

A Philosophical Account of Coerced Self-Incrimination

George C. Thomas III*

I. INTRODUCTION

Although few would dispute that law and philosophy developed from the same tradition or even that law uses philosophical concepts, a premise of much legal scholarship is that law has developed its own methodology and is wholly separate from philosophy.¹ This attitude may reflect, in part, a feeling that philosophy is more esoteric or difficult than law, and that lawyers are ill-equipped to venture into philosophical thickets. It is true, of course, that philosophers often think about issues far removed from pragmatic reality while lawyers have to deal with real cases and real people.²

But law and philosophy cannot be so easily divorced. Indeed, judicial opinions can be seen as forming a data set that permits rough tests of philosophical concepts. While an individual case may reach an aberrant result, a relatively stable judicial concept will likely emerge over time. Perhaps courts define philosophically-related concepts differently than philosophers, but I think that unlikely. Philosophers do not invent philosophical accounts, and judges do not invent interpretations of legal concepts. Both groups draw from the surrounding culture.³

One way to gain insight into cultural attitudes toward a particular question is to look for similarities in legal and philosophical treatments of that question.⁴ I wish to examine one potential parallel between law and

* Many people commented helpfully on this material either in its present form or as part of a larger project. I cannot thank everyone but must thank Harry Frankfurt, Alan Wertheimer, Larry Crocker, Doug Husak, Richard Boldt, Jon Hyman, Eric Neisser, Vicki Been, and Kathy Brickley. In addition I tried out the basic theory on my 1991 Criminal Procedure class at Rutgers and benefitted from the comments of the students.

1. For a sophisticated account of law's unique methodology which does *not* fall into the trap of claiming that law is conceptually separate from philosophy, see RONALD DWORKIN, *LAW'S EMPIRE* (1986).

2. ALAN WERTHEIMER, *COERCION* 13 (1988).

3. See George C. Thomas III, *Legal Skepticism and the Gravitational Effect of Law*, 43 *RUTGERS L. REV.* 965 (1991).

4. See WERTHEIMER, *supra* note 2, at 308 (noting that there may be "much less to the difference between law and morality than might be supposed"). For a more specific historical similarity, see George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*,

philosophy by comparing the prevailing judicial account of coerced self-incrimination with the prevailing philosophical treatment of coercion. I will focus on the question of when, in particular cases, the police (P) coerce a suspect (S) into answering questions (A). The principal source of legal protection against this kind of coercion is the Fifth Amendment self-incrimination clause. The clause provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."⁵ As the clause prohibits *compulsion* rather than *coercion*, I begin with the assumption that compulsion and coercion are co-extensive concepts, an assumption I will later question. Moreover, I am interested only in coercion that causes (or will cause) an incriminating response. The extent to which government can penalize a refusal to testify—when the coercion is resisted—is a wholly separate question.⁶

Theories of coercion take at least four forms: empirical, normative, positive liberty, and social constructionist. The classical view, which finds its origins in Aristotle, consists in an *empirical* conception of coercion. An empirical conception presupposes that an outside witness can determine, on the basis of observation and very basic assumptions about human behavior, when S's action cannot be attributed to her own will. In Aristotle's example, a person is coerced (or, perhaps better, compelled) when "the principle of action is external" to S herself — as when she is "carried somewhere by a wind, or by men who had [her] in their power."⁷ In a category of less extreme cases, the very nature of P's threat will give us reason to be confident that we cannot attribute S's action to her own free choice. For example, if P says to S, who owns a valuable necklace, "Give me your necklace or I will shoot you," and S then hands over her necklace, we would presumably be justified in saying that the will of P displaced the will of S—that P coerced S to give him her necklace.

Aristotle also acknowledged the central limitation of an empirical conception: so long as S gives over her necklace herself (it is not torn from her neck), the act is in some sense a reflection of her will.⁸ She had a choice: her necklace or her life. She could have refused and hoped that P would not shoot her. On an empirical account, we may well be justified in saying that S was coerced, but we must recognize that S could have done otherwise, albeit against rational judgement.

82 J. CRIM. L. & CRIMINOLOGY 243, 251-52 (1991) (noting that Thomas Hobbes's self-incrimination concept appeared in English cases of his time).

5. U.S. CONST. amend. V.

6. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (prosecutorial comment on defendant's refusal to testify held to be an impermissible penalty).

7. ARISTOTLE, NICHOMACHEAN ETHICS III.1, 1110a20-35.

8. Aristotle gives the example of a tyrant who orders one "to do something base, having one's parents and children in his power, and if one did the action they were to be saved, but otherwise would be put to death." Aristotle says that "[s]uch actions, therefore, are voluntary; but in the abstract perhaps are involuntary, for no one would choose any such act in itself." *Id.* at 1110a1-22.

Because of this problem, some argue that the basis for identifying coercion is the essentially *normative* question whether we should excuse S for complying with P's demand. This question turns on whether P put such pressure on S that she was left with a choice that she should not have had to face. If S turns over her necklace after P says, "Give me your necklace if you want to make me happy," we would probably be unsympathetic to S's claim that she was coerced. Certainly, P put pressure on S to induce her to give up her necklace, but the choice urged upon S by P is not wholly outside the bounds of friendship. Notice that the focus of the test has changed: we are not asking directly whether P displaced S's will; instead we are asking the normative question whether P forced S to make a choice she should not reasonably have had to make.⁹

A normative conception explains why the choice between turning over a necklace and being shot is coercive even though in some sense S voluntarily chose to turn over her necklace. An even clearer distinction between the empirical and normative viewpoints is seen in the case where P tells S, his employee, that he will fire her unless she has sex with him. Here, the argument that S voluntarily did P's bidding is perhaps more plausible; she had other options that are not as unpleasant as the chance of being shot (she could immediately resign, accept the risk that P would carry out his threat, or sue him for harassment). Yet in a normative sense P has coerced S, because he has forced her to make a choice that we would find unfair.

Of course, a normative conception works less well when the situation is itself morally ambiguous. Suppose P says to S, "Give me your necklace or I shall tell the authorities that you embezzled money from your employer." Assuming S is guilty of embezzlement, has she been left with an unfair choice? Has P behaved immorally? The morally ambiguous universe of police investigations presents a very similar set of problems for the normative viewpoint, as I discuss in Part IV below and elsewhere;¹⁰ for while police are engaged in the morally worthy conduct of trying to solve a crime, their use of coercion in order to get S to answer questions is presumably immoral (if we take the self-incrimination clause as a principle of morality). Yet if we cannot answer the coercion question without answering the morality question, we may have no answer to either.

A third view, in the Kantian tradition, is a *positive liberty* conception, by which standard S is coerced if she doesn't have the rational capacity, or is too misinformed, to do other than accede to P's will.¹¹ For exam-

9. See WERTHEIMER, *supra* note 2, at 214-17.

10. See Thomas & Bilder, *supra* note 4, at 265-69.

11. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 353 (1981) (describing Kant's tradition as: "we are free when our acts are done in accordance with reason, when a law of reason determines them"). Positive liberty can encompass much more than the knowledge and capacity necessary to achieve rational self-control. It can also include the right to have government meet

ple, assume that P knows that a rescue squad is only moments away when he tells S he will save her from drowning only if she gives him her necklace. If S knew that a rescue squad was on its way, she would not give up her necklace, so P's threat would be ineffectual but for S's ignorance; given her ignorance, his threat is, in fact, effective. As a result, S's surrender of the necklace in this situation may be thought of as coerced just because uninformed. Or assume S is compulsively unable to say no to any request. Her surrender of the necklace may be coerced because unfree. On a positive liberty account, one cannot act freely in the absence of rational self-control and adequate information.

The fourth account, *social constructionist*, is similar to the positive liberty account. On a social constructionist view, we cannot say whether S's action was coerced before we investigate the way S's preferences were structured before her interaction with P. If, as some argue, we have no preferences that exist independently of social interaction, then the key question is who structures the interaction and what it looks like in all its complexity.¹² For example, if S has been brainwashed by P-types to accede graciously to any request for her jewelry, then we may want to say that even if S's action of giving up her necklace was voluntary in some restricted sense, she nonetheless did not do so freely. The social constructionist account has particular force when dealing with agents who, like police, occupy an authoritative social position—not unlike that of parents, teachers, doctors, and lawyers—which “convey[s] some echo of dominance intertwined in some degree with alluring promises of nurturance [and which] stacks the deck toward ‘willing’ (though often ‘resentful’) submission by suspects, children, students, patients, or clients.”¹³ On this account, whether P displaced S's will in the particular interaction between the two is quite irrelevant, and whether S's choices were unfairly constrained is quite complex.

My task in this paper is to sketch a philosophical account of coercion developed by Robert Nozick, and to locate that account among the conceptual frameworks I have just laid out. Then I want to show how a version of Nozick's theory might operate as a judicial conception of coerced self-incrimination, and how it might explain the jurisprudence. By doing this, I hope to offer some tentative evidence of how our culture views coercion.

certain basic needs so that we can be free of those concerns. See, e.g., LAWRENCE CROCKER, *POSITIVE LIBERTY* 2 (1980) (describing this position as “positive libertarian”). I use “positive liberty” in this paper, however, only in the Kantian sense.

12. See Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 173 (1990) (arguing that S may have no preferences of her own that “exist prior to and independent of social interaction”; what we think of as “her” preferences are, instead, socially constructed, molded by “forces that make various choices more or less attractive”).

13. Robert A. Burt, *Loving Big Brother: Comments on Seidman, Police Interrogation, and the Fifth Amendment*, 2 YALE J.L. & HUMAN. 181, 187 (1990).

II. A BEGINNING POINT

I begin with a coercion account formulated by philosopher Robert Nozick from the writings of H.L.A. Hart and Tony Honoré.¹⁴ I start here for two reasons. First, Nozick's account has always seemed to me, on an intuitive level, to capture the essence of coercion. Second, it has been seminal, and is now widely accepted, at least in its basic outline, within the philosophical community.¹⁵ The acceptance by the philosophical community of Nozick's account is reason enough to begin with it.

