Chavez v. Martinez: Do You Really Have a Right to Silence?

Kimberly Cain Khomani

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol54/iss1/8
"You have a right to remain silent. Anything you say can and will be used against you in a court of law."¹ Warnings of this type are now well-known,² but their impact on a suspect's rights remains unclear. Such *Miranda* warnings are meant to ensure that police do not coerce unwitting suspects into making incriminating statements.³ If the police do not give *Miranda* warnings, the suspect's statements cannot be admitted into evidence against him at trial,⁴ subject to various exceptions.⁵ Arguably, these *Miranda* warnings give the police an incentive to follow the rules and not coerce a suspect into foregoing his Fifth Amendment right against self-incrimination. However, is this safeguard effective in those instances where a suspect's un-Mirandized statements are not introduced at trial? Does *Miranda* protect a suspect from police coercion under these circumstances?

The United States Supreme Court addressed this issue in the 2003 case *Chavez v. Martinez*.⁶ That case arose out of a § 1983 civil rights action.⁷

¹ J.D. Candidate, May 2005. The Catholic University of America, Columbus School of Law. The author wishes to thank O. Carter Snead for his insight and guidance throughout the writing process.
² Wainwright v. Greenfield, 474 U.S. 284, 286 (1986). This phrase is only one part of the *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Under *Miranda*, "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*
³ Michigan v. Tucker, 417 U.S. 433, 439 (1974) ("At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . '").
⁵ *Miranda*, 384 U.S. at 479.
⁶ *E.g.*, New York v. Quarles, 467 U.S. 649, 651 (1984) (acknowledging a public safety exception). Under the public safety exception, exigent circumstances that threaten the public's safety, such as the need to question the suspect on the whereabouts of an abandoned gun in Quarles, excuse an officer's failure to issue *Miranda* warnings prior to questioning a suspect. *Id.* at 651, 653.
⁷ 42 U.S.C. § 1983 (2001). The statute provides that [e]very 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
where Oliverio Martinez alleged that police sergeant Ben Chavez violated his constitutional rights under the Fifth and Fourteenth Amendments when the officer interrogated him without Miranda warnings and ignored his pleas to end the interrogation.\(^8\) Initially, officers Maria Pena and Andrew Salinas stopped Martinez during the course of a narcotics investigation.\(^9\) During a pat-down frisk, a struggle ensued between Officer Salinas and Martinez.\(^10\) Officer Pena shot Martinez several times, in the face, vertebrae, and leg.\(^11\) The incident left Martinez blind and paralyzed in both legs.\(^12\)

Sergeant Ben Chavez, the patrol supervisor, accompanied Martinez to the emergency room to hear his version of the events.\(^13\) Without reading Martinez his rights under Miranda, Officer Chavez questioned Martinez about the shooting.\(^14\) During the forty-five minute interrogation, in

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 . . . .

Id.


9. Oxnard, 270 F.3d at 854. The officers were questioning a farm field worker, Eluterio Flores, but found no drugs on his person nor any other evidence of criminal activity. Brief for the Respondent at 1, Chavez (No. 01-1444).

10. Oxnard, 270 F.3d at 854. Officer Salinas felt a knife, which Martinez used in his work as a strawberry field worker. Id.; Respondent's Brief at 2, Chavez (No. 01-1444).

11. Oxnard, 270 F.3d at 854. The facts of the incident are disputed. Id. The officers claimed that Martinez grabbed Salinas's gun and aimed it at them. Id. Martinez, however, claims that he did not touch the gun. Respondent's Brief at 3, Chavez (No. 01-1444).

12. Oxnard, 270 F.3d at 854. Martinez, formerly a strawberry field worker, still suffers as a result of that fateful day. See Steven Chawkins, It's 'Just Wrong, Says the Plaintiff,' L.A. TIMES, May 28, 2003, at A14. According to one news article, he is "[i]n pain much of the time, [but] sometimes can get around by using a walker. One of his eyes is missing and, beneath his sunglasses, he wears a bandage over the socket." Id. The article paints a portrait of Chavez's life:

He lives a world away from the marble chambers of the U.S. Supreme Court. He doesn't have a phone, or even a bathroom. With his father, Oliverio Sr., he resides in a dark, cramped trailer about the size of a suburban walk-in closet, a dilapidated tin box outside Camarillo beside the strawberry fields he had worked for the better part of 20 years.

Id.

13. Oxnard, 270 F.3d at 854.

14. Id. at 854-55. For a full transcript of the interrogation, see Benjamin Chavez, I Fought the Law, HARPER'S MAG., Sept. 2003, at 20. To hear an excerpt of the transcripts, as well as discussion of the case by R. Samuel Paz, lawyer for Oliverio Martinez, Sonia Mercado, co-counsel for Martinez, and Alan Wisotsky, lawyer for Sergeant Ben Chavez, see Exclusive: Democracy Now! Broadcasts for the First Time a Recording of a Police Sergeant Interrogating a Man Moments After Police Shoot Him 5 Times, Paralyzing and Blinding Him, DEMOCRACY NOW, May 30, 2003, at www.democracynow.org/article.pl?sid=03/05/30/1610234.
between periods of lost consciousness, Martinez expressed to Chavez that he was in extreme pain and thought he was dying; he twice told Chavez that he did not want to continue the conversation. Martinez's responses to Chavez's interrogation were never used against him in a criminal proceeding, but Martinez, nevertheless, brought a civil rights action in federal court.

The U.S. District Court for the Central District of California ruled in favor of Martinez, granting him summary judgment. Chavez appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the lower court's ruling, and held that Chavez violated Martinez's Fifth and Fourteenth Amendment rights by coercively interrogating him against his will. The court reached this conclusion even though the prosecutors did not use Martinez's statements against him in a subsequent criminal proceeding.

15. Oxnard, 270 F.3d at 854-55. The medical staff instructed Chavez to leave several times, but he continued to interrogate. Id. at 854.


17. Oxnard, 270 F.3d at 855. The court also denied Chavez's qualified immunity defense. Id. Qualified immunity protects public officials, like Chavez, 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Only conduct that an official could not reasonably have believed was legal under settled law falls outside the protective sanctuary of qualified immunity." Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies, the court uses a two-part analysis. Id. at 855-56. First, the plaintiff must allege a prima facie case that the public official violated his constitutional rights. Id. Second, if such a case is stated, the court must decide whether the alleged constitutional violation was improper under clearly settled law. Id. at 856.

18. Id. at 859.

19. Id. at 856. The court concluded: The record before us reveals that Sergeant Chavez doggedly pursued a statement by Martinez despite being asked to leave the emergency room several times. He ignored Martinez's pleas to withhold questioning until he had received medical treatment. A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received Miranda warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coerced interrogation. Id. at 858.

20. Id. at 856-57. In holding that Officer Chavez violated Martinez's Fifth Amendment rights, even though his statements were not used against him in a criminal proceeding, the Ninth Circuit relied heavily upon its opinion in Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992). In Cooper, the court held that a Fifth Amendment violation occurred at the time of the coercive interrogation, regardless of whether the interrogated suspect was ever called upon to incriminate himself. Id. at 1239.
The Supreme Court granted certiorari to review the Ninth Circuit's decision regarding the scope of the Fifth Amendment's protection against self-incrimination and the Fourteenth Amendment's protection of due process under the given factual circumstances. The Court, in a plurality opinion, held that even though Chavez did not recite Miranda warnings, the interrogation did not violate Martinez's constitutional right against self-incrimination because his statements were never used against him and thus could not be the basis of a § 1983 civil rights action grounded in the Fifth Amendment. In addition to reversing the Ninth Circuit's ruling on the Fifth Amendment self-incrimination issue, the Court also remanded to the Ninth Circuit the issue of whether Martinez could pursue a Fourteenth Amendment substantive due process claim against Officer Chavez.

