THE DEVELOPMENT OF THE RIGHT TO REMAIN SILENT IN CONNECTICUT

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The words that make up what is commonly known as "the *Miranda* warning" are nowhere to be found in the Constitution. Indeed, one former Justice of the United States Supreme Court described the cases establishing the *Miranda* warning in its present form as "a veritable fairyland castle of imagined constitutional restriction upon law enforcement."[1] Nevertheless, the words define a suspect's right to be free from police overreaching:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?

If not from the Constitution, the question is, where did the *Miranda* warning come from? This article traces the history of its development, both federally and in Connecticut. Part I discusses the history in the federal courts and Part II discusses the history in the Connecticut courts.

In the federal system, the answer is that the United States Supreme Court created the *Miranda* warning in the 1960s.[2] As with most groundbreaking federal constitutional decisions, however, there were murmurings of a *Miranda*-type warning in the state courts well before the United States Supreme Court decided *Miranda v. Arizona*.[3] In Connecticut, almost fifty years before *Miranda* was decided by the United States Supreme Court, the Connecticut Supreme Court decided *State v. Castelli*,[4] in which Justice Wheeler, dissenting, argued forcefully for a *Miranda*-type warning.[5]

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[1] *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *Miranda v. Arizona*, 384 U.S. 436.

[4] 92 Conn. 58 (1917).

[5] *Id.* at 81-82 (Wheeler, J., dissenting).

I. Restrictions on Custodial Interrogation in Federal Court

In the federal courts, the *Miranda decision* was the culmination of a long journey away from what was known as "the third degree," or less euphemistically, confessions extracted by torture.[6] The *Miranda* Court sought to end the "incommunicado interrogation" of suspects, because "the fact that in this country [interrogations] have largely taken place incommunicado" created some "difficulty in depicting what transpire[d] at" them.[7] In that environment, "police violence and the 'third degree' flourished."[8] One of the Court's most important holdings in *Miranda* was that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[9] An attorney's presence at interrogations would open the black box of police interrogation to sunlight and "would insure that statements made . . . [we]re not the product of compulsion."[10]

The journey to *Miranda*, however, was a long one that began in Seventeenth Century England. England recognized a right against compelled self-incrimination in 1637 in reaction to the then common practice of forcing those accused of crimes to testify under oath about the details of their crimes at their own trials.[11] Over the next two centuries, this limited right grew into a broad common law rule that a defendant's confession must be voluntary to be admitted as evidence against him.[12]

When the United States enacted the Bill of Rights, its relation to this pre-existing body of English law was not obvious. The Fifth Amendment's self-incrimination clause provided in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[13] Read literally, this clause codified only the narrow prohibition against forcing the accused to testify to their crimes at

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[6] *See* Note, "The Third Degree," *Harv. L. Rev.* 43 (1930): 617 (cataloguing reported cases of police abuse); *see also id.* at 618-19 ("In some parts of the country, whipping is in vogue. . . . Usually, however, a severe beating is administered with whatever is most convenient.").

[7] *Miranda*, 384 U.S. at 445.

[8] *Id.*

[9] *Id.* at 474.

[10] *Id.* at 466.

[11] *Id.* at 459 (discussing Star Chamber oath).

[12] *See Bram v. United States*, 168 U.S. 532, 544-57 (1897) (discussing English cases).

[13] U.S. Const. amend. V.

their own criminal trials. Yet from the start, the United States Supreme Court construed this clause more broadly than its language required.

For nearly a century after its enactment, the Supreme Court did not discuss the self-incrimination clause per se, but two cases from that era stand out. First, in 1803, the Supreme Court advised a witness in a civil trial that he was not "obliged to state any thing which would criminate himself" when examined on the stand.[14] The witness refused to answer one question, seemingly on that basis.[15] Second, while riding circuit, Chief Justice Marshall presided over the trial of Aaron Burr for treason, during which he ruled that "the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime . . . ."[16] The Court nevertheless made the witness answer the question at issue, after finding that its answer would not incriminate him.[17] Neither of these two cases mentioned the Fifth Amendment.

