

Essays

MIRANDA'S HOLLOW CORE

Ronald J. Allen*

*Miranda v. Arizona*¹ is one of the most important decisions of the twentieth century. It revolutionized criminal interrogations and was part of a larger revolution in the nature of both the Supreme Court and the federal system generally. It took power out of the hands of state officials and deposited it in the hands of federal judges.² It brushed aside risks to law enforcement as insufficient to offset the importance of the right to be free from compelled self-incrimination and the demand of equality.³ It also stimulated in part the counter-revolution in American politics that, for good or ill, began to rein in the Court and liberal politics more generally. The consequences of this development were seen in the 1968 election of Richard Nixon and the Court's decision that same year in *Terry v. Ohio*⁴ effectively announcing the end of the "procedural revolution."

The *Northwestern University Law Review* specifically, and the Northwestern University School of Law community more generally, played critical roles in the evolution of Fifth Amendment doctrine. John Henry Wigmore published a number of comments on the Fifth Amendment in the early days of the journal,⁵ comments that matured into his magisterial treatment of the Fifth Amendment in his treatise on Evidence.⁶ In the mid-sixties, Walter Schaefer, a member of this faculty prior to his appointment to the Illinois Supreme Court, argued against a *Miranda*-like ruling from the Supreme Court.⁷ Following in Dean Wigmore's footsteps, Fred Inbau

* John Henry Wigmore Professor of Law, Northwestern University School of Law; Fellow, Procedural Law Research Center, China University of Political Science and Law, Beijing. I am indebted to the Julius Rosenthal Fund for supporting this research; to Al Alschuler, Peter Westen, Brian Leiter, and participants of the Northwestern University School of Law Faculty Workshop for comments; and to Javitt Adili for his excellent research assistance.

¹ 384 U.S. 436 (1966).

² *Dickerson v. United States*, 530 U.S. 428, 428 (2000).

³ Ronald J. Allen, *In Praise of Yale Kamisar*, 2 OHIO ST. J. CRIM. L. 9, 15 (2004).

⁴ 392 U.S. 1, 3, 12 (1968) (upholding stop and frisks on reasonable suspicion).

⁵ John Henry Wigmore, *Mode of Obtaining Immunity in Return for Self-Criminating Evidence*, 1 ILL. L. REV. 44 (1906); John Henry Wigmore, *The Privilege of a Corporation Against Self-Crimination*, 1 ILL. L. REV. 43 (1906); John Henry Wigmore, *Statutory Immunity for Self-Crimination—Scope of the Immunity*, 4 ILL. L. REV. 280 (1909).

⁶ 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 276–530 (3d ed. 1940).

⁷ WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING

was an early and forceful critic of *Miranda*,⁸ and another Northwestern journal, the *Journal of Criminal Law and Criminology*, played an important role in airing the ensuing debate.⁹ During the decades of the 1980s and 1990s, the *Law Review* returned to the forefront when it published Joseph Grano's detailed and thoughtful reconsideration and rejection of *Miranda*'s constitutional legitimacy¹⁰ and became the center of the storm over the empirical consequences of *Miranda*.¹¹ The *Northwestern University Law Review* has been intertwined with, and played an important role in, this critical debate, a history of which it can be justly proud.

It is considerably less clear that the legal system can be justly proud of the contours of the Fifth Amendment debate. There is a black hole at the center of the debate over the meaning of compelled self-incrimination that converts much of the almost century-old argument into incoherent gibberish, including the striking turn to a new direction that the *Miranda* court took. "Incoherent" is an often used, and just about as often misused, term in legal scholarship. It is often trotted out to demonstrate the speaker's rejection of a particular legal datum, such as an opinion or statute, thus actually being used to mean "inconsistent with my preferences" rather than "incapable of rational understanding, unintelligible, or incomprehensible." It is also frequently used to refer to some possible inconsistency in legal datum that is then exploited rather than cabined or given a generous reconstruction. This is not what I mean by "incoherent." I mean literally

CONSTITUTIONAL DOCTRINES (1967).

⁸ Fred E. Inbau & James P. Manak, *Miranda v. Arizona—Is It Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 24 CAL. W. L. REV. 185 (1987); Fred E. Inbau, *Over-reaction—the Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982); Fred E. Inbau, "Playing God": 5-to-4 (The Supreme Court and the Police), 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 377 (1966) [hereinafter Inbau, "Playing God"]. See also Yale Kamisar's tribute to Inbau's work, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & CRIMINOLOGY 182 (1977), and Inbau's seminal manual on interrogation practice, FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962).

⁹ See, e.g., Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Inbau, "Playing God," *supra* note 8, at 377; Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973).

¹⁰ Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1986); see also JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* (1993); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 874–80 (1979).

