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It's Alive!: How Early Common Law Changes in the Right Against Self-Incrimination Inform the Right's Continuing Relevance

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Abstract

The intersection of the Self-Incrimination Clause and Miranda warnings has stemmed disagreement among courts on the scope and application of the right against self-incrimination. To aid in their dilemma, court's often embark on a historical inquiry to give insight into proper interpretations of the Clause. In light of a recent circuit split on one of the Clause's key terms—namely what constitutes a "criminal case"—this Article embarks on a historical inquiry that adds clarity to the topic. By highlighting the several ways the right against self-incrimination changed in its 200 year common law history before the Constitutional Convention, this Article argues that the right against self-incrimination was designed, and even intended, to change in the next several hundred years after its adoption into the Constitution.

> "Our forefathers, when they wrote [the right against self-incrimination] into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten to-day."[1]

I. Introduction

"Did you plan to set fire to the city of Westminster?" This question from the defense attorney was designed to invalidate the hostile witness's testimony against his client. This strategy proved short-lived when the judge objected to this line of questioning almost immediately. Normally, a witness could refuse to answer such an inquiry based on his right against self-incrimination; however, this witness did not enjoy such a right, since all of his crimes had already been pardoned. When the defense attorney reminded the court that the witness faced no possibility of incriminating himself, the court reminded the defense attorney "neither his life nor name must suffer, and therefore such questions must not be asked him." In the absence of the pardon, the question opened up the witness to criminal jeopardy; however, even in the presence of the pardon, the question opened up the witness to public reproach and calumny. Therefore, the court blocked such questioning,

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[1] *Maffie v. U.S.*, 209 F.2d 225, 237 (1st Cir. 1954).

finding that the right against self-incrimination also protected witnesses from being compelled to give testimony that would infame or disgrace him.[2]

If this courtroom scenario seems foreign, it is because the right against self-infamation was one of the evolutions of the right against self-incrimination (hereinafter, the "Right") in common law England and the Colonies prior to the Right's codification in the Fifth Amendment of the Constitution. Remembering these forgotten historical developments puts us back into the shoes of the Framers at the time of the Convention. It helps remind us how they understood the Right to tailor itself accordingly to the times in which it was being applied.

This Article argues that the Right's development in the common law for 200 years before the drafting of the Constitution reveals the intention that the Right continue to evolve after its ratification. The Framers knew how the Right had developed in England and the Colonies and would not have been so naive as to believe that they could stop the common law in its tracks. After all, the Right enjoyed consistent and progressive changes since its recognition in the ecclesiastical royal courts of the Crown; what would make the Framers think they could hold it static? Thus, a premium is not put on the size, scope, or effect of these changes, but rather on the existence of such changes.

While the original intent of the Framers may never be divined, this Article makes one thing clear: from its adoption into the common law[3] to its inclusion in the United States Constitution, the Right's meaning and application changed.[4] Such change should not be surprising either: throughout its history, those who championed the Right have adapted

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[2]This scenario closely follows the real events in the 1679 trial of Nathaniel Reading, which was a part of the string of tragic cases in the Popish Plot in England. It illustrates one of the first times a court recognized the right against self-infamation as an established right in the common law, even though it had been advocated for in previous generations. See Levy, infra note 9, at 317.

[3]The Right was officially recognized in English common law in 1649 after the two day trial and public spectacle of John Lilburne, who was accused and eventually acquitted of high treason. See Levy, infra note 9, at 300–01, 313.

[4]Although not the subject of this Article, subtle changes can be traced back to the Right's roots in the Latin maxim *nemo tenetur prodere seipsum* in the European *ius commune*. See Richard H. Helmholz, The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century, in The Privilege against Self-Incrimination 17 (Richard H. Helmholz et al. eds., 1997) [hereinafter Helmholz, Privilege]. The term *nemo tenetur prodere seipsum* roughly translates to mean that "no man is bound to accuse himself." See Levy, infra note 9, at 3. See Helmholz, Introduction, in The Privilege against Self-Incrimination 17 [hereinafter Helmholz, Introduction] (stating that the *ius commune* was the most common justice system in the Middle Ages in Europe; the *ius comune* was a combination of Roman law and Canon law that dominated European legal education before the modern era).

it to keep up with the changes in the criminal procedure of their times.[5] This realization lends a rational basis to believe the Framers expected that the Right would continue to change 200 years after the Constitutional Convention as it had done for the previous 200 years.

These historical happenings still prove relevant today, especially in the wake of *Miranda v. Arizona*[6] and the volumes of case law which it has spawned. *Miranda's* importance in our justice system is considerable. This case requires that law enforcement agents inform all that enter custodial interrogation that they have the right to remain silent and the right to speak to an attorney.[7] While it has its share of detractors,[8] *Miranda* has also been described as the mainstay of our criminal justice system.[9] It continues to stand as a symbol that represents the Court's goal toward expanding rights of the accused[10] during an era of injustice in our country's history.[11] Like the generations before the founding, the Court interpreted the Right to keep up with the ever changing procedures in the criminal justice system of their time.

Perhaps expectedly, the paradigm shift introduced by *Miranda* has caused confusion over the scope and application of the Right in the past few decades. Courts have filled volumes with discussions of *Miranda*'s progeny, which both limit *Miranda* and explores its relevance.[12]

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[5]More apply stated, "Advocates . . . [took] existing legal precedents into different contexts, turning them to new uses. In that sense there has been progression, even continuity of a kind . . . The rule has meant different things at different times." Helmholz, Introduction, supra note 4, at 12.

[6]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

[7]*Miranda*, 384 U.S. at 479.

[8]See generally, e.g., Stephen J. Markman & Paul Marcus, Miranda Decision Revisited: Did It Give Criminals Too Many Rights?, 57 UMKC L. Rev. 15, 15–20 (1988); Gerald M. Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417 (1985); Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387 (1996); Phillip E. Johnson, A Statutory Replacement for the Miranda Doctrine, 24 Am. Crim. L. Rev. 303 (1987).

[9]See Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination xi, 432 (1st ed. 968).

[10]See Michael J. Roth, Note, Berkemer Revisited: Uncovering the Middle Ground Between Miranda and the New Terry, 77 Fordham L. Rev. 2779, 2786 (2009) (calling *Miranda* the peak of the Warren Court's criminal procedure revolution (quoting Lucas A. Powe, Jr., The Warren Court and American Politics 407 (2000))).

[11]The 1960s was a time of both recovery from McCarthyism and the Red Scare, and also was the height of the Civil Rights era. See infra note 157 and accompanying text.

[12]See, e.g., *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980);

Chavez v. Martinez[13] is an exemplar of the need for clarity on this subject. *Chavez* held that the Right can only be broken if un-*Mirandized*[14] or coerced[15] self-incriminating evidence is used in a "criminal case."[16] However, the Court expressly declined to give a concrete meaning to the term "criminal case."[17] The Court has yet to clarify *Chavez*, which has caused a circuit split in the U.S. courts of appeals. The Court has clearly said that the Right is not applicable before criminal charges are filed,[18] and that the same Right is applicable at the actual criminal trial.[19] What about the period of time from when criminal charges are filed up until the commencement of trial? Is the self-incrimination clause applicable in this gray area? The

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California v. Prysock, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981); *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Dickerson v. U.S.*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003); *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). This footnote is not meant to be exhaustive, but only names a few examples of important developments in *Miranda* jurisprudence since the *Miranda* rule's inception.

[13]*Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003).

[14]For purposes of this Article, the term "un-*Mirandized*" statements or evidence will be defined as statements or evidence obtained without a *Miranda* warning. In other words, statements or evidence obtained in a situation where *Miranda* rights should have been read, but they were not.

[15]It is important to note the circuit split caused by *Chavez* addresses both the use of un-*Mirandized* self-incriminating evidence as well as coerced self-incriminating evidence. Un-*Mirandized* statements fit under the umbrella of "coerced" statements. *Miranda* is based on the idea that custodial interrogation is inherently coercive, and so *Miranda* warnings help prevent coerced self-incriminating statements. *Miranda*, 384 U.S. at 719.

Chavez governs for both situations. It covers wrongfully obtained self-incriminating evidence, including un-*Mirandized* and coerced statements. See *Chavez*, 538 U.S. at 766.

For the inadmissibility of coerced evidence under the Fifth Amendment, see the well cited case *Bram v. U.S.*, 168 U.S. 532, 542, 18 S. Ct. 183, 42 L. Ed. 568 (1897) ("In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the Self-Incrimination Clause] of the Fifth Amendment."); see also *Rochin v. California*, 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952) (explaining why coerced confessions are inadmissible under the Fourteenth Amendment's Due Process Clause: because of their unreliability, and their offense of the community's sense of fair play and decency); *Lynumn v. Illinois*, 372 U.S. 528, 537, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963); *Rogers v. Richmond*, 365 U.S. 534, 540–41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

[16]*Chavez*, 538 U.S. at 772–73.

[17]*Chavez*, 538 U.S. at 767.

[18]*Chavez*, 538 U.S. at 769.

[19]*Miranda*, 384 U.S. at 491–99.

Third, Fourth, and Fifth Circuits have answered no, holding that the term "criminal case" should be interpreted as a criminal trial that commences with opening arguments in front of a judge.[20] The Second, Seventh, and Ninth Circuits have answered yes, holding that the term "criminal case" should be interpreted as any criminal proceeding, commencing after criminal charges have been filed against a suspect.[21]

While the circuit split is still ripe, this Article differs from common scholarship addressing circuit splits in that resolving the split is not the focus, but rather illustrates the need for clarity on the subject.[22] This Article attempts to find such clarity by adding to the lively debate in scholarship between Living Constitutionalism and Originalism. Whereas Living Constitutionalism interprets the Constitution as a document that was designed to change over time, Originalism argues that the Constitution is best understood and applied as the original Framers, and citizens at the time, would have understood and applied the document. Over the years, for example, academics have attacked *Miranda*'s scope and effect by appealing to originalist ideals of the Right;[23] these interpretations have been wielded to undercut the application of the Right and the buffer zone that *Miranda* warnings provide for its protection.[24] While the debate on proper interpretation rages on, courts similarly disagree on the application of *Miranda*, which tie back to differing historical interpretations of the Right.[25]

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[20]See *Renda v. King*, 347 F.3d 550, 559, 62 Fed. R. Evid. Serv. 1131 (3d Cir. 2003); *Burrell v. Virginia*, 395 F.3d 508, 513–14 (4th Cir. 2005); *Murray v. Earle*, 405 F.3d 278, 285, 289–90 (5th Cir. 2005).

[21]See *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1026–27 (7th Cir. 2006); *Higazy v. Templeton*, 505 F.3d 161, 170–73 (2d Cir. 2007); *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009).

