analogously, the hunter gives the fox a free run so that he will be able to decide how he will respond to the hunters—to introduce a fighting chance, a bit of anarchy, into their interaction. The discomfort many feel with "inquisitorial" systems is precisely the absence of anarchy. The agency of the state is seen as pervasive.

This expressive right of the criminal defendant to determine just how he will struggle with the state has been noted in other contexts outside of a right of silence. In *Jones v. Barnes*,²³⁷ the Supreme Court ruled that appellate counsel's refusal, on tactical grounds, to raise nonfrivolous issues insisted upon by the client did not amount to ineffective assistance of counsel.²³⁸ In his dissent, Justice Brennan argued that the

²³⁶ BENTHAM, *supra* note 3, at 238.

²³⁷ 463 U.S. 745 (1983).

²³⁸ The Court in *Jones* emphasized the importance of "winnowing out weaker arguments on appeal" and the tendency of a contrary ruling to "seriously undermine[] the ability of counsel to present the client's case in accord with counsel's

Court's ruling "denigrates the values of individual autonomy and dignity central to . . . [the] Fifth and Sixth Amendment[s]."²³⁹ Brennan admitted that "[i]f all the Sixth Amendment protected was the State's interest in substantial justice, it would not include [a client's right to control litigation strategy]."²⁴⁰ But the Sixth Amendment recognizes the right of a criminal defendant to use the trial for his own purposes and to engage in a conflict with the state on his own terms. To use the power of the state to enforce the rights of the lawyer against the client would make the lawyer, and ultimately the client, an agent of the state.²⁴¹ Not surprisingly, Brennan thought this right to personal confrontation with the state was tied to the right against self-incrimination.²⁴²

E. Conclusion

To sum up, social contract theory cannot *justify* a right of silence, since the most that it can do is provide the criminal defendant with a subjective privilege to struggle against the

professional evaluation." *Id.* at 751. Thus, one might draw the conclusion that *including* the client's issues *would* have amounted to ineffective assistance of counsel. But one might also see the Court as merely protecting defense counsel from a court's second-guessing its judgments, *whichever* decision it makes. Nevertheless, the underlying paternalism concerning the choice of legal tactics in the Court's opinion certainly opens up the possibility that too much deference to the client concerning tactics could constitute ineffective assistance of counsel.

This right of defense counsel to determine strategy follows from Rule 1.2 of the Model Rules of Professional Conduct. Under Rule 1.2 the client has responsibility for determining the objectives to be pursued. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1999) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . ."). In contrast, the lawyer has ultimate responsibility for determining the legal means of reaching those objectives. Although Rule 1.2(a) states that a lawyer "shall consult with the client as to the means by which they are to be pursued," *id.*, the comment to Rule 1.2 specifies that "the lawyer should assume responsibility for technical and legal tactical issues." *Id.* cmt. [1].

²³⁹ *Jones*, 463 U.S. at 763.

²⁴⁰ *Id.* at 758.

²⁴¹ *See id.* at 764.

²⁴² According to such reasoning, the state should give great latitude to the competent criminal defendant who tries to further a self-destructive or perverse goal. But if a criminal defendant is properly advised by counsel and insists on pursuing a disadvantageous course of action, he should not be allowed to later claim ineffective assistance of counsel. The right to determine the nature of one's defense entails responsibility for one's decisions.

state, a privilege that coexists with the state's subjective privilege to put upon the defendant what it perceives to be the duties of citizenship. But in the context of contractarianism a right of silence can have an important expressive function. By giving expression to the defendant's privilege to do battle, the right of silence allows the contractarian state to distinguish itself from a state that views its citizens as having natural duties to submit to its authority. The question remains, however, why the right of silence was fastened upon as a means of expressing the criminal defendant's privilege to rebel. Why not allow the defendant to struggle against the state in another fashion, for example, by lying on the stand? With this problem in mind, I turn now to the cruelty justification of the right of silence.

