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Eliot T. Tracz

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Eliot T. Tracz

## Doctrinal Evolution and the Right Against Self-Incrimination

18 U.N.H. L. REV. 109 (2019)

**ABSTRACT.** The Fifth Amendment’s right against self-incrimination is one of the most well-known constitutional protections as it is often referenced in movies, television shows, and in the news. Despite this wide-spread awareness of the right against self-incrimination, the Federal Circuit Courts remain split over whether the right attaches before or during trial. The specific point of contention is when a “criminal case” commences.

This article examines the history of the right against self-incrimination beginning with its common-law origins in Great Britain. The evolution of the right against self-incrimination is explored up to the present-day circuit split, and the cases involved in the split are discussed in detail. Finally, this article argues for a broad application of the right against self-incrimination.

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**INTRODUCTION**

The Fifth Amendment is one of the most well-known constitutional amendments. It is so well known that the phrase “plead the Fifth” has entered common usage and can be heard regularly in conversation. This phrase is a direct reference to the protection against self-incrimination, which reads: “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.”<sup>1</sup> While this clause is commonly referenced, and the text seemingly unambiguous, the legal meaning of the clause is currently in a state of flux.

Over time, established laws change in meaning and application, even though the text of the law itself may stay the same. These changes are inevitable as law, like life, must evolve to fit the world in which it exists. The right against self-incrimination is quietly undergoing such a change as multiple Circuit Courts have expanded the scope of the right beyond its traditional existence as a “trial right.”<sup>2</sup> At the same time, other Circuit Courts have held tightly to the old application,

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> See *Vogt v. City of Hays*, 844 F.3d 1235 (10th Cir. 2017); *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009); *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009); *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007); *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006).

resulting in a circuit split.<sup>3</sup>

This article addresses the evolution of the right against self-incrimination from its common law origins in England to the current federal circuit split. In Section I this evolution is explored in some detail, drawing particularly upon competing theories of the origin of the right against self-incrimination. Section I also briefly summarizes relevant Supreme Court precedent. Section II discusses the theory of doctrinal evolution and the ideas of two of its most important theorists. Finally, Section III examines the circuit split and the cases taking each opposing view. Section III concludes with an analysis of why it is best for the right against self-incrimination to continue to evolve and apply more broadly to a criminal case.

## I. THE RIGHT AGAINST SELF-INCRIMINATION

### A. *The Fifth Amendment*

The right against self-incrimination is well known in society, as the phrase “plead the Fifth” is commonly used. Less well known, perhaps, is the actual text of the self-incrimination clause: “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .”<sup>4</sup> This clause has been described as a “landmark event in the history of Anglo-American criminal procedure.”<sup>5</sup>

Some points about the right against self-incrimination are clear. First, the privilege against self-incrimination, guaranteed by the Constitution, applies to all individuals.<sup>6</sup> Second, “a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.”<sup>7</sup> One unsettled issue is what the words “criminal case” include and when a “criminal case” begins.<sup>8</sup> That is the topic of the rest of this article.

### B. *History*

Professor John Langbein discussed two schools of thought regarding the

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<sup>3</sup> See *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005); *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005); *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003).

<sup>4</sup> U.S. CONST. amend. V.

<sup>5</sup> John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994).

<sup>6</sup> *Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

<sup>7</sup> *Id.* at 462.

<sup>8</sup> See *infra* Section III.

origins of the right against self-incrimination.<sup>9</sup> According to Langbein, some scholars believe that this right arose in the aftermath of the abolition of the courts of the Star Chamber and High Commission.<sup>10</sup> Langbein himself, on the other hand, argues that the right against self-incrimination arose from the evolution of the adversarial criminal procedure during the eighteenth century.<sup>11</sup> “Thus, Langbein credits the work of defense counsel with creating the right.”<sup>12</sup>

The first of these explanations follows a *post hoc, ergo propter hoc* sort of reasoning.<sup>13</sup> Professor Richard Hemholz has argued that the maxim *nemo tenetur prodere seipsum*, loosely translated as “no one is obliged to accuse himself,” was an established principle in English ecclesiastical courts before the earliest complaints against the Star Chamber or the Court of High Commission.<sup>14</sup> During the late sixteenth and early seventeenth centuries, this maxim was seized upon by Puritans in their resistance to demands of conformity to Anglican beliefs.<sup>15</sup> As a means of enforcing Anglican beliefs, English rulers made use of the ecclesiastical courts and the prerogative courts of High Commission and Star Chamber.<sup>16</sup> One of the tools exercised by these courts was the “ex officio” oath which required the defendant to swear to answer any questions put to him on pain of contempt or other sanctions.<sup>17</sup>

In 1641, political and military struggles forced Charles I to summon Parliament, who used its authority to abolish the Courts of Star Chamber and High Commission, as well as to ban the ex officio oath.<sup>18</sup> Eminent scholar John Wigmore wrote that following the fall of Star Chamber and High Commission and the demise of the ex officio oath, “a decided effect is produced, and is immediately communicated, naturally enough, to the common law courts.”<sup>19</sup>

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<sup>9</sup> Langbein, *supra* note 5.

<sup>10</sup> *Id.* at 1047.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Post hoc, ergo propter hoc*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/post%20hoc,%20ergo%20propter%20hoc> [<https://perma.cc/7VPV-X8WM>] (last visited Aug. 18, 2019, 11:43 AM) (meaning “after this, therefore because of this”).

<sup>14</sup> Richard H. Hemholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 969–89 (1990).

<sup>15</sup> Langbein, *supra* note 5, at 1073.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Habeas Corpus Act of 1640, 16 Car. 1 c. 10 (Eng.).

<sup>19</sup> 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 289 (John T. McNaughton ed., 6th ed. 1961).

The second explanation for the origin of the right against self-incrimination, and the argument favored by Langbein, posits that the right stems from the increased role of defense counsel in the late seventeenth century.<sup>20</sup> During the sixteenth century, the court was meant to serve as counsel for the accused; Sir Edward Coke discussed this idea writing: “[T]he Court ought to be . . . of counsel for the prisoner, to see that nothing be urged against him contrary to law and right . . . .”<sup>21</sup> The court would not, however, aid the defendant in matters of fact.<sup>22</sup>

This system necessarily compelled defendants to speak on their own behalf if they wished to mount a defense.<sup>23</sup> The assumption at the time was “if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence.”<sup>24</sup> As often happens, though, things began to change over time. Defense counsel entered the normal criminal trial in the 1730s largely through judicial discretion.<sup>25</sup> This may be, as Langbein argues, due to a shift in the criminal trial towards being a means to test the prosecution’s case against the defendant.<sup>26</sup>

Langbein argues that there are several reasons for this shift. First, the concept of “cases” replaced the “altercation” method in which the defendant rebutted each piece of evidence as received.<sup>27</sup> Second, the presumption of innocence was introduced.<sup>28</sup> Third, rules of evidence were formulated.<sup>29</sup> Fourth, the effectiveness of defense counsel increased the use of prosecuting counsel.<sup>30</sup> Fifth, the role of the judge changed as counsel took over for the defense and the prosecution.<sup>31</sup> Finally, the relationship between the court and the jury changed.<sup>32</sup>

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<sup>20</sup> Langbein, *supra* note 5, at 1066–67.

<sup>21</sup> EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CLAUSES* 29 (1644).

<sup>22</sup> Langbein, *supra* note 5, at 1051.

<sup>23</sup> *Id.* at 1049–66.

<sup>24</sup> J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, 348–49 (1986).

<sup>25</sup> John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 311–13 (1978).

<sup>26</sup> Langbein, *supra* note 5, at 1068–71.

<sup>27</sup> *Id.* at 1069–70.

<sup>28</sup> *Id.* at 1070.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1070–71.

<sup>32</sup> *Id.* at 1071.

