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Silence as a Moral and Constitutional Right

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SILENCE AS A MORAL AND CONSTITUTIONAL RIGHT*

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I want to thank the faculty and students of the Marshall-Wythe School of Law for their thoughtful and stimulating discussion of this topic after my oral presentation. Vivian Berger, Louis Henkin, Stephen Munzer, Thomas Schrock, Richard Uviller, and Lloyd Weinreb have all given me penetrating criticisms of a written draft. Though I have attempted to respond to many of their questions and comments, they have made me aware how much of what I say is debatable and could benefit from more searching examination. Though this written version already much exceeds the length of the oral lecture, I have not wished to depart drastically in style or content from the lecture itself, and thus have had to leave a more systematic attempt to work through some thorny issues for another occasion or for other scholars. I am grateful for two summer grants from the Kayden Research Fund which have aided underlying research on the privilege against self-incrimination.

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I. INTRODUCTION

Like the Fourth Amendment ban on unreasonable searches and seizures, the privilege against self-incrimination stands as a barrier to the government's acquisition of information about criminal activities. The moral analogue in private relations to the Fourth Amendment right is quite straightforward. One person should not rummage about the private spaces of another seeking signs of bad behavior unless he has very powerful reasons. The Fourth Amendment similarly limits the government, generally permitting searches only upon probable cause. The private moral analogue to the Fifth Amendment's right of silence is harder to identify, its analysis is more complex and the judgments of right and wrong are more dubious. When may one person properly ask another if he has done something wrong; what are the responsibilities of the person asked when such questions are put; and what may the questioner assume if no helpful response is forthcoming? Uncertainty about these matters may help explain the profound disagreements

over the right to silence, considered by some a pernicious impediment to the discovery of truth and by others "one of the great landmarks in man's struggle to make himself civilized."[1]

My discussion is based on the belief that exploration of the ordinary morality that governs questioning of those who may have done something wrong will aid us to understand what relations are appropriate between an inquiring state and suspected individuals in the criminal process, and may also influence our views about how broadly the existing constitutional right should be construed. I am not among those who believe that clarification of fundamentals often produces blinding changes of view, so I expect some strong disagreement with my evaluation of private situations, the manner in which I link these to relations between the state and individuals, and my views about constitutional interpretation. I hope, however, that the process of working through the issues I raise will illuminate the reader's own perspectives on the right to silence and on the broader concerns about a citizen's relation to his government which that right raises.

My own analysis eventuates in the conclusion that the basic core of the right to silence is morally justified and deserves constitutional protection. I suggest that the Supreme Court, however, has interpreted the right too expansively in its general refusal to permit inferences from failures to speak and in its constraints on dismissal of government employees who refuse to answer questions about their performance of duty.[2] I also suggest that the Court has not yet gone far enough in protecting suspects from the pressures and manipulative strategies of informal interrogation.

II. Standards of Moral Evaluation

Any attempt to say what actions and social practices are morally justifiable raises ancient and thorny questions about the status of such judgments. Though I cannot here defend my own understandings and aspirations, or even explicate these in ample depth, I do wish to say a few words about how I conceive the specific eval-

1. E. Griswold, The Fifth Amendment Today 7 (1955).

2. The qualifying word "general" is important here, since I do think the Court's approach sound for situations in which a person has been questioned before substantial evidence of guilt exists.

uations that constitute the heart of my presentation.

When people say, without qualification, that an act is morally wrong, they purport to do more than express their own attitudes about the act or the prevailing attitude of their culture; they assert that in some sense the act is objectively wrong.[3] Whether any such assertions are warranted is more doubtful. I believe that they are, and that ethical judgments have a grounding that transcends human opinion. Readers unable to accept this view may at least admit the possibility of judgments that are based on fundamental values of a culture,[4] judgments that may subject crude social attitudes about behavior and institutions to demands of rationality, universality, and coherence with other views.[5] Such judgments, rooted in a particular culture, might be thought to have special relevance for judges, and perhaps for legislators, even if more transcendent judgments can also be made.[6]

On this subject, in any event, I cannot confidently identify differences between my attempt to make judgments of the sort I think possible and those based on fundamental cultural values. The crucial values for my inquiry are that people should accord respect for the dignity and autonomy of each other, that they should show concern for their fellows' needs, and that they should act to promote human welfare; these values all receive significant recognition in American culture. Another reason why separation of attempted "objective" judgment from cultural judgment is so hard in respect to the matters with which I deal is that they do not lend themselves comfortably to absolute cross-cultural conclusions. Whether or not torturing and killing innocent people is wrong in all times and all places, the appropriateness of particular kinds of lies or refusals to respond depends considerably on the expecta-

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3. J.L. Mackie has a succinct and convincing discussion of this point. *See* J. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 30-35 (1977).

4. I pass over the serious problems of determining which values are fundamental and of dealing with confusion or substantial division of opinion on important issues.

5. On one view, these demands are imposed by the nature of moral language. On another, they are requirements of rational or moral action which people can somehow apprehend as appropriate to adopt.

6. The issue is complex, and the statement in text requires support of a theory explaining why such actors have a moral obligation to perform their roles and why those roles should be conceived as including reference to community values.

tions of members of a given society.[7] My proposals for personal moral standards and for legal principles are designedly meant to be sensitive to the general social environment in which we find ourselves.

Most substantive moral arguments about proper behavior are cast either in terms of likely consequences deemed desirable or harmful, or in terms of standards that classify actions as intrinsically right or wrong. Many "deontological," or standard-based, arguments have consequentialist underpinnings, and some "consequentialist" arguments have implicit deontological components, so distinguishing the two sorts of arguments is no simple task. Whether or not all valid nonconsequentialist standards can somehow be justified by the desirable consequences flowing from their adoption, a simple and open-ended consequential calculus is not an appropriate basis for persons to make individual moral choices or to evaluate institutional arrangements. They should be guided by both deontological principles and by consequentialist assessments. Without trying to explicate how the two kinds of considerations would relate to each other in a comprehensive moral theory,[8] I shall simply assume the relevance of both in the discussion that follows.

My primary focus is upon the respect and concern that individuals owe to each other and that governments owe to their citizens. By paying less attention to the efficient pursuit of truth, I do not mean to disregard the importance of that goal for evaluation of rights in the criminal process. But whatever one's views about how truth can best be found, arguments about the kind of right to silence that comports with respect for individuals also deserve attention; and these are arguments whose strength citizens and courts can evaluate without relying upon controversial empirical assumptions.[9] Moreover, my belief is that the crucial disagreements con-

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7. For example, when one decides whether to lie to a host about one's enjoyment of a party or to lie to a student about the quality of a paper, it makes a difference whether truthful (negative) statements are considered socially acceptable or personally offensive.

8. One recent interesting attempt along these lines is Charles Fried's RIGHT AND WRONG (1978). For criticisms that Fried's approach is too heavily deontological, see Barry, Review, 88 YALE L.J. 629 (1979); Munzer, *Persons and Consequences: Observations on Fried's Right and Wrong*, 77 MICH. L. REV. 421 (1979).

9. It may be that many arguments about moral rights do rest partly on very deep and

cerning the practices I discuss are over the moral rights of individuals, not over the effective discovery of truth.

III. Silence and Falsehood in Private Relationships

How one person should act toward another whom he suspects of wronging him depends on the precise character of the particular relationship and the wrong, so I cannot hope that an abstract and general account will produce definitive standards for all situations. But such an account can highlight some very important factors. I start with two basic distinctions: one between close relationships of trust and other private relationships, the other between occasions when a substantial basis exists to suspect a person of wrongoing and those when no such basis is present. By close relationships of trust I refer mainly to relations between family members and friends, but some working relations can take on this character after a period of time: one thinks of colleagues in a continuing enterprise, such as members of the same faculty.

A. *Slender Suspicion in a Close Relationship*

Suppose that *A* in a close relationship of trust recognizes a slight possibility that *B* has wronged him, has breached a confidence, taken personal property, or violated some special undertaking, such as the commitment to sexual fidelity in many marriages. Imagine, for example, that Ann cannot find her unusual bracelet and is aware that one of the many things that conceivably could have happened is that her roommate, Betty, may have stolen it. At this point, Ann may properly ask Betty whether she has seen the bracelet, but she may not appropriately ask her questions that are plainly directed to the chance that she may have taken it. In close adult relationships, trust is a characteristic and central element. We count on friends and loved ones having confidence in us, sometimes more confidence than we may deserve; if these people show they lack confidence in us, our self-esteem suffers and the bonds of

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complex empirical assumptions (*e.g.*, about what kinds of human relations will be experienced as most fulfilling). But, perhaps because these assumptions are often not exposed and perhaps because they are so obviously beyond proof or disproof at this stage of human development, they are not treated in ordinary or judicial discourse like more straightforward empirical assumptions.

the relationships are strained. If Ann treats seriously the slender chance that Betty has stolen the bracelet, she shows a lack of trust and grants Betty less respect than is called for by the relationship.

What may Betty properly do if Ann inquires about her possible guilt? She may answer the questions honestly, the course many people would choose, even if she resents their implication. But if Ann asks her to account for her activities, she might say something like "That's none of your business," or "I won't dignify that with an answer." Ann's improper question does not create a duty upon Betty to answer. Though Betty may decide that a response is morally preferable to silence in order to reassure Ann in her insecurities and minimize the strain on the relationship,[10] she does not *owe* Ann a response, and Ann has no legitimate complaint if she fails to provide one.

With greater hesitation, I reach the same conclusion if Betty actually happens to be guilty. Betty undoubtedly has a duty to repair her original wrong to Ann, insofar as she can; but unless disclosure is vital to repairing the damage,[11] Betty does not have a duty to tell Ann that she has wronged her.[12] Ann's improper question, though fortuitously on target, does not create a new duty on Betty to disclose her wrong.

What conclusion can Ann properly reach if Betty refuses to respond? Plainly, she lacks sufficient ground to suppose that Betty is guilty, because Betty's silence may well have been the outraged reaction of an innocent, untrusted, friend. The more troubling question is whether she can give that silence some weight if further evidence of Betty's guilt appears. She might reason as follows:

> I was wrong to question Betty and she was justified in not responding. Still, more guilty than innocent people would refuse to respond, so Betty's silence makes me think it is more likely

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10. In some situations, both the questioner and the relationship may benefit more from a refusal to respond, which can serve as a powerful reminder of the unacceptability of the original imposition.

11. For example, if Betty still has access to the bracelet, she could retrieve it and put it somewhere so that Ann would find it and think it had been misplaced.

12. This judgment is debatable. Some extremely close relationships may be based on assumptions of such complete openness that acknowledgement of any wrong would be a duty. In addition, over a broader range of relationships, there may be a duty to reveal certain kinds of wrongs, if not others.

> that she stole the bracelet. My responsibilities to Betty do not require me to disregard this relevant information, though my own improper question produced it.

If Ann were capable of dispassionate evaluation, I believe this response would be defensible. In most real situations, however, a person whose excessive suspicions lead her to put improper questions, may not be able to judge rationally the weight of a refusal to respond. Once Ann recognizes her own wrong and the propriety of a silent reaction, perhaps she should try to disregard that reaction as possible evidence of guilt.

B. *Solidly Grounded Suspicion in a Close Relationship*

I now want to introduce an important change in the facts. Cathy, a mutual friend who is unaware that Ann's bracelet is missing, has written Ann that she was surprised to find Betty's sister wearing a bracelet identical to Ann's. Ann knows that Betty took a trip to visit her family about the time the bracelet disappeared. Although other possibilities cannot be excluded,[13] Ann now believes, as would a neutral observer, that Betty probably took the bracelet and gave it to her sister.[14]

The close relationship of trust no longer bars an attempt by Ann to find out if Betty has taken the bracelet. She cannot be expected simply to discount the chance of Betty's guilt or to carry on the relationship without attempting to resolve the matter.[15] The most natural, open, course for Ann is to tell Betty what Cathy's letter says and ask for an explanation.[16] However tactfully Ann phrases

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13. For example, Ann may have admired Betty's bracelet and bought a similar one for her sister, someone else with access to the apartment may have given the bracelet to Betty's sister, or Cathy may have been mistaken.

14. In any genuine situation, *A* may know *B* so well that he will rationally continue to believe that *B* has not committed a certain kind of wrong despite strong extrinsic evidence to the contrary. And, because of the bond of friendship, *A* may continue to believe in *B*'s innocence even after an observer with *A*'s knowledge of *B*'s character would cease to do so. If *A*'s confidence is rationally based, it will vary with the kind of wrong involved. For example, a person who would never steal from a friend may be sloppy about keeping secrets.

15. Solidly grounded suspicion, if not resolved, will work like a festering sore in Ann's feelings toward Betty unless Ann is indifferent to Betty's probable wrong or is especially saintly.

16. I am assuming that Cathy has no interest in keeping her communication to Ann confidential.

the question,[17] Betty will perceive that Ann's confidence in her integrity is less than complete, but if Betty is fair-minded, she will recognize that Ann's shaken confidence is warranted by the external facts.[18]

How else might Ann seek to learn if Betty has stolen the bracelet? She could make a thorough search of Betty's belongings to see if anything else she has lost turns up.[19] She could ask a friend (or a professional detective) to get close to Betty and try to trick her into admissions. She could ask other members of Betty's family how the sister got her bracelet. Ann could simply keep a very close eye on Betty, or lay potential traps for her, leaving jewelry to which only Betty would have access.

