2003

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Recommended Citation

Michael Avery, You Have a Right to Remain Silent, 30 Fordham Urb. L.J. 571 (2002). Available at: https://ir.lawnet.fordham.edu/ulj/vol30/iss2/5

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Cover Page Footnote
The Author appreciates the advice of Professor Susan Klein, University of Texas Law School with respect to Fifth Amendment issues and the assistance of his colleague Professor Marie Ashe. The assistance of the Deans of Suffolk Law School with summer writing stipends made this work possible.

This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol30/iss2/5
YOU HAVE A RIGHT TO REMAIN SILENT

Michael Avery*

INTRODUCTION

Everyone who watches television knows that when someone is arrested, the police have to “Mirandize” the suspect by reading his rights to him and that one of those rights is the “right to remain silent.” The general public also knows that the suspect has the right to see a lawyer. Of course, in crime dramas these rights are often violated, but no one questions that they exist. As we also know, however, truth is often stranger than fiction; hence, the question of whether a person in police custody really does have the right to remain silent is now before the United States Supreme Court.

The Supreme Court will decide in the October 2002, term whether there is a cause of action under 42 U.S.C. § 1983 based on a coercive police interrogation of a suspect in custody who has not been given Miranda warnings. The Court granted certiorari, and will review the Ninth Circuit’s holding in Martinez v. City of Ox-

* Associate Professor, Suffolk Law School; B.A., Yale College; LL.B., Yale Law School. The Author appreciates the advice of Professor Susan Klein, University of Texas Law School with respect to Fifth Amendment issues and the assistance of his colleague Professor Marie Ashe. The assistance of the Deans of Suffolk Law School with summer writing stipends made this work possible. The Author assisted in the preparation of the amicus brief for the National Police Accountability Project of the National Lawyers Guild and the National Black Police Association in Chavez v. Martinez, No. 01-1444 in the United States Supreme Court.

2. Chief Justice Rehnquist noted in Dickerson v. United States, 530 U.S. 428, 443 (2000), that “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”
3. The statute provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. Martinez v. Chavez, 270 F.3d 852 (9th Cir. 2001), cert. granted, 122 S. Ct. 2326 (June 3, 2002) (No. 01-1444).
that the plaintiff in that case did allege actionable claims under the Fifth and Fourteenth Amendments on the basis of such police conduct. The issue raised in Martinez has been the subject of several lower federal court decisions and has caused considerable confusion in those cases. The facts and procedural history of Martinez establish a basis for analysis of the nature and scope of the constitutional rights of the suspect in custody who is subjected to coercive interrogation methods.

On November 28, 1997, Oliverio Martinez was shot five times during an altercation with Oxnard, California police officers. He was arrested and taken to a hospital emergency room. One bullet rendered Martinez blind, having damaged his optic nerve; another fractured a vertebra, paralyzing his legs. Three additional bullets passed through his leg around the knee joint. The injuries were life-threatening, and Martinez drifted in and out of consciousness during medical treatment.

Without first reciting the Miranda warnings, police Sergeant Ben Chavez questioned Martinez while he was receiving treatment in the emergency room. Medical staff asked Chavez to leave the room several times, but each time he returned and resumed his questioning. Chavez tape-recorded the questioning, which amounted to ten minutes over a forty-five minute period. The court of appeals noted that Chavez "pressed Martinez with persistent, directed questions regarding the events leading up the shooting." Based on the tape recording of the questioning, the District Court concluded that "[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Cha-
vez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." The sergeant stopped attempting to question Martinez only when hospital staff moved him out of the emergency room for a C.A.T. scan.

While most of Martinez's responses to Chavez's questions were non-responsive and consisted of complaints of pain and expressions of belief that he was dying, the court of appeals concluded that Martinez did "utter statements that the plaintiff could reasonably believe might be used in a criminal prosecution or lead to evidence that might be so used." The statements, however, were not, in fact, introduced against Martinez in any criminal proceeding. The question presented by the case, then, is whether a suspect's constitutional rights are violated by the conduct of police during a coercive interrogation, or are violated only in the event that an incriminating statement is taken and introduced against him in a trial or other criminal proceeding.

There are three potential claims that a custodial suspect who has been subjected to coercive interrogation might make. First, such police conduct might be considered to violate the suspect's Fifth Amendment right not to be compelled to incriminate himself. Second, it could be argued that such police overreaching violates a suspect's Fourteenth Amendment due process right not to make involuntary statements. Third, it might be argued that this form of police abuse constitutes a substantive due process violation under the Fourteenth Amendment as a result of police abuse that "shocks the conscience." In Martinez, the Ninth Circuit found that the plaintiff had alleged viable Fifth Amendment and Fourteenth Amendment involuntariness claims on the basis of police coercion of a potentially incriminating statement. The court also held that a reasonable officer would have known that his conduct under the circumstances

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16. Id.
17. Id.
18. Id.
19. Id. at 857.
20. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.
22. The Court recently reaffirmed that substantive due process protects against some forms of police misconduct in County of Sacramento v. Lewis, 523 U.S. 833, 855 (1998).
23. Martinez, 270 F.3d at 856-57.
violated these clearly established constitutional rights. For these reasons the Ninth Circuit affirmed the District Court's denial of the sergeant's motion for summary judgment based on the doctrine of qualified immunity.\(^2\)

Chavez argues in the Supreme Court that neither the Fifth Amendment nor the Fourteenth Amendment protects the right of a person in police custody to be free from interrogation methods that coerce an involuntary statement.\(^2\) Chavez argues that the only protection these rights provide is protection from the introduction of involuntary statements in evidence at a criminal trial. He argues that the only right that protects a suspect in custody during interrogation is a limited Fourteenth Amendment right to be free from practices that violate substantive due process by shocking the conscience.\(^2\) Chavez contends that there is no consti-

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\(^2\) Id. at 858. With respect to qualified immunity, see Anderson v. Creighton, 483 U.S. 635 (1987); Michael Avery et al., Police Misconduct: Law and Litigation ch. 3 (2002).

\(^2\) Brief for Petitioner at 7-8, Chavez v. Martinez, 122 S. Ct. 2326 (2002) (No. 01-1444). Petitioner Chavez is supported by amicus briefs filed by the United States, the State of California, the Criminal Justice Legal Foundation, the National Association of Police Organizations, and fifty California cities. Respondent Martinez is also supported by several amici, including the National Police Accountability Project of the National Lawyers Guild, the National Black Police Association, the American Civil Liberties Union ("ACLU"), and the California Attorneys for Criminal Justice ("CACJ").

\(^2\) Brief for Petitioner at 8, Martinez (No. 01-1444). If the only remedy available is a substantive due process claim, the circumstances under which constitutional violations will be found will be dramatically narrowed because of the necessity of demonstrating that the police conduct was "shocking to the conscience." This standard of proof originated in Rochin v. California, 342 U.S. 165 (1952), where the Supreme Court held that the forced stomach pumping of a suspect was shocking to the conscience and a violation of substantive due process rights. Id. at 172. In Lewis, the Court affirmed that there is a cause of action under § 1983 for substantive due process violations, and that to constitute this constitutional violation the conduct in question must be shocking to the conscience. Lewis, 523 U.S. at 833. The Court acknowledged, however, that there is "no calibrated yard stick" to measure what is conscience shocking. Id. at 847. The Court noted that proof of negligence is never sufficient to meet this standard of liability, while proof of "conduct intended to injure in some way unjustifiable by any government interest" would be most likely to meet the standard. Id. at 848-49. The Court held that for police officers to be held liable for injuries caused during a high-speed pursuit, a plaintiff must prove that the officers acted with intent to harm the plaintiff. Id. at 853-54. This is a test that can seldom be met, and its adoption means that persons injured during high-speed police chases have a cause of action against the police in theory, but not in practice. The stringency of this standard of proof is demonstrated by the fact that the Court in Lewis acknowledged that plaintiff's claim that the officers acted with "a reckless disregard for life" was not sufficient to establish a violation. Id. at 854. Under the Lewis analysis, defining the level of culpability required to meet the shocks the conscience standard is not simple, and depends upon the governmental interests asserted to justify an official's actions.

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tutionally protected right to remain silent when questioned by police or other government officials other than during questioning that takes place at a criminal proceeding.\(^{27}\)

The thesis of this Article is that coercive police interrogation by itself causes a constitutional violation that should be actionable pursuant to § 1983. It argues that the Fifth and Fourteenth Amendments do protect an individual in police custody from coercive interrogation, because the constitutional right not to incriminate oneself is a substantive right.\(^{28}\) This right is not merely a “trial right” that may be invoked only during criminal proceedings. Nor is the right limited to extreme cases where police abuse shocks the conscience. Recognition that there is a cause of action under § 1983 for damages caused by violations of this right is crucially important for deterrence of police misconduct.

In Part I, this Article examines United States Supreme Court case law that supports the argument that the “right to remain silent” is substantive and expansive. It provides an overview of cases that have established that the Fifth and Fourteenth Amendments are violated whenever state officials coerce from a person a statement that has a tendency to incriminate him. It also discusses cases that demonstrate the existence of a “right to remain silent” that applies in a broader range of circumstances than criminal proceedings.

Part II considers a variety of holdings and dicta that, if misconstrued, might be read as contradicting the Article’s thesis. It includes a review of Supreme Court decisions that have focused on and whether the government actor has time for deliberation before acting, or is required to engage in rapid decision-making. The Court has not had an occasion to determine what level of culpability would meet the standard in a coercive interrogation case, or to canvass what governmental interests might justify extracting an involuntary statement from a suspect. (It should be noted that in New York v. Quarles, 467 U.S. 649 (1984), the Court did recognize a “public safety” exception to the requirement that Miranda warnings be given before a suspect’s answers may be admitted into evidence. Id. at 655-56.) If the Court were to employ the “intent to harm” standard adopted in Lewis, it might be argued that an officer who intentionally coerces an involuntary statement from a suspect possesses the requisite intent to harm. On the other hand, given that the Court has not determined what governmental interests it might deem adequate to justify such conduct, whether any meaningful remedy would be provided by a substantive due process cause of action is speculative.

\(^{27}\) Brief for Petitioner at 13, Martinez (No. 01-1444).

\(^{28}\) The thesis of this Article is in complete disagreement with Professor Steven Clymer’s argument regarding the Fifth Amendment. See Steven D. Clymer, Are Police Free to Disregard Miranda?, 112 YALE L.J. 447, 449-50 (2002). Clymer takes the position that the government can violate the Fifth Amendment only when a compelled statement is introduced in evidence in a criminal case. Id. at 450. He has concluded that, “the Fifth Amendment privilege is simply an exclusionary rule.” Id.

