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The New Frontier of Constitutional Confession Law - the International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad

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INTRODUCTION

In recent years, American crime, like the American economy, has become markedly more global in nature.[1] Advances in technology have made former obstacles such as national borders and continental distances less daunting to foreign criminals who target the United States and its citizens with criminal schemes ranging from Internet fraud to drug trafficking to horrific acts of terrorism.[2] As a result of this trend, the Federal Bureau of Investigation (FBI) and other federal law enforcement agencies are dispatching their agents with increasing frequency beyond the borders of the United States to investigate violations of American criminal laws committed by non-American[3] citizens.[4]

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1. *See* Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA INT'L & COMP. L. 555, 555 (2000):

> It is a commonplace that crime, no less than other industries, has become a global venture. Criminal networks routinely cross borders to produce or distribute commodities that range from drugs to endangered species, and to purge the ill-gotten profits of their taint. Indeed, crimes occur in borderless space. Money is laundered, bets are made, pornography is viewed over the Internet.

Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1, 2 (2001) (discussing globalization of crime); *see generally* Howard M. Shapiro, *The FBI in the 21st Century*, 28 CORNELL INT'L L.J. 219 (1995) (in an address at the Cornell Law School, the General Counsel of the FBI discussed the globalization of crime and the FBI's efforts to meet that challenge).

2. *See* Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 38 (1990) (discussing the globalization of crime and stating: "[T]oday, terrorism, arms and high tech smuggling, and securities, tax and commercial fraud all contribute to this trend. In general, as the scope and volume of international interactions ranging from trade to tourism increase, so too do the criminal activities that inevitably accompany them."). *See generally* Amann, *supra* note 1; Shapiro, *supra* note 1.

3. For purposes of this Article, the term "non-American" refers to an individual who is not a citizen of the United States.

4. *See* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1261–63 (1998) (describing the recent increase in U.S. law enforcement activities overseas); V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L L. 257, 257 (1980) (suggesting that in the previous

Indeed, the FBI planned to double the number of agents it stationed abroad between 1996 and 2000 alone.[5] In light of the terrorist attacks in New York and Washington, D.C. on September 11, 2001, and with the persistent ebb of technological advances that continue to shrink the globe for enterprising foreign criminals, this heightened international presence will undoubtedly become a fixture of U.S. law enforcement in the years to come.[6]

A question of constitutional significance that will have to be resolved in this context is to what extent the various provisions of the Bill of Rights apply to non-Americans, if at all, when they are interrogated by American law enforcement officials abroad. Within the territorial boundaries of the United States, several different constitutional doctrines control the admissibility of pretrial confessions taken by law enforcement officials. These include the *Miranda* doctrine,[7] the due process "involuntary confession rule" of the Fifth and Fourteenth Amendments,[8] the Fifth Amendment's prohibition against compulsory

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twenty-five years the United States' three major exports had been "rock music, blue jeans and United States law"); Tyler Raimo, Comment, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473, 1495 n.114 (1999) (citing National Public Radio broadcast's assertion that the FBI had expanded from a primarily domestic law enforcement agency to an international law enforcement agency); Carrie Truehart, Comment, United States v. Bin Laden *and the Foreign Intelligence Exception to the Warrant Requirement for Searches of "United States Persons" Abroad*, 82 B.U. L. REV. 555, 555–56 (2002) (documenting expansion of American investigations into criminal activity abroad); David Johnston, *Strength Seen in a U.S. Export: Law Enforcement*, N.Y. TIMES, Apr. 17, 1995, at A1 (citing an informal State Department study suggesting that eight U.S. law enforcement agencies employed 1649 people in permanent overseas assignments in 1995).

5. RICHARD A. BEST, JR., CONG. RESEARCH SERV., INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREATS TO THE U.S. 12 (2001) (stating that the FBI launched a four-year plan in 1996 to double the number of agents serving in legal attaché offices in American embassies by the year 2000); *see also Counter-terrorism Policy: Hearings Before the Senate Judiciary Comm.*, 105th Cong. 123 (1998) (testimony of Louis J. Freeh, Director of the FBI, describing the recent expansion of the FBI's activities overseas).

6. In 2002, the FBI operated forty-four offices around the world, and planned to continue expanding its presence abroad. *See Current and Projected National Security Threats to the United States: Hearing Before the Senate Select Comm. on Intelligence*, 107th Cong. 88 (2002) (statement of Dale L. Watson, Executive Assistant Director, Counterterrorism and Counterintelligence, FBI) (discussing FBI's current deployment around the world and plans to continue expansion of international presence).

For the sake of simplicity, the terms "FBI" and "FBI agents" are used in this Article to represent all U.S. law enforcement agencies and their agents.

7. The intricacies of the *Miranda* doctrine will be developed in detail later in this Article. *See infra* notes 57–85 and accompanying text. In short, "*Miranda* warnings" are recitations of a suspect's constitutional rights, including the right to remain silent and the right to counsel, which must be administered before a law enforcement officer can "interrogate" a suspect who is in police "custody." Miranda v. Arizona, 384 U.S. 436, 469 (1966) (describing the specific warnings required prior to "in-custody interrogation").

8. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

self-incrimination[9] and the Sixth Amendment's right to counsel.[10] The Supreme Court has held that these protections apply during interrogations occurring within the United States regardless of the alienage[11] of the suspect under interrogation.[12] The Supreme Court has also held that these constitutional protections apply to American citizens who are interrogated by U.S. law enforcement officials outside of the United States.[13] But do these protections apply to non-Americans located outside of the United States at the time of the interrogation? Can an Italian citizen who has been brought to the United States for trial successfully claim, for example, that the confession he made to an FBI

> or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Although the Fourteenth Amendment Due Process Clause applies to the states, and the Fifth Amendment Due Process Clause applies to the federal government, the due process involuntary confession rule derived from each is identical. This doctrine will be discussed in detail *infra* notes 40–50 and accompanying text.

9. Although the details of the Fifth Amendment's privilege against self-incrimination will be explored later in this Article, it is based upon the following language in the text of the Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

10. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

11. "Alienage" has been defined as: "the status of a person . . . of another . . . nation." MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 28 (10th ed. 1993). As used in this Article, "alienage" refers to a person's citizenship, or lack thereof, of the United States. "Alien" is used to refer to a person who is not a citizen of the United States, as is the term "non-American."

12. As the Supreme Court has said:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.

Hellenis Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309 n.5 (1970) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945)). Although *Hellenis Lines* may perhaps not be as broad as the proposition for which it is cited in this footnote, no one would dispute the fact that all individuals, regardless of citizenship or alienage, are protected by the Bill of Rights during interrogations that occur within the United States. *See infra* note 172.

13. *See* Reid v. Covert, 354 U.S. 1, 5–6 (1957):

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Although *Reid* may perhaps not be quite as broad as the proposition for which it is cited in this footnote, this Article focuses solely on the applicability of constitutional confession law to non-Americans abroad and is not concerned with the applicability of the Bill of Rights to American citizens abroad.

agent in Italy must be suppressed because the FBI agent failed to recite *Miranda* warnings to him before the interrogation commenced? Can he claim that his confession should be suppressed because the FBI agent coerced it from him in violation of the due process involuntary confession rule? Can this defendant accurately assert that he was cloaked with the protections of the privilege against compulsory self-incrimination or the Sixth Amendment right to counsel during his interrogation in Italy?[14]

These questions have not yet been clearly answered by United States courts. Without guidance from the Supreme Court, lower courts facing these issues thus far have typically expressed confusion at the outset, followed by conclusory judgments that fail to address the inherent difficulties presented by these issues.[15] In many instances, these courts have done nothing more than make admitted assumptions that these constitutional rights either do or do not apply, without providing any explanation or citing any legal support whatsoever for their assumptions.[16] Yet in light of the ongoing globalization of crime, thoughtful and accurate answers to these questions are of increasing importance to all American criminal investigations abroad.[17] As a consequence, federal courts, and ultimately the Supreme Court, will be forced to confront these questions head-on in the not too distant future. In so doing, the courts will need to carefully examine the origin, text, policies, and precedents of these constitutional provisions to accurately determine their applicability in the international arena.

In a recent article, I addressed the first question that naturally arises in this context: whether *Miranda* warnings are required at the outset of an FBI interrogation of a non-American citizen abroad.[18] In that article, I examined the flexible, prophylactic nature of the *Miranda* doctrine,[19] the policies underlying that doctrine, and the difficulties inherent in requiring *Miranda* abroad (for example, how can an FBI agent abroad advise a foreign suspect that he has a right to an attorney during an interrogation when the law of the foreign country

14. As set forth *infra* at notes 33–88 and accompanying text, the primary constitutional doctrines that concern the admissibility of confessions are the *Miranda* doctrine, the privilege against compulsory self-incrimination and the due process involuntary confession rule. Accordingly, the extraterritorial application to non-Americans of the Sixth Amendment's right to counsel will not be addressed in this Article.

15. *See infra* notes 207, 239 and accompanying text; *see also* United States v. Bin Laden, 132 F. Supp. 2d 168, 194 n.26 (S.D.N.Y. 2001) (acknowledging the possibility of more than one constitutional confession doctrine as applied abroad to non-Americans).

16. *See infra* notes 207, 239 and accompanying text; *see also Bin Laden*, 132 F. Supp. 2d at 194 n.26.

17. *See Bin Laden*, 132 F. Supp. 2d at 185 (recognizing that applicability of U.S. confession law abroad is of increasing importance as U.S. continues to increase its law enforcement presence overseas).

18. Mark A. Godsey, Miranda's *Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703 (2002).

19. *Id.* at 1734–52.

where the interrogation takes place prohibits the presence of defense attorneys during pretrial interrogations?).[20] I then applied the balancing test that determines *Miranda's* applicability to new situations not addressed by the original *Miranda* decision.[21] I concluded that courts should not require FBI agents to strictly adhere to the dictates of *Miranda* abroad.[22] Rigidly requiring *Miranda* warnings in the international arena would unduly burden American law enforcement interests while simultaneously failing to advance the civil liberties that the *Miranda* court intended to protect domestically when it originally carved its now-famous warning/waiver procedure.[23]

But the answer to the first question logically raises the more important question that I address in this Article: If *Miranda* does not necessarily apply in the international arena, what constitutional limitations on interrogations, if any, do apply? Indeed, the Supreme Court has carved numerous exceptions to *Miranda's* applicability within the United States.[24] Where *Miranda's* warning/waiver framework does not apply within the United States, two distinct constitutional doctrines exist as possible "default" rules. The first, the due process involuntary confession rule, excludes from trial confessions that are made "involuntarily" as a result of police coercion.[25] The second, the privilege against compulsory self-incrimination, renders inadmissible confessions that were "compelled" by police coercion.[26] The Supreme Court, largely as a result of judicial politics and compromises,[27] has indicated a preference for the due process involuntary confession rule as the default rule where *Miranda* does not apply.[28] One might assume, therefore, that the same answer is appropriate abroad: Because *Miranda* does not necessarily apply abroad, the primary test for admissibility in this context is whether the confession was made "voluntarily" in compliance with the Due Process Clause.

A close examination of this issue, however, reveals an intriguing dilemma. As will be discussed below, when applying the appropriate tests for extraterritorial application of the Bill of Rights to the due process involuntary confession rule, one cannot escape the conclusion that the rule does not protect non-Americans

20. *Id.* at 1752–70.

21. *Id.* at 1754–80.

22. *Id.*

23. *Id.* For an argument that the courts should adopt an even broader *Miranda* exception abroad than I proposed in my recent Duke article, see generally M.K.B. Darmer, *Beyond bin Laden and Lindh: Confessions in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (arguing in favor of a broad "foreign interrogations" exception to *Miranda*).

24. *See infra* notes 73–85 and accompanying text.

25. *See infra* notes 40–50 and accompanying text.

26. *See infra* notes 59–64, 82–85 and accompanying text.

27. *See infra* notes 85–88 and accompanying text.

28. *See infra* notes 82–88 and accompanying text; *see also* Dickerson v. United States, 530 U.S. 428, 434 (2000) (stating that "[w]e have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily" and noting that *Miranda* added an additional layer of protection based upon the privilege against self-incrimination).

located beyond the borders of the United States.[29] But does this due process void mean that FBI agents are free to coerce confessions from such suspects through brute force and torture, and then introduce such confessions into evidence at trial in the United States? As will be demonstrated in this Article, the answer is no. Indeed, further exploration reveals that such suspects are not stripped of all constitutional protections; rather, despite their lack of U.S. citizenship and their location outside of the United States during their interrogation, these suspects are clearly protected by the privilege against compulsory self-incrimination and its ban on "compelled" confessions.[30]

But this answer gives rise to yet another important question: When is a confession considered "compelled" in violation of the privilege? At the current time, we have no clear answer. In the domestic setting, the due process rule prohibiting "involuntary" confessions and the privilege's ban on "compelled" confessions both apply to interrogations, and both theoretically regulate the amount of coercion that the police may constitutionally apply to a suspect. Given the choice of two doctrines, the Supreme Court has chosen to rely almost exclusively on the due process involuntary confession rule instead of the privilege as the basis for excluding problematic confessions.[31] As a result, the Court has thoroughly developed the contours of the due process involuntary confession rule, but has failed to establish a clear legal standard to determine when a confession is "compelled" in violation of the privilege.[32] However, because the Due Process Clause is inapplicable in the international arena, this choice between two doctrines is not available. Accordingly, the due process involuntary confession rule will no longer shield the privilege against compulsory self-incrimination from judicial scrutiny in this context, and the courts will be forced, once and for all, to determine what it means for a confession to be compelled.

This Article considers the above quandary and offers a solution. Part I explores in detail the constitutional confession rules that apply within the United States, establishing the requisite background for the remainder of the Article. Part II examines the tests for determining the extraterritorial application of provisions of the Bill of Rights to non-Americans abroad and posits that, under current Supreme Court precedent, non-Americans cannot claim the protection of the due process involuntary confession rule when they are located beyond the borders of the United States. This Part demonstrates that the only constitutional protection available to non-Americans abroad who are interrogated by FBI agents is the Fifth Amendment's prohibition of "compelled" confessions under the privilege against compulsory self-incrimination. Thus, the international arena presents a new frontier for American constitutional confes-

29. *See infra* notes 208–51 and accompanying text.
30. *See infra* notes 135–57 and accompanying text.
31. *See infra* notes 83–85 and accompanying text.
32. *See infra* notes 73–85 and accompanying text.

sion law that will force federal courts to forge a new understanding of the privilege in the interrogation setting, and to define the meaning of "compelled." Accordingly, Part III explores the historical origins, text, and policies of the privilege, along with the relevant Supreme Court cases interpreting the privilege in non-interrogation contexts, and offers a definition of "compelled" that is in harmony with each. In so doing, this Part critiques the alternative definitions of "compelled" offered thus far by other scholars. This analysis reveals that the appropriate test for compulsion under the privilege is different from the due process involuntary confession rule in several respects, and, in some ways, is more protective of a suspect's rights than the due process standard. Finally, this Article posits that this historically and textually accurate understanding of a "compelled" confession should be used in future cases in U.S. courts when determining the admissibility of confessions made by non-Americans to American law enforcement officials abroad.

I. CONSTITUTIONAL CONFESSION LAW WITHIN THE TERRITORIAL BOUNDARIES OF THE UNITED STATES

Several different constitutional doctrines operate in distinct but overlapping spheres to regulate the admissibility of pretrial confessions in American courts. Determining the extraterritorial application of these doctrines to non-Americans, however, demands a specific type of analysis that has not yet been fully performed by courts or other scholars. This analysis requires examination of the text, history, functions and policies of these doctrines, with particular focus on certain temporal issues that ultimately control their applicability abroad. Before turning to this analysis it is first necessary to create the appropriate backdrop. Accordingly, this Part explores in some depth how the various confession doctrines have evolved and currently function within the territorial boundaries of the United States. This discussion is referred to repeatedly in later sections of this Article, as distinctions are drawn and comparisons made.

A. 1897–1936: THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION EMERGES

The provision in the Bill of Rights that is the most textually relevant to the issue of coerced confessions is the Fifth Amendment's privilege against compulsory self-incrimination. The Fifth Amendment states, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."[33] The privilege means, in its simplest form, that a criminal defendant cannot be called against his will to testify at trial or any other formal proceeding about the acts with which he is criminally charged or about anything else that might incriminate him.[34] In 1897, the Supreme Court in *Bram v. United*

33. U.S. CONST. amend. V.

34. Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (stating that the Fifth Amendment privilege against compulsory self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might

States[35] first held that the privilege prohibits the introduction into evidence of a confession that has been coerced by the police during a pretrial interrogation.[36] In this respect, the Court stated: "'[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.'"[37] The rationale behind this extension of the privilege against compulsory self-incrimination from the formal trial setting to informal police interrogations is that if the police force a suspect to give a confession against his will, and if that confession is later used against him at trial, the suspect has essentially been compelled to testify against himself at trial.[38] The holding in *Bram*, however, only restrained the conduct of federal law enforcement officials; the privilege was not made applicable to the states until more than half a century later.[39]

B. 1936–1966: THE DUE PROCESS INVOLUNTARY CONFESSION RULE REPLACES THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

In the 1930s, the Supreme Court began reviewing state court convictions in which confessions obtained by the police through torture or other offensive means had been admitted into evidence.[40] Because the privilege against compulsory self-incrimination had not been incorporated (and applied to the states)

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be so used"); *see also* Brian R. Boch, Note, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 J. CRIM. L. & CRIMINOLOGY 883, 888–89 (1994) (observing that the Fifth Amendment's privilege against self-incrimination protects individuals from being forced to "testify" against themselves).

35. 168 U.S. 532 (1897).

36. Id. at 565. Although the privilege against self-incrimination protects against the admission into evidence of compelled statements of any type, this Article refers to all such statements with the generic term "confession" for the sake of simplicity.

37. *Id.* at 542–43 (quoting 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)).

38. Miranda v. Arizona, 384 U.S. 436, 461–66 (1966); *see also* Michigan v. Tucker, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973):

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1844 n.97 (1987) (discussing the rationale behind the extension of the privilege against self-incrimination to pretrial interrogations). For a thorough discussion of the *Bram* decision, see Darmer, *supra* note 23, at 321–28.

39. *See* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 519–20 (1992) [hereinafter Herman, *Part II*].

40. *See generally* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 (1964) (discussing state cases involving coerced confessions reviewed by the Supreme Court between the 1930s and 1960s).

through the Fourteenth Amendment at that time, the only option that the Court had at its disposal to exclude such problematic confessions was to create a corollary to the privilege using a provision in the Bill of Rights that had previously been deemed applicable to the states.[41] Accordingly, the Court announced a new "voluntariness test"—this time rooted in the Due Process Clause of the Fourteenth Amendment—and began using this doctrine rather than the privilege to exclude troublesome confessions.[42] The Supreme Court described this "due process involuntary confession rule" in *Schneckloth v. Bustamonte* as follows:[43]

> 'The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.'
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[44]

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41. *See* Herman, *Part II*, *supra* note 39, at 519–20 (arguing that the Supreme Court's switch to due process was caused by the privilege's inapplicability to the states).