¹¹ See Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996) [hereinafter Cassell, *All Benefits, No Costs*]; Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) [hereinafter Schulhofer, *Miranda's Practical Effect*]; see also John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

incoherent. The *Miranda* debate, and much that preceded it, is literally incoherent in that it makes no sense at all. The irony here is that *Miranda* exploited the apparent ambiguity and actual incoherence of its predecessor but replaced it with pure incoherence.

Interestingly, the incoherence at the heart of *Miranda* is virtually identical to that at the heart of the old common law test of voluntariness, yet the legal debate has proceeded as though oblivious to the point. Even more interestingly, the common law had begun to inch toward a resolution of the conceptual incoherence of the doctrine (without ever directly addressing the point) by shifting the debate from the voluntariness of a person's statement to the police practices that led to its being made. Had the echoes of rationality in the police practices approach to confessions been understood and developed, the legal system would not now find itself in the grip of one literally incoherent argument doing battle with another for supremacy.

These, at any rate, are the ideas I intend to develop in this brief Essay. I will first describe the development of the standards governing the Self-Incrimination Clause and explain why the test of voluntariness is literally incoherent. I will then explain why *Miranda* suffers from exactly the same flaw, although the police practices test does not. I will conclude briefly with some speculation as to why this peculiar spectacle developed.

There are many competing historical explanations of the relevant developments that preceded the adoption in the Fifth Amendment of the right to be free from compelled self-incrimination that supposedly inform its meaning.¹² There were concerns that one's religious duty to confess not result in civic harm; there were concerns about maintaining the common law forms of pleading and trial; there were concerns about the inability of uncounseled laymen to withstand interrogation by skilled professionals; and of course there were concerns about the use of torture and to a lesser extent of the effect of promises.¹³ Remarkably, the direct historical record of the Fifth Amendment is sparse and ambiguous, with little in the way of enlightening legislative history as to which of these various matters were uppermost in the minds of the many individuals who fashioned and adopted the Fifth Amendment. Whatever the cause, two related but separate doctrines arose to respond to the interests underlying compelled self-incrimination. One was the common law rule that excluded coerced confessions on the ground that evidence extracted through pain or promises was unreliable, the other a constitutional rule that crystallized the meaning of the Fifth

¹² See WIGMORE, *supra* note 6, at 276–311; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN L. REV. 1 (1949); see also R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION* (1997).

¹³ See Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Charles Richard Doyle, Note, *The Third Degree—Its Historical Background the Present Law and Recommendations*, 43 KY. L.J. 392 (1955).

Amendment into a rule that a person could not be “compelled” into testifying by the threat of being held in contempt.

Notwithstanding the differences between these two legal doctrines, plainly they were responding to similar concerns about the effects of incentives on individuals, with one focusing more on physical and the other more on psychological incentives. In a remarkable opinion early in the Supreme Court’s career in constitutional criminal procedure, the Court brought the two lines together in concluding that any confession obtained by threat or promise violated the Fifth Amendment.¹⁴ Equally remarkable, the *Bram* decision had virtually no apparent impact on anything. For the next half-century, allegedly involuntary confessions continued to be tested by due process in both state and federal cases, with little or no help from the Self-Incrimination Clause, and the Self-Incrimination Clause remained largely limited to dealing with legal compulsion rather than physical coercion.¹⁵

A number of factors conspired to change all this, in particular the twin problems of police brutality and racism in the criminal justice systems of the southern states.¹⁶ An increasing number of state cases were reviewed by the Supreme Court, and the Court began to experiment with different means of regulating police behavior. The old common law voluntariness test was constitutionalized, police practices were scrutinized, formal procedural mechanisms were employed to attempt to cabin the problem,¹⁷ and the right to counsel began to make an appearance. The driving force behind this multi-prong attack on the problem of confessions was precisely the difficulty of sorting out voluntary, willful acts from those that an individual is coerced into doing, but at a minimum¹⁸ this requires the near impossible—it requires reliable access to or a reasonable approximation of the motivations of the individual who makes a statement.¹⁹

¹⁴ *Bram v. United States*, 168 U.S. 532, 543–49 (1897).

¹⁵ See *Ashcraft v. Tennessee*, 322 U.S. 143, 154–55 (1944) (discussing voluntariness as a due process issue); *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936) (same).

¹⁶ See Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 5 (A.E. Dick Howard ed., 1965); Paulsen, *supra* note 13, at 414–19.

¹⁷ The *McNabb-Mallory* rule, for example. See *McNabb v. United States*, 318 U.S. 332, 339–40 (1943) (upholding the Court’s power to exercise “supervisory authority” in federal criminal proceedings that go beyond the minimal protections of due process enforced against the states); *Mallory v. United States*, 354 U.S. 449, 452–55 (1957) (reaffirming this rule). For a discussion of the development of the rule, see YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* 457–58 (9th ed. 1999).

¹⁸ As discussed below, this is truly a “minimum” because there is yet a deeper problem.

