VERDUGO, WHERE'D YOU GO?: *STOOT V. CITY OF EVERETT* AND EVALUATING FIFTH AMENDMENT SELF-INCRIMINATION CIVIL LIABILITY VIOLATIONS

Geoffrey B. Fehling[*]

INTRODUCTION

A man drives to a local gas station convenience store during halftime of a football game to buy some beer while wearing his favorite team's jersey. He completes his purchase, exits the store, and begins to drive home. Thirty seconds after leaving the store, a college student bearing a strong physical resemblance to the man—in an identical football jersey—threatens the store attendant and steals several six-packs of beer. Police respond by searching the neighborhood surrounding the store and identify the first man from the eyewitness reports given by the attendant. The police pull the man over, see the beer and matching physical description, and bring him into the station for questioning as a potential suspect.

Despite his innocence and not having properly received his *Miranda* rights,[1] the man confesses to the crime due to intimidating interrogation techniques and his fear of police questioning.[2] The man is released on his own recognizance that same evening, and prosecutors file charges the following day, relying in part on his coerced statements. Two hours after the formal charges are filed, the college student is apprehended after robbing the same convenience store a second time, and prosecutors drop all charges against the innocent man before his case commences in court. Nevertheless, the man files a claim pursuant to 42 U.S.C. § 1983[3] alleging that police

---

[*] George Mason University School of Law, Juris Doctor Candidate, May 2011; Editor-in-Chief, GEORGE MASON LAW REVIEW, 2010-2011; Davidson College, B.A. History, May 2006. I would like to thank George Ingham and Professor Michael O'Neill for their invaluable assistance with this Note, as well as my family for their patience and support.

[1] "*Miranda* rights" are procedural safeguards put in place by the Supreme Court to inform suspects of their legal rights during police interrogations and to help police conduct investigations without the ongoing risk of self-incrimination liability. *See* Miranda v. Arizona, 384 U.S. 436, 467-71 (1966). For a more detailed description of *Miranda* rights, see Michigan v. Tucker, 417 U.S. 433, 443-44 (1974), or for a discussion of judicially mandated prophylactic rules in general, see *infra* Part I.B.

[2] Compulsion in violation of one's Fifth Amendment right against self-incrimination is different from *Miranda*-defective testimony received after having not properly informed the defendant of his guaranteed rights. *See Tucker*, 417 U.S. at 440, 443 (differentiating "genuine compulsion of testimony" from the supplemental "protective guidelines" of *Miranda*).

[3] For a brief discussion of historical justifications and various applications of § 1983, see Jeffrey Alan Zaluda, Pullman v. Allen*: Harmonizing Judicial Accountability for Civil Rights Abuses with Judi-*

violated his constitutional rights by coercing his confession in violation of the Fifth Amendment's Self-Incrimination Clause.

Under a traditional analysis examining the man's potential Fifth Amendment self-incrimination claims, he would not have a valid claim because he was never compelled to be a witness against himself in a criminal case and his coerced statements were never used against him at trial.[4] Under the recent Ninth Circuit decision of *Stoot v. City of Everett*,[5] however, he could nevertheless recover.

The Fifth Amendment has always been understood to grant a witness the right to refuse to testify against himself at trial.[6] Self-incrimination liability exists when defendants allege specific, legitimate threats to their constitutional rights, whether through reliance on coerced statements at trial or other direct infliction of criminal penalties. For example, in *Gallegos v. Colorado*[7] the Supreme Court held that a juvenile's statements could not be used against him at trial after he had signed a confession following five days of detention without seeing a lawyer, parent, or friendly adult.[8] This protection, however, has evolved over time to encompass the ever-changing procedural postures of criminal cases found in our legal system. What was once characterized as a "trial right" focusing only on witnesses taking the stand against themselves has now expanded outside traditional courtroom trial settings.[9] Yet, despite the changing landscape of Fifth Amendment rights, courts have been hesitant to expand the right against self-

---

cial Immunity, 34 AM. U. L. REV. 523, 523-24 (1985). Section 1983 and related *Bivens* actions are discussed *infra* Part I.A.

4 *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see also* Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion) ("Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." (citation omitted)).

5 582 F.3d 910 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

6 *Cf. Chavez*, 538 U.S. at 767 (plurality opinion) ("Statements compelled by police interrogations of course may not be used against a defendant at trial . . . .").

7 370 U.S. 49 (1962).

8 *Id.* at 54-55.

9 *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the [Fifth Amendment self-incrimination] privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."). *But see* Ullmann v. United States, 350 U.S. 422, 438 (1956) ("We are not dealing here with one of the vague, undefinable, admonitory provisions of the Constitution whose scope is inevitably addressed to changing circumstances. The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921))).

incrimination too far from the core rights envisioned by the original Framers of the Constitution.[10]

Recently, in *Stoot v. City of Everett*, the Ninth Circuit adopted a "general approach" to self-incrimination violations by holding that use of coerced statements at trial is not necessary to bring a successful Fifth Amendment claim.[11] Specifically, the Ninth Circuit held that a defendant's Fifth Amendment rights would be violated if coerced statements were used in pretrial proceedings like arraignment or bail hearings.[12] Such a decision implies that violations of this nature necessitate constitutional remedies, not mere enforcement of prophylactic rules.[13] This approach fundamentally differs from previous Supreme Court characterizations of Fifth Amendment rights, particularly the statement in *United States v. Verdugo-Urquidez*[14] that pretrial misconduct by law enforcement officials cannot amount to a constitutional violation.[15]

Although procedural violations can occur during an interrogation before charges are ever filed,[16] such prophylactic violations are different from the underlying constitutional violations they are created to protect.[17] Courts have created judicially mandated safeguards expanding the core rights protected under the Constitution. Prophylactic rights (e.g., the right to an attorney or the right to remain silent during police interrogations[18]) provide causes of action for procedural violations outside the scope of core constitutional rights.

Recognizing an ongoing circuit split as to whether pretrial uses of defendants' coerced statements constitute a Fifth Amendment violation, *Stoot* attempted to reconcile the ambiguity arising out of the controversial 2003 Supreme Court decision *Chavez v. Martinez*.[19] The *Chavez* plurality held that defendants cannot claim a constitutional violation if they were never prosecuted or compelled to be a witness against themselves in a criminal case[20] but failed to discern the point at which "use" of coerced statements in

---

10 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (finding that the privilege against self-incrimination is a "fundamental trial right" which can be violated "only at trial"); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005) (same).

11 Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

12 *Id.*

13 *See id.* (determining that defendant's violations "impose precisely the [constitutional] burden precluded by the Fifth Amendment").

14 494 U.S. 259 (1990).

15 *Id.* at 264.

16 *See* Miranda v. Arizona, 384 U.S. 436, 463, 497 (1966).

17 Prophylactic rules and the inherent differences between core constitutional rights and procedural rules created to overprotect those rights are discussed *infra* Part I.B.

18 *See Miranda*, 384 U.S. at 444-45 (describing the various "procedural safeguards" required to use statements, whether exculpatory or inculpatory, obtained from custodial interrogation).

19 538 U.S. 760 (2003) (plurality opinion).

20 *Id.* at 766-67.

a "criminal case" violates a defendant's right against self-incrimination.[21] The aftermath of *Chavez* is unclear,[22] leaving courts to attempt to protect the Fifth Amendment's constitutional guarantees without exercising too much discretion in interpreting the scope of constitutional rights.[23]

This Note argues that the Ninth Circuit's expansion of Fifth Amendment protections in *Stoot* is improper. Specifically, courts evaluating whether a plaintiff can recover in a § 1983 action alleging violations of the privilege against self-incrimination should not expand the right to recover outside of the use of an incriminating statement at trial, unless the plaintiff can make a showing that a balancing of factors, such as weighing the scope of the proposed remedy against the amount of damages incurred, warrants such an expansion. Such a balancing approach was advocated by Justice Souter's concurring opinion in *Chavez*. Applying a damages-based analysis results in appropriate remedies for violations that do not undermine the enforcement of rights by permitting civil liability for actions that inflicted little or no actual harm to defendants. Admittedly, investigations involving intimidating police tactics that result in a coerced statement should be avoided. But at the same time, the text of the Constitution must be carefully interpreted to safeguard rights other than the fundamental protections originally envisioned by the Founding Fathers.[24]

Part I of this Note provides an overview of the constitutional protections against self-incrimination, from the abstract rights within the text itself to the types of prophylactic rules implemented to safeguard those rights. Part II then introduces the various interpretations of the Fifth Amendment's Self-Incrimination Clause and briefly discusses the primary approaches to self-incrimination violations—protection as either a pure trial right or as a trial right as well as a pretrial right. Part II concludes by reviewing the controversial *Chavez* decision that led to the current state of judicial instability vis-à-vis the ongoing circuit split regarding the scope of

---

21 *See id.* (failing to determine "the precise moment when a 'criminal case' commences," other than requiring a minimum "initiation of legal proceedings").

22 *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 998 (2003) (stating that Justice Thomas's "recharacterization" of the Fifth Amendment's self-incrimination right "does not enhance the stature or stability of [the] applications [of the right outside of a defendant's criminal trial]").

23 After *Chavez*, some courts have stated that the central concern of the self-incrimination privilege is the "*trial right* aimed at protecting the accused from the indignity of being compelled to give testimony against himself." United States v. Sweets, 526 F.3d 122, 129 (4th Cir. 2007). More specifically, judicial protection of that right "must not degenerate to a judicially-created code of pretrial police conduct." *Id.*

24 *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (recognizing that certain "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); *see also* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (recognizing "the use of procedural safeguards effective to secure the privilege against self-incrimination" as a means to protect fundamental constitutional rights).

self-incrimination liability. Part III then reviews *Stoot v. City of Everett* and the Ninth Circuit's recent attempt to reconcile the ambiguity in *Chavez*.

Parts IV and V explore the implications of the *Stoot* decision and address the lingering concerns about expanding the scope of civil liability for self-incrimination violations. Part IV argues that courts should adopt the intermediate balancing test from Justice Souter's concurrence in *Chavez* and examines the reasons for guarding against expansive liability and potential overdeterrence that unduly interferes with police enforcement. Part V determines that—even if the *Stoot* court ultimately reached the correct conclusion—the Ninth Circuit did not properly align its decision with an enduring apprehension regarding unchecked expansion of self-incrimination liability.

I. BACKGROUND: CONSTITUTIONAL PROTECTIONS AGAINST SELF-INCRIMINATION

Two types of Constitutional rights exist under the Fifth Amendment: core constitutional rights arising from the text itself and broader protections implemented by the courts to provide defendants appropriate safeguards against self-incrimination.[25] The Supreme Court has balanced these fundamentally different protections to preserve the Self-Incrimination Clause's original meaning, while at the same time adopting new principles to maintain the Clause's practical applications within the continually shifting realm of Fifth Amendment jurisprudence.[26]

A. *Fifth Amendment History and Text*

Many Americans are familiar with the concept, if not the language, of the Fifth Amendment's privilege against self-incrimination.[27] The Fifth Amendment states in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[28] This privilege works

---

25 *See Miranda*, 384 U.S. at 466 (discussing the "pre-trial *privilege*" in relation to "the protection of *rights* at trial" (emphases added)).

26 *See Chavez*, 538 U.S. at 777-79 (Souter, J., concurring) (agreeing with the plurality's holding to narrowly interpret the scope of Fifth Amendment rights and advocating a balancing test in future cases determining civil liability).

27 *See Tucker*, 417 U.S. at 439 ("At this point in our history virtually every schoolboy is familiar with the concept . . . of the [Fifth Amendment]."); *see also* Staci D. Schweizer, Chavez v. Martinez*: A Right Deferred?*, 31 AM. J. CRIM. L. 305, 305-06 (2004) ("With the annual parade of television crime dramas, the American public has become more knowledgeable about facets of criminal law and procedure. Many Americans can recite the *Miranda* warning by heart, and the phrase 'I choose to take the Fifth' has long been a part of popular speech." (footnotes omitted)).

28 U.S. CONST. amend. V.

as a safeguard for criminal defendants—or potential criminal defendants—and is one that courts take seriously.[29] This seemingly simple protection, however, leaves much open to interpretation.[30] For example, the Supreme Court has struggled to define what constitutes a "criminal case,"[31] as well as what it means to be a "witness" and to testify "against" one's own interests.[32] In the end, however, justifications for enforcing constitutional rights often relate back to the original text of the Fifth Amendment.[33]

Individuals may bring suit against state actors for violations of their Fifth Amendment rights under § 1983 of the Civil Rights Act of 1871.[34] Section 1983 gives citizens the right to sue any person who violates his constitutional rights while acting under the color of state law.[35] Generally, the federal government is precluded from being a party to such suits, but the Supreme Court has recognized an exception, sometimes referred to as a *Bivens* action,[36] which allows private claims against both federal and state

---

29 *See* Kastigar v. United States, 406 U.S. 441, 445 (1972) ("Th[e Supreme] Court has been zealous to safeguard the values that underlie the privilege [against self-incrimination]." (citing *Miranda*, 384 U.S. at 443-44; Boyd v. United States, 116 U.S. 616, 635 (1886))).

30 *See, e.g.*, *Chavez*, 538 U.S at 766-67 (plurality opinion) (interpreting the terms "criminal case," "witness," and the ambiguous application of those terms to settled case law (internal quotation marks omitted)). This ambiguity is not necessarily the fault of the courts as much as it is a product of the earliest self-incrimination protections and the haphazard creation of the text itself. *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. Q. 59, 88-89 (1989) (finding that the original "wisp of an anti-self-incrimination clause . . . expressed only a 'stunted version' of the full panoply of rights associated with the common law privilege against self-incrimination" (quoting LEONARD W. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 405-07 (1968))).

31 *See, e.g.*, *Chavez*, 538 U.S. at 766 (plurality opinion) (internal quotation marks omitted).

32 *See, e.g.*, United States v. Sweets, 526 F.3d 122, 130 (4th Cir. 2007) (internal quotation marks omitted) (adhering to "the constitutional protection that no person 'shall be compelled in any criminal case to be a *witness against himself*'" (quoting U.S. CONST. amend. V)); *see also id.* (noting that "if a person A takes the stand to testify against defendant B, this is not the same as forcing B to be a witness against himself, even if B's compelled pretrial statement led the police to learn of A's existence and information" (quoting Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 900 (1995)) (internal quotation marks omitted)).

33 *E.g.*, *Chavez*, 538 U.S. at 766 (plurality opinion) ("We fail to see how, *based on the text of the Fifth Amendment*, Martinez can allege a violation of this right . . . ." (emphasis added)).

34 42 U.S.C. § 1983 (2006); Jeffrey Alan Zaluda, Pulliam v. Allen*: Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity*, 34 AM. U. L. REV. 523, 524 (1985).

35 42 U.S.C. § 1983. Section 1983 provides a civil action for deprivation of rights, stating in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

36 The term "*Bivens* action" comes from the Supreme Court case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which was the first time the Court authorized suits against federal government officials for constitutional violations despite any federal statute authorizing such a suit. 403 U.S. 388, 389 (1971). The Court found that "violation of [Fourth Amendment prohibitions of

officials.[37] *Bivens* created a cause of action against the federal government similar to the action that § 1983 created against "state actors." The majority of lawsuits alleging Fifth Amendment violations are brought against government officials,[38] so having constitutional remedies for civil rights violations by federal officials is important to the development of self-incrimination liability.

Various rationales offer justification for the privilege against self-incrimination,[39] each weighing on how one should view the appropriate scope of the constitutional rights provided by the Fifth Amendment: protection of the innocent,[40] avoidance of the "cruel trilemma,"[41] unreliability of coerced statements,[42] deterrence of improper police practices,[43] fair state-individual balance,[44] and privacy rationales.[45] While none of these seem

---

unreasonable search and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct." *Id.*

37 *See* Butz v. Economou, 438 U.S. 478, 499-500 (1978); *Bivens*, 403 U.S. at 389, 396-97.

38 *See, e.g.*, Stoot v. City of Everett, 582 F.3d 910, 923-24 (9th Cir. 2009) (bringing § 1983 claims alleging that police officers coerced a confession), *cert. denied*, 130 S. Ct. 2343 (2010); Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1026-27 (7th Cir. 2006) (same); Burrell v. Virginia, 395 F.3d 508, 512 (4th Cir. 2005) (bringing § 1983 claims alleging that police officer forced self-incrimination by requiring proof of insurance).