Interesting as these two origin theories are, the truth is that we may never know how the right against self-incrimination arose. Practically speaking however, the historical origins of the right against self-incrimination become relevant as recent Supreme Court appointees move the court farther towards embracing Originalism.<sup>33</sup> With a split between circuits increasing the likelihood of Supreme Court review, the historical origins of the right against self-incrimination may become a factor in the outcome.

### C. *The Supreme Court*

When does a “criminal case” commence as it relates to the right against self-incrimination? The answer is unclear. The United States Supreme Court case law is largely unsettled. In *United States v. Verdugo-Urquidez*, the Court said “[t]he privilege against self-incrimination is a fundamental trial right of criminal defendants.”<sup>34</sup> Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.<sup>35</sup>

The most recent case to consider the right against self-incrimination, *Chavez v. Martinez*, acknowledged that “[s]tatements compelled by police interrogations cannot be used against a defendant at trial.”<sup>36</sup> The *Chavez* Court declined to rule on when a criminal case begins.<sup>37</sup> At the same time, the Court stated that a “criminal case” requires, at the very least, the initiation of legal proceedings.<sup>38</sup> The plaintiff in *Chavez* was never charged with a crime; therefore, his statements were never used against him in any criminal proceedings.<sup>39</sup>

*Verdugo-Urquidez* seems to be clearly of the opinion that the right against self-incrimination only applies at trial. *Chavez*, on the other hand, seems to read the right as applying to “criminal cases” though not necessarily limiting its application strictly to trial. Finally, there is *Miranda*, which requires that a person be informed of his or her right to remain silent (that is, his or her right against self-

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<sup>33</sup> Steven B. Katz, *The Supreme Court Embraces Statutory Originalism*, AMERICAN BAR ASSOCIATION (May 29, 2019) <https://www.americanbar.org/groups/litigation/committees/employment-labor-relations/articles/2019/spring2019-supreme-court-embraces-statutory-originalism/> [<https://perma.cc/WL66-9ZF9>] (last visited Sept. 24, 2019).

<sup>34</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

<sup>35</sup> *Id.*; See also *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (Fifth Amendment described as a “trial right.”).

<sup>36</sup> *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 766.

<sup>39</sup> *Id.* at 765.

incrimination) at the time of arrest, which may be well before trial.<sup>40</sup>

The various Circuit Courts are equally inconsistent in their holdings, vacillating between the right only applying at trial, and the right being applicable to pre-trial proceedings.<sup>41</sup> As recently as 2017, the 8th Circuit Court of Appeals wrestled with this issue but merely added to the already existing circuit split.<sup>42</sup> Because of the number of circuits that have weighed in on the issue of when a “criminal case” begins, the issue is certainly ripe for Supreme Court review. For purposes of this article, each decision reached by the different circuits merits discussion.

## II. DOCTRINAL EVOLUTION

Evolution is a word that is often used in everyday speech to convey the idea of change or, more precisely, of nonrandom change.<sup>43</sup> It is often described in a Darwinian model, yet ideas of the law as a living thing predate Darwin by hundreds of years.<sup>44</sup> The British jurist Sir Edward Coke touched on the issue in his famous *Institutes*, writing, “[n]ow as of the old fields must come the new corne, so our old books do excellently expound, and expresse this matter as the Law is holden at this day.”<sup>45</sup>

### A. *Oliver Wendell Holmes, Jr.*

Any discussion of doctrinal evolution should probably begin with Justice Oliver Wendell Holmes, Jr. and the ideas first presented in his monumental work, *The Common Law*.<sup>46</sup> *The Common Law* began as a series of lectures delivered in 1880 at the Lowell Institute in Boston, Massachusetts. In these lectures, Holmes introduced and explored the idea that old doctrines do not die out; they simply evolve to fit new policy doctrines.<sup>47</sup> Throughout his career, he elaborated on this idea and developed it into a more refined theory:

Every one instinctively recognizes that in these days the justification of a law for us

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<sup>40</sup> *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

<sup>41</sup> *See infra* Section III.

<sup>42</sup> *See infra* Section III.

<sup>43</sup> Owen D. Jones & Timothy H Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 479 (2005).

<sup>44</sup> *See id.*

<sup>45</sup> 2 SIR EDWARD COKE, *THE SELECTED WRITINGS OF SIR EDWARD COKE* 801 (Steve Sheppard ed., 2005).

<sup>46</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* (Paula J.S. Pereira et al. eds., 1880).

<sup>47</sup> *See generally id.*



cannot be found in the fact that our fathers have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals.<sup>48</sup>

Such theories, however, do not simply spring anew, and Holmes drew influence from several contemporary movements of equal stature.

It is unsurprising that *The Common Law* is sprinkled with allusions to the theories of evolution that were in vogue at the time the lectures were written. Charles Darwin published his *Origin of Species* in 1859,<sup>49</sup> and though there is no evidence that Holmes ever read it, the influence of Darwin's ideas were alive and thriving in the learned communities.<sup>50</sup>

Another equally powerful influence on Holmes was his relationship with the founders of pragmatist philosophy: Charles Sanders Peirce and William James.<sup>51</sup> The three were members of a group called the Metaphysical Club whose members worked "to come to terms with the new science, which had put all in doubt."<sup>52</sup> Rejecting a purely logical view of the law, Holmes' pragmatic influences are clearly demonstrated in what may be *The Common Law's* most famous passage:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>53</sup>

Given such influences, it is not surprising that Holmes developed a theory that legal doctrines, and therefore the law itself, are subject to evolution.

The most well-known illustration of Holmes's theory traces the origin of owner liability in tort law back as far as the Book of Exodus.<sup>54</sup> Holmes cites an oft-quoted passage from Mosaic law: "[i]f an Ox gore a man or a woman, that they die: than the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox

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<sup>48</sup> Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 452 (1899).

<sup>49</sup> CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (Down, Bromley, Kent eds., 1859).

<sup>50</sup> Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 364 (1984).

<sup>51</sup> *Id.* at 362.

<sup>52</sup> *Id.*

<sup>53</sup> HOLMES, THE COMMON LAW, *supra* note 46, at 5.

<sup>54</sup> *Id.*

shall be quit.”<sup>55</sup> Similarly, Holmes finds equivalents in the Roman laws of the *noxæ deditio*<sup>56</sup> as well as the laws of the Salic Franks in Germany.<sup>57</sup> Roman and Salic influences, Holmes found, could be identified in the laws of the United Kingdom as far back as 680 AD, thus providing a direct link between the ancient laws and the modern laws.<sup>58</sup> By this time, the owner of a violent animal, employer of a reckless employee, or other such person held responsible for the injury caused on his watch, could simply pay a fee to relieve the liability.<sup>59</sup> One hundred-thirty years after Holmes delivered *The Common Law* lectures, it is easy to identify in the early English laws the predecessor to the doctrine of *respondeat superior*.

Holmes’ dedication to his theory that doctrines evolve even after the basis for their origins have disappeared did not end with *The Common Law*. In his later works, he revisited and refined his theory.<sup>60</sup> Applying his theory, he demonstrated how a mysterious figure from Salic Law known as the Salmannus, who figured prominently in rituals surrounding transfers of real property, grew to be what we now know as the executor of an estate.<sup>61</sup> Equally as interesting to Holmes was how the ancient political practice of demanding hostages as surety for the behavior of a defeated foe served as a forerunner for the modern secured transaction.<sup>62</sup> For each of these examples it was evident that “just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten.”<sup>63</sup> It seemed to Holmes that in the law, as in nature, evolution was at work.

Each of the examples Holmes gave shows a case in which a precedent successfully evolved from its original purpose to meet some new need. From these examples, it would be easy to assume that old doctrines that continue to be applied are selected for their soundness in their new application. Holmes warns against such an assumption, however, counselling that “if old implements could not be

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<sup>55</sup> *Id.* at 10.

<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.* at 20.

<sup>59</sup> *Id.* at 17.

