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BEYOND TORTURE: THE *NEMO TENETUR* PRINCIPLE IN BORDERLINE CASES

LUIS E. CHIESA*

Abstract: The Latin phrase *nemo tenetur seipsum accusare* means roughly “no man has to accuse himself.” It is the basis of our rights against self-incrimination and forced inculcation. It protects against three practical problems associated with confessions: (1) untrustworthy confessions; (2) involuntary confessions; and (3) confessions provoked through unacceptable force. This article argues that the *Nemo tenetur* principle was intended primarily to avoid the third problem: confessions obtained through improper methods. It examines the arguments for and against justifying the principle as a protection against either untrustworthy or involuntary confessions. The article also develops a framework to aid in the identification of improper methods of interrogation. Finally, it concludes by applying this framework to three hypothetical cases and arguing that only confessions obtained through unacceptable force should be barred.

INTRODUCTION—THREE BORDERLINE CASES

The maxim *nemo tenetur seipsum accusare* (the “*Nemo tenetur* principle”) comes from Latin and is usually translated as “no one need accuse himself.”¹ In the United States, this principle is often identified with the right against self-incrimination.² In civil law countries, the *Nemo tenetur* principle guarantees at least five rights of the defendant in a

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¹ See also Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 479 (2005) (tracing the development of the *Nemo tenetur* principle from the use of “imprisonment, exile, and physical torture to punish silence and to provoke suspects to confess to heresy and other crimes”). See generally CLAUS ROXIN, *LA EVOLUCIÓN DE LA POLÍTICA CRIMINAL, EL DERECHO PENAL Y EL PROCESO PENAL* 123–38 (Tirant Lo Blanch ed., Gómez Rivero & García Canti-zano trans., 2000) (author trans.).

² See ROXIN, *supra* note 1, at 123–38; see also *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1965) (quoting *Brown v. Walker*, 161 U.S. 591, 596–97 (1896)) (discussing the origin of the *Nemo tenetur* principle and how it became part of fundamental constitutional law); Godsey, *supra* note 1, at 480 (noting that “the doctrine of *Nemo tenetur* and its abhorrence of the government use of torture and coercive interrogation techniques drove the self-incrimination clause’s ultimate inclusion in the Bill of Rights”).

criminal trial: (1) the right to remain silent; (2) the right not to be called to testify; (3) the right to speak to an attorney before incriminating oneself; (4) the right not to be coerced into inculcating oneself; and (5) the right not to incriminate oneself in a judicial proceeding.³

The main evil the *Nemo tenetur* principle seeks to avoid is the official use of torture as a means for obtaining incriminating testimony.⁴ The rationale behind excluding self-incriminating statements obtained through the use of torture can be explained in three different ways. First, confessions obtained by force or violence may not be trustworthy, because a suspect ordinarily would be willing to say anything to stop such mistreatment.⁵ Second, using torture to obtain incriminating statements violates a suspect's autonomy and undermines the volun-

³ See ROXIN, *supra* note 1, at 123–38. Although the United States Constitution protects the same rights, not all derive from the Fifth Amendment's protection against self-incrimination. See U.S. CONST. amend. V; see also *Miranda*, 384 U.S. at 471–74 (holding that the Fifth Amendment privilege against self-incrimination affords suspects in custodial interrogation the right to counsel); *Massiah v. United States*, 377 U.S. 201, 206–07 (1964) (holding that the government may not deliberately elicit incriminating statements from a suspect after initiation of criminal proceedings against him unless the suspect's attorney is present). For example, the right not to be coerced into incriminating oneself derives from the Fifth and Fourteenth Amendments' Due Process Clauses. See U.S. CONST. amends. V, XIV. Additionally, the right to speak to an attorney before incriminating oneself comes partly from the protection against self-incrimination and partly from a defendant's Sixth Amendment right to be assisted by counsel. See *Miranda*, 384 U.S. at 471–74 (holding that the Fifth Amendment's privilege against self-incrimination affords suspects in custodial interrogation the right to counsel); *Massiah*, 377 U.S. at 205–07 (holding that the government may not deliberately elicit incriminating statements from a suspect after initiation of criminal proceedings against him unless the suspect's attorney is present).

Therefore, strictly speaking, the right against self-incrimination does not have the same scope in civil law countries and in the United States. See Kai Ambos, *The Right of Non-Self-Incrimination of Witnesses Before the ICC*, 15 LEIDEN J. INT'L L. 155, 166 (2002). This article uses the term *Nemo tenetur* to include all five rights, which is broader than it is generally used in the United States. See *id.* at 159–62. Ultimately, what matters is that, regardless of their source, the guarantees derived from the *Nemo tenetur* principle are legally binding both in the United States and continental Europe. See Godsey, *supra* note 1, at 479–81; Ambos, *supra*, at 166.

⁴ See Godsey, *supra* note 1, at 479–81.

⁵ See *In re Gault*, 387 U.S. 1, 47 (1966) (“The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth.”). Early cases addressing the admissibility of confessions in state criminal trials required exclusion of such confessions primarily (and perhaps exclusively) because of their unreliability, but as the course of adjudication proceeded, it became clear that confessions would be held “involuntary” and hence inadmissible, even when their reliability was clearly established. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936). Indeed, in 1961, in *Rogers v. Richmond*, the Supreme Court held that a court assessing a voluntariness claim could not even consider the fact that the police tactics would not tend to produce a false confession. 365 U.S. 534, 543–44 (1961).

tariness of the confession.⁶ Third, it is inappropriate for the government to use torture as an interrogation technique.⁷ If torture is used to extract a confession, the trustworthiness of the confession is doubtful, the involuntariness of the confession is obvious, and the appropriateness of the officers' conduct is questionable. If all three justifications for excluding a confession are present, then the confession will likely not be admitted into evidence. If, however, the confession is either trustworthy, voluntary, or obtained without resorting to inappropriate conduct, the inadmissibility of such confession is less clear. Consider the following three examples:

The False Confession Case. John goes to the police and confesses to having committed murder. The evidence gathered by the police overwhelmingly suggests that John falsely confessed in order to protect Joseph, his son and chief suspect of the crime.

The Truth Serum Case. Luke dissolves several pills of Amytal, a truth serum, into Peter's drink. Peter, unaware that it contains the substance, takes the drink. A couple of hours later, Peter is lawfully arrested and interrogated by the police about his possible participation in a robbery. Peter, who had participated in the robbery, confesses to his role. The police do not know and have no reason to suspect Peter is under the influence of Amytal. Later investigation reveals independent evidence which fully confirms Peter's confession.

The Unnecessary Threat Case. Maria is arrested and interrogated by the police. Just as Maria begins to confess, a police officer interrupts her, threatening to beat her up if she does not incriminate herself. Maria then makes several inculpa-

⁶ See *Dickerson v. United States*, 530 U.S. 428, 433–34 (2000) (summarizing the role of the voluntariness test in confession jurisprudence through the past century); *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991); 2 EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 2303 (3d ed. 1998) (“To successfully offer an admission or confession into evidence, the prosecutor must comply with . . . the voluntariness doctrine The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily.”); WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 6.2(b) (3d ed. 2000) (“This due process test is customarily referred to as the ‘voluntariness’ requirement, the term used by the Court in enunciating the due process requisites for admissibility.”).

⁷ See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 843 n.33 (1985) (Stevens, J., dissenting) (“The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to community respect for officers of the law that in turn serves to promote their enforcement of the law.”) (quoting Roger J. Traynor, *Lawbreakers, Courts, and Law-Abiders*, 41 J. ST. B. CAL. 458, 478 (1966)).

tory statements. Other evidence introduced by the state at trial corroborates these statements. At her trial, Maria's counsel makes a motion to suppress the confession. During the hearing on that motion, Maria testifies that the police officer's threat did not influence her decision to confess.

In the first example, the *false confession case*, the main reason to exclude the incriminating statements is that there are good reasons to believe that they might be false.⁸ John's decision to confess, however, was completely voluntary. Moreover, the police did not use any inappropriate interrogation techniques to extract the confession.

The second example, the *truth serum case*, presents a different problem. Peter's confession was independently corroborated by the officers. As such, it cannot be excluded on the grounds that it lacks probative value.⁹ Furthermore, because the officers were unaware that Peter had taken Amytal, they could not have intentionally taken advantage of its effects. Consequently, the confession cannot be excluded on the grounds that the officers used inappropriate interrogation methods. The most powerful argument to exclude this confession is that it was involuntary, since the truth serum substantially diminished Peter's ability to freely choose whether or not to confess.

Finally, in the third example, the *unnecessary threat case*, the confession can be challenged because of the inappropriate methods used in interrogation. In that example, the confession is clearly trustworthy. Moreover, Maria's testimony during the suppression hearing reveals that the officers' threat did not influence her decision to confess and

⁸ See *Hysler v. Florida*, 315 U.S. 411, 413 (1942) (holding that "conviction through the use of perjured testimony . . . violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law") (citation omitted); *Mooney v. Holohan*, 294 U.S. 103, 111-12 (1935) (holding that the use by a state of testimony known by its "prosecuting authorities" to be false is a denial of due process of law). But see *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (explaining that courts should not have to "divine a defendant's motion for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision"); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."). See generally Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 121-35 (1997) (giving examples of potentially false confessions and analyzing the interrogation strategies in certain cases).

⁹ See *Hysler*, 315 U.S. at 420-22; *Mooney*, 294 U.S. at 112; see also White, *supra* note 8, at 111 ("Interrogation methods likely to lead to untrustworthy confessions should be prohibited, and safeguards designed to reduce the likelihood that false confessions will be admitted . . . should be adopted.").

therefore that her confession was entirely voluntary. As a result, the best argument in favor of suppressing this confession is that the police used an inappropriate method of interrogation.¹⁰

Whether the confessions in these three examples violate the *Nemo tenetur* principle depends on whether the main purpose of this safeguard is: (1) to exclude untrustworthy evidence; (2) to protect the suspect's autonomy; or (3) to prohibit the use of inappropriate methods of interrogation.¹¹ This Article argues that the main justification of the *Nemo tenetur* principle is as a protection against the use of improper methods of investigation. Under this interpretation, the confessions in the *false confession case* and the *truth serum case* do not violate the *Nemo tenetur* principle.¹² In contrast, under this interpretation, the confession in the *unnecessary threat case* did violate this principle because although the statement in that example was trustworthy and voluntary, the methods of interrogation used by the officers were inappropriate. The argument will be developed in three parts.