39 Professors Stephen A. Saltzburg and Daniel J. Capra's casebook, entitled *American Criminal Procedure*, discusses many of the rationales summarized in this Note. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 602-07 (8th ed. 2007). Some rationales, particularly those cited in important decisions interpreting the scope of Fifth Amendment self-incrimination rights, are discussed in more detail later in this Note. *See infra* Part II.A ("cruel trilemma"); Part IV.B.1 (police practices and state-individual balance). Even though some of these historical rationales have been largely discredited, *see* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415-16 (1966) (expressly rejecting the argument that the self-incrimination privilege protects the innocent), the issues each rationale presents remain helpful to understanding the constitutional problems courts have in protecting individual rights under the Fifth Amendment.

40 *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("[T]he privilege . . . is often 'a protection to the innocent.'" (quoting Quinn v. United States, 349 U.S. 155, 162 (1955))), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998).

41 *Id.* ("[The privilege against self-incrimination] . . . reflects many of our fundamental values and most noble aspirations[, including] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . .").

42 *See* Michigan v. Tucker, 417 U.S. 433, 455 n.2 (1974) (Brennan, J., concurring) (recognizing that the privilege "serves a variety of significant purposes," such as the Court's general "distrust of self-deprecatory statements" (quoting *Murphy*, 378 U.S. at 55) (internal quotation marks omitted)).

43 *See Murphy*, 378 U.S. at 55 (expressing fear "that self-incriminating statements will be elicited by inhumane treatments and abuses").

44 *See* 8 JOHN HENRY WIGMORE, EVIDENCE § 2251, at 317 (John T. McNaughton rev. ed., 1961) ("The [self-incrimination] privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.").

45 *See Murphy*, 378 U.S. at 55 (recognizing that an individual has a right "to a private enclave where he may lead a private life" (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting)) (internal quotation marks omitted)).

dispositive of the myriad issues underlying the Amendment's text and subsequent judicial manipulations, each can affect one's view of the legitimate scope of the Self-Incrimination Clause.[46] The Fifth Amendment's history is especially helpful in understanding its constitutional scope.

The historical basis for the Fifth Amendment right against self-incrimination stems from the Framers' opposition to courts that relied upon compulsion to extract sworn testimony from witnesses in the hope that factual inquiries would uncover uncharged and entirely uncorroborated offenses against the declarant.[47] The most rampant of these inquisitions was the Star Chamber, an ecclesiastical court that flourished in sixteenth and seventeenth century England.[48] Often used as a political weapon, Star Chamber inquisitions placed witnesses under oath and compelled testimony for the sole purpose of self-incrimination.[49] Even if witnesses revealed no substantive offenses, the court's indiscriminate procedures were such that the inquisitors could likely identify and punish those whose only offense was harboring theological opinions that conflicted with those of the crown.[50] The Star Chamber's "mix of executive and judicial character" compelled testimony in a manner that epitomized a basic disregard for individual rights.[51] The invocation of more modern concepts of self-incrimination protections began in the seventeenth century hearsay and sedition trials but did not fully emerge until the introduction of defense counsel and the truly adversarial—not inquisitorial—system of criminal procedure.[52] Prior to the advent of modern day adversarial processes in which defendants are actually given the chance to invoke the privilege, the

---

46 SALTZBURG & CAPRA, *supra* note 39, at 606.

47 *See* Doe v. United States, 487 U.S. 201, 212 (1988).

48 *See* Faretta v. California, 422 U.S. 806, 821-26 (1975). The Supreme Court described the stark contrast between common law justice and limitations on individual freedom:

> The Court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it—a reminder that high state policy could not safely be entrusted to a system so chancy as English law . . . .

Id. at 821 n.17 (alteration in original) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 23 (1973)) (internal quotation marks omitted). The background of the Star Chamber is discussed in *Faretta* as part of a defendant's Sixth Amendment claim. *Id.* at 821-23. For analysis of Star Chamber investigations in a Fifth Amendment context, see generally George M. Dery, *Lying Eyes: Constitutional Implications of New Thermal Imaging Lie Detection Technology*, 31 AM. J. CRIM. L. 217, 237-38 (2004).

49 *See Doe*, 487 U.S. at 212.

50 *See* Amar & Lettow, *supra* note 32, at 896-97.

51 *Faretta*, 422 U.S. at 821; *see also Doe*, 487 U.S. at 212 (determining that "[t]he major thrust of the policies undergirding the privilege is to prevent such compulsion [as found in Star Chamber]").

52 *See* Amar & Lettow, *supra* note 32, at 897.

court system had been dominated by a pretrial process devoted to provoking the witness to incriminate himself.[53]

Eventually, the American criminal justice system would represent a philosophy diametrically opposed to the inquisitorial trials that had occurred during the sixteenth and seventeenth centuries. Even the risk of allowing a guilty man to go free by protecting him from exposing prior misdeeds was deemed acceptable when balanced against the "far-reaching evil" of government officers abusing their power against witnesses compelled to incriminate themselves.[54] "Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."[55] The development of the protection did not expressly state a rule as to when constitutional violations occur,[56] focusing instead on building the policies underlying strong enforcement of the privilege.[57]

Recognizing the fears of the Framers, the Supreme Court has guarded against future interrogations and subsequent testimony bearing "any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed."[58] The Court summarized the policies behind the privilege against self-incrimination as follows:

> It 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; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" . . .

---

53 *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1059-60 (1994).

54 Ullmann v. United States, 350 U.S. 422, 428 (1956); *see also id.* at 427 ("[I]t [is] better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.").

55 *Id.* at 428.

56 Discussion of the privilege's application was somewhat contradictory as to where violations occur within a criminal case. For instance, the Court made a statement that seemed to attach liability to pretrial uses, stating that "[t]he natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." Michigan v. Tucker, 417 U.S. 433, 440-41 (1974). Nevertheless, the next sentence compared uses before the ultimate finder of fact (criminal trials and grand juries), failing to differentiate proceedings within the same criminal case. *Id.* at 441.

57 *See id.* at 444 (explaining the modern courts' extension of enforcement of the privilege from criminal trials to other proceedings, including police investigations).

58 *Id.*

> and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[59]

Yet some commentators have identified modern interpretations of basic Fifth Amendment rights as a departure from the Framer's original protection against Star Chamber-like inquiries.[60] The self-incrimination privilege has undeniably expanded beyond the Fifth Amendment's text.[61] For example, the Supreme Court has applied the self-incrimination privilege to civil as well as criminal proceedings,[62] grand jury testimony,[63] congressional investigations,[64] and juvenile proceedings.[65] One of the clearest areas in which the Fifth Amendment has expanded beyond its text is with respect to prophylactic rules, such as creating procedural safeguards to enforce suspects' pretrial interrogation rights[66] or to limit the use of illegally obtained evidence against a defendant at trial.[67]

---

59 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955); WIGMORE, *supra* note 44), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998).

60 *See, e.g.*, Davies, *supra* note 22, at 988-89 (asserting that recent Supreme Court precedent "virtually inverts the right the Framers thought they had protected").

61 *See Tucker*, 417 U.S. at 440 (recognizing that "the right has been given broad scope" through its application to a variety of proceedings other than traditional criminal trials).

62 *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) ("[T]he constitutional privilege against self-incrimination . . . applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

63 *See* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) ("The object [of the constitutional provision against self-incrimination] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."), *overruled in part on other grounds by* Kastigar v. United States, 406 U.S. 441 (1972), *and superseded on other grounds by statute*, 18 U.S.C. § 6002 (2006), *as recognized in* New Jersey v. Portash, 440 U.S. 450 (1979).

64 *See* Watkins v. United States, 354 U.S. 178, 195-96 (1957) ("It was during [the decade following World War II] that the Fifth Amendment privilege against self-incrimination was frequently invoked and recognized as a legal limit upon the authority of a [congressional] committee to require that a witness answer its questions.").

65 *See In re* Gault, 387 U.S. 1, 49-50 (1967) ("It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement."), *overruled in part on other grounds by* Allen v. Illinois, 478 U.S. 364 (1986).

66 *See* Miranda v. Arizona, 384 U.S. 436, 498-99 (1966) (refusing to "presume that a defendant has been effectively apprised of his rights" absent evidence that a warning was provided).

67 *See* Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (applying the exclusionary rule to physical evidence "obtained either during or as a direct result of an unlawful invasion" but not to illegally obtained verbal evidence).

B. *Prophylactic Rules: "Right" Versus "Privilege"*

The Fifth Amendment privilege against self-incrimination embodies a fundamental aspect of fairness within our justice system,[68] yet the Supreme Court has expressly stated that "[t]he importance of a right does not, by itself, determine its scope."[69] Specifically, courts have deemed it necessary to "overprotect" certain rights by implementing rules that give greater security to individuals than the abstract rights themselves seem to require.[70] Accordingly, a distinction is often drawn between the "privilege" of self-incrimination and the fundamental Fifth Amendment "right."[71] "Core" or "true" constitutional rights are those rights explicitly provided for in the Constitution.[72]

In *Miranda v. Arizona*,[73] the Supreme Court created an enlargement of abstract constitutional rights—or a "prophylactic rule"[74]—against the admissibility of statements made in police custody by defendants who are unaware of their rights.[75] The Court held that any statement made by a defendant in police custody in response to interrogation is admissible at trial only if the prosecution can show that the defendant was informed of his right to consult with an attorney and of his right against self-incrimination and that the defendant not only understood these rights, but he also voluntarily waived them.[76] In analyzing the basic constitutional rights afforded by the Fifth Amendment, the Court determined that "[p]rocedural safeguards must be employed to protect the privilege [against self-incrimination]" because a defendant's Fifth Amendment rights "cannot be abridged."[77]

This prophylactic rule suggests that the privilege of self-incrimination requires additional protection outside the basic Fifth Amendment constitu-

---

68 *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (finding that the Fifth Amendment "reflects a complex of our fundamental values and aspirations").

69 Michigan v. Tucker, 417 U.S. 433, 439 (1974).

70 Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 (2001) (internal quotation marks omitted).

71 *See* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion) ("Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person.").

72 For a discussion of "core" constitutional rights in a § 1983 context, see Bellamy v. Wells, 548 F. Supp. 2d 234, 238-39 (W.D. Va. 2008) ("[Section] 1983 reaches beyond 'true' or 'core' Constitutional rights alone because the statute's plain language also encompasses *any* privilege or immunity (not just rights) secured by (not just explicitly within) the Constitution.").

73 384 U.S. 436 (1966).

74 Scholars have disagreed over the precise definition of a "prophylactic rule," Caminker, *supra* note 70, at 1 n.2 (internal quotation marks omitted), but this Note will define them generally as judicially created rules used to safeguard against the violation of more basic constitutional rights.

75 *Miranda*, 384 U.S. at 498-99.

76 *Id.* at 478-79.

77 *Id.*

tional right.[78] Prophylactic rules enlarging the traditional scope of Fifth Amendment rights are "designed to safeguard the core constitutional right protected by the Self-Incrimination Clause."[79] Indeed, "[t]he Court made it clear that the basis for [the *Miranda*] decision was the need to protect the fairness of the trial itself" even if the mandate expanded the abstract rights granted by the Fifth Amendment's text.[80] Enforcing prophylactic rules like those in *Miranda* gives defendants a concrete claim for procedural violations following coercive police interrogations, but they do not always amount to valid constitutional violations under the Fifth Amendment.

Congress found it necessary to intervene by enacting legislation challenging *Miranda*'s prophylactic rules.[81] The Supreme Court, however, later held that Congress could not legislatively supersede Constitutional decisions.[82] Referring to *Miranda* as a "constitutional decision," the Court maintained that prophylactic rules are important procedural safeguards, albeit different from the constitutionally mandated protection of core rights under the Self-Incrimination Clause.[83] Prophylactic rules have become so imbedded in American criminal procedure that rules like *Miranda* are "part of our national culture."[84] Decisions interpreting prophylactic rules as necessary complements to constitutional mandates,[85] while lacking a true basis in the text of the Fifth Amendment,[86] have led courts to struggle to determine

---

78 *See id.*

79 Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality opinion).

80 Schneckloth v. Bustamonte, 412 U.S. 218, 240-42 (1973). Later decisions stated that the *Miranda* rules sought to uphold the trustworthiness of statements used at trial. *See* Withrow v. Williams, 507 U.S. 680, 692 (1993) (stating that "*Miranda* serves to guard against 'the use of unreliable statements at trial'" (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966))).

81 *See* Dickerson v. United States, 530 U.S. 428, 435-36 (2000) (describing congressional legislation, 18 U.S.C. § 3105, which governed the admissibility of statements into evidence regardless of whether defendants had properly received their *Miranda* rights); *see also id.* at 437 ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

82 *Id.* at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

83 *Id.* at 438-40.

84 *Id.* at 443; *see also* Mitchell v. United States, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (agreeing with the majority that *Miranda* rules have gained "wide acceptance in the legal culture" (quoting *id.* at 330 (majority opinion)) (internal quotation marks omitted)).

85 *See, e.g.*, *Dickerson*, 530 U.S. at 440 n.5 (noting that "*Miranda*'s warning requirement [rests] on 'the Fifth Amendment privilege against self-incrimination'" (quoting Illinois v. Perkins, 496 U.S. 292, 296 (1990))); *Withrow*, 507 U.S. at 691 ("'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial* right.'" (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990))); Moran v. Burbine, 475 U.S. 412, 427 (1986) (describing the Court's interpretation of *Miranda* as its "interpretation of the Federal Constitution").

86 *See Dickerson*, 530 U.S. at 437-38 (conceding the existence of binding language that consistently labels *Miranda* rules as "prophylactic," and "not themselves rights protected by the Constitution"

when the compulsion of statements and their subsequent use ripen into substantive § 1983 claims.[87] This is due in part to existing precedent failing to delineate a bright-line rule for liability[88] and some courts upholding a view that compelling evidence is necessary to expand existing self-incrimination rules.[89]

The *Miranda* case is one of many examples of the creation of prophylactic rules that extend beyond specific core constitutional rights that are designed to preserve these rights.[90] These rules are intended to provide practical support so that a narrowly defined constitutional right can be adequately protected.[91]

II. THE EVOLUTION OF FIFTH AMENDMENT SELF-INCRIMINATION VIOLATIONS

Courts have varied greatly when interpreting the scope of the Self-Incrimination Clause and assigning liability for use of coerced statements during criminal proceedings.[92] This Part begins with an overview of impor-

---

(quoting New York v. Quarles, 467 U.S. 649, 653 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974)) (internal quotation marks omitted)).

87 *See* Renda v. King, 347 F.3d 550, 558-59 (3d Cir. 2003) (declining to impose civil liability for clear *Miranda* violations and use of improperly obtained statements to file an indictment). *But see* Best v. City of Portland, 554 F.3d 698, 702-03 (7th Cir. 2009) (assigning liability for pretrial use of coerced statements in a suppression hearing). Courts still seem to delineate prophylactic rules from constitutional rights. *See* Hannon v. Sanner, 441 F.3d 635, 637 (8th Cir. 2006) ("The [*Dickerson*] Court defined *Miranda* as a 'constitutional decision' announcing a 'constitutional rule,' but never described the *Miranda* safeguards as a 'constitutional right' equivalent to the Fifth Amendment itself. We thus view *Dickerson* as maintaining the status quo of the *Miranda* doctrine.").

88 *See Renda*, 347 F.3d at 559 (recognizing that existing precedent "leaves open the issue of when a statement is used at a criminal proceeding" (citing Chavez v. Martinez, 538 U.S. 760, 766-67 (2003) (plurality opinion))).

89 *See* Chavez v. Martinez, 538 U.S. 760, 778-79 (2003) (Souter, J., concurring) (finding that a "powerful showing," among other factors, is necessary to justify expanded self-incrimination liability).

90 The fruit-of-the-poisonous tree doctrine is another example of prophylactic constitutional protection. *See* United States v. Sweets, 526 F.3d 122, 129 (4th Cir. 2007).

91 *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (explaining that prophylactic rules, like those in *Miranda*, are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected" to "provide practical reinforcement for the right"); Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.").

92 *Compare* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants."), *and* Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1027 & n.15 (7th Cir. 2006) (finding a preliminary hearing sufficient to invoke self-incrimination rights and "refus[ing] to hold that the right against self-incrimination cannot be violated unless a confession is introduced in the prosecution's case-in-chief at trial"), *with Chavez*, 538 U.S. at 766 (plurality opinion) (finding that Fifth Amendment violations during criminal proceedings "at least require[] the initiation of legal proceedings").

tant Fifth Amendment cases prior to the Supreme Court's ruling in *Chavez v. Martinez*.[93] It then describes the ambiguity created by *Chavez* with respect to use of a defendant's coerced statement in criminal proceedings and concludes with a discussion of current, post-*Chavez* Fifth Amendment interpretations.