[22]In this respect, this Article is quite different from works that have sought resolution of this particular circuit split through some novel interpretation or underlying current of common reasoning. See, e.g., Geoffrey B. Fehling, Note, Verdugo, Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations, 18 Geo. Mason L. Rev. 481 (2011); Thea A. Cohen, Note, Self-Incrimination and Separation of Powers, 100 Geo. L.J. 895 (2012).

[23]See generally Akhil Reed Amar & Renee B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857, 900 (1995).

[24]*Miranda* warnings are described as a prophylactic measure meant to safeguard the Right. Therefore, a violation in *Miranda* is not a violation of the Right itself, but is meant to be a buffer zone so as to prevent anyone from coming close to breaking the Right. See *Withrow v. Williams*, 507 U.S. 680, 690–91, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) (citing *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987); *Oregon v. Elstad*, 470 U.S. 298, 305, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985); *Quarles*, 467 U.S. at 654; *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974)).

[25]"The history of the Fifth Amendment right against compulsory self-incrimination, and the evils against which it was directed, have received considerable attention in

Therefore, this Article seeks to resolve the split in academia more so than resolve the split in the U.S. courts of appeals.

In so doing, this Article proceeds in five parts. Following this section, Section II provides a brief backdrop of the history of *Miranda*, the path to *Chavez*, and ultimately the culmination of uncertainty on the Right's application in a "criminal case" as illustrated in the circuit split. With this illustration in mind, Section III considers a brief background on the debate between Living Constitutionalism and Originalism as the methodological frame. This leads into Section IV, which discusses the common law history and changes of the Right from its recognition as a common law right in England through its adoption in the Constitution. These changes are the key, and show that the Right's understanding and application has changed with time. Section V concludes the Article, and offers both a look at the historical lessons learned from the various changes of the Right as well as short thoughts on interpreting the Right in light of the circuit split.

II. *MIRANDA* AND BEYOND: U.S. COURTS AND THE SELF-INCRIMINATION CLAUSE

The Fifth Amendment's Self-Incrimination Clause states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[26] This clause was interpreted perhaps most influentially in *Miranda*. This influence justifies analysis of the cases that led to *Miranda*, *Miranda* itself, and *Miranda's* progeny as a central component in tracking the Supreme Court's past and present perceptions of the Right.[27]

Until *Miranda*, the voluntariness test was commonly employed in

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the opinions of this Court." *Tucker*, 417 U.S. at 439 (citing *Kastigar v. U.S.*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966); *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678, 56 L.R.R.M. (BNA) 2544, 49 Lab. Cas. (CCH) P 51102 (1964) (abrogated on other grounds by, U.S. v. Balsys, 524 U.S. 666, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 49 Fed. R. Evid. Serv. 371 (1998)); *Ullmann v. U.S.*, 350 U.S. 422, 426, 76 S. Ct. 497, 100 L. Ed. 511, 53 A.L.R.2d 1008 (1956); *Counselman v. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, 3 A.F.T.R. (P-H) P 2529 (1892) (overruled on other grounds in part by, Kastigar v. U.S., 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972))). *Murphy*, for example, considered the Right's development in English common law and in the U.S. courts, and used these lessons from history to inform its ruling. See *Murphy,* 378 U.S. at 58–77. *Miranda* similarly recalled the history of the Star Chamber and the roots of the Right in common law in order to justify developing the prophylactic that the decision is famous for. See *Miranda*, 384 U.S. at 458–60.

[26]U.S. Const. amend. V.

[27]Even though this Article focuses on the correct interpretation of the Right, *Miranda* and its progeny are chiefly relevant because it has shaped American jurisprudence on how to interpret the Right. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 427, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (describing *Miranda* as "[the Court's] interpretation of the Federal Constitution"); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 909 (1999) (explaining that at the time

criminal procedure.[28] This legal rule viewed any confession as admissible so long as it was voluntary. Unfortunately, voluntariness was an unsound standard that was difficult to ascertain.[29] Not surprisingly, the voluntariness standard subjected many criminal suspects to torturous ordeals at the hands of the state in order to elicit a "voluntary" confession.[30] Cases like *Brown v. Mississippi,*[31] *Brooks v. Florida,*[32] and *Lynum v. Illinois*[33] represent the limitations of the voluntariness test, which placed too much faith in the veracity of confessions while failing to provide defendants with meaningful protection. In light of a steady stream of legal challenges in the 1950s and 1960s, the Court realized that reforms were needed and embarked on fashioning responsive safeguards.[34]

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of decision, *Miranda* was understood to be "an interpretation of the Fifth Amendment, which forbids compelling a person 'to be a witness against himself' in 'any criminal case' ''); *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (describing *Miranda* rules as resting on "the Fifth Amendment privilege against self-incrimination"); *Michigan v. Jackson*, 475 U.S. 625, 629, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) (overruled on other grounds by, Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009)) ("The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations."); *Edwards v. Arizona*, 451 U.S. 477, 481–82, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) (describing *Miranda* as having "determined that the Fifth and Fourteenth Amendments" required custodial interrogation to be preceded by advice concerning the suspect's rights).

Pre-*Miranda* decisions regarding the Right, some of which are explored in this Article, are only important if they provide a lead up to *Miranda* given the scope of this Article.

[28]See Paul Marcus, Defending Miranda, 24 Land & Water L. Rev. 241, 242 (1989); Roscoe C. Howard, Jr. & Lisa A. Rich, A History of Miranda and Why It Remains Vital Today, 40 Val. U. L. Rev. 685, 686–87 (2006).

[29]To a certain extent, the voluntariness standard still exists, since a voluntary waiver of *Miranda* rights can lead to a confession.

[30]See Marcus, supra note 28, at 242–43.

[31]*Brown v. State of Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936). In *Brown*, the suspect was hanged from a tree and continually whipped until he confessed. *Brown*, 297 U.S. at 281–82.

[32]*Brooks v. Florida*, 389 U.S. 413, 88 S. Ct. 541, 19 L. Ed. 2d 643 (1967). In *Brooks*, a suspect was confined in a small cell and given a restricted diet for thirty-five days until he confessed. *Brooks*, 389 U.S. at 413–14.

[33]*Lynumn v. Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). In *Lynum*, psychological coercion was involved to elicit a confession involving the use of threats regarding the suspect's children being taken away unless a confession was given. *Lynum*, 372 U.S. at 533–34.

The fact that many of these confession cases with horrendous fact patters involve racial minorities, including the upcoming *Miranda* decision, should be no surprise as the Court continued to move in this era for protections for minorities.

[34]See Marcus, supra note 28, at 242.

Mallory v. Hogan[35] and *Murphy v. Waterfront Commission*[36] were steps towards applying safeguards where they were needed the most: state law enforcement agencies.[37] Since the Constitution only applied to the federal government, *Mallory* made the Right applicable to the states through the Fourteenth Amendment;[38] *Murphy* was an appropriate complement to *Mallory*,[39] holding that the Right may be enjoyed in state court where an answer may incriminate the witness in federal court, and vice versa.[40]

It was *Escobedo v. Illinois*,[41] however, that made the most significant pre-*Miranda* break from the voluntariness test. In *Escobedo*, a murder suspect was being interrogated by the police when his request to speak with a lawyer was refused. The Supreme Court overturned the defendant's subsequent conviction, stating that the state's denial of counsel was in violation of the Sixth Amendment, which guarantees the accused the right to the assistance of counsel in all criminal prosecutions.[42] The Court importantly acknowledged that the period between arrest and indictment is critical because most false confessions are elicited during this time.[43] Consequently, the Court held that if the accused is denied a lawyer during this period, any statements made by the accused would be inadmissible in a criminal trial.[44]

A. Miranda and its Progeny

The Court's logic in *Escobedo* set the stage for *Miranda v. Arizona*.[45] When *Miranda* was decided, the Warren Court seemed to be on a

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[35]*Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[36]*Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678, 56 L.R.R.M. (BNA) 2544, 49 Lab. Cas. (CCH) P 51102 (1964) (abrogated on other grounds by, U.S. v. Balsys, 524 U.S. 666, 118 S. Ct. 2218, 141 L. Ed. 2d 575, 49 Fed. R. Evid. Serv. 371 (1998)).

[37]See supra notes 31–32 and accompanying text. All of these egregious fact patterns, came out of the states' sovereign exercising its police powers. This is to be expected, as most law enforcement duties are given to the states.

[38]*Mallory*, 378 U.S. at 7.

[39]The decisions for both *Murphy* and *Mallory* were handed down on the same day, which lends credence to the thought that the Court fashioned each with the other in mind.

[40]*Murphy*, 378 U.S. at 77–79.

[41]*Escobedo v. State of Ill.*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

[42]U.S. Const. amend. VI.

[43]*Escobedo*, 378 U.S. at 488.

[44]*Escobedo*, 378 U.S. at 488, 490–91.

[45]*Miranda*, 384 U.S. at 436.

See *Miranda*, 384 U.S. at 465–66, which captures the Court's reliance on *Escobedo* to support its reasoning in the *Miranda* decision.

campaign to expand the rights of the criminally accused,[46] which prompted it to progressively apply the Self-Incrimination Clause to situations outside of trial.[47] In *Miranda*, police took suspect Ernesto Miranda into custody and interrogated him.[48] Miranda was not advised of his right to remain silent or of his right to consult with an attorney.[49] Later, his confession to police officers was introduced by the prosecutor to incriminate him at trial.[50] The Court, noting these procedural defects, overturned Miranda's conviction and held that when a suspect is subject to custodial interrogations,

> [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[51]

Miranda warnings have been issued countless times over the decades by law enforcement officers when taking people into custody. Meanwhile, the warning has become one of the most popular phrases in American history.

Even more important than the ushering of the new *Miranda* warnings rule was the Court's findings earlier in its opinion that "[t]oday, then, there can be no doubt that the Fifth Amendment privilege [against self-incrimination] 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

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[46] *Miranda,* 384 U.S. at 467.

[47] See Roth, supra note 10, at 2786 (string citing numerous cases to illustrate the expansion of rights of the criminally accused, including the following: *Katz v. U.S.*, 389 U.S. 347, 357–59, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (declaring that wiretapping of telephone booths by investigators without a warrant violated the Fourth Amendment); *Escobedo*, 378 U.S. at 490–91 (ruling that the Sixth Amendment provides a criminal defendant the right to counsel during a police interrogation); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (finding a due process violation where the prosecution withheld certain evidence from the defendant during trial); *Douglas v. People of State of Cal.*, 372 U.S. 353, 355, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (guaranteeing indigent defendants the right to counsel during their first appeal of a criminal trial); *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963) (requiring states to provide counsel to defendants who could not afford one in criminal trials according to the Sixth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 653–55, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961) (incorporating the exclusionary rule to state criminal procedure law through the Fourteenth Amendment)).

[48] *Escobedo*, 378 U.S. at 491.

[49] *Escobedo*, 378 U.S. at 491.

[50] *Escobedo*, 378 U.S. at 492.

