CUSTODIAL COMPULSION

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ABSTRACT

In cases that fall under Miranda v. Arizona, *police interrogators not only give a suspect reasons to confess, they also suggest that the suspect ought to confess. In doing so, interrogators effectively invoke the Wigmorean duty of a citizen to produce any evidence he has in his possession, including his own confession. That is, they invoke the duty against which the Self-Incrimination Clause stands, so that the Clause is applicable to police interrogations and is violated where it is not waived. This means that "a* Miranda *violation" is a violation of the Self-Incrimination Clause in the field, just as a Fourth Amendment violation occurs in the field.*

This argument rests on the interrogation manuals relied on by the Miranda *Court, modern interrogation manuals, and actual interrogation practices as described by Professor Richard Leo. The key to this argument is the fact that there is a difference in kind between coercion and compulsion. Neither courts nor scholars have heeded this difference in interpreting* Miranda, *and have instead spoken incoherently of coercion under the Self-Incrimination Clause. This results in the duplication of the Due Process Clauses and also raises a bar to showing a* Miranda *violation, or obtaining relief for one, that virtually no one can clear. In interpreting and applying* Miranda, *courts ought to distinguish compulsion from coercion, and recognize that the interrogators' effective invocation of the duty to give evidence is compulsion under* Miranda *as well as under the Self-Incrimination Clause. To recognize that a* Miranda *violation is a violation of the Self-Incrimination Clause has profound implications for* Miranda *doctrine; principally, the application of a robust exclusionary rule that includes a fruit of the poisonous tree doctrine.*

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INTRODUCTION

The Fifth Amendment's Self-Incrimination Clause prohibits compelled testimony.[1] In its native habitat of judicial and quasi-judicial proceedings, Fifth Amendment compulsion includes the obligation to respond to a summons or subpoena,[2] speak truthfully under oath, speak under the threat of citation or prosecution for contempt, and face the threat of prosecution for perjury for failing to testify truthfully.[3] These obligations are essential features of well-functioning courts, legislatures, and administrative agencies. To put this another way, these obligations are compelling rule-of-law circumstances. The Supreme Court's analysis in *Miranda v. Arizona*[4] turns on the fact that the atmosphere of custodial interrogation is compelling.[5] What this means, this Article argues, is that in the circumstances of custodial interrogation, it appears to an ordinary citizen that speaking to the police is a rule-of-law obligation similar to the rule-of-law obligations imposed by summonses, subpoenas, and related legal proceedings. The suspect has not been misled in this regard. There is such an obligation, and it is the obligation against which the Self-Incrimination Clause stands. *Miranda*, properly understood, addresses the problem of custodial compulsion in this sense.

Miranda protects people in custody against compelled, not coerced, self-incrimination.[6] The word "coerced" does not appear in the Self-Incrimination Clause.[7] It is remarkable that this must be said, but so it is. From the beginning, the Supreme Court has analyzed *Miranda* cases using "coercion" and "compulsion" or "coerced" and "compelled" interchangeably.[8] Scholars have

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

[2] *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964) (holding state witness may not be subpoenaed to give testimony which may be incriminating).

[3] *See id.* at 55 ("[The Self-Incrimination Clause] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . .").

[4] 384 U.S. 436 (1966).

[5] *Id.* at 445 ("[The cases before the Court] thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."); *id.* at 456 ("In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring.").

[6] *See id.* at 457-58 (emphasizing that an "individual may not be compelled to incriminate himself").

[7] *See* U.S. CONST. amend. V.

[8] *See Miranda*, 384 U.S. at 470 ("With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court."); *see also* Michigan v. Tucker, 417 U.S. 433, 448 (1974) ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself.").

also run the two concepts together and not because they feel obliged to stay within the boundaries set by the Court.[9] Very little *Miranda* scholarship directly addresses the difference between compulsion and coercion, and that which does fails to clearly distinguish between them or to apply the distinction to *Miranda* in any useful way.[10] Coercion and compulsion are usually distinguished as degrees of voluntariness: the degree to which the suspect's will is impaired or the degree to which police tactics approach physical force.[11] This is a mistake. Compulsion and coercion differ in kind. Compulsion is circumstantial whereas coercion requires an agent.[12]

Suppose Abel finds himself dying of thirst in a desert. Fortunately, he comes upon an oasis with a pool of water. He must drink the water because of his circumstances: he is human, he is dehydrated, and only this water can save his life. He is compelled to drink the water.[13] No one would say that he has been coerced into drinking water.[14] Circumstances are compelling, not coercive.[15] In contrast, suppose Abel is bent on committing suicide and has walked into the desert with that purpose. Delirious and near death, Abel stumbles into an oasis by accident. Some people already there lead him to the water, but Abel refuses

[9] *See, e.g.*, Tracey Maclin, *The Prophylactic Fifth Amendment*, 97 B.U. L. REV. 1047 *passim* (2017) (using word "coercion" exclusively, instead of "compulsion," in article on *Miranda*).

[10] *See, e.g.*, George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1087 (2001) (discussing effect of substitution of compulsion for coercion as making it easier for defendants to suppress confessions).

[11] *See, e.g.*, Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 26-27 (2001) ("I do not think one can persuasively maintain that the two doctrinal rules are different in kind rather than degree."); Thomas III, *supra* note 10, at 1120 ("I indulge here the standard linguistic and philosophical view that coercion entails a greater magnitude of pressure than compulsion.").

[12] *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2627 n.6 (1996) ("The words [compulsion and coercion] differ only because compulsion can arise from many sources while coercion is always the product of purposeful human activity . . . ."); Michael Bayles, *A Concept of Coercion*, *in* NOMOS XIV: COERCION 16, 19 (J. Roland Pennock & James Chapman eds., 1972) (clarifying coericion as "designat[ing] an interpersonal relation requiring a complex intention by the agent"); George C. Thomas III & Marshall D. Bilder, *Criminal Law: Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 257 & n.74 (1991) (noting linguistic meaning of compulsion requires little or possibly no purpose on part of compellor unlike concept of coercion); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 560 (1985) ("Coercion is an interpersonal relation in which one person affects the behavior of another.").

[13] *See* Alschuler, *supra* note 12, at 2627 n.6 (emphasizing that coercion requires purposeful human activity).

[14] *See id.* (noting compulsion, but not coercion, may come from non-human source).

[15] *See id.*

to drink it. Realizing that Abel is delirious, and seeing that Abel is near death, they force water into Abel's mouth until his reflex to swallow is triggered. In this case, Abel's ingesting the water is coerced. Coercion, unlike compulsion, involves an exercise of agency by some other person.[16]

In Part I, this Article will introduce some necessary refinements into the distinction between coercion and compulsion. Law is not created and cannot be carried out except by the exercise of human agency.[17] If coercion is the product of agency and compulsion the product of circumstances, then either there is no meaningful difference between legal compulsion and legal coercion because both require agency or there is a difference between them that has nothing to do with agency versus circumstances. Another possibility is that the agency/circumstances distinction is amenable to refinement where law is concerned.

The refinement begins with the recognition that circumstances are sometimes brought about by human agency. Suppose Abel is traveling in the desert because he belongs to a desert tribe. Traveling together, they come upon an oasis. Everyone stops to drink and to refill their water containers. Abel, however, proposes to travel on without doing so—whereupon Abel will encounter serious social pressure to drink and refill as the others are doing. After all, it is clear that at some point Abel will become dependent on their water if Abel does not collect his own. If Abel gives in, as he should, one would not say that he has been coerced. It is his circumstances that will lead him to drink and restock his supply of water: his membership in a tribe, his putting not only his survival but that of others in jeopardy, and the principle that he has a responsibility not only to himself but to the tribe to collect water where and when he can. This Article's contention that coercion and compulsion are different in kind relies on this refinement. Coercion is only agentic, whereas one only sometimes finds agency in compulsion. Furthermore, agency in compulsion is secondary to circumstances. Agency creates circumstances, but it is the circumstances that constitute compulsion—at least in the setting of the Self-Incrimination Clause.

This Article's argument uses the term "rule-of-law circumstances" in a literal sense. The rule of law is the cumulative effect of acts of human agency that create and maintain legal rules, but at some point these acts of agency matter less than their cumulative effect.[18] Our lives are deeply embedded in the rule of law, so that sometimes the agency involved in exercises of legal authority recedes almost entirely into the background.[19] In short, legal compulsion consists of rule-of-law circumstances, and this includes the circumstances of police interrogation.

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[16] *See* Bayles, *supra* note 12, at 19 (defining coercion as requiring agent).

[17] *See infra* Section I.B (discussing role of agents in rule of law).

[18] *See infra* Section I.B (describing compelling rule-of-law circumstances).

[19] *See infra* Section I.B.

For example, the service of a summons or subpoena involves agency, but the process server has no normative effect independent from the legal obligation these documents impose. This obligation—the fundamental common-law principle that the state has a right to every person's evidence—is one of our most basic obligations, and is fundamental to our rule-of-law circumstances.[20] The agency of a process server adds nothing to this obligation beyond giving notice of it. This Article argues that police interrogators exercise agency, and that their words and actions invoke the principle that one must produce evidence at the command of the sovereign. Their doing so, however, is both subtle and covert, so that their agency in this regard—unlike their agency in coercing a suspect—is virtually invisible to the suspect. These are the rule-of-law circumstances of a suspect under interrogation—the police-dominated atmosphere that this Article calls custodial compulsion.

Part II argues for this distinction in kind with two types of analysis. First, it uses modest conceptual analysis, which attempts to refine concepts by clarifying their common understanding and our intuitions concerning them, to define compulsion and coercion.[21] For example, involuntariness plays a prominent role in the constitutional evaluation of confessions under both the Due Process Clauses and the Self-Incrimination Clause.[22] But there are two kinds of involuntariness to be accounted for. One is literal involuntariness, represented by someone's forcing one's swallowing reflex. There is also "hard-choice" involuntariness, represented by someone's putting a gun to one's head and giving one the choice between having one's head blown off or committing a crime. Coercion can involve either literal involuntariness or hard-choice involuntariness. Compulsion involves only hard-choice involuntariness.

This Article also employs extensional or "central case" analysis in order to elaborate on the distinction in kind between coercion and compulsion.[23] The central case of coercion is literal involuntariness, of the kind represented by triggering the reflex to swallow. Torture, including a gun to the head, is not literal involuntariness, but it lies close to that central case of coercion because its effectiveness is also all but guaranteed. Compulsion, in contrast, consists of

[20] *See* Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (stating "[t]he common-law principles underlying the recognition of testimonial privileges" include a "fundamental maxim that the public . . . has a right to every man's evidence").

[21] *See* FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS 42-44 (1998) (describing "modest" conceptual analysis as not attempting to define "the fundamental nature of our world" but rather "determining what to say in less fundamental terms given an account of the world stated in more fundamental terms").

[22] *See* Thomas III, *supra* note 10, at 1095 (describing role of involuntariness in Due Process and *Miranda* cases).

[23] The scope of application, or "extension," of terms such as coercion or compulsion includes a number of different features, not all of which may be present in each instance of the terms' use. An instance of the term possessing all or almost all of these features is a central case. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 10-11 (1980) (defining central cases as "states of affairs referred to by a theoretical concept in its focal meaning").

hard-choice involuntariness that falls far from literal involuntariness and outside of the extension of coercion that that central case defines. The rule-of-law circumstances imposed by summonses, subpoenas, and related legal proceedings lie near the central case of compulsion, which is to be obligated by circumstances to opt for one's second best preference. Tom would rather keep playing tennis than stop and drink water, but circumstances dictate that Tom should rehydrate. This example is not meant to suggest that legal compulsion is an equally benign hard choice. The point is that our rule-of-law obligations lie far closer to compulsion's central case of choosing the second best option than they do to the central case of coercion, literal involuntariness. Coercion and compulsion are different in kind, not degree, because the referents of each term cluster around these two radically different central cases.

In Parts III and IV, this Article develops the idea of custodial compulsion with reference to the interrogation manuals that the Court relied on in the *Miranda* opinion, and to the actual practice of interrogation as reported by Professor Richard Leo over many years.[24] This argument begins with the recognition that "You have to do this," is a constant theme running under the interrogator's insistence that "It is in your best interest to do this."[25] Custodial compulsion, in subjective instead of objective terms, is a belief on the part of the suspect that he is obligated to give evidence by speaking to the police, like a person who receives a summons or subpoena is obligated to tell the court what he knows. This compulsion is brought about in the initial stages of the interrogation when the interrogator fosters a sense of common purpose with the suspect, who is not told that he is a suspect, but only that he ought to assist the police in finding the true perpetrators of the crime. This obligation evolves as the suspect comes to believe he is not free to go unless and until he produces evidence that is satisfactory to the police—something which he might well believe from the outset. The obligation is reinforced when the interrogator imposes on the suspect the burden of proving his own innocence. Custodial compulsion continues through the course of the interrogation in the form of a suspect's putative duty—cobbled together by the invocation of any and all social duties the suspect might recognize and by the interrogator's own legal authority—to say exactly, and only, what the police tell him to say.

Part III reads coercion out of *Miranda*. When describing the atmosphere of custodial interrogation, the opinion consistently refers to "compelling"

[24] *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 5 (2008).

[25] Professor Stephen Schulhofer recognized this aspect of compulsion in interrogation, albeit for purposes of making a very different argument from mine. He wrote that, "At the heart of the problem is the suspect who does not know his rights, who believes that the police are entitled to make him talk. But since such a suspect thinks he is *obliged* to respond, his answers are 'compelled' in violation of the fifth amendment privilege." Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 454-55 (1987).

circumstances.[26] Even so, the Court frequently refers to coercion—either by name or by the use of standard terminology such as "undermines his will"[27]—and it does this in reference to the Self-Incrimination Clause. To make matters worse, the words "voluntary" and "involuntary" are used throughout the opinion, but there is no indication, other than context, whether the Court has in mind the torturous hard-choice involuntariness of coercion or the relatively benign hard-choice involuntariness of compulsion.[28]

Of course, these are the author's categories, so the question this Article poses is less "What did the Court mean?" and more "What should the Court have said?" *Miranda* is unquestionably a Self-Incrimination Clause decision, not a due process decision, but *Miranda*'s conflating compulsion and coercion set the stage for a decades-long trend of importing the substance of the Due Process Clause—the regulation of police coercion—into the Self-Incrimination Clause, which regulates compulsion.[29] The twin effects of this trend have been to raise the bar to proving a *Miranda* violation, or to obtaining relief for one, and to create a shadow due process clause that serves no purpose. This should not have happened.

The first step toward such a prescriptive reading of the opinion is to take a close look at the interrogation manuals that play such a large role in the *Miranda* Court's analysis. The Court reads the manuals as offering tactics that "undermine[] his will"[30]—that is, as tactics for coercing the suspect. This misrepresents the manuals. They recommend anything but coercion. For the last half-century or more, police interrogation manuals have described one strategy: to co-opt the suspect's moral and practical judgment, including his sense of social duty. From the start, when the interrogator enlists the suspect in a common cause of solving the case; to the middle, when the interrogator portrays a duty to speak as one of a full range of social duties; to the critical point at which he flips the burden of proof and lays it on the suspect; to the end of the process, when the interrogator relies on little more than his apparent legal authority to demand a confession, the suspect is led to believe that he is obligated, not only to speak, but to tell the story the police want him to tell.

Part IV finds the same phenomenon not only in the manuals, but also in interrogations as they are actually conducted. Richard Leo's findings show how

[26] *See* Miranda v. Arizona, 384 U.S. 436, 466 (using phrase "compelling circumstances").

[27] *See id.* at 455 ("The aura of confidence in his guilt undermines his will to resist.").

[28] *See id.* at 457 (asserting defendants' statements in cases of "unfamiliar atmosphere" and "menacing police interrogation procedures" might not "have been involuntary in traditional terms" but nonetheless implicate the Fifth Amendment).

[29] *See* Thomas III, *supra* note 10, at 1087 (arguing "the Court has transformed the *Miranda* doctrine into a due process protection").

[30] *See Miranda*, 384 U.S. at 455 ("From these representative samples of interrogation techniques, the [coercive] setting prescribed by the manuals and observed in practice becomes clear.").

thoroughly interrogators have internalized the manuals, and how unerringly those manuals have evolved toward invoking a duty to speak. To be sure, the manuals describe, and real life examples show, how police interrogators progressively narrow the suspect's options, and lead him to the unlikely conclusion that his best course of action is to confess to a crime he might or might not have committed. Any act, however, has many effects, and the interrogations that Leo describes show not only the shaping of the suspect's preferences and motivations, but also the foundation of perceived duty that police interrogators build under this decision-making structure.[31]

In custodial interrogation, the interrogator enlists the suspect in the common cause of locating the perpetrators of the crime or developing a case against them.[32] The interrogator appeals to the suspect's identity as a responsible member of society, and to his self-respect.[33] He appeals to any duty the suspect might recognize—familial, religious, moral—which, under the circumstances, all come down to the duty to speak.[34] The interrogator misrepresents the suspect's legal situation—above all by shifting the burden of proof to the suspect.[35] The interrogator uses his legal authority to demand manifestly irrational behavior from the suspect, and does so with a remarkably high rate of success.[36] All of this is accomplished within a carefully designed setting in which the suspect can do nothing without the interrogator's permission.[37] The interrogator does not force the suspect to confess. He shapes an impression of the suspect's circumstances that makes confession appear to be not only his best course of action, but also something he ought to do.

Part V draws out the constitutional implications of custodial compulsion. A violation of the Self-Incrimination Clause can occur only if the statement given

[31] *See* LEO, *supra* note 24, at 133. Combining the fostering of a sense of obligation with the shaping of the suspect's motivations, W.R. Kidd recommends bringing in the suspect's priest to appeal to the suspect's self interest. W.R. KIDD, POLICE INTERROGATION 160 (1940) (observing that priests can help interrogations "by urging the confessor to report his action to the police"). Kidd is cited in the *Miranda* opinion. *See* Miranda, 384 U.S at 448 n.8.

[32] *See* LEO, *supra* note 24, at 133 (observing interrogations create the "illusion that [the interrogator] and the suspect share a mutual interest").

[33] *See* WILLIAM DIENSTEIN, TECHNICS FOR THE CRIME INVESTIGATOR 102 (1952) (observing "the subject may talk because of recognition of his duty and responsibility as a citizen" or because "the subject feels he is doing a favor and wants recognition for it").