42. *See id; see also infra* notes 173–203 and accompanying text. As a result of this reliance on the Due Process Clause, it was unclear during that time whether *Bram* was still good law, and whether the privilege against self-incrimination was still applicable to pretrial interrogations. In *Haynes v. Washington*, for example, the defendant was arrested for robbing a gas station and was taken into police custody. 373 U.S. 503, 505 (1963). Although he admitted his guilt orally, the local police refused to allow the defendant to call his wife, to contact an attorney, or to be arraigned before a magistrate until he agreed to sign a written confession. *Id.* at 506–11. Finally, after being held incommunicado with the outside world for more than sixteen hours, the defendant agreed to sign the written confession. *Id.* at 504. At trial, the defendant was convicted after the government introduced his written confession into evidence. *Id.* After the defendant appealed his conviction to the Supreme Court, the Court held that the due process test for whether a confession is admissible is whether it was made "'freely, voluntarily and without compulsion or inducement of any sort.'" *Id.* at 513 (quoting Wilson v. United States, 162 U.S. 613, 623 (1896)). To determine whether a confession is voluntarily made, a court must consider "all of the attendant circumstances." *Id.* The Court held that the defendant "was alone in the hands of the police, with no one to advise or aid him, and he had 'no reason not to believe that the police had ample power to carry out their threats,' to continue, for a much longer period if need be, the incommunicado detention." *Id.* at 514 (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)). Because the confession in *Haynes* "was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities," *id.* at 513, the Court ruled that it had not been made voluntarily and should not have been admitted into evidence, pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* at 515–18. Accordingly, the defendant's conviction was overturned. *Id.* at 520. The Court in *Haynes* did not mention the privilege against self-incrimination.

43. 412 U.S. 218 (1973).

44. Id. at 225–26 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)) (citations omitted). *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustwor-*

After creating this "due process involuntary confession rule," the Supreme Court began using it to suppress involuntary confessions not only in state cases, but in federal cases as well.[45] The Due Process Clause of the Fourteenth Amendment was used in state cases,[46] and the nearly identical Due Process Clause of the Fifth Amendment was used in federal cases.[47] As the Supreme Court later reflected in *Dickerson v. United States*,[48] "for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in 'some 30 different cases decided during [that] era.'"[49] During this period of due process supremacy, the Court virtually ignored the privilege against compulsory self-incrimination and the *Bram* decision. It was therefore unclear whether *Bram* was still good law or even whether the privilege was still considered applicable to pretrial interrogations.[50]

C. 1966: THE PRIVILEGE RESURFACES IN *MIRANDA V. ARIZONA*

By the mid-1960s, the Court had grown dissatisfied with the due process involuntary confession rule. This dissatisfaction reflected in part the highly subjective nature of the test, which essentially required a district court both to reconstruct minute details of an interrogation after the fact and to attempt to divine the defendant's state of mind at the time of the interrogation in order to determine whether his will had been overborne.[51] This subjectivity rendered the test inherently difficult for the lower courts to apply.[52] In addition, the test lacked the bright-line quality that the Court has always favored in criminal

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thy Confessions, 32 HARV. C.R.-C.L. L. REV. 105 (1997) (discussing the history of the privilege against self-incrimination and the involuntary confession rule).

45. *See* Debate, *Will* Miranda *Survive?:* Dickerson v. United States*: The Right to Remain Silent, the Supreme Court and Congress*, 37 AM. CRIM. L. REV. 1165, 1168 (2000) ("in federal prosecutions the Court relied upon the Due Process Clause of the Fifth Amendment to overturn confessions in federal cases" during this era).

46. *See* Herman, *Part II*, *supra* note 39, at 500.

47. *See* Debate, *supra* note 45, at 1168; *cf.* Herman, *Part II*, *supra* note 39, at 500 (stating that, as late as 1951, it was unclear whether the exclusion of voluntary confessions in federal cases was based on the Fifth Amendment's self-incrimination provision, due process provision, or the common law confession rule).

48. 530 U.S. 428 (2000).

49. Id. at 433–34 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)). For a thorough discussion of the due process voluntariness era, see Darmer, *supra* note 23, at 328–37.

50. *See* Steven J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 437 (1987) (stating that *Bram* was quickly forgotten, and thus, the privilege was seen by some as inapplicable to the police interrogation setting); *see also supra* note 42 and accompanying text.

51. *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 115 (1989) (suggesting that the due process test was difficult to apply because it required a court to determine, as a matter of "psychological fact," whether the defendant's will had been overborne).

52. *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–75 (1981) (discussing difficulties for courts posed by due process involuntary confession rule).

procedure jurisprudence,[53] which meant that police officers were left with unclear and inconsistent messages as to how they should conduct interrogations.[54] Consequently, the rule was repeatedly violated and was largely ineffective at curbing offensive police conduct. By the mid-1960s, the Court began looking for a substitute doctrine.[55] After a short-lived experiment with the Sixth Amendment's right to counsel in *Escobedo v. Illinois*,[56] the Court settled on the replacement it had been looking for in *Miranda v. Arizona*.[57]

In *Miranda*, the Supreme Court changed the inquiry from a voluntariness standard to a bright-line warning/waiver requirement and, at least temporarily, shifted the focus of confession law from the Due Process Clauses of the Fifth and Fourteenth Amendments back toward the privilege against compulsory self-incrimination.[58] In overruling prior cases that held the privilege inapplicable to the states, *Miranda* made clear that the privilege applies to state as well as federal law enforcement officials and, like the due process involuntary confession rule, protects suspects from coercion during the pretrial interrogation stage of an investigation.[59] In examining the privilege in the interrogation context for the first time since *Bram*, the *Miranda* Court reformulated its interpretation of the term "compelled"—the textual focal point of the privilege. Although the Court did not provide a dictionary-type definition of when a

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53. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (discussing the Supreme Court's preference for "bright-line" criminal procedure rules); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 321–23 (1982) (same).

54. *See* Alschuler, *supra* note 53, at 243–46 (arguing that due process involuntary confession rule provided little guidance to police officers, and thus, was ineffective).

55. *See* Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429, 446–47 (1984) (discussing the Supreme Court's search for a substitute to the due process involuntary confession rule).

56. 378 U.S. 478, 490–91 (1964). The decision held that:

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

57. 384 U.S. 436 (1966).

58. Both *Miranda* and *Malloy v. Hogan*, 378 U.S. 1 (1964) (overturning state commitment for contempt where defendant was held because he exercised Fifth Amendment rights and refused to answer questions), returned the focus to the privilege against self-incrimination. *Miranda*, 384 U.S. at 457–58; *Malloy*, 378 U.S. at 5–14; *see also* Dickerson v. United States, 530 U.S. 428, 434 (2000) ("[O]ur decisions in *Malloy* . . . and *Miranda* changed the focus of much of the inquiry in determining the admissibility" of confessions from a due process inquiry to a focus on the privilege against self-incrimination); Michigan v. Tucker, 417 U.S. 433, 442–44 (1974) (noting that *Miranda* refocused confession law on the privilege against self-incrimination).

59. *Miranda*, 384 U.S. at 463–64; *see also* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 733 n.5 (arguing that *Miranda* made clear that the privilege applied in the interrogation setting).

confession is "compelled," it made clear that the longstanding police practice of interrogating suspects while in custody is a device that produces compelled confessions—even when no torture or "third-degree" tactics of any kind are utilized.[60] The Court based this holding on its belief that when a police officer does nothing more than ask a question of a detained suspect,[61] that act—combined with the fact that the suspect is in custody and is therefore not free to leave—creates an atmosphere that is "inherently coercive" to the suspect.[62] The atmospheric pressure that flows from custodial interrogation, by itself, is sufficient to constitute "compulsion" in violation of the privilege.[63] Thus, although the contours of the term were not made clear, the Court in *Miranda* interpreted the term "compelled" very broadly. As the Court itself acknowledged in *Miranda*, this new interpretation of "compelled" under the privilege was more protective of suspects' civil liberties than the previous due process standard.[64]

The Court in *Miranda* did not, however, go so far as to ban custodial interrogation outright. Rather, the Court ruled that a police officer may engage a suspect in custodial interrogation if he first takes affirmative steps to dispel the coercion inherent in the setting so that the suspect will no longer feel compelled to speak.[65] The pressure may be dissipated by informing the suspect that he has the right to remain silent, that his statements may be used against him at trial, that he may have an attorney present during the interrogation, and that if he cannot afford an attorney one will be appointed for him.[66] The interrogating law enforcement officer must then obtain a voluntary waiver of those rights from the suspect before he may commence questioning.[67] If the officer fails to do so, any resulting statements will be considered compelled *per se*, and will be inadmissible at trial.[68]

Thus, since *Miranda*, there have been two separate but parallel confession doctrines that apply to both federal and state governments alike: the due process involuntary confession rule, and the privilege against compulsory self-

60. *Miranda*, 384 U.S. at 467.

61. The Court later clarified that *Miranda* is triggered whenever the police engage a suspect in custody in "interrogation." "Interrogation" has been defined as "words or actions on the part of the police . . . that [they] should know are reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 466 U.S. 291, 301 (1980).

62. *Miranda*, 384 U.S. at 467–74.

63. *Id.*; *see also* Schulhofer, *supra* note 50, at 436 (discussing *Miranda* Court's definition of compulsion, and its equation with custodial interrogation).

64. *See Miranda*, 384 U.S. at 456–57 (acknowledging that the confessions suppressed in *Miranda* and its companion cases might not be "involuntary in traditional terms"); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 369 (1998) (stating that the *Miranda* Court's definition of "compulsion" was different than the meaning of "involuntary").

65. *Miranda*, 384 U.S. at 467–74.

66. *Id.*; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT NO. 1: THE LAW OF PRETRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 485–91 (1989) (discussing the obligations that *Miranda* places on police officers).

67. *Miranda*, 384 U.S. at 475–76.

68. *See id.* at 476 (stating that the warnings are a "prerequisite to the admissibility of any statement made by a defendant").

incrimination with its ban on compelled confession.[69] At least from textual and doctrinal standpoints, the privilege seems the more appropriate provision with which to regulate confessions, as it speaks directly to the issue of compulsory self-incrimination, while the Due Process Clauses are silent on the matter.[70] And, because the Court created the due process involuntary confession rule in the 1930s simply to fill the void left by the privilege's inapplicability to the states in that era,[71] that doctrine no longer seems necessary now that the void had been filled by the holding in *Miranda*. Thus, one might have reasonably assumed that after *Miranda* the Court would have allowed the due process involuntary confession rule to become dormant—or would have overruled it entirely—and would have instead based the admissibility of confessions solely on whether they were compelled in violation of the privilege.[72] This approach would have allowed the Court to hone its interpretation of the privilege and to continue clarifying when a confession is "compelled." But this did not occur. Instead, two things happened. First, the Court carved several exceptions to *Miranda* that undermined its previously broad interpretation of the term "compelled." Second, the Court inexplicably retained the due process involuntary confession rule as the default test for each of the newly-created scenarios where the *Miranda* warning/waiver procedure was deemed inapplicable.

D. POST-*MIRANDA*: THE PRIVILEGE ONCE AGAIN TAKES A BACKSEAT TO THE DUE PROCESS INVOLUNTARY CONFESSION RULE

In its 1984 decision in *New York v. Quarles*,[73] the Court created what has become known as the "public-safety" exception to the *Miranda* doctrine. This exception holds that when police officers have a pressing need to question a suspect to avoid a potentially imminent danger to themselves or the public, they may engage a suspect in custodial interrogation—and apply the limited amount of pressure associated with it—without first administering *Miranda* warnings.[74] In carving this exception, the *Quarles* Court instructed that the absence of *Miranda* warnings prior to custodial interrogation does not mandate the conclusion that any resulting confession was "compelled" in violation of the privilege.[75] This holding was directly at odds with one of the basic tenets of *Miranda*: Because compulsion is inherent in custodial interrogations, a confession is considered compelled *per se* if it is obtained through custodial interroga-

69. *See* Dickerson v. United States, 530 U.S. 428, 433 (2000) (recognizing the existence of the two parallel rules mentioned in the text).

70. *See* Herman, *Part II*, *supra* note 39, at 525 n.661 (arguing that the privilege, as opposed to the Due Process Clause, is the textually more appropriate provision with which to regulate confessions).

71. *See supra* notes 40–49 and accompanying text.

72. *See* Herman, *Part II*, *supra* note 39, at 551 (arguing that, after *Miranda*, the Court had no need for the due process involuntary confession rule, and thus should have replaced it entirely with the privilege).

73. 467 U.S. 649 (1984).

74. *See id.* at 654–58.

75. *See id.*

tion when the police do not first take steps to dissipate the atmospheric pressure on the suspect.[76] The *Quarles* holding, therefore, unquestionably relaxed the Court's interpretation of the term "compelled" in favor of greater police latitude, because it made clear that a finding of "compulsion" now requires some undefined amount of pressure beyond the level inherent in custodial interrogation.

Quarles and the other *Miranda*-exception cases[77] have not completely overruled *Miranda* in the sense that the basic warning/waiver procedure has been retained in most scenarios as the initial inquiry in determining the admissibility of a confession. But the warnings have become detached from the privilege and the concept of compulsion. Indeed, the *Miranda*-exception cases have made clear that the warnings are not necessary to keep a confession from being considered compelled; instead, they are now seen as a bright-line prophylactic rule, designed to protect the privilege, that "sweeps more broadly than the [privilege] itself."[78] In other words, the *Miranda* warnings requirement is now viewed as a judicially created rule, similar to a common law rule of evidence, designed to supply "practical reinforcement"[79] to the privilege by providing an easy and effective litmus test to determine when a confession is admissible in most situations.[80] In any situation where the Court has not carved a *Miranda* exception, the mere failure to provide *Miranda* warnings will likely result in a determination that the confession is inadmissible. The confession is inadmissible, however, only because the prophylactic rule has been violated, not because the lack of warnings rendered the confession "compelled" in violation of the privilege. It is this framework that made it feasible for the Court to create exceptions to the *Miranda* doctrine because the Court could allow statements taken in violation of *Miranda* to be introduced in certain circumstances, as long as the underlying constitutional right—the privilege—was not infringed. In doing so, the Court was carving exceptions only to a judicially created prophylac-

76. *See supra* notes 61–68 and accompanying text.

77. The Court moved away from *Miranda's* definition of "compulsion" in several other cases as well, referred to here, together with *Quarles*, as the "*Miranda*-exception cases." In *Harris v. New York*, 401 U.S. 222 (1971), for example, the Court held that a statement taken from a defendant during custodial interrogation where no *Miranda* warnings had been given may be used for impeachment purposes at trial. *Id.* at 225–26. And in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court ruled that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations. *Id.* at 444–51. *See generally* David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805 (1992) (discussing the "fruit of the poisonous tree" doctrine). These cases were based on the same principle as *Quarles*—that custodial interrogation, by itself, does not amount to compulsion in violation of the privilege. *Harris*, 401 U.S. at 225–26; *Tucker*, 417 U.S. at 444–45.

78. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

79. *Tucker*, 417 U.S. at 444.

80. The Court's holding in *Dickerson v. United States*, 530 U.S. 428 (2000), that the *Miranda* warnings have a "constitutional basis," *id.* at 439 n.3, does not change this analysis. *See* Godsey, *supra* note 18, at 1742–52 (discussing *Dickerson* and its implicit adoption of the theory that rules of criminal procedure can be both prophylactic and constitutional at the same time).

tic rule, not to an underlying constitutional right.[81]

Even more important was the new test for admissibility that the Court set forth in the *Miranda*-exception situations. Indeed, simply holding that the privilege is no longer violated by mere custodial interrogation—because custodial interrogation no longer equates with compulsion—does not mean that police officers are free to torture suspects to obtain confessions in these situations. Rather, it means that the pressure applied in *Quarles* and the other *Miranda*-exception cases—custodial interrogation—did not constitute compulsion in violation of the privilege. The officers in those cases violated only the *Miranda* rule—a prophylactic rule to which the Court is free to make exceptions as it sees fit. One might reasonably have assumed that the test for these cases, therefore, would still be whether the confession was "compelled" in violation of the privilege—whatever that term now means.

After *Quarles*, when is a confession considered "compelled"? The line that *Miranda* drew in the sand at "custodial interrogation" has been erased and moved back, but where has the new line been drawn? Inexplicably, the Supreme Court has not drawn a new line.[82] Instead, the Court has avoided the issue by holding that where the *Miranda* doctrine is inapplicable, the "back-up" test for the admissibility of a confession is not whether it was compelled in violation of the privilege, but whether it was made voluntarily under the old due process involuntary confession rule.[83] The *Miranda*-exception cases have continued to insist that the privilege and its prohibition of compelled confessions remain applicable to the pretrial interrogation context.[84] Yet, for reasons left unstated, the Court has declined to provide clear guidance on the precise role of the privilege in police interrogations, and has continued instead to emphasize pre-*Miranda* notions of due process and voluntariness.[85]

Why the doctrinal inconsistencies? Why has the Court fashioned a bi-layered

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81. *See supra* note 80; *see also* M.K.B. Darmer, *Lessons From the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 268–81 (2002) (discussing post-*Dickerson* cases and suggesting that *Miranda* remains a flexible, prophylactic rule after *Dickerson*).

82. *See* Benner, *supra* note 51, at 150–52 (arguing that the definition of "compulsion" in the *Miranda* decision has been undermined by the Court's subsequent cases, which have not provided a replacement); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1073–74 (2001) (noting that the Supreme Court has never provided a clear definition of "compulsion").

83. *See, e.g.*, *Tucker*, 417 U.S. at 444–45 (citing a due process decision, *Wong Sun v. United States*, 371 U.S. 471 (1963), and finding that the fruits of the *Miranda* violation could be used because the defendant's statements were not "involuntary"); *Harris*, 401 U.S. at 224 (holding that statements taken in violation of *Miranda* may be used for impeachment purposes if made voluntarily); *see also* Schulhofer, *supra* note 52, at 873 (noting that the due process involuntary confession rule "remains the principal basis for adjudication in various confessions situations not governed by *Miranda*"). See *infra* note 85 for more discussion on cases that explicitly address voluntariness.

84. *See, e.g.*, *Tucker*, 417 U.S. at 442 (stating that the privilege applies in the police interrogation setting).

85. *See* Dickerson v. United States, 530 U.S. 428, 437, 444 (2000) (recognizing that the due process involuntary confession rule remains a viable confession doctrine, and operates as default rule to *Miranda*); *see, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991) (applying the due process involuntary

approach that favors a prophylactic rule based on the privilege in some scenarios, and the due process involuntary confession rule in others? Why did the Court return to the due process involuntary confession rule at all after the *Miranda* decision seemingly made that doctrine obsolete?[86] Although the Court has never provided a satisfactory answer, at least one scholar has concluded that the due process involuntary confession rule survived because certain members of the Court were hostile to *Miranda* and hoped eventually to overrule it, returning the focus of confession law back to the less restrictive due process standard.[87] Retaining the involuntary confession rule, and having it already positioned as the default test where *Miranda* was inapplicable, would make that transition easier. However, now that any idea of overruling *Miranda* has been laid to rest with the Court's 2000 decision in *Dickerson v. United States*,[88] we are left with a state of constitutional confession law that is doctrinally unsatisfying and incomplete.

E. TODAY: THE BI-LAYERED APPROACH

In summary, despite the doctrinal inconsistency and gaps, a bi-layered procedure for determining the admissibility of confessions can be gleaned from the leading cases. The *Miranda* doctrine, which is a prophylactic rule derived from the privilege against compulsory self-incrimination, remains the preliminary litmus test for the admissibility of a confession in most scenarios. The due process involuntary confession rule, on the other hand, serves as the default test when *Miranda* does not apply. The two doctrines work in tandem as follows: If the appropriate warnings were not given, then the confession must be suppressed pursuant to the prophylactic *Miranda* rule; however, if the facts fit

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confession rule to situations where the privilege is not applicable); Miller v. Fenton, 474 U.S. 104 (1985) (same). See *supra* note 83 for more discussion of *Miranda* cases.

86. *See* Schulhofer, *supra* note 52, at 877–78 (noting that some assumed that the due process involuntary confession rule would be "buried" after *Miranda*).

87. *See* Herman, *supra* note 59, at 737–39 (noting that, due to changes in composition, a majority of the Court was generally hostile to the *Miranda* decision by 1972); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 103 (1992) [hereinafter Herman, *Part I*] (noting that several members of the Court disfavored *Miranda* a few years after the decision was published and probably wished to return to the less restrictive due process standard); Herman, *Part II*, *supra* note 39, at 521, 527, 531 (same). The leading critic of *Miranda*, who for years has put forth arguments to support the Court's hostility to *Miranda*, is former law professor and current United States District Judge Paul G. Cassell. To sample Cassell's work on this subject, see generally Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898 (2001); Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. Section 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999); Paul G. Cassell, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998).

