The Emerging Good Faith Exception to the Miranda Rule--A Critique

Martin R. Gardner

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol35/iss3/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
The Emerging Good Faith Exception to the *Miranda* Rule—A Critique

*By Martin R. Gardner*

Several Justices of the United States Supreme Court recently have espoused a "good faith" exception to the general rule in fourth amendment cases requiring exclusion of evidence obtained in unconstitutional searches or seizures. The good faith exception would permit the use at trial of evidence obtained by government agents who reasonably, but mistakenly, believed they were conducting a legal search or seizure. Proponents of the exception argue that it would not contravene what they consider the sole purpose of the exclusionary rule—deterrence of governmental invasions of privacy—because good faith misconduct is not deterrable. They believe that the rule is not mandated by the Constitution, and may therefore be modified by the

---

1. The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. In addition to the search and seizure context, exclusionary rules also prohibit the use at trial of certain evidence or testimony obtained by government officials through means that violate the fifth or sixth amendments. See C. Whitbread, CRIMINAL PROCEDURE 14 (1980). For a discussion of the fourth amendment exclusionary rule, see infra notes 19-73 & accompanying text.


4. See infra notes 74-83 & accompanying text. Chief Justice Burger would go so far as to allow the use of evidence obtained when government agents negligently violate the fourth amendment. See infra notes 75-77 & accompanying text.

5. See infra text accompanying notes 74-83.

6. "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect." Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting). See infra note 79 & accompanying text.

[429]
Although the proposed good faith exception is highly controversial, it may soon become law. The Court has broached the subject of an analogous good faith exception for certain evidence obtained in violation of the fifth amendment privilege against self-incrimination. Several Justices have suggested that a violation of "Miranda rights" during police interrogation of a criminal suspect should not necessarily prevent the resulting evidence from being used in the suspect's trial. Proponents of this exception perceive the primary purpose of the Miranda exclusionary rule as a "judicially contrived doctrine." Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring). See also United States v. Calandra, 414 U.S. 338, 348 (1974) (the exclusionary rule is a "judicially-created remedy").


Some commentators claim that a majority of the Court has already embraced the good faith exception. See, e.g., Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?, 30 DePaul L. Rev. 51, 67 (1980). Others count four Justices, but expect at least one more to join them. See, e.g., LaFave, supra note 8, at 338-40.

The fifth amendment provides in pertinent part: "No person shall be... compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law..." U.S. Const. amend V.

The fifth amendment provides in pertinent part: "No person shall be... compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law..." U.S. Const. amend V.
ary rule to be the same as that of the fourth amendment exclusionary rule—deterrence of governmental misconduct.\textsuperscript{14} They argue that, because good faith violations of \textit{Miranda} rights do not involve intentional or negligent governmental misconduct, no deterrent effect is achieved by excluding the evidence obtained.\textsuperscript{15} Although many commentators have considered the good faith exception to the fourth amendment exclusionary rule,\textsuperscript{16} there has been little scholarly analysis of the propriety of a similar exception in the fifth amendment context.\textsuperscript{17}

This Article first examines the fourth amendment exclusionary rule and the proposed good faith exception to that rule. It then traces the history of the exclusionary rule in fifth amendment self-incrimination cases and examines the Supreme Court's landmark decision in \textit{Miranda v. Arizona}. Throughout, the focus is on the doctrinal divergence of the fourth and fifth amendment exclusionary rules. The Article considers and criticizes proposals for a good faith exception to the fifth amendment exclusionary rule, and discusses the practical implications of the proposed exception. The discussion demonstrates that the purported analogy between the fourth and fifth amendment exclusionary rules rests on a fundamental confusion about the scope and purpose of the fifth amendment rule, particularly regarding the appropriate role of deterrence theory in the fifth amendment context. The Article concludes that whatever the merits of a fourth amendment good faith exception, the proposed fifth amendment exception would subvert fundamental constitutional principles and seriously threaten the vitality of \textit{Miranda}.\textsuperscript{18} Therefore, the Court should eschew any good faith exception to the \textit{Miranda} exclusionary rule.

\textsuperscript{14} See infra notes 172-78 & accompanying text.

\textsuperscript{15} See infra notes 170-78 & accompanying text.


\textsuperscript{17} Several commentators have noted the Court's references to a good faith exception in \textit{Miranda} cases but have not fully explored the ramifications of such an exception. See, e.g., Ritchie, \textit{Compulsion that Violates the Fifth Amendment: The Burger Court's Definition}, 61 MINN. L. REV. 383, 417 n.168 (1977); Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 SUP. CT. REV. 99, 124-25; Sunderland, \textit{Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond}, 15 WAKE FOREST L. REV. 171, 201 (1979).

\textsuperscript{18} See infra notes 240-85 & accompanying text.
The Fourth Amendment and the Proposed Good Faith Exception

The Divergence of the Fourth Amendment Exclusionary Rule From Its Fifth Amendment Counterpart

For most of the twentieth century the exclusionary rule has been used to enforce the fourth amendment's proscription of unreasonable searches and seizures. While earlier Supreme Court decisions suggested that exclusion of illegally obtained evidence was constitutionally mandated, recent cases have established that the fourth amendment exclusionary rule is a subconstitutional doctrine aimed at deterring governmental invasion of privacy. A brief history of search and seizure jurisprudence will illuminate the doctrinal divergence of the fourth and fifth amendment exclusionary rules.

Early Fourth Amendment Decisions

In the 1914 case of *Weeks v. United States*, the Supreme Court forbade federal courts from using in criminal trials evidence obtained through illegal searches and seizures. The *Weeks* Court feared that if illegally obtained evidence were not suppressed, federal courts would condone "a manifest neglect if not an open defiance" of the Constitution. This explanation for the exclusionary rule, which may be called the judicial integrity rationale, clearly suggested that the rule is constitutionally mandated.

However, the Court reached a different conclusion thirty-five years later in *Wolf v. Colorado*. While the *Wolf* Court recognized that the fourth amendment, and its protection against governmental invasions of privacy, applies to the states through the due process clause of the fourteenth amendment, the states were not constitutionally required to adopt the exclusionary rule. The Court reasoned that because deterring unreasonable searches and seizures was the main purpose of the exclusionary rule, and because such devices as private and adminis-

20. *Id.* at 398.
21. *Id.* at 394.
22. The concept of "judicial integrity" will be used in this Article to describe the avoidance of judicial participation in governmental wrongdoing. *See id.* at 392.
24. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Id.* at 27. *See also id.* at 30.
25. *Id.* at 27-28.
26. *Id.* at 28-31.
27. *Id.* at 31.
The Mapp Decision and Justice Harlan’s Dissent

Twelve years later, the Court in *Mapp v. Ohio* effectively overruled *Wolf* and required the states to apply the exclusionary rule to evidence obtained in violation of the fourth amendment. The Court’s rationale was, however, ambiguous. On the one hand, it maintained that the exclusionary rule was required in state cases because other remedies had been “worthless and futile,” thereby suggesting that the rule itself might not be constitutionally mandated. On the other hand, *Mapp* set out two theories implying that the rule must be imposed regardless of whether other remedies might deter invasions of privacy as effectively.

First, the *Mapp* Court repeated that, in addition to its deterrent function, the exclusionary rule maintains judicial integrity. The Court declared that “[n]othing can destroy a government more quickly than its failure to observe its own laws” and that the judicial use of illegally obtained evidence makes a “lawbreaker” of the government, in-

---

28. *Id.* at 29.
29. “Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn . . . a State’s reliance upon other methods which, if consistently enforced, would be equally effective.” *Id.* at 31.
30. The *Wolf* Court described the exclusionary rule in *Weeks* as a “matter of judicial implication” that was “not derived from the explicit requirements of the Fourth Amendment.” *Id.* at 28. Moreover, the *Wolf* Court intimated that Congress could legislatively overrule *Weeks*. *Id.* at 33. Finally, the *Wolf* Court subtly reinterpreted *Weeks* to substitute a deterrence rationale for the judicial integrity rationale. *Id.* at 31-33.
31. See *id.* at 39 (Black, J., concurring).
33. *Id.* at 655.
34. *Id.* at 652.
35. The Court pointed out that without an effective remedy fourth amendment rights are meaningless. *Id.* at 656. Failure to require the States to adopt the exclusionary rule would be tantamount to “grant[ing] the [fourth amendment] right but in reality . . . with-hold[ing] its privilege and enjoyment.” *Id.* (emphasis added). The “in reality” language may be interpreted to mean that the exclusionary rule is a practical requirement, not a constitutional one.
36. *Id.* at 659.
vites "contempt for law," and ultimately produces "anarchy."\textsuperscript{37}

Second, the Court developed another exclusionary rule theory based not on deterrence but on the "intimate relation" between the fourth amendment and the coerced confession doctrine\textsuperscript{38} derived from the fifth and fourteenth amendments.\textsuperscript{39} This theory, herein called the coerced confession analogy, was based on the Court's belief that the fourth amendment and the coerced confession doctrine protected the same interest, personal privacy.\textsuperscript{40} Given that the Constitution clearly requires courts to exclude coerced testimony,\textsuperscript{41} "Why," asked the Court, "should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.??\textsuperscript{42}

This analogy was consistent with the Court's earlier view that the fourth and fifth amendments run "almost into each other" in protecting the same "privacies of life" against governmental intrusion.\textsuperscript{43} This

\textsuperscript{37} Id. This suggests that the rule may be constitutionally mandated. If judicial use of illegally obtained evidence renders the government a "lawbreaker" and leads to "anarchy," the exclusionary rule ought to be required due to the Constitution's role as protector of the legal order.

\textsuperscript{38} See infra text accompanying notes 115-24.

\textsuperscript{39} Mapp, 367 U.S. at 656-57. The Court cited Bram v. United States, 168 U.S. 532 (1896), a case decided under the fifth amendment privilege against self-incrimination, \textit{id.} at 542, as support for the view that coerced confessions are inadmissible in federal cases. But see Miranda v. Arizona, 384 U.S. 436, 527-28 (1966) (White, J., dissenting) (the fifth amendment privilege might have been improperly applied in \textit{Bram}).

The \textit{Mapp} Court also cited Roger v. Richmond, 365 U.S. 534 (1961), a fourteenth amendment due process case, for the proposition that coerced confessions must be suppressed in state cases. \textit{Mapp}, 367 U.S. at 656. The Court's failure to refer to self-incrimination doctrine in the state context was at least partly due to the fact that at the time of \textit{Mapp} the fifth amendment privilege was not yet applicable to the States. \textit{See} Malloy v. Hogan, 378 U.S. 1 (1964) (extending the protection of the fifth amendment to defendants in state courts).

\textsuperscript{40} Mapp, 367 U.S. at 657.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 656.

\textsuperscript{43} Boyd v. United States, 116 U.S. 616, 633 (1886). The \textit{Boyd} Court held that the federal government was precluded, under both the fourth amendment and the fifth amendment privilege against self-incrimination, from using as evidence in a civil forfeiture proceeding an invoice obtained by a court order from two partners suspected of fraudulently attempting to import glass without paying the prescribed duty. The potentially incriminating invoice was viewed by the Court as private property and thus constitutionally protected. The Court explained:

The [fourth and fifth amendment] principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government, and its employees of the sanctity of a man's home and the privacies of life.

\textit{Id.} at 630 (emphasis added).
The concept of privacy entailed extensive protection of personal property. The fourth amendment protected individuals from seizures of personal property that was not an instrumentality of crime, even when government agents obtained a search warrant prior to the seizure. The fifth amendment privilege against self-incrimination also protected the individual from relinquishing personality if it tended to be incriminating. The Court had declared that "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Justice Harlan, joined by Justices Frankfurter and Whittaker, dissented in Mapp, rejecting the analogy between the fourth amendment and the coerced confession exclusionary rules and objecting to the majority's suggestion that the fourth amendment rule is constitutionally mandated. He saw the exclusionary rule developed in Weeks as simply "a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future," and rejected both the judicial integrity theory and the coerced confession analogy.

In Justice Harlan's view, allowing state courts to use illegally obtained evidence did not unconstitutionally sacrifice judicial integrity because it did not detract from the ultimate fairness of trials. Moreover, he argued that the doctrines requiring exclusion of coerced confessions are distinctly "disanalogous" to exclusion of evidence obtained in violation of the fourth amendment; the former are excluded to ensure that judicial proceedings are "accusatorial" rather than "inquisitorial," whereas the latter is excluded to deter actions of the police. According to Harlan, the fourth amendment provides substantive pro-

---

44. The rule exempting private property from evidentiary consideration under the fourth amendment came to be known as the "mere evidence" rule. See Warden v. Hayden, 387 U.S. 294, 300-10 (1967). Contraband or stolen goods were not exempt from governmental seizure, see Boyd v. United States, 116 U.S. 616, 623 (1886), and neither were instrumentalties of crime, see Gouled v. United States, 255 U.S. 298, 308-09 (1921).


