COMPULSION

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ABSTRACT

The lack of a definition of compulsion plagues Fifth Amendment jurisprudence and scholarship, producing analytical confusion and worse. Surprisingly, neither Fifth Amendment jurisprudence nor scholarship offers a definition of what it means to "compel" a person to self-incriminate, even though the concept of compulsion is critical to an understanding of the constitutional prohibition on compelled self-incrimination. The Supreme Court has occasionally referred to an overborne-will test for compulsion, but that test is of dubious provenance and difficult to apply. The Court frequently ignores the overborne-will test, and it cannot be reconciled with a good deal of Fifth Amendment doctrine.

Starting with the paradigm of compulsion that gave rise to the Fifth Amendment, this Article offers a definition of compulsion that can be defended on both originalist and nonoriginalist grounds: An official undertaking to induce a witness to provide evidence by threat of punitive sanctions. This definition explains large swaths of Fifth Amendment doctrine that courts and commentators alike find confusing or indefensible, and facilitates normative assessments of doctrine as well. It also charts a course for future development of Fifth Amendment law. The definition of compulsion, for example, suggests that Fifth Amendment protections apply whenever a suspect is confronted with a threat of punitive sanctions unless he submits to questioning, and debate over the propriety of asserted Fifth Amendment waivers and associated interrogation tactics should focus on whether the suspect is confronted with a threat of punitive sanctions beyond those that could be imposed as a result of conviction at a fair trial. Defining compulsion, moreover, illustrates the manner in which the Fifth Amendment limits inquisitorialism in the criminal process.

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INTRODUCTION

There is uncharted terrain at the core of the constitutional prohibition on compelled self-incrimination. This article seeks to map it.

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[1] Most of the terms of this prohibition—variously characterized as either a right or a privilege—are well understood.[2] A "person," for purposes of the Fifth Amend-

1 U.S. CONST. amend. V.

2 Although reference is frequently made to a Fifth Amendment "privilege," *see, e.g.*, KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE (7th ed. 2013) [hereinafter MCCORMICK ON EVIDENCE] (referring to "The Privilege Against Self-Incrimination"), this term is in some respects misleading. Leonard Levy, for example, wrote:

> I call it a "right" because it is one. Privileges are concessions granted by the government to its subjects and may be revoked . . . . Although the right against self-incrimination

ment's Self-Incrimination Clause, is a natural person, thereby excluding corporations, partnerships, or other collective entities.[3] Whether a proceeding is a "criminal case" is primarily determined by whether there is a legislative intent to treat it as such, though proceedings formally denominated as noncriminal are deemed "criminal" when no non-punitive purpose for imposing a sanction is apparent.[4] A "witness" is one who provides testimonial evidence, that is, factual information or assertions that are the product of human cognition, as opposed to physical evidence.[5] Finally, self-incrimination occurs when the witness's statements could reasonably be used against the witness in a criminal case or could lead to the acquisition of such evidence.[6] Although, at the margins, these elements of the Fifth Amendment right may produce some difficult questions, they are in the main reasonably determinate and coherent.[7]

There is no comparable clarity when it comes to the meaning of "compulsion." Fifth Amendment jurisprudence and scholarship have failed—indeed they have barely made an effort—to define what it means to "compel" an individual to self-incriminate.[8] The explanation for this difficulty is apparent; as George Thomas and Marshall Bilder once put it, "[b]ecause testimony is inherently volitional," the Fifth Amendment poses "interpretive problems that are insurmountable if 'volitional' and 'compelled' are both given robust meanings."[9] They added: "The paradoxical nature of volitional-but-compelled testimony explains why the self-incrimination clause continues to puzzle courts and commentators."[10] In other words,

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> originated in England as a common-law privilege, the Fifth Amendment made it a constitutional right, clothing it with the same status as other rights, like freedom of religion, that we would never denigrate by describing them as mere privileges.

LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION vii (1968).

3 *E.g.*, Braswell v. United States, 487 U.S. 99, 104–16 (1988); Bellis v. United States, 417 U.S. 85, 87–94 (1974).

4 *E.g.*, Allen v. Illinois, 478 U.S. 364, 368–74 (1986); United States v. Ward, 448 U.S. 242, 248–54 (1980). One can assert the protections of the Fifth Amendment, however, outside of the contours of a "criminal case" when one reasonably fears that the information sought might subsequently be used to incriminate in a criminal case. *See*, *e.g.*, United States v. Balsys, 524 U.S. 666, 671–72 (1998); Minnesota v. Murphy, 465 U.S. 420, 426 (1984).

5 *E.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 592–99 (1990); Doe v. United States, 487 U.S. 201, 207–14 (1988).

6 *See, e.g.*, Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 189–91 (2004); Ohio v. Reiner, 532 U.S. 17, 20–22 (2001) (per curiam).

7 *But cf., e.g.*, Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L REV. 351, 366–400 (2012) (questioning whether the distinction between testimonial and physical evidence comports with developments in neuroscience).

8 *See infra* Part I.A.

9 George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 245 (1991).

10 *Id.* (footnote omitted). *Cf.* Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72–73 (1966) ("[A]ll incriminating statements—even those made under brutal treatment—are 'voluntary' in

pretty much any statement by one under official pressure to talk could be deemed in some measure voluntary in that the witness must decide whether to yield to the pressure, and in some measure compelled by the pressure to speak. Thus, if it is true, as Akhil Amar and Renee Lettow once wrote, that "[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions,"[11] the lack of a workable test for what it means to "compel" an individual is surely a primary cause. The discussion that follows fills this surprising gap.

Part I below demonstrates the absence of anything approaching a usable account of compulsion in Fifth Amendment jurisprudence and scholarship. Part II then undertakes to define compulsion by looking to what was regarded as the paradigm of compulsion when the Fifth Amendment was framed. Although experience since the framing era has refined some of the ambiguities lurking in this conception, the framing-era paradigm of compulsion, Part II submits, offers a promising definition of Fifth Amendment compulsion.

Part III turns to what seems to be a serious problem—the paradox of waiver. In *Miranda v. Arizona*,[12] the Supreme Court famously held that custodial interrogation involves compulsion within the meaning of the Fifth Amendment, but added that a suspect under custodial interrogation, once properly advised of his rights, may waive the right to be free from compelled self-incrimination, provided the waiver is knowing, intelligent, and voluntary.[13] Fifth Amendment rights can also be lost if not invoked; it is settled that "an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege."[14] Yet, a voluntary decision to waive (or decline to claim) a right by one already "under compulsion" seems nonsensical; how can one "under compulsion" to speak somehow voluntarily surrender a right to remain silent? Part III uses the definition of compulsion to address this apparent paradox, and demonstrates that in most cases where individuals are said to have waived or forfeited Fifth Amendment rights, no compulsion was present. There are, however, some cases in which compulsion

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the sense of representing a choice among alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.").

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

12 384 U.S. 436 (1966).

13 *Id.* at 455–58, 467–76. The Court has continued to insist that those under custodial interrogation are capable of giving knowing, intelligent, and voluntary waivers of Fifth Amendment rights. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 382–87 (2010); Colorado v. Spring, 479 U.S. 564, 572–75 (1987); Moran v. Burbine, 475 U.S. 412, 420–24 (1986).

14 Garner v. United States, 424 U.S. 648, 653 (1976).

is present yet waiver is appropriate—when the only threat of sanctions facing a suspect involves a threat of lawful sanctions imposed after a fair trial.

Finally, Part IV applies the definition of compulsion to a number of hotly disputed Fifth Amendment issues, and demonstrates that the concept of compulsion helpfully explains and justifies even intensely controversial aspects of doctrine. The definition of compulsion, for example, supplies firm grounding for the holding that individuals undergoing custodial interrogation must be warned of their rights in *Miranda*, and, by disaggregating compulsion from Fifth Amendment waiver, it refutes the charge that *Miranda* involves an illegitimate form of prophylactic constitutional law. The definition of compulsion also supports the still-controversial rule prohibiting an adverse inference based on a criminal defendant's failure to testify announced in *Griffin v. California*,[15] while explaining the limits of that rule. Part IV also demonstrates that the definition of compulsion provides guidance on still-unsettled questions of Fifth Amendment law, and can set a course for the future development of Fifth Amendment jurisprudence.

I. THE ELUSIVE DEFINITION OF FIFTH AMENDMENT COMPULSION

Surprisingly, Fifth Amendment jurisprudence and scholarship contain nothing approaching a workable conception of what constitutes compulsion within the meaning of the Fifth Amendment. The absence of a workable definition, moreover, has caused considerable problems in Fifth Amendment jurisprudence.

A. The Absence of a Workable Definition

The Supreme Court last offered a definition of "compulsion" some four decades ago, when it addressed the question whether the Fifth Amendment requires that a grand jury witness suspected of wrongdoing must be warned that he is a target of the investigation.[16] After observing that "[t]he constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony," the Court wrote: "The test is whether, considering the totality of the circumstances, the free will of the suspect was overborne."[17]

The provenance of this Fifth Amendment overborne-will test is dubious; the sole authority that the Court cited to support it was a case addressing "the standard demanded by the Due Process Clause of the Fourteenth

15 380 U.S. 609, 614–15 (1965).

16 *See* United States v. Washington, 431 U.S. 181, 182 (1977).

17 *Id.* at 188 (citing Rogers v. Richmond, 365 U.S. 534, 544 (1961)). This was likely a dictum unnecessary to the decision; the Court's actual holding was: "Because target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination, potential-defendant warnings add nothing of value to protection of Fifth Amendment rights." *Id.* at 189.

Amendment for determining the admissibility of a confession."[18] Indeed, in due process jurisprudence, it has long been settled that if the defendant's will was overborne, a confession must be suppressed as involuntary.[19] If, however, statements branded as impermissibly compelled within the meaning of the Fifth Amendment because a suspect's will has been overborne are also, and for the same reason, barred from use as evidence by the Due Process Clause, the overborne-will test for compulsion renders the Fifth Amendment's Self-Incrimination Clause inexplicable surplusage.[20]

The problems with the overborne-will test, however, go well beyond redundancy. Under the overborne-will test, virtually any confession could be deemed compelled. Whenever an interrogation converts a suspect proclaiming innocence into one who has confessed, surely the suspect's will could be fairly characterized as overborne.[21]

Likely the most sophisticated effort to address this problem was undertaken by Thomas and Bilder who, relying on the work of the philosopher Harry Frankfort, argued that compulsion is present when some external force produces a "second-order volition" to confess inconsistent with a suspect's "first order desire" not to do so.[22] It is far from clear that this distinction between first-order desires and second-order volitions is tenable,[23] but even Thomas and Bilder ultimately conceded that because a skillful interrogator may be able to alter a suspect's "first-order desire" or "second-order volition," their approach "is no better at providing practical guidance than any of the other solutions that seek to uncover the will of the suspect."[24]

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18 *Rogers*, 365 U.S. at 540. At the time, the Court took the position that the prohibition on compelled self-incrimination was not incorporated within the Due Process Clause. *See* Cohen v. Hurley, 366 U.S. 117, 118 n.1 (1961).

19 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 433–34 (2000); Mincey v. Arizona, 437 U.S. 385, 397–402 (1978); Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973); Haynes v. Washington, 373 U.S. 503, 513–14 (1963); Culombe v. Connecticut, 367 U.S. 568, 601–02 (1961); *Rogers*, 365 U.S. at 543–45; MCCORMICK ON EVIDENCE, *supra* note 2, § 149. As it has evolved, due process jurisprudence developed a two-pronged voluntariness inquiry: "[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." Miller v. Fenton, 474 U.S. 104, 116 (1985) (citations omitted). For a helpful discussion of this evolution, see Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 330–61 (1998).

20 For a more elaborate argument along similar lines, see Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 440–46 (1987).

21 *Cf.* Donald A. Dripps, *Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 710 (1988) ("Given that confession is, from the standpoint of self interest, irrational . . . what 'person of ordinary firmness' . . . would do so *unless* he found the 'interrogation pressures overbearing'?").

22 Thomas & Bilder, *supra* note 9, at 269–72.

23 For an expression of skepticism on this point, see Ronald J. Allen, *Theorizing about Self-Incrimination*, 30 CARDOZO L. REV. 729, 733–34 (2008).

24 Thomas & Bilder, *supra* note 9, at 272–74.

Even this concession likely understates the problems. There is no ready way to tell whether a skillful interrogator has persuaded or compelled a suspect to confess; yet, as Albert Alschuler observed, "compulsion does not encompass all forms of persuasion. A person can influence another's choice without compelling it . . . ."[25] Beyond that, there may be a plethora of motives underlying any given confession, including not only the interrogator's influence, but also from the suspect's own guilt or other psychological needs. Assessing the role that each factor plays, of course, poses enormous difficulties. After all, as Thomas and Bilder acknowledged, "[e]xternal observers have no measure of the internal human will."[26]

Given the difficulties of the overborne-will test, it should come as little surprise that the jurisprudence applying it has long been criticized as confusing and inconsistent.[27] It even is unclear that the Court itself takes the overborne-will test seriously; the Court seems perfectly willing to ignore it when the mood strikes. For example, the Court held that the Fifth Amendment forbids a judge or prosecutor to comment on a defendant's decision not to testify at trial in *Griffin v. California*.[28] *Griffin* reasoned that adverse comment on a defendant's failure to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[29] Yet, when a defendant fails to testify, his will has not been overborne; instead, he has hewed to his decision to remain silent. Under *Griffin*'s conception of compulsion as the imposition of a cost on silence, Fifth Amendment compulsion is not confined to cases when a suspect's will has been overborne.

The Court has also held that the prohibition on compelled self-incrimination forbids public employers from discharging employees for refusing to waive Fifth Amendment rights in official inquiries relating to their duties.[30] It later added that the Fifth Amendment does not allow the government to bar individuals from performing public contracts if they refuse to waive their Fifth Amendment rights in official inquiries related to the

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25 Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626 (1996).

26 Thomas & Bilder, *supra* note 9, at 272 (footnote omitted).

27 *See, e.g.*, YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 6–25, 69–76 (1980); GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 146–56 (2012); George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 300–10, 328–29; Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2236–37 (1996); Penney, *supra* note 19, at 361–62; Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 101–03.

28 380 U.S. 609 (1965).

29 *Id.* at 614.

30 *See* Uniformed San. Men Ass'n v. City of New York, 392 U.S. 280, 282–85 (1968); Gardner v. Broderick, 392 U.S. 273, 276–78 (1968).

performance of the contracts,[31] or to bar persons from elective office if they assert Fifth Amendment rights before a grand jury or other investigative body in an inquiry relating to their duties.[32] The Court also held that the Fifth Amendment forbids a court from sanctioning an attorney who advised his client to refuse to produce requested documents in reliance on the Fifth Amendment.[33] Yet, in these cases, like *Griffin*, the investigative targets remained silent; the government failed to overbear their will. Whatever one thinks of these cases, it is hard to understand how they can be reconciled with the view that compelled self-incrimination occurs only when the government overbears an individual's will.[34]

Beyond that, if compulsion within the meaning of the Fifth Amendment means that a suspect's will has been overborne, then one under compulsion could never voluntarily waive Fifth Amendment rights—by this definition, a suspect under compulsion lacks volition because his will has been overborne.[35] Yet, as we have seen, the concept of a voluntary waiver of Fifth Amendment rights, even by those subject to the compulsion, is well-established.[36]

In light of the manifold problems lurking in the overborne-will test, it is small wonder that, in recent decades, although it occasionally makes passing reference to the concept of an overborne will,[37] far more frequently, the Court, even as it observes that the prohibition against compelled self-incrimination is at issue only when compulsion is present, offers no definition of or test for compulsion.[38] Sometimes, the Court uses the term "coer-

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31 *See* Lefkowitz v. Turley, 414 U.S. 70, 82–84 (1973).

32 *See* Lefkowitz v. Cunningham, 431 U.S. 801, 802–08 (1977).

33 *See* Maness v. Meyers, 419 U.S. 449, 458–68 (1975).

34 For an argument that the overborne-will test cannot explain even *Garrity v. New Jersey*, 385 U.S. 493 (1967), which prohibited the use in a criminal case of statements made by police officers after they were warned that they would be fired if they remained silent, see Steven D. Clymer, *Compelled Statements from Police Officers and* Garrity *Immunity*, 76 N.Y.U. L. REV. 1309, 1342–47 (2001).

35 For a more extensive argument along these lines, see Stephen J. Schulhofer, Miranda*,* Dickerson*, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 944–46 (2001).

36 *See supra* text accompanying notes 12–14.

37 *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 705–06 (1993) ("Long before *Miranda* was decided, it was well established that the Fifth Amendment prohibited the introduction of compelled or involuntary confessions . . . . [T]he courts enforced that prohibition by asking a simple and direct question: Was the confession the product of an essentially free and unconstrained choice, or was the defendant's will 'overborne'?") (citations and internal quotations omitted); Minnesota v. Murphy, 465 U.S. 420, 431 (1984) ("Although warnings . . . might serve to dissipate any possible coercion or unfairness resulting from a witness' misimpression that he must answer truthfully even questions with incriminating aspects . . . we decline to require them here since the totality of the circumstances is not such as to overbear a probationer's free will.") (citations and internal quotations omitted); Garner v. United States, 424 U.S. 648, 657–58 (1976) ("Nothing in this case suggests the need for a . . . presumption that a taxpayer makes disclosures on his return rather than claims the privilege because his will is overborne.").

38 *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 111 (2010); United States v. Hubbell, 530 U.S. 27, 34–38 (2000); Ohio Adult Par. Auth. v. Woodard, 523 U.S. 272, 286–88 (1998); Illinois v. Perkins, 496 U.S. 292, 296–98 (1990); Doe v. United States, 487 U.S. 201, 209–13 (1988); Colorado v. Spring, 479 U.S. 564, 572–74 (1987); Oregon v. Elstad, 470 U.S. 298, 312–14 (1985); New

cion" as a synonym for compulsion, but without offering any definition of coercion.[39] Even if coercion and compulsion are properly treated as synonyms, this merely trades one imprecise term for another; there is nothing approaching consensus about coercion's meaning.[40]

In *Miranda*, the Court shed a bit of light on the meaning of Fifth Amendment compulsion, writing that "the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak,"[41] though it failed to offer much in the way of a definition of or a test for compulsion.[42] Even this

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York v. Quarles, 467 U.S. 649, 654 (1984); Fare v. Michael C., 442 U.S. 707, 722–24 (1979); Lakeside v. Oregon, 435 U.S. 333, 339 (1978); Andresen v. Maryland, 427 U.S. 463, 471–77 (1976); Fisher v. United States, 425 U.S. 391, 397–401 (1976); Michigan v. Tucker, 417 U.S. 433, 440 (1974); Couch v. United States, 409 U.S. 322, 329 (1973).

39 *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment . . . is governmental coercion."); *Elstad*, 470 U.S. at 311 (referring to "the official coercion proscribed by the Fifth Amendment"); *Quarles*, 467 U.S. at 658 n.7 ("[A]bsent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry . . . ."); *Tucker*, 417 U.S. at 448 ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself."); Malloy v. Hogan, 378 U.S. 1, 7–8 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. Governments . . . may not by coercion prove a charge against an accused out of his own mouth.") (citation omitted). *See also* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 473 (1996) (referring to "the traditional Fifth Amendment prohibition of coercion").

40 *See, e.g.*, Michael Kates, *Markets, Sweatshops, and Coercion*, 13 GEO. J.L. & PUB. POL'Y 367, 368 (2015) ("Coercion is a philosophically contested concept. Indeed, the problem is even worse than that. For not only is there sharp disagreement in the philosophical literature as to what is the correct definition or meaning of coercion but the nature of that disagreement ranges over a number of different dimensions as well."). For a survey of philosophical conceptions of coercion, see Scott Anderson, *Coercion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 27, 2011), http://plato.stanford.edu/entries/coercion/#NozNewAppCoe. Professor Alschuler contended that coercion is included within the concept of compulsion: "'Coercion' refers to actions by human beings that improperly influence choice. 'Compulsion' includes these actions, but it also (and perhaps more clearly) includes human actions that disable choice entirely and natural events that either deprive a person of choice or else strongly influence his choice." Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 851 n.10 (2017). Perhaps so, but this still does not provide much in the way of precision.

41 Miranda v. Arizona, 384 U.S. 463, 467 (1966).

42 The *Miranda* Court wrote that "the modern practice of in-custody interrogation is psychologically rather than physically oriented," *id.* at 448, and that "[e]ven without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. It then observed: "In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent . . . ." *Id.* at 457. The Court found it "obvious" that "the interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner" and "carries its own badge of intimidation" that, even if not involving "physical intimidation . . . is equally destructive of human dignity." *Id.* (footnote omitted). It concluded: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Id.* at 461. At no point in *Miranda* does anything like a definition of or

bit of guidance, however, proved unstable; the Court has come to label *Miranda* and its progeny as "prophylactic" in that they impose broader constraints on interrogation than the Fifth Amendment itself.[43] If, however, *Miranda* is prophylactic, the meaning of compulsion becomes even more elusive; perhaps *Miranda*'s conception of compulsion is broader than the Constitution's.

Most leading scholars, while acknowledging that the Fifth Amendment reaches only "compulsion," offer no definition or test for it.[44] Some schol-

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test for compulsion appear. For a more elaborate discussion of *Miranda*'s failure to address the meaning of compulsion, *see* John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U.L. REV. 437, 464–72 (2013).

43 *See, e.g.*, *Shatzer*, 559 U.S. at 103–06; United States v. Patane, 542 U.S. 630, 638–41 (2004) (plurality opinion); Chavez v. Martinez, 538 U.S. 760, 770–73 (2003) (opinion of Thomas, J.); Davis v. United States, 512 U.S. 452, 457–58 (1994); Withrow v. Williams, 507 U.S. 680, 690–92 (1993); Duckworth v. Eagan, 492 U.S. 195, 202–03 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); *Elstad*, 470 U.S. at 306-08; *Quarles*, 467 U.S. at 654–58; Tucker, 417 U.S.at 438–46. *Cf.* Dickerson v. United States, 530 U.S. 428, 442 (2000) ("In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.") (citations omitted).

44 *See, e.g.*, MCCORMICK ON EVIDENCE *supra* note 2, § 125; Ronald J. Allen & M. Kristin Mace, *The Self Incrimination Clause Explained and its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 251–56 (2004); Amar & Lettow, *supra* note 11, at 904–09; Lawrence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 108–09, 149–53 (1989); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 117–22 (2004); Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of their Protected Scope*, 72 WASH. U.L.Q. 1603, 1642–48 (1994); Charles E. Moylan & John Sonsteng, *The Privilege against Compelled Self-Incrimination*, 16 WM. MITCHELL L. REV. 249, 267–79 (1990); Thomas & Bilder, *supra* note 9, at 245, 274–82. Perhaps the scholar who has come closest to offering a definition or test is Mark Godsey, who wrote, "if the police impose a penalty on a suspect during an interrogation to punish silence or provoke speech . . . such a penalty would constitute compulsion in violation of the self-incrimination clause . . . ." Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 516 (2005). The seeming simplicity of the proposal becomes muddied, however, by Professor Godsey's definition of a "penalty" as measured by reference to "the baseline of the parties at the time and place of the interrogation," which "is determined by analyzing the objective facts regarding the suspect's rights and conditions at the beginning of the interrogation . . . . The baseline is largely a function of the environment in which the interrogation takes place and the rights the parties are generally allowed in this setting." *Id.* at 518, 525. This inquiry is sufficiently imprecise that Professor Godsey admits "it is not clear whether an interrogation itself constitutes an objective penalty in violation of the self-incrimination clause." *Id.* at 528. Indeed, every time a police officer appears on the scene and starts asking pointed questions of a potential suspect, one might think the "baseline of the parties" has been altered, yet it seems unlikely that all efforts by the police to persuade suspects to cooperate with an investigation amount to compulsion. Conversely, if a suspect is already in custody at the time at which an interrogation begins, perhaps questioning alone does not alter the "baseline of the parties at the time and place of the interrogation," at least if the baseline "is largely a function of the environment in which the interrogation takes place and the rights the parties are generally allowed in this setting." *Id.* at 525. A test this imprecise does not offer a terribly workable solution to the problem of defining compulsion. *Cf.* McKune v. Lile, 536 U.S. 24, 40–47 (2002) (plurality opinion) (rejecting use of a "baseline" to determine if a change in a prisoner's status amounts to Fifth Amendment compulsion because "emphasis of any baseline, while superficially appealing, would be an inartful addition to an already

arly treatments even skip any consideration of compulsion.[45] We are left with what Thomas and Bilder wrote is "[t]he lack of a workable test for compulsion," a seemingly inevitable problem because the inquiry "involve[s] . . . a determination of the unknowable—whether the will of [the suspect or the interrogator] prevailed."[46]

Among legal scholars, there is little disagreement; Joseph Grano, for example, acknowledged: "Even were it possible . . . to take literally the notion of an overborne will, we do not have the tools to make such an empirical inquiry."[47] Professor Alschuler concluded that "[e]fforts to define compulsion and related words like coercion, duress, and involuntariness in terms of a subjective sense of constraint are unproductive."[48] William Stuntz once

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confused area of jurisprudence"). The same problem infects efforts to utilize the concept of a coercive threat to illuminate compulsion, since it requires reference to a baseline in order to identify a threat that can leave the actor worse off. *See* George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79, 86–92 (1993). Depending on one's view of the baseline and the extent to which official interrogation involves an implicit threat, virtually all interrogation might be regarded as coercive.

45 *See, e.g.*, 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2250–84 (John T. McNaughton rev. 1961); MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 3–23 (1980).

46 Thomas & Bilder, *supra* note 9, at 258–59 (footnote omitted).

47 JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 63 (1996) (footnote omitted). Most advocates of a voluntariness or overborne-will test, in contrast, fail to address its difficulties in application. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1128–29 (1998); Stephen J. Markman, Miranda v. Arizona*: A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 199–200 (1987). For his part, Professor Grano argued that instead of endeavoring to define compulsion or voluntariness, the constitutional inquiry into the permissibility of interrogation tactics should be governed by the Due Process Clause and "premised on notions of fundamental fairness that are rooted in some 'objective' source, such as tradition or concepts of ordered liberty and justice." GRANO, *supra*, at 95 (footnote omitted). The classic objection to identifying substantive due-process limitations on governmental power imposed by reference to history, tradition, or some notion of fundamental values, however, is that the process is all too likely to collapse into subjectivity and judicial policymaking. *See, e.g.*, Rochin v. California, 342 U.S. 165, 174–77 (1952) (Black, J., concurring); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 60–72 (1980); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989). Professor Grano acknowledged that the Court had yet to develop a sufficiently objective due process jurisprudence, but believed that a rigorous inquiry tethered to objective factors can minimize the likelihood that judges will read their personal values into the concept of due process. *See* GRANO, *supra*, at 95–99. Experience since Professor Grano's expression of optimism, however, does not offer much hope of determinacy. The last time the Court was asked to assess an interrogation technique under the Due Process Clause, in a case involving a suspect who had been shot by police, leaving him blinded and paralyzed, and who was questioned as he was undergoing emergency treatment, the Court divided 4-3 on the permissibility of the interrogation, with the remaining two Justices evidently unable to make up their minds. *See Chavez*, 538 U.S. at 774–76 (opinion of Thomas, J.) (finding no due process violation because interrogation did not interfere with medical treatment or otherwise do harm); *id.* at 779–80 (opinion of the Court) (leaving due process claim for remand); *id.* at 795–99 (Kennedy, J., concurring in part and dissenting in part) (finding a due process violation because interrogation created an impression that treatment was being withheld).