This Note examines suspects' Fifth Amendment protection against self-incrimination by exploring the development of Fifth Amendment jurisprudence prior to Miranda. Next, this Note discusses the rationale of Miranda, as well as its status as a constitutional requirement out of reach of normal congressional legislation. Then, this Note looks at the Chavez decision, analyzing: 1) whether a Miranda violation can trigger a § 1983 civil rights action without the use of an un-Mirandized statement at trial, and 2) whether Martinez could have a cognizable claim under the Fourteenth Amendment's substantive due process clause. Exploring in detail the diverse opinions of the Court in Chavez, this Note argues that the absence of a unified opinion on the Fifth Amendment issue indicates that, although it is not willing to expand Fifth Amendment protection to encompass the Chavez scenario, the Court is still struggling to find an effective remedy against coercive police interrogation. The five to four opinion on the substantive due process claim may provide such a remedy, recognizing the tension between the need for the police to gather information and the right of the suspect not to be a victim of excessively coercive police interrogation.

I. SELF-INCRIMINATION AND COERCED CONFESSIONS: BEGINNINGS

The Fifth Amendment to the U.S. Constitution states "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Supreme Court first applied this amendment in Bram v. United States to determine the appropriate use of incriminating confessions.

22. Id. at 772-73 (plurality opinion).
23. Id. at 779-80 (Souter, J., concurring). Part II of Justice Souter's concurrence was also the opinion of the Court. Id. at 777.
24. U.S. CONST. amend. V.
25. 168 U.S. 532 (1897).
The Court stated, “In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment . . . .”\textsuperscript{27}

The privilege against self-incrimination existed only at the federal level until 1964, when the Court decided \textit{Malloy v. Hogan}.	extsuperscript{28} In \textit{Malloy}, the Court held that the Fourteenth Amendment extended to the states the Fifth Amendment’s protection against self-incrimination.\textsuperscript{29} By incorporating Fifth Amendment protection against self-incrimination into the Fourteenth Amendment for use by the states, the Court sought to prevent states from compelling an individual to speak against his will because such comments may be used at trial.\textsuperscript{30}

\section*{II. The Requirement of \textit{Miranda} Warnings} Two years after \textit{Malloy} put Fifth Amendment protection within defendants’ reach for their use against state compulsion of incriminating testimony, the \textit{Miranda v. Arizona}\textsuperscript{31} decision went even further. \textit{Miranda} ensured protection from compelled self-incrimination by placing an affirmative duty on police officers to inform suspects of their rights prior

\begin{footnotes}
\footnote{26. \textit{Id.} at 542.}
\footnote{27. \textit{Id.}}
\footnote{28. 378 U.S. 1 (1964). The petitioner in \textit{Malloy}, who previously pled guilty to gambling, was called on to testify by the State of Connecticut to further its investigation into alleged gambling activities. \textit{Id.} at 3. The petitioner refused, stating that testifying would result in self-incrimination. \textit{Id.} The Superior Court of Hartford County held him in contempt, imprisoning the petitioner until he was ready to cooperate with the investigation. \textit{Id.} Both that court and the Connecticut Supreme Court of Errors denied petitioner’s writ of habeas corpus, finding that the Fifth Amendment’s privilege against self-incrimination applied only at the federal level and that the Fourteenth Amendment did not extend this protection to the states. \textit{Id.} The Supreme Court granted certiorari to review whether the Fifth Amendment’s privilege against self-incrimination extended to the states. \textit{Id.}}
\footnote{29. \textit{Id.} at 6. The test the Court used to determine whether the police violated the Fifth Amendment was not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was “free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . .” \textit{Id.} at 7 (quoting \textit{Bram}, 168 U.S. at 542-43).}
\footnote{30. \textit{Id.} at 8. The Court stated, “The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.” \textit{Id.}}
\footnote{31. 384 U.S. 436 (1966).}
to any questioning.\textsuperscript{32} For the first time, police officers were required to inform suspects of their right to remain silent.\textsuperscript{33}

Miranda, a landmark case, arose out of four consolidated appeals to the Supreme Court, the facts of which reinforced the Court's view that the Fifth Amendment was ineffective without additional safeguards.\textsuperscript{34} In the first case, Miranda v. Arizona, the police interrogated the petitioner at a police station without first informing him of his rights.\textsuperscript{35} The petitioner confessed in writing after a two-hour interrogation, attesting in his statement that "the confession was made voluntarily . . . 'with full knowledge of [his] legal rights, understanding [that] any statement [he] make[s] may be used against [him].'\textsuperscript{36} In the second case, Vignera v. New York, the government used the petitioner's uninformed confession against him at trial and claimed that a suspect had no constitutional right

\begin{footnotesize}
\textsuperscript{32} Id. at 444.  
\textsuperscript{33} Id.  
\textsuperscript{34} Id. at 456-57. The Supreme Court reviewed these cases at a time when crime rates were at a record high. ALFREDO GARCIA, THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH 88-89 (2002). Two years before the Miranda decision, former President Dwight Eisenhower spoke of the crime issue during a speech he gave at the Republican National Convention: 
Let us not be guilty of maudlin sympathy for the criminal who, roaming the street with switchblade knife and illegal firearms seeking a helpless prey, suddenly becomes upon apprehension a poor, underprivileged person who counts upon the compassion of our society and the laxness or weakness of too many courts to forgive his offense.  
Id. at 88 (quoting LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 40 (1983)).  
\textsuperscript{35} Miranda, 384 U.S. at 491-92. Alfredo Garcia, in The Fifth Amendment: A Comprehensive Approach, describes Ernesto Miranda: 
Ernesto Miranda, a Mexican American, was the quintessential "poor" defendant whose fate with the law was unfavorable from the outset of his life. He had an eighth-grade education and had had six arrests and four imprisonments between the ages of fourteen and eighteen. Miranda not only had an extensive criminal record at age twenty-three, when he was arrested for the crimes that would bring him fame and notoriety, but he also had a spotty employment record in which he held menial jobs for short periods of time.  
\textsuperscript{36} Miranda, 384 U.S. at 491-92. The confession was admitted in Miranda's jury trial.  
Id. at 492. He was convicted of kidnapping and rape, and sentenced to twenty to thirty years in prison.  
Id. The Court, in reversing the conviction, held that "[t]he mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."  
Id.
\end{footnotesize}
to a warning regarding his protection against self-incrimination. Similarly, in the last two cases, *Westover v. United States* and *California v. Stewart*, the petitioners made confessions without full knowledge of their rights under the Fifth Amendment.

The Court held that, in the context of a custodial investigation, a confession will be deemed involuntary due to the inherently coercive nature of the interrogation unless police officers use procedural safeguards to ensure that a suspect does not unwittingly incriminate himself. Thus, an uninformed confession is inadmissible in a criminal

---

37. *Id.* at 491-92. Vignera confessed to robbery without being told of his rights. *Id.* at 493. At trial, defense counsel asked the police officer whether Vignera had been advised of his rights. *Id.* The trial judge sustained the prosecution's objection to the question, thus preventing defense counsel from proving that Vignera was not warned of his right to remain silent. *Id.* The trial judge instructed the jury as follows: "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what I said? I am telling you what the law of the State of New York is." *Id.* at 493-94. Vignera was convicted of first-degree robbery, and sentenced to thirty to sixty years in jail. *Id.* at 494. The State argued to the court of appeals that "Vignera had no constitutional right to be advised of his right to counsel, or his privilege against self-incrimination." *Id.*

38. *Id.* at 495-98. Westover was interrogated first by the local police for several hours without warnings of his rights, but he did not confess. *Id.* at 494-95. He was then handed over to the FBI, who interrogated him for two hours, after which he confessed to two robberies. *Id.* at 495. His confessions were used at trial. *Id.* Westover was convicted of the robberies at a jury trial and was sentenced to fifteen years. *Id.* The Supreme Court found that even though the FBI warned Westover of his rights, "the FBI interrogation was conducted immediately following the state interrogation in the same police station[,] . . . the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation[, and] the giving of warnings alone was not sufficient to protect the privilege." *Id.* at 496-97. In *Stewart*, the police interrogated Stewart nine times over the course of five days. *Id.* at 497. During the final interrogation, Stewart admitted to robbing the victim. *Id.* He was never advised of his rights. *Id.* Stewart was convicted of robbery and first degree murder and was sentenced to death. *Id.* at 498.

