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## INTRODUCTION

For more than a century, the Supreme Court has interpreted the Bill of Rights as prohibiting the police from obtaining involuntary confessions from suspects through coercion.[1] The rule itself is simple: In criminal cases, a confession is inadmissible if the defendant did not speak voluntarily due to police coercion.[2] If asked whether this "involuntary confession rule" is an understandable and workable doctrine, however, a noticeable percentage of judges, prosecutors, police officers, criminal defense attorneys, and law professors would answer with an unequivocal "no."[3] This percentage would no doubt be higher in relation to those who have attempted to apply the voluntariness test in interrogation rooms and courtrooms in everyday practice.[4]

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1. *See infra* notes 2, 7-11, 129-40 and accompanying text; *see also* Dickerson v. United States, 530 U.S. 428, 433-34 (2000) (summarizing role of voluntariness test in confession jurisprudence through the past century).

2. *See Dickerson*, 530 U.S. at 433; Arizona v. Fulminante, 499 U.S. 279, 285-86 (1991); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(B), at 316 (3d ed. 2000) ("This due process test is customarily referred to as the 'voluntariness' requirement, the term used by the Court in enunciating the due process requisites for admissibility."); EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 2303 (3d ed. 1998) ("To successfully offer an admission or confession into evidence, the prosecutor must comply with . . . the voluntariness doctrine . . . . The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily.").

3. *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (documenting the "intolerable uncertainty . . . of the due process voluntariness doctrine"); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 25 (1980) (suggesting that courts should "scrap the 'voluntariness' terminology altogether"); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-72 (1981) (book review) (discussing the defects in the due process involuntary confession rule); George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 245 n.14 (1991) (citing numerous sources that discuss the problems with the involuntary confession rule); *see also infra* notes 6-26 and accompanying text.

Basic questions concerning voluntariness and free will—e.g., whether they exist, and if so, when they exist—have puzzled philosophers for centuries and represent one of history's Gordian knots.[5] Not surprisingly, judges have fared no better than philosophers in solving this age-old enigma since the Supreme Court first adopted voluntariness as the touchstone for constitutional confession law in 1897.[6] The problems with the involuntary confession rule are well-documented and legion.[7] The test requires a court to reconstruct minute details of an interrogation after the fact, usually with the police and the defendant offering wildly varying accounts of what took place.[8] A court determining whether or not a confession was voluntary must consider any and all circumstances that could enter into this inquiry.[9] This includes not only obvious objective factors, such as the length of the interrogation and whether the interrogators used force of any kind or degree against the suspect, but also subjective characteristics unique to the particular suspect.[10] The number and variety of subjcctive factors that may enter into the equation are unlimited and may include the suspect's age, race, education, certain psychological strengths or

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4. *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 116-17 (1989).

> Its most serious flaw, however, lay in the fact that it was a value-laden method of constitutional adjudication that created vague, unpredictable standards which failed to provide clear guidance to police and made judicial review a morass of subjeetivity. The Court itself openly complained of the diffieulties in drawing the line between an acceptable police tactic and a violation of due process particularly when the Court must make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of the accused.

Schulhofer, *supra* note 3, at 869-70 (internal quotations omitted) (discussing difficulties for courts and police posed by due proeess involuntary confession rule).

5. *See, e.g.*, BERNARD BEROFSKY, DETERMINISM (1971); DETERMINISM, FREE WILL, AND MORAL RESPONSIBILITY (Gerald Dworkin ed., 1970); RICHARD DOUBLE, THE NON-REALITY OF FREE WILL (1991); FREE WILL (Derk Pereboom ed., 1997); FREE WILL AND DETERMINISM (Bernard Berofsky ed., 1966); THE OXFORD HANDBOOK OF FREE WILL (Robert Kane ed., 2002); GIDEON YAFFE, LIBERTY WORTH THE NAME: LOCKE ON FREE AGENCY (2000); *see also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 61 (1993) (stating that the "effort to distinguish voluntary from involuntary actions dates back at least to Aristotle"); M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 328 (2003) (noting the age-old problem of determining voluntariness is "an enterprise fraught with difficulty").

6. Bram v. United States, 168 U.S. 532 (1897) (adopting voluntariness as constitutional standard for admissibility of confessions pursuant to self-incrimination clause); *see also* Thomas & Bilder, *supra* note 3, at 245 ("The paradoxical nature of the volitional-but-compelled testimony explains why the self-incrimination clause continues to puzzle courts and commentators."); *supra* notes 3-4 and accompanying text; *infra* notes 12-25 and aceompanying text.

7. *See supra* notes 3-4 and accompanying text; *infra* notes 14-26 and accompanying text.

8. *See* Schulhofer, *supra* note 3, at 869-72 (discussing difficulties for courts posed by due process involuntary confession rule).

9. Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973) (discussing fact that voluntariness test requires a court to examine the totality of the circumstances); *see also* David R. Jankowsky & Erie R. Sherman, *Custodial Interrogations*, 90 GEO. L.J. 1240, 1259-63 (2002) (outlining factors considered by courts in assessing voluntariness of statements).

10. *Schneckloth*, 412 U.S. at 225-26; LAFAVE ET AL., *supra* note 2, § 6.2(c); Jankowsky & Sherman, *supra* note 9, at 1259.

weaknesses, and even facts and events in the suspect's past life that might have subconsciously affected how he or she reacted in the interrogation room on the night in question.[11] The court must then throw all of these factors into a hat, mix them up in a totality of the circumstances approach,[12] reach in and attempt to pull out the answer to a question that can never be answered with confidence by a judge, psychiatrist, or magician.[13]

This Herculean task of divining a suspect's state of mind has been called "impossible,"[14] "perplexing,"[15] and an "Alice in Wonderland journey into the metaphysical realm" of free will.[16] The involuntary confession rule itself has been criticized as "legal double talk,"[17] "useless,"[18] and "downright misleading."[19] In 1985, the Supreme Court, while declining to replace the test, acknowledged that the test has many critics and candidly admitted that the "voluntariness rubric" has been roundly "condemned."[20]

Although the involuntary confession rule presents difficulties for courts, imagine the test from the perspective of a police officer conducting an interrogation. Factors that later might become important to the inquiry, such as the edueation of the suspect or the suspect's psychological strengths and weaknesses, are usually unknown to the officer at the time of the interrogation. This uncertainty leaves officers without clear guidelines

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11. *Schneckloth*, 412 U.S. at 225-26; LAFAVE ET AL., *supra* note 2, § 6.2(c); Jankowsky & Sherman, *supra* note 9, at 1259-63; Yale Kamisar, *What is an 'Involuntary' Confession?*, 17 RUTGERS L. REV. 728, 756-57 (1963) (book review) (discussing Court's examination of subjective factors unique to the suspect in question).

12. *Schneckloth*, 412 U.S. at 225-26.

13. Did the suspect speak with free will when she confessed? Does the fact that she spent more of her childhood on the streets than in a classroom suggest that she was not able to hold her own against the wily, highly trained interrogators? Or does this same background indicate that she might be more tough and streetwise than the average suspect, and thus, better able to withstand the pressure? Does it change the equation that her father is a police officer, and that she may, therefore, be more comfortable in police custody than most? Or does this same fact mean that shc is more susceptible to police intimidation than the average suspect, because she knows from her father's stories what the police are capable of doing during an interrogation?

14. Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1074 (2001).

15. *See* Grano, *supra* note 3, at 863.

16. *See* Benner, *supra* note 4, at 116.

17. ALBERT R. BEISEL, JR., CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955).

18. Monrad G. Paulson, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954).

19. Kamisar, *supra* note 11, at 747.

20. Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985). Judges and juries are frequently asked to determine the state of mind of a defendant in limited other circumstances. For example, in the mens rea context, juries are asked to determine whether the defendant intended to commit the crime in question. This inquiry, however, is substantially easier to complete because both direct and circumstantial evidence of intent is often available. Indeed, intent in this context can be inferred from objective facts relating to the defendant's conduct in carrying out the crime or in attempting to avoid detection. As the scholarly literature has illuminated, determining the voluntariness of a confession, on thc other hand, is a nearly impossible task. *See supra* notes 12-19 and accompanying text.

and hinders their ability to plan and conduct interrogations in a manner that they can feel confident will be immune from criticism later.[21]

While the theoretical ambiguity inherent in the voluntariness standard leaves police officers with little guidance in the field, in the courtroom this ambiguity most often works in their favor.[22] Given the power and decisiveness that a confession brings to a criminal prosecution, trial judges are often loath to find a confession involuntary.[23] Furthermore, if the defendant's confession is in the trial record, an appellate court will likely deem any judicial mistake that works against the defendant to be harmless error.[24] Thus, trial judges have a natural self-interest in favor of admitting confessions. Additionally, the vast "wiggle room" inherent in the highly subjective voluntariness test offers judges free rein to interpret the facts of an interrogation in a myriad of ways, thus making a finding that a confession was made involuntarily very rare in practice.[25] As a result, interrogators are often able to apply intense pressures to suspects without rendering the resulting confessions inadmissible.[26]

Given the pervasive problems with the involuntary confession rule in application, it is surprising how little mainstream attention has been given to its ascendancy to power and current doctrinal legitimacy. Indeed, although the rule currently lies at the foundation of confession law, it is unclear from which provision in the Bill of Rights it emanates. Some believe the Fifth Amendment's self-incrimination clause[27] demands a rule that

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21. *See* Benner, *supra* note 4, at 116-17 (discussing difficulties the test poses for interrogators). As Professor Schulhofer has noted:

> Because of its vagueness and its insistence on assessing 'the totality of the circumstances,' the voluntariness standard gave no guidance to police officers seeking to ascertain what questioning tactics they could use. Indeed, at the critical point when the police sensed that a suspect was about to 'crack,' they were enjoined to be on guard against both 'overbearing the will' and losing their chance by lessening the tension or pressure; in many common situations the message of the due process test was not just vague but inherently contradictory. Under these circumstances, moreover, exclusion of improperly obtained confessions was an unsatisfactory remedy: the defendant's physical or psychological injury was not redressed.

Schulhofer, *supra* note 3, at 869.

22. *See* Kamisar, *supra* note 11, at 739.

23. *See* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 752-54 (1987) (discussing tendency of lower courts to hold confessions voluntary and admissible under due process involuntary confession rule even in cases where extreme pressure was applied).

24. U.S. v. Abfalter, 340 F.3d 646 (8th Cir. 2003) (holding that a variance between the indictment and the government's proof at trial that does not result in actual prejudice to the defendant is harmless error and upholding the conviction obtained after the defendant confessed to an element of the crime); U.S. v. Brown, 951 F.2d 363 (9th Cir. 1991) (finding the admission of polygraph evidence after the defendant confessed to the charge to be harmless error); Boles v. Foltz, 816 F.2d 1132, 1136 (6th Cir. 1987) (finding that the admission of a wallet that the defendant confessed to having in his possession was a harmless error).

25. *See* Herman, *supra* note 23, at 752-54; *see also* KAMISAR, *supra* note 3, at 42-44, 74-75.

26. *See* Herman, *supra* note 23, at 752-54.

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

involuntary confessions are inadmissible.[28] Others claim that the involuntary confession rule is derived from the due process clauses of the Fifth and Fourteenth Amendments.[29] Still others argue that both the self-incrimination clause and the due process clauses are identical in this respect and work in tandem to prohibit involuntary confcssions.[30] It is as if the voluntariness test has ruled the roost for so long that courts and practitioners no longer question its source or doctrinal validity.

This Article argues that due to legal and historical errors, the Supreme Court has unduly relied on the involuntary confession rule in confession jurisprudence for the past century. As a result, the Court has ignored other important values and principles that the Court should consider and ultimately infuse into the equation. These values and principles should be used to forge a new test for confession admissibility that either replaces the involuntary confession rule outright or, at a minimum, supplements existing doctrine.

Four essential points support this thesis and form the foundation of this Article. First, nothing in the Bill of Rights requires, or even suggests, a voluntariness test as the primary test for confession admissibility. At no point did the Framers impose a voluntariness standard upon us and, like a cruel joke, make the unsolvable puzzle of "free will" the unavoidable sine

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28. *See, e.g.*, United States v. Rowland, 145 F.3d 1194, 1209 (10th Cir. 1998) ("The Fifth Amendment's privilege against self-incrimination prohibits the admission of incriminating statements where governmental acts, threats or promises cause the defendant's will to become overborne, thus rendering the statements involuntary.") (internal quotations omitted); United States v. Matthews, 942 F.2d 779, 782 (10th Cir. 1991) (reviewing a claim of involuntary confession under Fifth Amendment's self-incrimination clause); United States v. Rogers, 906 F.2d 189, 190-91 (5th Cir. 1990) ("The applicable standard for determining whether a confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice. . . . A statement is not compelled within the meaning of the Fifth Amendment if an individual voluntarily, knowingly and intelligently waives his constitutional privilege.") (internal quotations omitted); United States v. Crespo de Llano, 838 F.2d 1006, 1015 (9th Cir. 1987) (reviewing voluntariness issue under the self-incrimination clause); *see also* David Huitema, Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261 (2000) (arguing that courts must apply the self-incrimination clause beyond adherence to *Miranda* procedure); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 121 (1998) ("[I]n the Fifth Amendment 'the Constitution has prescribed the rights of the individual when confronted with the power of government,' and '[t]hat right cannot be abridged.'" (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

29. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .." U.S. CONST. amend. V. "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. *See, e.g.*, United States v. Cristobal, 293 F.3d 134, 140 (4th Cir. 2002) (stating that involuntary confession rule arises from due process); *see also* United States v. Valme, 182 F.3d 919, 921 (6th Cir. 1999).

30. *See, e.g.*, Wright v. Deland, 986 F.2d 1432, 1440 (10th Cir. 1993) (stating the voluntary confession rule arises from both due process and the self-incrimination clause); Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 185 (1988) (arguing that voluntariness requirement stems from both due process and the self-incrimination clause); *see also infra* notes 246-48 and accompanying text.

qua non in courtrooms and interrogation rooms for time immemorial. Indeed, the word "voluntary" and its various permutations do not even appear anywhere in the Bill of Rights.[31] Second, the involuntary confession rule exists today because of a series of mistakes and doctrinal complications, beginning with *Bram v. United States*,[32] the Supreme Court's first constitutional confession case, and continuing even after *Miranda v. Arizona*[33] seemingly rendered the rule obsolete. Third, the text of the self-incrimination clause suggests a standard based on compulsion, which focuses on the objective behavior of the interrogators, rather than on voluntariness, which focuses on the suspect's subjective state of mind.[34] Such a test would be more faithful and consistent with existing interpretations of the self-incrimination clause in non-interrogation contexts as well as with the text and historical origins of the self-incrimination clause. Fourth, a test for confession admissibility properly based on compulsion and the self-incrimination clause would differ in many important respects from the involuntary confession rule. Although many scholars and even Supreme Court Justices who follow conventional wisdom might disagree, existing interpretations of the self-incrimination clause in non-interrogation contexts, the historical origins of the self-incrimination clause, the text of the self-incrimination clause, and relevant policy issues all argue to the contrary.

Part I of this Article traces the development of the involuntary confession rule from its birth in the nineteenth century through 1936. Section A discusses how the Supreme Court first introduced the concept of voluntariness into constitutional confession law in 1897 in *Bram*. This Section argues that the *Bram* Court seemingly confused a common law rule of evidence with the self-incrimination clause and, as a result, introduced the voluntariness rubric into constitutional confession law. In critiquing the *Bram* decision, Section B introduces the concepts and argues that both the text of the self-incrimination clause and its historical origins support the notion that the proper test for admissibility under the self-incrimination clause should be compulsion rather than voluntariness.

Part II discusses confession law from 1936 to 1964, which was the golden era of the involuntary confession rule. During this period, the Supreme Court decided more than thirty confession cases based on voluntariness. This Part demonstrates that the voluntariness standard flourished in this period because the due process clauses rather than the self-incrimination clause controlled confession law. This Part further argues that existing interpretations of the self-incrimination clause in the

31. U.S. CONST. amends. I-X.
32. 168 U.S. 532 (1897).
33. 384 U.S. 436 (1966).
34. *See supra* note 27.

non-interrogation context, such as trials and congressional hearings, as well as textual and historical analyses of the self-incrimination clause suggest that the proper test for compulsion should be objective, focusing primarily on the conduct of the interrogators.

Part III examines the Supreme Court's temporary departure from the involuntary confession rule in *Miranda* and the decisions that followed. This case returned the focus of confession law back from the due process clauses to its rightful home in the self-incrimination clause. It also seemingly rejected the involuntary confession rule, replacing it with a new, objective test for compulsion under the self-incrimination clause that is a distant ancestor to the test for compulsion proposed later in this Article. Section B shows that as a result of political maneuvering, however, the incremental gains made by the *Miranda* Court were soon lost and the voluntariness test was allowed to creep back into confession law. Finally, Section C explains that with the 2000 case of *Dickerson v. United States*,[35] in which the Supreme Court upheld the constitutional requirement for *Miranda* warnings, the political battles that caused the voluntariness standard to be resuscitated post-*Miranda* may have lost steam. This Section argues that now that these battles are over the controversy over the *Miranda* warnings have subsided and the smoke has started to clear, the time is ripe for the Court to reassess the turbulent and unfortunate course its confession jurisprudence has taken over the past century.

Part IV then details a new path for the Court to consider. Drawing on the lessons learned in Parts I, II, and III, Part IV delineates a new confession test, called the "objective penalties test," based on the self-incrimination clause, in which the touchstone for admissibility would be compulsion rather than voluntariness. This test would hold inadmissible confessions that had been obtained by imposing an objective penalty in any form on the suspect to punish silence or provoke speech. Part IV develops the objective penalties test in detail through reference to the scholarly literature in the field of philosophy, where a rich standard has been created for determining when a coercive penalty has been imposed. Importing this philosophical literature into the realm of confession law, this Part attempts to create a workable standard for determining the admissibility of confessions. In an effort to demonstrate how this objective penalties test would work in practice, Part IV sets forth numerous hypothetical interrogations and analyzes how these interrogation problems would be solved under the newly proposed test.

35. 530 U.S. 428 (2000).

The Article concludes by exploring what remaining role, if any, the due process clauses and the involuntary confession rule should play in future constitutional confession jurisprudence.[36]

## I
## EMERGENCE OF THE INVOLUNTARY CONFESSION RULE: TRACING THE MISTAKES

The role of the involuntary confession rule in constitutional confession law emerged out of the Supreme Court's first constitutional confession case, *Bram v. United States*,[37] decided in 1897. As set forth below, the Court in *Bram* introduced this test by confusing the self-incrimination clause with the inapposite voluntariness doctrine, a common law rule of evidence that has little relation to the text, historical origins, or policies of the self-incrimination clause. This apparent legal error set the stage for the confusion that has pervaded our confession jurisprudence to this day.

### *A.* Bram v. United States*: The Decision*

In *Bram*, the defendant was a crewman on an American vessel who allegedly murdered the ship's captain and two others on the high seas. The Canadian police arrested him when the ship arrived in Halifax, Nova Scotia and escorted him into a Halifax detective's office, at which time Bram was stripped and searched.[38] The detective then commenced Bram's interrogation by stating:

> Your position is rather an awkward one. I have had [an eyewitness] in this office and he made a statement that he saw you do the murder. . . . Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from [the eyewitness]. But . . . some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.[39]

In response, the defendant made several incriminating remarks, which the state introduced into evidence at his murder trial.[40] The jury found Bram guilty, and Bram appealed his conviction to the United States Supreme Court, arguing that his confession was inadmissible because the

36. This Article frequently raises arguments based on text of the Bill of Rights, the historical origins of the Bill of Rights, and the original intent of the Framers. In doing so, it does not suggest that these resources should control our modern day interpretations of the Bill of Rights. This Article also makes no attempt to delve into the ongoing debate as to what role these resources should play in constitutional interpretation. The Article examines text, historical origins, and original intent simply because most would agree that, at some level, they are relevant to constitutional inquiry. However, the degree to which they are relevant is beyond the scope of this Article.

37. 168 U.S. 532 (1897).

38. *Id.* at 537-38.

39. *Id.* at 539.

40. *Id.* at 537, 562.

interrogation in question violated the self-incrimination clause.[41] The Supreme Court agreed and reversed Bram's conviction.[42]

The Court's decision in *Bram* is a significant landmark in Fifth Amendment jurisprudence for two reasons. First, *Bram* made clear for the first time that the self-incrimination clause applies to confessions taken by the police during informal, pre-trial interrogations, such as the one that occurred in the detective's office in Halifax, Nova Scotia.[43] This point, which may seem beyond controversy today,[44] may not have been so obvious at the time. Indeed, the self-incrimination clause states, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself."[45] Taken literally, the self-incrimination clause could mean only that the state cannot call a criminal defendant against his will to testify as a witness at a trial or other formal proceeding about the criminal charges against him.[46] This literal interpretation stems from the words "witness" and "criminal case"; when a suspect confesses to the police in an interrogation room, he is not at that time a "witness" on the witness stand, and no "criminal case" has commenced.

The unstated rationale behind *Bram*'s extension of the self-incrimination clause from the formal trial setting to informal police interrogations was probably driven by the Court's desire to place substance over form. If the police coerce a suspect to give a confession against his will, and if the state uses the confession against him at trial, the state has, for all practical purposes, coerced the suspect to testify against himself at trial.[47] The Court perhaps recognized that no meaningful distinction exists

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41. *Id.* at 569.

42. *Id.* at 556-58.

43. *Id.* at 551.

44. *See, e.g.*, Grano, *supra* note 3, at 868 (arguing that "it should not be surprising that courts basically have chosen" to apply voluntariness to police station interrogations); Thomas & Bilder, *supra* note 3, at 258 ("Virtually everyone has given up trying to limit the prohibition of compelled self-incrimination to courtroom testimony.").

45. U.S. CONST. amend. V.

46. *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) ("[T]he 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 be so used."); *see also* Brian R. Boch, *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 self-incrimination clause protects individuals from being forced to testify against themselves).

47. 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*

between forcing a criminal defendant to testify as a witness at his trial or, alternatively, taking him into the hallway of the courthouse, coercing him to confess, and then walking back into the courtroom and admitting his confession into evidence against him.

