

**Constitutional Law—Say No More: Police Coercion of Self-incriminating Statements Alone Not Violative of Self-Incrimination Clause—*Chavez v. Martinez*, 538 U.S. 760 (2003)**

The Self-Incrimination Clause of the Fifth Amendment guarantees the privilege against self-incrimination.<sup>1</sup> Throughout the last century, the United States Supreme Court has broadly interpreted this clause, and has deemed it applicable in a host of situations outside of the criminal courtroom context.<sup>2</sup> In *Chavez v. Martinez*,<sup>3</sup> the Court considered whether a Self-Incrimination Clause violation occurs when a police officer coerces self-incriminating statements from a suspect in custody.<sup>4</sup> In a splintered decision, the Court concluded that the coercion of self-incriminating statements, absent the use of the statements in a criminal case, is not a violation of the Fifth Amendment Self-Incrimination Clause.<sup>5</sup>

On November 28, 1997, California police officer Maria Pena shot Oliverio Martinez five times during an altercation between Martinez, Pena, and her partner, Officer Andrew Salinas.<sup>6</sup> The officers placed the critically wounded Martinez under arrest and paramedics transported him to the emergency room, where Sergeant Ben Chavez began to interrogate Martinez.<sup>7</sup> Without providing the requisite *Miranda* warnings, and despite Martinez's repeated objections, Chavez compelled Martinez to make self-incriminating statements.<sup>8</sup> The

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1. U.S. CONST. amend. V. The Fifth Amendment provides in part that “[N]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Id.*

2. See *infra* note 14 and accompanying text (detailing settings outside of formal courtroom proceedings where Court held clause to apply).

3. 538 U.S. 760 (2003).

4. *Id.* at 765-66 (plurality opinion) (considering whether Self-Incrimination Clause violation occurs without commencement of criminal trial).

5. *Id.* at 772-73 (plurality opinion) (determining absence of criminal trial defeats core Fifth Amendment claim); *id.* at 778 (Souter, J., concurring) (determining “powerful showing” required to warrant expansion of core right’s protection to allow civil liability).

6. *Martinez v. City of Oxnard*, 270 F.3d 852, 854 (9th Cir. 2001) (detailing sequence of events leading up to interrogation of Martinez), *rev’d sub nom.* *Chavez v. Martinez*, 538 U.S. 760 (2003). Officers Pena and Salinas were conducting a narcotics investigation when Martinez approached them on bicycle. *Id.* The officers ordered Martinez to dismount from his bicycle and submit to a search. *Id.* During the search, Salinas found a knife and a struggle ensued between Salinas and Martinez, the facts of which the parties dispute. *Id.* When Salinas yelled “He’s got my gun,” Pena drew her weapon and shot Martinez several times, instantly blinding him and leaving him partially paralyzed. *Id.*

7. *Martinez v. City of Oxnard*, 270 F.3d 852, 854-55 (9th Cir. 2001) (describing initial contact between Chavez and Martinez), *rev’d sub nom.* *Chavez v. Martinez*, 538 U.S. 760 (2003).

8. *Martinez v. City of Oxnard*, 270 F.3d 852, 855 (9th Cir. 2001) (recounting Chavez’s audio-taped custodial interrogation of Martinez at hospital), *rev’d sub nom.* *Chavez v. Martinez*, 538 U.S. 760 (2003). Chavez pressed Martinez with questions concerning the sequence of events leading up to the shooting. *Id.* Martinez’s answers were initially unresponsive, but he eventually complained of serious pain and begged for medical treatment. *Id.* The taped interview lasted ten minutes over a forty-five minute span, while Martinez

incident did not result in any criminal charges against Martinez, thus his statements were never used against him in a criminal trial.<sup>9</sup>

Martinez filed a complaint pursuant to 42 U.S.C. § 1983, alleging that Chavez violated his Fifth and Fourteenth Amendment rights by subjecting him to a coercive interrogation.<sup>10</sup> The District Court granted summary judgment for Martinez on his Fifth and Fourteenth Amendment claims against Chavez.<sup>11</sup> On interlocutory appeal, the Ninth Circuit affirmed.<sup>12</sup> The Supreme Court reversed, however, and held the absence of a “criminal case” in which Martinez’s statements were used against him precluded him from claiming a Fifth Amendment violation.<sup>13</sup>

Despite the Self-Incrimination Clause’s apparently limiting language, the Supreme Court has applied the clause to any proceeding where a witness fears his testimony may incriminate himself in a future criminal proceeding.<sup>14</sup> The Court has also incorporated the Clause into the Fourteenth Amendment, thus

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drifted in and out of consciousness. *Id.* Chavez ultimately admitted to grabbing officer Salinas’s gun and using heroin. 538 U.S. at 764.