39. *Id.* at 444. The *Miranda* Court cited two police manuals that contained instructions on how to extract confessions from unwitting suspects. *Id.* at 448-55. An excerpt from one such manual is as follows:

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.

*Id.* at 449-50 (quoting CHARLES O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)). Although such calculated examples of police coercion are compelling, it is important to note that the facts of *Miranda* itself did not indicate such extreme coercion. See *id.* at 491-92. The case stated that after two hours of questioning, Miranda signed a written confession. *Id.* There was no evidence of extreme coercion in the facts of the case. See *id.*
proceeding against a suspect.\textsuperscript{40} In the absence of other equally effective procedural safeguards proposed by lawmakers, the Court required the police to advise a suspect, prior to any questioning, of his right to remain silent, that his statements could be used against him in a subsequent criminal proceeding, and of his right to obtain an attorney on his own or through court appointed means.\textsuperscript{41} The Court reasoned that the suspect could only waive these rights voluntarily, knowingly, and intelligently.\textsuperscript{42}

To support its decision, the Court referred extensively to two police manuals that shed some light on the police tactics in use at the time.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} at 444, 479.
\item \textsuperscript{41} \textit{Id.} at 444. In order to further safeguard against false confessions, some states have implemented mandatory videotaping of police interrogations. \textit{See generally}, Steven A. Drizin \& Beth A. Colgan, \textit{Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions}, 32 LOY. U. CHI. L.J. 337 (2001).
\item \textsuperscript{42} \textit{Miranda}, 384 U.S. at 444. The Court in \textit{Moran v. Burbine}, 475 U.S. 412 (1986), outlined the voluntary waiver standard, stating that
\item \textsuperscript{43} \textit{Miranda}, 384 U.S. at 448-55. One dissenting opinion criticized the majority's reliance on police manuals not used by the police officers in \textit{Miranda}. \textit{Id.} at 499 (Clark, J., dissenting). Justice Clark, in his dissent, took issue with the majority's characterization of current police tactics and the references to the police manuals in its decision. \textit{Id.} at 499 (Clark, J., dissenting). Justice Clark stated:
\end{itemize}
The Court was particularly concerned with the "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." The Court observed that the manuals instructed the officers to use isolation, trickery, and the "good cop/bad cop" routine while conducting interrogations. By threatening the sanction of and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.

Id. at 499-500 (Clark, J., dissenting). Justice Harlan also dissented. Id. at 504 (Harlan, J., dissenting). In his dissent, Justice Harlan recounted the details of Miranda's crime and his subsequent arrest, asserting that the confession "was accomplished in two hours or less without any force, threats or promises." Id. at 518 (Harlan, J., dissenting). He continued: Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.

Id. at 518-19 (Harlan, J., dissenting).

44. Id. at 445.

45. Id. at 449-55. The Court described the "Mutt and Jeff" act as follows: "In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room."

Id. at 452 (quoting O'HARA, supra note 39, at 104). The Court provided another poignant example of police trickery:

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to
inadmissibility of the incriminating statement if the officer did not read the warnings, *Miranda* set out to secure constitutional rights for suspects during a custodial interrogation.

*Miranda* left open the possibility that Congress or the states may devise their own innovative procedural safeguards. The Court "encouraged Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 47 Within two years of *Miranda*, Congress enacted 18 U.S.C. § 3501. 48 This provision sought to replace the warnings laid out in *Miranda* with a voluntariness test. 49 Congress stated that as long as a suspect's statement was deemed voluntary in light of the totality of the circumstances, it could be admissible as evidence in a criminal proceeding. 50

The Supreme Court considered the constitutionality of § 3501 in *Dickerson v. United States*. 51 In *Dickerson*, the Court held that because *Miranda* laid out a constitutional rule, Congress could not overturn that

minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in the psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

*Id.* at 450.

46. *But see GARCIA, supra* note 34, at 120 n.3 (citing numerous articles with conflicting reports as to the effect of *Miranda* warnings on the rate of confessions, and concluding that "the true effect of Miranda on the confession rate is unknown and unknowable").


49. *See id.*

50. *Id.* The statute states, in pertinent part:

In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness . . . . The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

*Id.*

case by enacting legislation that changed the standard from one of obligatory warnings to a more vague voluntariness standard.\textsuperscript{52} The Court recognized Congress's frustration with \textit{Miranda}, stating, "The disadvantage of the \textit{Miranda} rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant [may] go free as a result."\textsuperscript{53} But, the Court expressed concern that "experience suggests that the totality-of-the-circumstances test which \textsection 3501 seeks to revive is more difficult than \textit{Miranda} for law enforcement officers to conform to, and for courts to apply in a consistent manner."\textsuperscript{54} Thus, the Court confirmed that \textit{Miranda} was binding law and determined that any congressional rule seeking to change it either would have to align with \textit{Miranda}, or pass in the form of a constitutional amendment.\textsuperscript{55}


\textsuperscript{53} \textit{Dickerson}, 530 U.S. at 444; see, e.g., Cassell, \textit{supra} note 35 (arguing that 18 U.S.C. \textsection 3501 should replace \textit{Miranda}); Steven D. Clymer, \textit{Are Police Free to Disregard Miranda}, 112 YALE L.J. 447 (2002) (arguing that \textit{Miranda} is merely an exclusionary rule that puts no constitutional obligations on police conduct). \textit{But see} Michael Avery, \textit{You Have a Right to Remain Silent}, 30 FORDHAM URB. L.J. 571 (2003) (arguing that suspects should have an absolute right to remain silent).

\textsuperscript{54} \textit{Dickerson}, 530 U.S. at 444. \textit{Contra} Jonathan B. Zeitlin, \textit{Voluntariness with a Vengeance: Miranda and a Modern Alternative}, 14 ST. THOMAS L. REV. 109, 122 (2001). The article summarizes the benefits of the legislation as follows:

If properly applied, \textsection 3501 would allow the judge to use common sense when considering whether a confession should be admitted or suppressed. The judge would not be limited to a technical application of \textit{Miranda} and instead, could consider all the circumstances of a conversation. It is for this reason that \textsection 3501 has been supported by so many in the field of law enforcement . . . . \textit{Id.} Zeitlin concludes the article lamenting "[t]hat the FBI failed to mirandize Dickerson before questioning him is unfortunate; that such failure should result in Dickerson's acquittal is deplorable. It is time for a better solution." \textit{Id.} at 163 (footnote omitted).

\textsuperscript{55} \textit{Dickerson}, 530 U.S. at 444. Garcia discusses several motives for Congress' attempt to repeal \textit{Miranda}

through this legislative sleight of hand[.]. Either it sought to declare the opinion an unconstitutional piece of judicial rule making, as its critics have charged, or it sought to set up a confrontation in which the Court would be faced with the option of exercising the power of judicial review to revoke the portion of 3501 repealing \textit{Miranda}. A third explanation is that Congress merely wanted to get on the bandwagon of popular opinion by reaffirming a "tough on crime" stance. Finally, Congress could have envisioned a changing political climate in which appointments to the Supreme Court by a conservative, Republican president would provide the new Court with the opportunity to ratify 3501 and overrule \textit{Miranda}. 
III. MIRANDA WARNINGS: IS THE FIFTH AMENDMENT VIOLATED WHEN THE STATEMENT IS NEVER USED AGAINST THE SUSPECT?