The first cases before the Court to squarely raise claims under the self-incrimination clause challenged test oaths required in the wake of the Civil War.[18] In both cases, the individuals' attorneys urged the self-incrimination clause as one ground among several rendering the test oaths unconstitutional.[19] The Supreme Court decided both cases on an alternative ground, however, and thus did not address the application of the self-incrimination clause.[20]

The initial development of self-incrimination clause jurisprudence came in a trio of cases decided in the 1880s and 1890s. The first true self-incrimination clause case was *Boyd v. United States*,[21] in which the Supreme Court held that the clause forbade a court from compelling a defendant to produce his private papers for use as evidence against him in a criminal trial.[22] Eight years later, the Supreme Court held that the

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[14] *Marbury v. Madison*, 5 U.S. 137, 144 (1803).

[15] *Id.* at 145.

[16] *United States v. Burr*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807).

[17] *Id.*

[18] *Ex parte Garland*, 71 U.S. 333 (1866); *Cummings v. Missouri*, 71 U.S. 277 (1866).

[19] *Ex parte Garland*, 71 U.S. at 368; *Cummings*, 71 U.S. at 302.

[20] *Ex parte Garland*, 71 U.S. at 374-78; *Cummings*, 71 U.S. at 323-32.

[21] 116 U.S. 616, 634-35 (1886).

[22] The Court held that this also violated the Fourth Amendment's search and seizure clause. *Boyd*, 116 U.S. at 634-35.

clause also forbade a court from compelling a witness to testify in a grand jury investigation to facts that might incriminate him.[23] Additionally, the Supreme Court held in *Bram v. United States*[24] that the self-incrimination clause also forbade the admission of *out-of-court* confessions obtained by police coercion.

These decisions, however, established a right against self-incrimination for defendants in federal court only. The Supreme Court had long held that the Bill of Rights did not govern the states.[25] The enactment of the Fourteenth Amendment in 1868 did not change that. When this issue was raised, the Supreme Court specifically held that the Fifth Amendment's self-incrimination clause still did not apply to the states.[26] But even if the self-incrimination clause did not apply to the states, the Fourteenth Amendment's due process clause did apply. And the Supreme Court later held that the due process clause independently forbade states from convicting defendants solely on the basis of out-of-court confessions extracted by torture.[27] From 1936 to 1964, the admissibility of confessions in state courts was thus governed, not by the self-incrimination clause, but rather by the due process clause.

In 1964, however, the Supreme Court held for the first time that the Fifth Amendment self-incrimination clause applied also to the states and forbade a state court from compelling a witness to testify in court to facts that might incriminate him.[28]

The next two years were pivotal to the development of self-incrimination clause jurisprudence as we know it today. First, the Supreme Court held that the Sixth Amendment right to counsel—which stated in relevant part, "*[i]n all criminal prosecutions*, the accused shall enjoy . . . the Assistance of Counsel for his defence"—was triggered at pre-indictment custodial interrogations.[29] Specifically, the Court held that:

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[23] *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892).
[24] 168 U.S. 532, 542 (1897).
[25] *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833).
[26] *Twining v. New Jersey*, 211 U.S. 78, 114 (1908).
[27] *Brown v. State of Mississippi*, 297 U.S. 278, 286 (1936).
[28] *Malloy v. Hogan*, 378 U.S. 1, 2-3 (1964).
[29] *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964).

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, *and the police have not effectively warned him of his absolute constitutional right to remain silent*, the accused has been denied 'The Assistance of Counsel' in violation of the Sixth Amendment . . . [and] no statement elicited by the police during the interrogation may be used against him at a criminal trial.[30]

Escobedo applied to both the federal government and the states.[31]

The *Escobedo* Court's language about the accused being warned of their constitutional rights soon proved prophetic. Two years later, the Court decided *Miranda v. Arizona*. In *Miranda*, the Court relied exclusively on the Fifth Amendment self-incrimination clause and held that:

> the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[32]

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[30] *Id.* (emphasis added).
[31] *Id.*
[32] *Miranda*, 384 U.S. at 444-45.

These new requirements applied to both the federal government and the states.[33] The *Miranda* Court's creation of a bright-line rule as to the admissibility of out-of-court confessions obtained through custodial interrogation—that such confessions were admissible only if the defendant had first been given a precise set of warnings—broke sharply with the Court's prior rule, dating back to *Bram*[34] that confessions were admissible unless involuntary, and that voluntariness was assessed on a case-by-case basis given the totality of the circumstances.