A. *A Right Protected: Characterizing Self-Incrimination Liability as a Fundamental Trial Right*

The Supreme Court has not hesitated to raise the historical significance of Fifth Amendment protections against compulsory self-incrimination.[94] Prior to the controversial *Chavez* decision in 2003, the Court had already wrestled with developing a consistent analysis of alleged Fifth Amendment violations and corresponding remedies,[95] instead creating a spectrum of approaches[96] from an expansive right extending beyond criminal court proceedings to a narrow right confined strictly to trials.[97]

Historically, the Court relied on the important policies underlying the self-incrimination privilege to determine its scope.[98] The rationale for a strong privilege stressed how the privilege restrained coercive police conduct well before trial.[99] One case that applied this rationale was *Murphy v. Waterfront Commission*,[100] where the Court outlined many "policies of the privilege" to determine its proper scope in granting a witness immunity from testifying at a hearing.[101] Recognizing that "[t]he privilege against

---

93 *Chavez*, 538 U.S. at 772 (plurality opinion).

94 *See supra* Part I.A; *see also* Kastigar v. United States, 406 U.S. 441, 444 (1972) (noting that the self-incrimination privilege "marks an important advance in the development of our liberty").

95 *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 55-56 (2000) (Thomas, J., concurring) (identifying potential shortcomings of original self-incrimination analysis and determining that an expanded understanding of the privilege might require reconsideration of existing doctrine).

96 This series of approaches was first suggested by Professor John T. Parry, who analyzed *Chavez v. Martinez* as a potential turning point in Fifth Amendment self-incrimination jurisprudence. *See* John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after* Chavez v. Martinez, 39 GA. L. REV. 733, 763-76 (2005). Parry concluded that prophylactic rules should be abandoned and replaced with a broad damages remedy for violations of the privilege. *Id.* at 838.

97 *See Verdugo-Urquidez*, 494 U.S. at 264; Miranda v. Arizona, 384 U.S. 436, 467 (1966).

98 *See, e.g.*, Bram v. United States, 168 U.S. 532, 545 (1897) (determining that the self-incrimination privilege "was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes"); Counselman v. Hitchcock, 142 U.S. 547, 562-64 (1892) (finding the privilege to be "an ancient principle of the law of evidence," which "must have a broad construction in favor of the right which it was intended to secure"), *overruled in part on other grounds by* Kastigar v. United States, 406 U.S. 441 (1972), *and superseded on other grounds by statute*, 18 U.S.C. § 6002 (2006), *as recognized in* New Jersey v. Portash, 440 U.S. 450 (1979).

99 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998).

100 378 U.S. 52 (1964).

101 *Id.* at 53, 55.

self-incrimination 'registers an important advance in the development of our liberty,'" the Court emphasized existing policy concerns in applying the privilege broadly as a general protection against witness manipulation and unfair prosecution.[102] As witness coercion and unfair prosecution can cause harm before trial, this interpretation suggests that the self-incrimination privilege necessarily relates to proceedings outside of trials, even if the Fifth Amendment itself lacks express justification for such an expanded scope.

Yet the Court has distinguished between the constitutional implications of a "core" constitutional rule as compared to a prophylactic rule. In *Michigan v. Tucker*,[103] the Court had to determine the applicability of a prophylactic rule where police interrogation occurred prior to the landmark *Miranda* decision, but where a criminal trial convicting the defendant was held afterwards.[104] The defendant in *Tucker* had not been properly informed of his rights during a police interrogation, and information gained during the interrogation was later used against him at trial.[105] Justice Rehnquist, writing for the majority, determined that Fifth Amendment rights had been given a broad application in cases where defendants had genuinely been forced to give testimony.[106] Justice Rehnquist explained: "Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."[107]

The Court looked for "the cruel trilemma of self-accusation, perjury or contempt"[108] but could not find that the defendant's statements had been truly involuntary.[109] During its analysis, the Court expressly distinguished prophylactic rules from fundamental constitutional rights and held that a breach of procedural safeguards during interrogation did not amount to a constitutional violation.[110] Justice Rehnquist acknowledged both the constitutional limitations on self-incrimination protections and the ongoing need to examine the applicability of the Fifth Amendment outside of criminal

---

102 *See id.* at 55, 79-80 (holding that "[f]airness" dictates a reevaluation of law governing self-incrimination immunity); *see also* Twining v. New Jersey, 211 U.S. 78, 91 (1908) (describing protection against self-incrimination as "a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions"), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

103 417 U.S. 433 (1974).

104 *Id.* at 435, 437.

105 *Id.* at 437.

106 *Id.* at 440.

107 *Id.*

108 *Id.* at 445 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998)) (internal quotation marks omitted).

109 *Tucker*, 417 U.S. at 445.

110 *Id.* at 443-45.

trials.[111] Prophylactic rules, like those in *Miranda*, are expected "to provide practical reinforcement" for the right against self-incrimination without creating a "constitutional straitjacket" that undermines effective enforcement of that right.[112] The *Tucker* Court limited the constitutional authority of the defendant's *Miranda* rights and chose not to expand liability for procedural violations before trial. Other decisions have both broadened the scope of trial rights to include a variety of other proceedings[113] and purposefully highlighted the significance of the privilege to assure its scope was not unduly limited.[114]

In dissent in *Miranda*, Justice Harlan advocated a balancing approach[115] that required a more individualized analysis to warrant expansion of the basic Fifth Amendment privilege, rather than mere reliance on broad Fifth Amendment constitutional power.[116] Justice Harlan argued that to expand the privilege, one must make a "powerful showing that [any] new rules [expanding its scope] are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land."[117] Justice Harlan's intermediate approach in *Miranda* qualified the majority's adoption of the highly debated "*Miranda* Rules," which worked as a prophylactic measure procedurally to safeguard defendants' testimony even before the initiation of criminal proceedings.[118]

---

111 *See id.* at 450-51.

112 *Id.* at 444 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)) (internal quotation marks omitted).

113 *See* Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (noting that Fifth Amendment protections "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and [they] protect[] against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used"). *Kastigar* expands liability to other non-trial proceedings but also states that the Fifth Amendment's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of [criminal] penalties.'" *Id.* at 453 (quoting Ullmann v. United States, 350 U.S. 422, 438-39 (1956)).

114 *See, e.g.*, Brown v. Walker, 161 U.S. 591, 610 (1896) (finding that the "[self-incrimination] constitutional provision . . . is justly regarded as one of the most valuable prerogatives of the citizen").

115 Justice Harlan's opinion in *Miranda* was not an anomaly, but rather a string of dissents in which he advocated an intermediate balancing approach to policy decisions surrounding Fifth Amendment constitutional rights. Parry, *supra* note 96, at 771. For more examples of Justice Harlan's dissents similar to the "powerful showing" requirement he proposed in *Miranda*, see *id.*

116 *Miranda*, 384 U.S. at 514-16 (Harlan, J., dissenting).

117 *Id.* at 515.

118 *Compare id.* at 467 (majority opinion) (holding that there is "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*" (emphases added)), *with id.* at 515 (Harlan, J., dissenting) (requiring a "*powerful showing*" to affirm that "new rules are plainly desirable" (emphasis added)).

A final, more definitive approach to Fifth Amendment rights is found in the Supreme Court case *United States v. Verdugo-Urquidez*.[119] In its analysis of the application of Fourth Amendment protections to nonresident aliens in foreign countries, the *Verdugo* Court made a point to contrast the significant operational differences between the Fourth and Fifth Amendments, namely, that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right . . . . Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."[120] The Fourth Amendment, on the other hand, does not turn on the use of evidence during criminal proceedings, but rather is "'fully accomplished' at the time of an unreasonable government intrusion."[121] In other words, Supreme Court dicta in *Verdugo-Urquidez* suggested that the pretrial conduct of law enforcement officials could not impair the constitutional right against self-incrimination.[122]

Circuit courts have differed in interpreting the Supreme Court's inconsistent and evolving approaches to the self-incrimination privilege. Prior to *Chavez*, some circuits held that violations occurred outside of trial.[123] The Second Circuit had found the "use or derivative use of a compelled statement at *any* criminal proceeding against the declarant violates that person's Fifth Amendment rights [and] use of the statement at trial is not required."[124] Most circuits, however, focused on final proceedings before the ultimate finders of fact (e.g., grand juries) rather than making finer distinctions over pretrial criminal proceedings.[125] Leading up to the Supreme Court's decision in *Chavez*, the Ninth Circuit case of *Cooper v. Dupnik*[126] was one of the few that held a Fifth Amendment violation could occur even when compelled statements were never used at trial.[127]

---

119 United States v . Verdugo-Urquidez, 494 U.S. 259, 264 (1990).

120 *Id.*

121 *Id.* (quoting United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 354 (1974)).

122 *Id.*

123 *See, e.g.*, Weaver v. Brenner, 40 F.3d 527, 535 (2d Cir. 1994). The declarant in *Weaver*, however, was testifying before a grand jury, which is markedly different from evidentiary hearings relying on out-of-court confessions prior to a criminal trial. *Id.* at 536.

124 *Id.* at 535.

125 *See, e.g.*, *id.* at 536. Both *Chavez* and *Stoot* were adjudicated in a traditional courtroom setting. Chavez v. Martinez, 538 U.S. 760, 763-66 (2003) (plurality opinion); Stoot v. City of Everett, 582 F.3d 910, 916-18 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010). Many other courts, however, have refused to find violations where coerced statements were made but never used in criminal proceedings. *See* Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (citing *Weaver*, 40 F.3d at 535; Mahoney v. Kesery, 976 F.2d 1054, 1061 (7th Cir. 1992); Davis v. City of Charleston, 827 F.2d 317, 322 (8th Cir. 1987)), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010).

126 963 F.2d 1220 (9th Cir. 1992) (en banc), *overruled by* Chavez v. Martinez, 538 U.S. 760 (2003).

127 *Id.* at 1238-44.

In *Riley v. Dorton*,[128] the Fourth Circuit appeared to anticipate the conflicting issues addressed by the Supreme Court six years later in *Chavez*.[129] In *Riley*, the court not only criticized the broad application of constitutional doctrine in *Cooper*,[130] but also expressed support for the dissenters in *Cooper* for tying self-incrimination violations to the use of coerced statements in criminal cases.[131] This approach was again rejected by the Ninth Circuit in *Stoot v. City of Everett*.[132]

Conflicts among the circuit courts highlight the lack of clarity leading up to the Supreme Court's decision in *Chavez* and make it even more apparent that the Court failed to take the necessary steps to improve, rather than confuse, existing Fifth Amendment doctrine when it decided *Chavez*.[133]

B. *The "Use" of a Statement in a "Criminal Case": Supreme Court Ambiguity in* Chavez v. Martinez

The *Chavez* decision arose out of an altercation between Oliverio Martinez and police officers on November 28, 1997, in which Martinez was shot, leaving him blind and paralyzed in both legs.[134] Sergeant Ben Chavez, a patrol supervisor, interviewed Martinez for forty-five minutes inside the trauma room of the hospital, during which time Martinez was undergoing medical treatment, was not given his *Miranda* warnings, and clearly desired to end the interview.[135] Following the incident, Martinez filed a civil rights

---

128 115 F.3d 1159 (4th Cir. 1997), *abrogated by* Wilkins v. Gaddy, 130 S. Ct. 1175 (2010).

129 *Id.* at 1164. *Riley* analyzed the important "use" in a "criminal case" language and recognized the dispositive factor that a Fifth Amendment violation cannot occur unless statements were actually used in a criminal proceeding. *See Chavez*, 538 U.S. at 769 (plurality opinion) (finding that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness").

130 *Riley*, 115 F.3d at 1164.

131 *See id.* ("This circuit has already criticized *Cooper's* reasoning, however, noting that the dissenters in that case made 'persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case.'" (quoting Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994))). The Third Circuit had also joined the dissenter's position in *Cooper* prior to being further criticized in *Riley*. *Id.*

132 Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

133 *See* Davies, *supra* note 22, at 1043. Professor Thomas Davies explains that the variation in constitutional interpretations regarding Fifth Amendment self-incrimination rights is largely due to "the inattention and inaction of the Supreme Court." *Id.* Specifically, the *Chavez* court "failed to respond by developing a coherent view of what the Fifth Amendment right should mean regarding police interrogation." *Id.*

134 *Chavez*, 538 U.S. at 763-64 (plurality opinion).

135 *Id.* at 764.

action for violations of his Fifth Amendment right against self-incrimination and his Fourteenth Amendment due process rights.[136]

The District Court for the Central District of California granted Martinez's motion for summary judgment, holding that Chavez's interrogation in the hospital violated his Fifth and Fourteenth Amendment rights.[137] On appeal, the Ninth Circuit agreed that Martinez's statements had not been voluntary, determining that his Fifth Amendment rights were clearly established at the time of the interrogation.[138]

1. The Decision of the Court

The plurality delivered its holding in two opinions, concluding that without the actual admission of compelled statements into evidence at a criminal trial, there could be no violation of the constitutional protection provided by the Fifth Amendment's right against self-incrimination.[139] The Court then held that Martinez did not have a valid § 1983 claim for violations of his Fifth Amendment privilege.[140] Justice Thomas, writing for the first plurality opinion, emphasized that the privilege against self-incrimination is a "trial right."[141] Relying on precedent like *Verdugo-Urquidez*,[142] Justice Thomas opined: "We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case."[143]

Although Martinez argued that a "criminal case" should include the entire criminal investigatory process, Justice Thomas found that violations of the privilege against self-incrimination, at a minimum, require the initiation of criminal proceedings as well as the "use" of statements in those proceedings.[144] Justice Thomas, however, elaborated no further on this standard. The Court's refusal to give a bright-line rule for the "use" of a defendant's statement in a "criminal case," although satisfactory for defendants like Martinez, failed to guide later courts that struggled to interpret this

---

136 *Id.* at 764-65.

137 Martinez v. City of Oxnard, 270 F.3d 852, 855 (9th Cir. 2001), *rev'd sub nom.* Chavez v. Martinez, 538 U.S. 760 (2003) (plurality opinion). Chavez was also denied a claim for qualified immunity, which was later upheld by the Ninth Circuit. *Id.* at 859.

138 *Id.* at 856-57.

139 *Chavez*, 538 U.S. at 772-73 (plurality opinion).

140 *Id.* at 773.

141 *Id.* at 771.

142 *Id.* at 767 (citing Withrow v. Williams, 507 U.S. 680, 692 (1993); *id.* at 705 (O'Connor, J., concurring in part and dissenting in part); United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

143 *Id.* at 766.

144 *Id.* at 766-67.

"gray area" of self-incrimination liability.[145] The "gray area" of *Chavez* is the time between filing formal criminal charges and the infliction of actual penalties.

Additionally, the Court purposely did not address the exact point at which the "use" occurs.[146] Justice Thomas was careful to limit his interpretation of the constitutional right so as not to conflate the core right with other rules intended to protect that right.[147] Prophylactic safeguards are related to the constitutional rights they protect, but they do not offer analogous remedies for civil liability. As stated by Justice Thomas in the plurality opinion, "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person."[148]

Thus, despite substantive analysis on safeguarding defendants' core constitutional protections, the Court was ambiguous, leaving many terms open to further interpretation.[149] Justice Thomas's characterization of Fifth Amendment rights left open the question of whether future decisions would further restrict the right or increase the separation between prophylactic applications of the privilege and core applications of the right.[150]

2. Justice Souter's Concurrence: Apprehension and Necessary Limitations on Self-Incrimination Liability

Justice Souter wrote a concurring opinion that agreed with Justice Thomas's refusal to expand the scope of the Fifth Amendment, but he felt that the decision relied on discretionary judgment and therefore warranted additional scrutiny.[151] Justice Souter advocated an intermediate balancing approach that limited expansion of core guarantees absent "the 'powerful showing' . . . necessary to expand protection of the privilege against com-

---

145 *See* Stoot v. City of Everett, 582 F.3d 910, 922-24 (9th Cir. 2009) (finding that the holding in *Chavez* "establishe[d] the parameters of the problem . . . but [did] not solve it"), *cert. denied*, 130 S. Ct. 2343 (2010).