88. 530 U.S. 428, 444 (2000) (holding that Congress does not have the authority to overrule *Miranda* because *Miranda* announced a "constitutional rule"). *See generally* Godsey, *supra* note 18 (discussing whether *Miranda* was constitutionally required).

within a *Miranda* exception, warnings are not required. The confession may be inadmissible, despite the *Miranda* exception, under notions of due process when it fails to satisfy the involuntary confession rule due to police coercion. The privilege's ban on compelled confessions, meanwhile, remains applicable to interrogations, but the Court has not defined its new meaning. Indeed, the privilege (and its role in interrogations) has become lost and forgotten, as it has once again taken a back seat to the due process involuntary confession rule.

II. THE EXTRATERRITORIAL APPLICATION OF CONSTITUTIONAL CONFESSION LAW TO NON-AMERICANS

In a recent article, I presented arguments in favor of an international *Miranda* exception.[89] This exception would apply when the following three circumstances are present: 1) the interrogation is conducted by American law enforcement agents; 2) the subject under interrogation is not an American citizen; and 3) the interrogation takes place beyond the borders of the United States.[90] The next question, and the focal point of this Article, is which doctrine, if any, controls the admissibility of confessions in the above circumstances in the place of the *Miranda* doctrine? As will be demonstrated below, the due process involuntary confession rule, which is the default rule in the United States for situations in which *Miranda* does not apply, is inapplicable to interrogations of non-Americans abroad. Section A demonstrates that although the Due Process Clause of the Fifth Amendment[91] purports to apply to any "person," this seemingly all-inclusive term, by itself, does not render the due process involuntary confession rule applicable to non-Americans abroad. Section B introduces the "substantial connections" test used by the Supreme Court to determine the applicability of certain constitutional rights to non-Americans abroad, and concludes that this test similarly does not extend due process protections to such suspects. Section C establishes that constitutional rights that can be categorized as "trial rights" invariably protect non-Americans abroad, while "freestanding civil liberties," as I term them, do not. This section then posits that the due process involuntary confession rule is properly categorized as a freestanding civil liberty, and therefore does not apply to non-Americans abroad. Section D argues that the only constitutional protection available to non-Americans abroad during interrogations by American law enforcement officials is the undefined privilege against compulsory self-incrimination because the privilege is, in fact,

89. *See generally* Godsey, *supra* note 18.

90. *Id.* at 1710.

91. Up to this point in the Article, both the Fifth and Fourteenth Amendment Due Process Clauses have been included in the discussion because both are relevant within the United States. *See supra* notes 46–47 and accompanying text. However, because federal law enforcement officials typically conduct investigations abroad, while state and local officials typically do not, the remainder of this Article will refer only to the Due Process Clause of the Fifth Amendment, which applies to the federal government. *See supra* note 47 and accompanying text. In any event, the two Due Process Clauses are effectively identical, so the analysis of one would apply to the other.

a "trial right." Part III then explores the historical underpinnings, text, policies, and Supreme Court interpretations of the privilege outside of the police interrogation context in an effort to formulate a conception of a "compelled" confession that comports with each element.

A. THE DUE PROCESS CLAUSE'S REFERENCE TO "ANY PERSON" DOES NOT, BY ITSELF, RENDER THE DUE PROCESS INVOLUNTARY CONFESSION RULE APPLICABLE TO NON-AMERICANS ABROAD

The starting point for any question requiring an interpretation of a provision in the Bill of Rights is the text itself. The Due Process Clause of the Fifth Amendment, from which the involuntary confession rule is derived, provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law."[92] One might reasonably argue that the seemingly all-inclusive term "person" renders the Due Process clause universally applicable to all human beings, wherever they may be located, in their dealings with the United States government. Under such a construction, it would protect non-Americans abroad from conduct by American officials that deprives them of any of the rights embodied in due process, including the right to be free from having involuntary confessions extracted from them. The Supreme Court, however, has not interpreted the term "person" in this manner.

The seminal case on the matter, *Johnson v. Eisentrager*,[93] involved twenty-one German citizens who had served in the German armed forces in China during World War II, had been convicted by American military tribunals in China, and were serving their sentences in China under the control of American military authorities.[94] They petitioned a federal court in the United States for a writ of habeas corpus on the grounds that their trial, conviction, and imprisonment had not comported with the Due Process Clause of the Fifth Amendment.[95] After the United States District Court for the District of Columbia dismissed the petitions, the Court of Appeals reversed, holding that the Fifth Amendment's broad language—referring to "person"—meant that its application was not limited to American citizens or to individuals located within the borders of the United States.[96] In reversing, the Supreme Court flatly rejected this broad interpretation of the term "person," stating simply that "[t]he Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."[97]

Despite the apparent breadth of this holding, an argument could be made that *Eisentrager* was intended to be limited to its wartime facts. An important

92. U.S. CONST. amend. V.
93. 339 U.S. 763 (1950).
94. *Id.* at 765–67.
95. *Id.* at 767.
96. *Id.* at 781–82.
97. *Id.* at 783.

concern of the Court in deciding whether to extend the civil liberties contained in the Bill of Rights to wartime enemies seemed to be the potentially crippling effect such an extension would have on the ability of the United States to conduct warfare.[98] The Court explored in detail the American tradition of vesting the power to handle citizens of enemy nations exclusively in the executive branch of government, and noted "[e]xecutive power over enemy aliens, *undelayed and unhampered by litigation*, has been deemed, throughout our history, essential to war-time security."[99] The Court held that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[100] To vest nonresident alien enemies with the right to bring suit in the United States alleging violations of the Bill of Rights would "hamper the war effort and bring aid and comfort to the enemy."[101]

Recent cases, however, suggest that *Eisentrager* should not be interpreted so narrowly. In the 1990 case *United States v. Verdugo-Urquidez*, the issue was whether the Fourth Amendment protects non-Americans abroad.[102] In that case, agents of the Drug Enforcement Administration (DEA) arrested a Mexican citizen and transported him to the United States to stand trial for smuggling narcotics into the United States.[103] Following his arrest, DEA agents searched the defendant's home in Mexico without a warrant and found incriminating evidence therein.[104] Prior to trial, the defendant moved to suppress this evidence on the ground that the DEA agents violated his Fourth Amendment rights by searching his home without a warrant.[105] In holding that the Fourth Amendment does not protect non-Americans from unreasonable searches beyond the borders of the United States, the Supreme Court cited *Eisentrager* favorably, reiterating that the word "person" in the Fifth Amendment does not automatically render its protections applicable to non-Americans beyond the borders of the United States.[106] The Court in *Verdugo-Urquidez* completely ignored the wartime setting of *Eisentrager* as a ground for distinguishing that case and expressed the holding of *Eisentrager* broadly as having emphatically "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[107]

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98. *Id.* at 773–81.

99. *Id.* at 774 (emphasis added).

100. *Id.* at 776.

101. *Id.* at 779. The *Eisentrager* Court also noted that American servicemen are stripped of certain constitutional rights when they enter the armed services. To allow wartime enemies to claim certain constitutional rights would thereby put them in a better position than our own servicemen. *Id.* at 783.

102. 494 U.S. 259, 261 (1990).

103. *Id.* at 262.

104. *Id.* at 262–63.

105. *Id.* at 263.

106. *Id.* at 269.

107. *Id.*

Furthermore, in those cases where the Supreme Court has held that the Due Process Clause of the Fifth Amendment protects certain non-Americans, it has been careful to limit its holding to non-Americans who were located within the territorial boundaries of the United States when the alleged due process violation occurred. For example, the Supreme Court stated in *Mathews v. Diaz*:[108]

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[109]

Likewise, when the Supreme Court has ruled that the Due Process Clause protects Americans located abroad, it has chosen its language carefully to limit its holding to American citizens only. In *Reid v. Covert*,[110] the Supreme Court stated in this respect: "When the [United States] Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."[111]

Thus, while the word "person" in the Fifth Amendment may at first glance suggest that the Due Process Clause applies to any human being located anywhere who is subjected to any form of state action by the United States government—including non-Americans abroad—Supreme Court interpretations of that term have undercut such an argument.[112] Accordingly, the text of the

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108. 426 U.S. 67 (1976).

109. *Id.* at 77 (citations omitted); *see also* The Japanese Immigrant Case, 189 U.S. 86, 101 (1903) (holding that the due process clause protects an alien "who has entered this country, and has become subject in all respects to its jurisdiction"); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that aliens "within the territorial jurisdiction" of the United States are protected by the due process clause).

110. 354 U.S. 1 (1957).

111. *Id.* at 6. The Court later reaffirmed in *Verdugo-Urquidez* that *Reid's* holding is limited to American citizens. *Verdugo-Urquidez*, 494 U.S. at 270.

112. The United States Court of Appeals for the District of Columbia was recently faced with the task of construing these cases and their impact upon the phrase "No person" in the 2000 case of *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds*, 536 U.S. 403 (2002). In *Harbury*, the plaintiff, an American citizen, was the wife of a Guatemalan citizen who had allegedly been tortured and killed in Guatemala by members of the Guatemalan Security Forces. *Id.* at 598. The complaint alleged that these acts had been performed at the direction of the CIA. *Id.* at 599. The plaintiff brought a civil *Bivens* action for monetary damages against the U.S. government alleging, among other things, that the government had violated her husband's due process rights. The due process right that that the government had allegedly violated was not the ban on extracting involuntary confessions at issue in this Article, but rather the prohibition against government conduct such as torture that "shocks the conscience." *Id.* at 602–03. Yet because the ban on conduct that "shocks the conscience" is derived from the Due Process Clause and therefore is controlled by the introductory phrase "No person," *Harbury's* interpretation of that phrase is instructive to the issue at hand.

The plaintiff argued in *Harbury* that the Due Process Clause applied to her husband, a non-American,

Due Process Clause does not support the extraterritorial application of the involuntary confession rule to non-Americans.

B. THE NARROW "SUBSTANTIAL CONNECTIONS" TEST RENDERS THE DUE PROCESS INVOLUNTARY CONFESSION RULE INAPPLICABLE TO MOST NON-AMERICANS ABROAD

Although the Supreme Court has rejected the argument that the term "person" renders the Due Process Clause applicable to non-Americans abroad, the Court has not completely ruled out the possibility that such individuals could receive due process protections in some circumstances. In *Eisentrager*,[113] the Court vaguely described a sliding scale in which protections in the Bill of Rights attach to aliens to the degree that they have peacefully and voluntarily associated themselves with the United States. In this respect, the Court noted that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and *ascending* scale of rights as he increases his identity with our society."[114] The Court suggested that the petitioners in *Eisentrager* were denied the protections of the Due Process Clause not just because they were non-Americans situated outside of the United States when the alleged constitutional violations occurred but also because, as German soldiers who had "remained in the service of the enemy,"[115] they had no peaceful connection to America prior to their most recent encounter with the United States government.[116]

The Court expanded on this theme in *Verdugo-Urquidez*, ruling that the Fourth Amendment did not apply to a search of the defendant's home.[117] Central to the Court's holding were the facts that the defendant was not an

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even though he was in Guatemala at the time of the alleged torture. *Id.* at 602–04. She further argued that *Eisentrager's* holding limited the application of that clause only in relation to non-Americans who are enemies of war. Persuasive to the D.C. Circuit, however, was the fact that the Court in *Verdugo-Urquidez* had refused to adopt such a narrow interpretation of *Eisentrager*. The D.C. Circuit noted that the *Verdugo-Urquidez* Court had characterized its rejection of the extraterritorial application of the Fifth Amendment in *Eisentrager* as "emphatic," stating:

> 'Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view . . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.'

Id. at 604 (quoting *Verdugo-Urquidez*, 494 U.S. at 269 (quoting *Eisentrager*, 339 U.S. at 770, 784–85)). Recognizing that the *Verdugo-Urquidez* Court's "extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not . . . limited" to "enemy aliens during wartime," the D.C. Circuit held that the plaintiff's husband was not protected by the Due Process Clause. *Id.*

113. 339 U.S. 763 (1950); *see supra* notes 93–97 and accompanying text.

114. *Eisentrager*, 339 U.S. at 770.

115. Id. at 776. In contrast, the Supreme Court has held that when the U.S. government acts with respect to American citizens located abroad, those citizens are entitled to the protections of the U.S. Constitution. Reid v. Covert, 354 U.S. 1, 6 (1957); *see supra* note 13 and accompanying text.

116. *Eisentrager*, 339 U.S. at 770–76.

117. *See supra* notes 102–07 and accompanying text.

American citizen and that the search in question took place beyond the borders of the United States.[118] But the Court suggested that these facts did not, by themselves, dispose of the defendant's claim. Quoting the "ascending scale of rights" language from *Eisentrager*, the Court denied the defendant's plea for Fourth Amendment protection not simply because he was an alien, but also because he "had no previous significant voluntary connection with the United States."[119]

Thus, in *Eisentrager* and *Verdugo-Urquidez*, the Supreme Court set forth a test, sometimes called the "ascending scale of rights test"[120] or the "substantial connections"[121] test, by which aliens are granted certain constitutional protections to the extent they have voluntarily connected themselves with the United States prior to the encounter with the United States government for which they seek constitutional protection. The Supreme Court has yet to clarify, however, what sort of "significant voluntary connection" with the United States would suffice to trigger the protections in the Bill of Rights. Indeed, the Court expressly declined to address the issue in *Verdugo-Urquidez*.[122] The small number of lower courts addressing the issue in the wake of *Eisentrager* and *Verdugo-Urquidez*, however, have not read this language broadly. In one case, for example, a court ruled that numerous prior business trips and vacations to

118. *See supra* notes 102–07 and accompanying text.

119. *Verdugo-Urquidez*, 494 U.S. at 271. *Verdugo-Urquidez* could be interpreted to require that an alien seeking constitutional protection both "come within the territory of the United States" and have a "previous significant voluntary connection with the United States." *Id.* Because all aliens would be on trial for criminal charges within the United States when the issues addressed in this Article would arise, the first requirement would always be satisfied. Thus, the only matter left unresolved would be whether such an alien had the requisite prior connections with the United States. *See, e.g., id.* (holding that because defendant was already within the United States for trial, the only issue was the extent of his prior connections to the United States).

120. *See, e.g.*, Rasul v. Bush, 215 F. Supp. 2d 55, 66 (D.C. 2002) (discussing "ascending scale of rights" test).

121. *See infra* notes 123–24.

122. 494 U.S. at 271–72 (refusing to decide whether a prolonged involuntary presence in the United States, such as the serving of a prison sentence, would suffice). One could read the Supreme Court's dicta on this issue in *Verdugo-Urquidez* and *Wong Wing*, *see supra* notes 102–12, as suggesting that an alien's voluntary presence or residence in the United States at the time of the alleged constitutional deprivation are prerequisites for the attachment of constitutional protections. *See* Ashkir v. United States, 46 Fed. Cl. 438, 444–45 (2000) (holding that non-resident alien could not invoke the Takings Clause of the Fifth Amendment when alleged constitutional deprivation occurred beyond borders of United States). Drawing the line at voluntary presence would, of course, be a clear, bright-line rule. However, the Court's refusal to anchor the ascending scale of rights test at such a clear line of demarcation, as well as its continued use of the vague "ascending scale of rights" language, strongly suggest that an alien could attain the protections in the Bill of Rights through significant prior connections with the United States other than residence or a voluntary presence at the time of the alleged constitutional violation. Indeed, the cases cited *infra* at notes 123–24 implicitly ruled that voluntary presence or residence in the United States at the time of the constitutional violation are not prerequisites when the courts dutifully applied the substantial connections test to non-Americans who were not present in the United States when the alleged constitutional deprivations occurred. These courts therefore assumed that the requisite substantial connections could be attained short of physical presence or residence.

the United States were insufficient.[123] In another case a different court ruled that a history of regular trips to America to visit relatives did not meet the "substantial connections" test.[124]

Thus, only in rare cases would the "substantial connections" test protect non-Americans during interrogations by American law enforcement officials abroad. Accordingly, this test does not generally support the extraterritorial application of the due process involuntary confession rule to non-Americans.[125]

C. PROVISIONS IN THE BILL OF RIGHTS THAT HAVE BEEN INTERPRETED AS "TRIAL RIGHTS" INVARIABLY PROTECT NON-AMERICANS ABROAD, WHILE "FREESTANDING CIVIL LIBERTIES" DO NOT

Provisions in the Bill of Rights that have been interpreted as "trial rights" protect all defendants, regardless of alienage, during their trials in the United

123. United States v. Fantin, 130 F. Supp. 2d 385, 391 (W.D.N.Y. 2000) (applying substantial connections test and holding that alien's prior contacts with United States were "either too transitory or stale" to satisfy test).

124. Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 60 n.17 (D.D.C. 1998) (applying substantial connections test and finding contacts insufficient); *see also Rasul*, 215 F. Supp. 2d. at 72 (applying *Eisentrager* and substantial connections test and finding that detainees at Guantanamo Bay, brought to the U.S. military base in Cuba from Afghanistan, were not entitled to protections of the Bill of Rights). *But see* Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993) (holding that two-year confinement at American military base in Cuba of aliens seeking political asylum in the United States, and screened by the United States for that purpose, established substantial connection to the United States giving rise to due process rights).

125. A line of Supreme Court cases known as the "*Insular Cases*" appears at first glance to suggest that non-Americans abroad are never protected by the Due Process Clause, but upon closer inspection these cases are distinguishable. In the *Insular Cases*, the Supreme Court held that certain constitutional rights do not apply to citizens of certain territories of the United States. *See* Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) (holding that Sixth Amendment right to jury trial was inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (holding that Fifth Amendment grand jury provision was inapplicable in Philippines); Dorr v. United States, 195 U.S. 138, 149 (1904) (holding that right to jury trial was inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197, 215–18 (1903) (holding that provisions on indictment by grand jury and jury trial were inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244, 287 (1901) (holding that the Revenue Clauses of the Constitution were inapplicable to Puerto Rico). In these cases, however, the question was whether Congress, in territorializing such places as the Philippines and Puerto Rico, intended to make them so incorporated into the United States that the entire Constitution would apply therein. In each case, the Court interpreted the treaties and laws in question that gave the United States a degree of sovereign power over these areas, and answered the question in the negative. *See, e.g., Ocampo*, 234 U.S. at 98–99. Thus, Congress did not intend that citizens of the Philippines, for example, were to be considered so much a part of the United States that they could claim protection of the U.S. Constitution. *Id.* In contrast, when a non-American is present within the borders of the United States, as in *Plyler*, *Bridges*, *Russian Volunteer Fleet*, *Wong Wing*, and *Yick Wo*, his position is markedly better, as the application of the Constitution to such an individual does not turn on the interpretation of treaties or congressional intent. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (discussing the *Insular Cases*); Plyler v. Doe, 457 U.S. 202 (1982); Bridges v. Wixon, 326 U.S. 132 (1945); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* Michael A. Cabotaje, Comment, *Equity Denied: Historical and Legal Analyses in Support of the Extension of U.S. Veterans' Benefits to Filipino World War II Veterans*, 6 ASIAN L.J. 67, 88–96 (1999) (discussing the *Insular Cases*).

