COERCED CONFESSIONS AND THE FOURTH AMENDMENT

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Since 1936, the Supreme Court has consistently located the source of its jurisprudence on coerced confessions[1] by a state criminal defendant in the Due Process Clause of the Fourteenth Amendment.[2] This is completely understandable, as coerced-confession jurisprudence developed at a time when the Court was loathe to apply mechanistically particular clauses from the Bill of Rights to the States. Instead, the Court's practice was to determine whether the proceedings against the defendant were so lacking in fundamental fairness as to constitute a breach of the vague dictates of due process.

Yet, more recently, the Court's jurisprudence on the application of the Bill of Rights to the States has embraced a clause-specific approach. That is, claims that a state has violated due process are addressed by the Court in terms of the specific clauses of the Bill of Rights, nearly all of which are by now applied to the States via the Fourteenth Amendment, and in the identical fashion as they apply against the federal government. Thus, in *Graham v. Connor*,[3] the

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1. Though the terms are fairly interchangeable in the case law and commentary, *see*, *e.g.,* Arizona v. Fulminante, 499 U.S. 279, 287 n.3 (1991), this Article uses the term "coerced" rather than "involuntary" to describe statements taken from suspects as a result of certain police conduct. This is because the focus of the jurisprudence has shifted from whether the statement was made voluntarily in some abstract sense to whether it was the result of police overreaching or misconduct. *See infra* Part I.C.

This Article uses the term "confession" to describe any statement taken from the suspect of a criminal inquiry, regardless of whether the statement is inculpatory or exculpatory, or whether it would be considered a "confession," an "admission," or some other creature at common law. Thus, this Article often uses the word "statement" interchangeably with "confession."

2. "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

3. 490 U.S. 386 (1986).

Supreme Court ruled that where a specific provision of the Bill of Rights governs a particular aspect of the criminal process, a person alleging a constitutional infringement with respect to that aspect can claim only those rights that inhere in that particular provision. Where those rights are not sufficiently broad to provide a constitutional claim, one cannot rely on any vague, background guarantee of due process to fill in the gap. To put it another way, where a potential constitutional claim falls within the ambit of a particular right guaranteed by the Bill of Rights, the claim can be only as broad as the guarantees of that provision.

If the Court is to continue to hold that state action that coerces a confession from a criminal suspect is a violation of his[4] constitutional rights, the Court should at least identify which specific constitutional provision, if any, is at issue. The prime candidate would seem to be the Fifth Amendment's Self-Incrimination Clause.[5] Indeed, many practitioners, scholars, and judges today would likely point to the Self-Incrimination Clause as the source of the proscription against coerced confessions. And it is that Clause upon which the Court relied on in its landmark decision in *Miranda v. Arizona*,[6] which established a prophylactic rule to guard against the possibility of coercion in the interrogation room. Obviously, the *Miranda* doctrine and the line of cases addressing actual coercion are inter-related. Since both lines of case law seek to prevent the evil of the use of a suspect's own words, obtained against his will, to convict him, one would think that the same constitutional language governs both. Moreover, in some cases—including *Miranda* itself and *Malloy v. Hogan*,[7] where the Court first expressly applied the Self-Incrimination

4. This Article refers to the criminal suspect with exclusive use of the masculine pronoun because the overwhelming majority of arrested criminal suspects are male. *See* U.S. DEP'T OF JUSTICE, FED'L BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 229 (1999) (reporting that 78.2% of all arrestees in the United States in 1999 were male). Moreover, with respect to the types of crime that one would think are most likely to induce police to resort to coercive tactics, the percentages are even greater. *See id.* (reporting that in 1999, males were arrested for 98.7% of forcible rapes, 92.9% of sex offenses other than forcible rape or prostitution, 89.9% of robberies, 88.6% of non-negligent homicides, 87.1% of burglaries, 85.6% of arsons, 80.3% of aggravated assaults, and 85.6% of violent crimes generally). The reader should, of course, be aware that female criminal suspects are sometimes subjected to conditions alleged to have produced coerced confessions. *See*, *e.g.*, Lynumn v. Illinois, 372 U.S. 528 (1963).

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

6. 384 U.S. 436 (1966).

7. 378 U.S. 1 (1964).

Clause against the states—the Court intimated that it is the Self-Incrimination Clause, incorporated through the Fourteenth Amendment, that prohibits the use of the coerced confession at trial.[8]

Yet the Court has understandably been disinclined to ground coerced-confession jurisprudence solely in the Self-Incrimination Clause, even after *Graham*. After all, the plain terms of the Self-Incrimination Clause prohibit the prosecution in a criminal case only from forcing the accused to be "a witness against himself"—that is, either actually to testify at trial or, in the broader and more common scenario, to make a statement before trial that is then used against him at trial. Thus, the violation of the accused's rights under the Clause takes place if, and only if, the statement is admitted against him at trial, not at the time when the statement is actually extracted.[9]

Yet the Court's coerced-confession cases make reasonably clear that it is not simply the *use* of such a confession that violates basic constitutional norms; it is also the extraction of such a confession in the first place that violates basic notions of fairness embodied in our Constitution. Thus, to rely solely on the Self-Incrimination Clause as the basis for a jurisprudence that disfavors the use of coercion to secure confessions would not only be inconsistent with current law, but it would also be to read the Constitution in a way contrary to certain normative judgments about how agents of the state should act, judgments that virtually all would agree are embodied in the Constitution itself.[10]

But where? The answer lies with the Fourth Amendment.[11] After all, the Fourth Amendment is primarily concerned with ensuring that government agents act reasonably when they seize a person suspected of a crime and search for evidence of that crime.[12] Thus, what the courts have heretofore regarded as a confession extracted under circumstances violative of due process can also be seen as a confession that is the result of an "unreasonable" search and seizure. As this Article will show, under this line of reasoning, the extraction of a coerced confession from an accused implicates two

8. *Id.* at 7.

9. *See, e.g.,* Chavez v. Martinez, 123 S.Ct. 1994, 2000-04 (2003).

10. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding that the state's compulsion of a confession by physical torture constituted a wrong so "fundamental" it was "revolting" to any sense of justice).

11. The Fourth Amendment reads, in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

12. *See id.*

separate potential constitutional violations. First, in general, when physical or psychological coercion is used to extract a statement, an unreasonable search and seizure has taken place in violation of the Fourth Amendment, and the statement and its fruit are excludable from trial pursuant to the ordinary workings of the exclusionary rule.[13] Second, if and when that statement is nonetheless introduced against the defendant at trial, he has been compelled to be a witness against himself in violation of the Fifth Amendment.[14] By contrast, a violation of the prophylactic rules set forth in *Miranda v. Arizona*[15] is never per se unreasonable, so no Fourth Amendment violation takes place, and no constitutional violation takes place at all unless and until the unwarned statement is admitted at trial.[16] And there might be occasions in which the use of physical or psychological compulsion to obtain a confession is reasonable under the circumstances but constitutes compulsion nonetheless. On those occasions, the statement may not be admitted at trial, lest the Self-Incrimination Clause be violated, but not because the police have done anything "wrong."

Such a reconfiguration would be more consistent with the Supreme Court's emphasis in its more recent coerced-confession cases, not on the voluntariness of the confession in some metaphysical sense,[17] but on whether the confession was obtained through overreaching by the police, the traditional touchstone of Fourth Amendment law. In addition, the highly fact-sensitive, case-by-case determination of whether a confession was freely made or coerced fits nicely with the Fourth Amendment's focus on reasonableness in light of all the circumstances. At the same time, the Fourth Amendment's concept of reasonableness helps give some shape to a jurisprudence that has suffered from a lack of objective criteria for judges to apply. Thus, when the courts say that a confession was coerced because of police overreaching, they are essentially saying that the police conduct during the seizure of the accused and the search of his mind for evidence, in light of the circumstances, was unreasonable.

This Article argues that coerced confessions are more

13. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

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

15. 384 U.S. 436 (1966).

16. *Id.* at 476-77.

17. *See, e.g.,* Davis v. North Carolina, 384 U.S. 737, 740-41 (1966); Haynes v. Washington, 373 U.S. 503, 515-16 (1963); Blackburn v. Alabama, 361 U.S. 199, 205 (1960); Ashcraft v. Tennessee, 322 U.S. 143, 147-48 (1944).

appropriately viewed as both the products of unreasonable searches and seizures and as instances of compelled self-incrimination (but only if the statement is admitted at trial) rather than as violations of more general notions of due process. The Article is predominantly descriptive rather than prescriptive: The aim is largely to offer an account of coerced-confession jurisprudence that renders the Court's current case law in a variety of areas as internally coherent as possible. Thus, the Article largely takes the current state of the law as a given, including areas that are rather controversial, such as the *Miranda* doctrine[18] and the rule enunciated in *Graham*.[19] As to the controversies that rage to a greater or lesser extent in these and other areas, the Article attempts to remain agnostic. On the other hand, it does offer, in closing, what I regard as a few relatively minor adjustments to the law that best cohere with this Article's overall vision. The Article also makes no pretense that its overall theory is supported by an originalist view of the Fourth Amendment. To the contrary, I readily concede that it might not have occurred to the Framers that coerced confessions are a Fourth Amendment issue. I argue only that this theory is most consistent with both the plain language of the Fourth and Fifth Amendments and current Supreme Court jurisprudence as a whole.[20]

Part I of this Article examines the development of the law of coerced confessions, including *Miranda*. Part II demonstrates the erosion of due process as a foundation for the Court's coerced-confession jurisprudence. After providing a brief historical sketch of the incorporation debate, this Part introduces the problem posed by *Graham v. Connor*. Part III considers and rejects the notion that the constitutional proscription against coerced confessions resides solely in the Self-Incrimination Clause, based on both the language of the Clause and the decline in the emphasis on the reliability-enhancing justification for the rule against coerced confessions.

18. Scholarly criticism of *Miranda* is plentiful. *See, e.g.,* Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).

19. For a stinging (and, I believe, not fully justified) criticism of *Graham*, *see generally* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086 (1998).

20. For an excellent criticism of the recent over-use of originalism in Fourth Amendment adjudication, *see* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000). Sklansky argues powerfully that "the new Fourth Amendment originalism . . . should be unattractive even to those generally sympathetic to originalism." *Id.* at 1745.

Finally, Part IV examines the law of unreasonable searches and seizures under the Fourth Amendment, and proposes that the law of coerced confessions be seen, at least in part, as a natural outgrowth of Fourth Amendment jurisprudence. This Part then proposes a Fourth Amendment reasonableness standard to govern the issue of whether a confession has been coerced, which differs somewhat from current law. It also addresses some real-world implications of viewing coerced confessions as a Fourth Amendment issue, especially the fact that exigent circumstances might sometimes render an otherwise coercive interrogation reasonable. Finally, this Part explains why, as under current law, coerced confessions should be treated differently from un-Mirandized confessions with respect to the "fruit of the poisonous tree" doctrine. However, it argues that, contrary to current law, an un-Mirandized confession, like a coerced confession, should not be admissible for impeachment purposes.

I. COERCED CONFESSIONS, THE DUE PROCESS CLAUSE, AND *MIRANDA*

The Court's coerced-confessions jurisprudence developed in response to the use of physical and psychological coercion to extract statements from criminal suspects, statements that were then used against the suspects in criminal prosecutions.[21] The Court grounded this jurisprudence in general notions of due process, the only locus of constitutional rights against State, as opposed to federal, actors available at the time the jurisprudence was developed.[22] Even after the Self-Incrimination Clause was held to be incorporated against the States by the Fourteenth Amendment,[23] the Court continued to locate the source of its coerced-confessions jurisprudence in the Due Process Clause standing alone.[24] However, after struggling with idiosyncratic and fact-intensive cases of alleged coercion for thirty years, the Court announced a prophylactic rule in *Miranda*, establishing a conclusive presumption that coercion was present if certain warnings were not read to, and a waiver obtained from, the suspect, and, in essence, a concomitant rebuttable but heavy presumption that coercion was absent if the warnings were read and a

21. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

22. *See* Twining v. New Jersey, 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1, 7 (1964).

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

24. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).

waiver obtained.[25] While *Miranda* is grounded firmly in the incorporated Self-Incrimination Clause, the source of the proscription against coerced confessions continues, at least ostensibly, to be the Due Process Clause.[26]

A. Coerced Confessions and the Due Process Clause

"[F]or the middle third of the 20th Century [the] cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process."[27] It is generally agreed that the Supreme Court's coerced confession jurisprudence with respect to state defendants began in 1936 with *Brown v. Mississippi*.[28] In that case, one defendant, Ellington, confessed to a murder only after he was twice hanged by the neck from a tree limb and let down, tied to a tree and whipped, released, and then whipped a second time, informed by the sheriff's deputy performing the deed that the second whipping would continue until he confessed.[29] Ellington's two co-defendants, Brown and Shields, confessed to the murder after they were laid naked over chairs by the same deputy and whipped with a leather strap with buckles on it, also being told that the torture would continue until they confessed.[30] The defendants were also told that if they later attempted to recant their confessions, they would be met with the same treatment.[31] The next day, two sheriffs were taken "to hear the free and voluntary confession[s]" of the defendants, which confessions were eventually admitted into evidence at their trial and which, indeed, constituted the only evidence of their guilt.[32]

25. Dickerson v. United States, 530 U.S. 428, 435 (2000).

26. *Id*. at 434.

27. *Id*. at 433.

28. 297 U.S. 278 (1936). *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (noting that *Brown* "was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confession against him"); *accord* Withrow v. Williams, 507 U.S. 680, 688 (1993); Steven D. Clymer, *Are Police Free to Disregard* Miranda*?* 112 YALE L.J. 447, 477 n.122 (2002); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 234-35 (1988); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745, 747 (1987); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867 (1981); Larry J. Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 408 (1977).

29. *Brown*, 297 U.S. at 281-82.

30. *Id.* at 282.

31. *Id.*

32. *Id.* at 283-84.

The case presented the Court with somewhat of a dilemma. On the one hand, it was faced with a factual record, largely undisputed, that "'read[] more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.'"[33] Yet the most obvious basis for overturning the convictions—that each defendant was, in essence, "compelled . . . to be a witness against himself" in violation of the Self-Incrimination Clause of the Fifth Amendment—was all but foreclosed by the Court's prior decision in *Twining v. New Jersey*,[34] which had held that the Self-Incrimination Clause did not apply to the States via the Fourteenth Amendment's Due Process Clause.

The Court cut the Gordian Knot by relying on the Due Process Clause simpliciter. It wrote:

> the question of the right to withdraw the privilege against self-incrimination is not here involved. The compulsion to which [*Twining*] refer[red] is that of the processes of justice by which the accused may be called as a witness and required to testify. *Compulsion by torture to extort a confession is a different matter*.[35]

The Court held that the state's actions were so "revolting to the sense of justice," and constituted "a wrong so fundamental that [they] made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[36] Thus, the Court held that, regardless of whether the Self-Incrimination Clause itself is involved, where a conviction rests upon a confession obtained through violent means, due process of law has been offended and the conviction cannot stand.[37]

In later cases, the Court extended the rule of *Brown* to cover confessions extracted through psychological rather than physical coercion. Thus, in *Ward v. Texas*, the defendant, "an ignorant

33. *Id.* at 282-83 (quoting Brown v. State, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting), *rev'd*, 297 U.S. 278 (1936)).

34. 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1, 7 (1964).

35. *Brown*, 297 U.S. at 285 (emphasis added).

36. *Id.* at 286.

37. *Id.* at 285-86; *accord* Stein v. New York, 346 U.S. 156, 182 (1953) ("Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by law."), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964). *See* Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 451 (1964) (describing rule against coerced confessions as a "due process requirement").

negro," was transported "by night and day to strange towns, t[old] of threats of mob violence, and question[ed] . . . continuously."[38] The Court concluded that, even without regard to the defendant's claim that he had been beaten, burned, and whipped, the defendant's confession had been "the product of coercion and duress."[39] Indeed, the focus shifted in later cases to determining whether psychological coercion occurred, as the "third degree," rather than the "medieval" practices experienced by the *Brown* defendants, became the predominant method of extracting confessions. As the Court wrote in *Blackburn v. Alabama*:

> [C]oercion can be mental as well as physical, and . . . the blood of the accused is not the hallmark of an unconstitutional inquisition. . . . [T]he efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion." A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror.[40]

The test was sometimes articulated as whether the suspect's "will was overborne,"[41] or whether the confession was "the product of a rational intellect and a free will."[42] No matter how stated, the standard became whether the confession was voluntary under all the circumstances, taking into account both the character of the confessor himself and the police conduct.[43] Thus, the Court focused on such

38. 316 U.S. 547, 555 (1942).

39. *Id.*

40. 361 U.S. 199, 206 (1960) (footnote omitted). *See also Jackson*, 378 U.S. at 389 (1964) ("[P]olice conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will."); Townsend v. Sain, 372 U.S. 293, 307 (1963) ("These standards are applicable whether a confession is the product of physical intimidation or psychological pressure . . . .").

41. *See* Reck v. Pate, 367 U.S. 433, 440 (1961).

42. *Blackburn*, 361 U.S. at 208.

43. *See Stein*, 346 U.S. at 185 ("The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."); *accord Dickerson*, 530 U.S. at 434 ("The due process test takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.") (internal quotation marks omitted). *See also* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 880 (1979); Herman, *supra* note 28, at 743; Schulhofer, *supra* note 28, at 867.

In at least one case, the police methods alone were deemed to have been coercive without regard to the subjective characteristics of the suspect. *See Ashcraft*, 322 U.S. at 153-54 (1944) (interrogation for 36 hours straight deemed "inherently coercive"); *see also* Martin R. Gardner, *Section 1983 Claims Under* Miranda*: A Critical View of the Right to Avoid*

factors going to police conduct as the length and persistence of the questioning,[44] whether the suspect was afforded adequate sleep[45] and food,[46] whether the suspect was kept isolated from friends, family, and legal counsel,[47] whether the suspect was advised of the right to remain silent and to have an attorney,[48] whether a request for counsel was denied,[49] whether the suspect was kept in foreign surroundings,[50] whether the suspect was taken before a magistrate,[51] whether the circumstances were imbued with the potential for mob violence or other extrajudicial punishments,[52] any threats made of legal action involving members of the suspect's family,[53] any humiliating treatment of the suspect at the hands of the police,[54] and whether more sophisticated psychological methods were employed.[55] The Court also took into account the idiosyncratic characteristics of the suspect himself, such as his educational, intelligence, and socio-

Interrogation, 30 AM. CRIM. L. REV. 1277, 1281-82 (1993); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 450-51 (1987).

44. *See* Withrow v. Williams, 507 U.S. 680, 693 (1993); Mincey v. Arizona, 437 U.S. 385, 399-401 (1978); Clewis v. Texas, 386 U.S. 707, 709, 711-12 (1967); Davis v. North Carolina, 384 U.S. 737, 739, 746-47, 752 (1966); Gallegos v. Colorado, 370 U.S. 49, 52, 55 (1962).

45. *See* Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968); *Clewis*, 386 U.S. at 709, 712; Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (plurality); Leyra v. Denno, 347 U.S. 347 U.S. 556, 559-60 (1954); *Stein*, 346 U.S. at 185; Watts v. Indiana, 338 U.S. 49, 53 (1949) (plurality); *Ashcraft*, 322 U.S. at 153.

46. *See Greenwald*, 390 U.S. at 521; *Clewis*, 386 U.S. at 709-10, 712; *Davis*, 384 U.S. at 746; *Culombe*, 367 U.S. at 622 (plurality); *Reck*, 367 U.S. at 441; Payne v. Arkansas, 356 U.S. 560, 567 (1958).

47. *See, e.g., Mincey*, 437 U.S. at 401; Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (per curiam); *Clewis*, 386 U.S. at 712; *Davis*, 384 U.S. at 744-46; Haynes v. Washington, 373 U.S. 503, 504 (1963); *Gallegos*, 370 U.S. at 54-55; *Culombe*, 367 U.S. at 601 (plurality).

48. *See, e.g., Withrow*, 507 U.S. at 693-94; *Greenwald*, 390 U.S. at 520-21; *Clewis*, 386 U.S. at 710-11; *Davis*, 384 U.S. at 739, 740-41; Johnson v. New Jersey, 384 U.S. 719, 730-31 (1966).

49. *See, e.g., Mincey*, 437 U.S. at 399; *Greenwald*, 390 U.S. at 520-21; *Johnson*, 384 U.S. at 730-31; *Haynes*, 373 U.S. at 504.

50. *See, e.g., Withrow*, 507 U.S. at 693; *Clewis*, 386 U.S. at 709-10; Ward v. Texas, 316 U.S. 547, 551, 555 (1942).