Most of these alternatives would avoid directly exposing Ann's suspicions, and thus might spare Betty's feelings, but each has serious drawbacks from a moral point of view. The search involves an invasion of Betty's personal space. Getting someone to elicit admissions by deception may be even worse, resting as it does on an extreme manipulation of Betty's social environment. Even the more innocuous techniques of watching Betty carefully and "laying traps" require deceit by Ann, who must simulate full trust in Betty while acting directly contrary to such trust. Writing first to Betty's family may avoid this objection, but it is a kind of embarrassing insult to a friend.

One perspective for comparing these alternatives is to imagine Betty's feelings about them. If Betty is innocent, she may well be initially hurt by direct questions, but she can come to accept their appropriateness. If she subsequently learns that she has been subject to a search or the attentions of a pretended friend, she will be outraged. We can imagine her anguished cry upon hearing that Ann has written her family, "Why didn't you come to me first?"

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17. She might say something like, "I'm sure there is some innocent explanation for this, but Cathy writes me that . . . ."

18. Ann would show more respect for Betty if she took the position, "I don't care what the facts seem to be; I cannot believe Betty would harm me"; but such blind trust in the face of contrary evidence goes beyond what Betty can reasonably expect. Of course, if Betty realizes that Ann is aware that Betty's character renders this kind of theft almost unthinkable, *see* note 14 *supra*, then Betty may reasonably expect Ann to discount fairly substantial extrinsic evidence.

19. I pass over possible use of electronic surveillance, which seems too fanciful here.

Discovering that Ann has been "watching" her or laying traps will also make Betty feel wronged. If Betty is guilty, she may feel she has less complaint if other tactics are employed against her, but she still will probably be offended that Ann has tried to determine her guilt without first giving her a chance to explain.

Yet another alternative is open for Ann. She could simply assume Betty's guilt on the basis of Cathy's letter and end the relationship without revealing the true reason. That course shows little respect or concern for Betty, who might be innocent, and who, even if guilty, might have been able to respond to Ann in a way that would have preserved for both of them the value of their friendship.

This analysis suggests the following generalization: in close relationships, when *A* has strong grounds to suspect *B* of wrongdoing, *A*'s laying the grounds of his suspicion before *B* and asking for an explanation is not only morally appropriate action, it is more respectful of *B*'s dignity and autonomy than most alternative approaches to discovering the truth.

When Ann asks her for an explanation, Betty now has powerful moral reasons for responding. Ann undeniably has a legitimate interest in finding out what has happened to her bracelet, and external evidence strongly suggests that Betty's honest response to her appropriate inquiries will contribute to that end. Moreover, Ann's justified suspicions threaten their relationship. Betty has a duty as a friend both to aid Ann's search for the facts and to do what she honestly can to prevent a bitter termination of the relationship. If Betty is innocent, no countervailing moral reason could now support her refusal to answer Ann's questions truthfully.[20] What if Betty is guilty? She may believe that Ann will actually be so harmed by learning the truth that she should not reveal it. Such justifications have a certain plausibility when the original wrong is sexual cheating or conversational breach of confidence, but they are doubly suspect. When an act will strongly serve one's own interests, evaluating fairly whether the act will genuinely protect someone else as well is difficult. And deciding that lies will protect someone actively seeking the truth constitutes a paternalist refusal

20. Unless she has an independent right to withhold some extraordinary facts that are an integral part of her account.

to let the other person decide what is good for him, a plain impairment of his autonomy.[21]

If Betty does decide to protect Ann by concealing the truth, a refusal to respond hardly will be effective. Only lies will suffice, and they require a heavier justification than mere failure to respond. A different ground Betty might assert for refusing to tell the truth is that she has a moral privilege not to bring harmful consequences upon herself. I shall discuss a possible self-preservation justification more fully below, and here will say only that when close friends and family members alone are involved, the consequences of admissions of wrongdoing will usually be uncertain. For this reason, and because one is under a powerful duty to respond to questions that have been justifiably put by a close acquaintance, the claim that one can lie or remain silent to protect himself is not very attractive in this context.[22].

How may Ann justifiably react if Betty does refuse to respond? She will rightly perceive Betty's silence now as substantially probative of guilt; and since her own questioning was appropriate, no possible bar will exist to her according silence the weight it naturally has in this context. Moreover, Ann has the independent complaint that Betty has failed to fulfill an important duty of friendship. In their personal relations, Ann would be justified in acting as if Betty had committed the original wrong.[23]

At this stage, the only sense in which Betty has a moral right to silence against Ann[24] in regard to the lost bracelet is the very weak sense in which she has a moral right to silence on every subject. Ann cannot coerce Betty to respond, and if she tricks or pressures Betty into speaking, she violates Betty's autonomy and dignity. But these techniques are morally objectionable regardless of what

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21. Matters are sometimes more complex. In some intimate relations one person may give signals that he does not want to know the truth about certain matters even if he requests the truth on particular occasions.

22. A distinction is drawn by Kenneth Winston between relations in the criminal process and those in families and other continuing cooperative arrangements. Winston, *Self-Incrimination in Context: Establishing Procedural Protections in Juvenile and College Disciplinary Proceedings*, 48 S. CAL. L. REV. 813, 825 (1975).

23. Whether that will warrant termination of the friendship will depend on the magnitude of the wrong and the reasons Betty offers for refusing to respond.

24. This is an important qualification. Betty may have no duty to reveal her wrong to uninvolved third persons.

Ann wishes to learn from Betty and the strength of Betty's duty to provide answers. Betty has no special right to silence concerning her possible guilt.

C. *Slender Suspicion in Less Personal Relationships*

Will our conclusions differ if the relationship between *A* and *B* is less personal? I shall use an example of employer-employee relations, recognizing, of course, its limited power in light of the immense variety of relations into which suspicions can intrude. Arthur owns and runs a grocery store with fifteen employees, including Bob, who has been working for six months. Initially, Arthur starts to suspect that he is missing some food, but he is not sure any theft has occurred, much less which, if any, of his employees might be involved. Arthur may appropriately ask his employees if they have seen anything suspicious, but he should not question each to test his possible guilt. Though Arthur has not the same personal basis for trusting his employees that Ann has for trusting Betty, he still should assume that each is performing his duties honestly until a solid basis exists for supposing otherwise. Each of us needs to be treated as honest and trustworthy in ordinary relationships; inquiries based on remote conjecture do not accord due respect to those questioned. Do not misunderstand me. When genuinely momentous matters are at stake, treating everyone as potentially untrustworthy may be necessary. But even when employees understand the need for periodic lie detector tests or daily searches, they may feel degraded by them, at least until they are numbed by familiarity. Such treatment is to be avoided unless the stakes are very high indeed. So Arthur would be wrong at this point to question Bob as a potential suspect.

If Arthur does so, Bob would be justified in refusing to answer. Unless protected by union contracts, few employees would engage in a job-risking failure to respond, but whatever self-interest may dictate, Bob has no moral duty to answer Arthur—for the same reason Betty had no duty to answer at this stage.[25] This conclusion holds even if he has stolen the food. He then has duties to stop

25. One might argue, however, that one of Bob's duties as an employee is to account for his work activities whenever asked to do so by his employer, and that his duty to respond is therefore stronger than Betty's.

stealing and to repair the original wrong, but he does not have an initial duty to come forward and admit his wrong unless that is required for reparation, and Arthur's unjustified inquiries do not create a new duty to admit his guilt.

Because so few innocent employees will fail to answer, Bob's refusal may point toward guilt more than a similar refusal by Betty. But because the refusal is consistent with angered innocence, plainly it is not an adequate basis for Arthur to conclude that Bob is guilty. If further evidence of Bob's guilt comes to light, there may be no moral objection to Arthur according original silence its actual probative weight. If Arthur, however, recognizes the impropriety of his original questions, he may also assume that he cannot fairly evaluate the likely significance of a silent response and may properly try to disregard it as any evidence of guilt.

D. *Solidly Grounded Suspicion in Less Personal Relationships*

If Arthur has special reason to suspect Bob because, for example, another employee has reported him, questions directed toward his possible guilt become appropriate. Indeed, in less personal relationships the point at which such inquiries are acceptable may come earlier than with close friends and family members, since *A*'s assumption that *B* is trustworthy will be less deeply rooted, and treatment as a possible suspect will not wound *B* so much. As with the close relationships, questioning shows *B* more respect than searches or deceitful attempts to obtain admissions. Employers, however, have recognized supervisory responsibilities over employees, and special scrutiny of *B*, or traps, or initial attempts to get information from others may be more acceptable here than among friends. Nevertheless, inquiries put to Bob are certainly one proper way for Arthur to proceed when has has substantial grounds to think Bob guilty.

One of Bob's responsibilities as an employee is to aid Arthur in resolving legitimate concerns about the business.[26] Both Bob's im-

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26. Edgar Jones has written, "there is a demonstrable industrial and arbitral expectation that an employee shall respond informatively to those questions of his employer which are reasonably related to assuring the success of the enterprise." Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 U.C.L.A. L. REV. 1241, 1287 (1966). This passage is quoted and the relevance of the silence in work

plied commitment to performance when he took the job and the general benefits of fulfilling such expectations constitute moral grounds for Bob to act as his employee role requires.[27] If Bob is innocent and is now questioned by Arthur, he has a moral duty to explain his activities, so that Arthur will realize that no thefts have taken place or that someone else has committed them.

If Bob is guilty, what he may permissibly do is more difficult.[28] Let us suppose that he knows that although the police will not be brought in, he will be fired and will have some difficulty getting a new job if he admits to theft. Only some conflicting duty or privilege could override his employee duty to cooperate. Assuming that Bob has no unusual duties toward others that would warrant his refusing to reveal the truth, does he yet have some moral privilege of self-preservation that permits him to do so? The argument to that effect is that no one can fairly be expected to bring an extremely harmful consequence, such as being fired, upon himself.[29]

The strongest version of the suggested principle would treat an individual's self-harming behavior as being actually immoral.[30] A weaker version would consider the right of self-preservation as somehow offsetting Bob's duty to respond honestly to Arthur, leaving Bob in some sense morally free to decide which course to take. How Bob makes the choice might be thought to be morally indifferent. Or the choice to respond honestly, a choice relatively few people would be willing to make, might be regarded as morally

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settings discussed, in Winston, *supra* note 22, at 843-44 & n.93.

27. A. John Simmons has suggested that "[the] existence of a positional duty is a morally *neutral* fact," A. J. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 21 (1979), but that view fits comfortably with the idea that if one undertakes "to discharge those positional duties," *id.*, he is under a moral obligation to perform them, and it also fits comfortably with the assumption that strong consequentialist reasons will normally support performance of positional duties.

28. More precisely, if an honest account of his activities would make Arthur think he is guilty, the possible justification suggested below would apply.

29. Fully developed, such a principle would require qualifications I do not discuss. Persons can be expected to bring consequences this bad upon themselves if the only alternative is even worse consequences for loved ones. And people who voluntarily enter into roles that involve the taking of extreme personal risks for the welfare of others presumably have a moral duty to take those risks when the occasions arise.

30. That, of course, has been the traditional position on suicide and may have been Locke's view on agreeing to become a slave. *See* A. J. SIMMONS, *supra* note 27, at 67.

preferable, but not demanded by moral duty.[31]

A kind of natural rights argument might be advanced on behalf of a principle of self-preservation, the claim being that any individual has a basic right to avoid very destructive consequences to himself even if submission would serve the welfare of others.[32] Applied to innocent people, this claim has much appeal, yielding such conclusions as that someone cannot be blamed for declining to donate a kidney to save the life of a stranger. When the person's original wrongful act creates the risk of the very harmful consequences, the claim is more dubious. Still, regrettable as the original wrong was, and justifiable as the threatening response may be, perhaps the person committing the wrong should not be thought to have a moral duty to cooperate in bringing the consequences of that response upon himself.

The self-preservation claim will take on added force in many situations, because the wrongdoer's fate is closely tied to that of others. Children, a spouse, other relatives and friends, will be pulled down by any catastrophe that occurs to him. Even if he could somehow disregard considerations of his own interests, he might decide that his duties to aid those nearest to him outweigh his duty to his employer.

The proposed principle of self-preservation is hard to defend on the basis of any simple standard that judges acts by their contribution to the general good. Even if he makes reference to the welfare of family members, one who commits serious wrongs will often not be able to say persuasively: "Humanity will be better served if I avoid detection." But the following somewhat more complex utilitarian defense of the principle might be urged:

> People generally will be happier (or otherwise better off) only if they develop a character that strenuously avoids self-destructive actions. Even though application of a refined utilitarian calculus to particular actions might sometimes require such behavior, persons with the desired character will be incapable of submit-

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31. The mere fact that most people who find themselves in a particular situation will not perform an act does not foreclose the possibility that the act is required by duty, especially when, as with thieves who are under suspicion, the class of those in the situation is determined by original wrongful acts by members of the class.

32. *Cf.* T. HOBBES, LEVIATHAN, ch. 14 (Oakeshott ed. 1955).

> ting their own vital interests to such a calculus.[33] Thus, a society should try to develop in individuals the kind of character that will not yield self-interest or the interests of loved ones in the situation that Bob faces, and we should not prescribe moral principles that require such sacrifices.

