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SELF-INCRIMINATION BY INFERENCE: CONSTITUTIONAL RESTRICTIONS ON THE EVIDENTIARY USE OF A SUSPECT'S REFUSAL TO SUBMIT TO A SEARCH

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In the concluding decade of this century and the opening of the next, we can expect that law enforcement will be improved by the development of new, simpler, and more accurate techniques for the acquisition and analysis of evidence from the body of a suspect, from his[1] possessions, and from the space he controls. We have already witnessed the appearance— doubtless in primitive form—of a method for the identification of criminals that promises to revolutionize criminal investigation and proof: DNA matching.[2] When developed into a simple and reliable technique capable of pronouncing identity between some body tissue or fluid left by the criminal at the scene and an exemplar of genetic markings taken from the suspect, gene-printing will become the ultimate proof for the many crimes of physical violence or sexual assault in which the identity of the perpetrator is an issue.[3] In addition, we hear of the

* Professor of Law, Columbia University. The author expresses appreciation to Professor George Dix for a thorough and helpful critique and to Professor Kent Greenawalt and other colleagues for their astute reactions and benevolent advice. Gratitude goes also to Russell Leonard, a diligent and resourceful research assistant.

[1] Though it is *Journal* policy to use gender pronouns in the alternative, the editors have acceded to my preferred style of maintaining gender neutrality.

[2] The criminal defense bar has already perceived the threat and has assembled a formidable roster of geneticists and lawyers to lead a symposium in Washington, D.C., on March 16 and 17, 1990, entitled, "DNA: Understanding, Controlling, and Defeating the New Evidence of the 90s."

[3] In its present form, the simplicity and reliability of the gene matching technique is still a matter of sharp disagreement. While the FBI proudly announces absolute confidence in its lab results, some geneticists and statisticians have expressed doubt. *See* N.Y. Times, Jan. 29, 1990, at A1, col. 1. However, present difficulties with the technique appear to be more mechanical than theoretical. It seems likely that because of the importance of this forensic procedure, the methods quickly will be refined and the sources of scientific and judicial misgiving will be substantially removed.

refinement of voiceprinting, a technique for isolating the unique characteristics of speech to identify an individual's voice with at least as convincing certainty as his handwriting. We can believe too that forensic technology for locating the source of inorganic material will improve so that fibers and paint stains and the like can be traced with greater confidence. Perhaps science will even learn to emulate the bloodhound, detecting a fading human scent and recognizing its donor. In light of the invention of gene-printing, no flight of imagination can safely be called extravagant.[4]

Forensic examination of telling traces, personal traits, and specially produced exemplars generally requires, first, some means of obtaining the physical object for inspection, manipulation, or analysis. In some cases, the Constitution is largely unconcerned with the acquisition of the evidence, even when it must be taken from the suspect's body. So long as the suspect is not detained unreasonably to make the search and the probe is safe and painless, the fourth amendment allows free access by law enforcement authorities to characteristics and body material that are regularly and willingly exposed to the public at large.[5] Such "free" evidence includes not only the color and configuration of the face and body, but handwriting,[6] fingerprints,[7] and voice quality.[8]

Many methods of acquisition, however, require some penetration into areas under the protection of the Constitution's fourth amendment. The suspect's security must be breached either to obtain the item in which the evidence is thought to reside (*e.g.*, his vein containing the alcohol that impaired his driving, his closet in which hangs the shirt with the victim's blood on it) or to obtain an exemplar with which to compare the material left by the culprit at the scene of the crime (*e.g.*, some body fluid or tissue bearing his DNA coded signature). But even where the sought material is "private," the fourth amendment interposes no insuperable barrier to the ac-

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[4] The principal question, thus far, arising from innovative technology has been the admissibility of the expert evidence under generally prevailing standards, and the *Frye* test in particular. Frye v. United States, 293 F. 1013 (1923). *See, e.g.*, Note, *Fit To Be Fryed:* Frye v. United States *and the Admissibility of Novel Scientific Evidence*, 77 KY. L.J. 849 (1989).

[5] United States v. Dionisio, 410 U.S. 1, 14 (1973); *cf.* Katz v. United States, 389 U.S. 347, 351 (1967).

[6] United States v. Mara, 410 U.S. 19, 21 (1973).

[7] Dicta in Davis v. Mississippi, 394 U.S. 721, 727 (1969), to this effect became a holding in *Dionisio*, 410 U.S. at 15. Unlike fingerprints, material scraped from under a suspect's fingernails, the Supreme Court held, was private and could not be seized without meeting the reasonability standard. Cupp v. Murphy, 412 U.S. 291, 295 (1973).

[8] *Dionisio*, 410 U.S. at 14.

quisition; it insists only on a lawful method.[9] In addition to the search warrant (arguably, the Constitution's preferred route)[10], several alternate means to obtain the evidence have long been deemed "reasonable" and hence constitutionally acceptable.

Most common among the reasonable alternatives to the warrant is the consent of the entitled. Not precisely a waiver of the fourth amendment protection perhaps,[11] consent, freely tendered[12] by a person with a right at stake,[13] does allow the entry and search that would otherwise be barred without a properly issued warrant. Denial of solicited consent to search and to seize not only forces law enforcement officers onto a different course, it may itself constitute incriminating evidence. The refusal suggests that the target thinks that the search will turn up something incriminating, and that worried reluctance may convey relevant information to the judge or jury who eventually try the case.

The primary concern of this Article[14] is possible constitutional impediments to the admission in evidence of the inculpatory implications of a suspect's refusal to cooperate with the request of law enforcement officers to allow a search of constitutionally shielded aspects of his person, or the places and things that enjoy the shelter of the fourth amendment. The additional concern is whether the fact that the suspect is under arrest—with all the coercion implicit in

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9 The fourth amendment provides:

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

U.S. CONST. amend. IV. This language allows warranted or other reasonable searches into all spaces no matter how "private" and no matter how incriminating the evidence found therein may be, provided the means of acquisition are relatively safe, painless, and commonplace. *See, e.g.*, Winston v. Lee, 470 U.S. 753 (1985) (surgical search for a bullet disapproved); Schmerber v. California, 384 U.S. 757 (1966) (extraction of blood to test for the presence of alcohol approved); Rochin v. California, 342 U.S. 165 (1952) (use of an emetic solution to force the regurgitation of narcotic capsules disapproved on due process grounds).

10 At least during the era in which the ideas of Justice Potter Stewart dominated fourth amendment literature, the provision could be read to require search by warrant unless specific exceptions excused the lack of it. *See* Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell To Justice Potter Stewart*, 25 CRIM. L. BULL. 29 (1989).

11 *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

12 In some ways, consent is the narrowest exception to the warrant preference rule. It is the only one on which the prosecution bears the burden of persuasion and requires that voluntary consent be established over the "presumption" that law-abiding citizens will often acquiesce to what appears to be lawful authority without surrendering their rights of security. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

13 *See* United States v. Matlock, 415 U.S. 164 (1974); Stoner v. California, 376 U.S. 483 (1964).

14 In capitalizing this word, I yield to the firm policy of the *Journal*.

that status—precludes the use of the prisoner's refusal to allow an examination of even those things outside the pale of fourth amendment security. My major thesis is that where the state attaches to a person's assertion of a primary constitutional right to decline assistance (by refusing to consent to a search, for example) an adverse consequence consisting of the loss of a secondary right of the same derivation (specifically, the right not to be required to bear witness against oneself), then the use in a criminal prosecution of the adverse inference that refusal was motivated by a guilty conscience is unconstitutional—most probably as a violation of due process. My secondary thesis is that while custody imposes coercion on the indirect inferences along with the more direct expressions of guilt, the usual advisories can purge those effects for both purposes.

I. A Case: The Supreme Court Produces a Flawed Analysis

In 1983, The United States Supreme Court directly confronted the fifth amendment implications of declined consent.[15] The Court, behind Justice Sandra Day O'Connor, decided in *South Dakota v. Neville*[16] that the refusal of a driver to submit to a blood-alcohol test could be introduced in evidence against him without offense to the constitutional privilege against self-incrimination. Seventeen years earlier, Justice Brennan had written the famous decision in *Schmerber v. California*[17] where the Court, after rejecting other constitutional contentions, held that the principles of the fourth amendment applied to the intrusion into a suspect's body to obtain a blood sample to test for the presence of alcohol.[18] Musing in a footnote, Brennan had suggested that a fifth amendment issue would arise should a state attempt to use "any *testimonial* products" of the administration of the blood test.[19] *Neville* addressed the open question.

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15 A related issue—silence not as evidence of consciousness of guilt by willful concealment, but silence as evidence of considered judgment—was addressed by the Supreme Court in Wainwright v. Greenfield, 474 U.S. 284 (1986). In *Greenfield*, the Court held that the request of a Mirandized suspect for a lawyer could not be used against her as evidence of her sanity (as well as good sense). Following their reasoning in Doyle v. Ohio, 426 U.S. 610 (1976), the Court thought the *Miranda* advisory carried a promise that no adverse consequence would encumber the choice of silence, and the violation of that promise—however probative the consequential evidence might be—offends the concept of due process. For a discussion of these decisions, see Note, *The Sounds of Silence: Post-Miranda Silence and the Inference of Sanity*, 65 B.U.L. Rev. 1025 (1985). *See also* Comment, *Greenfield v. Wainwright: The Use of Post-Miranda Silence to Rebut the Insanity Defense*, 35 Am. U.L. Rev. 221 (1985).

16 459 U.S. 553 (1983).

17 384 U.S. 757 (1966).

18 *Id.* at 768.

19 *Id.* at 765 n.9 (emphasis in original). Footnote 9 reads in part as follows:

In *Neville*, the driver, under arrest, Mirandized, and unable to perform the usual motor tests for drunkenness, was asked whether he would submit to a blood-alcohol analysis.[20] In accordance with statute, he was warned that the consequence of refusal would be loss of his license to drive; he was apparently not told, however, that South Dakota also permitted the fact of refusal to be introduced in evidence against him on the criminal drunk driving charge.[21] Neville declined to allow his blood to be drawn for chemical analysis, saying, "I'm too drunk; I won't pass the test."[22]

Justice O'Connor informs us that most courts considering the question have held that use of the driver's refusal does not violate the privilege of the fifth amendment. Many courts, she writes, follow the reasoning of Justice Traynor of California,[23] holding that the refusal to perform a physical act, unlike the refusal to communicate, does not incur fifth amendment consequences. The Supreme Court of South Dakota took a different view, recognizing that refusal is a "tacit or overt [*sic*] expression and communication of the de-

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This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case.

Id.

20 *Neville*, 459 U.S. at 555.

21 Following the Court's approval of the South Dakota alternative to forcible extraction of blood, the double-barreled consequence of refusal to consent—suspension of license plus admission into evidence of the suspect's refusal to submit to the blood test—has been enacted in every state. See Note, *"Shed Thou No Blood": The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1137 (1987), for a list of state statutes. Indeed, in the state of Alaska, the refusal to submit to a chemical test for the presence of alcohol in the breath is a misdemeanor. ALASKA STAT. 28.35.032(f) (1989).