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\(^{27}\) Brief for Petitioner at 13, Martinez (No. 01-1444).

\(^{28}\) The thesis of this Article is in complete disagreement with Professor Steven Clymer’s argument regarding the Fifth Amendment. See Steven D. Clymer, Are Police Free to Disregard Miranda?, 112 YALE L.J. 447, 449-50 (2002). Clymer takes the position that the government can violate the Fifth Amendment only when a compelled statement is introduced in evidence in a criminal case. Id. at 450. He has concluded that, “the Fifth Amendment privilege is simply an exclusionary rule.” Id.
the text of the Fifth Amendment and discusses the holding and dicta in United States v. Verdugo-Urquidez. It concludes that these decisions do not require reading the self-incrimination clause as applicable only to statements compelled or introduced during trial. This Part also includes an examination of cases exploring the implications of the governmental right to compel testimony by offering immunity, which cases prompt the conclusion that governmental power does not contradict—but in fact presupposes—the existence of a substantive “right to remain silent.”

Part III presents a review of § 1983 decisions from the courts of appeals and demonstrates that the confusion and contradiction evident in these decisions establish a need for the Supreme Court to reaffirm in a clear voice that there is a meaningful constitutionally protected and enforceable “right to remain silent.”

The Article concludes that recognition of a remedy under § 1983 for coercive interrogation practices is essential to safeguard the constitutionally protected right to remain silent.

I. THE FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST GOVERNMENTAL COERCION OF SELF-INCRIMINATORY STATEMENTS: UNITED STATES SUPREME COURT CASES

A review of Supreme Court authority demonstrates that both the Fifth Amendment protection against self-incrimination and the Fourteenth Amendment due process protection against coerced involuntary statements establish constitutional rights that may be violated during interrogation. The argument that these rights may be violated only during trial proceedings is not supported by the case law.

A. History of Fifth Amendment Protections

In Bram v. United States, in the late nineteenth century, the Supreme Court held that in federal prosecutions the Fifth Amendment requires that an involuntary statement taken from a suspect in custody must be excluded from evidence. The Court traced at length the development, before and after the adoption of the Fifth Amendment, of the proscription against involuntary confessions in England and in American courts. The Court indicated that it had

30. 168 U.S. 532 (1897) (holding inadmissible a statement by the defendant to the police on the ground that it was not voluntary).
31. Id. at 543-57.
found the English experience singularly instructive, because the Fifth Amendment had:

contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.\textsuperscript{32}

The Court's historical discussion in \textit{Bram} points to common law decisions in England in the early 19th century that established that the privilege against self-incrimination included a right to remain silent during interrogation. The Court noted that even where a magistrate's examination of a prisoner was conducted without prior administration of an oath, the examination could not be introduced in evidence unless the accused "was made to understand that it was optional with him to make a statement."\textsuperscript{33} Indeed, an early English form of "\textit{Miranda}" warnings was required by statute:

The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."\textsuperscript{34}

The \textit{Bram} Court explained, writing in 1897, that English history subsequent to the American Revolution is also important for understanding the scope of Fifth Amendment protection, because, in pertinent respects, the rule as to confessions by an accused "is in England today what it was prior to and at the adoption of the Fifth Amendment."\textsuperscript{35}

In \textit{Brown v. Mississippi},\textsuperscript{36} in 1936, the Supreme Court held that in state prosecutions the Fourteenth Amendment due process clause requires that an involuntary statement taken from a suspect in custody must be excluded from evidence. The Court condemned

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 544.
\item \textsuperscript{33} \textit{Id.} at 550 (citing Reg. v. Arnold, 8 Car. & P. 621 (1838); Rex. v. Green, 5 Car. & P. 322 (1833)).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 557.
\item \textsuperscript{36} 297 U.S. 278 (1936). The case involved the hanging and whipping of African-American defendants to secure confessions.
\end{itemize}
the methods used to coerce confessions from the defendants in harsh language that evoked the historical abuses that led to the adoption of the Fifth Amendment.\textsuperscript{37} In 2000, in \textit{Dickerson v. United States}, the Supreme Court noted the continuing applicability of the due process voluntariness test of \textit{Brown} and its progeny, and the requirement of the exclusion of confessions that were obtained involuntarily.\textsuperscript{38} Due process is violated where a defendant's will is overborne by the circumstances surrounding the giving of a confession.\textsuperscript{39} The test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."\textsuperscript{40}

In \textit{Malloy v. Hogan},\textsuperscript{41} in 1964, the Supreme Court held that the Fifth Amendment's Self-Incrimination Clause was incorporated in the Due Process Clause of the Fourteenth Amendment and applies to the states. The decision requires that states observe 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."\textsuperscript{42} \textit{Miranda} followed immediately on the heels of \textit{Malloy}. Between the \textit{Brown} decision in 1936, and the decision in \textit{Escobedo v. Illinois}\textsuperscript{43} in 1964, the Court had reviewed some thirty voluntaryness cases under the totality of the circumstances test.\textsuperscript{44} In \textit{Miranda}, the Court recognized that there was "coercion inherent in custodial interrogation," and it therefore established "concrete constitutional guidelines for law enforcement agencies and courts to follow."\textsuperscript{45}

\textsuperscript{37} \textit{Id.} at 285-86.

Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand . . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

\textit{Id.}

\textsuperscript{38} \textit{Dickerson v. United States}, 530 U.S. 428, 434 (2000). In \textit{Dickerson}, the Court reviewed the history of Supreme Court protection of the right against compulsory self-incrimination. \textit{Id.} at 433-35.

\textsuperscript{39} \textit{Id.} at 434.

\textsuperscript{40} \textit{Id.} (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

\textsuperscript{41} 378 U.S. 1 (1964).

\textsuperscript{42} \textit{Id.} at 8.

\textsuperscript{43} 378 U.S. 478 (1964).

\textsuperscript{44} \textit{Dickerson}, 530 U.S. at 434.

\textsuperscript{45} \textit{Id.} at 435 (citing Miranda v. Arizona, 384 U.S. 436, 439, 442 (1966)).
B. The “Penalty” Cases

Contemporaneous with the Supreme Court’s struggle with the need to find an effective mechanism for securing the right to remain silent during custodial interrogation, a series of cases was making its way to the Court which would establish that the right to remain silent enjoys constitutional protection in other settings as well. In these cases, the Court established that the government may not impose certain non-criminal penalties against those who refuse to make statements which could incriminate them in independent criminal proceedings. Just three years after the Malloy decision, the Court decided Spevack v. Klein, where an attorney declined to answer questions and furnish records during a state bar disciplinary proceeding on self-incrimination grounds and was disbarred. The Supreme Court held that he could not be disbarred for exercising his Fifth Amendment rights, squarely resting the decision on the recognition of the right to remain silent in Malloy v. Hogan.

The Court reached a similar result in Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of New York. In that case, city workers had been dismissed after refusing to answer questions concerning not charging and misappropriating fees, on the ground that their answers might incriminate them. The Court held that they were entitled to sue for reinstatement. In so doing, the Court declared that the workers had been “entitled to remain silent” during their employment hearings where their answers to questions could have been used to prosecute them criminally.

Additionally, in Lefkowitz v. Turley, the Court struck down as unconstitutional a statute that cancelled existing contracts and precluded future awards of government contracts to any person who refused to answer questions concerning a contract with the state. The Court held that such answers could not be compelled, absent a grant of immunity from prosecution, by imposing the penalty of

46. 385 U.S. 511 (1967).
47. Id. at 513.
48. Id. at 514.
50. Id. at 281-82.
51. Id. at 285.
52. Id. at 284.
54. Id. at 84-85.
disqualification from government contracting. And, in Lefkowitz v. Cunningham, the Court held that a political party officer could not be removed from his position by the state and barred from holding party or public office because he had refused to waive his privilege against self-incrimination. Again, the Court made clear that the Fifth Amendment is violated at the moment when the statement is compelled: "When a state compels testimony by threatening to inflict potent sanctions unless the constitutional privilege against self-incrimination is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution."

In each of these cases, the Supreme Court might have ruled that no Fifth Amendment constitutional violation had occurred because the person questioned had made no statement, and no statement had been introduced against him in a criminal proceeding. If the Fifth Amendment were only a "trial right" there would be no constitutional justification for relief in these cases where no trial had commenced. The Court did not take that path, however, but instead held, as the Court characterized it in Minnesota v. Murphy, that "the state could not constitutionally make good on its prior threat" to impose a penalty for the assertion of the Fifth Amendment privilege.

Most recently, in McKune v. Lile, the Court again reiterated that state actions that compel incriminating statements violate the

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55. The Court reasoned that the result was compelled by the 1924 case of McCarthy v. Arndstein, 266 U.S. 34 (1924) and concluded:

The [Fifth] 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.

Turley, 414 U.S. at 77.


57. Id. at 809.

58. Id. at 805 (emphasis added).

59. Minnesota v. Murphy, 465 U.S. 420, 434 (1984). The lack of any "trial right" limitation on enforcing the Fifth Amendment's protection against self-incrimination is also demonstrated by the holding in Pillsbury Co. v. Conboy, 459 U.S. 248 (1983), that a judge may not hold a nonparty deponent in contempt for asserting the Fifth Amendment in a civil deposition. Id. at 263. The party seeking to hold the witness in contempt had argued that the questions and expected answers tracked the witness's prior immunized grand jury testimony, and that the privilege did not apply. Id. at 255. The Court held that there was no duly authorized assurance of immunity for the deposition testimony, and that the witness could not be compelled to answer deposition questions to which he asserted the Fifth Amendment privilege. Id. at 263.

Constitution and may be enjoined. The *McKune* plaintiff claimed that the Kansas sexual offender treatment program violated his Fifth Amendment right against self-incrimination by requiring him to admit his responsibility for a rape for which he had been convicted, and by requiring that he provide to program officials a detailed sexual history. Pursuant to the relevant Kansas statute, statements made by a prisoner to comply with this requirement were not privileged and the prisoner was not offered immunity in connection with his answers. At the same time, the failure to provide the requested information would result in the loss of privileges. The Court began its inquiry by noting that if the program amounted to compulsion, it would have to be terminated in its extant form.