Part I of the article argues that the *Nemo tenetur* principle should not be justified solely as a protection against the admission of untrustworthy confessions. First, it examines the counterarguments in favor of justifying the principle primarily as a protection against untrustworthy confessions. Second, it discusses *Spano v. New York* in which the Supreme Court suggested the *Nemo tenetur* principle should not be justified alone on the trustworthiness or untrustworthiness of a confession.¹³ As such, this part concludes that there is no necessary connection between a confession's trustworthiness and its admissibility and therefore that the

¹⁰ See *infra* Part III, for a discussion of what constitutes an inappropriate method of interrogation. See also *Beecher v. Alabama*, 389 U.S. 35, 38 (1967) (suggesting threats of force were inappropriate); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (suggesting promises of protection from force were inappropriate); *Ashcraft v. Tennessee*, 322 U.S. 143, 158–59 (1944) (holding that thirty-six hours of continuous interrogation is “inherently coercive”); *Brown*, 297 U.S. at 285–87 (suggesting confessions induced by force were inappropriate).

¹¹ See 3 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 824 (1st ed. 1904); Godsey, *supra* note 1, at 479–81; George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1296–99 (2007); White, *supra* note 8, at 111–12 (describing the evolution of untrustworthy and involuntary justifications in *Nemo tenetur* analysis).

¹² This does not mean that there are no arguments in favor of excluding these confessions. In the *false confession case*, for example, one could justify excluding the confession not because it was obtained in violation of the *Nemo tenetur* principle, but because it is false. See *Hysler*, 315 U.S. at 413; *Mooney*, 294 U.S. at 112; see also White, *supra* note 8, at 156 (concluding that interrogation methods leading to false confessions violate due process).

¹³ See *Spano v. New York*, 360 U.S. 315, 320 (1959).

Nemo tenetur principle should not be justified primarily as a protection against untrustworthy statements.¹⁴

Part II advances three arguments against using the voluntariness of the confession as the standard to determine whether it has been obtained in violation of the *Nemo tenetur* principle. The first part argues that most, if not all, legal systems sanction methods of interrogation which call into question the voluntariness of a suspect's confession. The second part argues that the involuntariness of a confession is determined almost entirely by normative criteria, based on society's legitimate expectations of moral strength.¹⁵ The third part discusses recent developments in neuroscience suggesting that human behavior is most likely determined almost entirely by factors outside an individual's control. It then asserts that if these findings were true, every human act would be considered involuntary. Consequently, examining the "voluntariness" of a statement would be a pointless endeavor.

Part III argues that the main purpose of the *Nemo tenetur* principle is to curb inappropriate police conduct. It contends that the appropriateness of the interrogation methods used by the state should be evaluated before looking to the statement's trustworthiness or the suspect's freedom of choice at the time of the confession. From this conclusion,

¹⁴ See *Smith v. United States*, 348 U.S. 147, 153–54 (1954). For example, uncorroborated confessions are typically unreliable, although they might have been obtained by methods that are perfectly compatible with the *Nemo tenetur* principle. See *id.* Conversely, many confessions obtained by torture are later corroborated and are, therefore, reliable. It would be a mistake, however, to conclude that because a confession obtained by physical coercion was trustworthy, it did not violate the *Nemo tenetur* principle.

It is important to distinguish between the *admissibility* of an uncorroborated confession and the *sufficiency* of an uncorroborated confession necessary to establish a conviction. Compare *Smith*, 348 U.S. at 152–53, and *Warszower v. United States*, 312 U.S. 342, 345–47 (1941), with *Ray v. State*, 615 S.E.2d 812, 817 (Ga. Ct. App. 2005) (explaining that when evaluating sufficiency of a conviction, a court does not weigh the evidence or credibility), and *Commonwealth v. Kimball*, 73 N.E.2d 468, 470 (Mass. 1947) ("The trend . . . is in the direction of eliminating quantitative tests of sufficiency of evidence."). Although most jurisdictions allow uncorroborated confessions to be admitted into evidence, a majority hold that that a defendant's uncorroborated incriminating statements are not sufficient evidence to sustain a conviction. See, e.g., *Smith*, 348 U.S. at 156; *Warszower*, 312 U.S. at 347–48. A minority of jurisdictions, however, allow the state to secure a conviction solely on the basis of an uncorroborated statement. See, e.g., *Ray*, 615 S.E.2d at 816–17; *Kimball*, 73 N.E.2d at 470. The Supreme Court in *Smith* stated that the purpose of requiring corroborating evidence is to "prevent 'errors in convictions based upon untrue confessions'" and to exclude statements that although "not . . . involuntary within the meaning of [the due process protections against coerced confessions]," are of suspect reliability. *Smith*, 348 U.S. at 153 (quoting *Warszower*, 312 U.S. at 347).

¹⁵ See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989).

it reasons that the question of whether an interrogation violates the *Nemo tenetur* principle is above all a normative one. In other words, the relevant question is whether the confession was obtained by interrogation techniques that are incompatible with the fundamental values that inform the United States' system of justice.

Part III also develops a framework to assist in the identification of interrogation methods which violate the rights guaranteed by the *Nemo tenetur* principle. The four categories of improper methods included in this theoretical framework are: (1) *exploitation* of a suspect by the police; (2) physical or psychological *coercion* of a suspect; (3) certain kinds of *deception*; and (4) the *transgression* of a mutually agreed upon rule to obtain an unfair advantage over a suspect.¹⁶ Finally, the article concludes by applying this framework to the three hypothetical cases outlined above and argues that only the confession obtained through improper methods should be barred.

I. THE *NEMO TENETUR* PRINCIPLE AND THE CONFESSION'S TRUSTWORTHINESS

The *Nemo tenetur* principle should not be justified primarily as a protection against the admission of untrustworthy confessions.¹⁷ An examination in favor of this approach reveals the danger in making the inadmissibility of a confession hinge on its trustworthiness.¹⁸ Were the principle justified primarily as a protection against untrustworthy statements, then the admissibility of a confession would depend primarily on its trustworthiness.¹⁹ Indeed, the United States Supreme Court has said that the right against self-incrimination, derived from the *Nemo tenetur* principle, cannot be justified solely as a protection against the admission

¹⁶ The clearest cases of *exploitation* occur when the police deliberately place the suspect in a condition of defenselessness or ignorance with the purpose of taking advantage of him. See STUART P. GREEN, LYING, CHEATING, AND STEALING 95 (2006). The paradigmatic example of physical coercion employed against the suspect is torture. See *id.* at 93–95. It is unclear whether the use of *all* types of deception should be considered incompatible with the *Nemo tenetur* principle. See *id.* at 95; see also *infra* Part III. It may be worth distinguishing, for example, between *lying* to obtain a confession and *misleading* the suspect into confessing. See GREEN, *supra*, at 95; see also *infra* Part III. A case of *transgression* takes place when the police obtain a confession from a defendant without allowing him to speak with his attorney or when the defendant gives up his right to legal representation after the criminal proceedings have begun. See *Massiah*, 377 U.S. at 206–07; see also *infra* Part III.

¹⁷ See *Spano v. New York*, 360 U.S. 315, 320–21 (1950).

¹⁸ See *id.*

¹⁹ See *id.*

of untrustworthy confessions.²⁰ As such, for a confession to be deemed inadmissible, it need not be deemed untrustworthy.²¹

A. *The Emergence of Trustworthiness as a Yardstick for Determining the Admissibility of a Confession*

One of the earliest cases in which a U.S. court held a confession inadmissible because it had been obtained by torture was *Hector v. State*, which the Missouri Supreme Court decided in 1829.²² In that case, the defendant, a slave, had been arrested for burglary.²³ He was interrogated and beaten “all night.”²⁴ During the course of this beating, Hector confessed to the burglary and said that if the police “would release him he would find the [missing] money.”²⁵ When he was released, however, he was not able to locate it.²⁶ At trial, Hector’s counsel moved to suppress the confession and other statements made during the interrogation.²⁷ The trial court denied the motion and admitted the statements as evidence.²⁸

In its opinion reversing the trial court, the Missouri Supreme Court expressed serious doubts about the confession’s trustworthiness.²⁹ It noted that Hector had probably confessed “to gain a respite from pain.”³⁰ The court also noted that the confession had not been corroborated by other evidence.³¹ It is unclear, however, whether the court would still have excluded the confession if Hector had been able to locate the money.³² This opinion highlights the link between the confession’s untrustworthiness and its inadmissibility by emphasizing that Hector’s confession was not reliable and was “most probably” made solely to stop the beating.³³ Nevertheless, it also shows the danger of making the admissi-

²⁰ See *id.*

²¹ See *id.*

²² See *Hector v. State*, 2 Mo. 166, 168 (1829).

²³ See *id.* at 167.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *Hector*, 2 Mo. at 167.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.* (noting the confession’s untrustworthiness “was strengthened by the fact that no money was found where the party and prisoner went to look for it”).

³² See *Hector*, 2 Mo. at 168.

³³ See *id.* Similarly, in *Brown v. Mississippi*, the defendant, who had already been arrested and tortured once, was arrested a few days later and again “severely whipped.” 297 U.S. 278, 281–82 (1936). The deputy told the defendant that “he would continue the

bility of a confession obtained by improper interrogation techniques hinge on its trustworthiness.³⁴ For example, if Hector had guessed the location of the money correctly or if his interrogators had suggested the correct location, the court may have found his confession trustworthy and admitted it even though it was obtained through inappropriate methods.