This justification faces a special hurdle in connection with wrongdoers. Broad perception of a duty to answer honestly about serious wrongdoing would help discourage the original wrongful acts.[34] So, the application of a self-preservation principle to these situations could be accepted on broad utilitarian grounds only if the benefits of extension outweighed the likely reduction in deterrence of the original wrongs as well as the benefits of discovering more wrongdoers.

Assuming that a right of self-preservation relieves Bob of his duty to respond honestly, does it justify his actually lying to Arthur or only his refusing to respond?[35] By lying, Bob would actively try to thwart Arthur's legitimate efforts to learn what happened and perhaps cast suspicion on some innocent person. He would also violate his general duty to tell the truth. Thus, more powerful supporting grounds are necessary for lying than for silence. Yet, remaining silent may be ineffective to protect any of Bob's vital interests,[36] so his practical choice may be between telling the truth and lying.[37] This is so, at least, if the principle of self-

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33. To be more precise, a person with the desired character would not be capable of submitting to a substantial worsening of his own position according to such a calculus. The argument is more difficult that the overall results would be benign if most people felt free to improve satisfaction of their own vital interests at the expense of the general welfare.

34. In close personal relations in which one feels obligated to be open and honest, the anticipation of having to disclose a wrong often constitutes a serious constraint.

35. The importance of a self-defense as a ground for lying is discussed in S. BOK, LYING 83-84 (1978). Bok's examples include wrongdoers who lie to prevent discovery, but she does not analyze whether the justification properly applies to these cases.

36. It is, however, possible that Bob might think his chances of being retained or finding a new job would be greater if he did not actually admit his guilt.

37. I slide over a subtle point here. Assume that the self-preservation principle is grounded solely on protection of vital interests and would justify Bob's refusal to respond if he could thereby protect vital interests, but that silence will be wholly ineffective in this respect, producing the same consequences as truth-telling. One might say that the principle confers a right to remain silent despite the practical futility of silence; or, one might say, as I would be inclined to do, that in light of the obvious ineffectiveness of silence the moral grounds for that course are removed, leaving in effect the duty to speak honestly and perhaps a possible justification for lying.

preservation is understood as concerning actual protection of Bob's interests. If instead the idea is taken to be that persons have a right not to contribute actively to their own downfall, then silence may be perceived as an important option to telling the truth even if it will not be effective in warding off any harmful consequences.

I am sorry to report my own uncertainty over the scope and power of the proposed principle of self-preservation. Partly because I think wrongdoers are primarily interested in the consequences that may befall them, not whether their own admissions play a role in bringing about those consequences, I see the principle as mainly concerned with avoidance of harmful consequences; though I also see some force in the idea that most of all a person should be able to refrain from taking an active role. I believe that lying does require much more powerful justification than simple refusal to respond. Beyond these points, much seems to depend on the magnitude of the original wrong, the effect of the harmful consequences on the wrongdoer and those close to him, and the effect on the original victim of discovering the facts. If, for example, Bob has stolen a small amount of food, his continued employment is a desperate need for himself and his family, and he is confident he can refrain from stealing in the future, the argument that he can lie to avoid discovery and certain dismissal is rather strong.[38] If, however, Bob has disguised himself and viciously assaulted Arthur at night in his store, he knows he is subject to periodic fits of rage, and he knows that Arthur will remain terrified until he discovers his assailant, his duty to speak the truth may well outweigh any interest in self-preservation or claim to remain passive.

Whatever the strength of the self-preservation principle, it obviously applies to the earlier stage of slender suspicion as well as when questions are based on substantial grounds. Thus, it reinforces the other arguments I have made[39] for why even a guilty

38. This assumes, of course, that the lies do not lead Arthur to blame and dismiss someone else who is innocent.

39. It is, in fact, closely related to the principle that an individual need not come forward to admit a wrong when that is unnecessary for rectification. The self-preservation principle as here elaborated is stronger in that it can sometimes override duties one would otherwise have. Powerful self-preservation reasons may override some duties of rectification as well as other duties, though as the hypothetical in the text indicates, when the victim's interest in rectification is great and cannot be accomplished without identification of the wrongdoer,

person is not under a moral duty to respond at that point.

How can Arthur appropriately react if Bob does refuse to respond? Few innocent people would decline to explain away evidence of their wrongdoing, so a refusal to respond is strongly indicative of their guilt. Although guilty persons may more often lie than remain mute, some still may be unwilling to lie and others will lack confidence that they can tell plausible lies. Because Arthur's concern and questions are appropriate, he need not hestiate to accord a silent response its actual probative weight; and even if Bob is innocent, his refusal to answer represents an unjustifiable failure of duty. Thus, Arthur will be justified if he dismisses Bob.

This conclusion does not rest on rejection of the argument that the self-preservation principle gives Bob a moral right to silence. Even if Bob is morally justified in putting himself and his family before his employer's interest in discovering the wrong, Arthur obviously need not give Bob's interests priority. And it would be ludicrous to say that in serving his own interests and giving silence its natural effect, Arthur is somehow interfering with Bob's right not to respond. That right is not a right to be thought innocent or a right to escape harmful consequences, but is a right not to *help* bring about those consequences. What would otherwise be appropriate actions by Arthur are not turned into wrongs because they reduce the practical value of Bob's right. We should reach the same conclusion about the possibility that questions directed at suspects often produce lies. We do not hold the people who ask proper questions responsible for those lies, or believe that they should disregard the lies if they discover them.

E. *Inquiry and Remorse*

Since admissions of guilt often are accompanied by statements of remorse, questions directed at someone suspected of committing a wrong may lead that person to express remorse. In what may be the fullest philosophic defense of the privilege against self-incrimination in recent years, Robert Gerstein contends that people should be able to express remorse in private settings and when they are freely inclined to do so, and that the state should not

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self-preservation does not seem a sufficient basis for withholding the truth.

compel such expressions.[40] His argument is directed at the criminal process, but in this section I consider briefly the possible relevance of a similar argument to private relations.[41]

We should recognize that expressions of regret need not be accompanied by the revelations of deep emotional feelings of guilt that concern Gerstein. Apologies do often accompany admissions, and may be "owed" to victims,[42] but even a sincere apology may be something much more modest than the outpourings of a stricken conscience.[43] In regard to compulsion, we should avoid too purified a notion of the conditions of freedom to develop and express feelings of remorse. Seeing how others are hurt by our actions and consequently suspect or resent us, often leads us to remorseful feelings. Questions put by victims might be conceived of as part of a natural process that does not interfere with the wrongdoer's freedom both to develop feelings of remorse and to decide how to reveal them.

Even if the victim's questions and likely inferences from silence were seen as circumscribing the wrongdoer's freedom in some significant way, that would not undercut their appropriateness. When Ann questions Betty, she is not trying to get her to apoligize or feel guilty; she is only trying to figure out what went on, a matter of legitimate concern to her. That her actions may possibly have the unfortunate side effect of pushing Betty into a premature expres-

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40. *See* Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979); Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343 (1979); Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970).

41. Part of Gerstein's concern is that the suspect is forced "to make public the judgment by which he has condemned himself in conscience." Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 92 (1970). In private contexts, an admission will not be fully public, but it may be compelled and may be to an audience the wrongdoer would not select under other conditions.

42. An apology is not only, or perhaps even primarily, a revelation of emotional feelings; it is a performative utterance made to someone who has been wronged that may be crucial for rectification once a person's guilt is evident. Imagine that *B* admits to *C*, but in front of *A* that he has wronged *A*. *B* then proceeds to tell *C* how badly he feels about what he did, all in *A*'s hearing. Although *A* knows how much remorse *B* feels he still might say to *B*, "But you haven't even apologized yet."

43. An apology in some circumstances need not even involve an indication that one regrets his initial choice. One can apoligize profusely for being late even while one claims that the lateness was necessitated by some stronger obligation.

sion of remorse does not alter their moral status.[44]

IV. A Right to Silence and the Criminal Process

A. *The Implications of a Moral Right to Silence Against the State*

So far, I have made a number of suggestions about the morality of silence when one private person questions another about possible wrongdoing. What, if anything, do my conclusions — some drawn confidently, others more tentatively — have to do with the government's efforts to enforce the criminal law? At the least, the previous discussion illuminates some possibly important distinctions; for example, between the suspected person's weighing of moral claims and the victim's weighing of moral claims. I believe, however, that the discussion also provides an important starting point for resolving questions about the state's use of its power. Unless important relevant differences call for variant treatment, the moral principles governing private relations should also govern relations between the state and individuals. Thus, inquiry about the significance of private relations for the criminal process requires close attention to special features of an individual's relation to his government. For now, we need put from our minds the Fifth Amendment and its interpretations because our present interest is in the practices we would recommend for a society not constrained by existing legal doctrines.

One critical aspect of its authority is the government's power to compel people to tell the truth, by confining those who refuse to answer and by treating lies as criminal. Unlike private persons, who are very rarely morally justified in using actual or threatened physical coercion to compel others to speak,[45] the government's

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44. Gerstein himself does acknowledge that some negative inferences from silence are appropriate but says that "[t]o find evidence of guilt in the motivation for silence . . . is to impugn its legitimacy." Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 Am. J. Comp. L. 81, 111 (1979). His endorsement, from the vantage point of moral philosophy, of the present English distinction between what may and may not be inferred from silence is insensitive to the relative unimportance of that distinction in most cases. *See* Greenawalt, *Perspectives on the Right to Silence*, in Crime, Criminology and Public Policy 239-40, 243-44 (R. Hood ed. 1974).

45. In extreme cases, as when disclosure will save lives, the use of physical force by private persons may be justified.

employment of such force is often warranted. Persons disagree about the proper occasions for that force and about the ideal scope of various privileges that excuse persons from answering questions. Few doubt, however, that forcing witnesses is sometimes appropriate even though the truth will embarrass the witnesses, put them in an uncomplimentary light, or jeopardize important interests of their own or of persons about whom they care deeply. If incriminating remarks are to receive special treatment, some special justification must apply to them.

One important question is whether the suspect has less moral obligation to tell the truth to criminal investigators than to victims in private relationships because the moral grounds in favor of responding honestly are weaker or because some counterveiling privilege of self-protection is stronger. In favor of the first alternative, it can be argued that because the establishment of criminal guilt is not directly connected to restitution to victims, and because many criminal acts either do irreparable damage or do not involve specific victims, a criminal's admission of guilt has little to do with compensatory justice. Moreover, the questions are not being put by the victims themselves, as in my two private examples, but by third parties, so any special duty to respond to the one who has been wronged is absent.[46] Finally, the ties between suspect and government are less close than in many private relationships and do not involve the voluntary undertaking of responsibilities that typifies friendship and employment.[47]

None of those points is a very powerful reason for considering the moral grounds in favor of truth-telling to be weakened. In private contexts, too, compensating for wrongs is often separable from admitting guilt. When redress can be made for criminal wrongs, its initiation usually depends upon identification of the criminal. And establishment of guilt and punishment work more subtle forms of

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46. Insofar as this point has force, it has application when wrongs are done to large impersonal private organizations.

47. The thrust of most social contract theories (here impliedly rejected) is to find some sort of voluntary undertaking of obligations toward the government by citizens, or by a broader category of residents. Only for naturalized aliens and government officials does such an approach seem plausible. For a thorough review of the arguments, see A. J. SIMMONS, *supra* note 27, at 57-100.

partial rectification, relieving victims and others of insecurity,[48] and satisfying normal desires that those who have caused injury be punished. Because victims usually want crimes solved, officials who investigate crimes can fairly be seen as representing them, as well as the larger public. Therefore, the suspect's responsibility to answer honestly seems little affected by the fact that someone other than the victim is putting the questions. Nor does the comparative weakness of a suspect's relation to the government mean that the moral bases for his telling the truth to criminal investigators are also weak. Often when individuals choose whether to comply with government initiatives, moral responsibilities concerning interests of very great moment are involved, and this is true of criminal investigations. Everyone has a strong moral duty not to inflict undeserved harm on fellow members of the community, and to prevent harms others might commit when he can do so easily. Those appalling examples of urban apartment dwellers who do not even pick up their telephones when a neighbor is being viciously assaulted are a powerful reminder of what life can be like when people do not act upon this duty. Since the establishment of guilt usually limits a crime's harmful effects and helps protect the community against future crimes, powerful moral grounds exist for contributing to the solution of serious crimes. These grounds apply to persons deciding whether to admit they have committed crimes.

If a suspect has, all things considered, less moral duty to tell the truth to criminal investigators than to victims in many private relationships, the reason is not that the grounds for honesty are weaker, but that some countervailing privilege of self-protection is more powerful, more powerful because of the potentially fearful consequences of admitting a serious crime. Even if we believe that open admission of guilt is usually the course of action that is best, we may hesitate to say that someone has a moral duty to bring conviction and imprisonment upon himself.