[51] *Escobedo*, 378 U.S. at 479.

incriminate themselves."[52] The Court candidly recognized that it was expanding the scope of the Fifth Amendment. The Court continued such expansion in *Lefkowitz v. Turley*[53] by expanding the Right to civil trials.[54]

Such expansions of *Miranda* and the Right caused uneasiness, prompting the Court to scale back the protections.[55] For one, since "custodial interrogation" was necessary to trigger the protections under *Miranda*, the Court sought to construe the term as narrowly as possible. In *California v. Beheler*,[56] the Court emphasized the meaning of "custodial" by noting that, "in *Miranda* . . . '[by] custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' "[57] In contrast, the Court

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[52]*Miranda*, 384 U.S. at 467.

[53]*Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973); see also *McCarthy v. Arndstein*, 266 U.S. 34, 35, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

[54]Witnesses can exercise their right to remain silent (or in other words, not be compelled to give an answer) during official questioning in a civil or criminal trial. This right would prevent otherwise compelled answers from causing a witness to be criminally prosecuted at some future time in light of his or her testimony. See *Lefkowitz*, 414 U.S. at 77; *McCarthy*, 266 U.S. at 40. *Chavez* is harmonious with *Lefkowitz* because even if a witness is compelled to answer at such a proceeding, the witness's privilege against self-incrimination is not broken unless it is used at the witness's potential future criminal prosecution. See *Lefkowitz*, 414 U.S. at 78. Yet, the holding still illustrates the broader point that the Court was expanding the scope of the application of Fifth Amendment protections. Similar to *Miranda*, *Lefkowitz* could be characterized as a prophylactic right; therefore, a witness exercising their privilege against self-incrimination by not answering a question is preventing even the possibility of the Right being violated because there will be no self-incriminating statement to introduce at their potential future criminal prosecution.

[55]See Caplan, supra note 8, at 1418 (illustrating the Supreme Court's unwillingness to expand *Miranda*, and the Court's dilution of *Miranda*'s principles (citing *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); Geoffrey R. Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, 118 (1977)).

Miranda's progeny were probably reactionary measures to prevent the dangerous expansion of the paradigm, or to protect the Court's legitimacy. The persuasion of this point is magnified when considering *Miranda's* critics in law enforcement and academia that thought the Court overstepped its bounds and usurped the role of the legislature in determining specific rules to protect Constitutional rights. See Roth, supra note 10, at 2789–90; see also Richard A. Leo, Miranda, Confessions, and Justice: Lessons for Japan?, in the Japanese Adversary System in Context: Controversies and Comparisons 200, 202 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002) (describing how law enforcement initially saw *Miranda* as ironically handcuffing them, preventing them from effectively investigating crimes and ultimately incarcerating criminals).

[56]*California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983).

[57]*Beheler*, 463 U.S. at 1123 (quoting *Miranda*, 384 U.S. at 444).

limited the "interrogation" aspect of *Miranda* in *Rhode Island v. Innis*[58] by holding "the term 'interrogation' under *Miranda* refers . . . to express questioning . . . [and] also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[59] Thus, as long as the police did not limit the physical freedom of a suspect or question them directly or indirectly, any self-incriminating statements could be used at trial without needing a *Miranda* warning. Additionally, *California v. Prysock*[60] gave law enforcement agents more flexibility in the practical application of *Miranda* warnings by not requiring that they be said verbatim.[61] *New York v. Quarles*[62] loosened the standard even further by establishing an exception to giving a *Miranda* warning when there was a public safety threat, as determined by the discretion of the individual law enforcement agent present at the scene.[63]

Such limits started to deteriorate the once expansive interpretation of the Self-Incrimination Clause that *Miranda* had articulated; the Court whittled away *Miranda*'s standards so much so that *Miranda*'s relevance was questioned in criminal justice.[64]

However, the Court refused to completely disband *Miranda* in *Dickerson v. United States*.[65] *Dickerson* was filed in response to a U.S. congressional statute that sought to do away with *Miranda* completely by reviving the voluntariness test.[66] The case arose out of an incident where a suspect made a voluntary, but un-*Mirandized*, self-

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[58] *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

[59] *Innis*, 446 U.S. at 300–01.

[60] *California v. Prysock*, 453 U.S. 355, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981).

[61] *Prysock*, 453 U.S. at 359–61.

[62] *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

[63] *Quarles*, 467 U.S. at 655–56.

[64] See Alfredo Garcia, Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?, 10 St. Thomas L. Rev. 461, 462–63 (1998) (arguing that the *Miranda* rule was a failure of the Warren Court and that it had effectively been done away with by cases like *Innis* and *Quarles*); see also Roth, supra note 10, at 2795 (noting that the development of the more conservative Burger Court had added to speculation that *Miranda* was losing importance).

[65] *Dickerson v. U.S.*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

[66] 18 U.S.C.A. § 3501(a) states:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

The purpose of this statute was to overrule *Miranda*. See *Dickerson*, 530 U.S. at 436.

incriminating statement during interrogation at an FBI office.[67] The Court denied the admissibility of this self-incriminating evidence and stated that *Miranda*—as a constitutional interpretation of due process rights—cannot be superseded by a contrary congressional statute.[68]

B. Chavez v. Martinez

While confusion was still lingering over *Miranda*'s continuing relevance, the Court decided *Chavez v. Martinez*.[69] The case involved the custodial interrogation of suspect Oliviero Martinez while he was at the hospital being treated for a gunshot wound.[70] Due to the stress caused by his injury, persistent questioning by the police, and a reasonable belief that death was imminent, Martinez gave an un-*Mirandized*, self-incriminating confession.[71] Martinez, however, survived the ordeal and later brought a section 1983 claim[72] against the police, even though he was never charged with a crime.[73]

The Court held that there had been no violation of Martinez's rights,[74] thereby clarifying an important point about *Miranda* and the Right. The Court reiterated that *Miranda* is a mere prophylactic rule that helps prevent any infringement of the Right.[75] Having *Miranda* rights read to a suspect is not a constitutional right in and of itself, but rather is employed as a buffer zone to prevent constitutional rights from being

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[67] *Dickerson*, 530 U.S. at 432.

[68] *Dickerson*, 530 U.S. at 432.

[69] *Chavez*, 538 U.S. at 760.

[70] *Chavez*, 538 U.S. at 764.

[71] *Chavez*, 538 U.S. at 764.

[72] 42 U.S.C.A. § 1983 reads:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1983 is a part of the Civil Rights Act of 1871 and allows people to sue state actors who violate their constitutional rights. Starting with *Chavez* and continuing through the circuit split, all of the cases discussed in this Article involved causes of action for relief under section 1983, claiming that State actors (law enforcement) broke their Fifth Amendment Right against self-incrimination.

[73] *Chavez*, 538 U.S. at 764–65.

[74] *Chavez*, 538 U.S. at 766, 776.

[75] *Chavez*, 538 U.S. at 770, 772.

broken.[76] As a result, "the absence of a 'criminal case' in which Martinez was compelled to be a 'witness' against himself defeats his core Fifth Amendment claim."[77]

Unfortunately, the question of what does constitute a Fifth Amendment claim was not addressed in *Chavez*. Although the Court articulated what does not constitute a "criminal case," it never articulated what does. Instead, the Court found that they "need not decide today the precise moment when a 'criminal case' commences," but that "a 'criminal case' at the very least requires the initiation of legal proceedings."[78] The Court did provide clues as to its intent by citing *Blyew v. United States*[79] and *Black's Law Dictionary*[80] to give a broad understanding of the definition of the term "case,"[81] but explicitly refused to decide the bounds of a "criminal case" for purposes of proper application of the Self-Incrimination Clause.

C. Circuit Split

This uncertainty caused by the undefined term of "criminal case" caused a circuit split, as lower courts have been left to answer follow-up questions: What constitutes a "criminal case" when using un-*Mirandized* self-incriminating evidence? Is such evidence excluded from only criminal trials (hereinafter referred to as the "Criminal Trial Theory"), or is it also excluded from any criminal proceeding after criminal charges have been filed (hereinafter referred to as the "Criminal Proceeding Theory")? All the courts agree that such evidence cannot be used at trial, but disagree on the legal rule applied in the gray area between the filing of criminal charges and the commencement of a criminal trial.

1. The Criminal Trial Theory: The Third, Fourth, and Fifth Circuits

The Third, Fourth, and Fifth Circuits have all held that the Right only applies to self-incriminating un-*Mirandized* statements used against a defendant at a criminal trial.

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[76]See *Chavez*, 538 U.S. at 770–71. A poor analogy is that jumping in the mote and swimming is not a violation in and of itself. Rather, it is only when you penetrate the castle that there is reason to go to war.

[77]*Chavez*, 538 U.S. at 772–73.

[78]*Chavez*, 538 U.S. at 767, 762. The Court says something very similar in *U.S. v. Patane*, 542 U.S. 630, 637, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) ("We need not decide here the precise boundaries of the [Self-Incrimination] Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.").

[79]*Blyew v. U.S.*, 80 U.S. 581, 595, 20 L. Ed. 638, 1871 WL 14736 (1871).

[80]Black's Law Dictionary 215 (6th 1990).

[81]*Chavez*, 538 U.S. at 766.

Only a few months after *Chavez*, the Third Circuit decided *Renda v. King*.[82] In this case, Valerie Renda filed criminal charges against her boyfriend for domestic abuse.[83] Later, Renda claimed to have been slammed against a wall in a follow-up call with the police.[84] The next day, the police interviewed Renda in person, but Renda did not reiterate the wall slamming incident in her written report because she admitted it was fabricated.[85] Even though the police conducted their interrogation of Renda without reading giving her a *Miranda* warning,[86] they still charged her with filing a false police report and took her into custody.[87] Further, they used her un-*Mirandized* self-incriminating statements to develop probable cause sufficient to charge her.[88] Later, the criminal case was dropped because the Renda's confession was excluded due to the lack of a *Miranda* warning.[89] When Renda later filed a section 1983 claim, the Third Circuit dismissed it, saying

> [U]nlike in *Chavez*, Renda's statement was used in a criminal case in one sense (i.e., to develop probable cause sufficient to charge her). To the extent that *Chavez* leaves open the issue of when a statement is used at a criminal proceeding . . . our prior decision in *Giuffre* compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution.[90]

The Third Circuit acknowledged that this case differed significantly from *Chavez*. Accordingly, it instead relied upon its prior ruling in *Giuffre v. Bissell*[91] to decide the case. *Guiffre* held that un-*Mirandized* self-incriminating evidence had to be used at a criminal trial in order to infringe on the privilege against self-incrimination.[92] Thus, while not expressly relying on *Chavez*, the Third Circuit became the first federal court of appeals to interpret the term "criminal case" to mean a criminal trial in light of the ambiguity left by *Chavez*.