<sup>60</sup> See, e.g., Holmes, *Law in Science and Science in Law*, *supra* note 48, at 452; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

<sup>61</sup> Holmes, *Law in Science and Science in Law*, *supra* note 48, at 444–46.

<sup>62</sup> *Id.* at 448.

<sup>63</sup> HOLMES, *THE COMMON LAW*, *supra* note 46, at 35.

adjusted to new uses, human progress would be slow. But scrutiny and revision are justified.”<sup>64</sup> For Holmes, history and experience were acceptable sources for modern doctrines, with the strongest precedents surviving to meet new challenges as their old uses died out. It was, however, the duty of lawyers and judges to continue to examine the precedents to ensure that they remained valid. “History sets us free,” Holmes wrote in 1899, “and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.”<sup>65</sup>

### **B. Robert C. Clark**

Following Holmes’s work, references to “evolution” were uncommon between the mid 1920s and the late 1970s.<sup>66</sup> Then, in 1977, Harvard Law Professor Robert C. Clark stepped beyond Holmes’ application of evolutionary theory to the common law and applied it to statutory law.<sup>67</sup> Professor Clark was a major proponent of a type of scholarship that he referred to as the Interdisciplinary Study of Legal Evolution (ISLE).<sup>68</sup>

Professor Clark’s first examination of the evolution of statutes came in his 1977 examination of subchapter C of the Internal Revenue Code.<sup>69</sup> Professor Clark identified a number of fundamental structural decisions that make up the foundation of the framework in which taxpayers, the IRS, and the courts interact. He theorized that within that framework, lawyers and taxpayers were constantly attempting to discover new ways of reducing their taxes.<sup>70</sup> Professor E. Donald Elliott, a Yale Law Professor and law evolution scholar, noted that while Professor Clark described a valid model of change, and despite his use of evolutionary language, it is unclear at this point of Clark’s career in what sense he means that these changes are evolutionary.<sup>71</sup>

In a 1981 paper, Professor Clark developed his most coherent theory of statutory

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<sup>64</sup> *Id.* at 37.

<sup>65</sup> Holmes, *Law in Science and Science in Law*, *supra* note 48, at 452.

<sup>66</sup> E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 59 (1985).

<sup>67</sup> See Robert Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90, 90 (1977).

<sup>68</sup> Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1238 (1981).

<sup>69</sup> Clark, *The Morphogenesis of Subchapter C*, *supra* note 67, at 90.

<sup>70</sup> *Id.* at 95.

<sup>71</sup> Elliott, *supra* note 66, at 60.

evolution.<sup>72</sup> He identified two general patterns of change that explained the development of laws.<sup>73</sup> First, Professor Clark described a four part pattern of development.<sup>74</sup> In the first part, external changes—whether technological, social, or otherwise—create new opportunities for legal rules to reduce certain costs.<sup>75</sup> The second part featured a responsive legal invention, in which a new legal principle or institution is created which reduces costs better than previously identified alternatives.<sup>76</sup> In the third part, the success of the new legal principle creates new needs and opportunities for reducing costs.<sup>77</sup> Finally, in the fourth part, substantial legal activity occurs, which results in the creation of statutes, regulations, and case law aimed at exploiting those opportunities.<sup>78</sup>

The cost reduction that Professor Clark identified as a goal of legal change falls into two different classes: primary and secondary.<sup>79</sup> While primary cost reduction is the result of elementary principles of institutional design, secondary cost reduction is only achieved by “lengthy, complex efflorescence of doctrinal detail.”<sup>80</sup> In Clark’s estimation, the associated legal developments are more capable of being studied without appealing to changes in exogenous factors.<sup>81</sup>

The second pattern identified by Professor Clark involves “the connection between changes in the *size* of economic units or transactions and the subsequent development of new institutions and rules.”<sup>82</sup> This pattern of development is, in Professor Clark’s opinion, particularly applicable to corporate and securities law.<sup>83</sup> Professor Clark attributes the rise of the corporate organizational form to its competitive success over alternative forms of organization.<sup>84</sup> Professor Clark’s theories tend to show those patterns of cost reduction are the underlying force

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<sup>72</sup> See Clark, *The Interdisciplinary Study of Legal Evolution*, *supra* note 68, at 1238.

<sup>73</sup> *Id.* at 1241.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1241–42.

<sup>81</sup> *Id.* at 1242.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1242–47.

<sup>84</sup> *Id.* at 1243 (noting the corporate form of organization includes such characteristics as limited liability, free transferability of shares, strong legal personality, and centralized management).

driving the evolution of legal rules,<sup>85</sup> therefore supporting the economic argument for why constitutions change over time.

### III. CIRCUIT SPLIT

Recent case law supports the existence of an evolving application of the right against self-incrimination. On the one hand, a small group of appellate courts interpret *Chavez* as limiting the right strictly to trial and not to pre-trial proceedings. A number of other appellate courts have found that the right against self-incrimination extends beyond trial and encompasses pre-trial proceedings.

#### A. *Limited to Trial*

##### 1. Third Circuit

In the case of *Renda v. King*, the Third Circuit Court of Appeals addressed whether a person's *Miranda* rights have been violated if that person's statements are not used against her at trial.<sup>86</sup> Valerie Renda was involved in a domestic dispute with her boyfriend, Joe Sonafelt, a Pennsylvania State Trooper.<sup>87</sup> On May 15, 1995, Ms. Renda left Sonafelt, taking their two-year old son with her to a friend's apartment.<sup>88</sup> Sonafelt reported this to the local police, claiming that Renda violated a custody order by abducting their son.<sup>89</sup> Local authorities referred the case to the Pennsylvania State Police.<sup>90</sup> There, Corporal Kelsey of the State Police determined that Sonafelt's complaint, in addition to a complaint that Sonafelt kicked Renda in the back the previous day, would be handled by State Police Trooper Paul King.<sup>91</sup>

On May 15, 1995, Trooper King contacted Renda by phone.<sup>92</sup> During the call, Renda told Trooper King that Sonafelt slammed her into a wall earlier that day; however, she also indicated that she did not want to file charges or give a statement.<sup>93</sup> Based on these allegations, Trooper King conducted a tape recorded

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<sup>85</sup> Elliott, *supra* note 66, at 62.

<sup>86</sup> See *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003).

<sup>87</sup> *Id.* at 550.

<sup>88</sup> *Id.* at 552.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

interview of Trooper Sonafelt, whom he provided with a *Miranda* warning.<sup>94</sup> The next morning, at about 2:30 a.m., Corporal Kelsey and Trooper King interviewed Renda in person, at her friend's apartment.<sup>95</sup> She was not given a *Miranda* warning; however, she provided a written statement that did not mention the May 15 assault.<sup>96</sup>

At trial, Trooper King and Corporal Kelsey testified that when they asked Renda why she had not included the assault in her statement, Renda stated that she had lied about the assault during her phone interview with Trooper King.<sup>97</sup> However, Renda contradicted this in her own trial testimony, by stating that she never told Trooper King and Corporal Kelsey that she lied, and that the reason she had not included the statement about the assault was because she did not want to file a complaint against Sonafelt.<sup>98</sup> She also testified that she only made the statement after Trooper King and Corporal Kelsey threatened her.<sup>99</sup>

On June 7, 1995, Trooper King charged Renda with giving false reports to law enforcement and obtained an arrest warrant for Renda.<sup>100</sup> The statements she made to law enforcement were suppressed because she had not received a *Miranda* warning and the case was nolle prossed by the District Attorney's office.<sup>101</sup> Subsequently, Renda filed suit in the Western District of Pennsylvania, alleging that Trooper King and Corporal Kelsey violated her First, Fourth, Fifth, and Fourteenth Amendment rights by subjecting her to a coercive interrogation.<sup>102</sup> Renda also claimed that she was interrogated without *Miranda* warnings, subject to unlawful search, arrest, and imprisonment, and maliciously prosecuted.<sup>103</sup> The District Court granted summary judgment for the defendants on the First Amendment, false arrest, false imprisonment, and *Miranda* claims, but a jury found in favor of Renda on the malicious prosecution claim.<sup>104</sup> Renda moved for relief from

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 552–53.