22 South Dakota v. Neville, 459 U.S. 553, 555 (1983). Oddly enough, the Court ignored the culpable content of the statement, treating it simply as a refusal to allow the blood test. In a footnote, however, the Court provides a clue to the solution of any *Miranda* problem that might threaten the use of the incriminating words by which a driver suspected of intoxication expresses her refusal: an offer by the police, the Court wrote, of the opportunity to take a blood-alcohol test is not "interrogation" within the concern of the *Miranda* rule. *Id.* at 564 n.15.

23 The Traynor decisions cited by O'Connor include the following: People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966), *cert. denied*, 389 U.S. 850 (1967); People v. Ellis, 65 Cal. 2d 529, 421 P.2d. 393, 55 Cal. Rptr. 385 (1966).

fendant's thoughts" which may not be compelled.[24] Reversing Neville's conviction, the high court of South Dakota had found coercion in the state's forcing the driver "to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself."[25]

O'Connor too declines to adopt the Traynor theory. Noting the "difficult gradation" from inaction (non-communication, according to Justice Traynor) to expressed refusal, the Court finds it easier to rest its decision on the absence of coercion. Thus, turning to the question of whether the state, by allowing the suspect to choose between submitting to the test or refusing, "compelled" him to refuse, O'Connor apparently agrees with the South Dakota Supreme Court that the question is cognizable under the fifth amendment. But she differs in her conclusion. In a somewhat mysterious section, O'Connor acknowledges that some choices are coercive *in se*, alluding specifically to the "cruel trilemma," a choice imposed on a partially immunized witness among self-incrimination, contempt, and perjury. Required by the state, she writes, such elections violate the fifth amendment privilege.[26] So too she notes, recalling *Schmerber*, the fifth amendment might bar the use of a "confession" given in preference to a dangerous or painful test or a procedure that violated fundamental religious beliefs.[27] But where the choice offered by the state is between submitting to a safe and painless test or having one's refusal used against one, there is no threat to the "values behind the fifth amendment." Just why this situation does not impose an equally cruel *di*lemma the Justice does not say. Though physically trivial, the consequences of the blood test might be severe for a highly inebriated driver like Neville, and the consequence of refusal is not much more pleasant to contemplate. If a state-imposed choice between three consequential options amounts to compelled testimony, why not bar the product of a double bind as well?

Passing rapidly the hard-choice-qua-coercion point (on which the case turned below), Justice O'Connor comes to the nub of her holding: "Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant

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24 State v. Neville, 312 N.W.2d 723, 726 (S.D. 1981).

25 *Id.* (quoting State v. Andrews, 212 N.W.2d 863, 864 (Minn. 1973)).

26 *Neville*, 459 U.S. at 563.

27 This is a somewhat mystifying bit of dicta. By it, the Court appears to acknowledge that (due process considerations apart) some alternatives are so repugnant that the option chosen has been "coerced" by the choice.

penalties for making the choice."[28] Beneath this genteel language of legitimate "offers" and "second options," the Justice appears to be reasoning that revoking a person's license to drive, even introducing evidence of his recalcitrance when he faces criminal penalty, is a lesser form of coercion than physically pinning the thrashing drunk to the deck and driving a pointed instrument through his skin. Since the state may do the latter, they may assuredly do the former.

South Dakota's humane statute, substituting adverse legal consequences for physical force in the extraction of the evidence, has a commendable ring to it and Justice O'Connor—on one level—is responding sensibly to a sensible legislative choice. However, the doctrinal predicate of her approval is curious: she assumes that license to intrude slightly on constitutional protections is implicit in license to intrude greatly. O'Connor did not invent this peculiar doctrine of greater and lesser intrusions. Derived from ideas expressed by Judge Learned Hand[29] and Justice O. W. Holmes, Jr.[30] and developed by Justices William Rehnquist (before he became chief),[31] John Paul Stevens, and Byron White,[32] the theory holds

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28 *Neville*, 459 U.S. at 563 (emphasis in original).

29 In United States v. Austin-Bagley Corp., 31 F.2d 229 (2d Cir. 1929), the government called one of the defendants to authenticate certain corporate records produced pursuant to subpoena. Judge Hand, joined by Judges Swan and A. Hand, wrote: "While, therefore, we do not disguise the fact that there is here a possible, if tenuous, distinction, we think that the greater includes the less, and that, since the production may be forced, it may be made effective by compelling the producer to declare the documents are genuine." *Id.* at 234.

30 For a discussion of the role of Holmes in developing this line of reasoning, see Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1306-07 (1984). As examples of Justice Holmes's thinking, Professor Kreimer cites Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting), and Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), *aff'd*, 167 U.S. 43 (1897).

31 Professor Kreimer also credits Chief Justice Rehnquist for the development of this doctrine. Kreimer, *supra* note 27, at 1309. He cites the following examples of Chief Justice Rehnquist's contribution: United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (proprietary power over mailboxes justifies exclusion of all unstamped mail); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125-26 (1977) (proprietary power over prisons includes power to prohibit prison unionization); Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion) (claimants "must take the bitter with the sweet" by accepting whatever due process limitations accompany the provision of a benefit); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 283 (1974) (Rehnquist, J., dissenting) (hospital management, unlike traditional government functions, is essentially the provision of a private facility on which government is free to impose limitations).

32 Justice Stevens's contribution can be found in Michigan v. Summers, 452 U.S. 692 (1981), a case in which Detroit police, arriving with a warrant to search a house for narcotics, encountered the defendant on his way out. The police detained the defendant during the search and afterwards arrested him and removed drugs from his person.

that where the state enjoys authority to penetrate privacy to a major extent, such as searching a home from roof to cellar or taking blood from an unwilling drunk, the lesser intrusion of searching the pockets of persons on the premises or using the drunk's refusal to submit to the blood test in evidence against him is implied.

Despite its august lineage, the theory is questionable, especially where the incursions are of a different nature and cognizable by different constitutional precepts; among other problems, disparate intrusions cannot be compared quantitatively. It is logical nonsense to say that a forcible physical penetration is a "greater" intrusion, measured by fourth amendment standards, than the use of a statement, measured by fifth amendment standards, and hence authority to perform the former implies authority to procure the latter in the same transaction. However broadly police may reasonably search, no license is implied to obtain testimonial evidence by coercion, though the pressure be subtle and the conversation casual. I am certain, for example, that Justice O'Connor and her colleagues would never allow the admission of a four-word answer ("You're looking at him") to a friendly eight-word question ("Hey buddy, you know who owns this gun?") between police and an unwarned suspect in handcuffs merely because it occurred during the lawful exe-

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Neither the warrant nor probable cause entitled the police to "seize" the person of the defendant. Yet the Supreme Court (reversing the Michigan courts) upheld the police conduct. Stevens explained:

> Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself. Indeed, we may safely assume that most citizens—unless they intend flight to avoid arrest—would elect to remain in order to observe the search of their possessions.

Id. at 701.

A similar rationale can be detected in Justice White's opinion in Chambers v. Maroney, 399 U.S. 42 (1970), an automobile search case. There the police arrested the driver of a car on the highway, but searched the vehicle (without a warrant) only after it had been removed and immobilized at a police station. The Court approved the search under the doctrine allowing searches of automobiles in motion on the open road. White wrote:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which is the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 51-52.

cution of a search warrant for the gun. The greater intrusion of a stem to stern search of personal belongings, authorized by warrant, provides no sanction for the slight intrusion of a friendly and brief custodial Q and A that accompanies it. Yet none of Justice O'Connor's colleagues objected to her employment of this curious doctrine of greater and lesser prerogatives in *Neville*.[33]

The Court's clumsy handling of several doctrinal ingredients has impaired the flavor of the broth, but has not actually poisoned it. Thus, the Court can not be fairly faulted at this juncture for its employment of the ensconced theory of minimal increments, however dubious that idea may be in terms of logic and sound policy. Nor can serious fault be found in the Justices' rejection of South Dakota's theory of coercion. The alternative of a "perhaps unpleasant examination" does not, after all, *coerce* testimonial evidence of refusal. So too, while more earnest consideration would have been welcome, the Court did not mistakenly discard the "cruel trilemma" theory of coercion. Strictly speaking, the cruel trilemma doctrine is not, as O'Connor would have it, a holding that the outcome of a hard choice in a tight spot created by state law is officially coerced in violation of the fifth amendment. Before the Court decided *Murphy v. Waterfront Commission*,[34] a witness in a state proceeding could be assured by the tender of state immunity only that he would not thereafter be prosecuted (or that the evidence he furnished would not thereafter be used against him in a criminal prosecution) within the borders of the immunity-granting jurisdiction. Since federal and state crimes often overlap, the immunized witness was caught in the trilemma of answering in the state forum at risk of furnishing evidence against himself in a federal prosecution, lying and risking a perjury charge, or evading the question and thereby inviting a possible contempt citation. The Court in *Murphy* relieved him of the triple bind by allowing state immunity to cross federal lines and shield the testimony from future use in the courts of the United States.[35] So the cruel trilemma doctrine does not produce a fifth

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[33] Justice Stevens's dissent in *Neville* is entirely based on the view that the holding below was adequately founded on state grounds because the state court opinion clearly held that the statute violated provisions against self-incrimination in the constitution of the state of South Dakota. Justice O'Connor replies to this point at length in a footnote. South Dakota v. Neville, 459 U.S. 553, 556 n.5 (1983).

[34] 378 U.S. 52 (1964).

[35] Justice O'Connor has curiously oversimplified—and misstated—the famous trilemma. As she writes:

> The classic Fifth Amendment violation—telling a defendant at trial to testify—does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self-accusation, or testify falsely (risking perjury) or decline to testify (risking contempt). But the Court has long recognized that the Fifth Amendment pre-

amendment alert wherever the state demands that the suspect elect between a rock and a whirlpool. And sound reason confirms that requiring a suspect to choose between unpleasant alternatives does not compel the choice of either of them. Thus, though mistaken and regrettable, these several weaknesses in the reasoning of the opinion do not, in sum, destroy the value of Justice O'Connor's effort in *Neville*.

II. Two More Cases: The Right to Refuse Cooperation as a Constitutional Entitlement

The major flaw in Justice O'Connor's reasoning in *South Dakota v. Neville* is the failure to recognize the constitutional character of the security interest of the suspect from whom consent to search is sought, and the testimonial nature of the evidence of consciousness of guilt generated by his refusal. Had the Court perceived the events of Neville's arrest in their correct constitutional posture, the result would have been different, but the decision would fit harmoniously with a developing doctrine of adverse inferences from entitled refusals to cooperate. This line rests on two cases, primarily, neither of which received due honor in the *Neville* opinion.