A. Miranda Interpretations by the U.S. Circuit Courts

Traditionally, the circuit courts have been reluctant to uphold Fifth Amendment claims when statements were not used against suspects at trial. The Seventh Circuit briefly addressed the Fifth Amendment’s application in these situations in Buckley v. Fitzsimmons. In response to petitioner Buckley’s assertion that the police coercively interrogated him without first giving him Miranda warnings, the court remarked, “Interrogations without Miranda warnings . . . do not violate a suspect’s rights; the violation occurs only when the statements are used in criminal proceedings.” Likewise, in Davis v. City of Charleston, the Eighth Circuit quickly dismissed Davis’ civil rights claim for violation of Miranda because the confession was not admitted at trial. In one sentence, the court dismissed this alleged constitutional violation and reinforced its position on the Fifth Amendment as a trial right, stating, “[the officer’s] failure to warn Davis of her rights pursuant to the Supreme Court’s decision in Miranda v. Arizona, did not deprive her of her constitutional rights as no statements obtained from Davis during custodial interrogation were used against her during trial.”

In Cooper v. Dupnik, however, the Ninth Circuit opened the door to the possibility of invoking the Fifth Amendment even when a non-Mirandized statement was not used against the suspect at trial. After a series of rapes occurred in the area over a two-year period, the sheriff’s department created a task force comprised of its most experienced officers. The task force devised an interrogation plan, under which they would “ignore the suspect’s constitutional right to remain silent as well as

---

GARCIA, supra note 34, at 99.

56. See Avery, supra note 53, at 601, 609-10 (discussing a circuit court decision as to whether coercive statements raise a claim under § 1983).


58. Id. at 1244.

59. 827 F.2d 317 (8th Cir. 1987), rev’d and remanded by 917 F.2d 317 (8th Cir. 1987).

60. Id. at 322.

61. Id. (citations omitted).

62. 963 F.2d 1220 (9th Cir. 1992).

63. Id. at 1223.

64. Id. The court noted that “[m]embers of the Task Force planned meticulously for the day they would arrest their first suspect.” Id. at 1223-24. The person responsible for the two-year criminal spree of rapes, robberies, and kidnappings was dubbed the “Prime Time Rapist.” Id. at 1223.
any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed.\(^5\) The police arrested Cooper and used these tactics on him.\(^6\) Despite his anxiety, Cooper maintained his innocence throughout the interrogation.\(^6\) Cooper's repeated requests for counsel went unheeded.\(^6\) Although his interrogator eventually believed that Cooper was innocent, other officers continued to interrogate him until late in the evening, when the interrogation finally ended and Cooper was put in jail.\(^6\) Cooper never confessed and was released twenty-four hours after his arrest.\(^6\)

\(^6\) Id. at 1224. While the members of the task force knew that the suspect's statement would be inadmissible due to the exclusionary rule of *Miranda*, they hoped that such tactics would "deprive [the suspect] of the opportunity of forming an insanity defense" and "prevent the defendant from testifying at his own trial." Id. at 1225. One of the task force members, Detective Barkman, testified that

\[\text{[f]irst of all, traditionally, I have believed and have taught that when an attorney or when someone asserts a right of silence or attorney, cease, scrupulously honor their request, for several different reasons. But there comes a time when in a major case having major criminal ramifications on public safety you may make a conscious decision to continue the interrogation failing to honor the request.}\]

Id. at 1226.

\(^6\) Id. at 1229-31. Cooper was identified as a suspect based on a supposed fingerprint match. Id. at 1228. In fact, the so-called match was identified by an identification technician whose primary job was to process color photographs for the crime lab. Id. This technician had taken Arizona's fingerprinting examination and had failed. Id. Furthermore, he had not worked with fingerprint identification for the previous six to nine years. Id. Not surprisingly, then, Cooper's fingerprints were later found not to match the suspect's, and Cooper was released. Id. at 1234.

\(^6\) Id. at 1230-31. It is remarkable that Cooper did not confess, due to the coercive atmosphere of the investigation. Id. at 1231. The interrogator told Cooper that he would be indicted for rape and questioned him about details of his sex life, family life, and religious background. Id. at 1229-31. The court stated that "the record contains evidence indicating he was traumatized by this encounter and later suffered post-traumatic stress syndrome. In the middle of the interrogation, even the hardened veteran Weaver Barkman [(Cooper's interrogator)] was, in his own words, 'upset,' 'angry,' displaying 'a lot of emotion,' and 'leak[ing] emotionally.'" Id. at 1231 (alteration in original) (citation omitted).

\(^6\) Id. at 1231. Cooper repeatedly stated, unequivocally, "'I want to talk to my lawyer, Nancy Pastero . . . , as soon as possible, sir, and I will not give you any more of my honesty because you're not buying it.'" Id.

\(^6\) Id. at 1231-32. One of the members of the task force, shortly after Cooper was arrested, announced to the press that "what we have caught is a man who has committed two rapes of twenty we are looking at." Id. at 1234. The court noted that the officer "made this statement knowing that (1) Cooper did not fit the physical description of the rapist given by the victims of the two rapes in question, and (2) [the interrogator] believed Cooper was not responsible for these incidents." Id.

\(^6\) Id. at 1232-33. It was not until two months later that the police department stated to the media that Cooper was no longer a suspect. Id. at 1234. The court noted, "[I]n the
The Ninth Circuit held that the officers' behavior violated both Cooper's Fifth Amendment right against self-incrimination and his Fourteenth Amendment substantive due process right.\textsuperscript{71} As to the Fifth Amendment claim, the Ninth Circuit found that although Cooper never confessed, he did make statements which "could and probably would have been used against him had he gone to trial."\textsuperscript{72} The court reasoned that there would be no cause of action for an inadvertent violation of \textit{Miranda} "without also trespassing on the actual Constitutional right against self-incrimination that those safeguards are designed to protect."\textsuperscript{73} In this case, such a trespass occurred because the police conduct was "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed" and thus required constitutional protection.\textsuperscript{74} As to the Fourteenth Amendment substantive due process right,\textsuperscript{75} the Ninth Circuit used the "shock the conscience" test developed in \textit{Rochin v. California},\textsuperscript{76} finding interim between his arrest and the announcement clearing him, Cooper alleges that he and his family were evicted from their residence, that he was fired from his job, and that he suffered serious injury to his business and personal reputation." \textit{Id.}

\textsuperscript{71}. \textit{Id.} at 1237.
\textsuperscript{72}. \textit{Id.} at 1236. Cooper made statements that he hit his wife, and that he sometimes roamed the streets alone at night for hours. \textit{Id.} at 1237.
\textsuperscript{73}. \textit{Id.} at 1243-44.
\textsuperscript{74}. \textit{Id.} at 1244 (alternation in original) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).
\textsuperscript{75}. The Fourteenth Amendment states the following: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.
\textsuperscript{76}. 342 U.S. 165 (1952). In \textit{Rochin}, the police, acting on a tip that Rochin was selling drugs, entered his home and found him in his bedroom. \textit{Id.} at 166. Rochin, seeing the police, swallowed two capsules. \textit{Id.} The police handcuffed Rochin and brought him to the hospital where they instructed the doctor to "force[] an emetic solution through a tube into Rochin's stomach against his will." \textit{Id.} Rochin subsequently vomited the capsules, which contained morphine, and was convicted of possession primarily based on this evidence. \textit{Id.} Holding that the police officers violated Rochin's Fourteenth Amendment right to substantive due process, the Supreme Court stated that "[t]he faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed." \textit{Id.} at 172. The Court set out the test as follows:

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not \textit{ad hoc} and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society. \textit{Id.} (citation omitted). For an examination of how the Due Process Clause might apply in the case of a suspected terrorist, see M.K.B. Darmer, \textit{Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism}, 12 CORNELL J.L. & PUB. POL'Y 319 (2003). Darmer poses the question:

Would government action that "shocks the conscience" in a case involving illegal drugs also "shock the conscience" in a case involving terrorism? What if, for example, a suspected terrorist swallowed capsules containing small bits of paper
that the police officers violated Cooper's Fourteenth Amendment substantive due process right through their planned and manipulative behavior to compel Cooper's confession.  

