Washington University Law Review

Volume 72 | Issue 4

January 1994

Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope

Kate E. Bloch
University of California, Hastings College of the Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview

Part of the Constitutional Law Commons

Recommended Citation
Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L. Q. 1603 (1994).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

FIFTH AMENDMENT COMPELLED STATEMENTS: MODELING THE CONTOURS OF THEIR PROTECTED SCOPE

KATE E. BLOCH*

I. INTRODUCTION

The scope of protection currently afforded compelled statements under the Self-Incrimination Clause[1] could furnish a suitable, if dry, habitat for Proteus. Within that span of protection, the morphing Greek sea god would discover recurring opportunities to shape and reshape himself. Although the Supreme Court no longer interprets the Fifth Amendment to require a complete ban on prosecution for the transactions described in compelled statements,[2] the sizes and shapes of protection available to such statements vary markedly.[3] On Mondays, for instance, Proteus could billow to the vast

---

* Associate Professor of Law, University of California, Hastings College of the Law; B.A., M.A. 1983, Washington University; J.D. 1986, Stanford Law School. I want to express my appreciation to the many colleagues who participated in my spring 1994 work-in-progress presentation. In addition, Tom Morawetz's superlative review and edit of the manuscript forced me to confront both substantive and stylistic gaps. Gordon Van Kessel, David Faigman, and David Steinberg each gave generously of his time to review the manuscript and contribute valuable insights. My thanks to Lou Wolcher, who inspired much engaging reflection on "meta" questions, even as I acknowledge that those reflections have almost certainly not been effectively realized in this work. I extend thanks to my research assistants who labored on or in preparation of this work, especially Mark Christensen, Kristin Whipple, Libbi Joroff, and Joe Parisi. Finally, I am grateful for the funding support both from the Hastings 1066 Foundation and the Hastings Summer Stipend Program.

1. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V, cl. 3.

2. "Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege." Kastigar v. United States, 406 U.S. 441, 453 (1972). "We hold that . . . immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Id.*

3. *See generally* Kate E. Bloch, *Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements*, 1992 U. ILL. L. REV. 625, 645-64 [hereinafter *Risks*]. The current Article is an outgrowth of *Risks*, my earlier study of use immunity. In exploring the issue of compelled statements obtained from law enforcement officers during the internal investigation of alleged criminal conduct, my earlier article raised the larger problem of the existence of varied levels of protection afforded compelled statements. Because the earlier article advocated a procedural resolution to the specific problem of internal investigations, the need to ascertain the level of protection for a given compelled statement proved unnecessary. The earlier piece, therefore,

Washington University Open Scholarship

dimensions of protection conferred by circuit court decisions like those in *North*[4] and *Poindexter*,[5] decisions that protect statements compelled through formal immunity grants. On Wednesday, fatigued by his Monday efforts,[6] Proteus could wither to a reduced form to guard statements beaten or threatened from unwitting arrestees by law enforcement officials; the protection of these compelled utterances involves more moderate dimensions.[7] And on Friday, he could shrink further still, confined within the scope of protection of perhaps the least protected compelled statements, those uttered by the accused who attempts to pursue competing constitutional rights.[8]

Proteus' comfort within the range of protections afforded compelled statements[9] results from the evolution of Fifth Amendment doctrine over the past century and, particularly, within the past several decades.[10] This evolution has generated a spectrum of varied protection levels, the boundaries of which remain quite indistinct. One end of the spectrum illumines a range of cases in which courts provide extensive protection to compelled statements. Prosecutors in this band may be prohibited from use of the compelled utterance for any purpose, either evidentiary or nonevidentiary.[11] Even awareness of the compelled utterances' contents

---

left the larger constitutional issue of understanding the existence of varying protection levels for later analysis. This Article addresses that constitutional issue: Whether there is a rational framework that comprehends the varied protection levels and enables the prediction of appropriate levels of protection for compelled statements in future cases. Because the larger constitutional issue was introduced in the earlier study, there are overlaps in some of the foundational materials.

4. United States v. North, 910 F.2d 843 (D.C. Cir.) (vacating convictions, in part because of the district court's failure to engage in sufficiently stringent scrutiny for *Kastigar* purposes), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

5. United States v. Poindexter, 951 F.2d 369, 371 (D.C. Cir. 1991) (reversing convictions because of the prosecutor's failure to prove that "Poindexter's compelled testimony was not used against him at his trial"), *cert. denied*, 113 S. Ct. 656 (1992).

6. I have taken some liberties by suggesting that Proteus would be fatigued by a single shape shift. After all, in the grasp of Menelaus and his comrades:

First he became a bearded lion, then a snake,
A panther, and a gigantic boar—then a running stream
And a great leafy tree

before fatigue arrived. THE ODYSSEY OF HOMER 65 (Ennis Rees trans., 1977).

7. *See Risks, supra* note 3, at 653-56.

8. *See id.* at 656-64. This span of protection excludes statements obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), unless they otherwise qualify as compelled.

9. Throughout this work, for convenience and concision, I frequently refer to the scope of protection of compelled statements, although the protection more particularly belongs to the utterer against the use of his compelled statements.

10. *See infra* notes 29-254 and accompanying text.

11. *See Risks, supra* note 3, at 646-53.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

may jeopardize maintenance of a successful prosecution.[12] Cases in the band at the opposite end of the spectrum condone not only prosecutorial awareness of the compelled statements' contents, but also a multitude of uses of those statements.[13] Permitted uses at this end of the spectrum include "nonevidentiary uses," such as a prosecutor's reluctance to plea bargain or her increased confidence in the defendant's guilt based upon awareness of the contents of the compelled statements.[14] In addition, cases in this band may anticipate direct evidentiary use of the speaker's compelled utterances for impeachment of the speaker before the trier of fact.[15]

The current state of self-incrimination doctrine evokes a certain irony. Statements elicited from an uncounseled suspect through threats, or perhaps even beatings, in the back rooms of the police station[16] receive less self-incrimination protection than those elicited pursuant to a formal court order, where the subject often has enjoyed the benefit of counsel and whose interrogation may proceed in full view of a trial court, a grand jury, or Congress.[17]

Irony invites inquiry. And beyond irony, the mere existence of disparate treatment levels under a single constitutional entitlement encourages exploration.[18] But concerted attention to the disparities in the scope of protection under the Self-Incrimination Clause is of relatively recent vintage, and the primordial questions concerning the disparities remain largely unaddressed and unresolved.[19] First and foremost, sustained

---

12 *See id.*

13 *See id.* at 656-664.

14 I have some hesitation in naming nonevidentiary uses, because the line separating nonevidentiary from evidentiary remains to be clearly drawn. *North*, 910 F.2d at 857 ("An initial difficulty is that a precise definition of the term nonevidentiary use is elusive."). One commentator describes "nonevidentiary uses" as "uses that do not furnish a link in the chain of evidence against the defendant." Gary S. Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 353 (1987).

15 *See Risks, supra* note 3, at 645-64.

16 Although physical violence may now be an uncommon method of eliciting confessions at police stations, *see infra* note 311 and accompanying text, during the period in which these disparities developed, cases record physical violence, sometimes to the extent of extreme and brutal torture, by police to induce suspects to confess. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 281-82 (1936) (quoting Brown v. Mississippi, 161 So. 465, 471 (Miss. 1935) (Griffith, J., dissenting)) (detailing the deputy's effort to whip the defendant, after repeatedly hanging him from a tree, until he confessed).

17 *See Risks, supra* note 3, at 645-56.

18 *But see infra* Part IV.E.

19 Many related issues, facets, and subsets of the disparities of treatment have been dialogued. *See, e.g.*, Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory*

Washington University Open Scholarship

inquiry has not been directed toward understanding the disparities. The Supreme Court itself has not articulated a rational framework to comprehend the spectrum.[20]

Understanding the disparities is a prerequisite to evaluation of their legitimacy.[21] If there is a principled framework that explains the current doctrine treating compelled statements, the first step in evaluating that treatment is to unearth and articulate the framework. The primary focus of this Article is to initiate that step. Once unearthed, a framework provides a common language and a motivation for courts to explain their reasoning in arriving at disparate levels of protection. Clearer explanations improve dialogue and understanding, both within and without the courts.[22] In addition, enhanced understanding facilitates consideration of the larger normative inquiries: Is disparity desirable or legitimate on constitutional, philosophic, or other normative grounds? And ultimately, what degree of protection should courts accord the various types of compelled statements?

In pursuit of that initial framework, the Article posits two theories to explain existing disparities within compelled statement doctrine. A good theory, in Stephen Hawking's words, "satisfies two requirements: It must

---

Self-Incrimination and the Involuntary Confession Rule (pts. 1 & 2), 53 OHIO ST. L.J. 101 (1992) (offering an extensive historical analysis of the relationship between the privilege against self-incrimination and involuntary confessions); Humble, *supra* note 14 (arguing that nonevidentiary use is not prohibited by the Fifth Amendment); Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978) (advocating a return from use to transactional immunity); Jerome A. Murphy, Comment, *The Aftermath of the Iran-Contra Trials: The Uncertain Status of Derivative Use Immunity*, 51 MD. L. REV. 1011, 1012 (1992) (arguing that the standard adopted by the District of Columbia Circuit "provides more protection than that mandated by the Fifth Amendment" and describing the standard as "unworkable"); William R. Stein, Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976) (advocating the provision of use immunity for concurrent or related proceedings). *See also Risks*, *supra* note 3, at 631 n.32 (citing additional sources). But courts and commentators have not adequately focused on providing a coherent and comprehensive understanding of the full breadth of the disparate scope spectrum.

20 Review of Supreme Court doctrine suggests that the Court has never fully acknowledged the spectrum of incongruencies in the treatment of compelled statements. Perhaps the closest the Court has come to acknowledging the extent of disparity was in Baltimore v. Bouknight, 493 U.S. 549, 562 (1990), in which it string cited a list of cases reflecting disparate protection.

21 I am not suggesting, however, that if no rational framework existed or could be discerned, that the disparities would be a priori illegitimate. For an acknowledgement of the potential value of the Fifth Amendment generally, even absent a "principled justification," see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986).

22 Consider Judge Coffin's comments in this regard with respect to constitutional balancing generally: "It is therefore high time to stimulate a more self-conscious, systematic, sensitive, comprehensive, and open effort at balancing." Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22 (1988).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations."[23] A good model[24] of self-incrimination scope doctrine should first describe existing Supreme Court scope decisions. The model should reasonably integrate as many of the variable elements of scope doctrine as possible. Second, lower courts should be able to forecast the appropriate outcomes of future self-incrimination scope cases by applying the principles animating the model. By invoking the definition of a scientific theory, I do not intend to suggest a one-to-one mapping between the application of a theory to the physical and to the legal universes. However, Professor Hawking's definition of a good theory, one involving predictive models, can prove an informative organizing principle for approaching the scope problem. This is similar to the way in which other constitutional theories describe existing constitutional doctrine and facilitate predictions about the resolution of future cases.[25] The creation of models that fit Professor Hawking's definition of a good theory should advance understanding of the existing doctrine by offering an explanation of current disparities in judicial treatment of compelled statements. Then, this unearthed framework may be used to guide future principled decisionmaking in scope cases and to serve as a medium for evaluating that decisionmaking.[26]

To establish a foundation for the creation and subsequent evaluation of explanatory and predictive models, Part II surveys the evolution of disparate treatment in Supreme Court doctrine. Part III distills two guiding principles from that evolution: compulsion and balancing. These principles form the basis for two primary models, one reliant on each of the principles, to describe the database of disparity decisions. In the first model, the extent of compulsion determines the extent of protection. The second model balances the right of the accused against government interests in order to gauge the required level of protection. Each is an empirically

23. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 9 (1988).

24. Although Professor Hawking's definition of a good theory suggests that a model is in some ways distinct from a theory, I employ model and theory interchangeably for purposes of this Article.

25. Consider, for example, the well-known, albeit oft-criticized, Equal Protection Clause model of strict, intermediate, and rational scrutiny. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 617-22 (12th ed. 1991) (detailing several theories critiquing Court treatment under this model).

26. The models proposed here, not unlike many other constitutional models, do not eliminate the need for courts to exercise either judgment or discretion. They should, however, provide an articulated framework within which that judgment or discretion can be exercised.

Washington University Open Scholarship

driven descriptive model. Part III also examines the extent to which each model accounts for existing doctrine, i.e., how accurately it describes the class of Supreme Court cases. Part IV critiques the models by highlighting their limitations, and seeks to develop an improved understanding of the doctrine upon which the models are based. Part V then explores the predictive ability of the models by applying them in two circumstances for which the scope of compelled statement protection remains to be defined.

II. THE DEVELOPMENT OF DISPARITY

To understand the evolution that produced the disparity in protection levels, this Part offers an overview[27] of pertinent Supreme Court doctrine. The overview traces the development of the doctrine in largely chronological order. This choice of format emphasizes the near isolation of the cells that compose the doctrine. Subsequent cases do not integrate and build upon the sum of previous doctrine. Rather, certain cells of the doctrine seem to have grown in petri dishes at opposite ends of the judicial laboratory. The various strains of the Court's compelled statement doctrine have evolved relatively free of comparative evaluation, and their differences are not well documented in the lab notes. As a result, although they all may share the same "DNA of compulsion," the relationship among the resulting strains is little understood, and the lab notes, at least at first reading, provide little guidance in determining how to treat new hybrids.

At the conclusion of this section, I group together those cases or entities that grew together in the same petri dish, forming three primary groups or tiers. This grouping is not to suggest, however, that these three tiers exhaust current Supreme Court treatment of compelled statements. Rather, these groups are chosen because they are the most mature in their delineation of both the factual circumstances that produced them and the realm of protection they afford compelled statements. These three tiers, therefore, can be more accurately contoured than other facets of Supreme Court scope doctrine.

These tiers will serve a fundamental purpose in the creation and application of the models. They are the reference classes or control groups used to test the models' ability to satisfy the first criterion of a good theory: the ability to "accurately describe a large class of observations on

27. This overview is not intended as a complete or exhaustive study of Supreme Court self-incrimination doctrine. In light of space and other constraints, I have endeavored to select from among the many Court cases those that best exemplify the primary features in the evolution of scope doctrine.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

the basis of a model that contains only a few arbitrary elements."[28]

A. Self-Incrimination in the Supreme Court: 1791-1900

Although the promise that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"[29] ascended to the status of constitutional text in 1791, nearly a hundred years passed before the Court's first sustained focus on the Self-Incrimination Clause.[30] In *Boyd v. United States*, the first significant self-incrimination decision during that period of focused inquiry, the Court considered the constitutionality of a statute directing defendants in a forfeiture action to produce an incriminating invoice regarding items to be forfeited.[31] The Court found that this compelled discovery to the district attorney, accompanied by statutory permission for the government to use the invoice against the defendant in the "quasi-criminal" forfeiture proceeding, violated both the Fourth Amendment's proscription against unreasonable searches and seizures[32] and the Fifth Amendment's prohibition on compelling a person to be a witness against himself.[33] Although the compelling order resembled a subpoena duces tecum, the court order in *Boyd* was enforced not through threat of contempt and incarceration, but by threat of loss by default.[34] The defendant's failure to produce the incriminating papers empowered the court to treat the charges against the defendant as "confessed, and made the foundation of the judgment of the court."[35] The compulsion in *Boyd* was

---

28. HAWKING, *supra* note 23, at 9.

29. U.S. CONST. amend. V, cl. 3.

30. The period of sustained inquiry began in 1886 with the Court's decision in Boyd v. United States, 116 U.S. 616 (1886).

31. *Id.* at 617-18. For the text of the statute at issue, see *infra* note 34.

32. *Id.* at 621-22.

33. *Id.* at 633-35. The *Boyd* Court's sweeping restrictions on compelled production of papers has undergone substantial modification. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 427 (2d ed. 1992) ("Under current precedent, very little, if anything, remains of *Boyd*'s Fifth Amendment analysis. Yet the *Boyd* analysis remains a universally accepted starting point for understanding the many strands of current Fifth Amendment doctrine applicable to the subpoena duces tecum.").

34. *Boyd*, 116 U.S. at 620-22. The *Boyd* Court stated:

> [A]nd if the defendant or claimants shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court.

Id. at 620 (citing Act of June 22, 1874, § 5, 18 Stat. 187).

35. *Id.* at 639 (Miller, J., concurring). The court order in question, as Justice Miller explained,

> is in effect a subpœna duces tecum, and, though the penalty for the witness' failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be

Washington University Open Scholarship

the threat of automatic forfeiture of the disputed items. This type of compulsion, while sufficient to invalidate the statute, did not exempt Boyd from subsequent retrial.[36] Neither violation of the Fourth or Fifth Amendments,[37] nor governmental awareness of the existence and the substance of the unconstitutionally compelled invoice, prevented retrial. One could infer that, for the next trial, the government would simply be prohibited from compelling production of the invoice or admitting it into evidence. The Court denotes no other apparent precautions to prevent the government from exploitating its awareness of the existence and content of the invoice, nor any sentiment that such knowledge fatally infects subsequent judicial proceedings. Compulsion, motivated by threat of default forfeiture, triggered Self-Incrimination Clause protection. Suppression of the unconstitutionally produced document was the solution. Retrial, absent the offending document, was expected.

Boyd inaugurated a period that produced several decisions of critical import for the question of the scope of self-incrimination protection. Six years after *Boyd*, the Court considered the Clause in another context, that of a challenge to an immunity statute. In its 1892 *Counselman v. Hitchcock*[38] opinion, the Court furnished several principles that continue to influence self-incrimination jurisprudence today. First, the Court implied that a grant of immunity of appropriate dimensions could be coextensive with the privilege itself.[39] The protection defined by the statute at issue in *Counselman*, however, provided only for direct use immunity. "It could not, and would not, prevent the use of [the witness'] testimony to search out other testimony to be used in evidence against [the witness] or his property, in a criminal proceeding. . . ."[40] To compel testimony, the immunity

---

> made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court.

Id.

36. The Court in *Boyd* held that:

> [T]he notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings.

Id. at 638. The Court, nonetheless, did authorize a retrial. *Id.*

37. Unless otherwise specified, reference to the Fifth Amendment is reference particularly to the Self-Incrimination Clause.

38. Counselman v. Hitchcock, 142 U.S. 547 (1892).

39. "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." *Id.* at 586. Presumably such a statute would withstand constitutional inquiry.

40. *Id.* at 564.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

would have to furnish more comprehensive protection than a simple promise not to use the specific utterances of the speaker against him.[41]

To respond to the Court's concern about the use of immunized testimony to search out other evidence, one may infer that, in addition to protection against direct use, constitutionally valid immunity would require protection against derivative use, at least derivative evidentiary use.[42] But the *Counselman* Court went well beyond the prohibition on derivative use necessary to reach its holding. The Court declared that "no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States."[43] To compel a witness to incriminate herself, pursuant to reasoning in the rarified atmosphere of immunity, the government was required to deliver total amnesty. Where compulsion came in the form of threat of contempt and incarceration, the potential for derivative use invalidated the immunity provision.[44] Although a similar possibility of derivative use, based upon prosecutorial awareness of the existence and contents of the invoice, was latent in the *Boyd* circumstance, the Court in *Boyd* had not barred future retrial. Disparate treatment of compelled statements had entered its infancy.

Counselman further established that self-incrimination protection extended not merely to an ultimate confession, but to all the "links [that] frequently compose that chain of testimony which is necessary to convict any individual of a crime."[45] Both of these principles, that immunity can

41. *Id.* at 585-86.

42. The term "derivative use" has come to encompass two forms of use. The first, that to which the *Counselman* Court appears to be regularly referring, is derivative evidentiary use. Derivative evidentiary use consists of evidence, generally testimony or physical items, derived from the compelled statements. The second form of use, now sometimes included under the rubric "derivative use," is derivative nonevidentiary use. To illustrate the distinctions between these forms of derivative use, suppose that a suspect in a murder case has been compelled to give a statement. If the compelled statement described the location of the murder victim and, as a result of pursuing the description from the compelled statement, the police located the victim's body, the victim's body would be derivative evidence. If instead of introducing the victim's body, the prosecutor simply felt greater confidence in pursuing her case as a result of locating the victim's body, that would arguably constitute nonevidentiary derivative use.

43. *Counselman*, 142 U.S. at 585. This is transactional immunity, the need for which was ultimately repudiated by the Court eight decades later. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) ("Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.").

44. *Counselman*, 142 U.S. at 564-65.

45. *Id.* at 566.

Washington University Open Scholarship

supplant the privilege and that the privilege protects all the links in the chain of testimony, continue to influence Supreme Court doctrine today.[46]

In apparent response to the dicta in *Counselman*, Congress hastened to enact an immunity provision that provided full or transactional immunity.[47] The Court in *Brown v. Walker*[48] considered and approved that statute in 1896, four years after *Counselman*.[49]

Just two terms beyond *Brown* and only five years after *Counselman*, the Court again found itself exploring the application of the Self-Incrimination Clause. The new context was unlike that of *Boyd*, which involved the compelled production of papers, or that of *Counselman* and *Brown*, both of which involved immunity. The Court in *Bram v. United States*[50] evaluated the application of the Self-Incrimination Clause inside the police station. The *Bram* Court considered the voluntariness of a statement by an in-custody arrestee to a police detective.[51] The Court explicitly grounded its determination that the confession was compelled on the Self-Incrimination Clause:

> 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 that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."[52]

With the question of the constitutional basis for assessing involuntary confessions settled for the moment, the Court turned to a definition of

46. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 457-58 (1979) (noting that immunity statutes can comport with the Self-Incrimination Clause); Maness v. Meyers, 419 U.S. 449, 461 (1975) (affirming that protection extends to "information which would furnish a link in the chain of evidence").

47. *See Kastigar*, 406 U.S. at 451-53 (detailing passage and provisions of the Compulsory Testimony Act of 1893); Hale v. Henkel, 201 U.S. 43, 67 (1906) (describing passage of the same legislation).

48. 161 U.S. 591 (1896).

49. "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity. . . ." *Id.* at 610.

50. 168 U.S. 532 (1897).

51. *Id.* at 537-39. *Bram* was not the Court's first treatment of an accused's confession obtained by a police detective. *See, e.g.*, Hopt v. Utah, 110 U.S. 574 (1884); Wilson v. United States, 162 U.S. 613, 623 (1896) (evaluating the voluntariness of a confession in federal court without explicit reliance on any particular constitutional provision, and holding that "the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort"). *Bram*, however, appears to reflect the Court's first articulated application of the Self-Incrimination Clause to such circumstances.

52. *Bram*, 168 U.S. at 542.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

compulsion. The *Boyd* Court had readily determined that production of documents under statutorily authorized threat of default forfeiture constituted compulsion.[53] In *Counselman*, the definition of compulsion had not even been at issue, for *Counselman's* compulsion was the primary form of legal compulsion historically recognized in Anglo-American courts, contempt punished by jail for refusal to answer.[54] The question of what constituted compulsion arose in *Bram* because the detective who questioned Bram after his arrest had no legal basis upon which to compel the answers from an in-custody arrestee.[55]

The *Bram* Court set forth "the general rule that the confession must be free and voluntary—that is, not produced by inducements engendering either hope or fear."[56] In addition to articulating the general standard for testing voluntariness, a standard that has undergone some modification,[57] two features of the *Bram* Court opinion deserve emphasis for our inquiry into disparate treatment. First, the *Bram* Court employed "compelled" and "not voluntary" interchangeably under a self-incrimination rationale, suggesting that, at least in 1897, the Court considered these concepts equivalent.[58] Second, in marked contrast to the Court's broad and demanding standard of full exoneration or transactional immunity in *Counselman*, there is no suggestion that the Self-Incrimination Clause requires total amnesty when a confession is compelled, not by an immunity statute, but by an overly zealous law enforcement officer. To the contrary, *Bram* and those cases to which the *Bram* Court makes prominent reference

53. *Boyd*, 116 U.S. at 633.

54. *Counselman*, 142 U.S. at 551-52. *See generally* FED. R. CRIM. P. 17(g) ("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court . . . .").

55. *Bram*, 168 U.S. at 556-57.

56. *Id.* at 557-58. The extent to which an "inducement engendering hope" would render a statement involuntary has been the subject of recent Court and scholarly commentary. For example, the Court in Arizona v. Fulminante, 499 U.S. 279, 285 (1991), stated that "although the Court noted in *Bram* that a confession cannot be obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence,' it is clear that this passage from *Bram* . . . under current precedent does not state the standard for determining the voluntariness of a confession." *Id.* (citing *Bram* 168 U.S. at 542-43 (quoting 3 H. SMITH & A. KEEP, RUSSELL ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896))). *See also* Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 952-53 (1994) (detailing *Bram*'s dwindling influence regarding government promises that produce confessions); George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 259 (1993) (advocating a return to some type of *Bram* "across-the-board prophylactic promise" protection).

57. *See supra* note 56.

58. *Bram*, 168 U.S. at 563-64.

Washington University Open Scholarship

merely require the excision of the offending incriminating remarks.[59] The Court's extreme solicitude regarding the scope of protection afforded compelled responses pursuant to an immunity statute, as demonstrated in *Counselman* and *Brown*, is conspicuously absent.

Perhaps the most persuasive proof of the Court's belief that a compelled or involuntary confession, one that did not stem from the immunity context, did not warrant complete amnesty finds voice near the conclusion of the majority opinion in *Bram*: "We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial."[60] The Court's terminology is neither "no new trial permitted" nor "if there is a new trial," but "on the new trial." Use of compelled utterances in this trial did not even raise an articulable possibility of a ban on a future trial. Nor is there any cautionary language regarding the effect that awareness of the incriminatory words may have on the efforts of future prosecutors. The concern of the Court in this regard is to insure that the offending remarks themselves are not presented to the trier of fact. The remedy for this improper compulsion, like that in *Boyd*, is excision of the offending material.

Thus, in 1897, compelling an utterance under the Self-Incrimination Clause might require the government to furnish total amnesty, as in *Counselman* immunity, or merely prohibit the government from introducing the statements before the trier of fact, as in *Bram* or *Boyd*. These are two profoundly different consequences derived from protection under the identical constitutional guarantee.

The contrast between the Court's treatment under the Self-Incrimination Clause of immunized statements and of other "involuntary or compelled" statements began a trend toward disparity that has persisted to this day. As pursued below, in the decades that followed, the basis for the exclusion of some involuntary confessions would shift from a self-incrimination analysis to a due process analysis. However, the essentially two-tiered approach—extreme solicitude for immunized statements and considerably less protection for other coerced statements—would continue.

---

59. *Id.* at 565. In today's spectrum of protection, *Bram* represents a more moderate form of protection than that generally provided to statements compelled by formal immunity grants. As the spectrum evolves, this band or tier of lesser protection, exemplified by *Bram*, is referred to as Tier Two.

60. *Id.*

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

B. Self-Incrimination in the Supreme Court: 1900-1963

The Court's next significant encounter with the Self-Incrimination Clause occurred in 1908, eleven years after *Bram*. In *Twining v. New Jersey*,[61] the Court held "that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution."[62] The *Twining* holding meant that the Self-Incrimination Clause would be available only in situations involving federal law enforcement officials and not for state law enforcement excesses resulting in involuntary confessions. *Twining* set the stage for the explicit schism in the constitutional basis for excluding compelled statements.

In *Brown v. Mississippi*,[63] the 1936 Court was faced with an egregious and uncontested example of an involuntary confession elicited from an in-custody suspect by brutal torture at the hands of state law enforcement officials.[64] The Court, without recourse to the Self-Incrimination Clause, determined that admission of such a confession violated the Due Process Clause of the Fourteenth Amendment.[65] The Court acknowledged its *Twining* holding, but concluded that "the question of the right of the State to withdraw the privilege against self-incrimination is not here involved."[66] Distinguishing *Twining* as compulsion involving "the processes of justice by which the accused may be called as a witness and required to testify,"[67] the Court asserted that "[c]ompulsion by torture to extort a confession is a different matter."[68] For twenty-eight years following *Brown*, those who sought to invoke the Supreme Court's power to reverse a state conviction based upon the admission of a compelled statement could look to the Due Process Clause for relief.[69]

61. 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

62. *Id.* at 114.

63. 297 U.S. 278 (1936).

64. *Id.* at 281-82.

65. *Id.* at 286-87.

66. *Id.* at 285.

67. *Id.*

68. *Id.*

69. Adamson v. California, 332 U.S. 46, 53-54 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964); Leyra v. Denno, 347 U.S. 556, 558 (1954) ("The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."). *See also* Herman, *supra* note 19, at 499 ("Between 1936 and 1964, the Court gave the confession rule its greatest development and direction by deciding more than thirty state cases involving claims of involuntariness. It resolved all of them under the Due Process Clause.") (footnotes omitted). Despite the Court's reliance on the Due Process Clause, some members of the Court had come

Washington University Open Scholarship

Whether recourse lay in due process for state prisoners, or self-incrimination and/or due process for federal prisoners,[70] compulsion by law enforcement officials never resulted per se in total amnesty; excision was the solution.[71] Where the evidence was otherwise sufficient, retrials were granted.[72] In these years, the Court also perpetuated the position of *Counselman*—that statements compelled by immunity required total deliverance.[73] This confirmed the enormous disparity in the scope of protection between statements compelled by formal immunity and those compelled by other persuasion.