*McKune* is also significant because of its reasoning that the plaintiff's status as a convicted prisoner would have to be taken into account in determining whether the penalty imposed for refusing to provide the requested information would render any statements "compelled." This indicates the Court's recognition that the constitutional violation takes place at the time a statement is compelled, rather than at some later time when the statement might be used against a defendant in possible criminal proceedings. The Court stressed the significance and singularity of imprisonment, emphasizing that "a convicted felon's life in prison differs from that of an ordinary citizen," and that "lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's privilege against self-incrimination."

C. Involuntariness Cases

Any argument that Fourteenth Amendment due process rights are violated only if an involuntary confession is introduced at trial is sharply at odds with the development of the involuntariness doc-

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61. *Id.* at 2024.
62. *Id.* at 2023.
63. *Id.*
64. *Id.*
65. "So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form . . . ." *Id.* at 2025. The Court also noted that because the federal sex offender treatment program was similar to that of Kansas, if the challenge to the Kansas program were sustained, "the constitutionality of the federal program would be cast into serious doubt." *Id.* at 2031.
66. *Id.* at 2026.
67. *Id.* at 2027.
The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. 69

Similarly, in *Haynes v. Washington*, 70 the Court explicitly declared that the methods employed by police to coerce a written confession might themselves be—and in the particular case were—"constitutionally impermissible":

[T]he coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. 71

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68. 360 U.S. 315 (1959). The Court held that a confession from a man who had been questioned for eight hours during which his requests to see his attorney were denied was involuntary. *Id.* at 323-24. Despite his consistent refusal to answer any questions, the police eventually obtained a confession when the defendant's friend on the police force falsely told defendant that the defendant's prior communication to him was getting him in trouble, that he was worried that he would lose his job, and that he was concerned about his pregnant wife and children. *Id.* at 319.

69. *Id.* at 320-21.

70. 373 U.S. 503 (1963). The defendant was held incommunicado for several hours and told that he would not be able to call his wife until after he made a written confession. *Id.* at 504.

71. *Id.* at 519. The Court also cited its earlier opinion in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), to the same effect:

Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.
 Indeed, the Court discussed in some detail the need to determine which methods of police interrogation violate the Constitution and which do not:

We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects . . . And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. But we cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated. We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded. 72

It is clear from this passage that the defendant’s constitutional due process rights were violated precisely by the interrogation methods employed by the police, not merely by the later introduction of the confession into evidence.

D. The Right to Remain Silent

In Miranda, the Supreme Court reaffirmed Bram and Malloy, again holding that the privilege against self-incrimination is applicable at the stationhouse. 73 The Court held, “[t]oday, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” 74 The most familiar legacy of Miranda, of course, is the requirement that police officers must advise suspects prior to interrogation that,

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74. Id.
“You have a right to remain silent.”75 For thirty-six years, countless officers have advised countless Americans at the specific direction of the Supreme Court that this is a right they possess.

Thus, the argument being advanced by Chavez in the Supreme Court, that the Fifth and Fourteenth Amendments, except for extreme cases that “shock the conscience,” apply only at trial, cannot be accepted without concluding that the suspect in the stationhouse in fact has no “right” to remain silent. A more appropriate warning by police officers, were the Supreme Court to conclude that the right to remain silent did not exist prior to trial, would be something like:

There is a risk that anything you say to us might be introduced into evidence at trial. At that time you will have an opportunity to try to convince a judge that any statements you made to us were involuntary. But regardless of what happens at trial, you don’t have a right not to answer our questions. And as long as we have a sufficient governmental interest in compelling an involuntary statement from you, we can make you talk, unless we do anything that is so brutal and degrading that it is shocking to the conscience.

In assessing whether law enforcement officers were, in effect, ordered by the Supreme Court in 1966 to mislead the American public about the nature of their rights, it is important to remember that the “right to remain silent” did not originate in Miranda, but that Miranda clarified a well established right. The right to remain silent had been recognized many times by the Supreme Court prior to the decision in Miranda. For example, in Escobedo v. State of Illinois,76 the Court referred to the suspect’s “absolute right to remain silent” in the face of police accusations.77 Prior to Miranda, the Supreme Court assumed that an educated person would know of her right to remain silent, even in the absence of any police warning concerning the right.78 As noted above, in making the Fifth Amendment applicable to the states in Malloy v. Hogan, the Supreme Court explicitly required that the state actors respect the right to remain silent.79 The Miranda opinion itself explained that the need to warn suspects that they have a right to remain silent

75. Id. at 444.
77. Id. at 485; see Culombe v. Connecticut, 367 U.S. 568, 631 (1961).
78. Crooker v. California, 357 U.S. 433, 440 (1958) (referring to “a voluntary confession by a college-educated man with law school training who knew of his right to keep silent.”).
was essential so that suspects would have a simple awareness of a pre-existing Fifth Amendment privilege that could be exercised by remaining silent:

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. . . . Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.⁸⁰

This last sentence of this passage also makes clear that the interrogators are not only required to advise the suspect of her rights, but also are constitutionally required to honor those rights. Both the constitutional right of a suspect in custody to remain silent and the obligation of the police to honor this right were reaffirmed by Chief Justice Rehnquist's opinion for the Supreme Court in Dickerson: "Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored."⁸¹ The Court described these procedures as necessary to meet the "constitutional minimum."⁸²

The right to remain silent also encompasses the right to initiate silence, as Miranda made clear in recognizing that one in custody has the right to stop answering questions at any time:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.⁸³

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⁸². *Id.* Clymer asserts that such language from the *Miranda* opinion merely "describes the new rules as if they are commands to police." *See Clymer, supra* note 28, at 484. This is sophistry. His conclusion depends upon reading the portions of the opinion that laid down the requirements that officers must follow during custodial interrogation as though they were all "prefaced with the words: 'In order to obtain an admissible statement . . . .'" *Id.* at 485. The *Miranda* opinion is not written in this fashion, and if it were, it would defeat a principal purpose of the opinion, which was to provide clear, unambiguous, and mandatory guidelines for police to follow in conducting custodial interrogations.
The Court has repeatedly reaffirmed this right.\textsuperscript{84} The Supreme Court has consistently described the Fifth Amendment privilege as including a right to remain silent, regardless of the context in which it is exercised. For example, it is clear that a criminal defendant has a "right to remain silent" during a psychiatric interview arranged by the state in connection with determining future dangerousness as a factor bearing on the imposition of the death penalty.\textsuperscript{85} In \textit{Estelle v. Smith}, the Court held not merely that unwarned statements taken from a prisoner cannot be introduced in evidence against him—it made clear that a defendant may not be compelled to answer a psychiatrist's questions: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, \textit{may not be compelled to respond to a psychiatrist} if his statements can be used against him at a capital sentencing proceeding."\textsuperscript{86} The Court has repeatedly characterized this interest as "the right to remain silent."\textsuperscript{87}

In a completely different context, the Fifth Amendment protects a public employee's "right to remain silent" in response to questions put to her by her employer where the answer might lead to a

\begin{itemize}
  \item \textsuperscript{84} The brief of the ACLU and CACJ in \textit{Chavez v. Martinez} includes the following string of citations for this proposition:
    \begin{itemize}
      \item \textit{Davis v. United States}, 512 U.S. 452, 458 (1994) ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); \textit{McNeil v. Wisconsin}, 501 U.S. 171, 176-77 (1991) ("Once a suspect asserts the right [to counsel], . . . the current interrogation [must] cease."); \textit{Minnick v. Mississippi}, 498 U.S. 146, 153 (1990) ("[W]hen counsel is requested, interrogation must cease."); \textit{Arizona v. Roberson}, 486 U.S. 675, 682 (1988) ("[A]fter a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'") (quoting \textit{Edwards v. Arizona}, 451 U.S. 477, 484-85 (1980); \textit{Connecticut v. Barrett}, 479 U.S. 523, 528 (1987) ("[O]nce the accused 'states that he wants an attorney, the interrogation must cease.'") (quoting \textit{Miranda}, 384 U.S. at 474; \textit{Edwards}, 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease.'") (quoting \textit{Miranda}, 384 U.S. at 474); \textit{Rhode Island v. Innis}, 446 U.S. 291, 293 (1980) ("In \textit{Miranda [ ],} the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.") (citation deleted); \textit{Fare v. Michael C.}, 442 U.S. 707, 719 (1979) ("[A]n accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); \textit{Miranda}, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.") (footnote omitted).
  \item \textit{Brief for ACLU at 6-7, Chavez v. Martinez, 122 S. Ct. 2326 (2002) (No. 01-1444).}
  \item \textit{Id.} at 468 (emphasis added).
\end{itemize}
YOU HAVE A RIGHT TO REMAIN SILENT

As Chief Justice Rehnquist recently noted for a unanimous Court in LaChance v. Erickson, "If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent." 90

E. The Right to Remain Silent as a Liberty Interest

The right to remain silent in the face of police inquiries is a liberty interest both "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition." 91 In addition to Fifth Amendment protection, it is secured by the Fourth Amendment's limits on the ability of the police to seize an individual. Prior to the point at which an individual is taken into custody, the right to remain silent is secured by a combination of Fourth and Fifth Amendment protections. Thus, it is well established that a person approached by a police officer on the street need not answer questions posed by the officer. As Justice White wrote in Terry v. Ohio:

I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. 92

88. For a discussion of the penalty cases, see supra notes 49-58 and accompanying text.
90. Id. at 267 (emphasis added).
91. In Chavez, the Petitioner argues that the right to remain silent does not satisfy these familiar tests from Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), and Moore v. East Cleveland, 431 U.S. 494, 503 (1977), of what constitutes a liberty interest. Indeed, Petitioner goes so far as to argue that, "[w]hat is deeply rooted in this [Nation's] tradition is not the right to be silent in the face of police questioning, but instead the duty to respond to those questions." Brief for Petitioner at 31, Martinez (No. 01-1444).
Justice White’s observation in *Terry* was frequently adopted in later opinions. In *Davis v. Mississippi*, the Court referred to “the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.” Further, in *Brown v. Texas*, the Supreme Court held unconstitutional a Texas statute that made it a crime to refuse to identify one’s self to a police officer where the defendant was detained without the reasonable suspicion required for an investigative detention under *Terry*.

The Constitution recognizes a right to remain silent because the coercion used to evoke self-incriminating statements—whether or not the coercion is effective—is itself odious in a free society. The United States Supreme Court has long recognized this principle. In the late nineteenth century, for example, in *Boyd v. United States*, the Court quoted Lord Camden’s opinion from the eighteenth century British case *Entick v. Carrington* as follows: “It is very certain that the law obliges no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust...”