V. THE RIGHT OF SILENCE AND THE MORALITY OF WARFARE

As we have seen, the cruel trilemma argument is, in the end, reducible to an apparently unanalyzable intuition that it is cruel to compel someone to bring about his own destruction—an intuition that has been claimed to be unintelligible by some and obvious by others.²⁴³ But rather than relinquishing all debate concerning this intuition,²⁴⁴ I believe it can be explained in terms of the *morality of warfare*. The fact that the cruelty of self-incrimination is peculiar to conditions of battle helps explain why the right of silence is thought to be an appropriate expression of the criminal defendant's anarchic struggle with the state.

Consider the inhumanity of forcing a combatant to perform actions, such as wearing the uniform of his opponent or saluting his opponent's flag, that make him look like an agent of his enemies.²⁴⁵ Out of respect for these attitudes, we feel a duty

²⁴³ See *supra* Introduction Part B. (discussing the cruel trilemma argument).

²⁴⁴ See Dix, *supra* note 18, at 333 n.214 (intuition is "metaphysical"); Ellis, *supra* note 6, at 838 (intuition is unanalyzable).

²⁴⁵ For this reason, under 1949 Geneva Convention Relative to the Treatment of Prisoners of War, prisoners of war must be allowed to wear their uniforms and insignia of rank, see 1949 Geneva Convention, *supra* note 27, art. 40; see also Convention Relative to the Treatment of Prisoners of War, July 27, 1929, art. 19 [hereinafter 1929 Geneva Convention], reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 277 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter ARMED CONFLICTS], and

to allow adversaries to express their belligerence even as we struggle to defeat them. We provide them with the minimal right to behave *as adversaries*.

This right to belligerence finds expression in international law, particularly in rules governing the treatment of prisoners of war and civilians in occupied territories. Like criminal defendants, prisoners of war have a right of silence. Under the 1949 Geneva Convention as well as the 1929 Convention, these combatants cannot be compelled to speak, and need only give their name, rank, and serial number.²⁴⁶ Analogously, under the Hague Conventions of 1899 and 1907, a belligerent was "forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense."²⁴⁷

cannot be required to salute enemy soldiers of lesser rank. See 1949 Geneva Convention, *supra* note 27, art. 39; 1929 Geneva Convention, *supra*, art. 18. Analogously, under the Hague Conventions, occupied populations could not be compelled to swear allegiance to the occupying power. See Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 45 [hereinafter 1899 Hague Convention], reprinted in ARMED CONFLICTS, *supra*, at 83; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 45 [hereinafter 1907 Hague Convention], reprinted in ARMED CONFLICTS, *supra*, at 83.

²⁴⁶ See 1949 Geneva Convention, *supra* note 27, art. 17. This right can be traced earlier in the nineteenth century, see WILLIAM FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 93-94 & n.29 (1942), and can be found in the first code of rules for land warfare ever adopted by a nation, promulgated by President Lincoln and prepared by the great German-American political theorist and scholar of international law, Francis Lieber. See General Orders No. 100 of 1863, art. 80 ("Instructions for the Government of the Armies of the United States in the Field") [hereinafter Lieber's Code], reprinted in ARMED CONFLICTS, *supra* note 245, at 14. Lieber's Code had a direct impact on the Hague Conventions, and through them, the Geneva Conventions. See Frank Freidel, *General Orders 100 and Military Government*, 32 MISS. VALLEY HIST. REV. 541, 541-42, 555-56 (1946); Elihu Root, *Francis Lieber*, 7 AM. J. INT'L L. 453, 466-69 (1913). On the influence of Lieber's Code generally, see George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

It is not surprising that international law governing the treatment of prisoners of war arose only in the nineteenth century. Prisoners were generally exchanged before that time, see A.J. BARKER, PRISONERS OF WAR 97 (1974), although until the end of the middle ages they were generally enslaved or killed. See *id.*; General J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 MIAMI L.Q. 40, 40-41 (1950). Indeed the American Civil War was the first conflict in which exchanges were not the predominant means of dealing with prisoners of war. See Howard S. Levie, *The Employment of Prisoners of War*, 57 AM. J. INT'L L. 318 320 (1963).