¹⁹ Common sense generalizations are often used to determine states of mind, such as intent or knowledge (“a person intends the natural and probable consequences of his acts”), but motivation is a considerably more subtle problem than that of intent or knowledge or the other “mental states” that the law identifies. It is perhaps no surprise that motivation is virtually never an element of a cause of action, civil or criminal (discrimination cases being a primary exception), even though evidence of motivation is often admitted at trial.

Dissatisfaction with these efforts led in turn to *Miranda v. Arizona*'s substitution of a warning and waiver regime. The central idea was that custodial interrogation inherently puts pressure on the suspect to confess, pressure that can easily overwhelm the will.²⁰ Because of the ambiguity in what an "involuntary confession" is, and how one can be identified, the voluntariness test did not suffice to sort out truly voluntary from involuntary confessions resulting from police interrogation. The Court's creative response was to attempt to bolster the will by requiring a warning of the right to remain silent and the consequence of making statements and by providing assistance if desired in the form of counsel. Together, in the Court's view, these warnings would help strike the balance in the jailhouse setting, thus preserving the right to make statements only in the unfettered exercise of free will.

In the view of law enforcement, by contrast, *Miranda* was tantamount to the elimination of confessions. Who in their right mind would fail to exercise both their right to remain silent and their right to counsel? If either were exercised, the result would be no statement to the police, and thus the end of confessions. The end of confessions, in turn, would be a substantial blow to law enforcement.²¹

Quite remarkably, neither the Court's hope of bolstering the will of interrogated suspects, nor the critics' fear of the end of confessions, came to pass. Instead, things went on more or less as before, with the primary difference that the police henceforth had to recite the warnings before obtaining waivers and proceeding to the interrogation.²²

Or is this so remarkable? I think not. Ironically, the Court's solution to the problem of determining voluntariness merely recapitulates the very same problem it was attempting to avoid. I cannot purport to know why the Court followed the very same path it was attempting to avoid, but perhaps one reason is that it, like many others, was misled by thinking the problem was one of protecting free will. It is not all that surprising that efforts to regulate what is either a mythical or a ubiquitous entity would come to no good end. In the remainder of this Essay I develop these two points, which together form the black hole around which *Miranda* revolved, and into which, in my opinion, it has fallen.

The substantive problem with the voluntariness test is its ambiguity. *Ashcraft v. Tennessee*²³ provides an excellent example. How can one say Ashcraft did not have his will overborne after thirty-six hours of interrogation? If even that kind of treatment can generate disagreement about

²⁰ As the *Miranda* Court put it, "[t]he fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

²¹ See citations to the debate over *Miranda*, *supra* note 9.

²² See citations to the debate on the empirical consequences of *Miranda*, *supra* note 11.

²³ 322 U.S. 143 (1944).

whether an ensuing confession is voluntary,²⁴ then the voluntariness test appears fairly useless. But the reason it is useless is precisely that we do not have effective access to the motivations of the suspect; we lack the means of identifying what made the person confess. But, if we have no means of determining what overbears the will, what reason is there to think that giving warnings and obtaining a waiver will suffice to stop this very same will from being overborne? Maybe it will not, so the answer goes, but it will strengthen the will, increasing the probability that only those who truly wish to will confess. But how can that be? If the atmosphere of the jail house is so compelling, if it is powerful enough to overbear the will to compel confessions to serious felonies by even innocent people, why will it not compel waivers of the abstract legal rights contained in the *Miranda* warnings?²⁵ In the absence of an explanation of such matters, one would predict exactly what close to forty years of experience have demonstrated, which is that *Miranda* did not make much of a difference. The very same forces it was trying to quell would overwhelm its solution. In retrospect, perhaps this is not much of a surprise. *Miranda*, and for that matter the ensuing debate over the case, completely neglects that its solution is dependent upon the psychology of decisionmaking, and there are no cites to any such work. The opinion is all *a priori* reasoning that fails to take seriously its own presuppositions.²⁶

There is a still deeper problem with *Miranda*. The psychology of decisionmaking necessary for its solution to function has to distinguish between “free will” and “compelled” statements. Not only must we have adequate insight into human decisionmaking, but that insight must resolve the free will/determinism debate and provide an algorithm for distinguishing freely willed actions from determined ones, yet it seems inescapable that either free will always exists in the sense that one always has choices one can make, or more likely it never exists because we live in a deterministic world. This debate is the strongest and most pervasive black hole around which the arguments over *Miranda* revolve, invariably without even acknowledging its gravitational pull.

Take the two possibilities in turn. First, if free will exists, it means that there is some sort of separation between the mental and physical world by

²⁴ Justice Jackson, dissenting, did not think the confession involuntary. *Id.* at 156–74 (Jackson, J., dissenting).