<sup>100</sup> *Id.* at 553.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

judgment relating to the *Miranda* claim but her motion was denied.<sup>105</sup> Trooper King appealed the verdict and Renda filed a cross-appeal.<sup>106</sup>

In determining that Renda's right against self-incrimination had not been violated, the Third Circuit relied heavily on its prior ruling in *Giuffre v. Bissell*<sup>107</sup> as well as on *Chavez*.<sup>108</sup> *Giuffre*, holding that a plaintiff may not base a \$1983 claim on the fact that police failed to provide a *Miranda* warning, served as the basis on which the District Court granted summary judgment for Renda's *Miranda* claim.<sup>109</sup> *Chavez*, the court argued, affirmed that *Giuffre* was good law.<sup>110</sup>

Going further, the court found that *Chavez* was similar to Renda's case in that both cases involved a situation where police questioned a suspect without providing a *Miranda* warning.<sup>111</sup> The difference between the two cases was that in *Chavez*, the defendant was never charged with a crime so his statements were never used in a criminal proceeding.<sup>112</sup> Because *Chavez* did not address the moment that a criminal case commences, the court argued that *Giuffre* "compels the conclusion that it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution."<sup>113</sup>

## 2. Fourth Circuit

In *Burrell v. Virginia*, The Fourth Circuit Court of Appeals addressed the issue of whether the Fifth Amendment right against self-incrimination only applied at trial.<sup>114</sup> Charles Burrell was involved in an auto accident on February 19, 2002.<sup>115</sup> After the accident, Officer Chris Johnson requested that Burrell produce proof of insurance for his vehicle.<sup>116</sup> Instead of producing his proof of insurance, Burrell refused to answer Officer Johnson and expressed his Fifth Amendment right

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 557–58.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 557–59; *See Giuffre v. Bissell*, 31 F.3d 1241 (3rd Cir. 1994).

<sup>110</sup> *Renda*, 347 F.3d at 557–58.

<sup>111</sup> *Id.* at 558.

<sup>112</sup> *Id.* at 558–59.

<sup>113</sup> *Id.* at 559.

<sup>114</sup> *See Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005).

<sup>115</sup> *Id.* at 510.

<sup>116</sup> *Id.*

against self-incrimination.<sup>117</sup> In response, the officer warned Burrell that if he continued to assert his Fifth Amendment privilege, Burrell would be arrested for obstruction of justice.<sup>118</sup> Sergeant John Hall, Officer Johnson's supervisor, arrived on the scene and repeated the warning but to no avail.<sup>119</sup>

During Burrell's transport to the hospital for treatment of injuries he sustained during the accident, Officer Johnson served him with a Confirmation of Liability form.<sup>120</sup> The form required that Burrell provide liability insurance information to the Virginia Department of Motor Vehicles within thirty days.<sup>121</sup> Officer Johnson also served Burrell with two summonses: one for lack of insurance and another for obstruction of justice.<sup>122</sup> Burrell was convicted of obstruction of justice, but the failure to pay the uninsured motorist fee was dismissed.<sup>123</sup> A Virginia appellate court later dismissed the obstruction conviction.<sup>124</sup>

Burrell filed a §1983 suit in federal court, alleging that the defendants violated his Fifth Amendment rights by compelling him to produce evidence of insurance and by issuing a citation without probable cause.<sup>125</sup> In his complaint, Burrell also claimed criminal violations of the Due Process Clause and the Commerce Clause, as well as a civil allegation for liability under the Racketeer Influenced and Corrupt Organizations Act.<sup>126</sup> The District Court dismissed all of those claims for lack of subject matter jurisdiction.<sup>127</sup> Burrell appealed the dismissals.<sup>128</sup>

The Court of Appeals found that *Chavez* barred a §1983 suit under the circumstances of Burrell's case, regardless of whether the Fifth Amendment precluded the admission of insurance information produced under compulsion.<sup>129</sup> This was so because *Chavez* refused to allow a §1983 suit to proceed since no compelled testimony was ever admitted in court and, therefore, there was no

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 510–11.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 511.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 513.



constitutional violation.<sup>130</sup> The Court of Appeals found that Burrell did not allege any trial action that violated his Fifth Amendment rights, and thus failed to state a claim.<sup>131</sup>

### 3. Fifth Circuit

In the 1996 case of *Murray v. Earle*, LaCresha Murray was eleven years old when she was involved in the death of two-year-old Jayla Belton.<sup>132</sup> At that time, LaCresha lived with her grandparents (who were also her adoptive parents), R.L. and Shirley Murray.<sup>133</sup> The Murrays provided daycare in their home for Jayla Belton, as well as for several other children.<sup>134</sup>

In May of 1996, Belton was dropped off at the Murray home for daycare.<sup>135</sup> As the day progressed, Belton began to show signs of illness.<sup>136</sup> After realizing that Belton had vomited at the lunch table, LaCresha's older sister, Shawntay, gave Belton some medicine and put her to bed.<sup>137</sup> No one looked in on Belton until late that afternoon.<sup>138</sup> At trial, R.L. Murray testified that at some point during the afternoon, he noticed that LeCresha had gone to the back of the house, near the bedroom where Belton was sleeping.<sup>139</sup> He claimed that he heard "thumping noises" but, assuming that LaCresha was just playing with a ball, he told her to stop.<sup>140</sup> Soon after, LaCresha told R.L. that Belton was "throwing up and shaking."<sup>141</sup> Around 5:00 p.m., a parent showed up to retrieve her children and noticed Belton's condition.<sup>142</sup> The parent urged R.L. to call 911; however, he declined.<sup>143</sup> Instead, R.L. took Belton

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 514.

<sup>132</sup> *Murray v. Earle*, 405 F.3d 278, 283 (5th Cir. 2005).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

to the hospital himself.<sup>144</sup> Belton was pronounced dead at approximately 5:30 p.m.<sup>145</sup>

An autopsy revealed horrifying injuries. There were over thirty bruises to Belton's head, ear, forehead, back, shoulder, elbow, chest, and the left side of her torso.<sup>146</sup> Even worse, Belton received a blow to the abdomen that broke four of her ribs and split her liver into two pieces.<sup>147</sup> The medical examiner determined that Belton died within five to fifteen minutes of her injuries and ruled her death a homicide.<sup>148</sup>

It is unclear when LaCresha first became a suspect, but three days after the autopsy, Detective Hector Reveles directed Detectives Ernest Pedraza and Albert Eells, as well as Angela McGown of Travis County Child Protective Services, to interview LaCresha.<sup>149</sup> After Detectives Reveles and Pedraza conferred with an assistant district attorney, they determined that LaCresha was not in the custody of the state, and that the interview did not need to occur in front of a magistrate.<sup>150</sup> LaCresha was given a *Miranda* warning, but her parents were not notified of the interview nor was an attorney.<sup>151</sup>

After about two hours of questioning, LaCresha confessed that she had dropped Belton and kicked her.<sup>152</sup> LaCresha was subsequently charged with capital murder and injury to a child, then convicted of negligent homicide and injury to a child after her statement was admitted by the juvenile court.<sup>153</sup> After widespread publicity, a new trial was ordered.<sup>154</sup> During that proceeding, in which LaCresha was charged with injury to a child, her statement of confession was again admitted, and LaCresha was again convicted.<sup>155</sup> As a result, LaCresha was adjudicated as a delinquent and sentenced to twenty-five years in the custody of the Texas Youth Commission.<sup>156</sup> Three years later, a Texas appellate court reversed LaCresha's

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 283–84.

