

FARTHER AND FARTHER FROM  
THE ORIGINAL FIFTH AMENDMENT:  
THE RECHARACTERIZATION OF THE RIGHT  
AGAINST SELF-INCRIMINATION AS A  
“TRIAL RIGHT” IN *CHAVEZ v. MARTINEZ*

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I. INTRODUCTION

Contemporary constructions of the constitutional provisions that were meant to restrain the government’s criminal justice powers are now quite distant from the original meanings of those provisions. Indeed, although recent Supreme Court decisions sometimes purport to look to the text and original meaning of those provisions, the constructions given typically have little connection to the historical meanings.<sup>1</sup>

The Fourth Amendment of the United States Constitution is now construed as though it created an overarching “reasonableness” standard for assessing all government arrests or searches, whether made with or without warrants.<sup>2</sup> However, as I have previously explained in other articles, the original Fourth Amendment was only a ban against general warrants;<sup>3</sup> the common-law standards for warrantless arrests and searches, which were considerably more stringent than modern “probable cause”<sup>4</sup> and certainly not as amorphous as “reasonableness,” were understood to be elements of the “due process of law” required for the initiation of a criminal prosecution under the Fifth Amendment.<sup>5</sup> The phrase “unreasonable searches and seizures” in the Fourth

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1. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 252-66 (2002).

2. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (“The Framers of the Fourth Amendment have given us only the general standard of ‘unreasonableness’ as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required.”); *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (“The relevant test is not whether it is reasonable [for police] to procure a search warrant, but whether the search was reasonable.”); *Carroll v. United States*, 267 U.S. 132, 147-50 (1925).

3. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620-42 (1999) (discussing the original meaning of the Fourth Amendment).

4. See *id.* at 620-42, 703-06 (explaining that “probable cause” alone originally was a standard for customs search warrants, not for criminal warrants or warrantless arrests).

5. See Davies, *supra* note 1, at 367-82, 389-96.

Amendment text was simply a pejorative label that denoted the unconstitutionality of searches and seizures made under general warrants.<sup>6</sup> Thus, contemporary “Fourth Amendment reasonableness” analysis generally permits the sort of discretionary arrest and search authority that the Fifth Amendment Due Process Clause and the Fourth Amendment ban against general warrants were meant to prohibit.<sup>7</sup>

The contemporary construction of the Fifth Amendment Self-Incrimination Clause is also quite distant from the original meaning of the clause. Indeed, the 2003 decision in *Chavez v. Martinez*<sup>8</sup> has increased that distance.

The Fifth Amendment provides, in relevant part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>9</sup> According to the positions taken by six Justices in *Chavez*, the core right protected by the Fifth Amendment Self-Incrimination Clause consists merely of prohibiting the introduction of compelled statements or of derivative “fruits” of such statements at a person’s criminal trial; the government’s conduct in compelling incriminating statements does not become a constitutional violation unless the statement or “fruit” is actually used in a criminal proceeding.<sup>10</sup> However, that treatment virtually inverts the right the Framers thought they had protected. They meant to prevent the government from compelling the giving of self-incriminating statements; the inadmissibility of compelled statements and their derivative “fruits” was simply the logical treatment of statements that should never have been compelled in the first place. The notion that the Fifth Amendment right is only a “trial” right seems to derive largely from the conflation of a late eighteenth-century English evidentiary doctrine regarding the admissibility of *privately* obtained confessions with the constitutional right against *governmentally* compelled self-accusation and from post-framing changes in the criminal trial.<sup>11</sup>

The purpose of this Article is to reduce the current confusion over the historical Fifth Amendment right by reiterating the content and salient features of the original understanding of that right<sup>12</sup> and by explaining how later

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6. *See id.* at 396-98; Davies, *supra* note 3, at 668-93, 716-22.

7. Davies, *supra* note 1, at 421-33; *see also* Davies, *supra* note 3, at 576-83.

8. 123 S. Ct. 1994 (2003).

9. U.S. CONST. amend. V.

10. *See infra* notes 26-43 and accompanying text.

11. *See* discussion *infra* Parts V-VI.

12. Assessing the original meaning of the Fifth Amendment right is a different undertaking from assessing the “origins” of the right. An inquiry regarding original meaning is an inquiry into how the right was understood at the time of the framing. In contrast, an inquiry into the origins of the right looks to earlier materials. The problem with conflating the origins of the right with the original meaning of the constitutional provision is that modern scholars may emphasize materials of which the Framers were unaware and, thus, that were not really part of the original meaning.

For discussions of the origins of the Fifth Amendment right, see, for example, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968);

developments obscured those features and led to the misperception that the right against compelled self-accusation is primarily or only a “trial right.”<sup>13</sup> The story that this Article tells is the story of how the Supreme Court systematically failed to ask the important questions about how the Fifth Amendment right should apply to novel police interrogation practices as those practices developed only after—indeed, substantially after—the framing.

I begin, in Part II, by briefly recounting the recharacterization of the Fifth Amendment right as merely a trial right regarding admissibility of evidence in *Chavez*. In Part III, I describe the pretrial, preaccusation applications of the framing-era common-law right against self-accusation. In Part IV, I discuss the invocatory character and original meaning of the Fifth Amendment text itself and criticize the claim in *Chavez* that “criminal case” in that text meant only a person’s own criminal trial. Then, in Part V, I describe the post-framing importation of the English evidentiary doctrine regarding the admissibility of privately obtained confessions and a related doctrine regarding the fruits of such confessions. In Part VI, I discuss the emergence of police interrogation during the mid- to late nineteenth century and explain how the application of the evidentiary confession doctrine to confessions obtained by the police obscured and undermined the original Fifth Amendment right. In Part VII, I also explain how changes in the criminal trial during the nineteenth century further obscured the pretrial, preaccusation character of the original Fifth Amendment right. Finally, in a brief conclusion, I argue that the Supreme Court failed to ask the hard questions about what the Fifth Amendment right should mean in the context of police interrogation prior to the 1966 decision *Miranda v. Arizona*,<sup>14</sup> and I also argue that the crabbed characterization of the right in *Chavez* moves away from, not toward, the right that the Framers meant to preserve.

## II. THE RECHARACTERIZATION OF THE FIFTH AMENDMENT RIGHT IN *CHAVEZ*

*Chavez* was a lawsuit brought pursuant to 42 U.S.C. § 1983.<sup>15</sup> Police detained and frisked the plaintiff Martinez and found a knife on his person.<sup>16</sup> When an altercation occurred, a police officer shot Martinez several times; one

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Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 67-92 (1989); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule* (pts. 1 & 2), 53 OHIO ST. L.J. 101 (1992), 53 OHIO ST. L.J. 497 (1992); Steven Penny, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-22 (1988); see also sources cited *infra* notes 60, 73.

13. Of course, there is a drastic difference between the treatment of a suspect or arrestee during police investigation and the treatment of a defendant at trial. See YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 27-40 (1980).

14. 384 U.S. 436 (1966).

15. *Chavez v. Martinez*, 123 S. Ct. 1994, 1999 (2003).

16. *Id.*

of the shots blinded Martinez and another paralyzed his legs.<sup>17</sup> After the shooting, defendant Chavez, a patrol supervisor, without giving the warnings or obtaining the waiver required by *Miranda*, persistently interrogated Martinez while Martinez was in custody and in pain awaiting medical treatment for the gunshot wounds.<sup>18</sup> However, Martinez was never prosecuted.<sup>19</sup>

Martinez filed a section 1983 action seeking damages, and the district court granted summary judgment against Chavez on the qualified immunity issue; that is, it found that Officer Chavez had violated Martinez's constitutional right and that a reasonable officer would have recognized that Chavez's conduct was unconstitutional.<sup>20</sup> Chavez appealed to the Ninth Circuit Court of Appeals, which upheld the district court's ruling stating that Chavez violated the Fifth Amendment when he "actively compelled and coerced" Martinez's statements<sup>21</sup> and that "a reasonable officer . . . would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation."<sup>22</sup>

The Supreme Court reversed as to the Fifth Amendment violation but remanded for reconsideration of whether the police questioning was sufficiently egregious to constitute a violation of the Fourteenth Amendment Due Process Clause.<sup>23</sup> I do not analyze the due process aspects of *Chavez* or address section 1983 liability in this article. Rather, my interest is with the Justices' crabbed and ahistorical treatment of the Fifth Amendment right as only a "trial right."

*A. The Recharacterization of the Fifth Amendment Right  
as a "Trial Right"*

In two opinions in *Chavez*, a total of six Justices concluded that there was no violation of the Fifth Amendment right upon which section 1983 liability could be found.<sup>24</sup> Those Justices did not dispute the compulsive or coercive character of Officer Chavez's questioning.<sup>25</sup> Rather, they concluded that, in the absence of actual admission of the compelled statements, or of "fruits" of such statements, into evidence at a criminal trial, there was no violation of the

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17. *Id.*

18. *Id.*

19. *Id.* at 2000. No explanation is given for the fact that Martinez was not prosecuted. Presumably, that reflects either the severity of the injuries Martinez sustained in the police shooting or doubts regarding the constitutionality of the detention and frisk of Martinez, as no facts are recited that would constitute reasonable suspicion, or both.

20. *Id.* at 1999.

21. *Martinez v. City of Oxnard*, 270 F.3d 852, 855, 857, 859 (9th Cir. 2001).

22. *Id.* at 858.

23. *See Chavez*, 123 S. Ct. at 2005-06, 2008.

24. *Id.* at 1999-2010.

25. *See id.*

protection provided by the Fifth Amendment right.<sup>26</sup>

In an opinion announcing the judgment of the Court, Justice Thomas, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia,<sup>27</sup> opined that the compulsive interrogation of Martinez did not violate his Fifth Amendment right against compelled self-incrimination because that right is a "trial right."<sup>28</sup> Specifically, Thomas asserted that this construction was necessary in view of the phrase "in any criminal case" in the text of the Fifth Amendment,<sup>29</sup> a phrase that he asserted referred to a trial proceeding or at least a formal prosecution.<sup>30</sup> Thus, because Martinez was never prosecuted, there could not be a violation of his Fifth Amendment right. As Thomas put it, "mere coerci[ve custodial interrogation by police officers] does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the [interrogatee]."<sup>31</sup> Significantly, Thomas's Fifth Amendment analysis does not seem to allow any consideration of the degree or severity of the coercion involved.

In addition, Thomas drew a distinction between the "privilege" against self-incrimination and what he labeled the "core" Fifth Amendment "right" itself.<sup>32</sup>

26. *Id.* at 2001.

27. It should be noted that although Thomas's opinion "announced the judgment of the Court," *id.* at 1998, he and Chief Justice Rehnquist and Justice Scalia, who joined him, actually dissented from the remand on the question of whether Chavez violated Martinez's right to due process under the Fourteenth Amendment. *Id.* at 2005. Justice O'Connor did not address the due process issue and, thus, effectively dissented from the remand on that issue.

28. *Id.* at 2001 ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a *fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" (quoting dicta from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)) (emphasis added in *Chavez*)); *id.* (rejecting the Ninth Circuit's conclusion that "the mere use of compulsive questioning, without more, violates the Constitution").

29. U.S. CONST. amend. V.

30. *Chavez*, 123 S. Ct. at 2000-01. See *infra* notes 130-36 and accompanying text in which I comment on the insubstantial nature of the authorities Thomas cited for this proposition.

31. *Id.* at 2002; see also *id.* at 2001 ("The text of the Self-Incrimination Clause simply cannot support the Ninth Circuit's view that the mere use of compulsive questioning, without more, violates the Constitution.").

Of course, the logic of Thomas's analysis is not new. In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), Justice Scalia concurred with the Court's holding that a prosecutor was not subject to section 1983 liability for having conspired with police to fabricate false evidence. *Id.* at 281. Although the majority's holding was based on prosecutor immunity, Scalia asserted that there was no violation of a constitutional right upon which section 1983 liability could be premised in the absence of evidence that the false evidence was actually used. *Id.* at 267, 281.

32. *Chavez*, 123 S. Ct. at 2002-03 ("Although our cases have permitted the Fifth Amendment's self-incrimination privilege to be asserted in non-criminal cases, . . . that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case."); *id.*

He asserted that although the “privilege” permits a person to refuse to answer potentially incriminating questions outside of his own criminal trial in the absence of a grant of immunity—for example, when appearing as a witness before a grand jury, in the criminal trial of another, or before a legislative committee—it is merely a “prophylactic rule,” apparently of less than constitutional stature.<sup>33</sup> Notably, Thomas did not identify any prior cases that had applied the “prophylactic” characterization to that setting. Indeed, the Court’s prior decisions on the scope of required immunity plainly had treated the required immunity as a dimension of the constitutional right itself.<sup>34</sup>

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at 2003 (referring to the “the core Fifth Amendment trial right”).

33. *Id.* (“Among these [prophylactic] rules is an evidentiary privilege that protects witnesses from being forced to give incriminating testimony [without a grant of the requisite immunity].”); *id.* at 2004 n.3 (noting that “the privilege is a prophylactic one”).

34. As explained by Chief Justice John Marshall, the right against self-accusation was applicable to any question posed to a witness if the answer to the question could lead to the discovery of incriminating evidence; however, a witness could not refuse to answer if there was no genuine threat of criminal liability. *United States v. Burr*, 25 F. Cas. 38, 40-41 (C.C.D. Va. 1807) (No. 14,692e). As discussed below, following that same logic, Congress has enacted federal statutes providing for compelled testimony under grants of immunity; however, the Supreme Court has never accepted the constitutionality, under the Fifth Amendment, of an immunity statute that did not provide for at least use, or testimonial immunity, plus derivative use immunity.

The first federal immunity statute was adopted in 1857 and applied only to testimony before Congress. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155, 155-56. That statute appears to have provided transactional immunity for any conduct that was the subject of required testimony as well as use immunity plus derivative use immunity regarding statements or papers produced. However, the scope of immunity for Congressional testimony was drastically narrowed when the 1857 statute was amended in 1862, during the Civil War, so as to cancel transactional immunity and provide only testimonial immunity but permit the use as evidence in a criminal prosecution of papers produced during Congressional testimony. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, 333. However, the first federal immunity statute of general application was enacted in 1868, and it stated that the information provided under immunity could not be “in any manner used against [the person testifying under immunity in any federal proceeding].” Act of Feb. 25, 1868, ch. 13, 15 Stat. 37, 37. Accordingly, it appeared to provide use, or testimonial immunity, plus derivative use immunity.

However, the Supreme Court subsequently struck down that statute in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), in which the Court held that the Fifth Amendment required immunity against derivative use of compelled testimony as well as testimonial immunity and expressed the view that only full transactional immunity could adequately assure protection against derivative use. *Id.* at 560, 585-86 (noting that a valid statute requires “absolute immunity”). In 1893, Congress responded by passing a transactional immunity statute, Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, and the Court upheld the constitutionality of that statute in *Brown v. Walker*, 161 U.S. 591, 610 (1896).

However, when the Supreme Court subsequently developed the “fruit of the poisonous tree” and “independent source” rules in Fourth Amendment doctrine in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-92 (1920), it became apparent that the endorsement of full transactional immunity in *Counselman* outran the logic of the protection against derivative use

Likewise, Thomas also described “the *Miranda* exclusionary rule” as only a prophylactic rule<sup>35</sup> and quoted the 1974 decision *Michigan v. Tucker* for the proposition that “the ‘procedural safeguards’ required by *Miranda* [are] ‘not themselves rights protected by the Constitution.’”<sup>36</sup> Notably, Thomas did not mention the Court’s seeming retreat from *Tucker* and reaffirmation of the constitutional status of *Miranda* in the 2000 decision *United States v. Dickerson*.<sup>37</sup> The absence of any mention of *Dickerson* is not that surprising with regard to Thomas and Scalia because they dissented from that decision,<sup>38</sup> but it is noteworthy that Rehnquist, who authored *Dickerson*, and O’Connor, who joined Rehnquist’s opinion,<sup>39</sup> now seem inclined to ignore it and revert to *Tucker*.<sup>40</sup>

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of compelled testimony (that is, the “fruits” of the compelled testimony) required by the Fifth Amendment right. Hence, in 1970 Congress reenacted the content of the 1868 immunity statute, 18 U.S.C. § 6002, and the Supreme Court upheld that statute in *Kastigar v. United States*, 406 U.S. 441 (1972), concluding that use, or testimonial immunity, plus derivative use immunity met the constitutional protection required by the Fifth Amendment. *Id.* at 462; *see also infra* note 135.

35. *Chavez*, 123 S. Ct. at 2003 (“[T]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.” (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985))).

36. *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *see also id.* at 2004 (“*Miranda*’s warning requirement is ‘not itself required by the Fifth Amendmen[t] . . . but is instead justified only by reference to its prophylactic purpose.’” (quoting *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987)) (alteration in *Chavez*)).

37. 530 U.S. 428 (2000). Although conceding that the Court had “repeatedly referred to the *Miranda* warnings as ‘prophylactic’” and that the Court had previously stated that the warnings and waiver requirements were “‘not themselves rights protected by the Constitution’”; the opinion of the Court concluded that “[w]e disagree with the Court of Appeals’ conclusion [that the protections announced in *Miranda* are not constitutionally required].” *Id.* at 437-38 (first quoting *New York v. Quarles*, 467 U.S. 649, 653 (1984); second quoting *Tucker*, 417 U.S. at 444); *see also id.* at 444 (“*Miranda* announced a constitutional rule . . .”).

38. *Id.* at 444-65.

39. *Id.* at 430-44.

40. While noteworthy, the reversion to *Tucker* by Rehnquist and O’Connor is not surprising. As Professor Kamisar has observed:

There appears to be a strong consensus among criminal procedure professors that the majority opinion in *Dickerson* was a compromise opinion designed to obtain the largest majority possible on the narrow questions of *Miranda*’s continued vitality. There also seems to be a consensus . . . that what *Dickerson* reaffirmed was not the [*Miranda*] doctrine that burst on the scene in 1966, but *Miranda* with all the exceptions it has acquired since 1966 frozen in time.

Yale Kamisar, *Weighing Poison Fruit*, AM. LAW., Oct. 2003, at 65, 66-67.

In light of *Chavez*, it would appear that Rehnquist and O’Connor viewed *Miranda* as constitutionally required only insofar as that meant that only the Court, but not Congress, could limit its operation.

In a separate opinion, Justice Souter, joined by Justice Breyer, concurred with Thomas's assertion that the "core" of the Fifth Amendment protection is a trial right.<sup>41</sup> Souter wrote, in an apparent reference to the "in any criminal case" language, that "the text of the Fifth Amendment . . . focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence."<sup>42</sup> Although he protested that Thomas's analysis was too rigid and does not seem entirely to have embraced Thomas's distinction between the Fifth Amendment "privilege" and the Fifth Amendment "right," Souter nevertheless concluded that it would be too costly to enforce the "complementary rules" relating to self-incrimination—that is, *Miranda*'s requirement of warnings and a waiver—through section 1983 damage actions.<sup>43</sup> Like Thomas, Souter did not mention *Dickerson*.

Justice Kennedy, joined by Justice Stevens, took a slightly different view. Although Kennedy expressed the view that "the Self-Incrimination Clause is a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts,"<sup>44</sup> and also, per *Dickerson*, that "[t]he *Miranda* warning . . . is a constitutional requirement,"<sup>45</sup> Kennedy nevertheless agreed with Justice Thomas to the extent "that failure to give a

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41. *Chavez*, 123 S. Ct. at 1995, 2006-07 (Souter, J., concurring).

42. *Id.* at 2006; *see also id.* at 2007 (asserting that grants of immunity and *Miranda* are "outside the Fifth Amendment's core"). However, Souter did not seem to distinguish the "privilege" from the "right" to quite the degree that Thomas did. *See id.* at 2007 (referring to potential expansion of the "protection of the privilege against compelled self-incrimination").