Nozick's basic account has five conditions:

- (1) P threatens to do something to S if S does NA (where, e.g., NA is not answering questions in a way that satisfies P), and P knows he is making this threat;
- (2) NA with the threatened consequence is rendered substantially less eligible as a course of conduct for S than NA without the threatened consequence.
- (3) P makes this threat in order to get S to do A (where A is to answer in a way that satisfies P), intending that S realize that she has been threatened by P;
- (4) S does A;
- (5) Part of S's reason for doing A is to avoid (or lessen the likelihood of) the thing which P has threatened.¹⁶

Before I go on in Part III to discuss the theory in detail, I want to make a few preliminary points about the basic structure of the account. Condition 1 requires a threat (which I will explain below). Condition 2 requires that the threat be effective, that it make doing NA substantially less eligible for S as a possible course of conduct. This ensures that threats that S considers trivial are not considered coercive—for example, P's threat that he will be sad if S does not surrender her necklace.¹⁷

Nozick's account might be called a narrow, or *strict* account of coercion in that it requires that P intend to threaten S and thus requires a subjective inquiry into P's thoughts as well as the inevitable subjective

14. See Robert Nozick, *Coercion*, in *PHILOSOPHY, POLITICS, AND SOCIETY* (P. Laslett, W. Runciman & Q. Skinner eds., 1972). As the formulation of the account is Nozick's, I will refer to it as Nozick's account, despite his acknowledged debt to H.L.A. Hart and Tony Honoré.

15. See WERTHEIMER, *supra* note 2, at 206; Peter Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 559 n.70. See also Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1353 n.220 (1984) (calling Nozick's account the "locus classicus" for the definition of coercion used by several recent theorists).

16. See Nozick, *supra* note 14, at 102-04. Nozick modified some of the conditions offered early in his paper. I use the modified conditions. He also added additional conditions to allow the account to withstand certain counterexamples. See *id.* at 103-07. As self-incrimination issues are not likely to resemble these counterexamples, I use the five conditions of the basic account, which I have adapted slightly to fit a self-incrimination context.

17. There is an obvious overlap between conditions 2 and 5. If the threat is trivial enough, then presumably it is not part of the reason S does A. Depending on how expansively condition 5 is interpreted, however, some threats may satisfy condition 5 but not condition 2.

analysis of why S acts. Indeed, the only completely objective aspect of the account is condition 4 (S does A). The strict nature of Nozick's account also excludes the cases where S reasonably but mistakenly believes she has been coerced (if, say, P was merely brandishing his gun as a joke), as well as those where the "coercion" comes from non-human physical forces or S's own internal psyche.¹⁸

We can see that a strict coercion account highlights a potential linguistic distinction between "coerce" and "compel." "Coerce" implies a purposeful state of mind on P's part, but the same may not be true of "compel." We might say S was compelled by the sun or by his master to wear a hat; we say S was coerced by his master to wear a hat; but we do *not* say that S was coerced by the sun to wear a hat.¹⁹ In contrast, compulsion might exist if P issues what S perceives as a threat even though P did not intend what he said to be a threat. In the interrogation context, this situation might exist if the police engage in certain activity that has the effect of threatening S even though they did not mean it as a threat at all. Under Nozick's account of coercion, however, inadvertent compulsion cannot be coercion.

Whether we want to identify instances of "strict" coercion or "mere" compulsion turns, I think, on what it is we want our account to do. There are at least two reasons we would want to identify unfree acts on S's part, and while they are often linked, they need not be. First, freedom and unfreedom are highly relevant to our ascription of responsibility, legal or moral. If we are strict voluntarists about responsibility, then our determination that S was coerced into doing A will excuse her from moral responsibility or legal liability.²⁰

A related concern is whether someone else can be blamed for S's involuntary conduct. If S does some bad action A, but only because she was coerced by P, then we may want to exculpate S (at least partially) and blame P. Blame most clearly belongs to P if P intended to make S act unfreely.²¹ Thus, the question is whether we want a theory of unfree acts to excuse S or to apportion responsibility between S and another human actor. If the latter is what we want, then we want an account that both

18. See CROCKER, *supra* note 11, at 17 (arguing that, on a less strict use, both of these categories may be considered coercion).

19. See Westen, *supra* note 15, at 560. But see CROCKER, *supra* note 11, at 17 (noting a nonstandard but "perfectly well understood use of 'coercion' in which non-human conditions may coerce").

20. Since Aristotle was largely concerned with the types of action deserving of praise and blame, his account of coercion focuses on the question whether S freely did A, not whether P caused S to do A. He makes this clear in his claim that involuntary acts are those "performed under compulsion or through ignorance." *Supra* note 7, at 1109b10. See also HARRY G. FRANKFURT, *Coercion and Moral Responsibility*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 46 (1988) ("A man's will may not be his own even when he is not moved by the will of another.").

21. See CROCKER, *supra* note 11, at 16-17.

identifies when S acts unfreely and fixes the responsibility for S's unfree act.

Which of these accounts would we want for deciding cases under the self-incrimination clause? While the self-incrimination clause is written in the passive voice and uses "compel" rather than "coerce," the historical evidence suggests that the Framers were concerned about purposive, governmental coercion rather than compulsion in any broad, empirical sense.²² The question in a self-incrimination case is not, after all, whether S should be blamed for her act of confessing but is, instead, whether the government should be allowed to use the confession. If the government did not coerce the confession, concluding that S acted unfreely does not seem to be adequate grounds for exclusion. Of course, if S's confession is not reliable evidence, it should not be grounds for convicting her, but the reason is that it is unreliable and not that S acted unfreely in confessing.²³

This reading of the self-incrimination clause accords with Nozick's "strict" account of coercion. Conditions 1 and 3 require that the coercive pressure—the threat—come from another person P, who knows that he is making a threat and who makes the threat in order to get S to do A, intending that S realize she has been threatened by him. These conditions not only identify a threat that is capable of making S act unfreely but also fix the responsibility clearly on P.

Condition 4 assumes that coercion implies success, that no coercion occurs if S resists the pressure of the constraint. While coercive forces can presumably exist as metaphysical facts in the universe,²⁴ S has not been coerced until she succumbs to the pressure. Until S speaks, for example, she has not been coerced to be a witness against herself. While S might claim a Fifth Amendment "privilege" to refuse to answer questions, or a criminal defendant might move to quash a subpoena to testify on the same ground, the privilege is invoked *before* S is coerced and gives her legal grounds to resist the coercion.²⁵

Once S's answers, condition 5 requires that her act be, in part, the result of S's seeking to avoid the threatened consequence. This condition

22. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 43-82 (1968) (concluding that the abuse of the oath *ex officio*, an oath that interrogators forced suspects to take, was largely responsible for development of the right against self-incrimination). The Court has long used "coercion," "compulsion," and "involuntariness" interchangeably. See, e.g., *Arizona v. Fulminante*, 111 S.Ct. 1246, 1252 n.3 (1991) (noting interchangeable usage of "coerced confession" and "involuntary confession"); *Miranda v. Arizona*, 384 U.S. 436, 470, 474 (1966) (using "coercion" and "compulsion" interchangeably).

23. See *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that even if S's confession is voluntary, S is constitutionally entitled to introduce evidence of its unreliability).

24. See Westen, *supra* note 15, at 562; MODEL PENAL CODE § 212.5 (Proposed Official Draft 1962) (creating the offense of "criminal coercion" defined, roughly, as a threat to take future detrimental action against someone).

25. These doctrinal trappings are prophylactic in nature, as suggested by the very term "privilege," which nowhere appears in the Fifth Amendment.

is necessary to ensure that S's act is unfree and thus excusable. Suppose P says, "If you don't give me your necklace, I will not be your friend." It may be that S had already planned to give P her necklace, because she knew how much he liked it. While P's proposal is likely a threat, it is not a threat that moves S to act, and so it is not coercive on Nozick's account. The most controversial aspect of condition 5—that P's threat need only be part of the reason S acts—I defer to Part III.

As might be expected, this account works to explain paradigmatic cases of coercion. Wigmore's classic example is when S confesses after P threatens her with the rack if she does not confess.²⁶ Equally classic is the witness before the grand jury who testifies after being threatened with contempt of court if she does not testify. In both cases P threatens to do something to S if she does NA (not answer), and P knows he is making the threat. The severity of the threatened consequence means that NA is substantially less eligible as a course of conduct for S than NA without the threatened consequence. P obviously makes the threat in order to get S to do A (answer), intending that S realize she's been threatened by P. S does A. And an external observer would be justified in concluding that part of S's reason for doing A is to avoid the thing which has been threatened.

III. EXPLICATING THREAT AND CAUSATION

Having sketched the contours of Nozick's account, I now turn to a more thorough consideration of two difficulties in applying the account. In doing that, I will locate Nozick's account in the conceptual framework sketched in Part I.

Nozick's account appears, on the surface, to resemble an Aristotelian, empirical, view of coercion, albeit a more sophisticated one. It might appear that an outside observer could simply judge whether, on the basis of P's and S's behavior, the conditions are met. But because there will be no coercion unless P threatens S (condition 1), we need to know what sort of proposal by P constitutes a *threat*. And because the notion of a threat may have an inherent normative dimension, Nozick's account may stand on at least partly normative foundations. A conception of threat need not be limited by ordinary language usage. What we call in ordinary language a "promise" can be just as coercive as what we call a "threat." Both threats and promises potentially make NA, in the language of condition 2, "substantially less eligible as a course of conduct for S than NA without the threatened consequence."

In effect, the problem is distinguishing between *offers* and threats. Clearly, the prospect of the rack will undoubtedly make silence substantially less eligible as a course of conduct than answering. An offer, too, is

26. See 2 JOHN HENRY WIGMORE, A TREATISE ON EVIDENCE § 824 (1923).

intended to make a certain course of action more eligible than its converse, but we do not typically think of an offer as a threat. While P's proposal to pay S ten times the fair value of her services may make refusing P's bidding substantially less eligible than acceding, P has hardly threatened S. If we want an account of coercion that ascribes responsibility to P rather than S, we should require that P has made S do A despite S's relatively strong desire not to do A, not that P has made A attractive enough that S decides freely that she wants to do it.²⁷ On this view, a proposal is a threat only when it makes (or promises to make) S's condition worse; and it is an offer when it makes (or promises to make) S's condition better.²⁸

That much is easy; the difficult question is "worse than what?" Assume S needs money, her family heirloom necklace is worth \$10,000, and P proposes to pay \$5,000. P's proposal makes S's condition worse than it would have been had P offered fair value, but that does not seem sufficient to make P's offer a threat. On the other hand, if P says, "Unless you give me your necklace, I will no longer be your friend," that seems to be a threat, at least if S wants P to be her friend. How can we distinguish the two?