²⁵ Kamisar, the great defender of *Miranda*, has never, to my knowledge, strongly emphasized the possibility of false confessions: “I share the view that not many *innocent* men (at least those of average intelligence and educational background) are likely to succumb to” objectionable interrogation techniques. Yale Kamisar, *What Is an “Involuntary” Confession?: Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963) (book review). Rather, his concern on this score is more “how many *innocent* men are likely to be *subjected* to these methods?” *Id.*

²⁶ My philosopher friends (such as Brian Leiter) would refer to this as *a posteriori* armchair scientific theorizing. My point is that the assertions preceded good grounds for knowledge.

which uncaused choices in the mental realm have consequences in the physical. While this strikes me as so much hokum for reasons I will soon develop, nonetheless if free will exists, its exercise is unaffected by the physical world, and thus it must always exist. A person who chooses to confess rather than endure yet more pain nonetheless chooses to confess. We may sympathize with or condemn the choice, but in a world in which there is free will, it is ubiquitous. In order to make a confession, the will must direct the body to articulate the words of the confession, and through that choice free will is exercised. Thus, a test designed to determine in such a world when choices are made in its absence is doomed to failure. And obviously words spoken without underlying choice, such as a person in a coma, would not constitute a confession.²⁷

Even more troublesome, it is highly unlikely that such a world exists. Choices are either made for reasons or not. If choices are made for reasons, those reasons determine the choices, and thus a choice is free only if the reasons are not themselves determined. Reasons, in turn, are either held for prior reasons or not. And so on in an infinite regress. If the regress leads back to nowhere but prior reasons, then obviously our choices are determined by those prior reasons. If they lead back to nothing, then the “reasons” we hold can only be explained as random fluctuations in the universe perhaps akin to quantum phenomena. Choices that ultimately are a consequence of random fluctuations in the universe do not embody any notion of free will worthy of respect, however, or bear any relationship at all to what passes in legal discourse for free will (which involves identity, autonomy, agency, and so on).

It is obvious that in order for a discussion of voluntariness to be well grounded, we must have a cogent and robust account of free will, but modern science seems to place us in a world where all states of affairs are determined by previous states of affairs—where all events and therefore all actions are determined by previous events. Our bodies and mental states, which are products of our genetic makeup and our past experiences, explain why we do what we do. But we want to attribute freedom and voluntariness only to individual agents who are architects of their own actions.²⁸ And if

²⁷ Although whether such words would be admissible would depend on state law. In *Colorado v. Connelly*, 479 U.S. 157, 159, 167 (1986), the Court held that the Fifth Amendment dealt only with state inducements and was not offended by the admission into evidence of a statement by a person who was insane.

²⁸ Peter Van Inwagen gives a classic account of the argument against the compatibility of free will and determinism. Van Inwagen defines determinism as the

conjunction of two theses: (a) for every instant of time, there is a proposition that expresses the state of the world at that instant . . . [and] if *A* and *B* are any propositions that express the state of the world at some instants, then the conjunction of *A* with the laws of physics entails *B*.

Peter Van Inwagen, *The Incompatibility of Free Will and Determinism*, 27 PHIL. STUD. 185, 186 (1975). According to this account, should determinism obtain, each subsequent state of the universe would be entailed by that which precedes it, a thorny possibility for freedom. *Id.*

we are not responsible for our genetic makeup and past experiences, how can we be responsible for our actions? How can we act voluntarily? We cannot.

To be sure, some philosophers have attempted to provide accounts of free will that embrace this deterministic worldview, but the way they reconcile the obviousness of determinism with our universal sense that we possess free will dooms these efforts as providing the foundation for the voluntariness test. Perhaps the best example is Daniel Dennett, who offers a naturalistic, evolutionary account of free will and agency. In *Elbow Room: The Varieties of Free Will Worth Wanting*, Dennett argues that the question of whether an agent could have acted otherwise in exactly the same situation is not worth discussing.²⁹ In his more recent *Freedom Evolves*, he gives a fuller account of his theory of the evolutionary development of both human consciousness and (what he takes to be) a particularly human notion of freedom.³⁰

For Dennett, free will is a byproduct of our self-regarding consciousness and our ability to select for more and more efficient behaviors or cultural memes; it is a product of both our consciousness and socialization.³¹ Dennett believes that what sets human beings apart is the fact that we can “answer inquiries about what we are doing and why. We can engage in the practice of asking, and giving, reasons.”³² In light of determinism, we cannot have a robust contra-causal freedom, on Dennett’s view, but he does not think it worth wanting. He believes that human consciousness is both a function of and a mediator of the inner competition of various impulses and drives for control,³³ and that it allows human beings to conceive better and better reasons and to strive for improvement of self and circumstance.³⁴ This account, according to Dennett, offers us everything we need to understand the ordinary concepts of agency, of holding others responsible and of taking responsibility. Thus, to the extent that free will exists for Dennett, it exists in this conscious process of examining our mental proclivities and altering them for the better.³⁵ Human beings are free, on Dennett’s view, to the extent that we are “rational, self-controlled, and not wildly misinformed.”³⁶

²⁹ DANIEL C. DENNETT, *ELBOW ROOM: THE VARIETIES OF FREE WILL WORTH WANTING* 136 (1984). Dennett thinks that the discussion of whether we “could have done otherwise” in exactly the same situation, the same state of affairs, is a question not worth asking, primarily because he accepts determinism. Rather, he thinks that it is useful to think of “could have done otherwise” in a more everyday sense and asks whether we could have done otherwise in similar but not identical situations. *Id.*

³⁰ DANIEL C. DENNETT, *FREEDOM EVOLVES* (2004).