The Fourth Circuit examined a similar issue a few years later in *Burrell v. Virginia*.[93] At the scene of a traffic accident, police asked one of

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[82] *Renda v. King*, 347 F.3d 550, 62 Fed. R. Evid. Serv. 1131 (3d Cir. 2003).

[83] *Renda*, 347 F.3d at 552.

[84] *Renda*, 347 F.3d at 552.

[85] *Renda*, 347 F.3d at 552.

[86] *Renda*, 347 F.3d at 552.

[87] *Renda*, 347 F.3d at 552.

[88] *Renda*, 347 F.3d at 553, 559.

[89] *Renda*, 347 F.3d at 553.

[90] *Renda*, 347 F.3d at 559.

[91] *Giuffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994).

[92] *Giuffre*, 31 F.3d at 1256.

[93] *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005).

the drivers involved, Burrell, to provide proof of insurance.[94] Instead, Burrell asserted his right against self-incrimination because he would have incriminated himself for the crime of not maintaining car insurance.[95] After this request and refusal occurred several times, police charged Burrell with obstruction of justice and failure to maintain insurance.[96] A Virginia traffic court convicted Burrell of obstruction of justice, but his conviction was later reversed on appeal.[97] While this case differs markedly from *Chavez*, the Fourth Circuit still held that the Right can only be violated at a trial because

> [t]he *Chavez* plurality . . . refused to allow a section 1983 suit to proceed, on the ground that no constitutional violation had occurred, since the compelled testimony was never admitted in court . . . On the reasoning of . . . the *Chavez* plurality . . . Burrell's Fifth Amendment section 1983 claim fails [because] [h]e does not allege any *trial* action that violated his Fifth Amendment rights.[98]

A plain reading of this language shows the Fourth Circuit interpreting *Chavez* and the Self-Incrimination Clause to require an actual trial to trigger the possibility of a constitutional violation.

Only months after this decision, the Fifth Circuit provided the same interpretation of the term "criminal case" in *Murray v. Earle*.[99] LeCresha Murray, an eleven year old girl, was a suspect in the death of a two year old victim.[100] Initially, Murray gave an un-*Mirandized* confession after police subjected her to a two hour custodial interrogation.[101] The trial court admitted this confession into evidence, which was a substantial factor in Murray's conviction.[102] Three years later, an appeals court reversed the conviction.[103] The Fifth Circuit relied on *Chavez* in deciding that Murray's rights *were* infringed because "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pretrial conduct by law enforcement officials may ultimately impair that right."[104] Therefore, the Fifth Circuit determined that Murray's Right was *only* infringed because the self-incriminating evidence was used at an

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[94] *Burrell*, 395 F.3d at 510.

[95] *Burrell*, 395 F.3d at 510.

[96] *Burrell*, 395 F.3d at 510.

[97] *Burrell*, 395 F.3d at 511.

[98] *Burrell*, 395 F.3d at 513–14.

[99] *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005).

[100] *Murray*, 405 F.3d at 283.

[101] *Murray*, 405 F.3d at 284.

[102] *Murray*, 405 F.3d at 284.

[103] *Murray*, 405 F.3d at 284.

[104] *Murray*, 405 F.3d at 285 (emphasis in original).

actual trial.[105] Additionally, the Fifth Circuit used *Chavez* to assert that the use of the term "criminal case" in the Self-Incrimination Clause should be construed as denoting a trial right.[106] Again, this is exactly what *Chavez* refused to determine, yet it was used in dicta by the circuit courts to determine the admission of un-*Mirandized* confessions.

2. Criminal Proceeding Theory: The Seventh Circuit, Second Circuit, and Ninth Circuit

In contrast, the Seventh, Second, and Ninth Circuits have held that the Right applies whenever an un-*Mirandized* statement is used against a defendant at any and all criminal pretrial proceedings.

The Seventh Circuit first considered this issue in *Sornberger v. City of Knoxville*.[107] The case is born out of the police's believe that the Sornbergers, a husband and wife couple, committed a bank robbery.[108] During Teresa Sornberger's interrogation, she made an un-*Mirandized* false confession that was later used against the couple in a preliminary hearing to determine if there was probable cause to charge them with the crime, a bail hearing determining the amount of bail, and a subsequent arraignment where Teresa entered her plea.[109] While the Sornbergers awaited their trial date for four months in prison, another man was caught in connection with a string of bank robberies, and confessed to the crime for which the Sornbergers were charged. This exculpatory evidence led to the Sornbergers' release, and they soon after filed a section 1983 claim.[110]

In response, the Seventh Circuit acknowledged the differences between the Sornbergers' case and *Chavez*, noticing that "[Teresa's] 'criminal case' advanced significantly farther than did that of the *Chavez* plaintiff, who never had criminal charges filed against him at all."[111] Instead, "Teresa's statement . . . allowed police to develop probable cause sufficient to charge her and initiate a criminal prosecution."[112] Ultimately, the Seventh Circuit decided that using this un-*Mirandized* confession in pretrial criminal proceedings did violate the Sornberger's Right, which in turn supported their section 1983 claim.[113] In explaining its reasoning, the Seventh Circuit stated,

[U]nder *Chavez*, a criminal prosecution must at least be initiated to

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[105] *Murray*, 405 F.3d at 289.

[106] *Murray*, 405 F.3d at 285 n.12.

[107] *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006).

[108] *Sornberger*, 434 F.3d at 1015.

[109] *Sornberger*, 434 F.3d at 1010–12, 1026.

[110] *Sornberger*, 434 F.3d at 1009, 1012.

[111] *Sornberger*, 434 F.3d at 1025.

[112] *Sornberger*, 434 F.3d at 1025.

[113] *Sornberger*, 434 F.3d at 1027.

> implicate a suspect's privilege against self-incrimination. We are also conscious of language in *Chavez* suggesting that the Fifth Amendment is, at bottom, a trial protection. Yet, where, as here, a suspect's criminal prosecution was not only initiated, but was commenced *because* of her allegedly un-warned confession, the "criminal case" contemplated by the Self-Incrimination Clause has begun. That Teresa's confession was then introduced as evidence of her guilt at a probable cause hearing, a bail hearing and an arraignment proceeding further persuades us that Teresa was "compelled in [a] criminal case to be a witness against herself."[114]

Following the Seventh Circuit's line of reasoning, the Second Circuit decided *Higazy v. Templeton*.[115] This case stemmed from the FBI's arrest of Abdallah Higazy after the 9/11 terrorist attacks. Higazy's arrest arose from an anonymous tip that claimed that Higazy had a radio transmitter that could support ground-to-air communications in his hotel room, located blocks away from Ground Zero.[116]

The Second Circuit later determined that the FBI agents coerced[117] self-incriminating statements out of Higazy, which were later used at a bail hearing to justify holding Higazy without bail.[118] However, it was later discovered that the radio transmitter was not owned by Higazy and he was released.[119] In its ruling, the Second Circuit pointed out that the type of bail hearing endured by Higazy was governed by the Federal Rules of Criminal Procedure. As these Rules govern all forms of criminal proceedings, these bail hearings should count as a critical stage of a "criminal case" with regards to the Right and *Chavez*.[120] Therefore, the Second Circuit found that the use of un-*Mirandized* self-incriminating statements in pretrial proceedings violates a suspect's civil rights and can support a section 1983 claim.[121]

Most recently, the Ninth Circuit applied the same rule when it decided *Stoot v. City of Everett*.[122] *Stoot* involved a four year old victim

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[114] *Sornberger*, 434 F.3d at 1026–27 (emphasis in original) (quoting U.S. Const. amend V).

[115] *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007).

[116] *Higazy*, 505 F.3d at 164–65.

[117] The primary issue in *Higazy* speaks to coerced self-incriminating evidence and does *not* concern un-*Mirandized* self-incriminating evidence. Even with this difference, it is still relevant to interpreting *Chavez* since that case is applicable to both coerced and un-*Mirandized* self-incriminating evidence. See *Chavez*, 538 U.S. at 766; see also supra note 15 and accompanying text.

[118] *Higazy*, 505 F.3d at 167.

[119] *Higazy*, 505 F.3d at 167.

[120] *Higazy*, 505 F.3d at 172. See Fed. R. Crim. P. 1(a)(1), 46(a).

[121] *Higazy*, 505 F.3d at 170, 173.

[122] *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009).

that said she was molested by fourteen year old Paul Stoot, Jr.[123] When the police interviewed Stoot, he was read his *Miranda* rights. Later, the courts found that Stoot did not understand these rights,[124] making the warning null and void.[125] As a likely result, Stoot later confessed under coercive pressure.[126] Before charges were eventually dropped, police used what amounted to his un-*Mirandized* confession[127] in an affidavit filed in support of the child molestation charge, a pretrial arraignment and bail hearing, and a pretrial evidentiary hearing.[128]

The Ninth Circuit, which had the advantage of seeing the development of the circuit split in light of *Chavez*, decided to apply the reasoning of the Seventh and Second circuits.[129] In explaining its decision, the Ninth Circuit stated that

> [a] coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status. Such uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding.[130]

Thus, the Ninth Circuit determined that using wrongfully obtained self-incriminating evidence in pretrial proceedings is similar enough to being compelled to be a witness against one's self, and should not be allowed in the United States criminal justice system.[131]

III. THEORIES OF INTERPRETATION: A CHANGING OR STATIC CONSTITUTION

The circuit split illustrates the need for clarity on the unresolved issues regarding the Right and its intersection with its *Miranda* buffer zone. With such uncertainty ever present, it is no surprise that the

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[123] *Stoot*, 582 F.3d at 914.

[124] *Stoot*, 582 F.3d at 916.

[125] Understanding one's *Miranda* rights is essential to "voluntarily, knowingly and intelligently" waiving those rights. *Miranda*, 384 U.S. at 444. Normally, if *Miranda* rights are read to a person, that person can waive their rights to remain silent and have an attorney present by not remaining silent, and not requesting an attorney. However, if they do not understand these rights and begin speaking, they have not done so "knowingly and intelligently" and any statements cannot be used in a "criminal case." See *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 2259–61, 176 L. Ed. 2d 1098 (2010).

[126] *Stoot*, 582 F.3d at 915.

[127] See supra note 15 for analysis coerced self-incriminating evidence is similarly inadmissible in a criminal case.

[128] *Stoot*, 582 F.3d at 923–24.

[129] *Stoot*, 582 F.3d at 924–25.

[130] *Stoot*, 582 F.3d at 925.