Any conception of "threat" requires a *baseline* by which to measure whether P's proposal promises to leave S worse off if she does NA than she would have been without the proposal. In order to know how S would have done without the proposal, we must find some way to measure S's baseline expectations—that is, the future she, or we, would project for her. But because "expectation" is multiply ambiguous, our conception of the appropriate baseline will split three ways: between empirical/statistical, phenomenological, and normative/moral. First, it can be an *empirical* or, in Joel Feinberg's useful terms, a *statistical* prediction.²⁹ The inquiry here considers prevailing social norms and customs, as well as laws of nature in making an objective judgment of S's likely future in the absence of P's proposal. If most people in society X would rescue a stranger who is drowning (assuming minimal risk to the rescuer), that statistical likelihood becomes part of the baseline. P's proposal to rescue S only if she surrenders her necklace is, then, a threat because it makes the consequence of S's keeping her necklace worse than it would have been if P had done what was statistically likely—rescue S.³⁰ Of course, society Y might have a different statistical baseline, in

27. For an illuminating discussion of the conceptual distinction between offers and threats, see Nozick, *supra* note 14, at 128-35.

28. See, e.g., FRANKFURT, *supra* note 20, at 31; Nozick, *supra* note 14, at 112.

29. JOEL FEINBERG, HARM TO SELF 219 (1986).

30. Larry Crocker argues that this is not a threat because P does not threaten an evil consequence. CROCKER, *supra* note 11, at 16. But I think "threat" should be defined more broadly. See, e.g., FRANKFURT, *supra* note 20, at 33 (including within definition of "threat" when P exploits S's dependency and need by demanding an unfair or improper price for satisfying S's needs).

which P's proposal would be an offer rather than a threat.

In the case of P's proposal to pay a low amount for the necklace, if we assume that P is not statistically expected to offer S fair value, then his proposal, albeit undesirable, does not leave her worse off than she might statistically have expected. But the statistical baseline seems out of place in the other necklace case in which P says he will no longer be S's friend unless she gives him the necklace. Whether or not it is statistically likely that friends continue to be friends, surely what counts more here is how S perceives the situation. In Alan Wertheimer's terms this is a *phenomenological* baseline.³¹ If S wants P to continue to be her friend, P's proposal that S choose between the necklace and his friendship feels like a threat because, from S's perspective, the consequence of keeping her necklace is now worse than it would have been absent P's proposal.³²

However, neither the phenomenological nor the statistical baseline works to produce an intuitively acceptable result in cases where what is either statistically likely or phenomenologically anticipated in a given society conflicts with what is morally expected, whether by that society's standards or by some transcendental norm. The classic example is Nozick's slave case.³³ Here, P beats his slave S once a day for reasons unconnected with S's behavior. One day P proposes not to beat S if S does A. S's statistical and phenomenological baselines would both construe P's proposal as an offer; having a chance to avoid the beating makes S better off than an observer would have statistically predicted or than S perceived she would be. But as it is morally wrong to beat (or own) slaves, P's proposal leaves S in an inferior position than she morally should occupy (not being owned or beaten). On a moral baseline, P is threatening to beat S unless she does A.

A combination of moral and phenomenological baselines may encompass the positive liberty requirement that S know crucial information about the choice she faces. Consider again the case in which P knows a rescue squad is only moments away when he tells S he will save her from drowning only if she gives him her necklace (A), and assume that neither the statistical nor the moral baseline would include P's rescuing S. Assume further that P is morally required to tell S that rescue is immi-

31. WERTHEIMER, *supra* note 2, at 207. Nozick uses "normal and expected course of events" to describe the appropriate baseline, noting that "expected" is "meant to shift between or straddle predicted and morally required." See Nozick, *supra* note 14, at 112. Yet later in the paper he uses a phenomenological baseline when a *type* of consequence "is itself part of the normal and expected course of events" if S does NA. The example he gives is that P's proposal to punish S for theft is a threat "even though in the normal and expected course of events [S] gets punished for theft" because the act of punishment makes the consequence of S's stealing worse against the "background of the normal and expected course of events minus *this* act of punishment." *Id.* at 117-18.

32. Consider Larry Crocker's hypothetical: P proposes to set S's inheritance at \$10,000 after P's will previously set it at \$100,000. Crocker finds this a threat "independently of whether [S] had any right to the \$100,000" (presumably, though, only when S knew the contents of P's former will). CROCKER, *supra* note 11, at 17.

33. Nozick, *supra* note 14, at 115-16.

nent. The baseline question now is whether P's proposal makes the consequence of keeping her necklace worse than if P did what was morally expected of him. While the consequence of S's doing NA is not actually worse if P refrains from telling her (since she'll be rescued anyway), S would perceive the consequence of doing NA as the likelihood of her drowning. Thus, the absence of crucial information can turn what is not otherwise a threat into a threat.³⁴

But the other aspect of positive liberty—ensuring a minimal level of rational autonomy—does not appear to be included in any of the baselines. Recall the S who compulsively accedes to any request; and suppose P tells her that he will give her \$5,000 for the necklace (worth \$10,000). If S had the capacity to refuse, P's proposal would be an offer, albeit a low one. S's inability to refuse adds nothing to the analysis unless P knows of S's malady and is seeking to exploit it.³⁵ In the absence of such circumstances, it is unlikely that P is morally or statistically expected to offer her fair value. And her incapacity would, if anything, make the phenomenological baseline even less likely to make the proposal a threat; while S would feel unfree to refuse, she presumably would not resent P for it, but rather would regret her psychological condition.

Nozick concludes that when different baselines produce different results, the right baseline to use may be the one that encompasses the future that S prefers, whether or not she should statistically expect it.³⁶ In the slave case, S would prefer not to be beaten; since the moral baseline is the only one that includes this as part of S's expected future, it is the one by which we should decide whether P has threatened S.³⁷ In the friendship-or-necklace case, the phenomenological baseline might govern, because S presumably would prefer not to have to choose between her friends and her jewelry, whether or not she has any moral or statistical reason to expect such a world.

Ultimately, despite its superficially empirical appearance, Nozick's

34. This is certainly the critical premise of *Miranda v. Arizona*, 384 U.S. 436 (1966), discussed *infra*. See also George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 330-31 (arguing that the law should "assur[e] that a person who confesses does so with as complete an understanding of his tactical position as possible"). But it is not true that all cases of withheld information are threats. If P offers \$5,000 when he thinks S's necklace is worth \$10,000, P's proposal would not be a threat because, in our society, it is neither statistically, morally, nor phenomenologically expected that an offeror volunteer his belief about the value of the object in question. That is why I use "crucial" in the text to describe the withheld information. Information is "crucial," I think, when it might affect S's decision and when P has privileged access to it. That would be true when P withholds the information about the rescue squad from the drowning S, but not (typically) in the low offer case as S has her own opinion about the value of the necklace. The low offer case might be a threat if S has a reason to think P's opinion is far superior to hers, or if P affirmatively deceives S in some way.

35. If P is seeking to exploit S's malady, the threat is the exploitation, not the lack of capacity itself. See, e.g., *Connelly v. Colorado*, 479 U.S. 157 (1986) (contrasting P exploiting the mental illness of S through interrogation with P listening to a mentally ill S who volunteers a confession).

36. Nozick, *supra* note 14, at 116.

37. *Id.* at 116.

account cannot be entirely divorced from a normative view of coercion. Although the statistical and phenomenological baselines are empirical in nature, if the moral baseline would produce a different result, and if S would prefer the morally expected course of events, Nozick contemplates defining threats by the moral baseline. Wertheimer presses further on the importance of the moral baseline. He argues that while coercion claims are "contextual" and have "variable descriptive and normative force," it is only (or principally) the moral baseline that distinguishes between "coercive and noncoercive proposals in cases which involve the ascription of responsibility."³⁸

I do not believe Nozick's account is similarly limited (or, in Wertheimer's term, "moralized"). It seems to me that some (perhaps most) of the cases of coercion under Nozick's account can be explained without recourse to an explicitly normative baseline. To the extent morality influences what is statistically or phenomenologically expected, all the baselines turn on moral concepts; but this is not what Wertheimer means by his "moralized" theory of coercion.³⁹ The difference is crucial for a claim that interrogation without additional threats can be coercive. Wertheimer argues that, under a moralized theory of coercion, the state may be morally permitted to interrogate suspects within certain limits and that the proposal to continue interrogation (within those limits) is not a proposal to make S worse off than she is entitled to be.⁴⁰ But it will be otherwise, as I will argue later, under the other two baselines.

However we define threat, condition 5 requires that the threat be part of the reason S does A. The difficulty is determining when S acts in order to avoid the proposed penalty. The easy cases are those in which we have evidence that S already intended to do A, and thus was not moved significantly by P's threat; or when, conversely, there is no real possibility of an independent motivation for S's action, as when S confesses rather than endure the rack. The hard cases are those in which S has potentially multiple motives. Consider again the necklace example: P states to S, "Unless you give me your necklace, I will no longer be your friend." Does the coercion analysis change if she surrenders the necklace in part because she knows how much P wants the necklace and looks forward to seeing the pleasure on P's face?

Note that S formed the intention to give P the necklace only after he

38. WERTHEIMER, *supra* note 2, at 212 & 217. At one point Wertheimer states that the moral baseline "does most of the important work" in determining coercion when S's responsibility for doing A is at issue, but in other places he seems to assume it does all the work. Compare *id.* at 217 with 215-16 & 242. Tony Honoré also reads Wertheimer to say that P's proposal must be morally wrong in this context. Tony Honoré, *A Theory of Coercion*, 10 OXFORD J. OF LEGAL STUDIES, 94, 97-98 (1990).

39. Wertheimer notes these "connections" among the three baselines, WERTHEIMER, *supra* note 2, at 208, yet still uses only the moral baseline to distinguish threats from offers. *Id.* at 242.

40. *Id.* at 216.

threatened her, a sequence Hart and Honoré consider significant.⁴¹ In addition, I believe S would feel that P forced her to surrender her necklace, despite the pleasure she might derive. Surely she felt the constraint of P's proposal in forming her intention to give him the necklace. That constraint operated as a proposed penalty on her freedom to keep the necklace, and she would likely perceive it as *the* reason she gave in to P's request, disregarding her other reasons.

On this view, it is necessary only that part of the reason S does A is a desire to avoid the threatened penalty. This is Nozick's condition 5. Indeed, once we know that S did A after being threatened with a relatively substantial penalty, a sort of quasi-presumption exists that condition 5 has been satisfied. This presumption can be rebutted only by showing that S acted not just out of mixed or multiple motives, but wholly from a motive distinct from the desire to avoid the penalty. This would be the case, for example, if S had previously decided to give P the necklace as a present.