<sup>152</sup> *Id.* at 284.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

conviction, finding that her confession was inadmissible.<sup>157</sup> LaCresha subsequently brought a \$1983 suit in the District Court for the Western District of Texas, which dismissed all of her claims, except her Fifth Amendment right against self-incrimination and her state law civil conspiracy claims.<sup>158</sup> The defendants appealed the denial of their summary judgment motions on those counts.<sup>159</sup>

Early in its opinion, the Fifth Circuit Court of Appeals determined that “[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right.”<sup>160</sup> The Court of Appeals offered no analysis of this statement or support for the tenant of law other than a footnote citation to *Chavez* and another case.<sup>161</sup> The Court of Appeals ultimately determined that summary judgment in favor of the defendants was appropriate.<sup>162</sup>

## ***B. Extending Beyond Trial***

### **1. Second Circuit**

Abdallah Higazy’s story began on September 11, 2001.<sup>163</sup> Higazy was an Egyptian student, studying computer engineering at Polytechnic University in Brooklyn, New York with sponsorship from the United States Agency for International Development and the Institute for International Education.<sup>164</sup> His sponsors arranged for him to stay at the Millenium Hotel, which was located across the street from the World Trade Center.<sup>165</sup>

Higazy awoke about forty-five minutes before the first hijacked plane crashed into the World Trade Center.<sup>166</sup> Shortly after the second plane crashed, Higazy and the other hotel guests were evacuated from the hotel, leaving Higazy with only one hundred dollars in cash, his wallet, and the clothes he was wearing.<sup>167</sup> In late

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 285.

<sup>161</sup> *Id.* at 285–89.

<sup>162</sup> *Id.* at 296.

<sup>163</sup> *Higazy v. Templeton*, 505 F.3d 161, 164 (2nd Cir. 2007).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

September or early October, hotel employees, including Millenium's chief security officer, Stuart Yule, and another security employee, Ronald Ferry, began retrieving and inventorying guest property that remained after the evacuation.<sup>168</sup> Ferry informed Yule that he found a radio, a passport, a yellow medallion, and a Koran in room 5101.<sup>169</sup> In November, a different hotel employee brought the radio to Yule's attention; this time, Yule called the FBI to tell them that he had "something of interest they should see."<sup>170</sup> Agents Vincent Sullivan and Christopher Bruno examined the radio and determined that it was "an air-band transceiver capable of air-to-air and air-to-ground communication."<sup>171</sup>

On December 17, 2001, Higazy went to the Millenium to retrieve his belongings.<sup>172</sup> He arrived in the morning because he had an exam scheduled for that afternoon.<sup>173</sup> While at the hotel, Higazy was approached by Agents Sullivan and Bruno, as well as a third FBI agent, Adam Suits.<sup>174</sup> The agents asked Higazy about the radio and Higazy denied the radio was his.<sup>175</sup> Even after being told that the radio was found in his room's safe, Higazy continued to express his denial, replying: "[T]hat's impossible."<sup>176</sup> During this conversation, Higazy told the agents that he had never seen such a radio before; however, he later told the agents that "he was once a lieutenant in the Egyptian Air Force and had knowledge of radio communications."<sup>177</sup> At the end of the interview, Higazy was detained as a material witness and taken to the FBI building.<sup>178</sup>

Higazy voluntarily waived his right to counsel but then changed his mind and asked for an attorney.<sup>179</sup> At that point the interrogation stopped and Higazy spent the night of December 17, 2011 in detention.<sup>180</sup> In light of contradictions between Higazy's statements and those of Millenium Hotel employees, Agent Bruno swore

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 164–65.

<sup>175</sup> *Id.* at 165.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

out an affidavit concluding that “Higazy might have given false statements to federal law enforcement agents.”<sup>181</sup> The affidavit was dated December 18, 2001.<sup>182</sup> Higazy was taken later that day before the United States District Court for the Southern District of New York on a material witness warrant.<sup>183</sup> Counsel for Higazy told the court that his client denied owning the radio and was “urgently desirous of taking a lie detector test.”<sup>184</sup>

Over the doubts of the government, Higazy was administered a polygraph test by Agent Templeton on December 27, 2001.<sup>185</sup> The first round of questions “[allegedly] suggested that Higazy’s answers to questions related to the September 11 attacks were deceptive.”<sup>186</sup> During the second round of questions, Higazy reported intense pain in his arm and asked Templeton to stop.<sup>187</sup> Templeton reportedly called Higazy a baby; when asked if other people ever suffered physical pain during a polygraph, Templeton responded that “[i]t never happened to anyone who told the truth.”<sup>188</sup>

During the polygraph, Higazy gave a series of explanations regarding how he had obtained the radio.<sup>189</sup> His first explanation was that he stole the radio from an electronics store.<sup>190</sup> Higazy then stated that he found it *near* the electronics store.<sup>191</sup> Next, he claimed he never saw nor possessed the radio.<sup>192</sup> Later on in the test, Higazy admitted finding the radio on the other side of the Brooklyn Bridge.<sup>193</sup> Finally, he admitted stealing the radio from the Egyptian military.<sup>194</sup> Throughout the course of this interrogation, Templeton yelled at Higazy for lying and said he would “tell Agent Sullivan in my expert opinion you are a terrorist.”<sup>195</sup> Templeton

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 166.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

wrote a statement saying that Higazy stole the radio from the Egyptian military, but Higazy's attorney advised him not to sign it.<sup>196</sup> Subsequently, on January 11, 2002, Agent Bruno charged Higazy with making false statements.<sup>197</sup> The magistrate judge ordered Higazy held without bail.<sup>198</sup>

Three days later, an airline pilot who had been a guest on the 50<sup>th</sup> floor of the Millenium Hotel, one floor below where Higazy stayed, returned to the property to reclaim his belongings.<sup>199</sup> After looking through his items, the pilot informed hotel staff that his transceiver was missing.<sup>200</sup> When contacted by the hotel, the FBI verified that the transceiver believed to be Higazy's actually belonged to the pilot.<sup>201</sup> Ferry was re-interviewed by the FBI and changed his account to say that the radio was found on a table in Higazy's room and not in a safe.<sup>202</sup> As a result, the government withdrew the complaint against Higazy.<sup>203</sup> Higazy subsequently filed an eight-count complaint against Templeton and the hotel, which included a claim that Higazy's Fifth Amendment rights against self-incrimination were violated.<sup>204</sup>

The Second Circuit Court of Appeals based its decision in this case on a different reading of *Chavez* than the Third, Fourth, and Fifth Circuits.<sup>205</sup> The court cited Justice Thomas's conclusion that "a 'criminal case' at the very least requires the initiation of legal proceedings."<sup>206</sup> Building on this, as well as citing to additional cases, the Court of Appeals determined that bail hearings constitute part of the criminal proceeding.<sup>207</sup>

After concluding that a bail hearing was part of the criminal case against Higazy, the Court of Appeals addressed whether the use of Higazy's statements violated the Fifth Amendment's prohibition on coerced statements.<sup>208</sup> Relying on prior Second Circuit precedent, the Court of Appeals found that "the use or the

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 167.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 168.

<sup>205</sup> *Id.* at 171.

<sup>206</sup> *Id.* (citing *Chavez v. Martinez*, 538 U.S. 760, 766 (2003)).

<sup>207</sup> *Higazy*, 505 F.3d at 172–73.

<sup>208</sup> *Id.* at 173–74.

derivative use of a compelled statement at any criminal proceeding against the declarant violates the person's Fifth Amendment rights; use of the statement at trial is not required.<sup>209</sup> The court further argued that there is no indication in *Chavez* that the use of an allegedly coerced statement at an initial appearance cannot be used in a criminal case.<sup>210</sup> Ultimately, the court found that the use of Higazy's statements at the bail hearing did violate his Fifth Amendment right against self-incrimination.<sup>211</sup>

## 2. Seventh Circuit

The Seventh Circuit Court of Appeals has visited this issue on two separate occasions, first, in *Sornberger v. City of Knoxville, Illinois*,<sup>212</sup> and again in *Best v. City of Portland*.<sup>213</sup> In each case the Court of Appeals determined that a "criminal case" extended beyond just a trial.<sup>214</sup> These cases are discussed in detail below.