[34] *See* CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 111 (1956) (counseling interrogator to employ "sentiments such as patriotism, motherhood, childhood, religion, or fidelty to ideals").

[35] *See* LEO, *supra* note 24, at 135 ("[A]ccusations create the social expectation that the suspect must persuade the interrogators of his innocence . . . .").

[36] *See id.* (pointing out suspects rarely "appreciate that, from a legal standpoint, the state must prove their innocence").

[37] *See id.* at 149 (quoting suspect who recounts that "an agent convinced me I was not free to leave").

is compelled, incriminating, and testimonial.[38] A suspect's confession to a police interrogator is incriminating and testimonial, but the Court does not consider it to have been compelled.[39] A *Miranda* violation creates only a presumption of a Fifth Amendment violation,[40] and this can be elevated to a finding of a Self-Incrimination Clause violation only by proof of "actual coercion"[41] in the field or by a court's admitting the confession into evidence in a criminal trial.[42] Otherwise, the statement has not been compelled, and a violation of the Self-Incrimination Clause has not occurred.

This Article argues that police interrogation in the field occurs under custodial compulsion, that this is Self-Incrimination Clause compulsion, and that the Clause is therefore violated when incriminating testimony is given outside the courtroom. Evidence so obtained is inadmissible at trial for any purpose unless the government can show that the suspect waived the privilege in the field, which, as a practical matter, is best proven by following the warning-and-waiver regime prescribed by the Court in *Miranda*.

A confession taken in violation of *Miranda* is subject to a very narrow exclusionary rule. Only the initial confession is inadmissible, and it is inadmissible only in the prosecution's case in chief.[43] This rule follows from the Court's conviction that a *Miranda* violation is not a violation of the Constitution, but results instead in a presumption of a constitutional violation. This mere presumption, the Court has concluded, deserves no more sanction than a narrow exclusionary rule.[44] However, if a Self-Incrimination Clause violation occurs in the field because interrogators obtain incriminating testimony by custodial compulsion without a waiver, then such a confession should be no more admissible than the first fruit of a violation of the Fourth Amendment, the Due Process Clauses, or the Sixth Amendment guarantee of counsel outside the courtroom.[45] For the same reasons, evidence discovered by way of a *Miranda* violation should be suppressed according to the fruit of the poisonous tree

[38] *See* Fisher v. United States, 425 U.S. 391, 397 (1976) (holding summons for taxpayer's records does not compel witness to testify); Schmerber v. California, 384 U.S. 757, 765 (1966) (finding blood draw is not testimonial).

[39] *See* Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (emphasizing that voluntary statements to police "remain a proper element in law enforcement").

[40] *See* Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer *Miranda* warnings creates a presumption of compulsion.").

[41] *Id.* at 309 (holding no Fifth Amendment violation where *Miranda* violation "unaccompanied by any actual coercion").

[42] *See* Chavez v. Martinez, 538 U.S. 760, 767 (2003) ("[S]tatements compelled by police interrogations of course may not be used against a defendant at trial . . . .").

[43] *See Elstad*, 470 U.S. at 308 (explaining that Fifth Amendment requires suppression of unwarned confession but not of evidence or witness testimony obtained from confession).

[44] *See id.* ("Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.").

[45] *See id.* at 305-06 (summarizing fruit of the poisonous tree doctrine).

doctrine applicable to violations of those other constitutional protections. Fruit of the poisonous tree doctrine deters violations of the Constitution and preserves other constitutional values such as the dignity and autonomy of the person—values which are as much at stake, if not more so, in Self-Incrimination Clause violations as they are in other violations of the Constitution by police.

I. COMPULSION, COERCION, AND LEGAL AGENCY

A. *Compulsion Is Not Coercion*

Compulsion and coercion differ in kind because the former is a matter of circumstances, whereas the latter requires agency. The circumstances of being human and the human body's need for water to survive compel one to drink water. One is coerced into drinking water if it is forced down one's throat until one's reflex to swallow is triggered. The circumstances of living in a rule-of-law state—specifically, the rule-of-law obligation to give evidence in response to a subpoena or summons, under threat of being held in contempt, and the obligation to testify truthfully under oath, under the threat of prosecution for perjury—compel one to speak to government authorities. One is coerced into speaking when an agent inflicts hard treatment to the point at which one's capacity to choose not to speak is lost.

The distinction between compulsion as a matter of circumstances and coercion as requiring agency is well recognized. Michael Bayles wrote in 1972,

> Coercion is an interpersonal relation in which one person affects the behavior of another. This characteristic distinguishes coercion from force, "making" compulsion, constraint, and restraint. Physical conditions may force, compel, or make a person act in a manner in which he would not have chosen without the conditions, but they cannot coerce him.[46]

Professor Peter Westen drew the distinction even more clearly:

> A constraint is not "coercive" unless it is brought to bear on an agent X *by another agent*. We do not say, "Frederick Douglass was coerced by the sun into wearing a hat," or, "He was coerced by a thunderstorm into taking shelter." We might say Frederick Douglass was "forced" by a thunderstorm to take shelter, or "compelled" by the sun to wear a hat, or "coerced" by his master to wear a hat; but we would not say he was "coerced" by natural causes to take shelter or wear a hat, because coercion presupposes a human coercer . . . .[47]

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[46] Bayles, *supra* note 12, at 19.

[47] Westen, *supra* note 12, at 560. In a later article, co-authored with Professor Kimberly Kessler-Ferzan, Professor Westen switched the terms' references around entirely. *See* Kimberly Kessler-Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 776 (2016) ("Compulsion operates entirely through application of present power; coercion operates through anticipation of future consequences . . . ."). Westen

In the cases and scholarly literature interpreting *Miranda*, however, this distinction in kind between coercion and compulsion has gone virtually unnoticed. Professor George Thomas and Marshall Bilder refer to the distinction, citing Westen:

> [S]tandard usage treats the words "compulsion" and "coercion" as essentially interchangeable. The words differ only because compulsion can arise from many sources while coercion is always the product of purposeful human activity: "While one would not say the sun coerced S into wearing a hat . . . one could quite comfortably say that the sun compelled S to wear a hat."[48]

and Kessler-Ferzan describe a rape in which the victim was held down by several men while each raped her. *Id.* at 767. This, they say, was compulsion. *Id.* at 776 (defining rapists use of "superior physical force" as compulsion). Sex in the case of compulsion, they say, was performed "without any act of will on [the] victim's part." *Id.* at 776. To overcome a person's will by physically incapacitating her entirely, however, describes literal involuntariness, putting that condition in a class with induced vomiting. This simply is not how the word "compulsion" is ordinarily used. The *Oxford Living Dictionary* offers twenty example sentences for "compulsion," not one of which involves literal involuntariness, total physical incapacitation, or any other behavior or circumstance that does not involve the exercise of will; thirteen of these examples refer to the inducement of behavior by governmental or legal action. *See Compulsion*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/compulsion [https://perma.cc/K99Z-P26A] (last visited Jan. 5, 2019) (stating for example that "some predict that, at that point, the government will be forced to introduce an element of compulsion" or "[t]he state's only function is as an apparatus of coercion and compulsion"). Westen and Kessler-Ferzan also describe a case in which a woman performed a sex act after she was credibly threatened with death—this, they say, was coercion. *See* Kessler-Ferzan & Westen, *supra*, at 775-76. Sex obtained by a credible threat of death is indeed coerced, as Westen and Kessler-Ferzan say. This is because a credible threat of death imposes a torturous hard choice on the victim that falls close to the central case of literal involuntariness. *See id.* at 776 (observing that the coercer structures the victim's options so that the end the coercer desires is preferable). Compliance is all but guaranteed in such cases. But Westen and Kessler-Ferzan apply the term "coercion" to this case because, "when an actor achieves sexual intercourse by means of coercion . . . he does so by structuring her options . . . such that she prefers sexual intercourse to the alternatives she fears she will otherwise suffer." *Id.* This description, however, applies to benign hard-choice involuntariness no less than to torturous hard-choice involuntariness. When one receives a subpoena, for example, one's options have been structured such that one prefers testifying to the alternative of being held in contempt. The Constitution calls this compulsion. *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."). Westen and Kessler-Ferzan might have explained that here they use "coercion" to describe torturous hard-choice involuntariness. Unfortunately they give no explanation for their choice to use "coercion" and "compulsion" as they do. They simply stipulate that this is their terminology.

[48] *See* Alschuler, *supra* note 12, at 2626 n.6 (quoting Thomas III & Bilder, *supra* note 12, at 257 n.74).

Thomas and Bilder do not bring the distinction to bear on *Miranda*, however. Professor Albert Alschuler explicitly disregards the distinction writing: "In the context of the Fifth Amendment privilege (which limits the conduct of government officers and not of the sun), the difference between the two concepts seems unimportant."[49] It is important to take account of the difference, however, if doing so will clarify *Miranda* doctrine. For one thing, Alschuler is not really agnostic about the distinction. In effect, he dismisses compulsion by circumstances as irrelevant to self-incrimination, and retains coercion. This move is characteristic of virtually all *Miranda* analysis, but it is not necessary. It is also irreconcilable with the words of the Fifth Amendment itself.[50]

B. *Compelling Rule-of-Law Circumstances*

The reason for the neglect of the distinction in *Miranda* scholarship seems obvious: police interrogators are agents. Where the *Miranda* opinion refers to coercion, this is how the Court views them.[51] However, the *Miranda* opinion also portrays them as the creators and exploiters of the circumstances of custodial interrogation.[52] As this Section explains, this Article's argument builds on this part of *Miranda*'s rationale.

Legal agency often recedes into the background of legal circumstances, so that the latter predominates in our experience. Consider how deterrence by law operates. If Ellen does not grab all the money out of an open cash register when the clerk leaves it unattended, this is not because she assesses the chances of her being caught, prosecuted, and convicted of theft, and finds that risk to be small. Ellen has no desire to grab the money at all, because she has internalized the prohibition on theft. The difference between a prohibition and a duty is largely semantic (one has a duty not to steal), so legal duties operate in the same way. Most of us are reconciled to the duty to file a tax return, and give no thought to not filing, or to the possibility of being prosecuted if we were to fail to do so. Our full set of internalized criminal prohibitions and duties constitutes a large segment of our rule-of-law circumstances. As we internalize them, the agency involved in creating and enforcing them recedes into the background, and fades in importance. Similarly, if a process server hands one a summons or subpoena, one can perceive legal agency at work if one thinks about it, but, subjectively, one is unlikely to do so.

In contrast, the agency of the bailiffs who administer oaths and the corrections officers who detain those in contempt of court is hard to miss. In these latter cases, however, agency recedes into rule-of-law circumstances for an objective reason. The law expressly contemplates compulsion of speech that these legal agents carry out, so that the reasons they give are *intra vires*; that is, internal to their duties. How they perform their duties is highly specified by local statutes

[49] *Id.*

[50] *See* U.S. Const. amend. V.

[51] *See* Miranda v. Arizona, 384 U.S. 436, 470 (1966).

[52] *See id.* at 469.

and rules that define service of process, mandatory oaths, or the conditions of detention for those in contempt. In this objective sense, their legal agency recedes into the background of our rule-of-law circumstances.

Police officers engaged in investigating crime seem to be a different matter. They perform their legal duties with wide discretion. Whether they obtain a wiretap or try to flip an informant, set up surveillance on a suspect location or enter it in full paramilitary mode, patrol in cars or on foot—none of this is determined by substantive or constitutional criminal law. Police are free agents relative to that body of law, and their agency does not recede into a background of legal duty. Police agency is very much on one's mind if one hears a siren and sees flashing lights in the rearview mirror. The interrogation of suspects seems to be no exception to this—especially if it is coercive. Clearly, if the police coerce a suspect into speaking, then legal agency is predominant over legal circumstances. Coercion is an abuse of discretion, and *ultra vires* with respect to constitutional criminal law. It does not recede into our rule-of-law circumstances.

Properly understood, however—that is, if we are attentive to the difference in kind between coercion and compulsion—police interrogation is different from other police conduct. Custodial compulsion, as Parts IV and V of this Article will develop, is the police interrogator's effective invocation of one of our most basic legal obligations: the duty to provide the State with all evidence in one's possession. As John Henry Wigmore wrote, in language often cited by the Supreme Court: "When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private . . . . The duty runs on throughout all, and it does not abate; it is merely sometimes not insisted upon."[53]

Because police interrogators do not mislead the suspect regarding this duty, their conduct is *intra vires* compulsion, as opposed to *ultra vires* coercion. Custodial compulsion is part of our rule-of-law circumstances in this objective sense. The obligation invoked in custodial compulsion, however, is the very obligation that the Self-Incrimination Clause is meant to override.

Custodial compulsion also has a subjective dimension. The principal reason that the interrogator's invocation of the duty to surrender one's evidence is circumstantial rather than agentic *from the suspect's point of view*, is that this invocation is never explicit, nor even intentional regarding the Wigmorean duty as such. It is subtle, covert, implicit. It is an accretion of a number of different tactics, words, and acts of the interrogator that form a base of obligation under the structure of instrumental choices in which the interrogator traps the suspect. This is nothing like a paramilitary invasion or a traffic stop. In the course of an interrogation, the invocation of the fundamental duty to speak is hard to detect—as is the police agency behind it. Because agency is concealed, this dimension of the interrogation more closely resembles the simple, innocuous service of a subpoena or summons by a legal functionary. The base of obligation laid under

[53] 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 2967 (1905).

the interrogation is best described as a set of rule-of-law circumstances. As such, it compels; it does not coerce.

If we distinguish compulsion and coercion in kind, instead of by degree, and if *Miranda* is premised on the compulsion of speech as governed by the Self-Incrimination Clause, then it makes sense to recognize and consider the significance of the rule-of-law circumstances of police interrogation. The opinion suggests this in repeated references to "the compelling atmosphere of the in-custody interrogation."[54] Interrogators inculcate a belief on the part of the suspect that he has a duty to produce evidence by speaking that is equivalent to the duty of one served with a summons or subpoena. It turns out that this is true—he does have an obligation to produce the evidence in his possession, by speaking. Of course, this is evidence against himself, which is why *Miranda* recognized that the Self-Incrimination Clause applies to interrogations in the field and why a violation of its privilege occurs there.[55]

II. CONCEPTS AND CENTRAL CASES

A. *Refining Coercion and Compulsion as Concepts*

Conflating the words "coercion" and "compulsion" in *Miranda* analysis is a mistake because the Fifth Amendment speaks of compulsion, and compulsion is not coercion. The argument in this Section is a modest conceptual analysis as described by Frank Jackson.[56] Conceptual analysis is an *a posteriori*, sociological "consideration of when it is right to describe matters in terms of the various vocabularies . . . [and] to do that is to reflect on which possible cases fall

[54] *See Miranda*, 384 U.S. at 465 (holding that waiver of constitutional privilege was not made "knowingly or competently" because of "the compelling atmosphere of the in-custody interrogation").

[55] Professor Yale Kamisar made a similar argument in 1966, before *Miranda* was decided but after the parameters of the debate had settled. He did so in response to an argument he summarized as follows:

> Dwell for a moment on the reasoning that because police officers have no legal authority to compel statements of any kind, there is nothing to counteract, there is no legal obligation to which a privilege can apply, and hence the police can elicit statements from suspects who are likely to assume or be led to believe that there *are* legal (or extralegal) sanctions for contumacy.

Yale Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 65 (1966). Kamisar captures the disingenuousness of the argument. This Article hopes to show that it is simply mistaken. There is a legal obligation to which the privilege applies: the Wigmorean duty to confess.

[56] *See* JACKSON, *supra* note 21, at 42-44 (describing modest role as "addressing the question of what to say about matters described in one set of terms *given* a story about matters in another set of terms").

under which descriptions."[57] It begins with the consideration of a "folk theory"—the ordinary conception of, or shared intuitions, about some matter.[58] An immodest conceptual analysis is one that is "given a major role in an argument concerning what the world is like."[59] This Article offers nothing so ambitious. A modest conceptual analysis is merely a bet that one's own intuition about the matter is one that others will assent to.[60] This Article's bet, advanced in the form of three distinctions beyond circumstances versus agency, is that this Article's understanding of coercion and compulsion can be, upon careful consideration, the general view.

First, we can distinguish between two kinds of involuntariness. Whereas "compulsion" consists of only one kind, "coercion" encompasses both. Coercion can consist of literal involuntariness. Say police who see a suspected drug dealer swallow some capsules and take him to the hospital, where an emetic is forced down his throat with a tube, so as to trigger vomiting in the hope of producing the evidence.[61] If the police succeed, then the suspect has produced the evidence in a literally involuntary way—he had no capacity to choose not to vomit it up. Coercion can also consist of hard-choice involuntariness, in which a person has two options, but one of them is impossibly hard to choose. Torture is a clear case of hard-choice involuntariness. Coercion and compulsion are clearly different in light of this distinction. Coercion involves either hard-choice involuntariness or literal involuntariness, whereas compulsion involves only the former. Served with a subpoena, one can produce the evidence or be held in contempt. To go to jail for contempt is the harder choice, so it is like torture and duress. However, to go to jail is far easier to choose than is continued submission to torture. This is one reason courts and commentators have tended to distinguish coercion and compulsion as degrees of involuntariness. Both involve hard-choice involuntariness. However, courts and commentators have overlooked the fact that coercion encompasses literal involuntariness and hard-choice involuntariness, whereas compulsion does not do so, and also the difference in kind this implies.

An example will help to explain the second and third distinctions. Suppose a person is running from a murderous gang, and he risks death by trying to escape across a highway instead of risking death at the hands of the gang. One would not say the gang has coerced the deceased into risking his life, even though he faced a human threat. The hard choice he faced on the side of the highway is not

[57] *Id.* at 41-42.

[58] *See id.* at 31-32 ("To the extent that our intuitions coincide with those of the folk, they reveal the folk theory.").

[59] *Id.* at 43.

[60] *See id.* at 42 (describing modest conceptual analysis as "betting" that others will find one's intuition compelling).

[61] *See* Rochin v. California, 342 U.S. 165, 166 (1952) (summarizing defendant Rochin's ordeal of being taken to hospital and forced to have stomach pumped by police).

like that of a person who confesses under torture, or the hard choice faced by a person who must choose and act while a gun is held to his head. The workings of compulsion are more amorphous than those of coercion. In *Miranda*, the person under custodial interrogation is said to occupy "the compelling *atmosphere* of the interrogation,"[62] because the compulsion faced in the station house is amorphous. There are two ways to account for this amorphous quality of compulsion in comparison to coercion, which are the second and third distinctions.