47. Mapp, 367 U.S. at 672 (Harlan, J., dissenting).

48. Id. at 680.

49. Id. at 683.

50. Id. at 684-85. "The point, then, must be that in requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, [as in the fourth amendment context] but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure." Id. at 684.
tection of privacy, whereas the coerced confession doctrine has little to do with privacy protection and is not violated until an unlawfully obtained statement is admitted at trial.51

Rejection of the Coerced Confession Analogy

Although Mapp has not been overruled, subsequent decisions have eroded its theoretical foundation. The Court apparently has adopted Justice Harlan's arguments. Privacy protection is no longer considered to be an important fifth amendment value.52 In addition, the Court

51. Id. at 684. Justice Harlan explained in detail:
The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then “a prisoner . . . [has been] made the deluded instrument of his own conviction.” . . . That this is a procedural right, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police. This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained.

52. The Court's first step toward disassociating privacy protection from the fifth amendment was virtually imperceptable. In Warden v. Hayden, 387 U.S. 294 (1967), a fourth amendment case, the Court upheld the introduction of items of "mere evidence"—a cap, a jacket, and a pair of trousers—into evidence. Hayden established the principle that any evidence, even private property, could be seized under the fourth amendment so long as a search warrant is obtained or an exception to the warrant rule—the "hot pursuit" exception in Hayden—exists. See C. Whitebread, supra note 2, at 156-57. By rejecting the "mere evidence" rule, see supra note 44, the Hayden Court removed the fourth amendment barrier against seizures of personal property and applied an analysis focusing entirely on the manner in which the government obtains the property rather than on the nature of the property itself. See Note, supra note 45, at 567-71.

Once "mere evidence" became admissible under the fourth amendment, the Court soon removed the fifth amendment protection of private property. In Andresen v. Maryland, 427 U.S. 463 (1976), the Court held that the fifth amendment provides no protection against an otherwise permissible search and seizure of private papers containing incriminating statements made by the accused.

Privacy protection under the fifth amendment suffered a further blow in Fisher v. United States, 425 U.S. 391 (1976), in which the Court held that except in certain cases threatening the separate attorney-client privilege, a summons directing a third party to surrender the defendant's private papers could never violate the fifth amendment because it would not constitute personal compulsion against the accused. Id. at 396-405. The Fisher Court disavowed privacy protection as a fifth amendment value:
currently does not consider the fourth amendment exclusionary rule to be constitutionally mandated; rather, it is merely one of several possible remedies available to deter illegal invasions of privacy. Consequently, the Court has explicitly rejected the coerced confession analogy.

In *Schneckloth v. Bustamonte*, the Court stated that fourth amendment rights are "of a wholly different order" than fifth amendment rights. The Court held that under the fourth amendment one can validly consent to be searched even without knowing that one has a right to refuse. The Court declined to require government agents to give *Miranda*-like warnings before asking for consent because "[t]here is a vast difference between [fifth amendment] rights that protect a fair criminal trial and the [privacy] rights guaranteed under the Fourth Amendment." Although the fourth and fifth amendments once seemed to "run almost into each other" in their protection of privacy, *Schneckloth* suggests they now follow clearly separate paths.

The Court indirectly attacked the coerced confession analogy of *Mapp* in *United States v. Calandra*, in which it held that grand jury witnesses cannot refuse to answer questions based on information obtained through illegal searches. Extending the fourth amendment exclusionary rule to grand juries would not have any deterrent effect, the Court reasoned, because illegally obtained evidence was already inadmissible in criminal trials. The majority described the exclusionary rule as a "judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Through its em-

The Framers addressed the subject of personal privacy in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination.

*Id.* at 400.

54. *Id.* at 242.
55. *Id.* at 234.
56. *Id.* at 241-42. The *Schneckloth* Court believed that the basis for the *Miranda* decision was the need to protect the fairness of the trial process. *Id.* at 240.
59. *Id.* at 349.
60. *Id.* at 351.
61. *Id.* at 348. Justice Brennan dissented, lamenting that the majority was committed to a course that could lead to the abandonment of the fourth amendment exclusionary rule.
phasis on deterrence theory, the Court downplayed Mapp's judicial integrity theory\textsuperscript{62} and the coerced confession analogy.\textsuperscript{63}

In the 1976 case of \textit{Stone v. Powell},\textsuperscript{64} the Court went further by explicitly rejecting the \textit{Mapp} Court's judicial integrity theory. The \textit{Stone} decision forbade federal courts from granting a state prisoner habeas corpus relief on fourth amendment grounds if the state court had "provided an opportunity for full and fair litigation of [the] Fourth Amendment claim."\textsuperscript{65} Once again, the Court emphasized that the fourth amendment exclusionary rule was judicially created,\textsuperscript{66} and designed solely to deter police misconduct.\textsuperscript{67} The Court discredited the judicial integrity theory by pointing out that illegally obtained evidence has traditionally been admitted when the defendant fails, or lacks standing, to object.\textsuperscript{68}

The coerced confession analogy was explicitly discredited in \textit{United States v. Janis},\textsuperscript{69} decided the same day as \textit{Stone}. In \textit{Janis} the Court held that illegally obtained evidence, although inadmissible in state criminal trials, was admissible in federal civil tax proceedings.\textsuperscript{70} As in \textit{Stone}, the Court relied exclusively on deterrence theory;\textsuperscript{71} it reasoned that the state police were already deterred by the inadmissibility of illegally obtained evidence in criminal proceedings. The Court concluded that extending the exclusionary rule to tax proceedings would

\textit{Id.} at 365 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting). He feared that if deterrence became the sole justification for the rule, illegally obtained evidence would seldom be suppressed. "I... fear that when next we confront a case of a conviction rested on illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case also, that 'it is unrealistic to assume' that application of the rule at trial would 'significantly further' the goal of deterrence—though, if the police are presently undeterred, it is difficult to see how removal of the sanction of exclusion will induce more lawful official conduct." \textit{Id.} at 365-66. Government lawlessness would remain unabated. "Unless we are to shut our eyes to the evidence that crosses our desks every day, we must concede that official lawlessness has not abated." \textit{Id.} at 365. \textit{See Stone v. Powell, 428 U.S. 465, 492 n.32 (1976) (literature debating the deterrent effect of the exclusionary rule).}

\textsuperscript{62} \textit{Calandra}, 414 U.S. at 365.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} 428 U.S. 465 (1976).

\textsuperscript{65} \textit{Id.} at 494.

\textsuperscript{66} \textit{Id.} at 482. Not only had the fourth amendment exclusionary rule lost virtually all its force as a constitutionally mandated doctrine by the time of \textit{Stone}, it had, in the minds of some Justices, become a pernicious device for releasing guilty offenders back into society. In his concurring opinion in \textit{Stone}, Chief Justice Burger described the rule as a "Draconian, discredited device." \textit{Id.} at 500 (Burger, C.J., concurring).

\textsuperscript{67} \textit{Id.} at 486.

\textsuperscript{68} \textit{Id.} at 485.

\textsuperscript{69} 428 U.S. 433 (1976).

\textsuperscript{70} \textit{Id.} at 460.

\textsuperscript{71} \textit{Id.} at 446-54.
GOOD FAITH EXCEPTION

not deter any fourth amendment violations. While embracing deterrence theory, the Court rejected the coerced confession analogy as a basis for excluding the evidence:

[The] comparatively late judicial creation of a Fourth Amendment exclusionary rule [in Weeks] is not particularly surprising. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation.

In sum, fifteen years after Mapp a majority of the Supreme Court had adopted Justice Harlan's view that the fourth amendment exclusionary rule was based not upon a direct constitutional mandate but upon a subconstitutional policy of deterrence. In contrast, as discussed below, the Court has clearly recognized that the fifth amendment exclusionary rule is constitutionally required. This distinction becomes critical when determining whether either rule can be judicially modified.

The Proposed Good Faith Exception to the Fourth Amendment Exclusionary Rule

As deterrence theory emerged as the overriding justification for the fourth amendment exclusionary rule, several Justices suggested that illegally obtained evidence should not be excluded when the police had acted in good faith; such misconduct is not deterrable. Chief Justice Burger, for example, proposed limiting the exclusionary rule to "egregious, bad faith conduct." He argued that penalizing police for inadvertent errors of judgment and honest mistakes exacts an exorbitant cost to law enforcement, and that the exclusionary rule could be eliminated altogether if an "effective alternative remedy" were found. Burger's "bad faith" standard, if taken literally, would exclude evidence only when the police intentionally or recklessly violate the fourth amendment.

72. Id. at 458.
73. Id. at 443 (emphasis added). Previously, the Court had made similar observations: "The exclusionary rule. . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits." Brown v. Illinois, 422 U.S. 590, 601 (1975).
74. See supra note 6 and infra notes 172-75 & accompanying text.
77. Id. at 414.
Other Justices have proposed a more moderate good faith exception. Justice Powell has asserted that the exclusionary rule should be applied only when "the police have engaged in willful, or at the very least negligent, conduct that has deprived the defendant of some right." Justice White has urged that the rule should not be applied "in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."

This term, the Supreme Court will decide whether to recognize a fourth amendment good faith exception. The Fifth Circuit Court of Appeals has already held that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." Although the language of some recent cases suggests that the Court might adopt the Chief Justice's theory, the Court is more likely to adopt a view similar to the Fifth Circuit rule.

Recognition of a good faith exception to the fourth amendment exclusionary rule might be seen as paving the way for a similar exception to Miranda's fifth amendment exclusionary rule. The following sections of the Article discuss the jurisprudence of the fifth amendment privilege against self-incrimination and demonstrate that, regardless of the Court's decision on the fourth amendment issue, adoption of a good faith exception to the fifth amendment exclusionary rule would contravene the principles upon which the privilege is based.

---

79. Stone, 428 U.S. at 538, 540 (White, J., dissenting).
80. See supra note 9.
81. United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980).
82. "[W]hile the officer's belief about the scope of the warrant . . . may well have been erroneous . . . the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's [subsequent incriminating] statement." Rawlings v. Kentucky, 448 U.S. 98, 110 (1979) (emphasis added). "Application of the exclusionary rule [when no showing is made that the police officer purposely violated the fourth amendment] could not have the slightest deterrent effect on the behavior of an officer such as [this]." United States v. Ceccolini, 435 U.S. 268, 279-80 (1978).
83. It is likely that Chief Justice Burger would concur with the position of Justices White, Powell, and Rehnquist, which is a less extreme version of his own view. Some speculate that Justice O'Connor will also advocate some form of good faith exception, thereby forming a majority. See LaFave, supra note 8, at 340.
The Fifth Amendment Privilege Against Self-Incrimination and the *Miranda* Rule

Purposes of the Privilege

The privilege against self-incrimination\(^{84}\) protects persons\(^{85}\) from

---

84. In providing that "no person . . . shall be compelled in any criminal case to be a witness against himself," U.S. CONST. amend. V, the fifth amendment embodies a principle borrowed from the common law and derived from centuries of struggle against tyranny. The history is well documented in L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). The privilege was developed during the English struggle to obtain freedom of religion and of speech, and was designed to protect those who were accused of religious crimes such as heresy, of political crimes such as treason, or of criticizing the government. *Id.* at 332. By the mid-seventeenth century, the privilege had been incorporated into English common law, with which it emigrated to America. *Id.* at 303. *See also* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 4 (1955).

The English origins of the privilege do not explain its present function. "[I]t would be ludicrous to attempt to fix the proper scope of the privilege in light of what was appropriate under the Stuarts or Cromwell." Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 679 (1968). "To say that the struggle to establish the right [against self-incrimination] in America duplicated or even paralleled the struggle in England would be a gross exaggeration because there was never in the colonies a Court of High Commission or a Star Chamber. Yet, they had their rough equivalents at certain times in certain colonies." L. LEVY, *supra*, at 339. Moreover, the scant colonial history of the privilege offers little help in understanding the intent of the Framers. *Id.* at 334; McNaughton, The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Être and Miscellaneous Implications in POLICE POWER AND INDIVIDUAL FREEDOM 223, 224 (C. Sowle ed. 1962). "[P]erhaps it is fruitless to search for some evil precisely envisaged by the early constitutional draftsmen, an evil at which the provision against self-incrimination was deliberately aimed." L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 221 (1959). Moreover, by the time the Bill of Rights was drafted, the founding fathers may well have perceived the privilege to be relatively insignificant in relation to other provisions expressed therein. Twining v. New Jersey, 211 U.S. 78, 110 (1908).