48 Alschuler, *supra* note 25, at 2626 n.6.

toyed with the notion that compulsion "mean[s] police conduct that thwarts rational self-interested decision making by the suspect,"[49] though he ultimately found this account wanting.[50] Indeed, preserving a suspect's ability to make a rational choice seems to have little to do with Fifth Amendment compulsion – a suspect could rationally choose to submit to interrogation rather than torture, for example, yet few would doubt that compulsion was exerted in forcing the choice on the suspect.[51] Professor Stuntz eventually abandoned the effort to define compulsion, writing, "compulsion can mean almost anything."[52]

Ronald Allen and Kristin Mace once predicted that instead of formulating a definition or test for compulsion, "the Court will continue the common-law process of locating the various types of pressure along a continuum and using social conventions to determine how much pressure is permissible."[53] There is reason to doubt, however, that Fifth Amendment jurisprudence can achieve anything like coherence in the absence of a definition of compulsion.

B. The Need for a Definition

The problems that arise in the absence of a clear conception of compulsion are well-illustrated by the splintered decision in *Salinas v. Texas*.[54]

Genovevo Salinas agreed to be questioned at a police station by officers investigating a double murder.[55] He answered an officer's questions until he was asked if his shotgun would match shells recovered at the crime scene; at that point, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."[56] Then, "[a]fter a few moments of silence, the officer asked additional questions, which [Salinas] answered."[57] Salinas did not testify at his subsequent trial, but "prosecutors used his reaction to the officer's question [about the shells] as evidence of his guilt."[58]

In an opinion joined only by Chief Justice John Roberts and Justice Anthony Kennedy, Justice Samuel Alito rejected Salinas's contention that the prosecution's evidentiary use of his silence violated the Fifth Amendment

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49 William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1264 (1988).

50 *See id.* at 1264–72.

51 *Cf.* Peter Westen & Stewart Mandell, *To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response"*, 19 AM. CRIM. L. REV. 521, 521 (1982) ("The privilege against self-incrimination protects people from being put to certain choices.").

52 William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 804 (1989).

53 Allen & Mace, *supra* note 44, at 256.

54 133 S. Ct. 2174 (2013).

55 *Id.* at 2178 (plurality opinion).

56 *Id.* (internal quotations and citation omitted).

57 *Id.*

58 *Id.*

under *Griffin*'s no-adverse-comment-on-silence rule, relying on the rule that "a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it.[59] Salinas, Justice Alito observed, never invoked the protection of the Fifth Amendment during his interview, even though "it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds."[60]

Justice Alito's opinion is seemingly a triumph of form over substance. Although, as Justice Alito noted, silence in the face of an interrogator's questions is not considered an invocation of the Fifth Amendment rights,[61] if a suspect states that he does not wish to answer, that is considered an invocation.[62] Justice Alito never doubted *Griffin*'s applicability when a suspect expressly invokes Fifth Amendment rights during police questioning, yet he failed to explain why the *Griffin* right to be free from an adverse comment on silence should turn on the fact that Salinas remained silent rather than (paradoxically) announcing that he was remaining silent, which would qualify as an invocation.[63] Nor did he explain why Salinas was under sufficient compulsion during a voluntary police interview to permit him to invoke a right to be free from *compelled* self-incrimination. Perhaps Salinas merely exhibited a preference to remain (selectively) silent not rooted in the Fifth Amendment.[64]

In his dissenting opinion, Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, rejected Justice Alito's reliance on an invocation requirement, and argued that the prosecution's use of Salinas's selective silence under interrogation as evidence against him effectively converted Salinas into a witness against himself, in violation of the Fifth Amendment.[65] Yet, on the question whether Salinas was subject to compulsion within the meaning of the Amendment, Justice Breyer did no more than cite *Griffin*, offering neither a definition of compul-

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59 *Id.* at 2179 (further internal quotations omitted) (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

60 *Id.* at 2180.

61 *Id.* at 2182 (citing Berghuis v. Thompkins, 560 U.S. 370, 375–76, 380–82 (2010)).

62 *See Berghuis*, 560 U.S. at 381–82; Michigan v. Mosley, 423 U.S. 96, 103–06 (1975).

63 The closest Justice Alito came to an explanation was when he wrote that an invocation "ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, or cure any potential self-incrimination through a grant of immunity. The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer." *Salinas*, 133 S. Ct. at 2179 (citations omitted). Yet, despite Salinas's failure to invoke, the government remained free to argue that the questions he was asked did not call for incriminating answers, or it could have offered him immunity. Moreover, since an invocation requires no more than a simple declaration that Salinas "wanted to remain silent or that he did not want to talk with the police," *Berghuis*, 560 U.S. at 382, an invocation would have shed little light on Salinas's reasons for remaining silent.

64 For a more elaborate critique along similar lines, see Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEG. F. 255, 275–80, 283.

65 *Salinas*, 133 S. Ct. at 2185–86.

sion nor an explanation for how Salinas was compelled to incriminate himself during a concededly voluntary interview, in which he evidently retained the ability to decide which questions he would answer.[66]

Justice Clarence Thomas's opinion, joined by Justice Antonin Scalia, was the only one to treat with the question whether Salinas was subject to compulsion within the meaning of the Fifth Amendment. He concluded that "[a] defendant is not 'compelled . . . to be a witness against himself' simply because a jury has been told it may draw an adverse inference from his silence."[67] Although *Griffin* held to the contrary when it comes to comment on a defendant's failure to testify at trial, in Justice Thomas's view, "*Griffin* 'lacks foundation in the Constitution's text, history, or logic' and should not be extended."[68]

Justice Thomas is not alone in attacking *Griffin*; Judge Henry Friendly, for example, wrote that *Griffin* "gave inadequate weight to the language of the amendment that testimony must be 'compelled'; presenting an unpleasant consequence is not compulsion unless the unpleasantness is so great as in effect to deprive of choice."[69] Moreover, since *Griffin*, the Court has frequently permitted the use of an adverse inference based on an individual's refusal to answer potentially incriminating questions in a variety of contexts outside of a defendant's silence at a trial or sentencing.[70]

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66 *Id.* at 2185, 2190. Moreover, as Professor Alschuler observed, the dissent anomalously privileges the suspect who communicates evidence of guilt through silence over one who speaks. *See* Alschuler, *supra* note 40, at 867–68. If Salinas were subject to compulsion, then presumably any form of resulting testimony from him, whether based on an inference from his silence or, even more clearly, his express statements, may not be used against him under the Fifth Amendment.

67 *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring in the judgment) (citation omitted).

68 *Id.* (quoting Mitchell v. United States, 526 U.S. 314, 341 (1999) (Scalia, J., dissenting)).

69 Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 700 (1968). *See also*, *e.g.*, Carter v. Kentucky, 450 U.S. 288, 306 (1981) (Powell, J., concurring) ("A defendant who *chooses not to testify* hardly can claim that he was *compelled to testify*."); Griffin v. California, 380 U.S. 609, 621 (1965) (Stewart, J., dissenting) ("Since comment by counsel and the court does not compel testimony . . . the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive."); Off. Leg. Pol'y, U.S. Dep't of Just., *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1095 (1989) [hereinafter OLP Memo] ("The government does not compel the defendant to remain silent. That reflects the defendant's own choice, and permitting adverse comment on silence, far from 'compelling' a choice not to testify, actually makes the choice of remaining silent less attractive."). For scholarly criticism along similar lines, see, for example, Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence:* Griffin v. California *after Fifteen Years*, 78 MICH. L. REV. 841, 853–66 (1980); Jeffrey Bellin, *Reconceptualizing the Fifth Amendment Prohibition of Adverse Comment on Criminal Defendants' Trial Silence*, 71 OHIO ST. L.J. 229, 249–62 (2010); and Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1341–49 (2009).

70 *See, e.g.*, Ohio Adult Par. Auth. v. Woodard, 523 U.S. 272, 288 (1998) (clemency interviews); Baxter v. Palmigiano, 425 U.S. 308, 317–20 (1976) (prison disciplinary proceedings). For an argument that the *Griffin* caselaw has become incoherent, see James J. Duane, *The Extraordinary Trajec-*

Salinas demonstrates the problem with the Court's failure to define Fifth Amendment compulsion. The opinions of Justices Alito and Breyer, by eliding that issue, fail to address the question whether Salinas was compelled to incriminate himself, which may explain why they could not command a majority of the Court. Only Justice Thomas addressed that issue; but, in doing so, he found it necessary to repudiate a substantial body of Fifth Amendment jurisprudence built on the edifice of *Griffin*.[71] Indeed, *Griffin* seems in some jeopardy; not only did Justice Thomas expressly attack it in *Salinas*, but Justice Alito went to some lengths to avoid reaffirming its core holding.[72] It is not for nothing that some believe "*Griffin* is on its last legs."[73] Yet, even Justice Thomas's opinion in *Salinas* failed to define compulsion; it only expressed a view about what compulsion is not.

The practical consequences of identifying compulsion in the constitutional sense are considerable. When the presence of compulsion is uncontested, as when a court issues an immunity order requiring a witness to testify on pain of contempt, the Fifth Amendment requires that the resulting testimony be immunized for all purposes, and cannot be used even for purposes of impeaching the witness's subsequent testimony,[74] or as a source of investigative leads that may produce a subsequent prosecution.[75] Similarly, when an interrogator compels an individual to confess within the meaning of the Fifth Amendment, any additional evidence derived from the confession must also be suppressed as "fruit of the poisonous tree."[76] When only a *Miranda* violation is at stake, however, in the absence of compulsion in the constitutional sense, the Court regards itself as empowered to craft a more limited exclusionary rule that permits illegally-obtained statements to be used when the costs of exclusion are thought to outweigh the benefits of adhering to *Miranda*.[77] For example, as long as they were not actually compelled, a suspect's statements obtained in violation of *Miranda* can be used to impeach,[78] and to acquire additional evidence such as further admissions

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tory of Griffin v. California*: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 STAN. J. CRIM. L. & POL'Y 1 (2015).

71 *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 327–30 (1999) (holding that a sentencing judge may not draw an adverse inference from defendant's silence in sentencing proceedings); Carter v. Kentucky, 450 U.S. 288, 301–05 (1981) (requiring a trial judge on request to instruct the jury to draw no adverse inference from defendant's failure to testify).

72 Justice Alito described *Griffin* as holding that "a criminal defendant need not take the stand and assert the privilege at his own trial." *Salinas*, 133 S. Ct. at 2179. This formulation manages to avoid restating, much less endorsing, the core holding of *Griffin*.

73 Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CALIF. L. REV. 699, 729 n. 146 (2014).

74 *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 456–60 (1979).

75 *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 38–44 (2000).

76 *See, e.g.*, Harrison v. United States, 392 U.S. 219, 222–26 (1968).

77 *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657–59 (1984).

78 *See, e.g.*, Oregon v. Haas, 420 U.S. 714, 720–24 (1975).

made after the administration of the requisite warnings,[79] or physical evidence.[80] Thus, it becomes all the more important to define compulsion in order to determine when the broad rule of exclusion required by the Fifth Amendment should be employed. It is to this task that we now turn.

II. DEFINING COMPULSION

In common parlance, the term "compel" connotes not so much an internal psychological process as the application of an external force to produce a result.[81] For an originalist like Justice Scalia, who believed that the words of a legal text "must be given the meaning they had when the text was adopted,"[82] contemporary usage will not do; but framing-era sources define "compel" in similar terms.[83]

The insight suggested by both contemporary and framing-era usage is that compulsion should be defined by reference to the external pressures placed on an individual. As we will see, this insight bears considerable fruit.

A. A Proposed Definition

While they differ on details, there is widespread agreement among scholars that the prohibition on compelled self-incrimination reflected the English repudiation of the practice of investigative tribunals such as the High Commission and Star Chamber to require individuals to provide sworn testimony.[84] Those who refused to take the oath *ex officio* required by

79 *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 305–09 (1985); *but cf.* Missouri v. Seibert, 542 U.S. 600, 614 (2004) (plurality opinion) (deliberate use of two-stage questioning with warnings given only after an incriminating statement is made requires exclusion); *id.* at 620–22 (Kennedy, J., concurring in the judgment) (same).

80 *See, e.g.*, United States v. Patane, 542 U.S. 630, 637–41 (2004) (plurality opinion); *id.* at 644–45 (Kennedy, J., concurring in the judgment).

81 *See, e.g.*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 253 (11th ed. 2003) (defining "compel" as "to drive or urge forcefully or irresistibly" and "to cause to do or occur by overwhelming pressure") [hereinafter MERRIAM-WEBSTER]; III THE OXFORD ENGLISH DICTIONARY 599 (2d ed. 1989) (defining "compel" as "[t]o urge irresistibly, to constrain, oblige, force") [hereinafter OED].

82 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012).

83 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH WORDS ARE DEDUCED FROM THEIR ORIGINALS 425 (1755) (defining "compel" as "[t]o force to some act; to oblige; to constrain; to necessitate; to urge irresistibly"); 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828) (defining "compel" as "to drive by force; to coerce").

84 *See, e.g.*, BERGER, *supra* note 45, at 3-23; ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 2–7 (1955); LEVY, *supra* note 2, at 266–332; 8 WIGMORE, *supra* note 45, § 2251; Alschuler, *supra* note 25, at 2638–47; Benner, *supra* note 44, at 68–92; Edwin S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 3–9 (1930); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 538–45 (1992); John H. Langbein, *The His-*

these tribunals faced contempt or other punitive sanctions.[85] Under the rule of *pro confesso*, for example, a refusal to take an oath was treated as a confession to the crime under investigation.[86] These practices provoked enormous opposition; Leonard Levy, for example, summarized the objections to the use of compelled oaths by the High Commission thusly:

> Victims of the High Commission could only protest feebly that the oath *ex officio* was a device of the devil, a violation of the law of the land, an instrument of the Spanish Inquisition akin to torture. The real objection to the Commission was its purpose, the fact that it was meant to punish the purest promptings of conscience, but its oath procedure remained the foremost target of its opponents.[87]

Once these objections prevailed, the prohibition on compelled self-incrimination became widely recognized as "an established, respected rule of the common law, or, more broadly, of English law generally."[88]

Prior to the Revolution, the prohibition on compelled testimony spread to the American colonies.[89] Adherence to the prohibition survived independence; between 1776 and 1783, eight states adopted constitutions or bills of rights that provided that no person could be "compelled to give evidence against himself," or, in the case of Massachusetts, "furnish evidence against himself."[90] During the consideration of the original constitution, four of the ratifying states recommended placing this prohibition in the United States Constitution.[91] Although the formulation employed by James Madison in his draft of what became the Fifth Amendment prohibition on compelled self-incrimination differed from that employed in the states,

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torical Origins of the Privilege Against Self-Incrimination at Common Law, 92 MICH. L. REV. 1047, 1074–84 (1994); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 4–12 (1949); Penney, *supra* note 19, at 315–18; R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769–74 (1935).

85 *See, e.g.*, LEVY, *supra* note 2, at 130–33, 203–04, 250; Charles M. Gray, *Self-Incrimination in Interjurisdictional Law*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 47, 79–80 (1997) [hereinafter ORIGINS AND DEVELOPMENT]; Langbein, *supra* note 84, at 1073.

86 *See, e.g.*, LEVY, *supra* note 2, at 132, 203–04, 269; Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEG. HIST. 326, 338–39 (2008–10).

87 LEVY, *supra* note 2, at 268–69. For discussions along similar lines, see, for example, Alschuler, *supra* note 25, at 2639–51; Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 218–21 (1998); Penney, *supra* note 19, at 315–18; and William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 412–16 (1995).

88 LEVY, *supra* note 2, at 313.

89 *See, e.g.*, *id.* at 368–404; Benner, *supra* note 44, at 84–88; Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1100–04 (1994); Morgan, *supra* note 84, at 18–23; Pittman *supra* note 84, at 775–83.

90 *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS § 9.1.3 (Neil H. Cogan ed. 1997) [hereinafter COMPLETE BILL OF RIGHTS].

91 *See id.* at § 9.1.2; LEVY, *supra* note 2, at 416, 418–21.

there is no evidence that it was understood as anything other than a codification of the preexisting rule against compelled testimony.[92]

Originalists should find much significance in this discussion. Originalism does not confine itself to the semantic meaning of constitutional text as found in framing-era dictionaries and the like; the manner in which the framing-era public would have understood constitutional text is of critical importance. As the Court has written in an opinion authored by Justice Scalia:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.[93]

Among those who contend that the original meaning of constitutional text is interpretively binding, many if not most advocate reliance on the framing-era public's understanding.[94] This approach seems to follow from the widespread if not universal view among originalists that legal texts are properly understood to reflect the meaning they were given at the time they were crafted.[95] On this view, the historical origin of the prohibition on com-

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92 See, e.g., LEVY, *supra* note 2, at 422–30; Benner, *supra* note 44, at 88–90; Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1008–09 (2003); Lewis Mayers, *The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common Law?*, 4 AM. J. LEG. HIST. 107, 110–19 (1960); Moglen, *supra* note 89, at 1121–24; Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1607–08 (1999). The consideration in Congress of what became the Fifth Amendment is remarkably unilluminating when it comes to original understanding of the prohibition on compelled self-incrimination. See COMPLETE BILL OF RIGHTS, *supra* note 90, § 9.1.1.

93 District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)) (internal citations deleted) (second brackets in original).

94 *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) ("[T]he objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 551 (1994) ("[T]he text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land.") (footnote omitted); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) ("[H]ow the words and phrases, and structure . . . would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted . . . .") (footnote and parenthetical omitted); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 677 (1991) ("[A] constitutional provision's 'objective meaning' to *the public* at the time the provision was ratified . . . .") (emphasis omitted).

95 *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 35–37 (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–117 (2004); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 67–90 (1992); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 28–53 (1994); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 160–212 (1999); Hans W. Baade, *"Origi-*

pelled self-incrimination has great interpretive significance since the Fifth Amendment codified a widely-understood and longstanding prohibition.

Nonoriginalists should also regard the origin of the rule against compelled self-incrimination as of critical import. After all, nonoriginalists do not doubt that any inquiry into the meaning of a legal text has a starting point in the framing era, even if the understanding of the text may evolve in light of felt experience.[96] In his defense of nonoriginalism, for example, Jed Rubenfeld argued that when a constitutional provision is directed at a paradigmatic evil, it should be understood as a commitment to prohibit the evil that gave it rise, without precluding an interpretation that proscribe additional practices regarded as sufficiently similar to warrant similar constitutional prohibition.[97] Even if one is skeptical about whether one can readily identify a discrete paradigmatic abuse at which most constitutional provisions are directed,[98] that skepticism seems unwarranted when it comes to the Fifth Amendment, which does seem to have been constructed with a particular paradigm in mind.[99] Indeed, the Supreme Court has justified its willingness to extend the Fifth Amendment beyond the abuses that gave it rise by assessing whether contemporary interrogation tactics raise concerns

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nal Intent" in Historical Perspective: Some Critical Glosses, 69 TEX. L. REV. 1001, 1103–07 (1991); Calabresi & Prakash, *supra* note 94, at 550–59; Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1186–1259 (1987); Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756–60 (1987); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641–57 (2009); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226, 229–36 (1988); Kesavan & Paulsen, note 94, at 1127–48; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–36 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512–14 (1988); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 38–42 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

96 *Cf.* Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.").

97 JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 99–124 (2005).

98 For an expression of skepticism along these lines, see Brannon P. Denning, *Brother, Can You Paradigm?*, 23 CONST. COMMENT. 81, 98–110 (2006) (reviewing RUBENFELD, *supra* note 97).

99 *See* Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1986–87 (2006). Indeed, many leading nonoriginalist arguments about the Fifth Amendment start with framing-era understandings and then endeavor to justify their evolution. *See, e.g.*, KAMISAR, *supra* note 27, at 35–37; Morgan, *supra* note 84, at 27–30.

fairly analogous to those that originally produced the prohibition on compelled self-incrimination.[100]

The paradigm that gave rise to the widespread acceptance of a prohibition on compelled self-incrimination suggests that compulsion, in the constitutional sense, whether considered in terms of original meaning or as a starting point for nonoriginalist construction, references a particular investigative tactic. On this view, compulsion is properly defined in terms of the paradigm of compelled self-incrimination: *An official undertaking to induce a witness to provide evidence by threat of punitive sanctions.*

B. Scrutinizing the Definition

The proposed definition and its constituent elements nicely explain Fifth Amendment jurisprudence. Although there are some important ambiguities in the definition that need to be examined, the definition provides a remarkably good account of Fifth Amendment compulsion.

1. Official Undertaking to Induce

As we have seen, the paradigm of compulsion did not involve an effort to plumb the internal psychology of a suspect, but rather focused on a particular investigative tactic involving an official effort to obtain evidence from a witness. Accordingly, the first element of the definition of compulsion identifies a necessary though not sufficient condition for the presence of compulsion—an official undertaking to induce an individual to provide evidence.

True to the paradigm, Fifth Amendment jurisprudence has long limited the prohibition on compelled self-incrimination to official undertakings to induce. In *Miranda*, for example, the Court cautioned that "[v]olunteered statements of any kind are not barred by the Fifth Amendment . . . ."[101] The Court later added that the Fifth Amendment is implicated only when interrogators employ "a measure of compulsion above and beyond that in-

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100 *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) ("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.") (citation, footnote, and some internal quotations omitted). *Cf.* McKune v. Lile, 536 U.S. 24, 41 (2002) (plurality opinion) ("Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.").

101 Miranda v. Arizona, 384 U.S. 436, 478 (1966). *Accord, e.g.*, Ohio Adult Par. Auth. v. Woodard, 523 U.S. 272, 286 (1998); Minnesota v. Murphy, 465 U.S. 420, 427 (1984). *Cf.* LEVY, *supra* note 2, at 374–75 ("Never in history has the existence of the right placed the state under an obligation to prevent a person from incriminating himself.") (footnote omitted).

herent in custody itself," involving "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[102]

The importance of tying compulsion to an official-undertaking-to-induce rather than a suspect's internal psychology is made particularly clear by *Colorado v. Connelly*,[103] in which the Court rejected the view that the Fifth Amendment barred the use of a confession by an individual who, by virtue of mental illness, "was not capable of making a 'free decision with respect to his constitutional right of silence . . . and his constitutional right to confer with a lawyer before talking to the police.'"[104] The Court wrote that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"[105] *Connelly* has been subject to fierce criticism from those who believe that it gives short shrift to concerns about the reliability of confessions.[106] Yet, *Connelly* is faithful to the paradigm of compulsion by focusing on the requirement that the government induce an individual to provide incriminating evidence.

The same point explains the Court's conclusion that the contents of a voluntarily-created document are not protected by the Fifth Amendment because the author was not compelled to produce them, but requiring an individual to produce such documents pursuant to court order is subject to Fifth Amendment protection when the act of production would involve testimonial self-incrimination.[107] The role of the government in undertaking to induce an individual to provide evidence is therefore critical; it is this aspect of Fifth Amendment compulsion that is captured by the official-inducement element of the proposed definition.

Another illustration of the importance of the official-inducement element involves a criminal defendant's ability to testify in his own defense. In the framing era, criminal defendants were not permitted to testify by virtue of their presumed interest in the outcome of the case, though they were often permitted to give unsworn statements.[108] In the nineteenth century, this

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102 Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (footnotes omitted).

103 Colorado v. Connelly, 479 U.S. 157 (1986).

104 *Id.* at 169 (quoting People v. Connelly, 702 P.2d 722, 729 (Colo. 1985)).

105 *Id.* at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985)). The Court added that the Fifth Amendment does not apply "whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police." *Id.*

106 *See, e.g.*, Benner, *supra* note 44, at 65–66; George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 272–76 (1988).

107 *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 35–40 (2000); United States v. Doe, 465 U.S. 605, 610–14 (1984).

108 *See, e.g.*, George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 624–50, 662–66 (1997); John Fabian Witt, Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903, 77 TEX. L. REV. 825, 835, 849–52 (1999). Leonard Levy once argued that in light of the framing-era rule that disqualified criminal defendants from giving sworn testi-

rule came under assault by those who argued that the reliability of the criminal process would be improved if the defendant could testify.[109] One of the arguments advanced against permitting a criminal defendant to testify, however, was that criminal defendants, if permitted to testify, would be impermissibly compelled to incriminate themselves by virtue of the need to meet the prosecution's case.[110] Yet, this argument ultimately did not carry the day; between 1864 and 1900, federal law and the law of every state except Georgia changed to permit criminal defendants to testify.[111]

The removal of the bar on testimony of a criminal defendant suggests a rejection of the notion that criminal defendants, if permitted to testify, are subject to compulsion in violation of the Fifth Amendment. Indeed, the Supreme Court eventually opined that a criminal defendant confronted with the prosecution's case is not under compulsion within the meaning of the Fifth Amendment.[112] The official-inducement element of the proposed

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mony, the Fifth Amendment would have had to reach unsworn statements or it would have been a "meaningless gesture." Leonard Levy, *The Right Against Self-Incrimination*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1569, 1570, 1572 (Leonard Levy et al. eds., 1986). This is a considerable overstatement; even if limited to a prohibition on compelled oaths, the Amendment would have been meaningful if only to preclude a return to that practice. For an argument along these lines, see Ralph Rossum, *"Self-Incrimination": Original Intent*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 275, 276–77 (Eugene W. Hickock ed., 1991).

109 *See, e.g.*, Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 120–29 (1981).

110 *See, e.g.*, Ferguson v. Georgia, 365 U.S. 570, 578–79 (1961); Bodansky, *supra* note 109, at 115.

111 *See, e.g.*, *Ferguson*, 365 U.S. at 577–78; Bodansky, *supra* note 109, at 93.