51. *See, e.g., Clewis*, 386 U.S. at 709; *Gallegos*, 370 U.S. at 55; *Culombe*, 367 U.S. at 601, 631-32 (plurality); *Reck*, 367 U.S. at 441; *Payne*, 356 U.S. at 567; Fikes v. Alabama, 352 U.S. 191, 197 (1957); Turner, 338 U.S. 62, 64 (1949).

52. *See, e.g., Fulminante*, 499 U.S. at 286-87; Thomas v. Arizona, 356 U.S. 390, 401 (1958).

53. *See Lynumn*, 372 U.S. at 534; Harris v. South Carolina, 338 U.S. 68, 70 (1949).

54. *See Culombe*, 367 U.S. at 622 (plurality); Malinski v. New York, 324 U.S. 401, 405 (1945).

55. *See* Spano v. New York, 360 U.S. 315, 323 (1959); *Thomas*, 356 U.S. at 401.

economic levels,[56] his age,[57] his general physical[58] and psychological state, including whether he was under the influence of drugs or alcohol,[59] his prior experience with the criminal justice system,[60] and his race.[61]

When the Court reversed course from *Twining*,[62] and held in *Malloy v. Hogan*[63] in 1964 that the Self-Incrimination Clause applied to the States by virtue of the Fourteenth Amendment, it appeared that the Court might declare that—*Brown* notwithstanding—its coerced-confessions jurisprudence was based on the privilege against self-incrimination. However, this turned out to be a false start. The Court in *Malloy* wrote that the distinction between mere compelled self-incrimination and "'compulsion by torture to extort a confession' was soon abandoned" after *Brown*.[64] The *Malloy* Court pointed out that the standard developed in the coerced confession cases was not whether the agents of the state engaged in "shocking" behavior,[65] the due process standard adopted in such cases as *Rochin v. California*.[66] Rather, the Court wrote, the focus of the inquiry was whether the

56. *See Withrow*, 507 U.S. at 693; *Fulminante*, 499 U.S. at 286 n.2; *Greenwald*, 390 U.S. at 519; *Clewis*, 386 U.S. at 712.

57. *See Withrow*, 507 U.S. at 693; *Gallegos*, 370 U.S. at 52-55; *Blackburn*, 361 U.S. at 208 n.7; *Spano*, 360 U.S. at 321.

58. *See Withrow*, 507 U.S. at 693; *Fulminante*, 499 U.S. at 286 n.2; *Mincey*, 437 U.S. at 398-99, 401.

59. *See Withrow*, 507 U.S. at 693; *Fulminante*, 499 U.S. at 286 n.2; *Mincey*, 437 U.S. at 398; Beecher v. Alabama, 389 U.S. 35, 36-38 (1967); Townsend v. Sain, 372 U.S. 293, 308 (1963).

60. *See Clewis*, 386 U.S. at 712; *Lynumn*, 372 U.S. at 534; *Reck*, 367 U.S. at 441; *Spano*, 360 U.S. at 321.

61. *See Clewis*, 386 U.S. at 709; *Davis*, 384 U.S. at 742; *Ward*, 316 U.S. at 555; Chambers v. Florida, 309 U.S. 227, 238 (1940). In the older cases, race was often used as a surrogate for educational or socio-economic level, with the fact that a suspect was African-American uniformly indicating the lower end of any scale. *See, e.g., Ashcraft*, 322 U.S. at 162 (Jackson, J., dissenting) ("[T]he Court always has considered the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white.").

62. Twining v. New Jersey, 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1, 7 (1964).

63. 378 U.S. 1, 6-8 (1964).

64. *Malloy*, 378 U.S. at 6-7 (quoting *Brown v. Mississippi*, 297 U.S. 278, 285 (1936)). *See also* Ritchie, *supra* 28, at 410.

65. *Malloy*, 378 U.S. at 7. *But see Fikes*, 352 U.S. at 201 (Harlan, J. dissenting) (arguing that confession not coerced "[i]n the absence of anything in the conduct of the state authorities which 'shocks the conscience'").

66. 342 U.S. 165 (1952). For a discussion of *Rochin*, *see infra* Part IV.A.2.a.

confession was "free and voluntary."[67] Thus, the Court concluded, the basis for the coerced-confession cases was a deep and abiding concern for maintenance of an accusatorial system, whereby a suspect is not compelled to prove the charges against him "out of his own mouth,"[68] a concern ordinarily thought of as driving the proscription against compelled self-incrimination. In a case decided soon after *Malloy*, the Court seemed to meld its coerced-confession jurisprudence to the now-incorporated Self-Incrimination Clause: "The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination."[69]

For a brief period after *Malloy*, the Justices appeared to disagree amongst themselves as to whether to continue to ground the Court's coerced-confession jurisprudence in the Due Process Clause. Thus, for example, the Court's brief per curiam opinion in *Beecher v. Alabama* concluded that "[u]nder the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand."[70] Justice Brennan, however, joined by Chief

67. *Malloy*, 378 U.S. at 7.

68. *Id.* Even before the incorporation of the Self-Incrimination Clause, when the notion was gathering momentum on the Court, those who subscribed to this view—especially Justices Black and Douglas—adverted to the Clause as at least one basis for the Court's coerced-confession jurisprudence. *See Gallegos*, 370 U.S. at 51 (Douglas, J.) (writing that "due process . . . condemns the obtaining of [coerced] confessions" in part because of "the element of compulsion which is condemned by the Fifth Amendment"); *Leyra*, 347 U.S. at 558 n.3 (1954) (Black, J.) ("[C]oerced confessions cannot be admitted as evidence in criminal trials. Some members of the Court reach this conclusion because of their belief that the Fourteenth Amendment makes applicable to the states the Fifth Amendment's ban against compulsory self-incrimination."). This view had previously made its way into the cases almost exclusively by way of dissent. *See* Stein v. New York, 346 U.S. 156, 197-98 (1953) (Black, J., dissenting) ("[T]oday's opinion . . . narrow[s] the scope this Court has previously given the Fifth Amendment's guarantee that no person 'shall be compelled in any criminal case to be a witness against himself."), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964); *Stein,* 346 U.S. at 208 (Douglas, J., dissenting) ("The practice now sanctioned is a plain violation of the commands of the Fifth Amendment, made applicable to the States by the Fourteenth, that no man can be compelled to testify against himself.") (citations omitted).

69. *Davis*, 384 U.S. at 740; *accord Miranda*, 384 U.S. at 464 (1966). *See also* Dickerson v. United States, 530 U.S. 428, 433 (2000) ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."); Lego v. Twomey, 404 U.S. 477, 485 (1972) (proscription against coerced confessions protects "the right of an individual . . . not to be compelled to condemn himself by his own utterances").

70. 389 U.S. 35, 38 (1967) (per curiam).

Justice Warren and Justice Douglas, concurred in the judgment only, relying solely on "the test of admissibility stated in *Malloy*."[71] And Justice Black also concurred only in the result (but, curiously, not in Justice Brennan's separate opinion), "exclusively on the ground that the confession of the petitioner was taken from him in violation of the Self-Incrimination Clause of the Fifth Amendment . . . made applicable to the States" by *Malloy*.[72]

However, the Court eventually, and without significant dissent, settled back into its old nomenclature and deemed that "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law."[73] Indeed, the Court has made it quite clear that what it had written in *Brown*—that "[c]ompulsion . . . to extort a confession is a different matter" from compelled self-incrimination[74]—is still true. It wrote that "even after holding that the Fifth Amendment privilege against self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process."[75]

B. The *Miranda* Revolution[76]

Nearly from the beginning of its venture in the field of coerced confessions, the Court ran into problems. Critics pointed to the

71. *Beecher*, 389 U.S. at 39 (opinion of Brennan, J.). *See also Lego*, 404 U.S. at 490 (Brennan, J., dissenting) ("When the prosecution, state or federal, seeks to put in evidence an allegedly involuntary confession, its admissibility is determined by the command of the Fifth Amendment that '(n)o person . . . shall be compelled in any criminal case to be a witness against himself.'") (alterations in original).

72. *Beecher*, 389 U.S. at 38 (opinion of Black, J.).

73. *Mincey*, 437 U.S. at 398 (emphasis omitted); *accord Dickerson*, 530 U.S. at 434 ("We have never abandoned this due process jurisprudence . . . ."); *Withrow*, 507 U.S. at 689 ("[W]e continue to employ the totality-of-the-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process."); Clymer, *supra* note 28, at 477 nn.122-23.

74. Brown v. Mississippi, 297 U.S. 278, 285 (1936).

75. Miller v. Fenton, 474 U.S. 104, 110 (1985). Eight of the nine justices concurred in the opinion and this statement. *See id* at 105. The lone dissenter, then-Justice Rehnquist, did not take issue with it either. *See id.* at 118-19 (Rehnquist, J., dissenting). Indeed, in an opinion the following term authored by now-Chief Justice Rehnquist, the Court reiterated this proposition with approval. *See* Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("The Court has retained th[e] due process focus, even after holding . . . that the Fifth Amendment privilege against compulsory self-incrimination applies to the States."). *But cf. id.* at 182 (Brennan, J., dissenting) ("Our interpretation of the Due Process Clause has been shaped by [a] preference for accusatorial practices . . . .").

76. Credit for this term goes to Professors Kamisar, La Fave and Israel. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 471 (8th ed. 1994).

indeterminancy of whether a given confession was voluntary, given that the determination depended entirely on a confluence of factors that might or might not later convince a court that the confession was coerced. Aggravating this indeterminancy was the fact that so many of the factors were idiosyncratic and varied from suspect to suspect.[77] Even those who supported the case-by-case character of the Court's coerced confession jurisprudence had to acknowledge these difficulties.[78]

The solution came in the landmark 1966 case of *Miranda v. Arizona*.[79] In a break with precedent, the *Miranda* Court grounded its decision, not in general notions of due process, but in a specific provision of the Bill of Rights—the Fifth Amendment's Self-Incrimination Clause—to which the Court adverted continuously in the course of its lengthy opinion.[80] The Court found that, even regardless of the multitude of factors taken into account in the totality-of-the-circumstances test, compulsion to speak and possibly incriminate oneself is "inherent" in the atmosphere of a custodial interrogation.[81] In response, the Court held that statements taken under such circumstances could not be used against a criminal defendant unless procedural safeguards were employed that were

77. *See* Reck v. Pate, 367 U.S. 433, 455 (1961) (Clark, J., dissenting) (decrying "the elusive, measureless standard of psychological coercion heretofore developed in this Court by accretion on almost an *ad hoc*, case-by-case basis"); Ashcraft v. Tennessee, 322 U.S. 143, 163 (1944) (Jackson, J., dissenting) ("No one can regard the rule of exclusion dependent on the state of the individual's will as an easy one to apply."). *See also* Joseph D. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 48 (1979).

78. *See, e.g.,* Culombe v.Connecticut, 367 U.S. 568, 601 (1961) (plurality) ("It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions.").

79. 384 U.S. 436 (1966). *See* Gardner, *supra* note 43, at 1282, 1287, 1307. The word "solution" is, to say the least, an overstatement, given the controversy *Miranda* has generated in the commentary, *see, e.g.,* Grano, *supra* note 18, at 174, and among various Members of the Court itself. *See*, *e.g.,* Dickerson v. United States, 530 U.S. 428, 444-57 (2000) (Scalia, J. dissenting). I mean to say only that *Miranda* greatly reduced the problem of indeterminancy in the Court's coerced-confession jurisprudence. Arguably, it did so by merely shifting the flaws in that approach to its own separate and, to some, illegitimate, doctrinal line. *See, e.g., Dickerson*, 530 U.S. at 463 (Scalia, J., dissenting); Steven J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda*,"* 54 U. CHI. L. REV. 938, 944 (1987); Schulhofer, *supra* note 28, at 879-82.

80. *See Miranda*, 384 U.S. at 439, 441-42, 444, 457-58, 460-61, 463, 465, 467, 477, 478. *See also* Clymer, *supra* note 28, at 478.

81. *See Miranda*, 384 U.S. at 458, 465, 467.

"effective to secure the privilege against self-incrimination."[82] Specifically, it held that for such statements to be admissible, it must be shown that the suspect was advised of his right to remain to silent, that anything he says can later be used against him, and his right to an attorney to be present during questioning, and that he waived these rights.[83]

The *Miranda* rule thus establishes a conclusive presumption that, without the appropriate warnings and waiver, any response by a suspect to custodial interrogation has been "compelled" within the meaning of the Self-Incrimination Clause and therefore cannot be used against that suspect at trial.[84] Concomitantly, in practice though not expressed doctrinally, the rule establishes another, rebutable presumption that if the appropriate warnings *have* been given and a waiver obtained, any resulting statement is constitutionally admissible.[85]

Yet, while *Miranda* overtook the Court's jurisprudence on coerced confessions, it did not supplant it. Courts must still

82. *Id.* at 444. *See also id.* at 457-58, 476-79.

83. *See id.* at 444, 479.

84. *See id.* at 535 (White, J., dissenting); Herman, *supra* note 28, at 736; Schulhofer, *supra* note 43, at 446-53; *see also* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106-11, 154, 160 (1985). Even after *Dickerson v. United States*, 530 U.S. 428, 433 (2000), this conclusive presumption is still properly characterized as "prophylactic," in the sense that it sweeps more broadly than is necessary to preserve the constitutional right at issue. It is true that *Dickerson* confirmed that *Miranda* states a constitutional rule. *Id.* at 438. It is also true, however, that the *Dickerson* Court did not back away from the characterization of that rule as "prophylactic." For example, the Court cited with approval the following passage from *Withrow v. Williams*, 507 U.S. 680, 691 (1993): "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a 'fundamental trial right.'" *Dickerson*, 530 U.S at 440 n.5. It also noted: "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Id.* at 444. That is, the rule is prophylactic. Members of the Court continue to disagree over this designation. *Compare* Chavez v. Martinez, 123 S.Ct. 1994, 2003 (2003)(plurality)(describing *Miranda* rule as "prophylactic") with *id* at 2012 n.3 (Stevens, J., concurring in part and dissenting in part)("[T]he Court disavowed the 'prophylactic' characterization of *Miranda* in [*Dickerson*].")

85. *See, e.g.,* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("Cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare."); *see also* Clymer, *supra* note 28, at 514 ("[A]dherence to *Miranda* all but guarantees admission of a suspect's statement."); Markman, *supra* note 79, at 945 ("As a matter of common sense, it is more difficult for a defendant to establish that he was forced to confess if he was told explicitly before questioning that he did not have to say anything.").

determine whether a confession was actually coerced even where the dictates of *Miranda* have been satisfied, notwithstanding the rebuttable presumption.[86] For example, if the police read a suspect his rights and he waives them, but the police then proceed to subject him to treatment of the *Brown* variety, there is little doubt that a court should determine that any resulting confession was coerced. Likewise, courts must still determine whether a confession was actually coerced in cases where *Miranda* does not apply, such as instances of non-custodial interrogation.[87] Thus, early reports of the death of coerced-confession jurisprudence were greatly exaggerated.[88] The Court continues to maintain two distinct though related doctrinal lines to deal with two distinct but related phenomena: "actual" coercion and "presumed" coercion.

C. "Actual" Coercion and "Presumed" Coercion

Though they obviously are related, the Court has treated "actual" coercion cases differently from "presumed" coercion (i.e., *Miranda*) cases in several important respects. For example, a statement that is the result of actual coercion can never be used to impeach a testifying defendant at trial.[89] On the other hand, a statement that is only presumptively coerced, because un-Mirandized,[90] can be used for impeachment purposes, if the statement is otherwise reliable.[91]

Furthermore, although it appears that the Court has never expressly said so,[92] it has assumed that the "tainted fruit of the

86. *See* Dix, *supra* note 28, at 243; Grano, *supra* note 43, at 865 n.33; Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 15-16 (1986).

87. *See* Grano, *supra* note 77, at 47-48; Grano, *supra* note 43, at 865 n.33; Herman, *supra* note 28, at 752 n.147; Schulhofer, *supra* note 28, at 877.

88. Schulhofer, *supra* note 28, at 877-78.

89. Mincey v. Arizona, 437 U.S. 385, 398 (1978).

90. The terms "un-Mirandized" and "unwarned" refer to statements taken either without all the warnings prescribed by *Miranda* or without a valid waiver. This Article avoids using terms like "*Miranda* violation" for reasons that will become apparent. *See infra* text accompanying notes 333-35, 363-66. *See also* Clymer, *supra* note 28, at 450-51 n.9.

91. *See* Oregon v. Hass, 420 U.S. 714, 722-24 (1975); Harris v. New York, 401 U.S. 222, 224-26 (1971); Clymer, *supra* note 28, at 505-07.

92. *See* Massachusetts v. White, 439 U.S. 280 (1978) (affirming by an equally divided Court); Commonwealth v. White, 371 N.E.2d 777 (Mass. 1977) (excluding physical evidence that is fruit of un-Mirandized statement); Patterson v. United States, 485 U.S. 922, 923 (1988) (White, J., dissenting from denial of certiorari) (noting that the question is an open one); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles:*

poisonous tree" doctrine applies with full force to a confession that is the result of actual coercion. That is, if a suspect's actually coerced statement leads police to physical evidence or to information regarding a witness, that evidence or witness's testimony must be suppressed as well as the confession itself as the "secondary fruit" of the coercive treatment. This appears to be the underlying assumption in cases like *Oregon v. Elstad*[93] and *Michigan v. Tucker*,[94] as well as in the opinions of several of the Justices who have written separately on the subject.[95]

On the other hand, where a statement is merely un-Mirandized, the statement itself is excluded but its fruits, generally speaking, are not. Thus, in *Tucker*, a suspect was subjected to custodial interrogation after being given warnings that deviated from those prescribed in *Miranda*.[96] In his resulting statement, he disclosed the identity of an individual who, ultimately, would give damning testimony at trial.[97] The Supreme Court held that the admission of this testimony was proper even though the defendant's statement itself was constitutionally inadmissible.[98] Likewise, in *Elstad*, where the purported "fruit" was a second confession of the defendant following one that was not preceded by *Miranda* warnings, the Court held the "fruit" admissible even though the original confession was not.[99] The Court has not addressed whether the third variety of fruit that can be disclosed by an un-Mirandized statement—physical

The Self-Incrimination Clause, 93 MICH. L. REV. 857, 917 n.265 (1995).

93. 470 U.S. 298, 312 (1985) ("There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ."); *see also id.* at 309 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.").

94. 417 U.S. 433, 448-49 (1974) (noting that circumstances of un-Mirandized statements "are a far cry from" those of statements coerced in the classic sense).

95. *See, e.g.,* New York v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part and dissenting in part) (noting that in several common-law jurisdictions outside the United States, fruits derived "from all confessions 'not blatantly coerced'" are admissible).

96. *Tucker*, 417 U.S. at 436.

97. *See id.* at 436-37.

98. *See id.* at 446-52.

99. *Elstad*, 470 U.S. at 308-09. It appears that the Court will soon re-visit this issue. *See* Missouri v. Seibert, 123 S.Ct. 2091 (2003), *granting certiorari to* 93 S.W. 3d 700 (Mo. 2002).

evidence—should be exempt from suppression. Justice O' Connor has embraced this view,[100] as have most federal circuit courts to address the issue.[101] Thus, it appears that the fruits of a "presumptively coerced" confession generally are constitutionally admissible while the fruits of an "actually coerced" confession are not.[102]

D. The Focus on Police Over-Reaching

The final wrinkle the Court has added to its coerced-confession jurisprudence is the requirement that the confession be not simply involuntary in some abstract or metaphysical sense, but that it be the product of official misconduct or overreaching. This change came just as the Court was reaffirming the due process basis for its coerced confession jurisprudence,[103] in the 1986 case of *Colorado v.*

100. *See* New York v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part and dissenting in part).