³¹ *Id.* at 245–55.

³² *Id.* at 251.

³³ *Id.* at 252–54.

³⁴ *Id.* at 268.

³⁵ DENNETT, *supra* note 29, at 139–44; *see also* DENNETT, *supra* note 30, at 259–80.

³⁶ DENNETT, *supra* note 30, at 284.

This account makes recourse to all sorts of psychological factors that have more to do with whether we feel as though we could have acted otherwise than with whether we actually could have acted otherwise. But free will for the purposes of either *Miranda* or the voluntariness test gets at the latter. Freedom is more than just an intuition or a suspicion that we could have acted otherwise. Being free is quite different from feeling a certain way. The fact that we have a “subjectively open future”³⁷ does not entail that we in fact have an open future. That we have imperfect knowledge, both of ourselves and of the states of the universe which operate to constrict our actions, does not entail that the future is really up to us, as it were.

Dennett would likely respond that the variety of freedom that he is offering is the only one worth having or wanting. In *Elbow Room*, he writes:

Why do we ask “could he have done otherwise?” We ask it because something has happened that we wish to interpret. An act has been performed, and we wish to understand how it came about. . . . Does it suggest a criticism of the agent that might, if presented properly, lead the agent to improve his ways in some regard? Can we learn from this incident that this is or is not an agent who can be trusted to behave similarly on similar occasions in the future?³⁸

But these are not the pertinent questions for the confessions debate. They fail to address the very question at issue: whether a person is in fact free—whether a person can be held morally responsible for actions. That an agent is untrustworthy does not tell us anything about whether the person is a responsible agent that possesses the mysterious ability to initiate uncaused causes. As Dennett suggests, society can hold individuals responsible for their actions, but the legal debates relevant to free will demand to know whether such ascriptions and assumptions are appropriately grounded in free will or something else.

Dennett's account may yield insight into how to view the evolutionary development of consciousness, but he never even attempts to provide a robust account of freedom—he does not think it is worth wanting. Though it may be instructive as a clarification of the mental experience of free will, it is more a naturalistic account of consciousness in a deterministic world than an account of free will. When another human being acts, we still need to know, post-Dennett, whether the actions are the simple consequence of inexorable universe-states in transition or the product of an individual agent at work. Dennett's account does nothing to resolve this question.³⁹

³⁷ *Id.* at 91.

³⁸ DENNETT, *supra* note 29, at 142.

³⁹ There are many other versions of compatibilism, but they all make the same analytical move of “defining” free will in a way that negates it. See, e.g., HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 47–57 (1988) (arguing that a person is not free when he acts against the will he would like to have). This is fine, but why does he want to have the will he wants to have? And so on. For a discussion, see Albert W. Alschuler, *Constraint and Confession*, 74 DENVER U. L. REV. 957, 964–967 (1997). For a philosophical critique, but in the context of another compatibilist perspective, see

Remarkably, the debate over free will, while having a long and storied history in both philosophy and among scholars of the substantive criminal law, has been almost entirely neglected by the debate over the Fifth Amendment. Among the few who have edged close to the problem is Professor Grano, who concluded that, notwithstanding the difficulties,⁴⁰ the best course of action is to simply posit a notion of mental freedom so as to develop outcomes that comport with our intuitions.⁴¹ But if our intuitions cannot be clarified or supported, perhaps it is best to shift the discussion to firmer foundations. Though philosophers like Dennett can give an account of freedom of a sort, they cannot give us an account of the sort of freedom on which we can predicate a robust account of voluntariness. Absent such a contra-causal account, an account that places responsibility firmly in the individual, it is sensible to seek firmer footing and to expand our inquiry away from “degrees of impairment of mental freedom.”⁴² Surely both Dennett and Grano are correct that the experience of free will and freedom of choice, the fact that we experience ourselves as conscious agents, is something worth noting and taking seriously. But these intuitions, unsupported, are inadequate to form the basis for a theory of will, and thus for the voluntariness debate within the sphere of constitutional criminal procedure.