Closely related to this point about self-defense is an argument based on the character of the relation between government and

48. This feeling is particularly sharp when one fears that the same criminal may strike again. If one believes that he has been victimized by someone with whom he is familiar, uncertainty over who committed the crime can breed an unsettling distrust of all those who might have done so.

suspect. Lies made to enemies are more easily justified than lies made to others,[49] both because less generally is owed to antagonists and because most antagonistic relationships lack the foundation of trust upon which the duty of honesty partly depends. From the perspective of the person formally accused of criminal acts, the government plainly has become an enemy in an important sense. Although prosecution may be halted by proof of innocence, and aspects of a theory of punishment may include rehabilitation and reintegration into the general society once the criminal's "debt" has been paid,[50] the government is nevertheless proceeding to establish that the suspect deserves to be cut off from society and placed in a highly unpleasant environment for the near term.[51] That is enough to make the state an enemy from the accused's point of view. Even before formal accusation, someone focused upon as a suspect faces the state as an antagonist, and anyone who fears prosecution may regard the state as a potential foe. The "state-as-enemy" argument supports the conclusions of the self-defense argument,[52] but does it fairly apply to those who are guilty?[53] Do persons acquire a moral privilege to lie or to remain silent when their own original wrongful acts have caused the state's antagonism? As I have earlier suggested, the self-defense argument is based on the moral justifiability of preserving oneself from harmful future consequences, and it may apply even to those who are to blame for creating their vulnerable position.[54] Similarly, even though a person is responsible for the state's justified enmity, the state's adoption of an antagonistic position may weaken his responsibilities toward it.[55]

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49. *See* S. BOK, *supra* note 35, at 141-53.

50. These elements are, of course, not present for capital punishment.

51. The imposition of harm upon the wrongdoer is a much more central feature of the criminal process than of attempts to establish guilt in most private contexts.

52. The state-as-enemy argument is not simply a reformulation of the self-defense argument, though they will often go together. The first argument could apply to dealings with an antagonist who is unable or unlikely to impose consequences one fears, the latter to dealings with friends who might, upon learning the truth, take misguided actions in pursuit of one's welfare.

53. For the *innocent* person who is prosecuted, the fact that the state is designedly trying to cause him great harm does seem an additional reason why he might be justified in not telling the truth if he thought that that would damage him.

54. *Cf.* T. HOBBES, *supra* note 32, ch. 21.

55. This is a troublesome point. In personal relations, if one's wrongful act causes justified

The suspect's perspectives do not by themselves determine the appropriateness of a right to silence. Rather, that depends on the view of the criminal process that the government, and society generally, should properly take. Even when the process has reached a stage of explicit adversariness, the government cannot treat the suspect like an unqualified enemy. In the first place, the point of the process is to establish accurately who is guilty; until that is clearly done the government must treat a suspect as possibly innocent.[56] Second, whatever view the suspect may justifiably take toward the prospect of imprisonment, the government cannot forget that criminals will eventually be reintegrated into the community and they should be so treated.[57] Third, the government may owe all its subjects a degree of respect just because it is the most powerful and most inclusive representative of the whole society. At the same time, the government cannot accept the view that the suspect's desire not to be convicted somehow ranks equally with society's wish for conviction of the guilty. The criminal process is not a battle between equally meritorious combatants to see which of two inconsistent but equally weighty goals will be achieved.[58] From so-

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enmity, one would not be warranted in treating the person as an enemy so long as a restoration of better relations is possible. If the wrong causes an irrevocable antagonism, there may come a time when the original wrongdoer may permissibly act as an adversary.

56. Sissela Bok says "a special case might be made for deception in lawful, *declared* hostilities, as against tax-evaders or counterfeiters . . . ." S. BOK, *supra* note 35, at 144. She continues, "the more openly and clearly the adversaries, such as criminals, can be pinpointed, and the more justifiable, therefore, the criteria for regarding them as hostile, the more excusable will it be to lie to them if honesty is of no avail." *Id.* Government deceit does seem most acceptable when it is directed at those already known to be guilty (*e.g.*, high figures in organized crime) or when it will impinge seriously only on those who are guilty (*e.g.* a simple trap is set that will attract only those who wish to commit crimes).

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

58. Some of the rhetoric in former Justice Fortas's well known defense of the privilege against self-incrimination comes close to such a conception. Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91 (1954). He said:

> [The Englishman] himself was a sovereign. He had the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit . . . .
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> . . . Equals, meeting in battle, owe no [duty to furnish ammunition to the other side], regardless of the obligations that they may be under prior to battle. . . . . [The government] has no right to compel the sovereign individual to surrender or impair his right of self-defense.

ciety's broader perspective, the aim of the process is to clear the innocent and convict the guilty.

The government's pursuit of accurate determinations, however, must be limited by principles of humane treatment. Whether grounds exist to make a suspect's refusal to respond morally acceptable, government compulsion to force admissions is inhumane. Though articulation of the grounds of this intuitive judgment is not easy,[59] the broader principle within which it falls is the cruelty of forcing people to do serious harm to themselves, even when infliction of the same harm by others is warranted.[60] That the right to silence rests on this basic moral perception, is suggested by judicial talk of "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."[61] When most witnesses feared damnation if they lied under oath and the penalty for felonies was death, the choice was particularly excruciating, but it remains cruel for the government to force people to help convict themselves, lie,[62] or be confined for contempt. This is particularly so when the government is not going to take exculpatory statements on their face, but is committed to seeking evidence against, or convicting, someone, despite whatever account he offers.[63]

If the moral basis for the right to silence in ordinary criminal cases is the inhumanity of forcing admissions, what should the

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Id. at 98-99.

59. *See* Ellis, *A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 838-39 (1970).

60. A similar principle can be invoked against forcing people to testify against close loved ones. The marital privilege is based on such a principle, but it may deserve wider application, though extension creates serious line-drawing problems. As Ellis has pointed out, the chances of genuine compulsion to testify truthfully against loved ones are much less in practice than in legal theory. *Id.* at 837.

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

62. The special force of the oath is now uneven. Some people regard lying under oath as abhorrent; others lie with apparent equanimity. Few criminal defendants are subsequently convicted of perjury. If they are not believed, they will probably be convicted of the original crime; if the original jury acquits them, the prosecution will be hard put subsequently to prove that they committed perjury, unless they plainly did so on some straightforward peripheral matter.

If lying under oath by suspects and defendants were immunized from punishment, their choice would be altered. But the government's compulsion upon them to testify and risk being trapped or otherwise damage their chances would still be cruel.

63. *See* Winston, *supra* note 22, at 825.

dimensions of the right be? When substantial evidence exists against someone, allowing ordinary inferences from his silence and dismissing him if he refuses to speak about his performance of public duty hardly seem inhumane. These are, rather, natural consequences of his choice to remain silent. Undoubtedly, those practices may affect a suspect's or a defendant's choice to speak, but the moral right to silence should not be viewed as a right to be released from all the normal influences to respond to accusations. Rather, it should be viewed as a right to be free of the especially powerful compulsions that the state can bring to bear on witnesses. Some support for this conclusion may be drawn from the practice of other liberal democracies. As far as I am aware, no nation grants silence as absolute a protection as our present principles purport to afford.[64] In England, for example, some adverse comment on pretrial silence and on refusal to take the stand is now permitted.[65] In the early 1970's, the prestigious Criminal Law Committee proposed expansion of presently permissible inferences and the adoption of other strategies to encourage responses to questions;[66] these proposals failed after heated debate,[67] but even their opponents did not generally argue that existing practices were unfair.[68]

From the moral point of view, pressures and tricks designed to get suspects to confess are much more questionable than inferences from silence and dismissal. When law enforcement officers browbeat suspects, play on their weaknesses, deceive them as to crucially relevant facts (such as whether a suspected confederate has confessed), or keep them in a hostile setting, the officials inten-

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64. On civil law countries, see Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 526-30 (1973); Voulin, *France* in POLICE POWER AND INDIVIDUAL FREEDOM 258-79 (C. Sowle ed. 1962). Canadian procedures are discussed in Martin, *Canada* in *id.* at 249-54; L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 6, 71-76 (1959).

65. Both the prosecutor and judge may comment on a defendant's pretrial silence; only the judge can comment on defendant's failure to testify. Comments may not suggest that the jury draw an inference of guilt but may invite it to give less weight to an account the defendant offers for the first time at trial and to give added weight to evidence the defendant fails to answer. *See* Greenawalt, *supra* note 44, at 235, 240, 243-44.

66. CRIMINAL LAW REVISION COMM., Eleventh Report, EVIDENCE (General) §§ 29-46, 110-12 (1972).

67. *See* Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979).

68. *See generally id.*; Greenawalt, *supra* note 44.

tionally manipulate the environment to make rational, responsible choice more difficult. Such tactics hardly accord with respect for autonomy and dignity,[69] and they work unevenly by undermining the inexperienced and ignorant and having little effect on the hardened criminal.[70] These tactics can be defended only under some extreme version of the battle model of the criminal process[71] or, more persuasively, with the argument that some compromise with ideal procedures is required because getting admissions from suspects is so crucial to solving crimes. The *Miranda* rules,[72] as well as their predecessor standards for coerced confessions, were formulated largely to curb the worst tactics of this sort, but the Supreme Court has not yet adopted constitutional principles that would effectively prevent admissions obtained by pressure and deceptions that would be considered immoral in private contexts.

How powerful is the moral right to silence in relation to criminal investigation before a substantial basis exists for suspicion? I have suggested that for private relationships a stronger moral right ordinarily exists before this threshold is passed. Does this idea have application to the criminal process, and if so, how should it affect the right to silence that a legal system grants?

As to most crimes, public officials should not question persons as suspects unless they have a substantial basis for doing so. Murders and other very serious crimes are exceptional in this respect; their solution is so important that anyone who conceivably may have committed them may properly be asked for an account of his activities that will establish his innocence. But, if citizens were commonly questioned by officials about their possible commission of more garden-variety crimes, such as petty theft and income tax evasion, an unhealthy atmosphere of resentment and distrust would result. Nonetheless, it is difficult to conceive the formulation

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69. *Cf.* Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 33-56 (1978).

70. Judge Friendly has emphasized the "equal protection" objection to such techniques. *See* Friendly, *The Fifth Amendment Tommorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 698, 713-15 (1968). Dorsey Ellis relates this point to perceptions among disadvantaged segments of the community regarding the system of criminal justice. Ellis, *supra* note 59, at 850.

71. Such a defense faces the problem that some of those pressured and deceived are innocent, and even those who are guilty may be further alienated by being manipulated.

72. Miranda v. Arizona, 384 U.S. 436 (1966).

of any legal principle that could effectively forbid such questioning.[73] People are often questioned about their possible knowledge of crimes committed by others, or about their "innocent" mistakes on tax returns. The line is very thin between such questions and those treating someone as a suspected criminal, and the official's view of the respondent may shift because of answers to earlier questions. We must, therefore, trust mostly to the good judgment of officials, and to their paltry resources,[74] to protect citizens from inappropriate fishing expeditions.

Except, perhaps, for the gravest sorts of crimes,[75] an actor does not have a moral duty to come forward and admit his guilt publicly unless that is necessary to provide restitution, to prevent his commission of future similar acts,[76] or to avoid injustice to others. If he happens to be the subject of inappropriate questions directed toward his possible guilt, they do not create a new duty to reveal the incriminating facts. His moral right to silence at that point does not, therefore, depend on some privilege of self-preservation overriding what would otherwise be a duty to respond, and thus rests on a firmer foundation than any right to silence after substantial evidence has been discovered.

The history of the privilege against self-incrimination itself supports this distinction. What the initial advocates of a right to silence proclaimed was that they could not be required to respond to incriminating questions in the absence of due accusation.[77] The

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73. However, something analogous does exist when questions impinge on First Amendment rights. *See* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

74. In urban centers, the problem is that police do not have time to question even prime suspects for many burglaries and other crimes.

75. A murderer may have a duty at least to identify himself and apologize to those close to the victim. Ordinarily this may be accomplished only by his admitting his act to officials. Some murders disturb the public enough so this duty may be owed to a much broader class.

76. I have in mind here the person who recognizes that his penchant for violence almost certainly will lead him to commit more brutal acts. It might be argued, of course, that the criminal has a duty to offer himself up for purposes of general deterrence, but even though he has committed a wrong that makes his punishment for that purpose appropriate, it would be stretching the notion of his duty too far to include that.

77. *See, e.g.*, L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 62 (1968). Even during the worst days of the Holy Inquisition, Aquinas and other canon law authorities wrote that persons should not be required to confess to hidden crimes whose existence was unknown, and the theory was maintained that persons brought before the Inquisition had been "accused" in some manner, even if only by vehement suspicion or common report. *Id.* at 95-96.

moral right not to supply the initial evidence against oneself is much more basic than any right not to respond to inquiry following substantial evidence. And the argument is powerful that an individual should not suffer serious adverse consequences because he invokes that more basic right.[78] Though the question is close, I think the argument is strong enough to overcome the contrary claims that silence even at an early stage is somewhat probative of guilt and should be accorded its natural force. Thus, I conclude that although adverse inferences are proper when a person refuses to respond to questions based on substantial evidence of his wrongdoing, those who bear responsibility for determining guilt should not be allowed to draw such inferences from silence that has occurred before substantial evidence of wrongdoing exists.[79] In support of this conclusion is the desirability of reducing the incentives for officials to engage in unwarranted fishing expeditions.

B. *The Force and Implications of Other Reasons for a Right to Silence*

I have tried to analyze the grounds for a moral right to silence in the criminal process and the rough legal dimensions of a right responsive to those grounds. I shall subsequently say a little more about desirable institutional approaches, but now I want briefly to consider other possible grounds for a right to silence, examining in a summary way whether these grounds provide a basis for expanding or contracting the dimensions of the legal right so far outlined.

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78. Investigative resources, however, may appropriately be concentrated on someone who refuses to respond rather than on those who provide convincing exculpatory accounts.