The second major contribution of *Bram* was the introduction of voluntariness as the standard for confession admissibility under the self-incrimination clause. In this respect, the *Bram* Court quoted from Russell's leading treatise stating, "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."[48] Throughout the remainder of the *Bram* decision, the Court referred to this lengthy standard in shorter forms by simply asking whether or not the confession in question was made by "one who . . . could be considered a free agent,"[49] or whether the confession was a product of "voluntary mental action."[50]

Applying this new standard to the facts at hand, the Court focused on the comments of the interrogating detective—specifically the detective's statement: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."[51] The Court explained:

> [H]ow could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? . . . Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement. . . . [The detective], in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow.[52]

The Court held that Bram made the incriminating statements involuntarily in large part because of this "influence" or "encouragement."[53] Recognizing that the positive inducement or hint of a benefit offered by the detective was slight, the Court quoted Russell's treatise once again, noting nonetheless that "the law cannot measure the force of the influence used or

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*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 self-incrimination clause to pretrial interrogations).

48. *Bram*, 168 U.S. at 542-43 (quoting 3 SIR WM. OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed. Horace Smith & A.P. Perceval Keep eds., 1896)) (emphasis added).

49. *Id.* at 564.

50. *Id.* at 562.

51. *Id.* at 539.

52. *Id.* at 564-65.

53. *Id.* at 565.

decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration if *any degree* of influence has been exerted."[54] Accordingly, the Court reversed Bram's conviction, and the case was remanded for a new trial in which his incriminating statements were inadmissible.[55]

### *B.* Bram v. United States*: A Critique*

The standard for determining voluntariness set forth in *Bram* is not the same as the more police-friendly definition of voluntariness used by the Supreme Court today.[56] Under *Bram*, a confession is inadmissible if "extracted by *any sort* of threats or violence, nor obtained by any direct or implied promises, *however slight.*"[57] The modern involuntary confession rule, however, considers the totality of the circumstances in determining whether the suspect's will was overborne.[58] Many slight pressures applied by the police to a suspect that would have been considered unconstitutional under *Bram*'s highly protective standard would now be considered permissible as being insufficient to overbear the will of most suspects.[59]

Nonetheless, the overarching point is that the *Bram* Court erred simply by choosing voluntariness as the touchstone for confession admissibility under the self-incrimination clause. And even though the test for determining voluntariness set forth in *Bram* is not the same as its modern-day incarnation, *Bram*'s adoption of voluntariness is key because it first introduced this concept into constitutional confession jurisprudence.[60] After *Bram*, the Court never seriously questioned the basic notion that voluntariness should be the standard for confession admissibility, even though it continued to modify and tinker with what "voluntariness" means.[61] This error initially took root when the Court failed, at any point in its opinion, to closely analyze the text of the self-incrimination clause. The self-incrimination clause's plain language bans "compelled" confessions,[62] not involuntary ones, which would be unproblematic if the two words were synonymous. However, this Article will argue that these two words mean two very different things, a point the Court in *Bram* did not address. In

54. *Id.* at 565 (quoting RUSSELL, *supra* note 48, at 478) (emphasis added).
55. *Id.* at 569.
56. *See infra* Part II.A.
57. *Id.* at 542-43 (quoting RUSSELL, *supra* note 48, at 478) (emphasis added).
58. *See id.*
59. *See id.*
60. The Court had previously held in *Hopt v. Utah*, 110 U.S. 574 (1884), and *Pierce v. United States*, 160 U.S. 355 (1896), that involuntary confessions are inadmissible. These cases, however, were based on the common law voluntariness doctrine, rather than the self-incrimination clause. It was the *Bram* decision, therefore, that first constitutionalized the common law voluntariness doctrine by incorporating it into the self-incrimination clause.
61. *See id.*
62. U.S. CONST. amend. V.

fact, each of these terms should demand a distinct test for confession admissibility.[63]

Rather than examine the text, the Court simply borrowed the voluntariness test from a line of early English and American common law cases and used it in place of the compulsion paradigm textually delineated within the self-incrimination clause.[64] While these early cases stand for the proposition that confessions must be voluntary in order to be admissible, they are historically unrelated to the self-incrimination clause and the interrogation practices the self-incrimination clause was intended to ban.[65] Indeed, the Court apparently confused two distinct confession doctrines that had evolved in the decades leading up to *Bram* and then used an inapposite line of cases to illuminate the meaning of the self-incrimination clause.[66] The first of these doctrines is called *Nemo tenetur*, which developed in response to harsh interrogation tactics. The second is the common law voluntariness doctrine, which was a rule of evidence designed to exclude unreliable evidence. The following two Sections will discuss each of these doctrines in detail.

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63. *See infra* Part IV.

64. Bram v. United States, 168 U.S. 532, 562-63 (1897).

65. *Id.* at 550-61. *See* Benner, *supra* note 4, 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 self-incrimination clause in *Bram*, which was, in contrast, based on the concept of Nemo tenetur and adopted in protest to tbe inquisitorial interrogation techniques used by the Star Chamber, High Commission, and ecclesiastical courts in medieval and early modern Europe); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-31 (1998) (charting the independent developments of Nemo tenetur, the precursor to self-incrimination clause, and the voluntariness rule). *But see* 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, 109-70 (1992) (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).

66. *See* Benner, *supra* note 4, 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 self-incrimination clause); *see also* 3 JOHN H. WIGMORE, EVIDENCE, § 833, at 327 n. 2 (Chadbourn rev. 1970) (discussing the distinction between the common law voluntariness doctrine and the self-incrimination clause); Penney, *supra* note 65, at 314-31 (same). *But see* Herman, *supra* note 65, 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). This Article argues that the Court in *Bram* essentially made an inadvertent mistake in utilizing the common law voluntariness doctrine to illuminate the meaning of the self-incrimination clause. When one reads *Bram*, it appears that the Court simply confused the two doctrines. In other words, the Court in *Bram* did not appear to have been conscious of the distinction between the two doctrines or to have deliberately chosen to meld two distinct doctrines into one. However, regardless of whether this was an inadvertent mistake or not, this Article asserts that the result was incorrect.

*1. Nemo tenetur*

The first confession doctrine, *Nemo tenetur prodere seipsum*, means "no one is bound to bring forth (i.e. accuse) himself."[67] The doctrine originated in the *ius commune*, the law applied in the European and English ecclesiastical courts beginning in the seventeenth century.[68] As documented in the leading historic texts on the subject, tribunals such as the Star Chamber and the Court of High Commission drew condemnation from outspoken civil libertarians of their era and later from the American colonists for having used imprisonment, exile, and physical torture to punish silence and to provoke suspects to confess to heresy and other crimes against the church and state.[69]

Foremost among these methods of extracting confessions was the *oath ex officio*, which required suspects to take an oath to God that they would respond truthfully to all questions.[70] Although it may be difficult to understand how an oath could constitute torture today, the religious beliefs prevalent in this era viewed perjury as a mortal sin.[71] Thus, a suspect under interrogation in certain ecclesiastical tribunals effectively had a choice of remaining silent and facing physical penalties, such as torture or imprisonment; taking the oath and incriminating himself, also resulting in penalties based on admitted guilt; or taking the oath and committing perjury, which was a mortal sin.[72] The oath, therefore, represented a form of compulsion because it required its suspects to face the cruel choice between

67. Benner, *supra* note 4, at 74 n.50; *see also* Penney, *supra* note 65, at 315.

68. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638-41 (1996) (discussing historical roots of the self-incrimination clause); *see* Herman, *supra* note 65, at 106-14, 116-43, 147-65 (describing the doctrine of Nemo tenetur, which was invoked to defend against the use of oaths and other devices of force employed by the Court of High Commission, the Star Chamber, and ecclesiastical courts to compel confessions); *see also* Benner, *supra* note 4, at 67-92 (describing the doctrine of Nemo tenetur); Penney, *supra* note 65, at 314-15 (noting that Nemo tenetur developed as a defense to oaths).

69. *See, e.g.*, R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 110-38 (1997) [hereinafter HELMHOLZ I]; 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 its use of physical and psychological torture, such as oaths, to obtain confessions); *see also* Benner, *supra* note 4, at 74-79 (discussing Court of High Commission and Star Chamber, and noting on page 77 n.73 that the Star Chamber resorted to torture during interrogations in "exceptional cases"). For an additional discussion of the historical events that prompted the inclusion of the self-incrimination clause in the Bill of Rights, see generally Alschuler, *supra* note 68 (discussing the Court of High Commission in England and its use of devices such as oaths to compel confessions); Benner, *supra* note 4; 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) [hereinafter Helmholz II] (discussing use of the oath ex-officio in continental Europe to obtain confessions in ecclesiastical inquiries); Herman, *supra* note 65 (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).

70. *See* Penney, *supra* note 65, at 315.

71. *Id.*

72. *Id.*

"earthly punishment and divine retribution."[73] As Professor Benner noted, "The oath . . . placed its victims in the intolerable dilemma of either 'cutting one's throat with one's tongue' or suffering eternal damnation."[74]

Although no records exist that shed light on James Madison's reasoning when he drafted the language that eventually became the Fifth Amendment self-incrimination clause,[75] the doctrine of Nemo tenetur and its abhorrence of the government use of torture and coercive interrogation techniques drove the self-incrimination clause's ultimate inclusion in the Bill of Rights.[76] In a recent book that recounts the historical events leading up to the inclusion of the self-incrimination clause in the Bill of Rights, Professor Eben Moglen writes:

> [Records from colonial America] disclose a strong array of beliefs that physical and spiritual coercion was an inappropriate way to secure evidence of crime. *Nemo tenetur prodere seipsum* was no meaningless tag. It expressed ideas about treatment of witnesses that were older than the system of criminal procedure of which they now formed [a] part. It played a role in the debate over the uses of physical coercion, casting weight onto the scale against the practice of judicial torture.[77]

Moglen then describes how popular objections to the oath and other abuses by tribunals became "staples of the pamphlet literature" in the Colonies during the era preceding the Revolution and later, the Constitutional Convention.[78] Indeed, by 1765, "a fundamental-law privilege against coercive testimonial pressure" had "embedded itself in the language of constitutional debate" in the Colonies.[79] The notion of Nemo tenetur appeared in several state constitutions during the 1770s and 1780s in the form of self-incrimination clauses similar in style and form to the language that ultimately became the Fifth Amendment's self-incrimination clause.[80] The texts of these state constitutional provisions often loosely mirrored the English translation of *Nemo tenetur prodere seipsum*[81] and were steeped in the fundamental-law history that believed deeply in that

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73. *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).

74. *See* Benner, *supra* note 4, at 75.

75. *See* Helmholz II, *supra* note 69, at 137-38; Benner, *supra* note 4, at 89.

76. *See* Herman, *supra* note 65, at 163-65 (stating that the constitutional protection against compelled self-incrimination stemmed from Nemo tenetur); *see also* HELMHOLZ I., *supra* note 69, 110-38 (discussing how Latin maxim Nemo tenetur and Framers' desire to ban practices of the High Commission and the Star Chamber contributed to the drafting of the Fifth Amendment); Benner, *supra* note 4, at 88-93; Penney, *supra* note 65, at 319 (same).

77. *See* HELMHOLZ I, *supra* note 69, at 122.

78. *Id.* at 132.

79. *Id.*; *see also* Benner, *supra* note 4, at 88-92.

80. *See* HELMHOLZ I, *supra* note 69, at 133-36; Benner, *supra* note 4, at 88-92.

81. *See* Benner, *supra* note 4, at 74 n. 50; *see also* Penney, *supra* note 65, at 315.

Latin maxim.[82] Moglen writes that it was the "Star Chamber," the "Inquisition," and the "rack in the Tower [of London]" that were the "emblem[s] of the need for a guarantee against coerced confession" in the Bill of Rights.[83]

### 2. *Common Law Voluntariness Doctrine*

The second, distinct confession doctrine that developed in England and the Colonies in the decades leading up to the *Bram* decision was simply a common law rule of evidence designed to prevent the introduction of unreliable evidence at trial.[84] This doctrine held that all involuntary

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82. *See, e.g.*, Alschuler, *supra* note 68, at 2638-41; Herman, *supra* note 65, at 106-14, 116-43, 147-65.

83. HELMHOLZ I, *supra* note 69, at 137. Although Nemo tenetur was, in its earliest stages of development, concerned with only official interrogations conducted under oath where adequate suspicion was lacking, by the time the Fifth Amendment was drafted the doctrine prohibited the use of oaths and other forms of compulsion even where overwhelming evidence of guilt was present. *See* Alschuler, *supra* note 68, at 2638-60. Professor Albert Alschuler has argued that the Framers likely drew a major distinction between interrogations where the suspect was under oath and unsworn interrogations. *Id.* Due to the Framers' abhorrence of oaths, the self-incrimination clause was intended to provide greater protection to suspects who were placed under oath prior to interrogation. As a result, when the Fifth Amendment was drafted, the self-incrimination clause and the doctrine of Nemo tenetur that underlies it were probably intended to prohibit only incriminating interrogation under oath, torture during unsworn interrogations, and other forms of coercive interrogation during unsworn interrogations. *Id.* at 2651-52. As most historians of the self-incrimination clause concede, the internal mechanics of our criminal justice system have changed so dramatically since the drafting of the self-incrimination clause that adjustments must be made to accommodate these changes and ensure that the its meaning is not lost. As our society has become more secular, oaths have largely lost their meaning and coercive power. In addition, at the time the self-incrimination clause was drafted, criminal defendants typically represented themselves at trial and provided their version of events in the form of unsworn testimony (placing a defendant under oath at trial would have been seen as coercive and in violation of Nemo tenetur and the self-incrimination clause). Large investigative police forces common in today's world were unheard of in that era, and as a result, suspects typically were not interrogated upon arrest as they are today.

Thus, the concerns about government abuse and the focus of the self-incrimination clause and Nemo tenetur at the time of the drafting were primarily directed at formal proceedings, which were where abuses had occurred in the past in the Star Chamber and the Court of High Commission, and where they would occur, if at all, at the time of the framing. Because in our modern era, however, defendants are represented by counsel and can muster a defense without testifying and pretrial police interrogations are the rule rather than the exception, the forum where abuses are more likely to occur is in the police interrogation room rather than the courtroom. Thus, because of these evolutionary shifts in how the criminal justice system operates, the self-incrimination clause today indisputably applies to pretrial interrogations in the way that it may have originally been intended to protect defendants only in more formal settings such as the courtroom.

This change in venue, forum, and context, however, should not alter the fundamental policies underlying Nemo tenetur and the self-incrimination clause. At their core, both doctrines prohibit improper coercion by the government to obtain confessions. Simply put, the historical origins and text of the self-incrimination clause, applied in the context of our modern criminal justice system, suggest that the government should be prohibited from using torture or other offensive devices of coercion to obtain confessions from suspects at trial or during pretrial police interrogation. *See* Penney, *supra* note 65, at 319.

84. *See* Herman, *supra* note 65, at 111, 114, 128, 133-34, 143-62, 165-70 (describing the evolution of the common law voluntariness test that excluded confessions on the ground of

statements are inadmissible at trial, not because of the offensive manner in which investigators may have obtained them, but because they are untrustworthy.[85]

The vast majority of cases that employed this doctrine held the confessions in question to be involuntary and thus unreliable not because the state imposed penalties or torture on the suspect, but because it offered positive benefits, such as bribes, to induce speech.[86] This doctrine was also often applied in cases where the inducement to speak was made by a private party rather than a government official.[87] These confessions were excluded because the suspect may have subverted the truth simply to obtain the benefit offered.

One of the leading English cases that embody this doctrine is the 1783 case of *Rex v. Warickshall*.[88] In *Warickshall*, the state indicted the

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unreliability); *see also* Benner, *supra* note 4, at 92-93 (relating that the common law evidentiary rule requiring confessions to be voluntary was rooted solely in the concern for reliability); Penney, *supra* note 65, at 314-22 (explaining that involuntary confessions at common law were excluded because of unreliability).

85. *See* Penney, *supra* note 65, at 314-22 (noting that the voluntariness doctrine lacked the political and social justifications of Nemo tenetur); *see also* Benner, *supra* note 4, 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); *cf.* HELMHOLZ I, *supra* note 69, 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").

86. *See* Benner, *supra* note 4, at 98-100; Herman, *supra* note 65, at 156-68; Penney, *supra* note 65, at 320-22 (summarizing cases involving "positive" inducements); *see also* HELMHOLZ I, *supra* note 69, 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"); *infra* note 118.

87. *See, e.g.*, State v. Bostick, 4 Del. 563 (1845) (confession found involuntary and therefore inadmissible where inducement offered by employer); Territory v. Underwood, 19 P. 398 (Mont. 1888) (confession found involuntary and therefore inadmissible where accuser offered inducement); State v. Whitfield, 70 N.C. 287 (1874) (confession found involuntary and therefore inadmissible where inducement offered by three citizens); Spears v. State, 2 Ohio St. 584 (1853) (confession found involuntary and therefore inadmissible where inducement offered by two private parties: a witness and a clergyman); The Queen v. Thompson, 2 Q.B. 12 (1893) (confession found involuntary and therefore inadmissible where inducement offered by complainant); Regina v. Moore, 169 Eng. Rep. 608 (1852) (confession found involuntary and therefore inadmissible where inducement offered by attending surgeon); Regina v. Warringham, 169 Eng. Rep. 575 (1851) (confession found involuntary and therefore inadmissible where inducement offered by wife of employer); Regina v. Garner, 169 Eng. Rep. 267 (1848) (confession inadmissible where inducement offered by physician); Regina v. Taylor, 173 Eng. Rep. 694 (1839) (confession inadmissible where inducement offered by a guest of the prosecutor's wife); Rex v. Spencer, 173 Eng. Rep. 338 (1837) (confession's admissibility questionable where inducement offered by unspecified private party); Rex v. Upchurch, 168 Eng. Rep. 1346 (1836) (confession found involuntary and therefore inadmissible where inducement offered by employer); Rex v. Thomas, 172 Eng. Rep. 1273 (1834) (confession found inadmissible where inducement offered by witness); Rex v. Simpson, 168 Eng. Rep. 1323 (1834) (confession found inadmissible on review where inducement offered by neighbor and relative of the complainants); Rex v. Kingston, 172 Eng. Rep. 752 (1830) (confession inadmissible where inducement offered by surgeon). *But see* Rex v. Tyler, 171 Eng. Rep. 1132 (1823) (confession allowed as voluntary when prisoner was offered inducement by a citizen because the citizen had no authority in the prosecution; court made no mention of Nemo tenetur).

88. 168 Eng. Rep. 234 (1783).

defendant for receiving stolen property.[89] The defendant made a full confession after the police made "promises of favour."[90] The Court did not discuss the nature of the promises made, but they presumably were of lenient treatment if she confessed, as was usually the case in these voluntariness decisions.[91] The Court held that the confession could not be received in evidence because the positive inducements rendered the confession involuntary, stating:

> It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled [sic] to credit.[92]

This language suggests that the Court in *Warickshall* did not consider the confession in that case to be objectionable because the manner in which it was obtained was condemnable as against "public faith."[93] Indeed, offering lenient treatment to a defendant as a common practice inherent in prosecutorial discretion is a benefit to the suspect rather than a penalty and should not offend notions of civil liberties or public conscience. Rather, the confession was rejected as involuntary simply because, as a matter of evidentiary principle, it was unreliable since it had been obtained through a kind of bribery.

A leading American case reflecting this doctrine is the 1845 case of *State v. Bostick*, in which the State told a young girl suspected of arson that if she confessed to the crime, she would be "sent home" and relieved of any criminal charges.[94] In holding the girl's subsequent confession inadmissible, the Court of Oyer and Terminer of the State of Delaware stated:

> A confession, clearly proved to have been deliberately and *voluntarily* made, is among the strongest proofs of guilt. But . . . where promises of favor or threats are used, the great danger is, that the confession, whether verbal or written, may be untrue; proceeding, not from a sense of guilt, but from the influence of hope or fear. In such cases, the confession is rejected. Therefore, a confession obtained by temporal inducement, by threat, or by a promise of hope or favor, having some reference to

89. *Id.* at 234.

90. *Id.*

91. *Id.* This Article makes this presumption simply because the "promises of favor" in the vast majority of cases in this era involved promises of leniency. *See infra* note 118.

92. *Id.*

93. *Id.*

94. 4 Del. 563, 565 (1845).

> the party's escape from the charge, held out by a person in authority, is inadmissible.[95]

Thus, the concept of voluntariness at common law was not an end in itself but only a means of predicting reliability. This sort of voluntariness test is appropriate for a common law rule of evidence that is concerned only with the reliability of evidence. Such a rule should engender suspicion of any statement that was made involuntarily, regardless of whether the police conduct in question was offensive to civil liberties and regardless of whether the statement was induced by a government official or a private citizen.

But this sort of voluntariness test has very little relation to the self-incrimination clause or the policies underlying it.[96] The common law cases that established the voluntariness doctrine generally do not mention Nemo tenetur, the practices of the Star Chamber and the Court of High Commission, or the events leading up to the adoption of the self-incrimination clause.[97] These cases are not couched in terms of a civil-liberties-based abhorrence of torture and offensive government coercion but merely reliability.[98] The historical data simply does not support the notion of the self-incrimination clause as a gatekeeping mechanism to further the truth-seeking function of criminal trials by banning all unreliable statements regardless of how or by whom the statements were induced.[99]

On a related point, the historical data also do not entirely support the notion that the self-incrimination clause was intended to ban confessions made as a result of positive inducements such as bribes or promises of leniency, where no negative penalties were threatened or applied by the interrogators, such as those associated with the Star Chamber and Court of High Commission that so enraged the colonists and Framers.[100] Positive benefits, such as promises of leniency, no doubt raise reliability concerns in some instances, but they do not infringe notions of civil liberties or rise to the level of constitutional concern as do torture and other penalties of similar ilk.[101] Unreliable statements made in response to promises of positive favors are appropriately addressed by rules of evidence, the common law, or perhaps general notions of due process fairness and the due process concern for fair and accurate trials if a positive benefit renders a statement

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95. *Id.* (emphasis added).