### a. Sornberger

On January 12, 2001, First Bank in Knoxville, Illinois was robbed by a man wearing a baseball cap.<sup>215</sup> Only the teller caught a glimpse of the robber's face, and she gave the police a general, physical description.<sup>216</sup> Later, when several of the bank's employees were reviewing footage of the robbery, one of the employees remarked that the robber "looked like" Scott Sornberger.<sup>217</sup> The other employees agreed, and Knoxville Chief of Police Rick Pesci heard at least one of the employees comment about the resemblance to Sornberger.<sup>218</sup>

Based on this information, Chief Pesci questioned several bank employees and learned that Sornberger and his wife were previous customers at First Bank but that their account was closed because of a low account balance.<sup>219</sup> Police were sent to Sornberger's place of employment to bring him to the police station.<sup>220</sup> Although

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<sup>209</sup> *Id.* at 173 (citing *Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994)).

<sup>210</sup> *Higazy*, 505 F.3d at 174.

<sup>211</sup> *Id.*

<sup>212</sup> *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006).

<sup>213</sup> *Best v. City of Portland*, 554 F.3d 698 (7th Cir. 2009).

<sup>214</sup> *Id.*; *Sornberger*, 434 F.3d at 1024–25.

<sup>215</sup> *Sornberger*, 434 F.3d at 1010.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

police found that Sornberger did not meet the physical description given by the teller, they questioned Sornberger and learned that he experienced recent financial difficulties.<sup>221</sup>

That same evening, Knoxville police questioned Sornberger's wife, Teresa, at the police station.<sup>222</sup> Despite being separated during questioning, the Sornbergers offered consistent alibis.<sup>223</sup> Both stated that they were at Sornberger's parents' home using his parents' computer at the time of the incident.<sup>224</sup>

Chief Pesci brought in several police officers from Galesburg to assist in the investigation, and on the day following the robbery, one of the officers, Officer Clauge, brought photographs from the surveillance cameras as well as pictures of Sornberger to show to the State's Attorney.<sup>225</sup> The State's Attorney declined to seek an arrest warrant for Sornberger, but did obtain a search warrant for the computer to confirm Sornberger's alibi.<sup>226</sup> After a further meeting with Chief Pesci and Officer Clauge, the State's Attorney determined that there was probable cause to arrest Sornberger for armed robbery.<sup>227</sup> The officers agreed to arrest Sornberger "during the execution of the search warrant . . . and . . . re-interview Teresa if she could be found at [Scott Sornberger's] parents' home."<sup>228</sup>

The day after the robbery the officers arrived at Sornberger's parents' house; only Teresa was home.<sup>229</sup> She accompanied officers to the Galesburg police station (it is disputed whether this was done voluntarily or under duress) but was allowed to ride in the front seat and was not restrained.<sup>230</sup> Officers Sheppard and Riley interviewed Teresa, resulting in a verbal, and later a written, confession in which she admitted that she assisted Sornberger in robbing First Bank.<sup>231</sup>

Upon arriving in Galesburg, Teresa was informed that she was a suspect in the robbery.<sup>232</sup>

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<sup>221</sup> *Id.* at 1010–11.

<sup>222</sup> *Id.* at 1011.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*



Teresa claim[ed] that she was then . . . coerced into confessing by Officer Sheppard who allegedly (1) falsely told her that witnesses placed her at the scene of the robbery; (2) “repeatedly told her to think about her kids”; (3) “yelled at her and accused her of lying”; (4) falsely promised her that, if she implicated her husband, she would not be charged with any crime; (5) “threatened to call the Department of Children and Family Services” . . . to take her children away if she maintained her innocence; and (6) “refused to honor her request to speak to an attorney.”<sup>233</sup>

Finally, she claimed that she never received a *Miranda* warning “until asked to repeat her oral confession to the Galesburg police stenographer.”<sup>234</sup>

The defendants claimed that Teresa needed little prodding before she voluntarily confessed.<sup>235</sup> The officers said that they informed her that they believed Sornberger robbed the bank, asked Teresa about a witness who saw her leave the bank that same day, and encouraged her to think about her children instead of protecting Sornberger.<sup>236</sup> The defendants further maintained that Officer Sheppard advised Teresa of her *Miranda* rights.<sup>237</sup>

After Teresa confessed, Chief Pesci was brought into the room and Teresa was asked to repeat her confession.<sup>238</sup> She refused, and this time the officers admitted that they made threats.<sup>239</sup> Eventually, Teresa was presented with a transcribed version of her confession and signed it.<sup>240</sup>

Criminal proceedings were brought against Sornberger and Teresa, with Teresa’s statement offered into evidence in support of the charges.<sup>241</sup> A pre-trial motion to suppress the confession was denied, with the court finding no violation of the right against self-incrimination.<sup>242</sup> While the Sornbergers were in custody awaiting trial, a man named Phillip Pitcher (who resembled Sornberger) committed a number of bank robberies in Indiana and Illinois.<sup>243</sup> Further investigation by the FBI resulted in the charges against Sornberger and Teresa being dropped.<sup>244</sup>

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1011–12.

<sup>235</sup> *Id.* at 1012.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

Sornberger and Teresa filed a §1983 suit against the City of Knoxville and the involved officers, alleging in part that Teresa's Fifth Amendment right against self-incrimination was violated.<sup>245</sup>

The Seventh Circuit engaged in a lengthy examination of *Chavez* before addressing the two cases it considered to be the most similar: *Renda* and *Burrell*.<sup>246</sup> The court noted that *Renda* left open the question of "when a statement is used in a criminal proceeding."<sup>247</sup> Next, the court noted that unlike in *Burrell*, Teresa's statements were used against her to support a determination of probable cause, to set proper bail, and at arraignment.<sup>248</sup> Therefore, the three "courtroom uses" of Teresa's unwarned statements did violate her Fifth Amendment right against self-incrimination.<sup>249</sup>

*b.* Best

In 2009, the Seventh Circuit revisited the issue of what constitutes a criminal case in *Best v. City of Portland*.<sup>250</sup> In this case, Larry Best was charged in an Indiana state court with two drug crimes: possession of methamphetamine and possession with intent to distribute methamphetamine.<sup>251</sup> The evidence against Best was obtained through searches of two homes: one with a warrant and one with the owner's consent.<sup>252</sup> Best unsuccessfully moved to suppress the evidence on the grounds that his Fourth Amendment rights had been violated.<sup>253</sup> In an interlocutory appeal, the trial court's ruling was affirmed.<sup>254</sup> Best then deposed the officer who led the searches and, based on new information obtained in the deposition, filed a motion to reconsider the original motion to suppress.<sup>255</sup> The prosecutor, however, dropped the charges against Best before the trial court could issue a ruling.<sup>256</sup>

Before the charges were dropped, Best filed a §1983 suit naming the City of

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<sup>245</sup> *Id.* at 1009–10.

<sup>246</sup> *Id.* at 1023–26.

<sup>247</sup> *Sornberger*, 434 F.3d at 1026 (citing *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003)).

<sup>248</sup> *Sornberger*, 434 F.3d at 1027.