Some go so far as to suggest that, unlike other Bill of Rights provisions, the privilege is pernicious:

"[T]he privilege is . . . exceptional . . . in the general setting of jurisprudence and morality. While it carries the burden of impeding ascertainment of that truth that is common to all testimonial privileges, it has uncommon burdens as well. . . . [T]he fifth amendment privilege extends, by hypothesis, only to persons who have been breakers of the criminal law or believe they may be charged as such. Again, while the other privileges accord with notions of decent conduct generally accepted in life outside the court room, the privilege against self-incrimination defies them. No parent would teach such a doctrine 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."

Friendly, *supra*, at 679-80. "[T]he wisdom and justice of the privilege against giving self-incriminatory testimony are far less evident than most of the rights and privileges of the Bill of Rights." S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 24 (1957).

85. "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." United States v. White, 322 U.S. 694, 698 (1944). The privilege is not available to corporations, Wilson v. United States, 221 U.S. 361 (1911),
having incriminating testimonial\textsuperscript{86} evidence introduced against them during criminal proceedings, if the evidence was obtained through governmental\textsuperscript{87} compulsion.\textsuperscript{88} The Court has construed the constitutional phrase “criminal cases”\textsuperscript{89} to protect anyone who refuses to answer “official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”\textsuperscript{90} Furthermore, the Court has interpreted “incriminating evidence” to include compelled testimony that might only indirectly incriminate a person by “furnish[ing] a link in the chain of evidence needed to prosecute” him.\textsuperscript{91} But once the possibility of incrimination is eliminated, either because the statutes of limitations have expired or because the government has granted immunity, a witness may be compelled to respond\textsuperscript{92} to governmental questions even though his answers might tend to expose him to embarrassment, disgrace, or criticism.\textsuperscript{93} Immunity grants protect the witness from evidentiary use, not only of the immunized testimony itself, but also of evidence derived therefrom.\textsuperscript{94}

Stating the doctrine of the privilege is a great deal easier than accounting for its rationale. Indeed, the Court has appealed to diverse policy considerations in a somewhat unsuccessful attempt to articulate


86. “Non-testimonial” evidence such as blood samples, fingerprints, and other physical evidence is not protected by the privilege even though such evidence might be “incriminating.” See, e.g., United States v. Wade, 388 U.S. 218, 221 (1967) (voice and body in suspect lineups are physical characteristics of a non-testimonial nature); Schmerber v. California, 384 U.S. 757, 765 (1966) (extraction of blood sample without defendant's consent does not violate privilege).

87. The fifth amendment privilege applies to state as well as federal governmental action. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

88. See C. Whitebread, supra note 2, at 256.

89. See U.S. Const. amend V.


92. The guarantee of the privilege “is only that the witness be not compelled to give self-incriminating testimony.” United States v. Washington, 431 U.S. 181, 188 (1977) (emphasis in original and added).

93. Brown v. Walker, 161 U.S. 591, 595 (1896). Accord Murphy v. Waterfront Comm'n, 378 U.S. 52, 100 (1964) (White, J., concurring) (“[T]he privilege does not convey an absolute right to remain silent. It protects a witness from being compelled to furnish evidence that could result in his being subjected to a criminal sanction.”).

the underlying values protected by the privilege. As a result, "the continuing debate over the policies underlying the right to silence is of considerable importance." The Court's eclectic approach to the privilege is illustrated by its 1964 decision in Murphy v. Waterfront Commission. In Murphy the Court declared that the privilege reflects many of our most fundamental values and noble aspirations, including 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 inhuman treatment and abuses; our sense of fair play which dictates "a fair state-individual balance ... 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 for the guilty," is often "a protection to the innocent." Unfortunately, many of these statements are so vague as to be of limited use and others merely restate the privilege. Courts and commentators, however, have carefully examined the various policies enunciated in the cases and literature, and have suggested that there are four central purposes of the privilege: 1) preserving the accusatorial nature of the criminal justice system, 2) ...
protecting the suspect's dignity and free will against the power of the state,
ensuring the reliability of evidence, and protecting individual rights of privacy.

The first two policies should be considered the main underpinnings of the privilege against self-incrimination. The third is protected by traditional due process requirements. The fourth has been eroded by allowing compelled disclosure once immunity is promised, and has been explicitly disavowed in recent cases. These as-

See Stone, supra note 17, at 156.

103. “[T]he great purpose [of the self-incrimination clause is the] protection of the lone individual against the all-powerful state.” Friendly, supra note 84, at 723. The privilege “protects the individual against the collective power of the state.” E. Griswold, supra note 84, at 30. “While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, [the framers] were not less concerned about the humanity that the fundamental law should show even to the offender.” L. Levy, supra note 84, at 432. “[M]ost importantly, [the privilege] serves the function of assuring that even guilty individuals are treated in a manner consistent with basic respect for human dignity.” McCormick on Evidence 252 (E. Cleary 2d ed. 1972) [hereinafter cited as McCormick].

104. “The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth.” In re Gault, 387 U.S. 1, 47 (1967). See McCormick, supra note 103, at 252; Sunderland, supra note 16, at 187 (“Various forms of coercion may force an individual to admit practically anything” and thereby generate “testimomially untrustworthy” evidence).

105. See Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (the privilege “stands as a protection of . . . the right of each individual to be let alone”); United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting in part) (the privilege safeguards the individual’s “right of privacy, a right to a private enclave where he may lead a private life”); Berger, supra note 95, at 213 (“human dignity” and “individual privacy” are two equally important values that should be protected by the privilege against self-incrimination); McKay, supra note 100, at 209-11 (the “real reasons” for the privilege are to preserve the integrity of the accusatorial system and to protect “individual privacy”).

106. The “real” purpose of the privilege is to protect the humanity of the suspect and his “sovereignty” against being conscripted by the state to defeat himself. McNaugton, supra note 84, at 237. “[T]he Burger Court sees the primary constitutional purpose of the privilege [as]: [the] preservation of an accusatorial system of justice in which the government must prove its case without the use of evidence forced from the mouth of the accused.” Ritchie, supra note 17, at 388.

107. See McKay, supra note 100, at 206 (abusive treatment that would result in evidentiary unreliability is adequately deterred by due process guarantees); see also supra notes 84-96 & accompanying text.

108. See supra notes 97-100 & accompanying text. Many commentators reject the notion that protecting privacy is a main purpose of the self-incrimination clause. See, e.g., Friendly, supra note 84, at 688. Even advocates of the privacy rationale admit difficulty in reconciling the rationale with current Supreme Court doctrine. See, e.g., Berger, supra note 95, at 194-95, 213; McKay, supra note 100, at 230; Ritchie, supra note 17, at 391-98.

109. See supra note 52 and infra notes 152-54 & accompanying text; see also United States v. Mandujano, 425 U.S. 564, 572 (1976) (the privilege cannot be invoked simply to protect the grand jury witness’ interest in privacy).
serted purposes form the background against which the development of the *Miranda* exclusionary rule and the propriety of a good faith exception to that rule can be assessed.

The Admissibility of Confessions Before *Miranda*: The Due Process Analysis

Before *Miranda v. Arizona*\(^{110}\) was decided in 1966, the law governing the admissibility of pretrial confessions was based largely on doctrines other than the privilege against self-incrimination. The earliest state cases arose in the 1930s and 1940s and concerned testimony compelled through physical coercion and police brutality. The Supreme Court ruled that such testimony must be excluded on due process grounds,\(^{111}\) because such police conduct was "revolting to the sense of justice"\(^ {112}\) and the resulting evidence was likely unreliable.\(^ {113}\) Excluding involuntary confessions later came to be seen as a means of promoting the values of an accusatorial system of criminal justice, and ensuring "fair play and decency."\(^ {114}\)

Toward these ends, the Court created two tests\(^ {115}\): a subjective test for determining whether the particular confession was voluntary,\(^ {116}\)

---


\(^{111}\) Brown v. Mississippi, 297 U.S. 278 (1936), was the Court's first state coerced confession case. See C. Whitebread, supra note 2, at 281-82. In *Brown*, the police had dictated confessions to a murder and then extorted signatures from three black defendants by hanging and whipping them. The Court excluded these confessions on due process grounds. *Brown*, 297 U.S. at 281-83, 287. See also Ward v. Texas, 316 U.S. 547, 555 (1942) (compelled confessions excluded on due process grounds); Chambers v. Florida, 309 U.S. 227, 238-43 (1940) (same).

\(^{112}\) Brown v. Mississippi, 297 U.S. 278, 286 (1936).

\(^{113}\) *Id.* at 283. The "untrustworthiness" rationale—the view that the coerced confession doctrine was designed merely to protect the integrity of the fact-finding process—could explain the result in *Brown*. Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 553-54 (5th ed. 1980) [hereinafter cited as Y. Kamisar].

\(^{114}\) [In]voluntary confessions are inadmissible not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." Rochin v. California, 342 U.S. 165, 173 (1952). See also McCormick, supra note 103, at 316.

\(^{115}\) The distinction between the subjective and objective tests is discussed in detail in McCormick, supra note 103, at 317-21.

\(^{116}\) See, e.g., Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (confession of suspect of
and an objective test for determining whether the circumstances surrounding the confession were inherently coercive. The subjective test was designed to ascertain whether in a particular case the confession was essentially the result of a free choice. The objective test, in theory, was designed to determine whether the interrogation offended basic standards of fairness and decency. No single factor, with the possible exception of direct physical coercion, guaranteed that a confession would be inadmissible under the objective test.

These due process tests, referred to jointly as the "coerced confession doctrine," often proved inadequate to protect the rights of suspects. The Court never resolved whether the true evil was unreliable evidence or obnoxious police behavior, resulting in confusion re-


119. See Malinski v. New York, 324 U.S. 401 (1945). In Malinski, the accused, isolated from friends and counsel, was required by the police to stand naked for three hours, and then permitted to partially clothe himself for occasional questioning during the next seven hours, until he confessed. Id. at 405. The Court reversed his conviction without determining that the confession was actually involuntary. Id. at 410.

120. McCormick, supra note 103, at 318-19. Even physically abused suspects did not always have their confessions suppressed. See, e.g., Lisenba v. California, 314 U.S. 219 (1941), in which the Court permitted use of a confession obtained after a police officer had slapped the suspect. Although the slap was unlawful under state law, it did not render the subsequent confession "coerced." Id. at 230-41. But see Brown v. Mississippi, 247 U.S. 278, 283-86 (1936) (the severe physical coercion by police appears to have resulted in a finding that the confessions were coerced because of the police brutality by itself).

121. Y. Kamisar, supra note 113, at 557. Some commentators have found other faults in the voluntariness test:

Judicial decisions speak in terms of the "voluntariness" of a confession, but the term itself provides little guidance. To the extent "voluntariness" has made a determination of the state of an individual's will the crucial question, it has not assisted analysis. Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement
garding the basis of the fifth amendment exclusionary rule. Moreover, the court did not sufficiently explain the objective test so that constitutionally appropriate interrogation could be readily distinguished from its unlawful counterpart. Because defendants had difficulty recreating in court the interrogation atmosphere, the police usually won the inevitable swearing contest. The result of courts applying these two due process tests in a non-uniform manner was confusion as to the nature and scope of suspects' rights.

The inadequacy of the coerced confession doctrine and the undesirability of case-by-case analysis of the constitutionality of police interrogations did not go unnoticed by the Supreme Court. Its initial response, in 1964, was to recognize the sixth amendment right to counsel during interrogation. Ultimately, however, in *Miranda v. Arizona*...
the Court chose to govern custodial interrogation by requiring the now-familiar *Miranda* warnings.\textsuperscript{127}

**The Exclusionary Rule of *Miranda v. Arizona***

In *Miranda* the Court established a strict exclusionary rule, lest the privilege against self-incrimination degenerate into merely "a form of words,"\textsuperscript{128} technically applicable at trial but effectively overridden through inducements of damaging statements gathered in the "inherently coercive" atmosphere of station house interrogation.\textsuperscript{129} The department's lack of legislative authorization to compel an answer. That is to say, until *Escobedo* was decided, at any rate, the Constitution did not appear to prohibit legislatures from investing police with the power to compel non-incriminating answers, although the legislatures had not seen fit to do so.