146 *See Chavez*, 538 U.S. at 766-67 (plurality opinion) ("We need not decide today the precise moment when a 'criminal case' commences . . . ."). Immediately following this ambiguity, Justice Thomas characterized the necessary "use" by relying on core "trial right" cases. *Id.* at 767 (citing *Withrow*, 507 U.S. at 692; *id.* at 705 (O'Connor, J., concurring in part and dissenting in part); *Verdugo-Urquidez*, 494 U.S. at 264).

147 *Id.* at 772.

148 *Id.*

149 *See id.* at 766-74.

150 Davies, *supra* note 22, at 997-98.

151 *Chavez*, 538 U.S. at 777 (Souter, J., concurring).

pelled self-incrimination to the point of . . . civil liability."[152] Finally, Justice Souter required some "limiting principle" to stem the risk of expanding the right so far as to assign liability for every police interrogation challenged under a broad self-incrimination rule.[153]

In Justice Souter's view, the judicial rule implemented under Martinez's theory of pretrial liability would expand the constitutional protections of the Fifth Amendment too far, risking a "global application" of violations in every instance of police interrogation producing a coerced statement.[154] For this reason, Justice Souter required a restriction on civil liability, creating a reasonable stopping point to protect the constitutional limitations of the right.[155] Lastly, he proposed further analysis to determine whether an expanded right is necessary to aid the basic guarantees already provided under existing law.[156] If defendants fail to offer compelling evidence that their case warrants expansion of the "basic guarantee[s]" already protected by prophylactic safeguards applicable to pretrial proceedings, then there is "no reason to believe that the law has been systematically defective."[157] Justice Souter's opinion rested on the rationale behind the rule limiting civil liability, seeking a valid explanation for broadening the constitutional scope similar to that of prophylactic rules protecting interrogations and other pretrial, pre-criminal case proceedings. An intermediate balancing test looked to proportionality, weighing the requisite "powerful showing" against expansion of civil liability under the basic guarantees of the Fifth Amendment.[158]

Justice Souter concluded by identifying the type of conduct that § 1983 self-incrimination cases seek to deter: coercive police interrogations.[159] Barring any compelling reasons requiring the Court to expand liability, defendants who fail to state a valid Fifth Amendment claim must instead rely on the Fourteenth Amendment and substantive due process analysis to attack "the particular charge of outrageous conduct by the police."[160] Accordingly, Justice Souter's concurrence adopted a balanced approach to assigning liability that requires, at a minimum, a forceful showing to warrant the expansion of core constitutional rights and further suggests

---

152 *Id.* at 777-78 (quoting Miranda v. Arizona, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)).

153 *Id.* at 778-79.

154 *Id.* at 778.

155 *Id.* at 778-79.

156 *Id.*

157 *Chavez*, 538 U.S. at 779 (Souter, J., concurring).

158 *Id.* at 778-79 (citation omitted) (internal quotation marks omitted).

159 *See id.* at 779 (recognizing that any damages remedy must depend on "the particular charge of outrageous conduct by the police, extending from their initial encounter with Martinez through the questioning by Chavez").

160 *Id.*

an alternative remedy more suited to the particularized conduct defendants seek to deter.[161]

3. Justice Kennedy's Concurring and Dissenting Opinion

Justice Kennedy's concurring and dissenting opinion disagreed with both Justice Souter and Justice Thomas, stating that it was wrong to find that violations of the Self-Incrimination Clause do not occur until a statement is introduced at trial because "[a] future privilege does not negate a present right."[162] Expressing concern over police interrogation so extreme that it results in torture-like behavior, Justice Kennedy characterized the Self-Incrimination Clause as "a substantive constraint on the conduct of the government, not merely an evidentiary rule governing the work of the courts."[163] Justice Kennedy felt that a constitutional violation occurs at the time and place where coercive police interrogation forces a defendant to give compulsory statements.[164]

C. *Assessing Post-*Chavez *Liability: Unclear Precedent*

The two plurality opinions, combined with Justice Kennedy's dissent, run the gamut of potential Fifth Amendment interpretations. From Justice Thomas's narrow "trial right" view requiring at least the initiation of criminal proceedings,[165] to Justice Souter's intermediate view requiring a stronger showing to warrant expansion of the core right,[166] and finally to Justice Kennedy's broad view invariably finding constitutional violations at the time of coercion,[167] *Chavez* provides uncertain precedent to future courts determining self-incrimination liability. In doing so, the fractured Court represented a microcosm of the larger divergence among the circuit courts as a result of the decision.

Following the *Chavez* Court's refusal to explicitly broaden the traditional scope of the Fifth Amendment to use outside of a criminal proceeding, lower courts struggled to establish what constitutes a self-incrimination violation.[168] Since *Chavez*, the Supreme Court has addressed the Fifth

---

161 *Id.* at 778-79.

162 *Id.* at 790, 792 (Kennedy, J., concurring in part and dissenting in part).

163 *Chavez*, 538 U.S. at 791 (Kennedy, J., concurring in part and dissenting in part).

164 *Id.* at 795.

165 *Id.* at 766-76 (plurality opinion).

166 *Id.* at 777-79 (Souter, J., concurring).

167 *Id.* at 789-802 (Kennedy, J., concurring in part and dissenting in part).

168 *See* Eidson v. Owens, 515 F.3d 1139, 1149 (10th Cir. 2008) (applying *Chavez* to determine "the criminal case . . . proceeded beyond the initiation of criminal proceedings and through the preliminary hearing phase, a point that the Seventh Circuit has found sufficient to implicate the right against self-

Amendment but has not clarified its pretrial applicability.[169] Therefore, in light of the Supreme Court's reluctance to definitively establish rules governing the Self-Incrimination Clause, the majority of pre-*Chavez* interpretations are still valid precedent to justify either expanding or narrowing individual defendant's rights under the Fifth Amendment.[170] Two divergent lines of cases have arisen in circuit courts following *Chavez*, one group limiting self-incrimination liability as a strict "trial right" and the other expanding liability to various categories of pretrial proceedings.

1. "Trial Right" Liability

A number of circuit courts have held that self-incrimination liability can only attach if the defendant's coerced statements are used at trial.[171] They have interpreted *Chavez* as a bar against expanded pretrial liability, finding that constitutional violations occur only when coerced statements are used during a criminal trial.[172] *Chavez* failed to delineate the exact moment when constitutional violations occur,[173] and circuit courts have subsequently defined the self-incrimination privilege narrowly absent any showing to broaden the constitutional right.[174] Although the precise definition of what constitutes a "necessary showing" is hard to determine, Justice Sou-

---

incrimination" (citing Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1026-27 (7th Cir. 2006))). *But see* Atuar v. United States, 156 F. App'x 555, 560-61 (4th Cir. 2005) ("[T]he Fifth Amendment is fundamentally a 'trial right,' and protects an individual from admission of certain evidence at trial." (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990))).

169 *See, e.g.*, United States v. Patane, 542 U.S. 630, 637 (2004) (plurality opinion) ("We need not decide here the precise boundaries of the [Self-Incrimination] Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial.").

170 *Chavez* did little to distinguish the existing body of case law surrounding varied interpretations of Fifth Amendment violations, as circuit courts coming down on both sides of the "trial right" divide rely on *Chavez* to support their position. *See, e.g.*, Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007) (determining that pretrial proceedings violated the defendant's Fifth Amendment rights "[b]ased on our prior rulings on the Fifth Amendment and bail hearings, and Justice Thomas's definition of 'criminal case' in *Chavez*"); Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003) ("The Supreme Court's recent holding in *Chavez v. Martinez* reaffirms our [previous] holding . . . that a plaintiff may not base a [Fifth Amendment] claim on the mere fact that the police questioned her in custody without providing *Miranda* warnings when there is no claim that the plaintiff's answers were used against her at trial." (citation omitted)).

171 *See, e.g.*, Burrell v. Virginia, 395 F.3d 508, 513-14 (4th Cir. 2005) (holding that the defendant's § 1983 claim failed because he did not allege "any *trial* action that violated his Fifth Amendment rights"); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005) ("The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial . . . .").

172 *See Renda*, 347 F.3d at 552 (finding that a plaintiff cannot bring a § 1983 claim without asserting that the plaintiff's statements were used against him at trial).

173 *See* Chavez v. Martinez, 538 U.S. 760, 766-67 (2003) (plurality opinion).

174 *See Burrell*, 395 F.3d at 513-14; *Murray*, 405 F.3d at 289.

ter's balancing test established that expanding the scope of civil liability requires evidence that the current guarantee is ineffective and that the new remedy is proportional to the "costs and risks" associated with its enforcement.[175]

In *Renda v. King*,[176] police interrogated a domestic abuse victim without providing *Miranda* warnings and subsequently obtained a written statement from the victim that was inconsistent with her prior and future testimony regarding the domestic dispute.[177] As a result, police filed a charge of giving false reports to law enforcement authorities, relying primarily on the inconsistent statement.[178] The district court suppressed the illegally obtained statements during trial, and the charge was eventually dropped.[179] The victim filed a § 1983 claim alleging that the coercive interrogation violated her Fifth Amendment privilege against self-incrimination.[180] The trial court denied the victim's Fifth Amendment claim, and she appealed.[181]

In affirming the lower court's denial of § 1983 liability under the Fifth Amendment, the Third Circuit held that using improperly compelled statements as a basis for filing charges, short of actual use in a criminal trial, was not a violation of a defendant's constitutional right against self-incrimination.[182] Determining that *Chavez* "[left] open the issue of when a statement is used at a criminal proceeding," the court found that prior characterizations of the Self-Incrimination Clause as a narrowly defined trial right prevent civil liability in pretrial proceedings.[183] The claim in *Renda* proceeded further than the claim in *Chavez* because in *Renda*, a criminal case had commenced and coerced statements were relied upon to file charges, even though the state later dropped the charges.[184] However, "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."[185] *Renda* is therefore consistent with the distinction between core constitutional and prophylactic rights.

Miranda violations arising from outrageous police conduct warrant valid constitutional claims, but not under the Fifth Amendment's Self-

---

175 *Chavez*, 538 U.S. at 778-79 (Souter, J., concurring).
176 347 F.3d 550 (3d Cir. 2003).
177 *Id*. at 552.
178 *Id*. at 553.
179 *Id*.
180 *Id*.
181 *Id*.
182 *Renda*, 347 F.3d at 559.
183 *Id*.
184 *Id*. at 558-59.
185 *Id*. at 559.

Incrimination Clause.[186] The Supreme Court has expressly stated that egregious police conduct—or any other type of extremely coercive interrogation—is best addressed through Fourteenth Amendment substantive due process analysis.[187] When given a chance to classify prophylactic *Miranda* rules as core rights rather than procedural rules that are constitutional in nature and enforced by the judiciary, the Court refused to do so, instead stressing the modern-day importance of such rules and maintaining a constitutional distinction.[188] In refusing to attach liability to pretrial proceedings, at least one lower court has distinguished fundamental constitutional rights from the procedural safeguards implemented to protect those rights.[189] Even in cases that proceed further into the ambiguous gray area of *Chavez* by initiating a criminal case, filing official charges, and relying on coerced statements during various pretrial proceedings, many post-*Chavez* courts have been wary of expanding self-incrimination liability outside of a narrowly defined trial right.[190]

2. Pretrial Liability

Other courts have adopted a broader view of self-incrimination liability in light of *Chavez* and other holdings expanding violations to pretrial proceedings.[191] These decisions have defined "use" in a "criminal case"—per *Chavez*—so that it triggers upon any reliance on coerced statements to file charges or upon their use at any subsequent proceeding, even if all criminal charges are dropped prior to the commencement of trial.[192]

The Seventh Circuit synthesized a line of cases rejecting the narrow view of the self-incrimination privilege in *Best v. City of Portland*.[193] In

---

186 *See* Chavez v. Martinez, 538 U.S. 760, 779 (2003) (Souter, J., concurring) (rejecting expanded civil liability for coercive police conduct under the Fifth Amendment, but recognizing a potential substantive due process claim against unjustifiable government action).

187 *Id.*

188 *See* Dickerson v. United States, 530 U.S. 428, 436-44 (2000).

189 *See Renda*, 347 F.3d at 558 ("*Miranda* is a prophylactic rule intended to safeguard the right protected by the Self-Incrimination Clause . . . and . . . rules designed to safeguard constitutional rights do not expand the scope of the constitutional rights themselves.").

190 *See, e.g.*, United States v. Sweets, 526 F.3d 122, 129-30 (4th Cir. 2007) (restricting the Self-Incrimination Clause to a "trial right" and expressing concerns about expanding constitutional rights to the detriment of society).

191 *See* Higazy v. Templeton, 505 F.3d 161, 167 (2d Cir. 2007) (finding a violation when defendant's statements served as the basis for filing a criminal complaint and for opposing bail); Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1026-27 (7th Cir. 2006) (finding a violation when a suspect's statements were used at a preliminary hearing determining probable cause).

192 *See* Best v. City of Portland, 554 F.3d 698, 702-03 (7th Cir. 2009) (accepting a range of preliminary hearings as constitutional violations and refusing to adopt the view that "criminal case" means use at the defendant's criminal trial (citing *Sornberger*, 434 F.3d at 1026-27; *Higazy*, 505 F.3d at 173)).

193 554 F.3d 698 (7th Cir. 2009).

Best, the defendant was charged with various drug offenses based on evidence obtained from searches of two homes.[194] The defendant moved to suppress the evidence from both searches, which the district court denied.[195] Following an immediate appeal and the discovery of new information supporting suppression of the evidence, the prosecution dropped all criminal charges.[196]

Consequently, the defendant filed a civil suit under § 1983, alleging that police officers had continued to interrogate him after he had invoked his right to counsel—thus constituting a violation of his *Miranda* rights.[197] Furthermore, he alleged that the coerced statements were used against him at a suppression hearing, which led to his continued confinement awaiting trial.[198] The district court denied the defendant's claim under a trial-right approach to self-incrimination liability, holding that no constitutional violation had occurred because the prosecutor dismissed all the charges and the coerced statements could never have been used against him in any criminal prosecution, let alone at trial.[199] On appeal, the Seventh Circuit reversed and held that the defendant's claim had progressed far enough to warrant civil liability, recognizing that "we have not adopted the narrow view that use in a 'criminal case' means 'at trial.'"[200] The Seventh Circuit's decision relied on previous cases holding that arraignments, probable cause hearings, and bail hearings relying on coerced statements could give rise to constitutional violations under the Fifth Amendment.[201]

The Seventh and Third Circuits identified *Chavez* as controlling precedent in determining whether to assign self-incrimination liability for various uses of coerced statements during criminal proceedings,[202] yet arrived at two very different conclusions. Unfortunately, such factual similarities failed to guide courts to the same conclusion when deciding cases within the gray area of *Chavez*. These divergent opinions highlight the need for a cohesive rule establishing when procedural violations of prophylactic rules end and violations of fundamental Fifth Amendment rights begin.

---

194 *Id.* at 699.

195 *Id.*

196 *Id.*

197 Best v. Portland Police Dep't, No. 1:03-CV-402 WCL, 2007 WL 1797633, at *5 (N.D. Ind. June 19, 2007), *rev'd sub nom.* Best v. City of Portland, 554 F.3d 698 (7th Cir. 2009).

198 *Best*, 554 F.3d at 702.

199 *Best*, 2007 WL 1797633, at *18.

200 *Best*, 554 F.3d at 702-03.

201 *Id.* at 702 (citing Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1026-27 (7th Cir. 2006); Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007)).

202 *Compare id.* (interpreting "criminal case" language in *Chavez* to accept liability for pretrial hearings), *with* Renda v. King, 347 F.3d 550, 558-59 (3d Cir. 2003) (interpreting same to limit liability for substantial use of statements against interests of privilege as a trial right).

III. *STOOT V. CITY OF EVERETT*

In *Stoot v. City of Everett*, the Ninth Circuit adopted a broad approach to self-incrimination liability in a case arising from the compulsion of coerced statements from a juvenile during a criminal investigation and the subsequent use of those statements during pretrial proceedings.[203] This Part begins with the factual and procedural background preceding the Ninth Circuit decision. It then outlines the Ninth Circuit's attempt to reconcile the ongoing circuit split following the ambiguous language in *Chavez*, where the court eventually rejecting the "trial right" characterization of the self-incrimination privilege in favor of expanded civil liability for pretrial proceedings.