Yet there is something dissatisfying about concluding that S was coerced when she had an additional motive for doing A. If we could quantify S's reasons for doing A, as Nozick has observed, we could switch from a yes-no "classificatory notion of coercion to a quantitative one," where P's threat would be some fraction of S's total reason for doing A.⁴² A quantitative notion of coercion contemplates a coercion spectrum from S being 0-coerced to S being 1-coerced, encompassing an infinite series of gradations. Even "in the absence of precise weights, one might begin to speak of someone's being partially coerced, slightly coerced, almost fully coerced into doing something, and so forth."⁴³

A coercion theory admitting of degrees of freedom has a strong intuitive appeal. We have all felt pressure to do something from proposals that left us feeling slightly less free than we would have felt in the absence of the proposal. But this experience felt different than when we acted almost entirely because of the threat behind the proposal. An account that recognizes this difference would capture something very important about the concept of being free (or unfree) to act.

Developing a theory of degrees of coercion is, however, beyond the scope of this paper. Pragmatically, it suffers from obvious problems. We cannot see inside of S's head and, even if we could, it is hard to imagine how we might quantify her reasons for acting.⁴⁴ As the Supreme Court has noted, "It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as 'a pre-arrest event such as a visit with a minister,' or an intervening event

41. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 53 & 55 (1961).

42. Nozick, *supra* note 14, at 135.

43. *Id.*

44. When Nozick raises this issue, he admits he is indulging in a "bit of science fiction." *Id.*

such as the exchange of words respondent had with his father."⁴⁵ Even more pragmatically, judges faced with a challenge to a confession must decide whether to admit the confession. It is difficult to imagine how the knowledge, if we had it, that S was "a bit" coerced into confessing could be made part of that judicial determination.⁴⁶

Thus, I will continue to use coercion in its categorical sense, recognizing that borderline cases will always be troublesome. With the issues of threat and causation more fully explicated, I turn now to the self-incrimination jurisprudence. My goal here is to show how the cases fit with a version of Nozick's account which takes seriously the positive liberty notion of the importance of information.

IV. JUDICIAL ACCOUNTS OF SELF-INCRIMINATION COERCION

Not all confession cases involve interrogation. Consider a case where a police chief offers to keep a lynch mob at bay if S confesses. I believe most people would intuitively find this proposal a threat, whether or not it is statistically likely that the police chief will protect her. The protection that P offers is part of S's morally expected baseline (and probably her phenomenologically expected baseline as well), which makes it a threat for P to condition protection on S doing A.⁴⁷

A threshold issue presents itself in interrogation cases. Most of the cases lack the kind of explicit proposal contemplated by Nozick's account and represented in my hypothetical cases. Although the early cases often involved explicit threats—confess or face a specific consequence—English and American courts for at least two hundred years have consistently found those confessions involuntary and thus inadmissible.⁴⁸ Thus, most cases from the modern era involve nothing more than interrogation. Perhaps a police officer who does nothing but ask questions is not intentionally making a threat. Addressing this issue will demonstrate the utility of the baseline analysis; we can apply what we learned about baselines rather than make linguistic or intuitive arguments.

Initially it must be true that P is making a proposal. A good example

45. *Oregon v. Elstad*, 470 U.S. 298, 314 (1985) (quoting *Dunaway v. New York*, 442 U.S. 200, 220 (1979) (Stevens, J., concurring)) (citation omitted).

46. Once the confession is admitted, the notion of partial coercion suggests letting the jury hear the circumstances that produced the confession. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the trial judge had ruled Crane's confession voluntary, and thus admissible, but the defendant sought to introduce evidence about the interrogation to support his claim that the confession was false. His claim could be understood to be that he was sufficiently coerced to make a false confession, even though he was not coerced in the classificatory sense. The Supreme Court ruled unanimously that Crane should be permitted to introduce this evidence of "partial coercion."

47. See *Payne v. Arkansas*, 356 U.S. 560 (1958) (held coercive). See also *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991) (promise of government informer to protect S from other inmates if S confessed held coercive).

48. See *Bram v. United States*, 168 U.S. 532, 542-61 (1897) (discussing at length criminal law treatises on interrogation as well as English and American cases).

of a constraint that does not contain a proposal is the routine mechanics of arrest and custody. These police actions leave S worse off than she would have been in their absence.⁴⁹ But because there is no proposal here—P is not saying to S, “if you do NA, I will continue to hold you”—there is no threat and thus no coercion on Nozick’s account.⁵⁰

Interrogation, however, contains a proposal that, while usually implicit, is nonetheless real: P implies that he will continue the interrogation if S does not answer to his satisfaction.⁵¹ Moreover, P must know that he is making this implicit proposal; indeed, P would gladly stop the interrogation if S gave answers that satisfied P.

To be sure, interrogation may contain proposals other than that of continued interrogation, and I will consider that question later in the paper. For the moment, however, I consider only the proposal to continue questioning and, thus, by “interrogation” mean questioning that gives rise to the inference that it will continue indefinitely. One or two questions might not contain the implication, and thus would not satisfy the threat requirement of condition 1—for example, a police officer, asking someone at the scene of the crime whether she saw anything, might only intend to ask that question and move on. The matter is, of course, complex, and must be considered in the whole context. It is not only the number of questions that must be considered but also the kind of questions, where they are asked, whether S is under arrest, and P’s tone of voice. A single question asked of an arrested S in an interrogation room in a menacing tone of voice might contain an implicit proposal to continue interrogation.

Assuming, however, that interrogation as I have defined it is taking place, P is making a proposal to continue questioning until S confesses, and the baseline question is whether this proposal puts S in a worse position if she does NA than she should or would have occupied without the proposal. Even if Wertheimer is right that a moral baseline does not classify P’s interrogation as a threat, a “non-moralized” theory that considered the other baselines might so classify it. This might seem to invoke the difficult empirical question of whether S should statistically have expected continuing interrogation, or the even trickier phenomenological question of whether S actually expected continuing questioning. But I believe that these inquiries are unnecessary.

Recall that the implicit proposal is, “I will continue interrogation if

49. See *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting).

50. It is also true, of course, that the routine mechanics of arrest and custody would typically fail to satisfy condition 3—P acts in order to get S to do A—even if they somehow satisfied condition 1.

51. Despite Wertheimer’s conclusion on his moralized account that interrogation is not typically a threat, he agrees that interrogation contains a proposal to continue if the suspect does not confess. WERTHEIMER, *supra* note 2, at 216. In *Greenwald v. Wisconsin*, 390 U.S. 519, 520 (1968) (*per curiam*), for example, S testified that he confessed after over two hours of interrogation because “I knew they weren’t going to leave me alone until I did.”

you refuse to answer in a way that satisfies me." Drawing on Harry Frankfurt, we may evaluate P's proposal to intervene in a course of events by "compar[ing] the course of events when P intervenes according to the terms of his proposal with what will happen if this intervention is subtracted from that course of events."⁵² But in the absence of the proposal, there would be no interrogation by definition, and S would obviously be better off. Hence P's proposal is a threat.

The question is easy because the proposal to continue interrogation exhausts the ways S's baseline can be worsened by continued interrogation. P must be interrogating S in order to propose continued interrogation. In contrast, if P says to S, "Give me your necklace or I will file a lawsuit to get it," P's proposal does not exhaust the ways in which S's baseline might be worsened by the filing of a lawsuit. P might be statistically expected to sue S without making the proposal, or S might live in fear of being sued at any moment. Not so in the interrogation situation, where P's very proposal to continue interrogation exhausts the ways in which S might expect to be interrogated. It follows trivially that under either a statistical or phenomenological baseline, P's proposal to continue interrogation must be viewed as a threat.

Indeed the Supreme Court has consistently viewed interrogation as coercive. In an 1897 case, for example, S began answering after an interrogation that consisted only of the detective saying, "Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder."⁵³ The Court implicitly concluded that this was a threat when it held that S's response was involuntary.⁵⁴ Since then, the Court has never wavered from the view that interrogation, even of relatively modest length, is coercive.⁵⁵ And in *Miranda v. Arizona* the Court described in detail the threat implicit in interrogation.⁵⁶

52. FRANKFURT, *supra* note 20, at 31.

53. See *Bram v. United States* 168 U.S. 532, 562 (1897).

54. *Id.* at 562-63. For a more detailed discussion of *Bram*, see Thomas & Bilder, *supra* note 4, at 253-55.

55. See, e.g., *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (confession held involuntary when made after interrogation of about two hours and fifteen minutes).

56. 384 U.S. 436, 457 (1966) (noting that "an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner"). The Court also quoted at length from a police interrogation manual:

Where emotional appeals and tricks are employed to no avail, [the interrogator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. . . . In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination.

Id. at 451 (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).

A. Pre-Miranda Voluntariness Cases

In this section, I discuss Supreme Court cases raising issues relating to the Nozick account, roughly in chronological order. Because *Miranda* is widely viewed as a watershed case, I will use it as a way of organizing the chronology. I want to show that while Nozick's account makes consistent sense of the Court's jurisprudence, only since *Miranda* has the Court begun to emphasize the positive liberty dimension of coercion (at least with respect to misinformation). Before *Miranda*, the Court relied on a more empirical analysis, creating a rebuttable quasi-presumption that only a coercive threat would cause a confession.

As the Court did not make the self-incrimination clause binding on state courts until two years before *Miranda* was decided, the focus of the Court's numerous pre-*Miranda* state confession cases was the more general requirement of due process of law.⁵⁷ Indeed, the due process inquiry was usually to test confessions not for coercion or compulsion but for voluntariness, terminology drawn from the common law. The Court made clear that due process was violated when an involuntary confession was used in evidence against the accused.⁵⁸

But what is an involuntary confession? As Louis Michael Seidman has observed, "Because the Court lacked a coherent conception of free will, it never managed to articulate a general theory that explained what made particular police techniques unacceptable. The result was that the decisions of cases tended to be ad hoc, unpredictable and apparently unprincipled."⁵⁹ The Court did identify a long list of factors ranging from physical brutality to falsely aroused sympathy.⁶⁰ The difficulty, however, is that the Court's list made "everything relevant and nothing determinative."⁶¹

Justice Frankfurter best described the nature of the pre-*Miranda* inquiry in *Culombe v. Connecticut*, while hinting at its near impossibility:

The inquiry whether, in a particular case, a confession was volunta-

57. Compare *Malloy v. Hogan*, 387 U.S. 1 (1964) (applying self-incrimination clause to states and holding that a witness in state court had a privilege to refuse to answer questions that might link him to a crime) with *Haynes v. Washington*, 373 U.S. 503, 515 (1963) (noting as one ground for inadmissibility that the statement was obtained by "techniques and methods offensive to due process").