43. *Id.* at 2006-07. Souter stated the following:

The most obvious drawback inherent in Martinez's purely Fifth Amendment claim to damages is its risk of global application in every instance of interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles, or violating one of the complementary rules we have accepted in aid of the privilege against evidentiary use. If obtaining Martinez's statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor *Miranda*? Martinez offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.

Martinez has offered no reason to believe that the guarantee has been ineffective in all or many of those circumstances in which its vindication has depended on excluding testimonial admissions or barring penalties. And I have no reason to believe the law has been systemically defective in this respect.

*Id.* at 2007. Compare this statement with Souter's conclusion in *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47, 350, 353-54 (2001) (opining that, although there were no reasons why a custodial arrest for a minor offense was reasonable in the specific circumstances, permitting section 1983 liability for such arrests would be too costly in the absence of an "epidemic" of such abuses).

44. *Chavez*, 123 S. Ct. at 2014 (Kennedy, J., concurring in part and dissenting in part).

45. *Id.* at 2013.

*Miranda* warning does not, without more, establish a completed violation [of the Fifth Amendment right] when the unwarned interrogation ensues.<sup>46</sup> However, Kennedy asserted that “[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear.”<sup>47</sup>

Justice Ginsburg expressed a similar view “that the Self-Incrimination Clause applies at the time and place police use severe compulsion to extract a statement from a suspect.”<sup>48</sup> However, it appears that even Justices Stevens, Kennedy, and Ginsburg might not regard compelled interrogation itself as a violation of the Fifth Amendment right unless the compulsion was “severe” or rose to the level of “torture.”<sup>49</sup>

Justices Kennedy, Stevens, and Ginsburg each noted that the Fifth Amendment right was intended to protect against abusive official interrogation practices of the sort that are associated with the inquisitorial procedures employed in the Court of Star Chamber in seventeenth-century England.<sup>50</sup> Notably, the other six Justices did not discuss the historical roots of the Fifth Amendment right.

#### B. *The Practical Consequences of Chavez’s Characterization*

As a practical matter, *Chavez’s* holding that there is no violation of the “core” of the Fifth Amendment right until a compelled statement is admitted at trial<sup>51</sup> appears to mean that section 1983 liability for a Fifth Amendment violation is virtually precluded when a public official abusively interrogates a suspect. That appears to be the result because the Court has previously created absolute or qualified immunities that would attach to each of the actors involved in the actual admission of a compelled statement or fruits of such a statement at trial.<sup>52</sup>

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46. *Id.* (stating that *Miranda* is constitutional, but because there are exceptions, violations of *Miranda* cannot be determined without trial and that exclusion is adequate remedy for *Miranda* violations).

47. *Id.*; *see also id.* at 2013-16.

48. *Id.* at 2018 (Ginsburg, J., concurring in part and dissenting in part).

49. *See id.* at 2013, 2018.

50. *See id.* at 2016 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2012 (Stevens, J., concurring in part and dissenting in part); *id.* at 2019 (Ginsburg, J., concurring in part and dissenting in part).

51. *Id.* at 2000-01.

52. Under section 1983 case law, a judge who improperly admits such evidence would enjoy the absolute immunity that applies to any judicial act. *See, e.g.,* *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). Similarly, a prosecutor who offers evidence in court also would enjoy absolute immunity for in-court conduct. *See Burns v. Reed*, 500 U.S. 478, 487-92 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that a prosecutor enjoys absolute immunity for conduct “intimately associated with the judicial phase of the criminal process”). In addition, a police officer who testifies regarding such evidence also would seem

*Chavez* may also signal further undermining of the warning and waiver regime of *Miranda*. At roughly the same time that the *Chavez* opinion was announced, the Court granted certiorari to hear two additional cases regarding aspects of *Miranda*.<sup>53</sup> One deals with whether a second warned statement is admissible after a comparable initial statement had been obtained through a deliberate police violation of the warnings required by *Miranda*.<sup>54</sup> The other deals with the admissibility of physical evidence, or “fruits,” discovered solely as a result of an unwarned police custodial interrogation.<sup>55</sup> Given the

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to enjoy absolute immunity as to his role as a witness. *See* *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983). Moreover, under the logic of *Chavez*, it would appear that a police officer who obtains a compelled statement but does not attempt to use it has not violated the Fifth Amendment “trial” right. Thus, it is unclear how a government violation of the Fifth Amendment right could ever be the basis for section 1983 liability. *Cf.* Brief Amici Curiae of Former Prosecutors, Judges and Law Enforcement Officials, Supporting Respondent, *State v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, *Missouri v. Seibert*, 123 S. Ct. 2091 (U.S. May 19, 2003) (No. 02-1371), *available in* 2003 WL 22359207, at \*24 (noting that, after *Chavez*, exclusion of statements or “fruits” is the only remaining means of enforcing the Fifth Amendment right).

53. *State v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, *Missouri v. Seibert*, 123 S. Ct. 2091 (U.S. May 19, 2003) (No. 02-1371); *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 123 S. Ct. 1788 (U.S. Apr. 21, 2003) (No. 02-1183).

54. In *Seibert*, the Court likely will decide whether there is any limit on the large loophole in *Miranda* that it created in the 1985 decision *Oregon v. Elstad*, 470 U.S. 298 (1985). In *Elstad*, the Court permitted use of a warned incriminating statement as evidence at trial when it was obtained in a custodial interrogation at a police station one hour after the police had obtained a similarly incriminating statement in violation of *Miranda* at Elstad’s house. *Id.* at 301. However, *Elstad* was decided under the premises that the initial unwarned custodial interrogation was an “oversight,” *id.* at 315-16, that did not involve “deliberately coercive or improper tactics,” *id.* at 314, and that the police did not “exploit the unwarned admission to pressure respondent” when obtaining the second incriminating statement, *id.* at 316. The issue in *Seibert* is whether the *Elstad* rule regarding the admissibility of a second statement extends to instances in which a police officer, following his training to deliberately flout *Miranda*, obtained an initial statement in an unwarned interrogation and then, after giving the required warnings, and after reminding the defendant that he had already confessed, obtained a repetition of that statement. It seems likely that at least some of the Justices will seize on the notion that there is no constitutional violation of the Fifth Amendment right unless and until a compelled statement is actually admitted into evidence as a basis for concluding that even a deliberate violation of the “prophylactic,” “complementary” *Miranda* rules is irrelevant as long as the specific, initial unwarned statement so obtained is not itself admitted as evidence. That seems especially likely because the Court has not hesitated to approve of police pretexts, and disapprove of assessment of actual police motives, in other contexts. *See, e.g.,* *Whren v. United States*, 517 U.S. 806, 819 (1996) (approving police pretextual traffic stop for drug investigation). However, some Justices may find it significant that the second warned statement in *Seibert* was not obtained independently of the prior unwarned statement insofar as the police referred to the initial unwarned statement in the process of obtaining the warned statement.

55. In *Patane*, the Court likely will decide whether the physical “fruits” of an unwarned

exceptions to *Miranda* that the Court has previously created, rulings favoring the police in these cases would amount to the practical abolition of *Miranda*.<sup>56</sup>

At present, it is unclear whether Justice Thomas's novel characterization of all applications of the Fifth Amendment right outside of a person's own criminal trial as mere "prophylactic" applications of the "privilege" rather than as "core" applications of the right<sup>57</sup> foretells any further curtailment of Fifth Amendment protections. What is clear is that Thomas's recharacterization does not enhance the stature or stability of those applications.

### III. THE ORIGINAL FIFTH AMENDMENT RIGHT

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custodial interrogation can be admitted at trial, even if the unwarned statement through which the police learned of the "fruits" must be excluded under *Miranda*. Petition for Writ of Certiorari at 13, *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 123 S. Ct. 1788 (U.S. Apr. 21, 2003) (No. 02-1183). The disregard in *Chavez* of *Dickerson*'s reaffirmation of the constitutional character of *Miranda*, coupled with the renewed characterization in *Chavez* of *Miranda* as merely a "prophylactic" or "complementary rule" of less importance than the "core" right itself, would appear to be necessary components of any rationale for admitting "fruits" discovered solely and directly through an unwarned statement that is itself inadmissible. That is so because it does not seem that any of the justices question that the Fifth Amendment itself does bar use of derivative "fruits" of compelled statements. Note, for example, that in *Chavez*, Thomas stated,

[O]ur cases provide that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (*or evidence derived from their statements*) in any subsequent criminal trial. This protection is, in fact, coextensive with the use and derivative use immunity mandated by *Kastigar* when the government compels testimony from a reluctant witness.

*Chavez*, 123 S. Ct. at 2002 (citations omitted) (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972)) (second emphasis added).

Because some of the Justices are prone to seek historical justifications for rulings, *see supra* note 1 and accompanying text, there is a risk that the Court could make a significant historical error in *Patane* regarding the admissibility of "fruits" of inadmissible confessions. As discussed below, the late eighteenth-century English *Warickshall* decision announced that physical evidence could be admitted in criminal trials even though it was discovered solely by means of information learned from induced and inadmissible confessions. *See infra* notes 168-73 and accompanying text. The United States has cited the English case in a footnote in its brief. Brief for the United States as Petitioner, *Patane* (No. 02-1183), *available in* 2003 WL 21715020, at \*37 n.11. However, as I explain below, the novel *Warickshall* doctrine regarding the admissibility of fruits of an inadmissible confession applied to privately obtained confessions and not to the right against government-compelled interrogation; the Framers were unfamiliar with that rule because it was published too late to have come to their attention prior to the drafting of the Fifth Amendment, and the doctrine has not been endorsed by any Supreme Court decision to date. *See infra* notes 178-89 and accompanying text; *see also infra* note 173.

56. *See Kamisar, supra* note 40, at 67 (expressing the view that if the Court rules in *Seibert* that a second statement obtained after a deliberate police violation of *Miranda* is admissible, "we should simply give *Miranda* a respectful burial").

57. *See supra* notes 32-36 and accompanying text.

The point that I address in this article is the distance between the “trial right” conception of the “core” Fifth Amendment right against compelled self-incrimination announced in *Chavez* and the original meaning of that right and text. Notwithstanding that several of the current Justices purport to endorse an original meaning approach to constitutional construction,<sup>58</sup> the references in the opinions of Justices Stevens, Kennedy, and Ginsburg to historic abuses, such as those associated with the Court of Star Chamber, are the only aspects of the opinions in *Chavez* that even approach the original Fifth Amendment right.<sup>59</sup>

Contemporary commentary tends to describe the original meaning and purpose of the Fifth Amendment right as murky or confused.<sup>60</sup> However, much of the apparent confusion may simply be the product of a failure to separate post-framing developments from the right described in framing-era sources themselves. As discussed in Part VI of this article, the original Fifth Amendment right has been obscured particularly by an overlay of a nonconstitutional “confession doctrine” that developed in the English common law of evidence regarding the admissibility of a privately obtained confession in a criminal trial, and that was imported into American law subsequent to the framing.<sup>61</sup> Indeed, that nonconstitutional doctrine seems to be a primary source for the notion, evident in *Chavez*, that the Fifth Amendment right is a trial right that relates only to the admissibility of incriminating statements.

#### A. *The Pretrial, Preaccusation Character of the Fifth Amendment Right*

We know that the right against self-incrimination was important to the American Framers. The state declarations of rights adopted prior to the federal Bill of Rights routinely included a protection against self-incrimination.<sup>62</sup>

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58. See Davies, *supra* note 1, at 252-66.

59. See *supra* note 50 and accompanying text.

60. See, e.g., Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994).

61. See *infra* notes 161-89 and accompanying text.

62. Twelve of the initial fourteen states (counting Vermont) adopted a state constitution prior to the adoption of the federal Bill of Rights (Connecticut and Rhode Island continued to operate under their colonial charters); eight of the twelve adopted a declaration of rights as part of their state constitutions, and each of those declarations contained a provision constitutionalizing the right against self-accusation. In the order of adoption, the states were the following: Virginia in 1776, VA. CONST., Declaration of Rights, § 8, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 48, 49 (William F. Swindler ed., Oceana Publ'ns, Inc. 1979) [hereinafter SOURCES] (“nor can he be compelled to give evidence against himself”); Pennsylvania in 1776, PA. CONST., Declaration of Rights, art. IX, *reprinted in* 8 SOURCES (1979), *supra* at 278-79 (“nor can he be compelled to give evidence against himself”); Delaware in 1776, DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL

However, it is implausible that the Framers conceived of the right as only a trial right because the historical sources suggest that the Fifth Amendment right against self-incrimination played little role in framing-era trials.<sup>63</sup>

The common-law right undoubtedly would have prohibited compelling a defendant to testify in his own criminal trial.<sup>64</sup> However, that issue simply did not come up in framing-era practice because defendants could not testify as witnesses under oath in their trials because they were viewed as interested parties and thus were deemed to be “incompetent” to be admitted as witnesses under the rules of evidence.<sup>65</sup> Instead, because defendants often defended themselves and defense counsel typically played only limited roles, if they were involved at all, defendants necessarily spoke about the accusation against them in the course of mounting a defense during their trials. Thus, historians refer to the framing-era criminal trial as the period of the “accused speaks” trial.<sup>66</sup> In addition, framing-era sources suggest that if defendants offered to make in-court confessions, they were generally discouraged from doing so by the judge.<sup>67</sup>

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RULES, § 15, *reprinted in* 2 SOURCES (1973), *supra*, at 197, 198 (“That no Man in the Courts of common Law ought to be compelled to give Evidence against himself.”); Maryland in 1776, MD. CONST., Declaration of Rights, art. XX, *reprinted in* 4 SOURCES (1975), *supra*, at 372, 373 (“That no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practised in this State, or may hereafter be directed by the Legislature.”); North Carolina in 1776, N.C. CONST., Declaration of Rights, art. VII, *reprinted in* 7 SOURCES (1978), *supra*, at 402, 402 (“and shall not be compelled to give evidence against himself”); Vermont in 1777, VT. CONST., ch. 1, art. X, *reprinted in* 9 SOURCES (1979), *supra*, at 487, 490 (“nor can he be compelled to give evidence against himself”); Massachusetts in 1780, MASS. CONST., pt. I, art. XII, *reprinted in* 5 SOURCES (1975), *supra*, at 92, 94 (“No subject shall . . . be compelled to accuse, or furnish evidence against himself”); New Hampshire in 1784, N.H. CONST., pt. I, art. XV, *reprinted in* 6 SOURCES (1976), *supra*, at 344, 346 (“No subject shall . . . be compelled to accuse or furnish evidence against himself”). A self-accusation provision also was included in the declaration of rights of the proto-state of Franklin (Tennessee) in 1784. DECLARATION OF RIGHTS OF THE STATE OF FRANKLIN, § 7, *reprinted in* 9 SOURCES (1979), *supra*, at 127, 128 (“and shall not be compelled to give evidence against himself”).

The evolution of the language of these provisions is discussed *infra* note 123. The unusual phrasings of the provisions of the neighboring states of Delaware and Maryland are discussed *infra* note 137.

63. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 280-81 (2003) (observing, based on accounts of eighteenth-century English jury trials, that defendants did not invoke the right against self-incrimination during such criminal trials).

64. See *id.* at 280-81 (noting that the right against self-incrimination is evident in several late eighteenth-century English trials in the form of judge’s explanations to jurors as to why certain questions could not be asked of the defendant).

65. See *id.* at 38.

66. See, e.g., *id.* at 48-51.

67. According to Blackstone:

Upon a simple and plain confession, the court hath nothing to do but to award judgment:

Similarly, it does not appear that an arrestee or suspected criminal would have been called to testify before a grand jury. Framing-era grand juries assessed the evidence that complainants brought to them but did not investigate to identify uncharged crimes.<sup>68</sup> Hence, it is unlikely that a suspect or arrestee would have had any occasion to invoke the right in that context.

However, the peripheral relationship of the right against self-incrimination to the conduct of criminal trials did not mean that the right was unimportant.<sup>69</sup> Rather, that right prohibited governmental interrogation of a person prior to an actual accusation that the person had committed a crime,<sup>70</sup> and it restricted governmental interrogation during the period between charge and trial to the single instance of a prompt judicial examination of an arrestee.<sup>71</sup> Of course, it followed logically that if a statement was obtained in an official interrogation that should not have occurred, then that statement would be inadmissible in evidence in a later trial. However, the point of the Fifth Amendment right was that the government should not engage in compelled interrogation. As I explain later, the Framers did not address how the right would apply to police interrogation because there was no such thing as police interrogation during the framing era; indeed, there were no police officers as we now understand that term.<sup>72</sup>

### B. *The Right Against Self-Accusation*

Although historians have traced the right against self-incrimination to the

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but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.

4 WILLIAM BLACKSTONE, COMMENTARIES 324 (1st ed. 1769); 4 *id.* at \*329 (9th ed. 1782). Blackstone made additions and revisions through the ninth London edition of his commentaries. RICHARD WHALLEY BRIDGMAN, A SHORT VIEW OF LEGAL BIBLIOGRAPHY: CONTAINING SOME CRITICAL OBSERVATIONS ON THE AUTHORITY OF THE REPORTERS AND OTHER LAW WRITERS 19 (1807). Later editions of the commentaries indicate the pagination of the 1782 edition with a “star,” or asterisk. I cite the first edition, but also provide the “star” cite to the 1782 ninth edition to identify changes or continuity in the text. The common practice of citing only the “star” paginated edition can lead to historical errors insofar as that citation may be misunderstood as being to the first edition. *See, e.g., Davies, supra* note 1, at 297-98.

68. *See Davies, supra* note 1, at 427 n.628.

69. If taken out of context, Langbein sometimes may appear to say that the right against self-incrimination did not exist. *See, e.g., LANGBEIN, supra* note 63, at 61, 277 (“In common law criminal procedure, therefore, the privilege against self-incrimination was the creature of defense counsel.”). However, those statements refer only to the inapplicability of the right in the context of the eighteenth-century “accused speaks” trial. *Id.*

70. *See Benner, supra* note 12, at 70-72.

71. *See infra* notes 85, 87.

72. *See infra* notes 91-93, 200-08 and accompanying text.

middle ages,<sup>73</sup> it appears to have become a significant feature of the common law during Coke's time, when the common-law courts issued writs of prohibition to prevent inquisitional interrogation, known as the *ex officio* oath procedure, in the ecclesiastical courts.<sup>74</sup> The hallmark of that inquisitional procedure was that persons were interrogated under oath to learn information which could then be used as a basis for a criminal prosecution, even though no prior accusation of crime had been made against them.<sup>75</sup> The right against self-accusation then became even more prominent as a response to the abuses associated with pretrial—indeed preaccusation—interrogation in the Court of Star Chamber and, especially, in the Court of High Commission during the early to mid-seventeenth century, and it was developed further by English judges during the late seventeenth and early eighteenth centuries.<sup>76</sup>

As described in framing-era sources, the common-law right against self-incrimination protected against such official “fishing” expeditions by prohibiting the government from requiring any person to contribute to his or her own prosecution.<sup>77</sup> Thus, Blackstone stated in 1765 that it was an established “rule and maxim” of law that “no man shall be bound to accuse himself.”<sup>78</sup> He also wrote in 1769 that “at the common law, *nemo tenebatur prodere seipsum* [no man is bound to accuse himself];<sup>79</sup> and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.”<sup>80</sup> Thus,

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73. See, e.g., Richard H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 17-45 (1997); LANGBEIN, *supra* note 63, at 277-78.