Today, about 180 years after *Hector*, the debate continues over whether a confession's admissibility should be determined based on its trustworthiness.³⁵ In the United States, for example, many have argued that terrorists should not be tortured because the information obtained is unreliable.³⁶ This argument was recently invoked by Senator John McCain, who pointed out that "in [his] experience, abuse of prisoners often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear."³⁷ The similarities between McCain's statements and the ones proffered by the court in *Hector* are striking and illustrate that the trustworthiness of the information obtained by torture is still a tempting way to determine the admissibility of a confession.³⁸

Excluding confessions primarily on "reliability" grounds is problematic because the state could devise methods of torture which produce trustworthy statements.³⁹ Were the *Nemo tenetur* principle justified

whipping until he confessed." *Id.* At that time, the defendant "agreed to confess to such a statement as the deputy would dictate." *Id.*

³⁴ See *Hector*, 2 Mo. at 167–68.

³⁵ See, e.g., *Jackson v. Denno*, 378 U.S. 368, 377 (1964) (holding that "a defendant in a criminal case is deprived of due process of law if his or her conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession") (citing *Rogers v. Richmond*, 365 U.S. 534, 543–44 (1961)); see also GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY* 228 (2003) (discussing voluntary false confessions); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 273–76 (1988) (discussing various reliability arguments); White, *supra* note 8, at 117 (discussing why some find reliability concerns no longer relevant).

³⁶ See, e.g., John McCain, *Torture's Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34.

³⁷ See *id.*

³⁸ See WIGMORE, *supra* note 11, § 824. As early as 1904, Wigmore suggested that the test for determining the admissibility of confessions obtained as a result of questionable police tactics should be whether the police conduct was "such that there was any fair risk of a false confession." *Id.* Wigmore's test asks whether the interrogation employed by the police was of such a nature that it created a fair risk of a false confession regardless of whether it is proven that the content of the confession was true. *Id.* Some scholars still defend reliability tests for determining the admissibility of a confession similar to the one advocated by Wigmore more than a century ago. See, e.g., Thomas, *supra* note 11, at 1294–95.

³⁹ See Thomas, *supra* note 11, at 1293–96. A recent report suggests that torture might lead to reliable information. See Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y.

primarily as a protection against untrustworthy statements, then the admissibility of a confession would depend primarily on its trustworthiness. The danger of this “reliability” argument, therefore, is that it opens the door to the legalization of torture if the information obtained is trustworthy.⁴⁰ To remain respectful of human dignity, it would seem that such statements should not be admitted into evidence regardless of their reliability.

Therefore, the primary justification of this principle should not be that it is a safeguard against untrustworthy statements.⁴¹ Although untrustworthy statements will sometimes be barred by the *Nemo tenetur* principle, the primary justification should be broader so as to exclude statements obtained through improper methods of interrogation in spite of their trustworthiness.⁴²

B. *The Limits of Trustworthiness in the Confession Context*

The United States Supreme Court has said that the right against self-incrimination—which derives from the *Nemo tenetur* principle—should not be justified primarily as a protection against untrustworthy confessions.⁴³ In *Spano v. New York*, the Supreme Court examined the link between a statement’s trustworthiness and its admissibility under the Due Process Clause guarantee against coerced confessions.⁴⁴ In that case, the issue was the admissibility of a confession obtained after interrogating the suspect from approximately 7:00 p.m. until 4:00 a.m.⁴⁵ The evidence presented at trial revealed no serious doubts about the truth-

TIMES, JUNE 22, 2008, at A1 (explaining how after being tortured, Khalid Sheikh Mohamed became “quite compliant” and produced useful intelligence). *But see* Mark Bowden, *The Ploy*, ATLANTIC, May 2007, at 54 (describing how interrogators, without torture, were able to produce reliable intelligence from people from Abu Musab al-Zarqawi’s inner circle that led to his eventual killing). Wigmore’s “reliability” tests would not bar the admissibility of incriminating statements obtained through torture as long as the government could prove that method of torture predictably and reliably produced useful intelligence. *See* WIGMORE, *supra* note 11, § 824.

⁴⁰ *See* WIGMORE, *supra* note 11, § 824; Charles T. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 245 (1946) (“[T]he predominant motive of the courts has been that of protecting the citizen against violation of his privileges of immunity from bodily manhandling by the police, and from other undue pressures . . . of the ‘third degree.’”); Thomas, *supra* note 11, at 1293–94; White, *supra* note 8, at 138.

⁴¹ *See* WIGMORE, *supra* note 11, § 824; McCormick, *supra* note 40, at 245; White, *supra* note 8, at 138.

⁴² *See infra* Part III for further discussion.

⁴³ *See Spano*, 360 U.S. at 320–21; Godsey, *supra* note 1, at 480.

⁴⁴ *See Spano*, 360 U.S. at 320–21.

⁴⁵ *See id.* at 317, 319, 322.

fulness of the confession and, consequently, the guilt of the defendant.⁴⁶ Rather, the Court ruled that the confession was inadmissible because it had been obtained in violation of the suspect's right to not be coerced into self-incrimination.⁴⁷ The Supreme Court did not ground its exclusion of the confession in the confession's trustworthiness. Chief Justice Warren justified the Court's holding by pointing out that:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.⁴⁸

This opinion suggests that justifying the exclusion of a statement obtained by improper interrogation techniques solely on the grounds that the statement is not trustworthy may inadvertently justify the admission of truthful statements obtained through torture. For example, in *Spano*, independent evidence showed the confession was most likely truthful.⁴⁹ Therefore, if the statement's admissibility was determined mainly by its trustworthiness, the confession obtained after eight straight hours of interrogation may have been admitted.⁵⁰

The Court, however, largely ignored the reliability of the confession.⁵¹ Instead, it focused on factors that had little to do with the confession's trustworthiness.⁵² For example, it noted that the suspect was a poorly educated foreigner with a history of emotional instability.⁵³ It also noted that one police officer who participated in the interrogation was a good friend of the suspect.⁵⁴ This officer told the suspect that the officer would lose his job if the suspect refused to confess.⁵⁵

This decision illustrates how even a trustworthy confession may still violate the *Nemo tenetur* principle.⁵⁶ Indeed, the Supreme Court, since

⁴⁶ See *id.* at 324.

⁴⁷ See *id.* at 320–21, 324.

⁴⁸ *Id.* at 320–21.

⁴⁹ See *Spano*, 360 U.S. at 324.

⁵⁰ See *id.*

⁵¹ See *id.* at 320–21, 324.

⁵² See *id.* at 320–21.

⁵³ *Id.* at 321–22.

⁵⁴ *Spano*, 360 U.S. at 323.

⁵⁵ *Id.* The Court also based its holding on the interrogation's duration. See *id.*

⁵⁶ See *id.* at 320–21; see also White, *supra* note 8, at 112–13.

Spano, has explicitly stated that some confessions are inadmissible even if they are trustworthy, because "certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."⁵⁷ Moreover, the Court has stated that "the aim [of the right against self-incrimination] is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."⁵⁸

II. THE *NEMO TENETUR* PRINCIPLE AND THE VOLUNTARINESS OF THE CONFESSION

It has been suggested that the *Nemo tenetur* principle protects against "involuntary" confessions.⁵⁹ This view is grounded on the notion that the right to be free from coercive interrogation stems from respect for the suspect's autonomy.⁶⁰ This justification of the *Nemo tenetur* principle has been influential both in civil law and common law countries.⁶¹ In Spain, for example, it has been stated that the exercise of the right against self-incrimination, which derives from the *Nemo tenetur* principle, seeks to ensure "the . . . freedom and spontaneity" of the suspect.⁶² Similarly, the United States Supreme Court has pointed out that the right against self-incrimination is intended to protect the "mental freedom" of the subject.⁶³

⁵⁷ See *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (reviewing whether voluntariness of a confession is an issue of fact).

⁵⁸ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (quoting *Lisbena v. California*, 314 U.S. 219, 290 (1941) (holding that there must be coercive police activity to determine a confession involuntary under the Due Process Clause)).

⁵⁹ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 433–34 (2000) (summarizing the role of the voluntariness test in confession jurisprudence through the past century); *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991) ("[A] 'determination regarding the voluntariness of a confession . . . must be viewed in a totality of the circumstances.'" (quoting *State v. Fulminante*, 778 P.2d 602, 608 (Ariz. 1988)); *IMWINKELRIED ET AL.*, *supra* note 6, § 2303 ("To successfully offer an admission or confession into evidence, the prosecutor must comply with [the voluntariness doctrine] The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily."); *LAFAVE ET AL.*, *supra* note 6, § 6.2(b) ("This due process test is customarily referred to as the 'voluntariness' requirement, the term used by the Court in enunciating the due process requisites for admissibility.")).

⁶⁰ See *Fulminante*, 499 U.S. at 285–88.

⁶¹ See *id.*; ALBERTO MONTÓN REDONDO ET AL., *DERECHO JURISDICCIONAL III PROCESO PENAL* 199 (Bosch 1995) (author trans.).

⁶² See REDONDO, *supra* note 61, at 199.

⁶³ *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944) (examining why coercion of a confession violates principles of liberty and justice).

At first glance, justifying the *Nemo tenetur* principle as a protection of a suspect's autonomy does not seem objectionable. After all, the Fifth Amendment bars the government from *compelling* individuals to incriminate themselves.⁶⁴ In fact, justifying the principle as a protection of the suspect's freedom is more defensible than justifying it as a protection against untrustworthy confessions. Nevertheless the voluntary or involuntary nature of the statement should not be the primary factor in determining whether it was obtained in violation of the *Nemo tenetur* principle.⁶⁵

Conceiving the *Nemo tenetur* principle as a vehicle for guaranteeing voluntary confessions presents three different problems. First, suspects in almost every legal system can be lawfully compelled to confess in a way that may diminish the voluntariness of the confession. Second, the definition of voluntariness depends on normative criteria. Third, recent scientific research has challenged whether any act is voluntary. As a result, the *Nemo tenetur* principle should not be justified primarily as protection of a suspect's autonomy.