Consistent with the approach begun in *Bram*, the Court seldom compared these two branches of self-incrimination doctrine. In those exceptional cases making reference to both halves of the dichotomy, the Court rarely provided more than cursory or cryptic comparisons.[74] In one unusual decision, *Shotwell Manufacturing Co. v. United States*,[75] the 1963 Court suddenly equated the protection to which immunized and coerced statements were entitled without acknowledging the long history of treating these statements disparately. The *Shotwell* Court considered the effect of a partially false disclosure under the Treasury Department's amnesty

over the years to view the Fourteenth Amendment as incorporating the Fifth Amendment's Self-Incrimination Clause. *Leyra*, 347 U.S. at 558 n.3. However, the Due Process Clause remains a viable vehicle for the suppression of compelled statements. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991).

70. The Court itself sometimes seemed ambivalent about the constitutional basis for federal exclusion. United States v. Carignan, 342 U.S. 36, 41 (1951) ("Whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy . . . .") (footnotes omitted).

71. Stein v. New York, 346 U.S. 156, 189 (1953) ("This Court never has decided that reception of a confession into evidence, even if we held it to be coerced, requires an acquittal or discharge of a defendant. On the contrary, this Court has returned all such cases for retrial, which we should not have done if obtaining and attempted use of a coerced confession were enough to require acquittal."). *Stein* was overruled on other grounds by Jackson v. Denno, 378 U.S. 368 (1964).

72. *See, e.g.*, *Jackson*, 378 U.S. 368.

73. The perception that the Self-Incrimination Clause required transactional immunity was reiterated by the Court in a number of cases. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906) ("The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.").

74. For example, in *Bram*, the Court makes reference to Brown v. Walker, 161 U.S. 591 (1896), a transactional immunity decision. But the citation relates to the historical development and subsequent inclusion of self-incrimination protection in the Constitution, rather than any comparison or discussion of differing scopes of protection afforded each type of compelled statement. Bram, 168 U.S. at 544-45.

75. Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

program, the "voluntary disclosure policy."[76] The policy, as described by the majority opinion, and as understood by the dissent, appeared to offer transactional or full immunity from prosecution for voluntary disclosure that preceded criminal investigation.[77] Yet, the Court, in a bizarre procedural twist, received the case as a suppression rather than as a dismissal question.[78] Having been procedurally metamorphosed from a transactional immunity dismissal question into a suppression or exclusion question, both the majority and the dissent classified the case under *Bram*.[79] After reciting the *Bram* test for voluntariness, the Court determined that a voluntary disclosure involving false information vitiated the immunity protection.[80] The Court was then able to conclude that the admission into evidence of the information furnished under the voluntary disclosure policy "did not offend the Self-Incrimination Clause of the Fifth Amendment."[81]

The *Shotwell* opinion is puzzling.[82] Ignoring the historical treatment descending from *Counselman*, the Court fails to explain why the *Shotwell* immunity circumstance, in which the discloser is promised protection

76. *Id.* at 344 ("In substance that policy amounted to a representation by the Treasury that delinquent taxpayers could escape possible criminal prosecution by disclosing their derelictions to the taxing authorities before any investigation of them had commenced.") (citation omitted).

77. *Id.* at 368-69 (Black, J., dissenting).

78. The defense moved the trial court for dismissal prior to trial, but the motion was denied. According to the dissent, the trial court had refused to dismiss because "the Treasury Department's promises of immunity were not authorized by statute, the Government was not legally bound to keep these promises and could therefore break faith with its taxpayers whenever it chose to do so." *Id.* at 369 (Black, J., dissenting). "Having been denied the promised immunity, the defendants then moved to suppress their confessions," that information which they had furnished under the voluntary disclosure policy. *Id.* This suppression motion relied on the Self-Incrimination Clause. It was the denial of this suppression motion and the affirmance of that denial by the court of appeals that the Supreme Court reviewed in *Shotwell*. *Id.* at 369-71 (Black, J., dissenting).

79. *Shotwell*, 371 U.S. at 347-48, 372.

80. *Id.* at 350.

81. *Id.* (footnote omitted). The Court appears to have treated the case using contract law concepts:

> [G]ranting that in deciding whether to disclose or run the risk of prosecution petitioners were initially justified in relying on the Treasury's general offer of immunity, once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it.

Id. at 349-50. Under a formal or statutory immunity grant, the usual penalty for false testimony is a perjury prosecution, rather than an invalidation of the immunity grant. Courts have, however, not uncommonly treated informal grants of immunity under contract principles. *See, e.g.*, United States v. Luloff, 15 F.3d 763, 766 (8th Cir. 1994) ("Informal immunity agreements are contractual in nature and are governed by ordinary standards of contract law.") (citations omitted).

82. For an analysis of the *Shotwell* opinion in the context of government promises and compulsion, see Dix, *supra* note 56, at 215 n.36.

Washington University Open Scholarship

against prosecution, is appropriately treated as an excision question. The opinion certainly suggests that some type of governmental immunity is equivalent to a *Bram* coerced confession and that both merit analysis under the same exclusionary framework.[83] Unfortunately, in this rare circumstance where there is an explicit juxtaposition of immunity and coerced confession, the Court fails to explain its choice of a coerced confession framework, and further fails to explain the relationship between coerced confessions and immunity. *Shotwell* represents a lost opportunity for delineating a framework for principled decisionmaking in scope cases.

C. *Self-Incrimination in the Supreme Court: 1964-1994*

The year 1964 was pivotal in the evolution of self-incrimination doctrine. In that year, the Court both incorporated the Fifth Amendment's Self-Incrimination Clause into the Fourteenth Amendment[84] and suggested that an immunity less encompassing than the transactional immunity required by *Counselman* might pass constitutional muster.[85]

In *Malloy v. Hogan*,[86] the Court revisited and overruled its 1908 *Twining* determination that the Self-Incrimination Clause did not bind the states.[87] In deciding, fifty-six years after *Twining*, that the Self-Incrimination Clause applied to the states, the Court turned full circle back to the 1897 decision in *Bram*. Justice Brennan even asserted that any distinction that developed in the 1936 *Brown v. Mississippi*[88] decision between the due process test and self-incrimination analysis "was soon abandoned,"[89] so that "today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897."[90] Although Justice Brennan's assertion that the Court had in fact applied the same standard to state coerced confession cases as it had to federal cases came under immediate attack by the dissent,[91] the intent

83. *Shotwell*, 371 U.S. at 347 (citing Bram, 168 U.S. at 542-43) ("We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment.").

84. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

85. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

86. 378 U.S. 1 (1964).

87. *Id.* at 2-3.

88. 297 U.S. 278 (1936).

89. *Malloy*, 378 U.S. at 6-7.

90. *Id.* at 7 (referring to and citing the *Bram* decision).

91. Justice Harlan, in dissent, stated:

The majority is simply wrong when it asserts that this perfectly understandable distinction

is clear in *Malloy* that in the future the tests should be identical. That now uniform test was "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. . . .'"[92] This regrounding of state coerced confession analysis in the Self-Incrimination Clause[93] underscores the continuing dichotomous treatment between statements compelled by immunity and those compelled by other forms of coercion. If both receive their primary protection from the Self-Incrimination Clause, what justification provides for the disparate treatment of the two types of compelled utterances?

Malloy's incorporation of the Self-Incrimination Clause also triggered developments in the immunity context. If the Fifth Amendment applied to the states, how could a state compel testimony pursuant to a state immunity order without guaranteeing the speaker Fifth Amendment protection against federal prosecution? Absent federal protection, the witness could justifiably contend that the state was violating her self-incrimination rights.

Thus in *Murphy v. Waterfront Commission*,[94] also decided in 1964, the Court broached the problem of intersovereign immunity in light of its decision in *Malloy*. In order to uphold a state grant of immunity without entirely preempting federal prosecution, the Court fashioned an immunity, less encompassing than that required in *Counselman*, to preserve the witness' federal right against self-incrimination.[95] The Court determined

---

> "was soon abandoned," *ante*, pp. 6-7. In none of the cases cited, *ante* pp. 7-8, in which was developed the full sweep of the constitutional prohibition against the use of coerced confessions at state trials, was there anything to suggest that the Fifth Amendment was being made applicable to state proceedings.

Id. at 18 (Harlan, J., dissenting).

92. *Id.* at 7 (quoting *Bram*, 168 U.S. at 542-43 (alteration in original)). For a discussion of the current voluntariness standard involving promises, see the sources cited *supra* note 56.

93. Two years after *Murphy*, the Court confirmed the applicability of self-incrimination protection to "constable's blunder" coerced confessions in Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* Court stated: "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside the 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." *Id.* at 467. The need to compare the disparate levels of protection and understand the disparities grew ever more apparent.

94. 378 U.S. 52 (1964).

95. The *Murphy* court described its immunity as follows:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him . . . . This exclusionary rule, while permitting the States to secure

Washington University Open Scholarship

that transactional immunity at the state level companioned by use and derivative use immunity at the federal level satisfied the dictates of self-incrimination protection.[96] By implying that, like "constable's blunder" coerced confessions, statements compelled by immunity might not necessitate total amnesty from prosecution, the Court enhanced the need to examine any disparities in the scope of protection for immunized statements and other compelled statements.

But Congress did not respond to *Murphy*, by authorizing use and derivative use immunity, until 1970.[97] In the interim (and years following), the richness of the protection spectrum remained to be fully plumbed. In 1968, two years before Congress replaced *Counselman*-style amnesty with *Murphy* use and derivative use protection, the Court invigorated yet another tier of protection, arguably a third tier. In *Simmons v. United States*,[98] the Supreme Court fashioned an exclusionary rule for statements given by a defendant at her pretrial motion to suppress evidence.

To advance a Fourth Amendment unlawful search and seizure claim through a motion to suppress in federal court, a defendant had to satisfy the criteria of standing.[99] Sometimes, the sole means of establishing the requisite connection between the items seized and the defendant was through the defendant's testimony.[100] To proceed on a motion to suppress, a defendant would take the stand and testify to his connection with the item in question, an item that might be the murder weapon or other incriminating evidence. These highly incriminating statements could then

---

> information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Id. at 79.

96. *Id.*

97. Congress responded in 1970 to the implications of the 1964 *Murphy* decision by passing the Organized Crime Control Act, which authorized grants of use and derivative use immunity rather than transactional immunity. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 926-932, contained the use immunity sections. Those sections are codified as amended at 18 U.S.C. §§ 6001-6005 (1988 & Supp. IV 1992).

98. 390 U.S. 377 (1968). The discussion of *Simmons* that follows is drawn largely from my earlier article, *Risks*, *supra* note 3, at 656-60.

99. *Simmons*, 390 U.S. at 389-90.

100. At the time of *Simmons*, the Court had articulated two circumstances in which the standing requirements were "relaxed." *Id.* at 390. Standing was relaxed when "seized evidence is itself an essential element of the offense" and where the defendant is "legitimately on [the] premises when the search occurs." *Id.* However, when the defendant's situation fell outside these two circumstances, she was required to establish standing. For the Supreme Court's more recent view of "standing," see United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

be used against the defendant in the subsequent trial. By asserting his Fourth Amendment claim, the defendant effectively waived his Fifth Amendment right. In reviewing this choice, the Court in *Simmons* found:

> [I]t [is] intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.[101]

Although the *Simmons* Court did not specifically apply the label "involuntary" to the defendant's testimony, the Court strongly suggested that the "undeniable tension"[102] between the choice of constitutional rights rendered this testimony involuntary.[103] As in *Bram*, which involved a coerced confession, *Simmons* protection does not preclude prosecution. Nor does the Court suggest that any precautionary measures need be observed to limit prosecutorial awareness of the defendant's incriminating testimony. This exclusionary rule, one the Court would later characterize as "a form of 'use immunity,'"[104] is a compromise method of relieving the accused of unpalatable choices: the speaker receives some protection for the testimony, the prosecution gains advantages varying from incidental to substantial in learning the incriminating information, and the trier of fact benefits from an augmented factual foundation upon which to decide the legal issue.

But *Simmons* is a problematic addition to the self-incrimination spectrum. Just three terms after *Simmons*, the Court retreated from and attacked *Simmons*' reliance on the Fifth Amendment.[105] In *McGautha v. Califor-*

---

101. *Simmons*, 390 U.S. at 394.

102. *Id.*

103. *Id.* The Court reasoned that although testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit:

> [T]he assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett [Simmons' co-defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination.

Id. (footnote omitted). For a sampling of varied interpretations of *Simmons*, see *Risks, supra* note 3, at 657 n.170.

104. United States v. Salvucci, 448 U.S. 83, 90 (1980).

105. In addition to the question of the legitimacy of *Simmons'* Fifth Amendment rationale, the extent to which *Simmons* places a prohibition on "fruits" or derivative evidentiary use is unclear. Although, as indicated below, direct evidentiary use and the corresponding derivative evidentiary use

Washington University Open Scholarship

nia,[106] the Court held that the unitary trial[107] of capital cases in Ohio did not unduly burden the defendant's Fifth Amendment right. The unitary trial required the "defendant to choose between remaining silent on the issue of guilt and addressing the court on the issue of punishment,"[108] a circumstance strongly resembling the *Simmons* burden. But *McGautha* characterized the "purely Fifth Amendment interests involved in *Simmons*"[109] as insubstantial,[110] and indicated that "to the extent that its rationale was based upon a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question."[111]

Nonetheless, the Supreme Court has not overruled *Simmons*. To the contrary, just six years after *McGautha*, the Supreme Court cited *Simmons* in defining the sacrifice of one constitutionally protected right for another as "coercive."[112] Additionally, in the 1990 decision of *Baltimore v. Bouknight*,[113] the Court cited *Simmons* to support the proposition that: "In a broad range of contexts, the Fifth Amendment limits prosecutors' ability

---

may be a viable option for impeachment purposes, *see infra* text accompanying notes 179-92, the extent to which the Court views *Simmons* as prohibiting "fruits" use in the prosecution's case-in-chief remains unarticulated. However, lower courts and commentators have interpreted *Simmons* as providing a form of use and derivative use immunity. *See Risks, supra* note 3, at 659-60.

106. 402 U.S. 183 (1971) (decided with its companion case, *Crampton v. Ohio*, 402 U.S. 183 (1971)).

107. Both guilt and punishment are determined in a single unitary trial proceeding. *Id.* at 191-92.

108. Joseph Doyle, Note, *The Due Process Need for Postponement or Use Immunity in Probation Revocation Hearings Based on Criminal Charges*, 68 MINN. L. REV. 1077, 1083 (1984). *See also* Stein, *supra* note 19, at 683-87. Crampton, the defendant in the case decided with *McGautha*, "contended that the Ohio unitary trial procedure was unconstitutional, since under it he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment." *Id.* at 684 (footnote omitted). In theory, the choice of rights presented in *McGautha* was between the Fifth Amendment right to remain silent and a due process right to allocution. Although the due process right to allocution may be more nebulous than the Fifth Amendment right to silence, Mr. Stein argues that because the Court assumed the existence of this allocution right, that nebulousness is not a valid ground for distinction. *Id.* at 685 n.70.

109. *McGautha*, 402 U.S. at 212.

110. *Id.*

111. *Id.* In *McGautha*, the Court indicated that in the determination of a constitutional violation, "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 213. *Compare Simmons*, 390 U.S. at 394 (holding that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection") *with* Baxter v. Palmigiano, 425 U.S. 308, 320 (1976) (permitting prison authorities to draw adverse inferences from prisoner's silence at a disciplinary hearing).

112. Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977).

113. Baltimore Dep't of Social Servs. v. Bouknight, 493 U.S. 549 (1990).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

to use testimony that has been compelled."[114] Arguably, then, the characterization of *Simmons* testimony as "compelled," in Fifth Amendment terminology, retains some vitality. Without this characterization, *Simmons* could not be included as a level of compelled statement treatment.

The creation of the *Simmons* tier clearly implicated the application and scope of self-incrimination protection. Nonetheless, *Simmons* mentions neither *Bram* nor *Counselman* (nor *Murphy*), and supplies no comparison with the other levels of protection the Court had already created. Notwithstanding this omission, both the language used in the opinion and common sense show that *Simmons* competing rights protection is clearly not *Counselman* transactional immunity. The language of the decision indicates that a defendant must object to the introduction of her *Simmons* testimony at trial in order to have it excluded. The need for objection and protection through exclusion suggests a lesser protection than transactional immunity. Similarly, common sense dictates that the *Simmons* Court did not equate its exclusion with a prohibition on prosecution. Otherwise, any defendant who wished to prevent prosecution would simply make a motion to suppress evidence prior to trial and testify to avoid being prosecuted on the underlying charge. The difficult and, at this stage in the evolution, unresolved question is whether *Simmons* competing rights protection is the same as *Bram* coerced confession protection. Both provide exclusion as a remedy. Both require some action on the part of the defendant to have the statements excluded: in *Simmons*, the defendant must object, in *Bram*, the defendant must demonstrate in a hearing that the confession was not voluntary. But the Court would not offer clarification of the relationship between coerced confessions and competing rights protection for at least a decade.

Three years after *Simmons*, the Court evaluated a self-incrimination challenge to a hit-and-run statute requiring a driver involved in an accident to notify the owner of property the driver had damaged.[115] The California Supreme Court found a tension between the reporting requirement of the

114. *Id.* at 562 (citing *Simmons*, 390 U.S. at 391-94). The Court cited *Simmons* first among the cases it used to support that proposition. *Id.* The citation to *Simmons* was accompanied by an explanatory parenthetical stating, "no subsequent admission of testimony provided in suppression hearing." *Id.*

115. California v. Byers, 402 U.S. 424, 426 (1971) (quoting CAL. VEH. CODE § 20002(a)(1) (Supp. 1971)). The statute required the driver "involved in an accident resulting in damage to any property including vehicles [to] . . . [l]ocate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved." *Id.*

Washington University Open Scholarship

statute and the Fifth Amendment.[116] To obviate that tension, the California court created a "use restriction"[117] on the information divulged by the driver to protect against subsequent use in a criminal prosecution. In a plurality opinion, the United States Supreme Court considered the statute and ultimately rejected the need for a use restriction.[118] The Court concluded "that there [was] no conflict between the statute and the privilege."[119] Of particular interest is the method the plurality used to arrive at its conclusion—explicit balancing.

> Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.[120]

The balance was between state interest and individual constitutional right. The balancing, acknowledged as inevitable, arises here in a regulatory, rather than a criminal, context. Of particular cogency, however, is that in concluding that no conflict existed, the *Byers* Court avoided altogether the question of the scope of protection for compelled utterances.[121] What *Byers* does indicate is that at least in some regulatory self-incrimination contexts, balancing may be a permissible means of reconciling conflicts between the self-incrimination privilege and government interests.

Between *Simmons* in 1968 and *Byers* in 1971, Congress incorporated the use immunity theory of *Murphy* into the Organized Crime Control Act

116. *Id.* at 427.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Byers* was certainly not the Court's first contact with self-incrimination issues outside the confines of the traditional criminal prosecution context. *See, e.g.*, United States v. Sullivan, 274 U.S. 259 (1927) (finding the Fifth Amendment did not exempt a taxpayer from filing a tax return for illegal liquor traffic, but suggesting that the Fifth Amendment could appropriately be asserted in response to particular questions on the return). *Compare id. with* Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77-79 (1965) (distinguishing *Sullivan* and finding the privilege a bar to forced disclosure and registration by members of a Communist organization) *and* Marchetti v. United States, 390 U.S. 39, 41-42 (1968) (finding the privilege a bar to forced disclosure and registration for a federal gambling tax). The Court in *Byers* clarified that the condemned disclosures in *Albertson* and *Marchetti* were, inter alia, "not in 'an essentially noncriminal and regulatory area of inquiry.'" 402 U.S. at 430 (quoting *Albertson*, 382 U.S. at 429) (citations omitted).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

(OCCA).[122] Transcribing the Court's apparent change of perspective on the need for *Counselman* transactional immunity, Congress empowered the government to confer an immunity less encompassing than transactional and still compel testimony.[123] The new immunity protected the speaker from use and derivative use of the testimony.[124] A challenge to the new legislation reached the Court in 1972 in the seminal case of *Kastigar v. United States*.[125]

Kastigar unveiled use immunity as an official tier of the protection spectrum, replacing the *Counselman* transactional immunity tier.[126] Three tiers of protection were now available for compelled statements: *Kastigar's* use immunity, *Bram's* coerced confession exclusion, and *Simmons'* competing rights exclusion. With the formal advent of approved use immunity, the need for comparison among the tiers grew more insistent. Was *Kastigar* immunity equivalent to *Bram's* exclusion or *Simmons'* protection? *Kastigar* furnishes some clues because it is one of the exceptional cases in which the Court posits a relationship between two of the spectrum's tiers.[127] The Court explicitly analogized the statutory use and derivative use immunity of the OCCA to the type of compelled statement in *Bram*.

> A coerced confession, as revealing of leads as testimony given in exchange for immunity, is inadmissible in a criminal trial, but it does not bar prosecution. . . .
>
> There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.[128]

---

122. 18 U.S.C. §§ 6001-6005 (1988). *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 276 (1983) (Blackmun, J., concurring) ("[T]he Reports state that the statutory immunity provided by § 6002 'is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* . . . rather [than] the transaction immunity concept of *Counselman*.'") (alterations in original).

123. *See* 18 U.S.C. §§ 6001-6005 (1988).

124. *Id.*

125. 406 U.S. 441 (1972).

126. "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Id.* at 453.

127. *Id.* at 461-62.

128. *Kastigar*, 406 U.S. at 461-62 (footnotes omitted). Support for a reading of *Kastigar* that provides parity in the scope of protection for immunized statements and coerced confessions may also

Washington University Open Scholarship

But the *Kastigar* analogy to coerced confessions, and to the moderate protection of excision, conflicts with language earlier in the opinion where the Court rhapsodizes about the comprehensive scope of protection that *Kastigar* use immunity will provide. The Court speaks, for example, of prohibiting "the prosecutorial authorities from using the compelled testimony in *any* respect."[129] Yet *Bram* prosecutors and *Simmons* prosecutors use the accused's testimony in many respects. Nonevidentiary uses, for example, are common in both the *Bram* and *Simmons* contexts.[130] The many incidental advantages that accrue from knowledge of the defendant's statements assist the *Bram* and *Simmons* prosecutors.[131] Are such uses forbidden *Kastigar* prosecutors?

The *Kastigar* Court does acknowledge that immunity protection relieves a defendant of the burden of proving involuntariness,[132] a necessary prerequisite to excision in *Bram*. Such proof is unnecessary here, where the compulsion is by court order and threat of contempt for failure to respond

---

be found, for example, in the Court's reference to the work of the National Commission on Reform of Federal Criminal Laws and its influence on the enactment of the OCCA. *Id.* at 452 n.36. The Court cites a Commission report that asserts that "'[t]he proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.'" *Id.* (quoting the Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission 1446 (1970)).

129. *Id.* at 453. Immunity protection should, however, be limited to utterances responsive to the question posed. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 476-78 (1972); Strachan, *supra* note 19, at 803 n.48.

130. *See Risks, supra* note 3, at 654-58 (discussing nonevidentiary use issues in the *Bram* and *Simmons* contexts and citing pertinent authorities). Nonevidentiary uses might include, for example, increased prosecutorial confidence in the guilt of the defendant or greater reluctance to plea bargain.

131. That the Court has entertained a relatively relaxed view of some types of prosecutorial use in the *Bram* tier is reflected in the Court's willingness, for a number of years, to allow jurisdictions to entrust juries as the ultimate arbiters of a confession's voluntariness. *See* Stein v. New York, 346 U.S. 156 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964). Pursuant to the New York procedure in *Stein*, the judge conducted a preliminary inquiry on the question of voluntariness. *Id.* at 172. However, the judge was "not required to exclude the jury," *id.*, during that hearing. (Perhaps, the *Stein* Court indicated, the judge was "not permitted to do so." *Id.*) At the conclusion of that hearing, apparently conducted in the trial jury's presence, the judge made an initial determination as to voluntariness. *Id.* The judge was required to "exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence." *Id.* However, "[i]f the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness." *Id.* Although the procedure in *Stein* was held unconstitutional in 1964, clearly during the period of its employ, the range of accepted prosecutorial uses of that confession, even where it was ultimately determined by the jury to be involuntary, was quite substantial.

132. *Kastigar*, 406 U.S. at 461-62.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

to the interrogator's questions.[133] But the *Kastigar* analysis does little to elucidate the relationship between *Bram* protection and *Kastigar* protection. Moreover, the *Kastigar* Court never mentions *Simmons*. Instead of supplying a principled framework to help differentiate among the protection tiers, *Kastigar* ignited a debate among courts and commentators on the scope of protection appropriate to this tier of the spectrum.[134]

The ambiguity of the holding, coupled with the absence of explicit direction from the Supreme Court, has produced a splintering among circuits on the appropriate scope of protection for statements obtained pursuant to 18 U.S.C. § 6002 (the OCCA).[135] Some courts, like the District of Columbia Circuit in *United States v. North*,[136] furnish extensive protection.[137] Others, like the Second Circuit in *United States v. Helmsley*,[138] offer less protection,[139] but perhaps still greater protection than that contemplated by the *Bram* coerced confession tier.

If we assume that *Kastigar*'s analogy to coerced confessions does not equate those two forms of protection, then, by 1972, the Court had created at least three tiers in the protection spectrum. Tier One is *Kastigar* use immunity protection. Tier One protection results from a formal governmental grant of immunity. It provides use and derivative use immunity. The language of the *Kastigar* opinion appears to impose a stringent standard of scrutiny on prosecutorial uses of the immunized statements.[140] Certainly,

---

133. "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.*

134. *See Risks, supra* note 3, at 645-53 (detailing various responses to *Kastigar*). In the companion case to *Kastigar*, Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), the Court held that a New Jersey statute provided use and derivative use immunity coextensive with the scope of Fifth Amendment protection. *Id.* at 475. The language of the New Jersey statute focused more on the term "evidence" than the OCCA language upheld in *Kastigar*. Following testimony under the immunity grant, the New Jersey "statute provided that: 'he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution . . . .'" *Id.* The New Jersey statute's language strongly suggests that the use prohibition sufficient to satisfy the Fifth Amendment is solely an evidentiary use restriction.

135. *Risks, supra* note 3, at 645-53.

136. 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

137. For a discussion of the rigor of the standard in *North*, see *Risks, supra* note 3, at 652-53; Murphy, *supra* note 19.

138. 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992).

139. For an analysis of the level of protection in *Helmsley*, see *Risks, supra* note 3, at 650-51.

140. *Kastigar*, 406 U.S. at 460 ("impos[ing] on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony").

Washington University Open Scholarship

the *Bram* decision had never required the intense scrutiny that the *Kastigar* Court may be read to have imposed.[141] Precisely how far this stringent scrutiny would extend was not resolved in *Kastigar*. In particular, the Court did not explicitly treat the question of evidentiary use for impeachment purposes or the precise restrictions, if any, on nonevidentiary use. While the *Kastigar* Court does make some reference to prohibiting particular uses, those of using testimony "as an investigatory lead"[142] or using "any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures,"[143] the *Kastigar* Court does not classify these uses as evidentiary or nonevidentiary.[144]

Tier Two protection, resulting from the coercion of the "constable's blunder" in *Bram*, is also a form of use immunity. But the protection it provides seems much less expansive than Tier One *Kastigar* immunity.[145] As in Tier One, the possibility of impeachment use remained an open question in 1972. Unlike in Tier One, nonevidentiary uses were accepted practice.[146] The existence and contents of the coerced confession almost certainly formed a part of the prosecutor's file. The prosecutor who would try the case would likely be the same one who would litigate the question of voluntariness. Before the hearing on voluntariness, the statement often served multiple "nonevidentiary uses,"[147] including facilitating an understanding of the case, influencing plea bargaining stance, and modifying trial strategy decisions.

Tier Three is the compulsion resulting from the tension between competing constitutional rights. In 1972, it resembled Tier Two. Prosecu-

---

141. A number of lower courts have read the *Kastigar* language to require this exacting scrutiny in demonstrating nonuse of the compelled testimony. Perhaps the most prominent of these is the D.C. Circuit in the *North* case. The District of Columbia Circuit in *North* indicated that the hearing in which prosecutorial use would be scrutinized upon remand to the trial court "must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item." *North*, 910 F.2d at 872.

142. *Kastigar*, 406 U.S. at 460 (citation omitted).

143. *Id.*

144. In addition, questions concerning application of the attenuation-of-taint and inevitable discovery doctrines, and their effect on the issue of derivative use remain unresolved in the *Kastigar* context. *See infra* notes 207-30 and accompanying text; *see also Risks, supra* note 3, at 651 n.137 (citing various interpretations).

145. *See Risks, supra* note 3, at 653-56 (describing an area of "moderate" scrutiny).