112 *See, e.g.*, Ohio Adult Par. Auth. v. Woodard, 523 U.S. 272, 287 (1998) ("[T]here are undoubted pressures—generated by the strength of the government's case against him—pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute 'compulsion' for Fifth Amendment purposes."); Barnes v. United States, 412 U.S. 837, 847 (1973) ("Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination."); McGautha v. California, 402 U.S. 183, 217 (1971) ("[T]he policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt."); Yee Hem v. United States, 268 U.S. 178, 185 (1925) ("[T]he practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion . . . . The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."). Somewhat inconsistently, on other occasions, the Court has characterized a defendant's testimony as a waiver of Fifth Amendment rights. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 364 (1996); Raffel v. United States, 271 U.S. 494, 496–97 (1926); Caminetti v. United States, 242 U.S. 470, 494 (1917). These statements, however, appear to rest not on the view that a criminal defendant is under compulsion to testify but can waive the right to be free from compulsion; but rather on the view that once a defendant has voluntarily disclosed incriminating facts by testifying, no Fifth Amendment right remains. As the Court has put it: "Disclosure of a fact

definition of compulsion explains why this is so. Although prosecutors may sometimes fashion their case hoping that it will force the defendant to the stand, we do not think of the prosecution's case-in-chief as an undertaking to induce the defendant to provide evidence, rather than an undertaking to discharge the prosecution's burden of proof. To be sure, the stronger the prosecution's case, the greater the threat that the defendant will face punitive sanctions, but without an undertaking to induce the defendant to provide evidence, a threat of conviction, without more, does not produce compulsion within the meaning of the Fifth Amendment.

The official-inducement element also makes comprehensible the much-criticized required records doctrine, which provides that despite the potentially incriminating character of the required disclosures, as an incident of an otherwise proper noncriminal regulatory regime, a business can be required to maintain and produce records reflecting its compliance with pricing regulations,[113] a driver can be required to stop and identify himself at the scene of an accident,[114] and an individual whose custody of a child is subject to judicial supervision can be required to produce the child for judicial proceedings.[115] Commentators have been harshly critical of this doctrine, arguing that a regulatory scheme cannot be enforced by compelling individuals to provide incriminating evidence.[116] Yet, this element of the proposed definition renders the doctrine readily reconcilable with the Fifth Amendment.

In the cases in which the required records doctrine has been recognized, the regulatory scheme at issue was directed not at undertaking to induce individuals to provide evidence, but rather at shaping primary conduct. The laws at issue in these cases, by requiring individuals to make disclosures about particular regulated activities, were official undertakings to provide an ex-ante incentive for individuals to comply with police power regulations involving pricing, driving, child custody and the like; these laws promoted "compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."[117] Accordingly, the disclosure requirements at issue, though enforced by criminal

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waives the privilege as to details," as long as there is no "reasonable danger of further crimination in light of all the circumstances, including any previous disclosures." Rogers v. United States, 340 U.S. 367, 373–74 (1951). *Accord, e.g.*, Mitchell v. United States, 526 U.S. 314, 321–22 (1999); 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 133; 8 WIGMORE, *supra* note 45, § 2276.

113 *See* Shapiro v. United States, 335 U.S. 1, 32–35 (1948) (requiring the keeping of records in accordance with government regulations does not transfer the Fifth Amendment privilege to those records).

114 *See* California v. Byers, 402 U.S. 424, 427–34 (1971) (plurality opinion); *Id.* at 439–58 (Harlan, J., concurring in the judgment).

115 *See* Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 558–62 (1990).

116 *See, e.g.*, Amar & Lettow, *supra* note 11, at 869–73; David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1141–42 (1986); Nagareda, *supra* note 92, at 1642–45.

117 *Bouknight*, 493 U.S. at 556.

sanctions, were efforts to shape primary conduct and promote compliance with noncriminal regulatory objectives, not official undertakings to induce individuals to provide evidence.[118] Conversely, some disclosure requirements directed at narrow classes of individuals likely to be engaged in unlawful activities violate the Fifth Amendment because, rather than undertaking to shape primary conduct, they operate to induce individuals to provide incriminating information or to identify themselves as potential prosecutive targets by invoking the Fifth Amendment.[119] One cannot identify the line between permissible regulation directed at primary conduct and impermissibly inducing of an individual to supply incriminating evidence with mathematical certainty, but this is precisely the line that the proposed definition of compulsion tells us needs to be drawn.[120]

The official-inducement element not only explains these important if much-debated aspects of Fifth Amendment jurisprudence, but also neatly elides many of the problems of the overborne-will test. As we have seen, the overborne-will test is plagued by the difficulties in determining why an individual chooses to submit to interrogation.[121] The objection to the compelled oath that gave rise to the prohibition on compelled self-incrimination, however, inhered in the investigative tactic itself—the threat of punitive sanctions deployed to induce individuals to provide evidence—and not to the psychological effect that the threat produced in particular individuals. Thus, identifying compulsion does not require a case-by-case inquiry into the effect of threatened sanctions on a particular witness. Faithful to the historical paradigm, this element of the definition makes clear that compulsion does not turn on an individual's psychology or his subjective reaction to an investigative technique, but rather on an objective

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118 *Cf.* United States v. Hubbell, 530 U.S. 27, 35 (2000) ("[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.") (footnotes omitted). For arguments similarly stressing the noncriminal objectives of the regulatory schemes upheld in the required-records cases, albeit without linking the doctrine to the meaning of compulsion, see Michael J. Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1179–80 (2007); and Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 26 (1986).

119 *See, e.g.*, Leary v. United States, 395 U.S. 6, 26 (1969) (holding that a regulation to pay a transfer tax on marijuana violates the Fifth Amendment); Haynes v. United States, 390 U.S. 85, 100 (1968) (holding that an obligation to register and pay a tax on a firearm if it is not acquired by lawful transfer or importation violates the Fifth Amendment); Marchetti v. United States, 390 U.S. 39, 42, 56 (1968) (holding that a requirement that individuals in the business of taking wagers register and pay an excise tax violates the Fifth Amendment); Albertson v. Subversive Activities Control Board, 382 U.S. 70, 70–79 (1965) (holding than an obligation for the Communist Party to register with the Subversive Activities Control Board violates the Fifth Amendment).

120 *Cf.* Stuntz, *supra* note 49, at 1287 (arguing that in the required records cases, "[t]he only solution is to make judgments of degree").

121 *See supra* text accompanying notes 21–36.

assessment of an investigative tactic—whether it is an official undertaking to induce individuals to provide evidence.

2. A Witness Providing Evidence

An analytically distinct element of the proposed definition requires that the authorities undertake to induce not just anyone, but specifically a witness, and to a particular end—to provide evidence.

Context always matters when reading legal texts; surely the term "compel" should be considered in the context in which it appears. The Fifth Amendment does not refer to compulsion in the abstract, but rather compulsion "to be a witness."[122] The term "witness," in turn, generally refers to those who provide testimony or evidence. For example, referring to the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him,"[123] the Supreme Court defined witnesses as "those who 'bear testimony.'"[124] And, as we have seen, at the framing, the Fifth Amendment was regarded as equivalent to the state-law prohibitions on compulsion to "give" or "furnish" evidence.[125] Thus, context suggests that compulsion, for purposes of the Fifth Amendment, must be directed at a witness, for the purpose of inducing the witness to provide evidence.

Some might find the manner in which this element of the proposed definition is stated to be overbroad. After all, many of the arguments that gave rise to the prohibition against compelled self-incrimination focused on the significance of compelling individuals to provide sworn testimony, which was thought to implicate religious injunctions against compelled oaths and produce a form of spiritual coercion by forcing individuals to choose between confession and eternal damnation.[126] The compelled oath, it was

122 U.S. CONST. amend V. The discussion that follows focuses on the requirement that an individual be compelled to be a witness because this illuminates the character of compulsion. It does not, however, consider the additional requirement that the individual be compelled to be a witness *against himself*—that is, the requirement of self-incrimination. That element of the Fifth Amendment right is analytically distinct from the inquiry into compulsion. Whether an individual has become a witness against himself involves consideration not of the character of compulsion, but instead whether the substance of the information that an individual is compelled to provide could be used to incriminate. *See, e.g.*, Hiibel v. Sixth Jud. Ct. of Nev., 542 U.S. 177, 190 (2004) (Fifth Amendment applicable only when there is "reasonable ground to apprehend danger to the witness from his being compelled to answer") (citation omitted). Indeed, a classic example of compulsion involves a witness ordered to testify under immunity, where the presence of compulsion is plain, even though the testimony cannot be used to incriminate. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled.").

123 U.S. CONST. amend. VI.

124 Crawford v. Washington, 541 U.S. 36, 51 (2004) (citation omitted).

125 *See supra* text accompanying notes 90–92.

126 *See, e.g.*, LEVY, *supra* note 2, at 23–24; LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 14 (1959); Alschuler, *supra* note 25, at 2641–43; Moglen, *supra* note 89, at 1100–01.

said, amounted to "a form of torture more cruel than physical torture because it tormented one's soul by tempting a man to save himself from punishment by perjuring himself at the expense of dishonoring God's name and risking eternal damnation."[127] Even putting spiritual concerns aside, compelled testimony has been thought to produce "the cruel trilemma of self-accusation, perjury or contempt . . . ."[128] Some have therefore argued that the Fifth Amendment is inapplicable when interrogators seek unsworn statements.[129] This view suggests that the second element of the proposed definition is overbroad, since it reaches any official undertaking to induce an individual to provide evidence, even if the evidence comes in the form of an unsworn confession or other statement.

To be sure, a definition of compulsion limited to efforts to obtain sworn testimony would leave investigators free to compel unsworn confessions, but only under the Fifth Amendment. As we have seen, the Due Process Clause forbids the use of involuntary confessions as evidence; accordingly, limiting the Fifth Amendment to compulsion to provide sworn testimony would not leave torture and other coercive forms of interrogation not involving sworn testimony beyond the reach of the Constitution. Indeed, historically, the rule against involuntary confessions developed separately from the rule against compelled self-incrimination.[130] Accordingly, those who would limit the Fifth Amendment to compulsion of sworn testimony regard the Amendment's application to unsworn interrogation as a "hopeless confounding of self-incrimination with due process."[131]

This attack on the breadth of the witness-providing-evidence element of the proposed definition is strengthened by framing-era practice. There is no framing-era precedent for anything resembling police interrogation because there was nothing in the framing-era analogue resembling a police force with investigative responsibilities.[132] There is, however, framing-era

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127 LEVY, *supra* note 2, at 24.

128 Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

129 *See*, Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1488 (1997) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

130 *See*, GRANO, *supra* note 47, at 124–25; Benner, *supra* note 44, at 99–101; Godsey, *supra* note 44, at 484; Penney, *supra* note 19, at 322; Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, *in* ORIGINS AND DEVELOPMENT, *supra* note 85, at 153.

131 William T. Pizzi & Morris B. Hoffman, *Taking* Miranda*'s Pulse*, 58 VAND. L. REV. 813, 840 (2005).

132 Framing-era law enforcement consisted of constables and sheriffs whose duties were confined to executing warrants, responding to breaches of the peace, making arrests for offenses committed in their presence, and pursuing offenders when summoned in the wake of a crime. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28–29, 68 (1993); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 419–32 (2002); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1468–72

precedent for judicial interrogation. Despite the emergence of the prohibition on compelled self-incrimination, English law permitted unsworn examination of criminal defendants by judicial officers at preliminary hearings, authorized under a statute enacted during the reign of Queen Mary.[133] These examinations often produced confessions that were treated as admissible evidence at trial.[134] The Marian preliminary examination spread to the American colonies, and seems to have persisted even after the adoption of the Fifth Amendment and its state-law analogues.[135] Historical practice accordingly suggests that a criminal defendant could be required to provide evidence as long as he was not compelled to take an oath. Indeed, Professor Alschuler has argued that the Fifth Amendment should be understood to permit a return to some form of the Marian procedure for judicial examination of suspects.[136] In *Salinas*, Justice Thomas, citing Professor Alschuler's article, contended that the Marian preliminary examination properly informs inquiry into the scope of the Fifth Amendment.[137]

Yet, Fifth Amendment jurisprudence has never limited compulsion to efforts to obtain sworn testimony. In the very first case in which the Supreme Court considered a Fifth Amendment objection, it invalidated a statute authorizing courts to order importers to produce business records in a criminal forfeiture proceeding or face an adverse judgment, even though the statute did not require the importer to be sworn, on the ground that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself . . . ."[138] Subsequently, in *Bram v. United States*,[139] the Court

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(2005). *See also* Herman, *supra* note 84, at 543 ("Until the beginning of the nineteenth century, interrogation was essentially a judicial or quasi-judicial task. Although law enforcement officers existed during the formative period of the privilege, their function was to keep the peace and apprehend offenders, not to interrogate.") (footnotes omitted).

133 2 & 3 Phil. & M., ch. 10 (1555) (Eng.).

134 See, e.g., LEVY, *supra* note 2, at 325; Alschuler, *supra* note 25, at 2653–54; Benner, *supra* note 44, at 80; Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 124–25, 141 (1992); Langbein, *supra* note 84, at 1059–61. For an analysis of the text and operation of the statute contending that its original purpose was to have justices of the peace undertake an appropriate investigation of alleged criminal conduct rather than obtain statements from the defendant, see JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 15–45 (1974).

135 *See, e.g.*, Alschuler, *supra* note 25, at 2656; Davies, *supra* note 92, at 1002–03; Moglen, *supra* note 89, at 1095, 1123–25. *See also* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 694 (2005) (finding defendant's statements at preliminary examinations admitted at trial in five of forty-eight New Jersey cases studied).

136 *See* Alschuler, *supra* note 25, at 2670.

137 *See* Salinas v. Texas, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring in the judgment). To similar effect, see Mitchell v. United States, 526 U.S. 314, 331–33 (1999) (Scalia, J., dissenting).

138 Boyd v. United States, 116 U.S. 616, 634–35 (1886).

139 168 U.S. 532 (1897).

held that the Fifth Amendment barred the use of an unsworn statement of an accused under police interrogation, reasoning that the interrogator effectively compelled Bram to provide evidence.[140] In *Miranda*, the Court, relying in significant part on *Bram*, reaffirmed that the Fifth Amendment applied to custodial interrogation even if unsworn.[141] On this point, the Court has never backtracked.[142]

Of course, one might believe that Fifth Amendment jurisprudence has not been faithful to a proper conception of compulsion, and therefore fault the second element of the proposed definition as replicating an error reflected in the case law. Yet, there is a solid case to be made that the Fifth Amendment reaches unsworn but compelled statements, based on two interrelated considerations.

First, considered in terms of either original meaning or ordinary parlance, the text of the Fifth Amendment is not limited to compelling individuals to provide sworn testimony. In terms of original meaning, most likely the Fifth Amendment was considered equivalent to the state-law prohibitions on compelling individuals to give evidence regardless of its form; Richard Nagareda has assembled compelling evidence on this point,[143] as has Justice Thomas.[144] Indeed, in one of its earliest cases considering the Fifth Amendment, the Supreme Court concluded the phrases "to be a witness" and one who "gives evidence" were interchangeable.[145] One can be a "witness" who gives "evidence," however, even when one is not under oath, as when a suspect provides an incriminating though unsworn statement later offered as evidence against him.[146] Nor does the term "witness" inevitably refer to one under oath; in both ordinary and framing-era parlance, individuals who have seen an event are often referred to as "witnesses" regardless whether they have testified under oath.[147]

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140 *Id.* at 562.

141 Miranda v. Arizona, 384 U.S. 436, 460–67 (1966).

142 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 434 (2000); Pennsylvania v. Muniz, 496 U.S. 582, 596, n.10 (1990).

143 *See* Nagareda, *supra* note 92, at 1607.

144 *See* United States v. Hubbell, 530 U.S. 27, 52–53 (2000) (Thomas, J., concurring).

145 *See* Counselman v. Hitchcock, 142 U.S. 547, 584, 586 (1892).

146 *Cf.* Crawford v. Washington, 541 U.S. 36, 51–52 (2004) (holding that persons making unsworn statements under circumstances that make them likely to be used as evidence against an accused are "witnesses" for purposes of the Sixth Amendment right to confront adverse "witnesses").

147 As far back as the first edition of Webster's dictionary, the multiple meanings of the term "witness" were evident; the first edition defined witness as:

> 1. Testimony; attestation of a fact or event. 2. That which furnishes evidence or proof. 3. A person who knows or sees any thing; one personally present; as, he was *witness*; he was an eye-*witness*; 4. One who sees the execution of an instrument, and subscribes it for purpose of confirming its authenticity by his testimony; 5. One who gives testimony; as, the *witnesses* in court agreed in all essential facts.

2 WEBSTER, *supra* note 83, at signature 114.1 verso (explanatory examples omitted). This dual meaning that can reference to both sworn and unsworn witnesses persists in contemporary usage. *See, e.g.*, MERRIAM-WEBSTER, *supra* note 81, at 1439; 20 OED, *supra* note 81, at 464.

Second, even if, in the framing era, the form of compulsion of greatest concern involved compelled oaths, that is no reason to ignore other forms of compulsion. As we have seen, a primary objection to the compelled oath was that it was regarded as so coercive as to amount to torture.[148] It would be odd, however, to read the Fifth Amendment as prohibiting compulsion to provide sworn testimony because it was regarded as coercive, while leaving other similarly coercive vehicles for obtaining testimony, such as obtaining an unsworn statement through physical torture, outside the ambit of compulsion. Indeed, the opponents of compelled oaths frequently likened them to the use of torture or other coercive means for obtaining confessions that could be used as evidence regardless whether they were sworn.[149] Although the spiritual coercion implicit in a compelled oath was likely of special concern in the framing era, in a more secular era, the threat of secular sanctions if one does not submit to official questioning may well have more potency than the threat to one's soul of swearing falsely.[150] When the oath fades in significance, there is less reason to draw a sharp distinction between sworn and unsworn interrogation.

There is also reason to doubt the importance of framing-era judicial examination of unsworn defendants as a precedent suggesting the view that only compulsion of sworn testimony is addressed by the Fifth Amendment. In England, the persistence of the Marian preliminary examination is unsurprising; since the Marian statute was not repealed, judges remained obligated to apply it despite the prohibition on compelled self-

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148 *See supra* text accompanying notes 88, 126–28.

149 *See, e.g.*, LEVY, *supra* note 2, at 327–29; Herman, *supra* note 134, at 170–209. As Justice Story put it when describing the Fifth Amendment, placing no evident weight on whether a confession was sworn, the Fifth Amendment:

> is but an affirmance of a common law privilege. But it is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt. And what is worse, it . . . . has been contrived, (it is pretended,) that innocence should manifest itself by a stout resistance, or guilt by a plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves. Cicero, many ages ago, though he lived in a state, wherein it was usual to put slaves to the torture, in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking, as they are brief. They are conceived in the spirit of Tacitus, and breathe all his pregnant and indignant sarcasm. Ulpian, also, at a still later period in Roman jurisprudence, stamped the practice with severe reproof.

III JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 660 (1833) (footnotes omitted). Significantly in this respect, Professor Langbein observed that in eighteenth-century England, there is some indication that the prohibition on compelled self-incrimination was coming to be applied to the questioning of even unsworn defendants. *See* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 280–81 (2003).

150 *Cf.* Alschuler, *supra* note 25, at 2667 ("In our era, however, the fires of hell have smoldered. Oaths have lost their terror and even their meaning.").

incrimination.[151] Moreover, John Langbein has demonstrated that even after its recognition, the right against compelled self-incrimination remained largely a dead letter in England as long as the rule barring defense counsel in criminal cases remained in force because, in the absence of defense counsel, defendants had little choice but to speak to defend themselves.[152] Thus, the persistence of the unsworn examination in England may say more about the need for counsel to make the prohibition on compelled self-incrimination effective than anything else.

The Marian examination may have had even less probative value in the United States when it comes to assessing the scope of the Fifth Amendment. For one thing, it is unclear how frequently judicial examination of criminal defendants occurred; there is some indication that framing-era lawyers and commentators believed that the Marian statutes were not part of the common law followed in America.[153] For another, framing-era practice may shed little light on the scope of the Fifth Amendment because it is unclear that the right against compelled self-incrimination was consistently recog-

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151 Even if the prohibition acquired something like constitutional status in England, this would not likely have been thought to provide a basis for ignoring or invalidating the Marian statute; the general view taken in English law was that Parliament was the supreme authority on the constitutionality of legislation. *See, e.g.*, CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 32–39, 106–07 (1930); David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 888–90 (2003). It was not until 1848 that a defendant was afforded the right to remain silent at a preliminary hearing. *See* 11 & 12 VICT. CH. 42 (1848) (Eng.). As Blackstone put it, seemingly recognizing the tension between judicial examination of the accused and the prohibition on compelled self-incrimination:

> The justice before who such prisoner is brought is bound immediately to *examine* the circumstances of the crime alleged; and to this end, by statute . . . he is to take in writing the examination of such prisoner and the information of those who bring him; which, Mr. Lombard observes, was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum*; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.

IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 296 (1769) (citation and footnote omitted). For a helpful exploration of the origins of this Latin maxim that encapsulates the prohibition on compelled self-incrimination, see R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990).

152 *See* Langbein, *supra* note 84, at 1059–62, 1065–71. To similar effect, see, for example, LEVY, *supra* note 2, at 320–23.

153 *See, e.g.*, Moglen, *supra* note 89, at 1126–29. *See also* FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 71 (9th ed. 1889) ("In several of the United States, among them which Pennsylvania may be mentioned, the [Marian] statute has not been viewed as in force; nor has the practice of taking the prisoner's examination been generally adopted.") (footnote and citation omitted). One framing-era source put the matter thusly:

> The confession of the defendant, taken on an examination before justices of the peace, or in discourse with private persons, it is said, may be given in evidence against the party confessing . . . . But it should be observed, that the examination of the offender, being taken in pursuance of the statute of England . . . which is not in force in this country, the trial of a criminal in this state must be governed by the rules of the common law, and our own acts of Assembly; neither of which will justify his own examination in order to convict him.

WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 188 (2d ed. 1810).

nized in the framing era; there is evidence from colonial New York, for example, that the right against compelled self-incrimination was rarely recognized even when it came to sworn testimony.[154] Indeed, we have seen that in the absence of counsel, Fifth Amendment rights are largely illusory, and the shortage of lawyers in early America would therefore have inhibited the development of Fifth Amendment rights. Using the example of New York, Eben Moglen observed despite the recognition of a constitutional right to counsel, "expansion of the criminal defense practice was slow."[155] Although data is sparse, it seems likely that most criminal defendants went unrepresented until well into the nineteenth century.[156] They were particularly unlikely to be represented at preliminary hearings, when the accused would have had little time to procure counsel.[157]

Significantly, judicial examination of the accused did not survive for long after American independence; it was abandoned over the course of the next century.[158] By the late nineteenth century, the prevailing practice was to leave to the defendant the decision whether to speak at the preliminary hearing.[159] This only strengthens the supposition that the persistence of judicial examination more likely reflected the absence of defense counsel advancing objections—or silencing their clients—than its consistency with the Fifth Amendment.

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154 *See* JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE 656–59 (1944).

155 Moglen, *supra* note 89, at 1126. A study of colonial justice in Frederick County, Maryland, similarly found that only a fraction of defendants had counsel, although by the early nineteenth century, the incidence of counsel had dramatically increased. *See* James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681–1837*, 40 AM. J. LEG. HIST. 455, 457–59 (1996) (providing that 17.9% of defendants had counsel during 1767–1771 and 59.7% of defendants had counsel during 1818–1825). In contrast, in colonial New Jersey records, George Thomas found appearances at trial by defense counsel in twenty-six of forty-eight cases, though it is unclear if counsel appeared at the preliminary examination. *See* Thomas, *supra* note 135, at 689 (comparing colonial New Jersey and England and finding that in England, defendants had counsel in eight of 171 cases while in New Jersey, defendants had counsel in twenty-six of forty-eight cases, amounting to "ratios [of] 5% defense counsel in London and 54% in colonial New Jersey.").

156 *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18, 27–33, 226–28 (1955); ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 79 (1930).

157 It is notable that in the handful of early cases in which the Supreme Court upheld the admission of statements made by a defendant during a preliminary examination as voluntarily made, albeit without consideration of the Fifth Amendment, the defendant did not have counsel at the preliminary examination to interpose objection. *See, e.g.*, Powers v. United States, 223 U.S. 303, 310–11, 313–14 (1912); Wilson v. United States, 162 U.S. 613, 621–24 (1896).

158 *See, e.g.*, KAMISAR, *supra* note 27, at 51–55; Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1231–38 (1932).

159 *See, e.g.*, I JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE § 235(b)(2) (1895); WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL PROCEDURE § 35, at 87–88, 93–94 (William E. Mikell ed., 2d ed. 1918); EMORY WASHBURN, A MANUAL ON CRIMINAL LAW 112 (1878). *See also* Bram v. United States, 168 U.S. 532, 549–52 (1897) (describing the emergence of the rule requiring magistrates to ensure that a defendant's statement was voluntary).

In any event, we have little insight into the framing-era conception of the relation between the prohibition on compelled self-incrimination and judicial examination; from the framing-era to the end of the nineteenth century, no judicial opinion considered the matter.[160] Even so, the tension between judicial examination and the Fifth Amendment was not unknown in the framing era; in the eighteenth and early nineteenth centuries, there were instances in both England and the United States in which *Miranda*-like warnings were required during judicial examination.[161]

Thus, the Marian examination provides highly uncertain evidence of the original meaning of the Fifth Amendment. Perhaps judicial examination survived only until defense lawyers arrived to assert their clients' rights. The relatively rapid disappearance of compulsory judicial examination, at a minimum, suggests that it was not a deeply rooted aspect of criminal procedure. Moreover, the fact that the Marian examination was unsworn could well have reflected no more than the then-prevailing rule barring sworn testimony by a defendant, rather than an understanding that the Fifth Amendment barred compulsion of only sworn testimony.

Finally, stare decisis has its claims as well. As we have seen, a long line of cases has consistently applied the Fifth Amendment to compulsion of even unsworn statements.[162] Given the development of Fifth Amendment jurisprudence, it seems clear that the concept of compulsion has come to include any official undertaking to induce an individual to provide evidence, whether sworn or unsworn, by threat of punitive sanctions. The second element of the proposed definition accordingly reflects this widely-accepted conception of compulsion.

3. By Threat

The proposed definition also requires that a particular means be used to induce an individual to become a witness—by threat of punitive sanctions.

As we have seen in Part II.A above, when the prohibition on compelled self-incrimination first emerged, it was in response to a witness's legal exposure to a formal threat of sanctions imposed by judicial process, such as the

160 For useful accounts of pertinent jurisprudence through the end of the nineteenth century, see Alan G. Gless, *Self-Incrimination Privilege Development in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion*, 45 AM. J. LEG. HIST. 391 (2001); and Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEG. HIST. 235 (1998).