The absence of serious engagement with the problem of free will within constitutional criminal procedure is even more remarkable because the field of criminal law is replete with debates over it. In a valuable new article, Professor Peter Westen provides a magisterial overview of the free will debate, tying the philosophical and substantive criminal law discus-

GARY WATSON, AGENCY AND ANSWERABILITY 13–32 (2004).

⁴⁰ Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 874–80 (1979). Professor Grano also sees the corresponding divide between determinists and indeterminists. Though most analytic philosophers are compatibilists, the critiques of each position (compatibilism, incompatibilism, and libertarianism) are many and unresolved.

Even Grano, who sees and begins to discuss the problem, ends up taking a detour. After noticing the philosophical problem, he asserts that

a concern for mental freedom must play a role in the law of confessions. This conclusion, however, requires acceptance of neither the free will postulate, which assumes a contra-causal freedom of choice, nor the notion that an individual’s confession is involuntary when “his will has been overborne.” Instead, the mental freedom inquiry requires us to make normative judgments about various degrees of impairment of mental freedom.

Id. at 865–66 (footnote omitted). A concern for “mental freedom” requires that it exist, and ontologically the concept makes sense only if there is free will. Without free will, there are not degrees of mental freedom.

There is a sense in which Grano and I may be in agreement. He seems to be concerned primarily with the fact that we are inordinately attached to the notion of free will, but he moves toward an essentially normative inquiry about the impairment of this freedom. The appropriate debate could indeed be a normative one, but it need not make any reference to free will properly to achieve its ends. The question instead is the appropriate level of force, threats of force, and inducements to which a suspect can be subjected. That could be an old-fashioned “normative” inquiry, or it could instead have its referent in whole or in part in conventional beliefs about the role of government, and so on.

⁴¹ *Id.* at 879.

⁴² *Id.* at 866.

sions together.⁴³ His objective is not to resolve the controversy or close the schism, but instead to demonstrate that it is a false problem:

[C]ommentators who regard free will and determinism as a problem fail to see what is trapping them. They fail to see that what is trapping them are conceptual presuppositions of their own making. The appropriate response to this supposed problem is not to show that free will is “compatible” with determinism, not to embrace either free will or determinism to the exclusion of the other, not to urge that judgment about their relationship be suspended until further evidence is gathered, and not to conclude that their relationship is a problem that requires higher intelligence than humans possess. Each of those responses is a failure to see the trap. And the only escape is to recognize that there *is* no trap—other than the one we have created for ourselves by posing a question in terms that are inconsistent with the conditions of thought by which we are obliged to address it. The only way out of this fly bottle of our own making is to recognize it for what it is, thereby enabling us to leave it behind.⁴⁴

Westen's argument is subtle, ingenious, and wrong, at least insofar as demonstrating that free will is a nonproblem. He usefully divides his argument into three separate categories and endeavors to show that the debate over free will and determinism is a false problem in each of them, but none of his arguments demonstrates that the free will/determinism debate is a nonproblem. I will respond to each category in turn.

Westen first treats normative statements by pure determinists. His argument is that people who purport to be pure determinists also use the language of morality, invoking such terms as “justification” or even the forbidden (to a determinist) word “ought.” But this argument simply is orthogonal to whether free will is a nonproblem or whether determinism is true. It shows that some people appear to be using words that are incompatible with propositions that they utter, but others may not so use language. More importantly, the explanation can obviously be that those who violate this linguistic canon have been programmed to do so since the beginning of time. In addition, the use of the word “ought” can have moral connotations or can simply refer to consequences of actions. One can, for example, ask a computer what one ought to do in many instances—such as what drug to take given a diagnosis. The answer is an “ought” answer in light of the probabilities of the case. Perhaps people are just computers in this way, whether they are deploying the word “ought” or “justification” or whatever. Westen's argument would show a problem with determinism only if we assumed free will, and thus the legitimacy of true moral responsibility, but that is just the question that is in issue. Once freed from such circularity, it is obvious that the argument is perfectly compatible with both free will and determinism. At most, Westen merely shows that people from

⁴³ Peter Westen, *Getting the Fly out of the Bottle: The False Problem of Free Will and Determinism*, 8 BUFF. CRIM. L. REV. 599 (2005).

⁴⁴ *Id.* at 601–02.

time to time utter false propositions, just as computer programs sometimes go awry.