A. *Voluntariness in Domestic and Comparative Perspectives: The Problem of Immunity, Efficient Collaboration, and Punishment Mitigation in Exchange for a Confession*

The first reason voluntariness should not be considered the primary justification of the *Nemo tenetur* principle is because suspects in almost every legal system can be compelled to confess in a way that calls into question the voluntariness of the confession. For example, for over 110 years, the Supreme Court has recognized that a suspect who receives immunity can be held in contempt for refusing to testify against himself.⁶⁶ The justification for this practice is that a grant of immunity

⁶⁴ See U.S. CONST. amend. V.

⁶⁵ See YALE KAMISAR, *What Is an "Involuntary" Confession?*, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 25 (1980) (suggesting that courts should "scrap the 'voluntariness' terminology altogether"); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (documenting the "intolerable uncertainty . . . of the due process voluntariness doctrine"); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–72 (1981) (reviewing KAMISAR, *supra*) (discussing the defects in the due process involuntary confession rule); George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 245 n.14 (1991) (citing numerous sources that discuss the problems with the involuntary confession rule).

⁶⁶ See *Brown v. Walker*, 161 U.S. 591, 609–10 (1896) (holding that a witness with immunity was required to testify regarding his knowledge of an alleged offense and could not refuse on the grounds that doing so would result in self-incrimination); see also *Kastigar v. United States*, 406 U.S. 441, 453 (1972). In *Kastigar*, the Supreme Court decided that a

leaves a suspect in the same position as if he had invoked his right against self-incrimination because his statements cannot be used against him in a criminal proceeding.⁶⁷

A statement made under threat of conviction for contempt, however, is not entirely voluntary.⁶⁸ Consequently, the Fifth Amendment protection against self-incrimination cannot be dependent on the suspect's freedom or spontaneity. If it were, then this practice of offering immunity in exchange for testimony would violate that right.⁶⁹

The Rome Statute—ratified by the majority of countries in the world—also allows the use of immunity as a tool to compel a witness to testify.⁷⁰ Yet, compelling a suspect to testify by giving him immunity is often frowned upon in civil law countries.⁷¹ Nevertheless, many countries allow the prosecution to offer a reduction in punishment for a suspect's "efficient collaboration" with governmental authorities.⁷² In these cases, the government does not entirely compel self-incrimination.⁷³ A

person can be forced to testify if the State guarantees it will not use the self-incriminating statements or any evidence derived from those statements in a prosecution against the declarant. See *Kastigar*, 406 U.S. at 453. This type of immunity is known as "immunity from use." See Ambos, *supra* note 3, at 164. Another type of immunity is "transactional immunity," which is immunity from criminal liability for any transaction, matter, or thing discussed in compelled testimony. See *id.* "Immunity from use" grants less protection than "transactional immunity," because it may allow the use of incriminating statements in a prosecution if there is independent incriminating evidence that is untainted by the suspect's compelled statements. See *id.*

⁶⁷ See *Kastigar*, 406 U.S. at 453; *Ullman v. United States*, 350 U.S. 422, 436 (1956) (holding that the Fifth Amendment privilege against self-incrimination only protects a witness from being compelled to give testimony that would result in criminal prosecution and therefore could not be invoked where the Immunity Act had removed the threat of prosecution for actions revealed by the compelled testimony).

⁶⁸ See Ambos, *supra* note 3, at 172–74.

⁶⁹ See generally *Kastigar*, 406 U.S. at 453.

⁷⁰ See International Criminal Court, Rules of Procedure and Evidence, R. 74, Sept. 10, 2002, ICC-ASP/1/3 (Part II-A). Despite the fact that the international community endorsed this rule, Professor Kai Ambos has suggested that granting immunity as a means to force a witness to testify is incompatible with the *Nemo tenetur* principle. See Ambos, *supra* note 3, at 172–77. Rule 74(3) conflicts with the *Nemo tenetur* principle only if the principle is justified primarily as a protection against the admission of involuntary statements. See *id.* at 177. However, the *Nemo tenetur* principle should not be considered a means to ensure a voluntary confession. Rather, it should be conceived as a right to prevent the state from obtaining a confession by using inappropriate or abusive interrogation methods. See *infra* Part III.

⁷¹ See Ambos, *supra* note 3, at 166; Quispe Farfán & Fany Soledad, *Derecho a la No Incriminación y su Aplicación en el Perú* § 3.6, (2002) (unpublished L.L.M. thesis, Universidad Nacional Mayor de San Marcos) (author trans.).

⁷² See Farfán & Soledad, *supra* note 71, § 3.6. Colombia and Peru, among others, allow granting benefits in exchange for efficient collaboration. *Id.*

⁷³ *Id.*

reduction in punishment, however, may increase the likelihood that the suspect will “waive” the rights afforded by the *Nemo tenetur* principle, thereby lessening the voluntariness of his confession.⁷⁴

Not all civil law countries regulate the legal effect of efficient collaboration.⁷⁵ Most allow, however, a considerable mitigation of punishment where the suspect gives a “truthful confession” of his participation in the crime.⁷⁶ Just like statements obtained in exchange for efficient collaboration, it is unclear whether a decision to confess which was induced by a promise of less severe punishment is really “voluntary” and spontaneous. Nevertheless, courts in civil law jurisdictions often allow this practice.⁷⁷ Indeed, Spain’s Constitutional Court has even asserted that this practice is compatible with the *Nemo tenetur* principle.⁷⁸ Because the “voluntary” character of this type of confession is questionable, the legitimacy of this practice must be based on a conception of the *Nemo tenetur* principle that is not grounded on the suspect giving the statement voluntarily.⁷⁹

As a result, the continental practice of granting benefits for efficient collaboration, like the practice of granting immunity in exchange for testimony in the United States, strengthens the argument against voluntariness as the primary justification of the *Nemo tenetur* principle. Neither practice can be reconciled with a right against self-incrimination unless one adopts a conception of the *Nemo tenetur* principle that is divorced from the voluntariness of the confession.⁸⁰

⁷⁴ *Id.*

⁷⁵ See Stephen C. Thaman, *Plea-Bargaining, Negotiating Confession and Consensual Resolution of Criminal Cases*, 11 ELECTRONIC J. COMP. L., Dec. 2007, at 1, 1–10, available at <http://www.ejcl.org/113/article113-34.pdf>.

⁷⁶ See, e.g., *id.* at 20–21. This is the case, for example, in Argentina, Spain, Italy, and Germany. See *id.* at 38, 41; Farfán & Soledad, *supra* note 71, § 3.6.

⁷⁷ See Farfán & Soledad, *supra* note 71, § 3.6.

⁷⁸ See STC, May 25, 1987 (R.J., No. 75) (author trans.) (holding that the offer of sentence-mitigation in exchange for a suspect’s confession does not deprive a suspect of the fundamental right not to confess involuntarily).

⁷⁹ See Farfán & Soledad, *supra* note 71, § 3.6. See generally Godsey, *supra* note 1, at 473 (discussing the departure in U.S. case law from “the involuntary confession rule”).

⁸⁰ Compare Farfán & Soledad, *supra* note 71, § 3.6 (noting that a reduction in punishment may cause a suspect to “waive” the rights afforded by the *Nemo tenetur* principle, thereby lessening the voluntariness of his confession), with Godsey, *supra* note 1, at 473 (arguing that confessions should be inadmissible where they are compelled by imposing objective penalties on a suspect in order to punish silence and provoke speech).

B. *The Difficulty of Identifying the Voluntariness of a Statement Without Appealing to Normative Criteria*

The second reason voluntariness should not be the primary justification for *Nemo tenetur* is that the definition of voluntary depends heavily on normative criteria.⁸¹ In the third book of *Nicomachean Ethics*, Aristotle contends that an act must be considered voluntary if it is caused by an agent's desire.⁸² Aristotle suggests that a person acts voluntarily if he agrees to commit a crime to spare the lives of his family because he has the option of committing or not committing the offense.⁸³ Ultimately, Aristotle argues, the cause of his act is not the coercion under which he is placed, but his desire to save his family.⁸⁴

The Aristotelian definition of voluntariness is at the core of criminal theory.⁸⁵ Indeed, the Aristotelian concept of voluntariness can be useful in some contexts.⁸⁶ Nevertheless, it is broader than the notion of "voluntariness" as it is used by courts and commentators when analyzing the *Nemo tenetur* principle.⁸⁷ For example, an incriminating statement made under torture is voluntary in the Aristotelian sense because the decision to incriminate oneself falls ultimately on the suspect.⁸⁸ Such a confession, however, would not be considered voluntary under the Supreme Court's jurisprudence today.⁸⁹

The concept of voluntariness used in the court's current jurisprudence is more similar to the analysis under the affirmative defense of duress.⁹⁰ Under that defense, an act carried out under coercion is gen-

⁸¹ See Godsey, *supra* note 1, at 468–69.

⁸² See ARISTOTLE, *THE NICOMACHEAN ETHICS* 55–56 (J.A.K. Thomson trans., Penguin Books 2004).

⁸³ See *id.* at 50.

⁸⁴ See *id.*

⁸⁵ See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 61 (1993) (stating that the "effort to distinguish voluntary from involuntary actions dates back at least to Aristotle").

⁸⁶ See *id.* at 61–62.

⁸⁷ See, e.g., *Dickerson*, 530 U.S. at 433–34; *Fulminante*, 499 U.S. at 285–86; GRANO, *supra* note 85, at 61–62 ("[F]or purposes of assessing blame and praise, we would find our standards . . . intolerably severe were voluntariness under Aristotle's definition the only relevant consideration.")

⁸⁸ See ARISTOTLE, *supra* note 82, at 50.