B. Foreshadowing the Scope of the Self-Incrimination Clause

Prior to Chavez, the Supreme Court addressed the scope of the Fifth Amendment's reach in dicta in United States v. Verdugo-Urquidez. In that case, the Mexican authorities brought a Mexican citizen, an alleged drug smuggler, to the United States to be arrested. Officials from the U.S. Drug Enforcement Administration (DEA), in cooperation with Mexican authorities, searched the suspect's home in Mexico, and uncovered documents regarding drug smuggling operations. The suspect moved to suppress the recovered evidence on the ground that it was illegally seized without a warrant and, therefore, violated the Fourth Amendment.

The Supreme Court held that a search of foreign property owned by a foreign citizen was outside the scope of the Fourth Amendment and thus, did not constitute an illegal search. Most significantly—in
analyzing the Fourth Amendment issue—the Court referenced in passing the Fifth Amendment, stating that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." The Court's dicta foreshadowed how it would interpret the scope of the Fifth Amendment, which became clear in Chavez.

IV. THE PATH TO THE SUPREME COURT: CHAVEZ V. MARTINEZ

A. The Dispute

The Chavez case arose out of an altercation between Oliverio Martinez and police officers, Maria Pena and Andrew Salinas, on November 28, 1997. Martinez was riding his bicycle through a deserted lot in a residential neighborhood when Salinas called for him to stop. Martinez obeyed Salinas, who patted him down for weapons. Salinas found a knife on Martinez and tried to handcuff him; a struggle ensued, the facts of which remained in dispute.

84. Id. at 264. The Court clarified this statement further, stating that "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." Id.

85. Chavez v. Martinez, 538 U.S. 760, 773 (2003) (plurality opinion). Contra Susan R. Klein, No Time for Silence, 81 Tex. L. Rev. 1337, 1341 (2003). The author argues: [Some] suggest that dicta in United States v. Verdugo-Urquidez intended to reverse the long line of "penalty cases" prohibiting the government from penalizing the invocation of the Fifth Amendment's Self-Incrimination Clause in any pretrial setting, even where there is no resulting statement to use in a criminal trial. ... [This] proposition[ ] is unsound.


87. Id.

88. Id. Both officers agreed that Martinez cooperated with them. Brief for Respondent at 1, Chavez (No. 01-1444).

He obeyed their command and parked his bike, put the kickstand down, and never spoke ill to Salinas, he just stood right by his bicycle. He obeyed when the officer told him to place his hands behind his head. Salinas had no information that Martinez was involved in criminal activity or under the influence of drugs.

89. Oxnard, 270 F.3d at 854. Salinas testified that Martinez was trying to get away from him; Martinez claimed that he did not resist. Id. The knife that Officer Salinas
maintained that Martinez did not attempt to strike them, they claimed that Martinez seized Salinas’s gun. Salinas reacted by striking Martinez. Martinez argued that he did not touch the gun itself, but rather grabbed Salinas’s hand to prevent him from reaching the gun. The parties agreed that Salinas cried out, “He’s got my gun,” prompting Pena to fire at Martinez several times. Martinez was rendered blind and paralyzed in both legs as a result of the shooting. The officers handcuffed Martinez and waited for paramedics to arrive.

Sergeant Ben Chavez, the patrol supervisor, arrived to ascertain what happened. After discussing the incident with Salinas, he boarded the ambulance carrying Martinez to hear Martinez’s version of the events. In the trauma room of the hospital’s emergency department, Chavez began a taped forty-five minute interview with Martinez. During this time, hospital staff ordered Chavez to leave the room several times. Throughout his conversation with Chavez, Martinez was in and out of consciousness, was afraid that he was dying, and was clear in his desire not to continue the interview. After the incident, Martinez filed a civil rights action for violation of his Fifth Amendment right against self-incrimination and his Fourteenth Amendment due process right pursuant

found was Martinez’s work knife, which he used to cut strawberries. Brief for Respondent at 2, Chavez (No. 01-1444).

90. Oxnard, 270 F.3d at 854.

91. Id.

92. Id. Flores, the farm worker who the officers questioned prior to stopping Martinez, witnessed the shooting and gave testimony supporting Martinez’s claim that he never touched the gun, much less grabbed it from Salinas’s holster. Brief for the Respondent at 3, Chavez (No. 01-1444).

93. Oxnard, 270 F.3d at 854.

94. Id. Five bullets struck Martinez. Id. One bullet hit an optical nerve in Martinez’s face, rendering him blind. Id. Another bullet hit one of his vertebrae, fracturing it such that his legs were paralyzed. Id. Three additional bullets hit him around his knee joint. Id.

95. Id.

96. Id. Chavez was a sixteen year veteran of the police force. Brief for the Respondent at 3, Chavez (No. 01-1444).

97. Oxnard, 270 F.3d at 854.

98. Id. Although the interview lasted forty-five minutes, the actual conversation between Chavez and a barely conscious Martinez totaled only ten minutes. Id. at 854-55.

99. Id. at 854.

100. Id. at 855. The court went into greater detail: “By the district court’s tally, ‘[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more.’” Id. (alterations in original). The court also noted that “Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.” Id.
to 42 U.S.C. § 1983, even though his statements were never used against him at trial.

B. The Lower Courts' Rulings

The District Court for the Central District of California denied Chavez's request for qualified immunity and granted Martinez's motion for summary judgment with regard to his claim that Chavez's coercive questioning of him in the hospital violated his Fifth and Fourteenth Amendment rights. Chavez appealed to the Ninth Circuit, arguing that he was entitled to qualified immunity.

On appeal, a three-judge panel of the Ninth Circuit held unanimously that Chavez was not entitled to qualified immunity because Martinez stated a prima facie case and Chavez should have known of the rights he violated. The court held that Chavez's "coercive, custodial interrogation" of an ailing, hospitalized Martinez violated the Fifth and Fourteenth Amendments. Because he proved a violation of his constitutional rights, Martinez could go forward with his § 1983 lawsuit.

The court provided several justifications for its holding. First, the court considered Cooper, where it found a violation of the Fifth Amendment despite the government's failure to prosecute the suspect. Next, the court extended Miranda's prevention of coercive police interrogations beyond the courthouse walls. Last, while the court

---

101. Id. Martinez alleged three violations: a stop lacking probable cause, the use of excessive force, and coercive interrogation while under medical care. Id.
102. Id. at 857.
103. Id. at 855.
104. Id. at 855-56.
105. Id. at 856, 859. The court explained that "[q]ualified immunity shields [police officers] 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Id. at 855 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The court elaborated, "Only conduct that an official could not reasonably have believed was legal under settled law falls outside the protective sanctuary of qualified immunity." Id.
106. Id. at 856.
107. Id. at 856-57.
108. Id.
109. Id. (citing Cooper v. Dupnik, 963 F.2d 1220, 1236-37, 1242-44 (9th Cir. 1992)). The court reiterated that the "Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity.'" Id. at 857 (quoting Miranda v. Arizona, 384 U.S. 436, 457-58 (1966)).
110. Id. Regarding its decision in Cooper, the court stated:

We echoed the Supreme Court's holding in Miranda that this animating purpose was adequately achieved only if the Fifth Amendment cast its protection against coerced self-incrimination not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement
recognized that dicta in the Supreme Court’s Verdugo-Urquidez decision suggested the Fifth Amendment was specifically a trial right, the court noted that Supreme Court dicta is not binding, stating that "where the two are at odds . . . we are bound to follow our own binding precedent." 111