The United States Supreme Court emphasized the values underlying the Fifth Amendment in *Murphy v. Waterfront Commission of New York Harbor*, where it declared that the privilege against self-incrimination reflects:

many of our fundamental values and most noble aspirations: ... our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance

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95. *Id.* at 727 n.6.


97. 116 U.S. 616 (1886).


99. *Boyd*, 116 U.S. at 629. The Court further remarked, “The principles laid down in this opinion affect the very essence of constitutional liberty and security.” *Id.* at 630.

by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."¹⁰¹

In *Miranda*, the Court stressed that the Fifth Amendment is designed to protect human dignity:

We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.¹⁰²

Recognition of the values underlying the Fifth Amendment demonstrates that coercive interrogation in itself causes injuries that the constitutional protection is intended to safeguard against. Coercive interrogation, even in the absence of physical violence, and even when it does not elicit statements later used in criminal proceedings, subjects suspects to inquisitorial methods, fear of inhumane treatment, degradation of individual personality, invasion of privacy, humiliation, and mental and emotional stress and suffering. Section 1983 provides a remedy for precisely such harms when they have been caused by constitutional violations.¹⁰³

II. POTENTIAL OBJECTIONS TO THE EXISTENCE OF A RIGHT TO REMAIN SILENT

A. Text of the Fifth Amendment

Some advocates of limiting the protections of the Fifth Amendment to the exclusion of evidence from trials rely on the text of the Amendment for their argument. The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." Viewed most narrowly this language might be taken to mean only that a defendant could not be compelled to take the witness stand in her criminal trial. Given the exclusionary rule, however, it would be hard to argue for this extreme view. It has been argued, however, that the text of the amendment compels the conclusion that where the subject of a police interview is not forced to testify in a criminal proceeding against her, and none of her statements are introduced in any such proceeding; there can be no violation of the Fifth Amendment.

The Supreme Court has explored to what extent the text of the Fifth Amendment limits its reach. In Pennsylvania v. Muniz, for example, in 1990, the Court made clear that a person is a "witness against himself" when he provides the state with evidence of a "communicative nature," and that application of the amendment is not limited to testimony that takes place in a courtroom:

The Self-Incrimination Clause of the Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." Although the text does not delineate the ways in which a person might be made a "witness against himself," we have long held that the privilege does not protect a suspect from being compelled by the State to produce "real or
physical evidence.” Rather, the privilege “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a “witness” against himself.”

In *Miranda v. Arizona*, we reaffirmed our previous understanding that the privilege against self-incrimination protects individuals not only from legal compulsion to testify in a criminal courtroom but also from “informal compulsion exerted by law-enforcement officers during in-custody questioning.”

The Court specifically held that custodial interrogation presents a situation in which “self-incrimination” may be coerced, i.e., where a suspect may be compelled to be a “witness against himself”:

Because the privilege was designed primarily to prevent “a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality,” it is evident that a suspect is “compelled . . . to be a witness against himself” at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns.

Repeating language from *Miranda*, the Court concluded that despite the differences between courtroom testimony and custodial interrogation, “[w]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning.”

The *Muniz* Court relied heavily on its earlier opinion in *Schmerber v. California*, where it had held that there was no Fifth Amendment right not to have blood taken over an arrestee’s ob-

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107. *Id.* at 588-89 (footnote and citations omitted). This portion of the Court’s opinion, written by Justice Brennan, was joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O’Connor, Scalia, and Kennedy.

108. *Id.* at 596 (footnote and citation omitted). This portion of Justice Brennan’s opinion was joined by Justices Marshall, O’Connor, Scalia, and Kennedy. The trilemma is the “cruel trilemma of self-accusation, perjury or contempt,” cited in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), as an evil against which the Fifth Amendment was intended to safeguard.


jection while he was a patient in a hospital after an automobile accident.\textsuperscript{111} In \textit{Schmerber}, the Court described the scope of the constitutional privilege with respect to communications in the broadest possible terms: “It is clear that the protection of the privilege reaches an accused’s communications, \textit{whatever form they might take}, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one’s papers.”\textsuperscript{112} \textit{Schmerber} distinguished between impermissible compulsion of “‘communications’ or ‘testimony’” and permissible compelling of a suspect to submit to physical examinations.\textsuperscript{113} Even with this distinction, however, the Court emphasized the breadth of the bar on compulsion of any form of communication when it suggested that compelling a suspect to participate in a polygraph examination might violate Fifth Amendment rights.\textsuperscript{114}

\textbf{B. Dictum in \textit{United States v. Verdugo-Urquidez}}\textsuperscript{115}

The Supreme Court suggested that the Fifth Amendment establishes a trial right and bestows no constitutional protection during custodial police questioning in dictum in \textit{United States v. Verdugo-Urquidez}.\textsuperscript{116} In that case, the Court stated that the Fifth Amendment right “\ldots is a right which is properly asserted only during trial and only by defendants in a criminal proceeding.”\textsuperscript{117} To the extent that \textit{Verdugo-Urquidez} suggests that the Fifth Amendment does not establish any rights to be free from compelled self-incrimination other than at trial or in criminal proceedings, it is dictum inconsistent with the historic teachings of the Court’s Fifth Amend-

\begin{footnotesize}
\begin{itemize}
\item 111. \textit{Id.} at 764.
\item 113. \textit{Schmerber}, 384 U.S. at 764.
\item 114. The Court reasoned:

\begin{quote}
Some tests seemingly directed to obtain “physical evidence,” for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege “is as broad as the mischief against which it seeks to guard.”
\end{quote}

\textit{Id.}
\item 115. 494 U.S. 259 (1990).
\item 116. \textit{Id.} at 264.
\item 117. \textit{Id.}
\end{itemize}
\end{footnotesize}
ment jurisprudence and with specific other decisions of the Court considering the same issue.

In Verdugo-Urquidez, the government obtained an arrest warrant for Verdugo-Urquidez, a Mexican citizen and resident believed to be a leader of an organization that smuggles narcotics into the United States.\textsuperscript{118} He was apprehended by Mexican police and transported to the United States where he was arrested by federal police.\textsuperscript{119} Following his arrest, Drug Enforcement Administration ("DEA") agents, working in cooperation with Mexican officials, without a warrant, searched his Mexican residences and seized certain documents.\textsuperscript{120} The District Court granted the defendant's motion to suppress the evidence and the court of appeals affirmed.\textsuperscript{121} The Supreme Court defined the issue to be decided: "The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."\textsuperscript{122}

The holding of Verdugo-Urquidez was limited solely to the facts of the search in Mexico, the Fourth Amendment, and the rights of aliens.\textsuperscript{123} It was stated as follows:

We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.\textsuperscript{124}

The Court in Verdugo-Urquidez discussed whether the defendant's Fourth Amendment rights were violated only by the illegal search, or also by introduction of illegally seized evidence at trial.\textsuperscript{125} The Court concluded that the exclusionary rule, which bars illegally seized evidence from trial, is "a remedial question separate from the existence vel non of the constitutional violation."\textsuperscript{126} Thus,

\begin{itemize}
\item \textsuperscript{118} Id. at 262.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 263.
\item \textsuperscript{122} Id. at 261.
\item \textsuperscript{123} Id. at 264.
\item \textsuperscript{124} Id. at 274-75.
\item \textsuperscript{125} Id. at 265-75.
\item \textsuperscript{126} Id. at 264.
\end{itemize}
the Court concluded, “if there were a constitutional violation, it occurred solely in Mexico.”

For the sake of illustration, the Court contrasted the Fourth Amendment with the Fifth Amendment, observing that in the case of Fifth Amendment violations, a violation clearly occurs at trial if a coerced statement is introduced in evidence. It should be noted, however, that the Court had no occasion to consider, even for the purpose of the comparison it was making, whether a Fifth Amendment violation can occur prior to trial. Further, the Verdugo-Urquidez dictum seems to contradict earlier Supreme Court characterization of coercive interrogation itself as constituting a Fifth Amendment violation.

In *Dunaway v. New York*, in particular, the prosecution had argued that even if the defendant had been seized without probable cause, a statement he made during an ensuing interrogation would be admissible if he had received *Miranda* warnings. The Supreme Court, however, held that an independent Fourth Amendment analysis would be required, reasoning:

> [A]lthough a confession after proper *Miranda* warnings may be found “voluntary” for purposes of the Fifth Amendment, this type of “voluntariness” is merely a “threshold requirement” for Fourth Amendment analysis. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

Given the discussion of a potential Fourth Amendment violation here, it is clear that the Fifth Amendment violation referred to is a violation constituted by the interrogation itself.

### C. Implications of Immunity

It has been suggested by lower federal courts that the ability of the government to compel testimony by offering immunity from future prosecution from an unwilling witness who has asserted the Fifth Amendment privilege, implies that there is no constitutional bar to compelling testimony. What the Supreme Court has actu-

127. *Id.*
129. *Id.* at 205.
130. *Id.* at 217 (footnote and citations omitted).
131. *See*, e.g., *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990) (“As the use immunity cases show, the government may require a suspect to speak, so long as it does not use the results against him.”), *rev'd on other grounds*, 502 U.S. 801 (1991); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (“The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so ex-
ally held in *Kastigar v. United States*,\(^{132}\) is that immunity in exchange for testimony is constitutional if the grant of immunity affords protection commensurate with that afforded by the privilege against compulsory self-incrimination.\(^{133}\)

There is a substantial distinction between compelling testimony through judicial grants of immunity, made in public proceedings in proceedings affording a witness procedural due process rights, including the right to be represented by counsel and to appeal any perceived irregularities, and coercing statements in the back rooms of police stations under circumstances where the suspect has been denied the right to see his attorney. The existence of the former recognizes, as *Kastigar* noted, quoting Justice Frankfurter, that immunity statutes have "become part of our constitutional fabric."\(^{134}\) The latter is simply a lawless abuse of authority by police officers.

In *United States v. Balsys*,\(^{135}\) the United States Supreme Court held that the Fifth Amendment protection against self-incrimination does not apply when the only prosecution feared is prosecution that might occur in a foreign country.\(^{136}\) Thus, the Court, in evaluating whether there was any prospect that a subpoenaed witness's testimony could be used in a "criminal case," limited the reach of that term in the Fifth Amendment to prosecution by the government whose power the clause limits.\(^{137}\)

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\(^{132}\) 406 U.S. 441 (1972).

\(^{133}\) *Id.* at 462. The Court noted in *Kastigar* that immunity statutes "have historical roots deep in Anglo-American jurisprudence," indeed, predating the adoption of the Fifth Amendment. *Id.* at 445 n.13.