The more recent of these appeared in 1968 in a somewhat different context. The case, *Simmons v. United States*,[36] was the Court's second effort to slay a two-horned dilemma so fearsome that, according to Judge Learned Hand, it caused hardened criminals to "wince":[37] the necessity of acknowledging a connection with a damaging item of physical evidence in order to obtain standing to challenge the lawfulness of its acquisition by the police.[38] Some years before, Justice Frankfurter had suggested an escape by removing the need to establish standing in any case where possession was itself the crime alleged.[39] Justice John Marshall Harlan had a better idea in *Simmons*.

Simmons insulated testimony given by a defendant in order to establish standing to suppress evidence under the fourth amendment exclusionary rule from subsequent use on the merits against

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vents the State from forcing the choice of this "cruel trilemma" on the defendant. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

Neville, 459 U.S. at 563.

36 390 U.S. 377, 389-94 (1968).

37 Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932).

38 This is hardly the time or place to quarrel with this seminal sensitivity; suffice it to say that some hard heads have wondered what is morally intolerable about the dilemma imposed on defendants to elect between a claim of illegal search and a defense built on the denial of connection with the item seized.

39 Jones v. United States, 362 U.S. 257 (1960).

the entitled person. Acknowledging that, "as an abstract matter," it might well be true that the testimony at the suppression hearing was not "compelled," the Court found that being required to waive the fifth amendment privilege in order to obtain the benefit of a right conferred under the fourth amendment creates "undeniable tension." "[W]e find it intolerable," Justice Harlan explained, "that one constitutional right should have to be surrendered in order to assert another."[40] Although Harlan did not specify the provision of the Constitution affronted by this tradeoff of entitlements, his intolerability standard sounds distinctly in due process tones.[41]

What the *Simmons* Court appeared to be saying is that the right to suppress evidence unlawfully obtained is a right derived from the fourth amendment itself and the assertion of that right usually entails delivery of some cognitive evidence— the defendant's asserted belief or knowledge that he had a connection with the inculpatory evidence in question, a connection that might contribute to his conviction. The assertion, then, of this ancillary fourth amendment right to suppress requires the waiver of the fifth amendment right to withhold such testimonial and communicative evidence. If, contrary to the Court's view in *Neville*, a driver's refusal to allow blood to be drawn amounts to the assertion of a right derived from the Constitution of the United States (in addition to whatever statutory grace may be accorded by a state statute like that of South Dakota), and the inference of consciousness of guilt from the exercise of that right is "testimonial and communicative," then the parallel is close. Unaccountably, Justice O'Connor did not even cite *Simmons* in her opinion in *Neville*.[42]

The other, closely related doctrine that undermines the *Neville* result fared slightly better than *Simmons* in the Court's reasoning; it was mentioned and summarily distinguished. Three years before *Simmons*, the Supreme Court decided *Griffin v. California*.[43] In this famous case, Justice Douglas embellished the concept of compulsion in the fifth amendment by holding that the privilege is violated whenever the state officially sanctions natural inferences flowing from a defendant's decision to withhold testimonial evidence. The case tested a California statute permitting prosecutor and court to

40 *Simmons*, 390 U.S. at 394.

41 The case may well have been decided under the Court's supervisory jurisdiction, but the general assumption, on and off the Supreme Court bench, appears to be that the ruling was constitutionally founded and applies in state as well as federal cases. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1979).

42 Nor is the case cited to the Court in any of the seven briefs submitted by the parties and their several *amici*.

43 380 U.S. 609 (1965).

comment upon a defendant's failure to testify in his own behalf. Enhancing the charm of *Griffin* was the peculiar circumstance that the fifth amendment privilege was found to be infringed though the defendant gave no evidence whatever against himself, compelled or free. Rather, Griffin had remained off the witness stand—despite the statutory threat of adverse inference—and objected to the carefully measured language by which the jury was told just what significance they might attribute to his election. In a celebrated passage, Douglas stated of the permitted comment, "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[44]

By the same logic, would not the use against a defendant of his refusal to consent to a search and seizure of his blood violate his fourth amendment right to security in his person by making the assertion of that right "costly" in the sense of allowing a criminal factfinder to draw natural inferences regarding the consciousness of guilt that might have impelled the refusal?[45] While O'Connor refers to the "price" and the "penalty" of refusing the blood-alcohol test, she deems the right of refusal to be of purely statutory origin.[46] In a footnote, she disposes of *Griffin* thus: "Unlike the defendant's Fifth Amendment right to refuse [to testify at his own trial], a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable."[47]

It is the Court's finding that the Constitution confers no right to refuse a blood search for alcohol that I believe is most seriously mistaken. For the right to object to the state's mission of corporeal intrusion is a constitutional entitlement as surely as Simmons's right to suppress illegally seized evidence and Griffin's right to withhold

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[44] *Id.* at 614. One might argue (as I am tempted to) that *Griffin* was wrongly decided and that the state may lawfully make the assertion of various rights "costly" in the sense that adverse, though not unfair, consequences may result. A prime example of this is offers of lesser punishment in exchange for relinquishment of the right to trial. But the case is now 25 years old and that probably cuts off debate on the merits.

[45] In point of fact, the inference from refusal to allow a search is considerably stronger (more "rational" perhaps) than that flowing from a defendant's decision not to testify at his own trial—a choice that may have various explanations, not the least likely of which is his fear of impeachment by prior convictions. *See* Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH. L. REV. 1290 (1981). In the totality of circumstances (the correct standard, Schneckloth v. Bustamonte, 412 U.S. 218 (1973)), the fact that a suspect knows culpable evidence is likely to be found is one good reason for believing that consent to search was involuntary. By the same reasoning, refusal to consent generates a rational inference that the suspect believes that evidence of his guilt is discoverable by the search.

[46] South Dakota v. Neville, 459 U.S. 553, 560 (1983).

[47] *Id.* at 560 n.10.

his testimony at his trial.[48]

III. The Primary Right to Refuse a Body Search or any Other Invasion of Private Space Originates in the Constitution

A key premise of the Court's summary disposal of *Griffin* is the assertion that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test."[49] While this is a fair reading of the result, *Schmerber* never considered the "right to refuse" as such. A person's right to decline consent is not inconsistent with the government's authority to override such disinclination, by force if necessary. The refusal, though it might not defeat the venture, does signify the assertion of a protest that might be later pursued to vindicate the right asserted. Thus, for example, police might ask a suspect to come voluntarily to the station house to stand in a lineup in order to "clear up a little misunderstanding." If the suspect refuses, police might nonetheless have the requisite probable cause to take him into custody.[50] But if they are mistaken in their belief that they have reliable information on which to ground an arrest, the defendant may suppress the lineup identification as fruit of the unlawful arrest. If the suspect

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48 Professor Ronald Allen, in his generous introduction to this Symposium, suggests that I have failed to recognize the impact on my thesis of California v. Byers, 402 U.S. 424 (1971). Allen, *The Pressures and Prospects for Change*, 81 J. Crim. L. & Criminology 1, 3 (1990). *Byers* approved a California statute requiring drivers involved in collisions to stop and identify themselves, despite possible self-incriminatory consequences. The decision turned on the rather Talmudic question of whether the statute was addressed to *all* drivers (in which case it was constitutional like the law requiring the filing of income tax returns *per* United States v. Sullivan, 274 U.S. 259 (1927)) or whether it was directed only to drivers involved in accidents, a "highly selective group inherently suspect of criminal activities" (in which case it was unconstitutional *per* Albertson v. SCAB, 382 U.S. 70 (1965), and others in the line). Although the defendant in *Byers* was in fact charged and convicted of *failing* to comply with the self-identification provision, the Court's decision was entirely concerned with the resolution of this insoluble riddle and the constitutional implications of *compliance*, never addressing my problem of the self-incriminatory consequences of the suspect's *failure* to cooperate.

49 *Neville*, 459 U.S. at 559.

50 My problem is easier if one assumes that the probable cause is independent of the suspect's refusal. It is an unresolved and perplexing question whether the refusal itself may contribute to probable cause or, like the exercise of an entitlement, it should not count as suspicion-heightening conduct. Concurring in Terry v. Ohio, 392 U.S. 1, 34 (1968), Justice White commented that the refusal of a suspect, under detention on suspicion only, to give an account of himself cannot furnish probable cause for his arrest. But state and federal courts have divided on the proposition, usually with scant consideration of the constitutional implications. Professor George E. Dix has described this narrow and disorderly patch of doctrine in a small section of a more ambitious exploration. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 Duke L.J. 849, 951-58.

freely accepts their invitation, however, he may have lost the claim to a government assertion that, by his consent, he waived his fourth amendment right against involuntary and unreasonable seizure of his person. Similarly, by refusal, a suspect might reserve a challenge when a police officer, having announced an arrest, requests permission to search the suspect's suitcase or the glove compartment of the car in which he was riding (a search usually deemed lawfully "incident" to an arrest). Ninety-nine times out of a hundred, perhaps, his refusal will mean nothing (if indeed the cops bother to ask leave at all), and the product of the search will be readily admitted in evidence. But in the hundredth case, the suspect may mount a successful attack on the proximity of the seizure to the arrest, a right he might have lost had the police been able to induce a free consent.[51] Thus the assertion of objection, though usually futile in fact, is not a legally inconsequential act; it may preserve for litigation a claim that would otherwise be lost by waiver.

Strictly on a doctrinal level, the refutation of Justice O'Connor's reading comes from the unmistakable fact that Justice Brennan, writing for the *Schmerber* Court, clearly believed that the fourth amendment was applicable to the body search.[52] Could any language be clearer than this:

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons" within the meaning of that Amendment.[53]

The right to refuse to consent to entry is the essence of the right to security itself. True, Brennan held that the immediate and warrantless search for alcohol in the bloodstream was reasonable in the exigent circumstances created by metabolism, but he emphasized that this was a fact-specific holding. Allowing the search in the particular circumstances is quite different from holding that there is no general constitutional right to refuse to consent to a body search for purposes of lab analysis.

To pursue the point a bit further, imagine this model: a PERSON is in control of a SPACE; a COP has been told by an INFORMER that the space contains a THING that will prove the

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[51] The example is largely theoretical since it is difficult to imagine a free consent tendered by a suspect immediately following his arrest. *See* Bumper v. North Carolina, 391 U.S. 543 (1968).

[52] Schmerber v. California, 384 U.S. 757, 767 (1966). For a discussion of the Court's treatment of the fifth amendment privilege, see Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982).

[53] *Schmerber*, 384 U.S. at 767.

person committed a crime; and there is a strong likelihood that the THING will soon be removed from the SPACE. The COP goes to the PERSON and asks for permission to enter and inspect the SPACE and remove the THING, if found therein. The PERSON refuses to allow the entry.

Scenario #1: The informer is unknown, perhaps a character of soiled credibility, and if the person refuses to admit the cop, the cop will have no lawful way to obtain the thing he seeks.

Presumably, all courts (Supreme included) would readily exclude evidence of the refusal as implying a consciousness that the incriminating thing was indeed within the space.

Scenario #2: The informer is known, his reliability attested by prior hits, but for one reason or another the cop has not yet taken her probable cause down to the courthouse; she correctly assumes, however, that if she does, the search warrant will issue.