As to the Fourteenth Amendment claim, the court held that a statement obtained through coercive interrogation violated the Fourteenth Amendment, regardless of subsequent use against the suspect at trial. 112 The only support the court cited for this holding was Cooper, which held that the actual use of a coerced statement in a criminal proceeding was not essential for a constitutional violation to occur. 113 Chavez appealed the court’s decision again, this time to the Supreme Court. 114

In Chavez, the Supreme Court, in a plurality opinion, disagreed with the Ninth Circuit’s interpretation of the Fifth Amendment and held that Chavez’s interrogation of Martinez—absent subsequent use of the statements from the interrogation against Martinez in a criminal proceeding—did not infringe upon Martinez’s right against self-incrimination. 115 The Court did not decide the Fourteenth Amendment issue, but remanded it for further consideration by the lower courts. 116

V. THE PLURALITY DECISIONS IN CHAVEZ V. MARTINEZ

A. The Decision of the Court

The Chavez opinion was rendered in two parts. 117 Justice Thomas wrote a plurality opinion on the Fifth Amendment issue; he was joined by Chief Justice Rehnquist and Justices O’Connor and Scalia. 118 Justice Souter wrote the second part, addressing the issue of Fourteenth

---

authority was invoked to curtail a criminal suspect’s freedom of action in any significant way.

Id. at 857.
111. Id. n.3.
112. Id. at 857.
113. Id. (“The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself . . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.” (ellipsis in original) (quoting Cooper, 963 F.2d at 1244-45)).
115. Id. (plurality opinion).
116. Id. at 776 (plurality opinion).
117. Id. at 762.
118. Id.
Amendment protection, joined by Justices Breyer, Stevens, Kennedy, and Ginsburg. 119

The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself." 120 Martinez argued that a "criminal case" should be broadened to include police interrogations; Justice Thomas disagreed, noting that a "'criminal case' at the very least requires the initiation of legal proceedings." 121 Due to the absence of any criminal proceedings against Martinez, Justice Thomas held that "[t]he text of the Self-Incrimination Clause simply cannot support the Ninth Circuit's view that the mere use of compulsive questioning, without more, violates the Constitution." 122

Justice Thomas also found support in case law indicating that the Ninth Circuit's decision was improper. 123 Established precedent indicates that the government may compel incriminating testimony of witnesses so long as their testimony is never used against them in a criminal case. 124 Thus, Justice Thomas concluded that merely obtaining a coerced statement is not enough to raise a Fifth Amendment claim when, as in Chavez, the witness is never compelled to testify against himself in a criminal proceeding. 125

Justice Thomas also considered whether a violation of Miranda could lead to a de facto violation of the Fifth Amendment without the witness actually incriminating himself. 126 He noted that although Miranda set forth a rule intended to protect the rights found in the Self-Incrimination Clause, it did not extend the scope of the Self-Incrimination Clause itself. 127 Thus, Justice Thomas found that "[t]he Ninth Circuit's view that

119. Id. One commentator noted, "This is one of those unfortunate cases in which higher mathematics is necessary to figure out the number of votes for particular issues." Martin A. Schwartz, Challenging Coercive Police Interrogations Under § 1983, N.Y. L.J., July 29, 2003, at 3. Justices Kennedy, Stevens, and Ginsburg joined Justice Souter's opinion on the Fourteenth Amendment issue "[t]o assure a controlling judgment of the Court." Chavez, 538 U.S. at 802 (Ginsburg, J., concurring in part and dissenting in part).
120. U.S. CONST. amend. V.
121. Chavez, 538 U.S. at 766 (plurality opinion).
122. Id. at 767 (plurality opinion).
123. Id. at 767-69 (plurality opinion).
124. Id. at 767-68 (plurality opinion); see Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (stating that an individual may choose to waive this privilege, even though his statements may incriminate him); Kastigar v. United States, 406 U.S. 441, 458-59 (1972) (holding that use and derivative use immunity is sufficient to compel testimony in light of a claim of Fifth Amendment privilege).
125. Chavez, 538 U.S. at 769 (plurality opinion).
126. Id. at 772-73 (plurality opinion).
127. Id. at 770, 772 (plurality opinion). Justice Thomas explained that "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the
mere compulsion violates the Self-Incrimination Clause finds no support in the text of the Fifth Amendment or [the Supreme Court's] case law.\textsuperscript{128} Therefore, the Court reversed the Ninth Circuit's decision with respect to the Fifth Amendment claim.\textsuperscript{129}

Justice Souter delivered the opinion of the Court regarding Martinez's Fourteenth Amendment claim that Officer Chavez violated his due process rights through coercive interrogation.\textsuperscript{130} The Court remanded the issue of whether Martinez had a substantive due process claim to the Ninth Circuit, leaving it to that court to determine whether the facts established a Fourteenth Amendment claim.\textsuperscript{131}

\textbf{B. Justice Souter's Concurrence}

Justice Souter also authored a concurring opinion.\textsuperscript{132} In this opinion, he suggested that the decision not to expand the scope of the Fifth Amendment in this case, while sound, required a more thorough analysis.\textsuperscript{133} Justice Souter reminded the Court that the scope of the Fifth Amendment could be expanded, and a new judicial rule created, if it were found necessary to ensure core Fifth Amendment protections.\textsuperscript{134} Thus, it is not inconceivable that the Fifth Amendment could be extended beyond its current bounds and be made applicable in cases like \textit{Chavez} if the Court found that civil liability protection was necessary to curb coerced confessions.\textsuperscript{135} Still, Justice Souter did not believe that

\begin{itemize}
\item constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." \textit{Id.} at 772 (plurality opinion).
\item \textsuperscript{128} \textit{Id.} at 773 (plurality opinion) (citations omitted). Justice Thomas asserted that the text of the Fifth Amendment did not condone "torture or other abuse" by police authorities. \textit{Id.} (plurality opinion). The Court's decision merely meant that the Fourteenth Amendment's Due Process Clause and not the Fifth Amendment was the proper vehicle for redress. \textit{Id.} (plurality opinion).
\item \textsuperscript{129} \textit{Id.} at 773 (plurality opinion).
\item \textsuperscript{130} \textit{Id.} at 779-80.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 777 (Souter, J., concurring in the judgment).
\item \textsuperscript{133} \textit{Id.} (Souter, J., concurring in the judgment) ("To recognize such a constitutional cause of action for compensation would, of course, be well outside the core of Fifth Amendment protection, but that alone is not a sufficient reason to reject Martinez's claim.").
\item \textsuperscript{134} \textit{Id.} (Souter, J., concurring in the judgment) ("[E]xtension[s] of the bare guarantee may be warranted, if clearly shown to be desirable means to protect the basic right against the invasive pressures of contemporary society." (quoting \textit{Miranda v. Arizona}, 384 U.S. 436 (1966) (Harlan, J., dissenting)).
\item \textsuperscript{135} \textit{Id.} at 777-78 (Souter, J., concurring in the judgment). Justice Souter then listed several Fifth Amendment holdings that, while outside the core guarantee of the Fifth Amendment, are necessary to preserve the essence of the protection behind the Fifth Amendment. \textit{Id.} (Souter, J., concurring in the judgment). For example, \textit{Kastigar} involved the requirement of immunity against prosecution before a witness is compelled to testify
Martinez could make a persuasive argument that an expanded Fifth Amendment protection against self-incrimination, allowing for civil liability protection, was necessary to aid "the core guarantee [of the Fifth Amendment]." \textsuperscript{136} Such an expansion of the Fifth Amendment, argued Justice Souter, could result in every interrogation being challenged under this rule. \textsuperscript{137} The lack of a limiting principle could result in liability for every interrogation the police undertake. \textsuperscript{138} In balancing the costs of expanding the Fifth Amendment's protection, Justice Souter noted that Martinez gave no argument that the Fifth Amendment guarantee had been rendered ineffective, requiring an expanded Fifth Amendment protection to include civil liability. \textsuperscript{139} Thus, Justice Souter concluded that