States.[126] This is, at first glance, an unremarkable statement. When an alien defendant is on trial in a federal courtroom in the United States, no one would dispute the fact that he is afforded the right to an attorney, the right to call witnesses in his defense and all of the other constitutional rights that are synonymous in this country with the right to a fair trial.[127] But the next step is key: When the vindication of a trial right requires the court to make findings of fact regarding police investigative conduct that took place prior to trial, the location where that police conduct took place becomes legally irrelevant. Stated differently, constitutional rights classified as trial rights can be backward–looking and, as a result, can attach at trial and then extend their protections retroactively to the pretrial investigation stage. When this occurs, it cloaks non-Americans abroad with constitutional protection after the fact, even though they were located outside of the United States and thus were not initially protected by the Bill of Rights at the time that the alleged constitutional violation occurred.[128]

Perhaps a hypothetical can best illuminate this point. To explore the hypothetical, a few terms must be defined as they are used in this Article. A "trial right" is a constitutional right that attaches only in the criminal trial setting. Its concern is to ensure a fair and accurate criminal trial process, or to further a trial-related policy. Thus, a violation of a trial right can occur only at trial. The other type of constitutional right is a "freestanding civil liberty." A freestanding civil liberty is not concerned with ensuring fair and accurate trials; rather, it protects individuals generally from government overreaching in a variety of non-trial settings—from the private home to the public street corner. Accordingly, a freestanding civil liberty can be triggered or violated in situations outside of the criminal trial context. Now that these terms have been defined, we may proceed with the hypothetical.

Suppose that an FBI agent in Italy interrogates an Italian citizen who is suspected of running a website that allows the suspect to traffic child pornography into the United States. The FBI agent deprives the suspect of food and sleep for seventy-two hours, until the suspect breaks down and confesses involuntarily. The suspect is then brought to the United States and charged with various child pornography violations. At trial, the involuntary confession is admitted into evidence and the suspect is convicted. On appeal, the crucial question for

126. This point is so widely accepted and practiced that courts rarely feel the need to state it. *See generally* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (citing cases and discussing American courts' practice of affording alien defendants full panoply of constitutional trial rights during their criminal trials). *See also supra* notes 11–12, 108; *supra* note 109 and accompanying text; *infra* note 172 and accompanying text. As an Assistant United States Attorney, I prosecuted numerous illegal aliens. Never did the Court or the United States Attorney's Office suggest that such individuals were stripped of constitutional trial rights because of their alien status. Indeed, to hold otherwise would work a fundamental change in American criminal trials, establishing a separate set of trial rules that would apply to non-Americans.

127. *See supra* note 126.

128. *See infra* notes 135–50, 173–207 and accompanying text.

purposes of this Article is whether the due process involuntary confession rule grants a freestanding civil liberty, which would mean that the due process violation occurred in Italy at the time the coercive interrogation took place, or whether the due process involuntary confession rule grants a trial right, which would mean that the constitutional violation occurred later in the United States when the government introduced the involuntary confession into evidence at the suspect's trial.

The answer to the above question determines whether or not the due process involuntary confession rule applies extraterritorially to non-Americans. The Bill of Rights protects non-Americans against constitutional deprivations that occur within the United States.[129] Non-Americans are not protected by the Bill of Rights, however, when the alleged constitutional violation occurs outside of the United States, unless they satisfy the "substantial connections" test.[130] But non-Americans are protected by constitutional "trial rights" at their trials in the United States, even when vindication of such rights requires courts to review the pretrial conduct of law enforcement officials in foreign countries.[131] Because violations of freestanding civil liberties occur only at the time of the law enforcement officials' alleged unlawful conduct, however, these rights do not protect non-Americans when the alleged violation occurs completely beyond the borders of the United States.[132] Thus, as explored in more detail below, if the involuntary confession rule grants a freestanding civil liberty, it would afford the non-American defendant no protection in an American court under *Verdugo-Urquidez* unless the defendant satisfies the narrow "substantial connections" test; because the constitutional violation in the above hypothetical occurred solely in Italy.[133] If the involuntary confession rule grants a trial right, however, it follows that the constitutional violation in the above hypothetical occurred solely at the defendant's trial within the territorial boundaries of the United States when the government introduced the involuntary confession into evidence. Consequently, the suspect would have a right to exclude the confession, despite lack of American citizenship, pursuant to the line of cases previously discussed that extend constitutional trial rights to non-Americans.[134]

Before attempting to answer the aforementioned question, it is necessary first to explore an example of a trial right, and alternatively, an example of a freestanding civil liberty. This process will set the necessary parameters for properly categorizing the due process involuntary confession rule in a subsequent discussion.

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129. *See supra* notes 12, 108–09, 126 and accompanying text.
130. *See supra* notes 93–125 and accompanying text.
131. *See supra* notes 102–07; *infra* notes 135–57, 173–207 and accompanying text.
132. *See supra* notes 102–07; *infra* notes 158–72 and accompanying text.
133. *See supra* notes 102–07; *infra* notes 208–51 and accompanying text.
134. *See supra* notes 12, 108–09, 126 and accompanying text.

1. The Privilege Against Compulsory Self-Incrimination Is An Example Of A Trial Right.

An example of a "trial right" is the Fifth Amendment's privilege against self-incrimination. Using a strict interpretation of the text of the Fifth Amendment,[135] the Supreme Court has held that the privilege against self-incrimination is violated only when defendants become witnesses against themselves at their criminal trials.[136] Therefore, if a law enforcement officer used brute force and torture to extract a compelled confession from a suspect, the officer would not have violated the privilege against self-incrimination at the time of the confession because the suspect would not yet have testified at trial.[137] If, however, the suspect were later prosecuted and the government introduced the involuntary confession into evidence, the suspect then would be considered a "witness against himself" in a "criminal case," and the Fifth Amendment would be violated at the time the confession was admitted.[138]

The distinction was first made clear in the line of federal cases involving governmental grants of immunity to witnesses. In *Kastigar v. United States*,[139] for example, the petitioners were subpoenaed to testify as witnesses before a federal grand jury.[140] The petitioners invoked the privilege against self-incrimination and refused to testify.[141] In response, the government applied to the United States District Court for the Central District of California for an order pursuant to a federal statute that granted the petitioners immunity from prosecution.[142] After the district court granted immunity to the petitioners, however, they still refused to testify and were held in contempt and detained

135. "No person . . . in any criminal case shall be compelled to be a witness against himself." U.S. CONST. amend. V.

136. Chavez v. Martinez, 123 S.Ct. 1994, 2001–04 (2003); *Verdugo-Urquidez*, 494 U.S. at 264.

137. *Chavez*, 123 S.Ct. at 2001–04; *Verdugo-Urquidez*, 494 U.S. at 264; *see also infra* notes 139–57 and accompanying text.

138. *Chavez*, 123 S.Ct. at 2001–04; *see Verdugo-Urquidez*, 494 U.S. at 264; Gardner, *supra* note 55, at 442 (arguing that text of privilege dictates that it is a trial right); *see also infra* notes 139–57 and accompanying text.

139. 406 U.S. 441 (1972).

140. *Id.* at 442.

141. *Id.*

142. *Id.* In response to the government's request, the district court granted immunity to the petitioners, *id.*, pursuant to the authority vested in it by 18 U.S.C. § 6002 (2000), which states:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

until they agreed to do so.[143] In discussing the constitutionality of statutes that authorize the government to immunize witnesses and then compel their testimony, the Supreme Court made clear that the "sole concern" of the privilege was not the forcible extraction of statements; rather, the privilege only prohibits such statements from being introduced at a trial or similar proceeding to inflict criminal penalties upon the person who was "compelled" to speak.[144] Once witnesses have been granted immunity, ensuring that their statements will not be introduced into evidence against them at a criminal trial, the privilege against self-incrimination no longer prohibits the government from forcibly extracting incriminating statements from them.[145] The Supreme Court concluded in *Kastigar* that when witnesses are granted immunity and still refuse to testify, the government may forcibly compel their testimony—without violating their Fifth Amendment rights—by detaining them until they agree to take the witness stand.[146]

This distinction is derived not only from the pivotal word "witness" and phrase "criminal case" in the text of the privilege, but because one of the policies behind the privilege is to further the truth-seeking function of the criminal trial process, as "compelled" confessions are likely to be unreliable and might lead juries in many cases to convict innocent defendants. As the Supreme Court explained in the 1993 case *Withrow v. Williams*:[147]

> Nor does the Fifth Amendment trial right protected by [the privilege] serve some value necessarily divorced from the correct ascertainment of guilt. A system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation. By bracing against the possibility of unreliable statements . . . [the privilege] serves to guard against the use of unreliable statements at trial.[148]

Thus, the privilege is a trial right because as a matter of text and policy it is concerned only with the government's "use" at trial of compelled statements.[149]

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143. *Kastigar*, 406 U.S. at 442.

144. *Id.* at 453.

145. *Id.*; *see also* Mahoney v. Kesery, 976 F.2d 1054, 1061–62 (7th Cir. 1992) (noting that Fifth Amendment privilege against self-incrimination does not protect witness after he or she is granted immunity).

146. 406 U.S. at 442.

147. 507 U.S. 680 (1993).

148. *Id.* at 692 (citations and internal quotations omitted). The above quotation substitutes the word "privilege" for the word "*Miranda*." Because *Miranda* was designed solely to protect the privilege, *see supra* notes 51–68 and accompanying text, the two words are interchangeable in this context. *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973) (stating that the *Miranda* Court "made it clear that the basis for the decision was the need to protect the fairness of the trial itself."); Gardner, *supra* note 55, at 437 (distinguishing between the privilege, which is based on trial-related concerns, and the Fourth Amendment, which is not).

149. The Court seemed to undermine the privilege's focus on reliability in *Colorado v. Connelly*, 479 U.S. 157 (1986), when it stated: "The sole concern of the [privilege against self-incrimination], on

As the Supreme Court said in *Verdugo-Urquidez* when contrasting the privilege with the Fourth Amendment: "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" when the coerced statements are introduced into evidence against the defendant.[150]

The Supreme Court recently reaffirmed this principle in the case of *Chavez v. Martinez*.[151] In *Chavez*, the petitioner, Martinez, brought a civil suit for monetary damages under Title 42 U.S.C. Section 1983[152] against a police sergeant.[153] Martinez argued that his rights under the privilege against compulsory self-incrimination had been violated at the moment that the sergeant in question subjected him to a coercive interrogation.[154] Martinez made this claim despite the fact that, following the interrogation, he was never charged with having committed a crime.[155] The Supreme Court rejected Martinez' claim, stating: "Martinez was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case."[156] The *Chavez* decision thus further solidifies the notion that the privilege against compulsory self-

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which *Miranda* is based, is governmental coercion." *Id.* at 170; *see also* Allen v. Illinois, 478 U.S. 364, 375 (1986) ("The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons"). But the Court then returned the privilege to its reliability roots in the 1993 case *Withrow v. Williams* when it stated: "By bracing against the possibility of unreliable statements in every instance of incustody interrogation, [the privilege] serves to guard against the use of unreliable statements at trial." 507 U.S. 680, 692 (1993) (internal quotations omitted). This Article asserts in Part III that the "reliability rationale" was grafted onto the privilege as a result of the Court's flawed historical analysis in the 1897 case of *Bram v. United States*, 168 U.S. 532 (1897). *See infra* notes 312–28 and accompanying text. An analysis of the historical underpinnings of the privilege suggests that courts interpreting this particular provision should be wholly unconcerned with reliability. *See infra* notes 309–28 and accompanying text.

Regardless of the Court's vacillations on this point of policy, the privilege will always be considered a trial right for two reasons distinct from policy. First, as we have seen, the text of the privilege dictates that it is a trial right. Second, to convert the privilege into a freestanding civil liberty would overrule the line of cases dealing with government grants of immunity, which would fundamentally alter the American criminal justice system. Even if the Court desired to overrule these cases, which is unlikely, it would still be bound by the text of the privilege. Thus, the privilege's status as a trial right is secure.

150. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (citations omitted); *see also* Charlotte E. *ex rel.* Deshawn E. v. Safir, 156 F.3d 340, 346 (2d Cir. 1998) ("Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding."); United States v. Bin Laden, 132 F. Supp. 2d 168, 181–82 (S.D.N.Y. 2001) (same); Godsey *supra* note 18 , at 1724–29 (2002) (collecting cases and noting that privilege is not violated until statements are introduced at trial). *See also* Darmer, *supra* note 23, at 348–51 (arguing that the privilege against compulsory self-incrimination grants a trial right).

151. 123 S.Ct. 1994 (2003).

152. *See infra* note 241 and accompanying text.

153. *Chavez*, 123 S.Ct. at 1999.

154. *Id.* at 1999–2000.

155. *Id.*

156. *Id.* at 2001.

incrimination is a "trial right."[157]

2. The Fourth Amendment Is An Example Of A Freestanding Civil Liberty

The Fourth Amendment, in contrast to the privilege against compulsory self-incrimination, is a freestanding civil liberty. This is because it was designed to protect privacy interests outside of the trial setting, such as in a private home, and not as a rule of procedure designed to monitor and further the truth-seeking function and fairness of criminal trials. In *Verdugo-Urquidez*, for example, DEA agents seized evidence from the alien-defendant's Mexican home without a warrant and later introduced that evidence at trial.[158] The DEA's failure to follow the requirements of the Fourth Amendment in that case, however, did not render the evidence unreliable, thereby casting doubt on the fairness of the trial or the validity of the defendant's conviction. The evidence (drug-dealing notes and ledgers) did not suddenly change in form or otherwise become less probative of the fact that the defendant was a drug dealer simply because the DEA seized it without a warrant. As the Supreme Court has noted in this respect, "The protections of the Fourth Amendment are of a wholly different order [than the privilege against self-incrimination], and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial . . . . '[T]here is no likelihood of unreliability or coercion present in a search-and-seizure case.'"[159] The Court has further elaborated this point, stating that the Fourth Amendment and its exclusionary rule cannot be thought "to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. Quite the contrary . . . the evidence excluded [under the Fourth Amendment's exclusionary rule] is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."[160]

Because of the policies supporting it, a violation of the Fourth Amendment is seen as occurring at the moment the unlawful search and seizure takes place—not, as with the privilege, at trial when the evidence seized is introduced. The alien-defendant in *Verdugo-Urquidez*, for example, asserted that he could claim

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157. *See infra* note 245–50 and accompanying text.

158. 494 U.S. at 262–63.

159. Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (quoting Linkletter v. Walker, 381 U.S. 618, 638 (1965)); *see also* Gardner, *supra* note 55, at 437 (discussing difference between privilege and Fourth Amendment).

160. Withrow v. Williams, 507 U.S. 680, 691 (1993) (internal quotations omitted). As the Supreme Court stated in *Stein v. New York*:

> Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.

346 U.S. 156, 192 (1953).

the protection of the Fourth Amendment because he was present in the United States during his trial and the government was attempting to introduce evidence obtained during a warrantless search at his trial.[161] The defendant's argument would undoubtedly have had merit if the Fourth Amendment were considered a trial right that is violated when the government introduces evidence seized in violation of its dictates.[162] The Supreme Court, however, disagreed with the defendant's characterization of Fourth Amendment protections, and in the process cast the Fourth Amendment as a freestanding civil liberty.[163] Based on the policies underlying the Fourth Amendment, the Court held that a violation is "fully accomplished" at the time of the unlawful search in question—not when the evidence is introduced later at trial.[164] The defendant's home was located in Mexico, and as a result the government conduct that was alleged to be unconstitutional occurred solely outside of the United States.[165] Because the defendant was a non-American who could claim only an alleged violation of the Constitution outside of the United States, he had no Fourth Amendment protection.[166]

Because a violation of the Fourth Amendment is fully accomplished at the time of the search or seizure, the introduction at trial of evidence seized in violation of the Fourth Amendment does not constitute a second, independent violation. Instead, evidence seized in violation of the Fourth Amendment is excluded as a result of a judicially created exclusionary rule, similar to a common law rule of evidence, which is designed to penalize police officers and to deter them from violating the Fourth Amendment in the future. As the Supreme Court held in *United States v. Leon*:[167]

> The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The wrong condemned by the Amendment is fully accomplished by the unlawful search or seizure itself; and the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered. The [Fourth Amendment exclusionary] rule thus operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deter-

161. *Verdugo-Urquidez*, 494 U.S. at 264.

162. *See id.* at 264–75.

163. *Id.* at 285–86.

164. *Verdugo-Urquidez*, 494 U.S. at 264; *see also* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998) (Fourth Amendment violation "fully accomplished" at time of search or seizure); Arizona v. Evans, 514 U.S. 1, 10 (1995) (same); NationsBank Corp. v. Herman, 174 F.3d 424, 429 (4th Cir. 1999) (same); Lamont v. Woods, 948 F.2d 825, 834 (1991) (2d Cir. 1991) (same); Marshall v. Whittaker Corp., 610 F.2d 1141, 1145 n.8 (3d Cir. 1979) (same); Elizabeth A. Corradino, Note: *The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far?*, 57 FORDHAM L. REV. 617, 623 n.39 (1989) (same).

165. *Verdugo-Urquidez*, 494 U.S. at 274–75.

166. *Id.*

167. 468 U.S. 897 (1984).

> rent effect, rather than a personal constitutional right of the party aggrieved.[168]

Thus, the Fourth Amendment and the privilege against compulsory self-incrimination are different in the sense that a Fourth Amendment violation occurs, if at all, when the "unreasonable" search takes place. The Fifth Amendment's privilege, on the other hand, can be violated only in a courtroom setting when the defendant's coerced confession is introduced and he becomes a "witness" against himself.[169] The privilege, therefore, contains its own constitutionally based exclusionary rule, as its only function is to exclude evidence at criminal trials.[170]

Once it is understood that a violation of the Fifth Amendment's privilege against compulsory self-incrimination does not occur until trial, the privilege and other "trial rights" in the Constitution can be distinguished from the constitutional rights at stake in cases in which the Supreme Court adopted the "substantial connections" approach. In *Verdugo-Urquidez* and *Eisentrager* for example, the alleged constitutional violations occurred outside of the United States.[171] In fact, in connection with the privilege and other constitutional trial rights, it becomes apparent that the location of the trial, not the location of the interrogation, is the dispositive factor. If a non-American who confessed abroad is later tried in the United States, the question in such a case is not whether the privilege applies abroad, but whether non-Americans located *within the boundaries of the United States*, for the purpose of attending their criminal trial, are protected by the privilege. Undoubtedly, they are.[172]

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168. *Id.* at 906 (citations and internal quotations omitted); *see* Illinois v. Gates, 462 U.S. 213, 223 (1983) (Fourth Amendment exclusionary rule not constitutionally based); United States v. Calandra, 414 U.S. 338, 347–48 (1974) (same); *see also* Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 45–46 (2001) (discussing history of Fourth Amendment's exclusionary rule, and noting that it has been interpreted as a judicially created rule not based in the Fourth Amendment itself); George C. Thomas III, *Judges Are Not Economists and Other Reasons To Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 49–50 (2001) (same).

169. *See supra* notes 135–57 and accompanying text.

170. *See* United States v. Janis, 428 U.S. 433, 443 (1976) (stating that the privilege contains a "direct command against the admission of compelled testimony" while the Fourth Amendment does not); Peter Arenella, *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982–83: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 239 (1983) (noting that the privilege "contains its own constitutionally-mandated exclusionary remedy"); Gardner, *supra* note 55, at 339 (same).

171. In *Eisentrager* the alleged constitutional injury was fully accomplished in China. Johnson v Eisentrager, 339 U.S. 763, 765–67 (1995). In *Verdugo-Urquidez*, the alleged injury was fully accomplished in Mexico. *Verdugo-Urquidez*, 494 U.S. at 262–63.

172. The concept that aliens on trial in the United States are protected by constitutional trial rights is so well established that it is rarely questioned. *See supra* note 126; *see, e.g.*, United States v. Maikovskis, No. M18-304, 1978 U.S. Dist. LEXIS 19113, at *18 (S.D.N.Y Mar. 10, 1978) (stating that privilege against self-incrimination protects aliens during court proceedings in United States). Thousands of illegal aliens are currently housed in American prisons after having been tried in American courtrooms. *See Can't Accelerate Deportations*, NAT'L L.J., Mar. 22, 1999, at A8 (stating that thousands

The crucial question for purposes of this Article, therefore, is whether the due process involuntary confession rule is a trial right like the privilege against compulsory self-incrimination, or a freestanding civil liberty like the Fourth Amendment's protection from unreasonable searches and seizures. If it is a trial right, then non-Americans on trial in the United States will have the right to exclude involuntary confessions regardless of the location where the pretrial confession was made. If the due process involuntary confession rule is considered a freestanding civil liberty, however, then non-Americans will be unsuccessful in excluding involuntary confessions made to FBI agents beyond the borders of the United States.