161 *See* Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 784–94 (2007); George C. Thomas III & Amy Jane Agnew, *Happy Birthday* Miranda *and How Old Are You, Really?*, 43 N. KY. L. REV. 301, 302–03, 308–16 (2016).

162 *See supra* text accompanying notes 138–142.

power to hold a recalcitrant witness in contempt or enter judgment against him under the *pro confesso* rule.[163]

Similar to the argument that the second element of the proposed definition is too broad because it is not limited to sworn testimony, some might object that in light of the paradigmatic abuse that gave rise to the prohibition, this third element is overbroad because the paradigm of compulsion required a threat of formal sanctions, as opposed to informal extrajudicial threats of punishment or other adverse consequences that may follow if an individual refuses to provide evidence. On this view, only compulsion exerted by law, rather than informal or implicit threats, is sufficient.[164]

For many, however, this attack on the breadth of the threat element of the proposed definition will not seem persuasive. When determining whether compulsion is present, it is hard to understand why the presence of compulsion should turn on whether a suspect is threatened with a formal judgment of contempt rather than a less formal but perhaps equally alarming alternative—such as a threat that the suspect will be beaten unless he confesses.[165] The text of the Fifth Amendment embraces all forms of compulsion, regardless of how it is applied. Thus, for the same reasons that the second element of the proposed definition embraces any effort to convert a suspect into a witness, whether sworn or unsworn, the third element embraces any threat, whether formal or informal. Indeed, this is the conclusion that Fifth Amendment jurisprudence long ago reached, and it is reflected in this element of the proposed definition.

Since at least *Bram*, it has been settled that informal compulsion is cognizable under the Fifth Amendment. In *Bram*, the first officer on a ship, suspected of murdering its captain, was taken into custody and brought to the office of a detective, where he was stripped, searched, and then questioned.[166] After telling Bram that another crew member "made a statement that he saw you do the murder" and that the detective was "satisfied that that you killed the captain," the detective added: "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."[167] In assessing the admissibility of Bram's ensuing statements, the Court wrote that the Fifth Amendment "was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from

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163 *Cf.* Pizzi & Hoffman, *supra*, note 131, at 843 ("Judges—who might hold a criminal defendant in contempt for refusing to testify—seem to have been the Founders' original targets, not the police.").

164 For exploration of this argument, see, for example, MAYERS, *supra* note 126, at 82–83; WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 13–18 (1967); and 8 WIGMORE, *supra* note 45, § 2252 at 328–29, 329 n.27.

165 For a more elaborate argument along these lines, see Herman, *supra* note 84, at 543–44.

166 Bram v. United States, 168 U.S. 532, 534–38 (1897).

167 *Id.* at 539.

moral causes . . . ."[168] The Court reasoned that the detective's comments to Bram "produce[d] upon his mind the fear that if he remained silent it would be considered an admission of guilt, and . . . den[ied him the] hope of removing the suspicion from himself."[169] Moreover, the detective had effectively "called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow."[170] *Bram* accordingly held that an interrogator's questions produce compulsion when they create a fear that unless the suspect can somehow satisfy the interrogator, or at least offer some grounds for leniency, things will go badly.

Bram was later extended in *Ziang Sung Wan v. United States*,[171] in which the defendant was held for some twelve days and persistently questioned, even though he was seriously ill, until he confessed.[172] Although the Court acknowledged that the suspect had received neither promises nor threats, in an opinion by Justice Louis Brandeis, the Court, relying primarily on *Bram*, concluded that the defendant's confession had been compelled within the meaning of the Fifth Amendment.[173] Subsequently, in concluding that the Fifth Amendment applied to custodial interrogation, *Miranda* similarly relied on *Bram*.[174]

Bram is often criticized for conflating the rule against involuntary confessions with the prohibition on compelled self-incrimination.[175] Yet, *Bram* actually elided the problems with an overborne-will test by focusing on the threats or inducements facing the suspect, not the suspect's subjective reaction to them. *Bram* explained that because "the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, [it] therefore excludes the declaration if any degree of influence has been exerted."[176] *Bram* found compulsion not by probing Bram's psyche and finding his will overborne, but because Bram faced a specific threat

168 *Id.* at 548.

169 *Id.* at 562.

170 *Id.* at 565.

171 266 U.S. 1 (1924).

172 *Id.* at 10–14.

173 *Id.* at 14–17.

174 Miranda v. Arizona, 384 U.S. 436, 460–62 (1966).

175 *See, e.g.*, GRANO, *supra* note 47, at 123–31; 8 WIGMORE, *supra* note 45, § 2266 & n.1; Davies, *supra* note 92, at 1034–37; Godsey, *supra* note 44, at 477–88. *But cf.* Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 453 (1938) ("It may be conceded that in time of origin the confession-rule and the self-incrimination rule were widely separated . . . . Nevertheless, the kinship of the two rules is too apparent for denial. It is significant that the shadow of the rack and the thumbscrew was part of the background from which each rule emerged.") (footnotes omitted).

176 Bram v. United States, 168 U.S. 532, 565 (1897) (quoting WILLIAM O. RUSSELL & CHARLES S. GREAVES, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896)) (internal quotations omitted).

of punitive sanctions—if he remained silent, he risked that his silence would fail to satisfy his interrogator of his innocence, or, at least, fail to suggest some basis to mitigate his culpability.[177] In this, *Bram* is supported by the basic insight that "failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question."[178] Thus, *Bram* is faithful to the historical paradigm of compelled self-incrimination, which, as we have seen, involves inquiry into whether a threat of sanctions faces a suspect who remains silent, not a mere voluntariness or overborne-will test.[179]

In any event, whether or not *Bram* was correct in the first instance, its recognition of informal compulsion is a rule of long standing, and represents the doctrinal foundation on which the edifice of *Miranda* stands. Moreover, despite post-*Miranda* jurisprudence that suggested that *Miranda*'s holding is broader than the Constitution requires,[180] the Court has confirmed that *Miranda* is rooted in the Fifth Amendment's prohibition on compelled self-incrimination.[181] Thus, this third element of the proposed definition, like the first two, faithfully reflects the longstanding course of Fifth Amendment jurisprudence.

4. Punitive Sanctions

The final element of the proposed definition limits compulsion to the use of a threat of specifically punitive sanctions. As Part I.A above explains, the paradigmatic abuses that produced the prohibition on compelled self-incrimination involved a threat of punitive sanctions if an individual refused to provide evidence, such as a judgment of contempt or a judgment of conviction under the *pro confesso* rule.

Some might object that the proposed definition is overbroad because it encompasses threats of any effectively punitive sanction, rather than being limited to threats of formal and expressly criminal sanctions of the type employed by the High Commission and the Star Chamber, such as a judgment of contempt, or conviction of a crime *pro confesso*. Nevertheless, some threats, though not involving criminal sanctions, have been regarded as sufficiently punitive to trigger the Fifth Amendment.

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177 For a more elaborate analysis of *Bram* along these lines, see Penney, *supra* note 19, at 326–29.

178 Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (quoting United States v. Hale, 422 U.S. 171, 176 (1975)) (ellipses in original and citations omitted). For explication of the manner in which the law treats silence as an admission by acquiescence, see MCCORMICK ON EVIDENCE, *supra* note 2, § 262; and 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, §§ 1071–73 (James H. Chadbourn rev., 1972).

179 *See supra* text accompanying notes 84–92.

180 *See supra* text accompanying note 45.

181 *See* Dickerson v. United States, 530 U.S. 428, 438–41 (2000).

As we have seen, the Court has held that the Fifth Amendment forbids the government from requiring public officials, employees or contractors to provide potentially incriminating evidence or face loss of their positions or contracts.[182] The Court has also concluded that an attorney cannot be required to provide potentially incriminating evidence or face disbarment or other professional sanctions.[183] This reflects the commonsense reality that even nominally noncriminal sanctions may be so effectively punitive in character, such as the "threat of substantial economic sanction,"[184] or the "threat of dismissal from employment,"[185] that they effectively produce compulsion; they are "sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'"[186] Physical violence is doubtless another type of effectively punitive sanction capable of forcing self-incrimination.[187] In terms of their punitive character and potency to induce individuals to provide potentially incriminating evidence, these sanctions are not meaningfully different from formal criminal sanctions. Recognizing that compulsion can include threatened sanctions not formally denominated as criminal punishment doubtless adds a measure of uncertainty to the definition of compulsion, but limiting it to a threat of formal criminal liability would make form prevail over substance.

C. Assessing the Definition

The proposed definition of compulsion is based on the historical paradigm of compelled self-incrimination, although it accommodates widely accepted developments in the understanding of that concept. To the extent that it is broader than would be required to describe investigative tactics that gave rise to the original prohibition, it is only because there are ambiguities lurking in what it means to be a witness, the concept of threats, and the character of punitive sanctions. Fifth Amendment jurisprudence has resolved these ambiguities by choosing substance over form—a witness is one who provides evidence whether sworn or unsworn since its incriminating character is little different; threats are covered whether formal or informal since they can be of equal potency; and all effectively punitive sanctions are embraced whether or not they are formally designated as criminal. This is the point Justice Brandeis made in *Ziang Sung Wan* when he wrote

182 *See supra* text accompanying notes 30–32.

183 *See* Spevack v. Klein, 385 U.S. 511, 514–16 (1967) (plurality opinion); *id.* at 519–20 (Fortas, J., concurring in the judgment).

184 Lefkowitz v. Turley, 414 U.S. 70, 82 (1973).

185 Uniformed San. Men Ass'n v. City of New York, 392 U.S. 280, 284 (1968).

186 Minnesota v. Murphy, 465 U.S. 420, 434 (1984) (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)).

187 *Cf.* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473–74 (2015) (characterizing use of excessive force against a pretrial detainee as "punishment" within the meaning of the Due Process Clause).

that "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise."[188] This elevation of substance over form has been a consistent theme of Fifth Amendment jurisprudence, and it is accurately captured by the proposed definition.

Even for originalists, confining the Fifth Amendment to the precise evil the Framers had in mind is a kind of slavish adherence to framing-era expectations that few would endorse. As Michael McConnell once put it: "[N]o reputable originalist . . . takes the view that the Framers' assumptions and expectation about the correct application of their principles is controlling . . . . [T]he Framers' analysis of particular applications could be wrong, or . . . circumstances could have changed and made them wrong."[189] Indeed, original meaning is often distorted when framing-era practice is consulted without reference to its historical context.[190] Changes in technological context provide one example; although, in the framing era, a "search" for purposes of the Fourth Amendment's prohibition on unreasonable search and seizure involved a physical trespass, no less an originalist than Justice Scalia authored an opinion concluding that the term "search" also included "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'" a conclusion that was necessary to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[191]

Accordingly, most originalists draw a distinction between original meaning and the original expected applications of constitutional text, and regard only the former as binding.[192] Perhaps the best example involves *Brown v.*

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188 Ziang Sung Wan v. United States, 266 U.S. 1, 14–15 (1924) (citing *Bram*, 168 U.S. 532 (1897)).

189 Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (internal quotations omitted).

190 *See, e.g.*, BALKIN, *supra* note 95, at 10–16, 75–81; RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 291–94 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1804–10 (1997); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–617 (1998); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–08; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1169–71 (1993).

191 Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

192 *See, e.g.*, BALKIN, *supra* note 95, at 6–14; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); McConnell, *supra* note 189, at 1284–87; Michael S. Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2059–62 (2006); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539–46 (2011); Rotunda, *supra* note

Board of Education.[193] Racial segregation remained common throughout the country even after the ratification of the Fourteenth Amendment,[194] but when addressing its constitutionality in *Brown*, the Court famously wrote that "we cannot turn the clock back to 1868 when the Amendment was adopted . . . ."[195] Virtually all originalists agree; the response of most to *Brown* is to argue that racial segregation is inconsistent with the original meaning of the Fourteenth Amendment's textual commitment to equality, even if the framing generation did not yet understand the implications of the constitutional text it had ratified.[196] Similarly, while the Framers had a specific investigative tactic in mind when they crafted the Fifth Amendment, its text addresses compulsion even when it manifests in different forms. Even for originalists, accordingly, there is ample reason to doubt the interpretive significance of the Framers' likely expectation that compulsion would generally involve sworn testimony or formal threats of criminal sanctions. If the form that compulsion takes changes or the understanding of how it operates deepens, Fifth Amendment jurisprudence should follow.[197]

Living constitutionalists, for their part, happily consider changes in context or practice. As interrogation migrated from the Star Chamber and the High Commission to police stations, living constitutionalists argue that the Fifth Amendment's application should follow the same path, rather than being confined to practices prevalent in the framing era.[198]

Accordingly, the proposed definition should be pleasing to originalists and living constitutionalists alike. It accurately captures both the framing-era paradigm and the evolution of Fifth Amendment jurisprudence; that should be reason enough to embrace it. There is, however, one remaining challenge to the definition—reconciling it with the law of waiver.

95, at 513–14; Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U.L. REV. 923, 935 (2009).

193 347 U.S. 483 (1954).

194 See Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885–93 (1995).

195 *Brown*, 347 U.S. at 492.

196 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 81–83 (1990); PERRY, *supra* note 95, at 42–44; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 423–26 (1995). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1092–1105 (1995) (arguing that *Brown* can be reconciled with framing-era understandings by noting that majorities in Reconstruction-era Congresses expressed opposition to segregation during consideration of what became the Civil Rights Act of 1875, though admittedly not the requisite two-thirds majority to amend the Constitution, and without presenting evidence that the requisite number of states would have ratified the Amendment on this understanding).

197 For an argument along these lines, *see* Lessig, *supra* note 190, at 1234–37.

198 For leading examples of non-originalist argument along these lines, albeit not based on a definition of compulsion, see KAMISAR, *supra* note 27, at 35–37, 48–64; Morgan, *supra* note 84, at 27–30; Stephen A. Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 12–15 (1986); and Schulhofer, *supra* note 20, at 437–39.

III. COMPULSION AND WAIVER

Perhaps the primary reason that Fifth Amendment jurisprudence and commentary have made so little progress in developing a definition of compulsion is that it seems so difficult to reconcile a rigorous conception of compulsion with the rule that the right to be free from compelled self-incrimination can be voluntarily waived. As Professor Alschuler once put it: "Although a defendant or suspect might sensibly waive a right to remain silent, few sane adults would waive a right to be free of compulsion."[199]

The problem is reflected in the critical reaction to *Miranda*. The Court wrote: "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[200] Accordingly, the Court required that those in custody be advised of their rights to remain silent and have counsel present during questioning, and then knowingly and voluntarily waive those rights, before any statements made in custodial interrogation are deemed to be consistent with the Fifth Amendment.[201] In dissent, however, Justice Byron White reasonably responded that if individuals in custody are subject to compulsion to speak, the mere provision of warnings could not be expected to somehow eliminate that compulsion and produce voluntary waivers.[202] Commentators have echoed that criticism ever since.[203]

Even putting the debate over *Miranda* aside, the law of Fifth Amendment waiver, though rarely examined by scholars, is in considerable disar-

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199 Alschuler, *supra* note 25, at 2627. To similar effect, see, for example, Benner, *supra* note 44, at 63–64 ("[T]he idea that any sane person would voluntarily (much less knowingly and intelligently) waive the right not to be subjected to compulsion is pure nonsense."). Professor Stuntz's effort to address this point reflects the basic problem; he argued that Fifth Amendment waiver doctrine should be understood to permit waiver when the harm at which the Amendment is directed is not present, which he characterized as "a relatively narrow evil—the practice of forcing individuals to choose between confession and false statement . . . ." Stuntz, *supra* note 52, at 766. But, whenever a suspect is under compulsion to speak, it would seem that the individual is forced to choose between confession and false statement, rendering any waiver inconsistent with Professor Stuntz's own formulation.

200 Miranda v. Arizona, 384 U.S. 436, 458 (1966).

201 *Id.* at 471–79.

202 *Id.* 535–36 (White, J., dissenting).

203 *See, e.g.*, DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 81, 119–20 (2003); THOMAS & LEO, *supra* note 27, at 172–74; Ronald J. Allen, Miranda*'s Hollow Core*, 100 NW. U.L. REV. 71, 75–76 (2006); Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 384–85 (1997); Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59–61 (1968); Joseph D. Grano, *Selling the Idea To Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 671–72 (1986) (reviewing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986)); Penney, *supra* note 19, at 370–71; Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 110–12 (1989); Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 740, 744–46 (1992).

ray. For decades, the Court cautioned that if an individual voluntarily chooses to make potentially incriminating statements rather than invoking his Fifth Amendment rights, that constitutes a waiver of Fifth Amendment rights.[204] The rule that Fifth Amendment rights be invoked or they are lost applies even when the individual has not been warned of his Fifth Amendment rights, as long as the individual has not been subjected to custodial interrogation within the meaning of *Miranda*.[205] It would seem, however, that a mere decision to answer a police officer's question could not produce a valid waiver of Fifth Amendment rights since waivers must be knowing and intelligent, as well as voluntary.[206] As one commentator observed, this invocation requirement, instead of demanding a knowing and intelligent waiver, "permits the uncounseled witness to give up a valuable right without being aware until after the fact that he is doing so. One pleasantly disposed could term this 'gee, you'll wish you hadn't said that' waiver."[207]

At some point, the Court seems to have realized that terming a failure to invoke Fifth Amendment rights a "waiver" was insupportable. By the time of *Minnesota v. Murphy*, the Court admitted that "[w]itnesses who failed to claim the privilege were once said to have 'waived' it, but we have recently abandoned this 'vague term,' and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.'"[208] But, if waiver does not explain the rule that Fifth Amendment rights must be asserted or they are lost, what does? Perhaps the rule rests on a doctrine of forfeiture. A rule of invoke-or-forfeit Fifth Amendment rights might seem plausible; as Professor Levy wrote: "Historically, it has been a fighting right; unless invoked, it offered no protection."[209] Once one focuses on the concept of compulsion, however, this reasoning collapses.

Fifth Amendment rights attach only after an individual is subjected to compulsion. Yet, in *Murphy*, the Court wrote that its "cases, taken together,

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204 *See, e.g.*, Rogers v. United States, 340 U.S. 367, 371 (1951) ("The privilege 'is deemed waived unless invoked.'") (quoting United States v. Murdock, 284 U.S. 141, 148 (1931)); United States ex rel. Vajtauer v. Comm'r of Immig., 273 U.S. 103, 113 (1927) ("The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it."); Powers v. United States, 223 U.S. 303, 314 (1912) ("[A] defendant, who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement.").

205 *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420, 429–34 (1984); Garner v. United States, 424 U.S. 648, 656–57 (1976).

206 *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 382–83 (2010); Colorado v. Spring, 479 U.S. 564, 573 (1987); Moran v. Burbine, 475 U.S. 412, 421 (1986).

207 Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 10 (1970). For a more elaborate discussion focusing on the same point in Fifth Amendment waiver law, see George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 246–49 (1977).

208 See Minnesota v. Murphy 465 U.S. 420, 427–28 (1984) (quoting Green v. United States, 355 U.S. 184, 191 (1957); *Garner*, 424 U.S. at 654 n.9).

209 LEVY, *supra* note 2, at 375.

'stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself.'"[210] But, once an individual is under *compulsion*, how can he make a free choice about whether to "make[] disclosures instead of claiming the privilege"? Surely the Court did not mean to suggest that one under torture must invoke or lose Fifth Amendment rights. Why should one under compulsion be expected to gather the fortitude to invoke the right against compelled-self-incrimination or else face forfeiture of the right?[211]

The Court sometimes acknowledges that strict adherence to an invocation requirement is untenable. It has held, for example, that the invocation requirement should not be applied to custodial interrogation,[212] cases in which an individual faces punitive sanctions for refusing to provide information, such when public employees are threatened with dismissal for failing to submit to questioning,[213] or cases in which the assertion of Fifth Amendment rights would in itself supply incriminating information to the government, such as regulatory schemes targeting classes of individuals likely to be engaged in unlawful activities who are required to disclose information about their activities or income.[214] The Court has not had much success, however, in explaining why it has recognized exceptions to the invocation rule in these contexts and not others. In *Garner v. United States*, for example, the Court wrote that the assert-or-waive rule is not applied when "the relevant factor was held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.'"[215] It seems likely, however, that any individual "under compulsion" necessarily lacks a "free choice to admit, deny, or to refuse to answer." Yet, as we have seen, the Court takes the position that even witnesses "under compulsion" must assert or lose Fifth Amend-

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210 *See* Minnesota v. Murphy 465 U.S. 420, 427 (1984) (quoting *Garner*, 424 U.S. at 654).

211 *Cf.* Donald Dripps, *Is the* Miranda *Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 27 (2000) ("If a suspect on the rack answered questions without asserting his privilege, the government would not be heard to argue that the privilege must be claimed and that answering the questions waives the privilege.").

212 *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (plurality opinion); *Murphy*, 465 U.S. at 429–30; *Garner*, 424 U.S. at 657–58; Roberts v. United States, 445 U.S. 552, 560–61 (1980).

213 *See, e.g.*, *Salinas*, 133 S. Ct. at 2180 (plurality opinion); *Murphy*, 465 U.S. at 434–35; *Garner*, 424 U.S. at 661–63.

214 *See, e.g.*, *Salinas*, 133 S. Ct. at 2180 (plurality opinion); *Murphy*, 465 U.S. at 439–40; *Garner*, 424 U.S. at 658–61.

215 *Garner*, 424 U.S. at 657 (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)). Similarly, in *Roberts*, the Court concluded that a defendant who cooperated with the investigation of the narcotics distribution conspiracy of which he was a member was required to invoke the Fifth Amendment at the time of sentencing because he "ha[d] identified nothing that might have impaired his 'free choice to admit, deny, or refuse to answer.'" 445 U.S. at 561 (quoting *Garner*, 424 U.S. at 657 (further internal quotations omitted)).

ment rights,[216] without explaining how such individuals retain "a free choice to admit, deny, or to refuse to answer."

The Court's efforts to explain the invocation requirement and its exceptions have added little but confusion. Once the definition of compulsion advanced above is applied, however, the apparent incoherence of the concepts of invocation and waiver disappears.

A. The Invocation Requirement

In *Garner*, the Supreme Court observed that although it had long stated that "a witness who revealed information instead of claiming the privilege lost the benefit of the privilege," the decision in "[*United States v.*] *Kordel* appears to be the only square holding to this effect."[217] In *Kordel*, the federal government brought suit against a corporation alleging violations of the Food, Drug, and Cosmetic Act, and served interrogatories which the district court ordered the corporation to answer.[218] The corporate officer who answered the interrogatories was subsequently indicted, and claimed that the interrogatories had compelled him to incriminate himself in violation of the Fifth Amendment.[219] The Court disagreed, writing that the corporate officer "need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination."[220] In *Garner*, the Court relied on *Kordel* to hold that the disclosures that a taxpayer made on his income tax return were not shielded by the Fifth Amendment because the taxpayer made those disclosures instead of asserting his Fifth Amendment rights on the return.[221]

There are many confusions lurking in *Kordel* and *Garner*, all stemming from the Court's failure to define compulsion. It might seem that there was compulsion aplenty in both cases. In *Kordel*, the district court had ordered the corporation to answer the interrogatories, and for just this reason, the court of appeals had concluded that the corporation's officers had been compelled to provide incriminating evidence.[222] In *Garner*, applicable law required a taxpayer to make a complete return or face liability for failure to make a return or contempt should the taxpayer disobey a judicial order requiring him to provide information about his tax liability.[223] Applying the

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216 *See supra* text accompanying notes 204–08, 210.

217 *Garner*, 424 U.S. at 653.

218 United States v. Kordel, 397 U.S. 1, 3–5 (1970).

219 *Id.* at 6–7.

220 *Id.* at 7 (footnote omitted).

221 *Garner*, 424 U.S. at 656–57, 665.

222 *See* United States v. Detroit Vital Foods, Inc., 407 F.2d 570, 573–74 (6th Cir. 1969), *rev'd sub nom.* United States v. Kordel, 397 U.S. 1 (1970).

223 *Garner*, 424 U.S. at 651–52.

definition of compulsion advanced above to these cases, however, neither *Kordel* nor *Garner* involved compulsion.

Compulsion, as we have seen, involves an official undertaking to induce a witness to provide evidence by threat of punitive sanctions. Once invoked, however, the Fifth Amendment removes the threat of punitive sanctions that might otherwise attend a refusal to respond to official inquiries. For example, had they chosen to invoke the Fifth Amendment, the corporate officers in *Kordel* and the taxpayer in *Garner* would have faced no threat of punitive sanctions if they refused to provide evidence—because the Fifth Amendment prohibits compelled self-incrimination, it would have, once invoked, prevented the government from attaching punitive sanctions to the refusal to provide potentially incriminating evidence.[224] Even if the government can ordinarily require an individual to provide it with information, an individual always has the right to defend against a threat of sanctions attached to an official demand for information by invoking the Fifth Amendment.[225]

Thus, in both *Kordel* and *Garner*, the disclosures at issue were not compelled within the meaning of the Fifth Amendment because the defendants faced no threat of punitive sanctions in light of their ability to invoke Fifth Amendment rights. For this reason, the final element of the definition of compulsion advanced above—a threat of punitive sanctions—was absent. Hence, the Court properly rejected the Fifth Amendment claims in these cases.

To this, one might ask why, if the Fifth Amendment itself operates as a defense to punitive sanctions when an individual is asked to provide potentially incriminating evidence, were the corporate officers in *Kordel* and taxpayer in *Garner* required to expressly invoke Fifth Amendment rights? Why did the Fifth Amendment itself fail to shield them from punitive sanctions for refusing to provide the information at issue? Conversely, one might also ask why, if individuals always remain free to invoke Fifth Amendment rights, is compulsion ever present? Nothing in this line of cases straightfor-

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224 *See, e.g.*, *id.* at 662–63 ("The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege . . . .").

225 *See, e.g.*, Selective Serv. Sys. v. Minn. Pub. Int. Res. Grp., 468 U.S. 841, 858 (1984) (rejecting a claim that requiring draft registration to receive federal financial assistance violates the Fifth Amendment as applied to those who have already failed to timely register because "these appellees, not having sought to register, have had no occasion to assert their Fifth Amendment privilege when asked to state their dates of birth; the Government has not refused any request for immunity for their answers or otherwise threatened them with penalties for invoking the privilege"); United States v. Sullivan, 274 U.S. 259, 263–64 (1927) ("If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. . . . It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon.").

wardly address these questions, but one can tease out an answer that turns on the character of compulsion.