74. See, e.g., Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 5-8 (1930).

75. See Davies, *supra* note 1, at 430 & n.636; Benner, *supra* note 12, at 73-77.

76. See, e.g., LANGBEIN, *supra* note 63, at 277-78; Corwin, *supra* note 74, at 8-9.

77. The unsuccessful 1768 to 1769 civil-law smuggling prosecution of John Hancock in the Boston vice-admiralty court, news of which was disseminated widely among the colonies, was contemporaneously described as an inquisitorial “fishing” procedure that violated Magna Carta. That episode may well have sensitized the American Framers to the need to prohibit inquisitorial interrogation. See Davies, *supra* note 1, at 431 n.640.

78. 1 BLACKSTONE, *supra* note 67, at 68 (1st ed. 1765); 1 *id.* at \*68 (9th ed. 1782). “Maxim” was a term for a fundamental, settled principle of law.

Chief Justice Marshall articulated the same maxim in 1807: “every witness is privileged not to accuse himself” and “[i]t is a settled maxim of law that no man is bound to criminate himself.” *United States v. Burr*, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, C.J., presiding). Criminate meant “to accuse.” See *infra* note 82 and accompanying text.

79. I have inserted the translation. Literally, *prodere* meant to “betray” himself. See *THE POCKET OXFORD LATIN DICTIONARY* 109 (James Morwood ed. 1994) (entry for “prodo”). The maxim was often stated using *accusare* instead. Blackstone seems to have used the two formulations interchangeably.

80. 4 BLACKSTONE, *supra* note 67, at 293 (1st ed. 1769); 4 *id.* at \*296 (9th ed. 1782).

the right was a right against governmentally compelled self-*accusation*.<sup>81</sup> “Incrimination” does not appear in framing-era dictionaries; however, they define “crimination” as “[t]he act of accusing; accusation; arraignment; charge.”<sup>82</sup>

The reason the Framers placed such a high value on the right against self-accusation is fairly evident if one recognizes that they undertook to preserve the accusatory character of common-law procedure. The thrust of accusatory procedure was that no one was to be subjected to any official criminal justice power unless a complainant-prosecutor previously had made out a substantial accusation that the person had committed a specific crime. As I explain below, a potentially accountable complainant had to swear to personal knowledge of a crime to obtain issuance of an arrest warrant or to complete a warrantless arrest. In addition, the complainant also had to be prepared to produce sufficient evidence to convince a grand jury of the apparent truth, not just probable cause, of the accusation.<sup>83</sup> Only then was a defendant called upon to answer at trial. As a practical matter, because there already had been a strong showing of the defendant’s guilt, the trial before the petit jury seems to have served primarily to determine whether the defendant could explain away the incriminating evidence or present exculpatory evidence.<sup>84</sup> By preventing the use of governmental interrogation prior to the making of an actual accusation of crime, the right against self-accusation gave substance to the requirement that a complainant possess strong evidence of crime prior to the activation of government criminal justice power. Thus, the right was crucial to the preservation of accusatory procedure.

In addition to banning pre-charge governmental interrogation, the right against self-incrimination also was understood to restrict post-charge, pretrial governmental interrogation to the single instance of a judicial “examination” of an arrestee immediately after an arrest.<sup>85</sup> That examination, which was also part of the magistrate’s determination of whether to release, bail, or commit an

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81. See, e.g., *Wilkes v. Wood*, Lofft 1, 13, 98 Eng. Rep. 489, 495 (C.P. 1763) (ruling that a witness in the trial of another person need not answer a potentially self-incriminating question because a person “is not bound to answer to any matter which may tend to accuse himself”). See also the 1807 statement of Chief Justice Marshall quoted *supra* note 78.

82. See *DICTIONARY OF THE ENGLISH LANGUAGE* (Samuel Johnson ed. 1755) [hereinafter *JOHNSON’S DICTIONARY*] (pages not numbered, see entry for “CRIMINATION”).

83. See *Davies*, *supra* note 1, at 427-28.

84. The focus of the trial on whether a defendant could rebut the evidence of guilt is evident in James Wilson’s reference to the trial jury as the “traverse” jury. See 2 *THE WORKS OF JAMES WILSON* 536 (Robert G. McCloskey ed., 1967) (reprinting Wilson’s 1791 Law Lectures in Philadelphia); see also *LANGBEIN*, *supra* note 63, at 48 (“The purpose of the altercation trial was to give the accused the opportunity to respond to this accusing evidence, hence our image of the ‘accused speaks’ trial.”).

85. See *infra* note 86 and accompanying text. The judicial examination of an arrestee is the only form of official interrogation regarding crime described by Blackstone. See *infra* note 87.

arrestee to jail to await trial, had been authorized by a sixteenth-century statute decreed during the reign of Mary Tudor<sup>86</sup> and, thus, was already established when the right against self-accusation was otherwise more fully developed during the seventeenth century. Notably, Blackstone portrayed that statutory authority for judicial examination of arrestees as contrasting with the common-law maxim,<sup>87</sup> and at least one American text that was published immediately after the framing of the Fifth Amendment condemned that examination as “repugnant” to the common-law right.<sup>88</sup>

Although the magistrate’s examination of an arrestee may initially appear to almost nullify the right against self-accusation, that was not the case. Framing-era judicial examination was subject to three significant restrictions. First, only magistrates, usually justices of the peace, had the authority to conduct examinations. Unlike the modern notion that government officers may do anything not prohibited by law, in framing-era common law an officer usually had authority to act only if that conduct was affirmatively recognized by law.<sup>89</sup> During the framing era, peace officers had no authority at all to interrogate even arrestees, let alone suspects.<sup>90</sup> Indeed, there were no police officers or departments in the modern sense during the framing era, so the practice of police interrogation simply could not develop.<sup>91</sup> The primary peace

86. Marian Committal Statute of 1555, 2 & 3 Phil. & M., c. 10 (Eng.). See generally LANGBEIN, *supra* note 63, at 40-41.

87. Note the juxtaposition of the statutory authority for a magistrate’s examination and the common law maxim in Blackstone’s description of post-arrest examination by a magistrate: The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10 he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes, was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum*; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.

4 BLACKSTONE, *supra* note 67, at 293 (1st ed. 1769) (footnote omitted); 4 *id.* at \*296 (9th ed. 1782).

88. WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 153 (Richmond, Aug. Davis 1799 printing of 1796 edition) (stating that the examinations of arrestees pursuant to the “statute of England of Ph. & M. . . . are repugnant to the common law” and interpreting Blackstone’s statement set out *supra* note 87, to that effect).

89. See Davies, *supra* note 3, at 737 n.543.

90. See Davies, *supra* note 3, at 749 n.574 (quoting Lord Camden) (citation omitted).

91. Cf. *United States v. Dickerson*, 530 U.S. 428, 435 n.1 (2000) (observing that the application of the Fifth Amendment “to the context of custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development”). As Professor Kamisar previously observed:

[It should not] be forgotten that for many centuries there were simply no “police interrogators” to whom the privilege could be applied. Although what Dean Wigmore calls “the first part” of the history of the privilege, the opposition to the ex-officio oath of the ecclesiastical courts, began in the 1200s, “criminal investigation by the police, with

officer was the parish constable—an amateur who served for a term of a year or so and whose duties consisted primarily of putting down “affrays,” controlling drunks, and executing arrest or other warrants issued by the local justice of the peace.<sup>92</sup> The constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person.<sup>93</sup> Presumably, “examinations” of an arrestee that took place in the parlor of the justice of the peace, and which were recorded by his clerk, did not present the same potential for abuse as the interrogations that would later occur in the backroom of the police station during the nineteenth and twentieth centuries.

Second, there was no authority for even judicial examination of mere “suspects”; rather, examination was permitted only after an arrest was actually made.<sup>94</sup> That was a significant restriction because during the framing era an arrest required a sworn allegation by a named complainant that he had personal knowledge that a crime had actually been committed, not just probable cause that a crime might have been committed,<sup>95</sup> and certainly not just the minimal “fair probability” notion of “probable cause” invented by the Supreme Court in the 1983 decision *Illinois v. Gates*.<sup>96</sup> Likewise, arrests could not be made merely on the basis of hearsay information from “confidential informants”; rather, an arrest was unlawful unless it was based on a sworn complaint by a named complainant who professed personal knowledge of the crime.<sup>97</sup> Moreover, if the complainant failed to prosecute after an arrest, or if the grand jury refused to indict the arrestee, the complainant was potentially liable for

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its concomitant of police interrogation, is a product of the late nineteenth century”; in eighteenth-century America as in eighteenth-century England “there were no police [in the modern sense] and, though some states seem to have had prosecutors, private prosecution was the rule rather than the exception.

KAMISAR, *supra* note 13, at 36 (footnotes omitted) (second alteration in original).

92. See Davies, *supra* note 1, at 424-25.

93. See Davies, *supra* note 3, at 629-30.

94. Blackstone identified the examination of a “prisoner” by a magistrate as the only form of governmental interrogation permitted, and he specifically stated that this occurred “[w]hen a delinquent is arrested . . .” See 4 BLACKSTONE, *supra* note 67, at 293 (1st ed. 1769); 4 *id.* at \*296 (9th ed. 1782). In addition, because an arrest was viewed as the beginning of “imprisonment,” the use of the term “prisoner” in connection with an examination by a magistrate denoted a person who had been arrested. See Davies, *supra* note 1, at 392 n. 518. The term “arrestee” seems to be of more recent origin.

95. See Davies, *supra* note 3, at 627-34. Under framing-era law, an arrest could not be justified on the basis of “probable cause” founded merely on information from a “confidential informant.” *Id.* The person who swore out a complaint and arrest warrant had to do so in his own name and was subject to a trespass action for damages (or, in theory, criminal prosecution) if the allegations made turned out to be insubstantial. *Id.*

96. 462 U.S. 213, 238, 246 (1983) (redefining “probable cause” as a “fair probability” of crime); see Davies, *supra* note 1, at 379-82.

97. See Davies, *supra* note 3, at 650-51.

trespass damages.<sup>98</sup> Thus, the arrest requirement meant that there was no authority for any official interrogation until a strong accusation of actual crime had been made by a named and potentially accountable complainant. The higher arrest standard in framing-era law is probably the single most overlooked and misdescribed feature of common-law criminal procedure;<sup>99</sup> that oversight has caused considerable confusion.<sup>100</sup>

Third, the right against self-accusation was violated if an arrestee was put under oath, a form of compulsion, during the post-arrest judicial examination; thus, if an examination was improperly conducted under oath, the written record of that examination could not be admitted as evidence in a subsequent trial.<sup>101</sup>

The right also prohibited compelled self-accusation in contexts other than the judicial examination of an arrestee. For example, if a person was called as

98. If a person made an arrest but did not prosecute, he was exposed to a damage action for false imprisonment. Blackstone described any “detention” of a person that was “unlawful” as “false imprisonment,” and further stated that “[u]nlawful, or false, imprisonment consists in such confinement or detention without sufficient authority.” 3 BLACKSTONE, *supra* note 67, at 127 (1st ed. 1768); 3 *id.* at \*127 (9th ed. 1782). As to the compensatory remedy, he wrote that “[t]he *satisfactory* remedy for this injury of false imprisonment, is by an action of trespass *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also; and therein the party shall recover damages for the injury he has received . . . .” 3 BLACKSTONE, *supra* note 67, at 138 (1st ed. 1768); 3 *id.* at \*138 (9th ed. 1782). For an example of a successful suit for trespass and false imprisonment for an unlawful arrest, see *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780) (holding person who made charge of theft liable when no theft was proven), discussed in *Davies*, *supra* note 3, at 634-35.

If a person made an arrest and then unsuccessfully sought an indictment, he was exposed to an action for malicious prosecution. Blackstone wrote that the usual remedy was “by a special action on the case for a false and malicious prosecution” and noted that “an action for a malicious prosecution may be founded on such an indictment whereon no acquittal can be; as if it be rejected by the grand jury, or be *coram non iudice*, or be insufficiently drawn. . . .”

However, any probable cause for preferring it is sufficient to justify the defendant. 3 BLACKSTONE, *supra* note 67, at 126-27 (1st ed. 1768); 3 *id.* at \*126-27 (9th ed. 1782) (similar statement with minor alterations). It is unclear precisely what Blackstone meant by “any probable cause” in this last passage. That term was sometimes applied to a legal filing that was defective only in a technical sense but was not baseless, such as an indictment that was “insufficiently drawn.” In addition, the two-prong standard for a lawful arrest required both proof that the charged crime had been committed “in fact” and also “probable cause of suspicion” that the arrestee was the person who committed it. See *Davies*, *supra* note 3, at 632-33. Thus, Blackstone may have meant that a suit for malicious prosecution would fail if there had been “any probable cause” that the accused was the person who had committed the crime, but it seems quite unlikely that he meant to discount the requirement that there be proof that the crime had been committed by someone in fact.

99. See *Davies*, *supra* note 3, at 639 n.252.

100. See *Davies*, *supra* note 1, at 426 n.625.

101. See cases cited in LANGBEIN, *supra* note 63, at 279-81. On the other hand, the witnesses against the arrestee were to be examined under oath.

a witness in the trial of another person, the witness could refuse to answer any question if the answer might tend, even indirectly, to accuse the witness of crime.<sup>102</sup> In America in 1789, that right was usually absolute—there were no statutes that broadly authorized the government to compel testimony in return for a grant of immunity.<sup>103</sup>

In addition, as Justice Thomas correctly noted in his 2000 concurring opinion, joined by Justice Scalia, in *United States v. Hubbell*,<sup>104</sup> the right also prohibited any official compulsion to produce potentially self-incriminating physical evidence.<sup>105</sup> As Lord Mansfield opined in a 1769 case, “[I]n civil causes, the Court will force parties to produce evidence which may prove against themselves . . . . But in a criminal or penal cause, the defendant is never forced to produce any evidence; though he should hold it in his hands, in Court.”<sup>106</sup> The reliability of the evidence was not a factor in the application of the right against compelled self-incrimination. Rather, the right flatly prohibited compelled production of highly reliable evidence.

#### IV. THE FIFTH AMENDMENT TEXT

The text of the Fifth Amendment reads that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>107</sup> Although some modern commentators have bemoaned the seemingly cryptic language of

102. See, e.g., *Wilkes v. Wood*, Lofft 1, 13, 98 Eng. Rep. 489, 495 (C.P. 1763) (defining the right against self-accusation to mean that a person “is not bound to answer to any matter which may tend to accuse himself” and ruling that a witness in a trial of another person need not answer a potentially self-accusing question); *United States v. Burr*, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14,692e) (Marshall, C.J., presiding) (ruling that a witness at another’s criminal trial is not bound to answer a question if the circumstances showed the witness’s answer “might criminate” the witness but concluding that the question at hand reasonably could not be supposed to have that effect).

103. Immunity statutes in the American colonies were both uncommon and rather narrow in scope. For example, there were a few that created immunity only regarding investigations of gambling. See *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972). State immunity statutes did not appear much before the middle of the nineteenth century and were still rather narrow in scope. For example, New York adopted an immunity statute that applied only to usury investigations in 1837. See *Perrine v. Striker*, 7 Paige Ch. 598, 601 (N.Y. Ch. 1839). New York also adopted an immunity statute applicable to legislative investigations of bribery in 1853. See *People ex rel. Hackley v. Kelly*, 24 N.Y. 74, 80-81 (1861), *discussed infra* note 122.

Federal immunity statutes date from 1857; the first federal immunity statute that was broadly applicable to criminal investigations was not enacted until 1868. See *supra* note 34.

104. 530 U.S. 27 (2000).

105. *Id.* at 51-52 (Thomas, J., concurring); see also discussion *infra* notes 117-19 and accompanying text.

106. *Roe v. Harvey*, 4 Burr. 2484, 2489, 98 Eng. Rep. 302, 305 (K.B. 1769) (first published 1776).

107. U.S. CONST. amend. V.

that text,<sup>108</sup> that complaint ignores the invocatory character of most of the provisions of the Bill of Rights.

*A. The Invocatory Character of the Fifth Amendment's Statement  
of the Right Against Self-Accusation*

When the American Framers wrote the initial set of state declarations of rights and the federal Bill of Rights, the Framers undertook to preserve the common-law rights that were deemed essential to accusatory criminal procedure and, thus, ban legislative importation of inquisitorial procedure.<sup>109</sup> In the case of the Fourth Amendment, there had been a recent controversy over the legality of general warrants; therefore, the Framers undertook to ban the conferral of discretionary arrest or search authority on ordinary officers by spelling out the standards for valid warrants in some detail.<sup>110</sup> However, because the other features of common-law criminal procedure had not been the subject of dispute and appeared to be settled, the Framers did not undertake to spell them out in detail.<sup>111</sup> Instead, the Framers were content simply to use a phrase sufficient to invoke the settled common-law right and place it off limits to legislative change.<sup>112</sup> Specifically, although the Framers sought to protect the right against self-accusation from legislative relaxation,<sup>113</sup> they had no reason to think that the right was unsettled. Hence, they were content to protect it against legislative alteration by a simple statement such as “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>114</sup>

Given the invocatory character of the Fifth Amendment text, it is an error to parse the precise phrasing of the words of the text too closely. In particular, it is an error to read fine distinctions into the phrasing of that text. For example, James Madison used the novel phrasing of “be a witness” when he drafted what became the Fifth Amendment Self-Incrimination Clause rather than the “accuse,” “give evidence,” or “furnish evidence” phrasing found in the

108. See, e.g., LEVY, *supra* note 12, at 430; Benner, *supra* note 12, at 88-89.

109. See generally Davies, *supra* note 1, at 401-18 (discussing the Framers' general approach to drafting of the Bill of Rights).

110. See Davies, *supra* note 3, at 657-60.

111. See *id.* at 668-70.

112. Davies, *supra* note 1, at 405-06; Davies, *supra* note 3, at 668-70.

113. See, e.g., Statement of Delegate Holmes at the Massachusetts Ratifying Convention (Jan. 30, 1788), reprinted in 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109-11 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1937) (quoting Holmes as advocating the need for a federal bill of rights because, among other concerns, “[t]here is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself . . .”). Patrick Henry also asserted that unless there was a federal constitutional protection against compelled self-accusation, Congress could authorize the use of torture to obtain confessions. See LEVY, *supra* note 12, at 418.

114. U.S. CONST. amend. V.

earlier state provisions.<sup>115</sup> Commentary has asserted that the use of “be a witness” meant that the Fifth Amendment right only applies to prohibit the use as evidence of the actual words spoken under compulsion but does not prohibit the use as evidence of any “fruits” discovered as a result of the compelled statement.<sup>116</sup> However, as Justices Thomas and Scalia correctly concluded in *Hubbell*, in 1789 there was no substantive difference between the use of “give” or “furnish evidence” and “be a witness” because the terms were virtually synonymous.<sup>117</sup> Even more fundamentally, the common-law right prohibited compelling production of self-accusing physical evidence as well as compelling self-accusing statements.<sup>118</sup> As Justices Thomas and Scalia also correctly pointed out in *Hubbell*, historical case authority shows that “[t]he 18th-century common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents.”<sup>119</sup> Thus, there was no reason to think that the use of “be a witness” was meant to constrict the settled common-law understanding of the right. In fact, it appears that Madison’s choice of the novel phrase “to be a witness” was merely stylistic.<sup>120</sup> The claim that his use of “be a witness” was meant to limit the scope of the right is erroneous.

It is equally an error—this time one committed by six Justices in *Chavez*, including Justices Thomas and Scalia—to treat the appearance of “in any criminal case” in the Fifth Amendment text as meaning that the protected right

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115. See *United States v. Hubbell*, 530 U.S. 27, 51-53 (2000) (Thomas, J., concurring); see also the state provisions set out *supra* note 62.

116. See, e.g., Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 917 (1995).

117. *Hubbell*, 530 U.S. at 50-51 (Thomas, J., concurring). Of course, during the framing era, as today, the term “witness” referred to a person who could potentially testify in court in the future as well as to a person who was actually testifying in court. See, e.g., 4 BLACKSTONE, *supra* note 67, at 126 (1st ed. 1769) (describing the offense of “dissuad[ing] a witness from giving evidence”).