96. *See* Benner, *supra* note 4, at 94 ("[T]he [common law] rule that the confession of guilt must not be the product of duress was not concerned with self-incrimination. Rather . . . it reflected a concern with the reliability of such a confession."); *see also* WIGMORE, *supra* note 66; discussion of Nemo tenetur *supra* Part I.B.1.

97. *See infra* note 118.

98. *See id.*

99. *See also* discussion of Nemo tenetur *supra* Part I.B.1.

100. *See id.* The distinction between positive inducements and negative penalties will be taken up in detail in Part IV.

101. *See id.*

so unreliable that its admission would contaminate a trial.[102] The granting of a positive benefit to induce speech does not, however, constitute torture or even a penalty against the suspect and, therefore, does not infringe the concept of Nemo tenetur or implicate the policies behind the self-incrimination clause.[103]

In any event, regardless of this distinction between positive benefits and negative penalties, the historical data do not support the notion that the self-incrimination clause and Nemo tenetur were intended to simply curb the admission of unreliable evidence. While the Framers were certainly aware of Nemo tenetur and clearly based the self-incrimination clause upon that ancient principle, it is doubtful that they were aware of the common law voluntariness doctrine when they drafted the Bill of Rights.[104] The voluntariness doctrine appeared in American cases only after the Bill of Rights was drafted. In addition, one commentator has noted that the earliest English cases espousing this doctrine, while decided prior to the drafting of the Bill of Rights, were not published in America until very near or after the drafting of the Bill of Rights.[105]

### C. Bram *Court's Conflation of the Voluntariness Doctrine with the Self-Incrimination Clause*

Despite the apparent incongruity between the common law voluntariness doctrine on one hand and the text and meaning of the self-incrimination clause on the other, the Court in *Bram* inexplicably ignored the self-incrimination clause's focus on negative penalties and compelled confessions and instead announced that the self-incrimination clause prohibits involuntary confessions.[106] In doing so, the Court cited and examined the cases and treatises discussing the common law voluntariness doctrine, such as *Warickshall* and *Bostick*, apparently without realizing that this doctrine was nothing more than a rule of evidence unrelated to the Fifth Amendment self-incrimination clause.[107] Indeed, in adopting voluntariness as the standard, the *Bram* Court quoted Russell as its leading source.[108] An examination of this text, however, reveals that the section of the treatise cited by *Bram* Court deals only with the common law evidentiary rule, not Nemo tenetur or the self-incrimination clause.[109] Russell's treatise cites

102. *See infra* Part IV.E.

103. *See also* discussion of Nemo tenetur *supra* Part I.B.1.

104. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 532 n.c (2d ed. 2003).

105. *Id.*

106. Bram v. United States, 168 U.S. 532, 565 (1897).

107. *Id.* at 541-45, 547-61. For a discussion about whether the *Bram* Court inadvertently incorporated the common law voluntariness doctrine into the self-incrimination clause or whether this was a conscious decision on the Court's part, see *supra* note 66.

108. *Id.* at 541-73.

109. RUSSELL, *supra* note 48, at 478-79.

only the leading common law voluntariness cases in support of the rule of law it describes and expresses the underlying reliability policy of that doctrine by stating, "the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one."[110]

The *Bram* Court also cited several additional treatises on the law of evidence, all of which reveal by their titles alone that they relate to an evidentiary rule rather than a civil-liberties-based rule like Nemo tenetur.[111] An inspection of the final treatise cited by the *Bram* Court, Bishop, is equally revealing.[112] This treatise states that "the danger that a confession will be false is the ground for excluding it,"[113] and involuntary confessions are not to be received into evidence because they are "unsafe evidence for the jury" to consider.[114] The Bishop treatise places involuntary confessions in the same chapter with its discussion of the unreliability of confessions made by the "drunk," "insane," and "unconscious."[115] This context further illuminates that Bishop was merely discussing a rule of evidence that excludes statements made as a result of bribes, alcohol, mental problems, or any other situation that would call into question the reliability of the confession.

The *Bram* Court also discussed, at great length, the cases that it felt supported its adoption of the voluntariness test as the proper standard for confession admissibility under the self-incrimination clause.[116] Again, these cases, including *Warickshall* and *Bostick* discussed *supra*,[117] pertain to the common law rule of evidence based solely on reliability.[118] Furthermore,

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110. *Id.* at 479.

111. *See, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (16th ed. 1899); 2 PITT TAYLOR, EVIDENCE (9th ed. G. Pitt-Lewis & Charles F. Chamberlayne eds., 1897); FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES (9th ed. 1884).

112. 1 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES (4th ed. 1895).

113. *Id.* at 749 § 1227.

114. *Id.* at 748 § 1224.

115. *Id.* at 750 §§ 1229-30.

116. Bram v. United States, 168 U.S. 532, 541-73 (1897).

117. *See supra* notes 88-95 and accompanying text.

118. *Bram*, 168 U.S. at 541-73 (citing Rex v. Simpson, 168 Eng. Rep. 1323 (1834)) (confession inadmissible where the prisoner testified that she made a false confession in hopes of gaining favor; jury heard her confession and convicted; judges later met to reconsider and found that the confession should not have been admitted; court made no mention of Nemo tenetur, the self-incrimination clause, the policies behind the self-incrimination clause, or any of the historical events associated with the self-incrimination clause); Territory v. Underwood, 19 P. 398, 400 (Mont. 1888) (confession inadmissible where suspect was told by accuser that if prisoner told the prosecuting witness "all about it," witness would withdraw or reduce the prosecution; also that the witness would help the prisoner in exchange for evidence against his accomplices, because the impression of these inducements made the confession involuntary and therefore categorically unreliable; court made no mention of Nemo tenetur or the self-incrimination clause and its policies and history). For more cases cited by *Bram* in which the court deems the confession inadmissible because it is concerned that the confession was involuntary or otherwise unreliable, all while making no mention of Nemo tenetur or the existence, policies or history of the self-incrimination clause, see, for example, People v. Thompson, 24 P. 384 (Cal. 1890); People

the cases are not grounded in a civil-liberties-based reaction to offensive government conduct during interrogations. The vast majority of the cases do not even mention Nemo tenetur, the policies underlying the self-incrimination clause, or the events leading up to the adoption of the self-incrimination clause.[119]

It was this apparent legal error, this conflation of the common law voluntariness doctrine with the self-incrimination clause, which allowed the Court to throw out Bram's confession. Although Bram was implicitly offered leniency if he confessed,[120] the detective in Bram's case did not impose a penalty on Bram for remaining silent or to induce him to talk. In fact, the detective did not engage in any conduct reminiscent of the

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v. Barrie, 49 Cal. 342 (1874); Beery v. United States, 2 Colo. 186 (1873); State v. Bostick, 4 Del. 563 (1845); Green v. State, 15 S.E. 10 (Ga. 1891); Rector v. Commonwealth, 80 Ky. 468 (1882); Biscoe v. State, 8 A. 571 (Md. 1887); Commonwealth v. Myers, 36 N.E. 481 (Mass. 1894); Commonwealth v. Nott, 135 Mass. 269 (1883); People v. Wolcott, 17 N.W. 78 (Mich. 1883); State v. York, 37 N.H. 175 (1858); People v. Phillips, 42 N.Y. 200 (1870); People v. Ward, 15 Wend. 231 (N.Y. Sup. Ct. 1836); State v. Drake, 18 S.E. 166 (N.C. 1893); State v. Whitfield, 70 N.C. 287 (1874); Spears v. State, 2 Ohio St. 584 (1853); Vaughan v. Commonwealth, 17 Gratt. 576 (Va. 1867); The Queen v. Thompson, 2 Q.B. 12 (1893); Regina v. Fennell, 7 Q.B. 147 (1881); The Queen v. Croydon, 2 Cox's Criminal Cases 67 (1846); The Queen v. Furley, 1 Cox's Criminal Cases 76 (1844); The Queen v. Harris, 1 Cox's Criminal Cases 106 (1844); Regina v. Cheverton, 175 Eng. Rep. 1308 (1862); Regina v. Warringham, 169 Eng. Rep. 575 (1851); Regina v. Morton, 174 Eng. Rep. 367 (1843); Regina v. Taylor, 173 Eng. Rep. 694 (1839); Sherrington's Case, 168 Eng. Rep. 1101 (1838); Regina v. Drew, 173 Eng. Rep. 433 (1837); Rex v. Spencer, 173 Eng. Rep. 338 (1837); Rex v. Court, 173 Eng. Rep. 216 (1836); Rex v. Upchurch, 168 Eng. Rep. 1346 (1836); Rex v. Thomas, 172 Eng. Rep. 1273 (1834); Rex v. Mills, 172 Eng. Rep. 1183 (1833); Rex v. Enoch, 172 Eng. Rep. 1089 (1833); Rex v. Green, 172 Eng. Rep. 990 (1832); Rex v. Kingston, 172 Eng. Rep. 752 (1830); Rex v. Griffin, 168 Eng. Rep. 732 (1809); Rex v. Jones, 168 Eng. Rep. 733 (1809); The King v. Thompson, 168 Eng. Rep. 248 (1783); Rex v. Warickshall, 168 Eng. Rep. 234 (1783); Rex v. Rudd, 98 Eng. Rep. 1114 (K.B. 1775).

Courts have inversely found the confession to be admissible because nothing demonstrated that the statements were not voluntary or unreliable, all while the court made no mention of Nemo tenetur or the self-incrimination clause. *See* Hopt v. Utah, 110 U.S. 574 (1884) (confession allowed where question of possible inducement offered without witness' knowledge; the Court examined voluntariness as measure of reliability; the Court examined the witness's words and actions on the immediate occasion of the confession for promise sufficient to overwhelm the prisoner's freedom of will; the Court found no inducement by the witness; the Court made no mention of Nemo tenetur or the self-incrimination clause); *see, e.g.*, Wilson v. United States, 162 U.S. 613 (1896); Sparf v. United States, 156 U.S. 51 (1895); State v. Patterson, 73 Mo. 695 (1881); Regina v. Reason, 12 Cox's Criminal Cases 228 (1872); The Queen v. Johnston, 15 Ir. R.-C.L. 60 (Q.B. 1864); Regina v. Moore, 169 Eng. Rep. 608 (1852); *see also* People v. McMahon, 15 N.Y. 384 (1857) (confession inadmissible where suspect was taken into custody without a warrant and questioned under oath at inquest, because confession was deemed to be unreliable by its nature and context; court distinguishes its reasoning from Nemo tenetur and self-incrimination clause in holding that an extrajudicial confession is inherently unreliable).

*But see* Thomas & Bilder, *supra* note 3, at 254 (stating that *Bram* not was based solely on a reliability concern). As Professor Benner has aptly noted, the *Bram* Court operated under a "veil of ignorance" when it engrafted the common law voluntariness doctrine onto the self-incrimination clause. *See* Benner, *supra* note 4, at 107. The common law voluntariness doctrine was "not concemed with self-incrimination"; rather, it "reflected a concern with the reliability" of confessions. *Id.* at 94. As a result, the self-incrimination clause's "attention shifted to the reliability" and away from "individual dignity." *Id.* at 95.

119. *See supra* note 118 and accompanying text.

120. Bram v. United States, 168 U.S. 532, 532-65 (1897).

ecclesiastical tribunals or that would have offended the policies underlying Nemo tenetur or the self-incrimination clause as seemingly envisioned by the Framers.[121]

## II
## INVOLUNTARY CONFESSION RULE UNDER THE DUE PROCESS CLAUSES

### *A. Due Process Involuntary Confession Rule*

From the time it was decided through the mid-1960s, the *Bram* decision applied only to the federal government and federal interrogators because the self-incrimination clause, like many provisions in the Bill of Rights, had not yet been held to apply to state proceedings and interrogations conducted by state and local police.[122] In the 1930s, however, the Supreme Court began reviewing a series of state cases in which confessions had been obtained through means offensive to civil liberties. For example, in *Brown v. Mississippi*, the first of these state confession cases, several African-American defendants confessed to murder charges only after having been beaten and tortured by the local sheriff acting in conjunction with an angry white mob.[123] The confessions were the sole evidence used against the *Brown* defendants to secure their convictions.[124]

The Court in *Brown* faced a dilemma. On the one hand, the Court wished to overturn the convictions and condemn the brutal interrogation methods employed by the local sheriff. On the other hand, the Court was confronted with clear precedent establishing that the one provision in the Bill of Rights textually designed to regulate police conduct during interrogations, the self-incrimination clause, was inapplicable to the State of Mississippi because it had not yet been incorporated into the Fourteenth Amendment and applied to the states.[125] To avoid this catch-22 and achieve the result it desired, the Court employed a different strategy. Because the due process clause of the Fourteenth Amendment indisputably applied to the states, the Court created a corollary to the self-incrimination clause using this provision. Accordingly, the Court announced a new "voluntariness test"—this time rooted in the due process clause of the Fourteenth Amendment[126]—and, for the next three decades, used this

121. *Id.* at 563-65 (focusing on the implicit offer of leniency made by the detective to Bram and finding that this offer of a benefit resulted in an involuntary confession).

122. *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). The self-incrimination clause was eventually made applicable to state actors in Malloy v. Hogan, 378 U.S. 1 (1964).

123. 297 U.S. 278, 282-83 (1936).

124. *Id.* at 279.

125. *See* Benner, *supra* note 4, at 113 (noting that the Court turned to notions of due process to exclude confessions because the self-incrimination clause was not yet applicable to the states).

126. *Brown*, 297 U.S. at 286.

doctrine rather than the self-incrimination clause to exclude troublesome confessions.[127] The Supreme Court later described this "due process involuntary confession rule" in *Schneckloth v. Bustamonte*[128] as follows:

> 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, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[129]

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.[130] The Court relied on the due process clause of the Fourteenth Amendment in state cases[131] and the nearly identical due process clause of the Fifth Amendment in federal cases.[132] As the Supreme Court later reflected in *Dickerson v. United States*, "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

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127. *See infra* notes 130-33 and accompanying text; *see also* Dickerson v. United States, 530 U.S. 425, 433-34 (2000) (summarizing the role of the voluntariness test in confession jurisprudence through the past century). The Court's reliance on the due process clause from the 1930s through the 1960s made it unclear during that time whether *Bram* was still good law and whether the self-incrimination clause was still applicable to pretrial interrogations. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (holding the confession inadmissible under the due process voluntariness test without mentioning the self-incrimination clause).

128. 412 U.S. 218 (1973).

129. *Id.* at 225-26 (citations omitted). *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997) (discussing the history of the self-incrimination clause and the involuntary confession rule).

130. *See* Paul Cassell & Robert Litt, *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) ("[I]n federal prosecutions the Court relied upon the Due Process Clause of the Fifth Amendment to overturn confessions" during this era).

131. *See* Herman, *Part II*, *supra* note 122, at 500.

132. *See* Cassell & Litt, *supra* note 130, at 1168; *cf.* Herman, *Part II*, *supra* note 122, at 500 (stating that as late as 1951, it was unclear whether the exclusion of involuntary confessions in federal cases was based on the Fifth Amendment's self-incrimination provision, the due process provision, or the common law confession rule).

'some 30 different cases decided during [that] era' . . . . "[133] During this period of due process supremacy, the Court virtually ignored the self-incrimination clause and the *Bram* decision. Thus, it was unclear whether *Bram* was still good law or even whether the Court still considered the self-incrimination clause to be applicable to pretrial, police interrogations.[134]

Several aspects of this due-process involuntary confession rule merit particular attention. First, although the Court switched from the self-incrimination clause to the due process clauses during this era, it continued to employ the basic concept of "voluntariness" that it first adopted in the *Bram* decision. Indeed, the Court may have preferred to use the *Bram* decision and the self-incrimination clause to throw out the troublesome confessions in these due process cases, but it could not. Instead, it did the next best thing, which was to retain the *Bram* test but employ it through a different provision in the Constitution that unquestionably applied to both state and federal actors.[135]

Second, during this era of due process supremacy, the Court continued to modify and hone its definition of "involuntary," making the test more police-friendly than its predecessor in *Bram*. In fact, during the due process era, the involuntary confession rule became more subjective than it had been under *Bram*. In *Bram*, the Court had stated that "[t]he law cannot measure the force of the influence used, *or decide upon its effect upon the mind of the prisoner*, and, therefore excludes the declaration if *any degree* of influence has been exerted."[136] During the due process era, however, the Court ignored its own warnings from an earlier era and boldly ventured into an analytic quagmire by attempting to measure the level of force used against a suspect and the effect of such force on the suspect's state of mind.[137] This move allowed the Court to greatly expand the levels of force permissible before a confession would be considered involuntary.

The new due-process-based involuntary confession rule considered the totality of the circumstances to determine whether a suspect's will had been overborne by the police conduct.[138] It was a highly subjective test, which took into account not only the governmental conduct involved but

133. 530 U.S. 428, 433-34 (2000) (quoting *Schneckloth*, 412 U.S. at 233) (1973). For a thorough discussion of the due-process based voluntariness era, see Darmer, *supra* note 5, at 328-37.

134. *See* Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 437 (1987) (stating that *Bram* was quickly forgotten, and thus, some saw the self-incrimination clause as inapplicable to the poliee interrogation setting).

135. *See supra* notes 122-27 and accompanying text; *see also* Benner, *supra* note 4, at 113 (discussing the Court's move to due process because the self-incrimination clause was not yet applicable to the states).

136. Bram v. United States, 168 U.S. 532, 565 (1897) (quoting RUSSELL, *supra* note 48, at 478) (emphasis added).

137. *See* Benner, *supra* note 4, at 115 (noting that the due process voluntariness cases differed from the *Bram* Court's conception of voluntariness in that the due process cases attempted to determine the suspect's state of mind).

138. *See supra* notes 8-11, 122-33 and accompanying text.

also characteristics unique to the suspect, such as age, background, strength of character, and mental condition at the time of interrogation.[139] The new due-process-based test focused primarily on the suspect's state of mind. Objective factors, such as the pressure applied by the police, were relevant but only with respect to the effect they had on the mind of the suspect under interrogation.[140] Theoretically, therefore, a particularly hearty suspect could be deemed to have made a voluntary statement in the face of enormous pressure, while a particularly weak suspect could be deemed to have made an involuntary statement in response to much lighter pressure.[141]

### *B. Involuntary Confession Rule Drifts Away from the Self-Incrimination Clause*

The Supreme Court's switch to reliance on the due process clause allowed confession jurisprudence to drift further and further away from the text and true historical meaning of the self-incrimination clause. It should be noted from the outset that from both historical and textual standpoints, the self-incrimination clause is undoubtedly the most appropriate provision in the Constitution with which to directly regulate confessions because it unambiguously speaks to the issue by banning the use of compulsion to obtain self-incriminating statements that are later admitted at trial against the suspect.[142] The Due Process Clauses, on the other hand, are completely silent on the matter.[143] It is a basic tenet of construction that between two provisions, one of which is linguistically and semantically relevant to the situation at hand and the other of which is not, the specific provision—here the self-incrimination clause—should take precedence.[144]

The distinction between the texts of the self-incrimination clause and the due process clauses is important. The self-incrimination clause says nothing about involuntary confessions—only compelled ones.[145] If the

139. *See id.*

140. *See id.*

141. *See* Kamisar, *supra* note 11, at 755-57 ("For if the Court means what it has said on a number of occasions, the 'voluntariness' test causes constitutionally permissible police interrogation to vary widely, according to the particular defendant concerned."); Ronald J. Allen and M. Kristin Mace, The Self-Incrimination Clause Explained and its Future Predicted, 94 J. CRIM. L. & CRIMINOLOGY 243, 250 (2004) (noting that if voluntariness test described by Supreme Court is taken literally, the amount of pressure permissible would vary according to the strength or will of the suspect under interrogation).

142. *See supra* note 34 and accompanying text.

143. The Due Process Clauses generally protect against the deprivation of "life, liberty or property" without "due process of law." U.S. CONST. amends. V, XIV.

144. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims.") (internal quotations omitted) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 82-86 (2002).

145. *See supra* note 34 and accompanying text.

self-incrimination clause provided, "no involuntary confession shall be admitted against any defendant," then a subjective, totality of the circumstances test would be appropriate. The word "voluntary," after all, is an adjective that describes the state of the mind of the suspect when he confesses. It semantically focuses the inquiry primarily on the state of mind of the suspect under interrogation, and it considers the conduct of the interrogators only in relation to the effect such conduct produces on the state of mind of the particular suspect under interrogation.

In contrast, the term "compel," as used in the self-incrimination clause and in the context of its placement in the Bill of Rights, is a verb that relates primarily to the action of the government official performing the interrogation rather than the subjective mental state of the suspect. "Compel" has been defined as "to drive or urge forcefully" and "to cause to do or occur by overwhelming pressure."[146] Thus, the word suggests a test that is objective at its core because it semantically focuses the inquiry on the conduct of the government official applying the pressure in question. Under this test, the self-incrimination clause is violated if the conduct of the government official objectively rises to the level of compulsion and the suspect's confession is causally related to that compulsion.[147]

Even if one is not convinced by this linguistic comparison of the terms "voluntary" and "compelled," an objective, interrogator-focused interpretation is more appropriate for two reasons. First, as discussed below, in an uncontroversial line of cases interpreting the self-incrimination clause outside of the interrogation context, the Supreme Court has interpreted the term "compelled" to require an objective test focused on the conduct of the government. Thus, Supreme Court precedent mandates an objective, interrogator-focused interpretation of the term "compelled." Second, and perhaps less persuasively, the objective interpretation of compulsion is more consistent with the historical origins of the self-incrimination clause. Each of these points will be addressed in turn below.

### *1. Formal Setting Cases*

Because of the Court's strict adherence through time to a voluntariness standard in confession law, it has not developed a clear interpretation of the word "compelled" in the interrogation context.[148] In other words, the voluntariness rubric has overshadowed the concept of compulsion in the interrogation setting, choking off its growth and development. Outside of the interrogation context, however, such as the formal trial, grand jury, or congressional hearing settings, the Court has applied the self-incrimination clause and clearly defined the term "compelled." The line of cases that has

146. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 253 (11th ed. 2003).
147. *See infra* Part III.A.
148. *See infra* Part III.

evolved out of this second setting will be referred to for the remainder of this Article as the "formal setting cases."