with incriminating evidence. \textit{Id.} at 778 (Souter, J., concurring in the judgment) (citing \textit{Kastigar v. United States}, 406 U.S. 441, 446-47 (1972)). The purpose of immunity statutes is to remove the danger of self-incrimination and ensure that the essential protection of the Fifth Amendment remains by guaranteeing that a person who gives incriminating testimony will not be prosecuted as a result of that testimony. \textit{See Kastigar}, 406 U.S. at 444-46. The issue before the \textit{Kastigar} Court was whether the immunity grant was "coextensive with the scope of the [Fifth Amendment] privilege." \textit{Id.} at 449. The Court found that it was. \textit{Id.} at 453. Immunity statutes, the Court said:

\begin{quote}
[S]eek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. . . . Such statutes have "become part of our constitutional fabric."
\end{quote}
\textit{Id.} at 446-47 (quoting \textit{Ullmann v. United States}, 350 U.S. 422, 438 (1956)). Other holdings reflecting extensions of the Fifth Amendment include: limiting compulsion to testify at criminal proceedings, barring penalties for exercising Fifth Amendment rights, and requiring \textit{Miranda} warnings. \textit{Chavez}, 538 U.S. at 778 (Souter, J., concurring). Justice Souter elaborated, "All of this law is outside the Fifth Amendment's core, with each case expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection." \textit{Id.} (Souter, J., concurring in the judgment).

\textit{136.} \textit{Chavez}, 538 U.S. at 778 (Souter, J., concurring in the judgment) ("I do not . . . believe that Martinez can make the 'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of civil liability as he asks us to recognize here," (quoting \textit{Miranda}, 384 U.S. 436, 515 (1966) (Harlan, J., dissenting)).

\textit{137.} \textit{Id.} at 778-79 (Souter, J., concurring in the judgment).

\textit{138.} \textit{Id.} (Souter, J., concurring in the judgment). Justice Souter explained:

If obtaining Martinez's statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor \textit{Miranda}? Martinez offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.

\textit{Id.} (Souter, J., concurring in the judgment).

\textit{139.} \textit{Id.} at 779 (Souter, J., concurring in the judgment).
the only remedy available to Martinez was a Fourteenth Amendment claim, an issue reserved for remand.\footnote{140. \textit{Id.} at 779-80 (Souter, J., concurring in the judgment).}

\subsection*{C. Justice Kennedy's Dissent and Concurrence}

Justice Kennedy's dissent took strong issue with the views of Justices Souter and Thomas.\footnote{141. \textit{Id.} at 790 (Kennedy, J., concurring in part and dissenting in part).} Justice Kennedy asserted that "[a] future privilege does not negate a present right."\footnote{142. \textit{Id.} at 792 (Kennedy, J., concurring in part and dissenting in part).} He argued that the Fifth Amendment privilege, in addition to protecting suspects from self-incrimination, also provided "a continuing right against government conduct intended to bring about self-incrimination," regardless of whether there is a subsequent criminal proceeding.\footnote{143. \textit{Id.} at 791 (Kennedy, J., concurring in part and dissenting in part).} As such, Martinez's lack of participation in a criminal proceeding would not exclude him from Fifth Amendment protection.\footnote{144. \textit{See id.} at 793-94 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy elaborated on his disagreement with the Court's decision, and his belief that the Fifth Amendment guarantees a present right against coerced confessions, stating:}

\begin{quote}
To tell our whole legal system that when conducting a criminal investigation police officials can use severe compulsion or even torture with no present violation of the right against compelled self-incrimination can only diminish a celebrated provision in the Bill of Rights. A Constitution survives over time because the people share a common, historic commitment to certain simple but
\end{quote}
Turning to the Fourteenth Amendment, and joining in Justice Souter’s concurrence, Justice Kennedy believed that a police officer violates an individual’s fundamental right to liberty when he extracts a confession using torture or its equivalent. In this case, the record demonstrated that Chavez used Martinez’s vulnerable position to secure a statement from him. The interrogator permitted Martinez to believe that he would not get further medical treatment without responding to Chavez’s questions. This action violated the Fourteenth Amendment; consequently, Justice Kennedy would have affirmed the Ninth Circuit’s opinion. However, he concurred with Justice Souter’s opinion so that the Court would have a controlling judgment and because he believed that the Fourteenth Amendment would supply a claim for Martinez on remand.

VI. The Right to Remain Silent: Does It Exist in Isolation?

The differing opinions in Chavez, including the Fifth Amendment plurality decision and the slim majority on the Fourteenth Amendment issue, call into question whether the Supreme Court resolved this dilemma or caused further confusion in this area. The Court in Chavez built on its dicta in Verdugo-Urquidez, limiting the Fifth Amendment to the words of its text and use only when an individual incriminates himself in court, thus eliminating this basis for relief in a civil rights action. The question then remains: what protection is available for the un-Mirandized suspect who is not charged with a crime? The answer lies in the Due Process Clause of the Fourteenth Amendment.

Several justices suggested that the Fourteenth Amendment sufficiently addresses situations like in Chavez. However, the Fourteenth Amendment applies only when “evidence [is] obtained by methods that are ‘so brutal and so offensive to human dignity’ that they ‘shock the
conscience' [and] violate the Due Process Clause." Given this high standard required to "shock the conscience" of the Court, and the fact that even within the Chavez case there were differing opinions as to whether Chavez's actions met this standard, is it necessary to find a middle ground to protect suspects who never go to trial and whose interrogation does not "shock?" \[153\]

Justice Stevens, in his concurrence, indicated that the Fourteenth Amendment might protect suspects like Martinez. He referenced cases wherein the Court found that unusually coercive police interrogations

\[152\] Id. at 774 (plurality opinion) (quoting Rochin v. California, 342 U.S. 165, 172, 174 (1952)).

\[153\] See id. at 774, 776-77 (plurality opinion), 798 (Kennedy, J., concurring in part and dissenting in part). Justice Thomas found that Chavez's interrogation of Martinez did not "shock the conscience," stating that [w]e... must take into account the fact that Martinez was hospitalized and in severe pain during the interview, but also that Martinez was a critical nonpolice witness to an altercation resulting in a shooting by a police officer, and that the situation was urgent given the perceived risk that Martinez might die and crucial evidence might be lost. In these circumstances, we can find no basis in our prior jurisprudence, or in our Nation's history and traditions to suppose that freedom from unwanted police questioning is a right so fundamental that it cannot be abridged absent a "compelling state interest."

Id. at 776 (plurality opinion) (citations omitted). Justices Kennedy, Stevens and Ginsburg, however, found that it did. Id. at 798 (Kennedy, J., concurring in part and dissenting in part). Viewing the facts from another angle, Justice Kennedy stressed the following: [Martinez's] blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through Miranda warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal refusal to answer questions.

Id. at 798 (Kennedy, J., concurring in part and dissenting in part); see also Avery, supra note 53, at 575-76. Avery argues that such a middle ground is needed. Id. He argues that there is actually no "right to remain silent," despite the popular Miranda warning, unless the suspect interrogated eventually goes to trial. Id. at 575. He argues a need for a concrete "right to remain silent," regardless of whether the statement is used at trial. Id. at 576. Avery argues that coercive police interrogation alone causes a constitutional violation that should be actionable pursuant to § 1983.... This right is not merely a "trial right" that may be invoked only during criminal proceedings. Nor is the right limited to extreme cases where police abuse shocks the conscience. Recognition that there is a cause of action under § 1983 for damages caused by violations of this right is crucially important for deterrence of police misconduct.

Id. at 575 (footnote omitted). This right, he believes, should be found in a § 1983 remedy for coercive interrogation practices. Id. at 575-76.

\[154\] See Chavez, 538 U.S. at 783-84, 787 (Stevens, J., concurring in part and dissenting in part).
violated the Fourteenth Amendment. Thus, his opinion indicated that the high standard of the Fourteenth Amendment is attainable, and perhaps sufficient to resolve claims such as Martinez's.