In *Garner*, the Court wrote that if a witness "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."[226] Still, an invocation, without more, could hardly create compulsion that does not otherwise exist. The Court implicitly acknowledged this point in *Murphy*, explaining that "[t]he answers of . . . a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege."[227]

Thus, compulsion comes into play by virtue of the government's *response* to an invocation. This insight enables us to make some sense of the invocation requirement. An invocation does not create compulsion; it instead puts the government on notice of its obligation to either test the soundness of the invocation or refrain from enforcing a request for evidence through a threat of punitive sanctions. Should the government breach that obligation by persisting in a threat of sanctions despite an invocation, compulsion is present. At that point, all the elements of the definition of compulsion are satisfied—an official request for information becomes an undertaking to induce a witness to provide evidence through a threat of punitive sanctions.

There are good reasons to employ an invocation requirement to put the government on notice of an individual's intention to assert Fifth Amendment rights. Absent invocation, the government may not realize that it cannot enforce a demand for information consistent with the Fifth Amendment—generally applicable rules like the requirements that interrogatories be answered or that income be disclosed in a tax return ordinarily are not incriminating, and absent an invocation, the government would have no reason to know that it must either test the validity of the invocation or refrain from enforcing such requirements by virtue of the Fifth Amendment. As the Court put it in *Garner*: "Unless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating."[228]

The invocation requirement sensibly functions to require the suspect to place the government on notice that he wishes to remain silent, triggering the government's constitutional obligation to refrain from enforcing a request for potentially incriminating evidence with a threat of punitive sanctions.

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226 *Garner*, 424 U.S. at 654–55 (quoting United States v. Monia, 317 U.S. 424, 427 (1943) (citations and internal quotations omitted)).

227 Minnesota v. Murphy, 465 U.S. 420, 427 (1984). To similar effect, see 1 MCCORMICK ON EVIDENCE, *supra* note 2, § 125 at 730 ("[A]s a general rule, compulsion is present only if a witness has asserted a right to refuse to disclose self-incriminating information and this refusal has been overridden.") (footnote omitted).

228 *Garner*, 424 U.S. at 655.

B. The Exceptions to the Invocation Requirement

The concept of compulsion nicely explains not only the invocation requirement, but its exceptions as well.

As we have seen, the invocation requirement is not applied to custodial interrogation, when an individual faces punitive sanctions for refusing to provide information, and when the assertion of Fifth Amendment rights would itself supply incriminating information to the government, such as requiring individuals to file tax returns that would identify them as within a discrete class of individuals likely to engage in unlawful activities if they invoke the Fifth Amendment.[229] The common feature in all these contexts is that they involve compulsion under the definition advanced above that is not eliminated even by an invocation.

Custodial interrogation has been regarded, at least since *Bram*, as involving compulsion because, as we have seen, *Bram* reasons that during official questioning of a suspect in custody, compulsion inheres in the threat that the suspect's silence will be taken as a tacit acknowledgement of guilt, or at least an indication that interrogators have little reason to show the suspect leniency.[230] Thus, even if a suspect invoked the Fifth Amendment during custodial interrogation, compulsion would persist; even if interrogators honored the invocation, that would fail to eliminate the threat of punitive sanctions that inhere in custodial interrogation because of the risk that silence will encourage the interrogators to press forward with prosecution—or at least fail to dissuade them.[231] The presence of compulsion to speak regardless whether an invocation would be honored explains the Court's failure to apply the invocation requirement to custodial interrogation.

The same is true when an individual is expressly threatened with punitive sanctions, as in the cases in which public employees face loss of employment if they fail to submit to questioning, or in the case hypothesized in *Murphy*, when the Court suggested that invocation would not have been required in the face an express threat that Murphy's probation would have been revoked if he declined to answer his probation officer's questions.[232] In the face of an express threat of punitive sanctions attached to silence, an invocation does nothing to eliminate the threat, nor the compulsion that it creates. Similarly, using the threat of punitive sanctions to require an individual within a discrete class of those likely to be engaged in unlawful conduct to either provide information or invoke, in either case identifying himself as a likely investigative target, also amounts to compulsion. In the face

229 *See supra* text accompanying note 214.
230 *See supra* text accompanying notes 166–179.
231 *See, e.g.*, *Murphy*, 465 U.S. at 429–30.
232 *Id.* at 438.

of such threats of punitive sanctions if a suspect exercises the right to remain silent, compulsion, as defined above, is present.

Thus, whenever an individual will remain subject to compulsion under the definition advanced above even if he were to invoke, invocation is not required. In such cases, invocation be ineffective, and in such cases, Fifth Amendment jurisprudence follows the commonsense rule that when compulsion is present, an individual need not somehow exert the fortitude to resist it by invoking Fifth Amendment rights. In this fashion, the definition of compulsion advanced above provides the explanation for both the invocation requirement and its exceptions.[233]

C. Fifth Amendment Waiver

It remains to consider the vexing question of Fifth Amendment waiver. The Court tells us that "[a] statement is not 'compelled' within the meaning of the Fifth Amendment if an individual 'voluntarily, knowingly and intelligently' waives his constitutional privilege."[234] Yet, if one is subject to compulsion, it would seem impossible to voluntarily decide to submit to interrogation. Beyond that, any inquiry into voluntariness encounters the seemingly intractable problem of determining what amounts to an act of free will, reintroducing all the difficulties inhering in the overborne-will test.[235] An effort to resolve this seeming paradox begins by considering the context, aside from custodial interrogation, in which Fifth Amendment waiver most often occurs—pleas of guilty.

Fifth Amendment waiver is ubiquitous; the Supreme Court tells us that every guilty plea requires a waiver of Fifth Amendment rights.[236] Indeed,

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233 As Justice Alito observed in *Salinas*, there is another context in which invocation is not required in order to gain the protection of the Fifth Amendment—under *Griffin*, a defendant need not expressly invoke in order to receive the Fifth Amendment's protection at trial because "a criminal defendant has an 'absolute right not to testify.'" Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013) (plurality opinion) (quoting Turner v. United States, 396 U.S. 398, 433 (1970) (Black, J., dissenting)). This reasoning is curious; one could say the same of Murphy, who had an absolute right to remain silent, as well. We will postpone consideration of *Griffin* until Part IV.B.1 below, but we will see that the presence of compulsion explains the absence of an invocation requirement in *Griffin,* as it does elsewhere.

234 Colorado v. Spring, 479 U.S. 564, 573 (1987) (quoting *Miranda*, 384 U.S. at 444).

235 For a helpful discussion along these lines, see Allen, *supra* note 203, at 73–85.

236 *See, e.g.*, Florida v. Nixon, 543 U.S. 175, 187 (2004) ("By entering a guilty plea, a defendant waives constitutional rights . . . [including] the protection against self-incrimination."); United States v. Ruiz, 536 U.S. 622, 629 (2002) (finding that a defendant must make "waivers" as to Fifth Amendment rights if pleading guilty); Godinez v. Moran, 509 U.S. 389, 398 (1993) (discussing the decision of a potential defendant to "waive" his Fifth Amendment right in the event of a guilty plea); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (explaining that the "privilege against compulsory self-incrimination guaranteed by the Fifth Amendment" is involved in a "waiver that takes place when a plea of guilty is entered").

waiver is required because a plea of guilty involves compulsion to incriminate under the definition of compulsion advanced above.

To plead guilty, the defendant must make an admission that convicts him. As the Supreme Court has explained, "central" to a guilty plea "is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so . . . ."[237] In addition, the record must indicate that the defendant knowingly and intelligently waived his constitutional rights, including "the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth," which cannot be validly waived on "a silent record."[238] For this reason, a guilty plea involves questioning of the defendant in open court to ensure that the requisites for a valid plea are present.[239]

It follows that the guilty-plea process involves compulsion under the definition advanced above—it induces a defendant to become a witness providing evidence by threat of punitive sanctions. The defendant is induced because he is required to offer the requisite admissions and waivers to enter the plea. The defendant's guilty plea and attendant admissions and waivers, moreover, convert him into a witness providing the evidence used to support the plea, and as this occurs, a threat of punitive sanctions hangs over the defendant's head. Moreover, since the defendant's admissions and waivers are used to convict him, the defendant is compelled to incriminate himself as well. The Court has therefore rightly concluded that a valid plea of guilty, because it is made by one under compulsion to self-incriminate, requires a waiver of Fifth Amendment rights. Accordingly, a valid guilty plea can be entered only if it is possible for one under compulsion to waive Fifth Amendment rights.

As Professor Alschuler has demonstrated, until well into the nineteenth century, in both England and the United States, pleas of guilty were uncommon and generally discouraged, especially when entered by an uncounseled defendant, and were often condemned under the rule against in-

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237 Brady v. United States, 397 U.S. 742, 748 (1970) (footnote omitted). *Cf.* FED. R. EVID. 410(a) (barring admission of evidence of a guilty plea or statements made during guilty plea proceedings only if the plea was later withdrawn). A defendant may plead guilty even while denying that he committed the charged offense, but only if the court assures itself that there is a factual basis for the plea and that it represents the defendant's voluntary and intelligent decision. *See* North Carolina v. Alford, 400 U.S. 25, 31–39 (1970).

238 *Boykin*, 395 U.S. at 243 (footnote omitted).

239 *See, e.g.*, FED. R. CRIM. P. 11(b) ("Before accepting a plea of guilty . . . the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

voluntary confessions.[240] But, as plea bargaining became prevalent in the twentieth century, pleas of guilty became more prevalent as well.[241] The simultaneous rise of plea bargaining and the increasing judicial acceptance of guilty pleas was no accident. When defendants had little to gain from pleading guilty, one might be skeptical about whether they could knowingly, intelligently, and voluntarily waive their trial rights. The rise of plea bargaining, however, made it plausible to believe that a defendant might receive sufficiently meaningful benefits from a plea of guilty to warrant the conclusion that such a decision could be voluntary; indeed, the notion that plea bargaining offers the defendant a measure of leniency in return for a plea of guilty has been central to the Supreme Court's willingness to reject arguments that plea bargaining is impermissibly coercive.[242] Plea bargaining's scholarly defenders have offered similar defenses.[243]

To be sure, critics have launched vigorous attacks on plea bargaining and its defenders.[244] Whatever force these attacks carry, for present purposes, the important point is that in a system that accepts guilty pleas and plea bargaining on the view that it reflects "'mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial,"[245] it follows that a defendant could make a knowing, intelligent, and voluntary decision to yield to the compulsion to plead guilty in the belief that the plea will likely produce a superior outcome to trial. The Supreme Court has repeatedly characterized a defendant's decision to plead guilty in such circumstances as voluntary.[246]

It follows that in a system that can reward pleas of guilty, voluntariness acquires a particular meaning—a defendant's ability to choose whether to risk trial, or plead guilty and perhaps receive some measure of leniency. The defendant is compelled to make the choice, but the government can compel a defendant to make this election consistent with the Constitution.

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240 *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 7–13 (1979). For an account of the judicial aversion to guilty pleas in seventeenth and eighteenth-century England, see LANGBEIN, *supra* note 149, at 18–21.

241 *See* Alschuler, *supra* note 240, at 26–32. For a more recent account along similar lines, see GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 154–74 (2003).

242 *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 219–22 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977); Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978); *Alford*, 400 U.S. at 31–39; McMann v. Richardson, 397 U.S. 759, 769 (1970); *Brady*, 397 U.S. at 749–55.

243 *See, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974–78 (1992); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 626–34 (2005); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1935–49 (1992).

244 *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2469–527 (2004); Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148–70 (2011); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980–91 (1992).

245 *Bordenkircher*, 434 U.S. at 363 (quoting *Brady*, 397 U.S. at 752).

246 *See, e.g.*, *Brady*, 397 U.S. at 749–54.

Requiring a criminal defendant to choose between pleading guilty and going to trial is consistent with the Fifth Amendment because the defendant is not compelled to incriminate himself by pleading guilty; he is only under compulsion to provide incriminating admissions and waivers should he elect to enter a guilty plea. Confronting a defendant with a threat of punitive sanctions if the defendant chooses to plead not guilty and is then convicted at a fair trial, in turn, is consistent with the Due Process Clause, which permits the government to deprive individuals of "life, liberty, or property," as long as the deprivation is accompanied by "due process of law."[247]

In contrast, when the government threatens a suspect with punitive sanctions other than those that might follow a lawful conviction at a fair trial, the government puts the suspect to an impermissible choice. The Due Process Clause forbids the imposition of punitive sanctions absent an adjudication of guilt at a fair trial.[248] It follows that the government may not compel a defendant to exercise the right to trial only if he is willing to face punitive sanctions other than those that can result from a lawful conviction. A plea of guilty to avoid a beating, for example, cannot stand because it involves a threat of sanctions that the government may not impose.[249] Such a plea would run afoul of the Fifth Amendment, in particular, because the government has no power to compel a defendant to elect between the right to trial and a beating,[250] just as the government may not compel an individual to choose between obtaining public employment and surrendering Fifth Amendment rights.[251] But, if the threat of punitive sanctions that a defendant faces involves only the risk of lawful sanctions imposed after conviction at a fair trial, waiver is permissible because the defendant confronts a constitutionally permissible choice—the choice between pleading guilty and going to trial.[252]

This foray into guilty pleas has implications for waiver during interrogation. If a defendant can waive Fifth Amendment rights by pleading guilty, at least when he is faced with a threat of only lawful sanctions following convic-

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247 *E.g.*, Baker v. McCollan, 443 U.S. 137, 145 (1979).

248 *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991); Bell v. Wolfish, 441 U.S. 520, 535–36 (1979); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–66 (1963).

249 *Cf.* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015) (characterizing use of excessive force against a pretrial detainee as "punishment" forbidden by the Due Process Clause).

250 *Cf.* Garrity v. New Jersey, 385 U.S. 493, 498 (1967) ("Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding whether to 'waive' one or the other.") (footnote omitted).

251 *See supra* text accompanying notes 31–34.

252 *Cf.* Brady v. United States, 397 U.S. 742, 755 (1970) ("[A] plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *vacated and remanded*, 356 U.S. 26 (1958) (per curiam)) (internal quotation marks omitted) (brackets in original).

tion at a fair trial, the question arises why a suspect cannot similarly waive during interrogation. *Bram*, as we have seen, reasoned that a suspect under custodial interrogation necessarily faces an implicit threat that silence will be punished, and cooperation rewarded.[253] If a defendant could conclude that his interests are best served by pleading guilty, *Bram*'s reasoning suggests that a suspect could similarly conclude that submitting to custodial interrogation might advance his interests, either by convincing the interrogator of his innocence, or by suggesting reasons for leniency. A suspect's decision to elect to submit to interrogation rather than remain silent could therefore be no less valid than a decision to plead guilty rather than going to trial. As long as this choice is left to the suspect, an ensuing waiver during interrogation is no less voluntary than a defendant's decision to plead guilty.

Some might object to this account of waiver during interrogation by arguing that even if a defendant, advised by competent counsel, might validly decide to plead guilty to avoid the possibility of a worse outcome after trial, an uncounseled layperson under the compulsion of custodial interrogation is in no position to make an informed assessment about whether to submit to interrogation.[254] *Miranda*, however, leaves it to the suspect to decide whether to remain uncounseled by recognizing a right to consult with counsel before deciding whether to submit to interrogation.[255] For some, the right to counsel recognized by *Miranda* is indefensible since the Fifth Amendment makes no reference to a right to counsel.[256] Yet, by recognizing a right to consult with counsel when deciding whether to undergo custodial interrogation, *Miranda* makes it possible for a suspect to receive the same expert assistance available to a defendant facing trial. And, just as a defendant facing trial may waive the right to counsel, so may a suspect under custodial interrogation; thus, in its discussion of waiver, *Miranda* relied on a case holding that a criminal defendant can waive his Sixth Amendment right to counsel, but only if he does so knowingly and intelligently.[257] *Miranda* jurisprudence, in short, affords suspects the same access to counsel that a defendant facing trial enjoys under the Sixth Amendment. What is more, as we have seen, history demonstrates that Fifth Amendment rights cannot be effectively asserted unless a suspect has counsel.[258] The relationship between the presence of counsel able to speak for a suspect, and the

253 *See supra* text accompanying notes 166–79.

254 *Cf.* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 986–87 (2001) (arguing that many suspects cannot rationally assess whether to speak when under police interrogation).

255 Miranda v. Arizona, 384 U.S. 436, 469–73 (1966).

256 *See, e.g.*, GRANO, *supra* note 47, at 169–72; Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 796–801 (2006); Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda*, Furman, and Beyond*, 54 VAND. L. REV. 359, 396–403, 434–38 (2001).

257 *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

258 *See supra* text accompanying notes 152–61.

ability of a suspect under compulsion to remain silent because he has someone to speak for him, explains the constitutional basis for a Fifth Amendment right to counsel. *Miranda*'s right to counsel accordingly offers a vehicle that affords individuals a meaningful choice about whether to exercise or waive Fifth Amendment rights.[259]

To be sure, laypersons may have some difficulty assessing whether they should waive the right to counsel, but this has never been regarded as a reason to preclude waiver. Applying the Sixth Amendment's right to counsel, for example, the Court has rejected the view that a valid waiver requires that a defendant be advised of the value of counsel in identifying defenses usually unknown to laypersons.[260] A valid guilty plea waiving the constitutional right to trial by jury similarly does not require that the defendant be accurately apprised of the strength of the prosecution's case,[261] the existence of a meritorious defense,[262] or of the existence of exculpatory evidence impeaching the prosecution's witnesses.[263] Given that these standards govern waivers of the Sixth Amendment right to counsel, it is hard to understand why Fifth Amendment waiver should be held to a higher standard.[264] The Fifth Amendment, after all, addresses compulsion, not improvidence.[265] Thus, while critics may be right that laypersons are likely to make improvident waiver decisions, this constitutes no barrier to waiver of the right to be free from compelled, as opposed to improvident, self-incrimination.

The scope of a valid *Miranda* waiver, however, is limited. For one thing, as we have seen in our consideration of guilty pleas, a waiver is valid only if a suspect faces no threat other than the threat of lawful sanctions following

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259 *Cf.* Brady v. United States, 397 U.S. 747, 754 (1970) ("*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession . . . . But *Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel, any more than *Miranda v. Arizona*, held that the possibly coercive atmosphere of the police station could not be counteracted by the presence of counsel or other safeguards.") (citation and footnote omitted).

260 *E.g.*, Iowa v. Tovar, 541 U.S. 77, 90–92 (2004).

261 *E.g.*, Brady v. United States, 397 U.S. 742, 756–57 (1970).

262 *E.g.*, Tollett v. Henderson, 411 U.S. 258, 266–69 (1973).

263 *E.g.*, United States v. Ruiz, 536 U.S. 622, 629–31 (2002).

264 George Thomas has argued that *Miranda* is best understood as anchored in due process rather than the Fifth Amendment because of the difficulty of "fashioning a waiver standard in the police interrogation room comparable to that in the courtroom . . . ." George C. Thomas III, *Separated at Birth But Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1099 (2001). Yet, he fails to identify precedent for more rigorous standards governing waiver of trial rights. The discussion above demonstrates, in contrast, that *Miranda*'s conception of waiver has been no less rigorous than has been applied to trial rights.

265 *Cf.* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 562 (1996) ("If there were an affirmative right not to incriminate oneself . . . then ill-informed, misguided waivers of the right would surely be invalid. But the Fifth Amendment protects suspects only against state-orchestrated compulsion, not against their own poor judgment.").

conviction at a fair trial. There is no reason to apply a different rule to waiver during interrogation. Moreover, even a valid *Miranda* waiver does not extinguish all Fifth Amendment rights. No one would contend, for example, that once a suspect has waived rights under *Miranda*, the suspect could then be subjected to a contempt judgment—much less torture—for failing to answer interrogators' ensuing questions, just as the waiver a defendant must provide in order to plead guilty does not thereafter allow the government to compel the defendant to self-incriminate at sentencing.[266] A *Miranda* waiver does not extinguish all Fifth Amendment rights; to the contrary, under *Miranda*, even after a waiver, there remains "the right to cut off questioning,"[267] which, the Court has stressed, must be "scrupulously honored."[268]

A *Miranda* waiver accordingly represents no more than a revocable submission to the compulsion that confronts an individual by virtue of lawful custodial interrogation—the implicit threat the suspect faces of punitive sanctions, imposed after a fair trial, if interrogators decide to pursue charges. A *Miranda* waiver is effective with respect to that and no other form of compulsion; it could not be effective with respect to other types of threatened punitive sanctions because, as we have seen, the Constitution does not permit the government to threaten a suspect with punitive sanctions other than those lawfully imposed after conviction at a fair trial.[269] To the extent that a suspect is confronted with a threat of punitive sanctions beyond the threat of conviction at a fair trial, a *Miranda* waiver is ineffective. In this respect, Fifth Amendment jurisprudence is sensitive to the charge leveled by *Miranda*'s critics, that the law can hope to regulate only interrogation tactics rather than ascertaining voluntariness.[270] The validity of a waiver under *Miranda* jurisprudence turns on the character of the choice with which interrogators confront a suspect, not an abstract inquiry into voluntariness.

It must be admitted that some language in *Miranda* is inconsistent with the account of compulsion and waiver advanced here, such as when *Miranda* suggests that advising suspects of their rights "dispel[s] the compulsion inherent in custodial surroundings . . . ."[271] That view, however, is not merely inconsistent with the account advanced here, but with *Miranda*'s discussion of waiver. If *Miranda* warnings somehow dispelled compulsion, sus-

266 *Cf.* Mitchell v. United States, 526 U.S. 314, 321–25 (1999) (Fifth Amendment rights at sentencing are not extinguished by prior guilty plea).

267 Miranda v. Arizona, 384 U.S. 436, 474 (1966). *See also id.* 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)).

268 Michigan v. Mosley, 423 U.S. 96, 104 (1975) (footnote omitted). For a helpful explication of this right to cut off questioning, see Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 552–56 (2012).

269 *See supra* text accompanying notes 248–53.

270 *See, e.g.*, Allen, *supra* note 203, at 84–85; Grano, *supra* note 203, at 675–89.

271 *Miranda*, 384 U.S. at 458.

pects would not need to waive their right to be free from compelled self-incrimination; the warnings would have already eliminated the compulsion that gives rise to the Fifth Amendment right.[272] The fact that *Miranda* demands a waiver even after the requisite warnings are given, and continues to regulate interrogation even after waiver, makes clear that the warnings are not properly understood to dissipate the compulsion that gives rise to the Fifth Amendment right, but instead are part of the process of obtaining a valid waiver of that right.

Miranda is accordingly best understood to rest on a conception of waiver; little different from the waiver that accompanies a guilty plea. In both contexts, waivers may be foolish or improvident, but that does not also make them compelled. A waiver that has not been compelled, in turn, is consistent with the Fifth Amendment. During both guilty pleas and custodial interrogation, even individuals under compulsion can provide valid waivers, as long as the only threat of punitive sanctions they face is the threat of a lawful sentence following conviction at a fair trial.

IV. COMPULSION APPLIED

The account of compulsion advanced above explains a great deal about Fifth Amendment jurisprudence that otherwise seems paradoxical. Defining compulsion enables normative assessments of Fifth Amendment jurisprudence. Defining compulsion, for example, helps to evaluate what are likely the most important issues in Fifth Amendment jurisprudence—the Fifth Amendment's relation to official interrogation, and the protections it offers to those who choose to remain silent.

A. Custodial Interrogation

Even after the Supreme Court reaffirmed the status of *Miranda* as a rule of constitutional law in *Dickerson v. United States*,[273] the Court and its Members have continued to characterize *Miranda* and its progeny as prophylactic.[274] And, in light of *Dickerson*'s failure to address the apparently prophylactic character of *Miranda*, the debate over its propriety has persisted.[275]

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272 A similar confusion is present in the Court's statement that a "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." Oregon v. Elstad, 470 U.S. 298, 307 (1985). If compulsion were not already present in custodial interrogation, it is hard to understand how it could be created, presumptively or otherwise, by a failure to provide warnings.

273 530 U.S. 428, 444 (2000).

274 *See* Maryland v. Shatzer, 559 U.S. 98, 103–12 (2010); United States v. Patane, 542 U.S. 630, 638–41 (2004) (plurality opinion); Chavez v. Martinez, 538 U.S. 760, 770–73 (2003) (opinion of Thomas, J.).

275 *See, e.g.*, Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898 (2001). Even *Miranda*'s supporters were unsatisfied with *Dickerson*'s failure to explain the propriety of *Miranda* in light of the Court's previous characterization of it as a prophylactic rule.

Miranda's critics argue that it goes beyond anything required by the Fifth Amendment by erecting what amounts to an unsupportable conclusive presumption that custodial interrogation always involves compulsion, and that Fifth Amendment rights cannot be validly waived absent the prescribed warnings.[276] Once compulsion is defined, however, it becomes possible to assess both *Miranda* and more general questions about when official interrogation implicates the Fifth Amendment.

1. Compulsion

Most *Miranda* supporters, rather than defending *Miranda*'s view that compulsion is inherent in custodial interrogation, instead defend Miranda as offering appropriate prophylactic protection for Fifth Amendment rights, albeit without offering a definition of compulsion that can be used to determine the extent to which *Miranda*'s conception of compulsion differs from that in the Fifth Amendment itself.[277] *Miranda*'s critics, however, vigorously deny judicial authority to enforce prophylactic rules.[278] Indeed, to the extent that *Miranda* restricts the use of statements made during custodial interrogation in the absence of compulsion, its scope exceeds that of the Fifth Amendment itself, raising a question whether the Court can properly enforce rules not required by the Constitution.

Justice White's dissenting opinion in *Miranda* framed the attack on the conception of compulsion embraced by the Court thusly: "[U]nder the Court's rule, if the police ask [an arrestee] a single question such as 'Do you have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled . . . ."[279] Justice White was quite right about the Court's rule, but, as it happens, his hypothetical falls squarely within the definition of compulsion advanced above.

Interrogation of an individual in custody is an official undertaking to induce an individual to become a witness by providing evidence, and therefore satisfies the first two elements of the definition of compulsion. The third and fourth elements are satisfied as well; once an individual has been

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See, e.g., Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 391–401 (2001).

276 *See, e.g.*, GRANO, *supra* note 47, at 178–82; Alschuler, *supra* note 40, at 855–58; Markman, *supra* note 47, at 211–21.

277 *See, e.g.*, Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 8–20 (2001); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471–76 (1999); Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 480–88 (1994); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1668–72 (2005); Schulhofer, *supra* note 20, at 447–53; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190–95, 207–09 (1988).

278 *See, e.g.*, GRANO, *supra* note 47, at 173–98.