The new rule was highly controversial. In the ensuing years, the Supreme Court greatly cut back *Miranda*'s reach by carving out a number of exceptions to its requirements.[35]

Nevertheless, the Supreme Court reaffirmed *Miranda* when it faced its most serious challenge—an attempt by Congress to legislatively overrule it through the enactment of 18 U.S.C. § 3501.[36] In *Dickerson*, the United States Court of Appeals for the Third Circuit had held that *Miranda* announced only a "prophylactic," not a constitutional, rule and so could be legislatively overruled. The Supreme Court disagreed, holding that *Miranda* announced a constitutional rule, that *stare decisis* counseled against overruling *Miranda* in light of its widespread acceptance in national legal culture, and that therefore, Congress could not legislatively overrule it.[37] Since *Dickerson*, the Supreme Court's *Miranda* jurisprudence has continued apace. As of publication, the Supreme Court's most recent *Miranda* decision held that evidence of an accused's silence in response to *non*custodial police interrogation *was* admissible if the accused did not affirmatively invoke the right to remain silent.[38] In so holding, the Supreme Court avoided answering the

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[33] *Id.* at 467.

[34] 168 U.S. at 549, 562.

[35] *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971) (statements obtained in violation of *Miranda* can still be used at trial to impeach defendant); *New York v. Quarles*, 467 U.S. 649, 651 (1984) (no need for *Miranda* warning if "overriding considerations of public safety" justify failure to warn); *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (no need for *Miranda* warning if undercover government agent asks the questions).

[36] *Dickerson v. United States*, 530 U.S. 428, 432 (2000). In contrast to the *Miranda* rule, 18 U.S.C. § 3501 (b) treated advising a suspect of his right to remain silent as only one factor among others for a court to consider when deciding whether a confession was admissible.

[37] *Id.* at 443-44.

[38] *Salinas v. Texas*, – U.S. –, 133 S. Ct. 2174, 2184 (2013).

certified question, namely, whether *Miranda* would *ever* bar the admission of evidence of an accused's silence in response to *non*custodial police interrogation.

II. Restrictions on Custodial Interrogation in Connecticut Court

Among state courts, the Connecticut Supreme Court has the dubious distinction of *almost* adopting a *Miranda*-type warning requirement half a century before the United States Supreme Court adopted it. In *State v. Castelli*,[39] Justice Wheeler argued in dissent that a defendant's confession was inadmissible because he was not first warned of his right to remain silent, heralding the United States Supreme Court's later holding to that effect in *Miranda*. The majority in *Castelli*, however, held that no such warning was required and Connecticut did not require a warning until the United States Supreme Court decided *Miranda* decades later.[40]

Connecticut appellate courts have cited *Castelli* for its holding on the self-incrimination clause exactly once in the fifty years since *Miranda*, in a case declining to construe the Connecticut constitution's self-incrimination clause more broadly than its federal counterpart.[41] No appellate court in this state has ever cited Justice Wheeler's dissent. A brief look at the Connecticut right against self-incrimination, before and after *Castelli*, is thus in order.

A. Constitutional and Legislative History of the Right Against Self-Incrimination in Connecticut

Connecticut's early governing documents contained no mention of a privilege against self-incrimination. Connecticut's founding document, the Fundamental Orders of 1639, articulated a system of government but did not set forth individual rights apart from the right to vote.[42] The same was true of the royal charter that Connecticut obtained from England in 1662, which largely mimicked the Fundamental Orders.[43] Connecticut's

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[39] 92 Conn. 58 (1917).

[40] *Id.*, 67.

[41] *State v. James*, 237 Conn. 390 (1996).

[42] Mary J. A. Jones, *Congregational Commonwealth: Connecticut, 1636–1662* (1968), Appendix III.