<sup>249</sup> *Id.*

<sup>250</sup> *Best v. City of Portland*, 554 F.3d 698, 699 (7th Cir. 2009).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

Portland and four police officers as defendants.<sup>257</sup> Among the claims included in the complaint was a claim that Best's Fifth Amendment right against self-incrimination had been violated.<sup>258</sup> The District Court for the Northern District of Indiana granted summary judgment in favor of the defendants, finding in part that "Best's right against self-incrimination could not have been violated because the case was dismissed before it went to trial."<sup>259</sup>

In addressing whether Best's Fifth Amendment right against self-incrimination were violated, the Court of Appeals relied on its prior ruling in *Sornberg*.<sup>260</sup> Specifically, the court found that the use of Best's allegations that his statements had been used at a suppression hearing were sufficient to allow a \$1983 case to proceed because the suppression hearing was part of a criminal case.<sup>261</sup> The court remanded the case without reaching the merits of Best's claim.<sup>262</sup>

### 3. Ninth Circuit

In *Stoot v. City of Everett*, Paul Stoot II was accused of sexually assaulting a four year old girl.<sup>263</sup> On January 15, 2003, the investigating officer, Detective Jon Jensen, called the middle school where Stoot was a student to arrange an on-campus interview in the principal's office.<sup>264</sup> Before conducting the interview, Jensen met with two prosecutors in order to review the legal standards for interviewing a juvenile.<sup>265</sup> Based on these discussions, Jensen noted that he learned two pieces of information: "(1) if the juvenile requests his parents during the interview, treat the request the same as one for legal counsel, and (2) give the juvenile a *Miranda* warning and have him sign the waiver form" even if the interview is non-custodial.<sup>266</sup> After this meeting, Jensen informed the middle school principal that she did not need to contact Stoot's parents; rather, he would do so after the interview.<sup>267</sup>

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<sup>257</sup> *Id.* at 700.

<sup>258</sup> *Id.* at 702-03.

<sup>259</sup> *Id.* at 700.

<sup>260</sup> *Id.* at 702-03.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 703.

<sup>263</sup> *Stoot v. City of Everett*, 582 F.3d 910, 913 (9th Cir. 2009).

<sup>264</sup> *Id.* at 914.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

Jensen testified that during the interview, he explained Stoot's rights, Stoot understood those rights, and Stoot waived those rights.<sup>268</sup> In his testimony, Jensen claimed that he employed "the interviewing technique of blaming the victim."<sup>269</sup> Ultimately, Stoot confessed to touching the victim.<sup>270</sup>

Stoot and his parents contended that after Stoot repeatedly denied touching the victim, Jensen changed his tactics and began making impermissible threats.<sup>271</sup> After two hours of questioning, Stoot claimed he made a false confession.<sup>272</sup> Additionally, Stoot and his parents alleged that Jensen's interviewing tactics violated *Miranda* because Stoot lacked capacity to consent to the interrogation.<sup>273</sup>

After the interview, a prosecutor filed an Information charging Stoot with first degree child molestation.<sup>274</sup> The Affidavit of Probable Cause attached to the Information relied only on the statements of the complaining witness, the interview with the victim, and Stoot's confession.<sup>275</sup> On November 3, 2004, a hearing was held to determine the admissibility of Stoot's statement.<sup>276</sup> After hearing from Jensen, Stoot, and experts, the court determined that Stoot lacked capacity to understand his rights, and the waiver of his rights was invalid.<sup>277</sup> The court also determined that the statements made by Stoot were the result of "impermissible coercion."<sup>278</sup> Finally, the court dismissed the charges against Stoot.<sup>279</sup>

Stoot and his parents filed a \$1983 suit against Jensen and the City of Everett.<sup>280</sup> The district court granted summary judgment for the defendants on all claims, including finding that Stoot did not demonstrate a claim that his Fifth Amendment right against self-incrimination was violated because the statements against him

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<sup>268</sup> *Id.* at 915.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 915–16.

<sup>273</sup> *Id.* at 916.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 917.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

were never used in a criminal trial.<sup>281</sup> Stoot appealed to the Ninth Circuit.<sup>282</sup>

In its opinion, the Court of Appeals argued that Stoot's Fifth Amendment claim fell "squarely within the gray area created by *Chavez*."<sup>283</sup> Unlike the plaintiff in *Chavez*, who was never charged with a crime, Stoot's statements were used against him in the Affidavit accompanying the Information which charged him with a crime, in a pretrial arraignment, and again in an evidentiary hearing.<sup>284</sup> The Court of Appeals considered prior case law from other circuits before adopting the approach of *Sornberger* and *Higazy*.<sup>285</sup> The court found that the use of coerced statements at trial was not required for Stoot to assert a claim that his Fifth Amendment right against self-incrimination had been violated.<sup>286</sup>

#### 4. Tenth Circuit

Matthew Vogt was a police officer in the City of Hays, Kansas.<sup>287</sup> In 2013, Mr. Vogt applied for employment with the Haysville Police Department.<sup>288</sup> During the hiring process, Mr. Vogt revealed that he still maintained a knife that he obtained during the course of his employment as a police officer in Hays.<sup>289</sup> Despite this revelation, the Haysville Police Department offered Mr. Vogt a position based on the condition that he report his acquisition of the knife and return it to the Hays Police Department.<sup>290</sup>

Mr. Vogt complied with the condition and reported to the Hays Police Department that he had kept the knife.<sup>291</sup> The Chief of the Hays Police Department ordered Vogt to submit a report concerning his possession of the knife and Vogt complied by submitting a one-sentence report.<sup>292</sup> Vogt subsequently provided the Hays Police Department with his two-week notice.<sup>293</sup>

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 918.

<sup>283</sup> *Id.* at 923.

<sup>284</sup> *Id.* at 923–24.

<sup>285</sup> *Id.* at 924–25.

<sup>286</sup> *Id.* at 925.

<sup>287</sup> *Vogt v. City of Hays*, 844 F.3d 1235, 1238 (10th Cir. 2017).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

Concurrently, the Hays police chief initiated an internal investigation into Vogt's possession of the knife.<sup>294</sup> In order to keep his job with Hays Police, the department required that Vogt give a more detailed statement regarding the knife.<sup>295</sup> Vogt complied, and the additional statement was used to find more evidence.<sup>296</sup> The Hays police chief ultimately asked the Kansas Bureau of Investigation to open a criminal investigation, and in support of this request, turned over Mr. Vogt's statements and the additional evidence.<sup>297</sup> Because of the pending investigation, the Haysville Police Department withdrew its job offer to Vogt.<sup>298</sup>

Vogt was charged in state court with two felony counts related to his possession of the knife.<sup>299</sup> After a probable cause hearing, the state district court found that there was no probable cause and the charges against Vogt were dismissed.<sup>300</sup> Vogt then filed suit in the District Court of Kansas alleging that his statements were used: "(1) to start an investigation leading to the discovery of additional evidence concerning the knife, (2) to initiate a criminal investigation, (3) to bring criminal charges, and (4) to support the prosecution during the probable cause hearing."<sup>301</sup> The District Court dismissed Vogt's complaint for failure to state a claim, holding that the right against self-incrimination is only a trial right and that Vogt's statements were used in pretrial proceedings, not in a trial.<sup>302</sup>

The Court of Appeals' opinion turned on the meaning of "criminal case" under the Fifth Amendment.<sup>303</sup> While the District Court found that the use of Vogt's statements did not violate the Fifth Amendment because they were not used at trial, the Court of Appeals disagreed, finding that the phrase "criminal case" also includes probable cause hearings.<sup>304</sup> The court's stated basis for reaching this conclusion included reliance on the text of the Fifth Amendment and the Framers'

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 1237.

<sup>303</sup> *Id.* at 1239.