A. *Background*

On December 23, 2003, the City of Everett Police Department received a report that a four-year-old girl had been sexually abused by a family friend.[204] During an interview of the young girl in which she gave confused and contradictory statements, police identified fourteen-year-old Paul Stoot as the primary suspect.[205] On January 15, 2003, Stoot was seized and interrogated by Everett Police Detective Jonathan Jensen at the boy's school without notifying his parents.[206] Toward the end of a two-hour interrogation, Stoot confessed to molesting the victim.[207] Jensen and Stoot characterized the interrogation very differently; Stoot asserted that Jensen's interviewing techniques violated *Miranda* because Stoot lacked the capacity to consent to the interrogation, while Jensen claimed that Stoot voluntarily waived his rights and subsequently confessed to molesting the victim.[208]

Prosecutors filed charges against Stoot on July 2, 2004, alleging child molestation in the first degree.[209] Supporting the charge was an Affidavit of Probable Cause that incorporated Stoot's confession.[210] A pretrial arraignment hearing ("CrR 3.2 hearing") was held following the indictment, and the Washington Superior Court found that "probable cause exist[ed] for the charge" and released Stoot on his own recognizance.[211] On November 3, 2004, the court held a Washington Criminal Rule 3.5 hearing ("CrR 3.5

---

203 Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

204 *Id.* at 913.

205 *Id.* at 913-14.

206 *Id.* at 914-15.

207 *Id.* at 915.

208 *Id.* at 914-16.

209 *Stoot*, 582 F.3d at 916.

210 *Id.*

211 *Id.* (internal quotation marks omitted).

hearing") to determine the admissibility of Stoot's confession, concluding that Stoot's statements "were the product of impermissible coercion" and therefore inadmissible at trial.[212] The Superior Court eventually dismissed with prejudice all charges against Stoot after determining that the victim was incompetent to testify.[213]

The Stoot family subsequently brought charges against Jensen and the City of Everett in the United States District Court for the Western District of Washington alleging, among other claims, Fifth and Fourteenth Amendment violations under 42 U.S.C. § 1983.[214] Their claims alleged Fifth Amendment violations arising from pretrial proceedings, namely, the affidavit, the CrR 3.2 hearing, and the CrR 3.5 hearing, which all relied on Stoot's coerced statements.[215] In addition, Stoot alleged that the extremely coercive interrogation techniques violated his Fourteenth Amendment substantive due process rights.[216] The district court granted the defendant's motion for summary judgment on all claims.[217] Regarding the Stoots' Fifth Amendment claim, the court held that Stoot had "failed to make out a cognizable § 1983 claim for violation of [his] Fifth Amendment privilege against compelled self-incrimination."[218] In reaching this decision, the court relied primarily on the *Chavez* line of cases suggesting that the privilege is a trial right only.[219] In fact, the district court noted that *Chavez* overruled a line of Ninth Circuit cases holding that a Fifth Amendment violation could occur even if coerced statements were never used in criminal proceedings.[220] The court reasoned that "criminal case," as used in *Chavez*, was synonymous with a "criminal trial" where guilt is determined, unlike an arraignment or evidentiary hearings.[221]

Even though the use of Stoot's incriminating statements at the CrR 3.5 hearing could have ultimately led to his confrontation with the statements at trial, the court found no constitutional violation because the defendant's guilt was "ultimately not at issue."[222] The Stoots appealed this decision by timely filing in the United States Court of Appeals for the Ninth Circuit.[223]

---

212 *Id.* at 916-17 (internal quotation marks omitted).

213 *Id.* at 917.

214 *Id.*

215 *Stoot*, 582 F.3d at 923-24.

216 *Id.* at 912.

217 *Id.* at 917.

218 *Id.* (internal quotation marks omitted).

219 Stoot v. City of Everett, No. C05-1983TSZ, 2007 WL 1232158, at *5 (W.D. Wash. Apr. 26, 2007) (citing Chavez v. Martinez, 538 U.S. 760, 767 (2003) (plurality opinion)).

220 *Id.*

221 *Id.* (internal quotation marks omitted).

222 *Id.* at *6 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

223 Stoot v. City of Everett, 582 F.3d 910, 918 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

B. *The Ninth Circuit's Analysis in* Stoot v. City of Everett

The Ninth Circuit affirmed the district court's grant of summary judgment to the defendants on all claims except the Fifth Amendment coerced confession claim.[224] Judge Berzon, who authored the opinion, reversed and remanded the Fifth Amendment claim, holding that use of coerced statements at trial is not necessary for Stoot to assert a violation of rights under the Fifth Amendment.[225] This Section discusses the Ninth Circuit's analysis of the "gray area" created by *Chavez*, the circuit split characterizing the Fifth Amendment as either a fundamental trial right or as being applicable to pretrial proceedings, and the Ninth Circuit's eventual adoption of a "general approach" to Fifth Amendment scope.

1. Problematic Parameters?: Deciphering the "Gray Area" From *Chavez v. Martinez*

The Stoots argued that Jensen violated Paul Stoot's Fifth Amendment rights "*during the interrogation* at Paul's school," while Jensen argued that the Stoots could not state a valid Fifth Amendment claim "because Paul's statements were never *used against him at trial*."[226] The Ninth Circuit rejected the defendant's contention, holding that use in a criminal case is broader than use in trial.[227]

The Ninth Circuit acknowledged that what constitutes "use in a criminal case" is unclear following the ambiguous precedent set by *Chavez*. The Ninth Circuit asserted that the *Chavez* decision "establishe[d] the parameters of the problem . . . but d[id] not solve it."[228] Based on an analysis of

---

224 *Id*. at 930.

225 *Id*. at 925, 928.

226 *Id*. at 922 (emphases added). Somewhat surprisingly, this is the same comparison the Supreme Court made between claims alleging constitutional violations at the time of interrogation and claims alleging violations following the use of coerced statements during criminal proceedings. *See* Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality opinion) (comparing prophylactic rules designed to protect witnesses before criminal proceedings commence with "core" constitutional rights that can only be violated following compelled testimony in a criminal case); *see also id.* at 773 ("The Ninth Circuit's view that mere compulsion violates the Self-Incrimination Clause finds no support in the text of the Fifth Amendment and is irreconcilable with our case law." (citations omitted) (citing Martinez v. City of Oxnard, 270 F.3d 852, 857 (2001), *rev'd sub nom.* Chavez v. Martinez, 538 U.S. 760 (2003); Cal. Att'ys for Crim. Justice v. Butts, 195 F.3d 1039, 1045-46 (9th Cir. 1999); Cooper v. Dupnik, 963 F.2d 1220, 1243-44 (9th Cir. 1992) (en banc), *overruled by* Chavez v. Martinez, 538 U.S. 760 (2003))). The lower court, in following *Chavez*, made the distinction that constitutional violations could not occur at the time of interrogation. *Stoot v. City of Everett*, 2007 WL 1232158, at *5-6. Instead, the court accepted the defendants' assertion, in accordance with prior case law, that a violation could not occur because Stoot's confessions were suppressed and never used against him at trial. *Id.* at *6.

227 *Stoot*, 582 F.3d at 922.

228 *Id*.

both Justice Thomas's plurality decision and Justice Souter's concurrence, the Ninth Circuit concluded that even though coercive police interrogations might give rise to substantive due process claims under the Fourteenth Amendment, "the Fifth Amendment was not violated unless and until allegedly coerced statements were used against the suspect in a criminal case."[229]

The Ninth Circuit reasoned that Stoot's claim fell "squarely within the gray area created by *Chavez*" because he was prosecuted and his statements were at issue within his criminal case.[230] The fundamental difference between the facts of *Chavez* and *Stoot* was that the prosecutor filed official charges against the defendant in *Stoot*, but Martinez—the plaintiff in *Chavez*—brought suit alleging a Fifth Amendment violation prior to the filing of any charges:

> Unlike Martinez, who was never charged with any crime, [Stoot's] statements were used against him in (1) the Affidavit filed in support of the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing (the CrR 3.2 hearing); and (3) a pretrial evidentiary hearing (the CrR 3.5 hearing) to determine the admissibility of his confession.[231]

Of the three forms of reliance on Stoot's statements, the Ninth Circuit concluded that only an affidavit supporting the indictment and a pretrial arraignment hearing constitute a "use" in a "criminal case" under *Chavez*.[232] Because criminal proceedings had been initiated against Stoot, his claim fell within the scenarios outlined in *Chavez* and was unlike Martinez's claim, which failed to present events in which his coerced, self-incriminatory statements could be "used" against him as part of a "criminal case."[233] Even though an allegedly coerced statement is technically used during pretrial criminal proceedings, as was the case with Stoot's affidavit

---

229 *Id.* at 923.

230 *Id.* Significantly, the Ninth Circuit cites but does not discuss Justice Thomas's threshold criminal proceedings initiation requirement or Justice Souter's concerns regarding expansive civil liability and the need for a "limiting principle." *See Chavez*, 538 U.S. at 772-73 (plurality opinion); *id.* at 778-79 (Souter, J., concurring).

231 *Stoot*, 582 F.3d at 923-24.

232 *Id.* at 924 (internal quotation marks omitted). The court later explained in a footnote that the immediate rejection of the third alleged use in the evidentiary hearing was due to the Stoots' "circular argument" that the statements were "'used' against him at the pretrial hearing to determine the admissibility of those same statements." *Id.* at 925 n.14. Given that the broad approach the court adopted includes virtually every "use" of coerced statements once formal charges are filed, there is little difference between a district court judge's reliance on statements to determine admissibility of evidence or to support an indictment.

233 *Compare Stoot*, 582 F.3d at 923 (finding defendants' statements to have been used to file formal charges, to advance the criminal prosecution, and to determine pretrial custody), *with Chavez*, 538 U.S. at 767 (plurality opinion) ("Martinez was never made to be a 'witness' against himself . . . because his statements were never admitted as testimony against him in a criminal case.").

and arraignment hearing, Fifth Amendment constitutional protection against self-incrimination still does not automatically extend.

2. The Circuit Split

Having established that *Chavez* controls,[234] Judge Berzon noted that the Ninth Circuit had yet to consider the Fifth Amendment scope issue—that is, how far to expand constitutional protections—as it relates to "use" of statements in criminal proceedings.[235] Thus, the Ninth Circuit turned to other circuits that have considered the Fifth Amendment scope issue.[236] These circuits, however, have not established a consistent rule.

The Third, Fourth, and Fifth Circuits (the "trial right" group) have each "applied *Chavez* to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*."[237] Relying on the same standard as *Chavez*, these circuits concluded that the Fifth Amendment privilege does not violate an individual's constitutional protection against self-incrimination unless the criminal case has advanced far enough to implicate the defendant's fundamental trial right.[238] More importantly, "these courts have held 'that it is the use of coerced statements during a criminal trial, and *not in obtaining an indictment*, that violate[ ] the Constitution.'"[239] In other words, the "trial right" group requires both the "initiation of legal proceedings" and some substantial use tied to a criminal trial before a defendant's Fifth Amendment right against self-incrimination is implicated.[240]

The court next examined the Seventh and Second Circuits' disagreement with the "trial right" analysis used by their sister circuits.[241] The court focused entirely on two cases, *Sornberger v. City of Knoxville, Illinois*[242] and *Higazy v. Templeton*,[243] which were found to be closely related to Stoot's claims.[244] In *Sornberger*, a couple mistakenly identified as bank robbers brought suit for Fifth Amendment constitutional violations under § 1983.[245] After police detainment, the wife, Teresa Sornberger, gave a ver-

---

234 *Stoot*, 582 F.3d at 922-23.

235 *Id.* at 924.

236 *Id.*

237 *Id.* (citing Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005); Burrell v. Virginia, 395 F.3d 508, 513-14 (4th Cir. 2005); Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003)).

238 *Id.*

239 *Id.* (emphasis added) (quoting *Renda*, 347 F.3d at 559).

240 Chavez v. Martinez, 538 U.S. 760, 766 (2003) (plurality opinion).

241 *Stoot*, 582 F.3d at 924.

242 434 F.3d 1006 (7th Cir. 2006).

243 505 F.3d 161 (2d Cir. 2007).

244 *Stoot*, 582 F.3d at 925.

245 *Sornberger*, 434 F.3d at 1009-12.

bal and written confession that she had assisted her husband in robbing the bank.[246] The confessions were false, and the wife later claimed that they were the product of police coercion.[247] Police relied on the confessions to support charges against the couple, and the trial court denied a motion to suppress the evidence.[248]

In determining that the statements allowed for damages under § 1983, the Seventh Circuit distinguished *Sornberger* from *Chavez*.[249] First, "[Sornberger's] 'criminal case' advanced significantly farther than did that of the *Chavez* plaintiff, who never had criminal charges filed against him at all."[250] Secondly, the prosecution was initiated as a result of the coerced statements' use in the criminal case.[251] The Ninth Circuit emphasized both of these factors, as well as the fact that the Seventh Circuit had distinguished *Sornberger* from similar cases in the Third and Fourth Circuits:

> [W]e are satisfied that her unwarned statements were used against her in a 'criminal case' and in a manner that implicates the Self-Incrimination Clause. Before charges against Teresa and her husband eventually were dropped, a preliminary hearing was held to determine whether probable cause existed to allow the case against her to go to trial. Teresa's confession was offered by the prosecution to support a determination of probable cause. Her confession was then used to set the amount of bail . . . . At a subsequent arraignment on charges stemming from the . . . robbery, Teresa's confession was once again admitted before she was called upon to plead guilty or not guilty.[252]

The alleged "uses" of Sornberger's coerced statements during her criminal case, such as at preliminary bail hearings and in supporting affidavits, were similar to those of Paul Stoot.[253] The *Sornberger* court, in rejecting the "trial right" approach, "refuse[d] to hold that the right against self-incrimination cannot be violated unless a confession is introduced in the prosecution's case-in-chief at trial before the ultimate finder of fact."[254]

Next, Judge Berzon examined a more recent case out of the Second Circuit, *Higazy v. Templeton*, where government officials used coerced statements as the basis for filing criminal charges and opposing bail.[255] Similar to Stoot and the defendant in *Sornberger*, the government eventually dropped all charges and the defendant filed suit.[256] The Second Circuit found that preliminary uses of a defendant's statement violate his Fifth

---

246 *Id.* at 1011.
247 *Id.*
248 *Id.* at 1012.
249 *Stoot*, 582 F.3d at 924-25.
250 *Id.* at 924 (quoting *Sornberger*, 434 F.3d at 1025) (internal quotation marks omitted).
251 *Id.*
252 *Id.* (alterations in original) (quoting *Sornberger*, 434 F.3d at 1026).
253 *Id.* at 925.
254 *Id.* at 924-25 (alteration in original) (quoting *Sornberger*, 434 F.3d at 1027 n.15).
255 Higazy v. Templeton, 505 F.3d 161, 167 (2d Cir. 2007).
256 *Id.* at 167-68.

Amendment rights even if they are never used against him in a criminal trial.[257] Specifically, "Higazy's initial appearance . . . , which included the determination of whether he would be detained or released on bail, was part of [his] criminal case."[258]

The manner in which the Ninth Circuit framed the divergent split placed substantial weight on the factual similarities to sister circuit cases, such as "use" in preliminary bail hearings, rather than delving deeper into the substantive scope analysis found in Supreme Court decisions like *Chavez*.[259] For instance, identifying the various "uses" in a "criminal case" that trigger civil liability (e.g., affidavits, pretrial arraignment hearings, or pretrial custody status) does not resolve whether a defendant whose coerced statements were technically relied on in a supporting affidavit *before all criminal charges are dropped* actually suffers any meaningful harm. Should courts find themselves in the "gray area" of *Chavez*, Justice Souter's balancing test advocates a more substantive examination of expanded § 1983 liability that goes beyond pretrial, procedural determinations of the ambiguous "criminal case."[260]

3. The Ninth Circuit's "General Approach" to Self-Incrimination Violations

Having examined competing sides of the circuit split, Judge Berzon chose to adopt the "general approach" of *Sornberger* and *Higazy*.[261] Accordingly, the Ninth Circuit held that "[a] coerced statement has been 'used' in criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status."[262] The *Stoot* court's broad approach encompasses virtually all pretrial uses following the basic "initiation of legal proceedings"[263] threshold. In other words, the Ninth Circuit held that the right against self-incrimination triggers upon use in a "criminal proceeding" as opposed to use in a criminal trial.[264]

Justice Souter's concurrence in *Chavez* advocated both a "powerful showing" by a defendant seeking to expand civil liability and some kind of "limiting principle" that prevents § 1983 from applying in cases of trivial

---

257 *Stoot*, 582 F.3d at 925.

258 *Id.* (first alteration in original) (quoting *Higazy*, 505 F.3d at 167-68) (internal quotation marks omitted).

259 *Id.* at 924-25.

260 Chavez v. Martinez, 538 U.S. 760, 778-79 (2003) (Souter, J., concurring); *see also infra* Part V.

261 *Stoot*, 582 F.3d at 925.