9. 538 U.S. at 764-65 (noting incident did not result in criminal charges or prosecution against Martinez).

10. *Martinez v. City of Oxnard*, 270 F.3d 852, 855 (9th Cir. 2001) (outlining Martinez’s claims against police), *rev’d sub nom. Chavez v. Martinez*, 538 U.S. 760 (2003). Section 1983 permits individuals to sue public officials who violate their constitutional or statutory rights while acting under color of state law. 42 U.S.C. § 1983 (2001). Martinez’s complaint alleged that the officers violated his constitutional rights by searching him without probable cause, using excessive force against him, and subjecting him to coercive interrogation. *Martinez*, 270 F.3d at 855.

11. *Martinez v. City of Oxnard*, 270 F.3d 852, 855 (9th Cir. 2001) (denying Chavez’s defense of qualified immunity), *rev’d sub nom. Chavez v. Martinez*, 538 U.S. 760 (2003). Chavez attempted to assert qualified immunity as a defense to Martinez’s claims. *Id.* There are two inquiries the court must make in determining whether qualified immunity applies. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). First, the court must consider whether the plaintiff has stated a prima facie claim of a constitutional violation. *Id.* at 201. Second, if the court finds that the plaintiff has stated such a claim, the court must then determine that the right was clearly established. *Id.* If the plaintiff satisfies both inquiries, the court must deny the defense. *Id.* The district court determined that both inquiries were satisfied, and thus denied Chavez’s defense of qualified immunity. *Martinez*, 270 F.3d at 855. The District Court denied summary judgment on Martinez’s claims that the police lacked probable cause to stop him and that they used excessive force. *Id.* Subsequently, those claims went to trial. *Id.*

12. *Martinez v. City of Oxnard*, 270 F.3d 852, 857 (9th Cir. 2001) (concluding Chavez’s coercive questioning violated Fifth Amendment even though statements never used at trial), *rev’d sub nom. Chavez v. Martinez*, 538 U.S. 760 (2003).

13. 538 U.S. at 773 (plurality opinion) (reversing Ninth Circuit’s denial of qualified immunity as to Martinez’s Fifth Amendment claim); *id.* at 776 (Souter, J., concurring) (expressing policy concerns in agreeing with plurality’s decision).

14. *See Minnesota v. Murphy*, 465 U.S. 420, 425 (1984) (acknowledging privilege’s expanse beyond simply permitting criminal defendant to refuse to testify at trial); *Michigan v. Tucker*, 417 U.S. 433, 440 (1974) (detailing non-criminal proceedings where Court held privilege applied); *see also Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (extending privilege to state statutory inquiries); *McCarthy v. Arndstein*, 266 U.S. 34, 39 (1924) (extending privilege to civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547, 559 (1892) (extending privilege to grand jury proceedings), *overruled in part by Kastigar v. United States*, 406 U.S. 441 (1972). These cases illustrate that “an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.” *Tucker*, 417 U.S. at 440-41.

making the privilege applicable against the States.<sup>15</sup> Not until 1966 in the landmark case of *Miranda v. Arizona*,<sup>16</sup> did the Supreme Court hold the privilege against self-incrimination also applies to custodial police interrogations.<sup>17</sup>

In *Miranda*, the Court presumed that police interrogations of suspects in custody were “inherently coercive,” and thus the Court held that statements made under these circumstances are inadmissible, unless the police first inform the suspect of certain rights and the suspect then freely waives those rights.<sup>18</sup> Prior to *Miranda*, a “voluntariness test” within the meaning of the Fourteenth Amendment Due Process Clause governed the admissibility of custodial statements.<sup>19</sup> In a separate but related line of cases, the Supreme Court employed Fourteenth Amendment substantive due process analysis to establish that police officers whose actions in obtaining evidence “shock the conscience” violate the Due Process Clause, regardless of whether the government admits the evidence in a criminal case.<sup>20</sup>