²⁴⁷ 1899 Hague Convention, art. 23(h), reprinted in ARMED CONFLICTS, *supra*

This right of silence is connected to a more general principle that captured adversaries cannot be forced to perform actions that directly aid their captors, for example, by working in armament factories.²⁴⁸ The 1899 Hague Convention read, "Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited."²⁴⁹ In addition, under both the 1899 and the 1907 Conventions, the labor of prisoners of war was to "have nothing to do with the military operations."²⁵⁰ Under current international law, similar restrictions apply. Because of the difficulty in determining just what is directly connected with military operation in the context of total warfare,²⁵¹ the 1949 Geneva Convention lists the work prisoners of war may be required to perform, in an attempt to exclude work, such as handling munitions, that is more directly related to military operations.²⁵²

It could be argued that prohibiting prisoners of war from working in munitions factories merely protects them from labor that is dangerous.²⁵³ If this were the sole concern sup-

note 245, at 77; 1907 Hague Convention, art. 44, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 82-83.

²⁴⁸ This right of prisoners goes back at least to the American Revolution, and, although it was not in Lieber's Code, it was in place during the Civil War. See *FLORY*, *supra* note 246, at 84. The right, under customary international law, of prisoners of war not to fabricate arms or construct fortifications was generally recognized in the nineteenth century. See *FLORY*, *supra* note 246, at 75 & n.29.

²⁴⁹ 1899 Hague Convention, art. 44, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 83-84. The same requirement is in the unratified Brussels Conference of 1874, art. 26, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 30.

²⁵⁰ 1899 Hague Convention, art. 6, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 70; see also 1907 Hague Convention, art. 6, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 70 (work "shall have no connection with the operations of the war"). Under the 1929 Geneva Convention, work done by prisoners of war was to "have no direct connection with the operations of war. In particular, it [was] forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units." 1929 Geneva Convention, art. 31, reprinted in *ARMED CONFLICTS*, *supra* note 245, at 280.

²⁵¹ See RICHARD I. MILLER, *THE LAW OF WAR* 44 (1975); Raymund T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 407 & n.48 (1952). For a discussion of the problems in determining what types of work are directly related to military operations, see *FLORY*, *supra* note 246, at 76-78; *Levie*, *supra* note 246, at 329-39; and *Dillon*, *supra* note 246, at 51-53.

²⁵² See 1949 Geneva Convention, *supra* note 27, art. 50; see also *The Leeb Case*, 1948 ANN. DIG. 394; *The Lewinsky Case*, 1949 ANN. DIG. 515; *The Student Case*, 1946 ANN. DIG. 296.

²⁵³ Analogously, one could argue that the right of silence enjoyed by prisoners of

porting this principle of international law, however, there would be no reason to distinguish prohibited labor on the basis of its relationship to the war effort. Indeed, compelling prisoners to engage in "labour which is of an unhealthy or dangerous nature" is also prohibited in a separate provision of the 1949 Geneva Convention.²⁵⁴ International law prohibits work that "is directly harmful to [the prisoner's] state of origin," not merely work that is dangerous.²⁵⁵ The motivation for prohibiting such labor is to deny captors this opportunity to humiliate and demean enemy soldiers.²⁵⁶

These rights of prisoners of war can help to explain the cruelty of compelling self-incrimination. Forcing a prisoner of war to help kill his comrades and forcing the criminal defendant to help bring about his own punishment both involve a type of psychological cruelty and humiliation that is tied to one's identity as a combatant. The cruelty is linked to the fact that the conflict is anarchic, in the sense that there is no overriding authority to settle the dispute and each side may act according to its moral lights. This anarchic relationship largely exists in international conflict and, as we have now seen, also exists under contractarian theory when the criminal defendant challenges the authority of the state. Because this justification of the right of silence requires anarchic conflict, it would explain why the right is usually not recognized in personal relationships and, especially, not in the relationship between parents and children.²⁵⁷

war protects against torture alone, rather than against forms of symbolic humiliation, even though these are likely to accompany torture.