58. See *Lisenba v. California*, 314 U.S. 219, 236-37 (1941). For an excellent study of the due process confessions rule and the self-incrimination clause, see Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule*, 53 OHIO ST. L.J. 101 (1992).

59. Seidman, *supra* note 12, at 163.

60. Other factors included isolation from family, friends, or counsel; trickery during the interrogation; whether the accused is provided with "basic amenities, such as food or cigarettes"; the length of questioning; and the youthfulness, low intelligence, mental, and physical condition of the accused. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 369-74 (3d ed. 1993).

61. Joseph Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1986).

rily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude, historical facts, the external "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.⁶²

Once a decision was made in the trial court, appellate judges were faced with the prospect of combing the record in search of the dozens of potentially relevant facts by which to evaluate this "imaginative recreation" and application of a fact-dependent rule of law. It is not surprising that the Supreme Court was deluged with certiorari petitions asserting that lower court judges had reached the wrong conclusion, ignored relevant facts, or misconstrued the facts found. As an example of the futility of Frankfurter's effort to clarify matters, only one other Justice joined his opinion announcing the Court's judgment in *Culombe*.⁶³ Moreover, in applying his articulated framework to the facts of the case before the Court, Frankfurter used 19 pages to describe the phenomenological facts and 15 pages to infer psychological facts and apply the legal standard.⁶⁴

Is Nozick's account more helpful? The general shape of the pre-*Miranda* confessions doctrine is consistent with Nozick's account. The common law concern was with the use of "threats," "promises," and "improper influence" to cause S to confess when that was not S's free and voluntary choice.⁶⁵ While the meaning of "improper influence" is not very clear, many promises in an interrogation context carry an implicit threat. If P says to S, "Confess and I will recommend leniency," S can read this "promise" to entail the threat that if she does not confess, P will deal with her harshly.

Building on my earlier claim that a proposal to continue interrogation is always a threat, whether interrogation satisfies the Nozick account ultimately turns on the condition 5 question of causation. Any confession case necessarily satisfies condition 4 (S does A). Almost all interrogations would also satisfy conditions 2 and 3. With respect to condition 3, once the questioning met my definition of interrogation, it would almost always be true that P makes the threat of continued interrogation in order to get S to answer, intending that S realize that she's been

62. *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961) (opinion announcing Court's judgment by Frankfurter, J.) (joined only by Stewart, J.).

63. *Id.* at 568.

64. *Id.* at 603-21 and 621-35.

65. See *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (quoting 3 RUSSELL ON CRIMES 478 (6th ed.)).

threatened by P. Condition 2 would also be satisfied because NA with P's threat of continued interrogation is rendered substantially less eligible as a course of conduct for S than NA without the threat. P is an authority figure who asks questions while expecting an answer. Indeed, if NA were not rendered substantially less eligible as a course of conduct for S in the face of interrogation, police would not value interrogation as much as they (evidently) do.

But condition 5 is more of a problem. It is not obvious that every S confesses during interrogation in part to avoid (or lessen the likelihood of) continued interrogation. S might confess to clear her conscience, to save someone else from suspicion, or because she is proud of what she has done. The degree of pressure on S is clearly relevant. A single question asked early in the interrogation—"were you at the scene of the crime?"—is less likely to justify the conclusion that S confessed in part out of a desire to avoid the next question than if asked after thirty-six hours of questioning or a series of questions accompanied by beatings.⁶⁶

If the pressure is sufficiently intense—the threat of the rack, for example—everyone concedes that it renders coerced any confession that follows the threat. While another motive might possibly be S's principal reason for acting, as external observers we are entitled to believe that it was S's desire to avoid the rack that caused S to confess. The same inference is justified if P denies S food, water, sleep, or needed medication for a period that would cause the external observer to conclude that S experienced a physical deprivation.

The difficult problem is the interrogation that contains no threats of physical torture and no physical deprivation. Here P asks S questions designed to get her to admit guilt; S does not answer to P's satisfaction and P continues to question her. Is this any different, in terms of whether S answers to avoid the proposed consequence, from the physical deprivation cases?

I believe there is no material difference. If interrogation is a threat that makes S's condition worse than it was prior to the proposal, an external observer would be justified in believing that, at some point in an interrogation of sufficient length, S answers in order to avoid the consequence of additional interrogation. This, of course, leaves unanswered where that point is. Justice White has argued that a court should not presume coercion if the first question P asks S is only whether she has anything to say.⁶⁷ It is difficult to argue with White's assertion if we ignore other potentially coercive influences by assuming, for example,

66. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of continual questioning held coercive); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutal beatings used as threat held coercive). Moreover, interrogation will likely produce more pressure if P strips S of his clothes and keeps him naked for several hours. See *Malinski v. New York*, 324 U.S. 401 (1945) (confession held involuntary).

67. *Miranda v. Arizona*, 384 U.S. 436, 533 (1966) (White, J., dissenting).

that S is not under arrest and that P asks the question of her while collecting general information at the scene of the crime. However, it is equally clear that at some point during questioning a threshold will be reached, and we will be entitled to infer coercion as the cause of S's confession.

In the early cases reviewing state convictions, the Court seemed inclined to indulge the very strong assumption that a confession was not coerced by interrogation unless "the inducement to speak was such that there is a fair risk the confession is false."⁶⁸ This inquiry is a more restrictive version of Nozick's condition 2—call it 2'—"NA with the threatened consequence is rendered so ineligible as a course of conduct for S that most people would confess falsely rather than endure it." Nozick's original condition 2 requires only that NA be rendered substantially less eligible. A 2' threat that would make most people confess falsely is, I think, a threat of much greater coerciveness. Using 2' rather than 2 would produce a much smaller universe of coerced statements.

But the Court made less use of 2' than some of its dicta would suggest. Rather than use 2' as a way of restricting the universe of coerced statements, the Court tended to use it as an objective, albeit stringent, test of the satisfaction of the difficult causation requirement of condition 5. If 2' is satisfied, then there is a very strong presumption that 5 is too. In *Brown v. Mississippi*,⁶⁹ for example, the defendants confessed only after brutal beatings and the promise of more until they made the statement P wanted them to make. This interrogation technique satisfies 2' and, therefore, 5.

To decide whether 2' had an independent role to play in the Court's pre-*Miranda* jurisprudence, we would need to discover cases finding no coercion where 5 but not 2' is satisfied. One candidate is *Lisenba v. California*,⁷⁰ but it does not provide a clear-cut example. Lisenba was subjected to two lengthy interrogations without confessing. After the second interrogation ended, he suggested to a deputy sheriff that if they went out to eat, "I'll tell you the story."⁷¹ Following supper and cigars, Lisenba made damaging admissions, which he later repeated in response to questioning by the district attorney.

The *Lisenba* interrogation might satisfy 5. Perhaps Lisenba confessed in part to avoid an anticipated third interrogation. Moreover, if P denied food to Lisenba, that would make the threatened consequence more severe and thus make it more likely that 5 was satisfied. But a plausible case can also be made the other way. The state produced testimony that

68. *Lisenba v. California*, 314 U.S. 214, 236 (1941).

69. 297 U.S. 278 (1936).

70. 314 U.S. 219 (1941). Although the Court stated that condition 2' was part of the inquiry, the facts of the case could be construed as satisfying neither condition 5 nor 2'. *Id.* at 236.

71. *Id.* at 232.

Lisenba was not denied food.⁷² And Lisenba's offer to tell the story if they went out to eat came after the second interrogation ended, when he was alone with a single officer who was, apparently, not questioning him. Lisenba had endured two lengthy interrogations without confessing. Finally, Lisenba testified that he confessed only because his accomplice had confessed. These factors could be read as indicating that Lisenba confessed not to get food or avoid a third interrogation but only because he saw no point in continuing to deny his involvement in the crime. Under this reading, 5 is not satisfied, and Lisenba's confession would not be coerced even under Nozick's account.

It is unclear whether the Court ever took seriously condition 2', other than as an easy way to satisfy 5. In any event, 2' had a very short life. Three years after *Lisenba*, the Court omitted reference to 2', instead stressing that the coercion inquiry turned on whether the interrogation had deprived S of the "mental freedom" to decide whether to answer P's questions.⁷³ Later cases disavowed a legal standard that "took into account the circumstance of probable truth or falsity" in favor of one that asked whether the confession was "freely self-determined."⁷⁴

This focus on whether a confession is "freely self-determined" is consistent with, and arguably equivalent to, Nozick's condition 5. If part of the reason S answers is to avoid P's threat of continued interrogation, S's confession would not be freely self-determined, even if the consequence of NA was not so awful that most people would falsely confess rather than endure it. As the Court had implicitly rejected 2' by 1961, the problem was not epistemological but practical—how to determine when S answered in part to avoid the continued interrogation.⁷⁵

Though the Court never acknowledged it, I believe that by the 1950s most Justices recognized the practical futility of a Frankfurter-type inquiry. I also think the Court recognized that coercion could be found on evidence that only part of S's reason for answering was to avoid the

72. The state's witnesses testified that Lisenba ate sandwiches at supper time. *Id.* at 232.

73. *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).

74. *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961). The Court continued to use "overbear the will" as part of the voluntariness test, *id.* at 544, thus creating a test that was seriously under-inclusive. There would surely be a large number of confessions not "freely self-determined" where the suspects' will was not "overborne"—at least if "overbear the will" entails a more strict causation requirement than Nozick's condition 5.

My claim, however, is that the Court during the 1950s and 1960s began to focus on the "freely self-determined" aspect of the test (or, alternatively, that the Court interpreted "overbear the will" to mean something like Nozick's condition 5). *See, e.g., Haynes v. Washington*, 373 U.S. 503 (1963) (confession involuntary when P told S he could not contact anyone until he gave a statement).

