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Distinguishing 'criminal case' from 'prosecution' requires some thought

Did you ever notice that all the rights provided to defendants in the Sixth Amendment apply during "criminal prosecutions" while the Fifth Amendment right against self-incrimination applies in a "criminal case"?

Did I hear you say, no?

Don't worry, you're not alone.

But the difference between a "prosecution" and a "case" can create problems. Consider, for instance, a recent decision from the 10th U.S. Circuit Court of Appeals, *Vogt v. City of Hays*, Kansas, 844 F.3d 1235 (2017).

Matthew Vogt was a police officer employed by Hays, Kan. He applied for another police position with Haysville, Kan. During his Haysville interview, he admitted that he once improperly retained a knife he had obtained during his work in Hays.

Haysville offered Vogt the job, contingent upon his informing the Hays Police Department about the knife and resolving the situation. After Vogt admitted this to his Hays supervisors, that department turned the incident over to the Kansas Bureau of Investigation.

This led Haysville to withdraw its job offer. It also led to Vogt's being charged with two felony counts relating to his possession of the knife. Vogt's statements were then introduced at a probable cause hearing, but the court found probable cause lacking and dismissed the charges.

In his civil suit against both cities, he alleged that Haysville had compelled him to incriminate himself to his Hays superiors by conditioning its job offer on this demand. Thus, the first issue was whether or not a probable cause hearing could be considered part of a "criminal case."

The 10th Circuit began by looking at *Chavez v. Martinez*, 538 U.S.

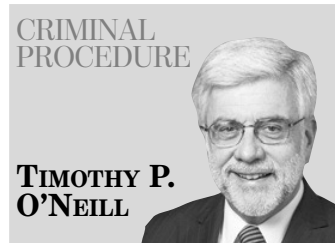
760 (2003). Ben Chavez had alleged that an abusive police interrogation resulted in his statements having been compelled despite the fact that no criminal charges were ever brought against him.

The Supreme Court held that although the police behavior at the interrogation could possibly have violated due process, it could not have violated the self-incrimination clause because there was no criminal case. A four-justice plurality said that a criminal case under the Fifth Amendment requires at least the initiation of criminal proceedings. Two other justices agreed, adding that there must be some "courtroom use" of the statements to trigger the self-incrimination clause.

The 10th Circuit noted that since *Chavez* there has developed a circuit split over what constitutes a "criminal case" under the Fifth Amendment. Three federal circuits hold that the right against compelled self-incrimination is only a trial right. But three other circuits take a broader view, holding that "criminal case" means that the guarantee begins earlier in the process and applies to bail hearings, suppression hearings, probable cause hearings and arraignments. (The 7th Circuit is part of this latter group. See *Best v. City of Portland*, 554 F.3d 698 (2009).)

To decide this issue, you must first differentiate between the terms "criminal prosecution," "criminal trial" and "criminal case." The Sixth Amendment provides in part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

The Supreme Court has held that a criminal prosecution under the Sixth Amendment begins at the commencement of adversary



Timothy P. O'Neill is the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

proceedings of any kind and concludes at either acquittal or sentencing. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). Thus "prosecution" and "trial" are not synonymous; a prosecution includes a trial, but not vice versa.

But the Fifth Amendment self-incrimination clause does not mention either "criminal prosecutions" or "trial"; it applies to a "criminal case." And the 10th Circuit concludes that a "criminal case" is arguably broader than a "trial" or even a "criminal prosecution."

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It first turns to ordinary usage. It cites professor Donald Dripps for his observation that "A 'case' is in any event not necessarily identical to a 'prosecution.' ... We speak routinely of police investigators working on a case before they have a suspect. If we think of a 'case' as a potential 'prosecution' we can square the text of the Fifth Amendment with its history."

Vogt then turns to history. James Madison's original draft of the self-incrimination clause provided that no person "shall be compelled to be a witness against himself." There is no limitation of any kind. During floor debate in the House, a representative proposed that the phrase "in any criminal case" be added to avoid conflict with "laws passed."

It is unclear which laws he was referring to. One suggestion is that it may be in reference to that part of the Judiciary Act of 1789 that allowed the judiciary to compel production of documents in civil cases. Under this reading, the phrase restricts the guarantee only to potential criminal, but not civil, liability.

Moreover, there is no indication that the Framers wanted to restrict "criminal case" to "criminal trial." As Thomas Davies has noted, "If the Framers had meant to restrict the right to 'trial,' they could have done so." Instead, the Sixth Amendment clusters all the rights possessed by a defendant after adversary proceedings have begun by the limiting language, "In all criminal prosecutions." The Fifth Amendment includes no such limitation.

The 10th Circuit held for the plaintiff on this issue by finding that the allegation that his compelled statements were used at a probable cause hearing adequately pleaded a Fifth Amendment violation. It concluded that a "criminal case" can exist before either a "criminal trial" or even a "criminal prosecution" commences.

The U.S. Supreme Court, of course, still has the last word on this issue. But *Vogt* reminds us that not even 225 years of case law has solved all the interpretive puzzles of the Bill of Rights.