\(^{134}\) *Id.* at 447 (quoting *Ullmann v. United States*, 350 U.S. 422, 438 (1956)).

\(^{135}\) 524 U.S. 666 (1998). The case involved enforcement of an administrative subpoena by the Office of Special Investigations for testimony from an immigrant who was suspected of having been a Nazi war criminal. *Id.* at 669. He had claimed the privilege against self-incrimination, based on fear of prosecution in foreign countries. *Id.*

\(^{136}\) *Id.* at 693.

\(^{137}\) *Id.* at 673-74. The Court further explained that the Fifth Amendment privilege also requires exclusion from state prosecutions of statements compelled by the federal government, and exclusion from federal prosecutions of statements compelled by state officials. *Id.* This is a consequence of the Court's decisions in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 77-78 (1964), where the Court held that the Fifth Amendment prohibited using state testimony or its fruits to obtain a federal conviction, and *Malloy v. Hogan*, 378 U.S. 1, 12 (1964), where the Court held
In its discussion of *Murphy*, the *Balsys* Court explained the nature of the government's power to offer immunity in exchange for testimony that would otherwise be protected by the Fifth Amendment privilege:

[U]nder the Self-Incrimination Clause, the government has an option to exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony. The only condition on the government when it decides to offer immunity in place of the privilege to stay silent is the requirement to provide an immunity as broad as the privilege itself.\(^\text{138}\)

*Murphy* achieved this required breadth by imposing an exclusionary rule prohibiting the federal use of testimony compelled by a state in the absence of a statute effectively providing for federal immunity.\(^\text{139}\)

Justice Souter's opinion for the *Balsys* Court makes clear that this judicially created immunity is not the primary vehicle for enforcing the Fifth Amendment, but is only a “fail-safe” device “to ensure that compelled testimony is not admitted in a criminal proceeding” in the absence of a previous grant of immunity.\(^\text{140}\) The Court explained:

The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity “would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee.”\(^\text{141}\)

It should be noted that this portion of Justice Souter's opinion was joined by all the Justices except for Justices Ginsburg and

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139. The exclusionary rule operates in both state and federal jurisdictions—“After *Murphy*, the immunity option open to the Executive Branch could be exercised only on the understanding that the state and federal jurisdictions were as one, with a federally mandated exclusionary rule filling the space between the limits of state immunity statutes and the scope of the privilege.” *Id.* at 683.
140. *Id.* at 683 n.8.
141. *Id.* (citations omitted).
Breyer, who dissented, taking a broader view of the protection afforded by the Fifth Amendment.

Thus, *Balsys* makes clear that the constitutionality of compelling testimony on the basis of a grant of immunity does not mean that the Fifth Amendment privilege is a "trial right" only. Clearly the "right to remain silent" is protected by the Fifth Amendment prior to and at the time of any government attempt to compel or coerce a statement. Like other constitutional rights, however, it is not absolute and the government, at its election, may "exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony."142 The *Balsys* characterization of the exclusionary rule as a "fail-safe" device in immunity cases is entirely inconsistent with the proposition that the Fifth Amendment is a right that exists only at trial. In cases in which immunity is granted to a witness with exposure to criminal charges, her exercise of the right to remain silent has taken place prior to the grant of immunity and, in the ordinary course, it is precisely the exercise of that right that triggers the government's interest in exercising its option to "offer immunity in place of the privilege to stay silent."143 Indeed, the assertion of a motion to suppress in connection with trial testimony has been explicitly described by the Court as offering inadequate protection, by itself, to protect the Fifth Amendment privilege.144

*United States v. Doe*145 is another major United States Supreme Court case that undermines the argument that the Constitution does not bar the compulsion of testimony. In *Doe*, the Court ad-

142. Id. at 682.

143. Id. Most grand jury witnesses appear before the grand jury in response to a subpoena and exercise their right to remain silent, if they choose to do so, in response to specific questions posed before the grand jury. The government then makes a grant of immunity (which may necessitate obtaining permission from higher-ranking prosecutors), and brings the witness back for a subsequent appearance before the grand jury.

144. It is true that in a later portion of the opinion, Justice Souter does refer in a "cf." reference, to dictum from *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), that a Fifth Amendment "violation occurs only at trial." *Balsys*, 524 U.S. at 692 n.12. That language from *Verdugo-Urquidez* is, however, inconsistent with the conclusion on the next page of the opinion in *Balsys* that although the Constitution does not guarantee protection of "personal testimonial inviolability," it does provide "a conditional protection of testimonial privacy subject to basics limits recognized before the framing and refined through immunity doctrine in the intervening years." *Id.* at 692-93 (footnote omitted). The footnote reference makes clear that the "basic limits recognized before the framing" refer to the "practice of exchanging silence for immunity . . . apparently as old as the Fifth Amendment itself." *Id.* at 692 n.13, 693.

addressed the question of whether the Fifth Amendment protects the contents of an individual's tax and business records in his possession. The taxpayer's argument in *Doe*, that private books and papers were protected by the Fifth Amendment, was based on the Court's opinion in *Boyd v. United States*. The taxpayer argued in *Doe* that "the Fifth Amendment should be read as creating a 'zone of privacy which protects an individual and his personal records from compelled production.'" One response to this argument might have been that obtaining the papers by subpoena would not violate the Fifth Amendment, and that only their introduction into evidence in a criminal proceeding against the individual would do so. The Court, however, did not make this argument and did not discuss it. It held, rather, that the records were not protected by the Fifth Amendment because the individual had prepared them voluntarily. The distinction drawn was not a distinction between giving a person's information to the government and the use of the information against him at trial; the distinction was perceived to be the difference between information voluntarily generated by an individual and information compelled from him by the state.

The *Doe* Court, moreover, affirmed the holding of the district court that the act of producing the documents to the government was privileged under the Fifth Amendment—"the act of producing the documents would involve testimonial self-incrimination." The Court declined to create a doctrine of constructive "use immunity," pursuant to which the government would not have been able to use the incriminatory aspects of the act of production against the person claiming the privilege. In the discussion of that point, the Court compared the application of the exclusionary rule on coerced statements with the proposed constructive "use immunity." In so doing, the Court made clear that the exclusionary rule operates to suppress statements resulting from Fifth Amendment violations that have already occurred:

146. *Id.* at 606.
147. 116 U.S. 616, 633 (1886).
149. *Id.* at 610.
150. The Court concluded: "Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. . . . We therefore hold that the contents of those records are not privileged." *Id.* at 611-12 (footnotes omitted).
151. *Id.* at 613.
152. *Id.* at 616.
Of course, courts generally suppress compelled, incriminating testimony that results from a violation of a witness's Fifth Amendment rights. The difference between that situation and the Government's theory of constructive use immunity is that in the latter it is the grant of judicially enforceable use immunity that compels the witness to testify. In the former situation, exclusion of the witness' testimony is used to deter the government from future violations of witnesses' Fifth Amendment rights.\textsuperscript{153}

\section*{D. Exceptions to the Miranda Protections}

There are important United States Supreme Court decisions recognizing exceptions to Miranda's warnings requirements. Although statements taken in violation of the rights protected by Miranda warnings may not be introduced in the state's case-in-chief in a criminal trial, in \textit{Harris v. New York}\textsuperscript{154} and \textit{Oregon v. Hass},\textsuperscript{155} the Court held that the state may offer such statements to impeach a defendant who testifies and contradicts statements made during interrogation.\textsuperscript{156} In addition, in \textit{Michigan v. Tucker},\textsuperscript{157} the Court held that \textit{Miranda} does not require the suppression of the testimony of a witness whose identity the police have learned from a statement taken in violation of \textit{Miranda}.\textsuperscript{158} Further, in \textit{Oregon v. Elstad},\textsuperscript{159} the Court held that a statement given after proper \textit{Miranda} warnings need not be suppressed as the "fruit" of a prior statement made during interrogation without warnings.\textsuperscript{160}

These cases do not compel the conclusion, however, that there is no constitutionally protected right to remain silent. This line of authority, as well as the Supreme Court's frequent references to the \textit{Miranda} warnings as "prophylactic," and "not themselves rights protected by the Constitution,"\textsuperscript{161} was relied upon by the court of appeals in \textit{Dickerson} in support of the conclusion that the

\begin{itemize}
\item \textsuperscript{153} Id. at 611 n.16 (citations omitted).
\item \textsuperscript{154} 401 U.S. 222 (1971).
\item \textsuperscript{155} 420 U.S. 714 (1975).
\item \textsuperscript{156} \textit{Hass}, 420 U.S. at 723; \textit{Harris}, 401 U.S. at 226.
\item \textsuperscript{157} 417 U.S. 433 (1974).
\item \textsuperscript{158} Id. at 451.
\item \textsuperscript{159} 470 U.S. 298 (1984).
\item \textsuperscript{160} Id. at 307.
\end{itemize}
protections announced in *Miranda* are not constitutionally required.\footnote{162. United States v. Dickerson, 166 F.3d 667, 687-90 (4th Cir. 1999).} The Supreme Court in *Dickerson*, however, rejected the argument that these cases implied that the protections provided by *Miranda* are not constitutionally required.\footnote{163. The Court’s conclusion was based “first and foremost” on the fact that *Miranda* applied the rule it announced to proceedings in state courts, which could not be done unless there was a constitutional basis for the rule. *Id.* at 688. The Court also noted that *Miranda* claims may be raised on habeas corpus, which is only available when one is held in custody in violation of the Constitution. *Dickerson*, 530 U.S. at 438-39.}

In so doing, the Court relied upon numerous references in the *Miranda* opinion to the constitutional basis for the decision. The first such reference highlighted by the Court clearly indicates that the constitutional rights secured by the decision apply to interrogation itself:

In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. Indeed, the Court’s ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* “were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.”\footnote{164. *Dickerson*, 530 U.S. at 439-40 (quoting *Miranda* v. Arizona, 384 U.S. 436, 491 (1966)) (footnotes omitted) (emphasis added). The *Dickerson* Court also cited *Butler* v. *McKellar*, 494 U.S. 407, 411 (1990), for the proposition that demonstrating that the Fifth Amendment applies during interrogation: “[T]he Fifth Amendment bars police-initiated interrogation following a suspect’s request for counsel in the context of a separate investigation.” *Dickerson*, 530 U.S. at 440 n.5.}

The *Dickerson* Court concluded that the decisions limiting the reach of *Miranda* did not demonstrate that it was not a constitutional rule, but merely “that no constitutional rule is immutable.”\footnote{165. *Dickerson*, 530 U.S. at 441.} The Court reasoned that the modifications in the *Miranda* rule were made in later decisions as a normal part of constitutional law.\footnote{166. The Court’s analysis of this point, as has been noted by Charles Weisselberg, was “fairly unsatisfying.” Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1133 (2001). Nonetheless, Weisselberg concludes that “Dickerson should put to rest the claim that *Miranda*’s procedures are merely nonconstitutional suggested guidelines.” *Id.* at 1134.} The argument that there is no constitutionally protected right to remain silent, however, calls for more than a modification of the *Miranda* protections. Eliminating the right to remain silent would not merely modify the constitutionally based prophylactic
rule designed to protect the right, but would gut the content of the Fifth Amendment guarantee itself.