<sup>304</sup> *Id.*

understanding of the right against self-incrimination.<sup>305</sup>

The court first addressed the text of the Fifth Amendment, drawing attention to the fact that the text does not include the term “trial” or “criminal prosecution.”<sup>306</sup> Far from being a lawyers’ quibble about semantics, the text of the Fifth Amendment is important for its differences from other Amendments.<sup>307</sup> The Court of Appeals discussed the Supreme Court’s distinction between the Fifth and Sixth Amendments in *Counselman v. Hitchcock*.<sup>308</sup> In that case, the Supreme Court held that a witness could plead the Fifth Amendment during a grand jury proceeding because the Fifth Amendment’s “criminal case” language is broader than the Sixth Amendment’s “criminal prosecution.”<sup>309</sup> The Court of Appeals agreed with the *Counselman* opinion, arguing that the term “criminal case” on its face encompasses all of the proceedings involved in a “criminal prosecution”<sup>310</sup>

The Court of Appeals then moved on to analyze the meaning of “criminal case” at the time of ratification in 1791, by reviewing dictionary definitions from the Founding era.<sup>311</sup> The Court of Appeals first addressed the 1828 dictionary published by Noah Webster.<sup>312</sup> This dictionary defined “case” as “[a] cause or suit in court” and says that the term “is nearly synonymous” with the term “cause.”<sup>313</sup> The same dictionary defines “cause” as a “suit or action in court.”<sup>314</sup> Based on these definitions, the Court of Appeals determined that the Founder’s understanding of the term “case,” at least as it relates to the Fifth Amendment, included more than the trial itself.<sup>315</sup>

Apart from the dictionary definitions, the Court of Appeals also supported its decision by considering the Framers’ understanding of the phrase “in any criminal

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<sup>305</sup> *Id.* at 1241–42.

<sup>306</sup> *Id.* at 1242.

<sup>307</sup> See, e.g., U.S. CONST. amends. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”), VII (“In suits at common law . . .”) (emphases added).

<sup>308</sup> Vogt, 844 F.3d at 1242 (citing *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1972)).

<sup>309</sup> *Counselman*, 142 U.S. at 562–63.

<sup>310</sup> Vogt, 844 F.3d at 1242.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 1243 (citing NOAH WEBSTER, *Case*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

case.”<sup>316</sup> First the court considered a draft of the Fifth Amendment by James Madison which omitted the phrase “criminal case” and read:

No person shall be subject, to more than one punishment, or one trial for the same offense; *nor shall be compelled to be a witness against himself*; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.<sup>317</sup>

The court found this draft meant that the protection against self-incrimination extended to civil as well as criminal cases.<sup>318</sup>

Second, the court addressed an objection to Madison’s wording of the Fifth Amendment by Representative John Laurence, who was concerned that Madison’s wording would create a conflict with “laws passed.”<sup>319</sup> While it was unclear what laws might be conflicted, Rep. Laurence proposed adding the phrase “in any criminal case.”<sup>320</sup> The court also argued that at the time that Rep. Laurence’s addition was accepted there was agreement that “the right against self-incrimination was not limited to a suspects own trial.”<sup>321</sup> The reason for this was that, at the time of the ratification of the Fifth Amendment, criminal defendants were unable to testify in their own cases.<sup>322</sup>

Finally, in determining that the right against self-incrimination applied to more than just trial, the Court of Appeals rejected an argument that this interpretation of the Fifth Amendment was not practical because pretrial hearings are frequently used to determine admissibility of evidence at trial.<sup>323</sup> The basis for this argument is that “courts have held . . . that evidence may be used in pretrial hearings even if the evidence would be inadmissible at trial.”<sup>324</sup> The Court of Appeals did not find this argument helpful because it assumes that the use of

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<sup>316</sup> *Id.* at 1244.

<sup>317</sup> *Id.* (citing James Madison, Remarks in Debate in the House of Representatives (June 8, 1789) reprinted in 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 448, 451–52 (Joseph Gales ed. 1834)).

<sup>318</sup> *Id.* (citing LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 423 (1968)).

<sup>319</sup> *Id.* (citing John Laurance, Representative, Statements in Floor Debate (Aug. 17, 1789), reprinted in 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 782, 782 (Joseph Gales ed. 1834)).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 1245.

<sup>322</sup> *Id.* (citing *Ferguson v. Georgia*, 365 U.S. 570, 574 (1961) (stating that when the United States was formed, “criminal defendants were deemed incompetent as witnesses.”)).

<sup>323</sup> *Id.* at 1246.

<sup>324</sup> *Id.*



compelled statements in pretrial hearings is not inadmissible under the Fifth Amendment.<sup>325</sup> Since the court found that the Fifth Amendment did apply to pretrial hearings, it necessarily followed that compelled statements are inadmissible in pretrial proceedings.<sup>326</sup>

### C. Analysis

From an evolutionary view, the right against self-incrimination is in a fascinating position. The split between circuits highlights the attempt to maintain a traditional view of the right, consistent with its history and prior applications, while at the same time showing the beginnings of the law moving in a different direction. This is doctrinal evolution in real time.

Eventually, one of these strains of thought will prevail and be explicitly adopted by the United States Supreme Court. There is reason to believe that the evolving view, which is to say the view that the right against self-incrimination extends to pre-trial proceedings as well as applying at trial, will eventually be adopted. Since the ratification of the Constitution, a number of changes have occurred in criminal law, including the development of the modern police force, the development of rules of evidence, and most importantly, the formalization of criminal procedure. The old view of the right against self-incrimination does not account for these changes.

A proponent of maintaining the traditional view of the right against self-incrimination might argue that the text of the Fifth Amendment should be interpreted through the meaning of the words at the time they were written. This sort of Originalism, as Justice Scalia notes, “requires the consideration of an enormous mass of materials.”<sup>327</sup> Nonetheless, in *Vogt*, the Tenth Circuit undertook just that sort of analysis. The *Vogt* Court attempted to determine the meaning of “criminal case” by relying on dictionaries from the founding era.<sup>328</sup> The court found that the term “case” meant “a cause or suit in court.”<sup>329</sup> This Originalist approach, at least as applied by the *Vogt* court, is unconvincing for two reasons: first, the definition of “case” relied upon by the Court does not lead directly to the conclusion that the Framers intended the right against self-incrimination to extend beyond trial. Second, there is a gap in this reasoning that would need to be filled by addressing criminal procedure at the time of ratification.

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

<sup>328</sup> *Vogt*, 844 F.3d at 1242.

<sup>329</sup> *Id.* at 1243.

If we interpret the phrase “criminal case” to mean criminal cases as we experience them today, it is difficult to exclude pre-trial proceedings from protection. There is precedent to support this view. In *Counselman v. United States*, the Supreme Court held that a witness could invoke the Fifth Amendment during a grand jury proceeding because the Fifth Amendment’s “criminal case” language is more broad than the Sixth Amendment “criminal prosecution” language.<sup>330</sup> *Counselman* also seems to support the idea that the term “criminal case” should be interpreted by considering the plain meaning of the text in modern language.<sup>331</sup>

A counter argument against extending the right against self-incrimination might point out that evidence which is not admissible at trial is often admitted at pre-trial proceedings. This argument was rejected by the *Vogt* court on the grounds that it assumes the use of compelled statements at pre-trial proceedings is not prohibited by the Fifth Amendment.<sup>332</sup> Additionally, the fact that some evidence which is inadmissible at trial may be considered in pretrial proceedings does little to address the fact that criminal procedure, and the scope of the “criminal case” has changed since the Fifth Amendment was ratified. It is more reasonable to conclude that the law regarding the scope of criminal cases has evolved, and that the law regarding the scope of the right against self-incrimination should change with it.

## CONCLUSION

By reviewing the history and application of the right against self-incrimination, it is evident that this right has evolved over time from its early origins in the English common law, through its enshrinement in the Fifth Amendment, and on to the present. It is equally evident that this right is now at a point where it may either evolve to address the “criminal case” in its modern form or keep plugging along in its traditional form. While allowing the right to continue to evolve best suits the needs of defendants in modern criminal cases, only time will tell whether the courts will continue to allow the right against self-incrimination to grow, or force it to remain a relic of late 18<sup>th</sup> Century criminal procedure.

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<sup>330</sup> *Counselman v. Hitchcock*, 142 U.S. 547, 562–63 (1972).

<sup>331</sup> *Id.* at 562.

<sup>332</sup> *Vogt*, 844 F.3d at 1246.