The second distinction is the recognition that coercion is intentional in a way that compulsion is not. In the example given above, the conduct of the gang members is intentional in some ways. They intentionally run and intentionally shout threats. They intend to pursue, catch, and harm the victim, even kill him. But suppose they do not intend to herd him toward the highway, and they do not intend for him to attempt to cross it. If this is their set of intentions, then they have not coerced him into attempting to cross the highway, because coercion requires not only agency, but also intent regarding the specific act coerced. The torturer, in contrast, does have the intent to obtain information from his subject. Consider also that his coercive intent is of a specific kind. The torturer does not only inflict pain; his persuasion consists primarily of the threat to inflict further pain. This is conditional intent: "If you do not tell me what I want to know, then I will continue to inflict pain." If the victim satisfies the torturer's curiosity, the latter does not intend to inflict pain. If the victim does not comply, then the torturer intentionally inflicts pain specifically in order to drag information out of the unwilling subject. This is a more complex constellation of intentions regarding the specific act coerced than one might find in other instances of coercion, but it is a well-defined constellation, and it shows by contrast the amorphous nature of compulsion.

The third distinction indicates that compulsion is amorphous because it is frequently multi-valent where choice and motivation are concerned, whereas coercion by an agent typically is not. One's circumstances regularly give rise to several conflicting motivations. If Tom finds himself sitting next to a talkative person in a crowded movie theater, he faces the choice of putting up with the running commentary on the film, causing a scene by complaining, moving to a different seat, or leaving the theater entirely. Each option impinges on his enjoyment of the film. If Tom's child gets into a fight at school, he faces the trilemma of disciplining her, doing nothing in the hope that she will learn from her mistake on her own, or praising her for standing up for herself. Each option carries a risk to her developing character. In contrast, coercion typically creates bivalent motivations: a two-dimensional, do-it-or-else dilemma. Speak, or the torture will continue. The multi-valence of compulsion is well represented in

[62] *See* Miranda v. Arizona, 384 U.S. 436, 465-66 (1966) (emphasis added) (holding that presence of lawyer prevents police-created atmosphere of interrogation from becoming compulsion).

law. The compulsion regulated by the Self-Incrimination Clause is routinely described as a trilemma.[63] A witness forced to testify against herself faces an untenable choice between committing perjury, confessing to a crime, or being held in contempt for not speaking at all.[64]

These points constitute this Article's understanding of the two concepts, and it places a bet that this understanding is widely shared. Compulsion means one thing and coercion means another because they are distinguishable on several fronts in addition to circumstances versus agency. "Coercion" consists of literal and hard-choice involuntariness; it is intentional regarding the act produced; and its resulting motivations are bivalent. "Compulsion" consists of hard-choice involuntariness, but not literal involuntariness; it is not necessarily intentional regarding the act coerced; and its resulting motivations are multi-valent. Each of these aspects of compulsion is reflected in the rule-of-law circumstances that pertain to self-incrimination.

B. *The Central Cases of Coercion and Compulsion*

The last paragraph of the preceding Section states that coercion "means" one thing and compulsion "means" another. If this paragraph had said that coercion "refers" to one thing and compulsion "refers" to another, this would be a different claim. The reference of a term is a matter of description. More precisely, it has to do with the term's "extension," which is the question of whether a predicate—such as "is dark"—attaches to some object or set of events, such as "this room," to form a true sentence.[65] The meaning of terms is more complex. For one thing, it is normative. A student should not write "blatant" if she means "obvious," or say "paranoid" if she means "afraid." Whereas conceptual analysis considers meaning, extensional analysis considers reference.[66]

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[63] *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) ("[The Self-Incrimination Clause] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . .").

[64] *See id.*

[65] *See* CHRISTOPHER HOOKWAY, QUINE: LANGUAGE, EXPERIENCE AND REALITY 90 (1988) ("Whenever a predicate or relational expression occurs in a sentence, we can replace it by another with the same extension and the truth value of the whole will not be affected.").

[66] *See id.* at 139-41 (defining extensional analysis as concerned with "the theory of reference" whereas conceptual analysis deals with "the theory of meaning or sense"). In his comprehensive study of coercion, Alan Wertheimer rejects conceptual analysis in favor of an extensional approach, writing that "attempts to identify a precise set of necessary and sufficient conditions for the truth of coercion claims are not likely to succeed, in large part because our linguistic intuitions are, themselves, unclear and controversial." ALAN WERTHEIMER, COERCION 181 (1987). Instead, he takes a "contextual" approach to coercion, identifying eleven extensions—eleven discrete sets of instances—of "coercion." *See id.* at 185-88. Wertheimer acknowledges that words other than "coercion" are used in these

One kind of extensional analysis is central-case analysis.[67] More may be predicated of some instances of a term than is predicated of other instances.[68] An instance of the term possessing all, or almost all, of its features is a central case.[69] Professor John Finnis describes central-case analysis as follows:

> There are central cases of constitutional government, and there are peripheral cases (such as Hitler's Germany, Stalin's Russia, or even Amin's Uganda). On the one hand, there is no point in denying that the peripheral cases *are* instances (of friendship, constitutionality . . .) . . . . And, on the other hand, there is no point in restricting one's explanation of the central cases to those features which are present not only in the central but also in each of the peripheral cases. Rather, one's descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases. And then one's account of the other instances can trace the network of similarities and differences, the analogies and disanalogies, for example, of form, function, or content, between them and the central cases.[70]

To illustrate central-case analysis, consider an example from substantive criminal law: the lesser-evils defense. This defense is not universally recognized for one very good reason: it amounts to a license to violate the criminal law,

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extensions, and carefully acknowledges that "linguistic differences may reflect distinctions of moral importance." *Id.* at 185 (noting these contexts "include situations in which we would not normally use the *word* 'coercion'"). Compulsion is found in three of these extensions, given Wertheimer's method. Regarding legal cases, he writes, "We may say, 'Wearing a seatbelt is compulsory in New York' and 'Australia has compulsory voting.'" *Id.* at 186. As an example of non-legal norms with penalties attached, he offers, "This university compels its students to take a foreign language." *Id.* at 187. And of non-legal norms with no penalties, he writes, "Students at that university are virtually compelled to join a fraternity." *Id.* To extend the reference of coercion to these three cases, however, simply overextends the word, resulting in the confusion evident in *Miranda* doctrine.

[67] *See, e.g.*, FINNIS, *supra* note 23, at 10 (describing form of extensional analysis focusing on "*central case(s)*," defined as "the states of affairs referred to by a theoretical concept in its focal meaning").

[68] *See, e.g.*, *id.* at 11 (distinguishing central cases from "peripheral cases," which are "watered-down versions of the central cases"); JOSEPH RAZ, PRACTICAL REASON AND NORMS 150 (1975) ("In [central cases] . . . all [of the general traits which mark a thing] are manifested to a very high degree. But it is possible to find systems in which all or some are present only to a lesser degree . . . .").

[69] *See* FINNIS, *supra* note 23, at 10-11 (describing "typical" instances, which possess all or most general traits of something, as "central cases"); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-6 (1968) (describing central case of legal punishment); RAZ, *supra* note 68, at 149-54 (describing legal systems as central case of institutionalized, or "normative," systems).

[70] FINNIS, *supra* note 23, at 11.

making the defense an existential threat to the rule of law.[71] For this reason, where the defense *is* recognized, courts must reject some lesser-evils claims as a matter of law.[72] But which claims are these?

The best way to determine which lesser-evils claims courts ought to reject as a matter of law is to use central-case analysis. One cannot successfully claim the lesser-evils defense if the offense one committed is a central case of the offense. For example, suppose that Ben's employer is about to switch its employees' health insurance to an insurance company that is notoriously stingy and heartless. Ben cannot claim the lesser-evils defense if, to stop this move, he kills the CEO, the CFO, the Director of Human Resources, and twelve members of the Board of Directors. If Ben succeeds in murdering these fifteen people, it does not matter that he can show that hundreds of employees would otherwise have suffered and died unnecessarily because of his employer's switch to the cruel insurer and that he prevented this by murdering only fifteen people. This is because the mass murder that Ben committed is a central case of murder. In other words, Ben's mass murder has all the features of "murder." Most of these features are not encompassed by the elements in the actual offense definition, but they usually, though not invariably, accompany murder.[73] A murder causes great suffering; it can put other lives at risk, even where it is only attempted; it can result in collateral personal injury and property damage; it threatens the rule of law by encouraging retaliation; it creates uncertainty and fear in the general population; and so on.

By contrast, in a peripheral case of murder, a murderer will be allowed to claim the lesser-evils defense. Suppose Jane is an ambassador to a hostile nation, and a war breaks out. The regular army of the nation in which Jane is stationed attacks Jane's embassy. The soldiers guarding Jane's embassy engage in battle, killing enemy soldiers. Jane joins in the fight, even though Jane is not a soldier, and kills an enemy soldier. Under the circumstances, it seems odd to call this a murder at all, but the essential elements of that crime are present: Jane has intentionally killed another human being. Because ambassadors are civilians, the justification defense for murder that soldiers have would not be available to Jane. As for the defense of self-defense, the threat to Jane, personally, is too diffuse, and her response to the threat is focused too little on the individual soldier she killed, to support such an argument. Jane would, however, have a good lesser-evils defense, because the murder she committed is a peripheral case of murder. To grant Jane a lesser-evils defense would not threaten the rule of law.

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[71] *See* Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 44 (2015) ("[S]eventeen jurisdictions explicitly refuse[] to make a lesser evils defense available if there was a readily available and less harmful alternative.").

[72] *See id.* at 42 (noting that lesser-evils defense "requires that the actor's conduct be to prevent a harm or evil greater than that caused by violating the law").

[73] *See, e.g.*, MODEL PENAL CODE § 210.2 (AM. LAW INST. 1980) (defining murder as criminal homicide committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to value of human life).

To return to compulsion and coercion, these concepts are different in kind, not degree, because they have different extensions. Consequently, each term also has a different central case. The central case of coercion is literal involuntariness, of the kind described above—forcing an emetic down a suspect's throat in order to trigger vomiting. By contrast, the central case of compulsion is hard-choice involuntariness of a relatively benign nature: circumstances that impose a choice of one's second-best preference. For example, Calvin prefers cookies over candy to satisfy his sweet tooth; but if Calvin has candy and no cookies in his house, then he is compelled to satisfy his sweet tooth with candy. Benign hard-choice involuntariness is the central case of compulsion because it is the most well-populated category of hard-choice involuntariness. It represents little more than the human condition: in almost every aspect of life, our circumstances trump our ideal preferences. We are compelled to take what we can get, or to do the best we can, under the circumstances as they are—which, in most cases, is not a great hardship. This is not to say that legal compulsion is benign. It is to say, instead, that legal compulsion is closer to the choice of a second-best preference than it is to induced vomiting.

To torture a person into giving a confession is unquestionably coercion. It is not, however, literal involuntariness. It is different from triggering someone's vomit reflex by forcibly administering an emetic. To torture someone for a confession creates a situation of hard-choice involuntariness, because one *does* have the choice to refuse to speak and to continue to suffer torture. If one does speak, one's speech is not a bodily reflex, such as swallowing or vomiting. Then again, the hard-choice involuntariness of torture is a long, long way from the hard-choice involuntariness involved in Calvin's being compelled to eat candy instead of cookies. The choice imposed by torture is extraordinarily hard—so much so that it is virtually impossible to imagine someone's choosing the harder alternative of continued torture. Indeed, the evidence points to the conclusion that, in the end, no one ever actually does choose continued torture.[74] Choosing the easier alternative of confessing is perfectly predictable—nearly as predictable as the consequences of forcibly administering an emetic. This is why torture is coercion instead of compulsion. It lies close to the central case of coercion—literal involuntariness—and far from the benign hard choices that are the central case of compulsion.[75]

[74] *See, e.g.*, S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM: FINDINGS AND CONCLUSIONS 2 (2014) (concluding torture is ineffective means for gaining information and cooperation because tortured persons will eventually say or admit to anything to stop being tortured).

[75] Wertheimer recognizes these two categories of hard choice in his extensional analysis of coercion. *See* WERTHEIMER, *supra* note 66, at 185-86 (noting that "we sometimes use coercion claims to describe cases in which the agent's actions or movements are nonvolitional," but that coercion claims can also "*explain* or *justify*" actions when circumstances "have created a situation in which [the actor] has only one *prudent* or

Compulsion under the Self-Incrimination Clause lies far from the central case of coercion and closer to the central case of compulsion. For example, to be under subpoena is not Don's preferred state. It presents a hard choice: speak or be held in contempt. If Don must speak, perhaps he would prefer not to tell the truth; however, he would be under a hard choice here, too: tell the truth or risk prosecution for perjury. If he speaks and tells the truth, then he is likely to be punished—which leaves him with no good options. This trilemma consists of hard choices that lie at a great distance from the hard choice presented by having no cookies in the house, but it lies at an even greater distance from being physically forced to vomit, or being tortured. For these reasons, our rule-of-law obligation to give evidence falls within the extension of compulsion, not coercion.

This being said, there is a noteworthy difference between torture as a case of coercion and subpoena as a case of compulsion. Torture lies closer to the central case of coercion than a subpoena does to the central case of compulsion. When it comes to custodial interrogation under *Miranda*, this distinction is even more acute. A subpoena lies closer to the central case of compulsion than does custodial interrogation, and custodial interrogation lies closer to coercion than does a subpoena. This does not make custodial interrogation coercion, however. Custodial interrogation still lies closer to the central case of compulsion than it does to the central case of coercion. Custodial interrogation might be a peripheral case of compulsion—recalling that the central case of compulsion is a benign, second-best-choice situation—but it is nevertheless compulsion.

This point is worth raising for two reasons. First, it is another explanation—in addition to coercion and compulsion both involving hard-choice involuntariness—for courts' and commentators' conflating coercion and compulsion in *Miranda* doctrine. The difference between torture and custodial interrogation, in terms of their proximity to their respective central cases, is more felt than seen; even so, this difference buttresses the tendency to conflate coercion and compulsion in *Miranda* doctrine.

Second, this point is worth raising because it accounts for one of the Supreme Court's central mistakes in this area. The Court has said repeatedly that a *Miranda* violation does not count as a violation of the Self-Incrimination Clause because it is not sufficiently coercive.[76] The Court seems to say that *Miranda*

reasonable choice"). He recognizes relatively benign hard choice. *See id.* at 233 ("Hard choices are importantly different from other choices. They have a particularly severe constraining effect. There is, as Joseph Raz suggests, a sense in which people do not act autonomously when they are struggling to maintain the 'minimum conditions of a worthwhile life.'" (citation ommitted)). Wertheimer then goes on to note that the word "coercion" describes torturous hard choice. *See id.* ("[J]ust as the prospect of hanging is said to focus the mind, (very) hard choices produce too much focus and not enough scope. For that reason we can, I think, plausibly use the family of coercion terms to describe hard choice situations.").

[76] *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 308 (1985) ("As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—

compulsion is not close enough to the central case of coercion. The point the Court misses is that, by the same token, *Miranda* compulsion is closer to the central case of compulsion than to the central case of coercion—which is a good reason to think a violation of *Miranda* is compulsion that violates the Self-Incrimination Clause. This is clearer if one bears in mind that coercion and compulsion do not lie on a spectrum of voluntariness. Instead, the picture is of an hourglass on its side, with the respective referents—the two extensions of coercion and compulsion—concentrated in each globe, with relatively few cases caught in the passage between them. *Miranda* cases fall well within the extension of compulsion. To say these cases are not coercive enough to be violations of the Self-Incrimination Clause is not a judgment call. It is simply a category error.

III. READING COERCION OUT OF *MIRANDA*

A. *Confusion over Coercion in the* Miranda *Opinion*

In the immediate aftermath of *Miranda*, Congress attempted to overrule the decision by means of a statute providing that the sole criterion for the exclusion of a confession is its voluntariness.[77] Many years later, the Supreme Court preserved *Miranda* against a challenge based on this statute by holding, in *Dickerson v. United States*,[78] that *Miranda* is a "constitutional rule."[79] Early in its opinion, the Court gave a brief history of *Miranda*:

> Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.
>
> . . . [F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. . . . Those cases refined the test into an inquiry that

for a broader rule."); Michigan v. Tucker, 417 U.S. 433, 448-49 (1974) (declining to exclude testimony of witness discovered via *Miranda* violation because "[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion"); *see also* United States v. Washington, 431 U.S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.").

[77] *See* 18 U.S.C. § 3501 (2018) ("In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given."); Dickerson v. United States, 530 U.S. 428, 436 (2000) ("[W]e agree . . . that Congress intended by its enactment [of 18 U.S.C. § 3501] to overrule *Miranda*.").

[78] 530 U.S. 428 (2000).

[79] *Id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

> examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. . . .
>
> We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. . . .
>
> In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. . . . We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself."[80]

Contrary to what the Court said in *Dickerson*, the Court in *Miranda* did not conclude "that the *coercion* inherent in custodial interrogation . . . heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'"[81] Where the circumstances of custodial interrogation are concerned, the *Miranda* opinion consistently refers to "the compelling atmosphere inherent in the process of in-custody interrogation,"[82] to "the compelling atmosphere of the in-custody interrogation,"[83] to "the compulsion inherent in custodial surroundings,"[84] to "otherwise compelling circumstances,"[85] to "the compelling atmosphere of the interrogation,"[86] to successive interrogations conducted in "the same compelling surroundings,"[87] to "the inherent compulsions of the interrogation process,"[88] and to "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[89]

We can take these passages at face value because the circumstances of custodial interrogation are not inherently coercive—they are inherently compelling. The circumstances of police interrogation would be inherently coercive if police officers ordinarily walked around the police station or other custodial situations with batons, tasers, and guns in hand. That is not only unlikely; two of the interrogation manuals on which the Court relied expressly

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[80] *Id.* at 433-35 (citations omitted).

[81] *See id.* at 435 (emphasis added) (quoting *Miranda* and characterizing quoted material as one conclusion Supreme Court reached in that case).

[82] Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).

[83] *Id.* at 465.