III. Section 1983 and the Right to Remain Silent—
Decisions from the Courts of Appeals

A. Circuit Court Decisions

What have the Courts of Appeals concluded with respect to whether coercing a statement from a person in custody is actionable under § 1983? While there is some lack of agreement about the precise nature of the right violated, a majority of the circuits (the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits) have held that coercing an involuntary statement is a constitutional violation for which damages may be awarded under § 1983.167 In addition, the D.C. Circuit has declared that a Fifth Amendment constitutional violation takes place at the time of interrogation.168

There is substantial agreement among the Courts of Appeals that forcing a person in custody to make an involuntary statement violates the due process clause of the Fourteenth Amendment. None of the courts of appeals have held that a Fourteenth Amendment due process violation based on a coerced statement does not take place until the statement is offered into evidence.

The Second Circuit held, in Weaver v. Brenner,169 that obtaining an involuntary confession was a due process violation actionable under § 1983.170 The court concluded that it had been clearly established in 1963 that the violation occurred at the time of the interrogation: "[T]he constitutional violation is complete when the offending official behavior occurs, and the refusal to admit at trial statements made as a result of coercion is merely a corrective way in which a court penalizes conduct that violates the Constitution."171 The court noted that it employed the Fourteenth Amendment due process clause because the Supreme Court has continued to analyze coercive interrogation techniques under it, despite having held that the Fifth Amendment privilege against self-incrimination-

167. For an analysis of cases from these circuits, see infra notes 169-206 and accompanying text.
169. 40 F.3d 527 (2d Cir. 1994).
170. Id. at 536.
tion applies to the states. The Second Circuit affirmed, in *Deshawn E. v. Safir*, that Fourteenth Amendment due process rights are violated by coercive interrogation itself: “A *Miranda* violation that amounts to actual coercion based on outrageous government misconduct is a deprivation of a constitutional right that can be the basis for a § 1983 suit . . . even when a confession is not used against the declarant in any fashion.”

The Fourth Circuit, in *Gray v. Spillman*, held that there is a cause of action for a coerced confession by referring to both the Fifth and Fourteenth Amendments without analyzing the basis for locating the violation in either amendment. Here, the court of appeals reversed the district court, which had dismissed because the plaintiff had not suffered any serious injury. The Fourth Circuit concluded:

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172. The court defined the test under the due process as “whether the suspect’s statements were made voluntarily, which depends upon examining all of the circumstances surrounding the interrogation to see if police overreaching overcame a suspect’s will and led to an involuntary confession, one not freely given.” *Weaver*, 40 F.3d at 536.

173. 156 F.3d 340 (2d Cir. 1998).

174. *Id.* at 348 (emphasis added). Without explicitly stating that it was making any change in the *Weaver* definition of the violation, the court concluded:

The due process clause of the Fourteenth Amendment prohibits self-incrimination based on fear, torture, or any other type of coercion . . . . The question in each case is whether the conduct of “law enforcement officials was such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined.” . . . The challenged conduct must be the “kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.” *Id.* (citations omitted). The court found that the interrogations of juveniles by police officers when the juveniles appeared in family court were not so coercive as to amount to due process violations. *Id.* at 348-49. The court relied on the fact that the juveniles were not detained for a long period of time or subjected to prolonged questioning, they were not left alone with the police, but had their parent or guardian present, there was no evidence that people were questioned in a weakened physical condition, nor that they were physically coerced or deprived, or emotionally and psychologically overwhelmed. *Id.*

175. 925 F.2d 90 (4th Cir. 1991). Plaintiff claimed that officers beat him during two custodial interrogations. *Id.* Plaintiff’s specific allegations were that he was handcuffed to a chair with the cuffs so tightly that his hands swelled, that his request for an attorney was denied, that he was kept in a room for several hours without food, water, and cigarettes, that he was not allowed to use the restroom, that his face was shoved into a wall, injuring his lip and knocking loose three teeth, that the officers made racist remarks and threatened to “beat the hell” out of him, that they kicked his foot, and that because of this, he eventually did make an incriminating statement. *Id.* at 90-91.

176. *Id.* at 93.

177. *Id.* at 91.
It has long been held that beating and threatening a person in the course of custodial interrogation violates the Fifth and Fourteenth amendments of the Constitution. The suggestion that an interrogee's constitutional rights are transgressed only if he suffers physical injury demonstrates a fundamental misconception of the [F]ifth and [F]ourteenth [A]mendments, indeed, if not our system of criminal justice.\(^{178}\)

The court further specified that proof of physical violence is not necessary to establish a constitutional violation, and that psychological coercion would be sufficient for a § 1983 claim.\(^{179}\)

The Fifth Circuit has held that, at least where physical force is used during interrogation, the plaintiff has a cause of action under § 1983. In *Lewis v. Brautigam*,\(^{180}\) the Fifth Circuit reversed the dismissal of a § 1983 cause of action, holding that "law officers who exact confessions by violence can be held civilly liable."\(^{181}\) Significantly, in *Lewis*, there had been no allegation of physical violence, but rather the claim was that the plaintiff had been removed from the county jail and sent to the state prison while awaiting trial, where he was questioned daily for hours at a time and threatened,

\(^{178}\) *Id.* at 93 (citations omitted). The court relied on *Adamson v. California*, 332 U.S. 46, 54 (1947), and *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). In *Riley v. Dornton*, 115 F.3d 1159 (4th Cir. 1997) (en banc), the court found that the plaintiff had no cause of action because no "interrogation" had taken place. *Id.* at 1165-66. The five dissenting judges would have found an interrogation, and went on to reaffirm *Gray* on the ground that there is a due process "right to be free from physical violence and coercion during custodial interrogation." *Id.* at 1169.

\(^{179}\) *Gray*, 925 F.2d at 94. The principle that physical violence is not required to violate the rule against coerced self-incrimination is long-standing. In *Bram v. United States*, 168 U.S. 532, 547-48 (1897), the Supreme Court explained that this was the "well-settled nature of the rule in England at the time of the adoption of the constitution and of the Fifth Amendment."

Looking at the doctrine as thus established, it would seem plainly to be deductible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession as voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create.

*Id.*

\(^{180}\) 227 F.2d 124 (5th Cir. 1955).

\(^{181}\) *Id.* at 128.
until he agreed to plead guilty to murder. In Ware v. Reed, the court held that the trial court had incorrectly instructed the jury that officers could not use "excessive or unreasonable" force during an interrogation. The court of appeals concluded that "during interrogation no physical force is constitutionally permissible." The court continued:

We are firmly of the view that the use of physical violence against a person who is in the presence of the police for custodial interrogation, who poses no threat to their safety or that of others, and who does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified, is a constitutional violation.

The Seventh Circuit has recognized that coercive police interrogation may give rise to a § 1983 claim under the Fourteenth Amendment Due Process Clause. Thus, in Duncan v. Nelson, the court specifically held that where a plaintiff can show that he suffered damages (other than a later conviction) from an interrogation and confession, he would have a cause of action under § 1983 to recover for them. The court analyzed the problem as a due process violation:

182. Id. at 126-27.
183. 709 F.2d 345 (5th Cir. 1983).
184. Id. at 353.
185. Id. at 351.
186. Id.
187. 466 F.2d 939 (7th Cir. 1972). Plaintiff complained that he had been interrogated while in custody on another charge. Id. at 941. He had been in the "hole"—solitary confinement for the eighteen days immediately prior to the interrogation, where he was required to sleep on the floor, receive one meal a day, and see neither family nor friends. Id. When he was released from the hole the defendant officers took him to a room where they handcuffed him to a chair and interrogated him for several hours. Id. He was later convicted of murder, but the conviction was vacated when an appellate court found his confession to have been involuntary. Id. at 941.
188. Id. Here the court concluded that plaintiff could not recover damages for his conviction and incarceration for several reasons. Id. at 942. The district court had ruled that the actions of the trial judge in admitting the evidence was a superseding, intervening cause for which the police could not be held liable. Id. The court of appeals considered the argument that the officers might have foreseen that the fruits of their allegedly unlawful labors would be admitted into evidence, but it found this argument untenable. Id. The court then reasoned that even if defendants should have foreseen the admission of the evidence, plaintiff might still have been convicted without the confession. Id. at 943. Finally, the court concluded that even if the conviction had been a proximate result of the defendants' acts, the particular sentence imposed by the judge was not such a result. Id.
189. The court of appeals did not specifically describe the injuries other than a conviction that might result from a coercive interrogation. Id. It did conclude, however,
For some time before the events here alleged, it had ceased to be seriously questioned that the due process clause of the Fourteenth Amendment prohibited compulsion to incriminate oneself by fear of hurt, torture, exhaustion, or any other type of coercion that falls outside the scope of due process. . . . Although the due process right allegedly violated here may be found in the historical underpinnings of the Fifth Amendment's prohibition against self-incrimination, "the essence of plaintiff's claim," as Justice Frankfurter stated in his dissent in Monroe v. Pape . . . "is that the police conduct here alleged offends those requirements of decency and fairness which, because they are 'implicit in the concept of ordered liberty,' are imposed by the Due Process Clause upon the states."  

The court specifically rejected defendants' argument that physical violence is a necessary adjunct to the cause of action and held that it is the totality of the circumstances that matters.

In Wilkins v. May, the Seventh Circuit again recognized that there are methods of interrogation forbidden by the due process clause:

When the deprivation occurs in the course of a police interrogation—a stage in the criminal justice process—it is fairly described as a denial of due process, with no need to add the oxymoronic "substantive." Interrogation so coercive is a form of criminal procedure incompatible with the traditional liberties of the subject. Chambers v. Florida, 309 U.S. 227, 237 (1940), and Brown v. Mississippi, 297 U.S. 278, 285-86 (1936), instance the rack as a method of interrogation forbidden by the due process clause. See also Williams v. United States, 341 U.S. 97 (1951). Interrogation at gunpoint is a comparable example—

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1. Id. at 944 (citing Monroe v. Pape, 365 U.S. 167, 208 (1961)) (other citations omitted).