101. *See* Amar & Lettow, *supra* note 92, at 882-83 (noting that fruits of un-Mirandized statements can generally be used at trial); Ritchie, *supra* note 28, at 416 (same). A circuit split has developed on this issue in the wake of the Supreme Court's decision in Dickerson v. United States, 530 U.S. 428, 433 (2000). *Compare* United States v. Patane, 304 F.3d 1013, 1019-29 (10th Cir. 2002), *cert. granted*, 123 S.Ct. 1788 (2003)(holding that, after *Dickerson*, physical evidence discovered as result of un-Mirandized confession must be suppressed) *with* United States v. Faulkingham, 295 F.3d 85, 92-94 (1st Cir. 2002) (holding that physical evidence discovered as result of deliberate decision not to administer *Miranda* warnings or obtain waiver must be suppressed, but not where police negligently failed to do so), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Oct. 7, 2002), *and with* United States v. Sterling, 283 F.3d 216, 219 (4th Cir.) (adhering to pre-*Dickerson* circuit precedent declining to suppress physical fruit of un-Mirandized confessions), *cert. denied*, 536 U.S. 931 (2002), *and* United States v. DeSumma, 272 F.3d 176, 180 (3d Cir. 2001) (same), *cert. denied*, 535 U.S. 1028 (2002). *Patane* and *Faulkingham* both relied on the fact that *Dickerson* held that the *Miranda* rule is constitutionally based. *See Dickerson,* 530 U.S. at 433; *Patane*, 304 F.3d at 1019; *Faulkingham*, 295 F.3d at 92. But both describe that constitutional rule as requiring that the warnings be given and a waiver obtained, rather than requiring that any statement not obtained under those circumstances be excluded from evidence at trial. *Patane*, 304 F.3d at 1028 ("The personal right to be free of government invasions of the privilege against self-incrimination is violated just as surely by a negligent failure to administer Miranda warnings as by a deliberate failure."); *Faulkingham*, 295 F.3d at 92 ("*Dickerson* . . . reaffirmed the status of *Miranda*'s *warning requirement* as a constitutional rule . . . .") (emphasis added). This is mistaken, given that the *Dickerson* Court itself described *Miranda*'s "core ruling" thusly: "[U]nwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson*, 530 U.S. at 443-44. The distinction is critical and is explored further *infra* text accompanying notes 183-93, 357-75.

It appears that the Supreme Court will resolve this issue next Term. *See* United States v. Patane, 123 S.Ct. 1788 (2003), *granting cert. to* 304 F.3d 1013 (10th Cir. 2002).

102. *See* Grano, *supra* note 84, at 110-11; Saltzburg, *supra* note 86, at 19.

103. *See supra* text accompanying notes 71-73.

Connelly.[104] Connelly was a chronic schizophrenic who, in a psychotic state, believed he heard the voice of God tell him to withdraw money from his bank account and purchase a plane ticket from Boston to Denver.[105] Once in Denver, the voice commanded that he either confess to the murder of a young girl in Denver the previous year or commit suicide.[106] Connelly approached a police officer and made a full confession.[107] Connelly denied that he had been drinking or using drugs and, though he admitted that he had been a patient in mental hospitals in the past, the police did not perceive that he was suffering from any mental illness at the time.[108] An expert later testified that Connelly's "condition interfered with [his] 'volitional' abilities; that is, his ability to make free and rational choices,'" but that it "did not significantly impair his cognitive abilities."[109]

The Court held that Connelly's confession was properly admitted into evidence against him at trial, despite the fact that it was literally "involuntary" because of his psychosis. The Court held that, in addition to involuntariness, a defendant claiming that a confession was coerced must show some measure of "coercive police conduct" in procuring the confession.[110] "[T]he crucial element" to a finding of coercion, the Court wrote, is "police overreaching": "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[111] Absent "wrongful acts" by the police or some other government official, there can be no "'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment."[112]

Thus, several broad conclusions can be drawn about the current state of the Court's coerced-confession jurisprudence. First, it is

104. 479 U.S. 157 (1986).

105. *Id.* at 161.

106. *Id.* at 160-61.

107. *Id.*

108. *Id.*

109. *Id.* at 161.

110. *Id.* at 163-64, 167. Professors Herman and Paulsen presaged this development decades earlier when they argued that the "voluntariness" terminology obscured the true nature of the inquiry—the focus on police misconduct. *See* Herman, *supra* note 37, at 457-58; Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 419 (1954).

111. *Connelly*, 479 U.S. at 163-64; *accord* Withrow v. Williams, 507 U.S. 680, 693 (1993).

112. *Connelly*, 479 U.S. at 165.

rather firmly embedded in the Due Process Clause of the Fourteenth Amendment. Second, the closely related *Miranda* doctrine is founded just as surely in the incorporated Self-Incrimination Clause of the Fifth Amendment. Third, to demonstrate coercion, a criminal defendant must satisfy a threshold showing of police misconduct and must show that, under the totality of the circumstances, the confession was involuntary. And finally, with respect to both the "fruits" doctrine and impeachment, the Court treats coerced confessions quite differently than it treats un-Mirandized statements, despite the inter-relatedness of the two doctrinal lines.

II. *GRAHAM v. CONNOR* AND THE EROSION OF THE DUE PROCESS FOUNDATION FOR THE RULE AGAINST COERCED CONFESSIONS

Although the Court continues to insist that its coerced-confessions jurisprudence is grounded in due process, recent developments in the law have severely undercut that assertion. Specifically, the Court's 1989 decision in *Graham v. Connor*[113] signaled a sea-change in how the Court views incorporation of the Bill of Rights through the Fourteenth Amendment. In *Graham* and its progeny, the Court has insisted that those who claim a deprivation of constitutional rights identify the specific provision of the Bill of Rights under which the claim falls, if at all possible. If a particular claim falls within the rubric of any particular clause of the first eight amendments, one may state a claim with respect to that provision or not at all.[114] The Court has thus rejected the notion that there is a general background due process protection if the claim should naturally fall within the ambit of a particular provision of the Bill of Rights and that provision can afford the claimant no relief. To understand fully the ramifications of *Graham*, one must first understand a little about the incorporation debate that dominated the Court from the late-1930s, when the notion of incorporation of particular provisions of the Bill of Rights started to gain momentum, to the late-1960s, by which time almost every such provision had been "selectively" incorporated.

A. A (Very) Brief Primer on Incorporation

The provisions of the Bill of Rights, of course, apply only to the

113. 490 U.S. 386 (1986).

114. *Id.* at 394.

individual's relationship with the federal government.[115] It is only by their incorporation into the Due Process Clause[116] of the Fourteenth Amendment, ratified in 1868 in the wake of the Civil War, that any of these provisions apply to the relationship between the individual and the State. While the determination of which specific provisions of the Bill of Rights were incorporated against the States by the Fourteenth Amendment has largely been settled, the debate within the Court spanned decades.

A useful starting point, at least for purposes of such a general discussion, is Justice Cardozo's opinion for the Court in *Palko v. Connecticut*.[117] There, the Court was presented with the question whether the Fifth Amendment's Double Jeopardy Clause[118] applied to the States via the Fourteenth Amendment's general requirement of due process. The nearly unanimous Court[119] answered the question in the negative and, in the process, narrowly described the types of interests protected by the Due Process Clause: only "the specific pledges of particular amendments [that] have been found to be implicit in the concept of ordered liberty,"[120] or those "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'"[121] or those without which "neither liberty nor justice would exist."[122] Cataloging its own jurisprudence, the Court included in that category some rights specifically protected by the original Bill of Rights, such as the rights to freedom of speech,[123] freedom of press,[124] the free exercise of religion,[125] peaceable assembly,[126] and, at

115. *See, e.g.,* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

116. *But see* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 161-67 (1986) (arguing that Bill of Rights was incorporated via Privileges and Immunities Clause); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMPLE L. REV. 95, 127-39 (1996) (arguing that Establishment Clause is best interpreted as having been incorporated via Equal Protection Clause).

117. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 396 U.S. 784 (1969).

118. "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

119. Justice Butler dissented without opinion. *See Palko*, 302 U.S. at 329.

120. *Id.* at 324-25.

121. *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

122. *Id.* at 326.

123. *Id.* at 324.

124. *Id.*

125. *Id.*

126. *Id.*

least in some circumstances, to the assistance of counsel.[127] It also included several rights not specifically mentioned in the original Bill, such as the "protection against torture, physical or mental,"[128] the requirement that "condemnation . . . be rendered only after trial,"[129] and the mandate that the trial be real and "not a sham or pretense."[130] And it excluded many of the specific provisions of the Bill of Rights, such as the right to be indicted by a grand jury,[131] the privilege against self-incrimination,[132] the right to a jury trial in both criminal and civil matters,[133] the right to be free of unreasonable searches and seizures,[134] and the right to confront one's accusers at trial.[135] In sum, in 1937, the Court, almost unanimously, adopted a position of "selective and non-exclusive" incorporation. That is, some but not all of the Bill of Rights were incorporated, and the notion of due process included some protections not in the original Bill at all. The process was additionally "selective" because a court had to look to the facts of the particular case to determine whether, in the context of that case, due process included the particular rights at issue.

A decade later, two additional views had emerged to fragment the Court, and the three views were on full display in *Adamson v. California*.[136] The narrow issue in that case was whether the Due Process Clause of the Fourteenth Amendment was violated by a California law allowing the court and prosecutor to comment on the defendant's decision not to testify at his trial.[137] That question was answered in the negative in an unremarkable opinion by Justice Reed, which reaffirmed that "[t]he due process clause of the Fourteenth Amendment . . . does not draw all the rights of the federal

127. *Id.* To these may be added the rights not to have private property taken for a public purpose without just compensation, *see* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1896), and of an accused to be informed of the charges against him. *See* Snyder v. Massachusetts, 291 U.S. 97 (1934).

128. *Palko*, 302 U.S. at 326 (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)).

129. *Id.* at 327.

130. *Id.*

131. *Id.* at 323 (citing, *inter alia*, *Hurtado v. California*, 110 U.S. 516 (1884)).

132. *Id.* at 323-24 (citing, *inter alia*, *Twining v. New Jersey*, 211 U.S. 78, 106, 111-12 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1, 7 (1964)). *See also supra* text accompanying notes 62-69.

133. *Palko*, 302 U.S. at 324 (citing, *inter alia*, *Walker v. Sauvinet*, 92 U.S. 90 (1875)).

134. *Id.* at 323 (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)).

135. *Id.* (citing *West v. Louisiana*, 194 U.S. 258 (1904)). To these may be added the right to bear arms. *See* Presser v. Illinois, 116 U.S. 252 (1886).

136. 332 U.S. 46 (1947), *overruled by* Griffin v. California, 380 U.S. 609 (1965).

137. *Id.* at 48-49.

Bill of Rights under its protection."[138]

It was the concurrence and dissents that contain an exposition of the various views of incorporation. Justice Black, joined by Justice Douglas, expressed his view that the Fourteenth Amendment incorporates the entire Bill of Rights—but *only* the Bill of Rights.[139] This view can be called "total and exclusive" incorporation. In a brief dissent, Justice Murphy, joined by Justice Rutledge, agreed with Justice Black "that the specific guarantees of the Bill of Rights should be carried over intact into the . . . Fourteenth Amendment."[140] However, he added the proviso that the Fourteenth Amendment might on occasion require more than simple adherence to the Bill of Rights:

> I am not prepared to say that the [Fourteenth Amendment] is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.[141]

This view can be called "total and non-exclusive" incorporation. Finally, Justice Frankfurter responded to these breakaway Justices by restating and defending the *Palko* rule of "selective and non-exclusive" incorporation: "The [Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them."[142]

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138. *Id.* at 53.

139. *Id.* at 69-92 (Black, J. dissenting). Interestingly, Justice Black had concurred in *Palko* without opinion ten years earlier. However, he had been on the Court less than four months at the time. *Compare Palko*, 302 U.S. at 319 (decided Dec. 6, 1937) *with* EDWARD L. BARRETT, JR., ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 1691 (8th ed. 1989) (Justice Black appointed to Court on Aug. 18, 1937). It is likely that his views on incorporation had not yet fully developed.

140. *Adamson*, 332 U.S. at 124 (Murphy, J., dissenting).

141. *Id.* (Murphy, J., dissenting).

142. *Id.* at 66 (Frankfurter, J., concurring). It does not appear that any Justice has embraced the remaining alternative in our ad hoc Punnett square: "selective and exclusive" incorporation. Arguably, a coherent defense of such a view could be conjured if, for example, one otherwise agreed with Justice Black but an analysis of a specific provision of the Bill of Rights reveals that incorporation would be a logical impossibility, as some have argued with respect to the Establishment Clause. *See* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206-07 (1990). *See also* Mannheimer, *supra* note 116 (refuting this view). Indeed, even Justice Black's view is, technically speaking, "selective and exclusive" incorporation, given that not even he advocated incorporation of the Ninth and

The Frankfurter "selective and non-exclusive" view of incorporation held sway and, at least nominally, still does. Yet, it eventually became apparent that Justice Black, and especially Justice Murphy, had lost the *Adamson* battle but won the incorporation war. By the end of the Warren Court era, the Court no longer looked to the facts of the particular case to determine whether the specific provision at issue was incorporated with respect to the circumstances of that case. Each provision was either "in" or "out," completely and for all cases. And they were mostly "in": with a few outlier exceptions like the Second Amendment,[143] the Grand Jury Clause of the Fifth Amendment,[144] and the Seventh Amendment,[145] nearly every provision in the Bill of Rights had been applied against the States.[146] Incorporation now is so complete, and the vague concept of "fundamental fairness" rendered so marginally relevant as a doctrinal matter, that a plurality of the Court recently wrote that the Court has "substituted . . . the specific guarantees of the various provisions of the Bill of Rights . . . for the more generalized language contained in the earlier cases construing the Fourteenth Amendment."[147] Indeed, the Court often avoids even "going through the motions" and stating an issue in terms of the Fourteenth Amendment. Instead, the Court

Tenth Amendments.

143. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); Presser v. Illinois, 116 U.S. 252, 265(1886) (holding that Fourteenth Amendment does not incorporate Second Amendment).

144. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ."); Hurtado v. California 110 U.S. 516, 538 (1884) (holding that Fourteenth Amendment does not incorporate Grand Jury Clause).

145. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (holding that Fourteenth Amendment does not incorporate Seventh Amendment).

146. *See, e.g.,* Benton v. Maryland, 395 U.S. 784, 795-96 (1969) (Double Jeopardy Clause); Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968) (Jury Trial Clause); Washington v. Texas, 388 U.S. 14, 19 (1967) (Compulsory Process Clause); Klopfer v. North Carolina, 386 U.S. 213, 225 (1967) (Speedy Trial Clause); Pointer v. Texas, 380 U.S. 400, 406 (1965) (Confrontation Clause); Malloy v. Hogan, 378 U.S. 1 (1964) (Self-Incrimination Clause); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (Assistance of Counsel Clause); Robinson v. California, 370 U.S. 660, 666-67 (1962) (Cruel and Unusual Punishments Clause); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (Fourth Amendment's exclusionary rule). *See also supra* text accompanying notes 123-35 (discussing specific provisions incorporated as of 1937).

147. Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality).

often will ask whether the State has violated the First, Fourth, Fifth, Sixth, or Eighth Amendment.[148]

At the same time, the Court has recognized a whole host of pure due process rights not grounded in any specific provision of the Bill of Rights. For example, it is a violation of due process for a State: to knowingly utilize perjured testimony in order to secure a conviction;[149] to withhold crucial exculpatory information from the defendant;[150] to base a conviction on a witness identification that resulted from an unduly suggestive pre-trial identification procedure;[151] to have guilt adjudicated by a finder of fact, who is interested in the outcome or otherwise partial;[152] to exclude a defendant from attending his own trial[153] to rely, in summation[154] or on cross-examination,[155] on matters so unduly prejudicial that the factfinder's reasoned analysis of the evidence has been precluded; and perhaps most famously, to base a

148. Taking the 2001-02 Term as an example, the Court decided 19 cases involving what were, strictly speaking, Fourteenth Amendment claims. In ten of these—that is, more than half—the Court cited the incorporated provision but *never cited the Fourteenth Amendment* in relation to the claim. *See* Stewart v. Smith, 536 U.S. 856, 857 (2002) (Sixth Amendment); Republican Party of Minnesota v. White, 536 U.S. 765, 768, 774, 781, 788 (2002) (First Amendment); Hope v. Pelzer, 536 U.S. 730, 737, 738, 742 (2002) (Eighth Amendment); Kirk v. Louisiana, 536 U.S. 635, 637, 638 (2002) (per curiam) (Fourth Amendment); Atkins v. Virginia, 536 U.S. 304, 306, 311, 321 (2002) (Eighth Amendment); Watchtower Bible and Tract Soc. of N.Y. v. Village of Stratton, 536 U.S. 150, 153, 160, 162 (2002) (First Amendment); Bell v. Cone, 535 U.S. 685, 693, 695 (2002) (Sixth Amendment); City of Los Angeles v. Alameda Books Inc., 535 U.S. 425, 429, 432, 440 (2002) (First Amendment); Mickens v. Taylor, 535 U.S. 162, 164, 165, 169 n.2, 176 (2002) (Sixth Amendment); Thomas v. Chicago Park Dist., 534 U.S. 316, 317, 320-21 (2002) (First Amendment). In three additional cases, the Court cited the Fourteenth Amendment only when describing a party's allegations or arguments. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 827 (2002); Porter v. Nussle, 534 U.S. 516, 521 (2002); Lee v. Kemna, 534 U.S. 362, 376 n.8 (2002). Moreover, in Kelly v. South Carolina, 534 U.S. 246 (2002), the Court did not cite *any* provision of the Constitution. Thus, in only five out of the nineteen cases did the Court give proper credit to the Fourteenth Amendment. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 648, 676 (2002); Ring v. Arizona, 536 U.S. 584, 597 (2002); McKune v. Lile, 536 U.S. 24, 35 (2002); Alabama v. Shelton, 535 U.S. 654, 661 (2002); Tahoe-Sierra Preserv. Counc. v. Tahoe Reg. Planning Agency, 535 U.S. 302, 307 n.1 (2002). *See also* Chavez v. Martinez, 123 S.Ct. 1994, 2008 n.1 (2003)(Scalia, J., concurring in part in the judgment)(acknowledging common use of this shorthand by the Court).

149. Mooney v. Holohan, 294 U.S. 103, 112 (1923).

150. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

151. Neil v. Biggers, 409 U.S. 188, 199 (1972).

152. *See* Tumey v. Ohio, 273 U.S. 510, 531-32 (1927).

153. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

154. Darden v. Wainwright, 477 U.S. 168 (1986); Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

155. Greer v. Miller, 483 U.S. 756, 765 (1987).

conviction on less than proof beyond a reasonable doubt.[156]

While ostensibly the Court still practices "selective and non-exclusive" incorporation, the resulting landscape looks more like Justice Murphy's vision of "total and non-exclusive" incorporation than anything else. Yet, even after the incorporation debate subsided, a further question remained. The Due Process Clause maintains independent vitality in areas where the rest of the Constitution is silent. This is an aspect of its "non-exclusive" component. But does that "non-exclusivity" still apply when a factual scenario is addressed wholly by more specific constitutional text? That is, what place, if any, does the Due Process Clause have in those areas *covered* by more specific constitutional text but where the specific provision implicated is not broad enough to bestow constitutional *protection*?[157]

B. Enter *Graham*

The question was answered in the 1989 case of *Graham v. Connor*.[158] In that case, the plaintiff had been treated roughly by police during an arrest and he brought an action pursuant to 42 U.S.C. § 1983 claiming a violation of his Fourteenth Amendment due process rights.[159] Dismissal of the claim was upheld by the Fourth Circuit, applying a "substantive due process" standard pursuant to which the plaintiff had to prove, *inter alia*, that the officers had acted "'maliciously and sadistically for the very purpose of causing harm.'"[160] This was part of the four-part test adopted by "the vast majority of lower federal courts" in assessing excessive force claims

156. In re Winship, 397 U.S. 358, 364 (1970).

157. As used in this Article, a governmental action is "covered" by a particular constitutional provision if that provision is implicated by the action; that is, if some level of analysis of the provision is required to determine whether the governmental action is valid. Constitutional "protection" occurs only when that analysis yields the result that the governmental action is invalid. *See* Massaro, *supra* note 19, at 1090. *See also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-90 (1982) (adopting similar use of terms in First Amendment realm); Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1527 n.5 (1993) (same). The Supreme Court seems also to have adopted this distinction. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is . . . inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment.") (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

158. 490 U.S. 386 (1989).

159. *Id.* at 390.

160. *Id.* at 391 (quoting *Graham v. Connor*, 827 F.2d 945, 948 (4th Cir. 1987), *vacated by*, 490 U.S. 386 (1989)).

by both arrestees and pretrial detainees.[161]

The Supreme Court rejected this analysis, at least in the case of arrestees. The Court wrote that, to evaluate constitutional excessive force claims, one must first "identify[] the specific constitutional right allegedly infringed by the challenged application of force."[162] The Court noted that "[i]n most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct."[163] Where "an explicit textual source of constitutional protection" applies to a given fact situation, that specific constitutional provision, "not the more generalized notion of 'substantive due process,' must be the guide."[164] Because the claim in *Graham* involved an allegation of excessive force "in the context of an arrest or investigatory stop of a free citizen," the question was whether the seizure was reasonable pursuant to the Fourth Amendment.[165]

Five years later, in *Albright v. Oliver*,[166] a plurality of the Court not only re-affirmed the *Graham* rule but also confirmed its substantial breadth. In that case, State authorities had issued an arrest warrant for Albright based on an informant's claim to Detective Oliver that Albright had sold her an illegal "look-alike" substance.[167] When Albright learned of the warrant, he surrendered himself and was soon released on bond.[168] Although Oliver testified at a preliminary hearing that Albright sold the substance to the informant, this claim later turned out to be unsubstantiated and the action was dismissed.[169] Albright brought a § 1983 action for constitutional malicious prosecution, claiming that he was prosecuted without probable cause in violation of the Due Process Clause of the

161. *Id.* at 393. Although distinctions are sometimes blurred, it appears that the term "arrestees" refers, at least, to those who have been arrested but who have not yet been brought before a magistrate for a probable cause hearing or otherwise. This Article is concerned solely with arrestees but its reasoning would extend to pre-trial detainees as well.