²⁵⁴ 1949 Geneva Convention, *supra* note 27, art. 52. The same was true of the 1929 Geneva Convention. See 1929 Geneva Convention, art. 32, *reprinted in* ARMED CONFLICTS, *supra* note 245, at 280.

²⁵⁵ See FLORY, *supra* note 246, at 74. Discussions of the provision make it clear that it is the direct relationship between the labour and military operations that is of concern, but they merely speak of the difficulty of drawing this line, rather than spelling out why it is morally significant. See PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 240 (1994) (1908); Levie, *supra* note 246, at 329-39. Indeed, I could find no evidence of the ultimate motivations for the provision on the basis of the "legislative history" of the provision or recommended amendments. See WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* 222-32 (1908); *THE REPORT TO THE HAGUE CONFERENCES OF 1899 AND 1907* 142-45, 522-28 (James Brown Scott ed., 1917).

²⁵⁶ The restriction is seen as having its source in "respect [for] the loyalties and human dignity of the captured personnel." MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR* 88 (1994).

²⁵⁷ See Friendly, *supra* note 4, at 680 ("No parent would teach such a doctrine

The relationship between the right of silence and warfare might also explain why the right does not apply in a civil suit. Civil suits are a form of state-regulated dispute resolution between those who have implicitly accepted the state's authority to adjudicate rights violations. The resolution of such conflict is within the context of civil society. Only when one refuses to accept the state's arbitration of a civil dispute, inspiring criminal sanctions, can one express his rejection of the state's authority in a form of anarchic conflict.²⁵⁸

A further analogy between the right of silence and the rights of combatants is that both apply despite the fact that one's opponent is considered morally wrong and one struggles to defeat him. The insensitivity of these norms to the moral status of one's adversary suggests that we are dealing with *role* morality, that is, a form of moral reasoning that is incommensurable with normal moral rules. Role morality does violence to the idea that moral rules form a universal and consistent system. The rule that one should allow one's adversary to express his belligerence exists in uneasy tension with the idea

to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not." (citations omitted)).

²⁵⁸ The morality of warfare might also explain why the right of silence does not extend to those who receive immunity from prosecution. If the right of silence is a right of warfare, it makes sense that genuine conflict with the state is a requirement for its exercise.

But the relationship between the right of silence and the morality of warfare unfortunately provides little guidance concerning other problems with the scope of the Fifth Amendment. Consider, for example, the question of non-testimonial evidence. See *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplar not testimonial and therefore can be compelled); *Gilbert v. California*, 388 U.S. 263 (1967) (same for writing sample); *Schmerber v. California*, 384 U.S. 757 (1966) (same for blood sample). If one emphasizes that the right of silence exists to keep someone from undermining his own side in battle, it would arguably require that it be extended to evidence of a non-testimonial nature.

One might argue, however, that there are limits to a combatant's right not to use his agency against himself. One can compel a soldier to throw down his weapons, for example. Requiring the defendant to turn over evidence or provide writing samples or voice exemplars might appear more like such immediate acts of disarmament, insofar as they involve specific and well-defined actions that are short in duration and that can usually be directly coerced. For that reason, one might argue, they are less likely to make one appear as an agent of the enemy.

that his cause is unjust and that he needs to be defeated and morally reeducated. Normal morality would counsel one to act so as to bring about as speedy a victory as possible. There would be humanitarian restrictions on one's methods, but not restrictions tailored solely to allow one's opponent to express his belligerence.

It is precisely this discontinuity between the morality of warfare and normal morality that explains why arguments in favor of a right of silence have seemed so contrary to our normal attitudes toward responsibility and legitimate moral education. Why, if the defendant has committed a crime, is forcing him to say so cruel? If we think he should be punished, why should we allow him to frustrate this goal?²⁵⁹ This inconsistency is often considered an argument *against* the right. But the hallmark of role morality is that it can recommend actions that are inconsistent with one's general moral goals.²⁶⁰

²⁵⁹ For a criticism of the idea of role-differentiated morality in favor of the universality and coherence of moral obligations, see Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 28 (David Luban ed., 1983).