146. "Use preclusion in coerced confession cases only prohibits direct and derivative evidentiary use. Prosecutorial knowledge of illegally extracted information and nonevidentiary use are not prohibited." Strachan, *supra* note 19, at 831. For a discussion of the effect of attenuation and inevitable discovery on this tier, see *Risks, supra* note 3, at 655.

147. Because the definition of nonevidentiary use is an open question, I name these uses with some hesitation.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

tors knew of the existence and content of the *Simmons* testimony because the defense was required to object before the testimony became inadmissible. Impeachment use was an open question; nonevidentiary use was the norm.[148] Succeeding terms, as described below, have chiseled only a few additional contour lines to render more clearly the scope of protection in each tier.

In 1974, two years after *Kastigar*, the Court decided the Fourth Amendment case of *United States v. Calandra*.[149] In *Calandra*, the Court affirmed the position it had adopted many years earlier,[150] that introduction of "incompetent" evidence before a grand jury did not render the indictment subject to challenge.[151] *Calandra* both reaffirmed this position with respect to the Fourth Amendment[152] and reiterated its application[153] to the Fifth Amendment.[154] Pursuant to the *Calandra* line of cases, "although 'the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee' against self-incrimination, . . . an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination 'is nevertheless valid.'"[155]

The Court's deferential approach to the grand jury's province suggests that the assessment by the models developed in Part III of the scope of permitted prosecutorial use may be limited to the question of trial use.

---

148. For a more detailed discussion of Tier Three protection, see *Risks, supra* note 3, at 656-64.

149. 414 U.S. 338 (1974). I have chosen this somewhat unusual vehicle (a Fourth Amendment decision) to address grand jury use of "incompetent" evidence because *Calandra* is a decision that succeeds *Kastigar*. Understanding *Kastigar* facilitates discussion of the very different approach that lower courts have, as a general rule, taken with respect to grand jury consideration of immunized testimony than the one promulgated by the Supreme Court with respect to "incompetent" Fifth Amendment evidence generally.

150. The Court adopted this position at least as early as 1910. *See* Holt v. United States, 218 U.S. 245 (1910); *see also* United States v. Costello, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966).

151. *Calandra*, 414 U.S. at 344-45.

152. *Id.* at 344-45, 351-52.

153. Albeit in dicta.

154. *Calandra*, 414 U.S. at 344-45 ("[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.") (citations omitted); Lawn v. United States, 355 U.S. 339 (1958).

155. United States v. Williams, 112 S. Ct. 1735, 1743 (1992) (citations omitted) (declining to require prosecutors to disclose exculpatory evidence before grand juries). *Williams* continued the *Calandra* line of cases by reaffirming the Court's deferential approach to the province of the grand jury. The *Williams* Court characterized the "grand jury proceeding's status as other than a constituent element of a 'criminal prosecutio[n].'" *Id.* (citing U.S. CONST. amend. VI).

Washington University Open Scholarship

Nonetheless, lower courts generally, with respect to the immunity tier of *Kastigar*, have not adopted the Court's deferential attitude toward prosecutorial use of immunized evidence before the grand jury.[156] Lower court treatment demonstrates a greater willingness to intervene to protect immunized material in the grand jury context than the Court's traditional deferential approach to grand jury consideration of evidence implicating the Fifth Amendment.[157] Greater scrutiny of prosecutorial use, while inconsistent perhaps with the Court's historical approach to grand juries, is consistent with the Court's historical approach to immunized testimony. Whether lower court treatment is an accurate assessment, imposing greater limits on prosecutorial use in the immunity tier, or whether the traditional approach to grand juries will prevail, remains to be determined.

During 1974, the Court also decided *Lefkowitz v. Turley*.[158] Consistent with a series of earlier decisions,[159] the Court found that a New York statute requiring a state contractor to either waive immunity "when called to testify concerning his contracts with the State" or pay the penalty of having existing contracts canceled and being barred from contracting with

156. For a discussion of the approaches of a number of circuit courts, see *Risks*, *supra* note 3, at 649 n.125. Unlike the position advanced by the Supreme Court's position advanced with respect to Fifth Amendment evidence generally, lower courts have permitted challenges to grand jury indictments on the basis that immunized testimony has been introduced before the grand jury. *See id.* Lower courts sometimes distinguish indictments challenged upon evidence improperly obtained in the "evidence-gathering process" from those challenging improprieties "within the grand jury process itself." United States v. Zielezinski, 740 F.2d 727, 732 (9th Cir. 1984). The argument, pursuant to this distinction, is that the violation in the latter context occurs at the time immunized information is introduced before the grand jury whereas with a traditional coerced confession, the "violation" would already have occurred before the evidence was introduced in front of the grand jury.

157. *See Risks*, *supra* note 3, at 649 n.125.

158. 414 U.S. 70 (1973).

159. The Court treated the intersection of the Fifth Amendment and limitation or termination of employment in several cases in the late 1960s and early 1970s. On various occasions the Court found the sanction of termination of employment sufficient to implicate Fifth Amendment protections. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that statements taken from police officers under threat of dismissal could not be used against the officers in a criminal proceeding); Gardner v. Broderick, 392 U.S. 273 (1968) (holding that a state could not require its employees to sign a waiver of immunity, but could require its employees to answer questions regarding employment under threat of discharge if the employee received use immunity for his or her answers); Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 392 U.S. 280 (1968) (holding that city-employed sanitation men could not be terminated for asserting their Fifth Amendment right to refuse to answer questions under threat of termination during an internal affairs proceeding, but allowing dismissal for refusal to account for public trust if no attempt were made to coerce them to relinquish their Fifth Amendment right); Spevack v. Klein, 385 U.S. 511 (1967) (holding that an attorney who asserts his Fifth Amendment right and refuses to testify or produce documents in bar disciplinary hearing could not be disbarred for such refusal).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

the State for five years[160] violated the Fifth Amendment. The choice between employment and incrimination was sufficient compulsion to implicate the Self-Incrimination Clause. In the *Turley* decision, the Court referenced both *Kastigar* and *Bram*.[161] An illustrative example follows:

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram v. United States, supra; Boyd v. United States, supra.*[162]

Does the juxtaposition of *Kastigar* and *Bram/Boyd* suggest equality in scope of protection? Although that inference is not unreasonable, the Court, consistent with the evolution of doctrine in this area, did not clarify the relationship between the two spheres of protection. Of course, the scope question was not before the Court. Rather, the Court was simply determining if the compulsion in question, coupled with a requirement of waiver of immunity, exceeded the Fifth Amendment threshold. The absence of explicit guidance leaves interpreters to infer and speculate.

If *Turley* continued the guidance gap, the Court's 1977 decision in *Lefkowitz v. Cunningham*[163] magnified the problem. The *Cunningham* Court confronted a Fifth Amendment quandary substantially similar to that of *Turley*: "whether a political party officer can be removed from his position by the State of New York and barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination."[164] The Court concluded that section 22,[165] the statutory section that provided for removal, "is . . . constitutionally indistinguishable from the coercive provisions we struck down in . . . *Turley*."[166] Does the Court mean that if statements had been compelled, they would have received *Kastigar* protection or *Bram/Boyd* protection? Or, as the Court suggests on the

160. *Turley*, 414 U.S. at 71.
161. *Id.* at 78. Following the references to *Bram*, the Court also referred to *Boyd*. *Id.*
162. *Id.*
163. 431 U.S. 801 (1977).
164. *Id.* at 802.
165. N.Y. ELEC. LAW § 22 (McKinney 1964).
166. 431 U.S. at 807.

Washington University Open Scholarship

succeeding pages, would the statements be entitled to *Simmons* protection?[167]

After concluding that section 22 violated the potential speaker's Fifth Amendment right for the reasons enunciated in *Turley*, the Court analogized to *Simmons*: "Section 22 is coercive for yet another reason: It requires [the officer] to forfeit one constitutionally protected right as the price for exercising another. See *Simmons* . . . ."[168] The conflict appears to involve the Fifth Amendment right to protection against self-incrimination and the First Amendment freedom of participation in "voluntary political associations."[169] Does the speaker compelled to choose between loss of employment and self-incrimination receive the protection of *Kastigar* or *Bram/Boyd* or *Simmons*? The Court failed to answer this question, and it failed to spell out the relationship among these spheres of protection.

In 1978, the Court did address the permissibility of the use of Tier Two statements of the *Bram* coerced confession variety for evidentiary impeachment purposes. In *Mincey v. Arizona*,[170] the Court relied on a due process rationale to clarify that the Constitution prohibited impeachment use of involuntary statements.[171] One contour of coerced confession scope doctrine could now be inked. The Court would permit no direct evidentiary use of *Bram* Tier Two coerced confessions. *Mincey* did not address whether impeachment use would be permitted in Tier One or Tier Three.

Although fourteen years had passed since the application of the Self-Incrimination Clause to the states, the Court in *Mincey* continued to rely on a due process rationale for evaluating involuntary statements.[172] As the majority opinion in *New Jersey v. Portash*[173] would clarify in the following term, the Court viewed due process involuntariness as equivalent to self-incrimination compulsion.[174] In addition to employing due process and self-incrimination interchangeably, *Portash* is a crucial decision in the evolution of scope-related cases. The Court in *Portash* determined that, for

167. *Cunningham*, 431 U.S. at 807-08.

168. *Id.* (citing Simmons v. United States, 390 U.S. 377, 394 (1968)).

169. *Id.* at 808.

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

171. "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law . . . ." *Id.* at 398 (emphasis in original).

172. This practice has continued to the current day. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991). For an extensive analysis of the relationship between due process and self-incrimination, see Herman, *supra* note 19.

173. 440 U.S. 450 (1979).

174. *Id.* at 459.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

Tier One statements, like those of Tier Two, the Fifth Amendment prohibited the evidentiary use of compelled statements to impeach the defendant at a later criminal trial on the underlying offense.[175] One passage in the Court's opinion is particularly enlightening for our study of disparate treatment:

> Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. . . . Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.[176]

This passage is critical in the development of scope doctrine. First, the Court decided that the Fifth Amendment forbids evidentiary impeachment use at trial of the accused's involuntary statements whether obtained through a formal grant of immunity or beaten from the accused at the police station. The question of evidentiary impeachment use had thus been resolved for both Tier One and Tier Two statements. Such use was impermissible in both tiers. Like the analogy in *Kastigar*, this passage from *Portash* suggests a parity in scope between coerced confessions and immunized statements, at least on the question of evidentiary trial use. Second, the Court stresses that these circumstances are above balancing. A pristine invocation of the privilege, presumably one resulting from "[t]estimony given in response to a grant of legislative immunity,"[177] or perhaps encompassing testimony in response to any influence sufficient to be called compulsion, sets an inflexible standard on the scope of direct evidentiary trial use.

By the time of the *Portash* decision in 1979, courts and commentators had been struggling to understand the scope of *Kastigar* and the relation-

---

175. *Id.* at 459-60. The compelled statements in *Portash* were made during immunized grand jury testimony. *Id.* at 451-52.

176. *Id.* at 459. The cases referred to in the passage are Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S. 714 (1975).

177. *Portash*, 440 U.S. at 459.

Washington University Open Scholarship

ship between *Kastigar* immunity and *Bram* confessions for seven years. Although offering some guidance through its language and its reliance on *Mincey*, a coerced confession case, to support its holding,[178] the *Portash* Court did not articulate principles animating the relationship between the *Kastigar* immunity at issue in *Portash* and the compulsion in *Mincey*. And, consistent with the evolution of scope doctrine, *Portash* makes no mention of *Simmons*.

The failure to engage in comparative scrutiny surfaced in the term following *Portash* when the Court reconsidered the *Simmons* doctrine. The 1980 decision in *United States v. Salvucci*[179] reaffirmed the limited "use immunity" of *Simmons*.[180] In direct contrast to the explicit prohibition for Tier One and Two statements in *Portash* and *Mincey*, *Salvucci* announced that the direct evidentiary use of the defendant's *Simmons* testimony (Tier Three) for impeachment purposes remained an open question.[181] In formally declining to "decid[e] whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial,"[182] the Court lists, without disapproval, lower tribunals which had held *Simmons* testimony admissible for impeachment use.[183] Further supporting the inference that impeachment use does not infringe upon the scope of protection in this tier of the protection spectrum, the *Salvucci* Court reiterates[184] an earlier holding[185] that "the protective shield of *Simmons* is not to be converted into a license for false representations."[186] Of course, the majority opinion in *Salvucci* discusses neither *Portash* nor *Mincey*.[187]

---

178. *Id.*

179. 448 U.S. 83 (1980).

180. "This Court's ruling in *Simmons* . . . grants a form of 'use immunity' to those defendants charged with nonpossessory crimes." *Id.* at 90.

181. *Id.* at 93-94. However, the dissent characterized the majority's position as "broadly hint[ing]" that "the testimony given at the suppression hearing might be held admissible for impeachment purposes." *Id.* at 96 (Marshall, J., dissenting).

182. *Id.* at 94.

183. *Id.* at 93 n.8.

184. The reiteration comes in a footnote of *Salvucci*. *Id.* at 94 n.9.

185. United States v. Kahan, 415 U.S. 239 (1974).

186. *Salvucci*, 448 U.S. at 94 n.9 (quoting *Kahan*, 415 U.S. at 243). For a critique of the Court's citation to *Kahan* and the implication that impeachment use would be permissible, see LAFAVE & ISRAEL, *supra* note 33, at 468-69 & n.5. Professors LaFave and Israel argue that *Simmons* testimony should qualify as "compelled," and be subject to the impeachment restriction of *Portash*. *Id.*

187. The dissent, by contrast, does cite *Portash*. *Portash* is cited as a *but see* reference in response to the majority's apparent inclination to permit impeachment use of *Simmons* testimony. *Id.* at 96 (Marshall, J., dissenting).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

One ready explanation of the Court's decision to leave impeachment use as a viable possibility in Tier Three is the criticism launched earlier: *Simmons* testimony is not compelled under the Self-Incrimination Clause definition.[188] But that explanation (as indicated earlier[189]) contradicts the language in the 1990 decision of *Baltimore v. Bouknight*,[190] which uses *Simmons* to illustrate the Fifth Amendment limits on the use of "testimony that has been compelled."[191] Moreover, because *Bouknight* arose in the context of a state proceeding, over which the Supreme Court generally has no supervisory power, the Court's decision presumably relies on some constitutional provision. The Self-Incrimination Clause seems the logical choice, particularly because the Court in *Salvucci* chose to reaffirm, rather than repudiate, its *Simmons* holding.[192]

The *Salvucci* case presented the Court with the opportunity to unify the treatment of all three tiers with respect to direct evidentiary impeachment use of compelled statements. In declining to rule against impeachment use, the *Salvucci* Court chose the path of disparity rather than consistency of treatment in scope doctrine. The most disturbing feature of the Court's choice is its failure to relate that choice to the distinctly different choices it made, just one and two years earlier, with respect to the same question in Tier One and Tier Two cases.

In the same year as the Tier Three *Salvucci* decision, the Court also addressed a scope question in a Tier One statutory use immunity context. The decision in *United States v. Apfelbaum* concerned the direct admissibility of prior immunized testimony in a prosecution for false statements during that testimony.[193] The Court acknowledged that a "source of . . . difficulty"[194] for lower courts in ascertaining the admissibility of prior immunized testimony rested with the Court itself, in the particular language of its earlier decisions in *Kastigar* and *Portash*.[195] The phrases "prohibit[ing] the prosecutorial authorities from using the compelled testimony in

188. *See supra* notes 105-11 and accompanying text.

189. *See supra* notes 112-14 and accompanying text.

190. 493 U.S. 549 (1990).

191. *Id.* at 562.

192. For a discussion of a Fourth Amendment rationale for *Simmons*, see Stein, *supra* note 19, at 685.

193. United States v. Apfelbaum, 445 U.S. 115 (1980). The OCCA explicitly authorizes use of the immunized testimony in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1988).

194. *Apfelbaum*, 445 U.S. at 120 n.6.

195. *Id.*

Washington University Open Scholarship

any respect"[196] and "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law"[197] certainly, if read literally,[198] would have precluded admission of the immunized testimony before the trier of fact in this case. In deciding that immunized testimony, both the false and the true portions, could be directly admissible in a prosecution of the speaker for false swearing, the Court retreated from a literal reading of the sweeping prohibitions on "*any*" use or "*any* criminal trial use" in the *Kastigar* and *Portash* decisions, respectively.[199] Although *Apfelbaum* is instructive for the Court's retreat from a literal reading of *Kastigar* and *Portash*, cases like *Apfelbaum*, those separate prosecutions which involve offenses, like false swearing, that are integral to the act of giving compelled testimony or failing to do so, are not the subject of the proposed models. Rather, the models address prosecutorial use of compelled statements in cases prosecuting offenses involved in the underlying circumstances about which the defendant was compelled to speak.

Several developments important to both the scope doctrine and the models later proposed transpired in the decade after *Salvucci* and *Apfelbaum*. The first development of note was the 1983 *Pillsbury Co. v. Conboy* decision.[200] In *Conboy*, the interrogator was a private litigant who sought to compel a witness' responses at a deposition by claiming that the questions and answers closely tracked, and were therefore derived from, earlier immunized testimony.[201] The Court construed the federal immunity provision of the OCCA[202] under which the original grant of immunity had been conferred.[203] It determined that "a deponent's civil deposition testimony, repeating verbatim or closely tracking his prior immunized testimony, is [not] immunized 'testimony' that can be compelled over the

196. *Kastigar*, 406 U.S. at 453 (emphasis in original).

197. *Portash*, 440 U.S. at 459 (quoting *Mincey*, 437 U.S. at 398 (emphasis in original)).

198. *Apfelbaum*, 445 U.S. at 120 n.6.

199. For analyses of the *Apfelbaum* and *Portash* decisions, see Richard S. Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421, 450 (1980) ("Statements such as immunized testimony 'cannot be used in any respect' and 'the witness and government must be in the same position before and after the immunity is granted' have become slogans with a life of their own, applied without any clear discussion of their underlying rationale."), and Peter Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690 (1982).

200. 459 U.S. 248 (1983).

201. *Id.* at 250-52.

202. Specifically, the Court was construing 18 U.S.C. § 6002 (1976).

203. *Conboy*, 459 U.S. at 260-62.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

valid assertion of his Fifth Amendment privilege."[204] Of importance for our purposes is the Court's emphasis on the prosecutorial control and choice exercised in the conferring of immunity. According to the Court, "[u]se immunity was intended to immunize and exclude from a subsequent trial only that information to which the Government expressly has surrendered future use."[205] Similarly, the Court underscored that the authority to immunize "is peculiarly an executive one."[206] Although the decision represented an interpretation specifically of the OCCA immunity provision, *Conboy* may imply that prosecutorial control over immunity is a significant factor in distinguishing among the tiers of protection.

Dicta in a case from the Court's 1984 term also requires discussion here. In *Nix v. Williams*,[207] the Court addressed both the application and limitations of the fruit-of-the-poisonous-tree doctrine in the context of the Sixth Amendment right to counsel. The fruit-of-the-poisonous-tree doctrine developed in response to police violations of individuals' Fourth Amendment rights against unreasonable search and seizure.[208] Under this doctrine, courts exclude not only "the illegally obtained evidence itself, but also . . . other incriminating evidence derived from the primary evidence."[209] The doctrine rests on a deterrence rationale.[210] Pursuant to this rationale, police officers will have greater incentive to respect the

---

204. *Id.* at 250, 263-64.

205. *Id.* at 260.

206. *Id.* at 261. The Court did not address the provisions of the OCCA that empower Congress, various committees, and other agencies to confer immunity. The importance of prosecutorial control over the decision to grant immunity will play a role in the balancing model. In addition to the Court's emphasis that, at least pursuant to the immunity statute, immunity is an executive, in fact a prosecutorial function, *Conboy*, 459 U.S. at 261, the *Conboy* decision also makes oblique reference to the scope of protection that such immunity will command. In criticizing the district court for compelling the deponent to respond to questions, the Supreme Court suggested that the district court "essentially predicted that a court in any future criminal prosecution of Conboy will be obligated to protect against evidentiary use of the deposition testimony. . . ." *Id.* The Court's choice of the limiting term *evidentiary* may, consistent with the analogy to coerced confessions in *Kastigar*, suggest that § 6002 immunity protects against evidentiary use only: that nonevidentiary use is not governed by the Fifth Amendment. Nonetheless, many commentators and lower courts continue to view *Kastigar* immunity as substantially broader than the *Bram* coerced confession exclusion, a conclusion supported by the distinctly different historical treatment of these two types of compelled statements. *See Risks*, *supra* note 3, at 645-56.

207. 467 U.S. 431 (1984).

208. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

209. *Williams*, 467 U.S. at 441 (citing *Silverthorne Lumber*, 251 U.S. 385).

210. *Id.* at 442-43 ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections.").

Washington University Open Scholarship

individual's Fourth Amendment rights if the evidence suppressed includes not only that obtained as a direct result of the illegal conduct, but also the useful evidentiary derivatives of that illegally obtained evidence.

However, three limiting principles can truncate the sweep of the fruit-of-the-poisonous-tree theory. The first, known as the attenuation doctrine,[211] permits the introduction of evidence derived from the initial illegality if "'granting establishment of the primary illegality, the evidence to which instant objection is made has been come at [not] by exploitation of that illegality . . . [but] by means sufficiently distinguishable to be purged of the primary taint.'"[212] Even where the suspect evidence maintains a "but for" connection to the illegality, sufficient attenuation can render the suspect evidence admissible. The attenuation principle follows from a deterrence rationale. At some point, the chain linking the illegality to the suspect evidence is so convoluted and strained, suppression is unlikely to deter the police misconduct.[213]

The independent source doctrine represents a second limiting principle. This principle permits the introduction of evidence despite a violation of the defendant's constitutional right[214] if the particular evidence is obtained from a source wholly unrelated to the illegality. Under a deterrence rationale, the government does not benefit from the illegality and thus officers are not encouraged to engage in the illegality.

The inevitable discovery doctrine embodies a third limiting principle on the reach of the fruit-of-the-poisonous-tree theory. Like attenuation, and unlike independent source, the suspect evidence does derive from the illegal police conduct. The evidence may even derive from the illegality on a relatively short and direct chain. This suspect evidence becomes admissible, however, because even absent the illegality, the government would inevitably or ultimately have discovered the evidence. Suppression, then, arguably would punish the government unnecessarily, since the government would have located this evidence with or without the illegality. Or as the *Williams* Court said, "the prosecution is not . . . put in a better position than it would have been in if no illegality had transpired."[215]

---

211. The label "fruit of the poisonous tree" is often used to refer not only to the derivative evidence prohibition but also to subsume one or more of the limiting principles.

212. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (citation omitted).

213. *See* Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part) (explaining the Court's holding in *Brown*).

214. *Silverthorne Lumber*, 251 U.S. at 392. I use the terms "violation" and "illegality" in the context of a Fourth Amendment application of the independent source principle.

215. *Williams*, 467 U.S. at 443.

The Court in *Williams* confronted the availability of the third limiting principle, inevitable discovery, for evidence derived from a violation of the defendant's Sixth Amendment right to counsel.[216] In holding this principle available to truncate the breadth of suppression, the Court discusses all three limiting principles and refers in dicta to the *Murphy* and *Kastigar* immunity decisions.[217] The Court indicates that it "has applied [the fruit-of-the-poisonous-tree] doctrine where the violations were of the Sixth Amendment . . . as well as of the Fifth Amendment."[218] To support that latter proposition, the Court cites both *Murphy* and *Kastigar*.[219] The language it quotes from *Murphy* relates both to the prohibition on use of the compelled testimony and its fruits as well as the ability to prosecute using independent sources.[220] The Court's reference to *Kastigar* states: "Application of the independent source doctrine in the Fifth Amendment context was reaffirmed in *Kastigar*."[221]

To the extent one reads the dicta in *Williams* as suggesting that the fruit-of-the-poisonous-tree doctrine is a prohibition on derivative evidentiary use and the independent source doctrine provides the applicable limiting principle in the immunity context, the *Williams* decision is consistent with

---

216. *Id.* at 434.

217. *Id.* at 442-44.

218. *Williams*, 467 U.S. at 442 (citing United States v. Wade, 338 U.S. 218 (1967)).

219. *Id.* at 442 n.3.

220. *Id.*

221. *Id.* This is the first of two citations to *Kastigar* and *Murphy* in the majority's opinion. The Court's second citation reference is used to support the following language:

> The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred.

Williams, 467 U.S. at 443. This second reference seems to suggest that deterrence serves as at least a partial motivating rationale in *Murphy* and *Kastigar*. Since the compulsion in the immunity contexts of *Kastigar* and *Murphy* is legally authorized compulsion, reliance on deterrence appears misplaced. *Kastigar* and *Murphy* did indicate, however, that "immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." Kastigar v. United States, 406 U.S. 441, 458-59 (1972) (footnote omitted) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964)).

The importance in *Kastigar* of leaving the witness and the Federal Government in substantially the same position as if the witness had invoked the privilege does not stem from a deterrence theory. Rather, the concern results from the need to insure that the OCCA supplied protection coextensive with that of the Fifth Amendment itself. *Id.* As a consequence, the *Williams* Court's reliance on *Kastigar* and *Murphy* in apparent support of the deterrence rationale of the Exclusionary Rule is difficult to understand. *See* Strachan, *supra* note 19, at 826 ("[P]recluding the use of legally compelled testimony is not meant to correct official misconduct.").

Washington University Open Scholarship

Kastigar.[222] A second reading, however, is available from the language. This second reading implies that the fruit-of-the-poisonous-tree theory with all three associated limiting principles applies in the immunity context as it might in a Fourth Amendment context. If one adopts this second reading, then the *Williams* decision can be understood both as largely resolving a number of scope issues in the immunity tier, and arguably, in the eyes of a number of courts, substantially increasing the scope of permitted prosecutorial use in the *Kastigar* immunity tier.[223] Although the language supports this second reading, for purposes of the models advanced in Part III, and for the reasons following, I suggest that as a descriptive matter, absent further Supreme Court guidance,[224] the first reading is to be preferred.

The second reading, one that imports into the immunity tier all three limitations on the derivative evidence prohibition, rejects *Kastigar*'s emphasis on a "legitimate source wholly independent of the compelled

222. At least with a reading of *Kastigar* that, at a minimum, prohibits evidentiary use.

223. This latter reading of *Williams* would presumably have resulted in very different decisions by, for example, the District of Columbia Circuit in United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992), and United States v. North, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and the Eighth Circuit in United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

224. In the subsequent Fourth Amendment decision of Murray v. United States, 487 U.S. 533 (1988), the Court did draw a distinction between the exclusionary rule (which the Court read as including an attenuation limitation) and the independent source doctrine. *Id.* at 536-37. The Court indicated that these two concepts, the exclusionary rule and the independent source doctrine, had developed "almost simultaneously," *id.* at 537, and that the latter doctrine, independent source, had "been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations." *Id.* The *Murray* Court's distinction between the doctrines and its reference specifically to the independent source doctrine as applying to the Fifth Amendment may be read as consistent with the understanding of *Williams* advanced in the text. However, the *Murray* Court's reference to the Fifth Amendment, like those in *Williams*, appears to be dicta. Whether the Court intended to suggest that the Fourth Amendment exclusionary rule, including the attenuation principle, should apply to the Fifth Amendment remains debatable.

Murray itself clarified the scope of the independent source doctrine in a Fourth Amendment context. The Court there held that evidence initially discovered through an unlawful search may be admissible if subsequently acquired through an independent source. *Id.* at 541-42. Whether this clarification of the independent source doctrine in the Fourth Amendment arena can be imported into the Fifth Amendment *Kastigar* context is also debatable, particularly because the *Murray* decision relies noticeably on the language of a deterrence rationale. *See id.* at 537 (citing language from *Williams* on "deterring unlawful police conduct"). If this clarification were transposable, however, it would suggest, at a minimum, that governmental awareness of immunized evidence would not preclude introduction of that evidence if the evidence derived from a source independent of the immunized information. Because *Murray* is a Fourth Amendment case, broader implications of applying the case to the Fifth Amendment *Kastigar* context are not pursued here.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

testimony"[225] necessary to sustain a criminal prosecution in the wake of an immunity grant. Instead, under both the attenuation principle and the inevitable discovery principle, evidence derived from the immunized testimony could be introduced into the trial. This second reading rejects *Kastigar*'s explicit finding that "negation of taint" does not satisfy the government's burden.[226] Attenuation of taint demands less than negation of taint. This second reading, without even recognizing the vigorous debate concerning the scope of *Kastigar* immunity,[227] simply equates the scope of exclusionary rule protection in the Fifth Amendment Self-Incrimination Clause immunity context with that available under the Fourth Amendment. Such a casual resolution of the scope debate, lacking substantive analysis, in the dicta of a Sixth Amendment decision seems improbable.[228]

If the 1984 *Williams* decision had resolved a substantial portion of the scope debate in the *Kastigar* tier by application of attenuation of taint and inevitable discovery, how could courts like the District of Columbia Circuit have concluded that an immunity grant required the extremely demanding level of scrutiny promulgated in cases like *North*[229] and *Poindexter*?[230]

Perhaps of greatest significance, neither the fruit-of-the-poisonous-tree title nor the deterrence rationale seems pertinent in the immunity circumstance. In the *Kastigar* context, there is no poisonous tree. To the contrary, a formal grant of immunity exemplifies the legally authorized means of compelling testimony. There is no constitutional violation in the compul-

---

225. *Kastigar*, 406 U.S. at 460.