162. *Graham*, 490 U.S. at 394.

163. *Id.*

164. *Id.* at 395.

165. *Id.* at 394-95.

166. 510 U.S. 266, 271 (1994) (plurality).

167. *Id.* at 268 & n.1.

168. *Id*. at 268.

169. *Id.* at 269.

Fourteenth Amendment.[170] Finding his claim to be barred under *Graham*, the plurality wrote broadly: "Where *a particular Amendment* 'provides an explicit textual source of constitutional protection' against *a particular sort of government behavior*," *Graham* excludes general due process from the equation.[171]

Graham might originally have been thought to apply only to the criminal procedure provisions of the Bill of Rights or, even more specifically, only to the Fourth Amendment.[172] However, *Albright* confirmed a broader reading of the rule. Following *Albright*, commentary on *Graham* has almost uniformly read it broadly.[173] Moreover, *Graham* has been applied in other areas by the federal courts of appeals, most notably in the Takings Clause context.[174]

Thus, the Court has reached somewhat of a compromise between Justice Black's "total and exclusive" incorporation and Justice Murphy's "total and non-exclusive" incorporation, and created what might be termed "total and modified exclusive" incorporation.[175] General due process principles might be the basis for additional rights but only in the interstices of the Bill of Rights, where no specific provision clearly governs. Where, however, a governmental action implicates a particular constitutional provision, only that provision and "not the more generalized notion of 'substantive due process'"

170. *Id.* at 271.

171. *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (emphasis added).

172. *See, e.g.,* Robert Ashbrook, Comment*, Land Development, the* Graham *Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1267-68 (2002) (suggesting these possible limitations); Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 584-85 (1990) (reading *Graham* more narrowly pre-*Albright*).

173. *See* Ashbrook, *supra* note 172, at 1267. *See*, e.g., Massaro, *supra* note 19, at 1088-89 ("Nothing in *Graham* suggests that the Court's preemptive approach to substantive due process should apply only to Fourth Amendment cases. Rather, *Graham See*ms to apply to *all* substantive due process inquiries."); *accord* Ashbrook, *supra* note 172, at 1289-92. *See also* Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 399-404 (2001) (acknowledging *Graham*'s breadth but also noting that large portions of criminal procedure are not affected by *Graham*).

174. *See* Ashbrook, *supra* note 172, at 1268-74 (discussing cases); Massaro, *supra* note 19, at 1088, 1099-1104 (same). In any event, even if the *Graham* rule applied only to "due process" claims arguably covered by the Fourth Amendment, that narrow reading would not affect this Article's central argument: that coerced confessions are more properly viewed as Fourth Amendment events than as implicating due process.

175. *But see Albright*, 510 U.S. at 303 (Stevens, J., dissenting) (arguing that the rule stated by the plurality was "not unlike" Justice Black's "theory . . . that the express guarantees of the Bill of Rights mark the outer limit of Due Process protection").

applies.[176] In this way, a rule of "field preemption"[177] applies to each provision of the Bill of Rights: each covers the field it occupies—whether it be "searches and seizures," "punishments," or some other area where the State operates—to the exclusion of general notions of fairness.

A concrete example will show how this might work in a real criminal case.[178] Suppose that Barney, driving his car in a high drug-prone neighborhood very late at night, is stopped by Police Officer Lew for a broken taillight. As the officer is about to let Barney go with a warning, Lew notices a bag of white powder in the passenger seat. The officer has extensive training and experience in the sale and packaging of narcotics and, based on that training and experience, as well as the appearance of the powder and the character of the neighborhood, believes it to be cocaine. Barney explains to the officer that it is merely deodorizing powder for the car and urges him to perform a field test on the substance. Barney happens to know that such tests are routinely performed by police in other cities and that they are reliable and take only minutes. However, they are relatively expensive and this particular police force does not have the budget for such a luxury item. In particular, Police Chief Wiggum is on record as choosing more powerful weapons for his officers rather than the field tests, because, according to the chief, most of those accused of crime "are guilty anyway," and he did not "really care" if a few innocent people have to spend a "few hours" in jail. So Barney is arrested and, pursuant to a search incident to the arrest, a loaded pistol is found in his waistband. Several days later, in preparation for Grand Jury proceedings, the police perform a laboratory test on the "drugs" and—lo and behold—there is no cocaine; Barney was telling

176. *Graham*, 490 U.S. at 395. *See also Albright*, 510 U.S. at 276 (Scalia, J., concurring) ("[T]his Court's jurisprudence . . . rejects 'the more generalized notion of "substantive due process"' at least to this extent: It cannot be used to impose additional requirements upon such of the States' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights."); Massaro, *supra* note 19, at 1091 ("[S]pecific text categorically trumps any vague substantive due process claim."). *Compare* Conn v. Gabbert, 526 U.S. 286, 293 (1999) (claim regarding search of attorney's office while his client was testifying in grand jury must be analyzed under Fourth Amendment) *with* County of Sacramento v. Lewis, 523 U.S. 833, 842-45 (1998) (claim regarding accidental death caused by police during high-speed chase must be analyzed under Fourteenth Amendment, since failed attempt to effect a seizure not covered by the Fourth).

177. *See* Massaro, *supra* note 19, at 1089 n.11, 1113.

178. The following scenario is based on the facts of Gonzalez v. City of New York, No. 94 Civ. 7377 (SHS), 1996 WL 227824, at *1 (S.D.N.Y. May 3, 1996). That decision was rendered by Hon. Sidney H. Stein at the time that the author was clerking for him.

the truth. Barney is indicted only for the gun possession.

Barney moves to suppress the gun under both the (incorporated) Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. His Fourth Amendment claim goes something like this: conceding that the officer had probable cause to arrest him, Barney argues that, despite this, it was "unreasonable" for the police force not to have available a quick and reliable field test. Had it done so, the logic goes, the officer would have realized immediately that Barney had no cocaine and would have let him go without ever knowing about the gun. Because the gun was discovered only because of the officer's allegedly "unreasonable" arrest, it should be suppressed. His Due Process claim is similar but adds a subjective intent element: the force's failure to make available a field test for its officers, for reasons that are either malicious or, at best, deliberately indifferent, resulted in his arrest—a deprivation of liberty without due process—which in turn led to discovery of the gun.

Regardless of the success or failure of his (incorporated) Fourth Amendment claim,[179] his pure due process claim should fail. Pursuant to *Graham*, the circumstances of Barney's arrest are governed only by the reasonableness standard of the Fourth Amendment. Thus, his due process argument that the official decision of the police force not to institute field testing was malicious or deliberately indifferent to possibly innocent suspects will fall on deaf ears.

III. COERCED CONFESSIONS AND THE SELF-INCRIMINATION CLAUSE

The considerations discussed in Part II present some difficulty in grounding coerced-confession jurisprudence in the Due Process Clause. After *Graham v. Connor*, one must ask whether the problem presented by coerced confessions appears to be addressed by any particular provision of the Bill of Rights that has been incorporated through the Fourteenth Amendment. One immediately springs to mind: the Fifth Amendment's Self-Incrimination Clause. However, placing sole reliance upon the constitutional privilege against self-incrimination to justify the prohibition against coerced confessions presents problems of its own.

Upon one view, the coerced-confession cases were grounded in the Self-Incrimination Clause all along. According to this view, the

179. *Gonzalez* indicates that the claim should fail because Officer Lew had probable cause. *Id.* at *5-8.

Court's reliance in *Brown* and its progeny on the Due Process Clause alone was a pragmatic device, necessitated by prior decisions holding that the Self-Incrimination Clause did not apply to the States via the Fourteenth Amendment. This was the view expressed by the Court itself in *Malloy v. Hogan*,[180] where the Court reversed course and held the Self-Incrimination Clause to be incorporated against the States.[181]

By its very terms, however, the Self-Incrimination Clause is offended only when an accused's compelled statements are admitted into evidence against him. The Clause provides that "[n]o person shall . . . be compelled *in any criminal case* to be a *witness against himself* . . . ."[182] The narrowest reading of this clause would prohibit the prosecution only from forcing a person to actually testify at his own trial.[183] Yet even a broad reading of the phrase "witness against himself" requires that, before a constitutional violation is complete, a speaker's words be used in a criminal judicial proceeding and "in a…criminal case.".[184] The Court has recently accepted this view in *Chavez v. Martinez*.[185] There, as Martinez was being frisked by two police officers, a scuffle ensued, during which Martinez was shot several times, permanently blinding him and leaving him paralyzed from the waist down.[186] As Martinez received emergency treatment at a hospital, Chavez, a patrol sueprvisor, questioned him for ten

180. 378 U.S. 1 (1964).

181. *See supra* text accompanying notes 62-69. *See also* Grano, *supra* note 43, at 929 (stating that *Malloy* characterized coerced-confession cases as self-incrimination cases).

182. U.S. CONST. amend. V (emphasis added).

183. Clymer, *supra* note 28, at 459.

184. Amar & Lettow, *supra* note 92, at 869 n.36 ("[A] Fifth Amendment violation occurs at the point when compelled testimony is introduced in a criminal case."); *id.* at 874-75 n.63 ("[U]nless the compelled statement is introduced at a criminal trial, a person has not been made a 'witness' . . . against himself '***in***' a 'criminal case.'"); Clymer, *supra* note 28, at 464-65 ("[U]se of a compelled statement in a criminal case is a necessary precondition for a violation of the privilege."); Dix, *supra* note 28, at 261-62 (distinguishing between the collection of the confession and its use); Gardner, *supra* note 43, at 1288 ("A violation [of the Self-Incrimination Clause] does not occur until the product of . . . compulsion is used against the suspect, i.e. until she becomes a witness against herself.") (footnote omitted); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 921 (1989) ("[U]nlike fourth amendment rights, fifth amendment rights are not violated unless and until the statement is used against the person making it . . . ").

185. 123 S.Ct. 1994, 200-04 (2003)(plurality); *see also id.* at 2006 (Souter, J., concurring in the judgment)

186 *Id*. at 1999 (plurality).

minutes over a 45-minute period.[187] Several times during the interrogation, Martinez said that he was choking and dying, pleaded for medical treatment, and stated that he would not tell Chavez anything until he was treated, but Chavez persisted.[188] Justice Stevens described an audio recording of the interrogation as "vividly demonstr[ing] that [Martinez] was suffering severe pain and mental anguish."[189] During the questioning, Martinez made at least two incriminating statemens: that he had taken the gun from one of the officers' holsters, and that he was a heroin user.[190] However, as Martinez was never prosecuted, these statements were never used against him.[191] He brought an action pursuant to 42 U.S.C. § 1983, alleging a violation of his rights pursuant to both the Due Process Clause (incorporated through the Fourteenth Amendment) and the Due Process Clause of the Fourteenth Amendment standing alone.

A majority of the Court held that Martinez had no Self-Incrimination claim because his confession was never used against him. Relying on a close reading of the constitutional text, a plurality of four Justices held that "Martinez was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case."[192] Justice Souter, in an opinion joined by Justice Breyer, largely agreed with the plurality's textual analysis that left Martinez's claim "well outside the core of Fifth Amendment protection."[193]

The result in *Chavez* is completely consistent with the use of the word "witness" in another constitutional provision: the Sixth Amendment's Confrontation Clause.[194] The Supreme Court has long held that a criminal defendant's right "to be confronted with the witnesses against him" embraces as "witnesses against him" not only those who actually testify at trial but also those who make out-of-

187 *Id*.

188 *Id*. at 2010-11 (Stevens, J., concurring in part and dissenting in part).

189 *Id*. at 2011.

190 *Id*. at 1999 (plurality).

191 *Id*. at 2000 (plurality).

192 *Id*. at 2001 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).

193 *Id*. at 2006 (Souter, J., joined by Breyer, J., concurring in the judgment).

194. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); *accord* Amar & Lettow, *supra* note 92, at 900, 910 n.229, 919 & n.273.

court statements later used at trial.[195] Indeed, even the narrowest reading of the phrase "witness[] against him" with any current viability would embrace persons who make out-of-court statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[196] Yet, regardless of how broadly or narrowly this clause is read, it is undisputed that the constitutional violation takes place, if at all, only at trial. Thus, it would be absurd to think that a suspect's Confrontation Clause rights have been implicated where the police, acting upon an anonymous tip that a suspect committed a murder and ditched his gun in a park, dig up the murder weapon, which they find is covered with the suspect's fingerprints.[197] Rather, the Confrontation Clause would be implicated, if at all, only if the anonymous tipster's statement is introduced into evidence at trial. So, too, is the Self-Incrimination Clause violated only when a defendant is "compelled . . . to be a witness against himself," that is, in a criminal judicial proceeding.

Thus, while it would be accurate to say that the privilege is implicated during custodial interrogation, it would be flatly wrong to say—as the Supreme Court did in *Miranda*—that "the privilege is fully applicable during a period of custodial interrogation."[198] The

195. *See, e.g.,* Mattox v. United States, 156 U.S. 237, 242 (1895).

196. White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment).

197. This is true even if the suspect has already been formally accused of the crime, by indictment or otherwise, such that there is an actual "criminal prosecution[]," triggering the protections of the Sixth Amendment. *See* Kirby v. Illinois, 406 U.S. 682, 690 (1972). Of course, if the police arrest the suspect *before* finding the gun, based solely on the tip, his Fourth Amendment right not to be seized without sufficient cause is implicated. *See* Florida v. J.L., 529 U.S. 266, 270-72 (2000); Illinois v. Gates, 462 U.S. 213, 238 (1983). Indeed, that police conduct in the investigatory and arrest phases of a criminal prosecution is governed generally by the Fourth Amendment, not the Fifth or Sixth, is exactly the point of this Article.

198. Miranda v. Arizona, 384 U.S. 436, 460-61 (1966). *See also id.* at 467 ("[T]he Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."). This was simply the result of imprecision on the part of the Court, for "Miranda does not hold that the police station is somehow a courtroom." Amar & Lettow, *supra* note 92, at 910 n.229. *See also* Loewy, *supra* note 184, at 919 ("[I]t is not accurate to say that the fifth amendment is applicable to noncriminal proceedings as such."). Some judges and commentators do indeed believe that the privilege can be violated once a confession is "compelled." *See, e.g.,* Chavez v. Martinez, 123 S.Ct. 1994, 2016 (2003)(Kennedy, J., joined by Stevens and Ginsburg, JJ., concurring in part and dissenting in part); Thomas S. Schrock et al., *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 19-25 (1978). However, this view can be achieved only by ignoring the language of the Fifth Amendment. *See* Clymer, *supra* note 28, at 489-502 (persuasively refuting this view).

Court's fallacy stems from its failure to uncouple two distinct concepts in the Self-Incrimination Clause: *compulsion* and *witnessing*. While the compulsion anticipated by the Clause might well occur in the station house, witnessing takes place only in a courtroom.[199] Thus, while the Court was quite correct in its determination that the "compelled" portion of the Clause can occur at any place and at any time, the "witness against himself" portion can occur only in a judicial proceeding. Thus, the Clause, and therefore the constitutional privilege, is "fully applicable" only in a criminal judicial proceeding.

Of course, the stricture against using a person's own words against him at trial partially explains the rule against coerced confessions. Language in some of the early coerced-confession cases makes this clear. Thus, in one instance, the Court drew an express parallel between its (federal) Self-Incrimination cases and the coerced-confession cases, condensing the two rules into one: "[A] coerced or compelled confession cannot be used to convict a defendant in any state or federal court."[200] Even where no express parallel was made, the language in some cases made clear that the *use* of the confession at trial violated constitutional norms.[201] Indeed, in one extreme instance, the Court seemed to imply that the Constitution was concerned *only* with the use of the confession at trial when it wrote:

> [P]etitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness of the *use* of his confessions, *and what occurred in their procurement is relevant*

199. Amar & Lettow, *supra* note 92, at 868 n. 28 ("[T]he Fifth Amendment protects against compelling statements outside a 'criminal case' if those statements are later usable *inside* a criminal case—at a criminal trial.") (emphasis in original); *id.* at 874-75 n.63 ("[C]ompulsion may not exist within the criminal case; but the introduction of the compelled statement—the witnessing—does occur *in* a criminal case, and it is this introduction that violates the Fifth Amendment."). Amar and Lettow reach this conclusion by reading the phrase "any criminal case" narrowly. However one interprets "criminal case," the phrase "witness against himself" clearly contemplates a trial or other formal judicial proceeding.

200. Ashcraft v. Tennessee, 322 U.S. 143, 154 n.9 (1944). *See* Grano, *supra* note 43, at 929 n.358 (pointing out that this quote conflates the privilege against self-incrimination and the rule against coerced confessions).

201. *See, e.g.,* Mincey v. Arizona, 437 U.S. 385, 402 (1978) ("Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."); Haynes v. Washington, 373 U.S. 503, 504 (1963) (describing issue as "whether the admission of the petitioner's written and signed confession into evidence against him at trial constituted a denial of due process of law").

only as it bears on that issue.[202]

Yet, there is something deeply unsettling to an intuitive sense of justice when the constitutional violation vis-a-vis a coerced confession—especially one extracted through physical violence—is described as having occurred only when the confession is actually used "against" the defendant at trial.[203] As the Court itself put it, "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."[204] And as Professor Paulsen once wrote: "There are some limits beyond which further detention, questioning, and the imposition of indignities by order of the police alone violate the orderly processes of a political system which recognizes the dignity of man."[205]

Consider *Brown*.[206] It is difficult to conceive of anyone familiar with our history and traditions of constitutional governance concluding that the State of Mississippi violated the defendants' federal constitutional rights *only* when it admitted the defendants' confessions into evidence at trial. To the contrary, the language of the opinion points our attention to something more, something deeper than simply a distaste for the use of a defendant's own compelled words against him. After all the comparison to a "'medieval account'"[207] surely refers to the torture itself, not merely the use of its products to convict the defendants. Moreover, the opinion speaks of the "methods . . . taken to procure the confessions" (not simply the use of those confessions) as "revolting to the sense of justice."[208] In short, as the opinion itself states, "[c]ompulsion by

202. Lisenba v. California, 314 U.S. 219, 235 (1941) (emphasis added).

203. *See* Donald A. Dripps, *Supreme Court Review: Foreward: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 712-13 (1988) (arguing that the Self-Incrimination Clause is neither necessary nor sufficient to prevent torture, brutality, and cruelty toward arrestees); Grano, *supra* note 43, at 924 (noting that if police use torture to obtain confession but confession is never used at trial, conviction cannot be attacked); Ritchie, *supra* note 28, at 393 (noting that the act of torture would not violate the Self-Incrimination Clause so long as any resulting statement is not used against the suspect).

204. Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960).

205. Paulsen, *supra* note 110, at 437; *see also* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41 (1981) (writing that coercive interrogation tactics conflict "with respect for autonomy and dignity").

206. Brown v. Mississippi, 297 U.S. 278 (1936). *See supra* text accompanying notes 27-34.

207. Brown, 297 U.S. at 283, 282 (quoting *State v. Brown*, 161 So. 465, 470 (1935) (Griffith, J., dissenting), *rev'd*, 297 U.S. 278).