2. 872 F.2d 190 (7th Cir. 1989). Plaintiff filed a Bivens action against two FBI agents who arrested and questioned him in an interrogation room while he was seated and handcuffed. Id. at 191. He claimed that one of them held a pistol two or three inches from his head, pointed at his temple. Id. He was later prosecuted and convicted of bank robbery. Id. at 192. The plaintiff succeeded in getting one of the statements he made during the interrogation suppressed, apparently because the motion judge believed that the agent had indeed pointed a gun at him. Id. at 191-92.
pending of course on the circumstances—even though it involves no touching.\(^{193}\)

In *Dickerson*, the Supreme Court cited, with apparent approval, the remedy provided by *Wilkins*.\(^ {194}\)

More recently, in *Buckley v. Fitzsimmons*,\(^ {195}\) the Seventh Circuit took for granted that coercing a statement would violate the rights of the suspect: “Coercing witnesses to speak, rather than loosening their tongues by promises of reward, is a genuine constitutional wrong. Overbearing tactics violate the right of the person being interrogated to be free from coercion . . . .”\(^ {196}\) In an earlier decision in the same case, the court had distinguished inappropriate coercion both from a mere failure to give *Miranda* warnings and from testimony compelled through immunity procedures:

Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails. A prosecutor could not be mulcted for conducting an interrogation without *Miranda* warnings, because a suspect has no entitlement to the warnings themselves. *Miranda* warnings protect the right to counsel and have no independent stature. Interrogations without *Miranda* warnings thus do not violate a suspect’s rights; the violation occurs only when the statements are used in criminal proceedings. . . . There is likewise no violation in ‘compelling’ a suspect to speak, where the compulsion does not involve practices forbidden on other grounds. The right not to be compelled to testify against oneself is an evidentiary privilege. As the use immunity cases show, the government may require a suspect to

\(^{193}\) *Id.* at 195 (parallel citations omitted). The court cautioned, however, that it was not suggesting that the federal courts undertake “to monitor the details of police interrogations, and to award damages whenever the police cross the line that separates coercive from noncoercive interrogation.” *Id.* It concluded that, “The relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation.” *Id.* The court went on to decline to articulate a specific test for determining when a violation takes place:

We do not undertake to specify a particular threshold, a task that may well exceed our powers of articulation. But it is a high threshold, and to cross it Wilkins and plaintiffs like him must show misconduct that a reasonable person would find so far beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.


\(^{195}\) 20 F.3d 789 (7th Cir. 1994).

\(^{196}\) *Id.* at 794.
you have a right to remain silent

speak, so long as it does not use the results against him. . . .
Arguments based on Miranda and the self-incrimination clause concern the conduct of the trial and therefore may not be the basis of damages; coercive tactics that are independently wrongful may, however, lead to awards.197

The Eighth Circuit recently recognized a cause of action for a coercive interrogation in Wilson v. Lawrence County:198 "Fundamental to our system of justice is the principle that a person’s rights are violated if police coerce an involuntary confession from him, truthful or otherwise, through physical or psychological methods designed to overbear his will."199 The court noted that the "Supreme Court has long held ‘that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.’"200

The Ninth Circuit has held in Cooper v. Dupnik201 that coercing an involuntary statement violates the due process clause whether or not there is any attempt to use the statement in later criminal proceedings.202 The court held, "The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself."203

198. 260 F.3d 946 (8th Cir. 2001). Plaintiff, a mentally impaired man, spent nine years in prison for a murder he did not commit. Id. at 949. He pled guilty to the crime after making a confession, which the court held there was sufficient evidence to conclude was coerced. Id. He was pardoned after an investigation convinced the governor of his innocence. Id.
200. Wilson, 260 F.3d at 952 (citing Miller v. Fenton, 474 U.S. 104, 109 (1985) (emphasis added by Eighth Circuit opinion)).
201. 963 F.2d 1220 (1992). The plaintiff, although completely innocent of any crime, had made statements that could have been used against him had he been put on trial, for example, that he sometimes left the house alone late at night. Id. at 1236-37.
202. Id. at 1247-48.
203. Id. at 1244.
The Tenth Circuit held, in *Rex v. Teeples*, 204 that, "Extracting an involuntary confession by coercion is a due process violation." 205 It further held that as a consequence, the improper interrogation was actionable under § 1983. 206

In *United States v. North*, 207 the D.C. Circuit stated that a Fifth Amendment violation occurs at the time the statement is made. 208 The court held that introducing evidence at trial based on immunized testimony previously given to the grand jury would itself violate constitutional rights, and the court distinguished cases in which a statement is taken in violation of a person's constitutional rights and later introduced in evidence. 209 In the latter cases, the court reasoned, the violation occurs when the statement is taken, and whether it can be introduced in evidence later is a question of the scope of the remedy. 210

The circuit court decisions discussed thus far have involved cases raising claims of direct violation of constitutional protections. Other circuit court cases have involved § 1983 claims on the basis of failures to give *Miranda* warnings. Most of these Circuit Court cases involving civil claims under *Miranda* have discussed only whether the mere failure to give *Miranda* warnings prior to questioning a suspect constitutes a sufficient basis for a claim under § 1983. The First, Second, Seventh, Eighth, Tenth, and Eleventh

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204. 753 F.2d 840 (10th Cir. 1985). Plaintiff was interrogated concerning a kidnap-ping in a hospital following his attempted suicide. Id. at 841-42. He made incriminat-ing statements and was convicted. Id. at 842. On the state appeal, the court held the confession was involuntary as a matter of law. Id.


206. *Teeples*, 753 F.2d at 843.

207. 920 F.2d 940 (D.C. Cir. 1990). This was the appeal of Iran-Nicaragua Contra conspirator Oliver North from a criminal conviction. The court held that his rights were violated when testimony was introduced against him which might have derived from his previous immunized testimony and that the trial court had not held an ade-quate *Kastigar* hearing. Id. at 947-48.

208. Id. at 948.

209. Id.

210. The court held:

[Where *Miranda* warnings are not given, the constitutional violation occurs independent of the grand jury. Whether the resulting confession can be used derivatively by the grand jury or in subsequent proceedings is a matter of the reach of the exclusionary rule, which is a function not of any rights of the defendant but of a remedial balance factoring in the possible unreliability of the confession and the need to deter the government from future violations of Fifth Amendment rights.

Id.]
Circuits have all held that the failure to give *Miranda* warnings does not by itself violate any constitutional rights.\(^{211}\)

The far more significant question is whether coercing a statement from a suspect in custody violates the Fifth Amendment, and this issue has seldom received any detailed analysis. For example, the Tenth Circuit in *Bennett v. Passic*, devoted less than a paragraph to the issue and rejected out of hand the notion that taking a statement in the absence of *Miranda* warnings, could violate the Fifth Amendment.\(^{212}\) It did not separate the issue of actually coercing a statement from the issue of the failure to provide warnings and it discussed no Supreme Court decisions other than *Miranda* itself.\(^{213}\) The Eleventh Circuit, in *Jones v. Cannon*, relied upon precedent from other circuits in concluding that questioning after failing to give *Miranda* warnings does not violate any substantive Fifth Amendment rights.\(^{214}\) This court discussed no relevant Supreme Court cases.\(^{215}\)

The Eighth Circuit has indicated that the Fifth Amendment can be violated only at trial, although the case where the court established this principle did not make clear whether the plaintiff actually made a statement.\(^{216}\) The Second, Fourth, and Seventh

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\(^{211}\) See, e.g., *Jones v. Cannon*, 174 F.3d 1271, 1277-78 (11th Cir. 1999) (noting that the officers claimed the plaintiff had confessed to a murder, although he denied making a confession); Deshawn E. v. Safir, 156 F.3d 340, 347-48 (2d Cir. 1998) (noting that a class action does not discuss whether statements were made in particular cases); *Neighbor v. Covert*, 68 F.3d 1508, 1511 (2d Cir. 1995) (noting that *Miranda* warnings are "a procedural safeguard rather than a right explicitly stated in the Fifth Amendment"—officers did not give *Miranda* warnings, plaintiff made statements, but charges were dismissed before trial); *Mahan v. Plymouth House of Corr.*, 64 F.3d 14, 15 (1st Cir. 1995) (noting that the plaintiff had made no statement); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990), rev'd on other grounds, 502 U.S. 801 (1991); *Warren v. City of Lincoln*, Nebraska, 864 F.2d 1436, 1442 (8th Cir. 1989) (en banc) ("the remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action"—the opinion reflects that plaintiff was questioned without *Miranda* warnings, but not whether he made any statements); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) ("No rational argument can be made in support of the notion that the failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act." The plaintiff had made an incriminating statement.).

\(^{212}\) *Bennett*, 545 F.2d at 1263.

\(^{213}\) *Id*.

\(^{214}\) *Jones*, 174 F.3d at 1290-91.

\(^{215}\) *Id*.

