Chapter 17

The Privilege against Self-Incrimination

"You have the right to remain silent." These words are as well known as any phrase in American law.We hear them spoken on countless television dramas whenever the police make an arrest. They represent the privilege against self-incrimination, a right guaranteed by the Fifth Amendment, which states, "No person. . . shall be compelled in any criminal case to be a witness against himself." This protection against forced confessions is essential to our conception of liberty, but the right also raises fundamental questions about how to balance individual liberty with society's need for security, questions that are as current as today's headlines.

The privilege against self-incrimination goes back to the fourth century, butits most dramatic early expression can be found in medieval controversies between the English king and the church. Royal courts used a system of justice that employed public accusations and jury trials. Defendants knew the charges against them, and they were tried in public by members of the community. Church courts, by contrast, favored a system in which accusations were often made in secret, and the judge was also the prosecutor. These courts did not inform defendants of the accusation against them but required that they take an oath to tell the truth and to answer all questions fully. Defendants then faced a series of questions based on the prior examination of witnesses and informants. Contradictory answers were used against the defendants in an effort to break them down and force confessions of guilt. Failure to take the oath justified torture to learn the truth. In this process, defendants could be forced to incriminate themselves. The oath used to begin the process, the oath ex officio (from Latin, meaning "by virtue of the office"), became known as a self-incriminating oath.

The two systems of justice had different goals. The church's inquisitorial system formed the basis of European criminal justice and focused on proving the accused guilty. It was better that the innocent should suffer than the guilty escape. The opposite was true for the accusatorial system of England—it sought to protect the innocent above all else. In the words of Sir John Fortescue, a fifteenth-century chief justice, "One would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally."

The sixteenth and seventeenth centuries witnessed a shift in English practice. Secret proceedings and torture became mainstays of the Star Chamber, the court that tried enemies of the state. In theory, the oath *ex officio* and torture were extraordinary powers required to protect national security, but more often they were used against religious dissenters. One such case involved John Lilburne, a Puritan arrested for smuggling religious pamphlets into England in 1637. He refused to take the self-incriminating oath, claiming that it was "against the very law of nature, for nature is a preserver of itself. . . . But if a man takes this wick-

ed oath, he undoes and destroys himself." Over the next three years, Lilburne was repeatedly jailed, fined, and tortured, but he became a hero to Englishmen for his defense of liberty. In response, Parliament abolished the Star Chamber in 1641, concluding that Lilburne's sentence was "illegal, unjust, against the liberty of the subject and law of the land, and Magna Carta."

The American colonists were well aware of this history of royal abuse when they came to the New World, and they brought with them a firm conviction that no man should be required to testify against or accuse himself. They considered this privilege part of their rights under common law. In 1641, for example, the Massachusetts Puritans included prohibitions against torture and self-incriminating oaths in their earliest law code, the Body of Liberties, even though the magistrates still sought confessions in religious trials. By the time of the Revolution, these protections were considered to be so essential to liberty that they appeared in the various state constitutions; in 1791, the privilege against selfincrimination became part of the Fifth Amendment to the U.S. Constitution.

During the nineteenth century, American courts excluded evidence from confessions that had resulted from official violence or trickery. Interrogation was acceptable, however, as was the use of deception and psychological pressure applied by friends, family, or community. The key was whether the confession was made voluntarily; if not, the evidence was considered unreliable. Courts usually accepted a confession as voluntary unless evidence demonstrated that a law officer used a clear and unmistakable threat, so law officers frequently pushed the bounds of what was acceptable. Their aim was to make defendants admit guilt and to create an efficient system of justice. A growing fear of crime and disorder from the "dangerous classes" of immigrants and urban poor added to the pressure to use whatever methods were necessary to gain a confession. The extent of lawlessness in law enforcement became apparent in the 1920s when a national commission revealed the routine use of police brutality, the so-called "third degree," to force confessions and remove suspected criminals from the streets.