208. *Id.* at 286.

torture to extort a confession is a different matter."[209]

Accordingly, the Court and its individual Justices have often expressed the intuitive sense that compelling a confession by torture or other coercive means is a delict of a constitutional magnitude in and of itself, regardless of whether the product is ever used against the confessor.[210] Thus, the *methods* used to extract a confession, and not merely the later *use* of the confession at trial, are often described as violating due process. Of course, the use of the confession at trial is an independent constitutional violation, but it is also an exacerbation of the initial error, in much the same way as is the use of the products of an unlawful search or seizure. The Court's coerced-confession jurisprudence is thus not aimed solely—or even primarily—at protecting defendants from compelled self-incrimination. It is aimed at deterring "illicit methods" by the police, by denying the prosecution the "fruits" of those methods.[211] It was, of course, that very goal that animated the adoption of the exclusionary rule in both federal and state Fourth Amendment cases.[212]

Moreover, if the primary concern were the use of the confession at trial, one might think that reliability enhancement would be the primary focus of coerced-confessions jurisprudence. Yet reliability has steadily been de-emphasized.[213] Under the common law of

209. *Id.* at 285. It has been argued that the officers in *Brown* administered "cruel and unusual punishment" as well, in violation of the (incorporated) Eighth Amendment. Loewy, *supra* note 184, at 935. However, the Supreme Court has made clear that Eighth Amendment protections are not triggered until after conviction. *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

210. *See, e.g.,* Lego v. Twomey, 404 U.S. 477, 489 (1972) (characterizing the rule against the admission of coerced confessions as one of "the exclusionary rules . . . aimed at deterring lawless conduct by the police"); Gallegos v. Colorado, 370 U.S. 49, 55 (1962) ("[T]he formal confession on which this conviction may have rested was obtained in violation of due process.") (citation omitted) (emphasis added); Spano v. New York, 360 U.S. 315, 320 (1959) ("[T]he police must obey the law while enforcing the law . . . ."); Watts v. Indiana, 338 U.S. 49, 55 (1949) (plurality) ("[T]he Due Process Clause bars *police procedure* which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction *based on the fruits of such procedure* . . . .") (emphasis added). *See* also Clymer, *supra* note 28, at 477 n.124 ("[T]here is considerable support for the proposition that the taking of a coerced confessions alone can violate due process . . . ."); Herman, *supra* note 37, at 451, 454, 457 (arguing that the rule against coerced confession "was developed with an emphasis on opprobrious police conduct"); Paulsen, *supra* note 110, at 419 ("With *Ashcraft* and *Malinski* the disciplining of state law enforcement officers became a principal purpose of the Fourteenth Amendment confessions rule.").

211. Haley v. Ohio, 332 U.S. 302, 307 (Frankfurter, J., joining in reversal of judgment).

212. Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960).

213. *See* KAMISAR ET AL., *supra* note 76, at 452-58.

evidence, coerced confessions were excludable because they were deemed unreliable.[214] In the eyes of some, after the Supreme Court constitutionalized the area of coerced confessions, the reliability justification was constitutionalized along with it.[215] While "a complex of values underlies the stricture against use by the state of [coerced] confessions,"[216] the Justices argued amongst themselves whether reliability-enhancement was the primary goal. Thus, the Court wrote: "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction . . . ."[217] On the other hand, the Court had also written: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[218]

However, the focus eventually shifted from the reliability-enhancing justification, and the "police methods" rationale behind the Court's coerced confession jurisprudence came to the fore. Thus, the Court wrote in *Spano v. New York*:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[219]

214. *See* Dickerson v. United States, 530 U.S. 428, 433 (2000). *See also* JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (3d ed. 1940)).

215. Dix, *supra* note 28, at 263 (arguing that reliability-enhancement was the original justification of coerced-confession jurisprudence); Paulsen, *supra* note 110, at 414-17 (arguing that reliability-enhancement was the primary focus of the jurisprudence for its first eight years); *accord* Miranda v. Arizona, 384 U.S. 436, 507 (Harlan, J., dissenting) ("[T]here was an initial emphasis on reliability . . . .").

216. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

217. Stein v. New York, 346 U.S. 156, 192 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964). Justice Jackson, who authored *Stein*, appears to have been the main proponent of reliability-enhancement as the primary justification for the Court's coerced confession jurisprudence. *See, e.g.,* Watts v. Indiana, 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring in the result) ("no confession that has been obtained by any form of physical violence to the person is reliable. . .").

218. Lisenba v. California, 314 U.S. 219, 236 (1941).

219. 360 U.S. 315, 320-21 (1959). *See also* Blackburn, 361 U.S. at 206 ("[T]he Fourteenth Amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'") (quoting *Lisenba*, 314 U.S. at 236); *id.* at 207 ("[N]either the likelihood

And two Terms later, the Court laid to rest once and for all the notion that reliability-enhancement was the primary justification for the constitutional proscription against coerced confessions. In *Rogers v. Richmond*, it wrote that this rule did not exist

> because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial . . . system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth . . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. *But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration*.[220]

Thus, it is commonly accepted that the modern jurisprudence on coerced confessions is concerned with reliability-enhancement as only an ancillary matter.[221] While that rationale still remains as an important aspect of coerced-confession jurisprudence, it cannot provide a full account.

Accordingly, the Court has continued to intimate that it is the methods of interrogation themselves, and not just the use of the product at trial, that offends due process. Thus, the Court wrote in *Miller v. Fenton*: "This Court has long held that certain *interrogation techniques*, either in isolation or as applied to the unique

that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake."). Writing five years before *Spano*, Professor Paulsen pinpointed the Court's decisions in Ashcraft v. Tennessee, 322 U.S. 143 (1944), and Malinski v. New York, 324 U.S. 401 (1945), as the turning point from the focus on reliability of the confession to the focus on police methods. *See* Paulsen, *supra* note 110, at 417-19.

220. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (emphasis added). *See* KAMISAR ET AL., *supra* note 76, at 454 (calling *Rogers* the Court's "most emphatic statement of the point that untrustworthiness of a confession was not (or no longer) the principal reason for excluding it . . .").

221. *See* KAMISAR ET AL, *supra* note 76,. at 453 ("Untrustworthiness is no longer the sole, or even the principal, reason for excluding coerced or involuntary confessions."); Grano, *supra* note 43, at 919 (arguing that trustworthiness of evidence is an underlying concern of coerced-confessions jurisprudence, though not the primary one); *see* Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 169-70 (1991) (arguing that reliability is of secondary importance to more deeply-rooted notions of justice embodied by rule against coerced confessions). Dix, *supra* note 28, at 272-73, suggests that *Connelly* abandoned altogether the reliability-enhancement as a justification for the rule against coerced confessions. However, the Court has subsequently invoked this justification as an ancillary concern. *See, e.g.,* Withrow v. Williams, 507 U.S. 680, 692-93 (1993).

characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."[222] In this way, the Court continues to acknowledge the dual focus of its coerced-confession jurisprudence, on proscribing both the use of compelled statements at trial and on the methods used to extract them. In perhaps its most self-reflective occasion on the subject, the Court referred to this dual purpose in justifying the placement of its coerced confession jurisprudence in the Due Process Clause:

It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. The locus of the right is significant because it reflects the Court's consistently held view that the 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.[223]

The Court has also continued to treat the exclusion of coerced confessions in the same "exclusionary rule" terms it uses to address the exclusion of the products of Fourth Amendment violations. Thus, in *Colorado v. Connelly*, the Court wrote of the "involuntary" confession at issue in that case: "The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."[224]

Accordingly, the Court has historically viewed, and continues to view, the constitutional problem implicated by the coerced confession not to be solely, or even primarily, its introduction into evidence at trial. Rather, the use at trial of the coerced confession is seen primarily as only an ancillary problem, secondary to the original constitutional violation: the extraction of the confession in the first place. The Self-Incrimination Clause, with its focus on the use of evidence at trial, is thus an improper locus for the constitutional stricture against coerced confessions.

222. 474 U.S. 104, 109 (1985) (emphasis added).

223. *Id.* at 116 (citation omitted).

224. 479 U.S. 157, 166 (1986).

IV. THE COERCED CONFESSION AS THE PRODUCT OF AN UNREASONABLE SEARCH AND SEIZURE

The foregoing presents somewhat of a dilemma. The proscription against coerced confessions is firmly embedded in our jurisprudence—and, most would think, rightfully so. After all, the kind of physical torture described in *Brown* and the extraordinary psychological coercion involved in much of *Brown*'s progeny should have no place in any civilized system of criminal justice. Yet, the Court has required, if at all possible, that any constitutional claim be stated in terms specific to a particular provision of the Bill of Rights. If a claimed constitutional deprivation touches on an area explicitly covered by one of the first eight amendments, the claim will succeed only if one of those provisions itself was violated, without a reliance on any background notion of general "due process." And, while the use of a coerced confession at trial obviously implicates the Self-Incrimination Clause, that Clause is not broad enough to address what is at the heart of the constitutional violation: the coercive tactics used to extract the confession.

One must ask, then, whether coercion by government officials that produces a confession implicates any other specific clauses of the Bill of Rights. The answer is the Fourth Amendment, the repository of rights that "the people" maintain against the government, State or federal, when it is in the investigatory and arrest stages of a criminal proceeding. The Fourth Amendment prohibits both searches and seizures that, for a variety of reasons, are considered unreasonable, and also excludes from criminal trials evidence that is a proximate result of such unreasonable searches and seizures. This jurisprudence can be applied to the phenomenon of the coerced confession, which is the product of both an unreasonable continuing seizure of the suspect and an unreasonable search of his mind for evidence.

A. The Products of Unreasonable Searches and Seizures

Before seeing how conventional Fourth Amendment principles might be extended to cover coerced confessions, it will be helpful to look to traditional Fourth Amendment case law on both unreasonable seizures and unreasonable searches that offers the most compelling analogues.

1. Unreasonable Seizures: Strictures on When*,* Where*,* How*, and* For How Long *a Person May be Seized*

The Supreme Court has long interpreted the Fourth Amendment

to place limits on several dimensions of "seizures" of individuals by State officials. Violation of these limitations will result in exclusion of any evidence that proximately results from the violation. Thus, the Court has placed limitations on *when* a person may be seized: The police may arrest a suspect only after they have obtained evidence establishing probable cause that he has committed, is committing, or is about to commit a crime,[225] and they may stop and detain a person only if they have reasonable suspicion of criminal activity or the potential therefor.[226] Likewise, the Supreme Court has placed some limits on *where* a person may be seized: It has held that the police generally may not arrest a person in his home without a warrant, even if they do have probable cause.[227] Any seizure effected in violation of these rules is "unreasonable" under the Fourth Amendment. If the police undertake an "unreasonable seizure," any resulting evidence—whether consisting of physical evidence,[228] statements of the arrestee,[229] or an identification of him by a third person[230]—is suppressed as the "tainted fruit of the poisonous tree," so long as there is a sufficient nexus between the evidence and the underlying illegality.[231]

Most relevant for purposes of a discussion of the applicability of Fourth Amendment principles to coerced confessions are two discrete areas of Supreme Court jurisprudence on the reasonableness of arrests: *how* arrests may be effected and *for how long* detention may continue before judicial oversight occurs.

a. Excessive Force: *How* an Arrest Can be Effected.

The main Fourth Amendment constraint on *how* the police may take someone into custody has already been discussed to some extent: the police may not use excessive force in effecting a seizure. Indeed,

225. Dunaway v. New York, 442 U.S. 200, 212-16 (1979).

226. Terry v. Ohio, 392 U.S. 1 (1968).

227. Payton v. New York, 445 U.S. 573 (1980). Some other specialized rules also apply to how State officials may effect an arrest in the home. For example, the police must generally announce their presence before entering with force, Wilson v. Arkansas, 514 U.S. 927, 934 (1995), and the police may not bring third parties along, other than to aid in executing the arrest warrant. Wilson v. Layne, 526 U.S. 603, 614 (1999).

228. *Dunaway*, 442 U.S. at 212-16.

229. Taylor v. Alabama, 457 U.S. 687, 690-93 (1982).

230. United States v. Crews, 445 U.S. 463, 472-73 (1980).

231. New York v. Harris, 495 U.S. 14, 19 (1991). The State may defeat this exclusionary rule by showing that the taint was attenuated. *Taylor*, 457 U.S. at 690-93.

the specific (and non-controversial) holding of *Graham v. Connor*[232] was that the use of physical force during an arrest is measured by a Fourth Amendment reasonableness standard. The Court had established this rule four years earlier in *Garner v. Tennessee*,[233] where it had first held that the Fourth Amendment governs *how* a seizure is carried out. There, the survivor of a burglary suspect, shot dead by a police officer when the suspect attempted to flee, brought suit claiming that such a "seizure" was unreasonable under the circumstances.[234] The various defendants claimed that once the police have probable cause to arrest, "the Fourth Amendment has nothing to say about *how* that seizure is made."[235] The Court quickly rejected this argument, holding that "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."[236] Indeed, the point was so non-controversial that the three dissenters accepted it without question.[237] Thus, it is well-settled that *how* a seizure is carried out is governed by a Fourth Amendment reasonableness standard.

b. The *Gerstein*/*McLaughlin* Rule: *How Long* a Person May be Detained.

The Court has also held that a person arrested by the State without a warrant has a presumptive Fourth Amendment right to a judicial determination of probable cause within forty-eight hours of arrest. If no such determination is made, the arrestee must be released from custody.[238] In *Gerstein v. Pugh*,[239] the Court held that while the Fourth Amendment requires that a warrantless arrest be premised on a probable cause determination by the arresting officer, the Amendment's protections do not end there. Rather, "the Fourth Amendment requires a judicial determination of probable cause as a

232. Graham v. Connor, 490 U.S. 386, 395 (1989). *See supra* text accompanying notes 158-65.

233. 471 U.S. 1, 7-8 (1985).

234. *See id.* at 3-5.

235. *Id*. at 7.

236. *Id*. at 8.

237. *See id.* at 25-26 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

238. This mirrors the rule once applied in federal cases, but not as a constitutional matter, suppressing any statement taken during a period of "unnecessary delay" before the suspect was brought before a magistrate. *See* Mallory v. United States, 354 U.S. 449, 454-56 (1957); McNabb v. United States, 318 U.S. 332, 344-46 (1943).

239. 420 U.S. 103, 113-15 (1975).

prerequisite to *extended restraint of liberty following arrest*."[240] The Court noted that Fourth Amendment protection even in the period "following arrest" was essential because "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest."[241] The Court even cited "indications" that a prompt appearance before a judicial officer was regarded by the Framers as one of the dimensions of a "reasonable" seizure.[242]

In an important sense, *Gerstein* prefigured *Graham*. Justice Stewart, agreeing with the State detainees in *Gerstein*, argued in a concurrence that an initial appearance before a judicial officer sometimes would require some of the incidents of an adversary proceeding as an aspect of "due process."[243] Specifically, he reasoned that general due process principles applied, and that reliance solely on the Fourth Amendment was insufficient, because the case did "not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person."[244] In a crucial passage, the Court rejected that argument: "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the

240. *Id.* at 114 (emphasis added). In *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), the Court held that if such determination is not made within forty-eight hours after arrest, the continued detention of the suspect is presumptively unreasonable. The Court has not yet determined whether and under what circumstances a confession that is taken during a period of detention unlawful under *Gerstein* and *McLaughlin* must be suppressed. *Compare* Powell v. Nevada, 511 U.S. 79, 85 & n.* (1994) (declining to decide issue) *with id.* at 89-92 (Thomas, J., dissenting) (opining that, under circumstances of the case, suspect's confession could not have been product of *Gerstein*/*McLaughlin* violation). *See* George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 460 (1986) (arguing that a confession made during any period of detention that constituted a *Gerstein* violation should be suppressed).

The Court has sometimes, in determining whether a confession was coerced, taken into account whether the police failed to take a suspect before a magistrate in a timely fashion after arrest. *See supra* note 51 and accompanying text. It expressly rejected the notion that such a delay per se rendered excludable any confession taken during that time period. *See* Stein v. New York, 346 U.S. 156, 186-88 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964). Justice Douglas was a strong proponent of such a per se rule. *See*, *e.g.*, Reck v. Pate, 367 U.S. 433, 448 (1961) (Douglas, J., concurring) ("I would hold that any confession obtained by the police while the defendant is under detention is inadmissible, unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel."); Loewy, *supra* note 184, at 935 (opining that lengthy delay between booking and confession in *Haynes v. Washington*, 373 U.S. 503 (1963), "constituted an unreasonable seizure under the [F]ourth [A]mendment").

241. *Gerstein*, 420 U.S. at 114.

242. *Id.* at 115.

243. *Id.* at 127 (Stewart, J., concurring in part).

244. *Id.* (Stewart, J., concurring in part).

'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial."[245] This was the germ from which *Graham* later sprang.[246]

2. *Unreasonable Searches: Strictures on Gathering Evidence from Within the "Person" of the Suspect*

Much of the Supreme Court's jurisprudence on what constitutes an "unreasonable search" revolves around either the meaning of the word "search,"[247] what level of suspicion is required under the circumstances,[248] or whether the ordinary warrant requirement may be dispensed with.[249] However, three cases stand out as guideposts for reasonableness of the intimate and intrusive "search" of a "person" where probable cause is established and the warrant requirement is either met or inapplicable. The guidelines they establish form a strong analogue to the Court's coerced-confession jurisprudence.

a. Rochin v. California.[250]

In the course of his arrest, Rochin had swallowed two capsules believed to contain narcotics.[251] He was taken to a hospital where, at the direction of an officer, an emetic solution was forced into

245. *Id*. at 125 n.27.

246. *Accord* Israel, *supra* note 159, at 404. Curiously, the *Graham* Court did not cite *Gerstein*, although the plurality in *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality), did. ("We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions.") (citing *Gerstein*, 420 U.S. at 114).

247. *See, e.g*., Kyllo v. United States, 533 U.S. 27, 29 (2001) ("This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment.")

248. *See, e.g*., Terry v. Ohio, 392 U.S. 1 (1968) (reasonable suspicion, not probable cause, needed for frisk). These include the so-called "special needs" cases. *See, e.g*., Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (no individualized suspicion necessary to perform drug tests on students participating in extracurricular activities).

249. *See, e.g*., Chimel v. California, 395 U.S. 752, 755 (1969) (deciding "whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to [his] arrest").

250. 342 U.S. 165 (1952). While *Rochin* technically is a due process case, not a Fourth Amendment case, the Court recently noted that if *Rochin* were decided today, it "would be treated under the Fourth Amendment, [and] with the same result." County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998). The decision to treat *Rochin* as a Fourth Amendment case is defended *infra* at text accompanying notes 289-91.

251. *Rochin*, 342 U.S. at 166.

Rochin's stomach against his will, causing him to vomit.[252] The two capsules were recovered and found to contain morphine and, based largely on that evidence, he was convicted of illegally possessing the drug.[253] Inventing a now-familiar standard, the Court held that the judgment against Rochin had been obtained in violation of his due process rights because the officers' "conduct . . . shock[ed] the conscience."[254] The Court analogized the case to its coerced-confession jurisprudence and, referring directly to *Brown v. Mississippi,*[255] wrote: "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[256]

b. Schmerber v. California.[257]

After being involved in an auto accident, Schmerber was taken to a hospital where a police officer directed a doctor to take a blood sample from Schmerber against his will.[258] A chemical analysis of the blood revealed he was intoxicated at the time.[259] The analysis was admitted into evidence at Schmerber's State trial for driving under the influence and he was convicted.[260] In addressing his Fourth Amendment claim,[261] the Court first noted that the procedure performed on Schmerber was undoubtedly a "search" of his "person," an event cognizable under the Fourth Amendment, and that, accordingly, the question was whether that search was "reasonable."[262] The Court also noted that its prior "search" cases had "little applicability with respect to searches involving intrusions beyond the body's surface."[263] This case was different; the Court was

252. *Id.*

253. *Id*.

254. *Id*. at 172.

255. 297 U.S. 278 (1936). *See supra* text accompanying notes 27-34.

256. *Rochin*, 342 U.S. at 173.

257. 384 U.S. 757 (1966).

258. *Id*. at 758.

259. *Id*. at 759.

260. *Id*. at 758-59.

261. *Schmerber* also raised a number of other claims, none of which was successful. *See id*. at 759-60 (pure due process claim); *id*. at 760-65 (self-incrimination claim); *id.* at 765-66 (right to counsel claim).

262. *Id*. at 767-68.

263. *Id*. at 769.