In essence, Westen's arguments against the relevance of normative statements in a deterministic framework smuggle in normative claims. According to Westen, statements that one "ought" to do something are irrelevant because, under determinism, it is not possible for individuals but to act as they do, and thus moral claims are incoherent, silly, whatever. Therefore, from a deterministic point of view, under Westen's construction, it does not make sense to talk about what one ought to do. What one says will either influence action or not, will either have a causal link to the subsequent actions of the party in question or not. But the causal link will not run through responsible agents being educated or influenced in their moral duty.⁴⁵

But, "ought" can mean many different things. The classic formulation dictates that "ought implies can." But the definitions of both "ought" and "can" are in play. "Ought" can mean an indication of simple preferences, a reference to commonly shared "best practices," or an admonishment to adhere to these practices lest one draw the ire of members of the community, among many possibilities. "Can" can be strong, indicating that an individual could have chosen otherwise in a given situation; weak, indicating that had the individual chosen otherwise in a given situation he or she could have acted accordingly; or shades in between. When Westen argues that it does not make sense to make "ought" claims under determinism, he takes himself to be making a conceptual claim about morality and determinism from without, but he is in fact sitting within a normative debate. He must and does implicitly adopt a particular stance regarding the content of the word "ought" that renders it incongruous with determinism. But, in so doing, Westen is presupposing a strong account of free will and, thus, the incoherence that he is attempting to demonstrate.

Westen next analyzes determinists who make certain metaphysical arguments, in particular arguments that imply that humans possess knowledge. In essence his argument is that knowledge requires some version of free will, for otherwise "[a] given assertion may be true. But because every assertion and every response has been predetermined from the beginning of time, we cannot know whether our assertions and responses, as well as our judgments as to their truth or falsity, have anything to do with reality."⁴⁶ Precisely. And what is objectionable about this? At most, again, all his argument shows is that individuals utter false statements, which is perfectly compatible with determinism (and free will for that matter). What is objectionable is simply that this is not consistent with the concept of a free and rational entity acquiring knowledge of its surroundings as an exercise of its

⁴⁵ *Id.* at 632–34.

⁴⁶ *Id.* at 640.

own free choices.⁴⁷ But, this again is to assume what is in issue. It demonstrates there is a “problem” only on the assumption that some version of free will is true. If that assumption is rejected, we are left again with our computer-like entity uttering propositions on various topics, all determined since the beginning of time, many of which no doubt are consistent with external reality (and some of which are not), even if the universe has been evolving for eternity toward my typing these letters on the computer screen.

Finally, Westen addresses the arguments of some of those who espouse belief in free will. Here his argument is analogous to the previous argument made above about the nature of choices. He adroitly points out that the source of those choices results at some point in a physical cause, dooming the arguments in favor of free will to falsity.

But, of course the argument for determinism is accordingly strengthened. At the end of the day, Westen points out that some determinists make arguments hard to reconcile with their stated beliefs (but not all do, and in any event they may be programmed to), and that free will enthusiasts are wrong. Collectively, his arguments are perfectly consistent with hard determinism, and thus, rather than showing the free will/determinism problem to be a false issue, provide, if anything, support for the truth of determinism.

I am either right or wrong to criticize Westen's arguments. If I am right, the argument for determinism is, if anything, supported, and thus so is the probability of the misdirection of the free will/voluntariness debate. Interestingly, if I am wrong, his conclusion also supports the misdirection of that debate:

The proper response to a false problem is not to wrestle with it but to escape it. The proper response to free will and determinism is to recognize that nothing can possibly come of it and, hence, that nothing can possibly turn on it. Just stop thinking about it. Just think about something else!⁴⁸

⁴⁷ At least, this is what is objectionable so far as the free will/determinism problem is concerned. Westen's argument can also be read as conflating the issues of consciousness and free will. He can be read as asserting that the possibility of consciousness (i.e., somebody or thing “knowing” something involves conscious awareness of the possibility) somehow negates determinism, but there is no reason to think that is true.

⁴⁸ Westen, *supra* note 43, at 652. Westen maintains that free will and determinism are “popular and commonplace hypotheses designed to account for ordinary experience.” *Id.* at 602. Westen's primary contention is they are incompatible ways of categorizing such ordinary experience. Westen is correct to note that both the concept of free will and that of determinism are ways of categorizing and understanding experience. In a certain sense, all of our thinking is geared toward understanding our experience. But where our categories of experience do not cohere, the solution is not, as Westen appears to advocate, to continue to use them blindly, to “think about something else.” *Id.* at 652. Rather, faced with such a situation, it is sensible to examine why they do not cohere and work to unify them; it is entirely possible that we are being blinded by some of their respective assumptions. Thus, if the weight of our considered experience leads to the conclusion that we have a “false consciousness” of free will, it is certainly reasonable to consider that possibility rather than to recoil from it. *Id.* at 639.

If one stops thinking about free will and determinism, one per force must also stop thinking about voluntariness and the exercise of will by individuals being interrogated and so on. That does not leave us with nothing to think about, however. It rather leads us back to the common law's focus on coercion and its evolution into a rule about police practices. As Professor Alschuler has argued:

The Court should define the term coerced confession to mean a confession caused by offensive governmental conduct, period. . . . Shifting their attention almost entirely from the minds of suspects to the conduct of government officers, courts should abandon the search for "overborne wills" and attempts to assess the quality of individual choices.⁴⁹

At least, in deference to Professor Westen, they "should" do so if their desires, whatever their sources, have to do with articulating words that relate to real rather than mythical entities.