118. See, e.g., *Roe v. Harvey*, 4 Burr. 2484, 2489, 98 Eng. Rep. 302, 305 (K.B. 1769); *King v. Purnell*, 1 Black. 37, 45, 96 Eng. Rep. 20, 23 (K.B. 1748); *King v. Cornelius*, 2 Str. 1210, 1211, 93 Eng. Rep. 1133, 1134 (K.B. 1744); *Queen v. Mead*, 2 Ld. Raym. 927, 927, 92 Eng. Rep. 119, 119 (K.B. 1703); *King v. Worsenham*, 1 Ld. Raym. 705, 705, 91 Eng. Rep. 1370, 1370 (K.B. 1701); see also *Davies*, *supra* note 3, at 726 n.511.

119. *Hubbell*, 530 U.S. at 51 & n.2 (Thomas, J., concurring).

120. I think it is likely that Madison adopted “be a witness” merely to achieve stylistic consistency. Three provisions in the Bill of Rights could be expressed in terms of “witness” or “evidence”: the Self-Incrimination Clause in the Fifth Amendment, the Confrontation Clause in the Sixth Amendment, and the Compulsory Process Clause in the Sixth Amendment. In the state provisions and proposals, self-incrimination was expressed in terms of “evidence,” confrontation was expressed in terms of “witness,” and compulsory process was sometimes expressed in terms of “witness” and sometimes “evidence.” Madison innovated when he consistently used “witness” in all three clauses. U.S. CONST. amends. V & VI. His consistency suggests that his choice of phrasing may have been entirely stylistic.

only regulates the admission of evidence in a person's own criminal trial.<sup>121</sup>

*B. The Original Meaning of "In Any Criminal Case"*

The claim in *Chavez* that "in any criminal case" restricts the operation of the right to a person's own criminal trial is not entirely novel,<sup>122</sup> but it is highly implausible. For one thing, the right against compelled self-accusation is in the wrong amendment to be a "trial right." Unlike the unsequenced cluster of criminal procedure rights that were typically included in the state declarations of rights that preceded the federal Bill of Rights,<sup>123</sup> Madison

121. See discussion *supra* Subpart II.A.

122. *Chavez v. Martinez*, 123 S. Ct. 1994, 2000-01 (2003). The claim that "in any criminal case" limited the right to criminal trials probably has its roots in the 1861 New York decision *People ex rel. Hackley v. Kelly*, 24 N.Y. 74 (1861). New York had adopted a state constitutional provision that copied verbatim the Self-Incrimination Clause of the federal Fifth Amendment. *Id.* at 81. New York also had adopted a state statute, the Bribery Act of 1853, that required anyone charged with bribery of a public official to testify against anyone else involved, but gave the person testifying only testimonial immunity, not derivative use immunity, regarding his testimony. *Id.* at 80-81. Hackley refused to answer a question about a bribe in a grand jury proceeding and invoked his right against self-accusation. *Id.* at 76. In the course of ruling that compelling Hackley to answer would not violate his constitutional right, the New York court first ruled that the constitutional right did not require a grant of derivative use immunity as a condition for compelling testimony. *Id.* at 83-84. The court then stated that, because Hackley enjoyed testimonial immunity, he could not refuse to testify against someone else. *Id.* In that context, the court stated: "The term 'criminal case' used in the [constitutional] clause must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against *him*." *Id.* at 84. The analysis of "in any criminal case" in *Kelly* was rejected by the federal Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892) (stating that the interpretation of "criminal case" in *Kelly* would "take away entirely [the Fifth Amendment right's] true meaning and its value"). However, Justice Thomas ignored the statement in *Counselman* in his opinion in *Chavez*. See *infra* notes 132-36 and accompanying text.

123. The Virginia Declaration of Rights, which was adopted shortly before the Declaration of Independence and was the first of the state declarations, set out criminal procedure standards in section eight, prohibited excessive bail and fines as well as cruel and unusual punishments in section nine, and then banned general warrants in section ten. VA. CONST., Declaration of Rights, reprinted in EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 170, 171 (1957) (reprinting from Proceedings of the [Virginia State Constitutional] Convention 100-03, and 9 WILLIAM WALLER HENING, *THE STATUTES AT LARGE* 109-12 (Richmond, J. & G. Cochran, 1821)). The cluster of criminal procedure standards in section eight reads as follows:

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the

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land, or the judgment of his peers.

*Id.*

There is a discrepancy regarding the punctuation preceding the self-incrimination clause. In the first draft of the declaration, George Mason separated the various trial rights with commas but set off the self incrimination clause with a semicolon. *See* 1 THE PAPERS OF GEORGE MASON 1725-1792, at 277-78 (Robert A. Rutland ed., Univ. of N.C. Press 1970) [hereinafter PAPERS OF GEORGE MASON]. However, like the sources cited for the quotation above, most of the historical sources show a comma in the final version of the declaration. *See also* VA. DECLARATION OF RIGHTS of 1776 (Final Draft), *reprinted in* 1 PAPERS OF GEORGE MASON, *supra* at 287-88. Another line of sources shows a semicolon in the final declaration. *See, e.g.*, 10 SOURCES, *supra* note 62, at 49 (reprinting 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812-13 (Washington, Francis Newton Thorpe ed., 1909), and apparently reprinting 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1908-09 (Washington, Benjamin Perley Poore ed., 2d ed. 1878)). However, the semicolon in the final version appears to be erroneous. The only documentation offered in these latter works is an 1816 printing of the Virginia Constitution, which I have not examined. In any event, other sources indicate that the comma was replaced by a semicolon no later than the middle of the nineteenth century. The original Virginia Declaration of Rights was “prefixed” to the Virginia Constitution of 1830, *see* 10 SOURCES, *supra* note 62, at 57, 58, but an official copy of the Declaration published in connection with the 1830 Constitution shows a semicolon. *See* THE CODE OF VIRGINIA: WITH THE DECLARATION OF INDEPENDENCE AND CONSTITUTION OF THE UNITED STATES; AND THE DECLARATION OF RIGHTS AND CONSTITUTION OF VIRGINIA 32, 33 (Richmond, William F. Ritchie, 1849).

Professor Levy has asserted that “[r]ead literally and in context, [the self-incrimination clause in section 8 of the 1776 Virginia Declaration of Rights] seemed to apply only to a criminal defendant at his trial.” LEVY, *supra* note 12, at 407. However, that assertion gave too narrow a reading to the use of the term “prosecution.” As explained *infra* note 126, a “prosecution” began when there was an arrest, so any custodial interrogation would have occurred during a prosecution. Moreover, it is unlikely the provision was meant to be “[r]ead literally”; instead, the reference to “prosecutions for criminal offenses” was probably understood to mean that the right against self-accusation attached only to potential criminal, rather than civil, liability. *See infra* notes 132-37 and accompanying text.

In addition, Levy’s assertion also ignored the peculiar reverse ordering of the rights stated in section 8: it starts with trial and ends with arrest. The final “law of the land” provision was an invocation of the chapter of Magna Carta under which Coke had discussed the law of arrest. *See* Davies, *supra* note 1, at 391 n.517. Indeed, the final clause replaced a final sentence in George Mason’s initial draft of this provision that read, “[a]nd that no Man, except in times of actual Invasion or Insurrection, can be imprisoned upon Suspicion of Crimes against the State, unsupported by Legal Evidence.” VA. DECLARATION OF RIGHTS of 1776 (First Draft), *reprinted in* 1 PAPERS OF GEORGE MASON, *supra* at 277-78. By permitting a lawful arrest upon mere “Suspicion” in the event of invasion or insurrection, the provision suggested by Mason had much the same practical effect as a provision for suspending the writ of habeas corpus. Mason’s provision implicitly assumed that, in the absence of those emergencies, lawful arrest would have to be justified by “Legal Evidence.”

If the Virginia framers had meant for the self-incrimination clause to be only a trial right,

separated the criminal procedure provisions in the federal Bill of Rights into

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they should have included the clause among the initial trial evidentiary provisions in section 8 that relate to the rights to confrontation and to production of favorable evidence. However, that is not where the self-incrimination clause appears; instead, it appears *after* the requirement of a unanimous jury verdict, which relates to the end of a trial. Hence, it does not appear that the right against self-incrimination was understood to be only a trial right; rather, it appears to have been meant to apply more broadly.

Section eight of Virginia's Declaration of Rights served as the model for the criminal procedure provisions in a number of the subsequent state declarations. For example, Pennsylvania adopted an almost verbatim copy:

That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

PA. CONST., Declaration of Rights, art. IX, *reprinted in 8 SOURCES* (1979), *supra* note 62, at 278-79. Note that in this provision, the right against compelled self-accusation was set off from the preceding trial-related rights by semicolons while the trial-related rights themselves were joined by commas.

The influence of section eight of Virginia's Declaration of Rights is also still evident in the somewhat altered and more detailed presentation of criminal procedure rights in the Massachusetts Declaration of Rights of 1780:

No subject shall be held to answer for any crimes or no offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASS. CONST., pt. I, art. XII, *reprinted in 5 SOURCES* (1975), *supra* note 62, at 94. Again, there is no clear procedural sequence; note that arrest comes in the middle. It is interesting that the right against self-accusation, which explicitly used the term "accuse," appears immediately after the requirement of a formal accusation, but prior to the trial-related rights of producing or obtaining evidence. The explicit use of "accuse" in the Massachusetts provision may be attributable to John Adam's authorship of that declaration. *See Davies, supra* note 3, at 685. Adams had been counsel to John Hancock when the latter had been subjected to inquisitorial procedure during a civil-law smuggling prosecution in the Boston vice-admiralty court—a prosecution in which there was no formal accusation and which was roundly condemned as a "fishing" expedition. *See supra* note 77.

Note that all of these state provisions treated the right against self-accusation as a right pertaining to criminal liability but made no reference to civil liability.

several provisions that were ordered to follow a procedural sequence.<sup>124</sup> The Fifth Amendment deals with pretrial and pre-prosecution rights and standards that protect a “person” regarding the initiation of a criminal prosecution<sup>125</sup> while the Sixth Amendment plainly deals with rights that protect “the accused” during

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124. As discussed below, when Madison drafted the criminal procedure provisions of the federal Bill of Rights, he obviously drew heavily on the proposals for federal amendments put forth by the New York Ratification Convention. The New York proposals regarding criminal procedure, which were not numbered, followed a fairly evident procedural sequence: they began by regulating arrest by stating that no person was to be “taken” but by “due process of Law”; then came a provision against double jeopardy—that is, against initiation of a repetitive prosecution; next came a reiteration of the importance of habeas corpus; then came a provision prohibiting excessive bail and fines and cruel and unusual punishment; lastly was a long provision that initially set out a requirement of grand jury indictment and of jury trial with detailed attention to venue followed by language that Madison would draw upon for what became the Sixth Amendment. Amendments Proposed by New York Convention, July 26, 1788, *reprinted in* DUMBAULD, *supra* note 123, at 190-91. The last provision read as follows:

And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense, and should not be compelled to give Evidence against himself.

*Id.* at 191. After this was a provision commanding that the right to jury trial should be “inviolate” and a provision banning general warrants. *See id.*

The notable feature of the New York proposals, for present purposes, is that the right against self-incrimination was appended to the language that Madison later drew upon when formulating the proto-Sixth Amendment. *See* the text of the Sixth Amendment *infra* note 126. However, Madison did not leave the right against self-incrimination at the end of the rights that pertained to the formal stages of prosecution that he put in the proto-Sixth Amendment. Rather, he combined it with rights that related to *the initiation of criminal proceedings*—the protection against repetitive initiation of a prosecution; the requirement of due process of law, which prominently included arrest standards (*see supra* note 5); and the Takings Clause, which effectively precluded legislative forfeiture of property as an alternative to forfeiture through a valid criminal proceeding—in what became the proto-Fifth Amendment. *See* Madison’s Proposals for Amendments, June 8, 1789, *reprinted in* DUMBAULD, *supra*, at 207. Madison initially proposed putting the provision regarding grand jury indictment, which was also generally regarded as a component of “due process of law,” in a revision of the criminal trial and venue provisions of Article III; it was subsequently moved to the beginning of the proto-Fifth Amendment when Madison’s plan for inserting rights amendments into the text of the Constitution was abandoned. *See* Davies, *supra* note 1, at 407-08 & n.570. Thus, it is quite clear that Madison and the First Congress understood that the right against self-accusation operated prior to any formal criminal proceeding and certainly prior to criminal trial itself.

125. The pre-accusation, pretrial character of the cluster of rights addressed in the Fifth Amendment has been overlooked because the original meaning of “due process of law” has been overlooked. Contrary to modern usage, “due process of law” did not refer to fair procedure generally or to fair trial procedure; in framing-era sources the requisites of fair trial are referred to as “due course of law.” *See* Davies, *supra* note 1, at 394-96 & n.521. “Due process of law” referred specifically to the requirements for validly initiating a criminal prosecution—the law of arrest and the law of grand jury indictment. *See id.* at 391-96, 408-15.

the court phase of prosecutions, including trials.<sup>126</sup> We know that the Framers understood this difference because there was a proposal in the First Congress to move the proto-Sixth Amendment into a revision of the criminal trial provisions of Article III, but there was never any comparable proposal to include the proto-Fifth Amendment, or the right against compelled self-accusation itself, in the trial provisions of Article III.<sup>127</sup>

In addition, although the term “criminal case” would have been expansive enough to have included a criminal trial in 1789, it would not have been limited to that meaning; the term “case” could just as readily have referred more broadly to a legal question or matter, or even potential question or matter.<sup>128</sup>

126. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

It should be noted that the Framers probably understood that a “criminal prosecution” began with arrest. *See, e.g.*, 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 72 (1736) (describing the “arrest or apprehen[sion]” of a person as “the first instance of [his] prosecution”). The Framers did not differentiate between an arrest and the commencement of a formal prosecution because a lawful arrest necessarily involved a sworn complaint of a specific crime, either when the arrest warrant was issued or, in the case of a warrantless arrest, when the arrestee was promptly taken to a justice of the peace for “examination” and discharge, bail, or commitment. Thus, in framing-era parlance, the judicial examination of an arrestee would have been understood to occur within his “prosecution.”

This is another point on which current doctrine diverges from framing-era doctrine. Today, because decisions regarding whether to make a formal charge are usually made by separate prosecutorial agencies subsequent to an arrest made by police, there is a gap between arrest and the commencement of a formal prosecution. *See infra* notes 203-04 and accompanying text. Moreover, the question of when a “prosecution” commences has been addressed primarily in terms of assessing when the right to assistance of counsel attaches, and the Supreme Court has ruled that, for that purpose, a “prosecution” commences either upon indictment or a defendant’s “first appearance” in court, rather than at arrest. *See United States v. Gouveia*, 467 U.S. 180, 189-90 (1984); *Brewer v. Williams*, 430 U.S. 387, 398 (1977). *But see Terry v. Ohio*, 392 U.S. 1, 26 (1968) (“An arrest is the initial stage of a criminal prosecution.”).

127. Madison included the right not to be compelled to be a witness against oneself among the pretrial criminal procedure provisions of his proto-Fifth Amendment rather than among the trial rights identified in his proto-Sixth Amendment. *See supra* note 124. Although the committee that reviewed Madison’s proposed amendments opted to move the proto-Sixth Amendment to a proposed revision of the trial provisions of Article III, it did not suggest moving the right against compelled self-accusation to that location. *See Davies, supra* note 1, at 407-08 & n.570.

128. *See JOHNSON’S DICTIONARY, supra* note 82. The entry for “CASE” includes, among

Indeed, the noteworthy feature of the Fifth Amendment phrasing is that it uses “criminal case” rather than the term “trial,” which is used in the Sixth Amendment.<sup>129</sup> If the Framers had meant to restrict the right to “trial,” they could have said so.

Moreover, the authorities cited by Justice Thomas in *Chavez* for his claim that “case” in the Fifth Amendment meant only “trial” are flimsy. They consist of a passage in the 1872 opinion *Blyew v. United States*, which merely stated that a statute that conferred jurisdiction as to “causes” affecting persons discriminated against under state law was not broader in scope than an earlier judicial interpretation of jurisdiction regarding “cases” affecting specific persons,<sup>130</sup> and a citation to the 1990 edition of *Black’s Law Dictionary*.<sup>131</sup>

The most notable feature of Thomas’s discussion is its total silence as to the Supreme Court’s prior construction of “in any criminal case” in the Fifth Amendment in the 1892 decision *Counselman v. Hitchcock*,<sup>132</sup> in which the Court concluded that “criminal case” included any criminal “investigation” or “criminal matter”<sup>133</sup> and that the term “criminal case” in the Fifth Amendment

other definitions not relevant, “6. Question relating to particular persons or things”; definition number six includes an example involving an appeal to a judge. The entry also includes “7. Representation of any fact or question,” a definition that provided an example of studying “the lawyers cases.” However, the entry for “CASE” provides no example denoting a court trial as such. In addition, the entry for “MATTER” includes, among other definitions not relevant, “7. Subject of suit or complaint” and “10. Question considered.”

129. See *supra* note 126 (quoting the Sixth Amendment).

130. 80 U.S. (13 Wall.) 581, 595. In *Blyew*, a federal prosecutor prosecuted a white person for the murder of an African-American woman under the criminal provisions of the 1866 Civil Rights Act. *Id.* at 583. The issue in the Supreme Court was whether a federal circuit court had jurisdiction over the case under the jurisdictional provision of the 1866 Act which conferred jurisdiction as to a criminal “cause” which “affect[ed] persons” who were prevented from securing their rights in state court because of discrimination. *Id.* at 590-91. The Court ruled that the circuit court did not have jurisdiction because, although the victim and witnesses were African-American, and a Kentucky statute discriminated against African-American witnesses, no African American was actually a party to the cause. *Id.* at 592-93. The United States sought to distinguish a prior decision, *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826), which had held that a prosecution for an attack on a Spanish minister was not a “case affecting” a foreign minister for purposes of federal jurisdiction. *Blyew*, 80 U.S. at 594 (citing *Ortega*, 24 U.S. at 469). In that context, the *Blyew* Court declined to treat the statutory term “cause affecting” as being broader than the term “case affecting” in *Ortega*. *Id.* at 594-95. I confess that I am at a loss as to how that ruling sheds light on the term “criminal case” in the Fifth Amendment.

131. *Chavez v. Martinez*, 123 S. Ct. 1994, 2000-01 (2003).

132. 142 U.S. 547 (1892).

133. *Id.* at 562. The Court stated:

The object [of the Fifth Amendment] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

is even broader in scope than “criminal prosecution” in the Sixth Amendment.<sup>134</sup> Although *Counselman* subsequently was overruled to the extent that it had suggested that only a transactional grant of immunity could be fully compatible with the Fifth Amendment,<sup>135</sup> its construction of “criminal case” was never called into question until Thomas implicitly did so in *Chavez*.<sup>136</sup>

Instead, it seems highly probable that the phrase “in any criminal case” was added to the Fifth Amendment simply to clarify that the right against compelled self-accusation did not extend to governmentally compelled interrogation, production of evidence, or oath-taking that might expose a person to only civil liability. There had not been any need to specify that the right ran only to criminal liability in the iterations of the right against self-accusation in the earlier state declarations of rights because, in those declarations, the right against self-accusation typically had been set out among a cluster of rights that were clearly focused on potential criminal liability.<sup>137</sup>

However, the right’s connection to criminal matters was clouded in Madison’s draft of the proto-Fifth Amendment because Madison had also innovated by including the Takings Clause, which had a civil rather than criminal character.<sup>138</sup> Thus, Congress apparently concluded that it was

*Id.*

134. *Id.* at 563.