⁸⁹ Compare *id.*, with *Dickerson*, 530 U.S. at 433–34 (summarizing the role of voluntariness test in confession jurisprudence through the past century), and *Fulminante*, 499 U.S. at 285–86 (credible threat of violence resulted in a coerced confession in violation of defendant's due process rights), and Grano, *supra* note 65, at 863 (documenting the "intolerable uncertainty . . . of the due process voluntariness doctrine").

⁹⁰ See MODEL PENAL CODE § 2.09 (1985) (prescribing the affirmative defense of duress only where the actor "engaged in criminal conduct because he was coerced to do so by the

erally considered to be voluntary.⁹¹ However, if the defendant is able to prove that his decision to succumb to the coercion was reasonable, he will not be punished for that coerced wrongful act.⁹² This defense is justified not because such acts are involuntary, but rather because society cannot fairly expect coerced actors to abstain from engaging in the illegal act when a person of reasonable firmness would have done the same.⁹³ The defendant's decision to succumb is analyzed under the "person of reasonable firmness" test.⁹⁴ Under this test, a court examines whether a person of reasonable firmness in a similar situation with similar pressure would have abstained from engaging in a wrongful act.⁹⁵ If the court concludes that a person of reasonable firmness would have resisted the pressure, then the defense does not apply.⁹⁶

A more accurate definition of voluntary under the *Nemo tenetur* principle would employ the same type of analysis. It would recognize that threats of torture or other types of coercion, while not completely obliterating the will, substantially reduce the subject's ability to choose freely whether to confess or not.⁹⁷ The subject still has a choice (to confess or to be tortured), but these remaining options are not particularly attractive.

This definition of voluntary, however, raises two questions. First, how much must the suspect's ability to choose be reduced so that his act should be considered involuntary? Second, when are the remaining courses of action so unattractive that the suspect's decision to confess should be considered involuntary?

Suppose a suspect has asserted his Fifth Amendment right not to incriminate himself. The police, reasoning that continued interroga-

use or threat of unlawful force against himself or another, that a person of reasonable firmness would have been unable to resist").

⁹¹ See, e.g., MODEL PENAL CODE § 2.01 (1985) (prescribing that only unconscious body movements or body movements that are the product of a reflex, convulsion, or hypnosis ought to be considered "involuntary" for the purposes of criminal law). The *Code* suggests acts committed under duress or coercion are voluntary. See *id.* Therefore, duress or coercion is only a defense to a crime if the defendant's decision to succumb to the coercion is reasonable. *Id.* § 2.09.

⁹² See *id.* § 2.09.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ *Id.*; see also Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741, 753 (2008) ("Usually it would be unfair to punish someone for succumbing to a threat that a normal law-abiding citizen would have been unable to resist."); Dressler, *supra* note 15, at 1385 (explaining that if a "person of reasonable moral strength cannot fairly be expected to resist the threat," then the actor has a valid excuse).

⁹⁶ See Dressler, *supra* note 15, at 1385.

⁹⁷ See Grano, *supra* note 66, at 874–75.

tion will be useless, tell the suspect that he must return to his cell. The suspect, however, is terrified of his cramped and smelly cell and decides to incriminate himself rather than return. Alternatively, suppose the police, instead of merely ordering the suspect back to his cell, threaten to torture him if he does not confess.

Should the suspect's confession in either scenario be considered voluntary? Was his choice so undermined by the fear of returning to his cell or his fear of being tortured that his confession should be considered involuntary? Can his confession be considered voluntary when his options (incriminating himself, being tortured, or returning to his cell) are unattractive?

To determine if the suspect's ability to choose has been sufficiently reduced so as to render his act involuntary, one must compare his conduct with the conduct that a person of reasonable firmness would observe in his situation.⁹⁸ Most people believe that confessions obtained by torture are involuntary because a person of reasonable firmness would confess under such treatment.⁹⁹ In the second scenario, where the police threaten to torture the suspect, the suspect's ability to act freely has been reduced to the point where his statement must be considered involuntary.¹⁰⁰ A person of reasonable firmness would confess in order to avoid being tortured.¹⁰¹ A similar analysis could be used to determine if the suspect's options were so unattractive that it must be concluded that his choice was involuntary. Given that a person of reasonable firmness would not consider confessing to a crime or submitting to torture to be attractive options, the decision to confess under these circumstances must be considered involuntary.¹⁰²

In this way, the "person of reasonable firmness" standard is eminently *normative* in nature.¹⁰³ The "voluntariness" of the act is not determined by the mental pressure experienced by the suspect.¹⁰⁴ Rather the "voluntariness" of the act is determined by examining whether the subject's choice-making capabilities were reduced in an *unfair* man-

⁹⁸ See MODEL PENAL CODE § 2.09; Chiesa, *supra* note 95, at 761-62; Dressler, *supra* note 15, at 1367-68.

⁹⁹ See, e.g., MODEL PENAL CODE § 2.09; Chiesa, *supra* note 95, at 761-62; Dressler, *supra* note 15, at 1367-68.

¹⁰⁰ See Chiesa, *supra* note 95, at 758.

¹⁰¹ See, e.g., MODEL PENAL CODE § 2.09; Chiesa, *supra* note 95, at 761-62; Dressler, *supra* note 15, at 1367-68.

¹⁰² See MODEL PENAL CODE § 2.09; Chiesa, *supra* note 95, at 761-62; Dressler, *supra* note 15, at 1367-68.

¹⁰³ See Schulhofer, *supra* note 65, at 874 n.41.

¹⁰⁴ See *id.*

ner.¹⁰⁵ In the first scenario, where the police merely order the suspect to return to his cell, the suspect's confession should be considered voluntary. It should be admissible even if it is demonstrated that he felt compelled to confess because of the mental pressure of returning to his cell. To reject the statement simply because of the suspect's perceived mental pressure would lead to an overly subjective analysis. Confessions made by a suspect must be considered involuntary and consequently inadmissible only if the officers compromised the suspect's voluntariness by using inappropriate methods as they did in the second scenario.¹⁰⁶

As the above scenarios show, the *Nemo tenetur* principle should not be primarily justified as a protection of a suspect's "freedom" and "spontaneity." Rather, the admissibility of confessions should be determined by examining whether the government unfairly constrained the suspect's decision to confess rather than by inquiring into whether the suspect freely chose to incriminate himself.

C. *Voluntariness and Neuroscience*

The third reason voluntariness should not be the primary justification for the *Nemo tenetur* principle is because recent developments in neuroscience suggest that human behavior is most likely determined almost entirely by factors outside an individual's control.¹⁰⁷ These discoveries further undermine the argument that the *Nemo tenetur* principle should be justified primarily as a protection of a suspect's autonomy.

Forty years ago, the neurophysicist Benjamin Libet made an extraordinary discovery.¹⁰⁸ According to his research, the brain unconsciously makes the decision to act almost half a second before a person is aware of his desire or intent to carry out the act.¹⁰⁹ These findings have been corroborated many times, most recently in 2008.¹¹⁰ The im-

¹⁰⁵ See generally ALAN WERTHEIMER, COERCION 228–30, 307–10 (1987) (defending a normative account of voluntariness and coercion).

¹⁰⁶ See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *infra* Part III.

¹⁰⁷ Benjamin Libet et al., *Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness Potential): The Unconscious Initiation of a Freely Voluntary Act*, 106 *BRAIN* 623, 623–42 (1983).

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 71 (2005); Chun Siong Soon et al., *Unconscious Determinants of Free Decisions in the Human Brain*, 11 *NATURE NEUROSCIENCE* 543, 543–45 (May 2008). Using functional MRI technology, Siong Soon and his colleagues were able to successfully predict the bodily movements of their human subjects up to seven seconds before they were aware of

plications of Libet's experiments are monumental.¹¹¹ If the intent to move our body develops after the brain has unconsciously made the decision to move it, it would appear that we do not have the ability to control our acts.¹¹² These findings suggest that while we may think we consciously control our acts, in reality, our conduct is predetermined by unconscious processes.¹¹³

According to some neuroscientists, this evidence suggests that our free will "is an illusion."¹¹⁴ Others have even suggested that the conscious will is nothing more than a mood, like happiness or sadness.¹¹⁵ If, according to the results of these experiments, the brain is faster than conscious thought, "[i]t seems that it is not our conscious mind that makes the decision, but instead the sub-conscious mind."¹¹⁶ Philosopher and sociologist Jürgen Habermas explained the impact that neuroscience has had and will continue to have over the debate about free will in the following manner:

[Many] neuroscientists take the position that all mental acts and experiences are not merely instantiated by brain processes but rather are causally determined by brain states alone. If neurological research today already holds the key, as is claimed, to soon explaining any given motivation or deliberation exclusively on the basis of the nomologically determined interaction of neuronal processes, then we would have to view free will as a fiction. For, from this perspective, we must no longer presuppose that we could have acted differently, nor that it was up to us to act one way rather than another. Indeed, within neurological descriptions, the reference to "us," as agents, no longer makes any sense. Human behavior is then no longer decided by persons but rather fixed by their brains:

making the decision to move their bodies. See Brandon Keim, *Brain Scanners Can See Your Decisions Before You Make Them*, WIREd, Apr. 13, 2008, http://www.wired.com/science/discoveries/news/2008/04/mind_decision.

¹¹¹ See Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J. L. SCI. & TECH. 1, 28–29 (2008).

¹¹² See *id.* at 29.

¹¹³ See MICHAEL S. GAZZANIGA, *THE ETHICAL BRAIN* 92–93 (2005); Morse, *supra* note 111, at 29.

¹¹⁴ GAZZANIGA, *supra* note 113, at 92–93. Renowned social psychologist Daniel Wegner has reached a similar conclusion. See generally DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* 1–28 (2002) (discussing that the idea that we "consciously will our voluntary actions" is merely an illusion).

¹¹⁵ WEGNER, *supra* note 114, at 325–28.

¹¹⁶ Derek Sankey, *Education Policy, Research and Neuroscience: The Final Solution?*, 33 AUSTRALIAN J. TCHR. EDUC., June 2008, at 31, 40.