D. THE DUE PROCESS INVOLUNTARY CONFESSION RULE IS A FREESTANDING CIVIL LIBERTY, AND THEREFORE DOES NOT APPLY TO NON-AMERICANS ABROAD UNLESS THEY SATISFY THE SUBSTANTIAL CONNECTIONS TEST

As the above discussion makes clear, a constitutional right can be categorized as either a trial right or a freestanding civil liberty by examining its text and the policies supporting the right. The privilege against compulsory self-incrimination is considered a trial right because it was designed to protect trial-related interests, and because the text demands that it is a trial right. The Fourth Amendment is a freestanding civil liberty because it was designed to protect privacy outside of the trial setting. Does the due process involuntary confession rule grant an individual a freestanding civil liberty to be free in any setting from the type of government pressure that yields involuntary confessions? Is the involuntary confession rule in essence a "roving" constitutional right, like the Fourth Amendment, designed to protect the right of suspects not to be bothered, harassed or tortured by the American government regardless of whether they are ultimately charged and brought to trial? Or does the due process involuntary

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of aliens are currently in jail after having been convicted of crimes in American courtrooms). Permitting the government to force illegal aliens to testify at their own criminal trials would work a fundamental change in the American trial process, creating a separate type of trial for non-Americans where no constitutional rights are honored. And, although the Supreme Court has not directly ruled on the applicability of the Fifth Amendment's privilege against self-incrimination to non-Americans who are located within the United States, it has ruled that they are entitled to equal protection rights, First Amendment rights, just compensation rights under the Fifth Amendment, and certain due process rights under the Fourteenth and Fifth Amendments. For equal protection rights, see *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (holding that illegal aliens are protected by the Equal Protection Clause). *See generally* Monroe Leigh, *Judicial Decisions*, 77 AM. J. INT'L L. 144, 151 (1983). For First Amendment rights, see *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that aliens have First Amendment rights). *See generally* Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee: *A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000) (discussing the application of the First Amendment to aliens). For just compensation rights under the Fifth Amendment, see *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931). For certain due process rights under the Fourteenth and Fifth Amendments, see *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that resident aliens are protected by the Fourteenth Amendment and stating in dicta that they also are protected by the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment protects resident aliens).

confession rule solely grant individuals a trial right—the right not to be convicted at trial through the use of a confession obtained through coercive means? Is its prohibition on forceful and third-degree interrogation tactics simply designed to keep the government from "stacking the deck" so that it may obtain an unfair advantage at trial? Was it created to ensure a fair and reliable trial by keeping out confessions that, because they may have been wrung out of innocent defendants through the use of torture, are considered patently unreliable and likely to lead juries to convict innocent defendants?

1. The Due Process Involuntary Confession Rule Historically Was Interpreted as Primarily Granting a Trial Right

The due process involuntary confession rule has been a chameleon, as it has been interpreted to support different policies as it has evolved.[173] Undoubtedly, when it was first introduced in the 1936 case of *Brown v. Mississippi*,[174] it was seen by the Court as a trial right. In that case, the defendants were convicted on the basis of confessions that had been obtained through torture.[175] In reversing the convictions, the Court held that the "*use* of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[176] The Court elaborated that "'[c]oercing the supposed state's criminals into confessions and *using such confessions so coerced from them against them in trials* has been the curse of all countries.'"[177] The due process violation in *Brown* occurred at trial, not at the time of the interrogations, when the state authorities "contrive[d] a conviction through the pretense of a trial, which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of [confessions] known to be perjured'" and unreliable.[178] The Court reaffirmed this concept a few years later in the 1941 case of *Lisenba v. California*,[179] stating:

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on such a confession.[180]

173. *See infra* note 186 and accompanying text.
174. 297 U.S. 278 (1936).
175. *Id.* at 286–87.
176. *Id.* at 286 (emphasis added).
177. *Id.* at 287 (emphasis added) (quoting Fisher v. State, 110 So. 361, 365 (Miss. 1926)).
178. *Id.* at 286 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).
179. 314 U.S. 219 (1941).
180. *Id.* at 236–37.

Through the ensuing decades, the Court's interpretation was consistent. In the 1945 case of *Malinski v. New York*,[181] for example, the Court stated that it is the "*introduction* of an involuntary confession" into evidence that violates the Due Process Clause.[182] The Court further commented: "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be *used* to convict a defendant. And if it is *introduced at trial*, the judgment" will be reversed.[183] A decade later in *Leyra v. Denno*,[184] the Court again instructed that it is the "*use* in a state criminal trial of a defendant's confession obtained by coercion" that is "forbidden" by the Due Process Clause.[185] The notion that it was the "use" at trial of an involuntary confession that violates the Due Process Clause was a direct result of the policies that were seen to underlie the involuntary confession rule. Indeed, woven throughout the cases in this era was a strong emphasis on trial-related policy concerns, including the need to ensure the reliability of criminal trials, maintain a sense of fairness in the criminal trial process, and maintain judicial integrity.[186]

Two cases decided during the "trial right era" deserve particular attention, as they help set the parameters for the later discussion of *Colorado v. Connelly*[187] in Part II.D.2 below.[188] The first case, *Blackburn v. Alabama*,[189] involved a

181. 324 U.S. 401 (1945).

182. *Id.* at 404 (emphasis added).

183. *Id.* (citations omitted) (emphasis added).

184. 347 U.S. 556 (1954).

185. *Id.* at 558.

186. As the due process involuntary confession rule has evolved, the Court has embraced a variety of policies as supporting it, some of which are trial-related, and others of which arguably are not. *See* Gardner, *supra* note 55, at 444–45 (discussing reliability and fairness); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 891–924 (1979) (discussing policies underlying the due process involuntary confession rule, including reliability, fairness, a concern for mental freedom, and deterrence of offensive police practices); Herman, *supra* note 59, at 750 (discussing reliability and deterring offensive police conduct); Herman, *Part I*, *supra* note 87, at 134, 150, 161, 187–88 (ensuring reliability protects interests of autonomy, privacy and dignity, because it protects against convicting the innocent); Herman, *Part II*, *supra* note 39, at 515–16 (discussing dominance of reliability policy, but also recognizing: 1) deterrence of offensive police conduct, 2) preference for accusatorial rather than inquisitorial interrogation techniques, 3) protecting personal autonomy); Comment, *supra* note 40, at 314 (discussing reliability and the need to deter improper police practices); *see also* Penney, *supra* note 64, at 313 (discussing the dominant role reliability has played in evolution of the due process involuntary confession rule, and stating that through time the Court has embraced different policies as underlying constitutional confession law in addition to reliability, including preventing abusive interrogation techniques and protecting the right of suspects to make autonomous decisions); Schulhofer, *supra* note 52, at 867–68 (discussing reliability, fairness, and a preference for an accusatorial rather than inquisitorial system of justice as policies underlying involuntary confession rule). Clearly the concern for reliable evidence and fairness in criminal trials are trial-related policies. It is perhaps because these seem to be the primary concerns of the due process rule in this era that the Court, even when recognizing other concerns such as the need to deter offensive police conduct, protect personal autonomy, and preserve our accusatorial system of justice, continued to view the "use" of an involuntary confession as the act that violates the Due Process Clause. *See supra* notes 174–85 and accompanying text; *infra* notes 189–203 and accompanying text.

187. 479 U.S. 157 (1986).

188. *See infra* notes 208–51 and accompanying text.

189. 361 U.S. 199 (1960).

defendant, Blackburn, who was later found to be insane at the time of his pretrial confession.[190] Testimony in the record revealed that, although the interrogating officer knew that Blackburn had been a patient in a mental hospital in the past, Blackburn had appeared "clear-eyed" and "sensible" during his interrogation.[191] The interrogation was conducted in a small room, over a period of eight or nine hours, with as many as three officers in the room at any given time.[192] No threats had been made to Blackburn to obtain his confession, and no torture or "rack and screw" interrogation techniques were employed. In reversing Blackburn's conviction, the Court elaborated on the policies behind the due process involuntary confession rule, which center primarily on the need to maintain the fairness and integrity of trials and our criminal justice system generally by prohibiting the use or introduction of involuntary confessions:

> It is . . . established that the Fourteenth Amendment forbids fundamental unfairness in the use of evidence whether true or false. Consequently, we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession. As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar.
>
> But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last term, the abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[193]

The Court then set forth its specific rationale for reversing Blackburn's conviction, focusing primarily on the fact that the use of a confession at trial that was made involuntarily due to mental illness offends the fair trial and judicial integrity policies underpinning the due process involuntary confession rule:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of

190. *Id.* at 200–05.
191. *Id.* at 204.
192. *Id.*
193. *Id.* at 206–07 (citations and internal quotations omitted).

> justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent circumstances are considered—the eight- to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.[194]

The second case, *Townsend v. Sain*,[195] involved a defendant, Townsend, who was questioned by the police while under the influence of the drug hyoscine, which was alleged by the defendant to be a truth serum.[196] The drug had been given to Townsend to alleviate severe symptoms he was experiencing at the time of the interrogation caused by heroin withdrawal.[197] The police officers who questioned Townsend claimed that they were unaware at the time of hyoscine's properties as a truth serum.[198] Townsend argued that, even though his confession was a product of the truth serum and not of any improper physical coercion by the police, his confession should have been suppressed pursuant to the due process involuntary confession rule.[199] The Supreme Court agreed. In remanding the case for further proceedings, the Court ruled that the Due Process Clause mandates the exclusion of an involuntary confession regardless of whether that confession was caused by "physical intimidation or psychological pressure" by the police or by an external source such as a truth serum, stating:

> It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a truth serum. It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a truth serum, if these properties exist. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. The Court has usually so stated the test: If the confession which petitioner made . . . was in fact involuntary, the conviction cannot stand . . . . And in *Blackburn v. Ala-*

194. *Id.* at 207–08.
195. 372 U.S. 293 (1963).
196. *Id.* at 298.
197. *Id.*
198. *Id.* at 299.
199. *Id.* at 304–05.

> *bama*, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.[200]

Blackburn and *Townsend* demonstrate the Court's view during this era that it was not the employment of coercive interrogation techniques by itself—devoid of any use at trial of the resulting confession—that violated the Due Process Clause. Rather, the violation occurred when a criminal trial was infected by the introduction of a tainted, coerced confession.[201] Indeed, as late as 1978 in *Mincey v. Arizona*,[202] the Supreme Court continued to view the due process involuntary confession rule primarily as granting a trial right when it stated that the "use" of an involuntary confession at trial merely for impeachment purposes—even when there is overwhelming other evidence of the defendant's guilt—tarnishes the proceedings in such a way as to violate the Due Process Clause.[203]

If one were to have asked in 1978 whether the due process involuntary confession rule would apply to the Italian defendant in the preceding hypothetical, the answer would have been in the affirmative.[204] Because the involuntary

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200. *Id.* at 307–09 (citations, footnotes and internal quotations omitted).

201. *See* Benner, *supra* note 51, at 128–35 (discussing cases in which courts found that, even in absence of police misconduct, due process was violated when confession was obtained from defendant whose capacity for self determination was substantially impaired); Schulhofer, *supra* note 52, at 867 (stating that the "admission" of an involuntary confession during this era violated due process).

202. 437 U.S. 385 (1973).

203. *Id.* at 398. During this era, language occasionally appeared in Supreme Court cases that arguably suggested, at first glance, that the due process violation was seen to occur at the time of the interrogation rather than at trial. For example, in *Rodgers v. Richmond*, 365 U.S. 534 (1961), the Court stated that when an involuntary confession has been admitted into evidence, the defendant's conviction must be reversed despite the fact that there was overwhelming evidence, other than the involuntary confession, establishing his guilt. *Id.* at 541. The Court went on to state: "Despite such verification, confessions were found to be the product of constitutionally impermissible methods *in their inducement*." *Id.* (emphasis added). The Court then stated, however, that "[s]ince a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we are constrained to find that the *procedures leading to his conviction* had failed to afford him that due process of law which the Fourteenth Amendment guarantees." *Id.* (emphasis added). This clarification suggests that it was the trial, rather than the interrogation, that violated the Due Process Clause.

204. Although not on point, in 1974 the Second Circuit ruled in *United States v. Toscanino*, 500 F.2d 267 (1974), that the Due Process Clause requires a court to divest itself of jurisdiction when a non-American defendant has been brought to the United States for trial by American officials through the use of illegal, offensive means. In *Toscanino*, the defendant had been kidnapped in Uruguay by American agents, and "abducted . . . to the United States" for purposes of prosecution. *Id.* at 268. The agents had allegedly tortured the defendant en route. *Id.* Because the constitutional violation in *Toscanino* can be seen as occurring both in Uruguay and in the United States as the agents transported him back to their jurisdiction for prosecution, it is not clear in this case whether the court held that the Due Process Clause protects non-Americans beyond the borders of the United States. In addition, the *Toscanino* Court viewed the due process violation as falling under the "shocks the conscience" doctrine of *Rochin v. California*, 342 U.S. 165 (1952), rather than the involuntary confession rule. *Toscanino*, 500 F.2d at 274. *See infra* note 205 and accompanying text; *see also* Iraola, *supra* note 1, at 7–8 (noting

confession rule was seen as granting a trial right that is violated when an involuntary confession is introduced at trial, any violation of the Due Process Clause would have happened at trial in the United States when the involuntary confession was introduced, and not at the time of the pretrial interrogation in Italy.[205] Accordingly, the reasoning in the *Mathews v. Diaz* line of cases would have controlled the matter,[206] and the Italian defendant at his trial in the United States would have successfully suppressed the involuntary confession extracted by the FBI in Italy.[207]

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that several circuits have adopted Second Circuit's approach in *Toscanino*, while others have rejected it).

205. The Due Process Clause has spawned numerous doctrines in addition to the involuntary confession rule. The *Rochin* rule, for example, holds inadmissible evidence obtained through police conduct so egregious that it "shocks the conscience." *Rochin*, 342 U.S. at 172. This doctrine is distinct from the involuntary confession rule. The *Rochin* decision is unclear as to whether this doctrine grants a trial right or a freestanding civil liberty. *Compare id.* (indicating that conduct that shocks the conscience violates due process) *with id.* at 174 (indicating that it is the use of such evidence to obtain a conviction that violates due process). Whether or not this doctrine might, during this era, have applied to exclude evidence obtained abroad through egregious means is beyond the scope of this Article.

206. *See supra* notes 108–09 and accompanying text.

207. A handful of cases in this era purport at first glance to address the issue, but a closer examination reveals that they are not on point. For example, in *Bram v. United States*, 168 U.S. 532 (1897), the defendant, a crewman on an American vessel, allegedly committed a murder upon the high seas and was interrogated by Canadian police when his ship arrived in Halifax, Nova Scotia. *Id.* at 537. The defendant made incriminating statements to the Canadian officers during the interrogation, and was eventually transported back to Massachusetts to stand trial for murder. *Id.* The United States Supreme Court reversed his conviction on the ground that the defendant had made the incriminating statements involuntarily as a result of pressure applied by the Canadian police. *Id.* at 562–65. The Court did not discuss the extraterritorial application of the privilege against self-incrimination in the decision, but simply analyzed the facts of the case as if it were assumed that the privilege applies in Canada where the interrogation took place. Because the defendant in that case was an American citizen, however, and because the decision addressed the applicability of the privilege rather than the due process involuntary confession rule, *Bram* provides no guidance in determining the application of the due process rule to non-Americans interrogated abroad.

In *United States v. Welch*, 455 F.2d 211 (2d Cir. 1972), the defendant was arrested by the Bahamian police at a bank in the Bahamas where he was attempting to deposit a United States treasury bill that had been stolen from a bank in New York City. *Id.* at 212. After being taken to police headquarters, the defendant made incriminating statements to the Bahamian police without first having been advised of his complete *Miranda* rights. *Id.* at 212–13. After being brought to the United States for trial, the defendant moved to suppress those statements pursuant to *Miranda*. *Id.* at 212. In upholding the district court's denial of the defendant's motion to suppress, the Second Circuit ruled that "since the *Miranda* requirements were primarily designed to prevent United States police officers from relying upon improper interrogation techniques and as the requirements have little, if any, deterrent effect upon foreign police officers, the *Miranda* warnings should not serve as the *sine qua non* of admissibility." *Id.* at 213. Because *Miranda*'s exclusionary rule was designed to deter American police officers from ignoring the dictates of that decision, applying the rule to the Bahamian police—who may not be aware of the *Miranda* decision and who are not bound by American law—would have little additional impact in protecting the privilege. The *Welch* decision was in accord with a line of cases from various circuits holding that *Miranda* does not apply to interrogations abroad that are conducted by foreign—as opposed to American—law enforcement officials. *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 454–55 (1990) (discussing the line of cases holding that *Miranda* does not apply to interrogations conducted by foreign police). Having dispensed with *Miranda*, the *Welch* court then went on to note, without significant discussion, that the defendant's confession was voluntary and thus the admission of his confession at

2. The Supreme Court's Decision in *Colorado v. Connelly* Recast the Due Process Involuntary Confession Rule as a Freestanding Civil Liberty

In the 1986 case of *Colorado v. Connelly*,[208] the Court fundamentally altered the nature of the due process involuntary confession rule and reinvented the doctrine as a freestanding civil liberty. In that case, the defendant, Connelly, walked up to a police officer on the street and "stated that he had murdered someone and wanted to talk about it."[209] The police officer advised Connelly of his *Miranda* rights, which Connelly promptly waived.[210] The officer then asked Connelly a few questions, Connelly's replies to which revealed he had been a patient in several mental hospitals.[211] A second officer arrived on the scene and asked Connelly "what he had on his mind."[212] Connelly then confessed in detail to a murder.[213] Prior to trial, Connelly moved to suppress the confession under *Blackburn* and *Townsend* on the ground that his confession was involuntary.[214] In support of his motion, a psychiatrist testified at the pretrial suppression hearing that, due to chronic schizophrenia, Connelly was in a psychotic state at the time of his confession and was following the "voice of God."[215] This voice

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trial was not unconstitutional. 455 F.2d at 213. By applying the involuntary confession rule to the facts of that case, the *Welch* court suggested—or, more correctly, assumed for argument's sake—that the involuntary confession rule applies abroad.

Similarly, both the Fifth Circuit in *Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973), and the Ninth Circuit in *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967), concluded, like the Second Circuit in *Welch*, that *Miranda*'s exclusionary rule does not apply to interrogations conducted by foreign police, and noted in dicta that the confessions in those cases were voluntary and thus were admissible. *Kilday*, 481 F.2d at 655–56; *Brulay*, 383 F.2d at 348. However, *Welch*, *Brulay*, and *Kilday* hardly can be said to constitute definitive rulings on the applicability of the due process involuntary confession rule to non-Americans abroad. First, the defendant in *Brulay* was an American citizen. 383 F.2d at 349. The other two decisions did not even mention the nationality of their respective defendants. Given the facts of *Kilday* and *Welch*, in which significant parts of the crimes in question occurred in the United States, it is quite possible that those courts did not address the citizenship issue because the defendants in each case were Americans. *Kilday*, 481 F.2d at 655; *Welch*, 455 F.2d at 212. In none of the aforementioned cases was there any credible suggestion that the confessions were involuntary, and therefore these courts simply mentioned in passing that the involuntary confession rule would not provide an additional basis for relief. In addition, it was not clear whether these cases were analyzing the issue under the privilege against compulsory self-incrimination or the due process standard. However, all three cases cited *Bram* in their discussion, which suggests that they were applying the privilege against self-incrimination rather than the due process involuntary confession rule. As set forth *infra* at notes 253–57 and accompanying text, the privilege would apply in such a situation, so the lack of clarity in these cases renders them unhelpful to the issue at hand. Furthermore, these cases did not directly address the issue or offer a level of analysis suggesting that the courts were ruling squarely on the tricky issue of the extraterritorial application of the due process involuntary confession rule to non-Americans abroad.