²⁶⁰ It is not surprising, therefore, that some have attempted to justify the adversary system in general, and the partisan duties of criminal defense attorneys in particular, on the basis of role morality. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1060-61 (1976) (arguing that role morality of friendship justifies partisan advocacy, even though such a role is in tension with other moral relationships). For criticisms of Fried's thesis, see Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 *YALE L.J.* 573, 578 (1977). For the early history of the debate over role morality in legal ethics, see David Luban, *Reason and Passion in Legal Ethics*, 51 *STAN. L. REV.* 873, 876-80 (1999).

Of course, some of these have hoped to justify the role morality of lawyers in a manner that makes it *consistent* with normal morality. For example, Stephen Pepper has argued that a lawyer's acting as a vigorous advocate for his client enhances the client's autonomy. See Stephen L. Pepper, *The Lawyers Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613, 617; see also Stephen Ellmann, *Lawyers and Clients*, 34 *U.C.L.A. L. REV.* 717 (1987); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 *N.C.L. REV.* 315 (1987). But, as we have seen, unless one is an anarchist, it is difficult to see how autonomy can justify the intentional frustration of the enforcement of the law. See *supra* Part III.D. Others have offered instrumentalist arguments that a partisan role for the lawyer contributes to the truth-seeking process. See, e.g., Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 *U. PA. L. REV.* 1060, 1063 (1975); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of the ABA and AALS*, 44 *AM. BAR ASS'N J.* 1159 (1958) (arguing that adversarial system promotes truth-seeking better than inquisitorial system, by inhibiting premature conclusions). But these arguments suffer from problems similar to those encountered by the

A relationship between the morality of warfare and the right of silence can be seen in a number of contractarian arguments for the privilege. After claiming that the right of silence is derivable from the view that the state is "merely an instrument created by contract in which rulers and ruled [are] parties on equal terms," Fortas argues: "The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. Equals, meeting in battle, owe no such duty to one another, regardless of the obligations that they may be under prior to battle."²⁶¹ Damaška also ties the right of silence to the idea that "a party to a contest should not be compelled to become *telum adversarii sui*, that is, an offensive weapon of his adversary."²⁶²

The morality of warfare helps support the contractarian argument for a right of silence by focusing the expression of the defendant's subjective privilege to struggle with the state on a right traditionally given to those with whom we engage in legitimate conflict. Indeed, the ideas that the right of silence is the expression of an individual's privilege to challenge the authority of the state and that it protects him against a form of personal humiliation are often expressed in the same breath. An example is Justice Field's praise for the privilege in his dissenting opinion in *Brown v. Walker*.²⁶³

The reprobation of compulsory self-incrimination is an established doctrine of our civilized society. As stated by appellant's counsel, it is the 'result of the long struggle between the opposing forces of the spirit of individual liberty, on the one hand, and the collective power of the state, on the other.' As such, it should be condemned with great earnestness A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.²⁶⁴

instrumentalist argument for the right of silence. How can limiting access to evidence of guilt enhance the truth-seeking process? See, e.g., LUBAN, *supra* note 25, at 68-74; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1031-38 (1975).

In fact, those who seek to "justify" the role of the lawyer in this fashion are not appealing to role morality at all. Since the resources for such justification are the principles of normal morality, the role will not have the discontinuity with normal morality that is its essence.

²⁶¹ Fortas, *supra* note 24, at 98.

²⁶² DAMAŠKA, *supra* note 126, at 126.

²⁶³ 161 U.S. 591 (1896).

²⁶⁴ *Id.* at 637 (Field, J., dissenting).

CONCLUSION: WHERE FROM HERE?