[84] *Id.* at 436.

[85] *Id.* at 466.

[86] *Id.* at 465.

[87] *Id.* at 496.

[88] *Id.* at 467.

[89] *Id.*

caution against making weapons visible at all.[90] One should take this simple observation as encouragement to think carefully about the meaning of the Court's phrasing. This Article's aim, however, is not to parse *Miranda*'s language, but to interpret *Miranda*, heeding the language of the opinion, while imposing my analysis on it to draw prescriptive conclusions.

Miranda did establish the Self-Incrimination Clause as one of "two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence"[91]—the other being the Due Process Clause.[92] The *Miranda* Court *did* affirm that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."[93] The *Miranda* opinion refers to "the product of free choice,"[94] to "the unfettered exercise of [the suspect's] own will,"[95] to "his capacity for rational judgment,"[96] to "an independent decision on his part,"[97] and to police efforts "to overcome free choice."[98] The question, however, is which of these phrases refer to coercive

[90] *See* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 18 (1962) (stating that "the interrogator should not be armed" but "should face the subject as man to man and not as policeman to prisoner"); O'HARA, *supra* note 34, at 98 ("The accoutrements of the police profession should be removed from view. The sight of a protruding gun or billy may arouse an enmity or defensive attitude on the part of the criminal.").

[91] *Miranda*, 384 U.S. at 464-65 (citations omitted) ("The voluntariness doctrine . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice."); *see id.* at 457 ("The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.").

[92] *See* Dickerson v. United States, 530 U.S. 428, 433 (2000) (citing pre-*Miranda* cases establishing Self-Incrimination Clause and Due Process Clause as constitutional bases for voluntariness test); *id.* at 435 (noting that *Miranda* concluded that "coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself'" (quoting *Miranda*, 384 U.S. at 439)).

[93] *Id.* at 478.

[94] *Id.* at 457 ("The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.").

[95] *Id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

[96] *Id.* at 465.

[97] *Id.*

[98] *Id.* at 474. The Court also quoted and cited *Bram v. United States*, 168 U.S. 532, 542 (1897), and *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924), to the effect that a confession must be voluntary under the Self-Incrimination Clause. *Dickerson*, 530 U.S. at 461 (quoting *Bram*, 168 U.S. at 542) (stating that applicability of privilege during custodial interrogation could have been taken as settled when *Bram* held that questions of admissibility based on voluntariness are "controlled by that portion of the Fifth

hard-choice involuntariness that falls close to the central case of literal involuntariness, and which refer to compelling hard-choice involuntariness that falls closer to the central case of benign hard choice.[99]

The *Miranda* opinion *does* give the reader plenty of reasons to think that the decision was motivated by "an increased concern about confessions obtained by coercion."[100] For example, the opinion uses the word "coercion" and phrases commonly denoting coercion in several places, and it does so with reference to the Self-Incrimination Clause. Regarding the interrogator, the Court noted that the interrogator's "aura of confidence in [the suspect's] guilt undermines [the suspect's] will to resist."[101] Regarding the newly prescribed warnings, Justice Warren wrote, "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[102] Regarding the newly established right to have counsel present during questioning, the Court wrote, "With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court."[103] When the Court says an interrogator "undermines [the suspect's] will to resist,"[104] it uses the language of coercion. When the Court says that custodial interrogation can "overbear the will,"[105] it uses a classic formulation of coercion. The Court also

Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself'"); *id.* at 462 (quoting *Ziang Sung Wan*, 266 U.S. at 14-15) ("[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.").

[99] Thirty years ago, Stephen Schulhofer recognized the Court's confusion over the meaning of compulsion, noting the Court's conflation of coercion and compulsion; however, he ultimately failed to dispel this confusion. *See* Schulhofer, *supra* note 25, at 440 (noting that *Miranda* "treated fifth amendment protection as distinct from the voluntariness requirement, but then drew on voluntariness concepts to explain 'compulsion'"). First, he described compulsion in terms of "pressure," which is an accurate way to describe coercion, but not compulsion. *See id.* at 443-45 (describing self-incrimination analysis as focused on threshold of permissible pressure). Second, he recognized that the voluntariness at issue under the Due Process Clause is different from the voluntariness at issue under the Self-Incrimination Clause. *See id.* at 443-47 (describing compulsion for purposes of Self-Incrimination Clause as requiring less pressure than involuntariness under the Due Process Clause). However, he failed to distinguish literal involuntariness from hard-choice involuntariness, and failed to see how some instances of hard-choice involuntariness cluster around literal involuntariness, but that most instances do not. *See id.*

[100] *Dickerson*, 530 U.S. at 434-45 (citing *Miranda*, 384 U.S. 436, 445-58 (1966)) (summarizing *Miranda*'s analysis of custodial interrogation and concerns about coercion).

[101] *Miranda*, 384 U.S. at 455.

[102] *Id.* at 469.

[103] *Id.* at 470.

[104] *Id.* at 455.

[105] *Id.* at 469.

thought it relevant to report that the torturous "third degree" interrogation that had flourished in early 1930s America persisted at least into the 1950s in cases involving physical brutality—including beating, hanging, and whipping.[106]

In each of these passages, the *Miranda* opinion suggests that the suspect has been subjected to the kind of hard-choice involuntariness that falls within the extension of coercion and near the central case of literal involuntariness. These passages suggest that the suspect is no more likely to resist the police than a suspect who has been carried to the hospital, held down, and forced to vomit. This is why one must concede that the Court, in these passages, spoke of the Self-Incrimination Clause in terms of coercion instead of compulsion. The Court's understanding of police interrogation, however, was mistaken.

B. Miranda *Misrepresents the Manuals*

In his book, *Interrogation*, which the *Miranda* opinion cites,[107] Harold Mulbar describes in detail the preferred setting for police interrogation.[108] For example, interrogations should take place in a room set aside for the purpose of interrogation—not in an office or the squad room.[109] Moreover, the room should look different from other rooms in the police station.[110] The room should be painted a neutral color and there should be no pictures, bulletin boards, or anything else that might distract the suspect's attention.[111] Under no circumstances should there be a telephone in the room.[112] The interrogation room must be private—locked and protected from interruptions.[113] The room must also be secure, but not obviously so—for example, there should be no

[106] *Id.* at 446 ("In a series of cases decided by this Court long after [the Wickersham Report], the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.").

[107] *Id.* at 448 n.8 (listing manuals and texts presenting information about effective police practices, procedures, and tactics).

[108] *See* HAROLD MULBAR, INTERROGATION 11-19 (1951). Fred Inbau and John Reid describe the same arrangement. *See* INBAU & REID, *supra* note 90, at 7-9 (describing ideal interrogation room as, among other things, set aside for interrogation, distraction- and interruption-free, quiet, private, and without pictures, telephone, or barred windows).

[109] MULBAR, *supra* note 108, at 12 ("Any agency interested in doing as much as possible to help interrogators should set aside a room for this purpose alone. A squad room will not do. An office will not do.").

[110] *Id.* ("Above all, it should not look like a police station room.").

[111] *Id.* ("There must be no pictures, bulletin boards, 'Wanted' posters or art objects. In short, *there must be nothing in the room to distract the attention of the subject*. . . . Fancy wallpaper with intricate designs will not help, just paint the ceilings and walls a neutral shade . . . .").

[112] *Id.* at 12-14 (noting that telephones "ha[ve] no place in an interrogation room" due to potential for interruption and distraction).

[113] *Id.* at 11 ("Make certain you will have absolute privacy in a room, locked, if you please, to prevent intrusion by anyone.").

barred windows.[114] A microphone should be set up in the interrogation room so that other investigators or a stenographer can be in a different room where they will not divert the suspect's attention.[115] The interrogation room and adjacent rooms must be quiet.[116] The isolation of an interrogation room can provide cover for coercion, but most of the recommendations for its design have nothing to do with coercion.[117] To the contrary, the room should be designed to put the suspect at ease.[118] No weapons or instruments of torture should be on display.[119] W.R. Kidd describes essentially the same setup that Mulbar does, but adds, "*Glaring lights have been held to constitute duress*. They should not be used."[120] As described by Mulbar and Kidd, the interrogation room is compelling, not coercive.[121]

The *Miranda* opinion relies heavily on Charles O'Hara's *Fundamentals of Criminal Investigation*.[122] O'Hara advises the interrogator to dominate by force of personality.[123] The purpose of doing this, however, is to maintain control over the interview—not, as the *Miranda* Court read it, to control the suspect.[124]

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[114] *Id.* at 14 ("The interrogation room must have security against escape, of course, but that does not mean a window full of steel bars . . . . [M]ake sure the bars are there but see that they do not look like bars.").

[115] *Id.* at 14-15 (recommending use of microphone wired to other room to enable reporter to transcribe conversation and other investigators to analyze interrogation while allowing interrogator to remain alone with subject).

[116] *Id.* at 16 ("Quiet is essential, both inside and outside the interrogation room.").

[117] *See id.* at 15 (noting that microphones come in handy because felons commonly complain after confessing "that they were coerced or forced to make damaging statements" while alone with interrogator).

[118] *See* INBAU & REID, *supra* note 90, at 7 (noting that absence of reminders of police custody or jail make it "easier . . . for [the suspect] to make a frank statement or to supply the interrogator with the desired information"); MULBAR, *supra* note 108, at 12 (emphasizing that interrogation room "*must be furnished comfortably* with the kind of soft chairs, rugs and possibly drapes that one would ordinarily find in a gentleman's library"); *id.* at 14 ("Remember, this is a small, well furnished 'library' we are in, not a jail!").

[119] *See* MULBAR, *supra* note 108, at 12; O'HARA, *supra* note 34, at 98 ("The accoutrements of the police profession should be removed from view.").

[120] KIDD, *supra* note 31, at 59.

[121] *See id.* (noting that, among other things the interrogation room should be quiet, private, distraction-free, and have a microphone).

[122] *See* Miranda v. Arizona, 384 U.S. 436, 449 n.9, 250 n.11, 451 n.14, 452 n.17, 453 nn.18-19 (1966) (citing O'HARA, *supra* note 34) (describing interrogation techniques and explaining efficacy of techniques).

[123] *See, e.g.*, O'HARA, *supra* note 34, at 96 ("The interrogator must be able to dominate his subject, not through use of his formal authority but because his personality commands respect."); *id.* at 98 ("The interrogator must always be in command of the situation. The strength of his personality must constantly be felt by the subject.").

[124] *Compare id.* (noting that domination of interrogation via personality enables interrogator to remain "in command of the situation"), *with Miranda*, 384 U.S. at 457 ("It is

O'Hara writes that "[t]he full weight of [the interrogator's] personality must be brought to bear on *the emotional situation*."[125] Furthermore, "[t]he strength of his personality must constantly be felt by the subject. [The interrogator] must never lose control through indignation, ill temper, hesitancy in the face of violent reactions, or obvious fumbling for questions as a result of a lack of resourcefulness."[126] Moreover, the full weight of the interrogator's personality is not necessarily intimidating, as the Court supposed: "To inspire full confidence, the force of the investigator's personality should be tempered by an understanding and sympathetic attitude."[127]

Depending on the emotional situation, O'Hara recommends sympathy, kindness, friendliness, and the role of the "helpful advisor" or the "sympathetic brother."[128] Fred Inbau and John Reid—whom the Court also cited—recommend telling the suspect that, if the interrogator were the suspect's own brother, or father, or sister, he would tell the suspect to tell the truth.[129] They also suggest that "if the subject happens to be a religious person, [the interrogator should] discuss with him the tenets of his particular creed. Mention to him the fact that his religion becomes meaningless unless he tells the truth with regard to the offense in question."[130] W.R. Kidd recommends bringing in relatives to shame the suspect.[131] All of this is manipulative. None of it is coercive.

The interrogation manuals also recommend techniques that amount to trickery, or worse. O'Hara recommends that the interrogator lead the suspect to admit to a lesser crime and then point out that if the suspect lied about committing the lesser crime, the suspect must have lied about committing the greater one.[132] He says the interrogator should bluff that he has knowledge of the crime that he does not have[133] or that an accomplice has confessed.[134] O'Hara

obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.").

[125] O'HARA, *supra* note 34, at 98 (emphasis added).

[126] *Id.*

[127] *Id.* at 96.

[128] *Id.* at 102-04.

[129] *See* INBAU & REID, *supra* note 90, at 56.

[130] *Id.* at 57.

[131] *See* KIDD, *supra* note 31, at 152-53 ("*Relatives* may be used to shame the suspect . . . .").

[132] *See* O'HARA, *supra* note 34, at 105 (highlighting investigators' tactic of leading suspect to admit to lesser offense in order to undermine suspect's credibility in denying greater offense).

[133] *Id.* (encouraging investigators to create impression of knowledge in order to convince suspect to confess); *see* KIDD, *supra* note 31, at 136-38 (same).

[134] *See* O'HARA, *supra* note 34, at 106 (describing tactic of "Bluff on Split Pair," which involves encouraging suspects to confess by stating that their accomplice, in separate room, has confessed); *see also* KIDD, *supra* note 31, at 134-36 (same).

recommends coaching a victim to pick the suspect.[135] In another interrogation manual cited by the Court, William Dienstein's *Technics for the Crime Investigator*, Dienstein recommends using the same bluffs, and adds lying about a non-existent witness to the list.[136] Dienstein also recommends arresting a suspect for an offense he has not committed as a convenient way to compel his attendance at the interrogation,[137] and suggests having several people "who could be witnesses" pick the suspect out of a lineup.[138] Some of these recommendations are unconstitutional and perhaps all of them are unethical. None of them amounts to coercion.

Interrogators are advised *not* to do what the *Miranda* opinion says they are encouraged to do. Inbau and Reid describe the "friendly-unfriendly act," in which one interrogator takes a soft approach, but regretfully yields to his more aggressive partner if the suspect will not confess.[139] They expressly caution against using coercion as part of this technique: "In the employment of the friendly-unfriendly act, the second (unfriendly) interrogator should resort only to verbal condemnation of the subject; under no circumstances should he ever employ physical abuse or threats of physical abuse or other mistreatment."[140] Dienstein advises interrogators, "Don't appear to dominate. Most people recoil when they feel they are being pushed."[141] The interrogator should also "[a]void harassing the suspect into making false statements."[142] Many of Dienstein's tactics involve subordinating the interrogator to the suspect, not the other way around: discount your prejudices; don't overestimate yourself; don't be patronizing; control your temper; if you make promises, keep them; be a good listener; avoid a clash of personalities; recognize the subject's interests; speak the language of the subject; keep the subject's viewpoint in mind.[143] Finally,

[135] *See* O'HARA, *supra* note 34, at 106 (describing tactic of "Reverse Line-Up," which involves encouraging suspects to confess following fictitious identifications purpotedly made by victims).

[136] *See* DIENSTEIN, *supra* note 33, at 113 (discussing "location trick," which involves investigators using fabricated stories to challenge suspects' alibis).

[137] *Id.* at 112 (emphasizing that "roundabout" tactic, which involves charging suspect with police-concocted offense solely for purpose of getting suspect into interrogation room, should be utilized when "it becomes necessary to interrogate a subject when in possession of very meager evidence").

[138] *Id.* at 114 (encouraging investigators to place suspect in lineup and have multiple witnesses identify suspect immediatley prior to interrogation).

[139] *See* INBAU & REID, *supra* note 90, at 58.

[140] *Id.* at 59.

[141] *See* DIENSTEIN, *supra* note 33, at 102 (cautioning interrogators from dominating suspects as such tactics are usually counterproductive).

[142] *Id.* at 106 (advising interrogators to avoid harassing suspects past limit of their knowledge, forcing them to make false statements).

[143] *See id.* at 102-05 (describing multiple interrogation tactics subordinating interrogator to suspect); KIDD, *supra* note 31, at 69-75 (making similar recommendations).

Dienstein recommends putting the suspect at ease by ending the interview, but then asking just one last question to catch the suspect off guard.[144] These are not postures from which the interrogator can coerce a suspect physically, mentally, psychologically, or otherwise. One can, however, compel the suspect to speak from there.

Instead of confronting the suspect aggressively, the manuals recommend establishing rapport. O'Hara contends that the purpose of any emotional appeal is "to create a mood that is conducive to a confession,"[145] not because of intimidation, but because the suspect feels he can confide in the interrogator.[146] Dienstein makes similar recommendations: "Usually, the suspect or accused should be looked upon by the interrogator with a feeling of compassion and as a fallen brother."[147]

Dienstein also encourages interrogators to "[m]ake the subject feel that his actions were justified by playing down or minimizing the crime and the methods, by allowing the subject to blame the victim . . . ."[148] O'Hara concurs. The interrogator "does not take too serious a view of the subject's indiscretion.[149] He has seen a thousand people in exactly the same situation," and "[o]bviously, the subject is not the sort of person that is usually mixed up in a crime like this, because the interrogator could tell from the start that he wasn't dealing with a fellow who was a criminal by nature and choice."[150] Rapport facilitates compulsion. It is irrelevant to coercion.

Some references to coercion in *Miranda* do distinguish coercion in interrogation from compulsion under the Self-Incrimination Clause, so that references to coercion are not misplaced. In each instance, however, the Court draws an implicit contrast to compulsion. In its summary of the interrogation manuals, the *Miranda* Court says, "Even *without* employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[151] The Court also wrote, "It is possible [using techniques in interrogation manuals] to induce the subject to talk *without* resorting to duress or coercion."[152] The Court portrayed its new Self-Incrimination Clause doctrine as an alternative to the constitutional regulation of coercion, stating expressly, "In these cases, we might not find the defendants'

[144] *See* DIENSTEIN, *supra* note 33, at 114 (highlighting fruitfulness of investigators asking suspect spontaneous question while leaving interrogation room).

[145] O'HARA, *supra* note 34, at 102.

[146] *Id.* at 115; *see also* KIDD, *supra* note 31, at 71 (encouraging officers to refrain "from demanding, threatening, bullying, or insulting" suspects).

[147] *See* DIENSTEIN, *supra* note 33, at 115.

[148] *Id.* at 110.

[149] O'HARA, *supra* note 34, at 104.

[150] *Id.*

[151] Miranda v. Arizona, 384 U.S. 436, 455-56 (1966) (emphasis added).