*Griffin v. California* is the first case in which the Court began to define the term "compelled" in the formal setting.[149] In *Griffin*, the defendant was charged with murder in the first degree.[150] At his trial, the defendant invoked his right under the self-incrimination clause not to testify in his own defense.[151] In closing arguments to the jury, the prosecutor commented on the defendant's failure to speak on his own behalf and asserted that the jury should draw an adverse inference against the defendant for that reason.[152] 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.[153] The jury convicted.[154]

On appeal, the Supreme Court held that both the prosecutor's comment and the trial judge's instructions to the jury constituted compulsion in violation of the self-incrimination clause.[155] The Court reasoned that these acts imposed a penalty on the defendant for remaining silent because they arguably increased the chances of a conviction.[156] In this respect, the Court stated:

> [The] comment on the refusal to testify[,] . . . which the Fifth Amendment outlaws. . . . is a penalty imposed by courts for exercising a constitutional privilege. 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.[157]

The Court subsequently expounded upon Griffin's definition of the term "compulsion" in several additional formal setting cases. In *Gardner v. Broderick*, for example, a police officer was fired by the state for refusing to testify before a grand jury investigating corruption in his department.[158] The Court held that this termination violated the self-incrimination clause

149. 380 U.S. 609 (1965).
150. *Id.* at 609.
151. *Id.*
152. *Id.* at 610-11.
153. *Id.* at 610.
154. *Id.* at 609.
155. *Id.* at 614.
156. *Id.*
157. *Id.* (citations, footnotes, and internal quotations omitted).
158. 392 U.S. 273 (1968).

because it imposed a "penalty of the loss of employment."[159] Similarly, in *Garrity v. New Jersey*, several police officers made self-incriminating statements at a state ticket-fixing inquiry.[160] Their statements were later used against them when they were prosecuted for participating in a conspiracy to cover up the ticket-fixing scheme.[161] Prior to testifying at the inquiry, the officers were told that, pursuant to a New Jersey statute,[162] they would lose their jobs if they did not testify.[163] The Court held that the imposition of this penalty rendered their statements compelled in violation of the self-incrimination clause, adding that the self-incrimination clause is a right the exercise of which "may not [be] condition[ed] by the exaction of a price."[164] The Court applied this principle again in *Lefkowitz v. Turley*, in which two architects who occasionally worked as independent contractors for the state were barred from receiving future state contracts because they invoked the self-incrimination clause before a state grand jury investigating corruption in the public contracting industry.[165] The Court viewed such government conduct as compulsion because it imposed sanctions on the exercise of the right to remain silent.[166] This line of cases was expressly reaffirmed as recently as 1999 in *Mitchell v. United States*, in which 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.[167]

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159. *Id.* at 279. Similarly, in *Lefkowitz v. Cunningham*, 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. 431 U.S. 801, 803 (1977). Cunningham refused to testify on Fifth Amendment grounds. *Id.* at 804. Under a New York statute, Cunningham's invocation of his rights under the self-incrimination clause 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.

160. 385 U.S. 493, 495 (1967).

161. *Id.*

162. N.J. REV. STAT. § 2A: 81-17.1 (repealed 1970); *Garrity*, 385 U.S. at 494-95 n.1.

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

164. *Id.* at 500.

165. 414 U.S. 70, 82-83 (1973).

166. *Id.*

167. 526 U.S. 314, 328-30 (1999). 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); Shannon T. Noya, Comment, *Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture*, 86 J. CRIM. L. & CRIMINOLOGY 493 (1996); 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).

Although various aspects of these cases will be discussed throughout the remainder of this Article, two points concerning the Court's interpretation of "compulsion" in the formal setting cases are noteworthy at this juncture. First, these cases make clear that the test for compulsion is objective.[168] The Court did not apply a subjective totality of circumstances test in any of these cases, such as that associated with the due process involuntary confession rule,[169] to determine if compulsion was present.[170] The Court made no inquiry into the state of mind of the defendant or whether the defendant in question actually felt compulsion. Indeed, in *Garrity*, the Court 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."[171]

Second, the Court interpreted the self-incrimination clause in these formal setting cases to prohibit the government's imposition of what I will call "objective penalties" in response to silence or to provoke speech,[172] regardless of the severity of the penalty.[173] In each of these cases, the penalty could be objectively 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. Furthermore, the Court did not consider relevant whether the speaker actually felt the identifiable penalty. The loss of future state contracts in *Turley*, for example, 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.[174]

### 2. *Historical Origins of the Self-Incrimination Clause*

The second argument in favor of an objective interpretation of the word "compelled" and against a subjective voluntariness analysis can be found in the historical data. Indeed, nothing in the scholarly literature suggests that the Framers intended to create a sliding scale that adjusts the amount of force permitted based on characteristics unique to each suspect, such as the test associated with the due process involuntary confession rule. As recounted in Part I.A, the historical events leading up to the inclusion of

168. *See* Herman, *Part II*, *supra* note 122, at 503.

169. *See supra* notes 8-11 and accompanying text; *supra* Part II.A.

170. *See* Herman, *Part II*, *supra* note 122, at 503.

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

172. *See supra* notes 149-71; *infra* Part III.A.

173. *See* Spevack v. Klein, 385 U.S. 511, 515 (1967); *see also supra* notes 149-71; *infra* Part III.A; *infra* Part IV.A.1; *infra* note 306.

174. *See supra* Part II.B.1; *infra* Part III.A; *infra* Part IV.A.1.

the self-incrimination clause in the Bill of Rights reflect the simple desire of the Framers to prohibit the government's use of torture and other coercive tactics in response to silence or to provoke speech. For example, the American colonists and the Framers objected to the use of the oath ex officio and seemingly did not inquire into whether the oath was permissible in individual cases in which the suspect's heretical religious beliefs or lack of religious fervor, which was often the reason the suspect was being interrogated in the first place, stripped the oath of its torturous qualities. Likewise, the Framers were incensed by the use of imprisonment, exile, and other penalties that the ecclesiastical tribunals of Europe imposed on those under interrogation. Objections to these penalties were made without regard to the state of mind of particular suspects who may have been able to withstand such treatment in individual cases.[175]

This point is illustrated to some extent by reference to the case of John Lilburne, who did more to ensure widespread public support for the doctrine of Nemo tenetur, and ultimately the self-incrimination clause, than perhaps any other individual in history.[176] Lilburne was a Puritan who in 1637 was brought before the Star Chamber on three separate occasions for allegedly smuggling heretical and seditious books into England.[177] Each time he appeared, Lilburne refused to take the oath and incriminate himself, arguing that the Star Chamber's interrogation techniques were illegitimate.[178] In response, the Star Chamber imprisoned Lilburne indefinitely, fined him 500 pounds, and required that he be whipped and placed in the pillory.[179] The whipping that Lilburne received during his march from the prison to the pillory was a public spectacle.[180] Upon arriving at the pillory, he gave a public address condemning the interrogation techniques of the Star Chamber.[181]

Lilburne's case generated great public opposition to the use of torture during interrogations, which ultimately resulted in the abolition of the Court of High Commission and Star Chamber in 1641.[182] Nevertheless, the fact that Lilburne withstood the pressure and did not confess to the Star Chamber seemingly had no bearing on the opposition engendered against the interrogation techniques used against him. Likewise, the historical records do not give even a passing thought to the idea that the

175. *See supra* note 174; *infra* notes 176-86 and accompanying text; *infra* Part III.A; *infra* Part IV.A.1.

176. *See* Benner, *supra* note 4, at 77.

177. *Id.* at 77-78.

178. *Id.* at 78-79 (Lilburne's specific complaint was that the Star Chamber did not inform him of the charges against him).

179. *Id.*

180. *Id.* at 79.

181. *Id.*

182. *Id.*

offensiveness of certain interrogation techniques depends on the strength or weakness of the person interrogated.

One might fairly attempt to challenge this historical argument by noting that the interrogation techniques of past centuries were so brutal that they could be deemed objectionable and impermissible per se when used against any person in any circumstance. Consequently, there was no need in that era to consider what effect particular interrogation techniques had on the state of mind of particular suspects. In today's world, the argument would go, the Supreme Court routinely attempts to regulate interrogation techniques that are more subtle and may not *always* be objectionable in every case. Thus, we must now make an inquiry into the state of mind of each suspect to determine what effect such subtle coercion had on her ability to withstand the pressure in question.

Notwithstanding the merits of the above argument in other contexts, it holds little weight with respect to the historical objections to the oath. The oath was the primary device of torture that gave rise to the self-incrimination clause,[183] yet it evinced none of the characteristics of torture when imposed on a suspect who did not believe in its religious power. Since those brought before the ecclesiastical tribunals that utilized the oath were often religious dissenters or nonbelievers,[184] it is more than likely that some under interrogation would not have felt the oath's religious significance and thus its coercive power. Yet this fact apparently made no difference, as the objections universally sounded against the use of the oath *at all*,[185] because it was generally deemed an offensive and objectionable interrogation technique during that period.

Thus, the Framers were aware of interrogation devices—certain objective penalties—that were utilized by those in authority in past centuries to obtain confessions. By including a provision in the Bill of Rights barring the government's use of compulsion to obtain statements, they presumably intended to hold inadmissible all confessions obtained by the government through the imposition of such penalties, regardless of the subjective strengths and weaknesses of the suspect under interrogation.[186]

### 3. *Causes for the Departure from Self-Incrimination Clause's True Meaning*

The Court's move away from an objective test for compulsion focused on the interrogator and toward a subjective voluntariness test focused on the state of mind of the suspect can be attributed to several factors. First

183. LEVY, *supra* note 69, at 43-82.

184. *Id.*

185. *Id.*

186. *See* Penney, *supra* note 65, at 319 (stating that the Framers included the self-inerimination clause in the Bill of Rights to prohibit the use of objective penalties sueh as "*ex officio* procedures or judicial torture" that were prevalent in "Medieval and Renaissance Europe").

and most obviously, one can look to the *Bram* decision, because it was in *Bram* that the Court first introduced the concept of voluntariness into the equation.[187] Further, *Bram* incorporated the common law voluntariness doctrine based on the policy of reliability into confession law.[188] Indeed, one of the many policies in the "complex of values"[189] woven throughout the confession cases in the due process era was an emphasis on ensuring that all confessions admitted into evidence were reliable and trustworthy.[190] This policy concern was unrelated to Nemo tenetur and the self-incrimination clause that first asserted itself in *Bram* when the Court engrafted the common law voluntariness doctrine into confession jurisprudence.[191] Indeed, 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 penalties. Such a policy perspective calls for a subjective totality of the circumstances approach requiring an examination of all the factors that may render a statement unreliable. A subjective voluntariness analysis is an appropriate test for this purpose because it adequately captures the underlying policy.

The problems that arose during the due process era can be blamed not only on *Bram*, however, but also on the Court's switch in the 1930s from the self-incrimination clause to due process. Had the Court retained its

187. *See supra* notes 134-49 and accompanying text.

188. *See id.*

189. Benner, *supra* note 4, at 116; *see also* Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

190. As the due process involuntary confession rule evolved, the Court embraced a variety of policies to support it; primary among them was the policy of reliability. *See* Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429, 444-45 (1984) (discussing reliability and fairness); Grano, *supra* note 3, at 891-924 (discussing policies underlying the due process involuntary confession rule, including reliability, fairness, a concern for mental freedom, and deterrence of offensive police practices); Herman, *Part I*, *supra* note 65, 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 122, 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); Herman, *supra* note 23, at 750 (discussing reliability and deterring offensive police conduct); *see also* Penney, *supra* note 65, 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 3, at 867-68 (discussing reliability, fairness, and a preference for an accusatorial rather than inquisitorial system of justice as policies underlying involuntary confession rule); *cf.* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 859 (1995) (arguing that reliability should be the touchstone rationale of the self-incrimination clause); Yale Kamisar, *Response: On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 936-49 (1995) (responding to Amar and Lettow and arguing that the reliability policy is not at the foundation of the self-incrimination clause).

191. *See supra* Part I.B-C.

focus on the self-incrimination clause, the fact that *Bram* had deviated from the text and history of the self-incrimination clause might have come to light as the Court continued to refine its analysis. But the linguistically vague due process clauses provided no textual or historical tether to keep the Court in check.

## III

## *MIRANDA V. ARIZONA* AND ITS AFTERMATH

Due to the highly subjective and unworkable nature of the voluntariness test, discussed in detail *supra*, police officers had a difficult time applying it in the field, and the Court saw repeated violations of the rule. Consequently, the Court became dissatisfied with the due process standard and began looking for a substitute doctrine in the mid-1960s.[192] After experimenting with the Sixth Amendment's right to counsel,[193] the Court found a replacement in *Miranda v. Arizona*.[194]

### *A.* Miranda v. Arizona*: The Decision*

The *Miranda* decision represented a monumental departure from the past, in several important respects. In reversing the convictions of Mr. Ernesto Miranda and the defendants in the companion cases, the Court chose, for the first time in decades, not to focus on notions of due process and the involuntary confession rule.[195] Instead, the Court in *Miranda* focused on the self-incrimination clause and recognized that the proper test for confession admissibility in the Bill of Rights is the self-incrimination clause's ban on compelled statements, which prohibits the police from

192. *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); Benner, *supra* note 4, at 115 (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); Gardner, *supra* note 190, at 446-47 (discussing the Supreme Court's search for a substitute to the due process involuntary confession rule); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 861 (2003); Herman, *supra* note 23, at 754-55; Schulhofer, *supra* note 3, at 869-75 (discussing difficulties for courts posed by the due process involuntary confession rule); *see also supra* notes 8-11 and accompanying text.

193. Escobedo v. Illinois, 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 bim 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.

194. 384 U.S. 436 (1966).

195. *Id.* at 461-65.

using compulsion to obtain confessions that are later used against the confessor.[196]

In attempting to define compulsion in the interrogation context, the *Miranda* Court focused on the fact that each of the defendants had been interrogated while in police custody. Recognizing that the officers did not employ any "third-degree" tactics during the interrogations in question, the Court nonetheless held that the mere act of custodial interrogation constitutes compulsion.[197] In other words, the simple act of asking a question to a detained suspect, by itself, creates an inherently coercive atmosphere and, therefore, applies the type of compulsion banned by the self-incrimination clause.[198] Thus, the Court in *Miranda* undeniably interpreted the term "compelled" very broadly. As the Court itself acknowledged, this new interpretation of "compelled" under the self-incrimination clause was more protective of suspects under interrogation than was the previous due process voluntariness standard.[199]

Despite this holding that custodial interrogation equates with impermissible compulsion, the Court in *Miranda* did not completely ban the long-standing police practice of custodial interrogation. Rather, the Court held that a police officer may permissibly interrogate a suspect in custody if he first takes appropriate steps to dispel the inherent atmospheric pressure so that the suspect will no longer feel compelled to confess.[200] The pressure can be dissipated by informing the suspect of her now-famous *Miranda* rights. If the officer informs the suspect of her rights and obtains a voluntary waiver of those rights, he may commence with the interrogation without necessarily running afoul of the self-incrimination clause. If the officer does not employ the warning/waiver mechanism, any resulting confession will be deemed an inadmissible confession tainted by the presence of compulsion.[201]

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196. *Id.* at 462.

197. *Id.* at 467.

198. *Id.* at 467-74; *see also* Schulhofer, *supra* note 134, at 436 (discussing the *Miranda* Court's definition of compulsion and its equation with custodial interrogation).

199. *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"); *see also* Penney, *supra* note 65, at 369 (stating that the *Miranda* Court's definition of "compulsion" was different than the meaning of "involuntary").

200. *Miranda*, 384 U.S. at 467-74.

201. *Id.* at 476 (stating that the warnings are a "prerequisite to the admissibility of any statement made by a defendant"). This aspect of the *Miranda* holding has been widely criticized as paradoxical. *See* Penney, *supra* note 65, at 311 ("Stated simply, opponents argue that *Miranda*'s conclusion that custodial interrogation is inherently coercive is impossible to reconcile with its holding that this coercion is dissipated by the recitation of rights by the police."); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1449 (1985) (comparing *Miranda* to the ineffectual caution printed on cigarette packages); Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 726-27 (1988) (arguing that because the pressures that compel the accused to confess bear equally on the decision to waive his right to silence, "any evidentiary use of interrogation's fruits, even when warnings were

*Miranda* stands as a watershed decision in the history of constitutional confession law not simply because of its notoriety, but because it finally corrected the historical and legal errors in confession jurisprudence that stem back through the due process era and all the way to *Bram*.

The first important accomplishment of the *Miranda* decision was that it shifted the focus of confession law from due process back to its proper home: the self-incrimination clause.[202] The self-incrimination clause had finally been made applicable to the states two years before *Miranda*; thus, by the time *Miranda* was decided, the Court no longer needed to rely on its strained due process experiment as it had for the previous three decades.[203]

Second, the Court in *Miranda* seemingly abandoned the voluntariness rubric and recognized that the correct test for confession admissibility in the Bill of Rights is compulsion, as the text of the self-incrimination clause dictates.[204] This important step not only made confession jurisprudence consistent with the Bill of Rights, but it also seemingly overruled the Court's legal error in *Bram* and in which the Court adopted the inapposite common law evidentiary rule of voluntariness as the sine qua non of confession admissibility.

Third, the Court in *Miranda* finally appeared to rid itself of the reliability rationale.[205] This policy rationale had been present in constitutional confession jurisprudence since *Bram* when it was engrafted into confession law as a result of the Court's legal errors.[206] The reliability rationale then flourished during the due process era, as it coincided with the all-encompassing, subjective voluntariness test that the Court constructed during that time period.

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given, is per se unconstitutional"); Ogletree, *supra* note 47, at 1827 ("Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of a police interrogation room they are woefully ineffective."); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 74 (1989) (arguing that warnings fail to overcome the inherently coercive effects of police custody); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 671 (1986) (book review) ("If a simple response to a single custodial question must be viewed as presumptively compelled, the possibility of having a voluntary waiver is difficult to understand.").

202. Both *Miranda* and *Malloy v. Hogan* returned the focus to the self-incrimination clause. *Miranda*, 384 U.S. at 457-58; *Malloy*, 378 U.S. 1, 5-14 (1964) (overturning state commitment for contempt where defendant was detained because he exercised Fifth Amendment rights and refused to answer questions); *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 self-incrimination clause); Michigan v. Tucker, 417 U.S. 433, 442-44 (1974) (noting that *Miranda* refocused confession law on the self-incrimination clause).

203. *Miranda*, 384 U.S. at 463-64; *see also* Herman, *supra* note 23, at 733 n.5 (arguing that *Miranda* made clear that the self-incrimination clause applied in the interrogation setting).

204. *See Miranda*, 384 U.S. at 474.

205. *See* Thomas & Bilder, *supra* note 3, at 277 ("[*Miranda*] rejected both the reliability of the confession and due process fairness as tests of coercion.").

206. *See supra* notes 84-196 and accompanying text.

Finally, the *Miranda* decision correctly interpreted the self-incrimination clause and the term "compulsion" as requiring an objective test. The definition of "compulsion" in the *Miranda* decision examined only the pressure placed on the suspect from an objective standpoint. The *Miranda* Court specifically refused to consider whether the suspect in question actually felt atmospheric pressure from the custodial interrogation or even whether the suspect already was aware of his rights.[207] In other words, *Miranda* stands for the proposition that the government is prohibited from using confessions obtained through compulsion in a general, objective sense, regardless of the state of mind of the specific suspect under interrogation in a given case.[208]

The curative benefits of *Miranda* were fleeting, as a newly constructed Court began turning back the clock to the due process era shortly after *Miranda* was decided. The major flaw with the reasoning in *Miranda*, which perhaps led to its downfall, is that it defined "compulsion" too broadly. *Miranda* essentially held that the atmospheric pressure that exists whenever an officer asks a question—any question—to a suspect in custody is compulsion in violation of the self-incrimination clause (unless the officer dissipates the compulsion by giving the required warnings and obtaining a waiver). Under the *Miranda* paradigm, atmospheric pressure alone equates with compulsion. The problem with this reasoning is not that it evades the text. Indeed, the self-incrimination clause simply bans compulsion and does not define the term. The Supreme Court is certainly within its authority to define that term in any way it sees fit. The problem with the Court's analysis is two-fold. First, *Miranda*'s definition of the term "compulsion" is at odds with how "compelled," as used in the self-incrimination clause, has been defined outside of the interrogation context in the formal setting cases. Second, the *Miranda* Court's definition of "compulsion" is perhaps inconsistent with the historical origins of the self-incrimination clause.

*Miranda* was consistent with the formal setting cases[209] in one important sense: both interpreted the term "compulsion" to require an objective test focused primarily on the conduct of the government.[210] *Miranda*, however, was inconsistent with the formal setting cases in its definition of "compulsion." *Miranda* viewed compulsion as arising from the atmospheric pressure inherent in custodial interrogation, while the formal setting cases did not.[211] Rather, the formal setting cases held that compulsion

207. *See Miranda*, 384 U.S. at 458-64.

208. *See id.* at 460.

209. *See supra* Part II.B.1; *cf. generally* Schulhofer, *supra* note 134 (discussing Griffin v. California, 380 U.S. 609 (1965)).

210. For a discussion of *Miranda's* inconsistency with the formal setting cases, see Godsey, *supra* note 192, at 851, 901.

211. *See supra* Part II.B.1.

exists only when an objective penalty has been imposed by the government on a suspect to provoke speech or punish silence.[212]

Professor Stephen Schulhofer has asserted, in contrast, that *Miranda*'s definition of "compulsion" is consistent with how that same term has been defined in the formal setting cases.[213] Schulhofer argues, for example, that the comments in *Griffin v. California* that the jury should consider the defendant's failure to testify in determining guilt applied "impermissible pressure" on the defendant to take the stand.[214] Schulhofer then equates this atmospheric pressure present in the courtroom in *Griffin* with the atmospheric pressure that exists in the police station when an officer interrogates a suspect who is in custody.[215] The comments by the judge and prosecutor in *Griffin*, however, violated the self-incrimination clause not simply because they applied atmospheric pressure to the defendant but because they turned the defendant's silence into a concrete piece of evidence that the jury was instructed that it may consider against him and, thus, directly increased the chances of his conviction.[216] As the *Griffin* Court itself recognized, atmospheric pressure was present from the outset of Griffin's trial for him to provide his side of the story, as it is in all criminal trials.[217] But the penalties imposed by the prosecutor and the judge against Griffin went beyond that inherent atmospheric pressure and changed the status quo in favor of the government and against the defendant.[218] If one were hypothetically keeping scores of the points each side had scored in their favor during Griffin's trial, the comments by the prosecutor and judge placed an addition point in the prosecution's tally, as it turned the atmospheric pressure into an additional piece of evidence that strongly suggested the defendant's guilt. As the Court recognized in *Griffin*, the comments solemnized

212. *See id.*

213. *See generally* Schulhofer, *supra* note 134.