In this Article I have explained what I believe are the dominant intuitions in favor of a right of silence among the general population and have shown how they might provide the source for a principled, if not airtight, argument for this right. If I am correct, future discussions of the Fifth Amendment should deal with some unfamiliar issues in political theory and moral psychology. How are these debates likely to turn out?

Under my reading of the right of silence, its justification depends in part upon whether we have only consensual duties to submit to the authority of the state. For if criminal defendants may not legitimately challenge the authority of the state, there is no reason to use the right to express the idea that the defendant and the state are pursuing conflicting interests of equivalent moral worth.

No one can deny that Lockean contractarianism was at least a part of the ideology of the Founders.²⁶⁵ But there is a good deal of debate concerning whether civic republicanism, which emphasizes natural duties to one's political community and the role of this community in moral education, might have been their predominant political philosophy.²⁶⁶ Although earlier historical work suggested that Lockean contractarianism was dominant,²⁶⁷ much work since the sixties has suggested that civic republican views were of greater importance.²⁶⁸

²⁶⁵ See, e.g., MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 5 (1978) (Locke's influence "goes without saying"); James A. Gardner, *Consent, Legitimacy, and Elections: Implementing Popular Sovereignty under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192-200 (1990); Thomas G. West, *The Classical Spirit of the Founding*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 1, 4 (Jackson Barlow et al. eds., 1988).

²⁶⁶ For a brief survey, see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2-5 (1999).

²⁶⁷ See, e.g., CARL BECKER, *THE DECLARATION OF INDEPENDENCE* 27 (1958); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 5-14 (1955). Cf. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 282-91 (1969) (although civic republicanism views were powerful at the time of the revolution, contractarianism came to dominate by the time of the ratification of the Constitution).

²⁶⁸ See BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 33-40, 53-54 (1965); STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 3-38 (1990); J.G.A. Pocock, *THE*

Since the right of silence as we know it arose after the ratification of the Bill of Rights,²⁶⁹ however, it may be that the Founders' political philosophy is less important than the philosophy of those who were instrumental in establishing and maintaining this right. Consent theories of political legitimacy are commonly accepted among the general population in the United States²⁷⁰ and have been for a long time.²⁷¹

But consent theories exist in tension with other attitudes that people generally have. Indeed consent theories of political obligation are difficult to reconcile with our view that people currently living within the territorial confines of the United States are actually citizens of the United States.²⁷² Social contract theory is also incompatible with commonly held views in international law. It probably goes without saying that under international law an individual who challenges a state's authority and seeks to separate from the state is not accorded the rights of a combatant. Under the *jus gentium* (common international law), rather than being an equal of the state, this challenger was a *pirate* who was warring against nations as a whole rather than against any particular nation.²⁷³ The same is true today.²⁷⁴

In addition, the contractarian's view that those in the state of nature may act upon their own perceptions concerning rights violations, even when this will result in feuding, stands

MACHIAVELLIAN MOMENT (1975). For two recent attempts to reassert Locke's importance to the founding, while incorporating many of the insights of the civic republicans, see DWORETZ, *supra*, at 37-38; and JEROME HUYLER, LOCKE IN AMERICA 1-28 (1995).

²⁶⁹ See *supra* Part I.

²⁷⁰ See Simmons, *supra* note 215, at 791 (consent theory is "widely and uncritically accepted today").

²⁷¹ See generally Allen, *supra* note 266 (surveying contractarian arguments in American case law in the past).

²⁷² See *supra* Part IV.C.5.

²⁷³ See THEODORE DWIGHT WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 144 (1899).