279 Miranda v. Arizona, 384 U.S. 436, 533 (1966) (White, J., dissenting).

deprived of liberty and then asked about a potential criminal charge, there is little denying that the individual faces a threat of punitive sanctions. There is, in particular, a threat of sanctions associated with a failure to submit to questioning; as *Bram* reasons, there is an implicit threat that a failure to answer will be taken as an acknowledgement of guilt, or at least an acknowledgement that there is little reason to offer the suspect leniency.[280] When one's captor asks, "Do you have anything to say?" or "Did you kill your wife?," there is an inescapable implication that unless the suspect can somehow satisfy the interrogator, things will go badly—not only is the suspect unlikely to be restored to liberty, but the dissatisfied interrogator is likely to have little reason to be lenient, or at least offer the type of leniency available to those who cooperate with interrogators.

Under the definition of compulsion advanced above, accordingly, compulsion is present in custodial interrogation—it is an official undertaking to induce an individual to become a witness by threat of punitive sanctions. The compulsion that inheres in custodial interrogation is more subtle than an express threat of a beating or a contempt judgment, but the Fifth Amendment is addressed to all forms of compulsion, not merely compulsion in its most obvious manifestations. *Miranda*'s conclusion that compulsion is inherent in custodial interrogation, rather than involving prophylaxis, nicely tracks the constitutional concept of compulsion.[281]

To be sure, on occasion, *Miranda* may over-enforce the Fifth Amendment. In *New York v. Quarles*,[282] for example, after a woman told police she had just been raped at gunpoint and that her assailant had entered a near-

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280 *See supra* text accompanying notes 166–79. Some suspects, of course, will have the fortitude to maintain silence during custodial interrogation; in such cases, they have nevertheless been subject to compulsion. This paradigm of compulsion, as we have seen, does not turn on whether the suspect submits or instead faces sanctions such as contempt or a judgment *pro confesso*; either way, there has been compulsion. To be sure, that a suspect has been subjected to compulsion does not make out a Fifth Amendment violation. The Fifth Amendment, after all, prohibits not compulsion without more, but compulsion to be a witness against oneself in a criminal case. In one of the few cases raising the question, a majority of the Court concluded that if compulsion does not actually produce evidence that is subsequently used to incriminate in a criminal case, the Fifth Amendment has not been violated, not because of an absence of compulsion, but because the suspect has not been made a "witness" in a "criminal case." Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (opinion of Thomas, J.); *id.* at 777 (Souter, J., concurring in the judgment). For a more elaborate argument in support of this conclusion, see Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 454–502 (2002). For contrasting views contending that the Amendment applies to interrogation regardless of subsequent evidentiary use of its fruits, see *Chavez*, 538 U.S. at 790–95 (Kennedy, J., concurring in part and dissenting in part); Davies, *supra* note 92, at 998–1018; Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1045, 1057–75 (2017); and John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after* Chavez v. Martinez, 39 GA. L. REV. 733, 797–814 (2005).

281 For arguments along similar lines, albeit not tied to a definition of compulsion, see Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 586–94 (2007); and Schulhofer, *supra* note 20, at 444–46, 452–53.

282 467 U.S. 649 (1984).

by store, an officer entered the store, found an individual matching the rapist's description with an empty holster in the store, and after taking the suspect into custody, asked where the gun was.[283] The suspect nodded toward some empty cartons, said "the gun is over there," the officer retrieved the gun, and only then read the suspect his *Miranda* rights.[284] The Court, noting that Quarles had made "no claim that [his] statements were actually compelled,"[285] recognized a "public safety" exception to *Miranda*, reasoning that "[i]n a kaleidoscopic situation . . . where spontaneity rather than adherence to a police manual is the order of the day," and when officers "act out of a host of different, instinctive, and largely unverifiable motives," it followed that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." [286]

Some commentators, albeit without offering a definition of compulsion, have argued that *Quarles* cannot be reconciled with the Fifth Amendment.[287] In light of the definition of compulsion advanced above, however, there was likely none present in *Quarles*. When official conduct is undertaken not to obtain evidence but to address an immediate threat to public safety, it falls outside the ambit of Fifth Amendment compulsion because the undertaking is not directed at inducing an individual to provide evidence. To be sure, as the exigency fades, it becomes increasingly less plausible to characterize interrogation as focused on protecting the public, rather than acquiring evidence, but given the immediate concern about recovering a gun in *Quarles*, it likely was the case that no compulsion in the constitutional sense was at work.

One can perhaps imagine a variety of hypothetical situations in which one or more elements of the definition of compulsion is absent in custodial interrogation.[288] In the vast majority of cases involving custodial interroga-

283 *Id.* at 651–52.

284 *Id.* at 652.

285 *Id.* at 654.

286 *Id.* at 655–57.

287 *See, e.g.*, Berman, *supra* note 44, at 165–66; Clymer, *supra* note 280, at 549–50.

288 Katherine Darmer, for example, once hypothesized a case in which a suspect who wants to go to jail eagerly confesses under custodial interrogation. *See* M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 640 (2007). Stephen Markman similarly hypothesized that "suspects in custody may respond to interrogation for a variety of reasons that have nothing to do with being pressured or intimidated," such as "go[ing] along with questioning as a means of finding out how much the police know or what evidence they have," "to bolster the credibility of a fabricated defense," "to rebut false charges and clear oneself," or a desire to confess for varied reasons "including relief from guilt, a desire to explain mitigating or justifying circumstances, a belief that denial or resistance is futile . . . or a desire to clear relatives or associates who might otherwise also come under suspicion." Markman, *supra* note 47, at 215. Yet, since the concept of compulsion, as we have seen, focuses on the tactics used by the interrogator and not the psychology of the suspect, even these examples involve compulsion under the definition advanced above.

tion, however, the interrogator undertakes to induce the suspect to provide evidence, and it is surely the threat of punitive sanctions that requires a suspect to take an officer's query seriously. Custodial interrogation, in the main, is an official undertaking to induce a witness to provide evidence by means of a threat of punitive sanctions, and for that reason involves compulsion.

Indeed, it is unclear whether *Miranda* is more likely to over- or underenforce the Fifth Amendment in light of the corollary to its holding, reflected in the invocation requirement, that noncustodial interrogation does not involve compulsion. In *Salinas*, for example, the officers' questions were an undertaking to induce Salinas to provide evidence, and his decision to submit to interrogation could easily have been influenced by the implicit threat of sanctions if he remained silent. In *Murphy*, similarly, the probation officer's questions were an effort to induce Murphy to provide evidence, and even if Murphy's probation could not be revoked based solely on his refusal to answer questions, his willingness to submit to questioning could well have been influenced by the implicit threat of sanctions. These cases suggest that the invocation requirement might sometimes underenforce the Fifth Amendment. But, because it is difficult to gauge the potency of an implicit threat of sanctions and its relationship to a suspect's decision to submit to questioning, Fifth Amendment jurisprudence utilizes a rule that requires either custody or an invocation followed by a threat of sanctions in order to determine whether compulsion is present.

Miranda's conclusion that compulsion is inherent in custodial interrogation accordingly operates not so much as a prophylactic rule but as what Brian Landsberg labeled "a bright-line rule [that] 'captures the background principle or policy incompletely and so produces errors of over- or underinclusiveness.'"[289] *Miranda* uses custodial interrogation as the bright-line test for determining whether the threat of punitive sanctions is sufficiently clear and related to the official undertaking to induce a suspect to provide evidence to constitute compulsion, just as the invocation requirement uses invocation followed by a threat of sanctions as a bright-line if imperfect test for making the same determination when custody is not present.

Some might object that a bright-line rule finding compulsion in custodial interrogation, no less than the bright-line rule finding no compulsion in noncustodial interrogation that underlies the invocation requirement, has no grounding in the text of the Fifth Amendment. Yet, the semantic meaning of the Constitution's text is frequently insufficient to resolve many inter-

289 Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 951 (1999) (quoting Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992)). *Cf.* Donald A. Dripps, Miranda *for the Next Fifty Years: Why the Fifth Amendment Should Go Fourth*, 97 B.U. L. REV. 893, 902–09 (2017) (exploring similarities between *Miranda* jurisprudence and bright-line Fourth Amendment rules governing search and seizure).

pretive questions. While it is possible to define compulsion, that definition does not tell us when a threat of punitive sanctions is so potent an influence on a suspect's decision to submit to interrogation that it should be regarded as compulsion. Court-made doctrine is therefore required to facilitate assessments of whether compulsion is present. The process of "fashion[ing] 'interpretative' implementing rules to fill out the meaning of generally framed constitutional provisions," which is itself "an ancient aspect of the judicial function in construing the meaning of any text," was famously dubbed "constitutional common law" by Henry Monaghan, citing *Miranda* as an example.[290]

There is in fact near-consensus among scholars that constitutional adjudication requires something like constitutional common law. Even many originalists acknowledge that there are occasions on which original meaning is insufficient to resolve a constitutional debate, necessitating resort to what they label "construction."[291] Nonoriginalists, for their part, readily agree that the interpretation of constitutional text must often be supplemented by judicially-created doctrine because of the inadequacy of the text to resolve any number of constitutional controversies.[292] Whether characterized as constitutional construction or living constitutionalism, *Miranda*'s bright-line rule about compulsion during custodial interrogation, as well as the invocation requirement's equally bright-line rule that compulsion is not present in noncustodial interrogation absent an invocation followed by a threat of punitive sanctions, are common-law doctrines that enhance the administrability of the prohibition against compelled self-incrimination. *Miranda* reasonably presumes that once an individual is taken into custody, a threat of punitive sanctions hangs over any subsequent effort at official interrogation, while the invocation requirement rests on the reasonable presumption that the government will not back its requests for information with a threat of punitive sanctions once it is placed on notice that the suspect is asserting Fifth Amendment rights.[293] As such, these rules are readily

290 *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 22–23 (1975).

291 *See, e.g.*, BALKIN, *supra* note 95, at 14, 31–32; BARNETT, *supra* note 95, at 118–30; WHITTINGTON, *supra* note 95, at 5–14; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–72 (2013); Grégoire C.N. Webber, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 147, 173–76 (Grant Huscroft & Bradley W. Miller eds., 2011).

292 *See*, *e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 7–101 (2001); Berman, *supra* note 44, at 79–107; Roosevelt, *supra* note 277, at 1655–67.

293 The position advanced above is informed by Mitchell Berman's distinction between an operative proposition, which reflects the meaning of constitutional text, and a decision rule, which enables courts to develop administrable rules that apply the operative proposition. *See* Berman, *supra* note 44, at 9–13 (explaining this terminology). In the account of the Fifth Amendment advanced here, the definition of compulsion functions as the operative proposition, and *Miranda* and the invocation requirement function as decision rules. Where the account here differs from that of Profes-

defensible; at least once one acknowledges the inevitability of constitutional common law.

2. Exclusion

The *Miranda* exclusionary rule is considerably narrower than the exclusionary rule otherwise employed for evidence obtained in violation of the Fifth Amendment. Evidence obtained in violation of *Miranda*, for example, can be used to impeach, and to obtain additional evidence, unlike evidence that is said to have been compelled in violation of the Fifth Amendment itself.[294] Applying the account of compulsion advanced here, however, the differences between the *Miranda* and Fifth Amendment exclusionary rules become readily justifiable.

Miranda was unusually strict in its approach to waiver. *Miranda* famously held that a statement made during custodial interrogation is not admissible unless the suspect is "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," and then "waive[s] effectuation of these rights . . . ."[295] Although the Court has permitted some variation in the verbal form of the warnings, it has consistently held that *Miranda* warnings must fairly convey each of the required admonitions.[296]

Ordinarily, waiver law is not so rigid. For example, although a plea of guilty "could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process,'"[297] and a trial court must make a record demonstrating that a guilty plea is knowingly and voluntarily made,[298] the Court does not insist that the record contain a recitation of the

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sor Berman, however, is that he argues that *Miranda* announces a decision rule that determines whether compulsion is present. *See id.* at 116–55. Professor Berman is therefore unable to explain cases such as *Quarles* in which the Court found no Fifth Amendment violation even though the authorities failed to comply with *Miranda*. *See id.* at 165–66 (calling the public safety exception "an error"). Professor Berman also does not consider *Miranda*'s treatment of waiver, which, as we will see in Part IV.A.2 below, is stricter than the ordinary standards for waiver of a constitutional right. Perhaps even more important, Professor Berman's account overlooks *Miranda*'s failure to define compulsion. *See* Stinneford, *supra* note 42, at 464–68.

294 *See supra* text accompanying notes 74–80.

295 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

296 *See, e.g.*, Florida v. Powell, 559 U.S. 50, 60 (2010) ("The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'") (citation omitted); Duckworth v. Eagan, 492 U.S. 195, 202 (1989) (requiring the *Miranda* warnings in that decision's original form or a "fully effective equivalent").

297 Henderson v. Morgan, 426 U.S. 637, 645 (1976) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).

298 *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242–43 (1969).

required admonition about the nature of the charge; a record supporting a reasonable inference that the defendant received the requisite advice will suffice.[299] Indeed, outside of *Miranda*, the Court has required no more than that a waiver of a constitutional right be knowing, intelligent and voluntary, without requiring particularized warnings or admonitions.[300] Even when it comes to Fifth Amendment waiver, *Miranda* is unusual. During guilty-plea proceedings, for example, the Court has not prescribed a specific regime of warnings akin to *Miranda*; it has held only that waiver may not be inferred from a "silent record."[301]

Miranda's unyielding approach to waiver suggests a good deal of prophylaxis. The scholarly commentary considering whether *Miranda* is prophylactic in character, however, does not distinguish between *Miranda*'s conceptions of compulsion and waiver.[302] This conflation has inhibited clarity of analysis. In terms of compulsion, as we have seen, there is little if any prophylaxis in *Miranda*. In terms of waiver, in contrast, *Miranda* is properly regarded as prophylactic, at least when compared to ordinary waiver principles, but it is hard to understand why that should be regarded as illegitimate. The Constitution says nothing about waiver; waiver is solely a creature of constitutional common law. As long as waiver doctrine is structured in a way that does not inhibit the recognition of textually-based constitutional rights, the judiciary should be free to craft a common law of waiver with appropriate prudential considerations in mind, including the advisability of prophylaxis. The risk of error when inferring a knowing and voluntary waiver from circumstantial evidence is surely far greater than when the defendant is specifically advised of his rights. Thus, there is a sound prudential case for a particularly strict approach to waiver when making difficult inquiries into the knowing and voluntary character of a suspect's decision to submit to interrogation.[303]

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299 *See, e.g.*, Bradshaw v. Stumpf, 545 U.S. 175, 182–83 (2005); Marshall v. Lonberger, 459 U.S. 422, 437–38 (1983).

300 *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786–87 (2009) (Sixth Amendment right to counsel); Green v. United States, 355 U.S. 184, 191–93 (1957) (Double Jeopardy Clause).

301 *E.g.*, Boykin v. Alabama, 395 U.S. 238, 243 (1969).

302 *See, e.g.*, Berman, *supra* note 44, at 114–36; Caminker, *supra* note 277, at 8–20; Clymer, *supra* note 280, at 540–50; Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 76–80 (2000); Klein, *supra* note 277, at 480–88; Roosevelt, *supra* note 277, at 1668–72; Thomas S. Schrock, Robert C. Welsh & Ronald Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CALIF. L. REV. 1, 41–56 (1978); Strauss, *supra* note 277, at 190–95, 207–09.

303 This focus on using prophylactic rules to reduce the risk of litigation error has been widely embraced by defenders of *Miranda* as a prophylactic decision, though they have not distinguished between *Miranda*'s approach to compulsion and waiver. *See, e.g.*, Caminker, *supra* note 277, at 8–20; Strauss, *supra* note 277, at 191–94.

Accordingly, *Miranda* is best characterized as "laying down a right and creating a safe harbor for those charged with respecting it."[304] While, as we have seen, *Miranda*'s conception of the right to be free from compelled self-incrimination contains little if any prophylaxis, its formula for obtaining a valid waiver of that right, in contrast, is prophylactic in the sense that it offers a safe harbor for interrogators if they follow *Miranda*'s special rules for a valid waiver, buttressed by an exclusionary rule to encourage use of the safe harbor. It does not follow, however, that such a prophylactic approach to waiver must employ an exclusionary rule as robust as would be required in a case involving no adequate evidence of a knowing and voluntary waiver. If a waiver does not meet minimum standards, giving it force would fail to give effect to a textually-based constitutional right. If a waiver fails to satisfy a prophylactic standard set above the constitutional floor, however, a failure to hew to that standard need not be treated as a constitutional violation.[305] This point explains the cases limiting *Miranda*'s exclusionary rule.

In *Michigan v. Tucker*,[306] for example, Tucker told interrogators during custodial interrogation that he understood his rights and did not want an attorney, and was told that any statements he made could be used against him, but was never expressly told that he could obtain a lawyer without charge if he could not afford one.[307] After concluding that the interrogators had not violated the Fifth Amendment but instead had merely "departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege,"[308] the Court reasoned that because the interrogation occurred prior to *Miranda*, there was no reason to exclude the testimony of a prosecution witness who was identified as a result of a statement that Tucker made under custodial interrogation in violation of *Miranda*.[309] Similarly, in *Harris v. New York*,[310] the defendant was not expressly warned of his right to appointed counsel during custodial interrogation, and the Court held that his unwarned statements could be used to impeach his testimony.[311] In both cases, the dissenters complained that the Court's approach was inconsistent with *Miranda*'s holding that unwarned statements must be treated as compelled under the Fifth Amendment.[312]

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304 Dorf & Friedman, *supra* note 302, at 82.

305 *Cf.* David A. Strauss, Miranda*, the Constitution, and Congress*, 99 MICH. L. REV. 958, 966–69 (2001) (arguing that courts could limit *Miranda*'s exclusionary rule in ways that would retain adequate incentives to comply with its holding).

306 417 U.S. 433 (1974).

307 *Id.* at 436.

308 *Id.* at 446.

309 *Id.* at 446–52.

310 401 U.S. 222 (1971).

311 *Id.* at 223–26.

312 *Tucker*, 417 U.S. at 462–63 (Douglas, J., dissenting); *Harris*, 401 U.S. at 229–32 (Brennan, J., dissenting).

This debate was replayed in *United States v. Patane*,[313] in which the arresting officer started to warn Patane of his rights, Patane interrupted to say that he knew them, and then told the officer where his gun was, enabling the officer to retrieve it.[314] In a subsequent prosecution charging Patane with unlawful possession of a firearm, a majority of the Court, though unable to agree on a single opinion, concluded that the gun could be used as evidence despite the officer's failure to complete the process of warning and waiver required by *Miranda* because no "coerced" statements were used against the defendant.[315] In dissent, Justice Souter argued that the majority had failed to respect *Miranda*'s "insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it."[316]

The *Tucker*, *Harris*, and *Patane* opinions fail to satisfy. Although the *Miranda* violations in these cases seem trifling, the majority made little effort to square its approach with *Miranda*'s conception of compulsion. The conception of waiver advanced above, in contrast, explains why the Court could properly limit the exclusionary remedy in these cases. In each, the presence of compulsion was a red herring; the claimed *Miranda* violation in each was based solely on the insufficiency of a waiver under *Miranda*. Thus, these cases are best understood to rest on the view that interrogators' failure to comply with the special waiver rules in *Miranda* does not, without more, amount to a violation of the Fifth Amendment itself. Indeed, in each of these cases, the facts suggest that a valid waiver could have been inferred under traditional standards, though not under *Miranda*'s safe harbor.

Thus, the conception of Fifth Amendment compulsion and waiver advanced here explains why the Court might properly limit the remedy offered for a violation of a safe-harbor waiver rule without running afoul of the conception of compulsion found in *Miranda*, and, indeed, in the Fifth Amendment itself. The Court has, in other words, limited *Miranda*'s exclusionary remedy only in cases in which *Miranda*'s prophylactic waiver rules have been breached, without ever retreating from *Miranda*'s conception of compulsion. When an individual is compelled to self-incriminate in the absence of a waiver that meets minimally acceptable constitutional standards, as opposed to *Miranda*'s prophylactic safe-harbor for waiver, the full Fifth Amendment exclusionary remedy remains appropriate.

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313 542 U.S. 630 (2004).

314 *Id.* at 635 (plurality opinion).

315 *Id.* at 643 (plurality opinion) ("Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self–Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial."); *id.* at 645 (Kennedy, J., concurring in the judgment) ("Admission of nontestimonial physical fruits . . . does not run the risk of admitting into trial an accused's coerced incriminating statements against himself.").

316 *Id.* at 645 (Souter, J., dissenting).

Prophylaxis is even more evident when it comes to the rules for a valid waiver after an invocation of *Miranda* rights. Once a suspect under custodial interrogation indicates that he wishes to exercise his right to silence by terminating questioning, that preference must be "scrupulously honored."[317] And, if a suspect requests counsel, no custodial interrogation is thereafter permitted without the presence of counsel unless it is initiated by the suspect.[318] These rules go well beyond the minimum standards for a constitutionally sufficient waiver; surely it would be possible for a suspect to knowingly and voluntarily waive his rights even after invocation under the general rules for Fifth Amendment waiver reviewed in Part III.C above. Nevertheless, the Court has embraced a conclusive presumption against waiver through the special *Miranda* rules governing post-invocation waivers.[319] This presumption enhances the administrability of *Miranda*; after all, there is a significant chance that a post-invocation waiver will be the result of police badgering, and an inquiry into the possibility that badgering has infected the voluntariness of an ensuing waiver presents the psychological difficulties of the overborne-will test. Yet, by utilizing a presumption, the rules about waiver after invocation go well beyond the traditional requirements for valid waiver. For this reason, the rules limiting waiver after invocation are properly characterized as prophylactic.

It follows that the Court can limit the prophylactic presumptions of compulsion to unambiguous invocations without running afoul of the Fifth Amendment, as it has done,[320] despite criticism that this rule runs afoul of *Miranda* and the Fifth Amendment.[321] Perhaps there are good reasons to extend these presumptions to more nuanced invocations, but this is a question of constitutional common law; such an extension of prophylaxis is not required in order to prevent compelled self-incrimination in the constitutional sense.

It also follows that the Fifth Amendment permits the implementation of these prophylactic rules without need of the full set of remedies employed when a waiver falls short of the minimum standards demanded by the Constitution. Thus, the Court has held that a statement made after a suspect has received *Miranda* warnings, requested counsel, but later made incriminating statements without an express waiver, can be used to impeach the defendant's testimony.[322] In such a case, a valid waiver could well have

317 Michigan v. Mosely, 423 U.S. 96, 104 (1975).

318 *See* Edwards v. Arizona, 451 U.S. 477, 485–87 (1981). This prohibition lasts for fourteen days after a suspect's custody for purposes of *Miranda* ends. *See* Maryland v. Shatzer, 559 U.S. 98, 104–12 (2010).

319 *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 104 (2010); McNeil v. Wisconsin, 501 U.S. 171, 177 (1991).

320 *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 380–82 (2010).

321 *See, e.g.*, Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 802–21 (2009).

322 *See* Oregon v. Haas, 420 U.S. 714, 715–16, 722–24 (1975).

been inferred under traditional standards for an adequate waiver, but not when measured by *Miranda*'s safe harbor. Accordingly, the Court could properly conclude that it has created a safe harbor that is sufficiently attractive to interrogators to encourage its use since, under the rules governing waiver after invocation, a failure to employ safe-harbor waiver rules will result in the exclusion of a defendant's statements in the prosecution's case-in-chief.[323] One can debate whether the Court's remedial scheme provides interrogators with sufficient incentive to utilize the safe-harbor, but this is a debate of constitutional common law; it cannot be answered by reference to the meaning of compulsion in the constitutional sense.[324]

The standards for Fifth Amendment waiver also support the limitation on *Miranda*'s exclusionary rule embraced in *Oregon v. Elstad*,[325] in which the Court held that a suspect's statements made after receiving the requisite warnings and then making a valid waiver are admissible despite "the psychological impact of the suspect's conviction that he has let the cat out of the bag . . . ."[326] The Court's reasoning is no model of clarity; at points, the Court suggested that a *Miranda* violation cannot be equated with a constitutional violation,[327] an approach subsequently repudiated in *Dickerson*.[328] Beyond that, *Elstad* has drawn considerable critical reaction from commentators who believe that it undercuts the incentive to comply with *Miranda*.[329] But, as an application of Fifth Amendment waiver principles, *Elstad* is readily justifiable.

In *Elstad*, the Court observed that even after a suspect gives an unwarned statement that cannot be used as evidence under *Miranda*, once the suspect subsequently receives warnings and waives his rights, the validity of the waiver is not impaired "because he was unaware that his prior statement could not be used against him."[330] Citing waiver jurisprudence, including guilty-plea cases, the Court concluded that a valid waiver does not require "a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case."[331] Thus, *Elstad* reflects the familiar rule, explicated in Part III.C above, that as long as a

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323 *Cf. id.* at 722 ("[T]here is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief.").

324 For an argument that the exclusionary regime fashioned by the Court creates adequate incentive to warn suspects of their rights but insufficient incentive to honor invocations, see Clymer, *supra* note 280, at 503–25.

325 470 U.S. 298 (1985).

326 *Id.* at 311.

327 *Id.* at 305–06.

328 *See* Dickerson v. United States, 530 U.S. 428, 441 (2000).

329 *See, e.g.*, Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 1000–02 (2012); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132–40 (1998); David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 840–55 (1992).

330 *Elstad*, 470 U.S. at 316.

331 *Id.* at 317.

suspect is advised of his rights and given a choice between speaking and remaining silent, facing no threat of punitive sanctions beyond the risk of lawful sanctions following conviction at a fair trial, an ensuing waiver is valid, even if the suspect was facing compulsion to speak within the meaning of the Fifth Amendment.

The differences between *Miranda*'s exclusionary rule and the Fifth Amendment exclusionary rule are hard to justify if *Miranda* is conceived as merely announcing a rule of Fifth Amendment law. But they are far easier to grasp if *Miranda*'s required warnings are regarded as part of the constitutional common law of waiver. Because *Miranda* adopts a prophylactic view of waiver—not compulsion—it can legitimately offer a narrower rule of exclusion when it comes to a violation of its waiver rules than would be required for a violation of the Fifth Amendment itself.

3. Interrogation Tactics

Despite the prophylactic character of its waiver regime, *Miranda* and its progeny are frequently attacked as insufficiently protective of Fifth Amendment rights by permitting manipulative techniques designed to convince a suspect that it is in his interest to speak with interrogators, and under circumstances in which it is unclear whether the suspect is able to understand his rights.[332]

The Court has held, for example, that as long as a defendant has been advised of his rights, he may validly waive them even when interrogators concealed from him that an attorney is available and wishes to advise him,[333] that the true purpose of their interrogation is to obtain evidence on a far more serious charge than the one on which the defendant has been held,[334] and, as we have seen, a suspect need not be told that his prior unwarned statement was inadmissible in order to provide a valid waiver.[335] Indeed, one might argue that *Miranda* and its progeny permit interrogation tactics that lead suspects to misgauge their interests. Many commentators, for example, have condemned deceptive interrogation tactics as undermining constitutional protections in interrogation.[336] Moreover, as we have also seen,

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332 *See, e.g.*, RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 119–64 (2008); THOMAS & LEO, *supra* note 27, at 185–218; WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 139–86 (2001); Susan R. Klein, *Transparency and Truth During Custodial Interrogation and Beyond*, 97 B.U. L. REV. 993, 1014–17 (2017); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1539–90 (2008).