In a sense—a very abstract, indeed metaphysical sense—the cop has the "right" to enter though she does not yet have the warrant, a right she enjoys by reason of the certainty that the authorization will be forthcoming on demand. But inchoate warrants are not recognized in law, and in a more conventional view, the cop with good solid probable cause but no judicial license is in no different position from the cop in the first scenario.

Scenario #3: The informer is known but untested, the urgency is great and the thing is dangerous; the information, moreover, is that the person ran into the space with the thing after committing the crime several hours before.

Should the cop decide to force his way into the space and find the thing within, a court *may possibly* rule that he was in "hot pursuit," as that justification was drawn in an analogous case,[54] wherefore the entry was lawful notwithstanding the person's objections. But the court might as easily rule that the pursuit was cool and, absent a valid consent, the entry was unlawful. Would it not be foolish to hold that existence of the person's right to refuse entry depends upon the subsequent ruling of the court on the availability of an independent ground for upholding the cop's intrusion? In sum, the right to refuse entry to secure space cannot rest upon the lawfulness of police entry without consent.[55] The right to refuse is not coterminous with the ability to defeat police access by its exercise.

Not that the rightly apprehensive and otherwise reluctant

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54 Warden v. Hayden, 387 U.S. 294 (1976).

55 One of the few opinions that carefully analyzes and articulates this point was written by the Supreme Court of Alaska. Elson v. State, 659 P.2d 1195 (Alaska 1983). For a discussion of the case, see *infra* notes 73-77 and accompanying text.

targets of police curiosity, by their refusal to cooperate, will greatly burden or even inconvenience the pursuing posse. As technology advances in forensic testing, it is fair to assume that search warrants will lose some of the logistical clumsiness that, today, inhibits their use somewhat. Without subtracting the judgment of the magistrate or the constitutional ingredients of oath, probable cause, and particularity of description, warrants might be electronically generated with speed and facility that will promote their routine employment far more effectively than the "exclusionary rule" ever could.[56] Moreover, especially in those cases where new and sophisticated methods are employed, such as the gene-printing by DNA analysis, one might expect that exemplars will be sought after the suspect is in custody, possibly represented by counsel, and solicitation of consent before applying for—or executing—the warrant that will authorize the extraction is unlikely. Thus, to deny law enforcement the use of refused consent, for whatever additional weight it might lend the prosecution's case, is not only just, but no great sacrifice.

IV. The Adverse Consequence Burdening the Assertion of the Primary Right to Refuse Access to Secure Space is the Secondary Loss of the Fifth Amendment Right to Withhold Testimonial or Communicative Evidence

In one view, refusal—like silence and inaction—proves nothing. Having a probative valence of zero, evidence of this sort supports no inference one way or the other on any fact in issue. The "insoluble ambiguity of silence," as the Supreme Court once termed it,[57] should not be equated with a demonstrated or expressed frame of mind. As a matter of logic, it might seem, proof cannot be built on vacancies; the non-production of data by the mute or uncooperative suspect results in no more than nothing, which cannot be converted by courtroom legerdemain into an evidentiary something.

Yet the law of evidence—reflecting common experience—has long recognized that, in special circumstances, the act of inaction speaks eloquently and to the point. While silence is often ambiguous, in a setting where an exculpatory statement would normally be

[56] For a description of the oral search warrant—and a discussion of some of the problems of persuading law enforcement officials to use it on a regular basis—see H.R. Uviller, Tempered Zeal 124-30 (1988).

[57] To be precise, the phrase was not employed to refer to silence in general but to the particular circumstance in which a silent suspect had been recently advised that he was under no obligation to speak and that words might injure his interest. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

expected from an innocent person, failure to speak out may imply a tacit acknowledgment of culpability. The law of evidence at least (exhibiting its usual confident assumptions concerning the mysteries of the human mind) has long indulged the inference that people who are directly accused, loath to lie, and reluctant to admit guilt openly, may respond with silence. Silence, then, is sometimes accepted as mute testimony of a guilty frame of mind.

Is evidence of refusal comparable to other sorts of mute evidence? Granted, the exercise of a proffered option not to take a blood test, for example, is at least some form of action; it seems somehow more affirmative than mere silence or omission which are, after all, nothing but empty spaces in the evidentiary mosaic. Yet a strong kinship with mute evidence may be found in the nature of the probative value assigned to the conduct. Like silence or inaction, refusing to submit to examination is of significance only insofar as it betokens a state of mind from which the inference of guilt may be fairly drawn; that is to say, a consciousness or subjective belief in the mind of the suspect that the product of the search she refused would reveal culpability. Like the mute or inert defendant reasonably expected to speak or act in the circumstances, the defendant who refuses voluntarily to submit her cells for laboratory analysis suffers a fortified suspicion of culpability since were she free of the sense of guilt, we assume, she would readily have allowed—indeed demanded—the test that would exonerate her.

This general category of proof—be it evasive action or suspicious inaction—usually goes by the designation "evidence of consciousness of guilt." Typically, such evidence seeks to show that, following the crime, the defendant fled and hid out somewhere incognito; that he changed his physical appearance; that he attempted to hide, alter, or destroy physical evidence; that he sought to persuade witnesses to lie or to disappear; or that he tried to fabricate an alibi. The inferential line runs thus: the defendant's conduct might have been motivated by his desire to avoid capture or the use against him of evidence connecting him to the crime; this desire might be caused by his belief that if he were prosecuted on such evidence he would be convicted; that belief might stem from his subjective belief that he committed the crime, which in turn might be attributable to the fact that he actually did commit the crime. The chain of inferences from a suspect's refusal to allow a search of herself or her space is identical to the more conventional forms of evidence of consciousness of guilt.

Insofar as evidence of consciousness of guilt expresses cognitive awareness, the evidence is fairly described as "testimonial or

communicative." This phrase, first used by Justice Brennan in *Schmerber v. California*,[58] describes the special concern of the fifth amendment privilege. While one may be compelled (by warrant or subpoena) to furnish auto-inculpatory evidence from the external, physical, or behavioral world without offense to the fifth amendment, no person may be compelled by process or otherwise to disclose internal, subjective, or cognitive data. The inference that a person failed or refused to submit to a search for objective evidence communicates subjective data: that he declined for reasons of belief that the results of the search would incriminate him. Facts giving rise to inferences, no less than direct reports, of the contents of the mind are testimonial and communicative and, as such, within the fifth amendment privilege to withhold. Indeed, the direct declaration of culpability, the confession, is no different in genus from evidence of consciousness of guilt: it is the disclosure of a subjective *sense* of culpability, with or without recalled data concerning the occurrence, from which *actual* culpability may be inferred.

V. The Constitution Prohibits the Use of Evidence of Consciousness of Guilt Inferred from the Exercise of a Constitutional Right

By requiring a suspect to suffer the reasonable inference of consciousness of guilt from his refusal to consent to a search in order to obtain the benefit of his right to say no, the *Neville* Court has allowed what the *Simmons* Court and the *Griffin* Court forbade. Yet, oddly enough, the constitutional predicate of the *Simmons* and *Griffin* decisions is not altogether clear.

Those cases are susceptible of the reading that admission of the testimonial inference from the suspect's choice violates the privilege of the fifth amendment.[59] In this reading, the evidence was supplied

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58 Schmerber v. California, 384 U.S. 757, 761 (1966).

59 Professor Mosteller, for one, takes this view. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567, 1592-1602 (1986). He sees compulsion cases falling into two categories: in the first, threats external to the trial process produce the testimonial assertions; in the second—a group in which he locates *Simmons* and *Griffin*—unconstitutional compulsion is generated by a rule of the trial process itself. When he attempts to explain the fifth amendment rationale for this category, however, Mosteller finds himself somewhat baffled and his analysis falters.

The fifth amendment reading of *Simmons* recently received a lift from a casual citation in an unrelated opinion of the United States Supreme Court. In Baltimore City Dep't of Social Serv. v. Bouknight, 110 S. Ct. 900, 909 (1990), Justice O'Connor writes: "In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled. *See Simmons v. United States* [citation omitted]." *See also* Comment, *South Dakota v. Neville—A Further Diminution of the Self-Incrimination Privilege?*, 6 Am. J. Trial Advoc. 485 (1983).

by the suspect only because she was *required* to do so in order to claim the entitlement of the primary right of silence or security. The required surrender of the right to withhold damaging concessions of fact, either explicit (as in the case of Simmons's co-defendant Garrett's testimony on his motion to suppress) or implicit (as in the case of Griffin's decision not to testify at his own trial), may be taken as *compelled* by the government, the government having constructed the adjudicatory procedure by which the exercise of the choice was required.

Though better than the weak theory of the Supreme Court of South Dakota in *Neville*,[60] this reading is still somewhat strained. Most apparent, neither the Court in *Griffin* nor *Simmons* chose to ground their decisions on the right not to be compelled to be a witness against oneself. But apart from that, the idea suffers from an atrocious implication. If it were true, the trial testimony of a defendant might itself be regarded as compelled by the state if it was given to contradict the evidence of the prosecution witnesses.[61] Moreover, the proposition baldly put does not commend itself to the Anglo-American sense of the proprieties: where the state offers a fair choice of assertion or waiver of a right, the reasonable implications of either election do not generate the same sort of repugnance as the products of the rack and screw said to underlie the fifth amendment precept.

Far more likely in contemporary sensibility is the offense to our prized principle of judicial fair play. A hidden cost attached to the assertion of a right of constitutional magnitude—even the cost of an otherwise fair and reasonable inference—strikes us as an ignoble part for our government to play. Thus, due process seems the most

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60 That is, a state imposed choice between "unpleasant" alternatives is coerced. State v. Neville, 312 N.W.2d 723, 726 (1981).

61 Foolish as it seems, this idea was actually argued to the Supreme Court and very nearly accepted. Harrison v. United States, 392 U.S. 219 (1968). In that case, the defendant testified after the prosecution introduced illegally obtained confessions. On retrial, the prosecution offered the defendant's prior trial testimony. The majority reversed again, holding the evidence was "impelled" by the prior illegality and hence was its "fruit." Dissenting, Justice White had this to say:

> Nor does the Court hold that Harrison was compelled to take the stand and incriminate himself contrary to his privilege under the Fifth Amendment. The reason is obvious. If a defendant were held to be illegally "compelled" when he takes the stand to counter strong evidence offered by the prosecution and admitted into evidence, he would be as much "compelled" whether it was error to admit the evidence or not. To avoid this absurd construction of the Self-Incrimination Clause, the Court casts about for a different label.

Id. at 229-30 (White, J., dissenting).

In McGautha v. California, 402 U.S. 183, 207 (1971), the Court clarified *Griffin* by noting that pressure generated by the need to meet strong prosecution evidence is not the sort of compulsion that attracts the attention of the fifth amendment.

appropriate concept with which to repel the perceived injustice. Even for the worst of us, we believe, the prosecution should not "have it both ways"; the government should not put the accused citizen in the position that he's damned if he does and damned if he doesn't claim the right held out to him as an entitlement of citizenship. And, reflecting these sentiments, courts customarily take it as virtually self-evident that the exercise of a right derived from the Constitution should not be burdened with an adverse consequence, however well that consequence may comport with ordinary, non-judicial common sense.