\(^{216}\) *Davis v. City of Charleston*, 827 F.2d 317 (8th Cir. 1987) (holding that the failure to give *Miranda* warnings does not deprive one of constitutional rights as long as no statements obtained from her were introduced at trial—the opinion does not make clear whether any statement was taken from plaintiff); see *Harris v. St. Louis Police Dep't.*, 164 F.3d 1085, 1087 (8th Cir. 1998) (following *Davis* in concluding that the mere failure to read plaintiff his rights was not actionable because he did not
Circuits have suggested that the use of a statement at any criminal proceeding would constitute a constitutional violation.\textsuperscript{217} In \textit{Deshawn E. v. Safir},\textsuperscript{218} the Second Circuit entertained an argument that the use of coerced statements for leverage in plea bargaining would violate the Fifth Amendment, but ultimately did not reach the issue because the case was a class action and the circumstances were different among class members.\textsuperscript{219}

By far the most thoughtful and thorough discussion among all the lower court opinions of whether coercive interrogation violates constitutional rights is found in the Ninth Circuit majority opinion in \textit{Cooper v. Dupnik}, holding that coercive interrogation itself violates the Fifth Amendment.\textsuperscript{220} The opinion, written by Judge Trott, the former head of the Criminal Division of the Justice Department, and a former United States Attorney from Southern California, squarely holds that the Fifth Amendment establishes a substantive right to remain silent:

> It is no accident that the first words out of a police officer’s mouth during a \textit{Miranda} advisement must be: You have “a right to remain silent.” This warning is required as a \textit{procedural} safeguard, but more importantly it expresses a \textit{substantive} Constitutional right—the right to remain silent rather than answer incriminating questions posed by the police. It is wrong, therefore, to relegate this part of the advisement to the status of “only a prophylactic device:” It is a prophylactic device, but it expresses a substantive right.\textsuperscript{221}

While recognizing the importance of the \textit{Miranda} warnings, the court clearly explained that it was not creating a cause of action for
violations of *Miranda* safeguards unless officers also trespassed on the actual right against self-incrimination.\textsuperscript{222}

*Cooper* also held that coerced interrogation violates the Fourteenth Amendment's proscription against extracting involuntary statements at the time of interrogation.\textsuperscript{223} The court relied heavily on the Supreme Court's opinion in *Brown v. Mississippi*,\textsuperscript{224} and concluded:

The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself. As the [*Brown*] Court said, "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners. . . ." The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution. Contrary to the appellants' argument, this is not just a rule of evidence. All a court does in a judicial context is apply the corrective where due process already has been denied. Our analysis on this point is confirmed by numerous observations of the Supreme Court. In *Innis*, the Court notes that "'[t]he fundamental import of the [Fifth Amendment] privilege . . . [goes to] whether [the suspect] can be interrogated. . . ." In *Tucker*, the Court states: "Where the State's actions offended the . . . Due Process Clause, the State was then deprived of the right to use the resulting confessions in court."\textsuperscript{225}

\textsuperscript{222} The court:

[S]tress[ed] again that this case does not deal with a product of police interrogation that is just technically involuntary, or presumptively involuntary, as those terms are used in *Miranda* jurisprudence, but with a product that was involuntary because it was actively compelled and coerced by law-enforcement officers during in-custody questioning, as those terms are used in *Miranda*, *Spano v. New York*, *Haynes v. Washington*, and *Mincey v. Arizona*. Our holding is consistent with the teaching of *Michigan v. Tucker*, and it does not create a Fifth Amendment cause of action under § 1983 for conduct that merely violates *Miranda* safeguards without also trespassing on the actual Constitutional right against self-incrimination that those safeguards are designed to protect. This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak. What we do confront is a case laden with police misconduct that is "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed."

*Id.* at 1243-44 (citations omitted).

\textsuperscript{223} *Id.* at 1244-45.

\textsuperscript{224} 297 U.S. 278 (1936); see *supra* note 21 and accompanying text.

\textsuperscript{225} *Cooper*, 963 F.2d at 1244-45.
The circuit courts of appeals cases discussed above demonstrate that the lower federal courts are in great disagreement about the scope of protection afforded by the Constitution for the right to remain silent. The Supreme Court now has an opportunity to resolve the confusion in this area in Chavez v. Martinez.

B. Importance of § 1983 Remedy

The decision of the Supreme Court in Chavez v. Martinez will be of critical importance not merely as a matter of providing guidance to the lower courts, but primarily because if the Supreme Court were to exclude from civil rights liability unreasonable violations of Fifth and Fourteenth Amendment rights, there would be no effective protection for the right to be free from coercive interrogation. The exclusionary rule is not sufficient to provide such protection because, in the first place, it is actually invoked in only a tiny fraction of all serious criminal cases—over ninety percent of felony cases are resolved by a plea where no trial is ever held.226

More importantly, in the absence of the Supreme Court’s recognition of civil liability for coercive interrogation practices, existing Supreme Court cases actually provide an incentive for officers to violate the Miranda protections and to interrogate suspects in violation of their constitutional rights.227 Once the police have advised a suspect of her right to remain silent and the suspect invokes that right, the police gain nothing by ceasing interrogation. If they stop questioning, the officers get no further information from the suspect. On the other hand, if the police ignore the suspect’s invocation of her right to remain silent, the suspect may continue to talk. Although the prosecution will not be able to use any statements made at this point in its case in chief at the suspect’s trial, it would be able to use such statements to impeach the defendant

226. Between October 1999 and September 2000, of the 68,079 federal criminal cases disposed of by plea or trial, 63,863 (93.8 percent) defendants pleaded guilty, 1235 (1.8 percent) were convicted or acquitted after bench trials, and only 2981 (4.4 percent) were convicted or acquitted after jury trials. STATISTICAL DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY SEPTEMBER 30, 2000, tbl. D-4. In 1996 of the 997,972 state felony defendants whose cases were resolved by plea or verdict, 905,957 (90.8 percent) entered pleas of guilty or nolo contendre, 54,474 (5.5 percent) had bench trials, and only 37,541 (3.8 percent) had jury trials. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 432 tbl. 5.42. The “federal numbers lump together felony and misdemeanor cases, [but] the overall felony percentages are probably about the same.” Stephanos Bibas, How Apprendi Affects Institutional Allocations of Power, 87 IOWA L. REV. 465, 465 n.6 (2002).

227. See Clymer, supra note 28, at 503-05.
were she to exercise her right to testify at trial.\textsuperscript{228} Moreover, the officers can use the information supplied to develop further leads and to find additional evidence and witnesses.\textsuperscript{229}

That police departments are motivated to violate the \textit{Miranda} protections is more than a theoretical possibility; it is a reality that has been documented both in litigation\textsuperscript{230} and by empirical research.\textsuperscript{231} In \textit{Cooper}, the deputies who interrogated the plaintiff suspected that he was the notorious "Prime Time Rapist" in Tucson, Arizona.\textsuperscript{232} The officers had decided in advance that whenever they had a suspect they would question him without allowing him to exercise his right to silence and without granting any requests he might make for an attorney.\textsuperscript{233} The officers deliberately chose to violate \textit{Miranda}, because although they knew the prosecution could not use any statements they obtained in its case in chief, they hoped to foreclose the defendant from making an insanity defense and from testifying at trial (reasoning that the statements could then be used for impeachment).\textsuperscript{234} The plan to ignore \textit{Miranda} and the suspect's rights was known to the officers' supervisors.\textsuperscript{235}

\textit{CACJ v. Butts} documented department-wide, policy driven, versions of the same strategy. Individuals and nonprofit associations of criminal defense attorneys challenged the policies of the police departments of Los Angeles and San Jose, California, that provided for the interrogation of suspects "outside \textit{Miranda}" despite

\begin{footnotes}
\item[230] See, e.g., CACJ v. Butts, 195 F.3d 1039, 1048-49 (9th Cir. 2000); \textit{Cooper}, 963 F.2d at 1220.
\item[232] \textit{Cooper}, 963 F.2d at 1223.
\item[233] \textit{Id.} at 1224.
\item[234] \textit{Id.} at 1225. The \textit{Cooper} opinion opens with lengthy detailed quotations from deposition testimony by the officers detailing their plans to ignore \textit{Miranda} and their reasons for doing so. \textit{Id.} at 1224-33. A typical excerpt demonstrates the hard-boiled cynicism of the officers concerning constitutional rights:
\begin{quote}
I continued the interrogation, hoping that it would be at least held voluntary to keep him off the stand and to deprive him of the opportunity of forming an insanity defense, and some of the questions went directly to the issue of sanity. And so those were my motives for violating, trampling on his civil rights and \textit{Miranda}'s, [sic] and the bottom line being, what are his damages. I mean, I'm going to violate this American citizen's rights, but look at the totality of the circumstances, the big picture, is it worth it, yeah.
\end{quote}
\textit{Id.} at 1227.
\item[235] \textit{Id.}
\end{footnotes}
the suspects' invocation of their right to remain silent and despite
their requests for an attorney. The policies were set forth in po-
lice training programs and materials. The process of interrogat-
ing the suspects after they had attempted to exercise their right to
remain silent and requested attorneys is documented in the tran-
script of the interrogations set out in the Ninth Circuit opinion.

The training materials in question and others directed to Califor-
nia law enforcement officers are described in a 1998 law review
article by Professor Charles Weisselberg, who was one of the plain-
tiffs' attorneys in CACJ. Typical of what officers were being
 taught are statements included in the conclusion from a training
bulletin published by the California District Attorneys Association:

As long as officers avoid overbearing tactics that offend Four-
teenth Amendment due process, the mere fact of deliberate noncompliance with Miranda does not affect admissibility for
impeachment . . . And since Miranda is not of constitutional di-
mension, officers risk no civil liability for "benign" questioning
outside Miranda. Instead, they have "little to lose and perhaps
something to gain . . ." 

Weisselberg cites appellate decisions from three states other than
California, where officers admitted that they deliberately violated
Miranda's prescriptions to obtain information, and decisions from
thirty-eight other states where circumstances suggested deliberate
violations of Miranda based on the fact that the cases involved no
question of whether a suspect was in custody or had unambigu-
ously invoked her rights. Based on his experience in California
and his research which suggested that deliberate violations of Mi-
randa were a "burgeoning practice," Weisselberg argues persua-

236. CACJ, 195 F.3d at 1041.
237. Id. The defense did not deny that the officers were trained to interrogate sus-
pects "outside Miranda," but argued that the individual defendants were protected by
qualified immunity from civil liability because they had relied on their training. Id. at
1049. The Ninth Circuit rejected this contention. Id. at 1049-50.
238. Id. at 1042-43. The following exchange sets out the essence of the officers' ap-
proach:

[Suspect]: Well, if I'm being charged with something, I'd rather not have
anything else to say until I have an attorney.

[Officer]: Okay? Let me explain something to you, James. I'm going to con-
tinue to ask you questions. Now, you realize that you didn't waive your
rights. That means we can't use 'em in court.

Id. at 1044.
239. See Weisselberg, supra note 231, at 133-38.
240. Id. at 133-34 (citations omitted).
241. Id. at 137-38.
sively that the exclusionary rule is insufficient to protect Fifth and Fourteenth Amendment rights.\textsuperscript{242}

The limited number of situations in which the exclusionary rule is available, coupled with incentives for the police to ignore protections against coercing involuntary statements, compels the conclusion that a recognition of the availability of § 1983 remedies for coercive interrogation practices is absolutely essential.

\textbf{Conclusion}

The Supreme Court cannot decide that there is no cause of action under § 1983 for damages caused by coercive interrogation practices without turning its back on a large body of its own jurisprudence and on the deeply rooted cultural and political expectations of American citizens who trust that they have a meaningful constitutionally protected right to remain silent when in police custody. Recognition of a § 1983 cause of action is necessary to supply an effective deterrent to police tactics that ignore the right to remain silent. Such a recognition by the Supreme Court would be an important historical step in securing the liberty promised by the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process clause.

\textsuperscript{242} Id. at 139-40.