333 Moran v. Burbine, 475 U.S. 412, 422–28 (1986).

334 Colorado v. Spring, 479 U.S. 564, 577 (1987).

335 *See supra* text accompanying notes 325–31.

336 *See, e.g.*, WHITE, *supra* note 332, at 196–215; Albert W. Alschuler, *Constraint and Confession*, 74 DENVER U. L. REV. 957, 967–78 (1997); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 101,

Miranda cannot be defended on the view that the administration of warnings somehow dissipates the presence of compulsion to speak.[337] The available empirical evidence, though limited, might be thought to confirm this point; suspects subjected to custodial interrogation invoke their right to halt the interrogation only about twenty percent of the time, with the vast majority of invocations occurring at the point at which warnings are administered.[338]

Yet, as the discussion in Part III.C above makes clear, a waiver is valid as long as a suspect is aware of his rights and is confronted with a threat of only lawful sanctions; there is no additional requirement that a suspect receive all information necessary to make a prudent decision.[339] Waiver law has never required that an individual receive something like a prospectus disclosing all material facts relating to the decision whether to waive. Nor does waiver law impose a fiduciary duty on law enforcement officials to protect the interests of the very individuals they are investigating. If a suspect under interrogation wants a fiduciary, he has a right to counsel, not a right to expect police or prosecutors to act in the stead of counsel.

Fifth Amendment waiver doctrine accordingly reflects the longstanding rule—hardly unique to the Fifth Amendment—that a waiver can be valid even if foolish. There is particularly little justification for departing from that rule when it comes to the Fifth Amendment which, as we have seen, addresses compulsion, not imprudence. In *Dickerson*, accordingly, Justice Scalia was surely correct that "[t]here is a world of difference . . . between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord."[340]

Suspects may be foolish to think that interrogators will speak only the truth or disclose all material facts, but those who want unvarnished legal advice have a right to counsel, not a right to expect that interrogators will act as if they were the suspect's counsel. As Part III.C above demonstrates, when the only threat of punitive sanctions that a suspect faces is the threat of conviction at a fair trial, the Fifth Amendment permits a suspect to waive the right to be free from that threat when deciding whether to speak. Inter-

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101–05 (2006); Godsey, *supra* note 44, at 515–39; Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 54–59 (2005); Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for a Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1263–72 (2007); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 456–57 (1996).

337 *See supra* text accompanying notes 271–72.

338 *See, e.g.*, Cassell, *supra* note 39, at 495–96; Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. 839, 859–60 (1996); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996). *But cf.* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017) (reviewing evidence suggesting that *Miranda* has reduced confession rates).

339 *See supra* text accompanying notes 260–65.

340 Dickerson v. United States, 530 U.S. 428, 449 (2000) (Scalia, J., dissenting).

rogators who obtain such a waiver, even if they overstate the evidence or otherwise use their superior knowledge and experience to convince a suspect to speak, are engaged in persuasion, not compulsion, so long as they make no additional threat of punitive sanctions. Official compulsion, as we have seen, involves obtaining evidence by threat of punitive sanctions. Official deception is different, and the Fifth Amendment addresses compulsion, not deception.[341]

Waivers, of course, must be both voluntary and intelligent. On the latter score, *Miranda* uses commonsense, nontechnical terms to apprise suspects of their rights. The fact that invocations most often occur when rights are administered suggests that these admonitions have meaning. There is, to be sure, some evidence that some individuals under particular disabilities, such as those with limited education, mental disabilities, or juveniles, have less capacity to understand *Miranda* rights.[342] Yet, there is no reason why the *Miranda* waiver inquiry cannot be sensitive to issues relating to capacity; indeed, the Court seems to be moving in that direction.[343]

Putting those under special disabilities aside, a summary of research by leading scholars acknowledged that at least under laboratory conditions,

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341 *Cf.* Stuntz, *supra* note 52, at 823 ("[O]ne cannot fairly label as punishment tactics that deceive suspects into thinking that their statements are not incriminating or will not prove harmful to them later in court."). A similar analysis governs when a waiver is obtained on the basis of a promise that is later breached. A broken promise does not fall within the definition of compulsion, and therefore does not afoul of the Fifth Amendment. Indeed, although the broadest language in *Bram* suggests that confessions could not be obtained by promises, *see* Bram v. United States, 168 U.S. 532, 542–43 (1897), the Court has since retreated from this position, *see, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287 (1991). To be sure, broken promises that induce confessions may be problematic for a variety of other reasons unrelated to compulsion. Guilty pleas obtained as a result of an unfulfilled promise, for example, are considered violative of due process. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261–62 (1971). That suggests that confessions obtained on the basis of unfulfilled promises may well be constitutionally suspect, but on the basis of a due process rather than a Fifth Amendment objection. For elaboration on this point, see Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 948–955 (1994). To the extent, however, that interrogators falsely lead a suspect to believe that his silence will be used to incriminate him, they are engaged in compulsion under the definition advanced above; they are undertaking to induce the suspect to become a witness providing evidence by threat of punitive sanctions. *Cf.* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (Or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1168 (2017) ("[F]alse threats to impose a legal penalty if a confession is not forthcoming are coercive, as these threats would be coercive if true. The Supreme Court's Fifth Amendment jurisprudence has long prohibited imposition of legal sanctions for refusing to make self-incriminating statements." (footnote omitted)).

342 *See, e.g.*, LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 75–90 (2005); THOMAS & LEO, *supra* note 27, at 196–207; Weisselberg, *supra* note 332, at 1564–74.

343 *See* J.D.B. v. North Carolina, 564 U.S. 261, 272–277 (2011) (finding that a juvenile's age must be considered in determining whether he was in custody for purposes of *Miranda*); *cf.* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 60–102 (2013) (reviewing evidence suggesting that juveniles have reduced capacity to understand and validly waive *Miranda* rights).

"average adults exhibit a reasonably good understanding of their rights."[344] To be sure, it might be possible to craft even more explicit or comprehensive warnings, such as admonishing detainees that no adverse inference can be drawn if they remain silent, or that they may cut off questioning at any time.[345] Additional warnings, however, might be counterproductive; increasing the length and complexity of warnings might reduce their efficacy.[346] In any event, additional warnings of this character go beyond anything that the law of waiver has ever required. Under traditional principles of waiver, to knowingly and intelligently waive the right to be free from compelled self-incrimination, an individual must be told only of the existence of the right to be waived—a right to remain silent—and the consequences of a waiver—that anything the individual says if he chooses to speak can be used to incriminate. The additional rights *Miranda* and it progeny confer, such as the right to cut off questioning, are not Fifth Amendment rights that a detainee is being asked to waive at the time a *Miranda* waiver is sought. Accordingly, *Miranda* offers most individuals fair warning of, and a fair chance to assert, the Fifth Amendment right not to be compelled to self-incriminate, consistent with traditional principles of waiver.[347]

Given that the warnings are given in plain terms, it is not obvious that the frequency of waiver is a function of compulsion or incomprehension as opposed to improvidence. In fact, there is ample reason to believe the latter explains most waivers. There is substantial evidence, for example, that offend-

344 Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAVIOR 3, 8 (2010) (citations omitted). There is, of course, reason to be skeptical of interrogation research under laboratory conditions—in actual interrogations, suspects may be under greater stress that may interfere with comprehension, but they also may be more motivated to listen carefully to an interrogator. The most comprehensive analysis based on observations of actual custodial interrogations was performed by Richard Leo and Welsh White, and although they found that interrogators sometimes issue warnings in a neutral manner, endeavor to deemphasize their significance, or seek to persuade suspects that it is in their interest to waive, and were generally critical of interrogation tactics, they did not claim that the observational data suggest that suspects do not understand their rights. Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 431–47 (1999).

345 For examples of proposals to expand the scope of the warnings, see Geoffrey S. Corn, *The Missing* Miranda *Warning: What You Don't Know Really Can Hurt You*, 2011 UTAH L. REV. 761, 782–94 (detainees should be told that no adverse inference can be drawn from silence); Godsey, *supra* note 256, at 792–94, 812–16 (detainees should be told that they cannot be penalized if they remain silent and that they have a right to halt questioning); and Sacharoff, *supra* note 268, at 583–85 (detainees should be told of their right to cut off questioning).

346 For a helpful discussion of this issue, see Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAVIOR 177 (2007)

347 *Cf.* Thomas, *supra* note 264, at 1104–09 (arguing that *Miranda* and its progeny are best understood as resting on a right to fair notice of rights during custodial interrogation).

ers have limited capacity for self-control.[348] It may well follow that offenders have difficulty restraining themselves from an effort to convince interrogators of their innocence. As for the innocent, there is evidence that they tend to over-estimate their ability to convince interrogators of their innocence, which may make them even more likely to submit to interrogation.[349]

In the face of the paucity of evidence that most suspects are incapable of giving a valid waiver, and given that the warnings are delivered in plain terms, there is little reason to believe that the frequency of waiver under *Miranda* is because its warnings fail to make individuals aware of their choice between silence and speech. If a suspect is aware of the choice whether to speak, and unwisely chooses to waive the right to remain silent, the Fifth Amendment is not offended.

It may be that many under custodial interrogation are prone to make improvident waiver decisions, overconfident of their ability to talk their way out of trouble,[350] desirous of appearing to cooperative with police,[351] or perhaps underestimating the long-term consequences of making an incriminating statement.[352] Whatever the policy implications, this presents no Fifth Amendment problem. The Fifth Amendment does not forbid improvident waiver; it is directed at compulsion, not improvidence. And, as we have seen, the law of waiver merely requires that waivers be knowing and voluntary, as opposed to prudent and well-considered. Under longstanding waiver principles, as long as a suspect is told of his rights and confronts no threat of punitive sanctions beyond the risk of conviction at a

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348 *See, e.g.*, MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 85–120 (1990); Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 523–29 (2012).

349 *See, e.g.*, Saul M. Kassin & Rebecca J. Norwick, *Why People Waive their* Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAVIOR 211, 217–18 (2004); Maria Hartwig, Pär Anders Granhag & Leif A. Strömwall, *Guilty and Innocent Suspects' Strategies During Police Interrogations*, 13 PSYCHOL., CRIME & L. 213, 224–25 (2007). The limited empirical evidence suggests that suspects with criminal records may be somewhat more likely to invoke their rights during interrogation. *See, e.g.*, Cassell & Hayman, *supra* note 338, at 895; Leo, *supra* note 338, at 654–55.

350 *Cf.* Schulhofer, *supra* note 265, at 561 ("[T]oday's suspects typically confess not because of fear of mistreatment but primarily because of misplaced confidence in their own ability to talk their way out of trouble."); George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1999 (2004) ("Many suspects talk, not because police are skilled or calculating, but because at some level they *want* to talk to police. They *want* to tell their story because they think they can skillfully navigate the shoals of police interrogation and arrive safely on the other shore.").

351 *Cf.* George C. Thomas III, Miranda*'s Spider Web*, 97 B.U. L. REV. 1215, 1224–33 (2017) (using statistics demonstrating the prevalence of consent searches in New Jersey after suspect has been advised of the right to refuse consent to suggest that innocent and guilty suspects alike wish to appear cooperative).

352 There is reason to believe that individuals under interrogation are likely to discount the long-term consequences of making statements under interrogation and over-estimate the short-term benefits of making statements that may shorten an interrogation. *See, e.g.*, Yueran Yang, Stephanie Madon & May Guyll, *Short-Sighted Confession Decisions: The Role of Uncertain and Delayed Consequences*, 39 LAW & HUM. BEHAVIOR 44 (2015).

fair trial, he has been confronted with a form of compulsion subject to waiver. It would be a tall order for the law to endeavor to save those with poor judgment from themselves.[353]

A more difficult problem is presented by *Missouri v. Seibert*,[354] which involved a two-part interrogation strategy in which an interrogator engaged in unwarned interrogation and, only after obtaining a confession, provided the suspect with warnings and sought a waiver, after which the suspect repeated the confession that he had already made, albeit in violation of *Miranda*.[355] A bare majority of the Court, though unable to agree on a single opinion, concluded that the warnings were ineffective to render the waiver valid, making the repetition of the previous unwarned confession inadmissible.[356]

On the view of Fifth Amendment waiver advanced above, *Seibert* is a difficult case because of the tension between the *Seibert* majority's understandable view that a two-part strategy drains *Miranda* warnings of their efficacy, and the general rule that a waiver is not impaired if a suspect is not made aware of all facts material to its wisdom, including advice about the inadmissibility of the suspect's earlier statements—the rule on which *Elstad* rest-

353 Some have proposed that interrogation features associated with significant numbers of false confessions, such as lengthy interrogations, interrogation of vulnerable suspects, and the use of threats, deception, or, promises, should be restricted if not prohibited altogether. *See, e.g.*, WHITE, *supra* note 332, at 196–215; Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 8 (2016); Kassin et al., *supra* note 344, at 16–23, 27–31; Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 35–41, 44–49 (2015). Although a full consideration of these issues is beyond the scope of this article, it should be noted that aggressive interrogation tactics associated with high numbers of false confessions may be unusually effective in inducing accurate as well as false confessions; there is no reliable data demonstrating that these tactics produce disproportionate rates of false confessions. *See, e.g.*, Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 503–38 (1988); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1188–97 (2001); Rosenthal, *supra* note 281, at 613–19; Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 55–69 (2014). Others have proposed requiring substantial indicia of corroboration to admit a confession, *see, e.g.*, LEO, *supra* note 332, at 286–91, though in many cases sufficient corroborative evidence may be unavailable even for accurate confessions, *see, e.g.*, Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2024–28 (1998). Thus, assessing these proposals is a policymaking exercise fraught with uncertainty. Conversely, my colleague Scott Howe has advanced what he characterizes as a "pro-confessional" proposal to offer sentencing discounts to those who confess, creating a predictable incentive and perhaps obviating the need to resort to other interrogation tactics. *See* Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U. L. REV. 905, 947–60 (2016). For a similar if less fully developed proposal, see Klein, *supra* note 332, at 1027–31. One wonders, however, whether mandatory sentencing reductions would prove palatable in cases involving quite serious offenses, especially when a confession is partial or unnecessary to convict, or increase the rate of false confessions. Of course, as Part III.C above suggests, the current regime of plea negotiation offers similar, if less predictable but more flexible, incentives to confess.

354 542 U.S. 600 (2004).

355 *Id.* at 604–06 (plurality opinion).

356 *Id.* at 611–17 (plurality opinion); *id.* at 620–22 (Kennedy, J., concurring in the judgment).

ed.[357] The discussion above, however, suggests that the majority reached the correct result.

That the two-part interrogation was strategic suggests an official undertaking to induce Seibert to provide evidence through a manipulation of Seibert's choices in a manner at odds with the Fifth Amendment. As we have seen in Part III.C above, a suspect can give a valid waiver only when the compulsion he faces involves no more than the threat of lawful sanctions, within the government's power to impose, following conviction at a fair trial. The Fifth Amendment, however, does not permit the government to offer a suspect under compulsion a choice to remain silent and put the government to its proof only after the suspect has been compelled to confess. Yet, that was the choice that the two-part strategy endeavored to present. The strategy undertook to induce Seibert to provide evidence by suggesting that he had already confessed, making the threat of punitive sanctions he faced especially—but impermissibly—potent. The two-part strategy therefore undertook to present Seibert with a threat of sanctions forbidden by the Fifth Amendment itself—sanctions premised on a suspect's compelled confession.

There is therefore considerable appeal to the majority's conclusion that when there is an official undertaking to induce a suspect to provide evidence by threat of punitive sanctions of this character, the suspect cannot give a valid waiver absent some effort to apprise the suspect that he retains a meaningful choice to remain silent and put the prosecution to its proof at trial.[358] Otherwise, there has been a form of compulsion not subject to waiver under the account of waiver advanced above. Accordingly, the two-part strategy presented Seibert with a threat of punitive sanctions that are, under the Fifth Amendment, beyond the government's power to impose. Perhaps that conclusion is debatable, but at least a focus on the view of Fifth Amendment compulsion and waiver advanced above identifies the right question in *Seibert*—whether interrogators confronted the suspect with an impermissible choice. The *Seibert* dissenters, in contrast, advocated reliance on "voluntariness standards."[359] As we have seen in Part I above, that descent into subjectivity produces only chaos.

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357 *See supra* text accompanying notes 325–31.

358 *Seibert*, 542 U.S. at 611–12 (plurality opinion) ("The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?"); *id.* at 622 (Kennedy, J., concurring in the judgment) ("If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken . . . . Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.").

359 *Id.* at 628 (O'Connor, J., dissenting).

4. Replacing Voluntariness Inquiry with the Fifth Amendment

All too often, as long as a suspect receives the requisite warnings during custodial interrogation, ensuing interrogation techniques are assessed only under the due process voluntariness test.[360] As Part I.A above demonstrates, application of this overborne-will test poses many problems. As Part III.C above demonstrates, however, even for one under compulsion, a waiver of the right to be free from compelled self-incrimination is valid as long as a suspect is confronted with no threat of punitive sanctions other than those following conviction at a fair trial. This standard provides, if not mathematical precision, at least considerably more clarity than a voluntariness inquiry. And, inasmuch as the Fifth Amendment addresses the extent to which a suspect can be compelled to submit to interrogation, it is unclear why a parallel due process voluntariness inquiry remains appropriate. The Court's general view has been that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."[361] When it comes to compulsion to incriminate, the Constitution's text suggests that the Fifth Amendment sets out the "process" that is constitutionally "due" a suspect. To the extent that either the Fifth or the Fourteenth Amendment's Due Process Clause is thought to contain broader protections for those facing compulsion to incriminate themselves than the Fifth Amendment's Self-Incrimination Clause, due process not only renders the Self-Incrimination Clause surplusage, but also reinjects into confession jurisprudence all the difficulties of an overborne-will test.

A useful illustration of the clarity afforded by a focus on the approach to compulsion and waiver advanced above as opposed to the murky due process concept of voluntariness is provided by *Miller v. Fenton*,[362] where the court, applying a due-process overborne-will test, upheld the use of a confession as voluntarily given following custodial interrogation involving feigned sympathy, a misrepresentation about the evidence, and implied promises of leniency.[363] In dissent, Judge John J. Gibbons argued that the interrogation tactics overbore the suspect's will; they so thoroughly under-

360 *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 109–10 (1985).

361 County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) (quoting Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion)); *cf.* Chavez v. Martinez, 538 U.S. 760, 773–74 n.5 (2003) (opinion of Thomas, J.,) ("If, as Justice Kennedy believes, the Fifth Amendment's Self–Incrimination Clause governs coercive police interrogation even absent use of compelled statements in a criminal case, then . . . the Due Process Clause would not.").

362 796 F.2d 598 (3d Cir. 1986).

363 *Id.* at 603–13.

mined the suspect's resistance that it produced his psychological collapse into a catatonic state.[364]

Under the overborne-will test, Judge Gibbons likely had the stronger position. Even so, it is understandable that the majority resisted the conclusion that a suspect's subjective reaction to the threat of lawful punishment—or his own guilt—means that a confession has been unconstitutionally obtained, at least if the Constitution is understood as a limitation on the government's investigative powers and not a probe into suspects' psyches. In *Miller*, the suspect was confronted with no threat of punitive sanctions other than the possibility of conviction at a fair trial. As we have seen in Part III.C above, when the compulsion a suspect faces involves no more than the threat of conviction at a fair trial, a suspect can give a valid waiver, even if he is subject to the compulsion that inheres in custodial interrogation. And, if a suspect validly waives his right to be free from compelled self-incrimination, it is hard to understand how the suspect's resulting confession can nevertheless be considered involuntary under the Due Process Clause.

Miller is usefully contrasted with cases in which the Fifth Amendment is offended because a suspect has been confronted with an impermissible choice. Forcing a suspect to choose between silence and physical violence is an easy case; there the suspect is confronted with a choice between silence and a form of summary punishment that the Constitution forbids.[365] Nearly as easy is *Ziang Sung Wan*, in which the defendant was effectively confronted with a choice between confessing and indefinite detention without medical care, even though he was seriously ill.[366] In such cases, the suspect is confronted with an effectively punitive sanction—prolonged in communicado custody—equally forbidden to the government in light of the constitutional right to a speedy trial,[367] as well as the obligation to provide medical care to pretrial detainees.[368]

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364 *Id.* at 613–28.

365 *Cf.* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015) (characterizing use of excessive force against a pretrial detainee as "punishment" forbidden by the Due Process Clause).

366 *See supra* text accompanying notes 171–74.

367 *Cf.* Baker v. McCollan, 443 U.S. 137, 145 (1979) ("Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment. For the Constitution likewise guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge; arrest pursuant to probable cause is itself sufficient.").

368 *See, e.g.*, City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) ("The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons, such as Kivlin, who have been injured while being apprehended by the police. In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner."). There is also likely a constitutional right to a prompt determination of bail after arrest. *Cf.* Gerstein v. Pugh, 420 U.S. 103, 114–16 (1975) (noting the common-law rule requiring prompt judicial determinations of probable cause and bail).

Lengthy custodial detention is problematic because, at some point, prolonged custody for purposes of interrogation becomes a punitive sanction beyond the government's power to impose. Current doctrine offers no mathematical formula for determining when custodial interrogation has become unduly prolonged, and in this sense the definition of compulsion advanced above might be thought to reintroduce some of the uncertainties of due-process voluntariness jurisprudence.[369] A focus on Fifth Amendment compulsion, however, at least asks the right question. The overborne-will test expects us to determine the effect of prolonged detention on the suspect's will. As we have seen, this is an inquiry fraught with difficulties.[370] The concept of compulsion, in contrast, focuses solely on the character of the threats confronting the suspect. This objective inquiry, whatever its difficulties, avoids an effort to plumb a suspect's psychological depths.

Another example of the manner in which added clarity is provided by a focus on the view of compulsion and waiver advanced above is provided by *People v. Thomas*.[371] In that case, the court concluded that a confession made after interrogators told Thomas that if he did not confess to abusing his child, interrogators would arrest his wife, and physicians would be unable to understand his child's injuries sufficiently to save his life, should be suppressed as involuntary.[372] The court reached this conclusion without disturbing the finding that Thomas had received *Miranda* warnings and had thereafter given interrogators a valid waiver.[373] The court's focus on voluntariness reflects the continuing effects of the problematic overborne-will test; confronted with the claim that the interrogator's tactics created no substantial risk of a false confession, the court responded by citing the Supreme Court's due process jurisprudence to support the view that even reliable confessions can be involuntary.[374] Yet, this observation does nothing to identify the boundaries of voluntariness; not all confessions induced by threats or deception, whether reliable or not, are considered involuntary.[375]

Disaggregating compulsion from waiver, in contrast, provides greater clarity, and suggests that the interrogator's tactics raised distinct issues. Although Thomas gave a waiver under *Miranda*, as we have seen, such a waiver is effective only with respect to the compulsion inhering in a threat of punitive sanctions following conviction at a fair trial. When silence will

369 *But cf.* County of Riverside v. McLaughlin, 500 U.S. 44, 52–58 (1991) (presumptively requiring a judicial determination of probable cause within forty-eight hours of arrest under the Fourth Amendment's prohibition on unreasonable search and seizure).

370 *See supra* text accompanying notes 19–26.

371 8 N.E.3d 308 (N.Y. 2014).

372 *Id.* at 314–16.

373 *See* People v. Thomas, 941 N.Y.S.2d 722, 728–29 (App. Div. 2012), *rev'd*, 8 N.E.3d 308 (N.Y. 2014).

374 *Thomas*, 8 N.E.3d at 314–15 (citing Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).

375 *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 737–39 (1969).

result in criminal charges against one's spouse, silence comes with another kind of punitive sanction attached. If the threatened loss of a job amounts to the kind of sanction that triggers the Fifth Amendment, surely there is little reason to treat the threatened loss of one's spouse differently. Conversely, it is harder to characterize the threat of facing moral responsibility for failing to assist physicians treating one's child as a threatened punitive sanction sufficient to satisfy the final element of compulsion. Urging a suspect to speak to help physicians treat his child may be a powerful technique of persuasion, but it is far less readily characterized as compulsion—inducing a witness to provide evidence by threat of punitive sanctions. A defendant's decision to credit an officer's assertion about the need for information to assist treatment of his child might be regarded as unduly credulous or understandable, but either way, it is not compelled.

The proper question when it comes to the validity of an asserted waiver of Fifth Amendment rights, in short, is framed in Part III.C above—whether interrogators have confronted a suspect under the compulsion of custodial interrogation with a permissible choice: speaking or remaining silent and facing no punitive sanctions beyond the threat of lawful punishment after conviction at a fair trial. This is the terrain on which the battle over the admissibility of confessions is properly fought; and it is the terrain of the Fifth Amendment, not due process.

B. Evidentiary Uses of Silence

It remains to consider the application of the definition of compulsion to those who remain silent. The seminal case on this subject is the holding that a defendant's failure to testify cannot be used as evidence of guilt in *Griffin v. California*,[376] but, as we have seen, critics argue that it lacks support in framing-era practice and fails to explain how an individual who is granted and exercises a right to remain silent can be said to be to have been compelled to incriminate himself.[377] There is, however, a flaw to this line of argument, made plain by application of the definition of compulsion advanced above.

1. Griffin *Assessed*

The historical case against *Griffin* may be put aside as inconclusive. Because, in the framing era, criminal defendants were not permitted to testify, there is no framing-era practice to consult when it comes to what inferences may be drawn from a defendant's failure to testify.[378] To be sure, some

376 380 U.S. 609 (1965).

377 *See supra* text accompanying notes 67–70.