214. *Id.* at 453.

215. *Id.*

216. *See supra* notes 177-85 and accompanying text.

217. Griffin v. California, 380 U.S. 609, 614 (1965). 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 not guilty. 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 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 himself. It seems unimaginable that defendants would not feel this implicit demand from the jury. For more discussion of the atmospheric pressure present during a typical criminal trial, see also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 287-88 (1998) (describing the "undoubted pressures" that criminal defendants feel to testify at their trials but stating that this atmospheric pressure does not constitute compulsion); *infra* notes 333-35 and accompanying text.

218. *Griffin*, 380 U.S. at 614.

that pressure into an actual, concrete penalty that could be objectively identified.[219]

As will be discussed more in Part IV, when a police officer simply asks a question of a suspect in custody, that act has not necessarily, by itself, imposed an objective penalty on the suspect. This is because, given the suspect's right not to answer, her situation has not concretely changed to her detriment as compared to the moment before the question was asked. If, however, the officer changes the status quo to provoke a confession by, for example, depriving the suspect of food and water until she talks or telling her that her silence will be used against her at trial to obtain her conviction, the officer has created and applied an objective penalty to provoke speech and punish silence. As will be discussed more in Part IV, were the doctrine developed in the formal setting cases to be applied to the interrogation context, a finding of compulsion would be required only when a concrete and identifiable change in the suspect's situation had occurred that could be objectively seen as penalizing the suspect for exercising his/her constitutional right to silence.[220]

*Miranda*'s broad definition of "compulsion," therefore, created a strange dichotomy wherein the same term had two completely different definitions depending on the context. In the informal setting, such as an interrogation room at a police station, the compulsion standard is satisfied by the mere presence of atmospheric pressure that derives from the custodial setting. In formal settings, such as trials and congressional hearings, however, compulsion is not found to exist in relation to the same sort of atmospheric pressure but only when an objective penalty is imposed on the suspect to provoke speech or punish silence. It simply does not make sense, however, to have two completely different definitions of the same term unless some policy exists that can justify this divergence.[221] No justification has been offered, however, as the Supreme Court has not directly addressed the issue. The Court in *Miranda* set forth its definition of "compulsion" without acknowledging the existence of a contradictory line of cases that defines the same term in the same provision in the Bill of

219. *Id.*

220. *See supra* Part II.B.1; *infra* notes 306-11 and accompanying text.

221. One might argue that a broader interpretation of the term compulsion is needed in the interrogation setting because in the formal setting the presence of defense counsel and the trappings of the courtroom automatically work to decrease the pressure inherent in that setting. In other words, atmospheric pressure should amount to compulsion in the interrogation setting because it may not be clear to a suspect under interrogation that the Constitution has followed her into the interrogation room. However, as this Article demonstrates, criminal defendants in the formal setting often experience severe atmospheric pressure to speak, which does not violate the self-incrimination clause absent a penalty imposed. *See supra* notes 213-19 and accompanying text, and *infra* notes 332-35 and accompanying text. Furthermore, post-*Miranda* confession jurisprudence allows penalties to be imposed on suspects under interrogation without rendering the resulting confessions involuntary. *See* Part IV.1.A. Thus, importing a penalties analysis to the interrogation context, as this Article proffers, would harmonize the concept of compulsion in the formal and interrogation settings.

cases that defines the same term in the same provision in the Bill of Rights in a different manner.

Furthermore, the objective penalties test associated with the formal setting cases offers a definition of compulsion that is more consistent with the historical underpinnings of the self-incrimination clause than the broad definition delineated in *Miranda*. As set forth in detail *supra*, the Framers adopted the self-incrimination clause to ban certain penalties, such as physical punishments, deprivations of liberty, and divine retribution via the oath ex officio, used by ecclesiastical tribunals.[222] The historical data, while not abundant and far from clear, does not seem to support the notion that the Framers were concerned with the kind of unstated, intangible atmospheric pressure described in *Miranda*.[223]

### B. *Post*-Miranda: *The Court's Return to the Due Process Voluntariness Test*

The year after *Miranda* was decided, the Court faced its next confession case, *Beecher v. Alabama*.[224] In *Beecher*, a majority of the Court reversed the defendant's conviction on the ground that the confession used against him at trial had been made involuntarily under the pre-*Miranda*, due process involuntary confession rule.[225] Four justices who concurred in the result wondered why the majority of the Court had returned to due process after that doctrine had seemingly been made obsolete by the *Miranda* decision.[226] Justice Brennan noted in his concurring opinion that although the confession in *Beecher* had been obtained prior to the release of the *Miranda* decision, it nonetheless had been obtained after the Court in *Malloy v. Hogan* held that the self-incrimination clause was applicable to the states in 1964.[227] Justice Brennan argued, therefore, that the Court should have asked whether Beecher's confession had been compelled in violation of the self-incrimination clause, rather than whether it had been made involuntarily under the due process standard.[228] Justice Brennan asserted that the test for compulsion applied in *Beecher* should have been the pre-*Miranda*, strict, objective standard set forth in *Bram*, rather than the more flexible, subjective, and police-friendly due process involuntary confession rule.[229]

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222. *See* discussion of Nemo tenetur *supra* Part I.B.1.

223. *See id.*

224. 389 U.S. 35 (1967).

225. *Id.* at 38.

226. *Id.* at 38-39.

227. *Id.* at 39. *See* Malloy v. Hogan, 379 U.S. 1 (1964).

228. *Id.*

229. *Id.* (arguing that because the Court in *Malloy*, which had been decided prior to the interrogation in *Beecher*, had adopted the *Bram* standard for compulsion, the *Bram* standard should apply in this case).

The Court's return to the due process involuntary confession rule in *Beecher* was a harbinger of the Court's future course. Over the next three decades, the Court gradually undermined the doctrinal advances that *Miranda* had made and reasserted the due-process-based voluntariness test as the underlying focal point of constitutional confession law. This trend is most evident in the line of cases that has come to be known as the "*Miranda*-exception cases," which, contrary to *Miranda*'s core holding, established that custodial interrogation, by itself, does not amount to compulsion in violation of the self-incrimination clause.[230]

In its 1984 decision in *New York v. Quarles*, for example, the Court created the "public-safety" exception to the *Miranda* warnings requirement. This exception applies when police officers have a pressing interest in interrogating a suspect to divert a potentially imminent danger to the public or themselves.[231] In crafting this exception, the *Quarles* Court held, contrary to one of the central tenets of *Miranda*, that the act of custodial interrogation does not equate with impermissible compulsion.[232] Indeed, Quarles was interrogated while in police custody and without the protection of *Miranda* warnings, but the Court held that no constitutional violation occurred because there had been no compulsion.[233] The *Quarles* holding, therefore, relaxed the *Miranda* Court's definition of "compulsion," because it suggested some undefined amount of pressure beyond the intangible, atmospheric pressure inherent in custodial interrogation must be present to constitute compulsion.

Despite this overruling of *Miranda*'s core holding, *Quarles* and the other *Miranda*-exception cases[234] retained the basic warning/waiver

230. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306 (1985) (viewing Miranda warnings as a bright-line prophylactic rule, designed to protect the self-incrimination clause, that "sweeps more broadly than the [self-incrimination clause] itself."); New York v. Quarles, 467 U.S. 649 (1984) (creating a "public-safety" exception to the *Miranda* warnings requirement); Michigan v. Tucker, 417 U.S. 433 (1974) (ruling that the "fruit of the poisonous tree" doctrine does not apply with full force to *Miranda* violations); Harris v. New York, 401 U.S. 222 (1971) (holding 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). *See generally* David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805 (1992). The Court's holding in *Dickerson v. United States* that the *Miranda* warnings have a constitutional basis does not change this analysis. 530 U.S. 428, 439 n.3 (2000). *See* 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, 1742-52 (2002) (discussing *Dickerson* and its implicit adoption of the theory that rules of criminal procedure can be both prophylactic and constitutional at the same time); *see also* United States v. Patane, 124 S. Ct. 2620 (2004) (discussing *Miranda*'s role as a judge-made prophylactic rule that has a constitutional basis).

231. *Quarles*, 467 U.S. at 654-58.

232. *Id.*

233. *Id.* at 655.

234. *See supra* note 230. *See generally* Wollin, *supra* note 230 (discussing the "fruit of the poisonous tree" doctrine). The Court's holdings in both *Harris* and *Tucker* were based on the same principle as *Quarles*—that custodial interrogation, by itself, does not amount to compulsion in violation of the self-incrimination clause. *Tucker*, 417 U.S. at 444-45; *Harris*, 401 U.S. at 225-26.

procedure as the initial litmus-test step in determining the admissibility of a confession in most situations.[235] But, in undermining the *Miranda* Court's broad definition of the term "compelled," these cases have separated the warnings from the self-incrimination clause and the concept of compulsion itself. Indeed, the *Miranda*-exception cases made clear that because the atmospheric pressure inherent in custodial interrogation is no longer seen as sufficient to constitute compulsion, the warnings are no longer required to prevent a confession from being deemed compelled per se when custodial interrogation is employed. Instead, the warnings are seen as a bright-line prophylactic rule, similar to a common law rule of evidence, which offers practical reinforcement to the self-incrimination clause by creating an easily administered presumption to determine when a confession is admissible in most scenarios.[236] After the emergence of the *Miranda*-exception cases, when a confession is held inadmissible due to the failure to provide *Miranda* warnings, it is not because the lack of warnings renders the confession compelled in violation of the self-incrimination clause. Rather, it is inadmissible because the judicially created prophylactic rule has been violated. Seen in this light, the Court in the *Miranda*-exception cases carved out exceptions only to a judicially created rule, to which the Court is free to create exceptions as it sees fit, not to an actual constitutional right.[237]

The important point for purposes of this Article is the new test for admissibility that the Court set forth in the *Miranda*-exception cases. After *Quarles*, when is a confession considered compelled? The benchmark set by *Miranda* at custodial interrogation has been eviscerated in favor of greater police latitude, but what level of pressure is now required for a finding of compulsion under the self-incrimination clause? Inexplicably, the Supreme Court has not provided a clear answer.[238] Rather, the Court has avoided the issue by suggesting that where the *Miranda* doctrine is inapplicable, the default test is not compulsion under the self-incrimination clause but voluntariness under the old due process involuntary confession rule.[239]

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235. *Quarles*, 467 U.S. at 653-58; *Harris*, 401 U.S. at 224-25.

236. *Tucker*, 417 U.S. at 444. The Court's holding in *Dickerson v. United States*, that the Miranda warnings have a "constitutional basis," 530 U.S. 428, 439 n.3 (2000), does not change this analysis. *See* Godsey, *supra* note 230, at 1742-52; *see also* United States v. Patane, 124 S. Ct. 2620, 2626, 2628-29 (2004) (discussing *Miranda*'s role as judge-made prophylactic rule that has a constitutional basis).

237. *See supra* notes 230, 235; *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*).

238. *See* Benner, *supra* note 4, 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); Klein, *supra* note 14, at 1073-74 (noting tbat the Supreme Court has never provided a clear definition of "compulsion").

239. *See, e.g.*, *Patane*, 124 S. Ct. at 2624 (holding that the evidentiary fruits of a *Miranda* violation are admissible so long as the statement that led to the evidence was made voluntarily); New

What we are left with at the foundation of confession law is a return to the basic rule of decades past that involuntary confessions are inadmissible under notions of due process. The *Miranda* warnings are still required in most situations but only as a prophylactic rule designed to make easier the Court's task of determining the voluntariness of a confession. Thus, rather than an objective test for compulsion based on the self-incrimination clause, as the *Miranda* decision promised, the underlying touchstone for confession admissibility is, once again, voluntariness. *Miranda* warnings provide an objective first-step litmus test for determining voluntariness, which is arguably an improvement over the time when the voluntariness test alone determined admissibility.[240] However, the voluntariness test continues to serve as the rule in cases where *Miranda* warnings are not required; as the doctrine underlying and justifying the *Miranda* warnings themselves; and, more importantly, as the only check on police conduct in the high percentage of interrogations where *Miranda* warnings have been provided and waived.[241] It is not clear why the Court returned to the due process involuntary confession rule after the *Miranda* decision seemingly made that rule obsolete.[242] Some scholars have speculated that the involuntary confession rule resurfaced because some members of the Court were hostile to *Miranda* and planned eventually to overturn it, returning the focus of confession law back to the more police-friendly due process test.[243]

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York v. Quarles, 467 U.S. 649, 655 n.5 (1984) (holding that statements taken under public-safety *Miranda* exception are admissible so long as they were voluntarily made under notions of due process); Harris v. New York, 401 U.S. 222, 224 (1971) (holding that statements taken in violation of *Miranda* may be used for impeachment purposes if made voluntarily); *see also* Schulhofer, *supra* note 3, at 873 (noting that the due process involuntary confession rule "remains the principal basis for adjudication in various confession situations not governed by *Miranda*").

240. The word "arguably" is used because, as set forth *infra* at notes 266-68, 325 and accompanying text, the ultimate impact of *Miranda* is that when the typical suspect waives her rights, courts presume the resulting confession is voluntary and provide very little oversight to the type of police tactics used during the ensuing post-*Miranda* interrogation. In many ways, therefore, the *Miranda* warnings requirement, as currently implemented, lessens court scrutiny on policy interrogation tactics. The objective penalties proposed in Part IV.B allow for more thorough scrutiny of interrogation practices after the *Miranda* warnings have been read and waived.

241. The problematic fact that the voluntariness test is the sole test that applies to interrogations after *Miranda* warnings have been provided and waived is worsened by the fact that after warning and waiver, courts presume all confessions to have been voluntarily made. *See* Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1217-21 (2001) (discussing fact that voluntariness test applies after *Miranda* warnings have been provided and waived, and that courts provide little oversight to police conduct after waiver, resulting in a diluted voluntariness standard post-waiver). *See infra* notes 266-68, 325 and accompanying text; *supra* note 240 and accompanying text.

242. *See* Schulhofer, *supra* note 3, at 877-78 (noting that some assumed that the due process involuntary confession rule would be "buried" after *Miranda*).

243. *See* Herman, *Part I*, *supra* note 65, at 103 (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 122, at 521, 527, 531 (same); Herman, *supra* note 23, at 737-39 (noting that, due to changes in composition, a majority of the Court was generally hostile to the *Miranda* decision by 1972); *see also* George C. Thomas III, Miranda's

Indeed, the *Miranda* decision created a firestorm and was highly criticized by politicians, media, and Justices alike as a rule that coddled criminals and was apt to let the guilty go free.[244] It was no secret that many of the Justices who joined the Court post-*Miranda* did not look favorably at that decision.[245] Retaining the involuntary confession rule and repositioning it as the underlying rule that the *Miranda* warnings were designed to protect would make the eventual overruling of *Miranda* that much easier. Indeed, by recasting *Miranda* as a judicially created prophylactic rule rather than a constitutional mandate, the Court was gradually freeing itself to dispose of the warnings altogether. This move would leave the involuntary confession rule—now considered to underlie the *Miranda* warnings—as the sole rule remaining when this transition occurred.

The self-incrimination clause's ban on compelled confessions remains applicable to interrogations, but the Court has not clearly defined its meaning. As a result, many have undoubtedly assumed that the test under the self-incrimination clause is now identical to the due process involuntary confession rule and that both doctrines overlap and simultaneously prohibit the admission of involuntary confessions. Dicta and "loose language"[246] in several Supreme Court opinions may support this assumption.[247] However, the text, history, and interpretations of term "compelled" in non-interrogation contexts demand an objective test based not on voluntariness but rather on compulsion and the imposition of objective penalties. Dicta, "loose language," and the Court's refusal to directly address the issue should not override these controlling principles.

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*Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1098 (2003) (book review). Former law professor and current United States District Judge Paul G. Cassell is the leading critic of *Miranda*. For years, Cassell has put forth arguments to support the Court's hostility to *Miranda*. To sample Cassell's work in this respect, 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. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999); Paul G. Cassell & Richard Fowles, *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).

244. *See* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 243-48 (1983) (discussing negative reaction of politicians and public to *Miranda*); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 158 (1970) (same).

245. *See supra* note 243.

246. *See* Schulhofer, *supra* note 134, at 440.

247. The Court most recently used "loose language," as Professor Schulhofer calls it, Schulhofer, *supra* note 246, at 440, regarding the terms "compelled" and "involuntary" in the 2004 ease of *United States v. Patane*. 124 S. Ct. 2620, 2624-30 (2004) (using "compelled" and "involuntary" interchangeably without directly addressing whether a distinction exists between the two terms). *See also* United States v. Washington, 431 U.S. 181, 188 (1977) (describing test for compulsion under the self-incrimination clause by using language associated with the due process voluntary confession rule).

It is apparent that the true meaning of the self-incrimination clause (and its role in interrogations) became lost in the shuffle during the Court's struggles over *Miranda*. The unnecessary breadth with which the *Miranda* decision defined the term "compulsion" was perhaps its own undoing. It caused such hostility that the Court rejected the doctrinal underpinnings of the decision without recognizing that perhaps some aspects of *Miranda* might have been worth saving. Indeed, *Miranda*'s rejection of the involuntary confession rule, and its creation of an objective test for compulsion, were steps in the right direction and marked the foundation for continued improvement in the area. The Court post-*Miranda* should have reined in its definition of compulsion to bring it more in line with the history, text, and interpretation of the self-incrimination clause in the formal setting cases, rather than reject almost the entire decision and nearly everything associated with it. The objective penalties test proposed herein and developed in detail in Part IV retains the meritorious aspects of *Miranda* and represents a middle ground that is truer to the meaning of the self-incrimination clause than the *Miranda* decision but avoids many of the problems delineated herein with the due process involuntary confession rule.

### C. Dickerson v. United States: *The Battle over* Miranda *Concludes*

Two years after *Miranda* was decided, Congress enacted 18 U.S.C. § 3501.[248] This statute was intended to overrule the requirement that officers give *Miranda* warnings to suspects by once again making voluntariness, rather than the recitation of warnings, the touchstone for the admissibility of confessions.[249] Section 3501 set forth a nonexclusive list of factors, including whether the suspect was advised of his constitutional rights, that courts could consider in determining voluntariness.[250] Although

248. 18 U.S.C. § 3501 (2000).

249. *See* Dickerson v. United States, 530 U.S. 428, 436 (2000) ("[W]e agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*.").

250. § 3501:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of

this statute was enacted in 1968, it was largely ignored by federal prosecutors. Thus, the *Miranda* warnings requirement remained intact simply by default.[251]

In *Dickerson*, however, the long-awaited confrontation between *Miranda* and § 3501 finally emerged. The Supreme Court in *Dickerson* noted that it may use its supervisory authority over the federal courts to prescribe "rules of evidence and procedure that are binding in those tribunals."[252] The power to judicially create such nonconstitutional rules, however, "exists only in the absence of a relevant Act of Congress."[253] Congress retains "the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."[254] On the other hand, when the Supreme Court establishes a rule that interprets or applies the Constitution, Congress may not legislatively supersede such a decision.[255] The question in *Dickerson*, therefore, was "whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[256] If the *Miranda* warnings were required by the Constitution, they could not be overruled by statute and § 3501 was unconstitutional; if the *Miranda* warnings requirement was merely a judicially created rule of evidence or procedure, Congress had the authority to overrule that decision by enacting § 3501.

The Court ultimately held in *Dickerson* that § 3501 could not be enforced because the warnings component of the *Miranda* decision was in fact intended to be a constitutional ruling.[257] In contrast, the court of appeals had held that the *Miranda* warnings are not constitutionally required because the Supreme Court has not always required them when circumstances have rendered their application impractical, such as in the *Miranda*-exception cases.[258] The court of appeals apparently believed that Supreme Court decisions that create prophylactic rules are

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counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

251. *See* Brooke B. Grona, Casenote, United States v. Dickerson: *Leaving* Miranda *and Finding a Deserted Statute*, 26 AM. J. CRIM. L. 367 (1999) (discussing the fact that § 3501 had never been invoked by prosecutors prior to *Dickerson*); *see also* United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000) (raising the issue of § 3501's application and stating that "the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it").

252. *Dickerson*, 530 U.S. at 437. For further discussion of *Dickerson*, *see* Godsey, *supra* note 230, at 1742-52.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 431-32, 435.

258. United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999).

nonconstitutional in the sense that they are similar to common law rules of evidence that may be modified or overruled by an Act of Congress. Only decisions that hand down constitutional mandates are within the Court's authority to interpret the Constitution, and only these decisions are immune to being overruled by Congress. Citing *Miranda*-exception cases such as *New York v. Quarles*[259] and *Harris v. New York*,[260] the Supreme Court responded in *Dickerson*:

> These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.[261]

Many scholars have argued that the *Dickerson* decision does not make sense.[262] If the *Miranda* warnings are constitutionally required, then the Court is not free to make exceptions to them in cases such as *Quarles*.[263] Yet, the Court explicitly reaffirmed *Quarles* and the other *Miranda*-exception cases in *Dickerson*, without a satisfactory explanation as to how it reconciled these competing doctrines. Given the Court's strong language in many of the *Miranda*-exception cases and the widespread belief that a majority of the Justices had, prior to *Dickerson*, hoped to overrule the *Miranda* warnings, it may have surprised many that the Court ultimately decided to retain the warnings. While trying to interpret the motives of the Court is like reading tea leaves, it is quite possible that certain key Justices ultimately decided to retain the warnings simply because of the strong support for the warnings that became apparent during the *Dickerson* litigation. Indeed, in a nearly unprecedented move, the Department of Justice filed its brief in support of its opponent in the case, Mr. Dickerson, and urged the Court not to overrule the warnings requirement.[264] It seemed that the majority of individuals or entities involved

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259. 467 U.S. 649 (1984); *see supra* notes 228-32 and accompanying text.