Justice Kennedy also saw the Fourteenth Amendment as an appropriate avenue of relief. He preferred to apply the Fifth Amendment to the Chavez case, but conceded that the Fourteenth Amendment's substantive due process rights provided an equally effective way to achieve the same result. Justice Kennedy focused on the central issues of balancing the legitimate need for the police to collect evidence in their investigation of a crime and the liberty right of the person undergoing interrogation. Justice Kennedy noted that "[t]here is no rule against interrogating suspects who are in anguish and pain," citing examples of exigent circumstances which justified such action, including the need to gather information regarding a kidnapping victim or a dangerous criminal. The police cannot, however, "prolong or

155. Id. at 787 (Stevens, J., concurring in part and dissenting in part). Examples include a suspect denied counsel and interrogated for forty-eight hours, Darwin v. Connecticut, 391 U.S. 346, 347 (1968), an officer with a rifle who threatened to kill the suspect if he did not talk, Beecher v. Alabama, 389 U.S. 35, 36 (1967), a suspect interrogated for nine days without food or sleep who confessed but later retracted his statement, Clewis v. Texas, 386 U.S. 707, 709-10 (1967), and a mentally retarded youth interrogated for a week during which time he fell ill and was taken to the hospital twice, Reck v. Pate, 367 U.S. 433, 439 & n.3 (1961).

156. Chavez, 538 U.S. at 783-84 (Stevens, J., concurring in part and dissenting in part). However, he dissented for the reason Justice Kennedy outlined, that the Fifth Amendment Self-Incrimination Clause applies regardless of whether the suspect is tried in a court. Id. at 789-90 (Kennedy, J., concurring in part and dissenting in part). See generally Mincey v. Arizona, 437 U.S. 385 (1978) (excluding a hospital interrogation much like the one in Chavez at trial on the grounds that it was not voluntary).

157. Chavez, 538 U.S. at 795-96, 799 (Kennedy, J., concurring in part and dissenting in part) ("[A] ruling on substantive due process in this case could provide much of the essential protection the Self-Incrimination Clause secures . . . .")

158. Id. at 796-97 (Kennedy, J., concurring in part and dissenting in part). Indeed, Justice Scalia, in oral arguments, suggested that coercion might be necessary to prevent a terrorist attack. Steve Lash, Court Weighs Critically Ill Suspect's Rights, CHI. DAILY L. BULL., Dec. 5, 2002, WESTLAW, 12/5/02 CHIDLB 2. The exchange between Justice Scalia and Martinez's attorney, R. Samuel Paz, proceeded as follows:

"What if you have a person [who] wants to blow up the World Trade Center?" Scalia asked. "When is necessity an excuse to violate the Fifth Amendment?"

Paz responded that saving the life of a child or hundreds of people in a skyscraper would justify police coercion so long as it remains reasonable under the circumstances.

"When there is immediate danger, there is no constitutional violation," said the Los Angeles attorney. "This is not a terrorist case."

Martinez, blind, paralyzed and near death, presented no imminent threat, Paz said.

Id.
increase a suspect's suffering against the suspect's will.' If such intentional suffering could be demonstrated, with the intent of eliciting an incriminating statement, then according to Justice Kennedy, § 1983 remedies should be available.

The Fourteenth Amendment due process approach provides sufficient protection and is its own middle ground between allowing a Fifth Amendment claim as Justice Kennedy would favor, and not allowing any claim as Justice Thomas proposes. Although the Amendment stops short of guaranteeing a stand-alone right to remain silent, divorced from the context of subsequent criminal proceedings, it does allow a claim for truly objectionable police practices. This analysis maintains the balance between the need for police to carry out necessary investigative interrogations and the requirement that they use appropriate methods to do so.

---

160. Chavez, 538 U.S. at 797 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy noted that "[t]he transcript of the interrogation . . . and other evidence considered by the District Court demonstrate that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions." Id. (Kennedy, J., concurring in part and dissenting in part).

161. Id. (Kennedy, J., concurring in part and dissenting in part).

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

163. Id. at 766 (plurality opinion).

164. See id. at 774 (plurality opinion).

165. Justice Kennedy, in his concurrence, elaborated on what might constitute a necessary interrogation:

There is no rule against interrogating suspects who are in anguish and pain. The police may have legitimate reasons, borne of exigency, to question a person who is suffering or in distress. Locating the victim of a kidnapping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer at large are some examples.

Id. at 796 (Kennedy, J., concurring in part and dissenting in part). However, many commentators remain concerned with the apparent lack of a true right to remain silent. E.g., Avery, supra note 53, at 584. Michael Avery, writing prior to the Chavez decision and arguing that recognizing a right to remain silent was crucial to deterring police misconduct, commented:

A more appropriate warning by police officers, were the Supreme Court to conclude that the right to remain silent did not exist prior to trial, would be something like:

There is a risk that anything you say to us might be introduced into evidence at trial. At that time you will have an opportunity to try to convince a judge that any statements you made to us were involuntary. But regardless of what happens at trial, you don't have a right not to answer our questions. As long as we have a sufficient governmental interest in compelling an involuntary statement from you, we can make you talk, unless we do anything that is so brutal and degrading that it is shocking to the conscience.

Id.
VII. THE NINTH CIRCUIT'S DECISION ON REMAND

The Ninth Circuit, on remand from the *Chavez* decision, had the opportunity to rule on whether Martinez had stated a claim for a Fourteenth Amendment due process violation.\(^{166}\) The court, reviewing the facts of the case, stated that "it would be impossible not to be shocked by Sergeant Chavez's actions."\(^{167}\) The court held that "[a] clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation."\(^{168}\) Thus, if Martinez's allegations are proven on remand to the district court, then Chavez violated Martinez's Fourteenth Amendment right to be free from coercive police interrogation,\(^{169}\) and Martinez would be able to pursue damages under § 1983.\(^{170}\)

VIII. CONCLUSION

While the Court in *Chavez* eliminated the Fifth Amendment as an avenue to pursue damages for a constitutional violation under § 1983, it opened the door for allowing a claim under the Fourteenth Amendment's "shocking the conscience"\(^{171}\) or "implicit in the concept of ordered liberty"\(^{172}\) tests. The Ninth Circuit, on remand, seized the opportunity by making freedom from the coercive police tactics used on Martinez a fundamental right, thus giving rise to a cause of action for damages under § 1983.\(^{173}\)

The Supreme Court's decision in *Chavez*, while clouded in diverging opinions, 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. While the Court refused to find the answer in the Fifth Amendment's privilege against self-

---

166. *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam).
167. *Id.* The Court recounted the "shocking" aspects of the case:
Martinez alleges that Chavez brutally and incessantly questioned him, after he had been shot in the face, back, and leg and would go on to suffer blindness and partial paralysis, and interfered with his medical treatment while he was "screaming in pain . . . and going in and out of consciousness." Chavez allegedly continued this "interrogation" over Martinez's pleas for him to stop so that he could receive treatment."
168. *Id.* (omission in original).
169. *Id.* ("The ultimate resolution of the merits of Martinez's Fourteenth Amendment claim will depend upon the resolution of contested facts. We leave that resolution to the district court.")
170. See supra note 7.
171. See *Chavez*, 538 U.S. at 774 (plurality opinion).
172. See *id.* at 775 (plurality opinion).
173. *Oxnard*, 337 F.3d at 1092.
incrimination, even the Fifth Amendment advocates on the Bench joined with the majority to designate the Fourteenth Amendment as an available avenue of relief. By rejecting the Fifth Amendment argument and embracing that of the Fourteenth, the Court created a situation where although there is not an absolute "right to remain silent," a person will be protected against unnecessary and excessive police interrogation.