[43] Wesley W. Horton, *The Connecticut State Constitution* (2d ed. 2012), 6-7; Christopher Collier, "The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights," *Conn. B.J.* 76 (2002): 1, 9 n.15.

first statutory code, published in 1650, did set forth a Declaration of Rights, but it too contained no right against self-incrimination.[44]

Connecticut first articulated a right against self-incrimination in 1672, but early recognition of this right was intermittent. The statutory code was amended in 1672 to provide that "no man shall be forced by Torture to confess to any Crime against himself."[45] In addition, a 1697 law permitting the court to jail those who refused to testify in open court stated that "no person required to give testimonie as aforesaid shall be punished for what he doth confesse against himselfe when under oath."[46] This clause was omitted from the statutory code of 1703 but the 1711 code again provided that a witness' compelled testimony "shall at no Time be construed to his Prejudice."[47] During the seventeenth and eighteenth centuries, the Connecticut legislature had the power to—and at times did—revise and eliminate individual rights.[48] Such rights were usually statutory in nature, but even if they might have emanated from the common law, the legislature sat as the court of last resort.[49] Government accountability to the people was enforced primarily through the frequency of elections, which occurred every six months.[50]

Connecticut adopted its first constitution in the modern sense of a document that *limited* government power in 1818, and included within it protection against compelled self-incrimination.[51] Article I, § 9 of Connecticut's 1818 constitution expressly set forth a right against self-incrimination providing, in relevant part: "In all criminal prosecutions, the accused shall have . . . [certain rights]. He shall not be compelled to give evidence against himself . . . ."[52] Connecticut held a second constitutional convention in 1901, which dealt primarily with legislative apportionment, but the voters rejected the constitution that came out of it.[53] In 1965, Connecticut held a third constitutional convention, again primarily on the issue of legislative apportionment, and this time the

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[44] Christopher Collier, "The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights," *Conn. B.J.* 76 (2002): 1, 9.

[45] *Id.* at 12.

[46] *Id.* at 12 n.23

[47] *Id.*

[48] *Id.* at 9-10, 14-17.

[49] *Id.*

[50] *Id.* at 6.

[51] Wesley W. Horton, *The Connecticut State Constitution* (2d ed. 2012), 14-17.

[52] Conn. Const. art. I, § 9 (1818).

[53] Wesley W. Horton, *The Connecticut State Constitution* (2d ed. 2012), 20.

voters accepted the new constitution.[54] Article I, § 9 became Article I, § 8 and now provided in relevant part: "In all criminal prosecutions, the accused shall have . . . [certain rights]. No person shall be compelled to give evidence against himself . . . ."[55] This is the current language of Connecticut's constitutional provision on self-incrimination.

B. Judicial History of the Right Against Self-Incrimination in Connecticut

The judicial history of the right against self-incrimination in Connecticut does not cleanly track its constitutional and legislative history. Even before the Code of 1672 created a statutory bar to torturing out confessions, such a right may have been understood to exist by virtue of the uncodified "natural law," revealed by God and reason.[56] Express sources of law were not as central to legal practice then as they are today; this was the era of equity and the common law.[57] Indeed, we know little about colonial courts during this era partly because, before 1785, judges did not need to give written statements of their reasons for deciding a case and any oral statements were not officially recorded.[58] Ephraim Kirby's reports of Connecticut cases, published in 1789, were the first reports of judicial decisions published in the United States.

From the reports that survive, it appears that the Connecticut Supreme Court did not discuss the right against self-incrimination before 1846, although the Superior Court did to some extent. These early Superior Court decisions were issued before the adoption of a constitutional right against compelled self-incrimination, and do not discuss the source of the right. Nevertheless these courts appear to have construed the protection broadly, seemingly forbidding compelled testimony if it would result in criminal *or civil* liability for the witness.

In *Boardman v. County of Litchfield*,[59] a creditor sued the county for money owed him by a debtor who escaped from the county debtor's prison due to its shoddy construction. When the plaintiff creditor asked

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[54] *Id.* at 21-23.

[55] Conn. Const. art. I, § 8 (1965).

[56] Christopher Collier, "The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights," *Conn. B.J.* 76 (2002): 1, 2-4.

[57] *Id.*

[58] *Id.* at 31 n.81.

[59] 2 Kirby 14, 15 (Conn. Super. Ct. 1786).

to call the jailer as a witness, the court ruled that he could not, "because under some circumstances he may be liable, he is therefore no more admissible than the sheriff.[60]

In *Storrs v. Wetmore*,[61] a plaintiff merchant sued the owner of a ship for goods that the ship failed to successfully deliver. The defendant ship owner offered testimony that another man had confessed to jointly owning the ship with him and should be joined as a codefendant.[62] The court ruled that this testimony was inadmissible but that the co-owner could voluntarily appear and testify to joint ownership if he wished.[63] The court explained, "any one might be permitted voluntarily to testify against his interest, though he could not be compelled."[64]