75. I should be clear. I am not claiming that the Court in its due process confessions cases always analyzed involuntariness claims in a way consistent with Nozick's account. The broader nature of the due process inquiry implicated values other than the right not to be coerced. *See, e.g., Blackburn v. Alabama*, 361 U.S. 199 (1960) (noting "complex of values" and stressing defendant's lack of mental capacity in holding confession involuntary). Rather, my claim is that the Court never consistently applied a due process test that is narrower than the Nozick account, such as including a more restrictive condition 2'.

continued interrogation. Moreover, I believe the Court in effect began to apply the quasi-presumption identified in Part III. Because interrogation, as I have defined it, meets the first three conditions, if S confesses, then 5 will be met unless evidence exists that S acted from a different motive than the constraint P placed on her. This quasi-presumption is consistent with the way I read Nozick's account. Lacking a window into S's head or some objective reason to believe that S wanted to answer, an external observer would reasonably assume that a response to P's interrogation was caused at least in part by S's desire to end the interrogation.

This quasi-presumption was arguably rebutted in *Lisenba* because S offered to discuss the matter after the interrogation had ended and later testified that he confessed only because his accomplice had confessed. Thus, *Lisenba* and most other pre-*Miranda* cases that found confessions admissible can be read as rebutting a quasi-presumption that S does A in part because of the threat.⁷⁶

B. *Miranda v. Arizona*

I have argued that by the 1950s the Court was applying something very much like Nozick's account to self-incrimination cases by viewing interrogation as a threat and by indulging a quasi-presumption that an answer given during interrogation was caused, in part, by the interrogation. If I am right, then *Miranda* was not the revolution in Supreme Court doctrine some have said it was.⁷⁷ Under my reading of the pre-*Miranda* cases, the major change in Supreme Court doctrine wrought by *Miranda* was to standardize the means by which the presumption of

76. Out of a universe of roughly 40 confession cases between the Supreme Court's first review of a state confession case and *Miranda*, I found only six cases where the Court reached the voluntariness issue and held the confession inadmissible. Of the five cases in addition to *Lisenba*, none referred to a condition 2' and all but one can be explained as failing to meet condition 5, at least under the Court's reading of the facts. See *Crooker v. California*, 357 U.S. 433, 438 (1958) (noting that P told S he did not have to answer questions); *Ashdown v. Utah*, 357 U.S. 426, 428 (1958) (noting that district attorney told S that "she did not have to answer any questions and that she was entitled to consult with an attorney"); *Stein v. New York*, 346 U.S. 156 (1953) (stressing that one co-defendant's confession was made not to police but to visiting parole officials with whom S was attempting to negotiate a deal in exchange for confession, *id.* at 167; noting that confession of second defendant came the morning after he was informed of first defendant's confession and advised to "sleep on it," *id.* at 168); *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (noting that confession ultimately used at trial came after P told S that "anything he might say would be used against him and that he should not 'make any statement unless he voluntarily wanted to'"). The one case that does not fit this description is *Gallegos v. Nebraska*, 342 U.S. 55 (1951), where the Court acknowledged sporadic interrogation over several days, limited food, solitary-like confinement, and threats by an assistant sheriff, yet found the confession voluntary.

77. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting) (stating that the Court's decision was "at odds with American and English legal history"). It is hardly novel to claim that *Miranda* was less than a revolution. The *Miranda* majority itself noted its holding was "not an innovation in our jurisprudence." *Id.* at 442. I suspect, however, that the change wrought by *Miranda* in the lower courts was more revolutionary because they were not applying the quasi-presumption in the same way as the Supreme Court's pre-*Miranda* cases. See Seidman, *supra* note 12, at 163 (voluntariness "approach left the rights at stake substantially underenforced"). Thus, *Miranda* was likely an attempt by the Supreme Court to force the lower courts to follow what I have called the quasi-presumption in favor of finding coercion during interrogation.

coercion could be rebutted: if a suspect receives a standard set of warnings, then a quasi-presumption of coercion will be rebutted. I will argue that implicit in the Court's reliance on a warning is a move towards a positive liberty conception of coercion. Finally, I will argue that when we view the *Miranda* warnings under a phenomenological baseline approach, we have reason to see the warnings themselves as coercive.

Miranda, in effect, held that condition 5 is satisfied in every case involving custodial interrogation unless P gives the prescribed warnings and obtains a waiver. Many have argued that *Miranda*'s presumption of coercion is over-inclusive.⁷⁸ Justice White, for example, argued in dissent that an initial question of "Do you have anything to say?" is very unlikely to coerce a confession. If we ignore the effect of custody and view the only threat as that of continued interrogation, I am inclined to agree.⁷⁹ There is no reason to believe, for example, that an S who is among bystanders at the scene of the crime answers that question for fear of continued interrogation.

On this view, *Miranda*'s over-inclusiveness results not from some flaw in the quasi-presumption of causation, but from a trivially flawed definition of interrogation. Interrogation, viewed by itself, can be a threat under the baseline analysis only if the questioning creates an inference of continued questioning.⁸⁰ Of course, the persistent theme of *Miranda* was that the interrogation cannot be viewed as distinct from the custody, and for the moment I want to assume the Court was right in finding that any custodial questioning is a threat. The examples the Court culled from police manuals serve to demonstrate that P makes this threat in order to get S to answer, and intending that S realize she's been threatened.⁸¹ The pressure generated by the police manual examples also supports the quasi-presumption in earlier cases that if S does answer, part of her reason is to avoid the continued interrogation.⁸²

I think the conceptual difficulty with *Miranda* is not that the Court too easily assumed that interrogation is a threat that is part of the cause of S's answer, but that the Court too easily assumed that a set of pre-

78. See, e.g., Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985). For an argument that a jurisprudential account of coercion crucially depends on presumptions, see George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117 (1991).

79. For an argument that seeks to justify a finding of coercion in this context, see Thomas & Bilder, *supra* note 4, at 273-74 (drawing on Harry Frankfurt's account of coercion; see FRANKFURT, *Freedom of the Will and the Concept of a Person*, *supra* note 20, at 11-25; and *Three Concepts of Free Action*, *id.* at 47-57).

80. This is a trivial flaw because most police questioning of any length, even if S is not in custody, creates an inference that it will continue until S gives answers that satisfy P. Once custody gets added to the mix, the *Miranda* assumption about the coercive effect of interrogation may be right for all but the most innocuous questions. See *Pennsylvania v. Muniz*, 110 S.Ct. 2638 (1990) (creating an exception to *Miranda* for routine booking questions).

81. 384 U.S. at 448-56.

82. See *id.* at 467 (noting the existence of "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak").

scribed warnings would rebut the presumed coercion. The prescribed warnings tell S that she need not answer, that anything she says can be used in court against her, and that she is entitled to a lawyer to assist her in deciding whether to answer.⁸³ The nature of the warnings suggests that the Court was influenced by the positive liberty conception of coercion that deems S's act unfree if P withholds crucial information. Here, however, rather than using the positive liberty conception to construct an entire baseline by which to measure any threat, the Court used it to make an assumption about how S responds to the threat of custodial interrogation in particular.

The critical assumption underlying *Miranda* is not, then, that custodial interrogation is always a threat or that it is always part of the reason S answers. The Court had been using similar assumptions in its later due process cases. Instead, *Miranda*'s critical change in the coercion analysis was the positive liberty assumption that knowledge of the "right" to resist interrogation would mean that P's threat did not play a significant part in S's decision to answer.⁸⁴ This emphasis on what the warnings can achieve creates, in effect, a counter-presumption that gives P a regular, routine way to demonstrate that condition 5 is not satisfied and thus that any resulting confession is admissible. The most significant effect of *Miranda*, ironically, may be to make police interrogation a more certain enterprise; even if some confessions are lost because suspects occasionally act on the warnings and remain silent, the confessions that are taken by complying with *Miranda* are virtually guaranteed to be admitted into evidence.⁸⁵ This explains what others have noticed—that while police and prosecutors were initially outraged by *Miranda*, they rather quickly dropped their opposition and now seem quite content with the *Miranda* doctrine.⁸⁶

There are actually two ways in which the warnings might lead us to believe that S was not coerced by P's threat. They might provide a reason to believe that P's threat played no part at all in S's decision to answer, thus leaving condition 5 unsatisfied. Or the warnings might diminish the threat. In effect, the warnings tell S that she can stop the interrogation at any time. If S believes P, it is much harder to find a threat in the prospect of continued interrogation.⁸⁷

83. *Id.* at 444.

84. If the warnings do not somehow insulate S from the threat of continued interrogation, no waiver of the *Miranda* rights would be possible, and the opinion contemplates not only waiver but also waiver in the absence of counsel. *Id.* at 475.

85. See Seidman, *supra* note 12, at 164.

86. See Stephen Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 456 (1987); AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS 28 (1988) (concluding that a "very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement").

87. Seidman argues that, under *Miranda*'s assumption about the coercive quality of custodial interrogation, the statement "I do not want a lawyer" in response to a question is compelled.

While the warnings may diminish the threat of continued interrogation, I believe they may create a new threat. To see this, we must be precise about what A means in condition 4 ("S does A"). Initially, I defined "A" to mean "answer P's questions," but I have sometimes used "confess" interchangeably with "answer" because for most purposes they are interchangeable. The state would not seek to introduce an answer unless it was incriminating and thus had at least some of the qualities of a confession. But many "confessions" are less than a full acknowledgment of guilt. Often S will tell a story that she believes to be exculpatory or that she thinks minimizes her guilt and shifts most or all of the blame to someone else. Often, S is wrong in her legal judgment, and the resulting statement is tantamount to a full confession. Even if the statement is not a full confession, the state may want to introduce it to discourage S from telling a more exculpatory story at trial or to impeach other statements S may have made.

To be precise, A in my adaptation of Nozick's conditions stands for only an answer to P's questions. But consider why S would give superficially exculpatory answers after being informed of the disadvantages of answering P's questions. The only plausible reason is that she thinks she can gain an advantage—release from custody or a reduced charge. Thus, while the prospect of continued custody viewed by itself may not be a threat, the *Miranda* warnings, ironically, may turn it into a threat. The *Miranda* warnings are a ritualistic event that strongly signals P's belief that S knows something about the crime and is probably guilty. S may think that if P is giving her *Miranda* warnings, she has no choice but to answer if she is to achieve her goal of release or a reduced charge.⁸⁸

By giving *Miranda* warnings, P may be saying to S, "You have the right to remain silent; if you do, you will pay the penalty of continued custody under suspicion of crime X." I think this proposal is equally a threat under the phenomenological baseline approach; S experiences the proposal as a threat because she wants her future baseline to include release from custody or a reduced charge. Assuming she answers the questions because she wants to talk P out of keeping her in custody, she must believe her release is a realistic possibility.