[152] *Id.* at 451 (emphasis added).

statements to have been involuntary in traditional terms."[153] By "in traditional terms," the Court meant in terms of involuntariness under the Due Process Clauses of the Fifth and Fourteenth Amendments.[154]

The *Miranda* Court's discussion of the interrogation manuals, then, is at best ambiguous where the distinction between coercion and compulsion is concerned. Its references to coercion occasionally apply properly to the Due Process Clauses, but too often they are applied improperly to the Self-Incrimination Clause, raising an ambiguity over what the Self-Incrimination Clause actually prohibits. This ambiguity ought to be resolved in favor of treating the Self-Incrimination Clause—and *Miranda*—as regulating the relatively benign hard-choice involuntariness of compulsion instead of the hard-choice involuntariness approaching literal involuntariness that is characteristic of coercion. If this is correct, then the next question is whether or how this is "custodial compulsion."

IV. CUSTODIAL COMPULSION

A. *What Is Custodial Compulsion?*

In one sense, custodial compulsion is the sum total of the non-coercive techniques described in the interrogation manuals and in the actual practice of interrogation, as described above in connection with the *Miranda* opinion's misrepresentation of the manuals, and as will be further described in this Part.[155] Interrogators manipulate the suspect in order to confront him with a series of hard choices. They say, "Tell us the truth now or it will be harder for you in the future," or "This is your last chance to avoid being arrested and charged." This Part, however, describes a more specific sense of custodial compulsion that bears directly on the role of the Self-Incrimination Clause in custodial interrogation.

The "compelling atmosphere of the in-custody interrogation"[156] is a set of rule-of-law circumstances that imposes the common-law duty to speak at the

[153] *Id.* at 457 (describing new doctrine as diverging from traditional definition of involuntary for purposes of Fifth Amendment analysis).

[154] *See id.* at 462 (citing Bram v. United States, 168 U.S. 532 (1897)).

[155] One minor point about "custodial compulsion" should be made here. The Supreme Court has prescribed a standard to decide the question of whether a person is or is not in custody, so that *Miranda* warnings must be given. *See* Berkemer v. McCarty, 468 U.S. 420, 423 (1984) (applying reasonable person standard in deciding whether person is or is not in custody). This has nothing to do with the "custodial" in "custodial compulsion." This Article's arguments here concern the rationale behind the rule of *Miranda* that warnings must be given in certain circumstances. To put this another way, this Article's arguments apply to all *Miranda* cases, not just those in which the *Berkemer* standard is met.

[156] *Miranda*, 384 U.S. at 465 (discussing atmosphere of in-custody interrogation as compelling subjects to speak).

command of the sovereign—the duty against which one has a privilege under the Self-Incrimination Clause. A compelling atmosphere is not a coercive atmosphere. At the outset of an interrogation, it is not even adversarial.[157] Police obtain the voluntary appearance of the suspect and develop a rapport with him. He is led to believe that he can speak safely because he shares a common purpose with the police.[158] The police have a legal duty to solve the crime, and the suspect has a legal duty, historically described as a fundamental duty, to produce any evidence he might have that will enable them to do that.[159] Police introduce the suspect into a carefully controlled atmosphere created by arranging the interrogation space, maintaining control over the suspect's movements, and strategically managing the flow of information to him.[160] This controlled environment facilitates the manipulation and trickery that follows, but it also unambiguously communicates an enforceable obligation on the suspect to tell the truth as the police see it. This is an instrumental imperative—to speak is the only way to escape interrogation—but it is also presented as a moral and legal obligation. Interrogators appeal to any moral duties that the suspect might recognize—each of which is, in this context, a duty to speak. They insist that the suspect bears the burden of disproving their accusations. They simply refuse to accept any exonerating statement the suspect makes until he says exactly, and only, what they want him to say. This custodial compulsion is the inherently compelling atmosphere addressed in *Miranda*.

B. *The Duty to Speak*

If any legal rule can be described as part of our rule-of-law circumstances, it is the duty to produce evidence upon demand of the sovereign.[161] The Self-Incrimination Clause does not protect a right to remain silent. It grants a privilege against a more fundamental duty to speak:

> The common-law principles underlying the recognition of testimonial privileges can be stated simply.
>
> > "For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which

[157] *See* INBAU & REID, *supra* note 90, at 13-15 (discussing need for interrogator to not intimidate suspect).

[158] *See id.* (advising interrogators to refrain from certain conduct to create atmosphere more conducive to suspect's willingness to talk).

[159] WIGMORE, *supra* note 53, § 2192, at 2965 (1905) (describing society's right to individuals' testimony as fundamental).

[160] *See* INBAU & REID, *supra* note 90, at 13-18 (describing various aspects of interrogation atmosphere that interrogators must control to best obtain confessions).

[161] WIGMORE, *supra* note 53, § 2192, at 2965-67.

> may exist are distinctly exceptional, being so many derogations from a positive general rule."
>
> Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[162]

Where this duty is concerned, however, the Court sees a fundamental distinction between the Self-Incrimination Clause as applied in the courtroom versus as applied in the field. In *United States v. Mandujano*[163] the Court said, "Under *Miranda*, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous, whereas a grand jury witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim."[164] This distinction, however, overstates the difference between grand jury testimony and custodial interrogation.

Mandujano seems to say that the obligation to produce evidence does not apply to custodial interrogation at all.[165] The first problem with this reading of *Miranda* is that the Supreme Court has never read *Miranda* so broadly. On the contrary, the Court has read *Miranda* as narrowly as possible and to the suspect's disadvantage at almost every opportunity.[166] The second problem with this interpretation of *Mandujano* is that the narrowest reading of *Miranda* undercuts it completely. In *Dickerson*, the Court was unwilling to say that the warning-and-waiver regime is constitutionally required. The farthest the Court was willing to go was to grant *Miranda* the status of a "constitutional rule."[167] The precise content of this holding remains a mystery, but at an absolute minimum *Dickerson* holds that the Self-Incrimination Clause applies to custodial interrogation by the police so as to allow the Supreme Court to regulate police interrogation in the states.[168] This means that unless the Self-Incrimination Clause serves no purpose at all in *Miranda*—unless even the most grudging concession in *Dickerson* is withdrawn—"the fundamental maxim that the

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[162] Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

[163] 425 U.S. 564 (1976).

[164] *Id.* at 580-88.

[165] *Id.* at 579-80 ("The Court thus recognized that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation.").

[166] *See infra* notes 324-31 and accompanying text (describing virtual "*Miranda* code" that tilts almost entirely in favor of government).

[167] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000).

[168] *Id.* at 438-40 (holding that while the Supreme Court does not have supervisory power over states themselves, *Miranda* allows the Supreme Court to appraise suspects' rights if suspects were interrogated while in police custody).

public . . . has a right to every man's evidence"[169] stands behind the police in custodial interrogation, and the Self-Incrimination Clause stands against it.[170]

It would be surprising if this were not so, given that the duty is invariably described as "fundamental," and sometimes as an "absolute" duty, as the Court called it in *Jaffee v. Redmond*.[171] John Henry Wigmore writes,

> From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole, – from justice as an institution, and from law and order as indispensable elements of civilized life.[172]

This sentence is notable because of its subtle transition from describing agency to describing circumstances. Wigmore addresses the duty as resting on a demand, which presumably has agency behind it. But Wigmore denies this, and describes the duty as arising from rule-of-law circumstances—from community, justice, law, order, and civilized life.

Wigmore's argument is formalistic, which one might expect of a legal scholar writing at the turn of the twentieth century. The duty is axiomatic by virtue of some immanent logic of the law:

> This inconvenience he may suffer, in consequence of his testimony . . . is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. . . . The duty runs on throughout all, and it does not abate; it is merely sometimes not insisted upon.[173]

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[169] United States v. Bryan, 339 U.S. 323, 331 (quoting 8 J. WIGMORE, EVIDENCE § 2192, at 64 (3d ed. 1940)).

[170] One might argue that the Constitution and Supreme Court do not directly regulate the common law duty to produce evidence, and that they do so only indirectly, through the constitutional regulation of the writs of subpoena and summons. In this regard, the Court's description of the duty as a common law principle in *Jaffee v. Redmond*, 518 U.S. 1 (1996), is significant. The recognition of a common law principle as positive law and the direct constitutional regulation of such a law is not beyond the Court's power. In *Nixon v. Warner Communications*, for example, the Court considered the regulation of a common law right of access to court records under the First and Sixth Amendments. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

[171] 518 U.S. 1, 19 (1996).

[172] WIGMORE, *supra* note 53, § 2192, at 2967.

[173] *Id.*

As an axiom of justice, the duty to produce evidence upon demand pervades civilized life. It is an indispensible feature of our rule-of-law circumstances.

To the modern reader, this legal formalism is not particularly persuasive, but Wigmore's argument is also instrumentalist:

> All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous.[174]

The duty will be imposed when it is necessary, and only then, and this necessity is a matter of the benefits outweighing the costs.[175] Wigmore says, and is regularly cited for the proposition, that exceptions to the duty should be rare and narrowly construed.[176] This description applies to *Miranda* and its attendant doctrine. It is hard to see how *Miranda* could be applied to fewer cases than it is, or could have been more narrowly construed when it is applied.

Wigmore's history bridges the gap between his formalism and his instrumentalism. He provides evidence that the duty arose as a necessity and that it is deeply embedded in the Anglo-American judicial system.[177] The writs of summons and subpoena each developed simultaneously with the role of "witness"[178] against a background in which any figure identifiable as a witness was regarded with hostility as an interloper.[179] The power to subpoena, with a failure to appear punishable by contempt, was recognized in the courts of chancery in about 1375, but its primary purpose was not to compel witnesses.[180] It served instead to aid in the obtaining of witness testimony by protecting witnesses from liability for "maintenance," that is, for exercising improper

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[174] *Id.*

[175] *Id.*

[176] *Id.* at 2968 ("It follows . . . that all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced."); *see, e.g.*, United States v. Jicarilla Apache Nation, 564 U.S. 162, 189-90 (2011); Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting 8 JOHN HENRY WIGMORE, Evidence § 2192, at 70 (3d ed. 1940)); Branzburg v. Hayes, 408 U.S. 665, 688, 691 (1972) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2192, at 70 (3d ed. 1940)).

[177] *See* WIGMORE, *supra* note 53, §§ 2190-92 (discussing history of duty to provide evidence stretching back to 1500s).

[178] *Id.* at § 2190, at 2959.

[179] *Id.* at 2960-61 ("The ordinary witness . . . was not only compelled; he was not welcomed.").

[180] The grand jury split off from the petit jury at about the same time. Wayne Morse dates the divergence to 1352. Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 114 (1931) ("[W]e see that by 1352 a clear-cut distinction existed between the jury of presentment, or grand jury, and the [petit] jury.").

influence over a jury.[181] The summons power in courts of common law came into use about one hundred years later.[182] The summons was codified in 1562, in the Statute of Elizabeth, but, like the subpoena, it constituted a right rather than a duty to give evidence—a right that needed recognition in order to counteract continuing hostility to witnesses in the form of charges of maintenance.[183] The earliest expression of this duty to provide evidence reported by Wigmore appears in 1742, in a debate on a bill to grant immunity to certain witnesses.[184] The duty was enacted as a legal rule in the Judiciary Act of 1789.[185] Judicial recognition of such a rule first appears around 1802.[186] These three centuries of practical evolution are reason enough to call the duty to produce evidence "axiomatic" and to take this description seriously, even if it is only a metaphor.

Whether Wigmore's argument is formalistic, instrumentalist, historical, or all three, it carries great weight in American courts. This is hardly surprising given that the Supreme Court has recognized the rule from the beginning. As Justice Marshall wrote in *United States v. Burr*,[187] "It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice."[188] Whereas Wigmore finds the first expression of the duty to testify in 1742, the Court cited an earlier instance in *Blair v. United States*,[189] decided in 1919: "But as early as 1612, in the Countess of Shrewsbury's Case, Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.'"[190]

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[181] WIGMORE, *supra* note 53, § 2190, at 2962 n.18 (highlighting purpose of subpoena power to protect witnesses from liability when coming forward, without compulsion, to provide testimony at trial).

[182] *Id.* at 2961-62 (discussing rise of courts' power to issue summons as against traditional court procedure).

[183] *Id.* at 2962 ("This Statute of Elizabeth . . . represented [a witness's] *right* to come to testify, unmolested by the apprehension of maintenance-proceedings.").

[184] *Id.* § 2192, at 2965-66 (highlighting Parliamentary debate surrounding Bill for Indemnifying Evidence as early instance of invocation of duty to give testimony).

[185] *See* Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 LAW & CONTEMP. PROBS. 51, 53 (1996) (explaining that "[t]he Judiciary Act of 1789 explicitly imposed that duty" to attend trial and testify if summoned by court).

[186] WIGMORE, *supra* note 53, § 2192, at 2966 (highlighting 1802 case *Butler v. Moore* as recognizing individual's constitutional right to "call upon a fellow-subject to testify what he may know of the matters in issue").

[187] 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e).

[188] *Id.* at 39.

[189] 250 U.S. 273 (1919).

[190] *Id.* at 279-80 (quoting Countess of Shrewsbury's Case (1613), 77 Eng. Rep. 1369, 12 Co. Rep. 94).

Taken together, *Dickerson* and the Court's descriptions of the duty to give evidence reveal another critical distinction between coercion and compulsion. Coercion receives no sanction from either substantive or constitutional criminal law. The police torturer acts *ultra vires*. In Part I, this Article contrasted his position to the legal agents who serve process. They add nothing of normative significance to the summons or subpoena itself beyond giving notice, and of course their actions are contemplated by the very law they carry out. Their legal agency is *intra vires*. What then of police interrogators? Their legal agency is not only different from the police torturer's, it is essentially the same as the process server's. Police interrogators compel rather than coerce because the law contemplates the duty they carry out—which is to enforce the ancient and fundamental duty to produce evidence upon demand of the sovereign.[191] In *Miranda* and *Dickerson*, the Court recognized that the Self-Incrimination Clause applies to custodial interrogation because it serves a necessary purpose there.[192] It interposes a privilege between the suspect and compelling rule-of-law circumstances: the ancient and fundamental common-law maxim that the public has a right to the suspect's evidence.

C. *The Rule-of-Law Circumstances of Custodial Interrogation*

Miranda "custody" is defined as *the equivalent of* formal arrest for a reason: police often interrogate a suspect when they do not have probable cause to arrest him.[193] They hope, of course, that the interrogation will produce it. Ideally, police hope to interview a suspect under circumstances that fall outside the definition of *Miranda* custody and that also fall either outside the boundaries of the Fourth Amendment or outside the definition of an arrest requiring probable

[191] Stephen Schulhofer argues that the informal compulsion of police interrogation is the modern version of informal compulsion found in examinations by magistrates in the period in which the privilege against self-incrimination was formulated. *See* Schulhofer, *supra* note 25, at 438 ("The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates." (citing Edmund Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-28 (1949)).

[192] As Stephen Schulhofer pointed out two decades ago,

> Prior to *Miranda*, the courts had uniformly held that police interrogation, because it imposed no formal penalty for silence, was immune from the Fifth Amendment limitations that apply in every other context. Because there was no formal legal obligation to speak, and thus no duty against which a formal privilege of silence could be applied, there simply was no privilege for the arrested suspect to waive; . . . *Miranda*, in a radical break with prior precedent, rejected that view. The Court's central holding was not the now-famous warnings, but the *principle* that Fifth Amendment standards would henceforth apply.

Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 551-52 (1996) (citations omitted).

[193] *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) ("[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.").

cause, such as during a *Terry* stop. This turns out to be easy.[194] As a first step, if police want to interrogate a suspect, they do not "pick him up for questioning." They call or visit and ask the suspect to come in for an interview.[195] Police tell the suspect that he is not a suspect or that they need to eliminate him as a suspect. They treat the suspect as a witness and give him the false impression that he is only a witness—beginning with the deliberate use of the word "interview" or some equivalent, instead of "interrogate."[196] "They will tell the suspect that they need only to ask him a few questions or that they need his help in solving a crime, invariably promising not to take much of his time."[197]

As deceptive as these tactics might be, there is one fact that police cannot hide: they are the police. Of course, they do not need to hide this fact. It is not a deterrent to the suspect; it is the greater part of his reason for coming in to be "interviewed." If the police were willing, or needed, to risk the cost in potential violations of the Fourth Amendment or *Miranda*, the police would go pick up the suspect for questioning and the suspect would willingly come along. The suspect comes in voluntarily for the same reason: the police request is backed by their legal authority, and the suspect has no idea of the limits of that authority. If he perceives a threat behind the invitation, it is not just any threat; it appears to be a legally enforceable threat. If he does not perceive a threat, he nevertheless perceives legal authority behind the invitation, and this is always difficult to ignore. If the suspect is guilty, he will come in because he believes the police do not think he is guilty, because he hopes his cooperation will throw them off the scent, or both. The one thing he will not do is ignore the invitation, because he knows or believes that the police have legal leverage of some kind no matter what he does. One way or another, the suspect shows up to be interrogated because he perceives a legal obligation to do so.

Once they have the suspect in hand, interrogators take the suggestion that he is there merely to give a statement one step further. They inculcate a sense of shared purpose—to be pursued according to the dictates of the interrogator, of course.[198] The warning-and-waiver regime of *Miranda* plays into this impression. As Richard Leo puts it, "*Miranda* warnings co-opt and integrate the suspect into the questioning process by fostering the illusion that the suspect and

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[194] *See* LEO, *supra* note 24, at 124-25 (describing techniques to avoid placing suspect in *Miranda* custody).

[195] *See* KIDD, *supra* note 31, at 56-58 (describing "invitations" delivered personally, by mail, by telephone, and by "roundabout"—or, "around the way").

[196] *See* LEO, *supra* note 24, at 121-22 (describing process of "[s]oftening [u]p the [s]uspect").

[197] *Id.* at 122; *see* KIDD, *supra* note 31, at 35 ("You can explain that your job is to clear him just as quickly as possible . . . .").