378 *Cf.* Alschuler, *supra* note 40, at 853 n.18 ("Although the Framers had no objection to drawing an adverse inference from an unsworn defendant's silence before a magistrate or at trial, they might

have argued that, in the framing era, it is likely that if the unsworn defendant at a preliminary examination held under Marian procedures failed to answer questions, or if a criminal defendant, at trial, failed to offer an unsworn statement, an adverse inference might well have been drawn by the trier of fact, though this claim is unsupported by concrete evidence of how frequently this occurred.[379] Perhaps a defendant's silence was so infrequent in the framing era that the question of an adverse inference rarely arose. More important, as we have seen, the framing-era failure to assert Fifth Amendment rights may well have been attributable more to factors other than to the framing-era understanding of the Fifth Amendment—in particular, the absence of defense counsel at preliminary examinations able to assert the rights of the accused.[380]

Moving past the framing era, most nineteenth-century statutes granting criminal defendants a right to testify provided that no adverse inference could be drawn from a defendant's failure to testify out of concern that such a prohibition was constitutionally required.[381] Such prohibitions were not universal, and they followed the ratification of the Fifth Amendment by decades, but they suggest that constitutional concerns about an adverse inference based on a defendant's failure to testify are not ahistorical. In jurisdictions that permitted consideration of a defendant's failure testify, state-court decisions in the late nineteenth and early twentieth centuries interpreting state constitutional prohibitions on compelled self-incrimination reached conflicting results, again suggesting that history does not speak with one voice.[382] The historical record is, in short, too mixed to permit reliable conclusions.

It is more productive to focus on the Fifth Amendment's text instead of an ambiguous historical record. *Griffin*'s characterization of an adverse inference as "a penalty imposed by the courts" that "cuts down on the privi-

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not have approved of drawing an adverse inference from a defendant's refusal to offer sworn testimony.") (citation omitted).

379 *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 332–36 (1999) (Scalia, J., dissenting); MAYERS, *supra* note 126, at 12, 16, 175–76, 188; OLP Memo, *supra* note 69, at 1025–26; Sampsell-Jones, *supra* note 69, at 1348–49.

380 *See supra* text accompanying notes 151–61.

381 *See, e.g.*, Ferguson v. Georgia, 365 U.S. 570, 580 (1961); Alschuler, *supra* note 25, at 2661–62; Bodansky, *supra* note 109, at 126.

382 *See* OLP Memo, *supra* note 69, at 1034–45. The Fifth Amendment was not regarded as applicable to state prosecutions until *Malloy v. Hogan*, 378 U.S. 1 (1964). In the nineteenth century, the closest a federal court came to this question was a case concluding that the court could draw an inference adverse to a grand jury witness based on his invocation of the Fifth Amendment in an inquiry into alleged violations of neutrality laws, and on that basis require the witness to post a bond, although relying heavily on the view that the case involved no criminal punishment. United States v. Quitman, 27 F. Cas. 680, 682 (C.C.E.D. La. 1854) (No. 16,111). When Congress later removed the bar on testimony by a criminal defendant, it also provided that a defendant's failure to testify "shall not create any presumption against him." Act of Mar. 16, 1878, 20 Stat. 30, 31. The Supreme Court subsequently held that any prosecutorial comment on a defendant's failure to testify violated the statute. *See* Wilson v. United States, 149 U.S. 60 (1893).

lege by making its assertion costly,"[383] however, is not rooted in any definition of compulsion; moreover, as we have seen, subsequent cases have rejected the view that the Fifth Amendment prohibits anything that makes assertion of Fifth Amendment rights "costly."[384] Nevertheless, the striking thing about a rule that permits a defendant's failure to testify to be used as evidence of guilt is that the defendant is left with no means to avoid becoming a "witness" who has provided evidence. As Justice Frank Murphy pointed out in the first case in which California's rule permitting comment on a defendant's failure to testify reached the Supreme Court, if the defendant does not testify, "his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain," and, "[i]f he does take the stand, thereby opening himself to cross-examination . . . he is necessarily compelled to testify against himself."[385] This insight offers strong justification for *Griffin*.

If a defendant is effectively required to provide evidence whether he testifies or not, each of the elements of compulsion outlined in Part II.B above is satisfied. A rule permitting evidentiary use of a defendant's failure to testify satisfies the official inducement element as an undertaking to induce the defendant to provide evidence either through testimony from the witness stand, or an inference of guilt flowing from the defendant's failure to testify. The second element of compulsion is also satisfied: the defendant becomes a witness because he provides evidence either by express testimony or silence. After all, even when the defendant remains silent, the adverse inference permits the jury to conclude that the defendant's failure to testify reflects implicit testimony through application of the longstanding rule that silence in the face of an accusation can be treated as evidence of the suspect's consciousness of guilt.[386] The final two elements are satisfied as well; a threat of punitive sanctions is what requires the defendant to appear in his defense as a "witness" in the form of either testimony or silent acquiescence. It is the threat of punitive sanctions that requires the defendant to mount a defense in which he effectively becomes a witness whether he testifies or not, at least when an adverse inference from silence is permitted.

When a defendant's failure to testify is treated as evidence of guilt, accordingly, the defendant is deprived of the option of declining to become a

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383 Griffin v. California, 380 U.S. 609, 614 (1965).

384 *See supra* text accompanying note 70.

385 Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting). To similar effect, see Alschuler, *supra* note 25, at 2628 n.11 ("When the defendant in *Griffin* refused to testify, the prosecutor invited a jury to infer this defendant's consciousness of guilt and his knowledge of incriminating circumstances . . . . The defendant in *Griffin* thus might have had no way to avoid incriminating himself; either his truthful speech or his silence would have been treated as evidence of guilt. Because the defendant lacked an alternative, he was compelled to become a witness of sorts against himself.").

386 *See supra* text accompanying note 178.

"witness" who provides evidence. For that reason, the very process of haling the defendant into court and requiring him to defend under a threat of punitive sanctions amounts to compulsion to become a "witness" within the meaning of the Fifth Amendment. And, because a defendant faced with a threat that his failure to testify will be used against him at trial is subject to compulsion in this fashion, there is no requirement to invoke Fifth Amendment rights in order to gain the benefit of *Griffin*; as Part III.B above demonstrates, the invocation requirement is not imposed against those who are subject to compulsion even if their invocation is respected.[387]

To be sure, a defendant is required to make many difficult choices that are not regarded as inconsistent with the Fifth Amendment, such as whether to testify, or to give the prosecution notice of an intention to present defense witnesses.[388] The adverse comment on silence, however, differs critically from these other choices; it means that the defendant is given no option but to become a "witness" by providing evidence.[389] Either the de-

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387 Conversely, at least when the defendant is sentenced by a judge, the Court hewed to the invocation requirement, albeit without explaining the distinction from *Griffin*. *See* Roberts v. United States, 445 U.S. 552, 560–61 (1980). The definition of compulsion offers the missing explanation. In *Roberts*, the defendant argued that his refusal to provide information at sentencing "was justified by legitimate fears of physical retaliation and self-incrimination." *Id.* at 559. The former, because it involves nongovernmental coercion, is not a form of compulsion within the meaning of the Fifth Amendment because the official-inducement element of compulsion is lacking. In cases in which it is unclear whether an individual is subject to Fifth Amendment compulsion, invocation is properly required so that the court can assess the propriety of the invocation. *See supra* text accompanying note 228.

388 *See* McGautha v. California, 402 U.S. 183, 215–16 (1971).

389 This point serves to explain *Raffel v. United States*, 271 U.S. 494 (1926), in which the Court found no Fifth Amendment violation when the defendant testified at his second trial and was impeached by his failure to testify at the first. *Id.* at 497–98. In *Raffel*, the defendant was able to decline to testify at his first trial without fear of adverse comment, and it was only his decision to take the stand at the second trial that produced the evidentiary use of his failure to testify. Accordingly, the prosecution did not leave the defendant with no option but to provide evidence; it was his own decision to testify at the second trial, after having remained silent at the first, that permitted evidentiary use of his silence. Far more questionable is the Court's reliance on *Griffin* to invalidate a rule requiring the defendant to testify before other defense witnesses on Fifth Amendment grounds in *Brooks v. Tennessee*, 406 U.S. 605 (1972). The rule was defended on the theory that if the defendant could testify after other defense witness, his testimony might be improperly influenced by the testimony of the other witnesses. *Id.* at 607. To the extent that the rule was calculated to induce the defendant to testify as the first defense witness by the threat of a punitive sanction—loss of the right to testify later—the rule falls within the definition of compulsion advanced above. Yet, one can question whether the rule is properly understood in this fashion. Unlike the adverse comment on silence at issue in *Griffin*, the challenged rule in *Brooks* left the defendant free to remain silent under the protection of *Griffin*'s no-adverse-inference rule, and for that reason one could argue that it was not an undertaking to induce the defendant to provide evidence. Indeed, Brooks did not take the stand at his trial. *See id.* at 614 (Burger, C.J. dissenting). For additional criticism of *Brooks*, concluding that it is best understood as a decision about a defendant's due process right to control the manner in which the defense case unfolds, see generally Peter Westen, *Order of Proof: An Accused's Right To Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L REV. 935 (1978).

fendant's sworn testimony or the defendant's implicit testimony by silence become part of the evidence before the trier of fact. When an inference of guilt based on a defendant's failure to testify is permitted, accordingly, by compelling the defendant to defend the charge, the government also compels him to be a witness, regardless whether he takes the stand.[390] Thus, the adverse inference amounts to compulsion within the meaning of the Fifth Amendment. *Griffin*, in short, is sound.

2. Griffin*'s Limits*

Focusing on the conception of compulsion advanced above not only explains *Griffin*, but also the subsequent cases identifying the limits of its holding.

As we have seen, *Griffin*'s conclusion that the government may not make an assertion of Fifth Amendment rights costly not only fails to explain why a defendant who remains silent has been subject to compulsion, but is also difficult to square with subsequent cases permitting the failure to testify to be the basis for an adverse inference in a variety of other contexts.[391] Because the Court has failed to offer a definition of compulsion, in the cases in which adverse inferences from silence have been permitted, the Court has struggled to explain the limits of *Griffin*, offering a hodge-podge of reasons for limiting its reach.

For example, the Court sustained a requirement that a prisoner accept responsibility for his crime before being admitted to a sex-offender treatment program on the ground that this serves legitimate penological interests and is not unduly harsh.[392] The Court has also written that *Griffin* does not forbid the use of an adverse inference based on a failure to testify in civil cases because, in criminal cases, the prosecution can respond to an assertion of Fifth Amendment rights with immunity, and the stakes are greater in criminal litigation.[393] But, the Court also held that an adverse inference can be drawn from a prisoner's failure to testify at a prison disciplinary hearing without any inquiry into the severity of the sanctions at issue or the government's ability to offer prisoners immunity.[394] And, it sustained an

390 Professor Alschuler acknowledges that this view "rests on a plausible reading of the word 'compulsion,'" but adds, "[t]he Framers of the Fifth Amendment meant to save people from improper pressures to confess—pressures exerted by human beings." Alschuler, *supra* note 40, at 868 n.79. This overlooks that it is the prosecutor who decides to hale a defendant into court, and if comment on silence is permitted, the prosecutor is guaranteed evidence from the defendant whether he testifies or not. In this fashion, *Griffin* protects defendants from compulsion exerted as a prosecutorial tactic.

391 *See supra* text accompanying note 70.

392 McKune v. Lile, 536 U.S. 24, 29 (2002) (plurality opinion); *see also id.* at 50–52 (O'Connor, J., concurring in the judgment) (stressing that the burden imposed on the prisoner choosing not to participate was not severe).

393 *Mitchell*, 526 U.S. at 328–29.

394 Baxter v. Palmigiano, 425 U.S. 308, 316–20 (1976).

adverse inference drawn if a prisoner under a death sentence refuses to submit to a clemency interview, without evident concern for the life-or-death stakes, on the ground that the prisoner has a choice whether to seek clemency.[395] Yet, the fact that a defendant voluntarily chooses whether to testify in his own defense did not stop the Court from barring the use of an adverse inference in *Griffin*.

The account of compulsion advanced above, in contrast, makes the limits of *Griffin* understandable. When an individual is given the option to remain silent in a civil proceeding in which he faces no punitive sanctions, the individual is not subject to Fifth Amendment compulsion. In such cases, the individual may experience pressure to speak by threat of nonpunitive sanctions, such as civil liability, but Fifth Amendment compulsion excludes the threat of solely civil sanctions, permitting silence to be afforded whatever probative weight is carried by any adverse inference that a trier of fact may draw from silence.[396]

Indeed, the cases in which the Court has permitted adverse inferences from silence involve no threat of punitive sanctions to induce individuals to speak. For example, sex-offender treatment programs are considered rehabilitative, not punitive.[397] Similarly, given the institutional interests in enforcing prison discipline, the Court has rejected their characterization as punitive; observing that prison discipline "does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitative goals."[398] Thus, even if prisoners are denied rehabilitative services or face prison discipline if they remain silent, they are not confronted with a threat of punitive sanctions for remaining silent and hence are not subject to compulsion. For that reason, the final element of the definition of compulsion is not satisfied.

It is also hard to characterize clemency proceedings as an official undertaking to induce a defendant to provide evidence through a threat of punitive sanctions; instead, they involve the defendant's effort to remove punitive sanctions already embodied in an adverse judgment. Accordingly, in clemency proceedings, the government does not undertake to induce an individual already under a final judgment of conviction to provide evidence by threat of punitive sanctions; for that reason, a defendant's incentive to

395 Ohio Adult Par. Auth. v. Woodard, 523 U.S. 272, 285–88 (1998).

396 *See, e.g.*, *Mitchell*, 526 U.S. at 328.

397 *See McKune*, 536 U.S. at 34.

398 Sandin v. Conner, 515 U.S. 472, 485 (1995) (citations omitted); *see also Baxter*, 425 U.S. at 319 ("Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime.").

provide a statement in clemency proceedings is not properly characterized as Fifth Amendment compulsion.

In short, by defining compulsion, the soundness of both *Griffin* and its limits become clear.

3. Extrajudicial Silence

Adverse inferences from silence are not confined to a defendant's failure to testify at trial. Whenever a suspect fails to provide information to the authorities, the question arises whether evidentiary use may be made of silence in an ensuing criminal prosecution.

The only case in which the Court has held that the use of an adverse inference based a defendant's extrajudicial silence violated the Constitution is *Doyle v. Ohio*.[399] In that case, the Court held that using a defendant's silence after receiving *Miranda* warnings to impeach the defendant's testimony at trial violated the Due Process Clause because "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights," adding that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[400]

In *Doyle*, the Court presumably relied on the Due Process Clause rather than the Fifth Amendment because it had already "permitted use for impeachment purposes of post-arrest statements that were inadmissible as evidence of guilt because of an officer's failure to follow *Miranda*'s dictates."[401] Yet, *Doyle*'s due process rationale is dubious, not only because *Miranda* warnings nowhere expressly promise that an arrestee's silence cannot be used for its evidentiary value, but because the defendants in *Doyle* did not claim that they had remained silent in reliance on the warnings.[402] In any event, a due process objection based on *Doyle* can readily be cured if arrestees are expressly warned that their silence can be used against them in subsequent proceedings—unless such a qualification would violate the Fifth Amendment.[403]

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399 426 U.S. 610 (1976).

400 *Id.* at 617, 618.

401 *Id.* at 617.

402 *Id.* at 621–25 (Stevens, J., dissenting).

403 *See* OLP Memo, *supra* note 69, at 1105–07; *cf.* South Dakota v. Neville, 459 U.S. 553, 565–66 (1983) (rejecting a due process challenge to the prosecution's evidentiary use of a driver's refusal to take a blood-alcohol test since the driver had not been assured that refusal would not be used against him). For a proposal to permit the trier of fact to draw an adverse inference when a suspect refuses to submit to interrogation, see Klein, *supra* note 332, at 1022-23, 1031. For a proposal permitting an adverse inference when a counseled suspect refuses to submit to interrogation, see David Rossman, *Resurrecting* Miranda*'s Right to Counsel*, 97 B.U. L. REV. 1129, 1137–55 (2017). Notably, both proposals fail to offer a definition of compulsion against which they can be tested to determine whether they offend the Fifth Amendment.

The definition of compulsion, however, means that the Fifth Amendment precludes a modification of the *Miranda* warnings to permit evidentiary use of a suspect's post-warning silence. If the requisite warnings told the suspect that silence could be used against him, the suspect would be placed in a dilemma no different from that condemned in *Griffin*. In such a case, the arrestee would be required to provide evidence no matter what he does. Compulsion is present since the suspect must either speak, thereby providing evidence for the prosecution's use, or remain silent, which could also be used for its evidentiary value. All of the elements of compulsion are present—the suspect has been induced to provide evidence through the threat of punitive sanctions.[404] Thus, the concept of compulsion advanced above explains why the Fifth Amendment would not permit a modification of *Miranda*'s warnings to permit the use of a suspect's silence in response to custodial interrogation.

Aside from silence during custodial interrogation following the *Miranda* warnings, *Doyle*'s due process holding supplies no basis to limit the evidentiary use of silence because, unless a suspect has received warnings, ensuing silence does not reflect reliance on the warnings.[405] As for the Fifth Amendment, the Court has never held that it bars the evidentiary use of extrajudicial silence outside of the context of custodial interrogation; the Court has held, for example, that a defendant's testimony that he acted in self-defense could be impeached by his failure to make the claim during the period that he remained at large prior to his arrest because this imposes no impermissible burden on silence.[406] Yet, because *Griffin* and its progeny cases offer no definition of compulsion, they seemingly turn on an uncertain inquiry into "whether a constitutional right has been burdened impermissibly . . . ."[407] Many commentators have argued that the evidentiary use of silence could readily be regarded as an impermissible burden on Fifth Amendment

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404 In *Doyle*, relying on *Raffel v. United States*, 271 U.S. 494 (1926), Justice Stevens argued in dissent that the Fifth Amendment never forbids the use of silence to impeach a defendant's testimony. *Doyle*, 426 U.S. at 628–33 (Stevens, J., dissenting). The Fifth Amendment, however, forbids all compulsion to be a witness, whether the evidence provided goes to the defendant's guilt or his credibility. Indeed, it is settled that evidence obtained by compulsion within the meaning of the Fifth Amendment cannot be used for any purposes, including impeachment. *See supra* text accompanying notes 74–75. As for *Raffel*, as we have seen, in that case the defendant was not placed in a position where he was compelled to provide evidence no matter what he did; his silence became impeaching only because he chose to testify at his second trial after remaining silent at his first. *See supra* note 389.

405 *See, e.g.*, Portuondo v. Agard, 529 U.S. 61, 74–75 (2000); Brecht v. Abrahamson, 507 U.S. 619, 628 (1993); Fletcher v. Weir, 455 U.S. 603, 605–07 (1982) (per curiam); Jenkins v. Anderson, 447 U.S. 231, 238–40 (1980).

406 *See Jenkins*, 447 U.S. at 236–38.

407 *Id.* at 238.

rights.[408] Once compulsion is defined, however, the Court's refusal to extend the Fifth Amendment to a suspect's pre-arrest silence, or even silence after arrest but before interrogation begins, is readily explicable.

The Fifth Amendment does not confer a right to remain silent but a right to be free from compulsion to incriminate. When a suspect remains at large prior to arrest, or even after arrest, and when a suspect remains silent prior to the commencement of custodial interrogation, there has been no compulsion.[409] Because the suspect has not been interrogated, the government has not undertaken to induce the suspect to become a witness. Therefore, the first element of the definition of compulsion is not satisfied.[410] It follows that the evidentiary use of an individual's silence places no burden, impermissible or otherwise, on the right to be free from compelled self-incrimination. In contrast, as we have seen, during custodial interrogation, compulsion is nearly always present, and for that reason placing an arrestee in a position where he is compelled to provide evidence whether he speaks or remains silent runs afoul of the Fifth Amendment, and not merely the uncertain due process rationale of *Doyle*.

The question on which no majority of the Court could be assembled in *Salinas* remains to be considered—whether silence in the face of noncustodial interrogation can be used against a defendant in an ensuing criminal prosecution. In *Salinas*, Justice Breyer advanced an argument similar to the defense of *Griffin* forwarded above; he reasoned that if the prosecutor were permitted to make evidentiary use of Salinas's silence, Salinas would be effectively required to provide evidence regardless whether he spoke or remained silent.[411] Beyond that, others have argued that making evidentiary use of silence is perilous since it is fraught with ambiguity; indeed, among the reasons that suspects may remain silent is their awareness of their Fifth Amendment rights.[412] Some also argue that the potential for coercion ex-

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408 *See, e.g.*, Anne Bowen Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination*, 52 GEO. WASH. L. REV. 191, 205–18 (1984); Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 154–59 (2001); Stone, *supra* note 27, at 146–47.

409 *Cf. Jenkins*, 447 U.S. at 241 (Stevens, J., concurring in the judgment) ("[T]he privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.") (footnote omitted).

410 For a similar argument, albeit not based on a definition of Fifth Amendment compulsion, see David S. Romantz, *"You Have the Right To Remain Silent": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt*, 38 IND. L. REV. 1, 47–50 (2005).

411 Salinas v. Texas, 133 S. Ct. 2174, 2185–86 (2013) (Breyer, J., dissenting). For arguments along similar lines, see Poulin, *supra* note 408, at 210–11, and Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 VA. L. REV. 897, 929–30 (2012).

412 *See, e.g.*, Rinat Kitai-Sangero & Yuval Merin, *Probing into* Salinas*'s Silence: Back to the "Accused Speaks" Model?*, 15 NEV. L.J. 77, 92–94, 97–98 (2014); Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 WM. & MARY L. REV. 285, 334–36 (1988); Strauss, *supra* note 408, at 144–46 .

ists in any official questioning in light of the suspect's fear that that if he fails to cooperate his guilt may be inferred.[413]

Once compulsion is defined, however, this inquiry becomes much easier. Compulsion requires not only interrogation but also a threat of punitive sanctions. By virtue of the Fifth Amendment, however, a suspect does not face a threat of punitive sanctions for failing to submit to noncustodial interrogation. Whatever implicit threat might be present in noncustodial interrogation is subject to the bright-line rules reflected in *Miranda* and the invocation requirement—absent custodial interrogation, the presumption is that the suspect faces no threat of punitive sanctions for remaining silent because of the ability to invoke Fifth Amendment rights. Thus, unless the subject of noncustodial interrogation is expressly confronted with a threat of sanctions for remaining silent, compulsion is not present. Had the officers threatened to arrest Salinas unless he agreed to answer questions, the case would present the kind of threat that the Court has suggested would trigger Fifth Amendment protection even absent an invocation.[414] No threat of that kind was made, however, in *Salinas*. It follows that even if the government can make evidentiary use of a suspect's response to noncustodial interrogation regardless whether the suspect speaks or remains silent, the government has not acquired this evidence through compulsion. Perhaps a suspect's silence in the face of noncustodial interrogation is ambiguous, but this presents no Fifth Amendment problem. The Fifth Amendment prohibits the use of evidence obtained by compulsion, not the use of ambiguous evidence.

Accordingly, of the three opinions in *Salinas*, Justice Alito's reliance on the invocation requirement comes closest to the mark. Justice Thomas's attack on *Griffin*, as we have seen, fails to explain how a criminal defendant, consistent with the Fifth Amendment, can be placed in a position in which, even if he remains silent, he provides evidence to the prosecution by being compelled to defend a charge. Justice Breyer's reliance on *Griffin* fails to explain how Salinas was compelled to provide evidence during a noncustodial interview. Yet, the confusion that flows from a failure to define compulsion flaws Justice Alito's opinion as well.

Justice Alito concluded that Salinas's failure to invoke the Fifth Amendment meant that he could not advance a Fifth Amendment claim.[415] What was fatal to Salinas's Fifth Amendment claim, however, was not his failure to invoke. Even if Salinas had expressly invoked a right to remain silent during the interview, he still would not have been subject to compulsion within the meaning of the Fifth Amendment unless, after the invoca-

413 *See, e.g.*, Kitai-Sangero & Merin, *supra* note 412, at 98–100; Maclin, *supra* note 64, at 289–90.

414 *See supra* text accompanying note 232.

415 *Salinas*, 133 S. Ct. at 2177–78, 2184 (plurality opinion).

tion, he was threatened with punitive sanctions for remaining silent. That point, however, only comes clear once one defines compulsion.

CONCLUSION

The ultimate normative question that overhangs any consideration of the Fifth Amendment is whether the prohibition on compelled self-incrimination has any persuasive justification. Although there are occasional and generally inconsistent scholarly efforts to advance a normative justification for the Fifth Amendment,[416] there is something approaching a consensus among scholars that no normative account, whether premised on privacy, autonomy, avoidance of cruelty, maintenance of an adversarial system of justice, protection of the innocent, or a concern for the reliability of evidence, adequately justifies the Fifth Amendment.[417] There are, after all, lots of ways in which the criminal justice system can infringe on privacy or autonomy, permit cruelty, tolerate non-adversarial investigative tactics and unreliable evidence, or threaten the innocent without running afoul of the Fifth Amendment. The Fifth Amendment is poorly crafted to achieve any of these goals. Measured against the lofty objectives usually advanced to justify it, the prohibition on compelled self-incrimination comes up short.

Focusing on the concept of compulsion, however, not only explains and helps to evaluate Fifth Amendment doctrine, but also sheds light on this final and largest of normative inquiries. The prohibition on compelled self-incrimination, when applied with a rigorous definition of compulsion in mind, offers a modest dose of what David Sklansky has called, albeit rather pejoratively, "anti-inquisitorialism."[418]

The Fifth Amendment does not guarantee a fully adversarial system of justice—as we have seen, it permits a good deal of official questioning in non-adversarial settings, whether custodial or not. The Fifth Amendment does, however, offer some assurance that interrogation of a suspect to build a case against him must be reasonably consensual. The government may do many things in order to acquire evidence, but it may not threaten punitive sanctions to convince a suspect to submit to interrogation that may incriminate. If the state cannot secure some degree of cooperation from a suspect consistent with the law of waiver, it must look elsewhere to build its case. This

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416 *See, e.g.*, Amar & Lettow, *supra* note 11, at 922–27 (reliability of evidence); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 90–94 (1970) (privacy); Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEG. STUDIES 209, 221–28 (2007) (undue harshness contrary to autonomy); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 451–74 (2000) (protecting the innocent).

417 *See, e.g.*, Allen, *supra* note 23, at 730–39; Dolinko, *supra* note 116, at 1074–1147; Dripps, *supra* note 21, at 711–18; Friendly, *supra* note 69, at 679–98.

418 David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1635, 1635–36 (2009).

may not offer ironclad protection for the innocent, and it may often aid the guilty, but it is a real limitation on the investigative reach of the government.

The Fifth Amendment offers modest virtues, and a modest limitation on the coercive powers of the state. The government can use immunity to compel testimony, and it may use a variety of techniques to persuade a suspect to surrender Fifth Amendment rights. There is no Platonic ideal of dignity, autonomy, privacy, or liberty lurking in the Fifth Amendment. In a Constitution meant to operate in the real world of crime and punishment, however, Platonic ideals are hard to come by. A modest constraint on government, and modest protection for liberty, may be the best we can realistically expect. On that score, the prohibition on compelled self-incrimination may not look so bad.