²⁷⁴ Under the definition of a combatant in the Protocol I of 1977 to the Geneva Convention (relating to protection of victims of international armed conflicts) a combatant is a member of an *organized armed force* under command. See Protocol I, art. 43, in ARMED CONFLICTS, *supra* note 245, at 577. Indeed, even Protocol II, governing domestic armed conflicts, which provides some limited protections (but not a right of silence) for detainees, does not apply to those arrested as a result of riots or isolated and sporadic acts. See Protocol II, art. 1, in ARMED CONFLICTS, *supra* note 245, at 621.

in stark contrast to our usual views concerning the reasonable imposition of reciprocal risks. Submission to an authority generally appears morally required when such submission brings with it common benefits of coordination and the reduction of conflict.²⁷⁵

Furthermore, there is a strong tradition of treating one's relationship with a political community as having a moralizing effect on individuals. It is only in the context of making social compromises with others that one realizes one's true nature. The duty to cultivate virtue puts upon us a duty to enter into civil society.

But even if it is true that one's duty to the state is merely consensual, this is not enough to *justify* a right of silence. There is no compelling reason that someone entering the social contract would reserve such a right. The right of silence gets support from contractarianism only because it provides a means of giving legal expression to the criminal defendant's ability to put himself into the state of nature by challenging the state's authority. The right expresses that the state, although struggling against the defendant, recognizes his subjective privilege to struggle back. But one might ask whether it is necessary to give legal expression to this moral fact at all and, if it is necessary, why it must be done through a right of silence.

Furthermore, even if the right is accepted as having expressive importance, it does so only for those criminal defendants who reject the state's authority and assert those natural rights that would allow them to remain silent. One can easily question whether a significant number of criminal defendants actually challenge the authority of the state. Giving defendants a right of silence appears to treat them as radical libertarians—Freemen, citizens of the Republic of Texas, members of the Posse Comitatus or the Patriot or common law court move-

²⁷⁵ See SCHMIDTZ, *supra* note 195, at 38-40 (arguing that since one has a right to punish only by the least risky acceptable method, those in the state of nature have a duty to let the state punish for them); Leslie Green, *Authority and Convention*, 35 PHIL. Q. 329 (1985) (arguing for a limited moral duty to consider authority that provides the benefits of coordination). The duty to avoid conflict is the reason why Kant thought that "each may impel the other by force to leave [the state of nature]." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 124 (Mary Gregor trans. 1991) (1797).

ments—who genuinely challenge the authority of the state, sometimes in court.²⁷⁶ Furthermore, even if a criminal defendant did challenge the authority of the state, he must also assert a colorable natural right to remain silent. Naked self-interest on the part of the criminal defendant—the mere desire to protect himself against punishment that he does not desire—would not make the criminal defendant's resistance subjectively privileged. Finally, there is the psychological question of whether those engaging in the necessary form of conflict with the state feel genuine humiliation and subordination as a result of their inability to express their belligerence through silence. It may be that the principles of respectful combat that bolster the right of silence are simply too musty and antiquated to be relevant to modern criminal defendants.

Contrary to academic consensus, the Fifth Amendment right to remain silent is not without principled justification. Indeed, these justifications are tied to profound issues in political theory and moral psychology. As a result, it is no wonder that so many people find the right viscerally attractive. But these justifications are also extremely subtle and conceptually unstable. Spelled out in detail, they may lose their hold on the popular imagination.

²⁷⁶ See *United States v. Drefke*, 707 F.2d 978, 981 (8th Cir. 1983) (per curiam) (defendant appealed conviction for tax evasion on ground that he had not contracted with the United States government for the provision of goods and services); *Hilgeford v. People's Bank, Inc.*, 652 F. Supp. 230, 233 (N.D. Ill. 1986) (habeas petitioner convicted of trespass asserted right of sovereignty, issued own orders as judge in case, and held federal judge in contempt); cf. *McLaughlin v. Commissioner*, 832 F.2d 986, 987 (7th Cir. 1987) (per curiam) (petition brought by taxpayer arguing absence of liability for income tax on the ground of his withdrawal from his contractual relations with the United States); *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984) (imposition of penalty for frivolous return challenged on ground that plaintiffs "are exempt from federal taxation because they are 'natural individuals' who have not 'requested, obtained or exercised any privilege from an agency of government'"). On the movements generally, see Levin & Mitchell, *supra* note 211; Smith, *supra* note 211.