The *Miranda* warnings were meant to supplement the established principles of the coerced confession doctrine. Due process considerations still help determine whether statements made by suspects who have been apprised of their rights are truly voluntary. \textit{See, e.g.}, United States v. Blocker, 354 F. Supp. 1195, 1198 n.11 (D.D.C. 1973) (although a signed waiver form is strong evidence that a suspect voluntarily waived his *Miranda* rights, "[t]he court must still decide whether, in view of all the circumstances, defendant's subsequent decision to speak was a product of his free will"); \textit{see also} Mincey v. Arizona, 437 U.S. 385 (1978) (Court must make due process determination of "voluntariness" of statement given by suspect who had not waived his *Miranda* rights before admitting for impeachment purposes). Due process doctrine also is used in assessing the admissibility of statements made by suspects not in custody. \textit{See, e.g.}, Hoffa v. United States, 385 U.S. 293, 303-04, 310 (1966) (*Miranda* warnings not required when defendant is not in custody and makes statements to undercover police agent; statements were "voluntary" and thus admissible under due process considerations).

In addition, the Court has recently held that the *Miranda* warnings are not required in custodial interrogation situations in which public safety is endangered. New York v. Quarles, 52 U.S.L.W. 4790 (U.S. June 12, 1984) (No. 82-1213). Thus the sole constitutional doctrine governing admissibility of statements obtained in such situations is the due process doctrine. \textit{See id.} at 4792 n.5.

128. *Miranda*, 384 U.S. at 444 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

129. The *Miranda* Court made numerous references to the coerciveness inherent in custodial police interrogation. \textit{See, e.g.}, \textit{id.} at 455, 461, 467, 468, 478; \textit{see also id.} at 533 (White, J., dissenting). Given this coercive atmosphere, exercise of the privilege against self-incrimination at trial would be ineffective unless special procedural protections were applied to station house interrogation.

Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."
Court held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”130 The Court reviewed police interrogation manuals and other sources documenting police interrogation practices,131 and concluded that warnings were necessary to deter widespread police misconduct, including the physical violence and “third degree” tactics that were at times used against suspects.132 The Miranda warnings were spelled out133 as the required procedural safeguards “unless other fully effective means are devised.”134

Aside from the risks of police brutality and psychological coercion, the Court declared that such warnings are necessary to counter the inherent compulsion of the police station,135 to protect the suspect’s human dignity136 and right to a “private enclave,”137 to ensure that any statement made by the suspect would be the product of a free choice,138 and to preserve an accusatorial system of criminal justice.139 The Court declared that the Constitution requires a “fair state-individual balance,”140 which in turn requires the state to obtain evidence against a defendant through its own independent labor rather than by the “cruel, simple expedient of compelling it from [the defendant’s] own mouth.”141

Most importantly for purposes of assessing the propriety of a good faith exception to the fifth amendment exclusionary rule, the Miranda Court rejected a case-by-case appraisal;142 warnings, or their

---

130. Id. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).
131. Id. at 444.
132. Id. at 445-58. The dissenters criticized the Court’s use of these sources as a basis for the strict exclusionary rule. Id. at 532-33 (White, J., dissenting). “Judged by any of the standards for empirical investigation utilized in the social sciences, the factual basis for the Court’s premise is inadequate.” Id. at 533.
133. “Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Id. at 444.
134. Id.
135. Id. at 455-56, 458.
136. Id. at 457.
137. Id. at 460.
138. Id. at 458.
139. Id. at 460.
140. Id. (quoting 8 J. WIGMORE, EVIDENCE 317 (McNaughton rev. ed. 1961)).
141. Id. (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).
142. The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of
equivalent, \(^{143}\) became a prerequisite to admissibility\(^{144}\) even if the prosecution could show that the confessor was aware of his rights.\(^{145}\) An incriminating statement may still be admitted if the suspect waives the privilege,\(^{146}\) but the government must meet a "heavy burden" to establish that there was such a waiver.\(^{147}\) The Court implied that the constitutional rights at stake must not be compromised even if law enforcement might be hampered.\(^{148}\) Allowing the government to violate individual rights would condemn it to the status of lawbreaker, subject it to society's contempt, and ultimately lead to anarchy.\(^{149}\)

The Purpose of \textit{Miranda}

The interests the Supreme Court sought to promote through the \textit{Miranda} warnings may be considered in light of the four traditional purposes underlying the privilege against self-incrimination: 1) maintaining the accusatorial system of criminal justice; 2) protecting the suspect's dignity and free will; 3) ensuring the reliability of testimonial

\footnotesize{the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.}

\textit{Id.} at 468.

143. The \textit{Miranda} Court was somewhat unclear about the status of the warnings. In several places the Court suggested that the warnings might be subconstitutional regulations that could be disregarded if appropriate alternatives were devised. In one passage the Court noted:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the . . . safeguards must be observed.

\textit{Id.} at 467.

144. \textit{Id.} at 479.

145. \textit{Id.} at 469-72.

146. The \textit{Miranda} decision does not prevent all confessions from being used as evidence. Voluntary confessions by persons not under police custody remain admissible, \textit{id.} at 478, as do confessions by suspects in custody who were warned of their rights and "knowingly and intelligently" chose to confess, \textit{id.} at 475, 478. The Court found these rules necessary to allow for effective law enforcement. \textit{Id.} at 481.

147. \textit{Id.} at 475.

148. \textit{Id.} at 479.

149. \textit{Id.} at 480 (quoting \textit{Olmstead v. United States}, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
evidence, and 4) protecting the suspect's privacy rights. A close reading of *Miranda* suggests that interests (1) and (2) were of primary importance to the Court, while interests (3) and (4) were viewed as having very little to do with the values protected by the privilege against self-incrimination.

The *Miranda* Court did not explicitly address interest (3), reliability of evidence, as a goal of the privilege. Language in *Miranda* does suggest, however, that interest (4), protection of privacy, had little to do with the outcome of the case. The Court specifically noted that suspects *may be* interrogated in some circumstances if counsel is present even though the suspect desires to remain silent. Had privacy protection been a central concern, the Court likely would have condemned not only the use of statements obtained in violation of *Miranda*, but also the fact of the interrogation itself, especially if the suspect desired to be left alone. Subsequent cases confirm that privacy is not a significant interest protected by the privilege against self-incrimination.

The evil the *Miranda* Court meant to eliminate arises not from the privacy intrusion—the questioning of the suspect—but from the use of

---

150. See supra notes 95-105 & accompanying text.

151. If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

152. The Court did say that if the suspect asserts his right to consult with a lawyer "there can be no questioning." *Miranda*, 384 U.S. at 444-45. Likewise "the police may not question him" if he indicates he does not want to be interrogated. *Id.* While such language may imply a violation of the fifth amendment at the moment of questioning, the *Miranda* rule prohibits only the use of improperly obtained statements. "[T]he prosecution may not use statements . . . unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* (emphasis added). Thus, unless the government introduces the evidence against the suspect, the privilege against self-incrimination is not violated. See infra notes 155-56 & accompanying text.

153. See, e.g., Fisher v. United States, 425 U.S. 391, 400 (1976) (quoted supra note 52). The *Fisher* Court did acknowledge, however, that the prohibition against coercing testimonial responses does in fact protect privacy interests. *Id.* at 399. See supra note 52.

compelled statements against him.\textsuperscript{155} Such use is the gravamen of a violation of the fifth amendment privilege against self-incrimination.\textsuperscript{156}

The \textit{Miranda} Court was primarily concerned with interests (1) and (2), maintaining an accusatorial system\textsuperscript{157} and protecting the suspect's obtained by federal agents while questioning a suspect not in custody and in his home held admissible even though no \textit{Miranda} warnings given).

\textsuperscript{155} The Court's position on this point was later made clear in Baxter v. Palmigiano, 425 U.S. 308 (1976), in which the Court said that \textit{Miranda} is violated only when a statement elicited without full compliance with its demands is \textit{used} in a criminal prosecution. \textit{Id.} at 315. Therefore, the \textit{Baxter} Court saw no constitutional impediment to using statements obtained without the \textit{Miranda} safeguards in “non-criminal” prison disciplinary proceedings. \textit{Id.}

State court opinions have offered similar interpretations. The fifth amendment is violated “only when [a defendant’s] statements, taken without the necessary observance of his protection, are used against him in a criminal case.” Terpstra v. Niagara Fire Ins. Co., 26 N.Y.2d 70, 75, 256 N.E.2d 536, 538, 308 N.Y.S.2d 378, 382 (1970). Similarly, Noncoercive questioning is not in itself unlawful [and] Fifth . . . Amendment rights protected by . . . \textit{Miranda} are violated only when evidence obtained without the required warnings and waiver is introduced against the person whose questioning produced the evidence. The basis for the warnings required by \textit{Miranda} is the privilege against self-incrimination . . . [which] is not violated when the information elicited from an unwarned suspect is not used against him . . . . Unlike unreasonable searches and seizures . . . there is nothing unlawful in questioning an unwarned suspect so long as the police refrain from physically and psychologically coercive tactics condemned by due process and do not use against the suspect any evidence obtained. People v. Varnum, 66 Cal. 2d 808, 812-13, 427 P.2d 772, 775-76, 59 Cal. Rptr. 108, 111-12 (1967).

Thus, \textit{Miranda} does no more than assure unwarned suspects of “informal use immunity,” Ritchie, supra note 17, at 413. \textit{But see} Rhode Island v. Innis, 446 U.S. 291, 309 & n.5 (1980) (Stevens, J., dissenting) (“\textit{Miranda} protects a suspect [who is in custody and has requested an attorney] from any interrogation at all”). Some commentators have embraced the point of view expressed by Justice Stevens in Innis. See, e.g., Schrock, Welsh & Collins, supra note 127, at 21 & n.101, 22 n.106, 32-33 n.138; Stone, supra note 17, at 137-41.

\textsuperscript{156} See supra note 155. Some commentators have taken the contrary view that the privilege against self-incrimination is violated at the time unwarned suspects are questioned. \textit{See} Schrock, Welsh & Collins, supra note 127, at 21; Stone, supra note 17, at 137-41. These authors argue that because \textit{Miranda} obviously extends fifth amendment protections to the police station, it must follow that the privilege can be violated by the mere taking of a statement without a waiver of \textit{Miranda} rights. In other words, these authors see the taking of the statement as a sufficient condition for violation of the privilege. This position suggests that a suspect's rights would be violated if a “waiverless” statement is written by the suspect and then torn up by the prosecutor who then drops all charges and releases the suspect, never to bother him again. However, \textit{Miranda} is more accurately read as holding that the taking of a “waiverless” statement is only one necessary precondition for a violation of the privilege; the additional necessary condition is governmental use of the statement against the suspect. This reading accommodates \textit{Miranda}'s clear application of the privilege to the station house (in much the same way the privilege applies to other non-trial settings such as the grand jury) but avoids the dubious position that the suspect can “incriminate” himself even though the government makes no use whatsoever of the “incriminating” evidence.

\textsuperscript{157} An accusatorial system is characterized by accusation by non-judicial entities, no-
dignity and free will. The Court was convinced that inquisitorial methods of station house interrogation were widespread. For example, the Court noted that police manuals recommended that officers interrogate suspects in private and display an air of confidence in the suspect's guilt. Even before *Miranda*, commentators had argued that such police practices would lead suspects to fear sanctions for refusing to speak. By requiring the police to inform suspects of their right to remain silent, the *Miranda* Court sought to guarantee that the accusatorial safeguards were not rendered meaningless by police interrogation practices.

In addition, the *Miranda* warnings were designed to protect the suspect's dignity and free will by dissipating the inherently coercive atmosphere of police interrogations. But the protections were meant to do more than simply address the evil of coercion. By making the suspect aware of the privilege against self-incrimination and the consequences of its waiver, the warnings would serve the purpose of enabling the suspect to make a rational choice between silence and confession, thus protecting his or her dignity as a choosing moral agent. Without knowledge of one's rights, "knowing and intelligent" waivers are impossible.