226. *Id.*

227. For reference to or discussion of the views of a number of courts and commentators involved in the debate both before and after 1984, see *Risks*, *supra* note 3, at 640 n.65, 646-53; see also Kenneth J. Melilli, *Act-of-Production Immunity*, 52 OHIO ST. L.J. 223, 232-33 (1991) ("[I]t is by no means clear that the 'attenuation' doctrine limits the exclusionary principle as applied to evidence derived from immunized testimony. . . . Beyond the broad proscriptions of *Kastigar*, the Court has not yet specifically addressed the possible application of the 'attenuation' doctrine to the fruits of immunized testimony.") (footnotes omitted). Review of the sources cited here demonstrates that attenuation, inevitable discovery, and the applicability of a deterrence rationale, among other related issues, clearly constituted part of the vigorous debate in progress on the scope of *Kastigar* immunity in 1984. *See* Strachan, *supra* note 19, at 829-30.

228. I am not suggesting that the Court might not someday explicitly address the scope of *Kastigar* immunity and import doctrines of attenuation of taint or inevitable discovery to permit greater prosecutorial use, or even that such a reading of the existing *Kastigar* decision would be impossible. However, given the existence of the debate then in progress about the scope of immunity under *Kastigar*, it would seem unlikely that the Court would resolve that debate in cursory dicta, especially such dicta in a case that did not even involve the Self-Incrimination Clause.

229. 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

230. 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).

Washington University Open Scholarship

sion. Nor should the deterrence rationale apply since there is no constitutional violation from which the government should be deterred. As a consequence, the first reading, one that simply recognizes the derivative evidence function of the fruit of the poisonous tree, rather than equating it precisely with its applicability in the Fourth Amendment, and affirms the availability of the independent source rule in the immunity context, yields the preferable interpretation of the Court's dicta in *Williams*. With this reading, *Kastigar* immunity is at least a substantial grant of protection and the question of the applicability of attenuation and inevitable discovery remains unresolved.

As the 1886 decision in *Boyd*[231] illustrated, compulsion implicating the Fifth Amendment is not limited to oral utterances.[232] The most noteworthy recent self-incrimination decisions return to the question of compelling the production of documents or other tangibles. In 1984, the Court in *United States v. Doe*[233] held that through an appropriate grant of statutory immunity, the prosecution could compel the production of records.[234] Permitting the government to compel production of any documents from a defendant may be perceived as undermining the promise of *Boyd* that such compulsion violates both the Fourth and Fifth Amendments.

The nature of the compulsion has also changed since *Boyd*. In *Boyd*, the compulsion was threat of default forfeiture. Since *Doe* requires that the compulsion proceed pursuant to a formal grant of immunity, the nature of the compulsion has changed from a threat of default forfeiture to a threat of contempt of court and incarceration.[235] Thus, the penalty for failure to comply has arguably been magnified,[236] from loss of property to loss of liberty, and the Court extends the immunity protection only to specific

231. 116 U.S. 616 (1886).

232. *Id.* at 633 ("And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.").

233. 465 U.S. 605 (1984).

234. *Id.* at 617.

235. 18 U.S.C. § 6002 (1988) ("[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination."); *Kastigar*, 406 U.S. at 462 (affirming contempt order issued under 28 U.S.C. § 1826 for refusal to testify under §§ 6002-6003 immunity grant).

236. But see Justice Miller's concurrence in *Boyd*, 116 U.S. at 639, suggesting that having "charges against him of a criminal nature, taken for confessed" was more "severe" than imprisonment. The compulsion scale of the models interprets incarceration as more severe than default forfeiture, contrary to Justice Miller's position. *See infra* notes 308-11 and accompanying text.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

aspects of the production of the records.[237] Moreover, the contents do not necessarily receive any protection because only the assertions involved in producing the items are subject to the compulsion.[238]

Thus, *Doe* affords less protection than contemplated in *Boyd* because it enables the government to compel production, heightens the penalty for failure to comply, and circumscribes the aspects of production protected by the immunity. However, the Court also expanded the protection for act-of-production in one respect by imposing the use immunity protection of the OCCA. In *Boyd*, basic excision was the solution—*Boyd* protection correlated to *Bram* Tier Two protection. By requiring the government to afford formal use and derivative use immunity pursuant to the OCCA, the protection of compelled document production has been elevated to Tier One, a potentially more encompassing protection than the *Boyd* excision remedy. Act-of-production immunity for records under the Fifth Amendment requires a formal grant of use immunity for the compelled, incriminating, and testimonial aspects of production. By implication, the scope of immunity protection for those aspects of production corresponds to that afforded other statements compelled pursuant to the OCCA. Thus, by 1985, the Court had elevated the scope of *Boyd* protection from that of *Bram* Tier Two to that of *Kastigar* Tier One, but narrowed the acts protected by that more extensive scrutiny.[239] The requirement that compelled document production proceed through formal immunity channels will prove of importance in the models later proposed.

Two intriguing nuances of scope doctrine emerged in the wake of *Doe*. The first appeared in 1988 in the five-to-four decision in *Braswell v. United States*.[240] In *Braswell*, the Court confirmed that a "custodian of corporate records may [not] resist a subpoena for such records on the ground that the

237. *Doe*, 465 U.S. at 612-13 & n.10 ("If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged."). Moreover, *Doe* immunity is unavailable if the "communicative aspects" of the act-of-production are "foregone conclusions." *See* Fisher v. United States, 425 U.S. 391, 410-11 (1976); Melilli, *supra* note 227, at 236 ("According to the *Fisher* Court, where the relevant testimonial component—existence, possession, or authentication—is a 'foregone conclusion,' then the testimonial aspect of the act of production . . . 'adds little or nothing to the sum total of the government's information. . . .'") (quoting *Fisher*, 425 U.S. at 411).

238. *Doe*, 465 U.S. at 612-13 & n.10. *But see infra* note 347.

239. The particular question of production of private papers has not been fully resolved by the Court. *But see Doe*, 465 U.S. at 618 (O'Connor, J., concurring) ("I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.").

240. 487 U.S. 99 (1988).

Washington University Open Scholarship

act of production would incriminate him in violation of the Fifth Amendment."[241] The Court prohibited the custodian from claiming Fifth Amendment protection because his act was merely the act of the entity, not a personal act.[242] If no Fifth Amendment claim were available either to the entity or to the custodian,[243] logic suggests that the Court's analysis should have ended there. But the *Braswell* Court invented an evidentiary limitation not apparent in prior production rulings and extended a limited form of protection to the custodian. The majority forbade the government from making any "evidentiary use of the 'individual act' against the individual . . . . [I]n a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian."[244] Precisely what scope this evidentiary use prohibition could claim is unclear. However, as Professors LaFave and Israel have explained, "that prohibition did not carry with it the burden of meeting the independent source requirement imposed in the immunity cases."[245] Thus, this evidentiary limitation appears to differ from act-of-production immunity. Perhaps *Braswell* implicates some penumbral Fifth Amendment protection for the custodian.[246] But whether this *Braswell* evidentiary immunity replicates the scope of *Bram* Tier Two or *Simmons* Tier Three, or illumines a separate level of protection remains to be discovered. The Court itself, however,

> reject[s] the suggestion that the limitation on the evidentiary use of the custodian's act of production is the equivalent of constructive use immunity . . . . Rather, the limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity.[247]

241. *Id.* at 100.

242. *Id.* at 110. For a discussion of *Braswell*, see LAFAVE & ISRAEL, *supra* note 33, at 444-45.

243. "A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds." *Braswell*, 487 U.S. at 113.

244. *Id.* at 118.

245. LAFAVE & ISRAEL, *supra* note 33, at 444 n.12.

246. The Court argued that it was, in an effort to avoid jury confusion or misattribution of the act of production, simply effectuating the legal fiction of the custodian's role in corporate law. *Braswell*, 487 U.S. at 118 n.11. The prohibition would thus be arguably unrelated to self-incrimination protection. But unless the Court was acting in its supervisory capacity overseeing the federal courts, it is not readily apparent upon what grounds the Court imposes this prohibition. One may, therefore, reasonably presume that the prohibition rests upon a self-incrimination rationale. If so, *Braswell* may represent some immunity shy of *Kastigar* immunity, whose prohibition against evidentiary use remains to be sculpted.

247. *Id.* at 118 n.11.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

And yet, *Braswell* does seem to create a new level of protection for custodians of records, one that differs from act-of-production immunity.

The most recent significant development in the evolution of scope doctrine arose in the 1990 decision in *Baltimore v. Bouknight*.[248] In *Bouknight*, a juvenile court issued an order, under penalty of contempt, requiring Ms. Bouknight to produce her child. Because the child was a ward of the court, the *Bouknight* majority viewed Ms. Bouknight as the child's custodian.[249] In light of *Braswell*, the Court prohibited her from successfully advancing a Fifth Amendment claim.[250] The Court did suggest, however, that, although

> [w]e are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings . . . imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.[251]

To support that proposition, the Court cited *Braswell*, implying that some type of use restriction might be available to Ms. Bouknight.[252] The Court explained that "[i]n a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled."[253] Illustrating this contention, the Court listed cases arguably providing vastly different levels of protection, including *Simmons* and *Murphy*.[254] This

---

248. 493 U.S. 549 (1990).

249. *Id.* at 551-52.

250. The *Bouknight* Court stated:

> Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," . . . Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.

Id. at 555-56 (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)).

251. *Bouknight*, 493 U.S. at 561.

252. *Id.* (citing Braswell v. United States, 487 U.S. 99, 118 & n.11 (1988)).

253. *Id.* at 562.

254. *Id.* Supporting citations in the string cite also included: 1) Maness v. Myers, 419 U.S. 449, 474-75 (1975) (White, J., concurring) (suggesting that "where the claim of privilege is overruled because the witness has not carried his burden of demonstrating . . . that the sought-after answer may incriminate him and there is apparently no occasion for an assurance of immunity . . . the witness is nevertheless protected by a constitutionally imposed use immunity if he answers in response to the order and under threat of contempt. If . . . the State later finds the answer or its fruits incriminating and offers either against the witness in a criminal prosecution, the witness has a valid objection to the evidence . . . ."); 2) Adams v. Maryland, 347 U.S. 179, 181 (1954) (holding that a statute granting direct use immunity to a witness testifying before a Senate Committee did not require assertion of the Fifth

Washington University Open Scholarship

most recent doctrine is perhaps also the most enigmatic. The Court appears to acknowledge, at least implicitly in its choice of supporting cases, disparate protection under the Fifth Amendment, but the Court makes no apparent attempt to reconcile those disparities.

D. *Three Tiers for Reference*

The preceding overview of Supreme Court doctrine summarizes the evolution of disparity in the scope of protection that compelled statements have received. This journey through the development of self-incrimination scope doctrine illustrates a doctrine without an articulated framework, without a coherent and comprehensive model to determine whether the disparities of treatment represent principled or ad hoc decisionmaking. For the purposes of this analysis, however, let us sculpt, in gross, three tiers of the protection spectrum. These tiers will serve an essential function. Because they represent the most clearly defined aspects of scope doctrine, they furnish the class of cases through which we can determine if the models meet the first criterion of a good model: the ability to "accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements."[255]

The tier of the spectrum receiving the highest levels of protection, Tier One, involves statements compelled by formal grants of immunity. This *Kastigar* immunity is often, although not exclusively, controlled by the prosecuting authority. Lower courts tend to scrutinize the potential use of these formally immunized statements extensively, or at least substantially. Direct and derivative use prohibitions protect the immunized material. Direct evidentiary use, whether in the case-in-chief or for impeachment purposes, is prohibited.[256] Derivative evidentiary use is also prohibited. Whether doctrines of attenuation of taint or inevitable discovery will apply

---

Amendment privilege for immunity to attach); 3) New Jersey v. Portash, 440 U.S. 450 (1979) (discussed *supra* in text); 4) Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (discussed *infra* in Part V). The Court also included two citations preceded by a *But cf.* signal. These references were to United States v. Doe, 465 U.S. 605, 616-17 (1984) (discussed *supra* in text) and Pillsbury Co. v. Conboy, 459 U.S. 248, 261-62 (1983) (discussed *supra* in text).

255. HAWKING, *supra* note 23, at 9.

256. *Portash*, 440 U.S. 450. Excluded from this prohibition on direct use are those cases, like United States v. Apfelbaum, 445 U.S. 115 (1980), involving a separate prosecution for false swearing during immunized testimony, which involve offenses that are integral to the act of giving compelled testimony or failing to do so. *See* 18 U.S.C. § 6002 (1988) (permitting introduction of immunized testimony in prosecutions "for perjury, giving a false statement, or otherwise failing to comply with the order."). The models do not address and are not intended to apply to those cases.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

and consequently circumscribe the reach of the derivative use prohibition in this tier remains disputed.[257] Tier One may also prohibit some or all direct or derivative nonevidentiary use.[258]

Tier Two encompasses those statements produced by official questioning, absent a formal grant of immunity, in which the speaker is promised some qualifying form of lenity or threatened with something other than contempt of court. The prototypical example involves the "constable's blunder" of *Bram*. Courts scrutinize potential infringements in this tier moderately. As in Tier One, the Court has outlawed direct evidentiary use, even for impeachment purposes. Courts interpret the fruit-of-the-poisonous-tree doctrine to operate to prevent derivative evidentiary use in this tier.[259]

---

257. *See* E. R. Harding, Note, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of* Kastigar, 19 VILL. L. REV. 470, 489 (1974); *Risks*, *supra* note 3, at 647 n.110, 651 n.137. The *Hazelwood* decision, referred to in *Risks*, *supra* note 3, at 651 n.137, rejecting the application of the inevitable discovery doctrine, was subsequently appealed to the Alaska Supreme Court. The Alaska Supreme Court reversed the court of appeals and held that the inevitable discovery doctrine did apply to the federal statutory use and derivative use immunity of 33 U.S.C. § 1321(b)(5) (1988), the reporting statute at issue in the *Hazelwood* case. State v. Hazelwood, 866 P.2d 827, 831-34 (Alaska 1993); Charles J. Walsh & Steven A. Rowland, *Immunized Testimony and the Inevitable Discovery Doctrine: An Appropriate Transplant of the Exclusionary Rule or a Broken Promise?*, 23 SETON HALL L. REV. 967 (1993). Consider also the discussion of *Nix v. Williams supra* notes 207-30 and accompanying text. I employ the terms attenuation and inevitable discovery for purposes of consistency even though there is no primary illegality in the *Kastigar* context.

258. Courts have sometimes interpreted this tier as forbidding nonevidentiary use. United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973) (dismissing indictments because the government failed to prove that "the United States Attorney, who admittedly read [the defendant's immunized testimony] did not use it in some significant way short of introducing tainted evidence"). Two recent circuit court decisions illustrate the continuing uncertainty regarding *Kastigar*'s position on nonevidentiary use. In July of 1994, the District of Columbia Circuit Court of Appeals reiterated its position in *North* by "assum[ing], without deciding, 'that a prosecutor cannot make nonevidentiary use of immunized testimony,' any more than evidentiary use, without running afoul of use immunity." United States v. Kilroy, 27 F.3d 679, 687 (D.C. Cir. 1994) (quoting United States v. North, 910 F.2d 843, 860 (D.C. Cir. 1990)). Also in July of 1994, the Eleventh Circuit affirmed that it had "adopted the 'evidentiary' interpretation of *Kastigar*: that the focus of a challenge on self-incrimination grounds should be on the direct and indirect evidentiary uses of immunized testimony, rather than on non-evidentiary matters such as the exercise of prosecutorial discretion." United States v. Schmigdall, 25 F.3d 1523, 1529 (11th Cir. 1994) (citing United States v. Byrd, 765 F.2d 1524, 1529-31 (11th Cir. 1985)).

259. *See Risks*, *supra* note 3, at 655-56; *cf.* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (implying that an "actual infringement of the suspect's constitutional rights" rather than "a noncoercive *Miranda* violation" would trigger application of the fruit-of-the-poisonous-tree doctrine). The Court has certainly indicated that the derivative evidence prohibition of the fruit-of-the-poisonous tree doctrine is available in cases involving compulsion other than immunity. *See, e.g.*, United States v. Blue, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."). The Court has also applied the attenuation principle associated with the fruit of the poisonous tree in suggesting that the connection between a coerced confession and

Washington University Open Scholarship

With the application of the fruit-of-the-poisonous-tree doctrine, courts also apply principles of attenuation of taint and inevitable discovery to truncate the reach of the derivative use prohibition in this tier, thereby allowing some derivative evidentiary use.[260] And nonevidentiary use of the accused's compelled statements is accepted practice.[261]

Tier Three is the compulsion of choosing between competing rights. In this tier, the speaker preserves the option of silence but at the cost of potential failure to prevail at a hearing. The paradigm example is that of the defendant in *Simmons*. As in Tier Two, nonevidentiary use is the norm and attenuation[262] and inevitable discovery may render some derivative evidence available for prosecutorial use in the case-in-chief. Unlike in Tiers One and Two, however, direct evidentiary use, in the form of impeachment, remains, at a minimum, an open question and plausibly a viable option. Accordingly, unlimited derivative evidentiary use, for impeachment purposes, presumably also remains, at least, an open question.

III. MODELING SELF-INCRIMINATION DOCTRINE

The overview just sketched reveals that the tiers of compelled statement protection evolved in an environment almost devoid of comparative scrutiny. As a result, the Court has produced no coherent framework to explain the multiple tiers of protection. Nor has the Court adequately addressed the factors that distinguish one tier of protection from another. The paucity of side-by-side juxtaposition and evaluation and the consequent absence of an articulated framework impede our ability to determine whether existing disparities are justified or desirable. The absence of such a framework also produces a guidance gap for principled evaluation and resolution of future self-incrimination cases.[263]

---

an ultimate guilty plea could "'become so attenuated as to dissipate the taint.'" Parker v. North Carolina, 397 U.S. 790, 796 (1970) (citations omitted). Consider also Harrison v. United States, 392 U.S. 219, 222-26 (1968) (applying the fruit-of-the-poisonous-tree and attenuation principles to illegally obtained (although not involuntary) confessions).

260. *See Risks*, *supra* note 3, at 655-56. Again, for consistency I will continue to employ the terms attenuation and inevitable discovery, whether or not there exists a primary illegality.

261. *See id.* at 653-56.

262. I continue to employ the terms attenuation and inevitable discovery for consistency even though in a Tier Three context there may be no primary illegality.

263. *Cf.* Regan v. New York, 349 U.S. 58, 64 (1955) ("The law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action.").

A. The Need for a Coherent Framework: A Case-in-Point

The recent Ninth Circuit decision in *United States v. Beltran-Gutierrez*[264] highlights the need for a structural framework to explain the relationship among the tiers of protection. The defendant, Mr. Beltran-Gutierrez, testified at his pretrial *Simmons* suppression hearing. The prosecution later used the defendant's *Simmons* testimony during cross-examination to impeach his trial testimony.[265]

On appeal, the defendant "assert[ed] that, under *Simmons*, his suppression hearing testimony was 'implicitly' given 'a type of "use immunity"' and, as such, was 'compelled' testimony which precluded its introduction to impeach him under New Jersey v. Portash . . . ."[266] The Ninth Circuit rejected the defendant's claim to protection from impeachment use. The court offered a collection of reasons for rejecting the defendant's assertion. First, the court distinguished *Portash.*

> In *Portash*, the Court held that testimony given in response to a grant of legislative immunity is coerced testimony and therefore may not be used either to prove guilt or to impeach. *Simmons* did not hold that a defendant's testimony at a suppression hearing was inadmissible because it was compelled pursuant to a grant of immunity.[267]

Portash, in the Ninth Circuit's view, appears to differ from *Simmons* initially in the type of coercion used to elicit the testimony. *Portash* involved a grant of legislative immunity, *Simmons* did not. But the Ninth Circuit's efforts to distinguish *Portash* (a Tier One case) from *Simmons* (a Tier Three case) result in the court declaring the defendant's *Simmons* testimony not compelled at all: "Gutierrez was not forced to testify at his suppression hearing. He did so voluntarily in order to preclude the use of incriminating evidence at his trial. Thus, he did not face 'the cruel trilemma of self-accusation, perjury or contempt.'"[268]

Yet, if the defendant's testimony were voluntary,[269] why would Self-

264. 19 F.3d 1287 (9th Cir. 1994).

265. *Id.* at 1288.

266. *Id.* at 1290.

267. *Id.* at 1290 (citation omitted).

268. *Id.* (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)). In the paragraph following, the Ninth Circuit panel reiterated the position that "Gutierrez elected to testify in his own defense at his trial." *Id.* at 1291.

269. If the statements had been taken within the coercive confines of custodial interrogation at a police station, rather than at a pretrial suppression hearing as in *Beltran-Gutierrez*, a failure to

Incrimination Clause protection attach at all?[270] The court subsequently asserts that "[t]he Fifth Amendment protected [the defendant] from the use of his suppression hearing testimony in the Government's case in chief to prove his guilt. It did not protect him from impeachment for testifying falsely."[271] The Ninth Circuit somehow perceives *Simmons* as providing partial Fifth Amendment protection to voluntary statements. Although the result in *Beltran-Gutierrez*, permitting impeachment use in Tier Three, is consistent with Supreme Court precedent,[272] the contradictory analysis signals the need for a principled framework to explain different levels of protection for statements resulting from different types of Fifth Amendment compulsion.[273]

In the pages that follow, I propose two principled frameworks for interpreting existing Supreme Court doctrine on the scope of compelled statement protection and for guiding future decisions. The goal of each model is to explain in relative terms how much protection a compelled statement should receive. The models do not intend or pretend to offer definitive methods for resolving the threshold question of determining which statements should qualify as compelled.[274]

---

administer prophylactic *Miranda* warnings would have prevented the prosecution from employing the defendant's statement in its case-in-chief even if the statements were otherwise voluntary. In that police setting, the court's use of the term "voluntary" might have been less problematic.

270. But consider the evidentiary limitation of *Braswell*, 487 U.S. 99.

271. *Beltran-Gutierrez*, 19 F.3d at 1291.

272. The fundamental question raised in *Beltran-Gutierrez* was whether *Simmons* permits impeachment use of the suppression hearing statements. The U.S. Supreme Court had explicitly raised that issue and left the question open, if not impliedly condoned such use, in *Salvucci*. Thus, permitting impeachment use is entirely consistent with existing Supreme Court doctrine. Moreover, *Beltran-Gutierrez* does not raise the more complex question of hybrid circumstances among the tiers.

273. The Ninth Circuit is not alone in its efforts to distinguish among types of compelled statements and the scope of their permitted use. *See, e.g.*, People v. Pacchioli, 9 Cal. App. 4th 1331 (1992). In *Pacchioli*, the defendant withdrew an earlier guilty plea and sought to have his postplea incriminating statements, made to a probation officer, suppressed for case-in-chief and impeachment purposes at his subsequent trial. *Id.* at 157-58. The *Pacchioli* court analyzed both Fifth Amendment and due process issues to rule that the trial court's decision to permit impeachment use of the defendant's postplea incriminating statements did not violate the defendant's Fifth Amendment or due process rights. *Id.* at 160-62.

274. As indicated earlier, the substantially larger task of articulating a coherent rationale for the Fifth Amendment generally is not the aim of this Article. Moreover, many commentators have suggested that a coherent framework for self-incrimination jurisprudence is simply not an attainable goal. *See, e.g.*, Dolinko, *supra* note 21, at 1064 ("I suggest that the leading contemporary efforts to justify the privilege as more than a historical relic are uniformly unsatisfactory and that no efforts along similar lines are likely to succeed."). *But see* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988) ("But while there may be no descriptively sound, comprehensive theory of the privilege, there is an increasingly strong pattern that runs through a great deal of fifth

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

Before examining each model, an observation about both models may be helpful. As empirically driven descriptive models, each strives to explain the results of Supreme Court decisionmaking. The components of the models are drawn largely from the factors featured by the Court itself in its language and from reasonable inferences to be drawn from its majority decisions or dissents on self-incrimination.[275] But supporting language has been chosen selectively from the decisions. The goal of the models is not to explain the substance or nuance of Supreme Court language, but to explicate the results of the decisions in a reasoned manner conducive to future predictions.

The principle animating the first model is compulsion. The extent of compulsion determines the extent of protection: the greater the compulsion, the greater the protection. The second model balances the right of the accused against government interests in order to set the required level of protection. The section immediately following is devoted to describing the models and explaining how each fits existing Supreme Court doctrine. Following this description and explanation, the Article concentrates on evaluating the models and examining their limitations.

B. The Compulsion Model

1. The Model Described

The compulsion model posits a correlation between the extent of compulsion and the extent of protection: the greater the compulsion, the greater the protection. Under this model, compulsion is a sliding scale, with certain types of compulsion meriting greater protection than others. Compulsion is measured by three criteria: (1) the nature of the compulsion; (2) the degree of automaticity of infliction of penalty; and (3) the legitimacy of the compulsion.[276]

The nature of the compulsion measures its severity. The degree of automaticity gauges whether the infliction of the penalty for failure to succumb to the compulsion is direct or indirect, immediate or remote. The legitimacy scale embodies two related calculations. First, the legitimacy scale expresses whether the questioning occurred pursuant to some legally authorized procedure, that is, a procedure with some colorable claim to

---

amendment law. . . . That pattern . . . can be derived from notions of excuse.").

275. For some insights on the process involved in selecting the components, see *infra* notes 372-86 and accompanying text.

276. For a discussion of the origin or selection of the models' components, see *infra* Part IV.D.

Washington University Open Scholarship

legitimacy.[277] Second, legitimacy measures the deliberateness of the immunity grant—whether a promise of nonuse or immunity preceded the questioning. The combination of official legal process and assurance of nonuse yields the highest legitimacy figure. The absence of a colorable claim of authorized procedure and/or the lack of a promise of nonuse of the statements diminishes the legitimacy value.

On this scale, a severe penalty counts as greater compulsion than a mild penalty, a swift and sure penalty constitutes greater compulsion than a delayed and uncertain one, and an officially condoned procedure coupled with a broad promise of immunity is more legally compelling than that same penalty exacted without legal process or an immunity promise. Of the three components, nature receives the widest range. The range serves two functions. First, it accommodates the greater variability in types of compulsion, and second, the wider range incorporates an intuitive impression that whether one is being beaten rather than reprimanded is more important than whether the beaters or reprimanders have a legitimate right to engage in such behavior. Similarly, whether the beating is contemporaneous with the refusal to comply with the compulsion or is delayed, the circumstance of being beaten is probably more significant than the temporal relationship between the silence and the resulting beating. Once evaluated, these three factors enable assignment of a compulsion value which will permit assessment of the amount of protection to be afforded the compelled statement. Under the compulsion theory, the scope of protection is inverse to the extent of permitted prosecutorial use of the statement. The greater the compulsion, the less prosecutorial use permitted. The less prosecutorial use, the greater the self-incrimination protection.

Prosecutorial use, for the purposes of this model, lies on a roughly sketched scale beginning at the top with unimpeded direct evidentiary use in the prosecution's case-in-chief, continuing downward through evidentiary impeachment use, proceeding to derivative evidentiary use available under principles of attenuation and inevitable discovery and through various forms of nonevidentiary use, and concluding at the bottom with no use at all. The

277. In *Kastigar*, the Court implied that the legal authority to engage in the questioning is of some moment to the Court's scope analysis:

> There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

Kastigar, 406 U.S. at 462.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

measure of use implicates the type of use rather than the number of times a prosecutor makes particular use of the compelled statements. For example, a prosecutor might feel a surge of increased confidence in the case each time she picked up the file knowing the defendant had confessed to the police. That type of nonevidentiary use would merit only a low value in our calculus even if she picked up the file a thousand times. By contrast, a prosecutor's evidentiary use of but a single phrase of the defendant's compelled utterances in order to impeach the defendant before the trier of fact would command a substantial value on the use scale.

This scale is extrapolated from current treatment of types of use in both Supreme Court doctrine and other court scope decisions. Direct evidentiary use in the prosecution's case-in-chief constitutes the master set of uses at the apex of the scale. Other uses constitute subsets of the master set of direct case-in-chief evidentiary use. The first well-defined subset is evidentiary impeachment use. Although the prosecution is limited in timing and purpose in its use of compelled statements, as a form of direct evidentiary use, impeachment use confers greater benefits on the prosecution than nonevidentiary uses alone. Moreover, if the prosecution is permitted to employ the actual compelled utterances against the defendant, one may infer that the prosecution can also derive evidence from the compelled statements to impeach the defendant. Impeachment use, albeit a subset, offers prosecutors a wide range of possible uses.