Generally, the issue arises in the reported decisions from prosecution efforts to obtain some trait or substance from the person of the suspect. Many of these cases are, like *Neville*, intoxicated driving charges, and nearly all—on one ground or another—come out much the way the Supreme Court did.[62] In a host of other circumstances, however, state and federal courts have, by and large, correctly distinguished between admissible inferences from refusals to cooperate and inadmissible assertions of constitutional rights. Although the distinction properly rests on the difference between traits normally exposed and those considered within protected privacy,[63] courts have rarely articulated their conclusions on that basis.

All federal circuits passing on the question held or opined that the refusal to submit a handwriting exemplar was admissible as evidence of consciousness of guilt.[64] At least five circuits (D.C., Second, Fifth, Sixth, and Ninth) have ruled admissible the refusal of a suspect to speak or participate in an identification procedure of some sort.[65] These, of course, are clear examples of unprivileged

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62 *See, e.g.*, People v. Thomas, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978); People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966). Cases are collected in Annotation, *Admissibility in Criminal Cases of Evidence That Accused Refused to Take Test of Intoxication*, 26 A.L.R.4th 1112 (1989).

63 This distinction, stemming from language in Katz v. United States, 389 U.S. 347 (1967), is discussed more fully below.

64 United States v. Jacobowitz, 877 F.2d 162 (2d Cir. 1989); United States v. Knight, 607 F.2d 1172 (5th Cir. 1979); United States v. Askew, 584 F.2d 960 (10th Cir. 1978); United States v. Blankney, 581 F.2d 1389 (10th Cir. 1978); United States v. Stembridge, 477 F.2d 874 (5th Cir. 1973); United States v. Nix, 465 F.2d 90 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); United States v. Doe, 405 F.2d 436 (2d Cir. 1968); Owens v. Wolf, 532 F. Supp. 399 (D. Nev. 1981). One circuit had previously held such evidence to be inadmissible, but 23 years later fell into line. *Compare* United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) *with* White v. United States, 355 F.2d 909 (7th Cir. 1966).

65 United States v. Terry, 702 F.2d 299 (2d Cir.) (holding refusal to furnish a palm print admissible as consciousness of guilt), *cert. denied*, 461 U.S. 831 and 464 U.S. 992 (1983); United States v. Franks, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); United States v. McKinley, 485 F.2d 1059 (D.C. Cir. 1973) (upholding admission of defendant's refusal to shave prior to lineup as ordered by court); Higgins v. Wainwright,

submissions: no rights, constitutional or other, shield from compelled disclosure to the government the idiosyncrasies of one's script, the inflections of one's voice, or the configuration of one's visage.

In one of the rare cases in which a federal court considered a privileged refusal, the Court of Appeals for the Eighth Circuit offered no explanation for its correct conclusion.[66] The court simply agreed with the trial judge that an agent should not be permitted to testify to the defendant's initial refusal to permit a search of his briefcase, declining the appellant's invitation to "enunciate a novel rule of constitutional proportions drawn primarily from precedents applicable to the fifth amendment privilege against self-incrimination, appended to the fourth amendment privilege against noncustodial search."[67]

In two interesting, related cases, courts of appeals held comment was inappropriate, and adverse inference forbidden, from the fact that a defendant had sought the advice of legal counsel. In *United States ex rel. Macon v. Yeager*,[68] the court, citing *Griffin*, found "constitutional error" in the prosecutor's comment to the jury that the defendant phoned a lawyer on the morning after the murder for which he was convicted. In another circuit, the prosecutor elicited from a federal agent that the defendant's lawyer had been present when he arrived to execute a search warrant, a fact the government alluded to on summation as indicative of an effort by the defendant to defeat the search. Citing *Macon*, and several cases in their own and other circuits, the court found reversible error in the inference of consciousness of guilt drawn by the prosecution from the exercise of the right to counsel.[69]

Among the states, many courts treat the question as though it were one of compelled self-incrimination. Several decisions follow Justice Traynor's lead and find evidence of refusal "non-testimonial" and hence outside the ambit of the fifth amendment privilege.[70] Most others simply find that the suspect's decision to

424 F.2d 177 (5th Cir. 1970) (upholding admission of refusal to speak requested words during a lineup); United States v. Parhms, 424 F.2d 152 (9th Cir. 1970) (upholding admission of refusal to participate in lineup).

66 United States v. Wood, 834 F.2d 1382 (8th Cir. 1987).

67 *Id.* at 1387.

68 476 F.2d 613 (3d Cir. 1973).

69 United States v. McDonald, 620 F.2d 559, 562-63 (5th Cir. 1980).

70 For Traynor's reasoning, see People v. Ellis, 65 Cal. 2d 543, 421 P.2d 393, 55 Cal. Rptr. 385 (1966), and People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966). Cases following that reasoning include the following: New York v. Denard, 148 A.D.2d 957, 539 N.Y.S.2d 195 (1989) (refusal to provide a handwriting exemplar);

withhold cooperation was unforced.[71] In an Ohio case,[72] the trial court ordered a lineup identification procedure and the defendant refused to participate. The court held his refusal (the subject of a contempt citation) admissible partly on the ground that the defendant had no fifth amendment right to refuse to be identified since being perceived does not furnish testimonial evidence.[73]

Some decisions in the states are based on the "right to refuse" idea rather than the fifth amendment. One court relied on the finding that the police were "acting lawfully" in attempting to obtain the evidence, a variant, it seems, on Justice O'Connor's rationale that Neville had no "right to refuse" to have his blood extracted for alcohol readings.[74] In this Oregon case, the court, while excluding evidence that the Mirandized defendant declined to speak to police before consulting counsel (a refusal to do what he was not legally obliged to do), allowed evidence that the defendant refused to be photographed before talking to his lawyer.[75] The rationale was as follows: "Just as in *South Dakota v. Neville* . . . where the defendant had no constitutional right to refuse to take a blood-alcohol test, defendant here had no constitutional right to refuse to be photographed or to consult an attorney before being photographed."[76]

In Missouri, in 1974, we encounter one of the rare instances in which a court allowed evidence of the refusal of a suspect at liberty to permit the search of a bedroom in his house, a privileged choice. The case, *State v. Henderson*,[77] affirmed a murder conviction, holding that the defendant was lawfully arrested within his dwelling, although without warrant, and that the search, which discovered the murder weapon under the mattress in a bedroom, was also lawful. The court then considered the argument that the trial court erroneously allowed witnesses to testify that the defendant had refused to permit the police to enter and search the room in which the gun had

Kansas v. Haze, 218 Kan. 60, 542 P.2d 720 (1975) (refusal to provide a handwriting exemplar); New Jersey v. Cary, 49 N.J. 343, 230 A.2d 384 (1967) (refusal to submit to blood-grouping and voice-print tests).

71 *See, e.g.*, Commonwealth v. Monahan, 378 Pa. Super. 623, 549 A.2d 231 (1988); Kansas v. Haze, 218 Kan. 60, 542 P.2d 720 (1975).

72 State v. Clement, Nos. 87AP-900, 87AP-1115 (Ohio Ct. App. Dec. 30, 1988) (LEXIS, States library, Omni file).

73 The other ground was the common rationale that the state did not coerce the defendant to withhold his consent. *Clement*, Nos. 87AP-900, 87AP-1115 (Ohio Ct. App. Dec. 30, 1988).

74 State v. Wall, 78 Or. App. 81, 88, 715 P.2d 96, 100 (1986).

75 *Id.*

76 *Id.*

77 510 S.W.2d 813, 819 (Mo. Ct. App. 1974).

been found.[78] Testimony or comment was impermissible, the defendant contended citing *Griffin*, on this assertion of his fourth amendment rights.[79] The court rejected the analogy, pointing out that the fourth amendment, unlike the fifth, is "qualified"—the citizen enjoys only the right to be free of *unreasonable* searches and seizures.[80] Since the intrusion was held to be reasonable, the court held, the comment was not upon the assertion of a constitutional right.[81] To complete its circularity, the Missouri court further held that the search was legal because founded on probable cause and the probable cause was founded in part on the defendant's refusal to permit the search.[82]

The *Henderson* opinion is remarkable, although it is not very different from *Neville* and the other blood search cases in accord. The right to security against *unreasonable* intrusions under the fourth amendment is no more "qualified" than the right to be immune from *compelled* self-incrimination under the fifth. In both cases the underlying right is operative only upon a judicial determination that the modifier term has been established. When Henderson attempted to bar the warrant-less officers from the bedroom of his flat, he reasonably believed that he was exercising his constitutional rights. Surely, we would not divest him, post facto, by a holding (questionable, at that)[83] that the search was not too broad to be reasonable as an incident to his arrest elsewhere in the house. Finally, when the court justifies the incursion in part by its success, we know we are dealing with a court whose grip on basic principles of constitutional law is less than sure.

By contrast, the Supreme Court of Alaska has displayed an exemplary clarity and soundness of reason on this subject. *Elson v. State*[84] arose when a trooper stopped Elson's car for speeding and noted signs of intoxication. After arresting Elson, the trooper patted him down and felt a hard object in his pants that he suspected was a knife.[85] When he attempted to remove the object, Elson grabbed his wrist to prevent it.[86] He was then properly searched, and a Bic lighter and cocaine "snifter" containing traces of the drug

78 *Id.* at 822.
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*; *see supra* note 47 and accompanying text.
83 *See* Chimel v. California, 395 U.S. 752 (1969).
84 659 P.2d 1195 (Alaska 1983).
85 *Id.* at 1196.
86 *Id.*

were taken from his pocket.[87] He was convicted of the possession of cocaine.[88]

Elson unsuccessfully sought a pretrial order precluding evidence of his attempt to stop the trooper from completing his search.[89] Reviewing this ruling, Justice Rabinowitz for the court divides his opinion into a consideration of the admissibility of 1) the refusal to consent and 2) the resistance to the search. Rabinowitz first notes that the court had previously held inadmissible a refusal to allow a search that would have been illegal if conducted without permission.[90] Elson argued for an extension of this rule to the case where the search would have been legal even if conducted without consent.[91] The intermediate court of appeals had been unpersuaded, holding that "when a person objects to what is later determined to be a constitutionally permissible search, that objection may be admissible at trial as evidence of the person's guilt."[92]

The Supreme Court of Alaska disagreed, concluding that the rationale of their prior decisions "applies with equal force to lawful searches."[93] The Alaska high court put its reasoning in terms of deterring the assertion of the right in question, finding that a person could not be expected to know whether he was "protecting or prejudicing himself by choosing not to consent" since the determination of the legality of the search comes, typically, long after the fact.[94] Moving to the question of the admissibility of Elson's physical resistance to the search of his person, the court found that he had no comparable right to resist, and consequently the admission of testimony concerning this conduct was consonant with the Constitution.[95]

VI. The Special—and Specially Troublesome—Case of the Suspect in Custody

In the ample literature, little space is accorded the special problem created by police custody when a suspect under arrest refuses to cooperate in the government's quest for evidence. The problem arises from the *de jure* coercion inherent in the custodial situation

87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.* at 1197 (citing Padgett v. State, 590 P.2d 432 (Alaska 1979), and Bargas v. State, 489 P.2d 130 (Alaska 1971)).
91 *Id.* at 1198.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.* at 1201.

that infects all testimonial or communicative products of interrogation.[96] Insofar as I have demonstrated that evidence of refusal, offered for the guilty conscience it betrays, is testimonial and communicative evidence (of the same variety as the confession itself), the fifth amendment questions are as follows: first, was the refusal procured by interrogation? second, if so, was the standard advisory administered in compliance with *Miranda*[97] and, if so, was it adequate to dispel the coercive atmosphere?