The Court noted the importance of deterring improper methods of interrogation by excluding statements made in violation of the *Miranda* warnings requirement. Yet rather than including deterrence in its...
enumeration of interests protected by the privilege, the Court appeared to treat such deterrence only as a means to the end of protecting those interests noted above. Had the Court viewed deterrence as a constitutional end in itself, it likely would have analogized to the fourth amendment and recognized a constitutional violation at the moment inquisitorial methods were employed. Instead, the privilege against...
self-incrimination is violated only when the government attempts to use an illegally obtained statement.¹⁶⁹

The Emerging Good Faith Exception to *Miranda*

Five years after deciding *Miranda*, the Court began narrowing its scope.¹⁷⁰ The Court relied heavily on deterrence theory to define the scope of *Miranda*, even though the issue of deterrence was subsidiary to the fifth amendment values articulated by the *Miranda* Court.¹⁷¹ Once the Court began focusing on deterrence, several Justices urged the Court to recognize a good faith exception to the *Miranda* exclusionary rule.

Deterrence Theory to the Forefront

The seeds of the good faith exception to the *Miranda* rule were sown in *Harris v. New York*,¹⁷² in which the Court permitted the government to use for impeachment purposes statements that, under *Miranda*, were inadmissible to establish guilt.¹⁷³ The *Harris* Court implied that the *Miranda* rule has only one purpose: deterring impermissible police conduct.¹⁷⁴ Because "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," the Court saw no reason to exclude the evidence for purposes of impeaching the defendant.¹⁷⁵

Not only did the *Harris* Court elevate deterrence theory to a new
and unwarranted level of importance in *Miranda* cases, but it reached suspect conclusions when it applied the theory.\textsuperscript{176} Moreover, the Court disregarded the predominant fifth amendment interests enumerated by the *Miranda* Court; maintaining the accusatorial system and preserving the suspect's ability to make free and rational choices. Such disregard caused the *Harris* dissenters to complain:

The prosecution's use of the tainted statement "cuts down on the privilege by making its assertion costly." . . . Thus, the accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony.\textsuperscript{177}

The dissenters also noted that the "objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system."\textsuperscript{178}

**Two Proposals for a Good Faith Exception**

Although the *Harris* opinion did not suggest adoption of a good faith exception to the fifth amendment exclusionary rule, its emphasis on deterring police misconduct set the stage for Justice Rehnquist's majority opinion in *Michigan v. Tucker*.\textsuperscript{179} Defendant Tucker, questioned by police prior to the *Miranda* decision, was not informed of his right to appointed counsel.\textsuperscript{180} Through their interrogation of Tucker the police discovered the identity of a witness, Henderson, who subsequently testified against the defendant.\textsuperscript{181} Although the Court suggested that Tucker's statements were inadmissible,\textsuperscript{182} it held that the product of his

\textsuperscript{176} Far from deterring undesirable police conduct, *Harris* provides an incentive to police not to warn suspects of their *Miranda* rights. Stone, *supra* note 17, at 112. By not giving warnings, the police enhance the likelihood that the suspect will confess. If the suspect testifies at trial, the confession can be used to impeach him. Because limiting instructions are generally ineffective, the jury is likely to interpret the confession as evidence of guilt. On the other hand, if the suspect chooses not to testify, the jury may interpret his silence as evidence of guilt. *Id.* See also Dershowitz & Ely, *supra* note 168, at 1220-21.

The fear that the Court may be encouraging police misconduct appears to be substantiated by the case of *Oregon v. Hass*, 420 U.S. 714 (1975). In *Hass*, the police continued to interrogate the suspect after he asked to speak with his lawyer. Nevertheless, the Court allowed his statement to be used for impeachment purposes. *Id.* at 722. In so doing, the Court reversed the Oregon Supreme Court, which believed that inadmissibility was necessary in order to achieve deterrence. State v. Haas, 267 Or. 489, 492, 517 P.2d 671, 673 (1973).

\textsuperscript{177} *Harris*, 401 U.S. at 230 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting) (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

\textsuperscript{178} *Id.* at 231 (emphasis added).

\textsuperscript{179} 417 U.S. 433 (1974).

\textsuperscript{180} *Id.* at 436.

\textsuperscript{181} *Id.* at 436-37.

\textsuperscript{182} *Id.* at 445. Tucker's statements identifying Henderson were not admitted at trial. *Id.*
statements—Henderson’s testimony—was admissible.\textsuperscript{183}

Writing for the Court, Justice Rehnquist identified two purposes for the exclusionary rule in self-incrimination cases: deterring police misconduct and excluding untrustworthy evidence.\textsuperscript{184} The Court found that the interrogation involved no compulsion abridging Tucker’s fifth amendment privilege, but “departed only from the prophylactic standards later laid down . . . in \textit{Miranda} to safeguard that privilege.”\textsuperscript{185} Moreover, the circumstances surrounding Henderson’s statements created no threat of evidentiary unreliability.\textsuperscript{186} The Court made no mention of \textit{Miranda}’s concern for protecting the accusatorial system or suspects’ dignity and free will.\textsuperscript{187} Given its view of the purposes of the privilege and \textit{Miranda}’s relationship thereto, the Court saw no reason to exclude the statements.\textsuperscript{188}

The Court explained its deterrence rationale by analogizing to the fourth amendment exclusionary rule.\textsuperscript{189} Without acknowledging the fundamental differences between fourth and fifth amendment doctrine, the Court simply concluded that “[i]n a proper case this [deterrence] rationale would seem applicable to the Fifth Amendment context as well.”\textsuperscript{190}

In dicta,\textsuperscript{191} Justice Rehnquist suggested that the good faith of interrogating officers could justify an exception to \textit{Miranda}:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, how-

\begin{itemize}
  \item \textsuperscript{183} \textit{Id.} at 452. The interrogation of the defendant took place before \textit{Miranda} was decided, but the trial took place afterwards. \textit{Id.} at 435.
  \item \textsuperscript{184} \textit{Id.} at 446-48.
  \item \textsuperscript{185} \textit{Id.} at 445-46. For a reaffirmation of this “prophylactic” interpretation of \textit{Miranda}, see New York v. Quarles, 52 U.S.L.W. 4790 (U.S. June 12, 1984) (No. 82-1213). For a critique of the view that the \textit{Miranda} warnings are merely “prophylactic standards,” see generally Schrock, Welsh & Collins, \textit{supra} note 127.
  \item \textsuperscript{186} \textit{Tucker}, 417 U.S. at 449.
  \item \textsuperscript{187} The Court did suggest that the value of “judicial integrity” was “assimilated” in the deterrence and evidentiary reliability rationales for the exclusionary rule. \textit{Id.} at 449 n.25.
  \item \textsuperscript{188} \textit{Id.} at 449-50.
  \item \textsuperscript{189} \textit{Id.} at 446.
  \item \textsuperscript{190} \textit{Id.} at 447.
  \item \textsuperscript{191} The Court decided the case on the narrow ground that the officers interrogated Tucker before \textit{Miranda} was decided, and that they complied with pre-\textit{Miranda} requirements. \textit{Id.}
\end{itemize}
ever, the deterrence rationale loses much of its force. 192

Chief Justice Burger set out his own theory of the good faith ex-
ception in a dissenting opinion in the later case of Brewer v. Wil-
liams. 193 The Brewer Court held that statements elicited from
the defendant Williams by police in the absence of counsel must be ex-
cluded because the police conduct violated his sixth amendment right
to counsel. 194 A police officer had appealed to Williams, a murder sus-
pect whom the officer knew was deeply religious, with the now famous
"Christian burial speech" in the hope of eliciting information about the
location of the victim's body. 195 Williams had been advised several
times of his Miranda rights and had asserted his right not to make a
statement until meeting with his lawyer. 196 Nevertheless, Williams re-
sponded to the speech by telling the police where the body was
hidden. 197

The Chief Justice disagreed with the Court's conclusion that Wil-
liams' statements must be suppressed, arguing that Williams had
waived his fifth amendment right to silence. 198 Further, Burger as-
serted that even if Williams had not waived his right to silence, the
Court would err gravely by applying the exclusionary rule to a "techni-
cal violation" without considering whether the goals of the rule would
be furthered. 199 He emphasized deterrence of unlawful police conduct

---

192. Id.
194. Id. at 401-06.
195. Id. at 392-93. While the defendant Williams was being transported in a police car
from Davenport to Des Moines, Iowa, one of the detectives accompanying him, knowing
that he was a former mental patient and deeply religious, made the following appeal to
Williams:
I want you to give something to think about while we're traveling down the
road. . . . Number one, I want you to observe the weather conditions, it's raining,
it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to
be dark early this evening. They are predicting several inches of snow for tonight,
and I feel that you yourself are the only person that knows where this little girl's
body is, that you yourself have only been there once, and if you get a snow on top
of it you yourself may be unable to find it. And, since we will be going right past
the area on the way into Des Moines, I feel that we could stop and locate the body,
that the parents of this little girl should be entitled to a Christian burial for the
little girl who was snatched away from them on Christmas [E]ve and murdered.
And I feel we should stop and locate it on the way in rather than waiting until
morning and trying to come back out after a snow storm and possibly not being
able to find it at all.

196. Id. at 391-92.
197. Id. at 393.
198. Id. at 417 (Burger, C.J., dissenting).
199. Id. at 420.
as the only valid reason to exclude reliable and probative evidence. Indeed, Burger characterized *Miranda*’s exclusionary rule, like its fourth amendment counterpart, as a “judicially conceived remedial device” to be applied only when “egregious” police conduct precedes the suspect’s statement, or when the facts of a particular case call into question the reliability or voluntariness of the statement. “*Miranda*’s safeguards are premised on presumed unreliability long associated with confessions extorted by brutality or threats; they are not personal constitutional rights, but are simply judicially created prophylactic measures.” The Chief Justice argued that because Williams’ statements were voluntary and reliable, and were not preceded by egregious police conduct, they should be admissible. Burger implicitly rejected the *Miranda* Court’s notion that, because the interrogation atmosphere remains “inherently coercive” when police questioning continues after a suspect has asserted his right to remain silent, such questioning is improper.

The Burger and Rehnquist theories are similar. Both draw analogies to fourth amendment doctrine and propose a case-by-case analysis of interests to determine whether exclusion is called for under *Miranda*.

---

200. *Id.* at 421.
201. *Id.*
202. *Id.* at 422. The Chief Justice’s statements in *Brewer* are reminiscent of his views on police deterrence before joining the Supreme Court. In a case in which the suspect was warned, signed a waiver form, but objected to a police officer's writing down the confession, then-Judge Burger argued that the confession should be admitted as a waiver of *Miranda* rights:

> The record demonstrates entirely reasonable police activity satisfying the deterrent purposes underlying the *Miranda* rule. There is not a scintilla of evidence suggesting that what had been forthcoming from Appellant’s lips was the result of unreasonable or improper police conduct. The fact that Appellant may not have desired the statement to be transcribed does not compel the conclusion that he was being subjected to the kind of police activity found unconscionable in *Miranda*. The most that can be said from Appellant’s statements is that he may have unintentionally incriminated himself.


204. *Id.* at 423.
205. *Id.* at 423-24. Concurring in *Brewer*, Justice Marshall also considered police conduct a crucial factor. However, he favored excluding the evidence on the grounds that the police “consciously . . . set out to violate Williams’ . . . privilege against self-incrimination.” *Id.* at 407 (Marshall, J., concurring).

206. *Miranda*, 384 U.S. at 473-74 (“Once warnings have been given, the subsequent procedure is clear. If the individual indicates . . . that he wishes to remain silent, the interrogation must cease. . . . [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion.”).
The cost of excluding highly probative evidence of guilt is weighed against the benefits of exclusion: deterring police misconduct and protecting against unreliable evidence.

The theories differ, however, in the quality of police conduct necessary to justify exclusion based upon the deterrence rationale. As with his fourth amendment good faith doctrine, Chief Justice Burger would utilize deterrence theory to exclude evidence automatically only in cases of "egregious" police conduct, while Justice Rehnquist, on the other hand, would probably call for exclusion of evidence obtained through negligent as well as intentional police misconduct.

Critique of the Good Faith Exception

The good faith exception theories of both Chief Justice Burger and Justice Rehnquist suffer from flawed reasoning and fundamental doctrinal errors.

207. A subtle difference in the extent to which the respective theories would apply a balancing test or case-by-case analysis should be noted. Given his rejection of the view that custodial interrogation is inherently coercive, at least in cases in which the Miranda warnings have been given, Burger appears to favor employing a case-by-case analysis in all Miranda cases not involving egregious police misconduct.

Thus, in cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the Miranda prophylaxes, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." . . . This individualized consideration or balancing process with respect to the exclusionary sanction is possible in this case, as in others, because Williams' incriminating disclosures are not infected with any element of compulsion the Fifth Amendment forbids; nor, as noted earlier, does this evidence pose any danger of unreliability to the factfinding process. In short, there is no reason to exclude this evidence.