79. The text contains an implicit judgment that is debatable even if my major distinction is accepted. Sometimes a person will refuse to respond to questions that are appropriately put to him prior to evidence of his guilt. This can happen because the crime is so grave that the net of those who can properly be questioned as possible wrongdoers is very wide or because the question is genuinely directed to him as a possible witness, not a suspect. Silence in either instance may be probative of guilt. By suggesting that inferences not be allowed even in these situations, I am putting major emphasis on the principle that one should not have to supply the initial evidence against himself rather than on the principle that he should not have to reply to inappropriate questions.

1. *Protection of the Innocent*

The right to silence may prevent some convictions of innocent people.[80] If forced to speak, some innocent defendants would make very poor witnesses, and some innocent suspects would make damaging admissions. Every once in a while, we are made aware of instances in which suspects confess to the police under great pressure, and their confessions are subsequently demonstrated to be false. There can be, however, no solid evidence indicating how often innocent people who remain silent before or at trial and are acquitted would have been convicted if they had spoken.[81] Given the very high incidence of convictions of defendants who decline to testify, we must doubt that silence helps many innocent persons.[82] And it must be a fairly unusual occasion when truthful pretrial statements by innocent people lead to prosecution and conviction.[83]

Stricter safeguards against police pressures would provide better protection against the kinds of tactics that might induce false admissions during interrogation. Allowing inferences from silence and dismissal from public employment would increase in one respect

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80. Since convictions of the innocent rightly are regarded as much worse than acquittals of the guilty, a practice that protects the innocent can be defended even though it detracts from the overall rate of accurate determinations.

The right to silence of other witnesses may actually contribute to the conviction of some innocent defendants by allowing the true culprits to conceal their guilt. Judge Friendly has expressed the view that the innocent are more often harmed than aided by the right to silence. Friendly, *supra* note 70, at 580-81.

81. See Ellis, *supra* note 59, at 844-45, on the likely dimensions of the problem. *Compare* Wilson v. United States, 149 U.S. 60, 66 (1893) *and* Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 548 (1956) *with* United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923) *and* A. TRAIN, FROM THE DISTRICT ATTORNEY'S OFFICE 97 (1939).

82. Judge Friendly notes an old study in which 21 of 23 defendants who failed to take the stand were convicted. Friendly, *supra* note 70, at 699 (citing A. TRAIN, THE PRISONER AT THE BAR 109-12 (1923)). Silence undoubtedly does help some defendants who thereby avoid having damaging prior records introduced for impeachment purposes, but the need for silence in those circumstances could be eliminated by sharper restrictions on the use of prior convictions.

83. The dangerous situations are those in which the line between guilt and innocence is not clear. *See* Greenawalt, *supra* note 44, at 254-55.

Some of the risks inherent in pretrial statements could be eliminated by an accurate recording system. A more radical innovation in American procedure would be to prohibit use of any pretrial statement at the trial itself, a possibility discussed by L. MAYERS, *supra* note 64, at 106-07.

the pressures on innocent suspects and defendants to speak and the former also would run the risk that jurors might give too much weight to the silence of those who do not speak. But the dangers to the innoccent from these practices appear slight. Other aspects of our system of criminal justice threaten convictions of the innocent much more severely: juries can convict on uncertain eyewitness testimony; jurors are prejudiced by the routine introduction of prior convictions to impeach defendants; and, most pervasively, pleas of guilty are accepted when guilt has not been firmly established.[84] Although the value of protecting the innocent may properly figure as one aspect of arguments in favor of a right to silence,[85] it cannot carry the burden of justifying the right to silence in general or of forbidding inferences and dismissals.

2. *Other Methods of Establishing Guilt*

Some have feared that acceptance of the principle that government may compel incriminatory admissions would lead to grossly abusive methods of acquiring confessions and to disregard of less obnoxious, more reliable, techniques of gathering evidence.[86] Whatever may have been the historical connection, there is little reason to suppose that legal compulsion in formal proceedings would now lead to torture or other obnoxious methods of coercion,[87] much less to think that adverse inferences from silence would have that effect. In many cases, methods of gathering facts that do not depend upon questioning of suspects will prove ineffective or too burdensome;[88] and one of the main points of my earlier discussion is that many other techniques for establishing guilt are actually worse from a moral point of view. In any event, if a right

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84. *See* Uviller, *Pleading Guilty: A Critique of Four Models*, 41 L. & CONTEMP. PROB. 102, 119-26 (1977).

85. *See* Ellis, *supra* note 59, at 844-48.

86. *See, e.g.*, 8 J. WIGMORE, EVIDENCE § 2250 (J. McNaughton rev. 1961).

87. Indeed, the opposite result is possible. If investigators knew that suspects would be subject to orderly inquiry, there might be less temptation to use informal pressures. *See* Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 79-80 (1980).

88. Again, if one thinks of most urban crimes, the problem is that the police use no methods of investigation, not that they use a less preferred method. If unreliable pretrial confessions were deemed a serious problem, the introduction of all such confessions at trial could be barred, with the police required to gather "more objective" evidence on the basis of the confession.

to silence were denied or limited only after substantial independent evidence of a person's guilt were produced, other methods would ordinarily have to be employed to build the original case.

3. *A Fair Balance Between State and Individual; and Guilty Pleas*

The Supreme Court and others sometimes have supported the right to silence with reference to the values of an accustorial system and to a fair balance between state and individual that requires that government to "shoulder the entire load" of proving guilt.[89] These ideas are either a shorthand reference to the points about methods of proving guilt or the cruelty of requiring an individual to testify against himself,[90] both already discussed, or they substitute conclusory rhetoric for analysis of what procedures are fair. In either case, they demand no separate analysis here.

One thing these phrases do, however, is obscure the nature of our own criminal process for roughly ninety percent of the cases. The ordinary prelude to criminal conviction is the negotiated guilty plea, which is so widespread precisely because it relieves the state of shouldering the entire load of proving guilt.[91] In that process an accused is treated as a rational bargaining agent, but the state permits his conviction without a thorough formal inquiry into his guilt and determines his penalty partly on the basis of what it may take for him to waive that inquiry. This hardly shows an accused great respect or evidences serious concern with the supposed goals of criminal punishment. Our present system of plea bargaining hardly can induce anything but cynicism in the participants. That system is largely the product of the complexity and difficulty of the fuller criminal process. Insofar as a very expansive right to silence before and at trial impedes efficient ascertainment of guilt, it contributes to a guilty plea alternative that treats an accused with little respect and concern.

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

90. Yet another possibility is that they point toward symbolic values of the right to silence, treated below.

91. *See* L. WEINREB, DENIAL OF JUSTICE 71-86 (1977).

4. *Crimes That Should Not Be Crimes*

The right to silence developed with claims to freedom of religious conscience and has been used in recent history as a defense against political persecution. In the private sphere, if a friend or an employer treats as a wrong something that a person believes is not a wrong, the person may find a new friend or employer. But governments have a monopoly on the definition of criminal wrongs, and emigration is often not a feasible option. By guarding some people against conviction for inappropriately defined crimes, the right to silence affords some protection against abuse of this monopoly power. The impact of the right will be especially great in respect to victimless crimes; and the crimes against which it has special effect may correlate positively with the sorts of crimes a society should not enact.[92] Still, the effects on enforcement of proper crimes are a fearful price to pay for partial protection against some improper crimes. Moreover, the latter can better be guarded in other ways. Other constitutional protections, particularly freedom of speech, freedom of religion, equal protection, due process constraints on vagueness, and the so-called substantive right of privacy, now provide ample protection against most of the gross abuses of statutory definition. Concerns about such abuses can now provide only marginal support for the right to silence and are not a sufficient basis for opposing my suggestions about adverse inferences and dismissals.

5. *Arbitrary Prosecution*

Another kind of abuse against which a right to silence provides some protection is arbitrary selection of persons to be prosecuted. Almost everyone commits one crime or another at some time in his life and most people commit crimes of some seriousness. If, in the abuse of prior evidence, government officials could discover by sustained inquiry whether any particular person had committed criminal acts, tremendous discretion would be placed in officials to determine who would suffer criminal conviction.[93] This discretion

92. One must be cautious, however. The right to silence is a potent bar, but it would not stop enforcement of crimes cast in terms of expression, or even belief, when public statements have been made.

93. *See* McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Af-*

would endanger unpopular figures and political opponents. Of course, officials presently have substantial discretion to determine who will be prosecuted,[94] but the desirability of constraining the exercise of that discretion provides a very important reason in support of my suggestion that before substantial evidence of guilt is discovered the legal right to silence should be expansive.

6. *Expressions of Remorse*

Because of the public character of admissions at trial and to law enforcement officers,[95] the argument for silence grounded on the unacceptability of compelling expressions of remorse[96] may seem especially strong in relation to the criminal process. However, the purpose of factual inquiries about crime is rarely to elicit remorse. In addition, the connection between acknowledgement of incriminating facts and expressions of genuine remorse is much weaker here than in the context of close personal relations. Suspects who are questioned by police and defendants at criminal trials will often admit damaging facts that may contribute to their conviction without ever admitting criminal behavior. When actual guilt is admitted, it is often unaccompanied by any remorseful expression and even when such expressions are offered, they are frequently not sincere.[97] The tactics of inquiry most likely to force honest expressions of remorse are police pressures which play heavily on pangs of conscience and push guilt-stricken suspects into emotional outpourings. Concern that people should be able to develop and express feelings of remorse privately may reinforce the conclusion I already have suggested that strong police pressures are not consonant with the respect a government should accord its

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fectation, Raison d'Etre and Miscellaneous Implications, in POLICE POWER AND INDIVIDUAL FREEDOM 223, 232-33 (C. Sowle ed. 1962). One can imagine a regime of widespread enforcement of minor crimes, but law enforcement officials presently have such difficulty making any response to many serious crimes that that specter is now much less realistic than the concern about selective enforcement.

94. For some thoughts on how that discretion should be exercised, see Greenawalt, *Conflicts of Law and Morality: Institutions of Amelioration*, 67 VA. L. REV. 177, 210-22 (1981).

95. Whether an admission to one or two police officers itself counts as public, the admission is likely to be revealed to a larger audience.

96. See the three articles by Robert Gerstein, *supra* note 40.

97. The encouragement of insincere expressions of feeling is not to be desired, but is an evil quite different from the forced revelation of deeply felt and highly personal emotions.

citizens.

The occasional instance, on the other hand, when formally compelled testimony would produce an honest expression of remorse is hardly a substantial argument against such testimony. Compelled testimony may lead witnesses to the expression of other deeply personal feelings, such as shame, or force them to play parts that may cause lifelong self-condemnation, as when a person has to reveal the guilt of a close friend. In light of all the necessary but unintended cruelties that accompany a system of compulsory testimony, singling out public expressions of remorse as particularly unacceptable is odd. In any event, allowing inferences from silence and dismissal from public employment would have slight effect on the number of times when remorse is expressed.

7. *Symbolic Significance*

Apart from its specific effects, the right to silence might be defended as a valuable symbol of each person's autonomous independence, and of the limits of government power.[98] But a symbol that portrays each person as a separate sovereign unit, justifiably fending off aggressions by a hostile force, may have a harmful side. This symbol may make people less sensitive to the indignity of other techniques of investigation and guilt determination, techniques that might be appropriate between enemies, but are unacceptable within genuine communities. And such a symbol may weaken the sense that obedience to law is something more than the bad man's calculation of most likely advantage. Logically, no doubt, the view that a suspect is to be treated at arms length as a thoroughgoing adversary is reconcilable with the view that all should obey the law; but a person who is encouraged to think that his unconstrained pursuit of advantage in the criminal process is a natural right may also conclude that selfish prudence is the only good reason for complying with the law.[99]

The most unqualified claims in favor of a right to silence erect

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98. *See* C. FRIED, ANATOMY OF VALUES 145-46 (1970).

99. In an unpublished paper, Purpose and Paradox: Studies in the Privilege Against Self-Incrimination, Thomas Schrock says, "The other side of the emphasis on sanction and self-preservation can be a de-emphasis of right and wrong, of obligation to obey the law, and of concern about loss of community."

individual self-centeredness into a norm. At least for cases of properly grounded suspicion, the proper basis of a right to silence lies elsewhere, in the notion of compassion. The right should be viewed as a concession to the narrow concerns of most of us, not as an endorsement of that narrowness or a rejection of broader norms of concern and cooperation. Once the right is so understood, we are in a position to take a truer view of the acceptability of actions based on its exercise. That persons are indirectly encouraged to forego the right is not a cause for dismay, so long as government actions have independent justification and are not taken for the purpose of forcing waivers. Inferences based on silence and dismissal will not undermine what is truly valuable in the symbolism of the right.

8. *The Lessons of History*

Given the tremendous complexity of evaluating most social institutions, it sensibly can be argued that if the judgment about a practice is complicated and uncertain, as it is with the right to silence, we should not abandon ancient usages. This argument has little force in respect to inferences and dismissal. For most of the history of the right to silence, persons suspected or accused have had considerable pressures to speak and negative inferences have been drawn from their silence. The question of what the government may do as employer to persons who refuse to respond to inquiries is a relatively recent one. Substantial changes in the process of criminal investigation might represent a sharper break with established procedures. However, the practices these modifications would replace, such as police pressures to admit guilt, constitute present limitations in the right to silence that clearly are in tension with the idea that the government owes respect even for those suspected of criminal acts.