While Justice O'Connor did not expressly consider the point in *Neville*, she did indicate in a footnote that the admissibility of the suspect's words in refusing the blood-alcohol test raised no *Miranda* problem since they were not procured by "interrogation."[98] This rather casual treatment of the issue may bear reexamination if it should be presented more directly. As Justice O'Connor recalled in her footnote, the Court had previously taken a close look at the meaning of the term interrogation in the *Miranda* context. In *Rhode Island v. Innis*,[99] Justice Potter Stewart wrote:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[100]

This intentionally and explicitly broad definition puts Justice O'Connor's cramped conception in a dubious light. Reciting only the words in the parentheses above, ignoring entirely the substance of the holding, she writes that the police "inquiry" concerning the blood-alcohol test in *Neville* was standard procedure, and was cus-

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

97 The usual warning has four parts, and runs something like this:

> You have the right to remain silent; anything you do say may be used in evidence against you; you have the right to consult with counsel before and during questioning; and if you have no funds with which to retain counsel, a lawyer will be provided for you free of charge. Do you understand? What do you wish to do?

98 The footnote reads as follows:

> In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), police words or actions "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection.

South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

99 446 U.S. 291 (1980).

100 *Id.* at 300-01.

tomarily stated in "virtually the same words to all suspects."[101] In the Justice's view, it is similar to a police "request to submit" to fingerprinting or photography.

Justice O'Connor misses the plain import of Justice Stewart's words in *Innis* and vastly enlarges the minor parenthetical exemption. What Stewart doubtless intended to exclude from his definition of "interrogation" is the request for name, address, and other identification data that normally attend "booking." It seems clear that all he meant to accomplish was to allow the regular booking procedure to continue even where the suspect declines to answer questions or requests counsel. As O'Connor reads the exemption it threatens to consume the rule—and much of *Miranda* with it. Most suspects, for example, as a matter of normal police "routine," are asked, "What happened?" in those very words; would O'Connor suggest that the regularity of the question removes it from the *Innis* definition of interrogation? Nor is the presentation of a choice whether or not to cooperate, regardless of the form of words employed, quite the same as the "request" to be printed or photographed. A demand of a drunk driving suspect in custody, for example, that he choose whether to allow blood to be drawn under a statute that expressly loads his refusal with the incriminating implication of guilt is surely action that the police should know risks an incriminating reply. No response at all—other than docile compliance—is expected when police direct the suspect to put his fingers on an inkpad or turn his head and hold still in front of a camera.

Let us, then, regard Justice O'Connor's footnote in *Neville* as unstable and consider the police presentation of the option as "interrogation." Under this assumption, the problems of custodial coercion, ineradicably inscribed on our jurisprudence by *Miranda v. Arizona*[102] must be addressed. Four variations can be composed on the theme: 1) no *Miranda* warnings have been administered; 2) conventional *Miranda* warnings have been given and rights asserted; 3) we might imagine the announcement of some new advisory specifically relating to the possible adverse consequences of the refusal to permit the acquisition of evidence sought by the police; and 4) standard warnings were given and rights waived. Each of these four variants then must be considered in both the case of a search for

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101 *Neville*, 459 U.S. at 564.

102 Miranda v. Arizona, 384 U.S. 436 (1966). There are many of us who have not fully appreciated the contribution of the *Miranda* doctrine to our criminal jurisprudence. Yet the durability of its underlying premise can no longer be doubted and no related problem can be discussed without taking into account the presumptive coercion attendant on all custodial interrogation.

evidence shielded by the fourth amendment and the demand for evidence that enjoys no constitutional protection.

Variation #1: no warning. Any inculpatory *statement* made by a suspect in custody in response to police interrogation must be excluded from evidence if not preceded by a warning and free waiver of rights. Elementary and inescapable. By the same rule, no inculpatory *inference* should be admitted from an unwarned suspect in custody, where that inference proceeds from a response to the functional equivalent of interrogation. But should the rule of exclusion apply equally to refusals to allow police to acquire constitutionally unprotected as well as protected evidence? It is fair to assume that police know that a prisoner, asked to submit a handwriting exemplar or to stand in a lineup, might balk just as the suspect asked for a sample of her blood or urine. And they know that, should the prisoner express that choice, they would have useful evidence of a guilty conscience. And that the inculpatory effect of the balky prisoner's response dictates the result: exclusion.

The juridical fact that the suspect enjoys no fourth amendment right to withhold the items sought has no bearing on the incriminating significance of her refusal. Consciousness of guilt may be as inculpatory when the defendant has every right to take evasive action (such as making a hasty departure) as when she acts illegally (attempting to suborn perjury, for example). Thus, regardless of the fourth amendment status of the police quest, the use of an inference of consciousness of guilt from the unwarned prisoner's refusal to cooperate would offend the fifth amendment (as read by—or as augmented by— *Miranda*).

Variation #2: warned and unwaived. Strictly speaking, a prisoner who responds to the *Miranda* warnings by refusing to speak or by requesting an opportunity to consult with counsel has communicated nothing about his willingness to submit to a lab test or about his readiness to assert his unwillingness to do so and take the consequences of that refusal. But then, he has not been advised that such a choice would be tendered, nor has he been alerted to the adverse consequences attendant thereon. As long as we are proceeding on the close analogy between consciousness of guilt expressed directly and by inference, logic requires us to accord the same exclusion to the indirect products of virtual interrogation as we must impose on the direct product of actual interrogation: exclusion.

We would do no different if a prisoner had responded to the functional equivalent of interrogation by asserting a demonstrably false exculpatory statement. Suppose, for example, that following a prisoner's expressed decision not to talk, one of the cops turns to

her partner and says, "I suppose if this guy knows anything helpful to himself, he'll tell us about it—he could save himself a lot of trouble," and the suspect replies that he was at work at the time of the crime. Clearly, even if they could readily prove its falsity, the prosecution could not use the defendant's statement to prove his consciousness of guilt.

Variation #3: Neville-warned. Under *Miranda*, of course, the right to withhold conversation that might reveal one's subjective sense of culpability may be waived on proper advice. Can the notion of warning and waiver be carried into the subtle and elusive world of inference and implication? From a suspect fully and appropriately advised, we might have some hope of obtaining a usable inference of consciousness of guilt, even if he is in custody.

Amusing is one word for the idea; baffling is the other. Simply framing the advisory with reasonable precision might answer the question from a practical standpoint. Imagine a police officer following up the conventional *Miranda* litany with something like the following (to enhance the drama, picture the advisee as drunk):

> Now I further advise you that if you should be asked to participate in any test, inspection, or examination to obtain evidence that might be used against you, or to allow any search of your property or person, you may cooperate or you may refuse to cooperate. If you refuse to cooperate, your refusal may not be used against you if the test, inspection, examination, or search sought evidence that you are legally entitled to withhold. If, however, you refuse to allow a test, inspection, examination, or search of things, places, or features and characteristics of your person that you knowingly and regularly expose to the public and therefore are not entitled to regard as private, then that refusal may in the future be used as evidence against you.[103]

Perhaps the level of incomprehensibility might be reduced by fashioning the warning to those situations in which there is actually some danger of the use against the suspect of his refusal. These are the cases in which the suspect is legally obliged to cooperate. It might be worded something like this:

> You are about to be asked to [stand in a lineup] [submit to fingerprinting] [speak for purposes of voice identification] [try on an article of clothing for fit] [provide an example of your usual handwriting] [etc.]. I now advise you that you have no legal right to refuse to do what you are asked. If you do refuse or resist, that fact may be used against you as evidence that you thought you had something to hide.

Such advice would have been totally unnecessary, of course, were

[103] Although my formulation may appear complex to the point of incomprehensibility, it is not much more ornate than the standard advisory read to Neville by the arresting officers, as reproduced in the Court's opinion. *Neville*, 459 U.S. at 555 n.2.

the suspect at liberty. The special circumstance requiring such advice is the atmospheric pressure of custody. The question, then, is whether these words, like the *Miranda* litany, will serve to dissolve the corrosive cloud. Does my spoken advisory reassure our prisoner that the custodial circumstances will not be employed for coercive purposes? Not at all. The unspoken premise of the *Miranda* quatrain is that the police will not force the prisoner to speak since silence is his right. My adaptation, by contrast, advises the suspect in effect that police *will* compel cooperation since the prisoner has no right to withhold it.

To bring the inculpatory inference from a refusal to do what the prisoner is obliged to do into alignment with the inculpatory import of a spoken acknowledgment of culpability requires some artificial construction. One would have to say that the prisoner has the right not to communicate his consciousness of guilt by withholding *his refusal* to exhibit his public traits. Withholding refusal means offering cooperation, so the articulation would have the peculiar form: "I am required to advise you that you have the right to furnish the evidence that we seek to use against you." However this advice may please the constitutional purists, it may induce in both advisor and advisee the impression that the law is indeed a long-eared quadruped famed for its obstinacy and stupidity.

To phrase an appropriate and intelligible advisory covering the effects of refusal to allow what the suspect is entitled to refuse is even more difficult. It might sound something like this:

> At this time, we request that you consent to [a search of your —] [the removal of — from your —] [the extraction of a small amount of blood from your (finger) (arm) to be tested for the presence of —] [etc.]. You have the right to refuse to allow this. If you consent, you will forfeit the right to challenge our authority to do this over your objection. We now advise you that, if you refuse to consent, your refusal cannot be used in evidence against you.

Where appropriate, the following sentence would be added:

> However, we may be legally authorized to do this over your objection and we will do so, subject to a judge's later ruling on whether our actions were lawful or not.