Brewer, 430 U.S. at 424 (Burger, C.J., dissenting).

Justice Rehnquist, on the other hand, seems to give some credence to the "inherent coercion" finding. He apparently grants that Tucker's statements would be inadmissible even though no actual evidence of coercion or evidentiary unreliability existed. See supra note 182 & accompanying text. Therefore, Rehnquist might favor limiting the case-by-case analysis to cases such as the derivative evidence situation in Tucker when the questionable evidence is not the direct product of a Miranda violation.

208. Excluded evidence is often highly indicative of guilt. In Brewer, for example, the victim's body was found exactly where Williams said it would be. Brewer, 430 U.S. at 393. See supra notes 184-88, 199-207 & accompanying text.

209. See supra note 74-77.

210. See supra note 202, 207 & accompanying text. But see infra note 283.

211. See supra notes 202, 207 & accompanying text.

212. See Tucker, 417 U.S. at 446-52.
Flawed Reasoning

Chief Justice Burger advocates admitting evidence in some cases even though it was obtained by means of a “technical violation” of the defendant’s *Miranda* rights.213 His theory lends itself to several possible interpretations. First, Burger may be saying that the type of “technical” violation of the *Miranda* “prophylaxes” involved in *Brewer* is really not itself a violation of the privilege against self-incrimination.214 However, this interpretation cannot explain the Court’s imposition of the *Miranda* doctrine upon the states had the Court not considered it to be constitutionally mandated.215 In addition, this interpretation cannot be reconciled with the *Miranda* Court’s intent to move beyond the earlier case-by-case due process analysis toward a clear rule requiring exclusion of evidence whenever the requirements of *Miranda* are not met.216 *Miranda* violations, including those violations of the self-incrimination privilege found in *Miranda* itself, are often “technical” in the sense that no actual coercion is demonstrated.217 The point of *Miranda* is that actual coercion is not a prerequisite to inadmissibility. The *Miranda* rule precludes any evidence obtained through custodial interrogation devoid of the warnings, or without a valid waiver once

213. *See supra* text accompanying note 199.
214. *See supra* text accompanying note 204.
215. The *Tucker* Court’s characterization of the *Miranda* warnings as no more than prophylactic safeguards of the self-incrimination privilege has been the subject of scholarly criticism, much of which regards that characterization as inconsistent with *Miranda*. *See*, e.g., Schrock, Welsh & Collins, *supra* note 127, at 38-41; Stone, *supra* note 17, at 123.

The *Miranda* Court itself suggested the constitutional status of the *Miranda* exclusionary rule:

> It is also urged upon us that we withhold decision on this issue [of warnings] until state legislative bodies have had an opportunity to deal with these problems by rule making. . . . However, the issues presented are of constitutional dimensions and must be determined by the courts. . . . As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

*Miranda*, 384 U.S. at 490-91.

216. *See supra* notes 142-45 & accompanying text; *see also* Stone, *supra* note 17, at 118 (the *Tucker* Court’s conclusion that violations of self-incrimination clause occur “only if confession is involuntary under traditional standards” is an “outright rejection of the core premises of *Miranda*”).

217. Indeed, the *Miranda* case itself involved no apparent coercion. The interrogation of Ernest Miranda lasted only two hours, was conducted by two officers in an interrogation room, and evidenced no physical or psychological coercion of the suspect. *Miranda*, 384 U.S. at 447. The Court stated that “overt physical coercion or patent psychological ploys” need not be shown in order to justify exclusion. *Id.* at 455-56.
the warnings are given, from being used against the suspect.\footnote{218}{Id. at 444-45.}

A second interpretation of Burger's view in \textit{Brewer v. Williams} suggests that even if Williams' fifth amendment privilege against self-incrimination was violated, his statement nevertheless should be admissible if the constitutional interest in excluding it is outweighed by the government's interests, and if the violation was merely "technical." If this is the Chief Justice's position, fifth amendment rights are in jeopardy of being routinely balanced away. The Court has never suggested that a violation of the constitutionally based privilege against self-incrimination is a matter of degree.\footnote{219}{The constitutional language that "no person . . . shall be compelled in any criminal case to be a witness against himself," see supra note 84, suggests an absolute bar against coerced self-incrimination.}

Furthermore, if only "egregious" police misconduct triggers the exclusionary rule, evidence will seldom be suppressed even though the dictates of \textit{Miranda} have not been met.\footnote{220}{Indeed, one could hardly characterize the conduct of the interrogating officers in \textit{Miranda} as "egregious." See supra note 217.}

Perhaps Burger would argue, as he has in objecting to the fourth amendment exclusionary rule, that instead of applying the "Draconian" exclusionary rule, alternative remedies for fifth amendment violations should be devised.\footnote{221}{\textit{See Brewer}, 430 U.S. at 420 (Burger, C.J., dissenting); see also supra note 66. Burger intimated in his \textit{Brewer} dissent that alternatives to the exclusionary rule should be devised. He asserted that the majority's decision keeps "the Court . . . on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing." Brewer, 430 U.S. at 415-16 (Burger, C.J., dissenting) (emphasis added).}

However, such alternatives are logically impossible in self-incrimination cases. While there may be reason to doubt the constitutional necessity of the fourth amendment exclusionary rule,\footnote{222}{\textit{See supra} notes 47-73 & accompanying text.} the fifth amendment privilege is itself a constitutionally required exclusionary rule.\footnote{223}{\textit{See supra} text accompanying note 73; see also Dershowitz & Ely, supra note 168, at 1214; Ritchie, supra note 17, at 388-89 & n.37; Stone, supra note 17, at 110-11.} Whereas a fourth amendment violation occurs at the moment of the unlawful privacy violation,\footnote{224}{\textit{See supra} notes 50-51 & accompanying text; see also Ritchie, supra note 17, at 417 & n.168.} violations of the privilege against self-incrimination do not occur unless and until the government uses the tainted evidence against the defendant in a criminal proceeding.\footnote{225}{\textit{See supra} notes 155 & accompanying text.} Although alternatives to the exclusionary rule might conceivably be developed to protect fourth amendment privacy
GOOD FAITH EXCEPTION

interests, no alternative could possibly protect the fifth amendment values of maintaining an accusatorial system and respecting the dignity of criminal defendants. If use of compelled self-incriminating evidence is permitted, the fifth amendment's protection is destroyed. Admitting the evidence and resorting to "alternative remedies" such as civil suits against governmental officers responsible for the self-incrimination would protect neither the defendant's right to a free and rational choice nor his right to a trial within an accusatorial system of criminal justice.

Under any interpretation, adoption of Burger's argument in Brewer that evidence may be admissible despite a Miranda violation would threaten the viability of the privilege against self-incrimination. Similar problems pervade Justice Rehnquist's opinion in Tucker.

Justice Rehnquist's approach, as described in his Tucker opinion, contains two inconsistencies. First, because he suggests that Tucker's statement (as opposed to Henderson's) likely would be inadmissible, he appears to accept Miranda's premise that custodial interrogation is inherently coercive. This recognition, however, seems contrary to his view that the sole justifications for Miranda's exclusionary rule are to deter police misconduct and to protect against unreliable evidence. If these are, indeed, the only purposes of Miranda, Tucker's statement, like Henderson's, should be admissible given the absence of actual coercion and the obvious good faith of the interrogating officer. Moreover, if the failure to advise Tucker of his right to appointed counsel automatically rendered his subsequent statement inadmissible, one wonders how the Miranda warnings can be viewed as merely prophylactic standards rather than as constitutionally mandated requirements of the privilege against self-incrimination itself.

Second, since Rehnquist's opinion for the Court assumed that

227. See supra notes 179-94.
228. Rehnquist stated that Tucker's statements might be inadmissible even though there was no evidence of actual coercion. Tucker, 417 U.S. at 445, 452. But see Justice Rehnquist's statement in the context of the "public safety" exception to Miranda: "Today we merely reject the only argument that respondent has raised to support the exclusion of his statement, that the statement must be presumed compelled because of [the officer's] failure to read him his Miranda warnings." New York v. Quarles, 52 U.S.L.W. 4790, 4792 n.5 (U.S. June 12, 1984) (No. 82-1213) (emphasis in original).
229. See supra note 184 & accompanying text.
230. The absence of coercion negates the concern that Tucker's statement might be unreliable. The "good faith" of the interrogating officer is established by the fact that his only "unlawful conduct" was to give three, rather than all four Miranda warnings at a time when Miranda had not yet even been handed down.
231. See supra note 185 & accompanying text.
Tucker’s statement identifying Henderson could not be used against him.232 Principles of derivative evidence, established in the analogous context of the immunity grant cases, should have been applied to preclude the use of Henderson’s statement as well.233 When the government promises immunity in exchange for testimony, the suspect waives the privilege but gains equivalent protection by virtue of the guaranteed immunity.234 Any immunity grant sufficient in scope to replace the fifth amendment privilege must protect against the use not only of the immunized testimony but also of all evidence derived from the immunized testimony.235 The privilege against self-incrimination prevents the government from using not only the immunized testimony itself but also any evidence derived therefrom against the recipient of immunity.236 Thus, if Tucker’s statements were compelled by the gov-

232. See supra note 182.

233. See supra note 94 & accompanying text. The derivative evidence doctrine is analogous to the fourth amendment “fruit of the poisonous tree” doctrine that requires exclusion of secondary evidence obtained by exploiting an initial violation of the fourth amendment. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

Whether Miranda establishes such a derivative evidence rule is unclear. The Miranda opinion did include a single sentence arguably advocating a derivative evidence rule: “But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].” Miranda, 384 U.S. at 479 (emphasis added). Courts and commentators are not in agreement on this issue. Compare United States v. Downing, 665 F.2d 404 (1st Cir. 1981) (evidence found by means of a key discovered as a result of federal agent’s request for defendant to empty his pockets after the latter had asserted his right to counsel must be excluded), with Wilson v. Zant, 249 Ga. 373, 290 S.E.2d 422 (1982) (evidentiary fruits of statements obtained in violation of Miranda not automatically excluded). See Friendly, supra note 84, at 712; George, supra note 165, at 487-89; Pitler, “The Fruit of the Poisonous Tree” Revisited and Shepardized, 56 CALIF. L. REV. 579, 619-20 (1968).

It is important to note that, unlike the fourth amendment, the fifth amendment is not violated until the government seeks to use the tainted evidence against the suspect. See supra notes 155-56 & accompanying text. Even though in Tucker the government did not seek to use the defendant’s own statement, it may be that since Tucker’s statement would have been inadmissible under the Miranda rule had the government sought to use it, the government should likewise be precluded from using Henderson’s statement, as it was derived directly from Tucker’s.

234. See infra note 235.

235. Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892). The Counselman Court struck down a federal immunity statute that granted witness protection only against the use of the witness’ testimony itself. The Court held the statute invalid because it “could not, and would not, prevent the use of [the witness’] testimony to search out other testimony to be used against him.” Id. at 564. See Kastigar v. United States, 406 U.S. 441, 459 (1972) (scope of the fifth amendment privilege is “co-extensive with” use and derivative use immunity); see also C. Whitebread, supra note 2, at 261.

236. See supra note 94 & accompanying text; see also New Jersey v. Portash, 440 U.S. 450 (1979) (immunized grand jury testimony held inadmissible even for purposes of impeaching defendant’s testimony at trial).
ernment, the fifth amendment should have forbidden not only their use but also the use of Henderson’s statements. The purpose of such protection is not to discipline or deter the police, but “to maintain intact the practical protection against incrimination” provided by the privilege. Unless Henderson’s statements are excluded, the government is permitted to use Tucker’s tainted statements as a decisive link in the chain of evidence against him thereby circumventing the fifth amendment’s prohibition against self-incrimination.

Fundamental Doctrinal Errors

Despite their differences, the Rehnquist and Burger theories share common weaknesses. They both unduly emphasize evidentiary reliability as a crucial value underlying Miranda’s exclusionary rule. Apart from the fact that the Miranda Court did not address the issue of evidentiary reliability, that issue had perhaps already assumed a position of secondary importance under the coerced confession doctrine. More importantly, both Justices view deterrence of police misconduct as the main objective of Miranda. Fundamental doctrinal errors lie at the heart of this interpretation of Miranda.