208. 479 U.S. 157 (1986).
209. *Id.* at 160.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 161, 164.
215. *Id.* at 161.

demanded that he either confess to the killing or commit suicide.[216] Connelly had "reluctantly" followed the voice in confessing to the police officers.[217]

The trial court, state appellate court and then the Supreme Court of Colorado all agreed that Connelly's involuntary confession had to be suppressed.[218] Based on a straightforward reading of *Townsend* and *Blackburn*, the Colorado courts ruled that the introduction into evidence of such a patently unreliable involuntary confession would taint the trial and constitute the requisite "state action" that would violate the Due Process Clause.[219]

On appeal, the U.S. Supreme Court did not dispute that Connelly's confession had been made involuntarily or that his confession was unreliable.[220] The Court nonetheless reversed and remanded the case for trial, holding that the introduction into evidence of Connelly's involuntary confession on remand would not violate the Due Process Clause.[221] What is particularly striking about the *Connelly* decision is how the Court described the policy underlying the due process involuntary confession rule and the "triggering act" that violates the Due Process Clause. With respect to policy, the Court relieved the involuntary confession rule of its previous role of protecting against admission of unreliable and unfair evidence at trials, stating simply: "A [confession] rendered by one in the condition of [Connelly] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of [the state of Colorado], and not by the Due Process Clause of the Fourteenth Amendment."[222] This holding is directly at odds with a long line of the Court's due process confession cases, all of which had repeatedly admonished that one of the primary functions of the involuntary confession rule is to protect against the admission of unreliable confessions.[223]

But the *Connelly* Court went even further. It not only eviscerated the trial-related policy rationale on which the due process voluntariness rule had been grounded for fifty years, but it also expressly refocused the rule as being aimed instead at preventing abuses by the police in the *pretrial* interrogation context. The Court asserted that the purpose of the Due Process Clause in relation to confessions is to prohibit "'certain interrogation techniques . . . [that are] so offensive to a civilized system of justice that they must be condemned.'"[224] The Court then characterized its previous fifty years of due process confession cases as having been primarily concerned with controlling "coercive police conduct"

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216. *Id.*
217. *Id.*
218. *Id.* at 162.
219. *Id.*
220. *Id.* at 164–67.
221. *Id.* at 167.
222. *Id.* (citations omitted).
223. *See supra* note 186 and accompanying text; *see also* Herman, *Part II*, *supra* note 39, at 517 (discussing how the *Connelly* decision was at odds with prior case law).
224. *Connelly*, 479 U.S. at 163 (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985)).

during interrogations.[225] For example, the Court insisted that the original due process confession case, *Brown v. Mississippi*, and all the due process cases that followed, "focused on the crucial element of police overreaching."[226] This statement is, of course, disingenuous because the pre-*Connelly* Court viewed the Due Process Clause as being concerned primarily with the "use" of involuntary confessions at trial because of the corrupting effect they have on the integrity of the trial process.[227]

Taking its departure from precedent one step further, the *Connelly* Court suggested that involuntary confessions are excluded from evidence not because the act of admitting such confessions violates due process, but rather because the exclusionary rule associated with the voluntariness requirement is a judicially–created punitive measure to deter police officers from engaging in "coercive police activity" in future cases.[228] In so stating, the Court necessarily characterized "coercive police activity" as the "real" due process violation—the act that triggers (and violates) the due process involuntary confession rule.[229]

A few statements by the Court in this respect are particularly instructive. For instance, the Court stated: "[S]uppressing [Connelly's] statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter *future* violations of the Constitution."[230] This assertion reflects a belief that the "constitutional guarantee" granted by the due process involuntary confession rule is not the right to exclude involuntary confessions at trial, but rather the right to be free from police coercion generally. Involuntary confessions are excluded so that other suspects in the future will not be subjected to the "true" constitutional concern—police coercion. The use of the word "future" in the statement above further reflects an understanding that the due process voluntariness rule is violated not at trial, but in the pretrial interrogation stage when the "coercive police activity" takes place.

Also enlightening is the fact that the Court cited its decision in *United States v. Leon*[231] for its discussion of the exclusionary rule associated with the due process voluntariness rule.[232] *Leon* made clear that evidence seized in violation of the Fourth Amendment is excluded pursuant to a judicially created rule, and not because the Constitution requires it.[233] Thus, *Leon* helped establish the Fourth Amendment as a freestanding civil liberty. The Court's linkage of the

225. *Id.* at 163–64.

226. *Id.* at 163.

227. *See supra* note 186 and accompanying text; *see also* Benner, *supra* note 51, at 142 (arguing that *Connelly* "obliterated" the reliability rationale).

228. 479 U.S. at 166–67.

229. *See id.* at 167.

230. *Id.* at 166 (emphasis added).

231. 468 U.S. 897.

232. *Id.*

233. *See supra* notes 167–68 and accompanying text.

due process involuntary confession rule to the Fourth Amendment in this respect is significant.

Given *Connelly's* shift in policy focus from the trial stage to the pretrial interrogation context, and its linkage of the due process exclusionary rule to the Fourth Amendment and *Leon*, it is not surprising that the *Connelly* Court held that the "use" of an involuntary confession, by itself, does not violate the Due Process Clause.[234] Indeed, the lower courts in Colorado had all found the requisite "state action" triggering the Due Process Clause to be the prosecutor's "use" of Connelly's involuntary confession.[235] This view was consistent with the Court's earlier due process jurisprudence, particularly *Blackburn* and *Townsend*, which together had stood for the proposition that even where there is no improper police conduct, the introduction of a confession that is involuntary for any reason—whether because of a "truth serum" or mental illness—violates the due process involuntary confession rule.[236] Consistent with its newfound interpretation of the rule as serving a pretrial rather than a trial function, however, the *Connelly* Court expressly rejected the idea that the mere "use" of an involuntary confession at trial constitutes the requisite state action that triggers and violates the Due Process Clause.[237]

Since *Connelly* the due process involuntary confession rule functions, like the Fourth Amendment, to prevent abuses by the police at the pretrial investigation stage regardless of the setting. It no longer functions, like the privilege against compulsory self-incrimination, only in the trial setting by blocking the introduction of unreliable, coerced confessions. After *Connelly*, therefore, involuntary confessions are excluded from evidence not because the Constitution requires it, but because, as with evidence seized in violation of the Fourth Amendment, a judicially created rule designed to deter police officers from committing future constitutional violations requires it. After *Connelly*, the "use" of an involuntary confession at trial does not violate the Constitution, just as the "use" of evidence seized in violation of the Fourth Amendment does not violate the Constitution. Finally, after *Connelly*, a violation of the due process involuntary confession rule is "fully accomplished" at the time of the unlawful interrogation, just as violations of the Fourth Amendment are fully accomplished at the time of the unlawful search or seizure. In other words, the Court in *Connelly* converted the due process involuntary confession rule from a trial right to a freestanding civil liberty.[238]

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234. 479 U.S. at 167.

235. *Id.* at 162.

236. *See supra* notes 189–201 and accompanying text.

237. *See* Benner, *supra* note 51, at 126, 136 (noting that *Connelly* "charted a new course in a direction 180 degrees" from prior case law in holding that the admission of an involuntary confession does not violate due process); Herman, *Part II*, *supra* note 39, at 508 (noting that after *Connelly*, due process is not violated merely by the "prosecution's use of a statement in evidence against the maker").

238. The Supreme Court further eroded the notion that the mere "use" of an involuntary confession violates the Due Process Clause in *Arizona v. Fulminante*, 499 U.S. 279 (1991) (plurality decision), when it held that the introduction of an involuntary confession does not require a reversal if the error

Although no court has yet directly addressed the effect of *Connelly* on the extraterritorial application of the due process involuntary confession rule,[239] *Connelly's* impact has been recognized by several lower federal courts in the related area of civil liability of the police for unlawful interrogations. Cases occasionally arise in which the police coerce a confession from a suspect, but then decline to bring charges against that suspect. This occurs in some cases because the police eventually realize they had initially targeted the wrong suspect and obtained a confession from him only because they applied undue pressure during the interrogation. The suspect then files a civil suit citing the

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was harmless in light of the other evidence at trial. *Id.* at 306–12. One could argue that certain language in the Court's opinion suggests that the due process involuntary confession rule is a trial right. Indeed, the Court referred to the admission of an involuntary confession as a "trial error." *Id.* at 309. Labeling the introduction of an involuntary confession as a "trial error," however, cannot be seen as equivalent to categorizing the due process involuntary confession rule as a "trial right," particularly because the Court in *Fulminante* categorized the introduction of evidence seized in violation of the Fourth Amendment as a "trial error" as well. *Id.* at 310. However, the law is very clear that the Fourth Amendment is not a trial right. *See supra* notes 158–68 and accompanying text. In addition, the dissent in *Fulminante* attacked the majority and its adoption of the harmless error analysis for having overruled a long line of precedent establishing that "'*the admission in evidence* . . . of [a] coerced confession vitiates the judgment because it violates the Due Process Clause.'" *Id.* at 288–89 (emphasis added) (quoting Payne v. Arkansas, 356 U.S. 560, 568 (1958)).

239. *See* United States v. Wolf, 813 F.2d 970, 972 n.3 (9th Cir. 1987) (recognizing that *Connelly* undermines the extraterritorial application of American confession law to non-Americans, but expressly declining to decide the issue because the confession in that case was found to be voluntary regardless of the applicability of the Bill of Rights). In *United States v. Fernandez-Caro*, 677 F. Supp. 893 (S.D. Tex. 1987), the court suppressed evidence that was the "fruit" of a confession that had been extracted from the defendant in Mexico by Mexican law enforcement agents through the use of torture. *Id.* at 895. The court ruled that the defendant, who was not an American citizen, could claim the protection of the due process "shocks the conscience" doctrine. *Id.* However, *Fernandez-Caro* is not relevant to the issue at hand because it was decided under *Rochin* rather than the due process involuntary confession rule. *See supra* note 205 (discussing *Rochin* doctrine). That the court avoided determining the extraterritorial application of the involuntary confession rule is telling. Moreover, although the court in *Fernandez-Caro* cited several cases for the proposition that the *Rochin* doctrine applies to non-Americans abroad, *id.* at 895, a close examination of these cases should, in fact, lead one to the opposite conclusion. The *Fernandez-Caro* court cited *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *United States v. Heller*, 625 F.2d 594 (5th Cir. 1980), and *United States v. Hawkins*, 661 F.2d 436 (5th Cir. 1981) as its authority for this proposition. 677 F. Supp. at 894–95. Both *Heller* and *Hawkins* stated in dicta that a court has the power to exclude evidence seized abroad in a method that "shocks the conscience," and both courts relied on *Morrow* for this proposition. *Heller*, 625 F.2d at 599 (citing *Morrow*); *Hawkins*, 661 F.2d at 456 (same). Neither *Heller* nor *Hawkins* indicated on what ground such evidence may be excluded. *Heller*, 625 F.2d at 599 (remaining silent as to legal ground for exclusion); *Hawkins*, 661 F.2d at 456 (same). However, the *Morrow* decision, on which *Fernandez-Caro* was purportedly based, held that a federal court has the authority to exclude evidence seized abroad by means that "shock the conscience" not under the Due Process Clause, but under the "supervisory powers" of the federal courts. *Morrow*, 537 F.2d at 139. When a court excludes evidence pursuant to its supervisory powers, it does so only when the Constitution does not apply, and it therefore creates an exclusionary rule for that purpose similar to a common law rule of evidence. *See generally* United States v. Payner, 447 U.S. 727 (1980) (discussing supervisory powers of the federal courts). The *Morrow* court thus eschewed the applicability of the Due Process Clause in this context, and the district court's holding in *Fernandez-Caro* was, therefore, contrary to the law of its own circuit. For a discussion of other cases that purport to address the applicability of the due process involuntary confession rule to non-Americans abroad, see *supra* note 207.

rule in *Bivens*[240] or under Title 42, United States Code, Section 1983,[241] alleging that the police violated his constitutional right under the due process involuntary confession rule to be free from coercive police activity. These cases require a court to make the same finding required when determining the extraterritorial application of the rule to non-Americans: whether a violation of the rule is "fully accomplished" at the time of the interrogation or whether the violation occurs later when the confession is introduced into evidence. If the violation occurs at the time of trial and not at the time of the interrogation, then the civil suits of these plaintiffs must fail—no constitutional deprivation took place against them because they were never charged and tried.

Analyzing the policies behind the rule, several lower courts have held that a violation of the due process involuntary confession rule is fully accomplished at the time of the coercive interrogation, and that, as with the Fourth Amendment, involuntary confessions are excluded as a deterrent measure pursuant to a rule of judicial—rather than constitutional—origin. For example, in *Weaver v. Brenner*,[242] the Second Circuit held that civil damages could be awarded even where there had been no "use" of an involuntary confession, because "the constitutional violation [of the due process involuntary confession rule] is complete when the offending behavior occurs, and the refusal to admit at trial statements made as a result of coercion is merely a corrective way in which a court penalizes conduct that violates the Constitution."[243] Similarly, in *Cooper v. Dupnik* the Ninth Circuit ruled that the "due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself. . . . All a court does in a judicial context is apply the corrective where due process already has been denied."[244]

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240. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that citizens may sue federal officials for monetary damages in relation to constitutional deprivation). For an overview of *Bivens* suits, see generally Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1118–20 (1989).

241. The relevant portion of Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000). For an overview of Section 1983 suits, see Thomas E.L. Dewey, *Prisoners' Rights: Procedural Means of Enforcement Under Section 1983*, 79 GEO. L.J. 1253, 1281–94 (1991).

242. 40 F.3d 527, 536 (2d Cir. 1994).

243. *Id.*

244. Cooper v. Dupnik, 963 F.2d 1220, 1244–45 (9th Cir. 1992). References to the "use" or "introduction" of an involuntary confession as the triggering act that violates the Due Process Clause can still be seen in judicial decisions from time to time. *See, e.g.*, Ledbetter v. Edwards, 35 F.3d 1062, 1067 (6th Cir. 1994) (due process prohibits the "admission" of an involuntary confession); United States v. Tatum, 121 F. Supp. 2d 577, 580 (E.D. Tex. 2000) (the "use" of a coerced statement violates due process). However, in none of these cases is the court actually addressing the temporal issue of when the Due Process Clause is violated. Indeed, such statements are typically made in passing when

The Supreme Court's recent decision in *Chavez v. Martinez*[245] seems to support the position taken by the Second Circuit in *Weaver* and the Ninth Circuit in *Cooper*. As stated *supra*, *Chavez* involved a Section 1983 suit for monetary damages against a police sergeant where the statements elicited by the sergeant through coercion were never used against the suspect in a criminal trial.[246] The suspect, Martinez, brought suit under both the privilege against compulsory self-incrimination and the Due Process Clause. While the Court rejected Martinez' claims under the privilege against compulsory self-incrimination, holding that the privilege is a trial right,[247] a majority of the Court differentiated Martinez' claim based on the Due Process Clause.[248] Indeed, in a section of his opinion that consisted of a single sentence, Justice Souter, writing for the Court on this issue, remanded the case for Martinez to pursue his due process claim.[249] The Court left it to the lower courts to determine "the scope and merits of any such [due process] action that may be found open to [Martinez]" based on the coercive interrogation.[250] Thus, while certainly not dispositive of the issue, the distinction made by the Court in *Chavez* tends to support the notion that the due process involuntary confession rule is a freestanding civil liberty, and that a violation of the rule is fully accomplished at the time of the coercive interrogation.

These courts are correct that, after *Connelly*, the due process involuntary confession rule mirrors the Fourth Amendment and that a violation of the rule is fully accomplished at the time of the coercive interrogation. Accordingly, if one were to ask post-*Connelly* whether the Italian suspect in the previously posed hypothetical could suppress his involuntary confession at trial in the United States, the answer would be no. Because the due process violation in his case was "fully accomplished" in Italy and no separate constitutional deprivation occurred by the mere introduction of his involuntary confession at trial, his motion to suppress on due process grounds would not be successful under *Verdugo-Urquidez*.[251]

E. THE DEFAULT TEST FOR NON-AMERICANS ABROAD IS THE PROHIBITION OF "COMPELLED" CONFESSIONS CONTAINED IN THE PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

As previously explored in detail, there is a two-step process for the admissibility of confessions within the territorial boundaries of the United States.[252] I

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quoting boilerplate standards from older Supreme Court cases, and thus should be interpreted as mere dicta. *Ledbetter*, 35 F.3d at 1067; *Tatum*, 121 F. Supp. 2d at 580.

245. 123 S.Ct. 1994 (2003).

246. *See supra* notes 152–55 and accompanying text.

247. *See supra* notes 156–57 and accompanying text.

248. 123 S.Ct. at 2008.

249. *Id.*

250. *Id.*

251. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264–74 (1990).

252. *See supra* notes 82–91 and accompanying text.

have asserted in a previous article that the first step, the *Miranda* doctrine, does not strictly apply to non-Americans abroad.[253] As demonstrated, the second step or default rule in the United States—the due process involuntary confession rule—also does not apply to non-Americans abroad.[254] But within the United States a third confession rule has lurked in the background, overshadowed by the due process involuntary confession rule, remaining largely unexplored and undefined.[255] This rule is the privilege against compulsory self-incrimination.[256] Stated simply, the privilege and its ban on "compelled" confessions applies to non-Americans abroad. The Italian suspect in the hypothetical would not be successful in suppressing his coerced confession on the grounds that he was not Mirandized, or that his confession was involuntary in violation of the due process involuntary confession rule. But his argument that introduction of the confession would violate the privilege would be meritorious because the privilege is a "trial right," the violation of which takes place within the United States when a "compelled" confession is introduced.[257] Although *Connelly* converted the due process involuntary confession rule from a trial right to a freestanding civil liberty, the privilege's position as a trial right has remained intact, and is unlikely to change in the future.[258] Unfortunately, the Court's preference for the due process involuntary confession rule through the years has shielded the privilege from being examined thoroughly in the interrogation context, and no clear definition of a "compelled" confession exists at this time. Part III looks at the origins, text, policies and precedents relating to the privilege in an attempt to shed light on the precise meaning of "compulsion."

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253. *See supra* note 18 and accompanying text.

254. *See supra* notes 208–51 and accompanying text.

255. *See supra* notes 73–91 and accompanying text.

256. *See supra* notes 73–91 and accompanying text.

257. *See supra* notes 135–57 and accompanying text.

258. Colorado v. Connelly, 479 U.S. 157, 170 (1986); *see supra* note 149. *See also supra* notes 151–57 and accompanying text. Although I believe it is unlikely to occur, the Court's decision in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), arguably leaves room for the Court to modify its position on this issue in the future. Indeed, the Court's holding in *Chavez* that the privilege against compulsory self-incrimination is a trial right was a plurality decision. Justice Thomas, joined by three other Justices, made clear that, in his view, the privilege is violated only at trial when a coerced statement is introduced into evidence. *Chavez*, 123 S.Ct. at 1999–2004. Justice Souter, however, wrote a concurring opinion, joined by one other Justice, which was not quite as decisive on this issue. Indeed, Souter wrote that at its "core," the privilege against compulsory self-incrimination is a trial right. *Id.* at 2006–08 (Souter, J., concurring). Souter added, however, that if a defendant/petitioner could make a "powerful showing" that it is necessary in a given case to extend the privilege against self-incrimination beyond its core in order to protect the basic right, the Court could do so. *Id.* at 2007. Souter believed that Martinez had failed to make such a powerful showing under the facts and circumstances of that case. Based on this analysis, it is conceivable that, if faced with the issue in the future, Justice Souter would extend the privilege to cover an interrogation of a non-American abroad, if he felt that such an extension was necessary to protect the core right.