The Supreme Court has also held that the government may constitutionally compel self-incriminating testimony in certain instances when an individual exchanges the Fifth Amendment privilege for some equally adequate protection.<sup>21</sup> In *Kastigar v. United States*,<sup>22</sup> the Court held that a grant of “use

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15. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating Fifth Amendment into Fourteenth Amendment Due Process Clause).

16. 384 U.S. 436 (1966).

17. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966) (holding privilege applicable during custodial interrogation).

18. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (pronouncing police must give suspects fourfold warning before questioning to protect privilege against self-incrimination). The “procedural safeguards” the *Miranda* Court imposed were intended to provide “practical reinforcement” for the Fifth Amendment privilege. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). “The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory incrimination is protected.” *Id.*

19. *Dickerson v. United States*, 530 U.S. 428, 431-34 (2000) (acknowledging Court never abandoned Due Process jurisprudence but simply changed focus). The Court applied the Due Process “voluntariness test” throughout the middle third of the twentieth century in numerous cases and examined “the totality of the circumstances” to determine whether a suspect voluntarily made a statement to police, and was thus admissible against the speaker. *Id.* at 433-34; see *Michigan v. Tucker*, 417 U.S. 433, 441 (1974) (listing state cases employing “voluntariness test” to determine admissibility prior to *Miranda*). The inquiry was “whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary.” *Tucker*, 417 U.S. at 441. After *Miranda*, the failure to administer requisite warnings resulted in the exclusion of statements otherwise “voluntary” under traditional Due Process analysis. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985).

20. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (opining on official conduct necessary to reach “conscience-shocking” level). The type of behavior a court would likely deem “conscience-shocking” and sustain a substantive Due Process claim is “conduct intended to injure in some way unjustifiable by any government interest.” *Id.* at 849; see also *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (establishing “shocks the conscience” standard as governing substantive Due Process analysis). See generally Stuart Taylor, *You Do Not Have a Right to Remain Silent*, The Atlantic Online, at <http://www.theatlantic.com/politics/nj/taylor2002-07-30.htm> (last visited January 23, 2004) (considering legality of torture to prevent nuclear or terrorist attacks).

21. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (holding use and derivative use immunity

and derivative use” immunity provides a witness with the same protection as the Self-Incrimination Clause and, therefore, the compulsion of self-incriminating testimony with such a grant in place does not violate the Clause.<sup>23</sup> The Court employed similar reasoning in the so-called “penalty” cases, which involve government threats of discharge or other economic penalties to compel self-incriminating testimony from its employees or contractors.<sup>24</sup> In these cases, the Court held that the government may constitutionally impose these threats to compel testimony, but that it is unconstitutional to force a waiver of immunity in doing so.<sup>25</sup>

In *Chavez v. Martinez*, a majority of the Court decided the government did not violate Martinez’s Fifth Amendment rights because it never admitted the compelled statements in a criminal trial.<sup>26</sup> The Court reached this ultimate result, however, through different reasoning embodied in the Court’s plurality and concurring opinions.<sup>27</sup> Unable to reach an agreement on whether Chavez’s interrogation of Martinez “shocked the conscience” and thus violated the Fourteenth Amendment, a majority of the Court instead agreed to remand that

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coextensive with scope of privilege against self-incrimination); Steven Clymer, *Are Police Free To Disregard Miranda*, 112 YALE L.J. 447, 464-67 (2002) (asserting immunity and penalty cases confirm Self-Incrimination Clause only violated at criminal trial); Larry Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court’s Definition*, 61 MINN. L. REV. 383, 388 (1977) (arguing Fifth Amendment protects only against use of compelled testimony, not act of compulsion itself).

22. 406 U.S. 441 (1972).