262 *Id.*

263 *Chavez*, 538 U.S. at 766 (plurality opinion).

264 *Stoot*, 582 F.3d at 925.

police investigation.[265] Judge Berzon later stated in a footnote that the Ninth Circuit's decision was responsive to Justice Souter's concerns, but only with respect to the "limiting principle" establishing that "the Fifth Amendment has been violated only when government officials use an incriminating statement to initiate or prove a criminal charge."[266] This "sensible 'stopping place,'" the court found, limits liability where there are no charges filed and no reliance on coerced statements to file formal charges or oppose bail.[267] This analysis, however, likely does not rise to the "realistic assessment of costs and risks"[268] necessary to avoid the "global application"[269] of risk in situations where statements could be treated as stand-alone violations subject to compensation.

IV. FUNDAMENTAL SPLIT: EXCLUSIVE TRIAL RIGHT VERSUS PRETRIAL PROTECTIONS

Courts should attempt to balance the scope of pretrial civil liability sought against the actual damages suffered by defendants bringing the § 1983 claims. Expansion of liability for self-incrimination violations is warranted only when defendants make the required showing that the basic constitutional guarantees afforded to them by core constitutional rights, as well as the procedural prophylactic rules implemented to overprotect those rights, are insufficient.

The *Stoot* court attempted to reconcile shaky Supreme Court precedent expressed in *Chavez* after addressing the various interpretations circuit courts had given the constitutional scope issue since *Chavez* had been decided. Although technically within the *Chavez* analysis—requiring a witness be "compelled to be a witness against himself in a criminal case"[270]—the court neither justified its view, which conflicts with the Supreme Court's narrower scope interpretation, nor made the "powerful showing" Justice Souter suggested to warrant expanding civil liability.[271] Courts should adopt Justice Souter's balancing test to determine liability for self-incrimination violations because they must justify damages remedies for coercive police conduct when potentially expanding the scope of constitutional rights.[272] This Part places *Stoot* in the line of decisions broadly inter-

---

265 *Chavez*, 538 U.S. at 778-79 (Souter, J., concurring) (internal quotation marks omitted).

266 *Stoot*, 582 F.3d at 925 n.15

267 *Id.*

268 *Chavez*, 538 U.S. at 778 (Souter, J., concurring).

269 *Id.*

270 *Id.* at 766 (plurality opinion).

271 *Id.* at 778 (Souter, J., concurring) (internal quotation marks omitted).

272 *Cf.* Michigan v. Tucker, 417 U.S. 433, 440 (1974) (recognizing that the proper scope of the Fifth Amendment self-incrimination privilege centers around protecting against the cruelty of historical

preting Fifth Amendment constitutional violations, determining that the court's analysis should have further developed necessary limiting principles.

A. *Deciphering* Chavez*: The Appropriateness of Justice Souter's Balancing Test to Determine Self-Incrimination Liability*

There are several underlying principles common to both sides of the circuit split that prove useful in discerning the correct approach for defining self-incrimination liability.[273] As all post-*Chavez* circuit decisions have announced, the question the Supreme Court left unanswered in *Chavez* is clear[274]: What constitutes a "use" in a "criminal case," and what characterization of that use is best aligned with defendants' core constitutional protections? The overriding concern (that all of these circuits have expressed) is the extent to which coerced statements impose an unfair burden on the defendant to essentially testify against himself.[275] This association of interests is best examined not by imposing an overinclusive threshold including virtually all post-indictment, pretrial proceedings, but by adopting and applying the modes of analysis advocated by the Supreme Court.[276]

The *Stoot* decision strays from both Justice Thomas's and Justice Souter's plurality opinions in *Chavez* in that it broadens the fundamental trial

---

interrogations); Kastigar v. United States, 406 U.S. 441, 453 (1972) (focusing on actual damages suffered to determine appropriate civil liability).

[273] *See Tucker*, 417 U.S. at 439-40 (recognizing that, despite the "considerable attention" given to Fifth Amendment rights in myriad situations, the Supreme Court has noted a recurring theme that "the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality'" (alteration in original) (quoting Ullmann v. United States, 350 U.S. 422, 428 (1956))).

[274] *See, e.g.*, Stoot v. City of Everett, 582 F.3d 910, 923 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010); Higazy v. Templeton, 505 F.3d 161, 171 (2d Cir. 2007); Burrell v. Virginia, 395 F.3d 508, 513 (4th Cir. 2005).

[275] *See Higazy*, 505 F.3d at 170 (noting that "the [Fifth] Amendment's 'sole concern is to afford protection against being forced to give testimony leading to the infliction of [criminal] penalties'" (second alternation in original) (quoting *Kastigar*, 406 U.S. at 453)); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005) ("It is axiomatic that a criminal defendant's constitutional rights have been violated 'if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.'" (quoting Miranda v. Arizona, 384 U.S. 436, 464 n.33 (1966))).

[276] *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion) (advocating a narrower "trial right" approach and noting that although rules like those in *Miranda* protect the rights found in the Self-Incrimination Clause, they do not extend the scope of the Clause itself); *id.* at 778-79 (Souter, J., concurring) (advocating a balancing approach that requires a "powerful showing" and a concrete "limiting principle" to curb expansive civil liability (internal quotation marks omitted)); *id.* at 791 (Kennedy, J., concurring in part and dissenting in part) (advocating a broad approach that interprets the Fifth Amendment privilege as "a continuing right against government conduct intended to bring about self-incrimination," regardless of any use of incriminatory statements in subsequent criminal proceedings).

right approach without justifying an expanded scope of civil liability.[277] Yet expansion of the Fifth Amendment beyond basic constitutional rights, as Judge Harlan explained in *Miranda* and Justice Souter later adopted in *Chavez*,[278] requires a new rule to "satisfy [the] deep needs of society."[279] The basic rationale behind the Fifth Amendment protects fundamental constitutional rights against encroachment by future judicial interpretation.[280] Quite simply, "[n]othing new can be put into the Constitution except through the amendatory process[, and n]othing old can be taken out without the same process."[281]

Core constitutional protections are inflexible, but a novel application of those rights to different situations, such as self-incrimination protections during pretrial proceedings, is available through delicate balancing of extra costs and benefits. Specifically, modification of fundamental constitutional doctrines must, at the very least, be justified by a showing of a commensurate level of expanded liability associated with the new judicially imposed rule.[282] In *Miranda*, Justice Harlan warned against overprotecting suspects during interrogation because, by doing so, courts may unduly restrain police conduct while not providing much of a benefit at all to society.[283] This remains true nearly thirty years after *Chavez*, when police can face lawsuits

---

277 *Compare id.* at 767 (plurality opinion) (relying on both *Verdugo*'s "*fundamental trial right*" language and *Withrow*'s "trial right" designation to determine that a violation does not occur until statements are used in a criminal case (quoting Withrow v. Williams, 507 U.S. 680, 692 (1993); United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)) (internal quotation marks omitted)), *and id.* at 778 (Souter, J., concurring) (finding that a "'powerful showing' . . . [is] necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability [asserted by the plaintiff]"), *with Stoot*, 582 F.3d at 925 (holding that use of coerced statements in pretrial proceedings, as well as in the filing of formal charges, constitutes a Fifth Amendment violation because the "use of the coerced statements *at trial* is *not necessary* for [Stoot] to assert a claim for violation of his rights under the Fifth Amendment" (second emphasis added)).

278 *Chavez*, 538 U.S. at 778 (Souter, J., concurring).

279 *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting).

280 *See* Ullmann v. United States, 350 U.S. 422, 427-28 (1956) ("If it be thought that the privilege [against self-inrcimination] is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." (quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)) (internal quotation marks omitted)). *But see id.* at 427 ("The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.").

281 *Id.* at 428.

282 General rationales emphasizing the important historical background underlying the Self-Incrimination Clause warrant vigilant enforcement, but this should not translate into unchecked liability. *Cf. Chavez*, 538 U.S. at 778 (Souter, J., concurring) (advocating "a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of [greater] civil liability" (citing *Miranda*, 384 U.S. at 515, 517 (Harlan, J., dissenting))).

283 *Miranda*, 384 U.S. at 514-16 (Harlan, J., dissenting).

from suspects who made incriminating statements, even though the statements were never used at trial and all charges were dropped.[284]

Procedural safeguards already exist in the form of prophylactic rules to protect defendants from coercive police conduct.[285] The Supreme Court has repeatedly determined that a defendant may suffer an infringement of his self-incrimination rights without enduring a violation of his constitutional rights.[286] The Court has implicitly suggested that complainants must allege concrete violations not covered by existing protection of fundamental rights[287] and has explicitly advocated a need for compelling evidence justifying any new rules governing self-incrimination liability.[288]

Although Justice Thomas's opinion in *Chavez* was somewhat vague in assigning bright-line self-incrimination liability within a criminal case, the Ninth Circuit in *Stoot* granted an overly broad right. The Ninth Circuit provided little justification, as recommended for expanded liability in Justice Souter's *Chavez* concurrence,[289] even when the defendant suffered no demonstrable injuries resulting from pretrial uses of his self-incriminating statements. Assuming the court would have been able to identify some substantive harm caused by uses of Stoot's coerced statements in an affidavit and during preliminary hearings,[290] none of those adverse effects could have led to the infliction of actual criminal penalties because all charges

---

284 *See* Higazy v. Templeton, 505 F.3d 161, 173 (2d Cir. 2007) (finding a violation after use in a preliminary bail hearing); Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1027 n.15 (7th Cir. 2006) (finding a violation after use in an affidavit supporting charges and preliminary hearings); *see also* Weaver v. Brenner, 40 F.3d 527, 535 (2d Cir. 1994) (holding that the "use or derivative use of a compelled statement at *any* criminal proceeding against the declarant violates that person's Fifth Amendment rights; use of the statement at trial is not required"). *But see* Burrell v. Virginia, 395 F.3d 508, 512 (4th Cir. 2005) (finding no violation after charges were filed and statements relied upon in criminal case); Renda v. King, 347 F.3d 550, 559 (3d Cir. 2003) (finding no violation when coerced statements were used as a basis for filing criminal charges). In *Burrell*, the court chose to apply *Chavez*, and specifically Justice Souter's limiting principle, to find that the plurality limited Fifth Amendment constitutional violations to only the "*courtroom use* of a criminal defendant's compelled, self-incriminating testimony," thereby excluding pretrial evidentiary and probationary hearings, or the filing of initial charges. *Burrell*, 395 F.3d at 513 (citing *Chavez*, 538 U.S. at 777 (Souter, J., concurring)).

285 *See, e.g.*, *Miranda*, 384 U.S. at 444-45 (discussing *Miranda* rights).

286 *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 444 (1974) (finding that "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected").

287 *Cf. id.* at 444 (holding that a constitutional violation did not occur because police conduct "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*").

288 *See Chavez*, 538 U.S. at 778 (Souter, J., concurring) (advocating "a realistic assessment of costs and risks, necessary to expand protection of the privilege against self-incrimination").

289 *See id.* at 778-79.

290 *See, e.g.*, Best v. City of Portland, 554 F.3d 698, 702-03 (7th Cir. 2009) (recognizing defendant's restriction of liberty following the use of coerced statements to lengthen police detention).

were dropped. Instead, the *Stoot* court should have applied Justice Souter's intermediate approach to justify such an expanded right.

Several factors, such as interference with police investigation and proportionality of damages, pose valid concerns that would be served by further analysis when determining self-incrimination liability.[291] Justice Souter concurred in Justice Thomas's core belief in a trial right[292] but also suggested that future courts like *Stoot* should ask a basic question relating to fundamental constitutional beliefs protected by complementary rules such as *Miranda*: "[W]hy is this new rule necessary in aid of the basic guarantee?"[293] Increasing civil liability, Justice Souter believed, would be too costly a proposition without first determining that the Court's interest, on the balance, adequately aligns with society's interest in protecting the core constitutional rights.[294]

B. Stoot *Analysis: Choosing a Side, but Misplaced Focus?*

Because *Stoot* stops short of fully discussing the various fears expressed by Souter's concurrence in *Chavez*,[295] it is necessary to address several outstanding concerns applicable to the *Stoot* court's interpretation of the self-incrimination privilege. Interference with effective criminal investigations, adherence to judicial mandates advocating vigilant protection of minors, and proportionality of remedies sought compared to damages incurred are all valid concerns previously recognized by the Supreme Court that assist in making the powerful showing required under Justice Souter's balancing test.[296]

---

291 *See infra* Part IV.B.

292 *Chavez*, 538 U.S. at 777 (Souter, J., concurring).

293 *Id.* at 779.

294 *See id.* ("Martinez has offered no reason to believe that the guarantee has been ineffective in . . . those circumstances in which its vindication has depended on excluding testimonial admissions or barring penalties. And I have no reason to believe the law has been systemically defective in this respect."). Justice Souter expressed similar concerns regarding costly implications of broad constitutional interpretations. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 350, 353-54 (2001) (concluding that § 1983 liability for minor arrests would be costly absent an "epidemic" of such violations and refusing to support "the development of a new and distinct body of constitutional law").

295 *Chavez*, 538 U.S. at 778-79 (Souter, J., concurring).

296 *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 453 (1972) (discussing damage-based remedies); *In re* Gault, 387 U.S. 1, 55 (1967) (discussing juveniles); Miranda v. Arizona, 384 U.S. 436, 515 (1966) (Harlan, J., dissenting) (discussing police conduct).

1. Maintaining Fair, Yet Efficient, Police Investigation

Unlike the right against self-incrimination,[297] neither the Constitution nor Supreme Court precedent guarantees the right to a flawless trial without any interference from police.[298] In *Michigan v. Tucker*, the Court noted that enforcing the constitutional right against self-incrimination does not include creating a set of judicially mandated police conduct.[299] The Court stated that "[j]ust as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever."[300] This belief is analogous to the overriding concern that constitutional rights are different from prophylactic rules implemented to protect those rights; courts cannot allow self-incrimination violations for any adverse effects remotely related to the self-incrimination privilege because Fifth Amendment rights are narrowly tailored. At the same time, however, courts must remain vigilant in upholding a fair balance between individual and state interests, weighing citizens' needs for individual rights against law enforcement officials' need to effectively protect those rights.[301]

The historic rationales guarding against damaging interrogations (e.g., torture-like conditions, Star Chamber inquisitions[302]) are not applicable to every situation where a defendant is harmed. Not only are some § 1983 suits brought by plaintiffs who suffered no real injuries during their criminal case, but more appropriate remedies exist for extremely coercive interrogations (e.g., *Miranda* violations, substantive due process) outside a "criminal case."[303] Reading pretrial, pre-indictment violations into existing Self-Incrimination Clause doctrine needlessly blurs the line between constitutional and procedural rights under the Fifth Amendment. Since both *Tucker* and *Chavez*, lower courts have relied upon traditional trial right decisions to guard against the expanded role of civil liability for general pretrial proceedings.[304]

---

297 *See Chavez*, 538 U.S. at 766 (plurality opinion) ("The Fifth Amendment . . . requires that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" (second and third alterations in original) (emphases omitted) (quoting U.S. CONST. amend. V)).

298 Michigan v. Tucker, 417 U.S. 433, 446 (1974).

299 *See id.* at 446-47.

300 *Id.* at 446.

301 *See* WIGMORE, *supra* note 44, at 296.

302 *See Chavez*, 538 U.S. at 789-90 (Kennedy, J., concurring in part and dissenting in part) (recognizing torture-like conditions as an obvious Fifth Amendment violation); Doe v. United States, 487 U.S. 201, 212 (1988) (recognizing ecclesiastical courts within Fifth Amendment rationale).

303 *See Chavez*, 538 U.S. at 779 (Souter, J., concurring) (determining that claims for "outrageous conduct by the police, extending from their initial encounter with [the defendant] through the questioning by [detectives] . . . must sound in substantive due process").