III. WHAT IS A "COMPELLED CONFESSION"?: THE "OBJECTIVELY IDENTIFIABLE PENALTY" TEST

Although the Court has not given clear guidance on the meaning of "compulsion" in the police interrogation context, it has defined this term clearly in the context of formal proceedings, such as trials or Congressional hearings. Section A explores the cases in this area, which stand for the principle that any government conduct that imposes "objectively identifiable penalties" on the refusal to speak, or to provoke statements, constitutes compulsion in violation of the privilege. Section B posits that any formulation of the term "compulsion" in the interrogation context must be informed by this standard. This Section therefore proposes the "objectively identifiable penalty" test as the test for compulsion in the police interrogation context. The Section then critiques alternative tests offered to date by other scholars. This analysis demonstrates that, in contrast to tests proposed by other scholars, the "objectively identifiable penalty" test is consistent with both the text and history of the privilege. In addition, the "objectively identifiable penalty" test proposed herein is the only test proposed thus far that is consistent with current Supreme Court precedent. Section C then discusses how the "objectively identifiable penalty" test would operate in the police interrogation context. The Article concludes by asserting that this test should be used to determine the admissibility in American courts of confessions taken by the FBI from non-Americans abroad.

A. THE SUPREME COURT HAS INTERPRETED THE PRIVILEGE IN THE FORMAL SETTING AS REQUIRING AN OBJECTIVE TEST THAT PROHIBITS THE GOVERNMENT'S IMPOSITION OF "PENALTIES" IN RESPONSE TO SILENCE OR TO PROVOKE SPEECH

The Supreme Court has created a clear and well-developed jurisprudence regarding the meaning of "compulsion" in formal proceedings such as trials. In *Griffin v. California*,[259] for example, the defendant was charged with murder in the first degree.[260] At his trial, the defendant invoked his right under the privilege against compulsory self-incrimination not to testify in his own defense.[261] In closing arguments to the jury, the prosecutor commented on the defendant's failure to speak on his own behalf, and asserted to the jury that it should draw an adverse inference against him for that reason.[262] The judge likewise instructed the jury that the defendant had a constitutional right not to testify, but it was free to draw an unfavorable inference from his failure to do so.[263] The jury convicted.[264]

On appeal, the Supreme Court held that both the prosecutor's comment and

259. 380 U.S. 609 (1965).
260. *Id.* at 609.
261. *Id.*
262. *Id.* at 610–11.
263. *Id.* at 610.
264. *Id.* at 609.

the trial judge's instructions to the jury constituted "compulsion" in violation of the privilege.[265] The Court reasoned that these acts imposed a "penalty" on the defendant for remaining silent.[266] The prosecutor's and trial judge's comments were considered penalties because they arguably increased the chances of a conviction. In this respect, the Court stated:

> [The] comment on the refusal to testify . . . is a penalty imposed by the courts for exercising a constitutional privilege, which the Fifth Amendment outlaws. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[267]

In *Gardner v. Broderick*,[268] a police officer was fired by the state for refusing to testify before a grand jury investigating corruption in his department. The Court held that this termination violated the privilege because it imposed a "penalty of the loss of employment."[269] Similarly, in *Garrity v. New Jersey*,[270] several police officers made self-incriminating statements at a state ticket-fixing inquiry.[271] Their statements were later used against them when they were prosecuted for participating in a conspiracy to cover up the ticket-fixing scheme.[272] Prior to testifying at the inquiry the officers had been told that, pursuant to a New Jersey statute,[273] they would lose their jobs if they did not

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265. *Id.* at 614.

266. *Id.*

267. *Id.* (citations, footnotes, and internal quotations omitted).

268. 392 U.S. 273 (1968).

269. *Id.* at 279. Similarly, in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the plaintiff, Cunningham, was subpoenaed to testify before a special grand jury convened to investigate his alleged improper conduct in the political offices he had held, which consisted of elected positions in the Democratic Party of the State of New York. *Id.* at 803. Cunningham refused to testify on Fifth Amendment grounds. *Id.* at 804. Under a New York statute, Cunningham's invocation of his rights under the privilege automatically divested him of all his party offices, and activated a five-year ban on holding any public or party office. *Id.* at 803. Cunningham then filed a civil suit in federal court, alleging that the New York statute was unconstitutional because it penalized the invocation of his right to remain silent. *Id.* at 804. After the lower courts agreed with Cunningham, the Supreme Court affirmed. *Id.* The Supreme Court stated: "[W]hen a State compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." *Id.* at 805.

270. 385 U.S. 493 (1967).

271. *Id.* at 495.

272. *Id.*

273. The New Jersey statute in question provided:

> Any person holding or who has held any elective or appointive public office, position or employment (whether state, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or

testify.[274] The Court held that the imposition of this "penalty" rendered their statements "compelled" in violation of the privilege, adding that the privilege is a right of which the exercise "may not [be] condition[ed] on the exaction of a price."[275] The Court applied this principle again in *Lefkowitz v. Turley*,[276] where two architects who worked on occasion as independent contractors for the state were barred from receiving future state contracts because they invoked the privilege before a state grand jury investigating corruption in the public contracting industry.[277] The Court viewed such government conduct as "compulsion" because it imposed sanctions on the exercise of the right to remain silent.[278] This line of cases was expressly reaffirmed as recently as 1999 in *Mitchell v. United States*,[279] when the Court held that the defendant's silence at sentencing could not be used to justify the imposition of a "penalty" by the trial court in the form of an increase in her sentence.[280]

Two points concerning the Court's interpretation of "compulsion" in the formal setting are noteworthy. First, these cases make clear that the test for compulsion is objective.[281] In none of these cases did the Court apply a subjective "totality of circumstances" test, such as that associated with the due process involuntary confession rule,[282] to determine if compulsion was present.[283] There was no inquiry into the state of mind of the defendant or whether the defendant in question actually felt compulsion. Indeed, in *Garrity*, the Court

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> is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this state provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this state.

N.J. Rev. Stat. § 2A:81–17.1 (Supp. 1965), *quoted in Garrity*, 385 U.S. at 494 n.1.

274. *Garrity*, 385 U.S. at 494.

275. *Id.* at 500.

276. 414 U.S. 70 (1973).

277. *Id.* at 82–83.

278. *Id.*

279. 526 U.S. 314 (1999).

280. *Id.* at 328–30. For an additional discussion of the "formal setting" cases, see generally Steven D. Clymer, *Compelled Statements From Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309 (2001); Anthony J. Phelps, Note, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing*: Mitchell v. United States *Settles the Conflict*, 38 BRANDEIS L.J. 107 (2000); Shannon T. Noya, Comment, *Hoisted By Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493 (1996).

281. *See* Herman, *Part II*, *supra* note 39, at 503.

282. *See supra* notes 43–44 and accompanying text.

283. *See* Herman, *Part II*, *supra* note 39, at 503.

ignored the facts (which Justice Harlan noted in his dissent) that, at the inquiry, "all of the officers were advised they had a right to remain silent, three of the officers were represented by counsel, a fourth officer had decided that counsel was not necessary, the interrogation took place in familiar surroundings, and the interrogation was both brief and civilized."[284]

Second, the privilege was seen in these "formal setting" cases to prohibit the government's imposition of "objectively identifiable penalties" in response to silence or to provoke speech,[285] regardless of the severity of the penalty.[286] By "identifiable," I mean that in each of these cases, the penalty could be identified and articulated from the record as an actual and concrete penalty: a comment that increased the chance of a conviction, the loss of a job, the loss of future state contracts, etc. By "objectively," I mean simply that it was not necessary that the identifiable penalty was actually felt by the speaker. For example, the loss of future state contracts in *Turley* was considered a penalty regardless of whether the architects intended to seek state contracts in the future, or whether the loss of such contracts would affect their income.[287] The remainder of this Article will refer to such penalties as "objectively identifiable penalties."

B. THE "OBJECTIVELY IDENTIFIABLE PENALTY TEST" SHOULD BE EXTENDED TO THE INTERROGATION CONTEXT, AS IT IS MORE HISTORICALLY, TEXTUALLY, AND DOCTRINALLY SOUND THAN THE ALTERNATIVE "CUSTODIAL INTERROGATION" OR "VOLUNTARINESS" TESTS

This Article proffers that a correct interpretation of "compelled" in the interrogation setting must be reconciled with how the Court has interpreted "compelled" in the formal setting. The privilege against compulsory self-incrimination purports to establish a single standard. Without an adequate legal justification, it would be strange, if not doctrinally unsound, to interpret a certain government act to constitute "compulsion" in some scenarios, but not in others. Under this view, police officers would be prohibited from imposing "objectively identifiable penalties" on suspects in any setting and in any form in response to silence or to provoke speech. This test will be developed in more detail in Section C.

The idea that the "formal setting" cases should be used to determine the

284. *Id.* (citing *Garrity*, 385 U.S. at 502–06 (Harlan, J., dissenting)).

285. *See supra* notes 259–84 and accompanying text.

286. Noted scholars Stephen J. Schulhofer and the late Joseph D. Grano debated the meaning of these "formal setting" cases in two seminal articles: Schulhofer, *supra* note 50 and Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. Chi. L. Rev. 174 (1988). Although they vehemently disagreed on the application of these cases to the police interrogation setting, *see infra* notes 289–340 and accompanying text, both agreed that these cases prohibit the imposition of *any* penalty, no matter how slight, in response to silence or to provoke speech. *See* Schulhofer, *supra* note 50, at 443 (even nominal fine would violate privilege); Grano, *supra*, at 183 (agreeing that nominal penalty would violate privilege because it asserts a "claim of right" to the defendant's testimony).

287. *See supra* notes 276–78.

meaning of compulsion in the interrogation context is not a novel concept. Indeed, two notable Fifth Amendment scholars, Professors Stephen Schulhofer and Lawrence Herman, have argued variations of the same.[288] Professor Schulhofer argues, for example, that the "formal setting" line of cases supports the Court's holding in *Miranda* that custodial interrogation, by itself, equates with compulsion in violation of the privilege.[289] Schulhofer asserts that the improper comments in *Griffin v. California*[290] that the jury should consider the defendant's silence in determining guilt applied "impermissible pressure" on the defendant to testify.[291] Schulhofer then equates this atmospheric pressure present in the courtroom in *Griffin* with the atmospheric pressure inherent in the police station during custodial interrogation.[292] What Schulhofer fails to recognize, however, is that the *Griffin* decision was not based upon the presence of atmospheric pressure. Rather, the comments made by the prosecutor and the judge were seen to violate the privilege because they constituted "objectively identifiable penalties" against the defendant, as they directly increased the chances of his conviction.[293] As the Court itself recognized, atmospheric pressure was present from the beginning of Griffin's trial for him to provide his side of the story, as it is in any criminal trial.[294] But the penalties imposed by the prosecutor and the judge went beyond that ordinary atmospheric pressure, changing the status quo in favor of the government and against the defendant.[295] The comments "solemnized" that pressure into an actual penalty that could be objectively identified and measured.[296]

Contrary to Schulhofer's assertions, when a police officer simply asks a question of a suspect in custody, that act has not, by itself, imposed an objectively identifiable penalty in response to silence or to provoke speech. If, during the interrogation, the officer changes the status quo to provoke a confession by, for example, depriving the suspect of cigarettes until he talks or

288. *See generally* Schulhofer, *supra* note 50 (arguing that the "formal setting" cases require an objective test for compulsion in the police interrogation context and that these cases also support the holding in *Miranda*); Herman, *Part II*, *supra* note 39 (arguing that the "formal setting" cases suggest an objective test for compulsion in the police interrogation context).

289. *See generally* Schulhofer, *supra* note 50.

290. 380 U.S. 609 (1965).

291. *See* Schulhofer, *supra* note 50, at 453.

292. *Id.*

293. *See supra* notes 265–67 and accompanying text.

294. *Griffin*, 380 U.S. at 614. As anyone who has tried criminal cases can verify, significant pressure is present in nearly every trial for the defendant to provide the jury with an explanation as to why he or she is innocent. This inherent pressure exists throughout the trial, from opening statements through summations. For example, when a particularly damaging piece of evidence is admitted against a defendant during the prosecution's case-in-chief, the members of the jury almost invariably turn their heads in unison like an audience watching a tennis match and stare at the defendant to see his or her reaction. Is he calm? Is he squirming in his seat? Does he look ashamed or guilty? In some situations, it is clear to any observer that the jurors are searching for an answer from the defendant—an explanation. It is unimaginable to me that defendants would not feel this implicit demand from the jury.

295. *Id.*

296. *Id.*

telling him that his silence will be used against him at trial, then the officer has at that time "solemnized" the pressure into an "objectively identifiable penalty" to provoke speech. The "formal setting" cases would require a finding of compulsion only at that moment—at the imposition of such a "penalty."[297]

Furthermore, Schulhofer's proposal is contrary to existing law. As described previously, the *Miranda*-exception cases have undermined the notion that custodial interrogation equates with compulsion.[298] The Supreme Court has not yet provided a new definition of "compulsion," but it is clear that it requires some amount of pressure beyond mere custodial interrogation.[299] The "objectively identifiable penalty" test that I have proposed, therefore, is consistent not only with the "formal setting" cases, but with the Court's current interpretation of "compelled" in the police interrogation setting as well.

On the other hand, another notable scholar, the late Professor Joseph Grano, asserted vigorously for years that the test for compulsion should be the same as that under the due process involuntary confession rule: whether the confession was made "voluntarily."[300] This theory should be rejected for several reasons. First, the "voluntariness test" is contrary to the text of the privilege. The word "voluntary" is, linguistically speaking, an adjective that calls for an inquiry into the suspect's state of mind. The word "voluntary" therefore demands a subjective test—focusing on all factors that could affect the suspect's mental state. Not surprisingly, the due process rule that has evolved around the word "voluntary" likewise requires an inquiry into the "totality of the circumstances" to determine whether the suspect's will has been "overborne."[301] It is a subjective test, which takes into account not only the governmental conduct involved, but characteristics unique to the speaker, such as his age, background, the strength of his character and his mental condition at the time.[302] Under a subjective voluntariness test, a particularly hearty suspect may be deemed to have made a voluntary statement in the face of enormous pressure, while a particularly weak suspect may be deemed to have made an involuntary statement in response to the lightest of pressures.

The text of the privilege, however, requires no such focus on the state of mind of the individual being questioned. The privilege says nothing about "involuntary" confessions—only "compelled" confessions.[303] "To compel" has been defined as "to drive forcefully" and "to cause to do by overwhelming

297. *See supra* notes 259–87 and accompanying text.

298. *See supra* notes 73–88 and accompanying text.

299. *See id.*

300. *See generally* Grano, *supra* note 286 (arguing that the test for compulsion should be a "voluntariness" inquiry); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confession Law*, 84 MICH. L. REV. 662 (1986) [hereinafter Grano, *Selling the Idea to Tell the Truth*] (same).

301. *See supra* note 44 and accompanying text.

302. *See id.*

303. *See supra* note 9 and accompanying text.

pressure."[304] The privilege, like the rest of the Bill of Rights, restrains the conduct of government officials only.[305] Therefore, the term "compel," as used in the privilege and in the context of its placement in the Bill of Rights, is a verb that relates to the action of the government official performing the interrogation. It demands an *objective* test, because semantically it directs the focus of the inquiry solely on to the conduct of the government official applying the pressure in question, rather than the subjective mental state of the suspect. If the force used by the government official objectively rises to the level of "compulsion" the privilege has been violated, period.

This objective interpretation of the term "compelled," which focuses solely on police conduct, is consistent not only with the text of the privilege and how the privilege has been defined in the "formal setting" cases,[306] but with the historical origins of the privilege as well. Nothing in the scholarly literature suggests that the Framers intended to create a sliding scale that adjusts the amount of force permissible depending on characteristics unique to the suspect. The historical events leading up to the inclusion of the privilege against compulsory self-incrimination in the Bill of Rights reflect a simple desire by the Framers to prohibit the government's use of force and other such objectively identifiable penalties in response to silence or to provoke speech. The precursor of these events was the operation of the Star Chamber, the Court of High Commission and the other ecclesiastical courts of medieval and early modern Europe, which produced confessions from subjects through the use of torture and other objective devices of coercion.[307] Thus, the Framers were aware of

304. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 234 (10th ed. 1995).

305. *Cf.* Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (stating that the privilege and Bill of Rights limit conduct of government officials only, not private parties).

306. *See supra* notes 259–87 and accompanying text.

307. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 34–35, 101 (2d ed. 1986) (discussing Tudor England's Star Chamber and other ecclesiastical proceedings, and their use of physical and psychological torture, such as oaths, to obtain confessions). For an additional discussion of the historical events that prompted the inclusion of the privilege against compulsory self-incrimination in the Bill of Rights, see generally Albert W. Alschuler, *A Peculiar Privilege In Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996) (discussing the Court of High Commission in England and its use of psychological devices such as oaths to compel confessions); Benner, *supra* note 51; R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990) (discussing use of ex-officio oath in continental Europe to obtain confessions in ecclesiastical inquiries); Herman, *Part I*, *supra* note 87 (discussing use of torture in Europe to compel confessions); John J. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994) (same).

Foremost among these objective devices of torture was the oath *ex officio*. This procedure, used by the High Commission, Star Chamber and other ecclesiastical courts, required its subjects to take an oath to God that they would respond truthfully to all questions put to them. *See* Penney, *supra* note 64, at 315. Failure to take the oath resulted in being held in contempt and the imposition of imprisonment or torture. *Id.* Although it may be difficult to understand how an oath could constitute torture today, the religious beliefs prevalent in this era ensured that perjury was viewed as a mortal sin. *Id.* Thus, a suspect under interrogation in the Star Chamber, for example, had a choice of remaining silent and facing physical penalties, such as torture or imprisonment, taking the oath and incriminating himself,

interrogation devices—certain "objectively identifiable penalties"—that were utilized by those in authority in medieval and Renaissance Europe to obtain confessions. By including a provision in the Bill of Rights barring the government's use of compulsion to obtain statements, they undoubtedly intended to prohibit the government's use of such penalties.[308]

Professor Grano's "voluntariness test" proposal can be traced to the Court's first interpretation of the privilege in *Bram v. United States*.[309] Although *Bram* has been explicitly repudiated by the Supreme Court,[310] an examination of the decision is nonetheless revealing because it demonstrates the problematic origins of the voluntariness test. In holding the defendant's statements inadmissible under the privilege against compulsory self-incrimination, the *Bram* Court stated: "[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."[311] In conflating compulsion with voluntariness, the *Bram* Court completely ignored the text of the privilege and the use therein of the objective verb "compelled" rather than the subjective adjective "voluntary."

But that was only its first mistake. The *Bram* Court then purported to address the historical underpinnings of the privilege.[312] Its analysis on this point reveals a second problem with the Court's voluntariness analysis. The *Bram* Court started by correctly noting that the adoption of the privilege was the culmination of centuries of "protest against the inquisitorial and manifestly unjust methods of interrogating accused persons . . . in the continental system[s]" of Europe.[313] The Court then recounted those "unjust methods," which included the torture and "browbeat[ing]" of suspects.[314] This history, so far, supports the adoption of an objective test, designed to prohibit the imposition of certain "objectively identifiable penalties."

At the next step, however, the Court's historical analysis is fundamentally flawed. The Court turned to early cases in England and Colonial America that stand for the proposition that statements must be "voluntary" to be admissible as evidence.[315] The Court borrowed from these cases the voluntariness test that

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which would also result in punishment, or taking the oath and committing perjury, which was a mortal sin. *Id.* The oath therefore constituted coercion because it required its suspects to face the cruel choice between "earthly punishment and divine retribution." *Id.* For a detailed historical account of the use of oaths in medieval and early modern England, see generally Helen Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959).