135. The Supreme Court subsequently rejected what amounted to dicta in *Counselman* regarding the need for full transactional immunity but accepted the holding in *Counselman* that the Fifth Amendment would be violated by compelled testimony in the absence of a grant of immunity against derivative use of the compelled testimony. *Kastigar v. United States*, 406 U.S. 441, 449-55 (1972) (describing the requirement of derivative use immunity under the Fifth Amendment right as “the conceptual basis of *Counselman*”); see also *Ullmann v. United States*, 350 U.S. 422, 436-37 (1956) (suggesting that *Counselman* had actually struck down the immunity statute at issue in that case because the Justices viewed it as failing to protect against derivative use of the compelled testimony); Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 983 (1995). The relationship between the immunity rulings in *Counselman* and *Kastigar* is discussed *supra* note 34.

136. *Chavez*, 123 S. Ct. at 2000-01.

137. See *supra* notes 62, 123 for examples. Two exceptions should be noted. The 1776 Delaware Declaration of Rights provided “15. That no Man in the Courts of common Law ought to be compelled to give Evidence against himself.” DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES, § 15, *reprinted in* 2 SOURCES (1973), *supra* note 62, at 198. Similarly, the Maryland 1776 Declaration of Rights provided “XX. That no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this State, or may hereafter be directed by the Legislature.” MD. CONST., Declaration of Rights, art. XX., *reprinted in* 4 SOURCES (1975), *supra* note 62, at 373. I speculate that both of these were written with a view to the allowance of compelled production of documents in proceedings in equity or possibly other civil proceedings, a matter that was later addressed in the federal 1789 Judiciary Act. See *infra* note 140 and accompanying text.

138. See U.S. CONST. amend. V. I have previously suggested that Alexander Hamilton

necessary to add “in any criminal case” to clarify that the right against self-accusation extended only to criminal matters.

Specifically, that phrase was added to the Fifth Amendment text during the debate regarding the Bill of Rights in the House of Representatives when Representative Laurance complained that the draft self-incrimination provision was so “general” that it was “in some degree contrary to laws passed” by the Congress so “it ought to be confined to criminal cases.”<sup>139</sup> In *Hubbell*, Justices Thomas and Scalia endorsed the view of several historians that Laurance sought this addition because he was concerned that Madison’s language might seem to conflict with a provision in the Senate Judiciary Bill that related to judicial authority to compel production of documents in civil cases.<sup>140</sup>

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substituted “due process of law” rather than the more traditional “law of the land” in the New York proposals for a federal bill of rights because he thought that the former was a clearer guarantee that forfeiture of property could be based only on a properly initiated prosecution but not on a legislative enactment. See Davies, *supra* note 1, at 408-15. Madison apparently borrowed “due process of law” from the New York proposals and probably shared Hamilton’s concern. *Id.* I speculate that Madison added the Takings Clause to the pretrial criminal procedure protections included in the proto-Fifth Amendment because its ban against taking private property for public use without compensation prevented an end-run around the ban against legislative forfeitures in the “due process of law” clause. *Id.* at 415 n.586.

139. The legislative history of the Bill of Rights contains only the following regarding the addition of “in any criminal case” to the Self-Incrimination Clause:

Mr. Laurance [s]aid this clause contained a general declaration, in some degree contrary to laws passed, he alluded to that part where a person shall not be compelled to give evidence against himself; he thought it ought to be confined to criminal cases, and moved an amendment for that purpose, which amendment being adopted, the clause as amended was unanimously agreed to by [the House of Representatives].

Statement of Representative John Laurance (Aug. 17, 1789), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, at 1290 (Charlene Bangs Bickford et al. eds., Baltimore & London, Johns Hopkins Univ. Press 1992) [hereinafter DOCUMENTARY HISTORY]. The name “Laurance” is sometimes spelled “Lawrance” or “Lawrence” in other sources.

140. *United States v. Hubbell*, 530 U.S. 27, 53 n.3 (2000) (Thomas, J., concurring) (endorsing the view of prior commentary that attributed Laurance’s concern to a provision of the 1789 Judiciary Act which authorized courts to compel production of documents in civil trials according to a doctrine of the law of equity, a section that had been the subject of heated debate in the Senate).

However, there is a difficulty with this interpretation of Laurance’s statement: although he referred to a conflict with “laws passed,” see the statement quoted *supra* note 139, the House had not yet passed the Judiciary Act. The Senate had passed the Judiciary Bill and sent it to the House on July 17, but the House did not take up the Judiciary Bill until August 24. See 11 DOCUMENTARY HISTORY, *supra* note 139, at 1328 (indicating the beginning of House consideration of the Judiciary Bill). That was a week after Laurance’s reference to “laws passed” on August 17. See *supra* note 139. Professor Levy has dismissed this inconsistency by suggesting that Laurance’s statement about “laws passed” was “inaccurate.” See LEVY,

Alternatively, I have suggested that Laurance may have been expressing concern that the provision appeared to create a general right that might interfere with the oaths required in customs declarations.<sup>141</sup> However, regardless of which provision Laurance referred to, it is still the case that his concern was not to limit the right to criminal trials as such but only to preserve the distinction that the right applied only to potential criminal liability rather than civil liability. It is noteworthy—and disturbing—that in *Chavez*, Justices Thomas and Scalia completely ignored the obvious implication of their own previous assessment in *Hubbell* of why “in any criminal case” was added to the Fifth Amendment.<sup>142</sup>

Additionally, as noted above, the historical sources show that the right against self-accusation was understood to arise primarily in pretrial or pre-prosecution settings rather than in the context of a person’s own criminal trial.<sup>143</sup> Thus, a witness in the trial of another person could invoke the right to refuse to answer a potentially self-incriminating question.<sup>144</sup> Again, as of the framing era, broadly applicable grants of immunity by which a person could be compelled to answer had not been invented.<sup>145</sup> Likewise, a suspect could refuse to produce physical evidence that might be self-incriminating.<sup>146</sup> Plainly, the right was understood to operate outside a person’s own criminal trial.

Thus, I do not see how one can conclude that the addition of “in any criminal case” in the Fifth Amendment reduced the right against self-accusation to merely a trial right unless one is prepared to conclude that the Framers undertook to deceive and delude the American people by introducing a novel restriction on the settled meaning of the right against self-accusation. The claim in *Chavez* that “in any criminal case” in the Fifth Amendment reduced the right

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*supra* note 12, at 425. However, it is highly improbable that Laurance was mistaken about the unfinished status of the Judiciary Bill because he had been among those who had unsuccessfully argued on August 13 that the House should take up the Judiciary Bill before acting on Madison’s proposed amendments to the Constitution. See 11 DOCUMENTARY HISTORY, *supra* note 139, at 1211. Accordingly, unless Laurance’s statement was incorrectly recorded, he was not referring to the Judiciary Act. However, it is possible that he had referred to Senate passage of the bill and the more general reference to “laws passed” was incorrectly recorded: there are numerous errors in the records of the House debates from that period. See Davies, *supra* note 3, at 717-19 (discussing inconsistencies and errors, during the same period, in the reports of the House debate regarding the language of the Fourth Amendment).

141. The 1789 Customs and Collections Act, which initially was treated as two bills and was enacted July 31, 1789, was one of the few “laws passed” prior to the House debate, and Laurance had been the primary author of that Act. See Davies, *supra* note 3, at 705 n.450.

142. *Chavez v. Martinez*, 123 S. Ct. 1994, 1999-2006 (2003).

143. See *supra* notes 62-80, 102-06 and accompanying text.

144. See *supra* note 102 and accompanying text.

145. See *supra* note 103 and accompanying text.

146. See *supra* notes 104-06 and accompanying text.

against self-accusation to a trial right<sup>147</sup> is acontextual, ahistorical, and essentially arbitrary.

It is plain that—unlike the current Court—the Framers did not perceive the Fifth Amendment right as merely a “trial right.” However, the Framers of the Fifth Amendment never anticipated three post-framing developments that appear to have created considerable confusion in the modern understanding of the right: the emergence of police interrogation of suspects and arrestees, the transformation of the defendant’s role in the criminal trial, and the invention of statutes that compel testimony in return for a grant of immunity. These developments—especially the first two—have created confusion because they have led to a conflation of a “confession doctrine” that emerged in the law of evidence with the constitutional right against compelled self-accusation.<sup>148</sup>

#### V. THE CONFESSION DOCTRINE

In *Dickerson*, in which the Court had seemed to reaffirm that the regime of required warnings and waiver set out in *Miranda* were constitutionally required by the Fifth Amendment,<sup>149</sup> Chief Justice Rehnquist offered “a brief historical account of the law governing the admission of confessions.”<sup>150</sup> He began by describing a “voluntariness test,” which “developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy” and cited *King v. Rudd* and *King v. Warickshall* as authorities for that test.<sup>151</sup> He then noted that “[o]ver time, [cases in the Supreme Court] recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment” and cited the 1897 decision *Bram v. United*

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147. *Chavez*, 123 S. Ct. at 2000-01.

148. See discussion *infra* Part V.

149. See *supra* note 37 and accompanying text.

150. *United States v. Dickerson*, 530 U.S. 428, 432 (2000).

151. *Id.* at 433 (“See, e.g., *King v. Rudd*, 1 Leach 115, 117-118, 122-123, 168 Eng. Rep. 160, 161, 164 (K.B. 1783 [sic]) (Lord Mansfield, C.J.) (stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263-264, 168 Eng. Rep. 234, 235 (K.B. 1783) (‘A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected’); . . .”).

The 1783 date provided in Rehnquist’s citation to *Rudd* is incorrect. The proceedings in *Rudd* were held in 1775. See 1 Leach, 110, 168 Eng. Rep. 157 (indicating that the case reports beginning with *King v. Powell*, 1 Leach 110, 168 Eng. Rep. 157 (K.B. 1775), and including *Rudd*, are for “1775”); see also a second report of *Rudd*, 1 Cowp. 331, 98 Eng. Rep. 1114 (stating the date of the initial proceeding as “Monday, July 3d, 1775”).

*States*<sup>152</sup> as a case that treated the voluntariness test as an aspect of the Fifth Amendment right.<sup>153</sup> Of course, prior to the incorporation of the Fifth Amendment right into the Fourteenth Amendment in 1964, the Fifth Amendment did not apply to the states, so the only constitutional standard applicable to interrogation by state police was the Fourteenth Amendment Due Process Clause.<sup>154</sup>

Unfortunately, Rehnquist's account of the "voluntariness" standard invites two fundamental historical misunderstandings of the Fifth Amendment right. First, it allows the reader to assume that there has been a continuous understanding that the evidentiary standard for admitting confessions and the Fifth Amendment right were one and the same. However, that simply was not the case. The English doctrine announced in *Warickshall* (although the *Rudd* case made a passing reference to the doctrine later set out in *Warickshall*, it actually involved a different point<sup>155</sup>), to which Rehnquist attributed the

152. 168 U.S. 532 (1897).

153. *Dickerson*, 530 U.S. at 433 (citing *Bram*, 168 U.S. at 542).

154. See *infra* notes 232-33, 238 and accompanying text.

155. *Rudd* involved a confession made before a magistrate as a condition for being allowed to turn a crown witness against confederates in return for nonprosecution. *Rudd*, 1 Leach at 116, 168 Eng. Rep. at 161. Mrs. Rudd was a defendant in a prosecution for forgery of several bonds. *Id.* at 115-16, 168 Eng. Rep. at 160-61. She confessed to a magistrate, Sir John Fielding, as part of the process of being "admitted . . . in the character of an accomplice, a general witness for the Crown as to all the forgeries." *Id.* at 116, 168 Eng. Rep. at 160-61. However, when other evidence suggested that Rudd had not been completely forthcoming about her involvement in the forgeries and that there had been additional forgeries to which she had not confessed, she was arrested and held for trial notwithstanding the promise made by the magistrate, and she then sought release through a writ of habeas corpus proceeding. *Id.*, 168 Eng. Rep. at 161.

In the course of his discussion, Lord Mansfield made a passing reference to what *Warickshall* would later announce as the induced confession doctrine but indicated that it was not involved in Rudd's case:

The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial. But it has been urged, that the prisoner in this case is an accomplice who has been admitted as a witness to give evidence; that she has already given evidence; that she is further ready to give evidence to convict her partners in this business; and that she is therefore entitled by law to the King's pardon . . . .

*Id.* at 118, 168 Eng. Rep. at 161-62. Note that Mansfield said nothing about the rationale for the practice of excluding confessions made "under threats or promises."

Mansfield expressed the view that a magistrate had no authority to guarantee nonprosecution and ruled that Rudd could be prosecuted notwithstanding the magistrate's promise. *Id.* at 121, 168 Eng. Rep. at 163. However, Mansfield also ruled that "[i]f any evidence or confession has been extorted from her, it will be of no prejudice to her on the trial." *Id.* at 123, 168 Eng. Rep. at 164. Mansfield also used the term "deceived" in this context. See *id.* at 122, 168 Eng. Rep. at 164 ("if . . . the Justices had deceived her"). Thus,

“voluntariness test,” was only a nonconstitutional doctrine of the law of evidence that is commonly referred to as the “confession doctrine.” In contrast to the constitutional right that prohibited *governmentally compelled* confessions, the “confession doctrine” of the law of evidence addressed the admissibility of *privately obtained* out-of-court confessions.<sup>156</sup> As I discuss below, the notion that the English evidentiary confession doctrine constituted the Fifth Amendment right was not invented until the 1897 *Bram* decision in which the Supreme Court, in a flourish of false history, treated the former as though it were equivalent to the Fifth Amendment right regarding police interrogation.<sup>157</sup>

The second misunderstanding that Rehnquist’s account invites is that it suggests that there has been a consistent “voluntariness” criterion for assessing the admissibility of a confession and that the “voluntariness test” that is part of modern doctrine as it pertains to the admissibility of confessions made to police is as rigorous as the historical *Warickshall* standard for admissibility.<sup>158</sup> In fact, the English confession doctrine did not determine admissibility on the basis of modern, multi-factored notions of “voluntariness” but rather applied a more stringent test as to whether a confession was unreliable because it had been induced to any degree by any promises of leniency or threats.<sup>159</sup> As I explain immediately below, the confession doctrine did not merely require that a confession not be involuntary, but rather required that a confession be entirely voluntary. Indeed, in 1991 the Rehnquist Court had actually explicitly noted

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it appears that Mansfield’s statement that her confession to the magistrate “will be of no prejudice” meant that a statement made in the course of seeking admission to the status of a crown witness would not be admissible as evidence if the status of crown witness were denied. Thus, it does not appear that the exclusion of Rudd’s confession from the subsequent prosecution turned on a “voluntariness test,” as Rehnquist’s account implies. Rather, the ruling that Rudd’s confession could not be used against her when she was subsequently tried appears to have amounted to a rule for the treatment of a proffer made in an unsuccessful bid to gain leniency by turning prosecution evidence. *Cf. State v. Phelps*, 1 Kirby 282, 282 (Conn. 1787) (refusing to allow the state’s attorney to testify as to what the defendant had disclosed during an unsuccessful application to become a prosecution witness because “it would tend to defeat the benefits the public may derive from [such disclosures], should they be made use of to the prejudice of those from whom they come”). Interestingly, Rudd was ultimately acquitted “[a]fter a very long trial” by jury; the two men she identified as being involved in the forgeries were hanged. *Rudd*, 1 Leach at 133, 168 Eng. Rep. at 168.

There is another case report of *Rudd* by Cowper that is virtually the same as that by Leach. *See King v. Rudd*, 1 Cowp. 331, 98 Eng. Rep. 1114 (K.B. 1775). However, it does not appear that Americans imported as many copies of Cowper’s Reports as they did of Leach’s. *See infra* note 183.

156. *See* discussion *infra* Subpart V.A.

157. *See Bram v. United States*, 168 U.S. 532 (1897), discussed *infra* notes 216-26 and accompanying text.

158. *See* discussion *infra* Subparts V.A., V.C.

159. *See* discussion *infra* Subpart V.A.

the Court's prior departure from the rigorous conception of "voluntariness" adopted in *Warickshall* and *Bram*, prior to the 2000 *Dickerson* decision, but that fact is not mentioned in Rehnquist's history.<sup>160</sup>

#### A. *The Two Parts of the English "Confession Doctrine"*

*Warickshall* dealt with a confession obtained by a private victim-prosecutor<sup>161</sup> and announced two rules of admissibility related to such out-of-court confessions: one dealt with the admissibility of the confession itself, and the other dealt with the admissibility of physical evidence located by the information given in the confession, what are now called derivative "fruits" of the confession.

##### 1. The *Warickshall* Rule on Admissibility of a Confession

The first rule announced in *Warickshall* was that a confession was inadmissible if the defendant had been induced to make it either by promises of leniency or threats made by the private prosecutor or others.<sup>162</sup> There had long been a common-law doctrine that prohibited the admission of privately obtained confessions obtained by brutality.<sup>163</sup> The innovation in the *Warickshall* doctrine, which apparently articulated a rule that had emerged in earlier unreported English cases,<sup>164</sup> was that it required exclusion of a confession

160. See *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) (stating that "[a]lthough the Court noted in *Bram* that a confession cannot be obtained by "any direct or implied promises, however slight, nor by the exertion of any improper influence," . . . under current precedent [this passage] does not state the standard for determining the voluntariness of a confession" (quoting 3 H. SMITH & A. KEEP, *RUSSELL ON CRIMES AND MISDEMEANORS* 478 (6th ed. 1896) [hereinafter *RUSSELL ON CRIMES*], *quoted in* *Bram v. United States*, 168 U.S. 532, 542-43 (1897))). As I explain *infra*, notes 223-224 and accompanying text, *Bram* had endorsed the rigorous "purely voluntary" standard for admitting confessions (that is, the absence of any degree of inducement of the confession) that had been announced in *Warickshall*. Thus, *Fulminante* repudiated *Warickshall* as well as *Bram*.

161. See *King v. Warickshall*, 1 Leach 263, 263, 168 Eng. Rep. 234, 234 (1783) (referring to the promise held out by "the prosecutor"; that is, by the victim complainant); see also *Penny*, *supra* note 12, at 321 n.59 (same interpretation).

162. See *Warickshall*, 1 Leach at 263-64, 168 Eng. Rep. at 235 (stating that "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected").

163. See 1 HALE, *supra* note 126, at 304 (stating that confessions are admissible if "voluntary" and "made without torture"); 2 *id.* at 284-85 (stating that confessions are admissible if made "freely without any menace, or undue terror imposed"). See also Herman (pt. 1), *supra* note 12, at 153 (quoting a statement in a 1754 edition of Gilbert's treatise on evidence that confessions must be "voluntary and without Compulsion" and that extorted confessions obtained by "Pain and Force" are "not to be depended upon").

164. It appears that this rule against the admissibility of "induced" confessions had

“induced” by far less drastic means than physical brutality. Presumably, the English courts deemed that a limitation on the admissibility of privately obtained confessions, rather than a ban against the obtaining of such confessions, was adequate because they did not view private conduct as creating as great a danger of oppression as governmental interrogation.<sup>165</sup>

Moreover, the test for improperly induced, and thus inadmissible, confessions was typically stated so as to exclude a confession if there had been *any degree of inducement* because it was thought that any degree of inducement made the confession unreliable.<sup>166</sup> That strict admissibility standard also

developed in several earlier English cases in the 1770s—indeed, it was alluded to in 1775 in *Rudd*, see *supra* note 155. However, the rule apparently was not articulated in a published case report prior to the 1789 report of the 1783 decision in *Warickshall*. See LANGBEIN, *supra* note 63, at 218-29 (describing the development of the confession rule).

One indication that the rule did not emerge, or at least become visible, until the 1770s is the absence of any mention of the rule in the first edition of volume four of Blackstone’s commentaries, which was published in 1769. 4 BLACKSTONE, *supra* note 67 (1st ed. 1769). Blackstone subsequently added a passage that refers to the concern with confessions obtained by “promises of favour, or menaces” that was also evident in *Warickshall*:

a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under [the statute of 7 W. III. c. 3.]. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.