304 *See, e.g.*, United States v. Sweets, 526 F.3d 122, 129 (4th Cir. 2007) (finding that the Fifth Amendment's Self-Incrimination Clause "is a *trial right* aimed at protecting the accused from the indig-

Adopting a rule to allow for self-incrimination liability in most pretrial proceedings absent a full balancing of competing interests may also adversely affect future prosecutions. Restraining prosecutorial conduct could have an overdeterrent effect if the analysis in *Stoot* were widely adopted.[305] Weighing society's interests in upholding the core Fifth Amendment rights against the gains from assigning civil liability at the time charges are filed can curb this risk. Pure trial uses, such as the use in a defendant's case-in-chief before a jury, would not benefit from the adoption of a balancing test because such uses do not fall into the gray area of liability between the filing of charges and the infliction of penalties at criminal trial.[306]

Problems arise, however, in situations like *Stoot* where the court exercises its power to expand civil self-incrimination liability to pretrial uses that are arguably better protected outside of the Fifth Amendment. Justice Harlan, in advocating a balancing approach, felt that even the prophylactic measures upheld in *Miranda* did not reap the benefits necessary to justify implementing restraints on pretrial police conduct.[307] Justice Harlan believed that "[w]hat the Court largely ignores [by expanding the self-incrimination privilege] is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it."[308]

In *Stoot*, a showing that the application of self-incrimination liability to the defendant's claim would not interfere with police conduct more than it would affirm society's interest in restricting overzealous criminal prosecution would strengthen the court's argument expanding the scope of the right. Given the fact that Stoot was not detained, fined, or subjected to any criminal penalties during his case,[309] the deterrent effects on effective prosecution outweigh the harm caused by introduction of his coerced statements at pretrial proceedings. Successful § 1983 claims alleging Fifth Amendment

---

nity of being compelled to give testimony against himself"). In *United States v. Sweets*, the Fourth Circuit took safeguarding one step further by warning against unduly restraining police conduct as follows: "Efforts to protect against [Fifth Amendment] violation[s], therefore, must not degenerate to a judicially-created code of pretrial police conduct . . . ." *Id.* Recognizing *Miranda* and other prophylactic rules, the court concluded that shifting the right from a trial-based protection "would indeed tend to convert the trial right to a general pretrial code of police procedure in conducting investigations." *Id.*

305 *See* Parry, *supra* note 96, at 833 ("In a situation of overdeterrence, law enforcement officials will play it safe, which translates into less effective policing and a resulting increase in at least certain kinds of crimes. Increased crime as a result of overdeterrence of law enforcement translates into more harm to individuals and less social welfare . . . ."). Parry's damages-focused analysis determined that overdeterrence is a "real but not overriding" factor. *Id.*

306 *Cf.* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (applying a strict rule for constitutional violation when the Court "deal[s] with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible").

307 Miranda v. Arizona, 384 U.S. 436, 515-17 (1966) (Harlan, J., dissenting).

308 *Id.* at 516.

309 *See* Stoot v. City of Everett, 582 F.3d 910, 912-18 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

self-incrimination violations are twofold: defendants need to articulate both (1) a viable constitutional violation and (2) at least some kind of harm warranting imposition of civil liability on the government officials.[310] Stoot's claim, therefore, fails this inquiry because it lacks justification for expanded pretrial liability, and any measured harm or criminal penalty inflicted as a result of the pretrial uses of his coerced statements is de minimis.

The distinction circuit courts have drawn in determining whether civil liability applies often turns on the fact that charges were either never filed or filed and subsequently dropped,[311] thereby precluding the penalties associated with reliance on coerced statements during trial. These factors, particularly the absence of concrete criminal penalties affixed to the pretrial uses of Stoot's coerced statements,[312] make it more likely that a claim falls short of the powerful showing necessary to create a new self-incrimination rule given the fact that courts have documented the deterrent effects exclusionary rules have on police investigation.[313]

2. The Need for Increased Protection of Juveniles

Courts have used the age of juvenile witnesses to determine whether equity demands that existing constitutional protections be expanded to assign civil liability.[314] In *Gallegos v. Colorado*, the Supreme Court found that the victim's youth played a factor in determining that his coerced confession was obtained in violation of his constitutional rights.[315] The Court later affirmed the special treatment of minors, noting that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."[316] Therefore, Fifth Amendment scope issues regard-

---

310 *Cf.* Kastigar v. United States, 406 U.S. 441, 454 (1972).

311 *See* Chavez v. Martinez, 538 U.S. 760, 766 (2003) (plurality opinion) ("We fail to see how, based on the text of the Fifth Amendment, [the defendant] can allege a violation of this right, since [he] was *never prosecuted for a crime*, let alone compelled to be a witness against himself in a criminal case." (emphasis added)); *see also* Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003) (determining that defendant's statements were never used against him because *his criminal charges were dropped* after *Miranda* violations forced their suppression).

312 For a discussion of damage proportionality, see *infra* Part IV.B.3.

313 *See* United States *ex rel.* Burt v. New Jersey, 475 F.2d 234, 239 n.1 (3d Cir. 1973) (per curiam) (recognizing that when an "exclusionary rule [like the self-incrimination privilege] has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief" (quoting Harris v. New York, 401 U.S. 222, 225 (1971)) (internal quotation marks omitted)). Deterrence from expanded liability occurs not only during the criminal trial itself, but also in all future prosecutions, as State officials must comply with the new rule governing their conduct. *See* United States v. Sweets, 526 F.3d 122, 130 (4th Cir. 2007).

314 Gallegos v. Colorado, 370 U.S. 49, 55 (1962).

315 *Id.* at 54-55.

316 *In re* Gault, 387 U.S. 1, 52 (1967).

ing criminal cases against juveniles like Stoot may be influenced by the Court's special concern with just treatment.

For example, the Fifth Circuit previously narrowed its approach to self-incrimination liability with a justification that courts must protect young defendants from being compelled to testify against themselves.[317] The court concluded that "states must take greater care to protect juveniles against coerced confessions during police interrogations, because children are more likely to be induced to confess, and their confessions are less likely to be reliable."[318] This rationale could be read to include not only juveniles, but also any inherently vulnerable parties who should be afforded additional judicial protection.[319] Again, Justice Souter's balancing approach to constitutional scope issues would be strengthened under the analysis in *Stoot* had the Ninth Circuit addressed one of the ongoing concerns to show that the defendant's claim proved the requisite showing to extend the constitutional protection from the trial right designation in *Chavez*.

3. Proportionality

The overriding concern in Justice Souter's balancing test is that the claimant alleging Fifth Amendment violations must make a showing powerful enough to justify expansion of a core constitutional right.[320] Even before Justice Harlan's balancing test was adopted by Justice Souter in *Chavez*,[321] courts were already wary not only about distinguishing between rights and privileges within the Fifth Amendment context,[322] but also about minimizing overprotection of defendants' rights at the expense of the adversarial justice system.[323]

Proportionality of damages relates to both the control of police and prosecutorial conduct and the protection of juveniles within the criminal justice system.[324] Barring the most extreme conduct,[325] excessive self-

---

317 Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005).

318 *Id.*

319 *Cf.* Tyars v. Finner, 709 F.2d 1274, 1281-83 (9th. Cir. 1983) (recognizing the "additional protections" that certain parties may require when measuring "a deprivation of individual liberty").

320 Chavez v. Martinez, 538 U.S. 760, 778 (2003) (Souter, J., concurring).

321 *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)).

322 *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 443-44 (1974).

323 *See Miranda*, 384 U.S. at 467.

324 *See supra* Part III.B.1-2.

325 The Supreme Court is attentive to police conduct that is so extreme that it becomes torture-like and fails to serve any legitimate investigatory function. *See Chavez*, 538 U.S. at 789-90 (Kennedy, J., concurring in part and dissenting in part) ("A constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place."); *see also* WIGMORE, *supra* note 44, at 315 (stating the prevention of torture as one of the only significant reasons supporting the self-incrimination privilege).

incrimination liability mitigates effective police investigation disproportionately to society's interests in safeguarding the right. Given the historical importance of upholding an individual's right against self-incrimination, courts must remain steadfast in balancing abstract rights with the practical effects of implementing those rights. A similar view holds true when courts determine liability in cases implicating juveniles.[326] The mere fact that the defendant is a juvenile does not radically alter the fundamental aspects of the privilege,[327] but it could be used as a consideration in implementing a balancing approach to expanding the scope of the right. Damages should be determined on the basis of the harm done to the putative defendant, namely, whether infringement of the defendant's rights has ripened into a valid constitutional claim by inflicting some modicum of harm. Simply, alteration of the Fifth Amendment scope issue must be done proportionally in relation to the damages incurred and the conduct sought to deter.

Beneath arguably insufficient analysis in *Stoot*, the Ninth Circuit may have justified expanded liability under Justice Souter's balancing approach using some of the factors discussed above. Assigning civil liability is but one remedy. Alternatively, courts could consider suppressing the statements[328] or making a sentencing adjustment,[329] given the appropriateness of each remedy to the facts of a particular case. Courts have often suggested a general willingness to consider remedies outside the narrowly-defined causes of action based on violations of the Fifth Amendment if a true hardship, albeit not one violating the Self-Incrimination Clause, has occurred.[330] One final alternative might be to allow statutory liability through an act of Congress, removing the need for a valid constitutional violation.[331] The Su-

---

326 Youth as a factor in Self-Incrimination Clause violations is not dispositive. *See* Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005). It is merely one of many factors that courts consider when looking at the totality of the circumstances surrounding the juvenile defendant's interrogation, criminal case, and subsequent civil liability claim. *See In re* Gault, 387 U.S. 1, 52 (1967) (noting age as a factor in applying privilege to juveniles); Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962) (noting age as a factor in determining coercive interrogation); *Murray*, 405 F.3d at 285 (noting age as a factor in determining civil liability).

327 *In re Gault*, 387 U.S. at 49-50.

328 *See* Michigan v. Tucker, 417 U.S. 433, 463-64 (1974) (Douglas, J., dissenting) (finding that the testimony of a witness arising from unconstitutional police action must be suppressed under the "'fruits' doctrine"); Wong Sun v. United States, 371 U.S. 471, 485-86 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

329 *Cf.* United States v. Haynes, 582 F.3d 686, 710 (7th Cir. 2009) (considering a defendant police officer's abuse of trust and police authority to support a sentencing adjustment). Applied conversely, it is plausible that courts could apply downward sentencing adjustments for criminal defendants who are subjected to coercive or abusive police interrogation.

330 *See, e.g.*, *Chavez*, 538 U.S. at 779 (Souter, J., concurring) (recognizing substantive due process claims for truly outrageous police conduct resulting in coerced statements); Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting) (same).

331 Congress has already shown its willingness to adopt legislation interpreting the application of procedural rules governing the privilege. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000)

preme Court, however, has already shown its unwillingness to allow legislation to mitigate existing safeguards that have the potential to radically change the current system of criminal procedure.[332]

Even if the *Stoot* court ultimately reached the correct decision on the record before them—and to avoid further confusing the outstanding constitutional issues following *Chavez*—a more thorough analysis is required. Justice Souter's balancing test should be adopted because courts should not expand pretrial liability absent a compelling reason to do so. The Supreme Court has reminded us that "we must continue to hark back to the historical origins of the privilege,"[333] which supports balancing multiple factors prior to expanding liability beyond a trial right to pretrial liability.[334]

The Ninth Circuit failed to adequately consider these factors when broadly applying *Chavez* to pretrial proceedings under the minimum threshold required by Justice Thomas.[335] The *Stoot* decision's cursory reference to Justice Souter's limiting suggestions did not establish the "powerful showing" necessary to justify extension of a constitutional right to conduct outside of trial.[336] Courts can preserve the proportionality of the scope to the damages sought to be prevented by permitting constitutional violations under the Fifth Amendment only when there is a legitimate, specific threat that the use of self-incriminating testimony will lead to the infliction of criminal penalties.[337]

(interpreting Congress's enactment of 18 U.S.C. § 3501, which "laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made"). The Supreme Court has closely guarded any decisions pertaining to the application or interpretation of the Constitution, so any statute would need to modify non-constitutional, criminal procedure issues relating to the compulsion and later use of coerced statements. *See id.* at 437 ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

332 *See id.* at 432 (holding that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress"); *see also supra* Part I.B (discussing the Court's protection of Miranda rules as a constitutional issue conflicting with congressional legislation about evidence admissibility standards).

333 Michigan v. Tucker, 417 U.S. 433, 439-40 (1974).

334 *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("The privilege against self-incrimination registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." (quoting Ullmann v. United States, 350 U.S. 422, 426 (1956)) (internal quotation marks omitted)), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998). *But see Tucker*, 417 U.S. at 439 ("The importance of a right does not, by itself, determine its scope . . . .").

335 Stoot v. City of Everett, 582 F.3d 910, 923-25 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

336 *Id.* at 925 n.14.

337 Kastigar v. United States, 406 U.S. 441, 453 (1972); *see infra* Part V.A.

V. A NEED FOR CAUTION: FUTURE IMPLICATIONS OF EXPANDED SELF-INCRIMINATION LIABILITY

Following *Chavez*, the ongoing circuit split highlights the concerns that courts have identified with either widening or narrowing exposure to self-incrimination liability.[338] The Supreme Court has neglected to clarify how recent precedent must guide the future of Fifth Amendment claims,[339] but that does not mean subsequent analysis lacks any alternatives beyond merely choosing a side based on uncertain precedent. This Part advocates a damages-based analysis and examines the suitability of Justice Souter's intermediate balancing approach to justifying the expansion of Fifth Amendment rights.

A. *Damage Control: Effectively Limiting Self-Incrimination Liability*

A damages-based analysis adequately addresses the proportionality issues presented by Justice Souter's balancing test to determine when constitutional protections and subsequent civil self-incrimination liability should be expanded. Some courts have correctly expanded traditional "trial right" violations to non-traditional criminal proceedings but have limited such an approach to where courts can articulate infliction of real penalties or damages to the defendant.[340] In *Kastigar v. United States*,[341] the Supreme Court addressed both of these competing interests within the context of qualified immunity.[342] Relying on two influential self-incrimination cases,[343] the

---

338 *See, e.g.*, Higazy v. Templeton, 505 F.3d 161, 170-73 (2d Cir. 2007) (reconciling imprecise terminology in *Chavez* with previous holdings to broaden constitutional scope); Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1024-27 (7th Cir. 2006) (distinguishing "courtroom uses" in other circuits from language in *Chavez* to find defendant's pretrial use to be a constitutional violation (internal quotation marks omitted)).

339 *See* David Viens, Comment, *Constitutional Law—Say No More: Police Coercion of Self-Incriminating Statements Alone Not Violative of Self-Incrimination Clause*—Chavez v. Martinez, 538 U.S. 760 (2003), 38 SUFFOLK U. L. REV. 223, 228-29 (2004) ("In *Chavez v. Martinez*, the Court [had] a clear opportunity to define the scope of the Fifth Amendment Self-Incrimination Clause[,] . . . [but] failed to seize upon this opportunity by generating a fractured set of opinions . . . .").

340 Michigan v. Tucker, 417 U.S. 433, 439-46 (1974).

341 406 U.S. 441 (1972).

342 *Id.* at 444-45, 452-54. The Court in *Kastigar* examined self-incrimination in the context of immunized witnesses, as well as witnesses who had given coerced confessions, concluding that both instances would prevent the use of such statements at trial. *Id.* at 456-62. Although the Court analogized the statutory proscription awarded in both situations, some commentators have distinguished witnesses asserting qualified immunity from those asserting violations arising from coercive police interrogations. *See* Viens, *supra* note 339, at 226 n.23 ("There is a substantial distinction between compelling testimony through judicial grants of immunity, made in public proceedings affording a witness procedural due process rights, including the right . . . to counsel and appeal any irregularities, and coercing statements

Court held that the privilege's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts."[344] The Court thus reasoned that the constitutional focus was to prevent "infliction of criminal penalties on the witness."[345] Lower courts have since adopted this holding to explicitly preclude claims alleging that the Fifth Amendment protects defendants from mere prosecution for crimes.[346]

Conversely, some of the non-trial right protections point toward trial in that they exist to suppress statements so that they cannot be used in a subsequent trial.[347] Testimony in non-criminal cases (e.g., civil cases, grand jury proceedings) can be compelled if, for example, jeopardy attaches[348] or immunity is granted.[349] Therefore, *Kastigar* is different from *Stoot* in that it narrows the suppression of coerced statements to future infliction of criminal penalties instead of interpreting liability during criminal proceedings.

A test that focuses at least in part on damages works to ascertain whether expanded self-incrimination liability will effectively protect an

---

in the back rooms of police stations." (alteration in original) (quoting Michael Avery, *You Have a Right to Remain Silent*, 30 FORDHAM URB. L.J. 571, 595 (2003))).