So, there we are. If free will exists, choices to confess always involve it, so there is no line to draw between confessions as an exercise of free will and those that are not. If it does not exist, obviously there is no line to draw, and the whole question is useless, which again leaves us without a line. Yet, the *Miranda* debate and the voluntariness debate that preceded it largely proceeded as though there were. With one significant exception. A member of the Northwestern faculty, Fred Inbau, saw that the critical problem had little to do with the exercise of free will, but instead was about whether police tactics are abusive or likely to make an innocent person give a false confession. His great opponent, Professor Yale Kamisar, by contrast, defended *Miranda* on the basis of *a priori* reasoning about what tactics a suspect would experience as more or less "compelling." But in Kamisar's terms, nothing can turn on this subjective experience.⁵⁰ Unless

⁴⁹ Alschuler, *supra* note 39, at 957.

⁵⁰ In the one extended treatment of the free will problem in Kamisar's writing of which I am aware, he merely assumes that free will exists, or as he says, although most people confess for a reason, "in another sense, *all* criminal confessions are 'voluntary,'" that sense being that individuals always have a choice. Kamisar, *supra* note 25, at 747. I am not sure how he knows that, and frankly I think he is wrong. If he is right, then it is mysterious how he can also coherently suggest that different situations can "become increasingly less 'voluntary,'" *id.* at 750 (emphasis omitted), or how "powers of resistance and self-control" can be "enhanced," *id.* at 751. In these passages, written before *Miranda* was decided, Professor Kamisar is criticizing the use of a sliding scale of "voluntariness," but he obviously accepts it as an empirical reality. Indeed, it makes no sense to suggest that the proper test for confessions should be "the risk of untrue confessions" and "the offensiveness of police interrogation methods," *id.* at 746, on the one hand, and to insist on warnings and waiver on the other, except as a surrogate for bolstering an individual's "will." Interrogations without warning are not in themselves "offensive." They become so only if there is an increased risk of breaking down the will of the suspect, whether innocent or guilty. Writing after *Miranda* was decided, and defending warnings and waivers, Kamisar clearly embraces the idea that statements can become increasingly involuntary. See, e.g., Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 36–37 (1974) (noting that police warnings may "mitigate" the compulsion inherent in custodial interrogation). Again, if it exists, free will is attached to an on/off switch, not a dimmer. In any

the Fifth Amendment means a confession is valid only if the suspect is under no pressure, relative measures are irrelevant; an absolute standard is required.

The answer to this conundrum is Inbau's, which in turn reiterates the common law's concern about reliability, spiced with a limit on brutal behavior—an inquiry into appropriate state practices, whatever the source of appropriateness.⁵¹ Inbau, in turn, learned his lessons from the master, John Henry Wigmore, who argued against the use of the voluntariness terminology as early as 1940.⁵² Members of the Northwestern faculty have thus been instrumental to the effort to keep attention focused on the right issues, but they have been less successful in convincing the Supreme Court of the errors of its ways.⁵³ There are surely many reasons for this. Among them is the strong belief in free will that permeates our culture and consciousness, and the conventional view that free will can be “overborne” in some fashion or other. This presents an interesting question for the legal analyst and the legal system more generally: To what extent does one work with rather than explicitly reject operating assumptions widely held but wrong? I have no good answer to this question, but I suggest that the pattern of cases from *Miranda* going forward may be a response to it. The obvious progression from *Miranda* was the elimination of confessions, but instead the Court's cases have led to a near-return to the previous equilibrium.⁵⁴ Notwithstanding the ambiguity of the test, that prior equilibrium was largely informed by a set of concerns that reduced to the question of what is too much pressure to be brought to bear on a suspect. If the *Miranda* substitution could not truly introduce a new paradigm (because its focus on the exercise of will was mistaken), and if the prior equilibrium had settled at an approximately appropriate level, then the consequence of *Miranda* should be small rather than large change. In short, Wigmore and Inbau were right—the coercion debate would be best served by attention directed more to appropriate state practices and less to the nebulous and perplexing concepts of freedom of the will and voluntariness.

event, my main point here is that the failure of the *Miranda* debate to attend adequately to its true philosophical underpinnings has not been helpful.

⁵¹ See *supra* note 8.

⁵² WIGMORE, *supra* note 6, § 822.

⁵³ Allen, *supra* note 3.

⁵⁴ Over the long run, *Miranda*'s effects on law enforcement may well have been largely insignificant. Compare Cassell, *All Benefits, No Costs*, *supra* note 11 (arguing that *Miranda* caused only a small, though significant, loss in criminal cases annually and has a negligible effect on plea bargaining), with Schulhofer, *Miranda's Practical Effect*, *supra* note 11, 502 (1996) (arguing that *Miranda*'s effect has been almost totally insignificant).