The U.S. Supreme Court during this period extended Fifth Amendment protection to civil cases in which testimony might lead to criminal prosecution, but it also rejected a universal or national privilege against self-incrimination. In *Twining v. New Jersey* (1908), the president of an investment bank enriched himself at his company's expense.When he refused to testify on his own behalf at trial, the judge told the jury that it could draw a negative inference from his silence. New Jersey's constitution allowed this conclusion, even though the practice violated the defendant's Fifth Amendment privilege. The U.S. Supreme Court upheld Twining's conviction. The protection against self-incrimination was "a wise and beneficent rule of evidence," the justices concluded, but it was not an essential part of due process. States were free to set their own standards. New Jersey's position, in many ways, reflected popular attitudes toward anyone who claimed the privilege.During the various congressional hearings in the 1950s to root out communism in the United States, for instance, "taking the Fifth," shorthand for refusing to testify for fear of self-incrimination, was often seen as an indication of guilt. For many Americans, concerns for order and national security trumped the rights of individuals to remain silent.

Finally in 1964, the Court decided that the privilege against self-incrimination was an essential part of due process as protected by the Fourteenth Amendment, thereby restricting the states as well as the federal government. But how-

"No man shall be forced by Torture or confesse any Crime against himselfe nor any other unless it be in some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be that of nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane."

—Massachusetts Body of Liberties (1641)

far did the right extend? It clearly bound legal proceedings, but did it apply to investigations and other pretrial actions as well? Two years later, it became clear that it did when the justices reviewed a conviction for rape. Their decision embroiled the Court in the most famous and bitterly criticized confession case in the history of American law.

Around midnight on March 2, 1963, an eighteen-year-old woman closed her refreshment stand at a Phoenix, Arizona, movie theater and walked home. A short distance from her house, a car pulled in front of her, blocking the sidewalk. The driver grabbed her and forced her into the back seat.Tying her hands and feet, he threatened her with a sharp object and drove her into the nearby desert, where he raped her. He dumped her, hysterical and disheveled, near her house, where she lived with her mother and married sister.

Less than two weeks later, the police arrested Ernesto Arturo Miranda, a twenty-three-year-old Mexican American dockworker who lived with his girlfriend in Mesa, a Phoenix suburb. Miranda was known to the police. He had a record of six arrests and four imprisonments by the time he was eighteen. He also had a history of sexual problems: one of the arrests was for attempted rape; another was for Peeping Tom activities.

When he was brought in for questioning, Miranda was in constitutionally unprotected territory. In 1963, the rights that protected a defendant in the courtroom—the right to remain silent, the right to counsel, the right to confront witnesses, and other protections for the criminally accused—did not extend to the police station. Most people believed law officers needed wide latitude to investigate and prosecute crime. This certainly was the case in Arizona, where the state's constitutional convention in 1910 had rejected a ban on third-degree interrogations. "Do you intend to array yourselves on the side of the criminals," one delegate argued, "do you intend to put the State of Arizona on the line protecting criminals?" The goal of criminal justice was to protect the public, not criminals. This view was widely shared in the 1960s.

By all accounts, Miranda's interrogation was routine. He was alone with the police, without a lawyer. No one kept a record, and memories differed about what occurred. Miranda claimed the officers promised to drop an unrelated charge of robbery if he admitted the rape; the police denied making this offer. No one used physical force or unusual psychological tactics. In the end, Miranda confessed to the rape, writing his account of the crime by hand. The entire affair took less than two hours.

The police did not force Miranda to confess, but a question remained about whether he had confessed voluntarily. After all, he was in a highly stressful en-

vironment—confined in a small room with harsh lighting, surrounded by armed men who wore badges of authority, and without legal assistance. He also suffered from mental illness, according to two psychiatrists who examined him later. Given these circumstances, could his confession be considered freely given and therefore reliable? If not, it could not be used at trial.

Miranda's court-appointed attorney was unsuccessful in persuading the court to exclude the confession.He then sought to discredit the victim, claiming that she had not resisted—a circumstance that, even if true, would be irrelevant under today's law—and that she was only trying to protect her reputation. The jury rejected these claims and found Miranda guilty of kidnapping and rape. The court sentenced him to a prison term of up to fifty-five years.