C. *Institutions*

What might the criminal process look like if a serious attempt were made to implement my suggestions? Though no formal prohibition would bar questioning persons as possible suspects, superiors would discourage investigatory officers[100] from doing so in or-

100. Lloyd Weinreb has provided a powerful argument that investigation should be per-

dinary cases absent a significant likelihood of guilt. By a "significant likelihood of guilt," I mean a flexible standard that would depend on the seriousness of the crime but would often be less rigorous than probable cause. For example, if an apartment burglary were apparently committed with a set of keys, each of four outsiders with keys could be asked where they were at the time of the burglary. More probing, systematic questioning of a suspect should take place only after probable cause of guilt exists, the point at which arrest is now possible. A neutral official, a magistrate, should determine the presence of probable cause before this more intense questioning occurs. To avoid possible pressure and deceitful manipulation, the questioning should not be done by the police alone, but by a magistrate or in front of him,[101] and the suspect should be accorded counsel.[102] To avoid any subsequent misinterpretation of what took place, a precise record should be kept.[103] At each of these stages, a person would have the privilege of remaining silent. Fact-finders would not be permitted to draw adverse inferences from refusals to respond prior to questioning before the magistrate; but if a suspect then claimed his right to silence, that fact would be introduced as adverse evidence at his trial. If a defendant did not testify at his trial, the jury could be invited by the judge to draw an adverse inference from his silence.

I lay no claim to originality for most of these suggestions. Almost fifty years ago, Paul Kauper proposed that suspects be questioned before magistrates and that failure then to respond be admissible in evidence.[104] More recently, two of our most distinguished jurists,

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formed by an investigating magistracy rather than the police. L. WEINREB, DENIAL OF JUSTICE (1977). That possible change in present practice is peripheral to the main concerns of this discussion.

101. A magistrate might question in a fairer manner, but allowing law enforcement officers to do the questioning would take advantage of their familiarity with the case and minimize the risk that the magistrate would become partisan. *See* Y. KAMISAR, *supra* note 87, at 89-90. For jurisdictions retaining grand juries, questioning of suspects before them would be an alternative to questioning before magistrates, though the usual absence of counsel in that setting would raise a problem.

102. An informed representative rather than a full-fledged lawyer might be sufficient.

103. The absence of accurate recording is a critical objection to present interrogation practice.

104. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932). The relevance of his proposal in the present context is thoughtfully discussed in Y. KAMISAR, *supra* note 87, at 77-94.

Walter Schaefer[105] and Henry Friendly,[106] have urged such a procedure. As I have said, comment on silence at trial is now allowed in England[107] and was permitted in some jurisdictions before the Supreme Court said the practice violates the Constitution.[108] What I do wish to urge strongly is that procedures like these would be more consonant with the degree of respect a government owes its citizens than the practices we now possess.

V. The Moral Right to Silence and Constitutional Principles

The Supreme Court has interpreted the Fifth Amendment to be much more restrictive of inferences from silence and of dismissals from public employment than the suggestions I have made.[109] The Court has yet to declare unconstitutional forms of pressure and deception that are in severe tension with ideas of respect.[110] Thus, authoritative constitutional doctrine now accords a right to silence that is both more and less expansive than what should be regarded as a moral right to silence against the government. In this section, I inquire whether either constitutional amendment or constitutional interpretation should bring the two more closely into line.

In what is perhaps an excess of caution, let me say that I do not start from the premise that constitutional rights and moral rights against the government must be congruent. Even in its most open-ended and flexible provisions, the Constitution does not protect every moral right against the government, and it should not be stretched by interpretation, or amended to do so.[111] Some constitu-

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105. W. Schaefer, The Suspect and Society 76-81 (1967).

106. Friendly, *supra* note 70, at 713-16.

107. *See* note 65 & accompanying text *supra*.

108. *See* Griffin v. California, 380 U.S. 609 (1965).

109. The relevant interpretations are discussed below. *See* notes 123-64 & accompanying text *infra*.

110. *See* Y. Kamisar, *supra* note 87, at 86-87; White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).

111. The proposition that the courts are not authorized to create constitutional rights whenever they perceive moral rights is relatively straightforward, though not entirely uncontroversial. The reasons against amendments to protect remaining moral rights are more complex. Some moral rights may be difficult to formulate or inappropriate for courts to administer; thus one might recognize that a citizen has a right to a decent education or a minimum level of welfare without necessarily thinking that those rights should be constitutionally enforceable.

tional rights have little or nothing to do with moral rights.[112] Others are grounded in moral rights, but appropriately go beyond these moral rights,[113] or provide one specific form of protection for a moral right when different safeguards would suffice.[114] The divergence between moral and constitutional rights becomes a concern when one underlying reason for a constitutional right is a view of what morality requires and other bases for the right do not provide adequate reasons for its present scope. That, I believe, is now the posture of the privilege against self-incrimination.

A. *Amendment*

The proposals I have made about inferences, dismissal, and interrogational pressures are not important enough to warrant constitutional amendment. These would constitute marginal alterations in the privilege against self-incrimination. To use the amendment process to make such alterations in the Bill of Rights would be to undermine its rich symbolism as a simple statement of individual freedom. Even if one could identify other desirable changes in the scope of the right to silence,[115] touching matters I have not discussed, adoption of the detailed language necessary to effect the changes would be unfortunate.[116] Only if the federal government or a number of states offered some fundamental reconstruction of the criminal process, and these efforts were turned away by the courts, should amendment be considered a serious option. In the meantime, changes in the coverage of the Fifth Amendment should take place by interpretation, if they should

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112. For example, the rights conferred on individuals that are designed to preserve the federal structure.

113. Citizens may have a moral right not to have an official state religion, but the broad scope of the establishment clause may be justifiable only in terms of the need for relatively sharp lines and as a shield against political divisiveness.

114. Individuals may have a moral right not to be subjected to criminal conviction without an opportunity for judgment by their peers, but a government need not provide grand and petit juries as those institutions have developed in England and the United States.

115. Judge Friendly argues for changes concerning production of documents and registration and reporting requirements. Friendly, *supra* note 70, at 701-03, 716-20.

116. See Judge Friendly's proposed language at *id.*, 721-22. He discusses the criticism that an amendment of so many words should be avoided, *id.* at 725, and concludes that "it would be far better if any needed adjustment could be accomplished through judicial action . . . ." *Id.* at 726.

take place at all.

B. *Interpretation*

1. *Ethical Evaluation and the Privilege Against Self-Incrimination*

Before examining the specific doctrines encompassing the topics I have discussed, I need to say a few words about the general relevance of ethical evaluation for interpretation of the privilege against self-incrimination. The most modest position is that ethical evaluation should be employed only when the basic moral judgments upon which it rests are thought to correspond with those of the Framers, and then only to resolve the constitutionality of practices whose status is left in doubt by the constitutional language and the pre-constitutional history. A widely accepted, though somewhat more controversial, view is that courts may also employ values accepted by the Framers to reach judgments about particular practices that differ from those of the Framers. Thus, for example, the Supreme Court's imposition of constitutional limits on ordinary libel law might be thought warranted as a fulfillment of the Framers' philosophy of freedom of expression, even if the Framers themselves would have considered all libel outside the ambit of speech protected by federal and state constitutions.[117] Finally, one may believe, as I do, that present ethical evaluation can properly figure in guiding the development of constitutional provisions even when that evaluation cannot reasonably be thought to correspond with the Framers' views.[118] This is not the occasion to try to defend that belief. Nor is such a defense necessary for what follows, because I perceive no clear divergence between the values of the

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117. I add the caveat about state constitutions because the Framers may not have imagined that federal law, to which the original Bill of Rights exclusively applied, would contain ordinary principles of libel law.

118. One might ground this position on the view that the Framers wished to invite reliance on changing moral conceptions. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977). That the Framers had any such intent is dubious even in regard to more open-ended constitutional language, like the cruel and unusual punishment clause, and is implausible in respect to the privilege against self-incrimination, whose language was meant to capture existing principles. A persuasive justification of the power to rely on present ethical judgment must rest on the claim that it will help a constitution to serve and endure as a vital part of a liberal democracy.

Framers and our own as they bear on these issues.[119]

For the problems of concern here, the Framers' views about particular practices are not very helpful. Claims against compulsory self-incrimination had arisen mainly in reaction to questions about religious orthodoxy and political loyalty that had been put by English prerogative courts to persons who had not been formally accused. Though early assertions of the privilege were cast in terms of the wrongfulness of demanding that people not otherwise accused of crime be required to accuse themselves, these claims had been broadened to cover all formally compelled self-accusation. Our Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." That language plainly forecloses any compelled testimony of a defendant, but it reflects no clear judgment about informal pressures to speak. Lacking professional police forces, late eighteenth century society enforced its criminal law in a manner substantially different from current practices. At least into the 1700's, the questioning of suspects by magistrates was common and only infrequently did it prove unproductive.[120] A suspect's responses were introduced at his trial.[121] Because defendants were not even allowed to testify under oath, no questions of forced testimony arose, but unsworn statements by defendants were usually made and silence on their part undoubtedly hurt their cause.[122] The Framers did not mean explicitly to bar agents of the government from informally seeking self-disclosure of those suspected of ordinary crimes, nor to preclude

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119. *See generally* L. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT (1968). Stanely Katz has remarked that "we do not yet fully understand the conception of 'individual rights' in the 17th century," Katz, Book Review, 1970 WIS. L. REV. 226, 233. Even if that view is correct and applies to the eighteenth century as well, we may be forgiven for relying on our own values in the absence of any more authoritative starting point.

120. *See* L. LEVY, *supra* note 119, at 325-30; 8 J. WIGMORE, *supra* note 86, § 2250; Kauper, *supra* note 104, at 1231-37; Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1038-40 (1964). Only in 1848 was a statute passed in England requiring that suspects be warned that they need not speak. *See* 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 441 (1883).

121. 8 J. WIGMORE, *supra* note 86, § 2250.

122. In England, felony defendants were not allowed full representation by counsel until 1836, *see* Note, *supra* note 120, at 1022-30, and undoubtedly most felony defendants in the colonies lacked counsel. The accused himself thus had to present whatever factual defense he had. According to Stephen, any defendant who did not answer questions posed by the prosecution was likely to be convicted. 1 J. STEPHEN, *supra* note 120, at 440.

those who were determining guilt mainly on the basis of other evidence from taking into account failures to speak in circumstances when most innocent persons would wish to speak, nor to limit what government agencies might do in response to invocations of a right to silence by government employees.

Although the Framers made no negative judgment about inferences from silence and dismissal from government employment, these practices bear enough relation to the underlying values and explicit protections of the privilege against self-incrimination to be within the range in which judicial development of rights is warranted. And the reasons against informal compulsions to speak are so closely linked to the reasons against formal compulsions that application of the privilege against self-incrimination is appropriate to them, even if historically the due process clause was perceived as the constraint on admission of coerced confessions.[123] Thus, room exists for creative judicial interpretation in each of the areas I have discussed. The issue is whether the interpretation that has thus far occurred is adequately sensitive to the relevant values.

Before I proceed to examining the Court's work, I may say that I reject suggestions that the Court should approach all arguable claims of individual right with a heavy weight on one side of the scales. Significant protections of individual rights would not be possible if the courts took the view that all curtailments of government power must rest on clear constitutional mandates. Thus, that position of extreme judicial restraint is unacceptable. Equally unacceptable is the position that because the protection of moral rights is so important, doubtful cases should always be resolved against the government. If the expansion of criminal procedure rights makes it more difficult to convict the guilty, the expansion is at the expense of the victims' moral rights to obtain redress, and it increases the likelihood of future violations of other persons' moral rights not to be subjected to criminal wrongs. Neither in specific constitutional safeguards nor in our general plan of government can I find any principle that rights of individuals against other individuals should invariably yield to claims of rights against the government, when the two are in potential conflict.

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123. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

2. *Inferences from Silence*

I want to discuss first, and most thoroughly, what the Supreme Court has said about the inferences a jury may be invited to draw from a defendant's refusal to take the stand at trial or his silence at some earlier stage.

a. *Silence at Trial*

Although legal rules about instructions cannot stop jurors from assuming that a silent defendant is a guilty defendant, these rules can have some effect on juries, and on judges sitting as triers of fact. They also can state a standard about the import of the right to silence.

Prior to 1965, a minority of states permitted adverse comment by a judge on a defendant's failure to take the stand. The federal rule against such comment rested upon statutory interpretation. In *Griffin v. California*,[124] however, the Court declared both judicial and prosecutorial comment to be unconstitutional. Failing to draw any distinction between the prosecutor's sharp remarks about Griffin's refusal to say what he knew and the trial court's measured instruction that the jury could consider the defendant's failure to deny or explain evidence against him as tending to support its truth, Justice Douglas, for the majority, said that comment is "a remnant of the 'inquisitional system of justice' . . . . It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[125] In *Griffin* the Court did not decide whether a defendant is positively entitled upon request to an instruction that the jury may not give weight to his silence, but on March 9 of this year it resolved that question in the defendant's favor.[126]

Because jurors are likely to weigh a defendant's silence whatever they are told and because most defendants take the stand to avoid

124. 380 U.S. 609 (1965). A decision on the federal constitutional issue was made necessary by the Court's holding a year earlier that the federal privilege against self-incrimination applies against the states. Malloy v. Hogan, 378 U.S. 1 (1964).

125. 380 U.S. at 614.