[131] *Stoot*, 582 F.3d at 925.

courts use history to inform their decisions.[132] However, different camps among judges and academics disagree on what these lessons from history should teach us. Should we appeal to history in order to apply what the Right meant 200 years ago when it was adopted in the Constitution? Conversely, should we appeal to history in order to get a picture of the development of the Right to stay true to its continued evolution? These questions form the basic debate between competing hermeneutical principles applied to the Constitution: Originalism and Living Constitutionalism. Ironically, the debate over whether the Constitution is alive can be said to be alive itself, with some of the most qualified jurists and legal minds contributing to the discourse.[133]

Originalism comes in many forms,[134] but are all bound by the common thread that the original meaning of the law as adopted in the past is a dispositive tool of interpretation of how to apply the law in the present.[135] When applied to the Constitution, it is a theory that places its faith in the Framers' original intent and posits that this original intent should govern the application of the law, even today.[136] Thus,

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[132]See, e.g., infra notes 159 and 169 and their accompanying text.

[133]Accordingly, I do not seek to provide a definitive treatise on these topics since there are resources far more expansive than this Article that discuss these issues in more detail. I only seek to lay a brief but informative backdrop of the debate in how it relates to the Right.

[134]Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 244, 247–62 (2009) (arguing that originalism is not one coherent theory, but is a camp of which several different originalist theories exist, all bound together by seeking after their particular version of originalist intent); see also Jack M. Balkin, 103 NW. U. L. Rev. 549, 550–51 (2009). Relatedly, and quite ironically, originalist theory has changed over time, subscribing to differing theories of interpretation. These include the original intent of the framers, the original meaning to those reading the law at the time period of its enactment, the original meaning of those who ratified the law, the original understanding of commoners subject to the law, the original objective meanings and common understandings, and so forth. See David A. Strauss, The Living Constitution 11, 25–28 (2010).

[135]See generally Robert H. Bork, The Tempting of America: The Political Seduction of the Law 145 (1990). Bork makes arguments that the Constitution should be interpreted in accordance with "original understanding," and should only have the force it was meant to have by those who enacted and ratified it. Bork, supra note 135, at 143–46. Bork further states that the political content of important decisions that face judges today are not to be made by the judge, but rather should be decided by "those who designed and enacted the Constitution." Bork, supra note 135, at 176–77; see also Remarks by Justice Antonin Scalia at The Woodrow Wilson International Center for Scholars in Washington, D.C, March 14, 2005; A Theory of Constitutional Interpretation: Remarks by Justice Antonin Scalia at The Catholic University of America Washington, D.C. Oct. 18, 1996; Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 724–27 (1988).

[136]See Bork, supra note 135, at 143.

the key question for the originalist[137] is "what did the Framers originally intend the Right to mean?" As applied to the Right, Originalism has recently been employed to argue that the Right would only be infringed in the context of a criminal trial,[138] and would likely resolve the highlighted circuit split in favor of the Third, Fourth, and Fifth's Circuit's Criminal Trial Theory.

Originalism has an intuitive appeal. After all, whom better to understand what the law means than those who drafted it. Nevertheless, this interpretive theory is not without its flaws.[139] For example, how can the intent of the Framers be determined with any sense of accuracy? The Framers lived and died 200 years ago, and in some cases, did not leave any debate or legislative history for modern legal historians to piece together their intent.[140] Next, one of the Framers himself, Thomas Jefferson, advocated for the meaning of laws to change as the times change.[141] In a letter to James Madison, Jefferson stated that "[t]he Earth belongs . . . to the living . . . We seem not to have perceived that, by the law of nature, one generation is to another as one independent nation is to another."[142] Jefferson's view remains true over 200 years later, as the present-day United States has more in common with present day New Zealand than it has with the United States of the 18th century.[143] Why then should Americans of today be subject to the rule[144] of men who lived 200 years ago? Lastly, Original-

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[137]Or at least a branch of originalists. See Colby & Smith, supra note 134, at 244, 247–62.

[138]See Amar & Lettow, supra note 23, at 900.

[139]See Strauss, supra note 134, at 7–31.

[140]See Levy, supra note 9, at 423; see also Eben Moglin, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege against Self-Incrimination 109, 138 (Helmholz et al. eds., 1997).

Unfortunately, the Framers did not engage in any floor debate when drafting or adopting the Self-Incrimination Clause. Neither did the Clause's drafter, James Madison, leave any thoughts or discourses on the matter.

[141]Michael J. Gerhardt, Book Review: Interpreting Bork: The Tempting of America: The Political Seduction of the Law, 75 Cornell L. Rev. 1358, 1382–83 (1990) (arguing that the framers and ratifiers rejected an interpretive theory of original understanding).

[142]Strauss, supra note 134, at 24, 99–100 (quoting Thomas Jefferson Papers 15:392–97, Letter to James Madison (Sept. 6, 1789)).

[143]See Strauss, supra note 134, at 100.

[144]The Framers set up the Republic to suppress any inkling of tyranny they perceived to be present in the British monarchy. How ironic then that originalists, in a way, argue that the Framers should have a somewhat tyrannical rule as an infallible governing body which enjoys a dynasty of ideas some 200 years after their death.

ism cannot explain the evolution of laws to allow for practices such as desegregation or women's suffrage.[145]

Living Constitutionalism answers the flaws of Originalism by holding to the idea that the Framers created doctrines with many vagaries in order to give the document room to be tailored to the times.[146] Living Constitutionalism does not constrict itself to the mores of the Framers, but takes into consideration how the laws should apply and change to suit the mores of the present day.[147]

One of the main criticisms of Living Constitutionalism is that it lacks certainty, as the laws can change with the whim of activist judges pushing their own social agendas.[148] When legal interpretation is captured by such activism, there may be no way to accurately predict litigation outcomes *ex ante*. Thus, the population cannot intuitively conform their actions to what they know the law to be.

However, judges are not able to "go rogue" as critics may suppose since their actions are constrained by *stare decisis*.[149] This common law doctrine compels judges to follow prior decisions and the reasoning of previous courts.[150] The central idea behind *stare decisis* is that change should come through small incremental progressions allowed and guided by the principles of the common law.[151] Thus, only rarely will judges introduce great uncertainty into the legal system by striking down precedent and advocating a 180 degree turn. More *commonly*, changes in the law are achieved by taking small bites over generations of cases. After all, climbing a flight of stairs is not done in one

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[145]See Strauss, supra note 134, at 77–97. Even Supreme Court Justice Antonin Scalia, perhaps the most prominent defender of originalism today, stated in a 1997 speech that in regards to explaining the historical changes in constitutional law, such as Brown v. Board of Education, stated "I am an originalist. I am a textualist. I am not a nut." Being an originalist when it is convenient is necessary to hold to the theory. In contrast, adhering to complete consistency of originalism would mean arguing for the framers' understanding and perpetuation of racial segregation and discrimination of women, to name a few things. Strauss, supra note 134, at 12–17; see also Gerhardt, supra note 141, at 1381 (stating that it may be necessary to abandon original intent to deal with problems unforeseen by the framers).

[146]See Balkin, supra note 134, at 553–54 (citing Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427, 457–61 (2007)); see also Balkin, supra note 137, at 560–61; Strauss, supra note 134, at 113–14.

[147]See Strauss, supra note 134, at 1–2.

[148]See Strauss, supra note 134, at 36.

[149]See generally Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281 (1990) (discussing the current role of *stare decisis* in Supreme Court jurisprudence).

[150]See Strauss, supra note 134, at 33–35; see also Arthur W. Machen, Jr., The Elasticity of the Constitution, 14 Harv. L. Rev. 200, 201–02 (1990).

[151]See Strauss, supra note 134, at 41 (discussing Edmond Burke, the famous 18th century British judge who advocated for small, conservative change through the common law).

leap, but by taking one at a time and traversing a distance that only seems great when you look back with hindsight. Thus, tailoring the laws appropriately to the times is a strength of our Constitution[152] and a role the common law has played for centuries.[153]

When Living Constitutionalism is applied to the Right itself, the questions become what lessons can be learned from history to see where the Right has come from[154] and what should be done to ensure the Right's continued development along the same path? Courts have answered the former question by referring to the tyrannical and inquisitorial nature of religious courts in England and Europe, necessitating the need for such a Right to protect the liberties of the people.[155] In contrast, courts have answered the latter question with rulings like *Miranda* so as to minimize the possibility that the criminally accused will have to answer a line of questioning that will result in either self-accusation, perjury, or contempt.[156]

While both Originalism and Living Constitutionalism compete as interpretational tools of the most important document in our Union, only Living Constitutionalism consistently explains the changes of the law in the hands of history. With this in mind, this Article points to a

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[152]*Miranda* itself has been described as a necessary tailoring of a prophylactic law protecting the Right in order to combat the egregious fact patterns of eliciting involuntary confessions in the 1950's and 60's. See Marcus, supra note 28, at 244.

Miranda has also been described as a reaction to restore the loss of civil rights due to the Red Scare of the same time period in the 1950's. See Friendly, infra note 154, at 671 (citing Erwin N. Griswold, The Fifth Amendment Today (1955)).

[153]See Strauss, supra note 134, at 51–98 (discussing examples of constitutional change through the gradual evolution of the common law, including First Amendment Jurisprudence, and landmark decisions like *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 (1954), supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955), and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified by, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

[154]See Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 678–79 (1968), stating

> The privilege has always been responsive to the particular needs and problems of the time. While no one could sustain the thesis that in 1789 the privilege was limited to political and religious crimes, neither can anyone demonstrate that it would ever have come into existence if its proponents had been murderers and rapists rather than John Lilburne in London and William Bradford in Philadelphia. Just as it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," it would be ludicrous to attempt to fix the proper scope of the privilege in light of what was appropriate under the Stuarts or Cromwell.

In other words, the Right probably would have been stomped out by public opinion if it had arisen to protect vile offenders, as opposed to educated men of conscious.

[155]See infra note 159 and accompanying text.

[156]See *Pennsylvania v. Muniz*, 496 U.S. 582, 596, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990).

further method of historical analysis to add needed clarity to the application of the Right in the context of this debate.

IV. DISCUSSION: THE CHANGE OF THE PAST SHAPES THE CHANGE OF THE PRESENT

As stated previously, unlocking the answers to the perplexing questions concerning the Right's potency and scope are often sought in the roots of its past.[157] Considering the importance U.S. courts have emphasized in looking backward in order to move forward, it is only appropriate to outline and discuss the Right's development in common law England in the 16th, 17th, and 18th centuries as well as in the American colonies before the Right was codified in the Constitution.[158] This is the history that the Framers remembered, but we have forgotten.[159]

The annals of history are not being opened[160] for the purpose of making originalist arguments, as is the common approach when

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[157]See Helmholz, Introduction, supra note 4, at 5; see also supra note 159 and accompanying text.

[158]It should also be noted that the right against self-incrimination goes back further than the time period indicated. The *Miranda* court stated that "[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible," and also had roots in Jewish criminal procedure. *Miranda*, 384 U.S. at 459 n.27 (citing Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 6, III Yale Judaica Series 52–53); see also Norman Lamm, The Fifth Amendment and Its Equivalent in the Halakhan, 5 Judaism 53 (1956). Levy confirms this assertion, tracing the Right's roots at least as far back as the Jewish Talmud, which records traditions going back to Biblical times. See Levy, supra note 9, at 433, 436–37. While this history is certainly relevant, it cannot be said to have been relied upon by the Framers, whose ideas of civil and criminal procedure were the product of 16th, 17th, and 18th century English common law. While it is possible and potentially plausible that the right against self-incrimination had roots in Judeo-Christian theocratic criminal procedure, reliance on the Talmud is not authoritative for this piece.