Again, whatever might be gained in simplicity (if anything), may be lost in utility. Obviously, where the police believe they have authority to make the intrusion, these words do little to dispel the latent menace in the scene. But since the prisoner's refusal may not in any case be used as evidence of consciousness of guilt where it is an assertion of a constitutional entitlement (as it is in the cases posited), it is difficult to see what is gained by the labored explanation

of consequences. In these entitlement cases, there are really no unsuspected adverse consequences against which the unwary prisoner must be cautioned. And, as to a simple announcement of the right to refuse consent to a search, the Supreme Court (wisely, I think) ruled the courtesy unnecessary.[104]

Variation #4: Miranda-warned and waived. This is the most problematic variation. If a special formulation cannot be tailored to the specific request for permission to invade a constitutionally protected or unprotected area, will conventional custodial advisories suffice? Undeniably, the facial meaning of the language of the standard *Miranda* warning does not convey the advice that refusal to be tested may carry evidentiary consequences. The words "anything you say may be used against you" require some stretching to accommodate the adverse use of the suspect's declaration that she refuses to be searched, examined, or inspected. Such refusal, moreover, might be communicated in obstinate silence, in which case the use of it directly contradicts the implicit message of the advisory that silence is safe. In addition, any waiver from a warned person who is deeply intoxicated may be disregarded as inoperative.

Notwithstanding these acknowledged difficulties, it seems a senseless anomaly to hold that the atmospheric coercion of custody can be readily purged for purposes of intensive and extensive interrogation but not for the simple inference flowing from the single expression of reluctance to cooperate. And in a realistic mode, I think we must recognize that it is not the precise wording of the ritual warnings, parsed for syntax by scholars, nor even the implicit promise of safety in non-cooperation that animates the *Miranda* rule. Rather, the core of the process is the assurance it provides to the prisoner that the police who hold the power recognize their obligation to respect the prisoner's choice to forego interrogation.

In addition, I would contend that to the prisoner the general tenor of the warning is that, from that point forward, she is at risk. Anything she says or does may turn out to have adverse effects on her case. I know an unreported case in which a Mirandized prisoner, feeling chilly in the air-conditioned squadroom, requested one of the officers to give him his shirt from the duffelbag that had been seized by the police at the time of his arrest.[105] The bag also contained the proceeds of a recent burglary and the prisoner's implicit acknowledgment that the clothing in the bag was his was eventually

104 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

105 No report or record of this case exists since the trial ended in acquittal. I learned the facts from counsel and the judge presiding.

used as evidence against him on the burglary charge. I cannot imagine that the admissibility of that evidence is affected by the fact that the *Miranda* warning, as given, said nothing about the possible use against him of the inculpatory implications of his request for clothing.

So, with considerable misgiving, I would elect to allow the standard form *Miranda* advisory to do double duty and cleanse the air of custodial coercion for purposes of reasonable inferences flowing from declined offers to cooperate along with its customary function. At the same time, having traversed the absurdities of attempting an adaptation of the *Miranda* rule to the inferences flowing from declined consent, I have come to appreciate the good sense, if not the doctrinal purity, of Justice O'Connor's construction of the word "interrogation" to find *Miranda* inapplicable to the custodial refusal, even where expressed in auto-inculpatory language.[106]

By removing the special coercion factor implicit in custodial interrogation—either by my crude application of the warning waiver routine or by the Court's dubious exemption dodge—the availability of the inference returns to the status of non-custodial refusals. That is to say, the use of the inference as proof of consciousness of guilt depends upon whether the cooperation solicited was within the suspect's constitutional prerogative to decline.

VI. Summary and Conclusion

Until recently, some commentators and a number of Justices essayed to map a golden triangle where the fourth amendment and the right of silence in the fifth "overlapped."[107] Here, as Justice Douglas for one[108] liked to say, identical interests in "privacy" were advanced by both provisions and the protection was, presumably, doubly blessed. Fortunately, this romantic notion has finally been

106 *Neville*, 459 U.S. at 564 n.15.

107 The classic authority for this view was Boyd v. United States, 116 U.S. 616 (1886), in which the Court (in language since repudiated) said:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.

Id. at 633.

108 *See, e.g.*, Warden v. Hayden 387 U.S. 294, 312 (1967) (Douglas, J., dissenting).

scuttled.[109]

It should be well-understood in today's hard-soled jurisprudence that the values protected by these two basic provisions are quite distinct. The fourth amendment spreads broadly over all private space, conversations, and containers of all sorts (mobile and immobile, animate and inanimate) to shield from government acquisition a broad variety of objective evidence: tangible material, microscopic traces, words, and visual or photographic impressions. But though generously inclusive, security under the fourth amendment is relatively frail. It may be lawfully penetrated by the state merely on a sworn statement to a magistrate, in advance, giving a good reason to think the search will be productive. Even without prior judicial authorization, a search and seizure will pass constitutional muster on a convincing demonstration that the intrusion was reasonable under the circumstances. Thus, the coverage of the fourth is wide but shallow. The right of silence in the fifth, by contrast, applies narrowly to the compelled disclosure of subjective data, the perceived product of one's own cerebral processes. The protection, however, runs deep, in the sense that it is absolute and impenetrable.[110]

Notwithstanding this distinct separation, an occasional intersection may be discovered in certain interactions between the disparate rights. One of these occurs when a suspect reacts to some police action seeking evidence from within the vast province of the fourth amendment shield. The reaction may furnish important evidence to help the prosecution meet its heavy burden of proof, especially if the defendant has given no other indications of a subjective consciousness of culpability. If the expression is spontaneous, unaffected even by the subtle pressures of custody, if the choice—though required by a state-made decision point—is not itself coerced, it is difficult to ground a constitutional objection to the use of the evidence.

Yet, there remains something unsuitable to the design of the fourth and fifth amendments to allow an adverse evidentiary conse-

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109 At least one has grounds for hope that the idea is dead. *See* Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976). Romance dies hard, however, and the idea may still have some life in it, at least in some quarters.

110 This is the meaning of Justice Brennan's landmark pronouncement in Schmerber v. California, 384 U.S. 757, 761 (1966), that the fifth amendment protects *testimonial or communicative* evidence only. *See* Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1145-54 (1987); Arenella, *supra* note 49, at 31 (published during the pendency of *Neville* and, presumably, designed to assist the Court to the conclusion they reached).

quence to attach to the invocation of a constitutional entitlement.[111] The fourth amendment right of a citizen to decline to cooperate in a search for physical evidence is more than a right to refuse to allow an *unreasonable* search; it includes the right to challenge the reasonableness of a warrantless search by withholding consent at the threshold. And the assertion of that implicit right to refuse to allow the intrusion, to refuse to waive any protection that the uncertain contours of the constitutional entitlement might bestow, should be free of damaging implications, regardless of how rational the inference of culpable consciousness may be.

To draw out the point a bit further, let us suppose that law enforcement authorities request a suspect to submit to surgery for the removal of a bullet from his gut, a bullet that they hope can be linked ballistically to a police weapon, thereby proving that the suspect was at the scene of a gunfight with police.[112] I would assume that Justice O'Connor and those who adopt her line of thinking would say that in this case the suspect has a right—constitutionally derived—to refuse permission to operate. Would they, then, find the right to refuse surgery sufficiently close to the right of a defendant on trial to withhold his testimony that *Griffin* applies to forbid drawing the natural inference that permission is denied because the defendant knows where the bullet came from?[113]

Assuming that the *Neville* contingent will preclude evidence of the suspect's refusal to allow surgery, one must examine more closely the distinguishing feature between this refusal and the refusal to allow the extraction of blood in a drunk driving case. To the suspect, the choices have much in common. In both, an option is presented with what appears to be an available alternative of refusal.

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111 Writers have argued, with considerable effect, that a mere adverse consequence to a fairly posed choice is not an impermissible burden. *See, e.g.*, Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *After Fifteen Years*, 78 MICH. L. REV. 841 (1980). Indeed, the plea bargaining system—constitutionally acceptable—may be viewed as a tax on the assertion of the right to trial. *See* Corbett v. New Jersey, 439 U.S. 212 (1978). Nonetheless, the consequential harm, especially where avoidable, seems inconsistent with the nature of the right. *See* Simmons v. United States, 390 U.S. 377 (1968) (holding that the testimony of a defendant necessary to establish standing to assert a claim under the fourth amendment may not be used against the defendant as evidence of guilt).

112 The most prominent example of this kind of search is Winston v. Lee, 470 U.S. 753 (1985).

113 We might note in passing that, in the Supreme Court at least, two alternative conclusions are available: *Griffin* could be overruled (as many continue to think it should be); or the rights might be distinguished, perhaps on the grounds that the explicit language of the fifth amendment privilege (most obviously commanding that a defendant is entitled to decline to furnish evidence) has no analogue in the vague injunction that searches and seizures be reasonable.

Although the consequences may not be known—whether objection will ultimately frustrate the enterprise, or will strengthen suspicion and fuel the pursuit—the suspects in both cases probably understand that by declining they can obstruct police curiosity, at least temporarily. And in both cases, the suspect might prefer even so uncertain a victory to what they fear will be the certain discovery of incriminating evidence by the requested search. Thus, from the vantage of the person invested with the rights in question, the inference from refusal to a guilty conscience is identical in both cases, and the perception of a right of refusal as a weapon (of uncertain ultimate effectiveness, to be sure) is virtually the same.

The only difference is in the post-facto judicial judgment that one suspect was entitled to refuse access and the other (according to the Court in *Neville*) was not. What, precisely, is the right to refuse in the fourth amendment context? The right to choose silence under the fifth amendment is fairly clear since that choice is binding upon the interrogating or prosecuting authority. But the denial of access is uncertain. It may be surmounted by exigency in the case of blood-alcohol and perhaps by a warrant in the surgical-search case. To some, the existence in law of the right of refusal depends upon the effectiveness of the assertion of the right. At least Justice O'Connor seemed to think that where the blood search could proceed over objection, per *Schmerber*, the intoxicated driver had no right to refuse. So in the surgical-search case, might the Justice not say that the admissibility of the evidence of refusal depends upon whether the magistrate ultimately grants the order to perform the surgery (a decision, incidentally, that might go on such rights-irrelevant grounds as the depth and location of the bullet)?

Such a result, however, exhibits legal scholasticism at its worst. The constitutional right to refuse a search cannot derive its existence from a post facto judicial ruling that the search will not be allowed on any ground independent of consent. So, by the express language of *Schmerber*, confirmed by good sense, an inebriated driver has the right to refuse to donate a blood specimen notwithstanding the authority of the police to take it from him over his objection. And by the same reasoning, a suspect has no constitutional right to deny witnesses the opportunity to inspect his facial features in a lineup regardless of whether he can be physically forced to stand impassively to be viewed. The distinction stems not from the effectiveness of the refusal in halting the investigation, but from the doctrine of private and public features and the Court's definition of the concern of the fourth amendment. As the reasons for searches and seizures of bodies and spaces multiply with the development of fo-

rensic technology, the barrier against secondary gain, in derogation of the fifth amendment's stern injunction, should be firmly set according to these principles.

The fundamental precept, as I would construct it, would be that no adverse inference may be drawn concerning the mental state of a person who declines to furnish the cooperation with law enforcement that he is under no legal obligation to perform.[114] Where, however, the suspect enjoys no constitutional entitlement to refuse the access sought, and is under no official compulsion that might infect the expressions of his mind, I see no impediment to drawing the reasonable inference from conduct, mute or active, that may reveal a consciousness of guilt.