[198] LEO, *supra* note 24, at 133 ("[T]he modus operando of the interrogation process remains . . . to obscure the detective's adversarial role and goal of incrimination by creating the illusion that he and the suspect share a mutual interest.").

the investigator share a commonality of interest, thus creating the appearance of a relationship that is more symbiotic than adversarial."[199]

Describing one tactic in this common cause stage of interrogation, Charles O'Hara suggests that the interrogator lay out everything he knows for the suspect and then invite the suspect to tell his version. In doing so, the suspect will provide either new facts or exploitable lies.[200] The obvious question is, why would any suspect be so forthcoming? Here is O'Hara's explanation:

> The subject will, ordinarily, continue to answer questions, since he cannot know that all this information is not necessary for an investigative report. He is willing to assist the interrogator in developing his report. The interrogator gives the impression he is not interested in guilt or innocence; he wishes only to obtain details for his report. *No person, obviously, should prevent the police from accomplishing their report by refusing to answer routine questions.*[201]

In other words, the suspect cooperates by speaking because the interrogator has conveyed the fact that the suspect has a general duty to provide the government with all evidence he has in his possession. William Dienstein similarly recommends taking advantage of the fact that "the subject may talk because of recognition of his duty and responsibility as a citizen . . . ."[202] This is the subjective side of custodial compulsion: a belief on the part of the suspect that he has a duty to speak.

This unlikely duty to assist in his own interrogation is likely to be perceived by a suspect whose self-image as an honorable, responsible person is continually reinforced by the interrogator. Naturally, the principal social duty in the context of interrogation is to tell the police the truth. Leo writes that one detective said,

> The subject was told that it was always better to tell the truth. He was told that he had been taught to tell the truth by his parents and when he was a child and did something wrong he got in more trouble for lying about what happened than he did for what ever it was that he did. He agreed. The subject was told that nothing changes when a person grows up.[203]

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[199] Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUD. 93, 116 (1994).

[200] *See* O'HARA, *supra* note 34, at 109 (describing how interrogator can acquire information such that it would be easy to discover lies by interrogator giving "impression that he is not interested in guilt or innocence" and inviting "subject to tell in his own words all that he knows").

[201] *Id.* (emphasis added).

[202] DIENSTEIN, *supra* note 33, at 102.

[203] LEO, *supra* note 24, at 158.

Reid and Inbau suggest telling the suspect that confessing is "the only decent and honorable thing to do," in order to save the victim the trauma of testifying.[204] They recommend combining flattery with appeals to honor and give several examples from their own experiences:

> In a case involving a rapist who was in military service and aspired to an advanced military career, the interrogator flattered the subject regarding his desire for public service and suggested that his interest in a military career was good evidence of the subject's basically honorable character. The interrogator then urged that the subject should be honorable as regards the case under investigation and tell the truth. A confession followed shortly thereafter.[205]

They recount successfully using the same tactic against a child-molesting clergyman, who was encouraged to go to the chapel of the jail and "while alone 'with God'" write out what had happened.[206]

These are techniques that make the suspect out to be a good, cooperative citizen, who is expected to be helpful to the police. O'Hara advises, "If the subject appears to be cooperating, the investigator should endeavor to develop in him a pride in his cooperation."[207] The interrogator's questions should be framed in terms of the sentimental virtues of "patriotism, motherhood, childhood, religion, or fidelity to ideals."[208] O'Hara thinks that this technique is particularly promising with the juvenile who is the "Non-Criminal Type."[209] "'Mother' is a magic word for inducing a state of repentance and a desire for confession."[210] The same strategy is productive with "'White Collar' First Offenders"—these are "middle-class offenders . . . who are traditionally known to subscribe to orthodox ethical principles and conventional moral standards."[211]

Stated in terms of the sociology of interrogation, to invoke any social duty in the context of interrogation is to invoke the duty to produce evidence on demand. In the interrogation manuals cited in the *Miranda* opinion, and in those written

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[204] *See* INBAU & REID, *supra* note 90, at 57 (describing technique as "somewhat of a challenge for the offender").

[205] *Id.* at 71.

[206] *Id.*

[207] O'HARA, *supra* note 34, at 110.

[208] *Id.* at 111 (describing techniques that encourage suspect to provide information); *see* KIDD, *supra* note 31, at 85 (noting emotional type is "inclined to be strongly religious, strongly patriotic, possessed of a strong sense of social duty or obligation"); *id.* at 110-14 (recommending appeals to racial pride, family pride, and school spirit).

[209] O'HARA, *supra* note 34, at 112 (describing groups of offenders "which may be induced to make confessions").

[210] *Id.* at 113.

[211] *Id.* at 114.

later, police are advised to use "normalizing" techniques.[212] They are told to suggest deviant stereotypes that encompass the suspect's criminal behavior—"the child molester" or "the thief"—and to contrast these with positive images of respectability and virtue.[213] The interrogator suggests that the former descriptions do not fit the suspect and that the latter do, because the crime was a one-time deviation from his true character.[214] Richard Leo describes the strategy in sociological terms:

> The interrogator persuades the suspect that he can demonstrate – to himself as well as to the officer – that he possesses these character traits only by confessing to his wrongdoing. The confession becomes an act of social inclusion through which the suspect is restored to his former social status. Thus, by invoking and inculcating the prevalent norms of society, the interrogator impresses upon the suspect a morally favorable conception of himself in order to facilitate inculpatory admissions. The act of confession is compelled by the obligations that attach to this role.[215]

Significantly, Leo describes this technique in terms that echo Wigmore's rationale for the duty to produce evidence. Recall that Wigmore characterized that duty as "a contribution which [any person] makes in payment of his dues to society"[216] and justified it as a "demand [that] comes, not from any one person or set of persons, but from the community as a whole . . . ."[217] Leo writes, "With normalizing strategies, police interrogators exploit the suspect's psychological need to feel positively about himself, to feel socially connected to others (for example the interrogator), and sometimes even to feel connected to the larger society."[218] In this light, it is easy to see how a suspect could believe that he has an obligation to produce evidence by speaking to his interrogator. He occupies the role of a reasonable and responsible member of society. His interrogator occupies a position in the hierarchy of these roles that calls for respect, and for the moment at least, deference and cooperation. Underlying all of this is "a felt sense of obligation"[219] that, in this context, is an obligation to provide evidence by speaking.

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[212] *See* Leo, *supra* note 200, at 111-12 (noting that "normalizing strategies create incentives for confession").

[213] *Id.* at 111 (describing how interrogators "invoke normative images to which they pressure suspects to conform by confessing").

[214] *Id.* at 112 (noting that investigators may tell suspect that offense "was merely an anomalous deviation from his otherwise impeccable character").

[215] *Id.* (citation omitted).

[216] WIGMORE, *supra* note 53, § 2192, at 2967.

[217] *Id.*

[218] Leo, *supra* note 200, at 113.

[219] *Id.* at 117.

All of these initial tactics and their implied legal obligations go toward rendering *Miranda* "a manageable annoyance."[220] One reason that most suspects waive their *Miranda* rights is that the interrogator has convinced the suspect that the two of them are engaged in the common cause of solving or explaining away the crime—under the direction of the only one of the two who has legal authority.[221] The warnings and waiver are portrayed as mere legal formalities, which the suspect must help the interrogator to meet.[222] The suspect is persuaded to waive his rights in order to prove that he is not, for example, a "cold-hearted killer,"[223] but is instead a person who performs his social duties, including his duty to speak.[224] Leo describes the role of the warnings in this process:

> Moreover, the fourfold *Miranda* warnings that routinely precede every interrogation have become something of a well-recognized ritual. Like other rituals, *Miranda* warnings may function to maintain confidence in our social and political relationships. As Erving Goffman argued, rituals affirm the hierarchy of roles and relationships within our social institutions; they are, essentially, conventions through which we show respect to others, typically our social superiors. By creating a felt sense of obligation among suspects to show respect to the police who question them, the ritualistic *Miranda* warnings thus provide suspects with an opportunity to legitimize their own status during the questioning process.[225]

After the inconvenience of *Miranda* has been taken care of, the interrogation turns adversarial.[226] The police themselves dispel the illusion that they and the suspect are engaged in a common enterprise.[227] It is important to see, however, that the legal obligations suggested in the initial stages of the interrogation run through the adversarial stage, all the way to a confession. For example, the suspect who appears voluntarily because he assumes the police have the legal authority to "pick him up for questioning" anyway continues to believe that his presence is legally enforceable long past the point at which his "voluntary"

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[220] LEO, *supra* note 24, at 124 (noting that warnings do "not prohibit any post-waiver interrogation techniques, and suspects rarely invoke their rights following the warnings").

[221] *See id.* at 128 ("If interrogators personalize the interaction and convince the suspect that they are trustworthy, the suspect will almost inevitably view the *Miranda* warnings as insignificant.").

[222] *See id.* at 127 ("[I]nterrogators may portray the reading of the warnings as an unimportant bureaucratic ritual and communicate, implicitly or explicitly, that they anticipate the suspect will waive his rights and make a statement.").

[223] *Id.* at 129.

[224] *Id.*

[225] Leo, *supra* note 199, at 116-17 (citation omitted).

[226] LEO, *supra* note 24, at 132 ("Once the interrogator has obtained the suspect's implicit or explicit waiver . . . the tone, content, and force of the interrogation may change dramatically.").

[227] *Id.* at 124.

appearance has turned into an arrest requiring probable cause. Leo quotes one suspect: "I was frustrated because I did not know what was going on and being escorted to and from the bathroom by an agent convinced me I was not free to leave."[228] It probably was not a great leap from this perception to the conclusion that he had a duty to speak—which was, after all, the reason he was there.

One tactic that takes the place of the common enterprise tactic suggests even more strongly that the suspect has a duty to speak. Interrogators reverse the presumption of innocence by laying out the case against him (much of which might be a bluff) and then telling him to explain why it's wrong. This "informal shifting of the burden of proof from the state to the accused" is "one of the most subtle, yet ingenious, psychological aspects of American interrogation."[229] Interrogators keep the suspect on the defensive, desperately trying to meet his nonexistent burden of proof.[230] This may be the most direct and unambiguous way of telling the suspect that he has a legal obligation to provide the State with evidence by speaking.

Interrogators reinforce the impression that the suspect has an obligation to speak by stressing that this is an obligation to speak truthfully. They insist that the suspect's denials are not credible.[231] Specifically, they persuade the suspect that his denials will hurt him in court. Most suspects will be aware that perjury is a crime, and some will know that lying can be construed as obstructing justice. Interrogators use this knowledge against them, of course:

> Interrogators often will make more general attacks on a suspect's denials, saying that they do not add up or make sense and thus no one – especially prosecutors, judges, and juries – will believe or credit them. Invoking such third parties can be a particularly persuasive interrogation strategy because it may be joined with a discussion of the potential unfavorable consequences to the suspect if he continues to deny. As one interrogator warned a suspect: "All the lying that you're telling me is going to come back and haunt you."[232]

This legal duty to tell the truth presumes a duty to speak, and now the suspect has been reminded that this duty is enforced by the threat of further criminal liability.

Interrogators suggest a different kind of obligation at the end of the adversarial stage. They insist that the suspect tell them the story they wish to

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[228] *Id.* at 149.

[229] *Id.* at 135.

[230] *See id.* at 136 (noting that "only rarely does a suspect tell his interrogators that he wishes to end the interrogation" after interrogators accuse suspect).

[231] *See id.* at 136-38, 141 ("Interrogators shift the burden of proof onto the suspect, but then refuse to credit his denials.").

[232] *Id.* at 138 (citation omitted).

hear, on pain of the interview's continuing indefinitely.[233] Leo describes this as one of the three principal reasons for confessing:

> [T]hey wish to terminate the interrogation and escape from the stress, pressure, and confinement of the interrogation process . . . .
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> . . . .
>
> . . . For suspects who are already sleep deprived, fatigued, distressed, or suffering from physical discomfort (e.g., drug withdrawal), interrogation exacerbates these conditions. Accusatory interrogation is a highly unpleasant experience for just about every suspect, however. The need to escape may become so overwhelming that it overpowers any rational considerations about the effects of confessing. . . . Some suspects confess because they come to perceive it as the best or only means available to put an end to the process . . . .[234]

The phrase, "so overwhelming that it overpowers any rational considerations about the effects of confessing,"[235] sounds like coercion, and of course the *Miranda* court used the same kind of language in describing the purportedly coercive techniques of modern interrogation. Leo is inclined toward the view that modern interrogation is best described as coercion.[236] If a person is subjected to sleep deprivation or drug withdrawal, then this might amount to torturous hard-choice involuntariness. Both tactics are well-known techniques of actual torture. This does not undermine this Article's argument for two reasons. First, actual torture by these means is not representative of police interrogation as the manuals and Leo describe it. Second, actual torture by these means is adequately regulated by the Due Process clauses, so that there is no need to draw them into the ambit of *Miranda* or the Self-Incrimination Clause.

Police interrogators today employ strategies that have been described in interrogation manuals, in more or less the same terms, for almost eighty years.[237] The current edition of Reid and Inbau's interrogation manual describes the interrogation room just as Mulbar described it in 1951.[238] It still recommends building rapport with the suspect as an essential first step,[239] as does Charles

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[233] *See id.* at 134-35, 158-59 (discussing interrogation techniques designed to elicit confessions).

[234] *Id.* at 162-63.

[235] *Id.*

[236] *See id.* at 199-203 (employing distinction between coerced-compliant and coerced-internalized confessions that is standard in sociological literature).

[237] *See id.* at 107-08 (describing lasting effects of W.R. Kidd's *Police Investigation*, which was published in 1940).

[238] *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 57-61 (4th ed. 2004) (providing suggestions for setting up interrogation room).

[239] *See id.* at 93-94 ("The investigator should establish a rapport with the suspect before asking questions directly relating to the issue under investigation.").

Yeschke's *The Art of Investigative Interviewing: A Human Approach to Testimonial Evidence*.[240] Yeschke cautions against efforts to subdue the suspect psychologically.[241] An accusatory tone will be less effective than an open and positive demeanor.[242] According to Inbau, in the preliminary steps of the interview the interrogator should say he is only looking for information,[243] and should begin with open questions.[244] He should offer rationalizations for the crime and suggest mitigating factors.[245] The interrogator should promote the suspect's own sense of dignity, worth, and importance,[246] and comment on his redeeming qualities.[247] Interrogators ought to subordinate their own egos to the psychological needs of the suspect.[248] Neither intentional nor implied threats will be effective.[249] The interrogator's law enforcement authority should be invoked sparingly and wisely.[250]

The manuals' recommendations have not evolved much because they are very, very effective.[251] The techniques enable interrogators to progressively

[240] *See* CHARLES L. YESCHKE, THE ART OF INVESTIGATIVE INTERVIEWING: A HUMAN APPROACH TO TESTIMONIAL EVIDENCE 72-75 (2d ed. 2003) ("Rapport is a psychological closeness established in the very beginning of an interview . . . .").

[241] *See id.* at 74 (advising interviewer to check whether interviewee is receptive to what interviewer is saying).

[242] *See id.* at 95 ("Do not conduct the interview in an accusatory way; instead, keep yourself open, positive, and neutral.").

[243] *See* INBAU ET AL., *supra* note 238, at 95-96 (providing as example introductory statement for investigators, "[m]y only concern today is establishing the truth—what did or did not happen").

[244] *See id.* at 102-11 ("When evaluating an account, such as what happened to a victim, a suspect's alibi, or what a witness saw or heard, the investigator should elicit this information by asking an initial open question early in the interview.").

[245] *See id.* at 213 (instructing investigator to provide possible moral excuse for committing crime and suggest possible circumstances that justify crime such as urgent financial need).

[246] *See* YESCHKE, *supra* note 240, at 79 (explaining that it is important for interviewer to make interviewee feel accepted).

[247] *See* INBAU ET AL., *supra* note 238, at 224 ("Regardless of the suspect's background, there is usually something positive that can be said about the suspect.").

[248] *See* YESCHKE, *supra* note 240, at 80 ("You will only alienate the interviewee if you react to emotional tirades with threats and insults or if you fall back on your position of authority and demand that the interviewee remain civil . . . ."). Instead, the interrogator should validate the suspect's emotions. *See id.* at 79 ("[Interviewees] need reassurance, support, and acceptance while revealing their thoughts and exposing their secrets.").

[249] *See id.* at 85 (describing silence as form of implied threat).

[250] *See id.* at 89-94 (explaining role of authority in interviews).

[251] It must be said that the "Reid method" of 2004 is substantially different from its first iteration in 1962. *Compare* INBAU ET AL., *supra* note 238, at 212-16, *with* INBAU & REID, *supra* note 90, at 209-16. The primary focus of the latest edition is educating interrogators on how to distinguish true from false statements by assessing the suspect's behavior during the interrogation. INBAU ET AL., *supra* note 238, at 212 (noting that interrogation method should

narrow the suspect's options to the point that he sees confessing to a crime or making fatal admissions as his best choice under the circumstances. But the techniques of the manuals also shape those circumstances, and the principal feature of these compelling circumstances is one of the most basic of our rule-of-law obligations: the duty to give evidence. To invoke this duty enhances the effectiveness of any interrogation technique by laying a foundation of obligation under the structure of necessity. The invocation of this duty, and not only strategic necessity, is *Miranda*'s target, and should be central to our efforts to understand *Miranda*. After all, the *Miranda* warnings tell the suspect what he is not *required* to do, not what it is inadvisable to do.

V. *MIRANDA* AS A CUSTODIAL COMPULSION CASE

This Part argues that if incriminating testimony is obtained by custodial compulsion, then a Self-Incrimination Clause violation has occurred in the field. The warning-and-waiver regime serves an evidentiary function and the *Miranda* rights to a warning and to counsel are mere adjuncts to the privilege itself. If this is so, then *Miranda* doctrine can be rid of two related and equally troubling features: its pointless duplication of the due process ban on involuntary confessions and its extraordinarily narrow exclusionary rule.

A. *A Constitutional Violation in the Field*

The constitutional theory underlying the rules implementing *Miranda* is consistent with the Self-Incrimination Clause doctrine generally, or appears to be so. The Clause applies only to compelled, incriminating testimony.[252] A confession taken by a police interrogator is testimonial and incriminating. The

not be used to make innocent person confess). The principal difference in tactics is that the suspect is to be confronted with an unambiguous accusation at the first step. *Id.* at 212 (describing step one). This step, however, follows the preliminary steps of establishing rapport and asking for information using open questions. *See id.* at 93-94 (instructing on establishing rapport); *id.* at 102-11 (instructing on open questions). In steps two and three, the interrogator is advised to offer the suspect moral excuses for committing the crime and to repeatedly steer him toward accepting one of them. *Id.* at 213. Step four consists of suggesting economic, religious, and moral reasons why the suspect would *not* have committed the crime. *Id.* at 213-14. Steps five and six involve assessments of the interrogator's and the suspect's non-verbal comunications, such as body language. *Id.* at 214. In step seven, the interrogator asks suggestive questions about the details of the crime's commission. *Id.* Steps eight and nine consist of taking the suspect's verbal and written confessions. *Id.* None of this, needless to say, involves coercion. In the Reid method's advice to invoke moral reasons to commit or not to commit the crime, it involves compulsion as described above.