[159]See *Quinn v. U.S.*, 349 U.S. 155, 161–62, 75 S. Ct. 668, 99 L. Ed. 964, 51 A.L.R.2d 1157 (1955), stating:

> The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution — and the necessities for its preservation — are to be found in the lessons of history. (citing Griswold, supra note 152, at 2–7). As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. Transplanted to this country as part of our legal heritage, it soon made its way into various state constitutions, and ultimately, in 1791, into the federal Bill of Rights. The privilege, this Court has stated, "was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.

This respect for history is repeated elsewhere in American common law when referring to the Right, such as in this Article's opening quote from *Maffie*, 209 F.2d at 237.

[160]This article is not meant to be a work of expansive legal history. Instead, I refer readers to the works I largely relied upon in my research to gain a fuller view of the Right's development in the hands of the common law. See generally Levy, supra note 9; see also Laurence A. Benner, Requiem for Miranda: The Rehnquist Court's Volun-

considering the past in legal scholarship.[161] Rather, the lesson to be learned is the evolution of the Right as nurtured by the common law; for this purpose, it is the journey that is important, and not the end destination. Therefore, if the Right changed according to the current of the common law in its 200 year history before the Constitutional Convention, the pool of Framers—made up of mostly lawyers—would have taken this legal history into account and expected the Right to change in the next 200 years after its adoption in the Constitution.[162]

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tariness Doctrine in Historical Perspective, 67 Wash. U.L.Q. 59, 67–92 (1989); Lawrence Herman, The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (pts. 1 & 2), 53 Ohio St. L.J. 101 (1992), 53 Ohio St. L.J. 497 (1992); Steven Penny, Theories of Confession Admissibility: A Historical View, 25 Am. J. Crim. L. 309, 314–22 (1988).

[161]Some have dived into finding original intent to support the idea that over time, the original intent of the Framers has been lost by constricting the Right more so than it was ever intend. See Levy, supra note 9, at 427 (arguing that The Fifth Amendment was meant to be bundle of pretrial rights that extended beyond the criminally accused and his trial, whereas the Sixth Amendment was meant to be a bundle of rights at trial); see also Thomas Y. Davies, Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1009–14 (2003); Albert W. Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege against Self-Incrimination 181, 190–91 (Helmholz et al. eds., 1997) (stating "[t]he [Self-Incrimination Clause] that the framers included in the Bill of Rights in 1791 . . . plainly refers, not just to the initiation of criminal proceedings or to a first accusation, but to the conduct of a criminal trial"); John H. Langbein, The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries, in The Privilege against Self-Incrimination 82, 82–83 (Helmholz et al. eds., 1997) (stating "[o]nly later did the practical usage of the Self-Incrimination Clause change to being a 'trial right.' In the eighteenth and nineteenth centuries, the development of the rules of evidence, and the emerging importance of the criminal defense attorney, gave rise to this understanding.").

[162]The Framers were well aware of the common law's ability to shape precedent. While detractors may argue that the Framers never intended Article III courts to wield such power, William Michael Treanor's work sheds light on judicial review before *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803), which has been referred to as the genesis of judicial review by modern scholarship. See William Michael Treanor, Judicial Review Before Marbury, 58 Stan. L. Rev. 455, 457 (2005). Treanor found thirty-one cases during the founding era in state and federal court where judges invalidated laws for being unconstitutional, and seven more where the law was upheld, but at least one judge would have invalidated the law on constitutional grounds. Treanor, supra note 162, at 457–58. This in-depth study shows, even to the originalist, that understandings of the constitutional powers of the courts during the founding era, even before *Marbury v. Madison*, allowed for judicial review, and thus gave the court their most drastic tool in shaping constitutional interpretations: invalidating legislative statutes. The Framers were aware of this, and so it should come as no surprise that such avenues of change were entrusted to the courts. This also makes sense from a political science perspective, since the Framers could be said to have been rebelling against the Parliamentary Supremacy that defined English law.

> As they moved toward revolution, Americans saw in British assertions of parliamentary supremacy "the ascendancy of what [the old] constitutionalism had taught . . . Americans

This section highlights the numerous ways that the Right evolved in the common law from its first assertions in 16th century England until the time of the Framers.

A. From God's Law to Man's Law

The most basic change in the Right was the context in which it was asserted. From its origins in England, the Right was first invoked by the accused to protect themselves from charges of religious crimes in ecclesiastical courts. These courts were separate and apart from the common law courts.[163] In this context, the Right served as a defense against the oppressive imposition of the oath *ex officio*,[164] which required a person to swear to tell the truth to any question asked of him before he even knew the charges against him.[165] To refuse to take the oath or to refuse to answer a certain line of questioning would end in the same result as if you had given a guilty confession.[166] Beginning in the 1500s, Protestants began suffering unfortunate fates because the oath *ex officio* not only offended their belief that they should not swear, but also guaranteed their punishment for believing heretical doctrine in the eyes of the Anglican Church.[167]

The procedure of administering the oath was terrifyingly brilliant, as it was self-accusatory in nature. It was an "inescapable trap" since refusal to take the oath would result in a ruling of guilt, but taking the oath opened the accused to the almost certain punishment for perjury (as conveniently determined by the ecclesiastical court), in which the accused's lies were sufficient evidence of their guilt.[168] The oath *ex officio* opened the door to the historical trilemma of facing self-accusation, perjury, or contempt, which came to define the religious

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to fear most-arbitrary power-and the demise of what that constitutionalism had taught them most to cherish-liberty founded on restraints to power and protected by the rule of law."

. . .

Parliamentary disregard of the sphere of colonial power was unacceptable and illegitimate because, if Parliamentary power was not subject to limitation by competing power, it would threaten freedom.

Treanor, supra note 162, at 539, 558.

Taking this into account, arguments that the Framers never intended for the Courts to be able to shape Constitutional law fall flat.

[163]See Helmholz, Introduction, supra note 4, at 7.

[164]More commonly known as the oath *de veritate dicenda* as it was termed in canonical parlance. See Helmholz, Privilege, supra note 4, at 18.

[165]See Levy, supra note 9, at 47.

[166]See Levy, supra note 9, at 23–24, 132; see also 5 John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 274 (3d ed. 1940).

[167]See Levy, supra note 9, at 159–60; see also Helmholz, Privilege, supra note 4, at 18, 40–41.

[168]See Levy, supra note 9, at 23–24.

Inquisition sweeping across Europe during the Reformation and the ecclesiastical courts' equivalent reign of terror in England.[169]

As time went on, bold, religious men of conscience transitioned from merely not taking the oath to presumptively claiming they had a right not to take the oath so as not to accuse themselves. After time, the accused began winning this uphill battle, and the ecclesiastical courts recognized the Right in 1641.[170] However, this in no way affected the criminal procedure in common law courts.[171] While the common law courts did not employ any offensive self-accusatory oaths, it was still common practice to press the accused for guilty confessions in pretrial examinations.[172]

It did not take the common law courts long to catch up when the Right was established officially in 1649.[173] The hard-fought defense of John Lilburne's trial for treason was the catalyst for this change.[174] As the influence and jurisdiction of the religious courts faded as they were eventually disbanded,[175] the Right continued to apply in the common law courts. Thus, the Right which was intended to combat the oath *ex officio* in religious tribunals was successfully transplanted into the common law courts. It has been a source of protection for the

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[169]See *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990). In *Muniz,* the Supreme Court discussed the policies supporting the privilege against self-incrimination in deciding whether an answer to a question that was asked of an individual during a custodial interrogation constituted testimonial evidence. *Muniz*, 110 S. Ct. at 2641. The Court stated

> [A]t its core, the privilege reflects our fierce unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury, or contempt . . . that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.
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> . . .
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> Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," (citation omitted), it is evident that a suspect is "compelled . . . to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma — either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns.

[170]Levy, supra note 9, at 282 (citing the Act for Abolition of the Court of High Commission, and Act for Abolition of the Court of Star Chamber, both passed on July 5, 1641); see also Langbein, supra note 161, at 102.

[171]John Udall was likely the first to claim the Right against Self-Incrimination in a common law trial in 1590 for his authorship of a book that was claimed to be libelous to the queen and seditionist. See Levy, supra note 9, at 168.

See Levy, supra note 9, at 282.

[172]Levy, supra note 9, at 282.

[173]Levy, supra note 9, at 313.

[174]See Friendly, supra note 154, at 678 (citing Levy, supra note 9, at 301–13).

[175]See infra note 170 for the abolition of the ecclesiastical courts.

criminally accused ever since.[176] In other words, as the times changed, so did the application of the Right.

This transplant was not the original intention of the religious men who first claimed the Right, nor the ecclesiastical courts that first recognized the Right. Rather, what started as a rebellion against the oath *ex officio* as an attempt to avoid offending both God and man became a staple in the secular courts for all to enjoy.

B. Self-Incrimination Extends to Self-Infamation

Another marked change in the evolution of the Right is its expansion and subsequent constriction regarding the right against self-infamation, or the right of a witness not to answer a question because it may cause them embarrassment or infamy.[177] In the1679 case of Nathaniel Reading, the right against self-infamation was extended to witnesses testifying against the defendant on the basis of avoiding public infame or disgrace, even if they could not be later convicted for their testimony because of an existing pardon.[178] English criminal defendants enjoyed this right against self-infamation as a broad extension of the Right.

The right against self-infamation was also enjoyed in certain colonies both before and after the Revolution. States like New York, New Jersey,[179] Virginia,[180] and Pennsylvania, which adopted the English's interpretation of the Right, each respected a witness's right to avoid a line of questioning on the grounds of self-infamation.[181] However, this right quickly fell out of favor in the states that did recognize the right

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[176]See Helmholz, Introduction, supra note 4, at 7, 18–19; Charles M. Gray, Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries, in Self-Incrimination 47, 47–81, supra note 4 (describing the inter-jurisdictional relationship between common law courts, which had the power to review and control the ecclesiastical courts).

[177]See Levy, supra note 9, at 317–18.

[178]Levy, supra note 9, at 324. At the trial, a witness who had been pardoned from all of this crimes and could not be convicted criminally of anything he confessed, still was allowed not to answer the question of whether he had planned to set a city on fire. Levy, supra note 9, at 324. The judge decreed that "neither [the witness's] life nor name must suffer, and therefore such questions must not be asked him." Levy, supra note 9, at 324. The right against self-infamy had been advocated for along with the right against self-incrimination since at least 1528 and had finally come to fruition over 150 years later. Levy, supra note 9, at 319–20.