23. *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (replacing transactional immunity with use and derivative use immunity). The Court reasoned that a grant of this type of immunity places a witness in substantially the same position as a citizen who successfully asserted the privilege and remained silent. *Id.* at 461-62. The Court also compared self-incriminating statements compelled from an immunized witness to a coerced confession. *Id.* In both instances, the Court noted, any prosecution would be precluded from using either the speaker’s statements, or any of the fruits derived from them, in the case-in-chief against the speaker. *Id.* But see Michael Avery, *You Have a Right to Remain Silent*, 30 FORDHAM URB. L.J. 571, 595-96 (2003) (distinguishing between immune witnesses and coerced suspects). “There is a substantial distinction between compelling testimony through judicial grants of immunity, made in public proceedings affording a witness procedural due process rights, including the right . . . to counsel and appeal any irregularities, and coercing statements in the back rooms of police stations.” *Id.* at 595.

24. See Clymer, *supra* note 21, at 467 (claiming privilege allows government to compel statements as long as later use restricted); Ritchie, *supra* note 21, at 388 (characterizing prohibition of compelled testimony in penalty cases “informal use immunity”). The “penalty” cases typically involved government employees or contractors compelled upon threat of some penalty to answer questions, where the answers would have been self-incriminating. Clymer, *supra* note 21, at 467-68.

25. See, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 76 (1973) (deeming statute suspending contractor for refusing to waive immunity violates Self-Incrimination Clause); *Gardner v. Broderick*, 392 U.S. 273, 277-79 (1968) (holding discharge of police officer for refusing to waive privilege violates Fifth Amendment); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of N.Y.*, 392 U.S. 280, 283 (1968) (holding dismissal of public employees for refusal to sign immunity waiver offends Federal Constitution); see also Susan Klein, *No Time For Silence*, 81 TEX. L. REV. 1337, 1341 (2003) (noting Court provided relief where government impermissibly penalized individuals’ refusal to waive immunity).

26. 538 U.S. at 772-73 (plurality opinion) (concluding absence of criminal case defeats Martinez’s *core* Fifth Amendment claim); *id.* at 777-79 (Souter, J., concurring) (agreeing with plurality’s conclusion).

27. *Id.* at 773 (plurality opinion) (announcing judgment); *id.* at 778-79 (Souter, J., concurring) (approving plurality’s judgment on separate reasoning).

issue to the Ninth Circuit for consideration.<sup>28</sup>

In reaching its decision regarding the Fifth Amendment question, the plurality first determined that the text of the Self-Incrimination Clause describes a “fundamental trial right,” and cited Supreme Court dicta in support of this proposition.<sup>29</sup> The plurality next examined the Court’s decisions in the “immunity” and “penalty” cases and compared the constitutionally permissible compulsion in those cases to the compulsion of self-incriminating testimony during a police interrogation.<sup>30</sup> More specifically, the plurality compared an immunized witness to a suspect forced to make self-incriminating admissions, and concluded that in both contexts a Fifth Amendment violation could not occur because the statements would be inadmissible at trial against the speaker.<sup>31</sup> The plurality acknowledged that an individual may assert the privilege prior to the commencement of a criminal trial, but asserted that the *core* right that the Self-Incrimination Clause protects could only be violated by the admission of compelled testimony at trial.<sup>32</sup> In concluding, the plurality asserted that its decision did not mean that torture or other abuses that result in a confession are constitutionally permissible, as long as the government does not use the confession against the suspect at trial.<sup>33</sup> Rather, the plurality asserted, courts would analyze these abuses under the Fourteenth Amendment Due Process Clause, and if found to “shock the conscience,” an immediate constitutional violation would have occurred.<sup>34</sup>

In *Chavez*, the plurality based its opinion largely on faulty reasoning.<sup>35</sup> The comparison between an immunized witness compelled to give self-incriminating testimony and a suspect compelled to make a confession is seriously flawed.<sup>36</sup> In the immunity context, the witness is guaranteed prior to

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28. *Id.* at 779-80 (remanding substantive due process claim to Ninth Circuit for consideration).

29. *Id.* at 766-67 (plurality opinion) (examining actual language of Fifth Amendment). The plurality cited dicta from *Verdugo-Urquidez*: “the privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials may ultimately impair that right, a constitutional violation occurs only at trial.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). That case, however, involved a Fourth Amendment question and there was no Fifth Amendment question before the Court. *Id.*

30. 538 U.S. at 767-68 (plurality opinion) (noting government may compel testimony with contempt threat when witness not target of case).