"writ[ing] on a clean slate"[264] because of the heightened solicitude society gives to "[t]he integrity of an individual's person."[265]

Ultimately, the Court upheld the search as reasonable after examining several of its characteristics. First, the Court found the procedure itself to have been so "commonplace" as to be almost a "ritual."[266] Second, the Court found that blood tests, in common experience, are minimally intrusive, as they involve the extraction of small amounts of blood and cause "virtually no risk, trauma, or pain."[267] The Court also relied on the fact that the blood test was "highly effective" in determining whether and to what extent a person is intoxicated.[268] Finally, the test in this case was conducted reasonably: by a doctor in a hospital setting and "according to accepted medical practices."[269]

c. Winston v. Lee.[270]

Lee was charged with attempted robbery based on an incident in which a shopkeeper, ordered to freeze by an armed assailant, instead fired at him, appearing to hit the assailant in the left side of the chest.[271] After returning fire and wounding the shopkeeper, the assailant fled.[272] Lee was found, with a chest wound, eight blocks away by police and he told them he had been shot by two individuals attempting to rob *him*.[273] The officers, apparently still ignorant of the attempted robbery of the shopkeeper, took him to the same hospital to which the shopkeeper had been taken earlier.[274] When the shopkeeper saw Lee, he identified Lee as the man who shot him, and charges were filed against Lee.[275] Thereafter, the prosecution moved for an order in state court to have Lee undergo surgery to remove the bullet from his left chest area, in order to show that the bullet came

264. *Id.* at 767-68.
265. *Id*. at 772.
266. *Id*. at 771 & n.13.
267. *Id*. at 771.
268. *Id*.
269. *Id*.
270. 470 U.S. 753 (1985).
271. *Id*. at 755.
272. *Id*.
273. *Id*. at 756.
274. *Id*. at 755-56.
275. *Id*. at 756.

from the shopkeeper's gun.[276] Ultimately, it was determined that the bullet was lodged about one inch deep in the muscle tissue in Lee's chest and that it would be necessary to put Lee under general anesthesia to remove it.[277]

The Supreme Court held that, under these circumstances, it would be unreasonable to force Lee to undergo the surgery against his will, notwithstanding the obvious existence of probable cause to believe that the search would bear valuable evidence, and regardless of whether a warrant was required. The Court noted that, in general, "where the community's need for evidence surmounts a specified standard, ordinarily 'probable cause,'" it is reasonable for the State to conduct a search, "[p]utting to one side the procedural protections of the warrant requirement."[278] Yet, relying on *Schmerber*, the Court held that "[a] compelled surgical intrusion into an individual's body for evidence" is different from other types of searches, because it "implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."[279] Intrusions into the "person," the Court wrote, implicate our "most personal and deep-rooted expectations of privacy."[280] Thus, a search warrant based on probable cause, ordinarily sufficient to validate a search, are only "threshold requirements" in this context.[281] The Court then identified the factors it had utilized in *Schmerber* to determine whether such a search was reasonable: "the extent to which the procedure may threaten the safety or health of the individual";[282] "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity";[283] and the State's need to conduct the search.[284]

The Court relied heavily upon the second and third of these factors to disallow the search. With regard to the first factor, the Court acknowledged that the risks of the procedure were probably "not extremely severe" but were in "considerable dispute."[285]

276. 470 U.S. 756.

277. *Id.* at 757.

278. *Id.* at 759.

279. *Id.*

280. *Id.* at 760.

281. *Id.* at 760-61.

282. 470 U.S. at 761.

283. *Id.*

284. *Id.* at 765.

285. *Id.* at 766. *See also id.* at 763-64 (describing the lack of clarity of the record on this

However, it was not disputed that the intrusion into Lee's privacy and dignitary interests "can only be characterized as severe";[286] as the Court bluntly and graphically put it, "the Commonwealth proposes to take control of [Lee's] body, to 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness,' and then to search beneath his skin for evidence of a crime."[287] On the other hand, the State had failed to demonstrate a "compelling need" for the bullet, largely because of the identification of Lee by the injured shopkeeper and the circumstantial evidence in the case.[288] On balance, then, the surgical procedure would have constituted an unreasonable search.

B. Coerced Confessions and Unreasonable Searches and Seizures

Using the appropriate analogues from well-established Fourth Amendment case law, one can see how the extracting by State officials of a coerced confession implicates the Fourth Amendment in at least two respects. It is at once the product of an unreasonable seizure of an individual and of an unreasonable search of his mind for evidence.[289]

1. The Coerced Confession as the Product of an Unreasonable Seizure

Conventional wisdom has it that the Fourth Amendment is implicated with respect to a suspect's statement only to the extent

point).

286. *Id*. at 766.

287. *Id*. at 765 (quoting *Lee v. Winston*, 717 F.2d 888, 901 (4th Cir. 1983), *aff'd*, 470 U.S. 753 (1985)).

288. 470 U.S. at 765-66. This is perhaps the least satisfying portion of the Court's opinion. Rare is the prosecutor who would take solace in a one-witness identification, along with purely circumstantial evidence, when she could have a ballistics expert testify that the bullet in Lee's chest almost certainly came from the shopkeeper's gun. Moreover, the Court utilized purely circular logic when it reasoned: "The very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel [Lee] to undergo surgery." *Id*. at 765. But if probable cause is a threshold requirement in *every* case of this type, then the very facts establishing probable cause will *always* "vitiate" the State's purported need for the evidence.

289. This suggestion has previously been made in Akhil Reed Amar & Renée B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011, 1012 (1995) ("Abusive actions in police stations, squad cars, and crime scenes . . . are paradigmatic unreasonable searches and seizures under the Fourth Amendment.") (emphasis omitted). *See also* Amar & Lettow, *supra* note 92, at 927 ("[T]he root antitorture idea is largely a Fourth Amendment idea and not a Fifth Amendment idea."). However intuitively on-target these observations are, Amar and Lettow do not cite anything in support.

that "if custody itself was illegally obtained, the court will inquire whether the suspect's statement was its unattenuated product."[290] Yet why should the Fourth Amendment stop there? While an arrest without probable cause is an unreasonable seizure, it is undisputed that the use of excessive force in *effecting* the arrest renders the seizure unreasonable as well.[291] Moreover, this is true regardless of whether the police are motivated by a desire to extract a confession, to administer "street justice," or simply to satisfy some sadistic predilection.[292] If, during an arrest occasioned by excessive physical force, the suspect blurts out, "Okay, I did it, stop beating me!" such a confession surely is the "unattenuated product" of the unreasonable seizure and should be suppressed.

From that hypothetical case, it is only a short step to *Brown*. There, excessive force (to put it lightly) was used, not during the arrest, but in its immediate aftermath, while the suspects were being held in custody. But, again, there seems no sense in artificially truncating Fourth Amendment protections at the point that the arrest itself has been successfully effected. Rather, "[t]he Fourth Amendment's instruction to police officers seems . . . more purposive and embracing."[293] Thus, Justice Ginsburg, relying in equal measure on "common law" and "common sense and common understanding," concluded in her concurrence in *Albright v. Oliver*[294] that a Fourth Amendment seizure continues even after a suspect posts bond and leaves actual custody. *A fortiori*, according to this reasoning, a seizure continues at least while a person is in custody.[295]

Although the circuit courts are split on this issue,[296] it appears

290. H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect*, 87 COLUM. L. REV. 1137, 1153 (1987).

291. *See supra* Part IV.A.1.a. *See also* Albright v. Oliver, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) ("[T]he Fourth Amendment governed both the manner of, and the cause for, arresting Albright.").

292. *See supra* text accompanying notes 158-65.

293. *Albright*, 510 U.S. at 277 (Ginsburg, J., concurring).

294. *Id*. at 277-79 (Ginsburg, J., concurring).

295. *See* Irene M. Baker, Comment, Wilson v. Spain: *Will Pretrial Detainees Escape from the Constitutional "Twilight Zone?",* 75 ST. JOHN'S L. REV. 449, 478-80 (2001) (arguing that all arrestees and pretrial detainees are covered by Fourth Amendment); Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 836-40 (1990) (arguing that arrestees are covered by Fourth Amendment until their first appearance before a judicial officer).

296. *Compare* Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002) (adopting continuing seizure approach); Fontana v. Haskin, 262 F.3d 871, 879-80 (9th Cir. 2001) (same); Wilson v. Spain, 209 F.3d 713, 715-16 (8th Cir. 2000) (same); United States v. Johnstone, 107 F.3d

that the Court already treats as a continuing Fourth Amendment seizure the time between actual arrest of a suspect and (at least) his first appearance before a magistrate, the time period with which we are primarily concerned. First, there is *Albright*.[297] While Justice Ginsburg was the only Justice to address this issue explicitly in *Albright*,[298] it appears that a majority of the Court agreed with her analysis. After all, if Albright had not been seized, his due process claim would not have been deemed, by both the plurality and Justice Souter, to have been "pre-empted" by the standards of the Fourth Amendment.[299]

Moreover, in *Gerstein*[300] and its progeny, as well as in other cases,

200, 206-07 (3d Cir. 1997) (same); Frohmader v. Wayne, 958 F.2d 1024, 1026 (10th Cir. 1992) (same); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (same), *with* Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (rejecting the "continuing seizure" concept); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (same); Reed v. City of Chicago, 77 F.3d 1049, 1052 n. 3 (7th Cir. 1996) (same); Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994) (same).

297. Albright v. Oliver, 510 U.S. 266 (1994).

298. *See* Eric J. Wunsch, *Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and § 1983: Is There a Constitutional Violation Remediable Under Section 1983?*, 85 J. CRIM. L. & CRIMINOLOGY 878, 904-05 (1995).

299. *See Albright*, 510 U.S. at 274 (plurality) ("The Framers considered the matter of *pretrial deprivations of liberty* and drafted the Fourth Amendment to address it.") (emphasis added); *id.* at 289 (Souter, J., concurring in the judgment) (discussing the "Fourth Amendment seizure that followed when [Albright] surrendered himself into police custody"). *See also* John T. Ryan, Jr., Note, *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?* 64 GEO. WASH. L. REV. 776, 798 (1996) (majority in *Albright* assumed plaintiff was seized the entire time); *id.* at 803 (contending that the majority held that "claims of injury for unreasonable searches or seizures that occur *following arrest* are more properly analyzed under a Fourth Amendment analysis") (emphasis added). *Cf.* County of Sacramento v. Lewis, 523 U.S. 833, 842-45 (1998) (because failed attempt to effect arrest was not a "seizure," a claim regarding accidental death caused by police during high-speed chase must be analyzed under Fourteenth Amendment). Justice Souter, joined by justice breyer, recently hinted that interrogation can be part of a Fourth Amendment "seizure." In Chavez v. Martinez, 123 S.Ct. 1994, 2007-08 (2003)(Souter, J., concurring in the judgment), Justice Souter wrote that "any argument for a damages remedy…must depend…upon the particular charge of outrageous conduct by the police, *extending from their initial encounter with Martinez through the questioning ny Chavez*." (emphasis added). However, he went on to write, incorrectly in my opinion, that any such claim "must sound in substantive due process." *Id*. at 2008 (Souter, J., concurring in the judgment). If the 'initial encounter" between the police and Martinez is examined as a Fourth Amendment event, as it must be pursuant to Graham v. Connor, 490 U.S. 386, 394-95 (1989), and if the same constitutional standard governs the entire "extend[ed]" incident, as Justice Souter suggested, then the Fourth Amendment governs Chavez's interrogation of Martinez as well. Pursuant to that standard, the police conduct need not be "outrageous" in order to afford Martinez a damages remedy; it need only be "unreasonable."

300. Gerstein v. Pugh, 420 U.S. 103 (1975).

the Court seems to have decided that a Fourth Amendment seizure can continue for hours or even days. Thus, the Court has set "reasonableness" limits on how long a person may be detained on reasonable suspicion[301] or on probable cause without a warrant or the initiation of other judicial proceedings.[302] In these cases, the requisite level of suspicion undoubtedly allows officials to *take* a suspect into custody. The further Fourth Amendment issue is how long they can *keep* the suspect in custody, absent review by an impartial magistrate. Thus, the implicit understanding undergirding these cases is that a continuing detention is a "seizure" for Fourth Amendment purposes.[303] Indeed, Justice Stewart's contention in *Gerstein* that the Fourth Amendment was inapplicable to "continuing incarceration" was specifically rejected by the Court, which wrote that the ambit of the Fourth Amendment "includ[es] the detention of suspects pending trial."[304]

Thus, the result in *Brown* is dictated, not by vague notions of due process, but by the combined results of *Garner*, *Graham*, and *Gerstein*. Where excessive force is used during the time period following arrest but before judicial proceedings are instituted, a Fourth Amendment unreasonable seizure has occurred. If a confession results, it is the product of the illegality.

Finally, if the Fourth Amendment does apply at least during that interval between arrest and the initiation of formal judicial proceedings, then its reasonableness standard governs all aspects of the continuing seizure. Under *Graham*, this reasonableness standard displaces the formerly utilized standard of due process, such that all of the psychological pressures and tactics once measured by a due

301. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 540-44 (1985) (holding sixteen-hour detention before warrant obtained not an unreasonable seizure under circumstances).

302. *See* Powell v. Nevada, 511 U.S. 79, 83 (1994); County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); *Gerstein*, 420 U.S. at 114. *See generally supra* Part IV.A.1.b. *See also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 807 (1994) (arguing that a person required to appear before a grand jury for weeks on end has been "seized").

303. *See* Thomas, *supra* note 232, at 459-60 (arguing that in unlawful pretrial detention cases, the constitutional "violation is the detention itself," and is a "continuing fourth amendment violation," and concluding that Fourth Amendment protection extends beyond actual arrest).

304. *Gerstein*, 420 U.S. at 125 n.27; *see supra* text accompanying notes 235-38. Any contrary rule would work perverse results; state officials would simply avoid any Fourth Amendment consequences regarding the length of a detention simply by virtue of the fact that, at some point, the "seizure" is over and Fourth Amendment protections thereby dissipate.

process standard ought now to be subject to a test of reasonableness. If the *use* of physical force during that period is governed by a reasonableness standard, then so should the *threat* of physical force. If overt physical violence is measured by reasonableness, then so, too, should the subtler but no less physically violent tactics of sleep- and food-deprivation. If the battering of a person's body is subject to a test of reasonableness, then so should the battering of his mind and soul that comes from prolonged and persistent questioning, isolation in foreign surroundings from friends and loved ones, the use of tricks and deception, exploitation of his impaired mental state by drug or disease, the use of threats of legal process against family members, and humiliating treatments. In short, all of the reasons the Court gave to extend *Brown*'s due process analysis to cover all manner of psychologically coercive tactics apply with equal force to support the extension in that context, in the wake of *Graham*, of a reasonableness inquiry.

2. The Coerced Confession as the Product of an Unreasonable Search

At the same time, *Rochin*, *Schmerber*, and *Winston* collectively provide a useful analogue to the "unreasonable search" aspect of coerced-confession jurisprudence. As the Court explained in *Schmerber* and *Winston,* certain searches are so intrusive—they are "hyper-intrusive"[305]—that a substantial justification is required before they can be deemed reasonable, even if the probable cause and warrant requirements have been met. Specifically, these cases, and *Rochin* before them, held "intrusions beyond the body's surface"[306] to a heightened reasonableness requirement.

There seems little reason to limit the scope of such "intrusions beyond the body's surface" to the sifting of stomach contents, blood, muscle, and sinew, to the exclusion of the contents of a person's mind. The "operative principle" in either instance "concerns control of the curtilage of the self," or the "freedom from intimate inspection."[307] After all, the Fourth Amendment secures "[t]he right of the people to be secure in their persons,"[308] and "[t]he mind [is] part of the person

305. *See* Ric Simmons, *Can* Winston *Save Us from Big Brother?: The Need for Judicial Consistency in Regulating Hyper-Intrusive Searches*, RUTGERS L. J. (forthcoming 2003). "Bodily Intrusion" searches, including those in *Rochin*, *Schmerber*, and *Winston*, make up a discrete sub-category of "hyper-intrusive searches" in Simmons' taxonomy. *See id.*

306. Schmerber v. California, 384 U.S. 757, 769 (1966).

307. Uviller, *supra* note 282, at 1146.

308. U.S. CONST. amend. IV.

protected by this precept."[309] As Professor Uviller wrote: "Particularly where the mind of the party is the repository, the inquisitorial method of dislodging the evidence offends deeply ingrained notions of individual immunity from hostile state incursion."[310] Indeed, the Fourth Amendment's list of the areas it protects—"persons, houses, papers, and effects"—appears purposefully to read in descending order of importance, whereby "persons" are placed at the very core of protection, with the other concepts extending out in concentric circles.[311] And if "persons" are at the core of Fourth Amendment protection, it seems fitting that the *mind* of the "person" is at the very "bullseye."[312] Thus, "[i]nvasion by the government to perceive the operation of the subject's mind, like the quest for objective evidence," ought to be subject to Fourth Amendment standards.[313]

Indeed, the kinship between *Brown* and *Rochin* is undeniable.[314] They lie at the interface of the "due process" cases concerning "hyper-intrusive" bodily searches and those addressing "hyper-intrusive" searches of the mind. *Rochin*, after all, relied extensively on *Brown*, citing the latter case for the proposition that it makes little

309. Uviller, *supra* note 282, at 1147; *see also id.* at 1168 (referring to interrogation as an "ex parte mind probe").

310. *Id*. at 1176; *see also* Amar & Lettow, *supra* note 92, at 927 (equating interrogation with a type of "search").

311. To some extent, the Court has recognized this. *See* Payton v. New York, 445 U.S. 573 (1980) (establishing heightened requirement for arrest in the home). In other respects, however, the Court has failed to observe this hierarchy. *See*, *e.g.,* Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 924-28 (1985) (arguing for heightened constitutional protection for "papers").

312. *See* Uviller, *supra* note 282, at 1169 (referring to the mind as a "specially shielded province"); *see also* Amar & Lettow, *supra* note 92, at 925 (referring to a person's "soul" to the same effect).

313. Uviller, *supra* note 282, at 1147. *See* also Schnapper, *supra* note 303, at 926 (arguing for special protection for private papers "as essentially unspoken thoughts that had never left the bosom of the thinker").

314. *See* Yale Kamisar, Response, "On the 'Fruits' of *Miranda* Violations, Coerced Confessions, and Compelled Testimony," 93 MICH. L.REV. 929, 949-52 (1995)(discussing *Rochin* as an analogue to coerced-confession situation); Paulsen, *supra* note 110, at 430-31 ("[O]utrageous police methods will invalidate a confession just as they will invalidate other evidence."). It appears that three justices agree that a confession is coerced for due process purposes only if the police use methods that "shock the conscience." *See* Chavez v. Martinez, 123 S.Ct. 1994, 2005 (2003)(plurality opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.)(utilizing 'shocks the conscience" standard to determine if confession was coerced). This would be an extraordinary departure from prior cases, which have found constitutional violations even on "less-than-shocking" facts. Herman, *supra* note 28, at 749; *accord* Gardner, *supra* note 43, at 1297 n.123; Grano, *supra* note 43, at 918-19.

sense to prohibit "the police [from] extract[ing] by force what is in [a person's] mind but [not from] extract[ing] what is in his stomach."[315] Of course, *Rochin*, like *Brown*, was technically a "due process" case, not a "Fourth Amendment" case. Yet this was purely a matter of timing. It was decided at a time when the strong form of "selective and non-exclusive" incorporation ruled the day, and was authored by the primary proponent of that view, Justice Frankfurter.[316] However, as the Court recently noted, if *Rochin* were decided today, it "would be treated under the Fourth Amendment, [and] with the same result."[317] Indeed, the point seemed almost incontrovertible—the Court blithely pointed this out in a footnote that passed largely unnoticed.[318] Similarly, if *Brown* were decided today, it, too, should be seen as a "Fourth Amendment" case.

And as the Court recognized early on in its coerced-confession jurisprudence, there is little reason to draw the line at physical torture designed at extracting the contents of a person's mind when psychological methods can be just as effective at doing so. Moreover, a "search" need not necessarily involve physical compulsion or even physical contact. For example, a search can occur when the police use "a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home."[319] Similarly, highly intrusive methods of interrogation might constitute an unreasonable search of the mind for evidence, despite the fact that the interrogator never lays a hand on the suspect.[320]

315. Rochin v. California, 342 U.S. 165, 173 (1952).

316. *See id.* at 169 (citing with approval the *Palko* formulation of selective and non-exclusive incorporation).

317. County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998).

318. As confirmation as to how the Court would today treat *Rochin*, one need go no further than Schmerber v. California, 384 U.S. 757 (1966), and its antecedent, Breithaupt v. Abram, 352 U.S. 432 (1957). *Breithaupt*, like *Schmerber*, concerned whether the taking of a suspect's blood against his will violated the Constitution. *Breithaupt*, 352 U.S. at 433-34. Yet in *Breithaupt*, the Court disposed of the Fourth Amendment and Self-Incrimination claims in seven sentences; neither the Fourth Amendment's exclusionary rule nor the Self-Incrimination Clause had been incorporated through the Fourteenth Amendment. *Id.* at 434. The bulk of the opinion addressed *Breithaupt*'s "primary assault on his conviction," that the blood test violated his due process rights in the same way that the pumping of Rochin's stomach violated his rights. *Id.* at 435-40. Fast-forward nine years. The *Schmerber* opinion was *Breithaupt*'s mirror image. Now it was the "due process" claim that got short shrift, essentially foreclosed by *Breithaupt*. *See Schmerber*, 384 U.S. at 759-60 & n.4. Instead, the *Schmerber* Court spent most of its time addressing the Fourth Amendment, *see id.* at 766-72, and Self-Incrimination Clause, *see id.* at 760-65.