While the line between the obligatory yield and the entitled refusal might be difficult to draw *a priori*, a substantial body of law is already in place, along with a principle of distinction that might work in the unassigned case. The operative standard derives from Justice Stewart's renowned aphorism expressed in *Katz v. United States*[115] thus: "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[116] While some might quarrel with the elaboration of the standard to place outside the ambit of fourth amendment concern such traits as fingerprints or vocal oscillations, there can be little dispute that taking any internal tissues, fluids, or foreign objects lodged within the body constitutes a fourth amendment event while obtaining an exemplar of handwriting or photograph of a face is not.[117]

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114 For the view that adverse inferences should be barred prior to the stage when a neutral determination of substantiality has been made and the defendant is assisted by counsel, on the record, and perhaps before a judicial officer, see Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 65 (1981).

115 389 U.S. 347 (1967).

116 *Id.* at 351; *see also* United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

117 As expected, the catalogue is neither tidy nor complete. Some body tissues and fluids do not readily fall on one side or the other of the *Katz* line, so courts are not yet in full agreement on saliva, urine, skin scrapings, hair, and visible marks and blemishes on genitalia or other normally clothed areas. But even here, some consensus is beginning to emerge. In two recent cases, the United States Supreme Court held the collection of *urine* for drug testing to be a fourth amendment event, even though both cases upheld the regulations as reasonable. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); Nat'l Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989). Regarding *hair*, various courts have based their decisions on whether the seized strand came from an area normally exposed to public view. *See, e.g., In re* Cecil Mills, 686 F.2d 135, 139 (3d Cir.), *cert denied*, 459 U.S. 1020 (1982) (facial and head hair not protected

The problematic case is the use of the cognitive implications of refusal by a suspect in police custody. Clearly, refusal to allow examination of *private* things, spaces, or features must not be burdened with adverse consequences for the suspect in custody any more than for her counterpart at liberty. But is there any offense to the Constitution in the use of a prisoner's refusal to cooperate in those situations where a free person is legally obligated to yield?

The prisoner's refusal is employed in evidence as a demonstration of her culpable frame of mind, "communicative" evidence obtained under the inherently coercive circumstances of police-dominated custody. Notwithstanding that the prisoner, unlike her free sister, had no right to refuse to surrender her fingerprints (let us say), and hence no right was taxed by the adverse use of her refusal, the prisoner's refusal was a communication *compelled* by the circumstance of imprisonment in violation of the fifth amendment.[118] Of course, if the prints themselves were obtained notwithstanding the prisoner's protest, they would be admissible evidence—it is only the fact of protest that is unusable.[119] Without warning and waiver sufficient to dispel the inherent coercion of custody (to follow—as we must—the theme of *Miranda*), no refusal, tacit or vocal, may be used for its implicit communication of a guilty conscience. And the rule does not depend on the nature or location of the evidence sought for examination within or without the pale of privacy.

Nor should there be, at least as a matter of strict fidelity to the Court's own definition of the term, an exemption from the *Miranda* injunction by reason of a lack of police "interrogation." Though Justice O'Connor's avoidance is tempting, a police request for consent is most probably issued with reason to think that the suspect might respond with a self-inculpatory refusal, especially where—as

by fourth amendment; hair roots may be different); United States v. Weir, 657 F.2d 1005, 1007 (8th Cir. 1981) (head and mustache hair have no fourth amendment implications); Bouse v. Bussey, 573 F.2d 548, 550 (9th Cir. 1977) (pubic hair seizure is a fourth amendment intrusion); State v. Sharpe, 284 N.C. 157, 200 S.E.2d 44 (1973) (head and arm hair have no fourth amendment implications); *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.2(g) (2d ed. 1985).

118 To be strictly accurate, a growing contingent of the Supreme Court, led by Chief Justice Rehnquist, has sought to divorce the *Miranda* rule from its foundation in the fifth amendment. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983); Michigan v. Tucker, 417 U.S. 433 (1974). These Justices insist on terms like "procedural safeguards" to describe requirements of *Miranda* and distinguish them from "rights" under the Constitution itself. Since I find this jurisprudence murky, I write of *Miranda* requisites as though they were demands of the fifth amendment itself.

119 Not being testimonial and communicative, fingerprints are not subject to fifth amendment strictures.

in South Dakota—the law expressly allows the use of the refusal as evidence against the driver.[120]

Suppose a suspect in police custody, Mirandized and electing silence. Police tell the suspect they want him to stand with five others to be viewed by the victim. He replies he will not participate voluntarily and if forced to do so he will call attention to himself in ways that will invalidate the exercise. Clearly, the suspect has no right to refuse since a lineup is indisputably not a fourth amendment event. Most courts would immediately conclude: No problem, the evidence of refusal goes to the jury. But, has the prisoner not communicated his cognitive sense of guilt as surely as though he had responded affirmatively to a police question, "Do you think the victim will identify you in a lineup?" If the suspect's answer to that question must be excluded as a direct declaration of consciousness of guilt under the inherently coercive circumstances of police custody and following the choice of silence, why allow the implicit communication in an expression manifesting a consciousness of guilt in another way?

Since no specially crafted warning is practical, can the inherent coercion of custody be adequately dispelled for these special purposes by the standard *Miranda* caution? Of necessity, the question is as artificial as the *Miranda* solution itself. To answer in the negative is to say that no waiver is possible when consciousness of guilt is expressed elliptically in a refusal to consent though more direct and damaging expressions of the same mental state are readily tolerated on appropriate warning. To answer affirmatively is to strain the meaning of the words of the *Miranda* warning. My preference is for the latter on the ground that the tenor of the standard warnings is that communications of all sorts, implicit and unintended included, may have adverse consequences.

Finally, to express these conclusions, I would propose three basic tenets, derived from what I take to be ruling principles and reasonable conjugations thereof, but at odds I fear with the holding and passing comments of *Neville*:

First tenet:

No evidence of consciousness of guilt may be inferred from the refusal of a suspect in police custody to consent to a search, inspection, or analysis of the private aspects of his or her body or belongings, or

120 Indeed, since the decision in *Neville*, South Dakota—and doubtless many other states—has written into its warning the statutory license to use the refusal in evidence against the suspect. Clearly, the threat of adverse use of a refusal is useful to the state to help persuade the suspect to undergo the test. Police want the blood-alcohol reading not the evidentiary inference.

those traits and things deemed public, absent full *Miranda* warnings and the expressed choice to communicate with the authorities without the presence of counsel.

Absent warnings and waiver, no testimonial disclosures by a prisoner of law enforcement officers may be used in evidence against him; this exclusion applies with equal impact to testimonial inferences of a cognitive awareness of culpability. But warnings and a voluntary waiver can cleanse the air of coercion for direct expressions of guilt, they should work as well for the inferential. Although imperfect, the effect of the *Miranda* advisory, the Supreme Court has told us, is not so much to provide precise and individually crafted legal advice as generally to neutralize the atmosphere of dread that permeates the custodial condition and to warn that communication is risky. Indeed, the literal import of the standard warning is nonsense—and every prisoner knows it; no lawyer will be provided to the suspect in police custody on demand and before and during police questioning as the standard litany declares.[121] Pull that option, and you merely preclude interrogation, exactly as though you had selected silence. The warnings are merely a pause, a moment to recognize that the cops realize the suspect has rights and to remind the suspect that what may seem like a casual conversation to follow may have dire consequences.

This tenet is not too far afield from more clearly recognized consequences of the *Miranda* routine on the admissibility of unintended communications of consciousness of guilt. If a suspect chooses to speak, and tells a false exculpatory story, that lie may be adduced in evidence by the prosecutor to prove its falsity and thereby the consciousness of guilt in the mind of the suspect who fabricated it, notwithstanding the fact that the suspect had no idea that his choice would be used in that manner. Nor did the *Miranda* formula expressly inform him that even a self-serving statement might be used against him if it is false. The old fashioned warnings should do no less in the case of an inadvertent communication of consciousness of guilt by refusing to submit a handwriting exemplar.

Second tenet:

Consciousness of guilt may be inferred from the refusal of the unconstrained suspect to do what he or she is legally obliged to do, just as it may be inferred from doing what he or she is not required to do.

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121 The United States Supreme Court has recently recognized the hoax implicit in this part of the standard advisory by approving a version of the warnings that realistically informs the prisoner that he will meet his assigned counsel in court, but that his request not to answer questions without a lawyer present will be honored. Duckworth v. Eagan, 109 S. Ct. 2875 (1989).

The second clause of this tenet merely states the familiar rule regarding voluntary action (*e.g.*, flight, concealment of evidence, fabrication of alibi) from which consciousness of guilt may be inferred. The first clause, I think, simply restates Justice O'Connor's "right to refuse" axiom: having the right to refuse access means that one is not legally obligated to permit access. I use it merely to avoid what I believe is Justice O'Connor's error in equating the right to refuse a search with the right to defeat a search. Principally, by this tenet I want to differentiate a drunk refusing to allow police to draw his blood (I regard him as entitled to refuse—though probably not prevent—that search) from the suspect-in-custody refusing to stand in a lineup for viewing by the victim, or submit to fingerprinting (things he is legally required to do).

Third tenet:

Where a suspect, either at liberty or in custody following warning and waiver, is not legally required to allow a search or other intrusive examination, his or her refusal may not be used against the entitled person as evidence of consciousness of guilt, whether or not law enforcement authorities may legally conduct the search without that person's consent.

Plainly put, this tenet suggests that *Griffin* should trump *Neville*. I have no difficulty—nor do others who have tried[122]—in transferring *Griffin* from the defendant's reliance on his fifth amendment right not to testify to a citizen's assertions of the fourth amendment right of security; in both cases, and to the same extent, the right is burdened by the cost of adverse consequences, reasonable though they be. My only problem is whether *Griffin* itself was correctly decided. I have my doubts. And my reading of the decisions informs me that Douglas's embellishment of the privilege has not been greeted with general enthusiasm on the benches of the Nation.

Nonetheless, the holding of the case is plain, it is twenty-five years old, and it has been frequently relied upon by diverse succeeding benches of the Supreme Court through a period of substantial revision. In short, the doctrine is firmly entrenched and deserves the full respect of important constructions of basic dogma. Thus, I conclude that the right of security expressed in the fourth amendment implies the right to refuse the state access to private domains, and any inference of a guilty motive for choosing to invoke that right weakens it by making its assertion costly. Unless the fourth amendment has no concern with the transaction, or the fifth

122 *See, e.g.*, United States v. Thane, 846 F.2d 200, 207 (3d Cir. 1988); United States v. Prescott, 581 F.2d 1343, 1351-52 (4th Cir. 1978); United States v. Taxe, 540 F.2d 961, 969 (9th Cir. 1976).

amendment implications have been effectively waived, the evidence of consciousness of guilt inferred from an assertion of fourth amendment rights should be excluded.