260. 401 U.S. 222 (1971) (allowing the prosecution to impeach a testifying defendant with a prior inconsistent statement taken from him during a pretrial police interrogation without *Miranda* warnings); *see supra* notes 230-39 and accompanying text.

261. *Dickerson*, 530 U.S. at 441.

262. *See, e.g.*, Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda *and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 35 (2001) (stating that *Dickerson* was "regarded by virtually every informed observer as inconsistent and unprincipled"); Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 394 (2001) (stating that the *Dickerson* decision is not plausible); Klein, *supra* note 14, at 1071 (concluding that *Dickerson* is contradictory and incoherent).

263. *See supra* notes 230-39 and accompanying text.

264. *See* Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898 (2001) (discussing the fact that the Department of Justice supported Mr. Dickerson's position and argued that the *Miranda* warnings requirement should be retained).

preferred the clarity of *Miranda* over the vague and highly subjective involuntary confession rule, which would be the controlling test in all situations, were the *Miranda* warnings to be removed.[265]

The *Dickerson* Court may also have been persuaded to retain the *Miranda* warnings requirement because the requirement seemed to favor the police more than the *Miranda* Court might have originally anticipated.[266] After *Miranda* warnings have been provided to a suspect and waived, most courts simply presume that any confession that follows was made voluntarily.[267] As a result, courts post-*Miranda* have provided very little oversight to what goes on during interrogations after the recitation and waiver of *Miranda* warnings, and interrogators have been able to apply quite a bit of pressure to suspects without running afoul of the Constitution.[268]

It is important to note that the Court in *Dickerson*, while reaffirming the warnings component of *Miranda*, did not undo the detachment of the warnings from the self-incrimination clause and the concept of compulsion that occurred in the *Miranda*-exception cases described *supra*. The *Dickerson* Court essentially reaffirmed the previous four decades of *Miranda* jurisprudence, including the relaxation of the *Miranda* decision's compulsion definition that occurred post-*Miranda*. The *Dickerson* Court reinforced the post-*Quarles* status quo, holding that custodial interrogation does not equate with compulsion and that the *Miranda* warnings are a constitutionally-based prophylactic rule. More importantly, the Court held that the underlying doctrine that the warnings are designed to protect is the due process involuntary confession rule rather than the broad, objective concept of compulsion that the *Miranda* Court originally set forth.

Whatever the Court's motivations for retaining the warnings, it appears that the warnings required by *Miranda* are here to stay, at least for the foreseeable future. Now that any desires by some of the Justices to

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265. *See* George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J. L. & HUMAN. 79, 102 n.86 (1993) (discussing the fact that the police eventually abandoned complaints about *Miranda*); Thomas, *supra* note 243, at 1092, 1096 (same).

266. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 497 n.9 (2002) (citing a number of scholars in support of the proposition that "[i]t is now widely recognized that when the police follow *Miranda*'s procedural instructions by administering the warnings and obtaining a waiver, *Miranda* serves as a license, rather than an impediment, to secure usable confessions").

267. *See* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare."); William J. Stuntz, Miranda's *Mistake*, 99 MICH. L. REV. 975, 988 (2001) (noting that courts may tolerate more coercion because the burden is on defendants who have waived their rights to show they did not understand the warnings); White, *supra* note 241, at 1220 ("A finding that the police have properly informed the suspect of his Miranda rights . . . often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices.").

268. *See* Herman, *supra* note 23, at 752-54 (providing case examples).

relinquish the warnings requirement and return completely to the due process involuntary confession rule have been vanquished, the time is ripe for the Court to put away its political disputes of the past and clean up the mess it has made in the arena of constitutional confession law over the past century.

If the Court does so, it should start with a clean slate. The Court should recognize that the much-maligned voluntariness test still survives after *Dickerson*, and indeed, it continues to serve as the foundation of confession law. The voluntariness test remains the test in all cases where *Miranda* does not apply; it remains the test during interrogations after the *Miranda* warnings have been provided and waived; and it serves as the doctrine underlying and justifying the *Miranda* warnings themselves. Indeed, the Court currently requires the *Miranda* warnings to help determine the voluntariness of a confession in the due process sense of the term, rather than whether the police conduct, namely the custodial interrogation, constituted compulsion as the self-incrimination clause dictates.[269] The Court should consider the fact that the involuntary confession rule is not required by the Bill of Rights and that it initially emerged as a result of legal and historical mistakes made by the Court in *Bram*.[270] The Court should then consider the tortured history of the involuntary confession rule in the mid-twentieth century that led to its widespread condemnation and the Court's ultimate search to replace it, culminating in the *Miranda* decision.[271] The Court should consider the fact that the voluntariness standard reappeared after *Miranda* primarily as a result of a backlash against the *Miranda* warnings requirement; a backlash that may have been justified in some respects, but that has gone too far. The Court should consider the fact that the involuntary confession rule is so unworkable and disfavored that even law enforcement agencies in the *Dickerson* litigation supported the retention of the *Miranda* warnings rather than return completely to the due process involuntary confession rule, as applied prior to the *Miranda* decision.[272] The Court should ask itself why it continues to focus on voluntariness as the touchstone for confession admissibility and as the doctrine underlying the *Miranda* warnings.

As Professor Yale Kamisar so aptly noted:

> The real reasons for excluding confessions have too long been obscured by traditional language. The time has come to unmask them and to build from there. It is fatuous, to be sure, to suppose

269. Although the Court sometimes uses the terms "involuntary" and "compelled" interchangeably, *see supra* notes 246-47 and accompanying text, the test that the Court applies for both is the due-process based voluntariness test rather than compulsion in an objective sense as required by *Miranda* and as suggested in this Article.

270. *See supra* Part I.

271. *See supra* notes 192-94 and accompanying text.

272. *See supra* notes 264-65 and accompanying text.

> that there will ever be a vocabulary free of all ambiguity . . . . But there are some words which, owing to their history, needlessly obstruct clear thinking, and "voluntary," "involuntary" *et al.*, are surely among them. The due process confession cases have too often been characterized by Indians-attacking-the-covered-wagon tactics, *i.e.*, circling around and around the problem and taking pot shots at it. The time has come for a more direct approach.[273]

Professor Kamisar made this statement in 1963.[274] More than forty years later, the Court, after several detours, has come full circle and in many respects has moved back to the position it held in 1963. Part IV addresses where the Court should go from here.

## IV
## CREATION OF A WORKABLE OBJECTIVE PENALTIES TEST BASED ON THE SELF-INCRIMINATION CLAUSE

The cumulative lessons derived from the historical journey in Parts I through III can be summarized as follows. First, confession law should be regulated primarily by the self-incrimination clause rather than by the due process clauses. Second, the touchstone for confession admissibility under the self-incrimination clause should be compulsion rather than voluntariness. Third, existing Supreme Court precedent suggests an objective standard that focuses on government conduct rather than the suspect's state of mind when determining the existence of compulsion. Fourth, compulsion exists under the self-incrimination clause when the government imposes a penalty on a suspect to either punish silence or provoke speech. The Supreme Court applies this standard in the formal setting cases. Furthermore, this objective penalties standard is not inconsistent with the Court's incomplete and ambiguous interpretations of compulsion in the interrogation setting.[275] Fifth, an objective penalties test for compulsion in the interrogation context is more consistent with both the text and the historical origins of the self-incrimination clause.[276]

These lessons suggest that the Court should develop and implement an objective penalties test to regulate the admissibility of confessions. This

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273. *See* Kamisar, *supra* note 11, at 759 (internal quotations omitted).

274. *See id.*

275. Indeed, current interpretations of compulsion in the interrogation context require something more than atmospheric pressure. *See* discussion of *Quarles supra* Part III.B. *Miranda*'s broad interpretation has been repudiated by the *Miranda*-exception cases, and the current state of the law requires that "something more" than atmospheric pressure be present during an interrogation to render it compelled. *See id.* The Court has not defined what "something more" means, other than to suggest that compulsion now equates with voluntariness, and thus, pressure must be applied sufficient to overbear the suspect's will. Thus, the objective penalties would correctly distinguish the concepts of compulsion and voluntariness, and would require "something more" than atmospheric pressure in that it would require a penalty to be imposed before a finding of compulsion can be made.

276. *See id.*

test would suppress a confession if the police impose a penalty on a suspect during an interrogation to punish silence or provoke speech because such a penalty would constitute compulsion in violation of the self-incrimination clause if the confession is later admitted into evidence against the suspect. This concept is not entirely without precedent. The 1967 decision of *Garrity v. New Jersey*[277] is perhaps the one existing bridge that arguably links the objective penalties test from the formal setting cases with the interrogation context. In *Garrity*, several police officers were convicted of participating in a traffic ticket-fixing scheme.[278] At their trials, the government introduced confessions that the officers had previously made at an inquiry held by the Attorney General of New Jersey.[279] The officers had confessed at the inquiry only after being warned that they would lose their jobs if they invoked their right to remain silent.[280] In reversing the convictions and holding the officers' confessions inadmissible, the majority of the Court seemingly relied on two distinct grounds: the due process involuntary confession rule and the objective penalties test from the formal setting cases.[281] Regarding the objective penalties test, the Court stated:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like the interrogation practices we reviewed in *Miranda v. Arizona*, [is impermissible].[282]

The Court went on to note that the self-incrimination clause provides suspects with a right to remain silent, a right "of constitutional stature whose exercise a State may not condition by the exaction of a price."[283]

This application of the objective penalties test in the interrogation context did not escape the notice of Justice Harlan. In a dissenting opinion, Justice Harlan observed:

> The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact, in the same fashion that the statements in [due process voluntary confession rule cases] were thought to be involuntary, and that the statements were inadmissible as a matter of law, on the premise that they were products of an impermissible condition

277. 385 U.S. 493 (1967).
278. *Id.* at 494.
279. *Id.* at 494-95.
280. *Id.* at 494.
281. *Id.* at 496-500.
282. *Id.* at 497, 500.
283. *Id.* at 500.

> imposed on the constitutional privilege. These are very different contentions and require different replies.[284]

Ultimately, Harlan did not disagree with the majority's position that both doctrines applied to the case.[285] Harlan merely repeated his view, which he stated in his dissenting opinion in another formal setting case, *Spevack v. Klein*,[286] that the self-incrimination clause should not prohibit the imposition of penalties or conditions that "serve important public interests."[287]

The *Garrity* decision raises the following paramount question: If threatening a suspect with termination violates the self-incrimination clause and renders a confession inadmissible as a matter of law when the threat occurs in a formal inquiry, why would this same sort of threat not render a confession inadmissible as a matter of law when it occurs in the stationhouse interrogation room? For example, an interrogating officer might threaten to make a behind-the-scenes effort to get a suspect fired from his private sector job if the suspect does not confess to a crime. Under existing law, such a threat would render the resulting confession inadmissible only if the court found that the threat overbore the will of the suspect and elicited an involuntary confession. But many courts might hold such a confession voluntary and admissible on the theory that an innocent man would rather lose his job than confess to a crime. Why would such a threat in a police interrogation room not also constitute an impermissible penalty on the exercise of a constitutional right and render the confession inadmissible as a matter of law? There is no satisfactory distinction between the two scenarios. The objective penalties test should be applied in the latter scenario as well.

Section A below defines the scope of what constitutes a penalty under this objective penalties test. Section B addresses whether an interrogation constitutes an objective penalty. This Section also suggests that *Miranda* warnings can play an important role in the objective penalties test. Section C distinguishes threats from offers and explains why only threats should be considered objective penalties. Section D focuses on how the objective penalties test would treat psychological pressure employed by the police in an interrogation room. Finally, Section E addresses the remaining role the due process clauses may play in supplementing the objective penalties test. This Section asserts that the objective penalties test could be supplemented by due process considerations in two ways.

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284. *Id.* at 501 (Harlan, J., dissenting).
285. *Id.* at 510.
286. 385 U.S. 511, 521-29 (1967) (Harlan, J., dissenting).
287. *Garrity*, 385 U.S. at 509.

### A. Objective Penalty Defined

Defining the concept of an objective penalty is not an easy task. First, the Court must define what penalty in the interrogation context is. Should every possible penalty imposed by an interrogator render a confession inadmissible, or should the Court specify which penalties are impermissible? Supreme Court precedent, indications of the Framers' original intent and public policy considerations inform the answer to this question provided below. Second, the Court must apply an objective standard to determine what constitutes a penalty. What set of facts objectively indicate a penalty? A rich pool of philosophical scholarship regarding improper coercion suggests that a court should base this determination on the baseline of the parties at the time and place of the interrogation.

#### 1. *Scope of the Objective Penalties Test: The "Laundry List" Approach vs. the "All-Inclusive" Approach*

The Court could define the scope of what constitutes an objective penalty by creating a list of interrogation techniques that it believes constitute impermissible penalties. Interrogation techniques such as the use of physical violence, sleep or food deprivation, or any other method that offends the Court's sense of justice could be added to the list on a case-by-case basis. Various scholars have mentioned the possibility of this "laundry list" method of regulating confessions.[288] In fact, this method seems to be the most consistent with the Framer's original intent.[289]

Existing interpretations of the word "compelled" in the formal setting cases and sound public policy concerns, however, support a much broader "all-inclusive" approach. The formal setting cases instruct that the imposition of any and all penalties imposed to provoke speech or punish silence violate the self-incrimination clause.[290] In *Malloy v. Hogan*, the Court stated that the self-incrimination clause protects the accused's "free choice to admit, to deny, or to refuse to answer."[291] In accordance with this principle, the Court in *Malloy* noted that it had, in the past, "held inadmissible . . . a confession secured by so mild a whip as the refusal . . . to allow a suspect to call his wife until he confessed."[292] The Court considers this result to be consistent with the self-incrimination

288. *See also infra* note 306. *See generally* Alschuler, *supra* note 68, at 2668; Klein, *supra* note 14, Allen and Mace, *supra* note 141, at 251-56 (arguing that the voluntariness test is in effect already an objective test for compulsion as implemented by the Supreme Court, and that the Court, in effect, has adopted a laundry list approach based on acceptable social conventions).

289. *See* discussion of Nemo tenetur *supra* Part I.B.1; *see also* Alschuler, *supra* note 68, at 2638-60.

290. *See supra* Part II.B.I; *supra* notes 213-19 and accompanying text; *see also infra* notes 291-306 and accompanying text.

291. 378 U.S. I, 7 (1964) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).

292. *Id.*

clause's guarantee of "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty* . . . for such silence."[293]

The next year, in *Spevack v. Klein*, the Court further elaborated that such a "penalty"

> is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of any sanction which makes the assertion of the Fifth Amendment privilege "costly.". . . . "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[294]

Two noted scholars, Stephen Schulhofer and the late Joseph Grano, discussed the issue of whether the formal setting cases interpret the term "penalty" using a limiting laundry list approach or a more liberal, all-inclusive approach in a pair of articles. Schulhofer, a well-known *Miranda* supporter, argued that the formal setting cases support the theoretical underpinning of the *Miranda* decision that the atmospheric pressure inherent in custodial interrogation constitutes compulsion.[295] Grano, a reputed *Miranda* critic, disagreed with this assertion and identified several flaws in Schulhofer's reasoning.[296] Importantly, though, both scholars agreed that the formal setting cases correctly adopt the broad "all-inclusive" definition of "penalty."[297] Grano agreed with Schulhofer that the government's imposition of even a small penalty on a defendant who refuses to testify in the formal setting violates the self-incrimination clause because it makes a "claim of right" to the defendant's testimony.[298] Thus, Grano would, for example, agree that if the state of New Jersey in *Garrity* threatened the officers that they would each be fined a nominal sum, the resulting confessions should still have been deemed inadmissible.

Grano supports his broad interpretation of the term "penalty" under a "claim of right" theory by making an analogy to the Fourth Amendment

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293. *Id.* at 8 (emphasis added).
294. 385 U.S. 511, 515 (1967) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).
295. Schulhofer, *supra* note 134, at 439-46.
296. Grano, *supra* note 30, at 182-86.
297. *See id.* at 183; Schulhofer, *supra* note 134, at 443.
298. Grano, *supra* note 30, at 183; *see* Schulhofer, *supra* note 134, at 443.

consent to search cases. Grano notes that when an officer applies mild pressure to a suspect to convince him to consent to a search of his automobile, for example, the mild pressure typically will not render the resulting consent invalid.[299] When an officer makes a claim of right to search an automobile by stating or suggesting that he has the authority to search, however, the resulting consent is always held invalid per se even if the pressure exerted by the officer is slight or nonexistent.[300] Likewise, because fining the *Griffin* defendants three dollars for refusing to testify would have constituted a similar claim of right to their testimony—in effect suggesting to them that the state has the right to their statements without providing immunity and will take steps to get those statements—that too would violate the self-incrimination clause per se.

Grano's concession on this point bolsters this Article's contention that the formal setting cases support an objective penalties test in the interrogation context. While Grano perhaps believed that he punched some holes in Schulhofer's thesis that the formal setting cases are consistent with *Miranda*'s "atmospheric pressure" test, Schulhofer's claim was the only theory that Grano was attempting to refute. Grano's arguments, however, do not undermine the thesis of this Article that the formal setting cases support an objective penalties test in the interrogation context. If threatening a defendant that he will lose his job if he does not testify at trial constitutes compulsion in violation of the self-incrimination clause, which Grano concedes, then why would the imposition of a similar penalty in an interrogation room not constitute impermissible compulsion?[301] In Grano's world, the former would be unconstitutional per se because it occurs in a courtroom, while the latter would be unconstitutional only if it rendered the resulting confession involuntary under the due process involuntary confession rule. Likewise, if threatening to fine a defendant three dollars if she does not testify at trial constitutes a penalty and compulsion because it makes a claim of right to the defendant's testimony, why would an officer's act of taking away a suspect's three dollar pack of cigarettes until she confesses not constitute a claim of right and, thus, a penalty and compulsion as well, regardless of whether this act overbore her will?[302]

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299. Grano, *supra* note 30, at 183-84.

300. *Id.*

301. Assuming, of course, that the suspect confesses after the penalty is imposed and the confession is used against her at trial.

302. Assuming the suspect is otherwise not prohibited from smoking in the place where the interrogation is held. *See infra* note 308 and accompanying text. This discussion, of course, also assumes that the issue of compulsion arises when the prosecution seeks to admit her confession into evidence against her at trial. *See generally* Chavez v. Martinez, 538 U.S. 760 (2003) (holding that the self-incrimination clause is implicated only when the government seeks to admit a confession against the defendant at trial). Under *Chavez*, whether compulsion existed during an interrogation is determined retrospectively when the government seeks to introduce the resulting confession into evidence, and thus, under the objective penalties test, the government could not introduce a confession

If Grano were alive today, he might have responded by asserting that the three dollar fine constitutes a claim of right and, thus, a penalty because it is a formal act of the state, authorized by statute, regulation or court order. This formality informs the defendant that the state is serious and that it intends to follow through with proper legal process to enforce the penalty. The fine signals to defendants that they do not have a true right to remain silent. If a true right to remain silent existed, the fine would be illegal and the statute that authorized it would not be on the books. A true right to remain silent and the state's legal right to penalize someone for remaining silent are mutually exclusive propositions. In contrast, Grano might have argued that when an interrogator makes a threat in an interrogation room by stating that he will take away the suspect's cigarettes until she confesses, for example, no legal process exists to back up that threat.[303] No statute, regulation, or court order exists that specifically authorizes this threat, and no formal legal procedure exists for enforcing it.[304]

This distinction, however, is logically insignificant. Threats in both formal and informal settings make a claim of right to the suspect's statement; both say to the suspect or defendant, "I have a right to your statements and will penalize you if you do not talk." The only difference is that the three dollar fine in the formal setting asserts a formal legal right backed up by legal process, while the police officer's threat in the informal interrogation setting asserts a right arising by virtue of the police officer's state-given position, his badge, his holstered firearm, and his position of dominance and control over the suspect. The fact that such a threat is not supported by formal legal process does not make it less of a threat, less of a penalty, or less of a claim of right for practical purposes. An officer who takes a suspect's cigarettes as a penalty imposed for refusing to confess sends a message to the suspect that the officer has a right to the suspect's confession without providing the suspect with immunity. Both the suspect and the officer know that the officer will not be charged with theft for taking the cigarettes (as a civilian may be for taking personal possession of the suspect's property). And for practical purposes, the officer will not be

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if it was obtained by imposing a penalty that makes a claim of right in the manner stated in the text. In other words, under *Chavez* as applied to the objective penalties test, an interrogator arguably can make a claim of right under the self-incrimination clause if the interrogator does not later use the resulting confession against the suspect. However, if government subsequently attempts to admit the confession into evidence at trial, this Article asserts that a retrospective analysis of compulsion would be conducted, and the confession would be inadmissible if the interrogator made a claim of right to the suspect's confession or otherwise imposed a penalty on the suspect to provoke speech or punish silence. Finally, this discussion assumes that immunity has not been provided to the suspect during the interrogation.

303. *See* Thomas & Bilder, *supra* note 3, at 258 (noting lack of legal process to back up threats in interrogation setting).

304. Again, this assumes smoking is not prohibited in the location where the interrogation takes place. *See infra* note 308 and accompanying text.

prohibited from making good on his threat until a confession takes place. The police officer is asserting a right that he is free to exercise under existing law as long as he does not employ such intense pressure that the suspect's confession will be deemed involuntary.

Another reason why there is no credible distinction between a penalty in a formal setting and a penalty in an informal setting is that a threat by a police officer in an interrogation room exerts more coercive pressure on a suspect than a similar threat made in the formal setting of a courtroom. A defendant who is threatened with a three dollar fine if he refuses to testify at his trial receives this threat in a proceeding open to the public and flanked by an attorney. It is not difficult to imagine a trial defendant making a calm and rational decision, after consultation with counsel, to pay the three dollar fine rather than risk taking the stand and testifying. A suspect under interrogation, however, who has an officer impose a small penalty on her for not confessing, such as taking away her cigarettes, is often without counsel, isolated from public scrutiny, and at the officer's mercy. The suspect would be rational to assume that the officer will continue to impose additional penalties of increasing severity until the officer is satisfied.