126. Carter v. Kentucky, 101 S. Ct. 1112 (1981). In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court rejected defendant's argument that he had a right to have the judge refrain from giving any instruction about his silence. *Id.* at 340-41.

that consequence,[127] the decision in *Griffin* may not be of great practical significance. Insofar as it does make a difference, the decision's effect may be benign, not because a great number of innocent defendants are stopped from testifying by their lawyer's fear that they will make poor witnesses,[128] but rather because innocent defendants in many American jurisdictions are deterred from testifying by the unjust practice of allowing prior convictions to be routinely admitted to impeach a defendant's credibility.[129]

What is worrisome about *Griffin* is not, therefore, the outcome for trial practice, but the underlying conception of the privilege against self-incrimination. That conception is aptly caught by the Court's statement that comment imposes a penalty. In what sense is it a penalty? A "penalty" is ordinarily a harmful consequence imposed by a person or agency as punishment for a wrongful act. Neither the jurors' drawing of natural inferences in the attempt to figure out where the truth lies, nor the judge's comment about inferences that may naturally be drawn is a penalty in that sense. Comment is not transformed into a penalty by the simple fact that the defendant may be worse off as a result, or by the possibility that his initial choice might be affected.[130] If boyfriends do not eat raw onions because girlfriends will be less likely to kiss them if they do, we do not suppose that the disinclination of girlfriends to kiss onioneaters is a penalty. Justice Douglas's use of the term

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127. In the cases studied in H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 137, 146 (1966), 82% of defendants and 91% of those not subject to impeachment by prior conviction took the stand. For a juror's observations about the wisdom of a defendant taking the stand even though he made a poor witness, see M.D. ZERMAN, CALL THE FINAL WITNESS, 154-55 (1977).

128. The majority makes much of this point in *Griffin*, quoting at length from Wilson v. United States, 149 U.S. 60 (1893), which contains a powerful statement of that concern. 380 U.S. at 613.

129. This fear apparently underlay the defendant's decision not to testify in Carter v. Kentucky, 101 S. Ct. 1112, 1115 (1981).

130. It might be thought relevant how powerfully the consequence operates on the defendant's choice, one that imposes considerable pressure being considerably more "penalty-like" than one that imposes slight pressure. See McGuatha v. California, 402 U.S. 183 (1971), declaring that a practice is not an impermissible penalty unless it "impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 213. Since the prospect of modest adverse comment by the judge is not likely to have great impact on the defendant's choice, particularly in light of the ability of his own counsel to provide an explanation why he has not testified, this approach should not lead to comment being considered an impermissible penalty.

"penalty" can only be interpreted as a kind of rhetorical device used to emphasize how sacrosanct is the right to silence. It implies a view far removed from the notion of a compassionate concession to the strength of self-centeredness in human personality.

I have suggested that the right to make inquiry of suspects is strongest when substantial independent evidence of guilt exists. From that perspective the moral right of silence is weakest when a person is formally charged and the prosecution has adduced substantial support of this guilt. As long as the trial court makes clear that silence is not itself proof of guilt, that the prosecution retains the burden of establishing guilt, and that the reasonable doubt standard must be met, I believe that restrained judicial comment inviting natural adverse inferences should be considered constitutionally acceptable, at least in jurisdictions that do not allow free use of prior convictions to impeach credibility.[131]

b. *Silence Before Trial*

If the defendant has remained silent at some stage prior to trial, can that silence be considered by the jury as relevant to the likely truth of a version of events the defense offers at trial? The two recent Supreme Court cases are *Doyle v. Ohio*,[132] decided in 1976, and *Jenkins v. Anderson*,[133] decided in 1980. Doyle testified at his trial that he had been "framed"; in cross-examination the prosecutor brought out that Doyle had not previously offered that account, and he argued that if the story had been true Doyle would certainly have protested along those lines when placed under arrest. The Supreme Court majority held that, because Doyle had been given *Miranda* warnings, his postarrest silence could not be used

131. Such is presently the law in England. *See* note 65 & accompanying text *supra*. There a distinction is drawn between permissible inferences about evidence the defendant was in a position to rebut and did not, and impermissible inferences that his silence indicates guilt. When, as usually is the case, his silence concerns the crucial facts of guilt or innocence, the distinction is mostly formal, and even on the abstract theoretical level, it may not be defensible. What is crucial is that jurors not be allowed to use silence as the main, or substantial, evidence of guilt.

Whether prosecutors should be allowed to comment seems to me doubtful. Prosecutorial comment is much less likely to be restrained than judicial instructions, and much more likely to lead jurors to give undue weight to silence.

132. 426 U.S. 610 (1976).

133. 447 U.S. 231 (1980).

to impeach his testimony. The warnings impliedly assured Doyle that no harm would come to him if he remained silent, and it would violate due process for the state to renege on that implicit promise. At his trial for murder, Jenkins acknowledged that he had inflicted the fatal knife wounds, but claimed that he had acted in self-defense. The prosecutor tried to impeach his credibility, establishing that he had not come forward to the police with that story and suggesting that a person who genuinely acted in self-defense would have done so. The Court held that this use of silence to impeach credibility violated no constitutional right.

Although Justice Powell authored the majority opinions in both *Doyle* and *Jenkins*, they lie in uneasy tension with each other,[134] and neither opinion satisfactorily comes to grips with many of the underlying issues. We may begin our analysis with an attempted synthesis. *Jenkins* endorses[135] the 1926 holding in *Raffel v. United States*[136] that when a defendant testifies at a second trial he may be impeached with his silence at his first trial. Thus, according to Justice Powell, even if a defendant is undeniably exercising a Fifth Amendment right in the most formal and obvious setting for the exercise of such rights, his silence may subsequently be used to impeach him. Since the Court gives us no basis for a contrary conclusion, we must suppose that it believes that the exercise of the privilege before the police can also be used to impeach.[137] On this premise, the result in *Doyle* can only be justified by the implication of the *Miranda* warning that no use would be made of a suspect's silence. That implication could be corrected. The police could warn suspects of the dangers of speaking and then also mention that if one chooses to remain silent, that fact might eventually be brought out if the suspect chooses to testify. But perhaps most

134. Part of the explanation may well be that some justices who joined him in *Doyle* dissented in *Jenkins*, and some justices who joined him in *Jenkins* dissented in *Doyle*. The opinions may have been tailored to capture the votes of the particular justices in each majority.

135. On this precise point, the division is five to four, because Justice Stevens and Justice Stewart, concurring, as well as the two dissenters, reject the majority's analysis. 447 U.S. at 241, 245.

136. 271 U.S. 494 (1926).

137. The Court has never suggested, as I have, that the right to silence should be stronger at earlier stages in the criminal process. Nor did it suggest in *Doyle* that some inherent compulsion about police interrogation would make inferences from silence inappropriate.

suspects would have difficulty grasping the significance of such a qualification to the warning.[138] In that event, surely it should be sufficient to give the qualification after the suspect has counsel and to let him consult with counsel over whether the risk of impeachment by silence should be run.

Because *Jenkins* casts no doubt on *Griffin v. California*, the Court's position is that the Constitution permits the use of silence to impeach a defendant's testimony even when any other use would be forbidden.[139] This distinction is hard to maintain.[140] The Court talks about testimony as a waiver of the right of silence, but surely the defendant's testifying cannot reasonably be taken as a waiver of his right to silence exercised at a prior trial or before the police. At each stage of the process he has a right to speak or not, and his right at an earlier stage should not be retroactively determined by what he chooses to do at a later stage.

The Court's main argument is that when one takes the stand one opens oneself up to all the traditional truth-testing devices. The opinion quotes and relies on *Harris v. New York*,[141] which holds that statements taken in violation of the *Miranda* warnings may be used to impeach a defendant's contradictory trial testimony. But what was involved in *Harris* was significantly different from what was involved in *Doyle* and *Jenkins*. In *Harris*, inadmissability of evidence was treated as a sanction for a rule violation by the police, and the Court determined that the additional deterrence gained by employment of the fruits of the violation did not warrant the restriction on impeachment use.[142] In *Doyle* and *Jenkins*

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138. *See* Y. KAMISAR, *supra* note 87, at 92. The suspect's or the defendant's actual anticipations are of doubtful relevance under *Raffel*, since it is unlikely that when the decision was made that Raffel would not take the stand at his first trial, either he or his lawyer was thinking about what might happen if the jury deadlocked, and he were retried and wished to testify at the second trial.

139. Justice Powell himself, concurring in *Carter v. Kentucky*, has indicated that he believes *Griffin* was wrongly decided. 101 S. Ct. at 1122 (Powell, J., concurring).

140. *See* Jenkins v. Anderson, 447 U.S. at 241-45 (Stevens, J., concurring); *id.* at 245-54 (Marshall, J., dissenting).

141. 401 U.S. 222 (1971).

142. I have grave difficulty with this rationale in Fifth Amendment cases. If a statement obtained in violation of the *Miranda* warnings does actually constitute compelled self-incrimination, use at trial of that statement also seems to constitute compelled self-incrimination. The force of this logic can be avoided, of course, if the *Miranda* rules are considered, as the Court has indicated on occasion, prophylactic safeguards that go beyond what the

the suspect has exercised his right to silence. If, as both *Griffin* and *Miranda*[143] suggest, one aspect of the right is that no adverse inference can be drawn from silence, use of silence for impeachment purposes directly impairs the right.

Even more crucially, the nature of the inference drawn in *Jenkins* is fundamentally different from that in *Harris*. In *Harris*, the defendant has told conflicting stories on two occasions; almost certainly he has lied at least once. If he is demonstrably a liar, the jury may discount his trial testimony.[144] In *Jenkins* there is nothing inconsistent about original silence and a claim of self-defense. Any adverse inference must run along the following lines. If Jenkins had really acted in self-defense, he would have come forward soon after the crime. He did not do so, so he probably did not act in self-defense. Therefore, his present testimony to that effect is probably not true. The central point is that the adverse inference would be just as strong if Jenkins did not take the stand and other witnesses testified that he acted in self-defense; the force of the inference goes to the plausibility of that version of the events, not (except indirectly) to whether Jenkins is a truthful person or is telling the truth on this occasion. At least as far as the constitutional principle is concerned, use for impeachment purposes in this context[145] cannot convincingly be distinguished from general rebuttal use.

Justice Stevens sensibly rejects the line drawn between impeachment and general rebuttal use,[146] but his alternative grounds for permitting introduction of Jenkins's silence are just as shaky. He argues that in the absence of government compulsion, the right to

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Constitution requires. Michigan v. Tucker, 417 U.S. 433 (1974).

143. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

144. I have some problem with this view when the prior inconsistent statements are admissions. (In *Harris* a different exculpatory statement was involved. People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969).) Jurors are aware that defendants have an extremely powerful incentive to lie and that many of them do so. Even if the prior statements are allowed only for impeachment purposes, their main effect may be to lead the jurors to suppose that the defendant would not earlier have made telling admissions unless he was in fact guilty.

145. Perhaps in special circumstances, silence will appear more directly relevant to defendants' truthfulness, and my remarks do not cover that possibility.

146. 447 U.S. at 244 n.7 (Stevens, J., concurring).

silence has no application to the prearrest situation.[147] But the government cannot *compel* self-incrimination at any point in the criminal process. At each stage if the government does not actually compel someone to speak, the question arises whether allowing subsequent adverse inferences from silence will constitute a forbidden (if weaker) form of compulsion or an unacceptable "penalty" on the protected choice not to speak. The only basis I can see for distinguishing among stages is in terms of the actual, or traditionally understood, importance of protecting silence at each stage. Justice Stevens, worried about the innocent defendant who will make a bad witness, plainly thinks that protection is specially warranted at the trial stage. But the suspect being interrogated by the police is much more vulnerable than the defendant protected by court and counsel, and the innocent person who has stabbed another to death in self-defense may by admitting his involvement to the police be bringing on himself prosecution and possible conviction.[148] Moreover, Justice Stevens wholly disregards what I have stressed as the most fundamental point in my discussion, that we ordinarily do expect people to respond to well-founded accusation, but we do not expect them to come forward and accuse themselves of wrongdoing or implicate themselves in what may be mistakenly perceived as wrongdoing.

Before proceeding to some hesitant conclusions about how pretrial silence should be treated, I should briefly consider some other possible distinctions suggested by the opinions in *Jenkins* and *Doyle* or by their facts. Various opinions in the two cases intimate that it may make a difference whether the suspect who stands silent is consciously exercising a constitutional right.[149] That fact strikes me as irrelevant;[150] the person who simply wishes to shield

147. *Id.* at 243 (Stevens, J., concurring). Justice Marshall calls this view "incomprehensible." *Id.* at 250 n.4 (Marshall, J., dissenting). The majority opinion does not resolve the question whether prearrest silence is protected by the Fifth Amendment. *Id.* at 236 n.2.

148. *Id.* at 250 (Marshall, J., dissenting).

149. *See* Jenkins v. Anderson, 447 U.S. at 242-43 (Stevens, J., concurring); 447 U.S. at 246-47 (Marshall, J., dissenting); Doyle v. Ohio, 426 U.S. at 617; 426 U.S. at 628 (Stevens, J., dissenting). The majority in *Doyle* talks of a suspect's silence as inherently ambiguous. 426 U.S. at 617-18. Whether it means anything more than that other explanations besides guilt are consistent with silence is not clear.