Attenuated or inevitably discovered derivative evidentiary uses comprise the next portion of the scale. The prosecutor can use derivative evidence that qualifies as sufficiently attenuated or inevitably discovered throughout his case.[278] The ability to employ the evidence in his case-in-chief endows the prosecutor with a full range of uses. As a result of this range, a reasonable argument arises for placing this type of use above impeachment use on the scale. Such a placement, however, would contradict existing doctrine. While the Court has expressly prohibited direct use through impeachment in both Tiers One and Two,[279] lower courts interpret Supreme Court doctrine as permitting derivative use through attenuation and inevitable discovery in Tier Two cases.[280] As a consequence, direct evidentiary use, albeit limited to impeachment, ranks as greater use than derivative evidentiary use and stands higher on the scale.

---

278. *Cf.* Nix v. Williams, 467 U.S. 431 (1984) (upholding trial court's admission of derivative evidence inevitably discovered in Sixth Amendment context).

279. *See* New Jersey v. Portash, 440 U.S. 450 (1979).

280. *See Risks*, *supra* note 3, at 655.

Washington University Open Scholarship

The next limiting line on the scale falls between that of evidentiary and nonevidentiary uses. This demarcation is not well-defined. As one appellate tribunal noted, "a precise definition of the term nonevidentiary use is elusive."[281] This elusiveness will also constrain the ability of the models to offer definite predictions. Although there is no official consensus ranking, courts, nonetheless, do distinguish among nonevidentiary uses. Dicta in a Ninth Circuit case suggested, for example, that "use of [immunized] testimony to persuade the complaining witness to consent to the prosecution comes close to . . . an evidentiary use."[282] That some uses are closer to evidentiary use than others implies a hierarchy among nonevidentiary uses. One may assume, for instance, that if planning trial strategy qualifies as a nonevidentiary use, such use is closer to the evidentiary line than is increased prosecutorial confidence in the guilt of the defendant. Considering again the scale of prosecutorial use discussed above,[283] the further up the scale from the bottom at no use, through various forms of nonevidentiary use and impeachment use, to case-in-chief evidentiary use, the less protection the speaker's compelled statements receive.

It may be helpful to represent the compulsion model itself as a mathematical relation. In this expression, the Fifth Amendment is not violated when, in a given case, the extent of compulsion, (C), plus the extent of use, (U), is less than or equal to a given constant, k, where k represents the government's interest in the detection and prosecution of criminal conduct:

$$C + U \leq k$$

For example, hypothesize that the maximum combination of compulsion and use that does not violate the Fifth Amendment is twenty units (k equals 20). Further hypothesize that each of the two variables, compulsion and use, may individually reach a maximum of twenty. Compulsion in which all three of its components (nature, automaticity, and legitimacy) were at their individual maximum would produce a value of twenty. Correspondingly, unrestricted evidentiary use of the compelled statements in the prosecution's case-in-chief would also produce a value of twenty. Consistent with this equation, then, no self-incrimination violation would

281. United States v. North, 910 F.2d 843, 857 (D.C. Cir. 1990).

282. Gwillim v. City of San Jose, 929 F.2d 465, 468 (9th Cir. 1991).

283. *See supra* notes 278-82 and accompanying text. For a discussion cataloguing some types of arguably nonevidentiary use, see Strachan, *supra* note 19, at 807-09.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

occur if compulsion were at its most severe, most automatic, and most legitimate, but the prosecution did not use the statement at all.[284]

$$(C)20 + (U)0 \leq 20(k)$$

Similarly, if the prosecution employed a defendant's statement as the centerpiece of its case-in-chief but no compulsion were involved in obtaining the statement, no self-incrimination violation would occur.[285]

$$(C)0 + (U)20 \leq 20(k)$$

The model thus presupposes that neither compulsion nor use alone violates the self-incrimination proscription.[286]

By assessing the extent of compulsion, the model generates a prediction for the relative quantity of permitted prosecutorial use. Because the equation has only two variables, assessment of the compulsion value will readily produce a measure of permitted prosecutorial use. The higher the use value, the less self-incrimination protection afforded the statement.

For purposes of the applications to follow, the numerical options for the nature component of compulsion range from zero to ten. Automaticity and legitimacy each range from zero to five. Before applying the model, the choice to include numerical values needs both an explanation and an acknowledgement. Numbers are a valuable tool in assessing the validity of the models. If no set of numerical values could be envisioned that fit the models, the models would not be viable. Developing these models alerted the author that versions without a numerical component (earlier versions of the ones described here) could engender extravagant claims about their abilities. Once numbers were inserted, limitations speedily surfaced. Numerical values inhibit the advancement of unprovable claims and force a certain precision in thinking.[287] The primary disadvantage of including numbers, however, is the process of selecting particular numerical values. The process proved, if not arbitrary, at least culturally relative, as discussed

284. For a discussion of this view of the Self-Incrimination Clause, see *infra* notes 391-93 and accompanying text. To suggest that no Self-Incrimination Clause violation has transpired is not to suggest that no due process violation has occurred.

285. An interesting subsidiary question is raised by the mathematical expression of the model: Should the ideal case result in equality? Would that compose a utilitarian best use of resources? These issues are not within the scope of this Article.

286. Consider the Court's dicta in United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that [self-incrimination] right, a constitutional violation occurs only at trial."). *See also infra* notes 391-93 and accompanying text.

287. They reduce (but do not eliminate) the margin of discretion.

Washington University Open Scholarship

in the critique in Part IV below.[288] For those readers who find the assignment of any numerical value jarring or who disagree with the particular values selected, disregarding the numbers entirely or objecting to particular numerical values selected should not preclude an evaluation of the validity of the models' underlying premises, so long as some set of numbers does exist that demonstrates the mathematical integrity of the models.

2. The Model as an Explanation of Existing Doctrine

(a) Tier One—Legally Authorized Contempt Compulsion

Under current doctrine, statements compelled by formal immunity grants, where compulsion consists of the threat of contempt, generally receive the most exacting scrutiny.[289] The Supreme Court held in *Counselman* that speakers of these statements deserved total amnesty from prosecution.[290] Many decades passed before the Court even permitted prosecution of the speaker with independently obtained evidence.[291] Analysis of these statements began at the top of the protection spectrum, with challenges to whether such statements could be compelled at all. Consequently, concessions regarding the scope of protection came slowly and cautiously. Before the accused looms the quintessential self-incrimination trilemma—self-accusation, perjury, or contempt.[292] This is the form of compulsion for which Justice Stewart declared balancing impermissible, characterizing compulsion under threat of contempt as "pristine."[293] Compulsion through immunity still consistently triggers the highest levels of scrutiny even though courts do not agree on precisely where within that

288. For a critique of the subjectivity of the numbers, see *infra* notes 397-98 and accompanying text.

289. *See, e.g., Risks, supra* note 3, at 646-53; United States v. North, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

290. Counselman v. Hitchcock, 142 U.S. 547 (1892).

291. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Kastigar v. United States, 406 U.S. 441 (1972).

292. Preventing an individual from being subjected to the "cruel trilemma" is considered one of the "fundamental values" of the Self-Incrimination Clause. *Murphy*, 378 U.S. at 55 ("The privilege against self-incrimination . . . 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. . . .").

293. *Portash*, 440 U.S. at 459.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

declared range the protection should fall.[294]

Does the compulsion model explain the result under the actual doctrine? Application of the model begins with assessment of the compulsion variable. The model evaluates the three components of the compulsion variable: nature, automaticity, and legitimacy. In Tier One, the penalty for refusal to comply with the interrogator's requests is contempt of court and jail. The nature of this compulsion is harsh and exacting. The nature component merits an elevated value for its severity. Incarceration, though extremely severe, ranks for purposes of the models as less severe than physical violence or death, and thus merits a value approaching but not at the maximum for the model.[295] For our purposes then, incarceration receives a nature component value of nine out of ten.[296]

With respect to automaticity, the mere refusal to comply with a compulsion order of this type serves as the trigger for a contempt proceeding and subsequent invocation by the executive authority of incarceration to enforce its compulsion order. Because mere refusal to answer, silence, achieves the threshold for imposition of the penalty, the penalty is swift, if not automatic, in execution. This contempt compulsion is, then, both severe in its nature and precipitate in its exaction. Compulsion enforced by a penalty that follows almost inevitably and formally on the refusal to comply invites insertion of a high value for automaticity. In the range of zero to five, contempt compulsion garners a five for automaticity.

To these two components, we add a measure of the legitimacy of contempt compulsion. Measuring legitimacy requires an assessment of both the authorized process and the deliberateness of the immunity grant.

---

294. *Compare North*, 910 F.2d at 872 (requiring that the "inquiry must proceed witness-by-witness; if necessary it will proceed line-by-line and item-by-item") *with* United States v. Byrd, 765 F.2d 1524, 1529 (11th Cir. 1985) ("The government is not required to negate all abstract 'possibility' of taint."). *See also Risks*, *supra* note 3, at 645-53 (discussing the distinctions in protection of, *inter alia*, *North* and *Byrd*).

295. This evaluation of the severity of compulsion is a relative and difficult one, generally producing highly culturally contingent results. *See infra* notes 397-98 and accompanying text.

296. For convenient reference, the table of values below represents the values under the compulsion model for all three tiers.

Tier #	Nature	Automaticity	Legitimacy	Compulsion	Use
Tier One	9	5	5	19	1
Tier Two	7	3	0	10	10
Tier Three	2	1	2.5	5.5	14.5

Washington University Open Scholarship

Compulsion in Tier One is often authorized through explicit statutory enactment, like the OCCA, which contemplates deliberate action to secure authorization under the pertinent empowering provisions.[297] Authority to engage in this compulsion is also often explicitly limited by statute. Thus, a formal set of controls and procedures generally governs permission to engage in this compulsion. Compulsion that is regarded as legally authorized or "proper" receives the greatest protection against prosecutorial use for the first measure of legitimacy. Because an official, broad, and documented promise of nonuse precedes the questioning, the second factor of legitimacy, an assurance of nonuse prior to questioning, is also satisfied. Contempt compulsion receives a maximum value in legitimacy currency, two and one-half units for authorization and two and one-half units for prior assurance of nonuse, totaling five units.

The following represents the mathematical expression of the compulsion value for Tier One compulsion:

$$9(\text{Nature}) + 5(\text{Automaticity}) + 5(\text{Legitimacy}) = 19(\text{Compulsion})$$

Substituting the value of compulsion into the compulsion model produces:

$$19(C) + (U) \leq 20(k)$$

The calculation of the compulsion variable enables rapid assessment of the extent of permitted prosecutorial use. If prosecutorial use exceeds one unit, the government violates the speaker's self-incrimination right. One unit of use on a scale of one to twenty, ranging from no use to case-in-chief evidentiary use, is quite minimal in current use doctrine terminology.

The minimal value assessed for prosecutorial use describes, with at least relative concurrence, the first tier of protection that the Supreme Court has historically afforded, and a number of lower courts currently afford, compelled statements of the Tier One type. With the components of compulsion in the model at or close to their relative maxima, contempt compulsion, both in the model and in the doctrine the model is designed to explain, secures close to the maximum measure of protection against prosecutorial use. If the prosecution exceeds this minimal level of use, the prosecution has violated the Fifth Amendment. Retrial, absent the offending use, is available to the prosecution if the impermissible use has not fatally tainted the evidence necessary to sustain a conviction.[298] When the prohibited use cannot be eliminated or sanitized, retrial becomes infeasible.

297. *See* 18 U.S.C. § 6002 (1988).

298. This Article does not explore the potential application of the harmless error doctrine as recently modified in Arizona v. Fulminante, 499 U.S. 279 (1991).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

(b) Tier Two—Traditional Coerced Confession Compulsion

Protection in the next tier of the model results from compulsion of a different order. The Court has traditionally afforded less protection to statements compelled with violence or threats of immediate violence by law enforcement officers than to statements compelled by immunity grants, even though many would deem this compulsion more repugnant than contempt of court. From the time of *Bram* in the late 1800s, the Court has never held that the compulsion of a confession by the "constable's blunder" prohibited per se prosecution of the speaker.[299] The Court began its treatment of these statements with excision, not preclusion, as the recourse.[300] Although direct evidentiary use is prohibited in this tier of the protection spectrum,[301] and the fruit-of-the-poisonous-tree doctrine and associated limiting principles may operate to prevent the admission of most evidence derived from the coerced statements,[302] incidental advantages accruing from nonevidentiary use have not been condemned.[303] The battle now underway between circuits in Tier One cases regarding the permissibility of nonevidentiary use[304] appears either to have been lost or not to have been waged with regard to coerced statements, because nonevidentiary use is the norm in coerced confession cases. Thus, with this form of compulsion, the scope of protection historically afforded is more moderate than that afforded in the Tier One immunity sphere.[305]

Compulsion in this tier ranges from promises of lenity to physical violence. The nature of compulsion in this sphere thus varies, from the relatively mild to the extremely severe.[306] Like the doctrine it seeks to

---

299. Stein v. New York, 346 U.S. 156, 189 (1953) ("This Court never has decided that reception of a confession into evidence, even if we held it to be coerced, requires an acquittal or discharge of a defendant."), *overruled on other grounds by* Jackson v. Denno, 378 U.S. 368 (1964).

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

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

302. "The Supreme Court has not expressly stated that the fruit-of-the-poisonous-tree doctrine applies to coerced confessions, but it is assumed that it does." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 278 (1991)(footnote omitted).

303. "Use preclusion in coerced confession cases only prohibits direct and derivative evidentiary use. Prosecutorial knowledge of illegally extracted information and nonevidentiary use are not prohibited." Strachan, *supra* note 19, at 831. I do not, however, mean to suggest that the permissibility of nonevidentiary use in this tier has gone uncriticized. *See, e.g., id.*

304. *See Risks, supra* note 3, at 647-53 (outlining different interpretations of the permissibility of nonevidentionary use).

305. *Id.* at 653-56.

306. For a critique of the subjectivity of the values, see *infra* notes 397-98 and accompanying text.

Washington University Open Scholarship

clarify,[307] the model selects one value for the nature component representing the entire tier, rather than a particularized value for the circumstances of each case. The value assigned to the nature of compulsion is a relative average over the range of types of compulsion in this tier. On the nature of compulsion scale from zero to ten, the severity of the penalties ranges from one to ten. A suggestion of leniency[308] falls in the lower range and violent physical assault attains the maximum of ten.

That threats of physical violence or death achieve the rating of greatest severity, although culturally relative, is consistent with the fundamental criminal law principle of duress. In criminal law, criminal conduct is excused if the compulsion to engage in the criminal conduct meets the legal definition of duress.[309] To qualify as duress, the threat facing the actor generally must entail danger to life or threat of serious bodily injury.[310] Criminal law excuses from criminal culpability those who act in response to this level of threat. Similarly, the model assigns this level of threat or violence the highest value on the severity of compulsion scale. But the greater variability in the nature of compulsion results in a lower average value for compulsion in this tier. The inclusion of the most severe penalty in this range, physical violence endangering life, weights the average toward the upper end of the range. However, commentators explain that "there does seem to be general agreement that the forms of [compulsion] have become less extreme, in that the use of overt physical violence has

---

307. The Supreme Court's definition of voluntariness has incorporated both positive inducements and negative threats and punishment.

> [T]he constitutional inquiry is not whether the conduct of state officers . . . 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." . . . We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed.

Malloy v. Hogan, 378 U.S. 1, 7 (1964) (citations omitted). *But see* Arizona v. Fulminante, 499 U.S. 279 (1991); *supra* note 56.

308. The model's assignment of a lesser value for promises of lenity may be read as consistent with the Court's greater reluctance recently to recognize promises as meeting the requisite compulsion threshold. See *supra* note 56 and sources cited therein discussing Arizona v. Fulminante, 499 U.S. 279 (1991).

309. *See, e.g.*, CAL. PENAL CODE § 26(6) (West 1994) ("Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused . . . ."). For an argument that a "pattern of excuse runs through a great deal of Fifth Amendment law," see Stuntz, *supra* note 274, at 1228.

310. *See, e.g.*, CAL. PENAL CODE § 26(6) (West 1994).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

largely given way to the employment of more subtle kinds of pressure."[311] Accordingly, the value assigned the nature of compulsion, on average, merits perhaps a seven on the scale of one to ten.[312]

Similar to the variability in the nature of the compulsion component, the automaticity of infliction of punishment for failure to respond also varies widely in Tier Two, from immediate to nonexistent. Failure to respond to the interrogator's questions, silence, may or may not spawn infliction of the threatened penalty. Due to the range for the automaticity component, its average value falls near the middle of its scale, perhaps a three in a range of zero to five.

Finally, this form of compulsion enjoys none of the authorized status of its immunity cousins. Rather, the exercise of compulsion in this tier can form the basis of a civil rights suit against the compelling party.[313] Nor does this compulsion contemplate an official assurance of nonuse prior to questioning.[314] To the contrary, in large measure the compulsion is designed to elicit admissions to be used against the speaker at a criminal trial. On the scale of zero to five, its legitimacy value is zero. Combining the values of the three components of Tier Two compulsion produces:

$$7(\text{Nature}) + 3(\text{Automaticity}) + 0(\text{Legitimacy}) = 10(\text{Compulsion})$$

Inserting the compulsion value into the compulsion model yields:

$$10(C) + U \leq 20$$

Pursuant to the model, Tier Two permits up to ten units of use, a substantially greater measure than the one unit available in Tier One. Ten units probably contemplates the full range of nonevidentiary possibilities, however ultimately defined, as well as derivative evidentiary use that meets the attenuation or inevitable discovery principles. Correspondingly, the model predicts a much diminished level of protection for Tier Two

311. LAFAVE & ISRAEL, *supra* note 33, at 292. *See also* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT xiii (2d ed. 1986) ("The Court should also realize that law enforcement agencies rarely today engage in third degree tactics.").

312. For a critique of the assignment of values, see *infra* notes 397-98 and accompanying text.

313. *See* Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting) (mentioning the possibility of suit under 42 U.S.C. § 1983).

314. Protection in this tier is self-executing, requiring neither statutory enactment nor deliberate decisionmaking by government officials. Automatic protection for the compelled statements may still require a threshold showing by the compelled speaker that, in fact, she suffered from some variation of recognized compulsion. However, the speaker need voice no objection to the interrogation at its inception or throughout its duration to later invoke a prohibition against use.

Washington University Open Scholarship

statements. The characterization of compulsion in Tier Two as animating this moderate protection of coerced confessions corresponds roughly to the class of cases and inferences drawn from them that the Supreme Court[315] and lower courts have ascribed to this category, permitting prosecutors wide latitude in nonevidentiary uses and some derivative evidentiary use.[316]

(c) Tier Three—Choice-of-Rights Compulsion

Tier Three characterizes the compulsion inherent in *Simmons*. In the *Simmons* circumstance, the defendant may opt for silence without incurring the penalties present in Tiers One and Two. But the silence may be costly. Exercise of the privilege may result in an inability to satisfy the criteria of standing and preclude advancement of a claim that items to be used against the defendant were seized unreasonably in violation of the Fourth Amendment. However, the choice required here is not dissimilar to that faced at various junctures in the criminal justice process. For example, this choice resembles the one the defendant must make when deciding whether to testify in his own defense during trial. The right to testify weighs against the right to silence.[317] The accused must choose. The nature of compulsion in Tier Three is a choice between the exercise of competing constitutional rights: sufficient compulsion to meet the self-incrimination threshold, but not in the range of violence or incarceration. Accordingly, this borderline compulsion, similar to choices that fail to meet the threshold of compulsion recognized by the Self-Incrimination Clause, merits a low value on the nature of compulsion scale, perhaps a value of two units.

To this, the model adds a value for the automaticity of infliction of the

---

315. The Supreme Court itself has neither employed the nonevidentiary use terminology nor probed any explicit limitations on nonevidentiary use in its scope cases. The conclusion drawn here is a logical inference from the evolution of the doctrine and its application by lower courts. Similarly, the fruit-of-the-poisonous-tree doctrine with its associated limiting principles is presumed to apply. *See* DRESSLER, *supra* note 302, at 278.

316. *See Risks*, *supra* note 3, at 653-56.

317. One commentator has noted:

> There are numerous situations in our adversary system where tensions arise between the exercise of different constitutional rights. The most common of these situations is the choice put to a criminal defendant either to remain silent and assert his privilege against self-incrimination or to testify and assert his due process right to be heard. No one would contend that a criminal defendant may not be put to such a choice.

Stein, *supra* note 19, at 674.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

penalty.[318] Here the penalty for silence is indirect,[319] potential loss of the suppression motion, rather than incarceration or insistent interrogation, or bullying, or even promises of lenity as inducements. Exercise of the option of silence results in no automatic and direct penalty by the government. The penalty is an indirect result of the choice of silence.[320] Thus, the automaticity value is very low. On the scale of zero to five, automaticity rates perhaps one unit.

Third, the model requires an assessment of legitimacy. *Simmons* compulsion is a function of a legally authorized process, the orderly proceeding of a suppression hearing prior to trial, deserving of two and one-half units for this first of two aspects of legitimacy. The second aspect of legitimacy is a measure of deliberateness—did a promise of nonuse precede the questioning? Since *Simmons* immunity is triggered by the defendant's decision to testify, deliberateness by an entity with immunity-conferring power is absent.[321] The immunity attaches automatically with

---

318. Unlike Tier One, but similar to Tier Two, protection in "choice-of-rights" compulsion is self-executing. It attaches without need for explicit assertion of the right against self-incrimination. Self-execution, however, does not absolve the speaker or her representative from a threshold showing that choice-of-rights compulsion was implicated in the obtaining of the statements, and an objection to the use of those statements.

319. *See* Stein, *supra* note 19, at 677 ("In *Simmons*, on the other hand, the penalty on the privilege was imposed *indirectly* through the operation of the normal criminal procedure."). Stein ultimately rejects the direct-indirect distinction. *Id.* at 689.

320. In distinguishing the circumstances of *Simmons* from those of "compelled testimony cases," a pair of commentators noted:

> [T]hough defendants have a constitutional right to testify in both suppression and revocation proceedings, they retain the absolute right to stand silent at such proceedings. This situation is quite different from the nondiscretionary compulsion to testify provided by new immunity statutes. While harm to a defendant may in fact flow from his decision not to testify at a suppression hearing, or even at a probation revocation hearing, he still has other rights on which to rely, most notably the government's burden of affirmatively proving guilt. In contrast, refusal to testify under a statute which allows the compulsion of testimony upon the grant of immunity can subject a witness to imprisonment. A compulsory statute that cuts more drastically into the right against self-incrimination would seem to warrant a greater extension of immunity than that condoned in the non-compulsory setting[] of . . . *Simmons*.

Jeffrey M. Feldman & Stuart A. Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229, 245 (1986) (footnote omitted). The authors contended that the Alaska Supreme Court would probably reject the then-new use immunity statute in effect in Alaska, resulting in a return to transactional immunity. *Id.* While I would characterize the *Simmons* circumstance as minimally compulsory, the quoted authors' position that differing levels of protection should accompany different types of statements is consistent with Supreme Court doctrine and the models proposed in this Article.

321. Although the power to protect these statements does reside with the judiciary, control over the receipt of the immunity rests with the defendant or his counsel.

Washington University Open Scholarship

the choice to testify; therefore, there is no addition for any deliberate choice to confer immunity in a particular case. The legitimacy value remains at two and one-half units. Combining the values of each of the three components produces:

$$2(\text{Nature}) + 1(\text{Automaticity}) + 2.5(\text{Legitimacy}) = 5.5(\text{Compulsion})$$

Inserting the compulsion value into the model yields:

$$5.5(C) + U \leq 20$$

Thus, the prosecution may exercise up to fourteen and one-half units of use before a self-incrimination violation accrues. This value affords prosecutors substantial latitude on the current scale. Fourteen and one-half units superimposed on current use doctrine probably contemplates not only the full panoply of nonevidentiary uses and derivative evidentiary use under principles of attenuation and inevitable discovery, but almost certainly includes a measure of direct evidentiary use. Evidentiary use in the form of impeachment would probably be consistent with a value of fourteen and one-half units. The model's prediction accords roughly with the measure of use that current doctrine allocates to Tier Three statements: nonevidentiary use is the norm, and direct evidentiary use in the form of impeachment remains at least an open question. Here, where the Court seems to perceive the accused's utterances as barely or quasi-compelled, both the Court and the model sculpt a miserly realm of protection.

Although the specific figures chosen above are somewhat arbitrary, the insertion of numerical values illustrates the inverse correlation posited by the model—that greater compulsion results in less permitted use. Since U represents the scope of protection, when U is a low number, little use is permitted and protection is consequently higher. When U is a high number, much greater use is permitted and protection is correspondingly diminished. The compulsion model then provides a framework for understanding the three basic tiers of protection that result from different degrees or types of compulsion. By articulating a guiding principle, the model is useful for both explaining the disparities in existing doctrine and forecasting and evaluating future self-incrimination circumstances. But compulsion is not the only principle through which existing doctrine can be understood or clarified. The next section proposes a second method for explaining the database of existing scope cases.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

C. *The Balancing Model*[322]

1. *The Model Described*

The balancing model weighs the pertinent governmental interests against the speaker's privilege against self-incrimination. Unlike the compulsion model, which selects one primary variable as the controlling principle, the balancing model weighs a number of variables in determining the relative level of protection. In particular, the balancing model incorporates

322. Discussions of balancing in the larger context of qualifying for self-incrimination protection are not uncommon. *See, e.g.*, Stuntz, *supra* note 274, at 1237 ("The real challenge is to explain why the balances are struck as they are in particular cases, and to do so in a way that allows one to assess, at least in broad terms, whether the doctrine is internally coherent. It may be that this challenge simply cannot be met—that unstructured balancing is the best we can do in explaining fifth amendment law—but if we can do better, we should."); Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 185 (1992) (advocating explicit recognition and adoption of a balancing approach, outside criminal matters, for self-incrimination cases, and claiming that "the balancing approach should be applied outside the criminal sphere where, although the individual has interests in protecting himself from compelled self-incrimination, the government also has a legitimate goal (separate from any criminal objectives) to obtain the sought after information"); Herman, *supra* note 19, at 503 ("[I]n administering the various functions of the privilege, the Court ordinarily does not balance the government's interest in obtaining information against the individual's interest in avoiding compulsion. Whether a case involves the admissibility of a compelled statement in a criminal proceeding or a witness's effort to avoid a sanction for nondisclosure, the Court normally ignores the government's interest in obtaining information."). Professor Herman argues that its refusal to balance results from its belief "that the tension between governmental and individual interest can best be adjusted by use of immunity." Herman, *supra* note 19, at 504-05.

The Court, in its plurality opinion in *Byers*, explicitly used a balancing construct. *See supra* notes 115-21 and accompanying text. A balancing approach also featured prominently in Justice Harlan's dissent in two compulsion cases in 1967. *See* Garrity v. New Jersey, 385 U.S. 493, 507 (1967) (Harlan, J., dissenting) ("The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interest it is designed to protect."); Spevack v. Klein, 385 U.S. 511, 525 (1967) (Harlan, J., dissenting) (advocating the "select[ion of] the rule or standard most appropriate for the hazards and characteristics of each consequence"). For additional discussions of balancing in the Court's determination of which statements reach the Fifth Amendment threshold and qualify for protection, see LAFAVE & ISRAEL, *supra* note 33, at 433; Larry J. Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 407, 414-15 (1977); Stein, *supra* note 19, at 676; and Jessica Wilen Berg, Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 702-03 (1994) (proposing "that a state's legitimate interest in compelling testimony for reasons other than amassing evidence for a criminal prosecution should be balanced against the defendant's interest in asserting the Fifth Amendment privilege," to determine whether Fifth Amendment protection should be available to the speaker).

Washington University Open Scholarship

flexibility on the government interest side of the expression that was unavailable in the compulsion model. In addition to the primary compulsion variable and the use variable, previously present on the left side of the compulsion model relation, the right side of the balancing model relation now consists of two new variables and a constant.

The constant on the right side of the relation is best characterized as it is in the compulsion model as an overarching governmental interest in the detection and prosecution of criminal conduct. Prohibitions or limitations on use of compelled statements can jeopardize the government's ability to uncover and punish criminal conduct. The value assigned this constant remains the same in the balancing model as it was in the compulsion model—a value of twenty. Using the same value for the constant facilitates comparison of the results of the models.

However, this primary governmental interest may be particularly endangered by certain circumstances, circumstances not adequately comprehended or accounted for in the compulsion model. For example, the identity of the person or entity granting immunity affects the ability of the government to satisfy its primary interest in the immunity context.[323] When the prosecuting entity controls the decision of whether to compel and the timing of the compulsion order, the risk of impeding the detection and prosecution of crime is lowest. In contrast, where the prosecution does not control the grant of immunity, the risk of irremediable damage to the government's interest in the detection and prosecution of crime is heightened.[324] The circumstances of Oliver North's criminal prosecution offer a notable example of the problems that may confront the prosecution when control of the decision to confer immunity rests elsewhere than with the prosecutors.[325] This risk bears directly upon the prosecution's ability

323. The concern with the identity of the immunity giver reflects in part the repeated emphasis of the Court, at least in the context of the federal immunity statute, on prosecutorial or executive control over the immunity grant. "No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one . . . ." Pillsbury Co. v. Conboy, 459 U.S. 248, 261 (1983). "Use immunity was intended to immunize and exclude from a subsequent criminal trial only that information to which the Government expressly has surrendered future use." *Id.* at 260.