308. *See* Penney, *supra* note 64, at 319 (stating that the Framers included the privilege in the Bill of Rights to prohibit the use of objective penalties such as "*ex officio* procedures or judicial torture" that were prevalent in "Medieval and Renaissance Europe.").

309. 168 U.S. 532 (1897).

310. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 285 (1991).

311. *Bram*, 168 U.S. at 542–43 (quoting 3 RUSSELL ON CRIMES 478 (6th ed. 1896)).

312. *Id.* at 543–51. *See infra* notes 318–26.

313. *Id.* at 544.

314. *Id.*

315. *Id.* at 550–61.

it inexplicably substituted for the concept of compulsion.[316] As several scholars have pointed out, however, the voluntariness test found in these early cases is historically unrelated to the privilege against self-incrimination and the practices the privilege was intended to address.[317] Indeed, two distinct confession doctrines evolved from the Middles Ages through the 19th Century.[318] The first, sometimes referred to as *nemo tenetur*,[319] was concerned with the use of oppressive government force during interrogations conducted by the Star Chamber and other inquisitorial tribunals in Europe.[320] This doctrine and the policies behind it were the impetuses behind the inclusion of the privilege in the Bill of Rights.[321]

The second doctrine was simply a common law rule of evidence that, like rules prohibiting the introduction of hearsay, was designed to prevent the introduction of evidence likely to be unreliable.[322] This doctrine was unconcerned with protecting civil liberties or curbing the brutal interrogation methods

316. *Id.* at 562–63.

317. *See* Benner, *supra* note 51, at 65–113 (describing the common law rule of evidence that barred the use of "involuntary" statements as unreliable and describing its historically inaccurate conflation with the privilege in *Bram*, which was, in contrast, based on the concept of *nemo tenetur* and adopted in protest to the inquisitorial interrogation techniques used by the Star Chamber, High Commission and other ecclesiastical courts in medieval and early modern Europe); Penney, *supra* note 64, at 314–31 (charting the independent developments of *nemo tenetur*, the precursor to privilege, and the voluntariness rule). *But see* Herman, *Part I*, *supra* note 87, at 109–70 (noting that early English and American courts did not frequently recognize a relationship between the voluntariness doctrine and *nemo tenetur*, but arguing that the voluntariness doctrine served merely as the exclusionary function of *nemo tenetur*).

318. *See* Benner, *supra* note 51 at 65–113 (describing evolution of the two distinct confession doctrines, the voluntariness doctrine, which was a common law rule of evidence, and *nemo tenetur*, which was distinct and gave rise to the privilege against self-incrimination); *see also* Penney, *supra* note 64 at 314–31 (same). *But see* Herman, *Part I*, *supra* note 87 at 106–70 (arguing that the voluntariness doctrine at common law and the concept of nemo tenetur may not have been separate, distinct doctrines, and that the voluntariness rule may have been the exclusionary function of *nemo tenetur*).

319. The complete Latin maxim provided: "Nemo tenetur prodere seipsum," which means "no one is bound to bring forth (i.e., accuse) himself." *See* Benner, *supra* note 51 at 74 n.50; *see also* Penney, *supra* note 64 at 315.

320. *See* Herman, *Part I*, *supra* note 87, at 106–11, 112–14, 116–28, 129–33, 134–43, 147–65 (describing the doctrine of *nemo tenetur*, which was invoked to defend against the use of oaths, and other devices of force, by the Court of High Commission, the Star Chamber and other ecclesiastical courts to compel confessions); *see also* Benner, *supra* note 51, at 67–92 (same); Penney, *supra* note 64, at 314–15 (noting that *nemo tenetur* developed as a defense to oaths).

321. *See* Herman, *Part I*, *supra* note 87, at 163–65 (stating that the constitutional protection against compelled self-incrimination stemmed from *nemo tenetur*); *see also* Benner, *supra* note 51, at 88–93 (same); Penney, *supra* note 64, at 319 (same). *See also* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 110–38 (1997) (discussing how Latin maxim *Nemo tenetur* and Framers' desire to ban practices of High Commission and Star Chamber contributed to the drafting of the Fifth Amendment).

322. *See* Herman, *Part I*, *supra* note 87, at 111, 114, 128, 133–34, 143–62, 165–70 (describing the evolution of voluntariness test that excluded confessions on the ground of unreliability); *see also* Benner, *supra* note 51, at 92–93 (stating that concerns about voluntariness were rooted solely in the concern for reliability); Penney, *supra* note 64, at 314–22 (explaining that involuntary confessions were excluded because of unreliability).

of tribunals like the Star Chamber.[323] The majority of cases that constituted this doctrine involved confessions that were deemed involuntary and thus unreliable because of positive benefits, such as bribes, that had been offered to suspects to induce self-incriminating statements.[324] This doctrine was also frequently applied in civil cases in which witnesses had been bribed to make statements in favor of a party to the litigation.[325] When drafting the Self-Incrimination Clause, the Framers were understandably not concerned with government officials granting positive favors to suspects. Grants of positive favors are appropriately addressed by rules of evidence such as hearsay rules that are based on reliability related policies, because a witness or suspect might utter certain words of choice in order to receive benefits. The granting of positive benefits to induce speech does not, however, infringe civil liberties, and thus does not rise to the level of constitutional concern. History reveals that the Framers intended the privilege to ban only negative inducements such as torture which do, in fact, offend notions of civil liberties.[326]

Because the common law voluntariness rule based solely on reliability served a purpose that was different from the purpose served by the privilege against compulsory self-incrimination, its scope was appropriately different from the scope of the privilege.[327] If one is concerned with making sure that all evidence admitted at trial is reliable, then one should be concerned with any matter that might render testimony unreliable—from government conduct to the speaker's subjective mental state, and from positive inducements to negative inducements. Such a policy perspective calls for a subjective "totality of the circumstances" approach to include all the factors that may render a statement unreliable. A subjective voluntariness analysis is an appropriate test for this purpose. But this

323. *See* Penney, *supra* note 64, at 314–22 (noting that the voluntariness doctrine lacked the political and social justifications of *nemo tenetur*); *see also* Benner, *supra* note 51 at 92–95 (stating that the common law voluntariness doctrine was not directly aimed at deterring torture, as was *nemo tenetur*, but was concerned instead with keeping any unreliable confession out of evidence). *See also* HELMHOLZ ET AL., *supra* note 321, at 153–56 (discussing common law "Confession Rule," which was based on the policy of keeping unreliable statements out of evidence, and noting that this rule has historically been "confused with the privilege against self-incrimination").

324. *See* Penney, *supra* note 64 at 320–22 (summarizing cases involving "positive" inducements); Benner, *supra* note 51 at 98–100 (same); Herman, *Part I*, *supra* note 87 at 156–68, 165–66 (same). *See also* HELMHOLZ ET AL., *supra* note 321, at 154 (noting that the common law Confession Rule barred confessions that had been made in response to "promises of favor" or "flattery of hope").

325. *See supra* note 324.

326. *See supra* notes 307–08 and accompanying text. *See also* HELMHOLZ ET AL., *supra* note 321, at 110–38 (describing aversion in American colonial period, based on the Latin maxim *Nemo tenetur*, to the use of torture or oaths to compel confessions, and the Framers' incorporation of that aversion into the Fifth Amendment's privilege against self-incrimination); *id.* at 185 ("When the privilege was embodied in the United States Constitution, its goal was simply to prohibit improper methods of interrogation."). *But see id.* at 192 n.62 (suggesting that the Framers "probably" intended the privilege to prohibit positive inducements, such as "promises of leniency," in addition to negative inducements).

327. *See* Herman, *Part I*, *supra* note 87, at 106–11, 111–12, 114–16, 128–29, 133–34, 143–62, 165–70 (describing the broad application of the common law rule of evidence, which used a "voluntariness" test to determine the admissibility of confessions); *see also* Benner, *supra* note 51, at 92–113 (same); Penney, *supra* note 64, at 314–23 (same).

test is detached from both the text and historical underpinnings of the privilege.[328]

Furthermore, Professor Grano's voluntariness proposal is particularly dubious because the test has not worked in practice. This test has been used under the parallel Due Process Clause since 1936,[329] and its failings are what caused the Court to search for the alternative it found in 1966 in *Miranda*.[330] Because the test is subjective and essentially requires a court to divine the state of mind of the suspect at the time of the interrogation, it is difficult for courts to apply and provides little guidance to the police.[331] Not surprisingly, the due process involuntary confession rule has been widely criticized as "useless" in the scholarly literature.[332] It is therefore questionable why anyone would want to graft this rule onto the privilege. This is particularly true when such a rule would be contrary to the text and history of the privilege,[333] and would create two completely different meanings for "compulsion" in the formal setting and police interrogation setting, rendering the privilege's jurisprudence internally inconsistent.[334]

Moreover, the Court's decision in *Miranda* repudiated any notion that the privilege requires a subjective "voluntariness" analysis, as Professor Grano proposes.[335] Indeed, *Miranda* corrected some of the Court's errors of the past, as it clearly set forth an objective test for compulsion.[336] *Miranda* was consistent with the formal setting cases in the sense that it set forth an objective standard, focused solely on the pressure exerted by the government: custodial interrogation.[337] But *Miranda* was arguably inconsistent with the formal setting

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328. *See* Benner, *supra* note 51 at 65, 92–101 (discussing the historically inaccurate conflation of the common law voluntariness rule with the privilege against compulsory self-incrimination); *see also* Penney, *supra* note 64, at 326–31 (same).

329. *See supra* notes 40–50 and accompanying text.

330. *See supra* notes 51–55 and accompanying text.

331. *See supra* notes 51–55 and accompanying text.

332. In *Miller v. Fenton*, 474 U.S. 104 (1985), the Supreme Court acknowledged its critics who had called the "voluntariness" test under the Due Process Clause "useless," stating:

> The voluntariness rubric has been variously condemned as 'useless,' Paulson, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954); 'perplexing,' Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979); and 'legal 'double-talk,'" A. Beisel, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955). *See generally* Y. Kamisar, POLICE INTERROGATION AND CONFESSIONS 1–25 (1980).

Id. at 116 n.4. Since the Court's decision in *Fenton*, several additional scholars have added their names to the list of critics. *See* Penney, *supra* note 64, at 354, 361–62 (criticizing "voluntariness" test); Schulhofer, *supra* note 50, at 451–53 (same). For arguments that the Court's alternative to the due process voluntariness test—*Miranda*—is equally flawed, see generally the works of Paul G. Cassell, *supra* note 87.

333. *See supra* notes 303–26 and accompanying text.

334. *See supra* notes 259–87 and accompanying text.

335. *See supra* notes 57–68 and accompanying text.

336. *See supra* notes 57–68 and accompanying text.

337. *See supra* notes 57–68 and accompanying text.

cases as well because it required a finding of compulsion prior to the imposition of any sort of objectively identifiable penalty.[338] In any event, the idea that custodial interrogation equates with compulsion is no longer a viable theory after *Quarles* and the other *Miranda*-exception cases.[339] The current state of the Court's jurisprudence indicates that compulsion requires some amount of pressure beyond mere custodial interrogation.[340]

The objectively identifiable penalty test I have proposed in this Article is consistent with current Supreme Court precedent because it requires something beyond mere custodial interrogation to constitute compulsion. My proposal is also doctrinally sound because it reconciles the definition of compulsion in the police interrogation context with the Court's definition of that term in formal settings. Finally, my proposal is also in harmony with both the text and history of the privilege. Accordingly, it should be adopted to determine the admissibility of confessions in the international arena.

C. THE OPERATION OF THE "OBJECTIVELY IDENTIFIABLE PENALTY" TEST IN THE INTERNATIONAL ARENA

Based on the above discussion, FBI agents abroad should be found to violate the privilege against compulsory self-incrimination whenever they impose an objectively identifiable penalty, in any form, on a non-American suspect in response to the suspect's silence or in an attempt to make the suspect speak. The test would be objective, and would focus solely on the conduct of the interrogating agents. A definition of an objectively identifiable penalty would have to be developed on a case-by-case basis, as has occurred in the formal setting context. This Article cannot purport to address the myriad of scenarios that arise on a daily basis during interrogations abroad. Examples of an objectively identifiable penalty could be a slap to provoke speech, a denial of sleep or food until the suspect speaks, a threat that the suspect's silence will be used against him in making charging decisions, a denial of cigarettes until and unless he speaks, a threat with a gun to provoke speech, a refusal to allow the suspect to use the bathroom until he speaks, or any of the other litany of penalties an imaginative FBI agent could concoct.

Additionally, FBI agents must not make a verbal claim of right to a suspect's statements. Stated another way, the agents must not suggest, directly or indirectly, that the suspect is required by law to speak. This rule is required under the formal setting cases because claims of right imply the agent's ability to resort to legal remedies, such as holding a suspect in contempt and imprisoning him, if he does not comply.[341] In its most obvious form, this rule would prevent

338. *See supra* notes 65–68 and accompanying text.
339. *See supra* notes 73–88 and accompanying text.
340. *See supra* notes 77–85 and accompanying text.
341. *See supra* note 286 and accompanying text.

an FBI agent from saying to a suspect: "You are required to tell us what happened. You do not have a choice."

As the foregoing discussion suggests, the use of any objectively identifiable penalty to punish silence or to provoke speech would violate the privilege. Such a rule is required under the formal setting cases not because something as slight as taking away a suspect's cigarettes to provoke his speech is, viewed in isolation, the type of penalty the Framers desired to prohibit. Rather, such an act makes a claim of right to the suspect's statements.[342] Claims of right imply the agent's ability to impose greater penalties. The use of punishment in any form says to the suspect: "I have the power to punish. You do not have a choice but to speak." Thus, even the slightest objectively identifiable penalty, if used to punish silence or to provoke speech, makes a claim of right to the suspect's statements, and constitutes an implied threat of the future imposition of additional penalties if the suspect does not cooperate. Such an act, as in the formal setting cases, constitutes compulsion under the privilege.

The imposition of objectively identifiable penalties must be distinguished from "denials of requests." Consider, for example, a suspect under interrogation who requests that his friend be allowed in the interrogation room during the interrogation. If the FBI agent grants access to the friend, there has clearly been no penalty imposed. But, if the agent denies this request and the suspect then confesses, has the agent imposed an objectively identifiable penalty? A distinction should be made as to whether the request was linked to the suspect's continued willingness to speak. Take, for example, a suspect who says, "I will not talk to you anymore unless my friend is present." This statement reflects an invocation of the right to remain silent unless a condition is met. If the condition is not met, the statement should be viewed as an unequivocal invocation of the privilege. Thus, if the FBI agent refused to allow the suspect's friend to be present, the agent would be required to refrain from any further questioning, just as would occur in the formal setting when someone invoked the right to remain silent. If the FBI agent then stated, "We're not going to allow your friend to sit in, so I guess this interview is finished," the interrogation could continue only if the suspect initiated further dialogue.

But what about a request that is not tied to an invocation of the privilege? Suppose an in-custody suspect under interrogation simply asks, "Can I have some food?" Whether a denial of this request would constitute an impermissible penalty turns on two factors. The first factor is whether the denial would

342. *See supra* note 286 (discussing how claims of right violate the privilege). Professor Grano argues that mere custodial interrogation does not constitute compulsion because it does not assert a "claim of right" to the suspect's statements. *See* Grano, *Selling the Idea to Tell the Truth*, *supra* note 300, at 684. I agree with this point. Grano's argument implicitly admits, however, that police actions that do in fact make a claim of right constitute compulsion. His argument in favor of a voluntariness test for compulsion contradicts this admission, because many objectively identifiable penalties would implicitly make a claim of right to a suspect's statements, but would not render the statements involuntary. Professor Grano's article does not attempt to explain this contradiction.

negatively change the status quo from the suspect's normal conditions of custody. For example, if the suspect is normally allowed to eat at that time under the conditions of his custody, not allowing him to eat would constitute a penalty above and beyond the status quo. But if the suspect made a ridiculous request that went above and beyond the status quo, like a request to have his favorite meal flown in, the denial of this request could not be seen as changing the status quo or imposing a penalty to provoke speech.[343] Second, the denial would have to be objectively viewed as designed to punish silence or provoke speech. This determination would depend on the unique circumstances of the interrogation. If the request was made while the suspect was talking freely, the denial of such a request should not give rise to an inference that it was designed to punish speech or provoke silence. But if, for example, the request and denial occurred after hours of contentious dialogue, and at a point when the suspect was at his "breaking point," a contrary inference might be drawn.[344]

CONCLUSION

American courts have not yet determined which constitutional confession doctrines, if any, protect non-Americans beyond the borders of the United States. But as American crime continues to become more global in nature, such determinations will have to be made in the not too distant future. In the United States, a two-step test controls the admissibility of confessions. The first step,

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343. If the suspect were not in custody, the conditions and status quo would be determined by the setting of the interrogation. Indeed, if the interrogation were taking place in the suspect's home, the FBI would not be able to deny a request for food, because to do so would constitute an impermissible "claim of right" if the second factor, discussed in the text above, also was present. *See supra* notes 286, 342 and accompanying text (discussing claims of right).

344. The test that I have proposed in this Article is different than the due process involuntary confession rule in two respects. First, the objectively identifiable penalty test is objective and looks solely at the police conduct involved, while the due process rule is subjective and examines the "totality of the circumstances." *See supra* note 44 and accompanying text. Second, the test proposed herein for compulsion is more protective of a suspect's rights than the due process involuntary confession rule. The due process rule requires suppression only when the suspect's will has been overborne. *Id.* The compulsion test proposed in this Article requires suppression whenever an objectively identifiable penalty has been imposed in response to silence or to provoke speech, regardless of the state of the suspect's will. Indeed, many such penalties would not cause the suspect's will to be overborne. One may therefore ask the following questions: "If the test under the privilege is more protective of a suspect's rights, shouldn't that test apply in all cases—even within the United States? By allowing confessions to be introduced that were obtained through the imposition of penalties that did not overbear the suspect's will, isn't the Court allowing the privilege against self-incrimination to be violated?" I would answer both of those questions in the affirmative. Simply put, by refusing to define compulsion under the privilege, the Court has allowed itself to use the less-restrictive due process standard without, at least on the surface, appearing to be doctrinally inconsistent. *See* Herman, *Part II*, *supra* note 39, at 518–28 (stating that any definition of "compulsion" would have to be broader than the due process "voluntariness test," and that the Court has avoided defining compulsion because it prefers the less-restrictive standard under the Due Process Clause). The Court has perhaps avoided providing a clear definition for compulsion because such a definition would have to be squared with the formal setting cases, which define that term broadly. By avoiding the issue, the Court can continue using the less-restrictive due process involuntary confession rule that it prefers.

the *Miranda* doctrine, is inapplicable in the international arena. The second step, the due process involuntary confession rule, likewise offers non-Americans no protection abroad. However, non-Americans abroad *are* in fact protected by the privilege against compulsory self-incrimination, and its prohibition on "compelled" confessions when questioned by American agents.

Due to judicial politics and compromises, the Supreme Court has not clearly defined compulsion in the interrogation context. Indeed, it has not needed to, as the due process involuntary confession rule has served as *Miranda*'s back-up test, and has accordingly shielded the privilege from direct judicial scrutiny. Because the due process involuntary confession rule is inapplicable in this context, however, American courts will finally be forced to determine the meaning of a "compelled" confession.

This Article contends that the privilege requires an objectively identifiable penalty test. This test prohibits law enforcement officers from imposing objectively identifiable penalties on suspects in response to silence, or to provoke speech. This test is consistent with both the text and historical underpinnings of the privilege. It is also in harmony with the Court's interpretations of the privilege in the formal setting, such as trials, and with the Court's incomplete definition of compulsion in the police interrogation setting. Accordingly, the objectively identifiable penalty test should be adopted by American courts to determine the admissibility of confessions made by non-Americans to FBI agents abroad.