[179]Levy, supra note 9, at 410–11.

[180]Levy, supra note 9, at 406.

[181]Levy, supra note 9, at 428–29. A Pennsylvania court decided that "[i]f [questioning] would involve [the witness] in shame or reproach, [the witness] is under no obligation to answer them." Levy, supra note 9, at 429. Also, this was extended by the same court in a civil case, stating that a witness could not be compelled to take the witness's oath if the witness's testimony "tends to accuse himself of an immoral act." Levy, supra note 9, at 428–29.

against self-infamation in the years following the Revolution.[182] Further, there is no proof that the right against self-infamation was ever enjoyed in federal courts after the Constitution was ratified,[183] which the newly enacted Right would have applied to exclusively.[184]

Cutting the right of self-infamation out of the application of the Right is a noticeable change between how the common law applied the Right in England, and how the Right was interpreted in the Founding generation.[185] Such a change is another example of the common law's evolution that the Framers would have been cognizant.

C. Pre-Trial Application, or Purely a Trial Right

The Right also changed in its application in pretrial criminal proceedings before its adoption in the Constitution.[186] In the beginning stages of the common law, the Right applied to all proceedings, except pretrial examinations.[187] Justices of the Peace examined the accused for the purpose of eliciting a confession. During such examinations, the Right did not apply because the examinations were not considered judicial proceedings.[188] While there were other protections afforded the accused in these pretrial examinations,[189] the Right was not one of them.

While England restricted the Right's application in pretrial interroga-

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[182]Levy, supra note 9, at 428–429.

[183]Levy, supra note 9, at 427.

[184]This was a time before the era of incorporation and before the Right was made applicable to the states in *Malloy,* 378 U.S. at 8.

[185]One can imagine the practical reasons for narrowing the Right to cut out self-infamy or embarrassment, since such a right could be taken advantage of. Also, the bounds of what could infame or embarrass are far more expansive than that which would incriminate. However, it is no mystery that as reputation and social standing became less of a commodity that this right fell out of use. This is especially true since this right was transported from a land that fostered nobility to the colonies, which did not have a noble class. Damaging the accused's reputation in 18th century America simply did not have the same devastating effects on that person's social and economic outlook that it did a century earlier in England. After all, it was part of American ideals at the time to reject a social system with a ruling noble class, and to undue primogeniture. Such a change in the application of the Right makes sense. The Right was appropriately tailored for the time and place while keeping the proper balance between the rights of the State with those of the accused.

[186]As stated before in this section, outlining the history and changes of the Right is not done for the purposes of making originalist arguments, but rather the opposite. The discussion of changes in the application of the Right from being a trial right or pre-trial right is only used to argue that changes occurred, not to argue that pre-trial application was part of the Framer's original intent.

[187]Levy, supra note 9, at 325.

[188]Such examinations were not considered judicial proceedings in England until 1848. See Levy, supra note 9, at 329.

[189]It was an established maxim in England that confessions must be voluntary, and thus voluntariness and the Right came together in somewhat of a nexus to

tions,[190] several colonies recognized and applied the Right in this context.[191] In Virginia, for example, the Right was extended to apply to pretrial examinations by Justices of the Peace from at least 1776 when the Revolution began.[192] Since Virginia was considered to be the largest and most wealthy of the colonies, it should come as no surprise that many others emulated Virginia's version of their self-incrimination clause. Pennsylvania, North Carolina, and Vermont adopted the same phraseology as Virginia's state self-incrimination clause;[193] additionally, Delaware, Massachusetts, and New Hampshire adopted virtually identical phraseology with only inconsequential changes.[194]

In developing the Right, this is one of the few examples of the colonies being more progressive than England during the same time period. Whereas England did not respect the Right at pretrial examinations, several of the colonies did. This change in application shows further evolution of the Right, which the Framers would have taken into account adopting the Right into the Constitution.

D. Civil or Criminal Procedure

One of the most robust changes in the development of the Right was its expansion to civil proceedings. In the common law courts of England, the Right was only invoked by criminal defendants who refused to take oaths or give self-incriminating answers. However, some of the American colonies applied the Right to civil matters. For instance, the language of Virginia's version of the Right appears to have been applicable to witnesses giving testimony that damaged them in civil matters as well as criminal matters. Virginia's version of the Right should sound a bit familiar, reading as follows:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled

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protect the accused from eliciting dooming confessions. See Levy, supra note 9, at 327–29.

[190]England did not extend the Right to pre-trial procedures until 1848, when the Sir Jervis's Act required authorities to apprise the accused of their right not to answer their questions. See Levy, supra note 9, at 375. Since this was long after the framing, it is irrelevant to discuss for the purposes of what the Framers considered at the time of the Constitutional Convention.

[191]See Levy, supra note 9, at 406.

[192]Levy, supra note 9, at 407.

[193]See Levy, supra note 9, at 409–10.

[194]Levy, supra note 9, at 409–10.

> to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.[195]

While the immediate context of the Right in Virginia's Constitution applies to capital or criminal cases, the Right would be rendered superfluous if it only applied in these situations because the accused could not even take the stand in their defense at this time in the colonies.[196] What would be the purpose of having the Right if the defendant could not even enjoy it at trial?

According to the vague text of the Virginia Constitution, the Right would apply to civil trials, where the civil parties would not be required to answer injurious questions that hurt their civil claims or defenses. This textual interpretation would also apply to Pennsylvania, North Carolina, and Vermont, which adopted the same phraseology as Virginia's Self-Incrimination Clause,[197] and additionally Delaware, Massachusetts, and New Hampshire, which included only minor changes to the Virginia phraseology.[198]

The assertion that the Right extended to civil testimony regarding civil rights may seem like a stretch, but is strengthened by the actual drafting of the Fifth Amendment. James Madison, the drafter of the Fifth Amendment, drafted the following:

> No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.[199]

The textual expansion[200] of the right to civil interests may have been a result of poor draftsmanship, but is unlikely in light of Madison's education and skill.[201] When comparing the draft to the Fifth Amendment as ratified, the relevant change is telling:

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[195]Levy, supra note 9, at 406; see also Moglin, supra note 140, at 134 (citing The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3813 (Francis N. Thorpe, 1909)).

[196]See Levy, supra note 9, at 407, 375.

[197]See Levy, supra note 9, at 409–10; Moglin, supra note 140, at 135.

[198]See Levy, supra note 9, at 409–10; Moglin, supra note 140, at 135.

[199]See Levy, supra note 9, at 422 (emphasis added).

[200]Even textualists would have to agree with this argument. Textualism is the theory of interpretation that states that an authority's text is the only source that should be examined when trying to determine its meaning. Therefore, other interpretive tools such as legislative history or historical sources of the time are not consider. See generally Antonin Scalia, Textualism and the Constitution, in Debating Democracy: A Reader in American Politics (Bruce Miroff et al. eds., 7th ed. 2011).

[201]Admittedly, it is a bit hypocritical of me given the scope of this Article, and presumptuous to divine Madison's intent (as the originalist attempts to do).

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[202]

The slight change of adding the phrase "criminal case"[203] speaks volumes. John Laurence, a Federalist lawyer from New York,[204] proposed changes to the wording of the Fifth Amendment that was unopposed and adopted unanimously, which confined the Right to that of criminal cases.[205] "Taken literally, the amended clause, 'No person shall . . . be compelled in any criminal case, to be a witness against himself,' excluded from its protection parties and witnesses in civil and equity suits as well as witnesses before non-judicial governmental proceedings such as legislative investigations."[206] This change shows that the committee, or perhaps only Laurence, realized that clarification was necessary if the Right was to only apply to criminal cases.[207] This necessary change in the language of the Fifth Amendment is further evidence then that the Virginia Constitution, which lacked the "criminal case" constriction, would have been understood to apply to civil cases as well as to criminal cases.

The Fifth Amendment and Virginia's provision also share similarities in their beginning phrases. Both clarify the context that they applied to criminal cases at the beginning of their respective sections.[208] However, the Drafters of the Fifth Amendment found it necessary to re-establish the context in regards to the Right by adding "in any criminal case" into the language. Again, the fact that Laurence thought it necessary

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[202]U.S. Const. amend. V.

[203]U.S. Const. amend. V. Also note that the language of the Fifth Amendment establishes the context in its first clause that the amendment applies to capital or infamous crimes, similar to how Section 8 of the Virginia colonial Constitution establishes its context in its first line. See supra note 201 and accompanying text for Section 8's text. However, the drafters of the Fifth Amendment found it necessary to clarify the Self-Incrimination Clause by reaffirming the context of the criminal case, which further supports the notion that the Section 8 clause, and those of the states that adopted similar clauses, did apply (at least textually) to civil cases as well as criminal cases.

[204]Levy, supra note 9, at 424–25.

[205]Levy, supra note 9, at 424–25; see also Moglin, supra note 140, at 138.

[206]Levy, supra note 9, at 425.

[207]Ironically, this clarification over 200 years ago has confounded the courts today, resulting in the circuit split highlighted in this Article over the meaning of the term "criminal case."

[208]See supra note 195 and accompanying text for the language of Virginia's Section 8.

to re-clarify the context in that particular clause suggested that in the absence of this re-established context, it would be a reasonable interpretation that the Right should apply beyond criminal cases.

This evidence from the draftsmanship of Virginia's Constitution and the Fifth Amendment show yet another important change in the evolution of the Right. Whereas the Right was employed in the common law courts in England in the exclusive context of criminal proceedings, it appears from the text of Virginia's Constitution that this right was expanded as early as 1776 to include civil matters as well. The Framers would have been well aware of this change, and of the textual variations surrounding the Right, and thus acted to ensure an ironic clarity[209] in the Fifth Amendment.

E. The Accused's Right to Testify on Their Own Behalf

Perhaps the most shocking adaptation of the Right came with the emergence of the defense counsel as a common participant in criminal trials. In the 16th and 17th centuries, the application of the Right was something quite different from today. During this time, the accused were required to put on their own defense without the assistance of defense counsel.[210] "Without defense counsel, a criminal defendant's right to remain silent was the right to forfeit any defense; indeed, in a system that emphasized capital punishment, the right to remain silent was tantamount to suicide."[211] This is evidenced by the fact that between the 1670's and 1780's there are no recorded instances when the accused refused to speak in their own defense.[212]

The plight of the accused in the pre-Constitutional era was compounded by limitations on their ability to testify on their own behalf and otherwise conduct a defense.[213] The reasoning behind this restriction was two-fold. First, a witness was qualified to testify based on his or her competence, which was in turn partially determined by their interest in the outcome of the case.[214] No one would be more interested in the outcome of the case than the criminally accused; in a sense, the court could not trust this testimony because it would almost certainly

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[209]See supra note 207.

[210]See Langbein, supra note 161, at 84.