324. For a Ninth Circuit opinion explicitly acknowledging the risk to a criminal prosecution when the immunity derives from colleague police officers, see United States v. Koon, 34 F.3d 1416, 1431-35 (9th Cir. 1994), discussed more fully *infra* note 442.

325. Although Congress apparently anticipated that its investigation would not preempt the criminal prosecution of Oliver North, its grant of immunity, coupled with the strict appellate definition of use, tolled the death knell for that prosecution. United States v. Poindexter, 698 F. Supp. 300, 304 (D.D.C. 1988) (noting that Congress "did not intend to prevent the prosecution," and that prior to taking the immunized testimony, Congress' "own legal staff analyzed the evidence already developed . . . to

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

to pursue the immunized accused wrongdoer.[326] The balancing model accommodates the phenomenon of risk by adding a risk variable (R) to the government constant. When control over the decision to confer immunity to the speaker rests with the prosecution, additional risk approaches zero. When control over the immunity grant shifts from the prosecution to other actors, the model increases the value assigned to the risk variable, ranging on a scale of zero to two.[327]

In addition to a small increment for risk to the primary government interest constant, the balancing model anticipates, in certain circumstances, potential augmentation on the government side of the mathematical expression through addition of interests other than the primary interest in the detection and prosecution of crime. For example, a respect for federalism might enhance the value on the government side of the expression in much the way a respect for federalism motivated the Court to permit use rather than transactional immunity for prosecutions initiated by a sovereign other than the one that conferred immunity.[328] Supplemen-

---

demonstrate . . . that ample proof of the principal crimes . . . already existed"). The citation here is to the 1988 *Poindexter* opinion because at that time the *North* and *Poindexter* cases were still joined. The convictions in both cases were subsequently reversed and/or vacated. United States v. North, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992). Following the appellate court's definition of use, the trial court commented: "You must realize that there is a very slight possibility that the ablest group of lawyers in the world could meet the standard of the court of appeals . . . . I don't believe there's anyone I know of who could." David Johnston, *North's Judge Doubts Verdict Will Stand Up*, N.Y. TIMES, June 15, 1991, at A1. Prior to Congress' grant of immunity, Independent Counsel Walsh had written a memo to Congress including the following: "Any grant of use and derivative use immunity would create serious—and perhaps insurmountable—barriers to the prosecution of the immunized witness." Memorandum of the Independent Counsel Concerning Use Immunity 1 (Jan. 13, 1987) (submitted to the Joint Congressional Iran/Contra Committees), *cited in North*, 910 F.2d at 863. Ultimately, Walsh informed the court that "the government is not likely, in the unique circumstances here presented, to be able to sustain a successful outcome." Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1.

326. The governmental interests do not include, as the doctrine they model does not include, assessment of the government's particular need for the compelled statement in a given case.

327. The limited range accorded this factor allows only a modest adjustment or fine-tuning of the values in the balancing model. The limitations on the range of this variable largely stem from maintaining the constant at a stable value of twenty in both models to facilitate a comparative analysis. If the models had been developed independently of each other, then the range for this variable might have been greater.

328. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and

Washington University Open Scholarship

tary interests, however, reach more substantial values, perhaps up to ten units, when the interest derives from a "regulatory regime"[329] distinct from criminal investigation and prosecution. The paradigm example arises in the context of custodial duties. Certain entities or persons, including corporations, are subject to governmental rights of inspection.[330] This supplementary governmental interest in the right of inspection in this regulatory context serves to augment the government interest side of the expression and, consequently, to limit the scope of protection available to custodians of such entities.

The government side of the expression in the balancing model then has one constant and two variables, the primary government interest constant (G), a risk variable (R), and a supplementary interest variable (S). At this stage, a mathematical expression may enhance explanation of the balancing model.

$$C + U \leq G + R + S$$

The left side of the expression largely represents harm to the privilege against self-incrimination of the accused. This harm is measured as compulsion plus use and calculated exactly as in the compulsion model. When this harm is less than or equal to the primary government interest in the detection and prosecution of crime (G) plus any increment for risk to that government interest (R) plus enhancement by separate, pertinent government interests (S), no self-incrimination violation occurs. When, however, the sum of compulsion plus use is greater than the sum of the government interest, the risk to that interest, and any boost provided by an interest separate from that in the prosecution and detection of crime, the speaker's self-incrimination right is violated.

> prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.

Id. at 79. Although the cited passage indicates that the government interests in question are those of investigating and prosecuting crime, these are interests belonging to each of the two sovereigns. Transactional immunity would satisfy the constitutional rule if not for the federalism concern. It is the separate interest in federalism that induces the Court to fashion the use immunity compromise. I use the term federalism to refer to truncating the rights or abilities of another sovereign, either federal or state. *See* Kastigar v. United States, 406 U.S. 441, 463-64 (1972) (Douglas, J., dissenting).

329. Baltimore Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 556 (1990).

330. "[T]he corporation 'is a creature of the State,' with powers limited by the State. As such, the State may, in its exercise of the right to oversee the corporation, demand the production of corporate records." Braswell v. United States, 487 U.S. 99, 105 (1988) (citations omitted).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

2. *The Model as an Explanation of Existing Doctrine*

Under existing doctrine, compelled statements protected by formal grants of immunity—Tier One statements—stand at the zenith of the protection spectrum. In the balancing model, these statements earn their extensive use immunity protection through a weighing of the speaker's privilege against competing governmental interests. On the speaker's side of the balance, exercise of the privilege, refusal to answer the interrogator's inquiries, in the face of immunity incurs a direct, legally authorized, and relatively automatic penalty, contempt and jail, the heaviest legally sanctioned penalty for refusal to answer. In these circumstances, compulsion is at an extremely elevated value, a value of nineteen—the same value as in the compulsion model.

Opposing this direct and formidable tax on the exercise of the privilege is the governmental interest in the detection and prosecution of crime, a constant. From that constant, the balancing model permits addition of risk not adequately accounted for in the compulsion model. The dominant risk lies in the identity of the immunity giver. In a Tier One circumstance where the immunity decision rests with the prosecution, the risk value is zero. In addition to risk, the balancing model also takes into account separate governmental interests, like federalism. Unless the conferring and prosecuting authorities represent different sovereigns, or other supplementary government interests are present, this "S" value in the posited Tier One example is zero.

When the conferring and prosecuting authority are the same, the Tier One balancing model expression yields:

$$19(C) + (U) \leq 20(G) + 0(R) + 0(S)$$

In this illustration of Tier One balancing, when none to minimal use is made of the compelled statement, no violation of the speaker's self-incrimination right occurs.[331] As Justice Marshall argued in his dissent in

331. For convenience, the following table supplies the values for the balancing model in each tier:

Tier #	Nature	Auto.	Legit.	Comp.	Risk	Supp. Int.	Use
Tier 1	9	5	5	19	0	0	1
Tier 1+	9	5	5	19	1	0	2
Tier 2	7	3	0	10	1	0	11
Tier 3	2	1	2.5	5.5	2	0	16.5

Washington University Open Scholarship

Kastigar, "because an immunity statute operates in advance of the interrogation, there is room to require a broad grant of . . . immunity without imperiling large numbers of otherwise valid convictions."[332] Thus, in this situation, the balancing model reduces to the compulsion model, because none of the distinguishing components of the balancing model is active.

However, the power to grant immunity is not limited to prosecutors. The OCCA clearly contemplates that additional authorities will grant immunity.[333] When, under the OCCA, Congress or an administrative agency invokes the immunity-granting power, risk to the primary government interest claims a value above zero, at least one unit. The expression then becomes:

$$19(C) + (U) \leq 20(G) + 1(R) + 0(S)$$

The addition of a unit of risk supports a use value one unit higher than in the first Tier One balancing equation.

Although the petitions for certiorari in both *North* and *Poindexter* brought the Court the opportunity to address the scope of congressionally supplied immunity, the Court denied both petitions.[334] The Supreme Court has not specifically addressed, therefore, the question of whether the scope of permitted use varies when Congress or an administrative agency is the immunity giver under the OCCA. The result suggested by the model arguably differs from the actual result of the *North* and *Poindexter* circuit tribunals. The majority on the panels in both of those cases indicated that any use would be scrutinized vigorously.[335] Translated into the terminology of the models, the *North* and *Poindexter* panels probably reach a result more closely approximating the result in the compulsion model, a value not exceeding one unit of use. Because the Court declined to resolve the question, the balancing model posits a measure of use arguably more generous than that permitted by the circuit courts in *North* and *Poindexter*. Nonetheless, the balancing model still supports a high level of protection for statements compelled by formal prosecutorial grants of immunity, and

---

332. *Kastigar*, 406 U.S. at 471 (Marshall, J., dissenting). Justice Marshall was referring to transactional immunity. *Id.*

333. 18 U.S.C. §§ 6001-6005 (1988). In particular, the OCCA contemplates immunity grants by Congress, its committees, and various administrative agencies. *Id.*

334. United States v. North, 500 U.S. 941 (1991); United States v. Poindexter, 113 S. Ct. 656 (1992).

335. *See Risks, supra* note 3, at 646-53.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

a slightly reduced level for those compelled by Congress or administrative agencies within Tier One. As the mathematical expressions illustrate, however, the measure of use between the compulsion and balancing models does not vary substantially for these Tier One examples. Both models provide at least substantial protection against use, consistent with the limited guidance of Supreme Court doctrine.

Weighing the same factors in Tier Two results in a lesser measure of protection for statements compelled by the overzealous interrogator with no formal legal authority to grant immunity. As in the compulsion model, nature, automaticity, and legitimacy sum to ten units.[336] Weighed against the uncertain, but potentially grave, illegitimate penalty for exercise of the privilege, is the cost of protection for these compelled statements to the government's ability to detect and prosecute criminal conduct. In Tier Two, as Justice Marshall explained in his dissent in *Kastigar*, "the decision to question . . . is often made in haste, under pressure, by an officer who is not a lawyer."[337] Because the immunity giver is not a prosecutorial actor, the risk to the governmental interest in detection and prosecution is greater than when the immunity decision rests with the prosecution. Under a balancing rationale, consistent with Justice Marshall's observation, we charge a higher price for a prosecuting lawyer's decision to confer immunity than for the same decision made by a police actor. A portion of the price, that for haste versus deliberateness, was tabulated within the compulsion legitimacy variable. Greater legitimacy and greater protection accompanied statements procured through a deliberate choice to confer immunity.

But the compulsion model did not adequately comprehend the additional risk of a nonprosecutorial actor conferring the immunity. Risk to the government interest in this context is elevated, receiving one of the available two units. The risk rises only a single unit because on the relative scale of zero to two, the greatest risk to prosecutorial interests derives from immunity givers whose goals are directly antagonistic to those of the prosecution. The police, however, generally pursue goals similar to those of the prosecution, and the prosecution can have some influence over police procedure when both agencies' goals coincide. The supplementary

---

336. See *supra* notes 306-14 and accompanying text for the calculation of the values on the speaker's side. Unlike the compulsion in Tier One, which is legally authorized, some measure of remedial action for improper compulsion may reside in civil rights actions against the offending law enforcement officials. *See* 42 U.S.C. § 1983 (1988).

337. *Kastigar*, 406 U.S. at 471 (Marshall, J., dissenting).

Washington University Open Scholarship

governmental interest value in this particular example is zero. In the paradigm Tier Two case, the balancing model yields:

$$10(C) + (U) \leq 20(G) + 1(R) + 0(S)$$

Permitted prosecutorial use is eleven units, one unit greater than in the compulsion model. As in the compulsion model, eleven units of use should encompass the full range of nonevidentiary use and derivative evidentiary use—through attenuation and inevitable discovery—and roughly corresponds to the treatment of Tier Two statements by the limited Supreme Court doctrinal guidance and by the practice of lower courts.[338]

In Tier Three, choice-of-rights compulsion merits the lowest figure on the compulsion scale. As in the compulsion model, the compulsion value is five and one-half units.[339] On the government's side of the expression, risk triggered by the defendant's decision to testify poses the greatest hazard, of the three tiers, to the government's interest in the detection and prosecution of crime. While the prosecution may assert some influence or indirect control over Congress' decision to grant immunity or over police policy regarding interrogation of suspects, the defendant has every incentive to frustrate prosecutorial goals. As a result, the risk value in the Tier Three circumstance reaches the top of its range, receiving a value of two units. Again, assuming an absence of federalism or other supplementary interests, the supplementary government interest value is zero. The Tier Three balancing relation follows:

$$5.5(C) + (U) \leq 20(G) + 2(R) + 0(S)$$

Use achieves a value of sixteen and one-half units. Use, therefore, bows to few restrictions. Nonevidentiary use is the norm. In addition, derivative evidentiary use through attenuation and inevitable discovery, and even direct evidentiary use for impeachment purposes appears encompassed comfortably within the use value. Tier Three balancing provides a somewhat greater use value than that of the compulsion model. But, like the compulsion model, the balancing model furnishes a quantum of protection roughly commensurate with that of the doctrine it seeks to explain.

---

338. *See Risks, supra* note 3, at 653-56.

339. See *supra* notes 317-21 and accompanying text for the calculation of this value.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

D. Other Possible Models

In addition to these two primary models, two alternate models merit at least brief discussion. The first is a case-by-case model. This model rejects efforts to superimpose any pattern or guiding principle on self-incrimination doctrine. It permits ad hoc case-by-case evaluation. This model, however, like the Court's current disparate scope doctrine, impairs our ability to understand and evaluate the constitutionality of the disparities in scope cases. And it offers little guidance for the resolution of future cases. Because it lacks predictive ability, this model fails Hawking's criterion for a good theory. Understanding, evaluation, and guidance are fundamental for principled decisionmaking.[340]

In the second alternate model, compelled utterances merit a set, uniform quantum of protection. In this model, the Self-Incrimination Clause is unbending and absolute. Compulsion occurs at a given moment and the scope of protection is fixed and consistent. This view of the Clause is not without appeal. At least with respect to establishing a uniform level for Tiers One and Two, it seems to correspond to a number of clues in Supreme Court text[341] and the thinking of at least one prominent commentator on disparate scopes of protection.[342] Nor is it difficult to envision the Supreme Court adopting this model. Adoption, however, would require a substantial overhaul of existing doctrine because the goal of a uniform quantum of protection bears little resemblance to existing Supreme Court treatment of compelled statements.[343] The model's failure to explain the existing decision database suggests that it also would fail

340. *See supra* notes 21-22 and accompanying text.

341. *See* discussion *infra* Part IV.A.2.

342. Assistant United States Attorney Humble argues that nonevidentiary use "is beyond the scope of the fifth amendment privilege." Humble, *supra* note 14, at 384. "Thus, the fifth amendment allows the nonevidentiary use of compelled testimony just as it allows nonevidentiary use of coerced confessions." *Id.* at 383. Humble explains that "[t]he fifth amendment does not protect immunized witnesses more than it protects others." *Id.* at 384. Implicit, if not explicit, in his argument is the understanding that the Fifth Amendment provides a single, uniform minimum level of protection for both Tier One and Tier Two statements.

343. To the extent that the Court has never explicitly resolved the nonevidentiary use issue, and in light of inferences a reader might draw from the analogy and references to coerced confessions and statutory immunity in Court opinions, one could conclude that, currently, the distinctions between Tier One and Tier Two statements are illusory. But that conclusion is far from well established and is inconsistent with the interpretations by many lower courts of statutory immunity. *See Risks, supra* note 3, at 645-53. Moreover, the merger of Tiers One and Two would still leave the Court's treatment of Tier Three statements outside the new framework and therefore unexplained.

Washington University Open Scholarship

Hawking's definition of a good theory. Because this Article focuses on developing theories which both explain existing Self-Incrimination Clause doctrine and furnish guidance for principled decisionmaking, exploration of the fixed-quantum model is not pursued here.

Other models are conceivable. For example, a utility-based theory might explain the data. Where the least harm accrues to the government interest in the detection and prosecution of criminal conduct, the model would afford the greatest protection (a variant of the proposed balancing model).[344]

In developing the main models of this Article, I do not suggest, therefore, that the field has been exhausted. Rather, these models are initial approaches to surfacing patterns in disparate treatment. Both of the primary models do describe, in large part, existing Supreme Court doctrine on statements the Court has deemed compelled. Moreover, the models' component elements stem from reasoned consideration of the factors composing self-incrimination doctrine rather than arbitrary adjustments to accommodate individual cases. Thus, the two primary models, subject to limitations described in Part IV, do substantially fulfill the first criterion of a good model. They describe a large subset of existing Supreme Court cases without many arbitrary elements. However, before we apply the models' forecasting abilities, and confront the second criterion of Hawking's definition of a good model,[345] the significant assumptions and limitations of the models deserve examination.

IV. CRITIQUING THE MODELS

This Part highlights underlying assumptions and limitations inherent in the models and their abilities to explicate the pattern of Supreme Court decisionmaking in the realm of scope doctrine.

A. *The Fit*

1. *Beyond and Between the Three Reference Tiers*

Although the models furnish a tolerable fit to the three tiers of protection doctrine sculpted for our descriptive purposes, close analysis of Supreme Court doctrine reveals that carving the doctrine into three neat tiers belies

344. For a discussion of another model focused more directly on due process, see *infra* Part IV.E.

345. Do the models enable us to forecast the appropriate scope of protection in compelled statement cases where the scope of protection remains to be articulated?

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

the complexity and nuances of the existing cases. One unresolved question is where to include the *Braswell* evidentiary limitation circumstance. In *Doe*,[346] the pertinent decision preceding *Braswell*, the Court clarified that production of documents in response to a subpoena duces tecum was entitled to scrutiny similar to that accorded other formally compelled statements, Tier One protection.[347] The Court's choice in *Braswell* to provide lesser protection—a strictly evidentiary limitation on the identity of the custodian complying with the production order—may represent assignment of dual levels of protection to formally compelled statements in the unique circumstances of custodial subpoena duces tecum responses. If *Braswell* does represent a departure,[348] in which tier of the protection spectrum does the evidentiary limitation fall? Or does it create a new tier?

If this aspect of *Braswell* refracts a new hue on the protection spectrum, then it signals a limitation on, at least, the compulsion model. The compulsion involved in a subpoena duces tecum is the compulsion of Tier One—contempt and jail for refusal to comply. In the first model, that high a degree of compulsion should require a very low use value to avoid violating the Fifth Amendment. But restrictions solely on evidentiary use suggest a value in the mid-range for the use element. If the use element falls in the mid-range in the first model, the expression becomes: $19(C) + 10(U) > k(20)$, and the *Braswell* Court nuance does not fit within the compulsion model. The possibility that *Braswell* creates an exception demonstrates one of the limits on the model[349]—its fit to existing doctrine may prove a close but not precise match.

Unlike the compulsion model, the balancing model may accommodate the *Braswell* evidentiary limitation. While the left side of the expression remains unchanged from the compulsion model, the *Braswell* circumstance embodies a supplementary governmental interest of importance to the Court and the model. *Braswell's* production was required as part of his custodial responsibilities, responsibilities that existed as a result of the State's control

346. United States v. Doe, 465 U.S. 605 (1984).

347. *Id.* at 616-17. For an analysis of a number of different approaches to the scope of act-of-production immunity, see Melilli, *supra* note 227. These approaches focus on whether act-of-production immunity results in immunizing the contents of the items produced, an issue not specifically addressed by the models proposed here. On the question of immunizing the contents, see also Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 40-49 (1987).

348. *See supra* notes 240-47 and accompanying text.

349. The model's limitation might be due in part to the Court's less than precise explication of the *Braswell* evidentiary restriction, or the *Braswell* limitation may simply not be a form of Fifth Amendment use immunity. Braswell v. United States, 487 U.S. 99, 118 n.11 (1988).

Washington University Open Scholarship

over a "state creature," a corporation.[350] The government's regulatory interest in the corporate records existed outside of the criminal context. That government interest rates a substantial value, perhaps as high as ten units, a value that could enable the level of protection the Court assigns the custodian in *Braswell*, an evidentiary use limitation.

$$19(C) + (U) \leq 20(G) + 0(R) + 10(S)$$

The balancing model's potential success may be illustrated by applying it to the case that followed the theory of *Braswell*, namely *Baltimore v. Bouknight*.[351] The Court in *Bouknight* found that

> [e]ven assuming that [the] limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.[352]

The *Bouknight* Court's language emphasized the importance of the separate regulatory governmental interest: "When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced."[353] The supplementary interest operates to reduce the level of protection afforded the compelled statements.

Despite the Court's protestation in *Braswell* that it was not enforcing a Fifth Amendment constructive use immunity,[354] in *Bouknight* the Court made clear that limitations on evidentiary use do derive from Fifth Amendment protection.[355] While the *Bouknight* Court did not perceive its role as requiring a definition of "the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of

350. *Id.* at 110.

351. 493 U.S. 549 (1990).

352. *Id.* at 555-56.

353. *Id.* at 558.

354. *Braswell*, 487 U.S. at 118 n.11.

355. "The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution." *Bouknight*, 493 U.S. at 561-62. The *Bouknight* Court also cited an array of cases offering different levels of protection to support the proposition that "[i]n a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." *Id.* at 562.

production in subsequent criminal proceedings,"[356] the Court did note that the "imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony."[357] The act of production did implicate the Fifth Amendment although it did not permit the custodian to refuse production. Perhaps the Court is implying that the evidentiary limitation is sufficient protection, or "use immunity," to overcome the Fifth Amendment claim. The Court's treatment of the "speaker" in *Bouknight* is consistent with the theory of the balancing model. The balancing model, by incorporating flexibility on the government interest side of the expression and introducing a substantial value for that interest in the *Braswell/Bouknight* custodial context, can rationally explain the evidentiary use restriction in those circumstances. The flexibility of the balancing model suggests that it promises a closer affinity to the doctrine that it is designed to explain than does the compulsion model.

2. *The Proximity on the Protection Spectrum of Tier One and Tier Two in Existing Supreme Court Doctrine*

A second fit limitation, which is applicable to both models, lies in the potential proximity in which the Court has placed immunized Tier One and coerced Tier Two statements in recent years. For example, the Court's analogy to coerced confessions in *Kastigar*[358] and its reference to *Mincey* for support of the limitations on evidentiary impeachment use of immunized testimony[359] may suggest a greater parity in treatment of Tier One and Tier Two statements than the models can accommodate.

If one reads the Court's decisions as creating a single, uniform level of protection for Tier One and Tier Two statements,[360] then the models will not accurately describe the existing database of Supreme Court scope decisions nor fulfill Hawking's first criterion of a good model. Such a reading is not implausible. It would simplify much scope doctrine, although the discrepant protection of Tier Three would remain to be addressed. But lower courts, rather than unreservedly embracing this reading, are

356. *Id.* at 561.

357. *Id.* (citing *Braswell*, 487 U.S. at 118 n.11).

358. Kastigar v. United States, 406 U.S. 441, 461 (1972).

359. New Jersey v. Portash, 440 U.S. 450, 459 (1979).

360. For a commentary arguing that the Fifth Amendment does not require a more demanding standard in Tier One type cases than in Tier Two, see Humble, *supra* note 14. For an explication of the position that Tier One statements should receive greater court protection than those of Tier Two, see Strachan, *supra* note 19.

Washington University Open Scholarship

embroiled in a dispute over the appropriate scope of protection to be afforded Tier One statements.[361] The debate ranges from the applicability of attenuation-of-taint and inevitable discovery principles,[362] whose availability lower courts generally accept in Tier Two,[363] to the permissibility of nonevidentiary uses,[364] also generally accepted by lower courts in Tier Two.[365] Even courts that permit relatively greater use for Tier One statements often seem to retain residual concerns about use that appear to distinguish their Tier One protection from that which courts generally accord Tier Two.[366] As a result, it seems that even some of the more "permissive" lower courts do not truly equate the protection of Tier One and Tier Two statements.[367] Parity also ignores the extended historical disparities of treatment between these two tiers.[368] Thus, while Tier One and Tier Two statements may someday receive equivalent protection, current doctrine implies that such parity is not yet the case. Therefore, the models' differing treatment is not inconsistent with either the evolution of protection in Supreme Court doctrine or the reality of interpretation of that doctrine by many lower courts considering statements in these two tiers.

B. No Absolute Values

To a substantial extent, the models offer only comparative values for the quantum of protection appropriate for each tier. Tier One embodies protection greater than Tier Two, which is greater than Tier Three. The models do not resolve the prickly debate regarding what constitutes nonevidentiary use or derivative use. Nor do they define the parameters of the fruit-of-the-poisonous-tree, attenuation-of-taint, and the inevitable discovery doctrines. These doctrines and questions riddle efforts to delineate the exact scope of protection within the tiers. But perhaps determining whether there are articulable reasons for permitting any disparity in treatment is a question that needs to be addressed at least at the

---

361. *See Risks*, *supra* note 3, at 646-53.

362. *See, e.g.*, *id.*

363. *See id.* at 655.

364. *See id.* at 646-53.

365. *Id.* at 654.

366. *Id.* at 647-53. For different expressions of the Ninth Circuit's position on permitted use, see United States v. Crowson, 828 F.2d 1427, 1431-32 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); United States v. Mapelli, 971 F.2d 284, 287-88 (9th Cir. 1992); United States v. Koon, 34 F.3d 1416 (9th Cir. 1994).

367. *See Risks*, *supra* note 3, at 646-53 (comparing the treatment of the tiers).

368. *See supra* notes 29-262 and accompanying text.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

same time as efforts to define the precise contours of each level of protection in the spectrum. If no principled model could be posited to explain disparate treatment, then the attempt to carve the detailed contours of each level might incline toward a purely intellectual exercise.

C. *No Moral Content/Ultimate Normative Assessment*

While the models do describe a large class of observations, they make few, if any, independent moral or normative judgments about the underlying doctrine. In distilling a guiding principle and developing a model based upon that principle, the models offer reasoned explanations of, and patterns in, existing doctrine. They are empirically driven descriptive models. The independent moral or normative evaluation of their legitimacy in larger constitutional and philosophic terms represents the next step in evaluating the models. That second step is beyond the scope of this Article. Until, however, an evaluation in larger constitutional and philosophic terms is undertaken, unreserved endorsement of the models would be premature.

On a larger scale, the merits of balancing as a mode of constitutional interpretation have become the focus of extensive scholarly debate.[369] An evaluation of the positions of that debate and their potential applicability to the models proposed here exceeds the parameters of the instant analysis. It is, however, worth noting that balancing or sliding scale adjudication is not magic. These decisional methods will continue to require the exercise of judicial wisdom in ascertaining the values for the components of the models. Nor do these types of adjudication eliminate subjectivity,[370] even if applied through mathematical models.

Moreover, the models do not address potential application of the doctrine of harmless error.[371] They merely facilitate prediction of when prosecutorial use will violate the Self-Incrimination Clause, not whether such a violation, for example, necessitates reversal of a conviction.

---

369. *See, e.g.*, Symposium, *When Is a Line as Long as a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707 (1994); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Coffin, *supra* note 22; David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

370. Coffin, *supra* note 22, at 25 ("What balancing does not do, even when done superbly, is eliminate all subjective forces from decision.").

371. Arizona v. Fulminante, 499 U.S. 279 (1991).

Washington University Open Scholarship

D. *The Origins and Support for the Models' Components*

As may be understood from the discussion of the doctrinal development and the models' descriptions, the models' components have been distilled from clues in Supreme Court text, outcomes in cases, and apparent policy choices made by the Court.[372] They represent the results of efforts to determine why the Court distinguished among different tiers of protection or declined to provide any protection at all. This subpart catalogues several additional examples of the clues used in formulating the models.

In the study of Supreme Court treatment of compulsion, the Court responds to different types of compulsion differently. The nature of the compulsion appears to count. For instance, in the *Portash* decision, the Court describes Tier One immunized testimony as "the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions."[373] If some form of compulsion is the essence of coercion, then by implication some form or forms are not the essence, but may still qualify as coerced. The particular form of compulsion that the Court employs to contrast against Tier One "essence" testimony is a form that, by description, is Tier Two coerced confessions. In Tier One, the compulsion is unquestionable. But in Tier Two, the defendant must prevail in a voluntariness hearing before the burden shifts to the prosecution regarding use of the defendant's coerced utterances. At that hearing, the court must decide the threshold question applicable in Tier Two but not Tier One cases: whether "physical or psychological pressures overrode the defendant's will." The Court's language signals a sensitivity to differences in the nature of compulsion.

Support for the selection of the nature of compulsion as a component in the models also inheres in the Court's 1953 decision in *Stein v. New York*.[374] In evaluating the voluntariness of a confession, the Court contrasted compulsion by physical violence with that by psychological

---

372. It is not my intention to suggest that the models developed in a vacuum. Like commentators before me, I have benefitted consciously, and undoubtedly subconsciously, from immersion in a wealth of commentary on the Fifth Amendment and related areas.