In a perverse way, S may be more likely to answer when warnings are given. S now feels the threat of continued custody more acutely than she did prior to the warnings, and she also likely perceives a greater benefit from answering. Since P tells her she need not answer, she may think that her willingness to answer will demonstrate her innocence. So the

Seidman, *supra* note 12, at 165. But *Miranda* assumed that the warnings would dispel the threat inherent in interrogation; under this assumption, the question "Do you want a lawyer?" would not be coercive. Seidman argues that the second assumption is inconsistent with the first. *Id.*

88. See Burt, *supra* note 13, at 188 (arguing that an uncounseled waiver is not "at all responsive to the problem of psychological coercion that [*Miranda*] properly identified at the heart of the issue").

proposal may look like this: "You do not have to answer; if you do not, I will continue to assume you are guilty of crime X; if you do, there is a possibility you can convince me otherwise."⁸⁹ Thus, S might "waive" her *Miranda* rights *because* P has given her the warnings.

If *Miranda* warnings create a new threat, their only value in avoiding coercion on Nozick's account is if they succeed in rendering S's own will the source of her actions, and thus blocking condition 5. But how can this be? S answers, at least in part, because S wants to avoid the threatened consequence of continued custody without charge reduction. Not surprisingly, if the *Miranda* warnings turn continued custody into a threat (and I think they do under the phenomenological baseline approach), the warnings cannot counteract the threat; the warnings are part of the threat. Indeed, the Court's premise that stationhouse custody is part of the coercive forces operating against S calls into question the Court's positive liberty assumption that the warnings can sufficiently dispel all threats in that context.

My critique of *Miranda* warnings as simultaneously enhancing and ameliorating different threats is open to criticism. I assume that S will answer after receiving the warnings because she now perceives the threat of continued custody if she remains silent. This may not always be empirically true; S may answer because she wants to confess. But this criticism is empty if one accepts *Miranda*'s basic methodology. Under *Miranda*'s assumption about the coercive atmosphere of custodial interrogation, it is also true that a particular S may answer because she wants to confess. It is just as likely that S answers after receiving warnings because she perceives the new threat posed by silence and custody as that S answers in the absence of warnings because she feels the threat of continued interrogation.

Another criticism is that my critique is critically dependent on the phenomenological baseline. The other two baselines would not seem to classify as a threat the proposal to continue custody unless S does A. If S is lawfully under arrest, the police must have probable cause to suspect her of crime X. For S to convince P that he has made a mistake in the face of probable cause is not a morally expected outcome, nor is it statistically likely. The whole point to arrest, as compared to a more limited "stop and frisk,"⁹⁰ is that arrest constitutes an indefinite curtailment of S's liberty on the charged crime until some time in the future when the charge is resolved or the prosecutor or judge intervenes to release S.⁹¹ By

89. See Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) (noting experimental finding that suggests possibility of positive correlation between warnings and successful interrogation).

90. See *Florida v. Royer*, 460 U.S. 491 (1983) (plurality) (holding that, under facts of case, "stop and frisk" doctrine would not permit detention of fifteen minutes).

91. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring judicial determination of probable cause as condition to hold an arrestee in jail).

hypothesis, her statistical baseline will project continued custody in the absence of judicial or prosecutorial intervention; likewise, she may morally expect to be kept in custody if, in fact, she is guilty.

If the phenomenological baseline is not an appropriate measure of threat, the proposal to continue custody unless S does A may not be a threat. Yet I think it is appropriate, for two reasons. First, coercion implies that S experienced a threat, and only the phenomenological baseline captures that experience. Second, the available empirical data generally find no significant diminution in the rate of confessions after *Miranda*,⁹² suggesting either that most suspects truly want to answer P's questions or that some threat survives the warnings. The former seems unlikely to me, and the latter both explains the empirical data and confirms the intuitive view that what feels like a threat is a threat.

If *Miranda* warnings create a new threat, conditions 2, 4, and 5 are easily satisfied. The threat of continued custody posed by silence renders NA substantially less eligible as a course of conduct for S than NA without the threat. If she answers, it seems likely that her decision to answer is based, in part, on a desire to avoid the threatened consequence of continued custody under suspicion of crime X.

But condition 3 is a more difficult problem. While one reason to keep S in custody may be to increase the likelihood that she will confess, and P clearly gives the warnings in order to render admissible any answers S may give, should we assume that P intends the warnings plus custody as a threat? Perhaps 3 is satisfied by focusing on the custody that begins with the interrogation. By seeking a *Miranda* waiver from S, P is asking her to do A. Moreover, he must intend S to perceive that she will remain in custody under suspicion of crime X until she satisfactorily explains whatever facts P has accumulated. So I think a plausible case can be made that P threatens continued custody under suspicion of crime X in order to get S to do A, and intending that S realize she's been threatened by P.

In sum, *Miranda*'s conclusion that custodial interrogation in the absence of certain information is coercive is fully consistent with Nozick's account, if one stresses the notion of positive liberty implicit in the Court's analysis. Even my further suggestion that the *Miranda* warnings themselves may be coercive can be explained by (or is at least consistent with) Nozick's account; here, however, I rely more on an empirical notion of coercion and less on a positive liberty notion.

C. *Post-Miranda*

I argued in the last section that the *Miranda* Court was not sufficiently

92. See Thomas & Bilder, *supra* note 4, at 277-81 (surveying empirical studies and concluding that *Miranda* warnings may be much less effective than both its critics and defenders generally assume).

prescient about the dilemma the warnings themselves might create, perhaps because of their over-reliance on a positive liberty conception. *Oregon v. Elstad*⁹³ demonstrates that the Court continues to adhere to a positive liberty view of the power of the warnings. Elstad made an incriminating admission in response to a question the officer asked before giving *Miranda* warnings; the officer later supplied the warnings and obtained a "waiver" and a full confession. The Court held the full confession admissible, rejecting Elstad's argument that he confessed only because he had already incriminated himself—that the "cat was out of the bag"—and that the *Miranda* warnings actually made his situation worse.

One way to read what happened in *Elstad* is that the *Miranda* warnings themselves created a threat—"what you have already said will be used against you in court; if you wish any benefit from me, you must try even harder to explain your actions."⁹⁴ Read this way, and without regard to my earlier argument that the warnings may always create a threat, the warnings in *Elstad* are a threat because it is *not* true that the earlier statement could be used against him. In this situation, S could morally expect to make a decision about whether to answer based on an accurate assessment of whether his earlier statement could be used against him.

The Court held, however, that when Elstad "waived" his *Miranda* rights, he possessed all the information he needed to make an informed decision about answering future questions.⁹⁵ Whether Elstad was coerced under the Nozick account is debatable. As noted a moment ago, condition 3 may not be satisfied. And the warnings may not even be a threat in *Elstad*. Elstad may have understood P to say, "You are already as good as convicted; we are not going to release you; you might as well tell us the rest of it."⁹⁶ If S believes this, P has devalued S's silence, but it is difficult to see how devalued silence is a threat. P is not threatening to do anything if S does NA. It is as if P tells S, "That necklace you think is worth \$10,000 is worth only \$5,000." If S believes P, P has devalued the necklace, but P is not proposing to do anything to take advantage of S's phenomenologically diminished baseline.

93. 470 U.S. 298 (1985).

94. This reading is made more likely by the fact that his initial admission, while incriminating, was not a full confession. *Id.* at 301 (noting that he answered "I was there" to P's statement that P "felt he was involved" in a neighborhood burglary). Thus, he might have still believed that he could convince the officers to release him if he answered their questions, particularly if he described a small role in the crime and some excuse for participating. See *id.* at 301 (relating that Elstad said he "wished to speak with the officers"); *id.* at 302 (Elstad admitted being paid to assist others with the crime and added to the written statement, in his own handwriting, that one of the others gave him a small bag of "grass").

95. *Id.* at 316-17.

96. *Id.* at 312 (noting "vast difference" between "coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will" and "disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question").

My point about *Elstad*, therefore, is not that the Court necessarily reached a result inconsistent with the Nozick account but, rather, that the Court continues to believe the *Miranda* warnings counteract all interrogation-based coercion. In responding to the argument that the warnings made *Elstad*'s situation worse, the Court noted that administration of *Miranda* warnings to an S who has already given a "voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."⁹⁷

Elstad thus shows that the Court is committed to a positive liberty view that withholding crucial information can make a proposal coercive (though one might disagree with the Court about what information should be crucial). I argued earlier that the Nozick account similarly contemplates a positive liberty knowledge requirement in defining the relevant baseline. The Nozick account does not, however, include the other positive liberty element—ensuring that S has minimum capacity—and the Supreme Court has also rejected this aspect of positive liberty, in *Colorado v. Connelly*.⁹⁸ Connelly approached a uniformed police officer on the street and confessed to a murder because the "voice of God" had given him the choice "either to confess to the killing or to commit suicide."⁹⁹ The state courts applied a conception of coercion that entails positive liberty/minimum capacity to hold Connelly's statement inadmissible: "One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure."¹⁰⁰ The Supreme Court reversed, noting that the Constitution does not require a confessing suspect be "totally rational and properly motivated."¹⁰¹

Connelly also noted that Fifth Amendment coercion exists only when the state is the coercer, stating that even the "most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."¹⁰² *Connelly*'s limitation of the clause to government actors is consistent with Thomas Hobbes's statement of the underlying principle and with the history of the origin of the clause.¹⁰³ In addition, the state's conduct in seeking to introduce compelled out-of-court statements is not itself coercive. There is no threat to do something unless S does A. There is no

97. *Id.* at 314.

98. 479 U.S. 157 (1986).

99. *Id.* at 161.

100. *People v. Connelly*, 702 P.2d 722, 728 (Colo. 1985).

101. 479 U.S. at 166. For a more detailed discussion of *Connelly* and its critics, see Thomas & Bilder, *supra* note 4, at 259-62.

102. 479 U.S. at 166. The Court's reference to the Due Process Clause as the relevant constitutional protection is presumably because the case arose in state court, and it is the Due Process Clause that makes the self-incrimination clause applicable to the states. See *Malloy v. Hogan*, 387 U.S. 1 (1964).

103. See THOMAS HOBBS, *LEVIATHAN*, ch. 21; LEVY, *supra* note 22, at 43-82.

threat at all. If the state did not coerce the confession, it is difficult to argue that the state by seeking admission of the confession is thereby coercing S to testify. *Connelly's* conclusion that the clause bars only coercion by Ps who are government actors is thus consistent with the history of the clause and the Nozick account.