237. In the witness immunity context the purpose of the derivative evidence rule is not “to discipline the police or lower judiciary as such.” George, supra note 165, at 481. Rather the purpose is to protect the individual’s fifth amendment right not to be a witness against himself. Developments in the Law—Confessions, 79 HARV. L. REV. 935, 1028 n.21 (1966). The same fifth amendment values are at stake in applying the derivative evidence rule to the police interrogation setting in Tucker. See infra notes 273-74 & accompanying text.

238. George, supra note 171, at 481. See supra notes 101-09, 156-68 & accompanying text.

239. [I]f the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the Miranda warnings would be of no value in protecting the privilege against self-incrimination. The requirement of a warning would be meaningless, for the police would be permitted to accomplish indirectly what they could not accomplish directly, and there would exist no incentive to warn.

Pitler, supra note 233, at 620. Justice Holmes’ comment in Siverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), is also relevant: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.” Id. at 392.

240. See supra notes 184, 204 & accompanying text.

241. See supra note 113 & accompanying text.

242. See supra note 121 & accompanying text.

243. In discussing the exclusionary rule in Tucker, Rehnquist asserted that its “prime purpose is to deter future unlawful police conduct.” Tucker, 417 U.S. at 446 (citing United States v. Calandra, 441 U.S. 338, 347 (1974)). Similarly, the Chief Justice stated in his Brewer dissent: “[D]eterrence of unconstitutional or otherwise unlawful police conduct is the only valid justification for excluding reliable and probative evidence from the criminal fact finding process.” Brewer, 430 U.S. at 420 (Burger, C.J., dissenting).
The Rehnquist and Burger theories draw an untenable analogy between fourth and fifth amendment jurisprudence.\textsuperscript{244} As discussed above, since \textit{Mapp v. Ohio}\textsuperscript{245} the Court has clearly distinguished the fourth and fifth amendment exclusionary rules, defining the former as a subconstitutional rule aimed at deterring invasions of privacy, and the latter as a constitutionally mandated guardian of the rights of criminal defendants and the accusatorial system of justice.\textsuperscript{246} As the Court said in \textit{Janis}: "In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from the violation."\textsuperscript{247}

If the fourth amendment exclusionary rule lends itself to a balancing approach, it does so for two reasons, neither of which apply in self-incrimination cases: 1) the fourth amendment exclusionary rule is not constitutionally mandated;\textsuperscript{248} and 2) the exclusionary issue arises "after and apart from" the violation of fourth amendment privacy rights; exclusion is contingent on a prior substantive violation. The contingent status of the fourth amendment exclusionary rule logically leads to a balancing analysis that takes into account governmental "good faith" as well as possible alternatives that might adequately protect fourth amendment privacy rights without incurring the heavy costs entailed in suppressing reliable and probative evidence.\textsuperscript{249} Such an approach is all the more defensible in light of the fact that the substantive violation and the issue of exclusion are analytically distinct in fourth amendment cases. Because a substantive violation of fourth amendment privacy interests always precedes the exclusionary issue, deterrence of future invasions of privacy naturally becomes a prime concern in structuring fourth amendment remedies.

None of these considerations is apposite in the fifth amendment context. The fifth amendment exclusionary rule is clearly dictated by the Constitution\textsuperscript{250} and is the only possible means of protecting the values underlying the privilege against self-incrimination.\textsuperscript{251} No violation of privacy, or of any other constitutionally protected substantive interest, precedes the invocation of the fifth amendment exclusionary rule.

\textsuperscript{244} See supra notes 189, 200-02 & accompanying text.
\textsuperscript{245} 367 U.S. 643 (1961).
\textsuperscript{246} See supra notes 30-76 & accompanying text.
\textsuperscript{247} \textit{Janis}, 428 U.S. at 443. See supra note 73.
\textsuperscript{248} See supra notes 19-73 & accompanying text.
\textsuperscript{249} See supra notes 74-83 & accompanying text.
\textsuperscript{250} See supra notes 215, 223, 246-47 & accompanying text.
\textsuperscript{251} See supra notes 221-26 & accompanying text.
The constitutional issue arises only when, and only because, the government seeks to *use* at trial tainted evidence against the defendant.\(^{252}\)

Given this understanding of the self-incrimination clause, one must conclude that deterrence theory is of minimal use in analyzing the *Miranda* exclusionary rule. After all, what unlawful government conduct is to be deterred by exclusion under the Rehnquist and Burger theories? Surely not invasions of the suspect’s privacy interests.\(^{253}\) The constitutional interest in avoiding physical brutality or undue psychological coercion of the suspect is protected by enforcement of due process rights.\(^{254}\) Perhaps Justices Rehnquist and Burger believe it is the failure to give the *Miranda* warnings that is the “unlawful act” to be deterred through application of the exclusionary rule. The Burger Court has suggested as much: “The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings.”\(^{255}\) Yet, the failure to give the warnings is not itself unlawful.\(^{256}\) The “illegality” arises only when the government *uses* evidence obtained without having given *Miranda* warnings.\(^{257}\)

Because deterrence theory is inapposite to analysis of *Miranda* exclusionary rule issues, governmental “good faith” or its absence is also irrelevant. *Miranda* cases are properly resolved simply in terms of whether or not the dictates of the decision have been followed. If, in a

\(^{252}\) See supra notes 155-56 & accompanying text.

\(^{253}\) See supra notes 108-09, 151-56 & accompanying text.

\(^{254}\) See supra notes 111-20 & accompanying text; see also supra note 168.

\(^{255}\) Oregon v. Hass, 420 U.S. 714, 723 (1975). The Court made a similar point in Brown v. Illinois, 422 U.S. 590 (1975): “The function of the [Miranda] warnings relates to the Fifth Amendment’s guarantee against coerced self-incrimination, and the exclusion of a statement made in the absence of the warnings, it is said, serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights.” Id. at 600-01.

\(^{256}\) See Tucker, 417 U.S. at 444 (citing Miranda v. Arizona, 384 U.S. 436, 467 (1966)). See supra notes 155-56 & accompanying text; Ritchie, *supra* note 17, at 417 n.168 (“When the police compel the accused to make incriminating statements . . . his privilege against self-incrimination is not yet infringed; it is only when these statements are used against him at trial that a violation occurs. . . . Thus, prohibiting use of the compelled statements prevents a violation of the privilege.”) (emphasis in original).

\(^{257}\) See supra notes 151-52 & accompanying text.

[If] the failure to give warnings is not in itself unlawful, the deterrent concern seems irrelevant. If the only illegality consists of use of the evidence, that can be handled simply by excluding the evidence when the situation arises; it is unnecessary to consider whether allowing the evidence to be used will encourage the police not to give warnings.

Stone, *supra* note 17, at 140 n.217. “If, in violating *Miranda*, the police do not necessarily violate the privilege, then the Court’s discussion of deterrence makes sense only if the Court is honoring or creating an exclusionary rule for violation of the *Miranda* safeguards alone.” Ritchie, *supra* note 17, at 417 n.168.
given case, the requisites of *Miranda* have been ignored, then the self-incrimination clause mandates that the improperly obtained evidence be excluded.

**Application of the Good Faith Exception to the *Miranda* Rule: Contravention of Fifth Amendment Imperatives**

The Chief Justice explicitly advocates a balancing test in his *Brewer* dissent,\(^{258}\) and Rehnquist appears to adopt a similar case-by-case approach in his *Tucker* opinion.\(^{259}\) By injecting into the admissibility question considerations beyond government adherence to the warnings requirement, such a balancing approach would eviscerate the protections the *Miranda* court sought to guarantee. Admission of evidence obtained without giving *Miranda* warnings undermines the core constitutional policies underlying the privilege against self-incrimination: maintaining an accusatorial system of criminal justice, and protecting the dignity of suspects by assuring them a free and rational choice to confess or not. The following examples illustrate the threat posed by the adoption of a good faith exception to the *Miranda* rule.

**Uncommunicated Miranda Warnings**

Situations might arise in which police officers attempt to inform suspects of their *Miranda* rights but, for one reason or another, the suspect never understands the information.\(^{260}\) Assuming complete good faith by the police, the Rehnquist and Burger theories would seemingly require admission of confessions obtained in such cases even though the core *Miranda* values would thereby be offended.

To pose an extreme hypothetical, suppose the police do not realize that a suspect is illiterate and deaf. Upon arrest the police take the

\(^{258}\) See *supra* notes 207-08 & accompanying text.

\(^{259}\) See *supra* notes 192, 207 & accompanying text. Such an analysis might lead to the anomaly of excluding a confession in the name of deterrence even if the suspect was afforded full *Miranda* protection. Suppose that Officer A begins to interrogate Suspect, purposely failing to give the warnings. Officer A leaves the room momentarily, during which time Officer B, unbeknownst to A, enters the room and gives Suspect the warnings. B leaves and A returns still assuming that Suspect is unwarned and continues the interrogation, again without giving the warnings. Suspect confesses. If deterring unlawful police activity is indeed the prime purpose of *Miranda*’s exclusionary rule and if the failure to give the warnings is the “unlawful police activity” which must be deterred, *see supra* text accompanying notes 249-50, then the confession should be suppressed to deter Officer A even though Suspect may in fact have made a valid waiver of his *Miranda* rights.

suspect to the station where they immediately present him with a written copy of his *Miranda* rights, which they read to him in a slow and careful manner. At the conclusion of the reading an officer asks the suspect if he understands his rights. The suspect, who can speak as well as read lips, looks up from the floor for the first time just as the officer asks and, without thinking, answers "yes." The officer then asks the suspect if he wants to discuss the crime. The suspect, who has again read the officer's lips, immediately blurts out a confession.

While several lower courts would quite correctly analyze the above situation in terms of whether the suspect's confession constituted a valid waiver of *Miranda* rights, and would likely exclude the evidence, admissibility could be mandated under the Rehnquist and Burger good faith approaches. If police deterrence were the primary justification for excluding otherwise reliable confessions obtained in violation of *Miranda*, the confession would not be excluded, given the absence of police misconduct, regardless of the fact that the warnings were never communicated to the suspect. No deterrent purpose could possibly be served by excluding the confession.

However, since the primary purposes of the *Miranda* rule are to protect the suspect's right to a "free and rational choice" as to whether he should confess, and to preserve the accusatorial system of criminal justice, then the confession in the hypothetical must be excluded. Without actual communication of the warnings, the suspect could not "rationally" make the decision to waive his rights to silence and to counsel. The government could not possibly carry its "heavy bur-

261. See, e.g., Lowery v. State, 51 Ala. App. 387, 391, 286 So. 2d 62, 65-66 (Crim. App. 1973) (confession inadmissible because suspect did not understand *Miranda* warnings due to emotional upset and drug injection); Schade v. State, 512 P.2d 907, 917 (Alaska 1973) (mental illness does not invalidate *Miranda* waiver so long as suspect is "basically rational"); State v. Collins, 297 A.2d 620, 629 (Me. 1972) (waiver of *Miranda* rights by mentally disturbed suspect is valid if suspect is "in touch with reality" and "fully aware of and appreciate[s] the nature and quality" of what is involved in waiving rights); State v. Basden, 19 N.C. Ct. App. 258, 259, 198 S.E.2d 494, 495 (1973) (low intelligence not an automatic bar to *Miranda* waiver so long as suspect "freely, voluntarily and understandingly" waives); Commonwealth v. Cannon, 453 Pa. 389, 393, 309 A.2d 384, 387 (1978) (mental illness not an automatic bar to waiver if totality of circumstances shows that the statements were the product of a rational intellect and free will); Lonquest v. State, 495 P.2d 575, 582 (Wyo.), cert. denied, 409 U.S. 1006 (1972) (intoxication will invalidate waiver if suspect "was unaware of his rights and unable to make an intelligent waiver"). The Supreme Court has held that, in assessing waivers of *Miranda* rights by juveniles, the inquiry is based essentially on "whether [the juvenile] has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." Fare v. Michael C., 422 U.S. 707, 725 (1979).

262. See supra notes 157-60 & accompanying text.
den” of showing that the suspect had “knowingly and intelligently” waived his *Miranda* rights. While the case of the deaf suspect described above may be unlikely to occur, it serves to illustrate the impropriety of appealing to deterrence theory and good faith considerations to assess the admissibility of confessions obtained contrary to *Miranda*. The same analysis suggested above should also apply in the more common cases of suspects who hear but do not understand the warnings due to intoxication, mental disease or retardation, or poor language skills.