[252] *See* Pennsylvania v. Muniz, 496 U.S. 582, 588-89 (1990) (stating Self-Incrimination Clause "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature").

Court has taken the view, however, that it is not compelled.[253] It is, obviously, not compelled by the service of a summons or subpoena. Nor is an interrogator's violating *Miranda*'s warning-and-waiver regime compelling. Not telling a suspect that he need not speak is not equivalent to telling him that he must speak. The *Miranda* opinion repeatedly refers to the compelling atmosphere of custodial interrogation, but this term has never played a significant role in *Miranda* doctrine.[254] Neither Chief Justice Warren nor the other signatories to the opinion elaborated on that metaphor in substantive terms, and no one on the Court has done so since. Under the Court's prevailing interpretation of *Miranda*, the Court has found compulsion, instead, in the incentives created by police interrogators, which the Court then and in subsequent cases has misdescribed as coercion.

Justice O'Connor's opinion in *Oregon v. Elstad*[255] contains the Court's clearest explanation of *Miranda* and its exclusionary rule. In that case, detectives investigating a burglary questioned a young man at his home without giving him *Miranda* warnings and took a second, virtually identical statement after warning him and obtaining a waiver.[256] The first confession was suppressed because the failure to warn created a presumption of a Self-Incrimination Clause violation:

> The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.[257]

The presumption of compulsion does not extend from the first confession to the second. The suppression of the fruit of a *Miranda* violation requires separate proof of "actual coercion"[258]:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his

[253] *Id.* at 589 (explaining that voluntary statements given to police are not compelled if the proper procedural safeguards are observed).

[254] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 457-58 (1966) (discussing the atmosphere of "compulsion inherent in custodial surroundings").

[255] 470 U.S. 298, 300-18 (1985).

[256] *Id.* at 300-01.

[257] *Id.* at 306-07 (citation omitted).

[258] *Id.* at 309.

> free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.[259]

One might think that the phrase "actual coercion" denotes a due process violation, but in context it describes a violation of the Self-Incrimination Clause.[260] By the time *Elstad* was decided, the misdescription of compulsion as coercion was pervasive: "compulsion" described coercion, "coercion" described coercion, and no doctrinal term described actual compulsion. Nothing in cases governed by *Miranda* (for example, neither the first nor the second confession in *Elstad*) ever amounts to "compulsion" under the Self-Incrimination Clause.

It is important to recognize that what is true of subsequent statements is also true of the initial statement taken in violation of *Miranda*. The initial statement is no more the product of "actual coercion" than are subsequent statements. Nothing done subsequently with the initial statement—including admitting it into evidence at a criminal trial—ever actually coerces the suspect or defendant to speak. This means that the Court's "presumption" that the Clause has been violated in the taking of the first confession is vacuous. A confession taken in the field in violation of *Miranda* has not been taken in violation of the Self-Incrimination Clause, and no *Miranda* violation ever ripens into a finding that the Constitution actually has been violated.[261] It is only "a *Miranda* violation." This, of course, is Justice O'Connor's point. Not even the suppression of the initial statement is constitutionally required. It is perfectly clear, then, that nothing that follows from that confession must be suppressed. An exclusionary rule would be required only if the "*Miranda* violation" were a violation of the Self-Incrimination Clause.

Elstad looks very different when viewed as a case of custodial compulsion. The first confession was not coerced; it was compelled with the techniques that the interrogation manuals recommend. The detective in *Elstad* testified,

> I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr.

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[259] *Id.*

[260] *See id.* at 304 ("The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment."); Kamisar, *supra* note 55, at 65-66 (asserting *Miranda* alters previous treatment of incriminating statements through absolute presumption).

[261] The fact that the Court has not been consistent in its application of the presumption is, perhaps, one indication of the presumption's emptiness. *Cf.* Thomas III, *supra* note 10, at 1086 ("By what standard does the Court decide which contexts should not benefit from *Miranda*'s conclusive presumption? This we are never told – another *Miranda* mystery.").

> Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."[262]

Compulsion was present from the initial stages of the interrogation, when the detective suggested only that Elstad should help him to find the true perpetrators of the crime. An unambiguous accusation would have undercut this strategy, so the detective initially minimized Elstad's culpability. Elstad was not arrested, and the detective did not attempt to overpower him psychologically. The detective relied on little more than his authority as a law enforcement officer to give Elstad the impression that he ought to talk.[263] Elstad turned out to be an easy target, but even his brief interrogation was a textbook case of compulsion.

If the compulsion in this brief conversation seems insufficiently severe and irresistible to implicate the Self-Incrimination Clause, the problem is in thinking of compulsion in terms of its being severe and irresistible. Coercion is evaluated on metrics of severity and pressure. Genuine custodial compulsion is evaluated relative to the legal compulsion of a summons or subpoena and the fundamental duty to give evidence. Elstad would have perceived legal compulsion if he had been handed a summons. The detective invoked this kind of obligation when he enlisted Elstad's help in solving the burglary—that is, when the detective asked Elstad to give him any evidence Elstad had in his possession—which is the first prescribed step in an interrogation in almost all of the manuals.

As the product of custodial compulsion, this confession was inadmissible, but not because of a vacuous presumption that it was taken in violation of the Self-Incrimination Clause. If custodial compulsion is recognized as Self-Incrimination Clause compulsion, then *Miranda* did not *extend* the Self-Incrimination Clause to the field, but instead recognized that it *applies* in the field—just as it does when the Wigmorean duty is imposed by a summons or subpoena.[264] A "*Miranda* violation" is not a failure to carry out the warning-

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[262] *Elstad*, 470 U.S. at 301.

[263] Stephen Schulhofer has made a similar point. *See* Schulhofer, *supra* note 25, at 447 ("The response of a naive young suspect, following just a few seconds of interrogation, can plausibly be seen as compelled by fear of mistreatment, by expectations of unrelenting interrogation, or more simply by the utterly natural assumption that he is obliged to answer—that when a person in authority asks a question, the official is legally entitled to a response."). He went on to argue that this compulsion could not account for the presumption of compulsion in every case in which warnings are not given or a waiver is not obtained. *See id.* This Article's argument does account for that presumption—by eliminating it in favor of finding that, in such cases, the Self-Incrimination Clause has been violated in the field.

[264] *See* Miranda v. Arizona, 384 U.S. 437, 467 (1966) ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."); Schulhofer, *supra* note 25, at 439 ("Against this background, the pre-*Miranda* claim that the fifth amendment had no application to informal pressure seems an historical curiosity. Although *Miranda*'s rejection

and-waiver regime. It is, instead, a violation of the Self-Incrimination Clause: taking incriminating testimony by means of compulsion in the absence of a waiver of the privilege. *Miranda*'s warning-and-waiver regime is no more or less than what the Court said it was: a way to prove that a knowing and voluntary waiver of the privilege has occurred in the field or a way to prevent a waiver from occurring at all.[265] The initial confession in *Elstad* was the product of a genuine violation of the Self-Incrimination Clause. It was incriminating testimony compelled by the circumstances of custody, taken without a waiver of the privilege, as inferred from the absence of a *Miranda* warning.[266]

B. *Adjunct Rights to Be Informed of the Privilege and to Counsel*

The Self-Incrimination Clause grants a privilege of silence to the suspect interrogated in the field, and the taking of incriminating testimony under custodial compulsion is a violation of that privilege. The warning-and-waiver regime of *Miranda* serves to prove or disprove a valid waiver of the privilege. The Clause grants only a privilege not to speak, however. It does not contain either a right to be informed of the privilege or a right to counsel. Why, then, did *Miranda* create either of these rights? Why did the Court require proof of a knowing waiver of the right to counsel along with a knowing waiver of the privilege? The answer is that the rights to be informed of the privilege and to have counsel are adjunct rights that the *Miranda* Court inferred from the privilege, and proof of a knowing waiver of the privilege requires proof of a knowing waiver of these adjunct rights as well.

The recognition of adjunct rights was nothing new when *Miranda* was decided. The use of public streets had long been recognized as a right adjunct to the right of assembly.[267] Nor has the recognition of adjunct rights been controversial since then. Freedom from censorship is an adjunct to the right to free speech.[268] The right to cross-examine is an adjunct to the right of

of this claim overruled numerous precedents, that step in its analysis no longer seems open to serious question.").

[265] *See Miranda*, 384 U.S. at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

[266] As Professor Tracey Maclin writes, in the course of showing that *Chavez v. Martinez*, 538 U.S. 760 (2003), was decided incorrectly, "if the witness does not *know* that his statements cannot be used against him *later* in a criminal case, his Fifth Amendment right is *presently* violated." Maclin, *supra* note 9, at 1077.

[267] *See* Stotland v. Pennsylvania, 398 U.S. 916, 919 (1970) ("At least since . . . 1939, the use of public property such as streets and parks has been deemed an important adjunct to the rights of free speech and assembly protected by the First Amendment.").

[268] *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 242 n.8 (2003) ("In practical terms, if libraries and the National Government are going to be kept from engaging in unjustifiable adult censorship, there is no alternative to recognizing a viewer's or reader's

confrontation.[269] The meaning of "adjunct" in this context varies from right to right. Coming together in public streets is one kind of assembly. Freedom from censorship is intrinsic to free speech. Cross-examination is partly constitutive of the right to confront one's accusors.

The Court recognized a right to be informed of the privilege and a right to counsel as adjunct rights to the Self-Incrimination Clause because these are, as the Court has said from the beginning, practical necessities.[270] The Court lists a remarkable number of functions the warning of the right to remain silent is meant to serve. The first is simply to make the suspect aware of the privilege, which is "the threshold requirement for an intelligent decision as to its exercise."[271] The warnings "overcom[e] the inherent pressures of the interrogation atmosphere,"[272] so as to "insure that the individual knows he is free to exercise the privilege at that point in time,"[273] and to "show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."[274] To tell the suspect that anything he says can be used against him "make[s] him aware not only of the privilege, but also of the consequences of forgoing it[,] . . . that he is faced with a phase of the adversary system [and] that he is not in the presence of persons acting solely in his interest."[275] Once lost, the privilege not to incriminate oneself cannot be reacquired or revived. As the Court pointed out, "[A]ll the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[276] In terms that appear only once in *Miranda*, but that have come to dominate *Miranda* doctrine, the warnings serve a prophylactic function.[277]

The adjunct right to counsel serves the same prophylactic function:

> The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police

right to be free of paternalistic censorship as at least an adjunct of the core right of the speaker.").

[269] *Cf.* Whorton v. Bockting, 549 U.S. 406, 420 (2007) (holding that "right of cross-examination as an adjunct to the constitutional right of confrontation" is "bedrock" right).

[270] *Miranda*, 384 U.S. at 439 ("[W]e deal with . . . the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment . . . .").

[271] *Id.* at 468.

[272] *Id.*

[273] *Id.* at 469.

[274] *Id.* at 468.

[275] *Id.*

[276] *Id.* (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

[277] *See id.* at 463 (comparing "appropriateness of prophylaxis" in regulation of state interrogations under the Self-Incrimination Clause to prophylactic regulation of federal interrogations under the Court's supervisory power).

> interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.[278]

The *Miranda* right to counsel is a modest addition to the privilege, as an adjunct right should be. It might seem quite the opposite. It might appear that a Sixth Amendment right has been grafted onto the Fifth Amendment privilege.[279] But consider carefully how exactly the presence of counsel at a police interrogation "would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege."[280] The interrogations governed by *Miranda* occur early in the course of a criminal case, and *Miranda* counsel's role is necessarily minimal. To permit a police interrogation without having interviewed one's client at length; without the benefit of independent investigation; without having any idea what evidence the interrogators have or what crimes they think might have been committed; and, if one's client is exposed to liability, without negotiating immunity, would constitute ineffective assistance of Sixth Amendment counsel. This, plainly, is not what *Miranda* counsel is expected to do. Instead, *Miranda* counsel fully executes her role once she instructs the suspect to stop talking.[281] To contrast this brief episode with the functions of Sixth Amendment counsel is to appreciate the adjunct status of the *Miranda* right to counsel.

C. *The Logic of a Voluntary* Miranda *Waiver*

One piece of conventional *Miranda* wisdom is that there is a contradiction in its voluntary waiver requirement. Echoing Justice White's *Miranda* dissent, Joseph Grano stated the problem this way:

> If a simple response to a single custodial question must be viewed as presumptively compelled, the possibility of having a voluntary waiver is difficult to understand. Similarly, if the right to counsel's presence in this

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[278] *Id.* at 466. The Court goes on to say this:

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end.

Id. at 469-70.

[279] This is a misperception for which the *Miranda* Court can be blamed. The Court initially conflated the *Miranda* right to counsel with the Sixth Amendment right—a position it quickly abandoned. *See Kirby v. Illinois*, 406 U.S. 682 (1972).

[280] *Miranda*, 384 U.S. at 466.

[281] As Justice Jackson once pointed out, "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

> fifth amendment sense arises because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege," allowing the defendant to subject himself to such overbearing pressures by waiving his rights is incomprehensible.[282]

Grano was perhaps the most prominent of *Miranda*'s detractors, but some, if not most, of *Miranda*'s supporters accept the criticism as well.[283]

This criticism would be valid if *Miranda* barred coercive interrogation, and if the Self-Incrimination Clause prohibited coerced testimony, but *Miranda*'s logic is not marred by any such contradiction. In the passage quoted just above, Grano conflates coercion with compulsion when he quotes the *Miranda* opinion's reference to interrogation that might "overbear the will," followed by his own reference to "overbearing pressures."[284] As this Article has argued, coercion is not compulsion. If the suspect is subjected only to compulsion properly understood, then his will has not been overborne. A suspect who is subjected only to custodial compulsion retains full capacity to waive his *Miranda* rights voluntarily.

To be subjected to the duty to produce evidence at the command of the sovereign might compel a suspect to waive his privilege against self-incrimination, even if it does not coerce him into doing so. To compel him to act according to this duty, however, does not require the negation of his capacity to choose. The suspect who waives his privilege under compulsion is still able to speak voluntarily in the sense of voluntariness—the absence of torturous hard-choice involuntariness—that Grano's argument relies on.

Finally, *Miranda* does not say, as Grano assumes, that "a simple response to a single custodial question must be viewed as presumptively compelled."[285] That presumption was imposed by *Michigan v. Tucker*[286] and *Elstad*.[287] More

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[282] Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 671-72 (1986) (quoting *Miranda*, 384 U.S. at 469); *see Miranda*, 384 U.S. at 536 (White, J., dissenting) ("But if the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?").

[283] *See, e.g.*, Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at* Miranda v. Arizona, 95 B.U. L. REV. 1387, 1411 (2015) ("I agree that the waiver rule announced in *Miranda* 'is plainly at odds with the rest of the opinion.'" (quoting GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 152 (2012))).

[284] Grano, *supra* note 282, at 672 (quoting *Miranda*, 384 U.S. at 469).

[285] *Id.* at 671.

[286] 417 U.S. 433 (1974).

[287] Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer *Miranda* warnings creates a presumption of compulsion."); *Tucker*, 417 U.S. at 443 ("[A] defendant's statements might be excluded at trial despite their voluntary character under traditional principles.").

importantly, a *Miranda* violation, properly understood, does not result in a presumption at all. To take a confession without *Miranda* warnings, or where the privilege of silence or *Miranda* counsel has been invoked and not waived, or without advising the suspect of these rights at all, constitutes a violation of the Self-Incrimination Clause in the field.

D. Miranda *as a Pointless Ban on Involuntary Confessions*

In reading *Elstad* and subsequent opinions, one might take the words "actual coercion" to be referring only to a backup role played by the Due Process Clauses. Evidence obtained by coercion is inadmissible on that authority.[288] In *Elstad*, however, Justice O'Connor is not referring to due process.[289] As has been the Court's practice, she is conflating coercion and compulsion in Self-Incrimination Clause doctrine, and her point is confined to that Clause. She writes, "The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised."[290] She quotes *United States v. Washington*[291] in her *Elstad* opinion, to this effect: "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."[292] This "coerced self-accusation," in other words, is the *faux* "coercion" that passes as compulsion under current *Miranda* doctrine.

To conclude from Justice O'Connor's opinion that the fruit of a *Miranda* violation is governed by the Due Process Clauses' ban on coercion, instead of by the Self-Incrimination Clause's ban on "coercion," is understandable. The substitution of the word "coercion" for "compulsion" turned out not to be merely a nominal substitution. Instead, the substitution served to import genuine coercion—that is, hard-choice involuntariness approaching literal involuntariness and torture—into the Self-Incrimination Clause, at least where the fruit of a *Miranda* violation is concerned. To put this another way, the Court imported the substance of the Due Process Clauses into the Self-Incrimination Clause. This move has rendered *Miranda* redundant. This effect might not have been intended, but it is otherwise fair to say that the Court's handling of Fifth Amendment compulsion in *Miranda* has been a fraud.

Scholars have argued for years that to read *Miranda* as duplicating the due process ban on involuntary confessions renders *Miranda* pointless and

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[288] *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 21 (2015).

[289] *Elstad*, 470 U.S. at 303 (considering question of "whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession").

[290] *Id.* at 310 (citing New York v. Quarles, 467 U.S. 649, 654-55, 655 n.5 (1984); *Miranda*, 384 U.S. at 457).

[291] 431 U.S. 181 (1977).

[292] *Elstad*, 470 U.S. at 305 (quoting *Washington*, 431 U.S. at 187).

irrelevant. For example, in 1977, Geoffrey Stone said this of the Court's opinion in *Tucker*:

> [T]he Court in *Miranda* had held that, in the absence of appropriate safeguards, a statement obtained in such circumstances is elicited in violation of the privilege despite its voluntary character under traditional standards. Mr. Justice Rehnquist's analysis in *Tucker* – viewing the privilege solely in terms of the voluntariness test – simply rejects this aspect of *Miranda* . . . .[293]

It will be impossible to separate *Miranda* from the Due Process Clauses until compulsion and coercion are seen to be different in kind. To distinguish them by degree is not impossible, but to do so necessarily perpetuates the mistaken view that the Self-Incrimination Clause is the "Due Process Junior" clause. If, in contrast, we introduce a difference in kind into due process doctrine and Self-Incrimination Clause doctrine, then each body of law serves a distinct purpose in governing police interrogation.