319. Kyllo v. United States, 533 U.S. 27, 29 (2001).

320. Amar & Lettow, *supra* note 92, at 859 (explaining that pre-trial questioning of

As in *Rochin*, *Schmerber*, and *Winston*, the degree and methods of intrusion are critical. The mind, after all, "is not a proscribed precinct, utterly inaccessible to the probes of law enforcement people."[321] Just as the Court distinguished the "painful and intrusive stomach pumping" in *Rochin* from the "quick and virtually painless taking of a blood sample" in *Schmerber*,[322] so too do courts distinguish between a confession beaten from a suspect and one obtained through civilized questioning. Thus, a reasonableness standard, as in the more traditional Fourth Amendment context, seeks an accommodation between the claim to "indefeasible control" by each person "over his or her own personal preserves of the mind,"[323] and the genuine needs of law enforcement.[324]

It is no coincidence that some have described one of the underlying purposes of the privilege against self-incrimination as the protection of privacy. For example, in *Miranda*, the Court spoke of the privilege as a manifestation of "a 'right to a private enclave where he may lead a private life,'"[325] and of a government respect for "the inviolability of the human personality."[326] Yet this comes dangerously

criminal suspect, pursuant to proposed supervised deposition scheme, might involve "needlessly intrusive questioning, fishing expeditions, and offensive impositions upon a person's body [that] raise obvious Fourth Amendment concerns"). With respect to searches and seizures of "papers," Schnapper has written: "Ultimately, courts must ask whether the government has invaded the inner sanctum of ideas and emotions protected by the Constitution, not whether the invasion was achieved by means other than actual physical compulsion." Schnapper, *supra* note 303, at 927.

321. Uviller, *supra* note 282, at 1145.

322. Amar & Lettow, *supra* note 92, at 921.

323. Uviller, *supra* note 282, at 1146.

324. *Id*. at 1150 ("[O]ur enjoyment of privacy in our various storage compartments, including the cerebral, is subject to reasonable intrusion . . . for legitimate law enforcement purposes.").

325. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir.) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

326. *Id*. *See also* Amar & Lettow, *supra* note 92, at 925 (recognizing "a certain narrow but important protection of 'mental privacy'");Gardner, *supra* note 43, at 1316 ("[A]ffronts to dignity and intrusions into personal privacy appear to be, on their face, the very sorts of evils protected against by the Fifth Amendment privilege."); Erwin Griswold, *The Right to be Left Alone*, 55 NW. U. L. REV. 216, 223 (1960) (contending that the animating principle behind the privilege is privacy and "the right to be left alone"). Some commentators, particularly Professor Gerstein, contend that the privilege against self-incrimination protects, not privacy or dignitary interests in general, but the specific interest in determining for oneself whether and to what extent one will assume moral and legal culpability for one's acts. *See, e.g.,* Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 352-56 (1979).

close to repeating the error of *Boyd v. United States*,[327] that is, of conflating Fourth and Fifth Amendment concerns. It is the Fourth Amendment, not the Self-Incrimination Clause, that is driven by concerns over privacy and autonomy. After all, the Self-Incrimination Clause applies only in "criminal proceeding[s]" while the Fourth Amendment applies anytime the government "search[es]" or "seiz[es]."[328] Additionally, again, the Self-Incrimination Clause applies only if and when the mind's evidence is used against its creator in a judicial proceeding, whereas the Fourth Amendment applies at the time of the government incursion.[329] It would be more accurate to say, as others have, that Fourth Amendment interests are strengthened when they are reinforced by other constitutional provisions, such as the Free Speech[330] or Self-Incrimination Clauses.[331] Thus, where a search is likely to uncover self-incriminating thoughts that might later be used against their "owner," such as a search of private papers, the government must meet a heightened standard of reasonableness. A search of the mind of a person suspected by the State of criminal activity is the paradigm of such a search.

C. Modifying the Standard for Coerced Confessions

The question remains whether the old due process standard, with its multifarious factors, sufficiently reflects a Fourth Amendment reasonableness inquiry so that it can be retained in its entirety, or

327. 116 U.S. 616, 633 (1886) ("[T]he 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment"). *Boyd* has fallen into disrepute with the Court, *see* Uviller, *supra* note 282, at 1154, though it has its defenders in the academy. *See*, *e.g.*, Schnapper, *supra* note 303, at 924.

328. *See* Amar & Lettow, *supra* note 92, at 890-91 (citing fact that privilege against self-incrimination is unavailable to civil litigants, and witnesses in any case, and that it can be trumped by immunity as belying notion that it is designed to protect privacy).

329. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("[A] violation of the [Fourth] Amendment is fully accomplished at the time of an unreasonable governmental intrusion.") (internal quotation marks omitted).

330. *See* Stanford v. Texas, 379 U.S. 476, 485 (1965); *accord* Schnapper, *supra* note 303, at 925 (citing *Stanford* for proposition that Court has required special justification for searches implicating First Amendment rights).

331. *See*, *e.g.*, Amar, *supra* note 294, at 805-10 (arguing that Fourth Amendment reasonableness should be informed by other constitutional principles where appropriate, including principles underlying Self-Incrimination Clause); Schnapper, *supra* note 303, at 924-28 (contending that when courts consider reasonableness of search or seizure, they ought to consider whether and to what extent objects of search contain self-incriminating words).

whether some modifications are necessary. Since *Colorado v. Connelly*,[332] the standard has focused on police misconduct, which accords with a Fourth Amendment reasonableness standard. However, even after *Connelly*, the Court has not had occasion to re-state the standard in terms of the reasonableness of police conduct, so it is unclear whether and to what extent the idiosyncratic characteristics of the suspect are still relevant. After all, it is one thing to establish some measure of coercive police tactics as a *threshold* to finding a confession coerced, as *Connelly* did. It is quite another to rule out any characteristics of the defendant in the overall evaluation of a claim of coerciveness.

Still, *Connelly* did focus the inquiry on police misconduct, and factors idiosyncratic to the individual suspect are not entirely consistent with such an inquiry, except to the extent that they are known to and acted upon by the police. Taking the lead from *Connelly*, and from Joseph Grano's formulation of a due process standard that anticipated a more objective approach, one can attempt to articulate the appropriate Fourth Amendment standard. At the same time, a separate Self-Incrimination standard must be considered, for there might be cases (other than where statements are un-Mirandized) where a confession has been "compelled" despite the fact that the police acted reasonably.

1. A Proposed Fourth Amendment Standard for Coerced Confessions

Pursuant to a reasonableness standard, the courts should ask not whether the circumstances surrounding the confession were coercive, but whether they were *unduly* coercive. After all, under any type of Fourth Amendment analysis, the touchstone is a careful balancing of the right of the individual to privacy, autonomy, and dignity, on the one hand, with society's need to gather evidence to help prosecute and punish wrongdoers, on the other. One benefit of utilizing a Fourth Amendment reasonableness analysis is the explicit recognition of a necessary compromise between these competing interests.[333] Concomitantly, a reasonableness standard acknowledges explicitly that a legal determination of whether a confession was coerced is not based on an *empirical* assessment of whether the

332. 479 U.S. 157, 163 (1986). *See supra* Part I.D.

333. *See* Grano, *supra* note 43, at 889-90 (noting that coerced-confession jurisprudence mirrors society's simultaneous belief in two goals that "push in opposite directions": effective law enforcement and fairness to the individual suspect).

suspect's will was actually "overborne" or whether he exercised "free will." Rather, the determination is fundamentally a *normative* judgment about what police practices we as a society are willing to allow and which ones we should forbid within varying factual contexts.[334] By explicitly recognizing that the real issue is how much police pressure we as a society are willing to countenance, and by therefore framing the inquiry in objective terms, we encourage principled decision-making by the courts.[335]

Thus, I propose, at least as a starting point, the test formulated by Professor Grano in his influential work, *Voluntariness, Free Will, and the Law of Confessions*.[336] Operating within the old Due Process/Self-Incrimination rubric, Grano proposed the following objective test: a confession will be deemed coerced if is the product of "interrogation pressures that a person of reasonable firmness, with some of the defendant's characteristics, could not resist."[337] The "person of reasonable firmness" standard shifts the emphasis from the character of the suspect to the conduct of the police, who are charged with the knowledge of the limits of reasonable human resistance to pressure, as refined by court opinions. The focus is on a relatively unchanging set of limitations, established by societal norms, that the police may not transgress. However, some idiosyncratic characteristics may be taken into account even pursuant to a reasonableness standard. Grano elaborated that these include those characteristics that are apparent to the interrogating officer(s), "morally relevant" to the issue of coercion, and "not easily feigned or difficult to verify."[338] While I would leave to judges and juries their

334. *See id.* at 884-86, 896, 904, 908. Grano contends that the existing coerced-confession jurisprudence recognizes this functional approach, but only implicitly. *Id.* at 907-08.

335. *See id.* at 908.

336. *Id.*

337. *Id.* at 886-87, 898-909. Schulhofer, criticizes this test as failing to provide a "principled basis" for case-by-case adjudication, and argues that an objective test is too divorced from a true factual assessment to substitute for the traditional voluntariness test. *See* Schulhofer, *supra* note 28, at 873-74. For example, he argues, "Fourth Amendment jurisprudence has long since diverged from weighing the totality of the facts to determine whether a search was 'reasonable.'" *Id.* at 876 n.51. However true this contention was in 1981 when Schulhofer wrote it, the Court's Fourth Amendment jurisprudence now embraces a "totality of the circumstances" standard to a very large extent. For example, Schulhofer cited Spinelli v. United States, 393 U.S. 410, 416 (1969), for this proposition, but *Spinelli* and its doctrinal twin, Aguilar v. Texas, 378 U.S. 108, 114 (1964), were overruled two years later by *Illinois v. Gates*, in favor of a "totality of the circumstances" test. *See* Illinois v. Gates, 462 U.S. 213, 230 (1983).

338. Grano, *supra* note 43, at 900-06.

traditional role in determining whether a suspect was feigning such characteristics as mental retardation or intoxication, I agree with Grano as to the first two factors.

Pursuant to a Fourth Amendment reasonableness test, it is crucial that any idiosyncratic characteristics of the suspect, in order to be taken into account, be apparent or otherwise known to those charged with the duty of acting "reasonably." Indeed, the *Connelly* Court made clear that a suspect's mental illness or intoxication was a factor used in prior cases only to the extent that the police either created or were aware of and exploited the condition.[339] Similarly, a suspect's level of intelligence or education should be taken into account only to the extent that the interrogators know of and exploit these characteristics. But certain characteristics of the suspect, such as his age and general physical condition, will always be apparent.

Grano's "moral relevance" requirement reminds us of the goal of the inquiry and puts a reasonable limit on the types of idiosyncratic factors to be taken into account: only those that reasonable people would agree could lead to an undesirable level of infringement on a person's mental freedom. Thus, a person's overall mental or psychological state—again, if known to the police—would generally fit this category, since most reasonable people would likely reel at the thought of State officials taking advantage of mental invalids or persons of sub-normal intelligence. Age, too, would be a factor in many cases, for the same reason: a general and widespread distaste for the exploitation of the very old or the very young.[340]

Race, and for that matter, gender, are factors that will ordinarily be apparent to interrogators and that will sometimes be relevant. Many of the older cases appear to have used race as a factor under the assumption, no doubt true in nearly all of those cases, that the African-American suspect was interrogated by a coterie of white police officers. As the Court realized, the racial dynamic in the interrogation room can have a powerful impact on the suspect, a circumstance the police might be tempted to use to their advantage, especially in the 1950s and 1960s, but even so today. By like token, a squadron of large, male detectives might readily exploit gender distinctions in interrogating a lone female suspect. One need not subscribe to outmoded chivalric attitudes to recognize that the types

339. Colorado v. Connelly, 479 U.S. 157, 164-65 (1986).

340. Of course, one reason for this general distaste might be that the resulting confessions are less trustworthy. *See* White, *supra* note 72, at 1232. However, it is likely based also on a visceral reaction to the police practices themselves.

of pressure and tactics reasonable people would approve in the questioning by male interrogators of a male suspect might be unreasonable when applied to a female suspect. On the other hand, the influx of women and, especially, racial minorities into the Nation's police forces have lessened, though certainly not eliminated, the danger that police will exploit racial and gender dynamics to their own advantage. Thus, each case must be examined on its own to determine whether these characteristics of the suspect are relevant.

Given the Fourth Amendment's avowed purpose of balancing individual interests with societal needs, I would add to Grano's formulation two considerations: the police need for the evidence and the extent to which exigent circumstances are present. That the need for the evidence should be taken into account comes directly from *Winston*, where the Court weighed the highly intrusive nature of the search against the fact that the police already possessed sufficient evidence of the suspect's involvement in the crime.[341] Similarly, where the police already have substantial evidence of the suspect's guilt, or where such evidence is easily obtainable, the necessity for a confession is lessened, and so "hardball" tactics during interrogation need not be countenanced. On the other hand, where the police have sufficient reason to believe that the suspect committed a crime but it is based solely on weak or circumstantial evidence, and it appears likely that the case cannot be prosecuted without something more, police should be freer to resort to some tactics that might in other contexts be deemed coercive.[342]

This idea is nothing new. The Court itself flirted briefly with it in *Haynes v. Washington*,[343] where it found that the State's actions, already determined by the Court to have been coercive, were all the worse from a constitutional perspective because they were hardly necessary. The Court wrote:

> [T]he coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to obtain a conviction. The procedures here are no less

341. *See* Winston v. Lee, 470 U.S. 753, 760-65 (1985). I would not, as the Court did, rely on the circular logic that since the police have sufficient evidence to establish probable cause for the search, the search is probably unnecessary. *See supra* note 265.

342. *But see* Greenawalt, *supra* note 197, at 42-43 (arguing on moral grounds that the right to silence is *stronger* when police have *less* independent inculpatory evidence).

343. 373 U.S. 503 (1963).

> constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public.[344]

A reasonableness approach to coerced confessions would pick up on the thread left dangling in *Haynes*.

Additionally, in the rare case, police should be permitted to take into account any exigent circumstances that might exist. Thus, where a kidnapping suspect is questioned, and the interrogators have reason to believe that the victim is still alive, more vigorous tactics and questioning might be reasonable under the circumstances in order to maximize the chances of the victim's safe return.[345] Similar—and perhaps most relevant in a post-September 11 legal culture—is the "ticking time bomb" case, where an explosive device is set to be detonated and police have probable cause to believe the suspect in custody knows where it is, when it will detonate, and how it can be disarmed.[346] Or the "ticking time bomb" is a group of the suspect's confederates, not yet apprehended, who are planning a terrorist attack. It seems reasonable that different and more flexible interrogation methods should be open to the police in such a situation than if they were investigating a completed crime.

Again, this idea is nothing new. Taking into account exigent circumstances is a common staple of current Fourth Amendment doctrine, which is unsurprising given the focus of the analysis on "reasonableness."[347] While it appears that the Court has never invoked exigency as a justification for an otherwise actually coercive interrogation, it held in *New York v. Quarles*, in effect, that exigency will render irrelevant the presumptive coerciveness inherent in an interrogation and thus excuse the lack of *Miranda* warnings and waiver.[348] In *Quarles*, police were told by a woman that a man with a

344. *Id*. at 519.

345. *See* Loewy, *supra* note 184, at 925 ("[I]n a true emergency . . . the police are, or ought to be, at their coercive best . . . .").

346. This example comes from *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting). *See also* Clymer, *supra* note 28, at 549-50.

347. *See*, *e.g.*, Illinois v. MacCarthur, 531 U.S. 326, 331(2001) (stating that potentiality for loss of evidence sometimes constitutes exigent circumstances justifying failure to obtain search warrant); Payton v. New York, 445 U.S. 573, 590 (1980) (suggesting that "exigent circumstances" may excuse failure to obtain warrant for in-home arrest).

348. New York v. Quarles, 467 U.S. 649, 658-59 (1984).

gun who had just raped her had then entered a supermarket.[349] When cornered in the supermarket and apprehended, the suspect was found to have an empty shoulder holster.[350] Without reading him his *Miranda* rights, an officer asked where the gun was and the suspect responded, "'the gun is over there.'"[351] The Supreme Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence."[352] Using the same cost/benefit analysis employed in determining whether the Fourth Amendment exclusionary rule should be employed in a particular instance, the Court determined that the cost of adhering to *Miranda*'s strictures where the public safety is imminently threatened outweighs the benefits of guarding against compelled self-incrimination.[353] Both the statement and the gun itself were admissible.

This "public safety" exception to the *Miranda* rule can easily be applied to the context of coerced confessions. To heighten the sense of exigency, suppose that the police know a suspect has ditched his gun, not in a supermarket, but near a school for developmentally disabled children, as in *Rhode Island v. Innis*.[354] Suppose further that the officer quickly reads the suspect his *Miranda* rights, the suspect waives them, and the officer immediately grabs him by the shirt collar and screams, "Where's the gun!" three times before the suspect answers. Now suppose instead that after the *Miranda* waiver, the officer grabs the suspect by the neck, bends him over the hood of the patrol car, and repeatedly screams in his ear, "Where's the gun!" Finally, assume instead that following the *Miranda* waiver, the officer calmly takes out his service revolver, cocks it, holds it to the suspect's head and says, "Tell me where the gun is or I'll blow your head off." It seems to me that, under these circumstances, the officer in scenario one is probably acting reasonably, the officer in scenario three is almost certainly acting unreasonably, and the officer in scenario two is very close to the line. Of course, exigency is a sliding scale, and what is unreasonable where the danger is "merely" a loaded weapon abandoned in a public place might be appropriate in a "ticking time bomb" case. Yet, regardless of what the answer is in any particular

349. *Id.* at 651-52.
350. *Id.* at 652.
351. *Id.*
352. *Id.* at 655-56.
353. *Id.* at 656-58.
354. 446 U.S. 291 (1980).

case, by focusing on the reasonableness requirement in light of the exigent circumstances present, rather than on whether police conduct overbore the suspect's will in some abstract sense, we are at least asking the right question.

2. A Proposed Self-Incrimination Standard for Coerced Confessions

A Fourth Amendment test is not, however, the end of the inquiry. That Amendment is implicated when the confession is taken, but the Self-Incrimination Clause is implicated if and when the confession is admitted into evidence at the defendant's trial. Given this, one must also consider whether the above approach is consistent with a defendant's Self-Incrimination rights.[355] To put it another way, can a confession ever be deemed reasonably obtained pursuant to the above approach but still compelled within the meaning of the Self-Incrimination Clause?

In the run of cases, the two standards ought to be coextensive. Asking whether "a person of reasonable firmness," with those of the defendant's idiosyncratic characteristics known to the police and relevant to the inquiry, could have resisted the particular "interrogation pressures" used seems to be appropriate regardless of whether the touchstone is the reasonableness of the police conduct or whether a statement was compelled.

However, the "person of reasonable firmness" test assumes a baseline of no especial need for a confession and no exigent circumstances. Where police tactics are deemed reasonable only because of an especially great need for the evidence or because of exigent circumstances, any resulting statement must still be considered compelled. After all, if application of this baseline test reveals that a "person of reasonable firmness" would have succumbed to "interrogation pressures," it can hardly be said that the suspect was not "compelled." That the police conduct was nonetheless reasonable because of other considerations over and above the baseline circumstances does not alter this conclusion of compulsion.[356]

355. Ironically, the ruling in *Graham v. Connor* may have been motivated, in part, by a desire to achieve efficiency by obviating the need for dual, and possibly inconsistent, standards. 490 U.S. 386 (1989); *see* Massaro, *supra* note 19, at 1118. Here, *Graham* operates to achieve just the opposite. By removing the "due process" facade of coerced-confession jurisprudence, it reveals and uncouples the two separate constitutional provisions actually driving that jurisprudence: the Fourth Amendment and the Self-Incrimination Clause.

356. *See* Fisher v. United States, 425 U.S. 391, 400 (1976) ("[T]he Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness.").

Thus, going back to our first *Quarles*/*Innis* hypothetical,[357] the fact that it may have been reasonable under the circumstances for the officer to shake the suspect by his shirt collar and scream in his face does not mean that the suspect was not, in a very real sense, compelled to answer.