“Who or what is this ‘we’ that inhabits the brain? It is a commentator and interpreter with limited access to the actual machinery, more along the lines of a press secretary than a president or boss.”¹¹⁷

Some have interpreted Libet’s findings to be compatible with the idea of free will.¹¹⁸ However, “nothing in the brain sciences would lead an independent observer to conclude that we must be libertarian agents.”¹¹⁹ Even those who assert that human beings have the ability to act voluntarily acknowledge that “there are at present no accepted scientific models” that indicate that our acts can be consciously controlled.¹²⁰ They also acknowledge that there is currently no empirical evidence to suggest that our behavior is significantly determined by factors we can control.¹²¹ Perhaps even more compelling are the numerous studies showing that significant aspects of our behavior are deter-

¹¹⁷ Jürgen Habermas, *The Language Game of Responsible Agency and the Problem of Free Will: How Can Epistemic Dualism Be Reconciled with Ontological Monism?*, 10 PHIL. EXPLORATIONS 13, 20 (Joel Anderson trans., 2007) (quoting DANIEL C. DENNETT, FREEDOM EVOLVES 244 (2003)).

¹¹⁸ See, e.g., DENNETT, *supra* note 117, at 227–42. Dennett, however, defends an “evolutionary” notion of free will that is very different from what is commonly understood by the concept. *Id.* at 263. On the other hand, Libet has suggested that his findings can be compatible with the fact that human beings are able to *avoid* doing the act that the brain unconsciously determined should be done. See Benjamin Libet, *Do We Have Free Will?*, 6 J. CONSCIOUSNESS STUD., No. 8–9 (1999), at 47, 51–53. In Libet’s own words:

The initiation of the freely voluntary act appears to begin in the brain unconsciously, well before the person consciously knows he wants to act! Is there, then, any role for conscious will in the performance of a voluntary act? To answer this it must be recognized that conscious will [to act] . . . does appear about 150 msec. before the muscle is activated, even though [the brain unconsciously ordered the muscle activation several hundred milliseconds before the subject became aware of it]. An interval of 150 msec. would allow enough time in which the [subject’s] conscious function might affect the final outcome of the volitional process.

Id. at 51 (citation omitted). These statements suggest that it is possible that human beings might be able to willingly *avoid* doing something, but not to decide positively to do something. See *id.* at 51–53. Thus, it may be contended that human beings have “free *won’t*” instead of “free will.” See *id.*

¹¹⁹ Manuel Vargas, *Response to Kane, Fischer, and Pereboom*, in FOUR VIEWS ON FREE WILL 204, 206 (2007).

¹²⁰ See, e.g., Robert Kane, *Response to Fischer, Pereboom, and Vargas*, in FOUR VIEWS ON FREE WILL, *supra* note 119, at 166, 181 (quoting Manuel Vargas, *Revisionism*, in FOUR VIEWS ON FREE WILL, *supra* note 119, at 126, 143).

¹²¹ *Id.*

mined by genetic and environmental factors outside of our control.¹²² The results of this research “[are] forcing us to rethink the extent of our personal control over our choices.”¹²³

This evidence, which suggests that our acts are not determined by our conscious will, threatens to undermine any argument which seeks to justify the *Nemo tenetur* principle primarily as a protection of a suspect’s autonomy.¹²⁴ After all, why should we believe that such a fundamental right exists to protect a mental faculty whose existence is debated?¹²⁵ Because considerable evidence shows we may not be able to control our acts (including illocutionary acts), we should justify the *Nemo tenetur* principle by appealing to considerations that go beyond the “voluntariness” or “involuntariness” of the statement.¹²⁶

III. BEYOND TRUSTWORTHINESS AND VOLUNTARINESS

Parts I and II argued that it is undesirable to conceive the *Nemo tenetur* principle as a guarantee against untrustworthy or involuntary statements. Consequently, the principle should be justified primarily as a safeguard against the use of inappropriate interrogation techniques.¹²⁷ Justifying the *Nemo tenetur* principle primarily as a protection against inappropriate interrogation techniques, however, does not mean that the trustworthiness or voluntariness of a statement will not be taken into account.

Sometimes an untrustworthy confession is inadmissible pursuant to the *Nemo tenetur* principle.¹²⁸ An untrustworthy confession, however, can be obtained in a manner compatible with the *Nemo tenetur* principle.¹²⁹ Conversely, a trustworthy statement can be obtained through coercion or torture, and thus be incompatible with the suspect’s right to be free from coerced interrogation.¹³⁰

¹²² See Steven Pinker, *The Blank Slate*, 41 DIV. ONE GEN. PSYCHOLOGIST, Spring 2006, at 1, 3–4 (2006) (discussing various studies on the way in which genetics and the environment affect our behavior).

¹²³ TANCREDI, *supra* note 110, at 75.

¹²⁴ See *id.* at 75–76.

¹²⁵ See GAZZANIGA, *supra* note 113, at 95, 100–01.

¹²⁶ See, e.g., *id.*; WEGNER, *supra* note 114, at 26–27; Soon et al., *supra* note 110, at 545.

¹²⁷ See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 843 n.33 (1985) (Stevens, J., dissenting) (quoting Traynor, *supra* note 7, at 478); *Jackson v. Denno*, 378 U.S. 368, 376 (1963).

¹²⁸ See *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Hector v. State*, 2 Mo. 167, 168 (1829).

¹²⁹ See, e.g., GUDJONSSON, *supra* note 36, at 227–29 (discussing voluntary false confessions).

¹³⁰ See *Spano v. New York*, 360 U.S. 315, 320–21 (1959).

It is also possible that a confession obtained in violation of the suspect's right not to incriminate himself was secured under circumstances that would make the confession involuntary.¹³¹ Confessions obtained by torture, for example, are usually considered to be involuntary.¹³² Yet, conceiving the *Nemo tenetur* principle as a vehicle for guaranteeing the voluntariness of a suspect's decision to confess presents three different problems. First, suspects in almost every legal system can be compelled to confess in a way that calls into question the voluntariness of the confession.¹³³ Second, making the admissibility of a statement hinge upon its voluntary character is also objectionable, since the definition of voluntariness or involuntariness depends on normative criteria.¹³⁴ Third, recent scientific research suggests humans do not possess the ability to voluntarily control their acts.¹³⁵ As a result, the *Nemo tenetur* principle should be justified by considerations unrelated to the trustworthiness or voluntariness of the confession.¹³⁶

A. *The Nemo Tenetur Principle as a Protection Against Improper Governmental Conduct*

The *Nemo tenetur* principle should be understood as a guarantee against the state's use of improper or abusive interrogation techniques. The right, however, cannot be invoked against private persons in the vast majority of jurisdictions.¹³⁷ For example, the protection against self-

¹³¹ See *Kastigar v. United States*, 406 U.S. 441, 462 n.53 (1972) ("A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege.") (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 103 (1964) (White, J. concurring)).

¹³² GUDJONSSON, *supra* note 36, at 284.

¹³³ See *supra* notes 66–80 and accompanying text.

¹³⁴ See *supra* notes 81–106 and accompanying text.

¹³⁵ See, e.g., Libet et al., *supra* note 107, at 640; Soon et al., *supra* note 110, at 545.

¹³⁶ See *Spano*, 360 U.S. at 324 (holding that the accurate confession by the defendant obtained through coercion was violative of his Fourteenth Amendment rights); *Dix*, *supra* note 35, at 275 (stating that whether coercive techniques by police officers pose threats to reliability may be impossible to "address with any certainty").

¹³⁷ See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the due process clause of the Fourteenth Amendment."); *Wigfall v. State*, 710 So. 2d 931, 937 (Ala. Crim. App. 1997) ("So long as law enforcement officers do not incite or coach family members to elicit a confession from the accused, the fact that a defendant elects to confess after conferring with family members does not render a confession involuntary."); *Mirabal v. State*, 698 So. 2d 360, 362 (Fla. Dist. Ct. App. 1997) (holding that an involuntary confession to private employers cannot taint a second confession to police after defendant waived his rights); *Commonwealth v. Cooper*, 899 S.W.2d 75, 75–76 (Ky. 1995) (holding that coercive conduct by a private citizen does not render a confession

incrimination does not require that our friends advise us of our right to remain silent before asking potentially incriminating questions.¹³⁸ Therefore, if someone answers incriminating questions posed by a private person, the statements are admissible against him, regardless of how those answers were obtained.¹³⁹ Conversely, if the police torture a suspect to obtain a confession, that confession should be deemed inadmissible.¹⁴⁰ The crucial factor that differentiates these two cases is not the relative voluntariness or trustworthiness of the statements, but the presence or absence of inappropriate police conduct.¹⁴¹

B. *Identifying Improper Methods of Interrogation*

Once the *Nemo tenetur* principle is conceived as a protection against the use of unacceptable methods of interrogation to obtain incriminating statements, it becomes necessary to provide a framework that helps us to identify improper or abusive interrogation techniques. Such a framework is necessary to provide a concrete conceptual structure that

involuntary and therefore inadmissible under state law); *Hough v. State*, 929 S.W.2d 484 (Tex. Ct. App. 1996) (holding that a confession was voluntary, despite the defendant's estranged wife telling him that she would reconcile with him). *But see State v. Bowe*, 881 P.2d 538, 546 (Haw. 1994) ("[A]n individual's capacity to make a rational and free choice between confessing and remaining silent may be overborne as much by the coercive conduct of a private individual as by the coercive conduct of the police. . . . Therefore . . . admitting coerced confessions regardless of the source of the coercion, is fundamentally unfair."); *State v. Martin*, 645 So. 2d 752, 754 (La. Ct. App. 1994) ("[T]his state statute mandates that all confessions, regardless of whether a state actor was involved, must be voluntary."); *Commonwealth v. Brandwein*, 760 N.E.2d 724, 732 n.10 (Mass. 2002) ("[C]oercion by a private party may render a defendant's confession to that private party involuntary, requiring that the confession be suppressed as violative of due process."); *Commonwealth v. Smith*, 686 N.E.2d 983, 989 (Mass. 1997) (holding that, in a murder prosecution, the defendant's confessions made to his sister and brother were admissible, where the "judge correctly instructed [the] jury to disregard statements to family members unless they concluded for themselves that the Commonwealth had proved beyond a reasonable doubt that the statements were voluntary"); *People v. Sorbo*, 649 N.Y.S.2d 318, 319 (Sup. Ct. 1996) ("[F]ruits of statements made involuntarily to private parties are subject to suppression.").