In November 1965, the U.S. Supreme Court agreed to hear his appeal. The question before the justices was straightforward: did the failure of police to inform Miranda of his rights violate his Fifth Amendment guarantee against forced confessions? With Chief Justice Earl Warren writing for the majority, the Court extended the right to an attorney and the privilege against self-incrimination to the pretrial interrogation of a suspect. The justices also ruled that, prior to questioning, a suspect must be informed of these rights by using the now-familiar formula: he "has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

The opinion joined the Fifth Amendment's privilege against self-incrimination with the Sixth Amendment's guarantee of a right to counsel and, for the first time in U.S. history, applied both to the police station. Simply informing a person of his rights without also allowing the assistance of counsel would place the police at an unfair advantage, Warren wrote. The atmosphere of the interrogation room, where the suspect stood isolated and alone, carried "its own badge of intimidation." Even if no physical brutality occurred, it was "destructive of human dignity" and violated the constitutional requirement of fairness. The accused may choose to waive the assistance of a lawyer, but the Constitution requires that he be reminded of his right to have one. "Incommunicado interrogation [questioning without benefit of counsel]," the chief justice's opinion concluded, "is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."

Four justices disagreed vehemently with the decision. Their arguments varied, but the strongest objections centered on the fear that the new rules would hamper police unduly. "We do know that some crimes cannot be solved without confessions," warned Justice John Marshall Harlan II, "and that the Court is taking a real risk with society's welfare in imposing its new regime on the country."

"Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country."

—Mississippi Supreme Court, *Fisher v. State* (1926)

The result of the decision, other justices agreed, inevitably would weaken the capacity of law enforcement to convict dangerous criminals. "In some unknown number of cases," Justice Byron White argued, "the Court's rule will return a killer, a rapist or other criminal to the streets. . . to repeat his crime whenever it pleases him."

The decision did not free Ernesto Miranda, who was serving a separate sentence for robbery. He won a retrial but was convicted a second time, this time without the use of his confession as evidence. Paroled in 1972, he became a minor celebrity, selling autographed cards containing preprinted Miranda warnings on the streets of downtown Phoenix. After a three-year re-imprisonment for a parole violation, he died in 1975 in a barroom brawl over a three-dollar bet, one month after winning another release. During the investigation, police questioned the two suspects who eventually were charged with the crime. Their notes revealed that the detectives had dutifully warned both men of their right to remain silent.

Police officers, prosecutors, commentators, and politicians were quick to denounce the Miranda warnings, which they believed "handcuffed" the police. National data revealed a sustained rise in crime since the 1950s, and this decision, critics charged, would worsen the problem. This response was understandable, but its fears proved to be exaggerated. Numerous studies have since demonstrated that the decision did not restrain police unduly and had little effect on their work. A 1998 study, for example, found that less than 1 percent of all criminal cases had to be dismissed because police failed to give a warning before the accused confessed. In fact, more than 90 percent of all criminal convictions today involve plea bargains, with voluntary confessions, by defendants in exchange for a reduced sentence.

The *Miranda* decision did not halt voluntary confessions; it only defined proper methods of interrogation. One outcome has been increased professionalism in police practices. In response to Miranda, many departments raised standards for employment, adopted performance guidelines, and improved training and supervision. The result vindicated the view of the majority justices, first voiced by Justice Louis Brandeis in the 1920s, that hard work and respect for the law, not deception or lawbreaking, were the requirements for effective law enforcement. "Our government," Brandeis wrote in *Olmstead v. United States* (1928), "teaches the whole people by its example. If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Miranda v. Arizona was a revolutionary decision. It extended the protection of the Bill of Rights beyond the courtroom to an important pretrial procedure, custodial interrogation. Even though numerous political campaigns have promised to overturn the decision, in fact the warnings have become part of American culture. Subsequent courts have noted exceptions to the rules—the rules do not apply to on-the-scene questioning, for example—but the justices have always reaffirmed the requirement that suspects be informed of their rights. The 1966 decision, the Court noted in a later case, "embodies a carefully crafted balance designed to protect both the defendant's and the society's interests."

Today, we continue to wrestle with finding the appropriate balance between public order and individual rights. Since the terrorist attacks of September 11, 2001, the issues have taken on added significance. The Constitution, as Justice Robert Jackson reminded Americans in 1949, is not a suicide pact, but neither

are its requirements meaningless because of a threat to national security. The Fifth Amendment's privilege against self-incrimination achieves its importance, however, not in this extreme circumstance but in the more ordinary working of our legal system. The right is necessary for our sense of justice because it helps to ensure fairness. We assume the innocence of an individual until the government proves otherwise. Government has vast power, so we balance the scales of justice by, among other things, protecting the individual from a forced confession, an involuntary admission of guilt.Without it, there can be no due process of law.