In *State v. Phelps*,[65] a prosecutor in a criminal case sought to testify to what the defendant had told him when the defendant was seeking to serve as a witness for the state. The court ruled that the prosecutor could not, because "Disclosures, under such circumstances, to the [prosecutor], ought to be considered as confidential, and it would tend to defeat the benefits the public may derive from them, should they be made use of to the prejudice of those from whom they come."[66]

In *State v. Thomson*,[67] a prosecutor in a criminal case sought to have various prosecution witnesses testify to what the defendant had told them when he was seeking to serve as a witness for the state against his codefendants. The court ruled that the prosecutor could admit this testimony because, although such disclosures were inadmissible when made to the prosecutor, "this indulgence has not been extended further" to include prosecution witnesses.[68]

In *Simons v. Payne*,[69] a plaintiff creditor sued a debtor for money owed. The defendants claimed they had already paid a lesser amount to

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[60] *Id.*
[61] 1 Kirby 203, 203 (Conn. Super. Ct. 1787).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] 1 Kirby 282, 282 (Conn. Super. Ct. 1787).
[66] *Id.*
[67] 1 Kirby 345, 345 (Conn. Super. Ct. 1787).
[68] *Id.*
[69] 2 Root 406, 406 (Conn. Super. Ct. 1796).

the plaintiff's attorney in full satisfaction of the debt.[70] When the defendants sought to call the plaintiff's attorney as a witness, the attorney objected that he could not be compelled to testify against his own interest and, because he had posted bond to prosecute the plaintiff's case, he "stood in the same predicament with the [plaintiff], who clearly was not compellable to testify against his interest."[71] The court ruled that the attorney could not be compelled to testify to anything he learned *after* he posted bond, lest he "thereby expose himself to be subjected on his bond," but could be compelled to testify to what he learned beforehand, because otherwise a witness could render his testimony inadmissible at will by "his own voluntary act" of later acquiring an interest in the litigation.[72]

Finally, in *Starr v. Tracy*,[73] a plaintiff creditor sued various other creditors of the same debtor after these other creditors had the constable seize the goods at issue from the debtor's store. The plaintiff sought to call one of the debtor's other creditors as a witness, but this witness "claimed the privilege of being exempted from testifying [to] anything contrary to his interest."[74] The court ruled that "a witness may not deprive a party of his testimony by any voluntary interest he may take upon himself, as by wagering, etc. but a witness is not obliged to disclose what will make against him."[75]

The first cases from the Connecticut Supreme Court concerning a right against self-incrimination were decided after the enactment of the Connecticut constitution in 1818. The first two such cases, however, did not mention the constitution.

In the first case, *State v. Potter*,[76] the uncle of a man accused of murder came to visit him in jail and told the accused that: "The people don't think you are guilty, but that you know something about it; and if so, you had better tell all you know. . . . [T]he sooner you confess, the better it will be for you."[77] The next two days, the accused claimed that

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[70] *Id.*
[71] *Id.* at 406-07.
[72] *Id.* at 407.
[73] 2 Root 528, 528 (Conn. Super. Ct. 1797).
[74] *Id.* at 528-29.
[75] *Id* at 529.
[76] 18 Conn. 166 (1846)
[77] *Id.* at 169.

various others had murdered the victim.[78] A week after speaking with his uncle, the accused said to someone at the jail that "he could no longer be guilty of accusing innocent blood" and confessed that he, not these others, had murdered the victim.[79] There was no evidence that the accused had ever been warned that his confession would be used as evidence against him.[80]

The Supreme Court in *Potter* was called upon to decide whether the defendant's confession was voluntary and thus admissible as evidence against him.[81] The Court discussed the right against self-incrimination at length, beginning with the premise that "by the law under which we live, a confession produced by the impressions of hope or the torture of fear, is not admissible in evidence" and concluding that "the true principle [relevant here] is, was the confession so connected with the inducement as to be a consequence of it? If it was not, it must be considered as voluntary."[82] The Court held that the uncle's statement that "the sooner [the defendant] confess[ed], the better it will be for [him]" was too far removed, temporally and logically, from the defendant's confession a week later to have compelled him to confess.[83] Rather, "we have all the evidence that his confession was voluntary that we can ever expect under the tortures of an awakened conscience and an impending doom."[84]