[211]See Langbein, supra note 161, at 107.

[212]See Langbein, supra note 161, at 95–96. Further, the great political trials of the 17th century that gave birth to the common law's recognition of the Right followed this criminal procedure. See, e.g., Levy, supra note 9, at 274–75, where accused like John Lilburne in 1638 had to speak on their own behalf.

[213]Levy, supra note 9, at 324. The accused in England were not allowed to testify on their own behalf until 1898.

[214]Levy, supra note 9, at 324.

be biased, and thus was not allowed at all.[215] Second, the courts could be said to be paternalistic in trying to protect the accused from their own testimony. If the accused took the stand to testify on their own behalf, they would waive their Right and would open themselves up to cross-examination questions with potentially dire effects.[216]

At first blush, such criminal procedure could appear to be paternalistic, but in actuality was used to the accused's detriment. Ironically, while the court restricted the sworn testimony from the accused to act as a exculpatory witness on their own behalf, it compelled the accused to speak on their own behalf by *encouraging* them to put on their own defense.[217] Herein lies the technicality that harmonized this denial of counsel with the Right. Since the Right only applied to sworn testimony, defending oneself in open court without being sworn in meant that the Right would not apply.[218] Therefore, while the accused still technically enjoyed the Right to refuse to answer lines of questioning that may incriminate themselves, they still had the burden of speaking on their own behalf. What the courts realized all too well was a criminal defendant, untrained in the art of law, could stumble over himself, lose credibility with a jury, and incriminate himself through inconsistencies when responding to the prosecutor's arguments or examining witnesses. Such self-incrimination could happen just as easily as if the defendant were answering questions directed at him from the Crown or the court.[219]

Thus, without the active participation of defense counsel in criminal cases, the Right was rendered somewhat powerless to protect defendants from the perils of taking on their own defense.[220] Not surprisingly, these common law practices crossed over the pond; most of the colonies adopted similar criminal procedures of denying

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[215]Levy, supra note 9, at 324.

[216]Levy, supra note 9, at 324.

[217]See Helmholz, Introduction, supra note 4; Langbein, supra note 161, at 9, 82–84, 96. In medieval times and English common law, it was appropriate that the person coming under suspicion of having committed a crime should speak for themselves. See Helmholz, Introduction, supra note 4, at 13 (citing 2 Hawkins, Pleas of the Crown, ch. 39, § 2).

[218]See Helmholz, Introduction, supra note 4, at 15.

[219]The accused were encouraged even further to speak on his own behalf because of the various other limitations on his ability to conduct his defense. In the 17th century, criminal defendants did not have the right to subpoena witnesses for their defense. See Langbein, supra note 161, at 88.

[220]See Helmholz, Introduction, supra note 4, at 9.

defense counsel[221] to the accused and having defendants put on their own defense.[222]

The playing field became slightly more level with the emergence of the defense counsel in the late 18th century,[223] which gave the Right an entirely new meaning. It was only after the popularization of defense by proxy[224] that the Right actually became somewhat effectual for the common man to exercise his right to not self-incriminate himself by staying silent.[225] Further ushering in the new age of criminal procedure, defense counsels were more than willing to apply the old maxim of *nemo tenetur prodere seipsum*[226] in a way that had not been contemplated in its original context. Namely, they began to argue successfully that the accused has the right to not have to contribute to their defense at all, whether that be giving testimony, or statements in open court.

As the 18th century progressed, the utilization of defense counsel became more popular, and was almost a default occurrence by the time of the Convention. By the 1730s, defense counsel were just starting to become more common in criminal cases.[227] By the second half of the 18th century, defense counsel began frequently silencing their clients for reasons of obvious strategic advantages.[228] By the 1780s, the use of defense counsel had exploded,[229] with more and more defendants enjoying the fruits of the Right in its new application. By the time of the Constitutional Convention in the late 1780s, such a radical change in the Right's application would have been all too apparent to the Framers who would have seen this marked change in the course of their own lives (and for many, their own law practices). It is yet another example of a change in the Right's meaning that the Framers would have been aware; as such, it is another justification that they would have understood the Right to change and would have expected the Right to continue changing in the future hands of the common law.

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[221] See Moglin, supra note 140, at 112–13.

[222] See Helmholtz, Introduction, supra note 4; Langbein, supra note 161, at 9, 83; Moglin, supra note 140, at 111–14.

The colonies also limited the defendant's ability to subpoena witnesses, similar to their English counterparts. See Moglin, supra note 140, at 112–13.

[223] See Langbein, supra note 161, at 82–84.

[224] The idea that someone could stand in your shoes and offer up a defense on your behalf. Langbein, supra note 161, at 84.

[225] Langbein, supra note 161, at 83–84.

[226] See note 4 for further details on this term.

[227] See Langbein, supra note 161, at 96–97.

[228] See Langbein, supra note 161, at 99.

[229] See Langbein, supra note 161, at 82–83, 96–97.

The above referenced changes in the scope, application, and understanding of the Right show an evolution from the time it was accepted as a common law right through the time it was adopted into the Constitution. Some changes were bigger than others. The size or amount of change is not relevant, however, but only the presence of change. This supports the foundational principle of interpreting the Right: it was not a static right in common law England, and the Framers would have known that it would not be a static right in common law America. Therefore, the only originalist conclusion that can be supported from history is the intention of the Framers that the Right change over time.

V. CONCLUSION

The Right has a long and distinguished history in Anglo-American law.[230] Courts have often turned to history to inform their interpretation of the Right, and in doing so must make difficult decisions to continually adapt the Right to be effective in their time.[231]

The findings of this Article uncovers a nugget of wisdom from history to be taken into consideration: the Right changed from the time between its recognition as a common law right and its adoption in the Constitution. Such change came as a result of the changing times, and also through the transition of the Right from England to the American colonies. Such changes prove that at the time of the framing, the Right was known to have been a changing doctrine.

Such a finding bolsters the dominant view that the Constitution should be understood as a living document and not subject to the original meaning or intent of the Framers.

With this lesson in mind, courts should try and fashion the Right in a way to effectively protect the accused in our criminal justice system. This type of interpretation may shed light on solutions to the highlighted circuit split. While the purpose of this Article was not to resolve the split, I offer a few thoughts in closing.

First, the importance of pretrial procedures have increased exponentially in determining outcomes in criminal cases.[232] It would behoove courts to consider this when crafting applications of the

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[230]See Helmholz, Introduction, supra note 4, at 15.

[231]See, e.g., *Miranda*, 384 U.S at 458–60; *Murphy*, 378 U.S. at 58–77 (1964); *Tucker*, 417 U.S. at 439.

[232]See Jennifer Diana, Note, Apples and Oranges and Olives? Oh my!: Fellers, The Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine, 71 Brook. L. Rev. 985, 1001 (2005) (explaining that because of the significant change of how evidence is accumulated and presented at trial between the time of the framers to the present day, pretrial proceedings now have the potential to "settle the accused's fate . . . reducing the trial itself to a mere formality") (quoting *U.S. v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)); see also Beth Hornbuckle Fleming, First Amendment Right of Access to Pretrial Proceedings In Criminal Cases, 32 Emory

Right, which was meant to protect criminal defendants in an era when trial was common. After considering that we live in a legal justice system where the vast majority of cases are determined by pretrial procedures, such as plea bargaining,[233] interpreting the Right in a way that accounts for pretrial protections is justified.

Second, post-trial sentencing procedures have been determined to be of such significance in effecting one's freedom that un-*Mirandized* statements cannot be used.[234] Therefore, it is interesting that the courts would apply the Right and *Miranda* protections in sentencing proceedings when there is little opportunity for a criminal to incriminate themselves since they have already been convicted.[235] If the expansion of the Right and *Miranda* has reached sentencing hearings, then should not it also reach pretrial proceedings, which are ironically much more influential in the depravation of liberty than sentencing?

Lastly, *Chavez* is best left interpreted by its own words. The Court tellingly cited *Black's Law Dictionary*, which defines the word "case" as "[a] general term for an action, cause, suit, or controversy at law . . . a question contested before a court of Justice."[236] The Court also quoted *Blyew v. United States*,[237] which states that "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes and judicial

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L.J. 619, 633 n.42 (1983) (citing *U.S. v. Chagra*, 701 F.2d 354, 363, 9 Media L. Rep. (BNA) 1409 (5th Cir. 1983); *U.S. v. Criden*, 675 F.2d 550, 555, 8 Media L. Rep. (BNA) 1297 (3d Cir. 1982); *State v. Williams*, 93 N.J. 39, 53, 459 A.2d 641, 9 Media L. Rep. (BNA) 1585 (1983)) (supporting the finding that over the past two centuries, pretrial proceedings have increased in importance in the criminal justice system to determining the guilt of the accused, since many of these actions are settled before reaching trial); Langbein, supra note 161, at 82, 91 (citing Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1 (1979)).

[233]See Daniel L. Rotenberg, The Progress of Plea Bargaining: The ABA Standards and Beyond, 8 Conn. L. Rev. 44, 44 n.3 (1975) (stating that "[w]ith a few exceptions, judges and prosecutors from Arizona, Michigan, North Carolina, Wyoming, and Connecticut who were questioned for this study agreed on the necessity of plea bargaining in order to keep the courts functioning").

[234]See *Mitchell v. U.S.*, 526 U.S. 314, 327, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (holding that a guilty plea waived a defendant's right to invoke the privilege against self-incrimination at trial, but did not concomitantly waive the privilege at the sentencing hearing); see also *Higazy*, 505 F.3d at 172 (where the Second Circuit drew a parallel between sentencing proceedings and pretrial proceedings and cited *Mitchell* to show that the Right should apply to pretrial procedures since it is applicable in sentencing hearings); Langbein, supra note 161, at 93–95 (comparing trials in the 18th century with common day post-trial sentencing hearings).

[235]An alternative situation which would render the *Right* relevant is if during a sentencing hearing for one crime, the accused may need to invoke the Right to prevent incriminating themselves in regards to another crime.

[236]*Chavez*, 538 U.S. at 766 (quoting Black's Law Dictionary 215, supra note 83).

[237]*Blyew v. U.S.*, 80 U.S. 581, 20 L. Ed. 638, 1871 WL 14736 (1871).

decisions, each meaning *a proceeding in court, a suit, or action.*"[238] While this may seem at odds with other language in the opinion,[239] it certainly points to clues that the Court intends a broader application of the Right.

With the circuit split ever lingering, the future of the Right, *Miranda*, and the criminally accused should take a lesson from history: change is a good thing.

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[238] *Chavez*, 538 U.S. at 766 (quoting *Blyew*, 80 U.S. at 595 (emphasis added)).

[239] See *Chavez*, 538 U.S. at 767 (citing *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is *a fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" (emphases added) (citations omitted)); *Withrow*, 507 U.S. at 692 (describing the Fifth Amendment as a '' 'trial right' '')).