Likewise, an un-Mirandized statement should be considered compelled for purposes of the Self-Incrimination Clause but should not be considered the product of unreasonable police conduct. The *Miranda* doctrine is based on the conclusion that custodial interrogation is inherently coercive.[358] By definition, however, the "inherent" coerciveness of police detention and questioning is not a result of police misconduct. After all, as the *Miranda* Court recognized, custodial police interrogation is a necessary and valuable aspect of law enforcement. Moreover, as the Court also recognized in subsequent cases, the giving of warnings and obtaining of a waiver in and of themselves are not constitutionally required. The only constitutional requirement is that any statement *not* preceded by the warnings and waiver must be excluded from evidence.[359] The fact that this occurs, however, does not mean that the police have acted unreasonably.[360]

Thus, the Court's decision in *Quarles*, insofar as it allowed into evidence the suspect's un-Mirandized statement, was incorrect.[361] The decision by police in that case not to administer warnings before interrogation was undoubtedly reasonable. Indeed, the police might have gone further and still acted reasonably.[362] However, irrespective of the reasonableness of the police action in that case, the suspect's answer was presumptively coerced, a la *Miranda*. Thus, invocation of the sort of cost/benefit analysis utilized when addressing the operation of the Fourth Amendment's exclusionary rule was misplaced in the face of the clear command of the Self-Incrimination Clause that no person be "compelled . . . to be a witness against himself."[363] Whether the *gun* was properly admitted into evidence

357. *See supra* text accompanying notes 339-46.

358. *See supra* text accompanying note 79.

359. *See* Dickerson v. United States, 530 U.S. 428, 443-44 (2000) (reaffirming that *Miranda* states the constitutional rule "that unwarned statements may not be used as evidence in the prosecution's case in chief").

360. *See infra* text accompanying notes 363-366.

361. *See* New York v. Quarles, 467 U.S. 649 (1984). *See supra* text accompanying notes 340-45.

362. *See supra* text accompanying notes 341-45.

363. *See infra* text accompanying notes 361-62, 383-86; *see also* Clymer, *supra* note 28,

remains to be seen.

D. Impeachment and Fruits

One might ask why it matters that we distinguish between confessions that are compelled within the meaning of the Self-Incrimination Clause and that are also products of unreasonable police conduct in violation of the Fourth Amendment, on the one hand, and those that are compelled but that result from police practices that are reasonable on the other hand. So long as one or other constitutional provision is implicated, use of the confession at trial violates a defendant's constitutional rights. The observation is valid as far as it goes. If the focus is on the confession itself, use of it at trial in the prosecution's case-in-chief violates the Self-Incrimination Clause, irrespective of whether the Fourth Amendment has also been violated.

However, aside from the fact that the law ought to make sense,[364] one must also look to two other possible uses of the confession—as a means of obtaining other evidence and as impeachment of the defendant at trial—to determine whether a dual-standard approach has any real-world implications. With regard to the first consideration, the "fruits" of confession evidence, the approach outlined in this Article is largely consistent with what the Court has already done and demonstrates that there is an important real-world consequence of distinguishing between interrogation techniques that violate the Fourth Amendment and those that do not. With regard to impeachment, however, the distinction is unimportant: so long as the statement is compelled, it should not be used to impeach its maker in court. To the extent that the Court allows un-Mirandized statements to be used for impeachment, I submit that the Court has got it wrong.

1. The Tainted Fruit of the Coerced Confession

Again, a coerced confession violates the Fourth Amendment when it is taken and the Fifth Amendment only if and when it is used at trial, while an un-Mirandized confession violates the defendant's rights only when it is used against him. This goes a long way toward explaining at least one seeming anomaly in the law better than the Court has done: It explains why the "fruit of the poisonous tree" of an un-Mirandized statement is much more easily washed of its taint than

at 550.

364. *See* Loewy, *supra* note 184, at 939 ("[T]he Court ought to understand what it is doing.").

when the fruit springs from the poisoned soil of actual coercion. In *Michigan v. Tucker*,[365] the progenitor of this rule, the Court itself offered two explanations, neither of which is very persuasive. First, the Court there wrote that the safeguards prescribed by *Miranda* are "not themselves rights protected by the Constitution."[366] Yet the Court has recently reaffirmed that *Miranda* does indeed set forth a rule of law of constitutional dimension.[367] The *Tucker* Court also used a Fourth Amendment exclusionary rule model to determine that extending the exclusionary rule of *Miranda* to cover the fruits of an un-Mirandized statement would exact costs on society that outweigh its benefits.[368] However, the Self-Incrimination Clause, unlike the Fourth Amendment, is not made effective by an extra-constitutional exclusionary rule—it contains its own exclusionary rule.[369] That is, while the Fourth Amendment describes the right and the judge-made exclusionary rule prescribes the remedy, the Self-Incrimination Clause does both simultaneously. Accordingly, to whatever extent a cost/benefit calculus is appropriate where the issue is remedying a Fourth Amendment violation, such an analysis is wholly inapt in the context of *Miranda*, which is grounded in the Self-Incrimination Clause.[370]

The real answer is much simpler. *Miranda*'s "core ruling [is] that unwarned statements may not [constitutionally] be used as evidence."[371] Thus, while *Miranda* set forth a prophylactic regime, a failure to follow that regime is not a "violation" of anything in the Constitution. That is, it is not an act of wrongdoing on the part of the police. Failure to give the warning or obtain the waiver prescribed by *Miranda* ought to be described in wholly consequentialist rather than normative terms: such a "failure" simply means that any resulting statement cannot be used later against the suspect at trial.[372] In

365. 417 U.S. 433 (1974).

366. *Id*. at 444.

367. Dickerson v. United States, 530 U.S. 428, 437-44.

368. 417 U.S. at 446-48, 450-51.

369. *See* KAMISAR, *supra* note 306, at 987; Alan M. Dershowitz & John Hart Ely, Comment, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214 (1971); Gardner, *supra* note 43, at 1309 n.222; Loewy, *supra* note 184, at 926.

370. *See* Clymer, *supra* note 28, at 541.

371. *Dickerson*, 530 U.S. at 443-44.

372. *See* Loewy, *supra* note 184, at 915 ("[C]ourts should not care whether or not *Miranda* is violated so long as no evidence obtained from the violation is introduced against the person from whom it was obtained.").

essence, when a police officer conducts a custodial interrogation without adhering to *Miranda*, he is informally granting the suspect immunity.[373] It does not mean that he has done anything wrong.[374]

Indeed, police might sometimes intentionally render immunity informally, and societal benefits might sometimes flow from such an informal grant of immunity, as they do from formal grants. Sixteen years ago, Professor Uviller reported on the phenomenon of the "reverse Miranda warning" used by police after a suspect claim[s] his privilege of silence or requested help from a lawyer: You have asserted your rights under Miranda. That means that anything you say now can never be used against you, do you understand? Now having been advised of your rights, will you tell me what happened.[375]

373. Gardner, *supra* note 43, at 1306 ("[C]ontinued interrogation after assertions of *Miranda* rights might just as easily be viewed as informally granting the suspect limited use immunity."). Ritchie appears to deserve the credit for equating a variance from *Miranda* with an "informal" grant of immunity. *See* Ritchie, *supra* note 28, at 413. *Cf.* Amar & Lettow, *supra* note 92, at 900, 916 n.249 (stating that, after *Miranda*, "any compelled self-incriminating statement, whether inside or outside a courtroom, would automatically trigger immunity"). Kamisar refers to "unintentionally" granted immunity, KAMISAR, *supra* note 306, at 988-89, but it is not necessarily granted unintentionally in all cases. *See infra* text accompanying notes 367-69. Loewy, Kamisar, and Ritchie assumed that the immunity granted would be "use-plus-derivative-use," since such immunity currently is required by a formal grant. *See* Kastigar v. United States, 406 U.S. 441 (1972); Amar & Lettow, *supra* note 92, at 877-80. I agree that "formal" and "informal" immunity should be coextensive, but argue that simple use immunity makes more sense from a textual point of view. *See infra* text accompanying notes 370-73.

374. Chavez v. Martinez, 123 S.Ct. 1994, 2004 (2003) (plurality)("Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights…); *id*. at 2013 (Kennedy, J., concurring in part and dissenting in part)("[F]ailure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensures."); *See also*Kamisar, *supra* note 306, at 1009 (stating that the Court held in *Elstad* that "a victim of a Miranda violation 'has suffered no identifiable constitutional harm'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 307 (1985)); Clymer, *supra* note 28, at 534 ("A police officer who disregards Miranda does nothing wrong.");

375. Uviller, *supra* note 282, at 1141. Of course, telling the suspect that his words "can never be used against" him presents some difficulty since they can currently be used for impeachment pursuant to *Harris v. New York.* 401 U.S. 222, 224-26. Doyle v. Ohio, 426 U.S. 610, 618 (1976) (holding that it would be fundamentally unfair to imply to a suspect that his silence cannot be used against him and then to use it to impeach him); *see Harris*, 401 U.S. at 224-26. As I argue, however, *Harris* should be overruled. *See infra* text accompanying notes 387-92.

More recently, Professor Weisselberg has written on the similar phenomena, which he claims is widespread, of "questioning outside Miranda." *See generally* Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998). *See also* State v. Seibert, 93 S.W. 3d 700, 704 (Mo. 2002)(describing "two-step interrogatory technique designed to elicit an initital confession before reading the accused her rights, hoping that she would repeat that confession.") *cert granted* 123 S.Ct. 2091 (2003). Weisselberg argues

Police might take this course of action when, for example, they have sufficient evidence against one individual and seek evidence against an accomplice,[376] or simply for "corroboration of their suspicion[s]" or for a "personal sense of completion."[377]

Seen in this light, it becomes clear why the fruits of un-Mirandized confessions should be admissible at trial. They simply are not the product of an unconstitutional or otherwise illegal action. Again, the Constitution is not violated unless and until a "compelled" statement is introduced against the defendant in a criminal judicial proceeding. If that never happens, there simply is no "poisonous tree," so there can be no "tainted fruit." Thus, the fruits of un-Mirandized confessions ought to be admissible at trial.

Amar and Lettow have come to a similar conclusion but from a different direction. They have proposed a universal rule of simple use immunity, as distinguished from "use-plus-derivative-use" immunity: where a suspect is compelled to speak against himself, whether because his confession is coerced in a station house or because he is formally granted immunity by a Grand Jury or Congressional Committee, the Self-Incrimination Clause is satisfied as long as the statement itself is not admitted at trial, even if its fruits are.[378] But this solution is not completely satisfying. If, as Amar and Lettow concede, "[o]ur main concerns today should still be *protecting against third-degree tactics* and assuring reliability in evidence,"[379] mere use immunity gets us only halfway there. It is responsive to the latter, subordinate concern but not the former, primary concern, for police will still be inclined to use the "third degree" if they know that the fruits of any confession will be admissible even if the confession itself is not.[380] Even assuming that reliability-enhancement is the driving force behind the Self-Incrimination Clause, where police use tactics that violate a separate constitutional norm—the Fourth

that this is an abusive police practice. However, if the police are not being unduly coercive, they do not violate the plain terms of the Self-Incrimination Clause so long as no statements thereby induced are used against the suspect at trial. *See* Clymer, *supra* note 28, at 524.

376. *See* Loewy, *supra* note 184, at 920-22; Uviller, *supra* note 282, at 1144 n.19.

377. Uviller, *supra* note 282, at 1141.

378. Amar & Lettow, *supra* note 92, at 858-59, 911.

379. *Id*. at 865 (emphasis added); *see* also *id.* at 874-75 n.63 ("unregulated police-station coercion is often bad in itself"); *id.* at 894 ("Courts have . . . rightly shown considerable concern for deterring improper police practices").

380. *See* Kamisar,. *supra* note 306, at 976, 980, 994-95, 1000.

Amendment—reliability-enhancement is not the main concern.[381] Punishing and deterring such police action is.

Thus, absent an accompanying Fourth Amendment violation, mere use immunity makes sense when a suspect is compelled to speak via a grant of immunity, whether formally as in a Congressional hearing or Grand Jury, or informally as in a custodial interrogation without benefit of *Miranda* warnings.[382] Where, however, a coerced confession is concerned, there is a separate Fourth Amendment violation and the "fruit of the poisonous tree" doctrine should apply with full force, resulting in exclusion of both the confession and its fruits.[383]

Returning to our first *Quarles*/*Innis* hypothetical,[384] let us assume, as I first proposed, that a court would find the police officer's actions (shaking the suspect by the shirt collar while screaming in his face, "Where's the gun!") reasonable under the circumstances (an abandoned, loaded weapon near a school for developmentally disabled children). The suspect's hypothetical answer (say, "Right behind the bushes") should be suppressed, not because the police have unreasonably seized him or unreasonably searched his mind for evidence, but rather because the answer was indisputably compelled.[385] Yet because there is no Fourth Amendment violation, suppression of the statement is *all* that is required to satisfy the Constitution. The gun itself is not tainted and it may be introduced into evidence. This is precisely the result Justice O'Connor would have reached in *Quarles*.[386]

381. *See supra* text accompanying notes 198-201.

382. *See* Amar & Lettow, *supra* note 92, at 883 n.109 (noting that the arguments supporting pure use immunity in the *Miranda* context, as articulated by Justice O'Connor in her separate opinion in *New York v. Quarles*, 467 U.S. 649, 665-74 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part), apply equally whenever the Self-Incrimination Clause is implicated).

383. Although Amar and Lettow reject the Fourth Amendment exclusionary rule under all circumstances, *see* Amar & Lettow, *supra* note 92, at 894 & n.169 (citing Amar, *supra* note 277, at 811-19), they recognize that some might disagree on this point but agree with their general argument that fruits of compelled speech are generally admissible. In that case, "fruits of police brutality should be suppressed," but fruits of more "civilized" compulsion should not. Amar & Lettow, *supra* note 281, at 1014 n.11. This is my argument precisely.

384. *See supra* text accompanying notes 341-346.

385. *See* Clymer, *supra* note 28, at 550.

386. 467 U.S. at 665-74 (O'Connor, J., concurring in the judgment in part and dissenting in part). Clymer comes to no definitive conclusion as to the appropriate fate of the gun. *See* Clymer, *supra* note 28, at 540-48.

2. Using the Coerced Confession for Impeachment

On the other hand, viewing a coerced confession as both the product of a Fourth Amendment violation and a potential Fifth Amendment violation also creates a different anomaly calling for re-examination. A defendant now may be impeached at trial with his un-Mirandized confession, on the theory that this does not violate the Self-Incrimination Clause.[387] A defendant may also be impeached with physical evidence that constitutes the product of an illegal search or seizure, on the theory that the deterrence rationale of the exclusionary rule would not be advanced by exclusion in those circumstances.[388] Why, then, may a coerced confession, which should be seen as implicating *both* the Fourth Amendment *and* the Self-Incrimination Clause *never* be used for impeachment?[389] If a testifying defendant may not use either the Fourth or Fifth Amendment "shield" as a "sword" by testifying contrary to either a prior statement or physical evidence without fear of impeachment, there seems little reason to accept the combination of the two as sufficient to provide him with such a valuable weapon.

The Court has explained that exclusion of physical evidence obtained in violation of the Fourth Amendment is required only when the incremental deterrence value of the exclusion in a particular context outweighs its probity as evidence.[390] This is because the exclusionary rule is a remedial device designed to enforce the substantive rights created by the Fourth Amendment.[391] In the context of use of the evidence for impeachment, the Court has ruled, the probative value of the evidence is high, especially given its inherent reliability,[392] while any incremental deterrent effect of applying the exclusionary rule would be minimal.[393] However, again, the Self-Incrimination Clause is, in and of itself, an exclusionary rule.[394] Thus, the Self Incrimination Clause bars use of a coerced

387. *See* Oregon v. Hass, 420 U.S. 714, 722-24 (1975); Harris v. New York, 401 U.S. 222, 224-26 (1971); *supra* text accompanying notes 91-92.

388. United States v. Havens, 446 U.S. 620, 627-28 (1980); *see* Walder v. United States, 347 U.S. 62, 65 (1954).

389. Mincey v. Arizona, 437 U.S. 385, 399-401 (1978).

390. *See* Loewy, *supra* note 184, at 909.

391. *See id.* at 910.

392. *See* Amar & Lettow, *supra* note 92, at 924 ("[T]he Supreme Court's repeated emphasis on trustworthiness has led it to sharpen the difference between testimony and physical evidence.").

393. United States v. Havens, 446 U.S. 620, 627-28 (1980).

394. *See supra* text accompanying notes 341-343.

confession, which would cause the defendant to be a "witness against himself," regardless of the deterrent effect such exclusion might have.

It remains to be seen why a presumptively coerced confession ought to be treated differently for impeachment purposes from an actually coerced confession. In *Harris v. New York*, the Court, relying heavily on Fourth Amendment case law, reasoned that in the context at bar, the incremental deterrent effect of barring use of an un-Mirandized confession for impeachment was outweighed by the utility of the evidence.[395] However, the Court failed to pay heed to the language of the Self-Incrimination Clause and the fact that it differs greatly from the Fourth Amendment. Again, one need not determine whether a cost-benefit analysis dictates application of the exclusionary rule to enforce the Self-Incrimination Clause, because that Clause is self-executing. It contains its own exclusionary rule, and exclusion of a defendant's compelled testimony from being used "against him" is always required.[396] After all, regardless of whether a defendant's words are used in the prosecutor's case-in-chief or for impeachment, such use makes the defendant a "witness against himself."[397]

There is one plausible explanation for treating presumptively coerced confessions differently from actually coerced confessions for impeachment purposes: concerns about reliability. The *Harris* Court added the proviso that un-Mirandized statements could be used for impeachment so long as "the trustworthiness of the evidence satisfies legal standards."[398] The Court thus saw un-Mirandized statements as

395. 401 U.S. 222, 224-26 (1971).

396. *See* Gardner, *supra* note 43, at 1289-91 (criticizing *Harris*, *Tucker*, and *Quarles* for using Fourth Amendment exclusionary rule reasoning out of context); Loewy, *supra* note 184, at 925-26 (arguing that the Court's use of cost/benefit analysis in determining when the exclusionary rule applies in *Miranda* context is illegitimate).

397. This assertion might require a rejection of the Court's determination in *Tennessee v. Street*, 471 U.S. 409, 414 (1985), that when an out-of-court statement by a person who does not testify at trial is used only for impeachment purposes, rather than for the truth of the matter asserted therein, the Confrontation Clause is not implicated. The Court thus held that only hearsay is covered by the Clause. This determination ignores the fact that the rule against hearsay and the Confrontation Clause, while addressing related concerns, are not coextensive. *See* Ohio v. Roberts, 448 U.S. 56, 62 (1980). *Street* is also not supportable with reference to the plain language of the Confrontation Clause. A "witness" is someone who gives testimony, and a witness who testifies live but only for impeachment purposes is no less a "witness." Since the Court, correctly, has extended the concept of "witness" to those who give statements out-of-court that are then used at trial, it should not matter for Confrontation Clause purposes whether the statement is used in the prosecutor's case-in-chief or only for impeachment.

398. *Harris*, 401 U.S. at 224.

being just as trustworthy, in general, as objective, physical evidence.[399] Aside from failing to take into account what the Self-Incrimination Clause actually says, this approach also gives short shrift to *Miranda*'s conclusive presumption of coercion. If this presumption is to be taken seriously, an un-Mirandized statement cannot automatically be assumed to be sufficiently reliable to be used for impeachment. Indeed, quite the opposite should be assumed. Thus, no statement deemed to have been coerced—whether actually or presumptively—should be used "against" its maker, in any form, even for impeachment, when he is on trial in a criminal matter.[400]

V. CONCLUSION

After *Graham*, the rule against coerced confessions must be located, if possible, somewhere within the specific protections of the Bill of Rights. Yet because the rule is multi-faceted and grows from several different concerns, no single constitutional clause can do the heavy lifting required. A "division of labor among constitutional provisions" is in order.[401] After all, as the Court has acknowledged, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."[402] The Court has long recognized, on an intuitive level at least, that the process of wrenching a confession from an unwilling suspect, whether through use of brute physical force or more subtle psychological methods, "affect[s] more than a single right."[403] Such a process is both an affront to human dignity in and of itself, and it also renders the resulting statement an instance of compelled self-incrimination if used at trial. For awhile, the Court lumped these violations together under the rubric of due process. In *Malloy* and *Miranda*, it recognized the self-incrimination aspects of the phenomenon of coerced confessions, but continued, and continues, to utilize the old "due process" language in non-*Miranda* cases.

For good or ill, framing issues in terms of Fourteenth Amendment "due process" is passé with the Court. More

399. *See* Dershowitz & Ely, *supra* note 361, at 1215 (arguing that it makes more sense to allow physical evidence resulting from Fourth Amendment violation, than a statement taken without *Miranda* warnings, to be used for impeachment, because the former is at least reliable).

400. *See* Saltzburg, *supra* note 86, at 18-19 (arguing that *Harris* was wrongly decided).

401. Amar & Lettow, *supra* note 92, at 859.

402. Soldal v. Cook County, 506 U.S. 56, 70 (1992).

403. *Id*.

importantly, it is forbidden where more specific constitutional text applies. It is time for the Court to acknowledge that when a suspect is coerced into confessing, it is not general notions of due process that are violated at the time of the confession. It is the Fourth Amendment.