In the other case, *Barnes v. State*,[85] a tavern owner was charged with the crime of selling alcohol to a common drunkard.[86] The prosecutor called the customer in question as a witness and on cross-examination the defendant sought to ask the customer whether he was, in fact, a common drunkard, hoping that he would deny it.[87] The witness and prosecutor both objected that a "witness could not be required to answer an enquiry, when such answer might tend either to degrade him, or to convict him of a violation of the law" and the trial court sustained the objection.[88] The defendant appealed this ruling and the Connecticut

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[78] *Id.* at 166.
[79] *Id.*
[80] *Id.* at 169.
[81] *Id.* at 178.
[82] *Id.* at 178-81.
[83] *Id.* at 180-81.
[84] *Id.*
[85] 19 Conn. 398 (1849).
[86] *Barnes,* 19 Conn. at 398.
[87] *Id.* at 400.
[88] *Id.*

Supreme Court affirmed, holding that "[n]o witness is bound to answer, when the answer may incriminate himself, which is the case here, since a common drunkard may be confined to hard labour in a work-house."[89]

Two other Connecticut Supreme Court cases from the 1800s did mention the constitution as the source for the right against self-incrimination; both cases articulated a more restrictive view of the right's scope: *State v. Coffee*,[90] and *State v. Willis*.[91]

In *Coffee*, a prisoner was summoned before the state coroner under a statute granting the coroner power to compel the attendance and testimony of witnesses by subpoena and to punish them for refusing to answer.[92] The coroner "cautioned [the defendant] that he need not say anything unless he chose; that he could not compel him to make any statement, but that if he desired he might make any statement; that he (the coroner) would take it, and that he need not say anything unless he had a mind to."[93] The defendant did not confess to the crime, but did describe his actions on the night of the murder.[94] The defendant was later tried for the murder and his testimony to the coroner was admitted as evidence against him, over his objection.[95] On appeal, the Supreme Court held that the defendant's statement to the coroner was admissible both because it was voluntary and because it was not a confession "but simply a statement in relation to his own doings and whereabouts on th[e] evening [at issue]."[96]

In *Willis*, a defendant suspected of being one of two individuals who had committed a robbery-murder in South Norwalk, Connecticut, was arrested in Columbus, Ohio, imprisoned, and then brought before the Columbus chief of police and a New York detective.[97] The detective told him that "there [wa]s no use in denying it," that the defendant's accomplice had been arrested, and that if the defendant were to "tell the [police] chief and myself the whole thing—how it was done—it will

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[89] *Id.* at 404.
[90] 56 Conn. 399 (1888).
[91] 71 Conn. 293 (1898).
[92] 56 Conn. at 413-14.
[93] *Id.* at 413.
[94] *Id.*
[95] *Id.* at 413-14.
[96] *Id.* at 414.
[97] *Willis*, 71 Conn. at 294-95, 297.

make it a good deal easier for you."[98] The detective then brought the defendant by train to New York, telling him en route that "if you turn state's evidence, and put it on [your alleged accomplice], you can save yourself. That is the reason I am rushing on to New York, so that [your alleged accomplice] won't get the chance to turn on you. I am going to take you to our office, downtown, where we both can take a bath; and, after a rest, you can tell the whole thing to the superintendent."[99] In New York, the defendant was brought before a Connecticut sheriff and a superintendent of the New York detective agency, to whom he then confessed to the crime.[100] The defendant told the Connecticut sheriff additional details shortly thereafter, on his way from the detective agency back to the train station.[101] The prosecution sought to admit these two confessions at trial and the defendant objected to them as involuntary.[102] The trial court overruled the objections and the defendant was convicted.[103]

On appeal, the Connecticut Supreme Court affirmed.[104] The Court construed the constitution's self-incrimination clause as an "exemption [only] from a compulsory disclosure of one's crime when called upon to testify upon one's own trial or in any legal proceeding."[105] By contrast, out-of-court confessions were admissible along with evidence of any surrounding circumstances that rendered them less reliable.[106] Here, the jury could properly consider the defendant's confession and what weight, if any, to give it.[107] In addition, the Court held that despite any promises made to the defendant, "such testimony against one's self is not compelled, but is legally voluntary, when induced by official promises of favor."[108] Further, the defendant confessed—not to the detective who had threatened him—but to the Connecticut sheriff a few hours later, at that detective's agency.[109] "It is not to be presumed that, because one officer