31. *Id.* at 769-70 (plurality opinion) (concluding exclusionary rule barring coerced confessions provides same protection as use and derivative use immunity).

32. *Id.* at 772 (plurality opinion) (concluding failure to read *Miranda* warnings does not violate Constitution). The plurality opinion noted that the Court created prophylactic rules to protect the Clause’s core right, but concluded that the Constitution does not mandate these rules. *Id.* Thus, their omission does not violate the Constitution. *Id.*

33. *Id.* at 773 (plurality opinion) (stressing existence of adequate protections against police abuses).

34. *See id.* at 773-74 (2003) (plurality opinion) (asserting Fourteenth Amendment Due Process Clause governs in absence of criminal trial).

35. *See Avery*, *supra* note 23 and accompanying text (assessing comparison between immunized witness and coerced suspect).

36. *See supra* note 23 and accompanying text (describing effect of use and derivative use immunity grant).

the compulsion of his testimony that the government will not use his admissions against him in a criminal trial.<sup>37</sup> In the police interrogation context, however, a prediction that a future motion to suppress will have the same effect as an immunity grant does not provide the same guaranteed protection.<sup>38</sup> Although the ultimate evidentiary result would be the same if the prediction were to be realized, at the time of interrogation this prediction is not coextensive with the scope of the Fifth Amendment privilege.<sup>39</sup>

The plurality also mistakenly concluded that a Self-Incrimination Clause violation can only occur at trial.<sup>40</sup> The Court's language in the "penalty" cases suggests that a compelled waiver of the Fifth Amendment privilege is a violation of the Constitution.<sup>41</sup> In several of these cases, the Court ordered both injunctive and other forms of relief where the government impermissibly imposed a penalty on an individual who refused to waive his Fifth Amendment privilege.<sup>42</sup> If a violation can only occur at trial, as the plurality contended, the Court would not have been able to provide relief in these cases because no criminal trial ever commenced.<sup>43</sup>

Most importantly, the plurality incorrectly concluded that the Due Process Clause adequately protects criminal suspects against torture and other abusive interrogation methods.<sup>44</sup> The requisite standard to constitute a Due Process violation in this context, behavior that "shocks the conscience," is an extremely difficult standard for an individual to meet, and thus fails to provide the necessary protection against abusive interrogation practices.<sup>45</sup> Even the most heinous interrogation methods imaginable may not be found to "shock the conscience," if extraordinary enough circumstances were presented that seemed to justify the use of such methods.<sup>46</sup>

In *Chavez v. Martinez*, the Court was provided with a clear opportunity to define the scope of the Fifth Amendment Self-Incrimination Clause. The Court failed to seize upon this opportunity by generating a fractured set of opinions

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37. See *supra* note 23 (indicating immunity grants issued prior to testimony of compelled witness).

38. See Avery, *supra* note 23, at 595 (criticizing comparison between immune witness and coerced suspect).

39. See *supra* note 23 and accompanying text (comparing and contrasting witness granted immunity and suspect coerced to confess).

40. See *supra* note 25 and accompanying text (citing cases holding constitutional violation without commencement of criminal trial).

41. See *supra* note 25 and accompanying text (noting inference of Court's language).

42. Klein, *supra* note 25, at 1341 (noting Court allowed relief where government penalized employees for refusal to waive immunity).

43. Klein, *supra* note 25, at 1341 (acknowledging pretrial relief).

44. 538 U.S. at 773-75 (plurality opinion) (asserting Due Process Clause provides adequate protection against police abuses).

45. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (describing behavior court likely would deem "conscience-shocking").

46. See Taylor, *supra* note 20, at <http://www.theatlantic.com/politics/nj/taylor2002-07-30.htm> (last visited January 23, 2004) (questioning viability of "torture exception" in cases involving nuclear or terrorist threats).

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that, when pieced together, resulted in a decision. The Court failed to provide a majority rationale for its decision and instead produced a plurality opinion devoid of sound reasoning.

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