Defining compulsion broadly enough to prohibit any and all penalties imposed during an interrogation to provoke speech or punish silence also serves an important public policy objective. Interpreting the self-incrimination clause to prohibit all penalties creates a bright-line rule that is easier to apply in both interrogation rooms and courtrooms.[305] Under the laundry list approach, a court might easily hold that an officer's act of slapping a suspect across the face for refusing to confess is an impermissible penalty. But what is the result if an officer uses his middle finger and thumb to flick at a suspect, causing only a slight, momentary sting? Is a flick to the arm or leg permissible but a flick to the face a violation? Where does one draw the line at what is a permissible or impermissible penalty?

The broader, all-inclusive definition of penalty provides that *any* penalty imposed on a suspect to provoke speech or punish silence violates the self-incrimination clause because it makes a claim of right to the suspect's statement. Thus, this broad definition avoids having to guess on an ad hoc basis whether a given interrogation technique will ultimately get a thumbs up or thumbs down from the Court because it eviscerates the need for making hair splitting and seemingly arbitrary distinctions that would be unavoidable with the laundry list approach.

Finally, the broad, all-inclusive definition of penalty is more consistent with a true right to remain silent. If a right to silence exists, any penalty imposed as a condition on that right is illegitimate and inconsistent

305. Regarding the Supreme Court's preference for bright-line rules in constitutional criminal procedure, see Alschuler, *supra* note 192; LaFave, *supra* note 192, at 321-23.

with the Court's own declarations that the self-incrimination clause grants suspects a true right to remain silent.[306]

306. When this Article speaks of a true right to remain silent, it refers to the right not to have compelled self-incriminating statements admitted against a defendant at trial. *See generally* Chavez v. Martinez, 538 U.S. 760 (2003) (holding that the self-incrimination clause is implicated only when the government seeks to admit a confession against the defendant at trial); *see also supra* note 302. In his seminal 1996 article, Professor Alschuler argues that the true and absolute right to remain silent recognized in recent decades by the Supreme Court is contrary to the Framer's intent. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638-60 (1996). Alschuler essentially argues that the Framers would have intended the self-incrimination clause to adopt the laundry list approach, which would allow less severe forms of pressure during an interrogation. *Id.* at 2651-52; *see also supra* Part I.B.2. For the reasons stated herein, the all-inclusive approach, while perhaps providing greater protection to suspects than the Framers would have intended, is consistent with the Supreme Court's more recent pronouncements on the subject, particularly in the formal setting cases. Adopting the all-inclusive approach would thereby bring confession law into harmony with the formal setting cases. Sound policy reasons delineated in the text above further support this interpretation.

In *McKune v. Lile*, 536 U.S. 24 (2002), five Justices of the Court in a plurality opinion arguably, at first glance, adopted the view that the self-incrimination clause does not prohibit the imposition of de minimis penalties imposed for the exercise of the one's right to remain silent. *Id.* at 41-42, 52-54. *McKune* can be distinguished, however, on the ground that the alleged penalties imposed occurred in the prison context. The case involved a claim by an inmate who alleged that his Fifth Amendment rights were violated when he lost certain prison privileges because he refused to participate in a mandated sex offender program that required him to admit past offenses. Justice Kennedy, joined by three other Justices, took special pains to point out that the case involved consequences imposed on "prisoners, rather than ordinary citizens," *Id.* at 36, and distinguished the formal setting cases by noting that those cases dealt with free citizens rather than prisoners. *Id.* at 39-40. Justice Kennedy stated that a "broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction. The Court has instructed that rehabilitation is a legitimate penological interest that must be weighed against the exercise of an inmate's liberty." *Id.* at 36. Justice Kennedy further expounded:

> The compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system. A prison clinical rehabilitation program, which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.

*Id.* at 37-38. *see also* Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (holding that an inmate's silence at a prison disciplinary hearing may be used against him at such a prison proceeding because the proceeding implicated "the correctional process and important state interests other than conviction for crime."); Minnesota v. Murphy, 465 U.S. 420 (1984) (requiring a probationer to appear and discuss matters that affect his probationer's status with his probation officer does not violate self-incrimination clause because he was not faced with any reasonably perceived threat of revocation). In addition, Justice Kennedy seemed to classify the consequences imposed on the inmate to be deprivations of benefits rather than negative penalties. *Id* at 29 (classifying the prison procedure as offering "incentives" rather than imposing penalties). For a discussion of the distinction between threats (penalties) and offers (benefits) see *infra* Part IV.C.

Justice O'Connor, writing alone and casting the decisive fifth vote for the plurality, did not distinguish the prison context from the formal setting cases involving free citizens. Justice O'Connor also disagreed with the other four justices in the plurality in that she believed the consequences imposed constituted penalties rather than benefits denied. *Id.* at 53-54 ("[T]his case indisputably involves burdens rather than benefits . . . . "). Rather, Justice O'Connor seemed to adopt the laundry list approach to the self-incrimination clause and argued simply that the penalties imposed in *McKune* were not sufficiently serious to constitute compulsion in violation of the Fifth Amendment. *Id.* at 48-53.

This broad interpretation of penalty may appear overly protective of suspects and have more of a restraining effect on police coercion than existing law. Such an interpretation, however, would not unduly hamper interrogations. Indeed, society has a well-founded need for officers to interrogate suspects and to obtain confessions. The objective test would allow officers to conduct these important interrogations while respecting the

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Justice O'Connor then stated: "I believe the proper theory should recognize that it is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process." *Id.* at 53. She then cited to *McGautha v. California*, 402 U.S. 183 (1971), which held that the diffieult choice to testify or not that a defendant naturally faces in a non-bifurcated capital trial (tcstifying might help a capital defendant in the sentencing aspect of the jury's determination, but might simultaneously undermine his efforts in relation to the jury's determination of guilt) does not constitute eompulsion. *Id.*; *McGautha*, 402 U.S. at 213-21. *McGautha* is an example of what this Article will call the "criminal process" cases, in which the Court has held that certain difficult choices that naturally present themselves to a defendant from necessary aspects of the criminal process do not constitute compulsion. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970) (stating that if a defendant chooses to rely on an alibi defense, he may be compelled to disclose the substance of the defensc prior to trial or be barred from asserting it in order for his criminal trial to operate without disruption); Jenkins v. Anderson, 447 U.S. 231 (1980) (commenting that if a criminal defendant chooses to testify in his own defense at trial, he may be impeached with his pre-arrest silence; the self-incrimination clause cannot be used a license to commit perjury); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (noting that plea bargaining is an encouraged part of the criminal process and does not violate the self-incrimination clause); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (explaining that Ohio's provision requiring an interview with the parole board for those inmates who seek clemency does not violate the self-incrimination clause because the option to seek clemency is a voluntary choice for an inmate in the criminal process; Ohio's procedure represents a benefit denied to inmate's who remain silent rather than penalty imposed, and also benefit is not automatically denied in response to inmate's silence). Justice O'Connor then quoted the following language from *McGautha*: "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.* at 53 (quoting *McGautha*, 402 U.S. at 213). Justice O'Connor then succinctly summarized her rationale by stating: "Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate." *Id.* In sum, Justice O'Connor characterized *McKune* as a criminal process case, in which the government may impose penalties on a defendant for a legitimate reason as a necessary part of a fair criminal process. *See* United States v. Antelope, 2005 WL 170738 (9th Cir., Jan. 27, 2005) ("[T]he controlling issue [in Justice O'Connor's concurrence in *McKune*] is the state's purpose in imposing the penalty: Although it may be acceptable for the state to impose harsh penalties on defendants when it has legitimate reasons for doing so consistent with their conviction for their crimes of incarceration, it is a different thing to 'impose penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony.'") (quoting *McKune*, 402 U.S. at 53). Interrogation, however, is not analogous to and has never been considered by the Court as a context where a suspect faces a choice that flows naturally from a necessary part of the criminal process. The imposition of penalties during interrogation is not a required or inherent part of the criminal process and represents the clearest example of the government attempting to compel testimony without a legitimate reason related to such things as penological goals or the efficient management of criminal trials. Thus, this Article asserts that neither Justice Kennedy's or Justice O'Connor's opinions in *McKune*, nor the criminal process cases, represent clear and binding precedent against the application of an all-inclusive standard for penalties in the interrogation context.

suspect's right to remain silent by not penalizing the suspect in any way for her refusal to confess. As the formal setting cases recognize, the right to remain silent demands such a test, or it is not a true right at all.

### 2. *Creation of the Baseline of the Interrogation to Determine What Constitutes a Penalty*

Resolving the scope of how broadly to define what constitutes a penalty still leaves unanswered the question of what exactly constitutes a penalty. A rich pool of philosophical scholarship addresses the question of what constitutes improper coercion.[307] Such philosophical considerations are directly applicable to this Article's endeavor to develop a new objective penalties test. The touchstone to determining the sets of facts that amount to improper coercion is the "baseline" of the interrogation. This baseline is determined by analyzing the objective facts regarding the suspect's rights and conditions at the beginning of the interrogation. The relevant question for the Court to ask is whether, in light of this baseline, a reasonable person would objectively conclude that the interrogating officer acted in such a way as to punish silence or provoke speech by changing the suspect's status quo to her detriment. Such an act should be considered an impermissible penalty.

The baseline is largely a function of the environment in which the interrogation takes place and the rights the parties are generally allowed in this setting. Imagine, for example, an ongoing interrogation of a suspect who has thus far refused to confess. The baseline would be very different if the interrogation takes place in the custodial environment of a police station as opposed to the private space of the suspect's home. If smoking is not allowed in the police station, a reasonable suspect's baseline in the interrogation includes the fact that she cannot smoke. If the suspect takes out a cigarette during this interrogation, and the officer promptly removes it from the suspect's mouth and says, "Smoking is not allowed here," the officer has not changed the suspect's baseline to her detriment. The officer has simply maintained the status quo. If the interrogation takes place in the suspect's home and the suspect is not in custody, however, the officer would have no legitimate basis to penalize the suspect by taking away her cigarette. This act would be a penalty because the suspect had the right to smoke in her own home before the officer began applying pressure. In other words, it sends the message that the suspect's exercise of her right to

307. The philosophical texts on which the analysis in this Section is based include ALAN WERTHEIMER, COERCION (1987); Robert Nozick, Coercion, *in* PHILOSOPHY, POLITICS AND SOCIETY 101 (Peter Laslett et al. eds., 1972); Thomas, *supra* note 265.

remain silent will become increasingly costly and, thus, the officer makes a claim of right to the suspect's confession.[308]

This example demonstrates that the baseline should be determined by analyzing the objective facts regarding the suspect's rights and conditions at the beginning of the interrogation. These facts would be drawn from rules, regulations, and custom. If a suspect has a right to use the restroom whenever she pleases, as would be the case in nearly any interrogation whether in custody or in the suspect's home, depriving the suspect of that right would be a penalty. If the suspect has the right to eat whenever she pleases, deprivation of food would likewise change the status quo to the suspect's detriment. If the suspect, however, is in a custodial environment where eating is allowed only at mealtimes, then depriving the suspect of food and informing her that she will have to wait until the next mealtime would not be a penalty. Physical violence, such as slapping a suspect, would always constitute a penalty, because there are no situations in which a police officer in this country is allowed to use physical violence when a suspect is not physically resisting but is merely refusing to talk.

Police departments cannot change the parties' baseline in custodial interrogations by merely changing the rules and customs regarding the conditions of custody so as to change the parties' baseline in custodial interrogations. For example, a police department cannot issue a new departmental regulation stating that all officers are free to torture suspects while in custody as outside constraints would prevent this from happening. Constitutional provisions such as the Fourth Amendment, the Eight

308. The Supreme Court has already fashioned a somewhat similar approach in the context of determining the voluntariness of a guilty plea in the plea bargaining context. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1977), for example, the Court held that a prosecutor's comment during plea bargaining that he would reindict the defendant on charges carrying a more severe penalty if the defendant did not plead guilty to the original charges did not render the resulting plea involuntary. *Id.* at 357. The Court emphasized that the prosecutor had sufficient evidence at the time he made this statement to bring the additional charges against the defendant. *Id.* at 359, 364. Thus, one could easily argue that the possibility of additional charges were already part of the defendant's status quo in that case, and the prosecutor was simply offering a positive benefit to the suspect (by reducing the universe of charges that he faced) rather than changing his status quo to his detriment. *See also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 287-88 (1998) (Ohio's clemency procedure, which requires an applicant to submit to an interview with the parole board, does not constitute compulsion because clemency is a benefit offered (a voluntary option) that the applicant is not required to seek). In *McKune v. Lile*, the respondent argued that the Court should adopt a "reward/penalty" distinction with a determined baseline to determine what constitutes a penalty in the context of prison administrative proceedings. *McKune*, 536 U.S. at 45-46; *see also supra* note 306. Justice Kennedy, writing for three other Justices in a plurality decision, rejected this approach, stating that the baseline theory would be unworkable in that context. *Id.* Justice Kennedy based his decision on the inevitable difficulties of determining the baseline of inmates in the prison context because it is subject to arbitrary "administrative factors beyond . . . the control" of prison officials. *Id.* at 46. Justice Kennedy's opinion in *McKune* does not set the baseline theory proffered in this Article against direct Supreme Court authority because Justice Kennedy's opinion in *McKune* is not a holding of the Court, and it can be distinguished as arising in the prison context. This Article asserts that the Court could and should create a workable baseline theory in the interrogation context.

Amendment's ban on cruel and unusual punishment, and the due process *Rochin* doctrine (prohibiting outrageous conduct)[309] will keep the baseline at levels comparable to what they are now. In other words, these provisions already regulate the conditions of custody and continue to ensure that police departments maintain reasonable rules and regulations that reflect parties' baseline expectations. In addition, societal pressure and the democratic process will prevent police departments from implementing such draconian conditions of custody. In the unlikely event that such measures fail to maintain a reasonable baseline, the courts can create a general rule establishing a reasonable baseline in custodial interrogation cases that individual police departments cannot circumvent through regulations or policy changes.[310]

The objective penalties test proposed herein is logically intuitive and would be much easier for police officers to apply in the field and judges to apply in courtrooms than the involuntary confession rule when determining the admissibility of confessions. When an interrogation take places in a non-custodial environment, such as a suspect's home or place of employment, and the facts are such that the Fourth Amendment does not allow for the officer to place the suspect under arrest or take her into custody, then the suspect has an absolute right to do whatever she pleases, including simply walking away or refusing to answer the officer's pointed questions. If the officer prohibits her from doing as she pleases in a manner that a reasonable person would conclude was done to punish silence or provoke speech, then the officer has imposed a penalty. This result is entirely consistent with the notion that the suspect has a right to remain silent and to not be penalized for doing so. In a custodial situation, however, the interrogating officer would usually already be aware of, or could easily discover, the objective facts that comprise the suspect's baseline.[311] Custodial

309. *See infra* notes 340-42 and accompanying text.

310. Admittedly, this objective penalty test might be problematic during interrogations of non-Americans abroad, such as those taking place at the current time in the "War on Terror." In these international interrogations, it is currently unclear if other constitutional provisions and international norms and customs apply, and it is thus unclear what rights a suspect enjoys as part of her baseline. At the present time, it is not apparent, and it is in fact doubtful, that non-American suspects being held and interrogated outside the United States are being given the benefit of existing standards, such as *Miranda* warnings and the due process involuntary confession rule. Thus, the difficulty in applying the objective penalties test to non-Americans abroad does not present a hurdle that is not already present under existing law. If the objective penalties test were employed domestically and it were later determined that non-Americans interrogated abroad are entitled to the same rights during an interrogation that those within the borders of the United States enjoy, the test could be modified for that limited context with the creation of a generic, reasonable baseline to be used in all international cases.

311. One might note that a suspect who is not in custody would have greater latitude during an interrogation than one who is in custody. Thus, under this test, the police would be able to apply greater pressure to a suspect against whom they have developed sufficient evidence to take into custody. This dichotomy comports with Kent Greenawalt's conception of morality, in which he argues that the amount of pressure that the police should be allowed to employ during an interrogation should relate to

rules are generally clear as to the rights of and restrictions on persons in custody. If difficulties occasionally arise in determining the baseline of an interrogation, however, these ambiguities would pale in comparison to an interrogator's task under the due process involuntary confession rule.[312]

### B. *Interrogation as an Objective Penalty: The Role of* Miranda *Warnings*

In light of the analysis above, it is not clear whether an interrogation itself constitutes an objective penalty in violation of the self-incrimination clause. On one hand, a law enforcement officer's act of simply asking a suspect a pointed question, such as, "Where were you at ten o'clock last night?" should not be considered a penalty or, at least, that the suspect is free to ignore this question, tune it out, and walk away. On the other hand, if the officer continues to ask questions, eventually a reasonable suspect would feel harassed and infer that her freedom of choice is now limited to some degree. She may think, "I must keep listening to these questions and providing answers the officer doesn't like—all of which is seriously disrupting what I otherwise want to do—unless I tell the officer what he wants to hear." The suspect's freedom of choice has been limited at this point to her detriment.[313] This restraint on freedom would be a penalty imposed by the officer in response to the suspect's exercise of her constitutional right to remain silent.

The solution to this dilemma would be to employ *Miranda*-type warnings at the outset of nearly all interrogations and to employ *Miranda*-type rules regarding when an officer must cut-off questioning after a suspect invokes her rights. Informing a suspect that she has the right to remain silent and cut off the interrogation would ensure that the interrogation itself does not become a penalty or, at least, the suspect can freely maintain her status quo when the interrogation starts to resemble a penalty. *Miranda* warnings would continue to be required under this theory as a prophylactic rule but based on a different theory. Rather than requiring *Miranda* warnings to dissipate the atmospheric pressure supposedly associated with the first question of any custodial interrogation, this theory would be based on the presence of a pending, concrete penalty and, thus, would be consistent with the theoretical underpinnings of the formal setting cases.[314] Rather

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the amount of evidence they have to show that the suspect has committed the crime in question. *See* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

312. *See supra* notes 8-26 and accompanying text.

313. George C. Thomas III has argued in like fashion that interrogation carries with it an implicit threat. Thomas, *supra* note 265, at 93. A police officer "implies that he will continue the interrogation if [the suspect] does not answer to his satisfaction." *Id.*

314. *See* discussion of *Dickerson supra* Part III.C. The penalty-based theory with respect to the *Miranda* warnings set forth in this Article finds support by analogy to the Court's reasoning in *Carter v. Kentucky*, 450 U.S. 288 (1981). In *Carter*, the Court held that a trial court must, upon request from

than focusing on intangible pressures that perhaps render *Miranda* inconsistent with the formal setting cases[315] and historical origins of the self-incrimination clause,[316] warnings would be required prophylactically to ensure that the interrogation itself does not become a penalty and to empower the suspect to maintain her baseline regarding her relationship with the law enforcement officer. Under this theory, *Miranda* warnings would be required at the outset of nearly all interrogations, not just the custodial type that create atmospheric pressure.[317] After *Miranda* warnings are provided and questioning begins, an interrogator would be required to stop all questioning when the suspect indicates that she is no longer willing to talk. This secondary rule is consistent with existing doctrine and would be required to ensure that the status quo is maintained.[318]

In addition, once a suspect has received and waived *Miranda* warnings, the interrogator would be prohibited from imposing any type of objective penalty on the suspect to provoke speech or punish silence. Imposing a penalty on a suspect for remaining silent would be seen as directly inconsistent with the substance of the *Miranda* warnings, and thus, would undo or trump the warnings themselves. In other words, unlike the presumption of voluntariness that currently arises with the voluntariness test once the suspect has received and waived the warnings,[319] the objective penalties test would apply full force throughout all interrogations. *Miranda* warnings would therefore be used in the objective penalties paradigm not simply to create a presumption in favor of the interrogator, as with the voluntariness test. Rather, the warnings would be used only to make sure that the basic act of interrogation—without any objective penalties imposed

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the defendant, instruct the jury not to draw an adverse inference against the defendant for his failure to testify in his defense. *Id.* at 301-02. The Court's rationale was that without such instruction, the jury might decide on its own to penalize the defendant in violation of the self-incrimination clause. *Id.* Thus, the Court required an instruction to the jury in order to avoid the imposition of a concrete penalty that is hypothetically pending in any criminal trial. Likewise, *Miranda* warnings would be employed under the objective penalties test to head-off a similar penalty that is pending at the start of any interrogation.

315. *See* discussion of *Dickerson supra* Part III.C.

316. *See supra* Part I.B.2.

317. *See supra* notes 233-63 and accompanying text. As with any prophylactic rule, exceptions could be made to make the rule workable in practice. For example, an exception could be made for on-the-scene interrogations in emergency situations when the interrogation is not prolonged. *See supra* notes 272-84 and accompanying text. In the alternative, *Miranda* warnings might not be required per se, but their application would be at the officer's discretion when he or she perceived the act of interrogation might begin to resemble a penalty. Because the officer who refrained from providing *Miranda* warnings in such a case would assume the risk that a court will later find that a penalty was imposed, the practice would certainly develop that officers would routinely provide *Miranda* warnings at the outset of almost any interrogation to be on the safe side. However, this flexible rule would free officers from having to provide the warning in certain circumstances where it is not practicable or where they intend to ask only a few questions without pressuring the suspect or changing the suspect's baseline in any way.

318. *See supra* notes 233-53 and accompanying text.