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[98] *Id.* at 297-98.
[99] *Id.* at 298.
[100] *Id.* at 298-99.
[101] *Id.* at 299-300.
[102] *Id.* at 296-97, 299-300.
[103] *Id.* at 299-300.
[104] *Id.* at 316.
[105] *Id.* at 308.
[106] *Id.* at 307.
[107] *Id.* at 314.
[108] *Id.* at 309.
[109] *Id.* at 313.

makes threats or promises, their influence will lead the prisoner to accuse himself falsely to another officer."[110]

Finally, in 1917, the Connecticut Supreme Court directly addressed the state Constitution's protection against self-incrimination when it decided *State v. Castelli*. There, two defendants, both deaf and mute, were accused of murdering one of their wives.[111] They were brought before the state coroner who warned them "that he could not compel them to, and they were not obliged to, say anything about it, unless they wished to, and he inquired if they were willing to tell what they knew about it."[112] Each confessed.[113] A week later, the coroner asked one of the defendants, this time without warning him, "I am going to take you the way you took when you came to New Haven and to Crown street. Will you show me?"[114] The coroner then had the defendant act out the series of events up to and including the murder of the victim.[115] At trial, the prosecutor sought to have a witness testify to the defendant thus acting out the murder.[116] The defendant objected but the trial court overruled his objection; the defendant was convicted.[117]

On appeal, the Supreme Court held that the testimony was properly admitted, noting that "a warning had been given to [the defendant] the week before, and he had fully confessed after being warned. A week later he was asked, being deaf and dumb, to go to the scene of the crime and repeat the confession in pantomime, and upon the evidence he did so voluntarily. A second warning under such circumstances would have been superfluous."[118] Moreover, "[t]here is . . . no rule of law in this State which requires any such warning."[119] In dissent, Justice Wheeler disagreed, arguing that a "statement made to a coroner by an accused under arrest without a warning from him that he need not make it cannot be held to be legally voluntary. . . . [Its admission] was a violation of the rights guaranteed to [the defendant] by article 1 of our Constitution."[120]

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[110] *Id.*
[111] *Id.* at 60.
[112] *Id.* at 81 (Wheeler, J., dissenting).
[113] *Id.* at 60.
[114] *Id.* at 81 (Wheeler, J., dissenting).
[115] *Id.*
[116] *Id.* at 67.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 82 (Wheeler, J., dissenting).

Every case to cite *Castelli* in the century since its publication has, however, held that the confession or other evidence at issue was properly admitted.[121]

The Connecticut Supreme Court's most recent pronouncements on the self-incrimination clause of the Connecticut constitution have held that, pending evidence to the contrary, it is co-extensive with the federal self-incrimination clause—i.e., with *Miranda* and its progeny.[122] That being said, the authors suggest a read of Judge Blue's thorough analysis of the right against self-incrimination in *Burritt Interfinancial Bancorporation v. Brooke Pointe Associates*,[123] a civil case.

As a result, Connecticut's self-incrimination clause appears to be lying in a state of dormancy. Nevertheless, given Connecticut's history with the right, there is potential for greater recognition in the future. Indeed, Justice Wheeler led the way in championing the right against self-incrimination when he penned his dissent in *Castelli* one century ago.

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[121] *State v. Di Battista*, 110 Conn. 549 (1930); *State v. La Louche*, 116 Conn. 691 (1933); *State v. Palko*, 121 Conn. 669 (1936); *State v. McCarthy*, 133 Conn. 171 (1946); *State v. Guastamachio*, 137 Conn. 179 (1950); *State v. Lorain*, 141 Conn. 694 (1954); *State v. Doucette*, 147 Conn. 95 (1959); *State v. Taborsky*, 147 Conn. 194 (1960), rev'd sub nom. *Culombe v. Connecticut*, 367 U.S. 568 (1961); *State v. James*, 237 Conn. 390 (1996).

[122] *State v. Asherman*, 193 Conn. 695 (1984); *State v. Castonguay*, 218 Conn. 486 (1991); *State v. James*, 237 Conn. 390 (1996); *State v. Lockhart*, 298 Conn. 537 (2010).

[123] 42 Conn. Supp. 445 (Conn. Super. Ct. 1992).