343 In *Kastigar*, the Court relied on both *Ullmann v. United States*, 350 U.S. 422 (1956), and *Boyd v. United States*, 116 U.S. 616 (1886), two historic cases tracing damages-based remedies to self-incrimination jurisprudence from the nineteenth century. *See Kastigar*, 406 U.S. at 453 & n.38. *Ullmann*, in particular, is a seminal case explaining the rationales behind the protection of core constitutional rights and the overall importance of the self-incrimination privilege. *See Ullmann*, 350 U.S. at 428 (recognizing that, while a limited core privilege may save a guilty man from being found liable, the self-incrimination privilege was geared towards a "more far-reaching evil" of brutality in government prosecutions). The rationales protecting fundamental self-incrimination rights constitute a backdrop for an ongoing balancing approach to warrant expanded self-incrimination liability.

344 *Kastigar*, 406 U.S. at 453 (alteration in original) (quoting *Ullmann*, 350 U.S. at 438-39) (internal quotation marks omitted).

345 *Id.*

346 *See, e.g.*, United States v. Gecas, 120 F.3d 1419, 1429 n.14 (11th Cir. 1997) (en banc) ("[T]he Fifth Amendment protects against the infliction of criminal penalties based on self-incrimination, *not against mere prosecution*." (emphasis added) (citing *Kastigar*, 406 U.S. at 453)).

347 *See* Wong Sun v. United States, 371 U.S. 471, 477 (1963) (suppressing the derivative "fruits" of unlawful police conduct from use in trial (internal quotation marks omitted)). The "fruits" doctrine was originally created under the Fourth Amendment, but it has since been applied to verbal evidence in a Fifth Amendment context. *Tucker*, 417 U.S. at 439, 445 (internal quotation marks omitted).

348 For a discussion of double jeopardy and compulsion of testimony in a civil case following a defendant's acquittal in criminal court for the same charges, see Kyden Creekpaum, Note, *What's Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179, 1183-87 (2007). Perhaps the most infamous example of this procedural exception is the acquittal of athlete O.J. Simpson for the murders of Nicole Brown Simpson and Ron Goldman. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001).

349 *See* United States v. Hubbell, 530 U.S. 27, 43-46 (2000) (recognizing grants of immunity as coextensive with the constitutional privilege against self-incrimination, allowing compelled grand jury testimony only if evidence obtained is not used in subsequent criminal proceedings); *Kastigar*, 406 U.S. at 459-62 (same).

individual's constitutional right without undermining the meaning of that right.[350] Adopting an intermediate balancing test to justify expanded liability takes damages into account, but it also considers other factors often related to the infliction of damages, such as the proportionality of harm compared to the type of conduct sought to deter. It is not too remote an analogy to apply to the Ninth Circuit's decision regarding the use of coerced statements in *Stoot*: Does increased liability for violations in pretrial proceedings—triggered the moment that charges are filed—guard against infliction of criminal penalties on the defendant? In *Stoot* and other circuit cases determining constitutional violations after *Chavez*, it appears that the damages suffered do not outweigh the importance of limiting the scope of core constitutional rights.

For instance, Stoot was not detained or fined as a result of his pretrial hearings, and the charges that would have led to the infliction of criminal penalties at trial were voluntarily dropped.[351] Post-*Chavez* holdings have focused on the use of coerced statements at trial and the related penalties, if any, imposed upon the defendant. When a defendant asserts that use of his allegedly coerced statements in his criminal case as part of a suppression hearing led to continued detention and restriction of his civil liberties before trial, courts have been inclined to accept such uses to trigger self-incrimination liability.[352] In contrast, if a defendant is unable to state even one courtroom use of his coerced statements, courts have been unwilling to find any damages suffered or subsequent pretrial liability.[353] Preventing the use of coerced statements at a probationary hearing would arguably be relevant if the defendant is detained, but this was not the case with Stoot, as the exclusion of his statements from pretrial proceedings would not have prevented any damage to his constitutional rights. If damages are negligible and the use of the statements did not lead to the infliction of any criminal penalties, then a minimal showing proving the importance of protecting fundamental constitutional rights would warrant limiting liability.[354]

Recent decisions expanding civil liability for pretrial proceedings have focused on uses that are not determinative of a defendant's guilt or inno-

---

350 *Cf.* New Jersey v. Portash, 440 U.S. 450, 457-58 (1979) (recognizing the *Kastigar* Court's focus on preventing criminal penalties and supporting a balancing test used in two previous Supreme Court cases, which weighed the deterrence of police illegality against policy arguments for defendants' *trial rights* against self-incrimination); Parry, *supra* note 96, at 834-38 (advocating for the abandonment of prophylactic rules in favor of broad-based damages for constitutional violations).

351 Stoot v. City of Everett, 582 F.3d 910, 916-17 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

352 Best v. City of Portland, 554 F.3d 698, 702-03 (7th Cir. 2009).

353 *See, e.g.*, Burrell v. Virginia, 395 F.3d 508, 513-14 (4th Cir. 2005).

354 Even though Justice Souter fails to mention the minimum showing necessary within his intermediate balancing test because the proposed rule amounted to "global application [of liability] in every instance of [coercive] interrogation," he also does not require a strict standard other than "a realistic assessment of costs and risks." Chavez v. Martinez, 538 U.S. 760, 778 (2003) (Souter, J., concurring).

cence.[355] While preliminary hearings may be part of the ambiguous "criminal case" as defined in *Chavez*,[356] reliance on coerced statements at arraignment or evidentiary hearings do not lead to the infliction of penalties similar to those of a witness giving compulsory, self-incriminating testimony in front of a jury during trial.[357] If formal charges are filed and the indictment is based in whole or in part on the defendant's confession, what criminal penalties are inflicted if they are never used at trial or, more likely, a trial never occurs?

Focusing on the penalties actually inflicted on defendants bringing self-incrimination claims within Fifth Amendment scope analysis will address the potential deficiencies in post-*Chavez* liability cases. Even violations of procedural prophylactic rules balance the infliction of penalties against the level of infringement on the defendant's rights, as measured by various rationales behind the privilege.[358] Although cases advocating broader pretrial liability rely on *Kastigar* to support their expanded view of Fifth Amendment rights,[359] references to the decision as a general application of liability to pretrial stages of criminal prosecution would be addressed if courts begin to adopt Justice Souter's balancing approach.[360] If defendants cannot present compelling reasons to warrant inclusivity of pretrial pro-

---

355 *See, e.g.*, Higazy v. Templeton, 505 F.3d 161, 170 (2d Cir. 2007) (focusing on bail hearings); *see also Stoot*, 582 F.3d at 925 (considering pretrial probationary and evidentiary hearings sufficient, but further expanding scope where statements are "relied upon to file formal charges against the declarant").

356 *Chavez*, 538 U.S. at 766 (plurality opinion).

357 *Compare Stoot*, 582 F.3d at 916-17 (describing how the defendant was released on his own recognizance, the charges were dropped, and the defendant was not convicted of any crime or forced to stand trial), *and* Sornberger v. City of Knoxville, Ill., 434 F.3d 1006, 1012 (7th Cir. 2006) (describing how the defendants were detained but released without infliction of penalties before trial upon further investigation of crime scene evidence), *with* Ullmann v. United States, 350 U.S. 422, 428 (1956) (characterizing the self-incrimination privilege as being aimed at preventing the "far-reaching evil" and "stark brutality" of historical compulsion of testimony at trial), *and* Brown v. Mississippi, 297 U.S. 278, 279-81 (1936) (describing how the defendants were detained following "extreme brutality" by police, convicted of murder, and sentenced to death).

358 *See* Michigan v. Tucker, 417 U.S. 433, 445 (1974) ("[T]here were no legal sanctions . . . which could have been applied to respondent had he chosen to remain silent."). The Court in *Tucker* first evaluated the scope of the constitutional right versus the procedural rules protecting that right, and it then balanced other factors (e.g., historical rationales, lack of criminal penalties) to conclude that the statements were not involuntary. The Court then determined that "the historical circumstances underlying the privilege against compulsory self-incrimination" suggested a failure to provide *Miranda* rights, not a deprivation of constitutional rights. *Id.* at 444-45.

359 *Higazy*, 505 F.3d at 170; *Sornberger*, 434 F.3d at 1027 n.15.

360 An intermediate balancing approach is only limiting in name, not scope. The adoption of Justice Souter's test requires further analysis but could ultimately produce a result similar to that in *Stoot* as long as the court felt there was both a "powerful showing" by the plaintiff and some reasonable limit placed on whatever level of increased liability was sought. *See Chavez*, 538 U.S. at 777-79 (Souter, J., concurring) (concurring in the decision to limit liability as a trial right, but only as a preventative measure to justify creating a new judicial rule implementing Fifth Amendment rights).

ceedings, there is an alternative remedy under substantive due process.[361] This avenue is only necessary if the defendant cannot adequately limit the implementation of its theory adopting liability, as any number of reasons may allow courts like *Stoot* to justify such an approach.[362]

B. *Souter, Not Later: Adopting Justice Souter's Intermediate Balancing Approach*

The constitutional right against self-incrimination is effectively guarded by prophylactic rules,[363] so courts should be wary of expanding the constitutional right to proceedings outside of the previously recognized core scope. Extreme measures, such as interrogation that rises to the level of torture, will surely violate the defendant's rights and will enable liability under all opinions rendered in *Chavez*, constituting a "core" constitutional violation.[364] If this bright-line rule for "core" constitutional violations does not apply, however, courts should employ a more in-depth balancing test to weigh the actual harm suffered as a result of the alleged violations against society's interest in protecting (and often limiting) constitutional rights.

Despite purporting to rely on Supreme Court parameters established in *Chavez*, the *Stoot* court primarily related the Ninth Circuit's adoption of expanded Fifth Amendment privilege to persuasive authority from sister circuits rather than fully addressing the underlying concerns expressed in the characterization of the Fifth Amendment as a trial right in *Chavez*. When courts attempt to assign liability within the "gray area" correctly identified by the Ninth Circuit in *Stoot*, problems arise from the inherently

---

361 *Id.* at 779.

362 *See supra* Part IV.B.1-3; *see also Tucker*, 417 U.S. at 440 ("Although the constitutional language in which the [Fifth Amendment self-incrimination] privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited.").

363 *See, e.g.*, *Tucker*, 417 U.S. at 443-44 (describing prophylactic *Miranda* rules).

364 *See Chavez*, 538 U.S. at 773 (plurality opinion) (acknowledging that torture is clearly unconstitutional, not under Fifth Amendment self-incrimination law, but under Fourteenth Amendment due process); *id.* at 778 (Souter, J., concurring) (allowing for expanded liability when presented with a "powerful showing" (internal quotation marks omitted)); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) ("A constitutional right is traduced the moment torture or its close equivalents are brought to bear."). Torture-like interrogations clearly pass both Justice Souter's "powerful showing" requirement and Justice Kennedy's support of constitutional violations before a criminal case commences. One could argue that Justice Thomas's requirement for the initiation of legal proceedings technically precludes finding that torture is unconstitutional, but this issue is addressed in the opinion: "Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial . . . ." *Id.* at 773 (plurality opinion). The Fourteenth Amendment, rather than the Fifth Amendment, is more appropriate for interrogations coercive enough to amount to torture. *Id.*

vague nature of existing precedent. Only more substantive judicial analysis provides an appropriate remedy.

Given the Ninth Circuit's record of expanding civil liability in decisions that have been overruled,[365] an intermediate approach requiring full analysis of constitutional issues is necessary to escape being bogged down in the terminology and ambiguous precedent arising from cases like *Chavez*. Balancing various competing factors prior to assigning liability gives credence to decisions expanding the reach of constitutional claims into areas that may already be protected by judicially mandated rules or other constitutional remedies. Adopting Justice Souter's "powerful showing" requirement does not preclude shifting the scope of constitutional rights toward the proceedings already overprotected by prophylactic rules; it merely provides justifications that, on balance, implement sound constitutional policy.[366]

To be clear, advocating a strict trial right interpretation with little flexibility for examining each alleged constitutional violation within a balanced analytical framework is unwise.[367] For instance, granting a witness immunity to testify before a grand jury is common,[368] yet it clearly constitutes a preliminary matter outside the scope of any traditional "trial right." A similar proposal to validate constitutional claims for virtually all coercive police interrogations is impermissible, as shown by the Court's insistence on

---

365 *See* Martinez v. City of Oxnard, 270 F.3d 852, 856 (9th Cir. 2001), *rev'd sub nom.* Chavez v. Martinez, 538 U.S. 760 (2003) ("[A] Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody."); Cooper v. Dupnik, 963 F.2d 1220, 1239 (9th Cir. 2009) (en banc) ("[W]e conclude that [Plaintiff] adequately has stated a cause of action under § 1983 for a violation *in the sheriff's department* of his clearly established Fifth Amendment right against self-incrimination."), *overruled by* Chavez v. Martinez, 538 U.S. 760 (2003).

366 *Chavez*, 538 U.S. at 777-79 (Souter, J., concurring).

367 Commentators have warned against interpreting the plurality's opinion in Chavez as requiring application of the trial right as strictly as it appears in cases like *Verdugo-Urquidez* and *Withrow*. *See* Davies, *supra* note 22, at 1009 (finding it is an error "to treat the appearance of 'in any criminal case' in the Fifth Amendment text as meaning that the protected right only regulates the admission of evidence in a person's own criminal trial"); Parry, *supra* note 96, at 838 (concluding that insights after Chavez "should lead the Court to recognize that the immunity remedy makes the privilege more than a trial right"); Viens, *supra* note 339, at 228-29 (determining that the plurality in *Chavez* "mistakenly concluded that a Self-Incrimination Clause violation can only occur at trial"); *see also* Kimberly Cain Khomani, Note, Chavez v. Martinez*: Do You Really Have a Right to Silence?*, 54 CATH. U. L. REV. 373, 400 (2004) (concluding that, despite its diverging opinions, *Chavez* "succeeded in maintaining a balance between the needs of the police in investigating crimes, and the rights of individuals to avoid unduly coercive interrogations by the police").

368 *Cf.* Kastigar v. United States, 406 U.S. 441, 444 (1972) ("Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies." (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94 (1964), *overruled in part on other grounds by* United States v. Balsys, 524 U.S. 666 (1998))).

creating constitutional rules to safeguard core rights.[369] A balanced approach that examines both the compelling reasons to expand civil liability and the most appropriate damages for the conduct sought to deter will result in clearer, less confusing precedent as courts seek to examine Fifth Amendment constitutional violations post-*Chavez*. Just as Justice Thomas began by outlining Fifth Amendment rights as a traditional "trial right," courts must use that historical belief as a backdrop for framing future discussions of expanded liability. The Ninth Circuit's attempt to do this in *Stoot* was not effective, even though it appeared, on its face, to weigh both sides of the circuit split.[370]

Thinking back to the hypothetical scenario provided at the onset of this Note, expansive liability set to trigger at a predetermined procedural posture, such as at filing of formal charges, may not always present the soundest precedent. The Supreme Court has expressly stated that violations of prophylactic safeguards arising during police interrogation, by definition, do not infringe on a defendant's fundamental constitutional rights,[371] and it has advocated an approach focusing on the infliction of actual criminal penalties when determining whether a valid constitutional violation occurred.[372] Other remedies are available for violations of prophylactic rules separate from constitutional rights.[373] Suffering little more than an extended trip to the police station after an honest, albeit intimidating, interrogation that results in a coerced confession should not amount to the kind of liability envisioned by a right consistently characterized as a fundamental trial right.

---

369 *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (requiring "proper safeguards . . . to permit a full opportunity to exercise the privilege against self-incrimination"); *see also id.* ("[T]he Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

370 Stoot v. City of Everett, 582 F.3d 910, 924-25 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 2343 (2010).

371 *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (noting that "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected").

372 *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) (stating the self-incrimination privilege's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts" (alteration in original) (quoting Ullmann v. United States, 350 U.S. 422, 438-39 (1956)) (internal quotation marks omitted)).

373 *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 779 (2003) (Souter, J., concurring) (recognizing substantive due process claims under the Fourteenth Amendment for outrageous police conduct that rises to the "conscience-shocking level" (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)) (internal quotation marks omitted)).

CONCLUSION

Stoot recognized that loosening Fifth Amendment self-incrimination liability rules for using procedurally defective, coerced statements in pretrial proceedings provides concrete remedies to deter improper police behavior. On the other hand, courts must correctly interpret the Constitution no matter what benefits might arise from ignoring it. Justice Souter's balancing approach recognizes each of these concerns by limiting the proliferation of civil liability for situations in which defendants are unable to provide compelling evidence that their injuries warrant the powerful remedies sought. Thus, courts should adopt Justice Souter's approach, which balances the avoidance of expansive pretrial liability warnings with courts' willingness to deter coercive police conduct and avoid the cruel trilemma.