319. *See supra* notes 266-68 and accompanying text.

separate from and in addition to the act of interrogation itself—did not turn into a penalty in the manner described in this section. In other words, a suspect's waiver of the *Miranda* warnings would be seen only as an agreement to continue talking with the officer without having the interrogation itself amount to a penalty. Waiver would not be seen as an agreement that the officer may impose new and additional penalties on the suspect. In this way, the objective penalties test avoids one of the major problems with the voluntariness test and *Miranda* as currently implemented, which is that once the warnings are provided, courts offer little or no oversight of what goes on during interrogations.[320]

### C. *Extrinsic Threats: Distinguishing Threats from Offers*

Not all statements made by interrogators constitute penalties. Some statements may be threats while others may be offers. Threats, not offers, should be considered objective penalties. Philosophical literature extensively discusses the distinction between threats and offers and serves as the foundation for the central role this distinction plays in the objective penalties test that this Article advances. As stated above, determining a suspect's baseline regarding the objective conditions or rights of the environment in which the interrogation takes place, referred to here as "intrinsic facts," would not be a difficult task. Preexisting rules, regulations, and norms already define what rights the suspect enjoys and does not enjoy during an interrogation. For example, if an interrogator took away a suspect's cigarettes during an interrogation, the preexisting rules regarding smoking in the location where the suspect finds herself during the interrogation would determine the baseline and provide a ready answer to whether such conduct constitutes a penalty.

Some interrogators, however, may make threats that are unrelated to the suspect's conditions or rights during an interrogation. For example, an officer may hint to a suspect that he will bring charges against the suspect's husband if she does not confess. Or, in a similar vein, an officer may suggest that if a suspect does not confess, he will report information in his possession that suggests the suspect is neglectful of her children to the local child services department and have her children removed from her custody. These are "extrinsic facts" because they do not relate to the environment of the interrogation. The baseline for extrinsic facts is

320. *Id.* Under the objective penalties test, whether the *Miranda* warnings would be required in the same form and with the same substance that they are today is a question that will be addressed in a subsequent article by this author. In addition, this Article asserts that the self-incrimination clause would be self-executing under the objective penalties test and would not have to be affirmatively asserted by the suspect. *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420 (1984). This issue will also be addressed in a subsequent article by the author. Finally, the question of whether or not the *Miranda* waiver procedure in this context would be governed by a voluntariness test, or a penalties-based test, will be addressed in a subsequent article by the author.

typically not facially apparent from outside sources. For example, does the officer have the right to bring charges against the suspect's husband? Does the officer have the right to inform the local child services department of her neglectful conduct toward her children? By invoking such possible consequences, does the officer make a threat and change the baseline status quo to the suspect's detriment, or is the officer simply informing the suspect of unpleasant facts that are already part of the suspect's pre-existing baseline?

In both examples, many scenarios exist in which the officer would have a right to take the action in question. Indeed, the officer might have a duty to report neglectful conduct to the child services department. Allowing pre-existing rights of the officer to define the baseline for extrinsic facts, however, presents a difficulty not present with intrinsic facts. If an officer's rights were used as the baseline for extrinsic facts, clever interrogators could drum up a myriad of questionable tactics to improperly coerce suspects into confessing. Under such a scenario, interrogators could, as a matter of course, begin interrogations by stating: "If you do not confess, I am going to attempt to have your children removed from your custody, bring charges against your husband, inform your employer of everything bad I know about you, intensely investigate all of your friends and family to see if they've failed to pay all their taxes or committed any other illegal act, hold a press conference about the case, smear your name across the front page of the newspapers, etc." The officer could, in essence, threaten to end the suspect's life as she knows it, all of which he technically might have the right to do in a given case.

When considering whether an alleged threat tied to an extrinsic fact constitutes a penalty, therefore, one must make the vital distinction between statements by interrogators labeled as threats, which constitute penalties, and offers, which do not. When an officer threatens a suspect that he will have her children removed from her custody if she does not confess, is he threatening to impose a penalty? Or, on the other hand, is he making the following offer of a benefit that actually improves the suspect's status quo?: "If you confess, I'll cut you some slack and not have your children taken away from you, which is something I would otherwise do."

To distinguish threats from offers, an essay entitled *Coercion* by Harvard philosophy professor Robert Nozick,[321] and an article entitled *A Philosophical Account of Coerced Self-Incrimination* by Rutgers professor George C. Thomas III[322] are helpful starting points. Nozick, Thomas and others have discussed various theories by which one can semantically attempt to distinguish penalizing threats from non-penalizing offers. Each theory adopts a different source to determine the baseline, such as the

321. Nozick, *supra* note 307.
322. Thomas, *supra* note 265.

empirical/statistical baseline, the phenomenological baseline, and the normative/moral baseline.[323] While each of these theories are instructive to the task at hand, a detailed discussion of each would be a law review article in and of itself and is beyond the scope of this Article. The goal in this Article is to create a method for arriving at a new baseline for extrinsic facts, arising from the initial threat/offer distinction in the philosophical literature, which would have practical application in the interrogation rooms and courtrooms of America.

The proper baseline for extrinsic facts would be objective and would be based on actions of a reasonable police officer in the interrogator's situation. It would use reasonable law enforcement practices, customs, norms and societal expectations as the guidelines. The baseline would be determined by examining the external fact in question (for example, removing children from custody, bringing charges against husband) and making a judgment as to whether a reasonable police officer in the interrogator's situation would probably cause the fact in question to occur even if the suspect were not under interrogation and the officer did not desire a confession. If so, the fact was already part of the suspect's baseline when the interrogation began. By stating that this fact will *not* come to pass if the suspect confesses, the officer has offered the suspect a non-penalizing benefit. On the other hand, if a reasonable officer, based on reasonable law enforcement practices, norms, and customs and societal expectations, would probably *not* cause this fact to occur were it not for his desire to obtain a confession, the statement should be deemed a threat to violate the baseline to the suspect's detriment. The threat would thus impose an impermissible penalty.

For example, if an officer states that he will bring charges against the suspect's husband if she does not confess and it turns out that the police had insufficient evidence that the husband actually committed a crime, or if the alleged illegal activity occurred in the distant past and had heretofore been overlooked by the police in the exercise of their inherent discretion, a court can readily conclude that the statement was made as a threat. The baseline of the interrogation was that the husband would not be charged, and the officer threatened to violate the baseline to the suspect's detriment by invoking this extrinsic fact. If, however, the husband was an alleged accomplice of the suspect in the very crime for which the suspect is undergoing interrogation and sufficient evidence exists to bring charges against him as well, cutting a deal to overlook the husband's role in the offense should be seen as an offer.

Making the distinction between offers and threats would be relatively easy in many circumstances. Out-of-the-norm statements, such as an officer's statement that without a confession he will intensely investigate

323. *See generally id.* (discussing various baseline theories).

the suspect's friends and family to determine if they had evaded taxes, should easily be seen as a threat. Thus, the objective penalties test generally does a sound job of distinguishing between offers and threats with respect to out-of-the-norm statements by interrogating officers. This test would serve to curb flagrant penalties, which might theoretically be permissible in some circumstances under the due process involuntary confession rule.

One could criticize the extrinsic facts aspect of the objective penalties test on the basis that some comments made by interrogators may present closer calls and more difficult determinations. Two responses to such criticism are possible. First, the more difficult extrinsic fact determination would not arise that often. Common experience suggests that intrinsic facts are more often the subject of discussion during run-of-the-mill interrogations than extrinsic facts, and the objective penalties test can be applied with relative ease with respect to intrinsic facts. Thus, most cases would be decided easily. Second, even when a court is called upon to evaluate a threat or offer by an interrogator involving an extrinsic fact that is particularly tricky, the objective penalties test still provides the court more guidance than the current due process involuntary confession rule. The court would have the guidance of objective criteria grounded in common sense, such as societal expectations, norms, and reasonable law enforcement practices and customs. In contrast, a court's task under the due process involuntary confession rule requires the court to divine the subjective state of mind of the suspect based on an unlimited number of factors and without tethers to any objective criteria.[324]

Furthermore, the objective penalties test puts the law enforcement officer on notice that he will ultimately have the burden of proving, based on custom and past experience, that the occurrence of the extrinsic fact mentioned was a foregone conclusion and, thus, already part of the suspect's existing status quo at the start of the interrogation. If, for example, a law enforcement officer desires to obtain a confession by stating that the suspect's husband will not be charged with a crime if she confesses, the officer will know that he will later have to demonstrate that the evidence to charge the husband was available at the time of the interrogation. The officers will also know that he will have to demonstrate that the standard practices of a reasonable law enforcement officer indicate that the husband would have been charged even if the deal with the suspect had not been made. The universe of information that an officer must consider before making his decision is limited. This test, therefore, provides law enforcement with clearer guidelines as to their risks and what is at stake during an interrogation. In contrast, under the highly subjective due process involuntary confession rule, many facts that will later become important to the

324. *See supra* notes 8-20 and accompanying text.

admissibility of a confession, such as the suspect's education, psychological weaknesses, etc., are often completely unknown and unknowable to the police at the time of the interrogation, leaving law enforcement without bounds or guidelines of any sort.

The relative ease of applying the objective penalties test as compared to the due process involuntariness rule is best illustrated by imagining what instructions a supervising officer would give a new police officer before conducting an interrogation (putting aside any initial instructions regarding *Miranda* warnings). Under the existing due process involuntary confession rule, an officer might be told, "The law says you can't overbear the suspect's will. That probably means that you can't hit the suspect, but other than that, it is hard to say because the amount of pressure that will overbear the suspect's will depends on her psyche, strengths and weaknesses, and other subjective factors—most of which you won't know about and some of which could be subconscious or go all the way back to her childhood." In most cases, a new officer interrogating his first suspect would have no practical idea about what he can or cannot say or do to the suspect other than having a vague sense that too much pressure might be problematic. A particularly clever supervisor, however, might help out the new recruit by adding the following: "What I told you above is theoretical. In practice, once you give *Miranda* warnings, courts presume the confession will be voluntary, so you can sometimes get away with applying a lot of pressure as long as it is not really outrageous. So just go for it according to your instincts."[325]

Under an objective penalties test, on the other hand, interrogation instructions for a new officer would be more concrete and could be as follows:

> You obviously can't hit the suspect or use physical violence. You also can't take away any of her rights in a way that a judge might later think you were trying to get her to talk. If she has a right to smoke or eat or make unlimited phone calls or whatever in the place you're interrogating her, you've got to let her do it, because she has a right not to talk to you and taking away something she could otherwise do sends her the message that she doesn't really have a right to remain silent. So you can enforce whatever rules already apply, if any do, and tell her you're just enforcing those pre-existing rules, but you can't make up any new rules to get her to confess.
>
> Also, if you're going to offer her anything to get her to confess—like if this is a case where you would otherwise go to children's services and have her children removed from her custody, but you want to tell her that you won't do that if she

325. Regarding the point that courts tend to presume that confessions are voluntary if *Miranda* warnings have been provided, see *supra* notes 266-67 and accompanying text.

> cooperates—you better feel confident that you're really helping her out by making this offer. You will have to convince a judge later that a typical officer in your shoes would have referred the case to children's services even if he didn't want a confession, because the case called for it. You just offered to help her out—by making a good deal for her—to get a confession through bargaining. The thing you're offering her for a confession has to be a true concession on your part, so that you're making a fair deal with her that she can think about and consider, rather than coercing her with threats that you just drum up to get a confession.

An officer could distill this very simply as "no new rules" and "offers made to get a confession have to be real concessions and not drummed up or fake." These two guidelines are based in common sense and would be fairly easy for officers to understand and apply in the field. At a minimum, this test provides clearer guidelines than simply allowing officers to apply as much pressure and as many penalties as their instincts tell them they can get away with without rendering the confession involuntary. At an ensuing suppression hearing, the court would not be forced to make an "Alice in Wonderland journey into the metaphysical realm"[326] of freewill as it would today but rather would conduct two simple inquiries. First, the court would determine the parties' baseline regarding intrinsic facts based on the readily available conditions or rights of the interrogation. Second, the court would determine whether an interrogator who raises extrinsic facts to try to secure a confession makes a threat or an offer based on objective facts, norms, customs, and guidelines.

Regarding an extrinsic fact such as an officer's threat or offer that the suspect's children will not be taken away if she confesses, for example, the officer would testify at the hearing regarding whether the alleged offer in question fell within existing practices based on the facts of the case. The officer could perhaps cite to other cases with similar facts in which the officer in question referred the case to child services despite not seeking a confession. Either side could also, for example, call someone from the child services department as a witness to testify whether this case was one that the police would typically, in everyday practice, refer to them for further action. In the end, the court would make a common sense determination as to whether it believed the statement was really an offer or a threat. The prosecution, with the burden of proof, would have to carry the day to have the confession rendered admissible.

On a related point, it is a fairly universal practice in the United States that law enforcement officers do not have the authority to plea bargain with suspects regarding charging and sentencing issues during interrogations. Prosecutors ultimately decide what charges are to be brought against a

326. *See* Benner, *supra* note 4, at 116.

suspect and negotiate lenient sentences in the process of plea bargaining with defense counsel. It is not uncommon, however, for police officers to hint to a suspect that she might receive lenient treatment from the prosecutor if she confesses. A common phrase used by interrogators is, "If you talk, I will let the prosecutor know that you are cooperating."[327] Under the due process involuntary confession rule as it is currently applied, most courts hold that such suggestions of leniency alone do not render a confession involuntary.[328] The objective penalties test would reach the same result in these cases, as generic hints of leniency would typically be considered offers rather than threats.

If the objective penalties test was adopted, the test for alleged extrinsic threats would develop on a case-by-case basis, with a growing body of precedent making the test clearer and clearer as it evolved.[329] An important additional benefit that this test offers is the ability for courts to effectively monitor what occurs during interrogations after the *Miranda* warnings are given. Most courts today simply presume that any confession rendered after *Miranda* warnings were provided and waived was probably voluntary. There is, therefore, very little oversight of police conduct after the first few seconds of an interrogation.[330] The objective penalties test gives clearer guidelines as to how the police must behave after *Miranda* warnings are administered.

### *D. Psychological Pressures as Objective Penalties*

Interrogators frequently utilize a fair amount of psychological pressure to induce confessions and these confessions are often held admissible at trial.[331] For example, interrogators may use religion, raw emotion, tricks, or morality plays to guilt or fool a suspect into confessing. Does the employment of such tactics constitute a penalty?

Under the due process involuntary confession rule, psychological pressure is allowed as long as the suspect's will is not overborne—a test which, once again, provides little guidance. One could characterize psychological pressure as a penalty by asserting that it violates the baseline to the suspect's detriment. The theory would be that when such techniques are employed, the interrogator has caused the suspect's mood to change for the

327. *See, e.g.*, United States v. Harrison, 34 F.3d 886, 891 (9th Cir. 1994) (citing cases where courts held permissible comments by interrogators that they would let the prosecutor know that the suspect has cooperated).

328. *See, e.g., id.*

329. New legal standards are best developed and tested over time and on a case-by-case basis. This Article, therefore, makes no attempt to answer every question that could possibly arise concerning the application of the objective penalties test.

330. *See supra* notes 266-67 and accompanying text.

331. *See id.*

worse. This unwanted depression, guilt, or anxiety could be considered a penalty.

However, there are two reasons why only tangible, objectively identifiable violations of the suspect's baseline, such as those that have been discussed thus far in this Article, should constitute penalties. First, the formal setting cases suggest mere psychological pressure does not qualify as an impermissible penalty.[332] In the formal setting, trial defendants are routinely subjected to psychological pressure to testify.[333] When a crime victim takes the stand and tells her emotionally wrenching story about the defendant's alleged actions, the defendant sits in the courtroom and presumably feels the same sort of guilt and pressure that a talented interrogator could elicit in the interrogation room. In addition, it is not uncommon in opening or closing arguments for a prosecutor to point to the defendant and, with the jury and courtroom looking on, list the horrendous acts that the defendant committed.[334] Undoubtedly, defendants routinely feel powerful psychological pressure to speak at trial, none of which has ever been considered to violate the self-incrimination clause. It is only when the state solemnizes this pressure into a tangible and concrete penalty that the Court finds impermissible compulsion.[335]

Second, considering mere psychological pressure to be an objective penalty is undesirable on policy grounds. Intangible pressures such as guilt are nearly impossible to measure. Extending the category of penalties to include changes in mood or feelings caused by psychological pressure would create the same type of ambiguity and subjectivity that haunts the due process involuntary confession rule. Psychological pressures should, therefore, not be considered penalties. Pressures of this type are better suited for regulation under the due process clauses.

### *E. Filling in the Gaps: The Remaining Role of Due Process*

One might conclude that, in many ways, the objective penalties test proposed in this Article would have more of a restraining effect on police coercion than existing law. The current due process involuntary confession rule often allows many penalties to be imposed on suspects, all of which are inconsistent with the right to remain silent and thus would be impermissible under an objective penalties test. On the other hand, many coercive techniques that might render a confession involuntary would not be impermissible under the objective penalties test. For example,

332. *See supra* Part II.B.1, notes 215-19 and accompanying text.

333. *See id.*

334. Such comments during opening and closing statements were the standard practice in the United States Attorneys Office for the Southern District of New York when I practiced there as a prosecutor from 1996 to 2001. As a prosecutor in that office, I was taught that this was a particularly effective trial technique.

335. *See supra* Part II.B.1; *supra* notes 215-19 and accompanying text.

psychological pressure can sometimes render a confession involuntary but would not qualify as a penalty.[336] Likewise, an offer by a police officer that he will refrain from having the suspect's children removed from her custody if she confesses might sometimes render a confession involuntary, but the same statement may not be a penalty if it is determined to be an offer rather than a threat.[337]

To bridge this gap, existing due process doctrines should serve to buttress the court's confession analysis where the objective penalties test falls short. The initial use of *Miranda* warnings should stem from a compulsion analysis informed by the objective penalties test rather than the amorphous voluntariness analysis employed today. When analyzing an interrogation after *Miranda* warnings are given and questioning ensues, the interrogator's conduct should be analyzed to determine if an objective penalty was imposed by the interrogator to provoke speech or punish silence. If so, the resulting confession should be suppressed. However, if implemented, the objective penalties test should be supplemented by existing due process doctrines as back-up doctrines to the objective penalties test. Two distinct ways exist by which this could occur.

First, the objective penalties test could be applied as the first tier of analysis under the self-incrimination clause. The current voluntariness test could be applied as a secondary and complementary due process doctrine. Under such a system, a confession that survived the objective penalties test would still be inadmissible if the confession was involuntarily made. The due process involuntary confession rule would typically only need to be invoked as the back-up test in cases where psychological pressures or tricks were applied to the suspect in a way that rendered the confession involuntary or where a non-penalizing offer was made to the suspect that overbore the suspect's will. The example provided *supra*, of an interrogator offering not to report the suspect to children's services if she confesses, is a perfect example of a situation in which the involuntary confession rule may render a confession inadmissible where the objective penalties test may not (such a statement would pass the objective penalties test only in a case where it was a true beneficial offer to the suspect and thus not a penalty, as discussed *supra*).

This first alternative would be better than existing doctrine, because it would interject the long-ignored requirements of the self-incrimination clause into confession law. As an overlay first-step doctrine, the objective penalties test would provide greater guidance to officers than current law and would also empower courts to monitor what goes on during interrogations after *Miranda* warnings have been given and waived. The obvious problem with this approach, however, is that it fails to completely rid

336. *See supra* notes 331-35 and accompanying text.

337. *See supra* notes 321-327 and accompanying text.

confession law of the problematic voluntariness doctrine this Article seeks to debunk.

A second, more desirable alternative is to rid confession law of the involuntary confessions rule altogether. The objective penalties test would then be the sole constitutional confession doctrine, flanked by two existing due process doctrines.

The first supplementary doctrine is the due process right to a fair trial.[338] A confession that passes the objective penalties test may be so unreliable that its admission would result in an unfair trial. Such a confession would be suppressed under this due process doctrine. Clearly, certain non-penalizing offers that would not violate the objective penalties test might result in confessions that were quite unreliable and unfairly prejudicial to a defendant at trial if admitted. For example, many parents might falsely confess to a crime to avoid having a police officer report them to children's services and have the custody of their children stripped away. For this doctrine to supplement the objective penalties test, however, the much-criticized case of *Colorado v. Connelly* would have to be overruled and the law on this issue would have to be restored to its pre-*Connelly* state.[339]

The second supplementary due process doctrine would be the *Rochin* doctrine.[340] If an interrogating officer managed to engage in conduct that "shocks the conscience"[341] without imposing a penalty, such as employing extreme psychological pressure or outrageous tricks, a court could suppress the confession. Again, neither of these supplementary doctrines would be confession doctrines per se. Both would apply in a variety of circumstances beyond the interrogation context.[342] But the use of both doctrines would nicely complement the objective penalties test by curbing police conduct that manages to escape the objective penalties test but is nonetheless offensive or highly coercive.

## CONCLUSION

The involuntary confession rule is perhaps the most criticized doctrine in all of criminal procedure. With a doctrine that is so troubling and problematic, one might rationally assume that the Court has never parted ways with it because it is required by the Bill of Rights, and the Court has no choice but to suffer through it. Or, one might rationally assume that the

338. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 273 n.6 (1994) (compiling cases that establish due process right to a fair trial).

339. 479 U.S. 157 (1986). *Connelly* has been roundly criticized in the scholarly literature. *See* Godsey, *supra* note 192, at 889-92 (discussing the scholarly criticisms of *Connelly*); *see also* Herman, *supra* note 122, at 517 (discussing how the *Connelly* decision was at odds with prior case law).

340. This doctrine derives from a Supreme Court case, *California v. Rochin*, 342 U.S. 165 (1952).

341. *Id.* at 172.

342. *See supra* notes 338-41 and accompanying text.

doctrine has survived through time because no better alternative exists. Neither of these assumptions is accurate.

In adhering to the voluntariness test, the Court has betrayed the text, historical origins, and policies of the self-incrimination clause. These sources demonstrate that a more consistent and theoretically satisfying test for confession admissibility would be an objective analysis of the conduct of the interrogator in question. These sources reveal that the proper test for confession admissibility should be based on the concept of compulsion, found within the text of the self-incrimination clause. These sources, coupled with interpretations of the self-incrimination clause outside of the interrogation context, indicate that the proper test for compulsion is an objective penalties test. This test would hold any confession inadmissible when it has been obtained by imposing an objective penalty on the suspect under interrogation to provoke speech or punish silence.

As demonstrated in this Article, the objective penalties test would be substantially easier to apply in the interrogation rooms and courtrooms of America than the current involuntary confession rule. Not only is it a more practical and workable test than the standard that current doctrine provides, but it brings text, history, precedent, and policy into harmony with one another in a comprehensive new theory of constitutional confession law.