**“Excited Utterance” Interrogation**

The so-called “excited utterance” cases provide another set of situations in which a good faith exception would appear to permit the use of confessions elicited by custodial interrogation not preceded by the *Miranda* warnings. These cases involve an officer’s question uttered in shock or surprise rather than in an attempt to elicit information about a crime. Suppose this variation on the facts of a recent case:

A suspect is arrested for burglary. A pat down search reveals a condom containing a white powdered substance. Surprised, the officer immediately asks the suspect without giving the *Miranda* warnings, “What’s this?” The suspect responds, “You know what it is. It’s heroin.”

While the *Miranda* rule presently requires exclusion of such a statement as an improperly obtained product of custodial interrogation, Justices Burger and Rehnquist would probably urge admission of the evidence. The suspect’s statement was “voluntary” and would be

263. *See supra* note 147 & accompanying text.
264. *See supra* note 146.
266. *Id.*
268. *Id.* at 874. The “excited utterance” of a police officer likely constitutes “interrogation” under *Miranda*. The *Harryman* court concluded that *Miranda* applied: “[I]t is enough to decide that what the officer said could reasonably have had the force of a question on the accused.” *Id.* Subsequent to *Harryman*, the Supreme Court in Rhode Island v. Innis, 446 U.S. 291 (1980), provided a definition of “interrogation” for *Miranda* purposes that also suggests that the “excited utterance” in the text constitutes “interrogation.”

*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . . [I]nterrogation under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that they should know are reasonably likely to elicit an incriminating response from the suspect.

*Id.* at 300-01 (emphasis in original).
viewed as "reliable" evidence. Most importantly, this police conduct is not of the type that can be deterred by excluding the statement. Excited utterances are impulsive, spontaneous responses to unusual circumstances and are therefore inherently non-deterrible. The good faith exception to the *Miranda* exclusionary rule would therefore permit admission of the suspect's response to the officer's excited question.

Such a result is inconsistent with *Miranda* and the principles underlying the privilege against self-incrimination. The unwarned suspect is constitutionally entitled to protection from governmental use of incriminating statements obtained from custodial interrogation, absent a knowing and intelligent waiver of fifth amendment rights. This rigid reading of *Miranda* was originally intended by the Court. The intent and motive of the interrogating officer, as well as the voluntariness and reliability of the statement, are irrelevant if the suspect is unwarned. Plainly, in excited utterance cases the suspect has no chance to knowingly and intelligently waive his privilege against self-incrimination.

In addition to its theoretical inconsistency with *Miranda*, the good faith exception in excited utterance cases poses substantial practical difficulties. How is "excited utterance" interrogation to be clearly distinguished from regular questioning? An excited utterance exception would enable the police to feign excited utterances in hopes of obtaining confessions from unwarned suspects. While such deception certainly should be considered "bad faith" conduct, distinguishing these cases from the actual excited utterance situation would be difficult. Such an approach would be reminiscent of the case-by-case due process rules eschewed by the *Miranda* Court. More importantly, defining *Miranda* rights in terms of the interrogating officer's subjective state of mind would unwisely and unnecessarily misdirect the analysis of the suspect's rights. By focusing on the officer's state of mind, the good faith doctrine neglects the critical issue: the suspect's understanding of his rights.

"Good Faith" Interrogation in the "Rescue Situation"

A variation on the facts of *Brewer v. William* provides a third class of cases to which the good faith exception would likely be applied.

269. See *Harryman*, 616 F.2d at 873; see also *supra* notes 111-20 & accompanying text.

270. Deterrence theory assumes rational decisionmaking processes; non-rational actions cannot be deterred.

271. *Harryman*, 616 F.2d at 873; see *supra* notes 139-42 & accompanying text.

272. *Harryman*, 616 F.2d at 874.

Suppose the police reasonably believe that the suspect has kidnapped a small child and hidden her in a place where she will die if not immediately rescued. Hoping to discover the victim's location, the police purposely fail to warn the suspect of his *Miranda* rights and interrogate him about the kidnapping. The suspect then informs the police where the child is located and she is rescued. The government seeks to use the suspect's statement against him at his kidnapping trial.

If, as in the Chief Justice's view, the good faith exception should apply to the statements elicited by the "Christian Burial" speech in *Brewer*,\(^\text{274}\) then confessions obtained through interrogation motivated by the desire to save human life would, *a fortiori*, be admissible. Seemingly, Justice Rehnquist's approach would also favor admission of statements obtained when the police interrogation is conducted for the purpose of rescuing a victim of crime. Surely, saving lives is a value to be encouraged even when it collides with the strictures of *Miranda*. Assuming balancing were the proper mode of analysis, the victim's right to life would outweigh the suspect's *Miranda* interests.\(^\text{275}\) In such circumstances, the police do act properly in interrogating the suspect. Proponents of the good faith exception would therefore argue that *Miranda* should pose no bar to admitting the suspect's statement into evidence.\(^\text{276}\)

While interrogating unwarned suspects in order to save lives may be proper police conduct,\(^\text{277}\) it does not follow that *Miranda* provides no bar to the admissibility of evidence obtained through such interrogation. The privilege against self-incrimination is not negated by the concession that police interrogation of unwarned suspects is justified. Far from "negated," the *Miranda* rule is not even implicated until the government attempts to use the tainted evidence.\(^\text{278}\) Therefore, it fol-

---

\(^{274}\) *Id.* at 415-17 (Burger, C.J., dissenting).

\(^{275}\) Professor Kamisar has asserted that a majority of the Court would have excluded the statements in *Brewer* had the "speech" of the interrogating officer been motivated by a desire to save the life of the victim. Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?,* 67 Geo. L.J. 1, 9 (1978).

\(^{276}\) California courts have admitted into evidence statements obtained without giving the suspect the requisite warnings when the custodial interrogation was motivated primarily by a desire to save the victim's life. See, e.g., People v. Riddle, 83 Cal. App. 3d 563, 756, 148 Cal. Rptr. 170, 173 (1978), cert. denied, 440 U.S. 937 (1979); People v. Dean, 39 Cal. App. 3d 875, 884, 114 Cal. Rptr. 555, 561 (1974); see also Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. Chi. L. Rev. 657, 677 n.86 (1966).

\(^{277}\) If, however, police resort to physical coercion to elicit lifesaving information, due process limitations might be implicated. See *supra* notes 112-20 & accompanying text. But see *Leon v. State*, 410 So. 2d 201 (Fla. App. 1982) (coerced evidence of kidnap victim's whereabouts obtained through police threats and physical violence held admissible).

\(^{278}\) See *supra* notes 154-56, 168-69 & accompanying text.
allows that "the police may in fact acquire the lifesaving information so long as they do not attempt to use it to prosecute the defendant."279

Excluding statements obtained in such situations is unlikely to create a substantial disincentive to the police to obtain the lifesaving information from unwarned suspects. Police officers genuinely concerned with saving lives would continue to seek such information even at the risk of jeopardizing subsequent conviction of the suspect. Furthermore, officers would likely realize that information obtained in rescue situations might still be admissible under the existing “inevitable discovery” exception to *Miranda.*280 Moreover, even if the suspect’s statement is inadmissible to prove guilt, it may be admissible for impeachment purposes should he take the stand at his subsequent trial.281

For several reasons, the good faith exception should not be used to circumvent *Miranda* for the benefit of victims. Apart from its unjustifiable infringement of the suspect’s right to be informed of the consequences of making a statement, an exception to the exclusionary rule in rescue situations would pose practical problems. As in the “excited utterance” context, the rescue situation would require courts to consider the subjective intent of interrogating officers. Distinguishing interrogation motivated by a genuine concern for saving life from questioning based on a mere pretext of rescuing victims (for example, when the police question the suspect about the location of a victim they know is dead) would be difficult. Furthermore, once established in rescue cases, the good faith exception would likely spread into a variety of other “emergency” contexts. The evidentiary use of weapons or drugs obtained solely from information provided by unwarned suspects could be justified by a desire to remove dangerous instrumentalities from society.282 Thus extended, the “rescue exception” would undermine the


280. The “inevitable discovery” doctrine permits the admission of illegally obtained evidence if eventually it probably would have been discovered in a lawful manner. See *People v. Fitzpatrick,* 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied,* 414 U.S. 1050 (1973) (admitting weapon found in closet as result of police questioning in violation of *Miranda* because the police “inevitably” would have discovered the weapon in the course of normal investigation regardless of suspect’s statement). In the sixth amendment context, the Court held in *Nix v. Williams,* 52 U.S.L.W. 4732 (U.S. June 11, 1984) (No. 82-1651), that evidence that inevitably would have been discovered need not be excluded at trial because of independent police misconduct.

For a discussion of the “inevitable discovery” doctrine, see Y. KAMISAR, *supra* note 113, at 821-23.

281. See *supra* notes 172-75 & accompanying text.

282. Such an argument was made in a case just decided by the United States Supreme
unambiguous exclusionary rule established by the *Miranda* Court.

**Good Faith: The Exception or The Rule?**

The above cases illustrate particular factual contexts in which the good faith exception could operate. While the doctrine might be confined to these somewhat unusual situations, no principle would so limit it once it became an established element in *Miranda* analysis. Indeed, taken to an extreme the doctrine could be used to admit evidence in any case in which police do not purposely circumvent *Miranda*.

The police clearly are not particularly enamored with *Miranda*, and a complete emasculation of the doctrine would be possible through resort to the good faith exception. Even officers who purposely fail to give the warnings might, in some cases, convince the courts that the failure was inadvertent and in good faith, and therefore not the kind of conduct deterrable through application of the exclusionary rule.283 If so, failure to warn could quickly become the order of the day as the police would feel “unleashed” from the restraints of *Miranda*.284 Justice Brennan’s fears of sacrificing the fourth amendment exclusionary

---

283. See Y. KAMISAR, supra note 113, at 557-58; LaFave, supra note 8, at 357-58 (pro-police bias of judges). The deterrent effect of the exclusionary rule may depend on whether the goal of exclusion is “specific deterrence” of the particular police officer who obtained the evidence or “general deterrence” of police misconduct. See id. at 346-47.

284. See LaFave, supra note 8, at 358 (discussing fourth amendment exclusionary rule).
rule on the altar of deterrence theory\textsuperscript{285} could well be borne out in the fifth amendment context as well. The core \textit{Miranda} values of assuring an accusatorial system and protecting the suspect's right to make a free and rational choice whether to incriminate himself would be overriden by a misplaced and doctrinally unsound emphasis on deterring police misconduct.

\section*{Conclusion}

Whatever the merits of a good faith exception to the fourth amendment exclusionary rule, the Court should not adopt a similar exception to the \textit{Miranda} rule. Because the fourth amendment exclusionary rule is based on deterrence principles, it can be argued that a good faith exception is appropriate. In contrast, the \textit{Miranda} exclusionary rule is grounded on the constitutional mandate of the self-incrimination clause itself. Therefore, good faith issues are irrelevant to the determination whether incriminating evidence is admissible. Nevertheless, as a result of its improper emphasis on deterrence as the primary goal of the \textit{Miranda} exclusionary rule, the Court has imperiled the core values underlying the privilege against self-incrimination. Adoption of a good faith exception would signal a return to a case-by-case analysis of subjective factors,\textsuperscript{286} the very approach found wanting by the \textit{Miranda} Court. Worse, if the state were permitted to compel a witness to incriminate himself on the ground that his interrogator meant no harm, the fifth amendment privilege against self-incrimination would be eviscerated.

If the Court's real purpose is to gut \textit{Miranda}, it should face the issue directly and overrule the case.\textsuperscript{287} If \textit{Miranda} is to die, however, it deserves "a more respectful burial"\textsuperscript{288} with the Court justifying its demise with cogent reasoning. The present approach of obliquely sapping \textit{Miranda}'s strength through appeals to such devices as the good faith exception disserves the quest for an analytically sound law of confessions and lessens respect for the Court's ability to coherently fashion constitutional doctrine.

\begin{thebibliography}{99}
\item \textsuperscript{285} See supra note 61.
\item \textsuperscript{286} See supra notes 111-24 & accompanying text. Others have so read \textit{Tucker}, the leading case espousing the good faith doctrine. See, e.g., Berger, supra note 95, at 205; Ritchie, supra note 17, at 416-19; Stone, supra note 17, at 123.
\item \textsuperscript{287} Because a direct reversal of \textit{Miranda} might be politically untenable, the Court might prefer a piecemeal dismantling of the rule. See Stone, supra note 17, at 169.
\item \textsuperscript{288} Justice Harlan made a similar plea when the Court overruled Betts v. Brady, 316 U.S. 455 (1942), in Gideon v. Wainwright, 372 U.S. 335
\end{thebibliography}