E. *The Fruit of a* Miranda *Violation's Poisonous Tree*

Miranda's exclusionary rule is narrow. Only a confession not preceded by a *Miranda* warning and waiver is inadmissible.[294] The Court held in *Tucker* that the testimony of a witness who has been identified by means of an unwarned and unwaived confession is admissible.[295] In *United States v. Patane*,[296] the Court held that real evidence, such as a weapon, is admissible even if this evidence is the fruit of an unwarned or unwaivered confession.[297] Under *Elstad*, as explained above, a second, lawful confession that is the fruit of a first, unlawful confession is admissible at trial.[298] *Elstad*'s rule encouraged police to take an unlawful and inadmissible confession purposely in order to cause the suspect to lower his guard and give a second, lawful, and admissible confession. In *Missouri v. Siebert*,[299] the Court recognized an exception to *Elstad*'s rule only

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[293] Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118-19.

[294] *Miranda*, 384 U.S. at 384 ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.").

[295] Michigan v. Tucker, 417 U.S. 433, 444 (1974) ("[T]he police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*.").

[296] 542 U.S. 630 (2004).

[297] *Id.* at 637, 644 ("The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements.").

[298] Oregon v. Elstad, 470 U.S. 298, 218 (1985) ("No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver.").

[299] 542 U.S. 600 (2004).

because the abuse of that rule was so common as to effectively negate *Miranda* itself.[300] That the second confession was caused by the first confession plays no role in the rationale of that exception.

A violation of *Miranda*'s warning-and-waiver regime results in the suppression of the initial confession, but only because of the presumption that this Article has described as vacuous.[301] The fruit of the initial confession can be suppressed only if it was obtained by means of "actual coercion."[302] Of course, the number of cases in which this showing can be made is virtually nil. If evidence has been discovered by way of violating *Miranda*, then there is no reason to think police have also used coercion to obtain the same evidence. The upshot is that *Miranda* does not have a fruit of the poisonous tree doctrine.[303] For example, when it closed the *Elstad* loophole in *Siebert*, the Court was careful to avoid overruling *Elstad* itself. The second confession was deemed inadmissible on the ground that the warning that preceded it is ineffective wherever the *Elstad* tactic is effective.[304] The second confession was not excluded as fruit of the poisonous tree.[305]

The rationale in each of these cases is that the *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[306]

[300] *Id.* at 617 ("These circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.").

[301] *See Elstad*, 470 U.S. at 304 (describing presumption in *Miranda*, which "required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment").

[302] *See id.* at 309 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process . . . ."); *id.* at 305 ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." (citing United States v. Washington, 431 U.S. 181, 187 (1977))).

[303] *Id.* ("Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.").

[304] *See Siebert*, 542 U.S. at 613-14 ("Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986))).

[305] *Id.* at 617 ("Because the question-first tactic effectively threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible.").

[306] Michigan v. Tucker, 417 U.S. 433, 444 (1974); s*ee* United States. v. Patane, 542 U.S.

According to *Patane*, "unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the 'fruit of the poisonous tree' doctrine . . . ."[307]

The fact that a *Miranda* violation is a violation of the Self-Incrimination Clause does not, strictly speaking, imply such a doctrine. It strongly suggests, however, that the question of what to do about evidence discovered by means of a *Miranda* violation should be answered in the same way that this question is answered for other evidence obtained by constitutional violations in the field: under the Fourth Amendment, the Due Process Clauses, and the right to counsel under the Sixth Amendment recognized in *Massiah v. United States*.[308] The exclusionary rules under each of these constitutional provisions are different from one another. Each set of rules, however, includes a fruit of the poisonous tree doctrine, and each suggests reasons to recognize the doctrine for *Miranda* cases.

The Fourth Amendment has the most extensive exclusionary rule jurisprudence. The exclusion of evidence found by means of an illegal search or seizure is said to be required by the Fourth Amendment itself, leaving no doubt that a constitutional violation in the field will result in the exclusion of evidence in court.[309] Evidence discovered by way of the unlawful search or seizure is also inadmissible if it has a causal, but-for, connection to the Fourth Amendment violation.[310] That is, the fruit of the poisonous tree is inadmissible.[311] An inevitable discovery exception is applicable in search and seizure cases.[312] In addition, two other exceptions have been recognized: where the causal connection is attenuated[313] and where the causal connection is broken by

630, 641 (2004) ("[P]olice do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*.").

[307] *Patane*, 542 U.S. at 642.

[308] 337 U.S. 201 (1964).

[309] *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (describing substantive protections for all constitutionally unreasonable searches and seizures).

[310] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

[311] *See* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (stating that declarations are to be excluded if they are "'fruits' of the agents' unlawful action").

[312] *See* Murray v. United States, 487 U.S. 533, 539 (1988) (noting application of the Sixth Amendment's inevitable discovery rule to the Fourth Amendment).

[313] *See* Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) ("Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance . . . ."); *Wong Sun*, 371 U.S. at 491 (holding that break in custody of several days dispels effect of illegal search).

discovery through an independent source.[314] In *United States v. Leon*,[315] the Court recognized a good faith exception to the exclusionary rule that renders unlawfully obtained evidence admissible unless the constitutional violation is unreasonable (or advertently reckless, knowing, or intentional).[316] In *Herring v. United States*,[317] the Court relaxed this standard to exclude evidence found in a grossly unreasonable violation of the Fourth Amendment, but to admit evidence found in an unreasonable violation that might be described as merely careless.[318]

If custodial compulsion results in a genuine violation of the Self-Incrimination Clause, then the Constitution is violated in the field on those occasions, just as it is when an unlawful search and seizure takes place. Fruit of the poisonous tree doctrine under the Fourth Amendment serves to deter unlawful searches and seizures[319] and to advance other constitutional values such as preserving the dignity and autonomy of citizens. There is no reason to think that a fruit of the poisonous tree doctrine for *Miranda* violations would not serve just as well to deter unlawfully compelled confessions or to protect the dignity and autonomy of suspects.[320] The latter values, indeed, are as central to the Self-Incrimination Clause as they are to the Fourth Amendment, if not more so.[321]

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[314] *See Strieff*, 136 S. Ct. at 2061 ("[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source."); *Murray*, 487 U.S. at 538 (evidence discovered by means of illegal search is admissible if there is source for evidence independent from illegal search).

[315] 468 U.S. 897 (1984).

[316] *See id.* at 922 (stating that when officer acted in good faith in conducting search, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion").

[317] 555 U.S. 135 (2009).

[318] *See id.* at 147-48 (explaining that "when police mistakes are the result of negligence" and not "reckless disregard of constitutional requirements," evidence is admissible).

[319] *See id.* at 141 ("First, the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'" (quoting United States v. Janis, 428 U.S. 454 (1976))).

[320] *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (stating that Self-Incrimination Clause serves to preserve "the dignity and integrity of its citizens" and "the inviolability of the human personality").

[321] Chief Justice Warren wrote:

> As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life . . . . [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent

Hindsight might be as worthless as it is clear in this area, but it is nevertheless worth considering how an exclusionary rule with a good faith exception might have led to a more reasonable *Miranda* doctrine than the one we have. If we re-conceptualize *Elstad* in terms of fruit of the poisonous tree, then the second confession taken in the wake of an unwarned and unwaivered initial confession is clearly inadmissible. The causal connection expressed in terms of "letting the cat out of the bag" was, in *Elstad*—and is in most similar cases—clear enough.[322] The exploitation of *Elstad* by police in virtually every jurisdiction in the country would never have occurred had a fruit of the poisonous tree doctrine been in place. If the second confession had been treated as the inadmissible fruit of a *Miranda* violation, then police would never have had an incentive to purposely take an unwarned confession. If the Court in *Siebert* had been willing to adopt such a doctrine at that point, it would not have had to resort to the novel, even ad hoc, rationale that it did in order to put a stop to the practice.[323] It had only to ask whether the officers acted in good faith or instead exploited *Elstad* in bad faith.

Correcting *Elstad*'s error is not the only benefit of a fruit of the poisonous tree doctrine for *Miranda* violations. The Court has decided a series of cases that constitute a virtual *Miranda* code. This code is complex, stating whether the invocation of the right to silence or counsel must be explicit and unambiguous;[324] whether the waiver of the right to silence or counsel can be implicit or ambiguous;[325] whether the suspect has initiated conversation, thus cancelling his prior invocation of the right to silence or counsel;[326] whether the invocation of the right to silence or counsel is specific to the case under

labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Id.* (citations omitted); *cf.* Boyd v. United States, 116 U.S. 616, 630 (1886) ("Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.").

[322] *See* Oregon v. Elstad, 470 U.S. 298, 302 (1985).

[323] Missouri v. Siebert, 542 US 600, 616-17 (2004) (finding statements obtained through "police strategy adapted to undermine the *Miranda* warnings" inadmissible on the ground that warnings given in those circumstances could not have been effective).

[324] *See* Berghuis v. Thompkins, 560 U.S. 370, 382-84 (2010) (holding that invocation of right to silence must be explicit and unambiguous); Davis v. United States, 512 U.S. 452, 459 (1994) (holding that invocation of right to counsel must be explicit and unambiguous).

[325] *See Berghuis*, 560 U.S. at 384-85 (stating that waiver of right to silence can be done by speaking); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (explaining that waiver of either right need not be explicit or unambiguous).

[326] *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (expressing that willingness to discuss substance of case is initiation cancelling prior invocation).

investigation;[327] and whether the waiver of the right to silence or counsel is specific to the case under investigation.[328]

With only two exceptions, the Court has determined the issue at hand in favor of the government.[329] Had this code been developed in the shadow of an exclusionary rule with a good faith exception, it might have been more balanced than it is. It almost certainly would have been simpler, more flexible, and more sensitive to context. For example, consider the fact that the Court has held that the invocation of either right must be express and unambiguous,[330] but that a waiver of either right can be implicit or ambiguous.[331] This pronounced bias in favor of the government could easily have been avoided if the effectiveness of invocations and waivers were framed as whether the prima facie inadmissibility of a confession taken after invocation and/or without a waiver could be overcome by a showing that the police believed in good faith that the suspect had not invoked his rights or that he had waived them.

The right to counsel recognized in *Massiah v. United States* offers the closest comparison to *Miranda*. The Supreme Court decided a few years before *Miranda* that after formal adversarial proceedings begin, the Sixth Amendment guarantees the assistance of counsel not only in the courtroom, but in the field.[332] Confessions taken in violation of this right to counsel are suppressible, and so are the fruits of an unlawful confession.[333] In fact, one of the leading cases on fruit of the poisonous tree doctrine, *Nix v. Williams*,[334] is a *Massiah* case and

[327] *See* Arizona v. Roberson, 486 U.S. 675, 683-84 (1988) (showing that invocation of right to counsel is not case specific); Michigan v. Mosley, 423 U.S. 96, 104-06 (1975) (demonstrating that invocation of right to silence is specific to case under investigation).

[328] *See* Colorado v. Spring, 479 U.S. 564, 577 (1987) (indicating that waiver of neither right to silence nor right to counsel is case specific).

[329] *See Roberson*, 486 U.S. at 683-84 (holding that the invocation of the right to counsel bars subsequent interrogations); Edwards v. Arizona, 451 U.S. 477, 483-85 (1981) (explaining that questioning must cease immediately upon invocation of right to counsel). *But cf.* Maryland v. Schatzer, 559 U.S. 98, 110-11 (2010) (regardless of prior invocation of right to counsel, police may initiate contact two weeks after suspect has been released from custody).

[330] *See Berghuis*, 560 U.S. at 382-84 (finding that invocation of right to silence must be explicit and unambiguous); Davis v. United States, 512 U.S. 452, 459 (1994) (holding that invocation of right to counsel must be explicit and unambiguous).

[331] *See Berghuis*, 560 U.S. at 384-85; North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[332] *See* Massiah v. United States, 377 U.S. 201, 205 (1964) ("[F]rom the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932))).

[333] *See id.* at 206-07 (finding incriminating statements obtained in absence of counsel inadmissible at trial).

[334] 467 U.S. 431, 446 (1984) (stating that although the "Sixth Amendment right to counsel

not, as one might expect, a Fourth Amendment case. A body was discovered by means of an unlawful interrogation of a suspect who was represented by counsel, and it was prima facie inadmissible as fruit of the poisonous tree.[335] The Court held that it was admissible under an "inevitable discovery" exception to that exclusionary rule.[336] Whereas the Court has frequently revisited and refined *Miranda* doctrine, however, it has not done so with *Massiah* doctrine. As a result, it is not clear where Sixth Amendment fruit of the poisonous tree doctrine stands.[337] At least one court has concluded that *Massiah* doctrine should follow *Miranda*, and that the fruit of a confession taken in violation of the Sixth Amendment need not be excluded.[338]

This Article's position is that *Miranda* doctrine should follow *Massiah* and *Nix* in the direction of excluding the fruit of a poisonous interrogation. It is true that the two rights differ in scope and in rationale,[339] but this Article's argument is not deep enough to implicate those differences. The Court has justified its narrow exclusionary rule in *Miranda* cases by insisting that a violation of *Miranda* is not a violation of the Self-Incrimination Clause.[340] Where the *Massiah* right to counsel is concerned, the Court has never suggested that police interrogation of an indicted defendant without the presence of his lawyer is anything but a violation of the Sixth Amendment, even when it occurs outside a judicial setting. The fact that a violation of *Miranda* is a violation of the Self-Incrimination Clause aligns *Miranda* with *Massiah*. A violation of *Massiah* is a violation of the Sixth Amendment,[341] and evidence discovered by means of violating the Constitution ought to be suppressed. A violation of *Miranda* is a violation of the Self-Incrimination Clause, so that there too, in the absence of a

protects against unfairness," by ensuring reliability of evidence, police conduct in this case "did nothing to impugn the reliability of the evidence in question").

[335] *Id.* at 436-37 (explaining that the Supreme Court previously held that police "obtained incriminating statements" that led to discovery of body "by what was viewed as interrogation in violation of his right to counsel," but remanded case for new trial).

[336] *See id.* at 448 ("[W]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.").

[337] *See* Eve Brensike Primus, *Disentangling* Miranda *and* Massiah*: How to Revive the Sixth Amendment Right to Counsel As a Tool for Regulating Confession Law*, 97 B.U. L. REV. 1085, 1109 (2017) ("The Supreme Court has not yet imported its rejection of fruits doctrine for *Miranda* violations into the *Massiah* context, but it has also not decided a case about the admissibility of derivative fruits of *Massiah* violations in over thirty years.").

[338] *See id.* at 1112-13 (citing United States v. Fellers, 397 F.3d 1090, 1096 (8th Cir. 2005)) ("[O]ne circuit has already imported the *Elstad-Seibert* line of cases into the Sixth Amendment context.").

[339] *See id.* at 1096-97 (explaining that *Massiah* serves fairness and equality throughout proceedings whereas *Miranda* preserves privilege against self-incrimination for use at trial in future).

[340] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

[341] Massiah v. United States, 377 U.S. 201, 205-07 (1964).

waiver of the privilege it grants, evidence discovered by means of violating the Constitution should be deemed inadmissible.

The Due Process Clauses have the most robust exclusionary rule, at least in the context of confessions. It is unimaginable that the Court would find that a confession had been extracted by torture, and that it would then permit the confession—or even the fruit of the confession—to be admitted into evidence. In any event, it has never done so. Not only that, it has never explained why it does not do so. This alone might be one reason the Court has hesitated to give *Miranda* a robust exclusionary rule. Having admitted the substance of due process—the concepts of coercion and torturous hard-choice involuntariness—into its *Miranda* doctrine, perhaps the Court felt it necessary to bar the door against the Due Process Clauses' absolute rule of exclusion. If so, the problem could and should have been prevented by keeping coercion out of the Self-Incrimination Clause to begin with. All that was necessary was to observe the distinction between due process coercion and compulsion under the Self-Incrimination Clause.

CONCLUSION

In cases that fall under *Miranda*, police interrogators give a suspect instrumental reasons to confess. They also build a foundation of obligation under this instrumental structure. In doing this, interrogators effectively invoke the Wigmorean duty of a citizen to produce any evidence he has in his possession, including his own confession. That is, they invoke the duty against which the Self-Incrimination Clause stands, so that the Clause is applicable to police interrogations, and is violated where it is not waived. Relying on the interrogation manuals relied on by the *Miranda* Court, modern interrogation manuals, and actual interrogation practice as described by Richard Leo, this Article has argued that this is how the *Miranda* opinion's reference to the "compelling atmosphere" of police interrogation should be understood. Interrogation within the atmosphere of a duty to speak is "custodial compulsion." A confession taken in violation of the warning-and-waiver regime does not give rise to a presumption that a Self-Incrimination Clause violation has occurred. It *is* a violation of the Self-Incrimination Clause.

The key to this argument is the fact that there is a difference in kind between coercion and compulsion. Coercion is imposed by an agent, whereas compulsion is imposed by circumstances. Compelling circumstances include our rule-of-law circumstances, including the duty to produce any evidence we have when the sovereign asks for it. Neither courts nor scholars have heeded this distinction in interpreting *Miranda* and instead have spoken incoherently of coercion under the Self-Incrimination Clause. This results in the duplication of the Due Process Clauses and also raises a bar to showing a *Miranda* violation, or obtaining relief for one, that virtually no one can clear. In interpreting and applying *Miranda*, courts ought to distinguish coercion and compulsion and should recognize that the interrogators' effective invocation of the duty to give evidence is compulsion under *Miranda*, and also under the Self-Incrimination Clause. This means that

"a *Miranda* violation" is a violation of the Self-Incrimination Clause in the field, just as a Fourth Amendment violation occurs in the field. This has profound implications for *Miranda* doctrine: principally, the application of a robust exclusionary rule that includes a fruit of the poisonous tree doctrine. American courts should heed the distinction between coercion and compulsion, and all that follows from it.