¹³⁸ See *Wigfall*, 710 So. 2d at 937 ("So long as law enforcement officers do not incite or coach family members to elicit a confession from the accused, the fact that a defendant elects to confess after conferring with family members does not render a confession involuntary.").

¹³⁹ See *Connelly*, 479 U.S. at 165.

¹⁴⁰ See *id.* at 164.

¹⁴¹ See *id.* at 167 (holding that "coercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the due process clause of the Fourteenth Amendment," and hence a confession coerced by a private citizen is voluntary).

will assist judges in discriminating between acceptable and unacceptable methods of interrogation in borderline cases.¹⁴²

This Part provides such a framework by arguing that the police act improperly when they obtain a confession by methods that involve the use of *coercion*, certain kinds of *deception*, *exploitation* or the *transgression* of a mutually agreed upon rule with the purpose of obtaining an unfair advantage over the suspect.

1. Coercion

The government acts inappropriately if it coerces the suspect to confess by threatening to use physical force against him.¹⁴³ This is the core of the Fifth Amendment's due process protection against forced confessions. Coerced confessions must be considered inadmissible regardless of their trustworthiness and voluntariness.¹⁴⁴ A confession made under threat of torture must not be admitted as evidence even if there are techniques that allow the state to successfully ascertain the statement's trustworthiness. By the same token, forced confessions should not be admitted into evidence even if the subject conclusively demonstrates that the police coercion did not influence his decision to confess.¹⁴⁵

It is also inappropriate to try to compel the suspect to confess by threatening to cause him psychological pain.¹⁴⁶ Examples of psycho-

¹⁴² See Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 116–17 (1989).

[*Miranda's*] most serious flaw, however, lay in the fact that it was a value-laden method of constitutional adjudication that created vague, unpredictable standards which failed to provide clear guidance to police and made judicial review a morass of subjectivity. The Court itself openly complained of the difficulties in drawing the line between an acceptable police tactic and a violation of due process particularly when the Court must make "fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of the accused."

Id. (quoting *Haynes v. Washington*, 373 U.S. 503, 513 (1963)) (citing Schulhofer, *supra* note 65, at 869–70) (discussing difficulties for courts and police posed by due process involuntary confession rule).

¹⁴³ See U.S. CONST. amend. V; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349–50 (2006) ("We require exclusion of coerced confessions . . . because we disapprove of such coercion . . ."); *Watkins v. Sowders*, 449 U.S. 341, 347 (1981).

¹⁴⁴ See WIGMORE, *supra* note 11, § 824; McCormick, *supra* note 40, at 268–69; White, *supra* note 8, at 117.

¹⁴⁵ See KAMISAR, *supra* note 65, at 24.

¹⁴⁶ See GUDJONSSON, *supra* note 36, at 316.

logical pain may include a threat to take away a suspect's custody over his children or his property if he fails to incriminate himself.¹⁴⁷

In general, coercion occurs when the police obtain a confession by threatening to commit an *illegal* act.¹⁴⁸ Conversely, a confession is usually admissible if the suspect is compelled to testify against himself with a threat by the police to commit a *legal* act.¹⁴⁹ Suppose, for example, that a police officer asks a car driver if he has ingested alcoholic beverages in the past few hours. The driver refuses to answer, and the officer threatens to administer an alcohol test if the driver refuses again. If it is legal to administer an alcohol test, it is not inappropriate for the officer to threaten the driver with performing the test.¹⁵⁰

2. Deception

Police can also act inappropriately by using certain kinds of deception to obtain a confession.¹⁵¹ Not all kinds of deception, however, are equally wrongful. Obtaining a confession by lying to the suspect and obtaining a confession by misleading the suspect are different.¹⁵²

As a general rule, it is more blameworthy to lie than to mislead by asserting something that is not false.¹⁵³ Federal criminal law reflects the different culpability of these two types of deception.¹⁵⁴ For example, a witness is guilty of perjury if he lies under oath.¹⁵⁵ Lying is defined as asserting something the witness believes to be false.¹⁵⁶ A witness, however, does not commit perjury if he misleads others by asserting something true or not capable of being true or false.¹⁵⁷

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* at 206.

¹⁴⁹ See *id.*

¹⁵⁰ See *South Dakota v. Neville*, 459 U.S. 553, 562 (1983) (holding that the admission into evidence of the defendant's refusal to submit to a blood-alcohol test does not offend his privilege against self-incrimination because no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal).

¹⁵¹ See *White*, *supra* note 8, at 118–19.

¹⁵² See *GREEN*, *supra* note 16, at 77–78.

¹⁵³ See *id.* at 78.

¹⁵⁴ See 18 U.S.C. § 1621 (2006).

¹⁵⁵ See *id.*

¹⁵⁶ See *Bronston v. United States*, 409 U.S. 352, 357 (1973).

¹⁵⁷ See *id.* at 357–58 (stating that perjury statutes do “not [deal] with casual conversation and the [perjury] statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true”). In sum, the Supreme Court expressly held in *Bronston* that the federal perjury statute prohibits lying under oath, but not misleading under oath. See *id.*

The distinction is morally relevant in non-legal contexts. In the most recent presidential campaign, supporters of John McCain asserted that Barack Obama's middle name was "Hussein."¹⁵⁸ They also pointed out that this is a common name in the Muslim world.¹⁵⁹ Both assertions are true.¹⁶⁰ The purpose of the assertion, however, was to mislead the public into believing that Obama is Muslim and it is objectionable, although it would be much more blameworthy to falsely assert that "Obama is Muslim." The difference between lying and misleading should be taken into account when determining if an inappropriate deception was used to obtain a confession.¹⁶¹ Lying in order to obtain a statement must always be considered inappropriate.¹⁶² Nevertheless, misleading a suspect by asserting something that is not false is not necessarily unacceptable.¹⁶³ For example, a police officer acts in an unacceptable manner if he tells a suspect that it is better for him to confess, since DNA tests reveal that he raped the victim when the officer knows there are no such tests.¹⁶⁴ The officer, however, may try to induce a confession through other methods. For example, he could tell the suspect correctly, though with the intent to mislead, that the police officer is about to receive a DNA test that he believes will implicate the suspect in a rape.¹⁶⁵ Although the purpose of the latter assertion is to mislead the suspect into a belief that DNA tests will confirm his guilt, the suspect cannot rationally conclude this statement is true unless he also believes the DNA test will implicate him in the rape.¹⁶⁶ If the suspect makes the wrong inference without gathering additional information to clarify the situation, the police officer is not entirely responsible for the suspect's confession.¹⁶⁷ If it seems reasonable that individuals should be held ac-

¹⁵⁸ See Foon Rhee, *Biden Calls Latest Attacks on Obama Dangerous, Says McCain Campaign Is Inciting Anger*, BOSTON GLOBE, Oct. 9, 2008, at 18.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See GREEN, *supra* note 16, at 78–79.

¹⁶² See *id.*

¹⁶³ See *id.* at 77–78.; White, *supra* note 8, at 118–19.

¹⁶⁴ See GREEN, *supra* note 16, at 77.

¹⁶⁵ See *id.* at 78–79.

¹⁶⁶ See White, *supra* note 8, at 132.

¹⁶⁷ See *id.* Surprisingly, scholars have failed to grasp the significance of the lying/misleading distinction in the context of the admissibility of confessions. Professor White, for example, has argued that obtaining confessions by employing "certain types of trickery" should be banned. See *id.* at 135. Although Professor White's suggestion that officers should not make false statements about the evidence they have against the defendant is sensible, he glossed over the important difference between lying to the defendant about the evidence against him and misleading him into believing that strong evidence exists against him. See *id.*

countable for the consequences of their bad acts, why shouldn't they also be held accountable for the consequences of their bad inferences?¹⁶⁸

3. Exploitation

The police also act inappropriately when they exploit a subject's physical or mental condition or character traits with the aim of obtaining a confession. A suspect is exploited when he is used for someone else's benefit in a way that is detrimental to his own well-being.¹⁶⁹ The exploitation of a person can occur in many ways. It is possible, for example, to exploit a suspect's weaknesses.¹⁷⁰ It is also possible to exploit a suspect's strengths.¹⁷¹ Sometimes what is exploited is a suspect's particular circumstances.¹⁷² These traits or circumstances can be exploited by promises, flattery, or requests.¹⁷³ A suspect can also be exploited by appeals to his sense of friendship, compassion, or a religious, ethical, or legal duty.¹⁷⁴

Sometimes it is not clear that the exploitation of the suspect is morally wrong. For example, it is not obviously unacceptable to use a person's sense of friendship or compassion to get something.¹⁷⁵ In some contexts, however, it may be inappropriate to exploit these feelings.¹⁷⁶ For instance, in *Spano*, an officer who was a good friend of the suspect told the suspect that he would lose his job with the police if he failed to secure a confession.¹⁷⁷ The Supreme Court condemned this type of behavior.¹⁷⁸ It suggested, however, that the exploitation of the subject's sense of friendship and compassion did not necessarily entail the inadmissibility of the confession.¹⁷⁹ Rather, it stated that the totality

at 132. Whereas the former conduct is clearly inappropriate, it is unclear whether the latter type of conduct ought to lead to the inadmissibility of the confession thus obtained. *See id.*

¹⁶⁸ See Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 444 (1997) (arguing that deception, rather than lies, involve the hearer's responsibility and mistaken inferences).

¹⁶⁹ See generally 4 JOEL FEINBERG, HARMLESS WRONGDOING 176-78 (1988).