150. One's reliance on the import of the language of warnings introduces a separate element discussed above.

himself by refusing to speak should be accorded the same protection as one who wishes to shield himself and knows he is exercising a constitutional right in doing so.[151]

The majority opinions do not rest on the form that silence takes, but Justice Stevens suggests its possible relevance in *Doyle*.[152] Suppose that at the time of arrest, or some other discrete moment, the defendant would have been extremely likely to have made a spontaneous exculpatory utterance if the facts had actually been as the defense presents them at trial. A man arrested on the street for trying to snatch a purse, for example, would probably say "You have the wrong guy" if he had had no contact with the victim.[153] On other occasions silence may be accompanied by some act or omission that is suggestive of guilt. If *A* is with *B* when *B* is stabbed in a deserted place and leaves him disabled there, his failure to summon any sort of medical assistance might be considered probative of guilt. Even if ordinary silence should be immunized from adverse inferences, silence and inaction in these special settings might be treated differently.[154]

The hard general question for me is whether, when prearrest silence shares none of these special features, adverse inferences should be constitutionally barred. In favor of permitting them is the argument that the inferences are natural and are not a penalty on silence, the very argument I made against the reasoning in *Griffin*. One argument to the contrary is that juries may give so much more weight to prearrest silence than it warrants that such evidence should be forbidden. Justice Marshall regarded the suggested inference in *Jenkins* as so implausible that its presentation

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151. Even if the distinction were relevant in theory, it could be administered only in some very rough form.

152. 426 U.S. at 621-22, 630-32 (Stevens, J., dissenting).

153. This is how Justice Stevens treats the original failure to claim a "frame-up" in *Doyle*. Since, however, Doyle acknowledged that he had been attempting to purchase marijuana, 426 U.S. at 612-13, he plainly had a motive to withhold his story initially from the police even if it were true.

154. For a highly critical view toward allowance of "tacit admissions" into evidence, see Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Judicial Abandonment*, 14 GA. L. REV. 27 (1979). A per se rule against use of postarrest silence to impeach defendants' credibility is proposed in Comment, *Impeaching A Defendant's Trial Testimony By Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 973-75 (1975).

violated due process, and the point could be generalized that the prejudicial dangers of introducing prearrest silence are often so great that its use should never be allowed.[155] One source of worry in this connection is the fact that development of the significance of pretrial silence can only be done by prosecutorial efforts. Since the relevant facts must be exposed and examined at trial, judicial comment alone is not an option. A second argument against allowing inferences is that the right of citizens not to come forward and accuse themselves is so fundamental that its exercise should be shielded from harmful consequences. The thrust of my discussion has been that this right is indeed more fundamental than the right not to respond to due accusation, and I believe it is fundamental enough so that inferences should be constitutionally prohibited.

If, as I suggest, a certain point in the criminal process should be reached before silence can lead to an adverse inference, what should that point be? One might take the view that only after the prosecution has established its case at trial is there substantial enough evidence of someone's guilt, but from the perspectives both of likely guilt and reasonable investigative need, an earlier determination of probable guilt should suffice. Making arrest the crucial stage might place too much weight on the discretion of the police. A formal, though summary, finding by a neutral official would be a more appropriate dividing line. Whoever determines substantial evidence of guilt, I think that failure to speak in the uncomfortable environment of police custody should not lead to adverse inferences. More adequate protections such as the routine presence of counsel, reliable recording systems, and perhaps questioning by or in front of a neutral magistrate, are needed for those suspects who do speak, before juries should be allowed to infer that those suspects who do not speak have something to hide.[156]

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155. *Cf.* Grunewald v. United States, 353 U.S. 391, 420-24 (1957) (discussing possible impermissible impact on jury of silence before grand jury); People v. Conyers, 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402, *vacated and remanded*, 101 S. Ct. 56 (1980) (danger of prejudice if silence at time of arrest introduced).

156. The import of these suggestions is that under present practices, assertion of the privilege against self-incrimination before grand juries should ordinarily not be a permissible basis for adverse inferences, both because witnesses are unrepresented by counsel and because no neutral official has yet made a finding of substantial evidence of guilt. Exercising

3. *Loss of Employment*

Given what I have said thus far, I can indicate the sources of my discontent with prevailing principles on termination of government employment rather summarily. After some sharp divisions in the 1950's and 1960's,[157] the Supreme Court has apparently settled upon the following principles.[158] The government cannot dismiss an employee because he invokes the privilege against self-incrimination. If the government grants him immunity from criminal prosecution, it can then fire him if he refuses to answer relevant questions about his work, and it can also fire him if he testifies to corruption or dereliction of duty under a grant of immunity. But if the government declines to grant him immunity, it cannot "penalize" his refusal to respond, or his refusal to waive immunity, by terminating his employment.

Once there is substantial evidence of an employee's wrongdoing, I have argued that if he fails to offer an explanation of his performance of duties, termination of employment is a natural response. The government's indulgence in this natural response should not by itself be considered an unconstitutional penalty on the exercise of a right to silence, or an impermissible form of compulsion to testify that invalidates the testimony of those who fear that consequence.[159]

Having said this much, let me add some caveats. The government should not be able to fire employees who invoke the privilege in proceedings unrelated to their employment.[160] Nor should gov-

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its supervisory power to bar use of defendant's silence before a grand jury to impeach his trial testimony, the Supreme Court, in Grunewald v. United States, 353 U.S. 391 (1957), was sensitive to the nature of grand jury proceedings and to the unfairness of expecting a potential defendant to furnish evidence against himself. *Id.* at 421-24.

157. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967); Cohen v. Hurley, 366 U.S. 117 (1961); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). *Cohen* and *Spevack* involved disbarred lawyers, most of the Justices assuming that the principles applicable to public employment were relevant to disbarment.

158. *See* Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968). *Cunningham* involved a party official and *Turley* a contractor, but the Court decided that the principles relating to public employment were applicable.

159. I take the same view about revocation of the license to practice law, but I do not defend that view here or attempt to analyze which relationships with the government can properly be the basis for imposition of some adverse consequences based on failure to speak.

160. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 558 (1956). There may be a

ernment employees have to respond to every fishing expedition concerning possible wrongdoing; as with adverse inferences at trial, dismissal should generally be permitted only if there is substantial prior evidence of wrongdoing. Perhaps this principle should be relaxed for high officers with very important government responsibilities; they carry special responsibilities to preserve the openness and integrity of government operations[161] and perhaps should be expected to respond about their own performance whenever that has become an official concern. Finally, although a practice of dismissal on a case-by-case basis seems appropriate, statutory requirements of automatic dismissal are unacceptable. Such inflexible working smacks of an intent to force testimony rather than preserve the fitness of the work force; more crucially, such wording does not allow the government-as-employer to make the kind of individuated response to exceptional circumstances that one would expect from an ordinary employer. This does not mean that any statute authorizing dismissal must be unconstitutional. If the executive branch can adopt a general policy of dismissal, the legislature should be able to direct such a policy,[162] but it should have to provide the employee some hearing before the government-as-employer and allow the latter some leeway to respond to unusual circumstances.[163]

Because the statutes the Court has reviewed have not qualified the duty to respond by anything like a probable cause standard and have mandated automatic dismissal,[164] my approach might well have produced the same results as that dictated by prevailing principles. And because I doubt that many government employees prosper after invoking the privilege, expanding the formal power to

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few positions, for example, police chief or United States Attorney, for which dismissal would be appropriate even for exercises of the privilege unrelated to the job. Most of these positions would be ones as to which a chief executive would have wide discretion over dismissal, so it is difficult to imagine litigation arising over the cause of dismissal.

161. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 812 (1977) (Stevens, J., dissenting).

162. *See id.* at 811 (Stevens, J., dissenting).

163. No doubt automatic dismissal provisions were perceived as a way of circumventing corrupt decisions to retain corrupt employees. A statute could avoid this problem by setting up a special committee to review the employment of those failing to respond to inquiries about their performance of duty.

164. See cases cited in notes 157 & 158 *supra*.

dismiss might not be of great practical significance.[165] Nevertheless, the employment dismissal cases, like *Griffin*, are wrong in their conception of the nature of the privilege.

4. *Conditions of Pretrial Inquiry*

What I shall say about the conditions of pretrial inquiry will be even more sketchy. Here the reason is the difficulty and complexity of the subject. Any decent treatment would require another lecture, so I must limit myself to a few unsatisfying observations.

As the dissenters in *Miranda* clearly recognized,[166] the *Miranda* rules are not fully responsive to the concerns that underlay their creation. If one is concerned about the inherent compulsion of police station interrogation, he must doubt how genuinely voluntary are many waivers given in that setting, and if one is concerned about the truthfulness of police testimony, he must worry about warnings, waivers, and admissions to which only suspects and police are witnesses.[167] Not only are law enforcement officers still able in many cases to take advantage of strong pressures to talk, they may employ strategies, such as the placement of informers, or lies about physical evidence or supposed confessions of confederates,[168] that fall well below standards of respect and dignity to which we aspire in most contexts. That the well-informed are now better able to resist police attempts to elicit admissions than the naive is further reason for discomfort.

A common response is that the solution of serious crimes is such important business and the character of so many of those who commit them so decidely antisocial, we must, as we do in war, accept tactics that "nice" people do not use in ordinary relations.

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165. This became particularly true after the Court's decision that use immunity satisfies the Constitution. Castigar v. United States, 406 U.S. 441 (1972). As the Court noted in Lefkowitz v. Cunningham, 431 U.S. 801, 809 (1977), a state can grant use immunity without abandoning the possibility of future criminal prosecution. Once having afforded that immunity, it can compel truthful answers, however incriminating, and fire those officials whose answers show their unfitness for government employment.

166. 384 U.S. at 535-36 (White, J., dissenting).

167. *See* Y. KAMISAR, *supra* note 87, at 92-93.

168. *See generally* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979). As Professor White indicates, the Supreme Court has given relatively little guidance about the line between permissible and impermissible tactics before a person is formally accused.

Certainly the present climate of opinion, public and judicial, is hardly conducive to sizeable expansion of the rights of criminal suspects, and if the choice really is between solving serious crimes and showing marginally more respect for suspects, I would agree that solving the crimes should take precedence. Of course, the truth is that the magnitude of the rights of criminal suspects has only limited impact on police success in solving crimes. The main determinant is police resources, and at present the police cannot even make a pretense of investigating most serious crimes in urban centers. But even if we limit our focus to the rights of suspects, we should be able to have a criminal process that evidences more respect for suspects, that does not operate so unequally on weak and strong, and that does not sacrifice effectiveness. If the prosecution could introduce a suspect's pretrial silence as evidence, all suspects would have a substantial, rationally-based incentive to talk to investigating authorities. The burden of my presentation has been that such an incentive is much more consonant with recognition of the dignity of suspects than many tactics that are now permitted. Although I do not expect substantial expansion of the constitutional pretrial rights of suspects in the foreseeable future, in the longer term a readjustment of perspective might properly produce curtailment of some practices that are now permitted.

VI. Conclusion

I have made some explicit suggestions about a particular constitutional right, the privilege against self-incrimination. The analysis that has led to these suggestions has been complex, though not nearly as complex as the subject matter may require. Some of the suggestions can stand even if particular aspects of the analysis are rejected. Each reader can ask himself how far his disagreements with me over narrower points will carry through to my ultimate recommendations.

In conclusion, I want to draw attention to the broader underlying premises of the discussion. These are by no means self-evident, and their validity, though tested by the merits of my narrower comments, is not determined by them.

The first premise is that moral judgments about relations between private persons have great relevance to moral judgments about relations between governments and those living within their

domains. Some things about government are unique. But unless specific reasons can be adduced why different moral judgments are appropriate, reasons resting either on the general nature of government or applicable to the particular issue, we should start with the assumption that what is proper behavior between government and residents will closely resemble what is proper behavior in analogous relationships among private individuals and enterprises. This starting point deflects one away from two views that are often impliedly accepted if not explicitly defended: first, that government officials have a general privilege to disregard ordinary moral constraints in their pursuit of public aims; and second, that individuals need not concern themselves with the welfare of others when that welfare is manifested in government action adverse to their interests.

The second premise is that illuminating analogies do exist in the private sphere to the criminal process, and that neither the general nature of government nor the special features of the government's role in this context undermine the importance of those analogies for the rights that suspects and defendants should have. As far as the right to silence is concerned, I have suggested that the gravity of the penalties at the government's disposition and the possibilities of abuse that derive from its immense power and monopolistic position do affect the dimensions of the legal rights that should be recognized. I have rejected, however, the idea that the basic right should be conceived as fundamentally different than it would be in the private setting. Beyond what I have already suggested, I believe that citizens can have more respect for a process that largely conforms with the judgments of their own moral sense than one that introduces artificial protections at some points and disregards ordinary moral principles at others.[169]

The third premise is that the sort of moral evaluation I have

169. The moral sense of citizens may, of course, incorporate important distinctions between private relations and individual-government relations. Therefore, a lack of conformity between the right to silence in the criminal process and the right to silence accepted for private relations *does not necessarily* show that the former is at odds with the general moral sense of citizens. Nevertheless, although many people may accept as morally justified interrogational practices they would reject for private inquiry, I believe that, for the most part, their moral judgments about public investigation are informed by what would be proper in private settings.

engaged in is significant not only for legislative choice but also for judicial interpretation of long-established constitutional rights.

If these premises are sound, moral analysis of nongovernmental relations can often be a helpful, indeed important, tool in constitutional adjudication. This insight is certainly not novel, but it infrequently commands explicit recognition. Its disregard in relation to the privilege against self-incrimination has produced misleading characterizations and mistaken directions.