But the baseline issue is more troublesome. In the interrogation context, *Miranda* resolved the issue by presuming that custodial interrogation is a threat. Outside the interrogation room, however, the Court has yet to adopt a clear standard. In *California v. Byers*,¹⁰⁴ the Court seemed to rely on a phenomenological baseline. At issue was the constitutionality of a state statute that required a driver involved in an accident to leave her name and address at the accident scene or face a jail term. As compliance with this statute meets the other relevant conditions,¹⁰⁵ self-identification would be coerced if the statute constitutes a threat under condition 1. Neither the statistical nor moral baseline appears to define P's requirement as a threat. The statute would be the best indication of what society statistically expects drivers to do after an accident, and no reason exists to assume that the moral baseline would be different. So the question turns on the phenomenological baseline. Does S experience the statute's requirement as leaving her worse off if she fails to comply than she was in the absence of the statute? Clearly she does. If the phenomenological baseline is appropriately part of the threat baselines, then the statute poses a threat. While the Court could not muster a majority opinion on the question of whether the statute violated the self-incrimination clause, the Court unanimously agreed that Byers had been coerced to identify himself.¹⁰⁶

But a later case emphasized the moral baseline. In *South Dakota v. Neville*,¹⁰⁷ state law permitted drivers suspected of drunk driving to choose whether or not to take a blood-alcohol test. If a driver refused the test, one consequence was that evidence of the refusal could be admitted in a drunk driving prosecution. Neville refused to take the test and

104. 402 U.S. 424 (1971).

105. The statutory penalty would make NA substantially less eligible as a course of conduct under condition 2, and P (the government, in this situation, rather than the police) makes the threat in order to get S to do A, intending that S recognize she has been threatened by P. Conditions 4 and 5 are not relevant because Byers did not comply; instead, he sought a self-incrimination clause privilege to ignore the statute. When deciding this kind of question, the Court assumes that the statute would cause S to do A and asks whether the state should be permitted to coerce A.

106. *Id.* at 434 (plurality opinion of Burger, C.J.) (characterizing what happened as "compelled disclosure of identity"); *id.* at 457 (Harlan, J., concurring in the judgment) (discussing "California's decision to compel Byers to stop after his accident and identify himself"); *id.* at 459 (Black, J. dissenting) (noting relevant principle "forbids the Federal government to compel a person to supply information which can be used . . . to prosecute him for a crime"); *id.* at 464 (Brennan, J., dissenting) (discussing issue as whether government should be able "to use an individual's compelled statements"). As Byers did not comply with the statute, the issue was not whether P compelled S to do A, but whether S had a privilege not to comply with the statute, an issue beyond the scope of this paper.

107. 459 U.S. 553 (1983).

later objected to the admission of his refusal on the ground that he was coerced to refuse by the threat of the blood test.

P's proposal is probably a threat under the phenomenological baseline approach. In effect, P says to S, "I will use the blood test results against you if you do NA" (where NA means not refuse, or take the test).¹⁰⁸ While we do not know S's expectations precisely, he must have hoped that his future baseline included not taking a test that would provide accurate evidence against him. Indeed, his gratuitous explanation to P for why he refused the test ("I'm too drunk, I won't pass the test") suggests as much.¹⁰⁹

The Court adopted something like a moral baseline to conclude that what P did was not a threat. Under the Court's previous case law, compelling a blood test is permissible under the self-incrimination clause.¹¹⁰ Thus, S's moral baseline, measured by what the Constitution permits, could not include freedom from taking the blood test. This explains the key part of the Court's opinion: Since "the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice."¹¹¹ Although the Court's analysis is confined to the moral baseline, a statistical baseline probably reaches the same result. If state law permits police to force the choice that Neville faced, that is likely to be the socially expected outcome.

Neville is not, however, a rejection of the phenomenological baseline for two reasons. First, the statute in *Neville* requested evidence that is not protected by the self-incrimination clause, thus permitting the Court to use the clause itself to define a moral baseline against which to measure the consequences of S doing NA. In the category of statutes that punish nonproduction of evidence protected by the clause (*Byers*), a phenomenological baseline seems most true to the Nozick account and the history of that clause.¹¹²

108. P did not actually say the results would be used in evidence, but he strongly implied it. *Id.* at 555 n.2 (P said to S that "I have arrested you" for drunk driving and that "I request that you submit to a chemical test of your blood to determine your blood alcohol concentration").

109. *Id.* at 555. Admittedly, *Neville* presents an odd kind of threat, one that may fail to satisfy condition 2 (NA with the threatened consequence is rendered substantially less eligible as a course of conduct than NA without the threatened consequence). We can assume that S would not want to take a blood test whether or not P threatened him with a penalty if he took it.

110. The Court had held that disclosing properties of one's blood is *not* "being a witness against" oneself. See *Schmerber v. California*, 384 U.S. 757 (1966). *Neville*, on the other hand, assumed that a refusal is evidence protected by the clause. 459 U.S. at 560-61.

111. *Id.* at 563 (emphasis in original). The Court's analysis can also be explained as the classic doctrine of "the greater and the lesser." Under this doctrine, which Justice Holmes often espoused, if the government can prohibit some act entirely, it may place conditions on doing the act. For a critical analysis of the "greater-lesser" doctrine, see Kreimer, *supra* note 15, at 1304-14.

112. The clause was intended to limit the power of government to compel disclosure. See generally LEVY, *supra* note 22. Thus, saying that the existence of a legislative act establishes the statistical and moral baseline ignores the reason to have a prohibition of compelled disclosure in the first place. And, on Nozick's account, the proposal to punish theft is a threat even though it is the legislatively-established, hence expected, course of events.

The second reason that *Neville* does not reject the phenomenological baseline is that the outcome can be justified under condition 3—P threatens S in order to get S to do A—a requirement that, I argued earlier, was consistent with self-incrimination clause concerns. Notice that P is actually seeking alternative items of evidence and will obtain one or the other item in every case—that is, S will either take a blood test or S will refuse. The alternative nature of P's threat means, I think, that condition 3 is not satisfied. In *Neville*, P is *not* threatening the blood test in order to get S to refuse it so the refusal can be used against S; quite the contrary, P tells S that he wants him to take the blood test,¹¹³ and there is no reason to doubt P's sincerity since a test will provide more damning evidence (if P is right that S is drunk). Even if P is indifferent as to whether S takes the test or refuses, condition 3 would not be satisfied.

While *Neville* does not speak to a condition 3 requirement, the Court has in other cases held that there is no coercion when the police, without intent to cause a confession, engage in conduct that causes S to confess.¹¹⁴ One other thing can be said in favor of making condition 3 part of judicial self-incrimination doctrine—it is consistent with *Miranda*. The *Miranda* rule applies only to custodial interrogation, an inherently purposive police activity that would always meet condition 3.

Cases like *Neville*, *Connelly*, and *Elstad* show that real-life questions before the Supreme Court bear a strong resemblance to the "bizarre" counterexamples invented by philosophers. The Court's analysis of these questions, consistent with Nozick's account, endorses Nozick's condition 3 and thus limits coercion to threats by P, where P is a government actor, which are intended to get S to do A. When considering what proposals count as threats, the Court has alternated between a moral baseline (*Neville*) and a phenomenological baseline (*Byers*), without articulating a reason for preferring one over the other. The most likely reason for the distinction is that the moral baseline was easily determined in *Neville* since the form of evidence sought was not protected by the self-incrimination clause. In the *Byers* category of statutes that require disclosure of protected evidence, both the moral and statistical baselines seem beside the point.

V. CONCLUSION

The Nozick account provides a good description of the Supreme Court's approach to coerced self-incrimination. It explains the pre-*Miranda* cases reviewing state court convictions and also suggests that the pre-*Miranda* approach was not significantly different from *Miranda*'s

113. 459 U.S. at 555 n.2 (printed card stated in part, "I request that you submit to a chemical test of your blood to determine your blood alcohol concentration.").

114. See *Arizona v. Mauro*, 481 U.S. 520 (1987); *Rhode Island v. Innis*, 446 U.S. 291 (1980).

approach. This link between what may appear to be two very different theories of coercion is a plausible explanation for *Miranda*'s continued vitality in the face of the Supreme Court's growing conservatism over the last two decades. Nozick's account also explains the post-*Miranda* developments. It explains why mental illness cannot be a basis for finding coercion; it explains why P cannot inadvertently coerce S; and it offers an alternative explanation for why a refusal to take a blood test is not coerced by the threat of the test itself.

With a simple amplification I offered, Nozick's account also explains the *Miranda* remedy of requiring warnings. While Nozick's account clearly explains why *Miranda* found custodial interrogations coercive, it is not apparent from Nozick's account why the *Miranda* warnings are adequate to dispel the threats pervading the interrogation room.¹¹⁵ I argued that Nozick's account must be enlarged somewhat to accommodate a positive liberty conception of coercion, at least with respect to S's knowledge of crucial information. Once this dimension is highlighted, the *Miranda* warnings can easily be seen as effective remedies to the problem.

If the positive liberty gloss on Nozick's account explains the Court's reliance on *Miranda* warnings, it does not explain their surprising ineffectiveness in actually resisting the coercive power of custodial interrogation. I argued that we can only understand the ineffectiveness of the warnings if we use a phenomenological baseline. This baseline reveals what may be a defect of the positive liberty conception: information alone may not be sufficient to counteract the threats perceived by S when she is in such a vulnerable position. Indeed, certain information—for example, that P is certain S knows something about the crime—may actually be coercive in itself.

As with any analytical tool, my adaptation of Nozick's account does not provide easy answers to difficult cases. It does, however, direct attention to the particular aspect of the coercion inquiry that makes the question difficult. By narrowing the focus, the coercion account should promote more clarity in analysis. It also offers an explanation of why particular judicial doctrines have arisen, and it provides a plausible explanation of why *Miranda* has not had the effect the Court anticipated.

My paper is a partial, experimental verification of the Nozick account. The verification does not mean that the account is "right" in any ultimate sense—that it holds the key to understanding freedom and unfreedom. But the verification does mean the Nozick account is "right" in that it explains the cases and thus offers insight into how our culture views coercion. We intuitively use moral and statistical baselines to evaluate "threat" (and perhaps phenomenological baselines as well); we draw

115. Nozick's goal, of course, was not showing how to prevent occurrences of coercion.

a distinction between intentional and inadvertent coercion; and we believe that someone has been coerced when she does something partly because she has been threatened. These conclusions may not be the metaphysically “right” way to view coercion, but they are (it appears to me) the way our culture views coercion.