4 BLACKSTONE, *supra* note 67, at \*357 (9th ed. 1782). Contrast with 4 *id.* at 350-51 (1st ed. 1769) (containing no similar passage). The rule against the admissibility of “induced” confessions was also absent from Sergeant William Hawkins’ *Pleas of the Crown* until it was mentioned in marginal notes in the 1787 edition, edited by Thomas Leach. See *infra* note 166.

165. Although the rule against admission of induced confessions primarily applied to privately obtained confessions, it appears it also would have applied to the judicial examination of an arrestee, which did not otherwise violate the right against self-accusation, in the specific instance in which the magistrate improperly induced a confession by making promises of favorable treatment. In contrast, if a magistrate employed compulsion, for example, by placing the arrestee under oath, that would have violated the right.

166. For example, Thomas Leach described the inducement standard in the following way in the editor’s note that he inserted into the 1787 sixth edition of Sergeant William Hawkins’ *Pleas of the Crown*:

The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

2 WILLIAM HAWKINS, PLEAS OF THE CROWN 604 n.2 (Thomas Leach ed., 6th ed. 1787)

appeared in early American decisions that imported the privately obtained confession doctrine.<sup>167</sup> Thus, the focus was on the reliability of confessions rather than on “voluntariness” as that term is used in modern doctrine. If the confession doctrine standard were to be stated in terms of “voluntariness,” it would be more accurate to label it as an “entirely voluntary” standard. It would appear that, if the rule was applied as stated, it would have been a significant limitation on the admissibility of privately obtained confessions in criminal trials.

## 2. The *Warickshall* Rule on Admissibility of Physical “Fruits” of an Inadmissible Confession

The second rule announced in *Warickshall* was that physical evidence, such as stolen goods, discovered through the information obtained from an induced, and thus inadmissible, privately obtained confession would be admissible even though the confession itself was inadmissible—provided that the defendant’s confession was not identified to the jury as the means by which the evidence was discovered.<sup>168</sup> The rationale for this rule was that the physical evidence would be reliable proof of guilt even if the confession was not.<sup>169</sup>

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(citation omitted).

167. See, e.g., *Commonwealth v. Knapp*, 26 Mass. (9 Pick.) 495, 503, 505 (1830) (stating that confessions are admissible only if “entirely voluntary” and that “[a]n inducement which may operate [to prompt a confession] is sufficient to exclude [the] confession”). The Court further stated, “The slightest influence, say the books, is sufficient to exclude [confessions].” *Id.* at 506.

168. *King v. Warickshall*, 1 Leach 263, 264, 168 Eng. Rep. 234, 235 (1783) (physical evidence obtained through an induced confession “must be fully and satisfactorily proved, without calling in the aid of any part of the confession from which they may have been derived”).

169. *Id.*

Thomas Leach described this aspect of the doctrine in the second part of the note he inserted in the 1787 edition of Sir William Hawkins’ *Pleas of the Crown*:

But if any facts arise in consequence of even such a[n inadmissible] confession, they may be given in evidence; because *they* must ever be immutably the same, whether the confession which disclosed them be true or false; and justice cannot suffer by their admission. The truth of these contingent facts, however, must be proved independently of, and not coupled with, or explained by the conversation or confession from which they are derived.

2 HAWKINS, *supra* note 166, at 604 n.2 (citations omitted). Of course, if the logic of reliability is followed to its logical conclusion, the discovery of physical evidence by means of an improperly induced confession would tend to confirm the accuracy of the confession itself and thus justify the admission of the confession, notwithstanding the improper inducements. Some state courts actually admitted confessions on that basis prior to the 1950s. See Kamisar, *supra* note 135, at 937-38. However, the Supreme Court rejected that analysis as contrary to the voluntariness standard of the Fourteenth Amendment Due Process Clause in *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960).

It seems likely that this second rule was a reaction to the strictness of the inducement standard for testing the admissibility of a confession. If both the confession and the “fruits” had been made inadmissible, successful prosecution would often have been impossible. However, this second rule, allowing the admissibility of “fruits,” probably substantially offset the practical significance of the rule prohibiting the admissibility of induced confessions themselves. Indeed, it probably meant that private complainants often still had an incentive to induce a confession. The most common offense prosecuted at that time was theft, and recovery of stolen goods from a location that could be connected to a defendant usually would have been adequate to obtain a conviction even in the absence of a confession.<sup>170</sup>

However, subsequent English decisions show that the rule allowing use of “fruits” discovered by privately obtained confessions was not understood to alter the older common-law ban against official compulsion of production of potentially self-incriminating evidence; thus, the English courts did not conflate the *Warickshall* fruits rule with the right against self-accusation.<sup>171</sup> In addition, the Supreme Court did not endorse the fruits rule when it adopted the confession rule itself in later cases, including the 1897 decision in *Bram*.<sup>172</sup> To date, no Supreme Court decision has endorsed it.<sup>173</sup>

*B. Controversy Regarding the Relationship (If Any) Between the Confession Doctrine and the Fifth Amendment Right*

There has been considerable controversy among commentators as to whether the confession doctrine and the Fifth Amendment right against self-accusation were linked. As I discuss below, the Justices in the *Bram* majority

170. See LANGBEIN, *supra* note 63, at 183 (noting that “mundane property crimes . . . comprised the bulk of the court’s caseload”). The “fruits” rule announced in *Warickshall* may have been part of a broader move by English judges to facilitate criminal prosecution. The English courts also began the process of relaxing the standards for warrantless arrests by peace officers at about the same time. See, e.g., *Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B. 1780), *discussed in* Davies, *supra* note 3, at 634-35.

171. English courts continued to enforce the ban against official compulsion of production of self-accusing physical evidence even after the announcement of the *Warickshall* fruits rule. See, e.g., *Chetwind v. Marnell*, 1 Bos. & Pul. 271, 272, 126 Eng. Rep. 900, 900 (C.P. 1798); *Queen v. Granatelli*, 7 Rep. State Trials 979, 986 (C.C.C. 1849).

172. See *Bram v. United States*, 168 U.S. 532, 534-69 (1897).

173. Justice O’Connor, writing only for herself, has asserted that physical fruits discovered through a statement obtained in violation of *Miranda* need not be excluded from evidence. *New York v. Quarles*, 467 U.S. 649, 665-74 (1984) (O’Connor, J., concurring in part and dissenting in part). O’Connor based that conclusion largely upon the “nontestimonial” character of physical evidence, per the analysis in *Fisher v. United States*, 425 U.S. 391, 408 (1976), and *Schmerber v. California*, 384 U.S. 757, 761, 765 (1966). See *Quarles*, 467 U.S. at 665-68. However, she also cited the *Warickshall* fruits rule and suggested that “[t]he learning” reflected in that and other decisions from foreign countries should be accorded importance “in establishing the scope of the *Miranda* exclusionary rule today.” *Id.* at 673.

assumed they were. However, Dean Wigmore criticized that assumption and insisted that the two doctrines were entirely distinct, both historically and analytically.<sup>174</sup> In addition, he insisted that only the confession rule, but not the Fifth Amendment right, should apply to police interrogation because, in his view, the Fifth Amendment applied only to formal forms of legal compulsion involving the sanction of contempt of court. Thus, Wigmore insisted that the only criterion for assessing the admissibility of statements made during police interrogation, or the admissibility of derivative fruits of such statements, should be the reliability of the confession or fruits.<sup>175</sup> Subsequent commentators have suggested that the two doctrines are not entirely distinct insofar as the concerns they address overlap substantially<sup>176</sup> and have also noted that when courts assessed the admissibility of statements made to police, they often looked as much to voluntariness as to reliability.<sup>177</sup>

As I explain below, my own view is that the two doctrines are historically distinct because they are analytically distinct—but in a different way than Wigmore suggested. Specifically, I think that the right against self-accusation was understood to restrict governmental interrogation while the confession doctrine was applied to assess statements obtained by nongovernmental questioning. Moreover, I think that the doctrines are distinct historically because the reliability-based confession doctrine announced in *Warickshall* was imported into American law too late to have exerted any influence on the framing of the Fifth Amendment. Let me begin with this latter point.

### C. The Framers' Unfamiliarity with the *Warickshall* Confession Doctrine

Although the 1897 *Bram* decision would later assert that the “generic language of the [Fifth] Amendment was but a crystallization of the doctrine as

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174. See Herman (pt. 1), *supra* note 12, at 170-80 (summarizing Wigmore's position).

175. *Id.*; see also Penny, *supra* note 12, at 332 n.124.

176. See, e.g., Herman (pts. 1 & 2), *supra* note 12. Herman concluded that the right against self-incrimination and the confession rule addressed the same concerns and were interlinked historically, except for instances involving “confession induced by ‘benign,’ kept promises,” (as opposed to ones induced by false promises or legal sanctions, threats, or force) and instances of confessions “induced by private action”—instances to which only a reliability criterion rather than a voluntariness criterion applied. See Herman (pt. 1), *supra* note 12, at 194.

177. See, e.g., Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 451-57 (1938).

The issue of whether the principal criterion for admissibility should be voluntariness or reliability is particularly important for assessing the admissibility of derivative “fruits” of confessions because “fruits” can be reliable, even if the confession by which they are discovered was involuntary. Compare Amar & Lettow, *supra* note 116 (advocating a reliability criterion for applying even the Fifth Amendment right), with Kamisar, *supra* note 135 (advocating a voluntariness criterion). See also *supra* note 169.

to confessions<sup>178</sup>—that is, the doctrine announced regarding admissibility of confessions in *Warickshall*<sup>179</sup>—that statement had no historical basis. Indeed, it seems improbable that the Framers of the Fifth Amendment had even heard of the reliability-based evidentiary rule banning induced confessions, or the related rule regarding the admissibility of the fruits of such confessions, when that text was adopted.

Madison proposed what became the Fifth Amendment in a speech to the House of Representatives on June 8, 1789,<sup>180</sup> and the only modification to his proposed language for the Self-Incrimination Clause was made on August 17, 1789.<sup>181</sup> Although one recent commentary that advocated admitting the fruits of governmentally coerced statements has somewhat artfully described *Warickshall* as “the leading English case [regarding admissibility of physical fruits of a coerced confession] when the U.S. Bill of Rights was adopted in 1791,”<sup>182</sup> that statement is misleading: the plain fact is that no case report of the 1783 *Warickshall* ruling was published until the 1789 London publication of Leach’s Reports.<sup>183</sup> Hence, it is highly unlikely the Framers were aware of the novel content of that case report when the text of the Fifth Amendment was framed.

Although the induced confession doctrine itself—but not the related rule regarding admissibility of fruits—seems to have been alluded to in a brief passage Blackstone added to his *Commentaries* by the 1782 London edition of

178. *Bram v. United States*, 168 U.S. 532, 543 (1897).

179. See discussion *supra* Subpart V.A.

180. Amendments Offered in Congress by Madison, June 8, 1789, reprinted in DUMBAULD, *supra* note 124, at 207.

181. See *supra* note 139.

182. Amar & Lettow, *supra* note 116, at 916-17.

183. Although the decision in *Warickshall* was rendered in 1783, the opinion was not published until the publication of Leach’s Crown Cases Reports in 1789. See BRIDGMAN, *supra* note 67, at 190; see also LANGBEIN, *supra* note 63, at 218.

It is also quite unlikely the Framers were familiar with the passing reference to the confession doctrine that Lord Mansfield had made during the 1775 *Rudd* case, discussed *supra* note 155. Leach’s report of that decision, like that of *Warickshall*, was not published until 1789.

The passing reference in *Rudd* to the confession doctrine had also appeared in the other nearly identical report of *Rudd* in Cowper’s Reports. See *supra* note 155. The first edition of those reports had been published in London in 1783. See BRIDGMAN, *supra* note 67, at 86. However, it does not appear that many copies of the 1783 edition of Cowper’s Reports were imported into America. The library staff of the University of Tennessee College of Law found, using the Worldcat listing of academic and public library holdings of the Online Computer Libraries Center ([www.oclc.com](http://www.oclc.com)), that there are only 13 copies of the 1783 edition of Cowper’s Reports in participating libraries in the United States. By comparison, there are 31 copies of the 1789 edition of Leach’s Reports.

Like Leach’s report of *Rudd*, Cowper’s report of that case does not say anything regarding the reliability rationale for excluding induced confessions or the fruits rule subsequently announced in *Warickshall* itself.

that work,<sup>184</sup> that allusion did not appear in any American edition of the *Commentaries* prior to 1790.<sup>185</sup> In addition, there does not appear to have been any mention of the induced confession rule or the related fruits rule in the discussions of confessions that appeared in the various justice of the peace manuals published in America prior to the framing of the Fifth Amendment.<sup>186</sup> Rather, the first publication of the induced confession doctrine and the fruits rule announced in *Warickshall* appears to have been a brief editor's note which Thomas Leach inserted in the 1787 sixth London edition of Hawkins' *Pleas of the Crown*.<sup>187</sup> However, it appears that the large majority of the copies of that work that were imported by Americans were of a 1788 Dublin reprinting.<sup>188</sup> Given that the Framers were

184. See *supra* note 164. I have not determined in which of the London editions subsequent to the first edition that allusion first appeared.

185. The four volumes of Blackstone's *Commentaries* were reprinted in America in 1771-1772, but that edition did not contain the allusion to the induced confession rule. See 4 BLACKSTONE, *supra* note 67, at 350-51 (reprinted by Robert Bell, Philadelphia, 1772) (preserving pagination of the original London edition) (available in the microfiche collection Early American Imprints, First Series, No. 12327). The *Commentaries* were not reprinted again in America again until 1790. See 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS: ENGLISH LAW TO 1800, at 27, 29 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955). The passage alluding to the induced confession rule does appear in the 1790 American edition. See 4 BLACKSTONE, *supra* note 67, 357 (reprinted by Isaiah Thomas, Worcester, Massachusetts, 1790) (preserving the pagination of the ninth 1782 London edition) (available in Early American Imprints, *supra*, No. 22365). The pagination of the latter uses the same "star" pagination as do the various other post-1782 editions of the *Commentaries*, as discussed *supra* note 67.

186. Perhaps the most widely available legal texts in framing-era America were justice of the peace manuals which contained entries for a variety of legal concepts and standards. These manuals were typically aimed at a particular colony or state or region, but they often drew heavily on one of several prominent English manuals. For a listing of such manuals, see Davies, *supra* note 1, at 278 n.121, 280 n.122. Although these manuals often contained entries for "confession" or discussed confessions under entries for "evidence" or "criminals," I have not located any mention of the induced confession rule or of the related fruits rule in the manuals published in America prior to 1789.

187. An editor's note regarding the two doctrines pertaining to confessions was inserted in Leach's 1787 edition of Hawkins' *Pleas of the Crown*. 2 Hawkins, *supra* note 166, at 604 n.2. The portion of the editor's note dealing with the admissibility of a *confession* as evidence is set out *supra* note 166. The portion of the editor's note dealing with the admissibility of *physical evidence discovered because of a confession* is set out *supra* note 169.

188. Although comprehensive data is unavailable, there is a data source that strongly suggests that the large majority of the copies of Leach's edition of Hawkins that were imported into the United States were of the 1788 printing. The library staff of the University of Tennessee College of Law Library found, using the Worldcat listing of academic and public library holdings of the Online Computer Libraries Center ([www.oclc.com](http://www.oclc.com)), that there are 49 entries for the 1788 Dublin printing of WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN in participating libraries in the United States but only 8 listings for the 1787 printing (one being the Supreme Court Library). Thus, assuming that most of these works were

occupied with other pressing matters during the ratification debates of 1788 and the formation of the new government in 1789, and do not appear to have been actively involved in practicing criminal law during that period, it is highly improbable that they had become familiar with the contents of Leach's note prior to the formulation of the Fifth Amendment in mid-1789. Of course, it does not appear that the framers of the initial set of state constitutional protections of the right against self-accusation that had been adopted between 1776 and 1784 could have had any familiarity with either the induced confession rule or the fruits rule.<sup>189</sup>

Moreover, even if the Framers of the Fifth Amendment could have learned of the confession doctrine and its related "fruits" doctrine, there is no reason to think that they would have regarded those doctrines as having any bearing on the constitutional right articulated in the Fifth Amendment. As in framing-era England, investigation of crime in the American states was conducted by the victim-complainant rather than by a government peace officer. Thus, out-of-court confessions were obtained by the victim-complainant or other private persons acting on his behalf—not by the government.<sup>190</sup> As a result, the English legal texts did not equate the confession doctrine applying to privately obtained confessions with the right against officially compelled self-incrimination,<sup>191</sup> and the confession doctrine was presented as applying to privately obtained confessions when it initially appeared in American legal publications.<sup>192</sup>

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acquired from sources in the United States, it would appear that relatively few of the 1787 printings were imported.

189. For the state provisions, see *supra* note 62.

190. For example, see *Commonwealth v. Dillon*, 4 U.S. (4 Dall.) 116 (Pa. 1792), in which a boy who was arrested for arson made no confession when initially examined by the mayor (who would have been a magistrate) but was subsequently induced to confess by "several respectable citizens" who held out hope of leniency and by "[t]he inspectors of the prison" who threatened him with dire conditions. *Id.* at 116. The boy then repeated his confession before the mayor. *Id.* At trial, the boy's counsel invoked the confession doctrine in arguing that the induced confession should be inadmissible. *Id.* at 117. In response, the attorney for the prosecution argued that "[n]o public officer has improperly attempted to excite fear, or hope." *Id.* Although the trial judge commented that "[t]he interference of the inspectors of the prison was certainly irregular," he concluded that the confession was admissible and that the jury should decide the issue. *Id.* at 117-18.

191. Note, for example, that when Blackstone added an allusion to the inadmissible confession rule applicable to felony trials, he did so in the context of his discussion of the evidentiary standard for trials, not in the context of either of his references to the right against compelled self-incrimination. Compare 4 BLACKSTONE, *supra* note 67, at \*357 (9th ed. 1782) (discussing the admission of confessions at trial, set out *supra* note 164), with 4 *id.* at \*296 (discussing the right against self-accusation, set out *supra* text accompanying note 80).

192. See HENING, *supra* note 88, at 138 (referring to the note on the *Warickshall* confession doctrine in Leach's 1787 edition of HAWKINS, set out *supra* note 166, as relating to "the case of a private confession"). It is also noteworthy that Hening explicitly called

Thus, even if the Framers had been aware of the confession doctrine, there is no reason to think they would have conflated the confession doctrine that addressed privately obtained confessions with the Fifth Amendment right that restricted governmental interrogations.<sup>193</sup> Indeed, those among the Framers with legal training would have recognized that the novel *Warickshall* rule permitting admission of “fruits” located by means of induced and inadmissible privately obtained confessions contrasted with the settled ban against officially compelled production of self-incriminating evidence.<sup>194</sup> Likewise, it is doubtful they would have perceived that private inducement of confessions posed the same spectre of oppression as governmental compulsion.

It appears that the distinction between private questioning and governmental interrogation was understood by American courts in the immediate post-framing period. In fact, one of the earliest state decisions importing the English confession doctrine distinguished it from instances in which a confession was “illegally” obtained by the government.<sup>195</sup> However, some confusion of the two doctrines was evident by mid-century.<sup>196</sup>

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attention only to the ban against admitting induced confessions but not to the rule permitting the admission of “fruits” of such a confession. Henning stated only, “In the case of a private confession, it seems now to be the most modern opinion, that it should be received with great caution; and it is said, that if it be made either thro’ the flattery of hope, or the impressions of fear, it is not admissible.” See HENING, *supra* note 88, at 138 (citing 2 HAWKINS, *supra* note 166, at 604 nn.1-2, and 4 BLACKSTONE, *supra* note 67, at \*357 (9th ed. 1782)).