The privilege against self-incrimination is also essential to our understanding of individual liberty. As a society, we believe freedom rests upon a fundamental right to privacy and human dignity. Central to our conception of privacy is the need for men and women to be custodians of their own consciences, thoughts, feelings, and sensations. Forcing us to reveal these things, making us confess without our consent, robs us of the things that make us individuals. No one and no power has the right to take something so precious from us, and the Fifth Amendment exists to ensure that we guarantee to each citizen the dignity and self-respect that allows us all to be free.

Crafting an Opinion

After the Supreme Court hears arguments in a case, the justices meet in conference to discuss the case and take a preliminary vote. If the chief justice is in the majority, he assigns a justice who voted with the majority to draft an opinion for comment by all the justices. (If the chief is in the minority, the assignment is made by the justice with the most seniority who also voted with the majority.) The draft opinion is an opportunity for the majority justices to make their most persuasive arguments in the hope of gaining additional support. In Miranda v. Arizona *(1966), Chief Justice Earl Warren assigned the draft opinion to himself. Justice William Brennan, who voted in conference with the majority, read the chief 's draft and sent him a twenty-one-page memo suggesting changes. On the first page of the memo, Brennan recommended an important change in wording.*

Dear Chief:

I am writing out my suggestions addressed to your Miranda opinion with the thought that we might discuss them at your convenience. I feel guilty about the extent of the suggestion but this will be one of the most important opinions of our time and I know that you will want the fullest expression of my views.

I have one major suggestion. It goes to the back thrust of the approach to be taken. In your very first sentence you state that the root problem is "the role society must *assume*, consistent with the federal Constitution, in prosecuting individuals for crime." I would suggest that the root issue is "the restraints society must *observe*, consistent with the federal Constitution, in prosecuting individuals for crime."

In the final opinion for Miranda v. Arizona*, Chief Justice Earl Warren accepted Brennan's modification.He used his colleague's language—"the restraints society must observe"—instead of his own less forceful and less clear phrase, "the role society must assume."*

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

"Protecting Constitutional Rights Does Not in Any Way Prevent Law Enforcement"

Miranda v. Arizona *resulted in widespread protests that the Supreme Court had exceeded its authority and had begun to legislate rules of police conduct instead of decide cases. Many critics warned that the decision would handcuff police and let criminals go free. Lost among the outrage were the voices of supporters of what came to be called the "Miranda warnings." Senator Wayne Morse of Oregon was a strong advocate of civil liberties and endorsed the decision on the Senate floor. His following speech was recorded in the* Congressional Record *in 1966. Later studies of law enforcement revealed that the requirement to notify defendants of their rights did not lead to the direful results predicted by critics of the decision.*

As the RECORD shows, I have argued over and over again that the guilty have exactly the same constitutional rights as the innocent. I have argued that you cannot have constitutional rights for some but not for others. I have spoken out over the years, against arrests for investigation and against third-degree tactics on the part of police departments—and they continue to exist. . . in a variety of forms. . . .One has only to read this landmark opinion. . . in Miranda against Arizona, to appreciate how sound have been the arguments throughout the years of those of us who have been opposing the denial of constitutional rights when arrested. . . .

We cannot maintain a government by law within the framework of our Constitution if we countenance what would be the effect of the minority views expressed in this case: the sanctioning of arbitrary and capricious discretion in the police. . . .

[A]s one who worked a good many years in the field of research on law-enforcement policy, and as editor in chief of a five-volume work put out by the Department of Justice when I was an assistant to the Attorney General, I wish to say that it is in times of stress that it is so important that there be no transgression on constitutional rights by the police or by the courts, or we will cease to be freemen and freewomen. . . .

To these chiefs of police, prosecutors, and others who would have constitutional rights of arrested persons transgressed upon, I wish to say, as pointed out by the Chief Justice in this case, that protecting constitutional rights does not in any way prevent law enforcement on the part of an efficient police department or an efficient prosecutor's office and recognizes their duty to stay within the framework of the Constitution.