When that benefit was conscious, and where appropriate, I have endeavored to recognize those commentators, by citation, whose works were directly pertinent to the text materials. I am grateful to all those additional commentators whose works supplied background information. Nonetheless, to my knowledge, the models, as described here, are unique.

373. *Portash*, 440 U.S. at 459.

374. 346 U.S. 156 (1953), *overruled on other grounds by* Jackson v. Denno, 378 U.S. 368 (1964).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

coercion.[375] With respect to physical violence, the Court declared:

> Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.[376]

Although trustworthiness is no longer a cornerstone of the voluntariness evaluation,[377] the Court in *Stein* perceives physical violence or its threat as obviating the need for inquiry into voluntariness. In contrast, the Court, while acknowledging that "a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession,"[378] indicates that evaluation of psychological coercion "has a different point of departure."[379] "Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not."[380] As a consequence, psychological coercion necessitates evaluation of the particular circumstances. From these passages, a relative weighing of at least two types of coercion is possible. Moreover, these passages suggest that a nature of compulsion scale that elevates physical violence to the apex is consistent with the concern expressed by the Court here.

Another clue to the influence of the nature of compulsion on Supreme Court doctrine lies in the reduced protection the Court affords Tier Three statements, those that result from competing rights. Providing less protection for this tier is consistent with a perception that the compulsion in this tier is barely distinguishable from the many difficult choices involved in trial strategy that do not cross the self-incrimination threshold.

---

375. 346 U.S. at 182-86.

376. *Id.* at 182.

377. *See infra* note 386.

378. *Stein*, 346 U.S. at 184.

379. *Id.*

380. *Id.* It would appear, as a means of reconciling a possible inconsistency in the Court's pronouncements in *Portash* and *Stein*, that within Tier Two, once physical violence is established, it, like contempt, is recognized as inherently coercive. Perhaps the *Portash* weighing regarding "physical pressures" involves a determination of whether those pressures qualify as violence.

Washington University Open Scholarship

The automaticity component stems, in part, from repeated reference in Court doctrine to the existence or absence of a direct link between invocation of the privilege and punishment for silence. For example, in 1976 the Court held in *Baxter v. Palmigiano*[381] that prison disciplinary authorities could consider the prisoner's silence at the disciplinary hearing as one factor in determining whether to impose disciplinary sanctions.[382] The Court distinguished the line of cases involving discharge of public employees and contractors, because "refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State."[383] Whether the penalty accrues directly or automatically upon invocation of the Fifth Amendment is an important factor in self-incrimination doctrine. This factor is embodied in the automaticity component of both models.

With respect to legitimacy, as Justice Marshall explained in his dissent in *Kastigar*, we charge a higher price for "a calm and reasoned decision whether to compel testimony and suffer the resulting"[384] loss of evidence. The deliberateness of the choice to compel testimony also factors into both models.

A reader considering policy rationales motivating early protection of coerced statements may wonder why reliability is not a component of the models.[385] Its absence derives from the Supreme Court's repeated rejection of reliability as a pertinent inquiry in the self-incrimination context.[386] In this instance the Court's rejection renders reliability an

381. 425 U.S. 308 (1976).

382. *Id.* at 318.

383. *Id.*

384. *Kastigar*, 406 U.S. at 471 (Marshall, J., dissenting). Justice Marshall's comments were directed to a comparison of transactional immunity and the exclusionary rule for coerced confessions. However, the logic of his position applies to the disparities in scope between the immunity that *Kastigar* approved and traditional coerced confessions.

385. *See generally* LAFAVE & ISRAEL, *supra* note 33, at 294 (discussing the common law rule and the question of reliability).

386. *See* Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."); Jackson v. Denno, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . ."); New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely unreliable self-incrimination."). *But see* United States v. Carignan, 342 U.S. 36, 41 (1951) (implying that involuntary confessions might be excluded due to untrustworthiness).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

uninformative factor for distinguishing among protection levels.

This brief subsection is offered not as an exhaustive explanation but as an illustrative demonstration that the components of the models are grounded in reasoned consideration of the doctrine that they seek to explain. Nonetheless, the components chosen are not the only ones available within the tapestry of self-incrimination jurisprudence, nor do they stem exclusively from decisions focused on scope distinctions. As a consequence, the individual components and the models they form invite evaluation and commentary.

E. Due Process Versus Self-Incrimination

Another critique of the models involves their reliance on the Self-Incrimination Clause as a unifying constitutional entitlement. The Court, particularly in recent years, has frequently evaluated confessions under the Due Process Clause rubric.[387] One could construct models based in whole or in part on the Due Process Clause. However, in light of the Court's tendency to employ due process and self-incrimination interchangeably in many facets of the compulsion context,[388] switching from one rationale (self-incrimination) to another (due process), might prove simply a change in terminology rather than substance. Moreover, because this Article defers detailed consideration of the larger constitutional policies and purposes supporting the primary models proposed here, and in light of the Court's recent inclination to interpret the clauses either together or interchangeably when adjudicating scope cases, assorted policies underlying due process as well as those underlying self-incrimination may already be integral to or advanced by the proposed models.

One could, however, construct a due process or mixed model in which different relationships for each tier reflect the recognition of different factors influencing the Court in each tier. Consider, for example, a mixed

---

387. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991); Colorado v. Connelly, 479 U.S. 157 (1986).

388. *See, e.g.*, *supra* note 174 and accompanying text; *cf.* White, *supra* note 56, at 950 ("[T]he Court has indicated that the admission of an involuntary confession also will violate the defendant's Fifth Amendment privilege against self-incrimination."); Elizabeth A. Ganong, Note, *Involuntary Confessions and the Jailhouse Informant: An Examination of* Arizona v. Fulminante, 19 HASTINGS CONST. L.Q. 911, 917 (1992) ("Today, the Fifth Amendment protection against self-incrimination and the Fourteenth Amendment due process protections are interpreted together to prohibit the introduction of involuntary and coerced confessions at trial."). The Court has also suggested that coerced confessions receive protection beyond the protection of the Self-Incrimination Clause. *Kastigar*, 406 U.S. at 453, 461-62.

Washington University Open Scholarship

model. In this alternative, the Self-Incrimination Clause supplies the constitutional justification for exclusion of Tier One cases, and the Due Process Clause for Tiers Two and Three. Rather than equating the two clauses in the scope of protection context, the models promote both distinct and overlapping purposes and require incorporation of different factors in their mathematical expressions. Grounding the protection afforded the tiers on different constitutional entitlements may promise a ready justification for disparate treatment. Moreover, because Tiers Two and Three seem particularly conducive to balancing, due process opens a welcoming forum. In Tier One, under a self-incrimination rationale, the model could reject balancing, as Justice Stewart seemed to advocate in *Portash*,[389] yielding instead, a single bright-line level of protection. The *Kastigar* premise of restoring the speaker to "substantially the same position"[390] she occupied before her compelled utterances would dictate the single appropriate level of protection. A different and presumably lesser amount of protection would result from balancing in Tier Two, where deterrence of police misconduct or factors other than restoring the speaker to her pre-speech status would affect the choice of components for the expression. In Tier Three, perhaps the focus would be on fundamental fairness in the reformulated relation.

The mixed model is attractive and may be worth pursuing as a normative option. Nonetheless, as a possible model under the Hawking definition, the mixed expression model, one nonbalancing relation and two balancing relations with potentially different factors, may not only prove substantially more complex than the proposed models, but also less able to meet the predictive criterion of a good model. For instance, with separate expressions for different tiers, how would such a model treat hybrids—those cases that incorporate elements of different tiers?

Both of the models proposed in this Article do contemplate auxiliary due process protection, beyond that which may be incorporated in the factors of the existing expressions, for those circumstances involving deterrence of law enforcement misconduct. This auxiliary protection, however, does not augment the scope of statement exclusion but rather involves civil rights remedies.

---

389. 440 U.S. at 459 ("[W]e deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible."). It should be noted, nonetheless, that *Portash* employed both due process and self-incrimination language. *Id.*

390. *Kastigar*, 406 U.S. at 462.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

F. The Assumptions and Implications of the Models

Perhaps both the greatest strength and weakness of the models is their ability to reveal assumptions embedded in the doctrine they pattern. This ability is a fundamental purpose in positing models in the first place. The models, however, because of their close affinity to the doctrine itself, also generally incorporate its assumptions, for good or ill. For example, both models rely upon an understanding of the Self-Incrimination Clause as a provisional privilege of silence. The design, for instance, of the compulsion model permits violation of the Self-Incrimination Clause only where there is a combination of compulsion and use. When either use or compulsion is absent (equal to zero), no violation occurs. While philosophic analysis of this premise is left to later reflection, this fundamental assumption deserves brief discussion here.

Is the Self-Incrimination Clause violated by forcing an individual to admit criminal conduct if that witness' evidence is not used against him in a criminal case? The focus of the clause, under the models, is not on protecting the speaker's private realm but on preventing any compelled utterance from being used against the speaker in a criminal case.[391] As long as the presumption is that the speaker's utterances are available for use against him in a criminal case, the speaker may remain silent.[392] Once an

391. "As long as use immunity is granted, the government is free to compel even the most damning and private disclosures. This is irrational in privacy terms, for there is no apparent connection between privacy intrusion on the one hand and the threat of criminal punishment on the other." Stuntz, *supra* note 274, at 1234 (footnotes omitted).

392. *Compare*

> The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, see, e.g., Counselman v. Hitchcock, 142 U.S. 547; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. *See e.g.*, Haynes v. Washington, 373 U.S. 503.

Murphy v. Waterfront Comm'n, 378 U.S. at 57 n.6 (parallel citations omitted) *with*

> [L]anguage in these [Supreme Court] cases suggests that the right against self-incrimination is not violated by the mere compulsion of statements, without a compelled waiver of the Fifth Amendment privilege or the use of the compelled statements against the maker in a criminal proceeding.

Wiley v. Doory, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J., ret.). Consider also the Court's dicta in United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Although conduct by law enforcement officials prior to trial may ultimately impair that [self-incrimination] right, a constitutional violation occurs only at trial."). *See also* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989). *But see, e.g.*, Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.), *cert. denied*, 113 S. Ct. 407 (1992) (holding that procuring the speaker's statement through compulsion, even absent court use,

Washington University Open Scholarship

assurance against use replaces that presumption, compelling the witness to speak is no longer prohibited. In those circumstances where compulsion preceded assurance of nonuse, to prevent violation, improper use must be prohibited. The Fifth Amendment becomes a prohibition on use rather than gathering, for if compelling the speaker to utter incriminating remarks alone were the thrust of the amendment, no quantity of immunity would suffice to supplant it. As a consequence of this understanding of the Self-Incrimination Clause, compulsion alone does not violate the clause. The compulsion model represents this by limiting both C and U individually to the value of the constant. Neither alone can violate the privilege of silence. While this assumption is not a revelation,[393] it is important in its relation to examining the justifiability or desirability of disparate tiers of protection.

A second implication of current doctrine laid bare by the models, and related to the implication just above, involves the incentive for improper compulsion. Because the most extensive scrutiny accompanies formally compelled statements, and more moderate scrutiny accompanies statements obtained as a result of a "constable's blunder," government actors may be encouraged to obtain information through Tier Two compulsion practices, in lieu of pursuing formal immunity grants. To avoid just this outcome in the context of Fourth Amendment searches, and to encourage police to obtain search warrants, the Supreme Court has created a good-faith exception doctrine,[394] excusing certain errors in the warrant or search procedure. Existing compelled statement doctrine arguably furnishes a reverse incentive, encouraging election of improper compulsion and lesser scrutiny rather than more formal compulsion and greater scrutiny. Of course, one response to the problem of reverse incentive is embodied in differences between the Fourth and Fifth Amendments. A number of courts and commentators have argued that the Fourth Amendment is concerned

---

could constitute a cause of action against police officials pursuant to a self-incrimination theory). For an analysis of *Cooper*, see Julie E. Hawkins, Note, Cooper v. Dupnik: *Civil Liability for Unconstitutional Interrogations*, 50 WASH. & LEE L. REV. 1191 (1993).

393. *See, e.g.*, Loewy, *supra* note 392; Ritchie, *supra* note 322, at 388 ("The [Burger] Court thus views the fifth amendment strictly as a protection against the state's use of compelled testimony, rather than as a protection against the act of compulsion itself."). As Professor Ritchie suggests, pursuant to this view of the protection, "police torture of a defendant would not violate the fifth amendment privilege if the resulting confession were not used against him, but would violate the due process clauses of the fifth and fourteenth amendments." *Id.* at 393.

394. United States v. Leon, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

with good and bad faith and focuses on information gathering.[395] In contrast, and as argued above, the Fifth Amendment is primarily concerned with preventing use of compelled information rather than remedying any improprieties of compulsion.[396] However, to the extent that the underlying doctrine promotes election of improper compulsion, that encouragement remains in the models. The models' ability to surface these underlying assumptions should facilitate improved understanding and evaluation of the doctrine.

G. *Subjectivity and Cultural Contingency*

In a recent article on the residents of an area of northern Pakistan called Hunza, the article's author interviewed the *trangfa*, the individual formerly responsible for resolving certain disputes in the Hunza community.[397] The *trangfa* gave the following description of assessing punishment:

> In resolving crimes such as a man receiving a blow to his arm or face during a personal dispute with another man . . . , we would usually decide that he should get an ox or two; that is to say, if the victim had received one injury to the head, then he should receive one ox from his tormentor as compensation, and if he had received two wounds to his head—or one wound to his head and one wound to his arm—then he should get two oxen; arms and heads, of course being considered equally.[398]

The *trangfa's* pronouncement that arms and heads are considered equally is much like the determination that physical violence is more severe than incarceration. Both are culturally contingent. To the extent that cultural perspectives differ and those using the models for prediction purposes cannot assess the relative values of, for instance, the nature of compulsion in the cultural paradigm from which the numbers derive, the models will not prove effective tools to assess the scope of protection for cases in which compelled statement protection has yet to be ascertained. Because the numbers represent subjective, culturally relative values, the models are limited by the difficulty in entering the cultural paradigm from which such numbers derive.

On a larger scale, this limitation is an invitation to rethink and to critique cultural assumptions embodied in the models and the underlying doctrine.

---

395. *See Risks, supra* note 3, at 681-82.

396. *Id.*

397. John McCarry, *High Road to Hunza*, NAT'L GEOGRAPHIC, Mar. 1994, at 114, 134.

398. *Id.*

Washington University Open Scholarship

H. Occam's Razor Versus the Existence of the Balancing Model

Proposing more than one model inherently evokes a need to justify why more than one model has been proposed. Perhaps advancing more than one model further anticipates preference ranking between the models. In at least partial response to these issues, I offer the following observations. First, the compulsion model has the Occam's Razor advantage, simplicity. With a single variable (albeit one with three components), the compulsion model makes a swift evaluation of the scope of protection, as represented inversely by the value of the use variable. It provides, however, an arguably myopic view of self-incrimination jurisprudence because it represents the governmental interests as an unchanging constant. The balancing model's ability to accommodate structurally the varying importance of governmental interests offers a more detailed explanation of the government side of the equation. The balancing model thus furnishes a flexibility that the compulsion model lacks.

Flexibility has the potential to be either a boon or a bane. For those who, although preferring the Self-Incrimination Clause as an absolute, are willing to concede the existence of disparate levels, flexibility may spell abuse or excessive deference to government interests. For some, the mere provision for a variable government interest is taboo—violating the language of *Portash*, discussed at greater length below,[399] that forbids balancing as "impermissible." Flexibility may also mask bias and often proves subject to great manipulation.

The flexibility of the balancing model also raises the larger question of the origin of government interests. Which government interests fall within the cognizable range? The supplementary government interests included in the balancing model thus far derive from particular interests to which the Court has made reference in its self-incrimination-related opinions. Presumably as new circumstances requiring assessment of the scope of protection arise, so too will the need to evaluate the cognizability of previously unmentioned or unrecognized government interests. The inability of the balancing model, at its inception, to name every possible cognizable government interest or to delineate the appropriate location on the interest scale will constrain its predictive ability. Thus, in evaluating the cognizability and weight to be assigned government interests not previously

399. *See infra* notes 402-08 and accompanying text.

part of the calculus, some speculation will be involved.[400]

Balancing may, nonetheless, more accurately model the concerns motivating Court recognition of disparities. For instance, "because an immunity statute operates in advance of the interrogation, there is room to require a broad grant of transactional immunity without imperiling large numbers of otherwise valid convictions."[401] Although the language is particularly addressed to the distinction between transactional immunity and the "exclusionary rule" for coerced confessions, and advocates transactional immunity rather than use immunity, this language used by Justice Marshall in his dissent in *Kastigar* seems to imply a balancing of the government interest in the detection and prosecution of crime and the Fifth Amendment right. Different levels of protection may be appropriate depending upon the timing of the immunity grant. Consciously conferred prospective immunity, granted before the speaking, may produce less damage to the government interest in the detection and prosecution of crime. It imperils fewer convictions than retrospective immunity. Justice Marshall's language accommodates that lesser risk to the governmental interest by suggesting that greater protection is appropriate.

In addition, the balancing model explains scope decisions that the compulsion model cannot. In particular, it explains decisions embodying supplementary regulatory interests, like those in *Braswell* and *Bouknight*.

As a consequence, balancing, while sometimes providing only minor adjustments to the compulsion equation, may, nonetheless, constitute a preferable method of evaluating the scope of protection. To the extent that disparities of treatment among compelled statements continue to be recognized as justifiable, desirable, or even existent, balancing may furnish a more equitable, although manipulable, means of explaining the disparities.

I. The Balancing Model and Portash

One cogent critique of the balancing model is that the premise of the model, balancing, directly contradicts the language of the Supreme Court in *New Jersey v. Portash*.[402] In the majority opinion, Justice Stewart wrote: "Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing,

---

400. For critiques and discussions of constitutional balancing generally, see the sources cited *supra* note 369.

401. Kastigar v. United States, 406 U.S. 441, 471 (1972) (Marshall, J., dissenting).

402. 440 U.S. 450 (1979).

Washington University Open Scholarship

therefore, is not simply unnecessary. It is impermissible."[403] To which precise portion of the compelled statement spectrum the prohibition on balancing applies is not entirely apparent. However, the language and context do indicate that balancing in the scope of protection is impermissible for at least the upper tier or tiers of the spectrum.

That the Court appears to view balancing as impermissible should not, however, prove dispositive. First, the Court has offered no framework for otherwise explaining the disparities in scope doctrine. Nor does the *Portash* Court's rejection of balancing appear in the context of evaluating or even acknowledging the spectrum of disparate scope decisions. Rather, the Court is contrasting the balancing of interests involved in the scope of protection for noncompelled statements (*Miranda* violations) with that of compelled statements.[404] Second, despite the Court's explicit rejection of balancing, balancing can effectively explain most, if not all, of the Supreme Court results in the scope arena. Moreover, the Court itself, in addition to relying on balancing in regulatory contexts, has relied upon balancing in the "pristine" immunity situation.[405] In the 1964 decision of *Murphy v. Waterfront Commission*,[406] the Court employed a balancing rationale to introduce use immunity, in lieu of transactional immunity, into intersovereign prosecutions:

> [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that *in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime*, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits.[407]

Accommodation is a balance struck between the privilege and the government interest. While not specific to the scope of use immunity, the *Murphy* decision dramatically reduced—from transactional to use—the scope of immunity protection itself. Federalism motivated a compromise

403. *Id.* at 459.

404. *Id.*

405. *But see* Lushing, *supra* note 199, at 1697 ("No language in the Court's self-incrimination opinions, however, indicates that privilege ever bends under the weight of competing interests.").

406. 378 U.S. 52 (1964).

407. *Id.* at 79 (emphasis added).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

accommodation that would permit states to grant transactional immunity but not to automatically bar federal prosecution for the same transactions.[408]

In sum, the models suffer from a number of flaws, some a reflection of the doctrine they pattern, others a function of the models themselves. But these limitations should not prevent them from fulfilling the basic criteria of good models. Perhaps of greater significance, their advancement should encourage more extended and effective debate on the need for a satisfactory treatment of compelled statements.

V. FORECASTING WITH THE MODELS

To fulfill the definition of a "good" model, in addition to describing the database of Supreme Court scope doctrine with relative accuracy and little arbitrariness, the model "must make definite predictions about the results of future observations."[409] This section explores whether the proposed models satisfy this final criterion. Of course, evaluation of the ultimate accuracy of either model's predictive ability must await future Court pronouncements. To probe the models' capacity to forecast and the certainty with which they forecast, each model will be applied in two circumstances for which the scope of self-incrimination protection remains unresolved. In the first of these, the *Garrity*[410] problem, the Supreme Court has explicitly found that the compulsion involved exceeds the Fifth Amendment threshold.[411] The second circumstance involves a hypothetical suggested by the Court in *Minnesota v. Murphy*.[412]

In applying the models to each of these problems, two questions need resolution. First, does the model offer any prediction on the appropriate scope of scrutiny? Second, if the model makes a prediction, how definite or specific is the prediction?

A. Application to the Garrity[413] *Situation*

In 1967, the United States Supreme Court addressed the question of

408. *See supra* note 328 and accompanying text. For the applicable definition of federalism, see *supra* note 328.

409. HAWKING, *supra* note 23, at 9.

410. Garrity v. New Jersey, 385 U.S. 493 (1967).

411. *Id.* at 500. Because *Garrity* was a state case, the Court speaks in terms of the Fourteenth Amendment, through which the Fifth Amendment's self-incrimination provision was applied to the states. *See* Malloy v. Hogan, 378 U.S. 1 (1964); *supra* notes 86-93 and accompanying text.

412. 465 U.S. 420 (1984).

413. The description of *Garrity* is drawn largely from *Risks, supra* note 3, at 638-39.

Washington University Open Scholarship

protecting statements compelled by threat of employment termination. In *Garrity v. New Jersey*,[414] Edward Garrity and several colleague police officers were questioned concerning the alleged fixing of traffic tickets.[415] Prior to answering the questions, the state officers conducting the interrogation had informed Garrity and his colleagues that they were entitled to remain silent and that any information obtained could be used against them in a criminal prosecution,[416] but that a refusal to answer (invoking their Fifth Amendment right) would subject them to removal from office.[417] Statements given in response to that questioning were later introduced by the prosecutor against Garrity and his associates during their criminal trial.[418] The criminal conviction that ensued was upheld through the highest state court of New Jersey. On certiorari, in a five-to-four decision, the United States Supreme Court concluded that these statements were coerced: "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[419] The use of these coerced statements, the Court found, was prohibited by the Fifth and Fourteenth Amendments.[420] In the concluding paragraph, the majority declared: "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."[421]

Thus, *Garrity* dictated that the statements given in response to a threat of removal from office were coerced and subject to protection by the Fifth and Fourteenth Amendments. The statements themselves were exempt from use in subsequent criminal proceedings.[422] But to what scope of protection is the exemption entitled? Later decisions did little to clarify the relevant scope of protection. Six years after *Garrity*, the Court in *Lefkowitz v. Turley*, citing *Kastigar*, indicated that statements like those at issue in

414. 385 U.S. 493.
415. *Id.* at 494-95.
416. *Id.* at 494.
417. *Id.* at 494-95.
418. *Id.* at 495.
419. *Id.* at 497.
420. 385 U.S. at 500.
421. *Id.*
422. *Id.*

Garrity could be obtained by a prospective grant of immunity, or, even absent such prospective protection, once obtained, would merit the retrospective protection of *Bram*.[423] Which of these levels of protection (*Kastigar* or *Bram*) do these statements merit? The analysis grew more complex when in 1977, in *Cunningham*, the Court suggested that where there was a competing constitutional right, *Simmons* also would protect the relevant statements.[424] The scope of protection to which these statements are entitled remains an open question and, therefore, the case presents an excellent opportunity for application of models designed to predict the scope of protection to be afforded compelled statements.

1. The Compulsion Model

The fundamental task in the application of the compulsion model is assessing the extent of compulsion in the threat of dismissal from employment. The first goal in assessing the compulsion value is gauging the nature or severity of the compulsion. Determining the weight of this criterion is difficult.[425] Constitutional protections exist to shield property interests, but society demands, and the Court has imposed, the greatest constitutional safeguards to ensure the protection of liberty interests. Examples of the proportionately greater value placed upon protection of liberty abound in the different treatment afforded civil and criminal cases.[426] In the criminal realm, for instance, the sovereign shoulders the costs of representation for indigent individuals to protect liberty.[427] The

---

423. Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973) ("[I]n any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer . . . .").

424. Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977).

425. "It is said that from a practical standpoint threatened loss of a government job carrying valuable vested benefits or suspension from a profession may be a more effective compulsion than a small fine or even a few days in jail." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 707 (1968).

426. Although the liberty interest is at stake in contempt proceedings for refusal to testify in Tier One immunity cases, the contempt may be either civil, *see, e.g.*, *In re* Younger, 986 F.2d 1376, 1378 (11th Cir. 1993) (civil contempt for refusal to testify under immunity grant limited to "the lesser of the duration of the bankruptcy case or eighteen months"); criminal, *see, e.g.*, United States v. Monteleone, 804 F.2d 1004, 1006 (7th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); or both. In *Monteleone*, after defendant's refusal to testify pursuant to an immunity grant, "he was held in civil contempt and lived out the life of the grand jury in jail." *Id.* at 1006. He was subsequently convicted of criminal contempt related to his continuing refusal to testify before that grand jury. *Id.* The Seventh Circuit affirmed the criminal contempt conviction and sentence of four years imprisonment. *Id.* at 1012.

427. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment's guarantee of counsel for indigent criminal defendants applies to the States through the Fourteenth Amendment).

Washington University Open Scholarship

burden of proof required to deny an individual liberty far exceeds that generally required for civil cases involving deprivation of property: beyond a reasonable doubt versus preponderance of evidence. The Self-Incrimination Clause itself attests to society's greater concern with loss of liberty than loss of property because it offers protection only against compelled witnessing in a criminal case, where the ultimate threat is of loss of liberty. In light of these reflections, compulsion in the form of threat of job loss is perceived as less severe than incarceration, and less severe than physical assault. Job loss, however, rates as a greater penalty than promises of lenity or choice-of-rights compulsion. On the severity scale, job loss therefore receives a mid-range value, about five units.[428]

Second, in relation to automaticity, imposition of the penalty can follow swiftly on invocation of the privilege and consequent refusal to respond. Refusal itself can furnish sufficient legal grounds for transforming the threat of dismissal into the reality of loss of employment for a public employee.[429] The penalty, then, may flow directly and rapidly from invocation of the privilege. Automaticity's value reaches the apex of that scale, a value of five units.

Third, threatening dismissal for a refusal to respond to reasonable job performance related inquiries is part of a legitimate official inquiry,[430] gaining full measure for that factor in the legitimacy gradient, two and one-half units. With respect to advance promises of nonuse, *Garrity* immunity can attach absent any prior promise of nonuse. No formal grant is required.[431] Nonetheless, in many, if not most, jurisdictions the questioning is preceded by an admonition that the speaker's answers cannot be used

428. For convenience, the table below sets forth the values for the compulsion model in both example cases:

Example	Nature	Auto.	Legit.	Compulsion	Use
Garrity	5	5	4.5	14.5	5.5
Modified *Murphy*	8	5	2.5	15.5	4.5

429. *Cunningham*, 431 U.S. at 806 ("Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.") (citing Gardner v. Broderick, 392 U.S. 273, 278-79 (1968)).

430. *Cunningham*, 431 U.S. at 806.

431. "[U]se immunity automatically attaches as a matter of constitutional law when a public employer compels an employee, on pain of dismissal, to answer possibly incriminating questions about the employee's performance of his official duties." Brown v. City of North Kansas City, 779 S.W.2d 596, 599 (Mo. Ct. App. 1989) (summarizing Erwin v. Price, 778 F.2d 668 (11th Cir. 1985)).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

against her in court.[432] Although the immunity may attach absent an advance assurance of nonuse, more often, a formal inquiry into the officer's conduct will begin with an appropriate use immunity admonishment.[433] Combining the occasional automatic attachment with the probably more common prior promise of nonuse, the second factor in the legitimacy calculation yields perhaps two of the two and one-half available units. The resultant legitimacy value is a four and one-half of five possible units. Inserting the relevant values produces the compulsion value:

$$5(N) + 5(A) + 4.5(L) = 14.5(C)$$

Placing the compulsion value in the compulsion model shows:

$$14.5(C) + (U) \leq 20(k)$$

The model allows the prosecutor five and one-half units of use[434] before she transgresses on self-incrimination principles. Five and one-half units places the protection for *Garrity* statements between the protection of Tier One and the protection of Tier Two. Applied to existing doctrine, the model permits a substantial measure of nonevidentiary use, although a smaller measure than that allocated to Tier Two statements, and proscribes direct evidentiary use of any form. Derivative evidentiary use (through attentuation or inevitable discovery)[435] is probably not available. Applica-

---

432. *See Risks, supra* note 3, at 669 ("[C]ourts in many jurisdictions have required a tripartite warning, including notice to the officer: (1) of possible termination; (2) that the statements cannot be used in a criminal proceeding; and (3) that the questions will relate specifically and narrowly to the performance of his official duties.").