193. See LANGBEIN, *supra* note 63, at 11-12 (noting that even in “cases of felony,” “[t]he victim of the crime commonly served as the prosecutor” in English practice as late as 1820).

194. See *supra* notes 104-06, 171 and accompanying text.

195. One of the earliest reported American decisions to import the *Warickshall* “induced” confession rule was the 1830 Massachusetts decision *Commonwealth v. Knapp*, 26 Mass. (9 Pick.) 495. That decision noted the distinction between the confessions admissibility rule and the ban against official compulsion:

In determining this question [of the admissibility of the confession], it is proper to take into view the reason on which confessions so drawn out are excluded. It is not because of any breach of good faith in admitting them, nor because they are extorted illegally, (though there may be cases in which this would exclude them, as where a magistrate puts the accused upon his oath,) but the reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced, by the hope of advantage or fear of injury, to state things which are not true.

*Id.* at 503.

Commentary has identified the 1804 Massachusetts decision *Commonwealth v. Chabcock*, 1 Mass. \*144, as the earliest American decision applying the induced confession rule announced in *Warickshall*. See Herman (pt. 1), *supra* note 12, at 166 (identifying *Chabcock* as “the first American case . . . holding inadmissible a confession that had been induced by the victim’s ‘promise of favor’”).

196. For example, the 1857 New York decision in *People v. McMahon*, 15 N.Y. 384, 390, mixed together the *nemo tenetur prodere se ipsum* maxim typically associated with the right against self-incrimination and the confession doctrine. See Benner, *supra* note 12, at 99-100.

## VI. THE APPLICATION OF THE CONFESSION DOCTRINE TO POLICE INTERROGATION

As noted previously, at the time of the framing, there were no professional peace officers and there was no legal authority for the amateur peace officers of that period to interrogate suspects or arrestees.<sup>197</sup> In addition, the purpose of the criminal procedure protections in the Fourth and Fifth Amendments was to prevent legislative relaxation of common law accusatory criminal procedural standards.<sup>198</sup> Thus, if Congress or a state legislature actually had enacted legislation to replace the magistrate's post-arrest "examination" with police interrogation of suspects or arrestees, it seems likely that such a statute would have prompted a constitutional challenge based on the federal or state constitutional right against self-incrimination. Although judicial examination probably constituted a recognized exception to the right against self-accusation in 1789, though there is some question on that point, no similar exception allowed interrogation by peace officers.<sup>199</sup>

However, police interrogation was not initiated by legislation; indeed, *it was never formally authorized in any fashion*. Rather, the opportunity for police interrogation was created during the mid-to late nineteenth century as American courts departed from rigorous accusatory criminal procedure, and police agencies simply exploited that opportunity. As I have discussed in some detail in a previous article, English courts substantially relaxed the legal standard for a warrantless arrest by a peace officer when they began to recognize "probable cause" alone as the standard for such arrests in 1827, and American state courts followed that example during the mid-1800s<sup>200</sup>—usually without any admission by the judges that they were relaxing prior common-law arrest standards.<sup>201</sup> It appears that the relaxation of the warrantless arrest standard was the seminal doctrinal event that opened the way for the creation of modern investigatory criminal procedure and modern criminal justice institutions.

Although detailed studies of this transformation of police practices are lacking, the effects of the relaxed arrest standard seem fairly apparent. The relaxed arrest standard reduced the potential for lawful resistance to police warrantless arrests as well as the potential for successful trespass suits for false arrest regarding such arrests. As a result, police no longer saw a need for the protections afforded by arrest warrants. Thus, warrantless arrests became the norm and searches incident to arrest became a more prominent aspect of police work. In addition, the disuse of arrest warrants meant that the peace officer ceased to be merely the subordinate ministerial officer of the justice of the peace with the primary duty of executing warrants and instead became a member of

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197. See *supra* note 91 and accompanying text.

198. See Davies, *supra* note 1, at 403-18.

199. See Davies, *supra* note 3, at 749 n.574.

200. See *id.* at 627-39.

201. See *id.* at 637 nn.243-44.

an executive branch police department that developed its own definition and culture of police work.<sup>202</sup>

In addition, because the probable cause standard allowed a police officer to arrest on the basis of his own assessment of the circumstances, a prior complaint was no longer needed for a lawful arrest. Moreover, because public prosecutor agencies developed separately from police departments, a distinction developed between a police arrest and the filing of a formal accusation by the public prosecutor.<sup>203</sup> The separation of arrest from formal accusation, in turn, allowed for a substantial delay to occur between arrest and the beginning of formal prosecution, and that delay created a novel opportunity for police officers to engage in post-arrest interrogation and investigation. In effect, these changes meant that police could arrest suspects on the basis of relatively little information and then interrogate them to obtain a confession or leads regarding other evidence such as physical fruits.<sup>204</sup> If the interrogation was successful, the police then had probable cause when the case was presented to a prosecutor or judge; if not, they could simply release the arrestee without fear of adverse legal consequences.<sup>205</sup> In contrast, a framing-era complainant had to be confident of the evidence prior to arrest because complainants had little discretion to drop the prosecution without trial and were exposed to trespass liability if there was an acquittal at trial.<sup>206</sup>

202. *See id.* at 638-39.

203. In contrast to modern doctrine, it appears that arrest was understood as the first aspect of a “prosecution” in framing-era doctrine. *See supra* note 126.

204. Of course, it is precisely the delay that can occur between arrest and formal prosecution that still gives rise to the potential for abusive police interrogation. In modern doctrine, once formal proceedings are initiated, the right to counsel under the Sixth Amendment comes into play. *See supra* note 126. However, between the time when the police take a suspect into custody and the time at which formal proceedings commence, only the Fifth Amendment or Fourteenth Amendment Due Process Clause apply to police interrogation. Thus, the standards developed under those provisions, which I discuss below, and the exclusionary rules by which those standards are enforced are now the only legal restraints on informal police post-arrest interrogation.

205. The Supreme Court did not require the exclusion of confessions obtained as a result of illegal arrests until *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). As a result, the development of the police practice of taking persons into custody for purposes of interrogation—even in the absence of probable cause—went unhindered for many years because the Supreme Court had failed to apply the “fruit of the poisonous tree” doctrine to exclude statements obtained as a result of illegal (less than probable cause) arrests.

206. During the framing era, when the victim-complainant and his witnesses took the arrestee to a justice of the peace for examination, the complainant and his witnesses were “bound over” to appear at trial to prosecute. *See LANGBEIN, supra* note 63, at 42. That binding over “effectively stripped the victim of his discretion not to prosecute.” *Id.* A complainant who initiated an arrest but failed to prove at trial that the alleged crime actually had occurred was liable for trespass damages for an unlawful arrest. *See, e.g., Samuel v. Payne*, 1 Doug. 359, 359-60, 99 Eng. Rep. 230, 230-31 (K.B. 1780), *discussed in Davies, supra* note 3, at 634-35. In American law at the time of the framing, the complainant who

Meanwhile, as arrest warrants fell into disuse the role of the justice of the peace shrunk and the framing-era post-arrest “examination” of the arrestee by a magistrate withered away and was reduced, instead, to the modern probable cause hearing.<sup>207</sup> However, the crucial point for present purposes is that the police practice of taking suspects into custody for interrogation rather than upon a prior formal charge of crime, a practice that approaches an inquisitorial procedure, was entirely a post-framing, informal development; framing-era law did not permit any similar opportunity for precharge interrogation by any government officials, including peace officers.<sup>208</sup>

Although it may seem that the emergence of police interrogation would have called attention to the constitutional right against self-incrimination, it does not appear that there was any immediate judicial recognition of the governmental character of such interrogation. Indeed, during the framing era, acts by officers that exceeded the authority of their office were regarded as only personal wrongs, not as a form of government illegality or unconstitutionality, and that conception persisted into the late nineteenth century.<sup>209</sup> Thus, even if nineteenth-century courts might have doubted the propriety of police interrogation, it is unlikely that they would have perceived such interrogation as constituting a government action that raised a constitutional issue.<sup>210</sup> Hence, even if they recognized that informal police interrogation could involve “compulsion,” they likely would not have conceived of it as an instance of *governmental* “compulsion” comparable to those to which the right against self-accusation had previously been applied.<sup>211</sup>

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initiated a warrantless arrest and anyone who assisted, including a peace officer, were liable for the trespass if the arrest was unlawful. *See* Davies, *supra* note 3, at 633-36 (noting that the English rule adopted in *Samuel*, which provided immunity from trespass liability for an officer who arrested on the basis of a charge of felony made by another, was not imported into American cases until the 1820s).

207. Under current doctrine, police must present a warrantless arrest to a judicial officer, for example, a magistrate, for the magistrate’s “prompt” post-arrest determination that there was probable cause to justify the arrest. *See* Gerstein v. Pugh, 420 U.S. 103, 120, 124-25 (1975). Note, however, that the Supreme Court has ruled that the “promptness” requirement is met provided that the probable cause hearing occurs within forty-eight hours of the warrantless arrest, absent “a bona fide emergency or other extraordinary circumstance.” *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). In effect, this decision allows the police two days to develop probable cause *after* the arrest.

208. *See supra* note 90 and accompanying text.

209. *See* Davies, *supra* note 3, at 660-67.

210. *See, e.g.,* *Commonwealth v. Dillon*, 4 U.S. (4 Dall.) 116, 117 (Pa. 1792) (noting the “irregular[ity]” of the involvement of “inspectors of the prison” in obtaining a confession), *discussed supra* note 190.

211. There is no reason to think that, during the framing era, the verb “compel” and the noun “compulsion” were understood to apply only to instances of official actions. *See, e.g.,* JOHNSON’S DICTIONARY, *supra* note 82. Definitions of “COMPEL” include “1. To force some act; to oblige; to constrain; to necessitate; to urge irresistibly” and “2. To take by force or

Perhaps because the governmental character of informal police interrogation was unclear, during the nineteenth century American state courts assessed confessions obtained by the police according to the same evidentiary confession rules that previously had been applied to privately obtained, out-of-court confessions; however, state courts did not attempt to apply the federal or state constitutional provisions regarding the right against self-accusation to such interrogation.<sup>212</sup> Similarly, when federal criminal appeals were created in the 1880s, the federal Supreme Court initially assessed the admissibility of confessions obtained by police officers solely under a somewhat weakened version of the private confession doctrine without so much as mentioning the

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violence; to ravish from; to seize.” Definitions of “COMPULSION” include “1. The act of compelling to something; force; violence of the agents” and “2. The state of being compelled; violence suffered.” *Id.* Thus, the fact that courts initially did not perceive the application of the Fifth Amendment right to police interrogation cannot be traced to the meaning of “compel” or “compulsion.” Rather, it appears that the courts did not perceive such informal police compulsion as governmental conduct. *See supra* notes 190, 209-10 and accompanying text.

Indeed, the difference between the current and framing-era perceptions of governmental conduct has a deeper root: current doctrine tends to assume that an officer acts with government authority as long as his act is not prohibited by a legal authority; however, the framing-era conception was that an officer acted unlawfully, and thus not as the government, unless there was affirmative legal authority for his conduct. *See Davies, supra* note 3, at 737 n.543.

212. One study has reported that the early American state cases that excluded confessions all applied the confession doctrine rather than the constitutional right against self-accusation but noted that the cases primarily involved either confessions obtained by private persons or inducement by promises, rather than government coercion or compulsion. Thus, they did not appear to be cases to which the constitutional right against compelled self-accusation would have applied.

Through 1850, American courts excluded confessions in twenty-four reported cases.

In none of these cases was *nemo tenetur* [i.e., the constitutional right against self-accusation] said to be the basis for the exclusion. However, in thirteen of the cases, threats or unkept promises were made by nongovernmental actors to whom *nemo* is inapplicable. . . . In three cases, the report does not disclose whether the confession was induced by a governmental or nongovernmental actor. In the remaining eight cases, the confession was induced by a governmental actor. In two of these cases, however, the report does not disclose whether a benign promise was kept. Four of the remaining cases of governmental action involve unkept promises. . . .

Of the twenty-four cases through 1850 in which American courts held confessions inadmissible, in none was the confession obtained by governmental force and in only two were the confessions obtained by threat.

Herman (pt. 1), *supra* note 12, at 204-06 (footnotes omitted). Professor Herman concluded, “The cases of exclusion of confessions in England and America [from 1800] through 1850 are dominated by situations in which the *nemo* protection [that is, the right against self-incrimination] does not apply (nongovernmental inducement) or in which the protection does not *obviously* apply (promises, whether kept or unkept).” *Id.* at 207.

Fifth Amendment right.<sup>213</sup>

*A. The Application of the Fifth Amendment Right  
to a Police-Obtained Confession in Bram*

By the late 1890s, however, the Supreme Court was moving toward recognizing that misconduct by ordinary government officials might constitute government illegality and a violation of constitutional standards.<sup>214</sup> In addition, the Justices of the Supreme Court probably had been sensitized to the Fifth Amendment right by a contentious 1896 decision regarding the constitutionality of a federal immunity statute.<sup>215</sup> Thus, when the Court was confronted with a federal court murder conviction based largely upon a confession obtained by police under coercive circumstances in *Bram v. United States* in 1897, the Court finally applied the Fifth Amendment right to evaluate the constitutionality of admitting a statement obtained in a police interrogation.<sup>216</sup>

However, *Bram* did not construe how the Fifth Amendment right should apply to police interrogation so much as simply conflate the constitutional right with the evidentiary confession doctrine that had arisen in the context of privately obtained confessions. Instead of asking whether the governmental conduct involved in police interrogation should be prohibited, restricted, or conditioned by the Fifth Amendment right in some fashion, the *Bram* majority opined that the evidentiary confession doctrine constituted the content of the Fifth Amendment right.<sup>217</sup> Specifically, Justice White wrote that

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213. See, e.g., *Wilson v. United States*, 162 U.S. 613 (1896); *Pierce v. United States*, 160 U.S. 355 (1896); *Sparf v. United States*, 156 U.S. 51 (1895); *Hopt v. Utah*, 110 U.S. 574 (1884). It has been noted that these cases, which all upheld the admissibility of the confessions at issue, reflected “the Court’s great reluctance to reject statements made under questionable circumstances . . . .” OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 23-24 (1973).

214. By the 1890s, the Court had begun to recognize that conduct by state officials that deprived persons of due process of law constituted state action (that is, governmental action) for purposes of applying the Fourteenth Amendment. See, e.g., *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233 (1897) (stating “that the prohibitions of the [Fourteenth A]mendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities”); *Scott v. McNeal*, 154 U.S. 34, 45 (1894) (stating that the “prohibitions [of the Fourteenth Amendment Due Process Clause] extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities”). It seems likely that this broadened conception of the application of constitutional protections also affected the Justices’ view of the applicability of the Bill of Rights to federal courts and officers. See also Davies, *supra* note 3, at 666-67.

215. See *Brown v. Walker*, 161 U.S. 591 (1896). *Brown* and the other Supreme Court rulings regarding the federal statutes that have addressed compelling testimony under grants of immunity are discussed *supra* note 34.

216. 168 U.S. 532, 534-69 (1897).

217. *Id.* at 542-48.

the generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the Amendment itself.<sup>218</sup>

That, of course, was erroneous history. The *Bram* majority apparently made no attempt at all to identify what understanding the Framers actually had regarding the content of the Fifth Amendment right, but rather assumed that there had been a single, continuous common-law understanding regarding confessions.<sup>219</sup>

Interestingly, White's majority opinion in *Bram* recited that some mid-nineteenth-century English decisions had leaned toward treating the fact that a

218. *Id.* at 543. The complete conflation of the two standards is also evident in this passage:

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text books.

*Id.* at 542. Justice White then quoted a rendition of the confession doctrine from 3 RUSSELL ON CRIMES, *supra* note 160, at 478, an English treatise. *Id.*

219. Curiously, although Justice White's opinion for the *Bram* majority cited a number of English cases that anticipated or applied the confession doctrine espoused in *Warickshall*, including *Rudd* (discussed *supra* note 155), he did not cite *Warickshall* itself.

In citing several English cases decided prior to the framing of the Fifth Amendment in 1789—*e.g.*, *Bram*, 168 U.S. at 551-52, citing "*Rex v. Thompson*, (1783) 1 Leach, (4th ed.) 291" and "*Cass' case*, (1784) 1 Leach, 293"—White completely ignored the date of the publication of the relevant case reporter and the unavailability of those decisions to the Framers. As noted above, the first volume of Leach's Criminal Reports was not published until 1789, so the Framers of the Fifth Amendment had no access to the cases reported in the first volume of Leach's Reports. *See supra* note 183. Indeed, White even freely intermixed cases decided *after* the framing of the Fifth Amendment with those that predated it—see, for example, *Bram*, 168 U.S. at 547, citing "*Lambe's case*, (1791) 2 Leach, (4th ed.) 552."

Thus, it appears that White and the other justices in the majority were so confident of the historically false notion of a continuous common law doctrine regarding confessions that they never bothered to inquire whether the Framers actually even had access to the doctrine they equated with the Fifth Amendment right. The absence of any critical historical inquiry is evident in the following statement by White:

The well settled nature of the rule [regarding confessions] in England at the time of the adoption of the Constitution and of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of [the Fifth] Amendment. *Bram*, 168 U.S. at 548.

confession had been obtained through a police interrogation as making the confession so unreliable as to be per se inadmissible, noted that some decisions had concluded that the fact that a police officer had interrogated the defendant “may be an important element in determining whether the answers of the prisoner were voluntary,” and also noted that some decisions had expressed a view of interrogation by police officers as “unfair to the prisoner and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself.”<sup>220</sup> Likewise, White quoted an 1879 Texas statute that set conditions on the admission of confessions obtained by police.<sup>221</sup> Nevertheless, the *Bram* majority did not pursue the possibility of directly restricting or regulating police interrogation practices.<sup>222</sup>

Instead, the *Bram* majority simply endorsed a rigorous formulation of the confession doctrine under which a confession obtained by police was unreliable and inadmissible if it had been obtained by any degree of inducement by promises or threats;<sup>223</sup> put another way, a confession obtained by police was

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220. *Bram*, 168 U.S. at 556-57. Interestingly, by the time *Bram* was decided, the English courts were beginning to limit the stringent absence of any inducement standard for admitting confessions, which had been developed regarding privately obtained confessions in *Warickshall*, to inducements made by persons “in authority,” such as magistrates or police officers. *Id.* at 556, 559.

221. As recited by White, the statute provided that a confession shall not be admitted against a prisoner at his trial

if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offence was committed.

*Id.* at 558 (quoting TEX. REV. CIV. STAT. art. 750 (1879)).

222. The constrained treatment of the Fifth Amendment right in *Bram* may have reflected the unusual circumstances in that decision, in which the confession that related to murders on an American ship at sea, and thus related to a federal criminal charge, had been obtained by a Canadian police officer. *Id.* at 537 (noting that the police interrogation was conducted by a local officer in Halifax, Nova Scotia). In that context, there were no grounds for the Court to have asserted any legal authority to regulate the conduct of the foreign police officer; rather, its authority reached only the admissibility of the statement in the federal criminal trial.

223. *Id.* at 548 (“[T]he true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.” (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896))). The *Bram* Court also cited with approval the following statement of the confession doctrine in a legal treatise:

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat

admissible only if it was “purely voluntary.”<sup>224</sup> However, notwithstanding the rigor of the inducement standard as stated, that standard looked primarily to what an officer had said to a suspect being interrogated rather than to the coercive atmosphere or circumstances that could attend police interrogation. For example, police interrogation could involve new coercive conditions, such as prolonged incommunicado interrogation, that had not occurred in connection with privately obtained confessions.