¹⁷⁰ *See id.* at 181-82.

¹⁷¹ *See id.* at 181; Vittorio Bufacchi, *The Injustice of Exploitation*, 5 CRITICAL REV. INT'L SOC. & POL. PHIL. 1, 2 (2002).

¹⁷² See GREEN, *supra* note 16, at 95.

¹⁷³ See FEINBERG, *supra* note 169, at 181.

¹⁷⁴ *See id.*

¹⁷⁵ See GREEN, *supra* note 16, at 96-97.

¹⁷⁶ See *Spano*, 360 U.S. at 323.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* at 323-24.

¹⁷⁹ *See id.* at 323.

of the circumstances surrounding the statement must be analyzed in order to determine if the officer's conduct was sufficiently blameworthy so as to make the confession inadmissible.¹⁸⁰ Exploiting a suspect by appealing to his sense of friendship and compassion is just one of the factors considered in the analysis.¹⁸¹ Ultimately, the exploitation of such character traits should be considered relevant but not determinative when examining whether the police obtained a confession in a manner that is incompatible with the *Nemo tenetur* principle.¹⁸²

Certain types of exploitation, however, are clearly unacceptable. Take, for example, a shop-owner who drastically increases the price of basic goods after a natural disaster. The shop owner's behavior is unacceptable because he is purposely taking advantage of his customers' vulnerable position. This kind of exploitation becomes even more unacceptable when the person who takes advantage of the situation has intentionally caused the other's defenselessness.¹⁸³ Interrogating a suspect who is under police custody is an example of this type of exploitation.¹⁸⁴ In these situations, the government purposely reduces the suspect to a state of powerlessness in order to obtain a confession by exploiting the suspect's acute vulnerability.¹⁸⁵

Imagine a suspect newly in police custody. At first glance, it would seem that a suspect in police custody has not been placed in a position of great helplessness. When, however, it is taken into account that the suspect's basic needs and freedoms are entirely at the mercy of the police, the suspect's profound vulnerability becomes apparent.¹⁸⁶ The person in custody cannot move without police permission, and he has no power to interrupt the interrogation to use the bathroom, smoke a cigarette, or grab a bite to eat. If the interrogation room is too cold, the suspect can only wait for the police to decide to turn on the heat or give him a blanket. The police, in sum, have almost total control over the person in custody.¹⁸⁷ Therefore, it seems wrong for the police to try to obtain a confession by exploiting the defenselessness of the suspect.¹⁸⁸

¹⁸⁰ *See id.*

¹⁸¹ *See Spano*, 360 U.S. at 323.

¹⁸² *See FEINBERG*, *supra* note 177, at 176–77.

¹⁸³ *See GREEN*, *supra* note 16, at 96–97.

¹⁸⁴ *See Spano*, 360 U.S. at 323.

¹⁸⁵ *See id.*

¹⁸⁶ *See Miranda v. Arizona*, 384 U.S. 436, 457 (1966)

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

The police may nevertheless remedy the situation by advising the suspect of his constitutional right to remain silent and, more importantly, his right to counsel during the interrogation.¹⁸⁹ After the suspect has been advised that the police have to provide him with an attorney during the interrogation to defend him, the suspect no longer has reason to believe that he is utterly defenseless.¹⁹⁰

4. Transgression

The Supreme Court has ruled that after the formal commencement of criminal proceedings against a defendant, the Sixth Amendment's right to counsel bars the State from deliberately eliciting incriminating statements from the defendant unless his lawyer is present.¹⁹¹ The right to counsel afforded by the Sixth Amendment in such circumstances differs from the protections afforded to suspects pursuant to *Miranda v. Arizona* because it is triggered regardless of whether the suspect is being subjected to custodial interrogation.¹⁹² Therefore, it cannot be argued that the purpose of affording defendants with a Sixth Amendment right to counsel during police interrogations is to avoid the exploitation of the state of vulnerability caused by police custody. Furthermore, it cannot be maintained that the chief objective of this right is to protect the suspect against the use of coercion or deception.¹⁹³ What, then, is the evil sought to be avoided by this safeguard?

It is submitted that the Sixth Amendment right to counsel during police interrogations prevents the State from *transgressing* a mutually

¹⁸⁹ See U.S. CONST. amend. VI; *Miranda*, 384 U.S. at 444.

¹⁹⁰ See, e.g., *Miranda*, 384 U.S. at 444; GRANO, *supra* note 88, at 145. The late Professor Joseph Grano suggested that the protections afforded as a result of *Miranda v. Arizona* should be understood as safeguards to guarantee that confessions are obtained in a non-coercive manner. See GRANO, *supra* note 88, at 173–74. Grano further concluded that *Miranda* is problematic because, in his view, it could inadvertently bar confessions that were obtained without coercion. See *id.* at 202. Indeed, under *Miranda*, confessions obtained without coercion can be excluded. See *Miranda*, 384 U.S. at 457. Grano, however, failed to consider that *Miranda* seeks to prevent confessions obtained through exploitation, not just coercion. See *id.*; GRANO, *supra* note 88, at 195. Once *Miranda* is conceived as a case that seeks to prevent the coercion and exploitation of suspects, Professor Grano's argument to overrule *Miranda* loses much of its persuasive force. See *Miranda*, 384 U.S. at 477; GRANO, *supra* note 88, at 195. After all, exploiting the suspect can sometimes be as wrongful as coercing him. See Part III.

¹⁹¹ *Massiah v. United States*, 377 U.S. 201, 201, 207 (1964) (holding that incriminating statements surreptitiously obtained from the defendant by the government after initiation of criminal proceedings and without the defendant's attorney present were inadmissible).

¹⁹² See GRANO, *supra* note 88, at 145.

¹⁹³ See *supra* notes 143–174 and accompanying text.

agreed upon rule in order to obtain an undue advantage over the suspect.¹⁹⁴ Given the complexity of the criminal justice system, those in charge of litigating a criminal case are not the parties (the defendant and the People), but their attorneys (defense attorney and prosecutor). Therefore, once criminal proceedings have commenced, it is understood that the State must communicate with the defendant through his legal representative.¹⁹⁵ Only then can the defendant's rights be protected, since his ignorance of the complexities of the criminal justice system could cause him to inadequately manage his case without the steady hand of his defense counsel.¹⁹⁶

This mutually agreed upon rule between the suspect and the State is transgressed when the police interrogate the suspect without his lawyer after the criminal process has formally begun.¹⁹⁷ The conduct is inappropriate because with this transgression, the police have bypassed one of the foundational rules that undergird our criminal justice system in order to obtain an undue advantage over the suspect.¹⁹⁸ When this happens, the State has essentially "cheated" by violating a basic rule of the legal system in order to prevail over the defendant.¹⁹⁹

CONCLUSION

This Article began by describing three borderline cases in which it was not clear whether a confession had been obtained in violation of the *Nemo tenetur* principle. The *case of the false confession* presented a situation in which a suspect made a voluntary confession but where overwhelming evidence suggested that confession was false. In contrast, the confession obtained in the *case of the truth serum* was highly trustworthy but arguably not voluntary, given that it was induced by a drug. Lastly, in the *case of the unnecessary threat*, the police physically threatened the suspect if she refused to confess. The suspect, however, indicated in a judicial hearing that the threat did not influence her decision to confess.

In order to provide solutions for these three borderline cases, this Article argued that the *Nemo tenetur* principle should be understood as a safeguard against the use of unacceptable methods of police interroga-

¹⁹⁴ See U.S. CONST. amend. VI; *Miranda*, 384 U.S. at 444–45; *Massiah*, 377 U.S. at 207 (White, J. dissenting); GREEN, *supra* note 16, at 58, 63, 66.

¹⁹⁵ See U.S. CONST. amend. VI; *Massiah*, 377 U.S. at 205–07.

¹⁹⁶ See *Miranda*, 384 U.S. at 444–45.

¹⁹⁷ See GREEN, *supra* note 16, at 58.

¹⁹⁸ See *id.* at 58, 63, 66.

¹⁹⁹ See *id.*

tion. The trustworthiness or voluntariness of the statement may be important in other contexts, but they should not definitively determine the admissibility of a confession pursuant to the *Nemo tenetur* principle.

This conception of the *Nemo tenetur* principle suggests that the statement in the *false confession case* was secured in a manner that is compatible with the suspect's constitutional rights and thus would be admissible as evidence of his guilt. That, of course, does not mean that the confession must necessarily be admitted into evidence. In many jurisdictions there are rules that are designed primarily to protect against the admission of evidence with questionable probative value.²⁰⁰

Similarly, this conception of the *Nemo tenetur* principle suggests that the confession in the *truth serum case* also did not violate the suspect's right against self-incrimination and is, therefore, also admissible. In this example, the police had no reason to know the suspect was under the influence of a truth serum, so there is no question of whether they used unacceptable methods of interrogation to obtain the confession. If the police had administered the drug in order to obtain a confession or if they had reason to know that the subject was under the effects of the drug, then the analysis would be different.²⁰¹

Finally, it seems that the confession secured in the *unnecessary threat case* was obtained in a manner incompatible with the *Nemo tenetur* principle. Despite the fact that the suspect's statement in this case was entirely voluntary and highly trustworthy, the interrogation techniques used by the police to obtain the confession were repugnant. This alone should be enough to justify not admitting the confession into evidence. The difficulty of explaining this conclusion by appealing to the confession's voluntariness or trustworthiness counts as a powerful reason in favor of understanding the *Nemo tenetur* principle as a safeguard against the use of inappropriate methods of interrogation rather than as a mechanism for securing the reliability or voluntariness of confessions.

²⁰⁰ See *Mooney v. Holohan*, 294 U.S. 103, 111–13 (1934) (holding that the State's use of testimony known by prosecuting authorities to be false is a denial of due process).

²⁰¹ See *supra* Part III (explaining that the purposeful exploitation of a helpless suspect is improper and must be barred under the *Nemo tenetur* principle).