433. *Id.*

434. A recent commentator "address[ing] the use of [*Garrity*] statements in the context of the grand jury proceeding" asserts that:

> Courts should be reluctant to begin categorizing coercions as more or less violative of the Fifth Amendment. If the inquisition of a police officer pursuant to an internal investigation gives rise to a compelled statement contrary to the privilege against self-incrimination, the court should recognize it as such. Violations of the Fifth Amendment should not come in different sizes and flavors.

Andrew M. Herzig, Note, *To Serve and Yet To Be Protected: The Unconstitutional Use of Coerced Statements in Subsequent Criminal Proceedings Against Law Enforcement Officers*, 35 WM. & MARY L. REV. 401, 403, 430 n.181 (1993). Mr. Herzig appears to endorse Mr. Humble's position, Humble, *supra* note 14, permitting nonevidentiary use of compelled testimony. Herzig, *supra* (citing Assistant United States Attorney "Humble's convincing argument supporting the use of compelled testimony for nonevidentiary purposes"). As indicated in the evolutionary development section of this Article, it is my position that as a descriptive matter the Court has been engaging in disparate treatment of compelled statements.

435. For purposes of consistency, I employ the terms attenuation and inevitable discovery to express the type of derivative evidentiary use that might be available even though there may be no primary illegality in the *Garrity* context.

Washington University Open Scholarship

tion of the compulsion model illustrates its Occam's Razor advantage. Achieving a value for the compulsion variable dictates the remainder of the relation.

This application permits a determination of whether the model fulfills the final criterion of a good model. First, does the model offer a prediction regarding the allowable scope of protection? In defining, at least in relative terms, the realm of permissible use, the model does forecast the scope of scrutiny or protection to which *Garrity* statements are entitled. Second, is the scope prediction definite? To this inquiry, a somewhat more tentative response appeals. The scope or extent of permitted use is relatively definite assuming confidence in the value of the compulsion variable. However, due to unresolved questions in the doctrine of use, the model offers only a comparative value for use and a rough translation of that value into practical employ. In the unsettled field of use doctrine, five and one-half units encompasses certain levels of "use." For instance, those units include prosecutorial awareness of the substance of the statements. They probably further condone the incidental benefits of increased prosecutorial confidence in the case and greater reluctance to plea bargain. Whether that level allows other arguably nonevidentiary uses, e.g., the formulation of trial strategy, cannot be predicted by the model because the field of use doctrine itself remains unsettled.[436] If that doctrine were clarified, then the model's predictive ability in concrete terms would be amplified. Thus, the compulsion model largely satisfies the second and final criterion of a good model by projecting a prediction, relatively definite given the state of use doctrine.

2. *The Balancing Model*

Formulation of the *Garrity* compulsion model first simplifies efforts to complete the balancing model. Because the compulsion variable represents the same considerations in each model, it is appropriate to transpose the value for the compulsion variable from the compulsion model to the balancing model. To determine the extent of scrutiny or permitted use, the focus shifts now to the government interest side of the equation. The variables for which values remain to be determined include the risk to the government interest and any supplementary government interests present in this context.

---

436. *Cf.* United States v. North, 910 F.2d 843, 857 (D.C. Cir. 1990) ("An initial difficulty is that a precise definition of the term nonevidentiary use is elusive.").

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

The risk to the government interest in the detection and prosecution of crime is greater when the immunity giver is a colleague (i.e., another law enforcement officer) than when the decision lies with the prosecution. Risk here might parallel the one unit of risk for Tier Two circumstances, which also generally involve interrogation by law enforcement officers. However, in some respects, the *Garrity* situation does not precisely parallel the paradigm interrogation of the stranger suspect. In the *Garrity* case, the risk of abuse of immunity may exceed that applicable in most routine stranger interrogations. On occasion, incentive to immunize a colleague from criminal liability may be stronger, thus fostering intentional efforts to protect colleagues from criminal prosecution with *Garrity* immunity. The greater the disclosure, the greater the burden on the prosecutor to demonstrate independent sources for her evidence. The possibility of this protective conduct elevates the risk to the government, from one unit to one and one-half units.[437]

Perhaps the most challenging task in applying the balancing model is the determination of the existence and value of any supplementary interests. Assessing the cognizability of such supplementary interests in the *Garrity* context is particularly difficult. Although the Court announced, in *Garrity* itself, that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights,"[438] the Court in a later decision also characterized the government interests "in maintaining an honest police force and civil service" as "compelling."[439] Perhaps these compelling government interests, while not precluding recognition of the statements as meriting Fifth Amendment protection (i.e., exceeding the compulsion threshold), may appropriately factor into an assessment of the quantum of protection these compelled statements receive once the initial compulsion threshold has been exceeded. Consequently, the statements qualify as compelled, but in the balancing model, the government interests

437. For convenience, the following table sets forth the balancing model values for both example cases:

Example	Nature	Auto.	Legit.	Comp.	Risk	Supp. Int.	Use
Garrity	5	5	4.5	14.5	1.5	0	7
Modified *Murphy*	8	5	2.5	15.5	1	1	6.5

438. *Garrity*, 385 U.S. at 500.

439. *Cunningham*, 431 U.S. at 808.

Washington University Open Scholarship

would modify the quantity of protection the statements received. If the government interest in the integrity of its police force were recognized, the supplementary interest value would increase, thereby permitting greater use. The unresolved question of whether these interests should be recognized by the model illustrates one of the limitations on the predictive ability of the balancing model.[440] Employing the models is not a mechanical process, nor are the results precise. Evaluating the scope of protection to which compelled statements should be entitled continues to require the investment of judicial wisdom. The models, however, make explicit the choices that judges make.[441]

Presuming, however, the same sovereign interrogation and prosecution with no cognizable supplementary interests, the balancing model would be as follows:

$$14.5(C) + (U) \leq 20(G) + 1.5(R) + 0(S)$$

The balancing model yields a use value of seven available units before self-incrimination infringement fastens. Consistent with the design of the model, with greater flexibility on the government interest side of the equation, the use value is correspondingly higher in the balancing model than in the compulsion model. Seven units of use still places the permitted use between the Tier One and Tier Two allowances, thus condoning substantial nonevidentiary use, perhaps on the margin of allowing attenuated-type or inevitable-discovery-type derivative use, but forbidding direct evidentiary use.

Applying the final criterion of a good model to the *Garrity* balancing model supports several conclusions. First, the model does offer a prediction on the scope of protection through a measure of permitted use. Second, the scope forecast is, within the fuzzy parameters of use doctrine and limits on ascertaining the applicability of supplemental government interests, a reasonably definite prediction. Therefore, at least in gross, the model satisfies the definition of a good model, offering a reasonably definite prediction in a case in which the scope of protection remains to be articulated by the Court.[442]

---

440. For a discussion of this limitation, see *supra* Part IV.

441. Explicit and structured reasoning should enhance the employment of balancing. With respect to constitutional balancing generally, see Coffin, *supra* note 22, at 22 ("It is therefore high time to stimulate a more self-conscious, systematic, sensitive, comprehensive, and open effort at balancing.").

442. Of note, in 1994, the Ninth Circuit specifically addressed the scope of protection appropriate for a *Garrity* statement. The court's decision in United States v. Koon, 34 F.3d 1416 (1994), merits attention here. First, the court in *Koon* explicitly acknowledged the existence of the risk to a criminal

prosecution when the immunity giver is a police official.

> As the *North* court recognized, federal immunity statues provide a framework for a prosecuting attorney or Congress to make a reasoned decision as to whether the benefits of obtaining compelled testimony justify the obstacles that may be created in any future prosecutions.
>
> . . . .
>
> In contrast, immunity attaches [in an employment interview with a public employee] when a threat of loss of employment forces a public employee to respond to questioning by another public employee . . . . [I]n the[se] context[s, in particular in] internal affairs investigations, police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether.

Id. at 1433 n.13. In the Ninth Circuit case, Koon had given a compelled statement to the Los Angeles Police Department Internal Affairs Division in the aftermath of the beating of Rodney King. *Id.* at 1431. A witness testifying for the prosecution had subsequently been exposed to Koon's compelled interview statement. On appeal, the defense sought to have Koon's convictions reversed based upon the alleged taint of prosecution witness testimony from exposure to Koon's compelled interview statements. In addressing the identity of the immunity giver, the court contrasted the circumstances of *Koon* with those of a prosecutorial grant of immunity under the OCCA, *id.* at 1433 n.13, highlighting the OCCA prosecutor's opportunity "to make a reasoned decision as to whether the benefits of obtaining compelled testimony justify the obstacles that may be created in any future prosecution." *Id.* The court also recognized the opportunity for reasoned decisionmaking when Congress grants OCCA immunity. *Id.* The court suggested that in the *Koon* context, "the individuals who question the employee are concerned about potential misconduct. . . . They do not necessarily act with the care and precision of a prosecutor weighing the benefits of compelling testimony against the risks to future prosecutions." *Id.* Thus, the Ninth Circuit explicitly recognized the special risk to the government interest in the detection and prosecution of crime that rests with the identity of the immunity giver. Recognition of the risk to the government interest suggests that the balancing model, through its inclusion of the risk factor, may furnish a preferable paradigm for analyzing scope cases.

Nonetheless, the *Koon* court rejected the premise that "the showing required under the Fifth Amendment varies depending on the situation in which the testimony was compelled." 34 F.3d at 1433. The court explained: "The Fifth Amendment protects defendants from the use of their compelled statements regardless of when or where the statements were taken. We merely point out the implications of applying *North* in the *Garrity* context." *Id.* Those implications bolstered, in part, the court's rejection of the extremely stringent Tier One standard against use articulated by the D.C. Circuit in *North* and *Poindexter*. *Id.*

The court, in effect, chose a single level of protection for both *Garrity* statements, compelled by threat of job loss, and for *North* or OCCA statements, compelled by threat of contempt and incarceration. The court describes that use level as follows: "In sum, it is the law of our circuit that the prosecutor's *Kastigar* burden is met if the substance of the deposed witness's testimony is based on a legitimate source that is independent of the immunized testimony." *Id.* at 1432. This description, apparently applicable to both the statements in the *Koon* case and OCCA statements, suggests a relatively wide range of uses. In rejecting the *North* standard, *id.* at 1432-33, the Ninth Circuit appears to have chosen not to prohibit a witness from shaping or altering her testimony as a result of her exposure to the immunized materials so long as "there is an independent source for all matters on which the witness testifies." *Id.* at 1432. To some extent, the range of permissible use will depend upon the definition of the terms "substance" and "matter." Nonetheless, neither a witness' awareness of the immunized testimony nor his structuring of his own testimony, as a result of that awareness, before the trier of fact would necessarily violate the Fifth Amendment under the Ninth Circuit *Koon* standard. Although it is difficult to discern with certainty, the range of use suggested here might be in the general range of that posited by the models.

Washington University Open Scholarship

In addition to engendering careful scrutiny of scope doctrine and its underlying assumptions, the creation and application of the proposed models should enable courts to address the scope problem in a reasoned fashion. Equipping courts with a more explicit description of the doctrine and a method for applying the doctrine should promote enhanced dialogue and growing understanding of the complex problem of the contours of self-incrimination protection.

The models also embody advantages that attend greater predictability in law. For example, prospective application of the models could inform policymakers of the probable scope of protection that compelling statements in a given circumstance would produce. Then, as for example in the *Garrity* situation, policymakers could perform a cost-benefit analysis to determine, in advance of the compulsion, whether in light of the amount of protection available to the compelled statements, colleague police officers should engage in taking a compelled statement during the internal affairs investigation.[443] At a minimum, the models advance a dialogue on which factors courts should consider in sculpting the realm of protection for these compelled statements.

B. Probation Officer Interviews

The second test case stems from the 1984 decision of *Minnesota v.*

However, the 1994 *Koon* standard seems to conflict with language in a 1992 Ninth Circuit opinion in a traditional OCCA Tier One case. *See* United States v. Mapelli, 971 F.2d 284 (9th Cir. 1992). In *Mapelli*, the Ninth Circuit cited the stringent *McDaniel* case to support the following assertion: "The proscribed indirect use includes 'planning trial strategy.'" *Id.* at 287. Consequently, the Ninth Circuit's range of permitted uses, particularly in the traditional Tier One context, may not be as permissive as the *Koon* language initially implies. Or, perhaps the court's language in *Koon* is a function of the specific facts of the case. The court indicated that the testifying witness "was exposed to two substantially identical statements, one of which was immunized and one of which was not." 34 F.3d at 1433.

Moreover, even under a permissive interpretation, the court's standard does not allow direct evidentiary impeachment use of the immunized material. As a consequence, there remains a need to reconcile or explain the differing treatments the court gave the *Garrity* statements in *Koon* with the court's treatment, also in 1994, of the defendant's statements in *Beltran-Gutierrez*, discussed *supra* notes 264-73 and accompanying text, where the court condoned direct evidentiary impeachment use of Tier Three statements. Consequently, the *Koon* standard, adopted without apparent consideration of the remainder of the self-incrimination spectrum, does not effectively resolve the self-incrimination scope conundrum. For the treatment by a number of other lower courts of the scope of protection appropriate to a *Garrity* statement, *see, e.g.*, *In re* Grand Jury Subpoenas Dated December 7 and 8, Issued to Bob Stover, 40 F.3d 1096, 1100-02 (10th Cir. 1994); *Risks*, *supra* note 3, at 665-68.

443. *See Risks*, *supra* note 3 (detailing risks to prosecution and Fifth Amendment when scope of protection is unknown in the *Garrity* circumstance and proposing prosecutorial notice and veto before *Garrity* statements are compelled).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

Murphy.[444] In *Murphy*, the defendant's probation officer learned that the defendant had admitted committing an unsolved rape and murder, crimes unrelated to the case for which he was on probation. Murphy made this admission during counseling, provided as a condition of his probation.[445] The probation officer, who had learned of the confession from Murphy's counselor, contacted Murphy by letter asking that Murphy contact her to "discuss a treatment plan for the remainder of his probationary period."[446] Prior to contacting Murphy, the probation officer, after consultation with her supervisor, had decided that she would divulge any incriminating remarks made by Murphy regarding the heretofore unsolved crimes to the police.[447] In response to the letter, Murphy scheduled and attended a meeting with the probation officer.[448] During that session, Murphy repeated the incriminating admissions he had made earlier to his counselor.[449] Murphy then sought suppression of the admissions made to his probation officer at his subsequent criminal prosecution on Fifth Amendment grounds.

The Court described its task as determining "whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding."[450] Under the circumstances of Murphy's interview with his probation officer, the Court held that the statements were voluntary. The Court found no factors denying "'the individual a "free choice to admit, to deny, or to refuse to answer"'"[451] present in *Murphy*. The privilege was therefore not self-executing and Murphy's failure to invoke the privilege rendered the ensuing statements voluntary for Fifth Amendment purposes. The Court indicated that:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecu-

444. 465 U.S. 420 (1984).
445. *Id.* at 423-24.
446. *Id.* at 423.
447. *Id.*
448. *Id.*
449. 465 U.S. at 423-24.
450. *Id.* at 425.
451. *Id.* at 429 (quoting Garner v. United States, 424 U.S. 648, 657 (1976) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941))).

Washington University Open Scholarship

> tion. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.[452]

It is this modified circumstance, in which the state conditions response on revocation, that serves as the second test case. The *Murphy* Court suggests that such conditioning would prove "impermissible."[453] Such impermissible conditioning would produce compulsion cognizable by the Self-Incrimination Clause. Under these circumstances, those of a "classic penalty situation," a self-executing privilege would follow. But to how much protection would a defendant in the modified *Murphy* circumstances be entitled? What quantum of protection is indicated by "inadmissible in a criminal prosecution"?

In attempting to forecast the ambit of that protection pursuant to the models, the first step is the characterization of the nature of the compulsion in the modified *Murphy* context. Probation is often conceived of as a form of conditional liberty.[454] By accepting and complying with the terms of probation, a defendant can avoid imposition of a jail or prison sentence. Although probation may include local incarceration as part of the probation grant, probation generally assumes the form of a trial period through which, if one complies with the terms, one can avoid substantial custody time. Probation is therefore usually a preferred sentence of those convicted. Revocation of probation generally entails a return to, or initiation of, incarceration—a loss of that conditional liberty. The penalty in our

---

452. *Murphy*, 465 U.S. at 435.

453. *Id.* at 436. In fact, the Court explicitly contrasts the situation in *Garrity* to that of *Murphy*. In *Garrity*, the defendants were informed that failure to respond would result in loss of employment. Garrity v. New Jersey, 385 U.S. 493, 494 (1967). However, "Murphy was not expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in the imposition of a penalty." *Murphy*, 465 U.S. at 438.

454. *Black's Law Dictionary* defines probation as a:

> [s]entence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration. . . . It is not a matter of right, but rather is an act of grace and clemency available only to those defendants found eligible by the court. . . . It implies that defendant has a chance to prove himself and its purpose is reform and rehabilitation. For this purpose the defendant must agree to specified standards of conduct and the public authority operating through the court impliedly promises that if he makes good, his probation will continue; however, his violation of such standards subjects his liberty to revocation. . . .

BLACK'S LAW DICTIONARY 1202 (6th ed. 1990) (citations omitted).

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

modified *Murphy* case resembles the penalty imposed in our highest tier of protection, Tier One.

Perhaps the more difficult evaluation is whether the loss of conditional liberty is equivalent to the loss of unconditional liberty. Based upon distinctions in court treatment of accused nonprobationers and probationers, the losses are similar but not identical. Probationers have a diminished expectation of liberty. To violate probation and incur a penalty of incarceration does not necessarily require commission of a criminal act. For instance, a no-alcohol condition could constitute a condition of probation for an alcohol-related offense.[455] Violation of the condition, consumption of alcohol, while not criminal conduct, could constitute a violation of probation and trigger consequent punishment. Moreover, the standard of proof that the prosecution must meet at a probation revocation hearing can be lower than beyond a reasonable doubt.[456] As a result, the loss of conditional liberty, while arguably exceeding the loss of a job, may not equate precisely with the loss of unconditional liberty. On the severity scale of one-to-ten, with incarceration following unconditional liberty receiving a nine, revocation of probation rates perhaps an eight.

The second aspect of the compulsion variable is the automaticity of the infliction of the penalty for failure to respond to interrogation. Failure to respond may result in implementation of the threat of revocation. Summary revocation, in its crudest form, may occur immediately, with the instant detention and incarceration of the probationer pending official revocation proceedings.[457] The automaticity in the modified *Murphy* case would simulate that of the witness who refuses to respond to questioning pursuant to a subpoena, with the potential of immediate detention pending the official contempt proceeding. In the comparison of automaticity, Tier One and modified *Murphy* cases can be deemed equivalent, each receiving five units on the automaticity scale.

The third characteristic of the compulsion variable is the legitimacy of the compulsion. The first component of the legitimacy inquiry involves a determination of the legality of the interrogation and the compulsion employed to induce the probationer to speak. A probation officer's

---

455. *See, e.g.*, People v. Lindsay, 10 Cal. App. 4th 1642 (1992).

456. *See, e.g.*, People v. Rodriguez, 51 Cal. 3d 437, 439 (1990) (requiring a preponderance of evidence standard at a probation revocation hearing).

457. The ultimate determination regarding revocation would be made by a court at a formal hearing. The hearing "is not a criminal proceeding," *Murphy*, 465 U.S. at 435 n.7, although the "proceeding must comport with the requirements of due process." *Id.*

Washington University Open Scholarship

interview of a probationer represents a standard and legitimate component of probationary supervision. "A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege."[458] The more difficult inquiry is whether a state may legitimately threaten revocation of probation for refusal to answer. Although the various passages in *Murphy* regarding the legitimacy of revoking probation for refusal to answer incriminating inquiries are difficult to reconcile,[459] it appears that so "long as [the State] recognizes that the required answers may not be used in a criminal proceeding,"[460] the State may legitimately insist, under threat of revocation, that the probationer answer.[461] It is unclear whether the State must inform the probationer of the protected nature of his disclosures at the time of the compulsion.[462] If, however, the probationer responds to inquiries under penalty of revocation, even without formal or prior reassurance that the utterances are protected, the disclosure would enjoy protection against use in a criminal case. Interrogation in the modified *Murphy* circumstances may then be considered part of an authorized legal process. The first aspect of legitimacy, therefore, receives two and one-half units.

The second factor in the legitimacy evaluation calculates the deliberateness with which immunity is granted, or in other words, the existence or absence of a promise of nonuse prior to the questioning. As indicated,

---

458. *Id.* at 435.

459. *Compare*

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. . . . [A]nd nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated.

Id. at 436 n.7 *with*

> Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. . . . Indeed, in its brief in this Court, the State submits that it would not, and legally could not, revoke probation for refusing to answer questions calling for information that would incriminate in separate criminal proceedings.

Id. at 438.

460. *Id.* at 436 n.7.

461. *Id.* The State apparently may also penalize the probationer's failure to answer relevant inquiries. It is not clear whether the State is required to have informed the probationer of the protected nature of his disclosures prior to penalizing the probationer for failure to respond. *See id.* at 439.

462. Consider *Murphy*, 465 U.S. at 439.

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

whether an assurance of nonuse is required at the time of the modified *Murphy* compulsion is unclear. In particular, such an assurance might be required prior to penalizing a probationer for her silence in the face of inquiries. If a probation officer in fact delivered such an assurance, the value of the legitimacy factor involving a promise of nonuse use would be two and one-half units. However, absent an explicit policy within a probation department or a request for assurance of protected status by the probationer, the more likely scenario in the probation context is probably the absence of a promise of nonuse at the time of questioning. The suggestion that absence of such a promise is the likely scenario results from the usual circumstances of a probation interview.[463] Because routine probationary interviews are not necessarily directed toward the investigation of criminal wrongdoing apart from the circumstances of the probationary offense,[464] probation officers would probably be unlikely to spontaneously offer assurances of nonuse, even if they might be inclined to insist that the probationer respond or face revocation. Because the responses are protected even absent the prior promise, the models are useful in evaluating the extent of protection that a probationer's responses merit, with or without a prior assurance of nonuse. For purposes of this example, let us presume that an assurance of nonuse would be uncommon in the usual modified *Murphy* interview. Absent a promise of nonuse, the legitimacy value remains at two and one-half units.

Summing the compulsion value yields:

$$8(N) + 5(A) + 2.5(L) = 15.5(C)$$

Inserting the compulsion value into the compulsion model renders the

463. The probable absence of a promise of nonuse in a modified *Murphy* case may be contrasted with the probable provision of such an explicit assurance in the *Garrity* circumstance. In the probationary context, the usual purpose of the interview is to ascertain the probationer's compliance with the conditions of probation, rather than to seek incriminating information about other criminal conduct. As a result, incriminating information that does surface is likely to arrive unanticipated. In *Garrity*, the interview is an investigatory one. It is generally conducted by an internal affairs unit of a police department and, if not seeking information regarding potential criminal offenses, seeks information regarding matters subject to disciplinary action. Moreover, probation interviews are a standard part of probation supervision. *Garrity* interviews would be the exception rather than the norm for police officers.

464. Past criminal conduct, however, would not be an uncommon topic for probationary consideration. *See Murphy*, 465 U.S. at 432 ("[T]he nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality."). Such conduct is often the subject of prior convictions and may no longer raise Fifth Amendment concerns as a consequence of the status as a prior conviction and/or the passage of time and its effect on the relevant statute of limitations.

Washington University Open Scholarship

following:

$$15.5(C) + (U) \leq 20(k)$$

In the modified *Murphy* case, permitted use may reach four and one-half units. Compulsion of the modified *Murphy* variety permits more use by prosecutors of the defendant's statements than would Tier One compulsion, but less use than Tier Two. Evidentiary use would be prohibited, but a number of nonevidentiary uses would be permissible.

Application of the compulsion model to the modified *Murphy* situation furnishes a prediction for the scope of protection, measured by the models as the amount of permitted prosecutorial use. The prediction, while relative, is also relatively specific, within the limitations of "nonevidentiary use" doctrine. The model facilitates a formal and reasoned evaluation of the scope of protection, exposing the analysis of the factors that comprise the model.

Under the balancing model, the compulsion variable is simply transposed from the first model. The focus shifts to the right side of the equation for an assessment of any enhanced risk and additional governmental interests implicated by the modified *Murphy* case. Control over the interrogation and resulting use immunity rests not with the prosecution but with the probation officer. The shift in the locus of control outside the prosecutorial sphere, but to a governmental figure not antagonistic to prosecutorial interests, merits one unit of risk in the balancing equation.

In addition to the risk to the overarching governmental interest, the right side of the balancing model allows augmentation of the governmental values by the addition of other governmental interests. In the modified *Murphy* circumstances, augmentation might spring from a governmental interest in the administration of the probation system, namely, the need for a method of monitoring convicted individuals granted conditional liberty status. It is conceivable that a court could view this administrative role as a government interest distinct from that of the detection and prosecution of crime, and a role worthy of some weight in the balancing equation. Assuming such an interest deserves recognition in the model, there remains the difficulty of assigning a value to that interest. As administration of probation may be viewed as distinct from, but related to, crime control and consequently to the overarching governmental interest, a small supplementary value seems suitable, perhaps one unit. Substituting the values for the relevant factors, the balancing model would be the following:

$$15.5(C) + (U) \leq 20(G) + 1(R) + 1(S)$$

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5

The balancing model would permit six and one-half units of use, greater use than in the compulsion model but still within the range between Tier One and Tier Two. Transposing six and one-half units to the fuzzy parameters of use doctrine, six and one-half units includes substantial, albeit less than the full range of, nonevidentiary use and probably forbids evidentiary use of any kind. Subject to the limitations inherent in the models, the balancing model supplied a relatively definite forecast of the scope of protection in the modified *Murphy* situation. The balancing model, like the compulsion model, does fulfill, at least in relative terms, the final criterion of a good model. Ultimate evaluation of the models' accuracy awaits future Court pronouncements. In the interim, each model furnishes a reasoned method for evaluating the scope of protection due a compelled statement.

Of note, the compulsion model arrives at similar levels of permitted use for both the *Garrity* (five and one-half units) and the modified *Murphy* (four and one-half units) test cases. The balancing model also produced only a minor differential in permitted use, seven units for *Garrity* and six and one-half units for modified *Murphy*. The minor differential may seem counterintuitive in light of the differential in severity of compulsion between loss of job and loss of conditional liberty. However, the size of the differential is a function of the fact that the models have more than one component factor. In the compulsion model, the difference in the values for the legitimacy component largely explains the proximity of the final quanta of permitted use. For the balancing model, the differences in the legitimacy value, as well as in the risk and supplemental interest values, determine the similarity of the final values for the two test cases.

That the models produce counterintuitive results should not prove surprising. After all, the introductory conundrum of scope doctrine lay in the greater protection that courts afforded Tier One statements than Tier Two statements. Observers, at least initially, might be inclined to assume, based upon the severity of compulsion alone, that Tier Two, encompassing, inter alia, physical violence, deserved greater protection than Tier One, whose compulsion was a threat of incarceration. Yet, when all the factors were considered, the models explained the elevated protection of Tier One based upon factors beyond the severity of compulsion. In the end, one additional benefit the models may engender is a challenging of our initial assumptions about this realm of constitutional doctrine.

Washington University Open Scholarship

VI. CONCLUSION

Initial observation of Supreme Court treatment of the scope of protection afforded compelled statements revealed no coherent articulated framework. This pronounced absence limited understanding of the doctrine, cabined its reasoned evaluation, and undermined the ability of lower courts to decide scope cases. Closer scrutiny unearths discernable patterns and enables the creation of models of scope doctrine. The Article proposes two models, one based upon compulsion and another based upon balancing. The articulation and subsequent application of each of the models exposes underlying assumptions and limitations of the decision database. As a result, the models facilitate comprehension of the existing Supreme Court doctrine and further furnish a concrete method for guiding lower courts in their efforts to sculpt the contours of protection in cases in which that scope has yet to be determined. Ultimately, the models suggest that the dimensions of the realm of protections afforded compelled statements, the realm of Proteus' metamorphoses, can be reasoned and at least relatively predictable.

Whatever intrinsic value the models may possess as assessments of past Court conduct and forecasters of future Court efforts, their greatest contribution may lie elsewhere. The models supply a common language and a motivation for courts to explain the process by which they determine the appropriate level of protection due compelled statements. Both within and without the courts, explicit reasoning fosters dialogue and evaluation of the current underpinnings of scope decisions. That conversation and enhanced understanding can then inform normative inquiries: Is a scope doctrine providing disparate treatment, based upon compulsion or balancing or any of the components that compose those models or other factors, desirable or legitimate in larger philosophic, constitutional, or other normative terms? And ultimately, what degree of protection should the courts accord the various types of compelled statements?

https://openscholarship.wustl.edu/law_lawreview/vol72/iss4/5