Although the *Bram* majority did mention the coercive conditions in which Bram had been interrogated—that he had been stripped and was alone with the officer in a foreign land when interrogated<sup>225</sup>—it did not attempt to spell out any rules regarding such conditions. This omission was important because prior decisions of the Court had downplayed the importance of factors such as the suspect being in custody and manacled at the time of the confession and the fact that the suspect had not been warned of the consequences of speaking.<sup>226</sup> Thus, *Bram*’s “inducement” standard did not go very far in regulating the conditions of police interrogation.

As it turned out, however, the statement of the standard in *Bram* was of little consequence because the application of the Fifth Amendment right to the admissibility of police confessions in that case turned out to be an aberration. Perhaps because the Court’s conflation of the Fifth Amendment right and the confession doctrine was criticized as historically incorrect in Wigmore’s leading commentary on evidence law,<sup>227</sup> the Court backed away from the explicit application of the Fifth Amendment right to confessions obtained by police interrogation in subsequent federal cases and instead looked to notions of “decency and fair play” and “fair trial.” Hence, *Bram* did not become a significant precedent.<sup>228</sup>

The bottom line is that, because police interrogation had developed

or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

*Id.* at 542-43 (quoting 3 RUSSELL ON CRIMES, *supra* note 160, at 478). The *Bram* Court also quoted content similar to that of the note on the admissibility of confessions that Thomas Leach inserted into the 1787 edition of Hawkins’ *Pleas of the Crown*, discussed *supra* note 166. See *Bram*, 168 U.S. at 547.

224. *Id.* at 562 (“[Bram’s situation], and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that [Bram’s] reply to the detective could have been the result of a purely voluntary mental action . . .”).

225. *Id.* at 563. These factors received comparatively little attention in Justice White’s assessment of the admissibility of Bram’s confession; most of his discussion went to the effects of the words the detective had spoken to Bram. See *id.* at 561-65.

226. See, e.g., *Wilson*, 162 U.S. at 623.

227. See *supra* notes 174-75 and accompanying text.

228. See STEPHENS, *supra* note 213, at 25-30 (commenting on the likely effect of Dean Wigmore’s historical criticism of *Bram*, as described *supra* text accompanying notes 174-75, and discussing post-*Bram* confessions decisions).

informally, the Court never asked the hard question implied by the original Fifth Amendment right—whether police interrogation of suspects, as opposed to judicial examination of arrestees, was a constitutionally acceptable governmental practice. Rather, because police interrogation was already an established practice by the time the Court addressed it in *Bram*, the Court converted the Fifth Amendment right from a restriction of governmental pretrial interrogation into merely an assessment of the admissibility of incriminating statements that the government had obtained during such interrogation.

*B. The Application of the Fourteenth Amendment  
Due Process Clause to Police Interrogation*

In 1943, the Supreme Court changed tack regarding confessions obtained by federal officers for use in federal courts, and ruled, in *McNabb v. United States*, using its supervisory power rather than a constitutional basis, that confessions would be inadmissible if officers did not promptly take arrestees before a federal magistrate.<sup>229</sup> In other words, the Court undertook to limit the opportunity for police interrogation that had developed between arrest and judicial proceedings.<sup>230</sup>

Probably as a result of this supervisory rule, the confessions cases that the Court heard during the middle of the twentieth century involved state rather than federal proceedings. Although the Fourteenth Amendment Due Process Clause had presented a potential basis for applying the right against compelled self-incrimination to interrogation by state or local police, the Supreme Court had evaded that possibility by adhering to the view that only the most “fundamental” procedural standards regarding criminal procedure were aspects of the due process requirement of the Fourteenth Amendment.<sup>231</sup> Thus, in 1908 the Court ruled in *Twining v. New Jersey*<sup>232</sup> that the Fifth Amendment right against self-incrimination itself was not sufficiently “fundamental” to be applied

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229. 318 U.S. 332 (1943). The implications of *McNabb* were bolstered when the Court subsequently concluded in *Mallory v. United States*, 354 U.S. 449 (1957), that a suspect “is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.” *Id.* at 454. The *Mallory* Court also stated that, although a brief delay between arrest and formal charge might be permissible to quickly check a story volunteered by the arrestee, “the delay must not be of a nature to give opportunity for the extraction of a confession.” *Mallory*, 354 U.S. at 455.

However, the so-called *McNabb-Mallory* rule was seriously undercut by legislation enacted in 1968. See Benner, *supra* note 12, at 112. In addition, the Supreme Court has recently approved of as much as a forty-eight-hour delay between arrest and a probable cause hearing. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). Thus, the police again have ample opportunity to conduct post-arrest interrogation.

230. See *supra* text accompanying notes 203-05.

231. See Davies, *supra* note 1, at 414 n.582, 432 n.641.

232. 211 U.S. 78 (1908).

to the states through the Fourteenth Amendment's Due Process Clause.<sup>233</sup> As a result, only the Fourteenth Amendment due process standard itself was available as a federal constitutional standard for assessing the admissibility of confessions in state proceedings.

Beginning in the 1930s, the Court invoked the due process requirement to overturn convictions that involved confessions obtained by outright police brutality as well as other egregious procedural failings.<sup>234</sup> However, because the due process standard had been interpreted to impose only a minimalist procedural standard on state proceedings,<sup>235</sup> and because state courts were no longer applying the rigorous inducement standard of the earlier confession doctrine, the Court during the 1940s upheld the admissibility of police-obtained confessions in circumstances that involved inducements, threats, or coercion that went far beyond the boundaries of the earlier confession doctrine. Specifically, the Court construed the Due Process Clause to require rejection of a confession and overturning of a conviction only if the government had obtained the confession under such extreme coercion as to have overwhelmed the free will of the defendant.<sup>236</sup> Thus, although the Court continued to use the rhetoric of "voluntariness," the "entirely voluntary" standard of the common-law confession doctrine was replaced by a lower not-entirely-involuntary

233. *Id.* at 113. I previously have discussed the erroneous nature of the historical claims made in *Twining* that the right against self-accusation was not a settled, fundamental aspect of the Framers' understanding of "due process of law." See Davies, *supra* note 1, at 432 n.641; see also *id.* at 414 n.582.

234. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932).

235. See *Twining*, 211 U.S. at 100-02 (explaining that "due process of law" included only the most fundamental procedural protections).

236. See, e.g., *Lisenba v. California*, 314 U.S. 219 (1941). In *Lisenba*, the Court stated that it had reversed state convictions under the Fourteenth Amendment Due Process Clause that involved

protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified; who sensed . . . the danger of mob violence [against them]; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning.

*Id.* at 239-40. The Court further stated that it was appropriate to do this when police obtained statements through "tyrannical or oppressive means." *Id.* at 240. However, although the Court stated its disapproval of "the violations of law involved in the treatment of [the defendant]," such as prolonged incommunicado interrogation, denial of counsel, an improper transportation of the defendant to the scene of the crime, and allegations of physical violence against the defendant, *id.*, the Court declined to conclude that the police interrogation had violated the Fourteenth Amendment because the defendant "had [not] so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer." *Id.* at 241. This formulation is a long way from the "induced" confession doctrine of *Warickshall*. See *supra* notes 166-67, 223-24 and accompanying text.

standard of admissibility.

By the late 1950s the Court was beginning to reverse state convictions under this due process standard, but that shift was prompted primarily by changes in the membership of the Court and reflected only the looseness of the due process “voluntariness” standard.<sup>237</sup>

### C. *The Miranda Requirements of Warnings and Waiver*

It appears that, by the early 1960s, a majority of the Justices of the Warren Court had come to the conclusion that the due process “voluntariness” standard for assessing confessions was unworkable. In 1964, the Court reversed *Twining* and held that the Fifth Amendment right was incorporated into the Fourteenth Amendment Due Process Clause and applicable in state proceedings.<sup>238</sup> Two years later, the Court ruled in *Miranda* that the Fifth Amendment applied to custodial interrogation by state, as well as federal, police.<sup>239</sup>

However, the *Miranda* Court did not return to the “purely voluntary” standard the Court had previously articulated in *Bram*.<sup>240</sup> Rather, the Court ruled that custodial police interrogation was so inherently coercive that no confession so obtained would be admissible unless the police first warned the person of his right to be silent and right to counsel, and obtained the person’s knowing, intelligent, and explicit waiver of those rights.<sup>241</sup> The requirement of warnings prior to questioning was not novel; English courts had required such warnings as a means of assuring the absence of inducements under the *Warickshall* confession doctrine, though that requirement had not been widely

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237. See, e.g., *Spano v. New York*, 360 U.S. 315 (1959).

238. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

239. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987) (noting that *Miranda* constitutes a series of holdings, including that the Fifth Amendment right applies to the informal compulsion that occurs in police interrogations).

240. See *supra* note 224 and accompanying text. In fact, in 1991 the Rehnquist Court repudiated the rigorous “purely voluntary” standard endorsed in the 1897 decision in *Bram*. *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) (stating that “[a]lthough the Court noted in *Bram* that a confession cannot be obtained by “any direct or implied promises, however slight, nor by the exertion of any improper influence,” . . . under current precedent [this passage] does not state the standard for determining the voluntariness of a confession” (quoting 3 RUSSELL ON CRIMES, *supra* note 160, at 478, *quoted in* *Bram v. United States*, 168 U.S. 532, 542-43 (1897))). Thus, Chief Justice Rehnquist’s presentation of the history of confessions law in 2000 in *Dickerson* as though there had been a continuous “voluntariness” standard, see *supra* notes 149-60 and accompanying text, was especially misleading because, prior to that decision, the Court had already effectively repudiated the stringent voluntariness/reliability test for the admissibility of confessions announced in *Warickshall*, alluded to in *Rudd*, and subsequently endorsed in *Bram*.

241. *Miranda*, 384 U.S. at 467-76.

adopted by American state courts.<sup>242</sup> Likewise, the requirement of a knowing and intelligent waiver of rights was borrowed from earlier developments in federal trial procedure.<sup>243</sup> Thus, although *Miranda* did place a modest set of conditions on police interrogation, it actually did not go very far toward regulating the actual circumstances or conduct of such interrogation.<sup>244</sup>

For present purposes, the important point about *Miranda* is that it probably also fed the notion that the Fifth Amendment right was primarily concerned with assessing the admissibility of confessions obtained by police interrogation rather than with directly limiting or regulating the conditions of such interrogation. Indeed, the requirement in *Miranda* of a waiver of rights comparable to the waiver required to relinquish trial rights probably tended to reinforce the notion that the Fifth Amendment right was primarily a right to be silent at trial.

## VII. THE EMERGENCE OF THE RIGHT TO BE SILENT AT TRIAL

The preaccusation, pretrial character of the original Fifth Amendment right was also obscured by a second development—the emergence of the modern criminal trial during the nineteenth century. During the same period in which the original conception of the Fifth Amendment right as a restriction of governmental pretrial interrogation was being forgotten, the development of the modern criminal trial spurred a reconception of the Fifth Amendment right as a “right to be silent” at trial.

As defense counsel played a larger role in nineteenth-century trials, defendants no longer had to speak about the accusation to conduct their own defense.<sup>245</sup> In addition, federal and state statutes enacted during the latter part of the nineteenth century abolished the earlier rule that criminal defendants were incompetent to testify because they were interested parties and instead permitted defendants to testify as a witness in their own trial if they chose to do so.<sup>246</sup> The

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242. See, e.g., Benner, *supra* note 12, at 82 (discussing the adoption in 1838 in England of a requirement that warnings be given prior to magistrate examinations of arrestees); Penny, *supra* note 12, at 324 (discussing English judicial requirements that warnings be given prior to police interrogations).

243. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938), *cited in Miranda*, 384 U.S. at 475.

244. Although the *Miranda* decision was popularly criticized for “handcuffing the police,” academic appraisals of the decision generally regard it as a “compromise” decision that generally did not pursue other avenues for restricting or regulating police interrogation. See, e.g., Penny, *supra* note 12, at 372 & n.368 (identifying previous commentaries that described *Miranda* as a “compromise” decision).

245. See LANGBEIN, *supra* note 63, at 277 (“The reconstruction of trial procedure that resulted from the admission of defense counsel was the precipitating event in developing what we now recognize as the privilege against self-incrimination [at trial].”).

246. See, e.g., Act of Mar. 16, 1878, ch. 37, 20 Stat. 30, 30-31 (codified at 28 U.S.C. § 632 (1925); current version at 18 U.S.C. § 3481 (2000)) (providing that in federal criminal trials, “the person so charged shall, at his own request but not otherwise, be a competent

choice provided to defendants in the federal statute obviously reflected Congress's understanding that requiring a defendant to testify at trial would be contrary to the Fifth Amendment right against self-incrimination.

In addition, the federal statute that permitted a defendant to testify in his own criminal trial forbade adverse comment if he chose not to do so,<sup>247</sup> and the Supreme Court subsequently confirmed that this ban against adverse comment was required by the Fifth Amendment right.<sup>248</sup> Thus, the Fifth Amendment right came to be viewed as a "right to be silent" at trial.

In sum, the combination of the absorption of the rules regarding admissibility of confessions into the Fifth Amendment right in *Bram*, the subsequent weak assessment of the voluntariness of confessions under the Fourteenth Amendment due process standard, and the emergence of the defendant's "right to be silent" in the modern criminal trial has combined to create an impression that the right against self-incrimination is focused on trial.

#### VIII. CONCLUSION

The point of this article is not that we should return to the original interpretation of the Fifth Amendment. That obviously is not feasible at this late date. Moreover, although the rigorously accusatory criminal procedure of the framing era may have been adequate for criminal justice in close communities, it would not be adequate for today's mobile, urban society of strangers. There is a need for professional police and for proactive law enforcement and investigation; hence, police investigation, including interrogation, in some form, surely is here to stay.

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witness" and that "his failure to make such request shall not create any presumption against him"). This statute was understood to prohibit both the trial judge and prosecutor from commenting to the jury on the fact that the defendant did not testify. *See* *Bruno v. United States*, 308 U.S. 287, 290 (1939) (argument of the United States). However, the Court held in *Bruno* that this statute also impliedly required the trial judge to instruct the jury that it was not to consider a defendant's failure to testify if the defendant requested that instruction. *Id.* at 293.

247. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (codified at 28 U.S.C. § 632).

248. *Griffin v. California*, 380 U.S. 609, 615 (1965). Because the federal statute banned adverse comment, the Supreme Court had no occasion to address whether that ban was constitutionally required in federal cases. When the issue arose in state cases prior to the incorporation of the Fifth Amendment right into the Fourteenth Amendment Due Process Clause, the Supreme Court ruled that the Fourteenth Amendment itself did not prohibit adverse comments on a criminal defendant's failure to testify in state criminal trials. *See* *Adamson v. California*, 332 U.S. 46, 56 (1947). However, subsequent to the incorporation of the Fifth Amendment right into the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), the Court reversed *Adamson* and ruled in *Griffin* that the Fifth Amendment right does prohibit adverse comment on a criminal defendant's failure to testify in his criminal trial. *Griffin*, 380 U.S. at 615.

Instead, my point is that assessments of the current status of the Fifth Amendment right should not proceed under the false notion that the current treatment of that right is equivalent to the right that the Framers intended to preserve. That false notion is deleterious because it tends to give an aura of inevitability to the current treatment of the right, and that aura tends to block critical appraisal of the choices that actually have shaped its content.

The authentic history of the Fifth Amendment right is a story of a right that has been shrunk by a drastic expansion of governmental criminal justice power, including governmental interrogation power.<sup>249</sup> Moreover, that shrinkage has been permitted, to a large degree, because of the inattention and inaction of the Supreme Court. In particular, the Court initially failed to ask, or perhaps even perceive, the hard questions that were posed by the emergence of police interrogation as an unprecedented form of governmental interrogation. Despite the obvious danger of compelled self-incrimination in the backrooms of the police station, the Court failed to respond by developing a coherent view of what the Fifth Amendment right should mean regarding police interrogation.<sup>250</sup> In addition, although the *Miranda* decision finally made a modest beginning in applying the Fifth Amendment right to impose conditions on custodial interrogation, even that regime of warnings and waiver has been undercut by more recent decisions.<sup>251</sup> In fact, the opportunities for police interrogation of suspects have recently been expanded by decisions that have lowered the

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249. In addition to the emergence of coercive, governmental police interrogation, the federal grand jury has also taken on investigative powers that grand juries did not exercise at the time of the framing. See Davies, *supra* note 1, at 427-28.

250. Of course, it would appear that the same could be said of the failure of state courts to enforce state constitutional provisions regarding the right against self-incrimination.

251. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985), discussed *supra* note 54. Note also that the Court permits arrestees to be held for forty-eight hours prior to a probable cause hearing. See *supra* notes 207, 229.

standard for taking suspects into custody, or that have permitted custodial arrests for minor offenses, even if such arrests amount to pretexts.<sup>252</sup>

What is still necessary is for the Justices of the Supreme Court to take the question of what the Fifth Amendment right should mean today more seriously than they did in *Chavez*. At a minimum, the Justices should stop pretending that they are merely following the dictates of the text or original meaning of constitutional provisions when they are actually reinventing that text. Regardless of what one might think of the claim for section 1983 damages in *Chavez*, deciding the question of whether there was a violation of the Fifth Amendment right merely on the basis of an acontextual, ahistorical, and essentially arbitrary definition of the word “case” in the 200-year-old text hardly constitutes meaningful constitutional interpretation.

The question that still needs to be addressed seriously and directly is what kind of police and criminal justice power is consistent with a free and civil society. Specifically, when is police interrogation compatible with a meaningful conception of a right against compelled self-accusation, and what conditions should be mandated when such interrogation is permitted?<sup>253</sup> Whatever one might think of the appropriateness or efficacy of the specific regime of warnings and waiver that the Warren Court required in *Miranda*, that decision at least began to move—albeit haltingly—in the direction of addressing these crucial but long overlooked issues.<sup>254</sup> The claim in *Chavez*, that the Fifth Amendment

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252. As noted previously, the Court’s recent and significant relaxation of the probable cause standard in *Gates* increases police authority to make legal warrantless arrests and, thus, increases the opportunity for custodial interrogation of persons who amount to suspects. *See supra* note 96 and accompanying text. Likewise, the recent ruling in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), substantially expands police authority to make legal custodial arrests for even the most minor traffic offenses. *Id.* at 323. That authority is magnified by the implications of the Court’s ruling in *Whren v. United States*, 517 U.S. 806 (1996), that the police may use traffic stops and arrests as pretexts for criminal investigations. *Whren*, 517 U.S. at 813, 819 (holding that a traffic stop is reasonable where the officer had probable cause to believe that a traffic violation had occurred regardless of the officer’s subjective motive for making the stop). Taken together, these decisions constitute a drastic expansion of arrest authority, far beyond anything that would have been imaginable, let alone acceptable, to the Framers.

If the Court also permits the police to interrogate while engaging in deliberate evasions of *Miranda*’s rather modest requirement of warnings and waiver, and also rules that the physical “fruits” of even deliberate *Miranda* violations are admissible (the two issues currently pending before the Court, *see supra* notes 54-55 and accompanying text), it will have conferred almost completely discretionary inquisitorial powers on government officers—precisely what the Fifth Amendment right was intended to prevent.

253. During the framing era, judicial examinations of arrestees were contemporaneously recorded by a clerk, using the best technology available at the time—pen and ink. Thus, a requirement that all police interrogations of suspects or arrestees be recorded would comport with the original Fifth Amendment right.

254. From a historical point of view, there is considerable irony in complaints by critics

right is merely a trial right, is a large step in the opposite direction.

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of *Miranda* that the Warren Court illegitimately legislated in *Miranda*. It would be more accurate to say that the Court in *Miranda* belatedly began to address the constitutional implications of the massive extralegal expansion of governmental interrogation power that it previously had permitted to occur without consideration of the Fifth Amendment right.