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BURDENING THE FIFTH AMENDMENT: TOWARD A PRESUMPTIVE BARRIER THEORY

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INTRODUCTION

The privilege against self-incrimination contained in the fifth amendment of the United States Constitution[1] has proven to be a difficult provision of the Bill of Rights to interpret.[2] The language used by the framers establishing the privilege is both ambiguous[3] and misleading,[4] thereby making textual analysis unconvincing. Similarly, the historical background and intent of the framers are unclear,[5] features which otherwise would assist in defining the proper scope of the privilege. Finally, the policies that the fifth amendment is designed to further[6] are seriously disputed, leaving the privilege without an agreed upon rationale.

One particularly troublesome problem which the Supreme Court has had to face in interpreting the privilege has been the need to set limits on the kind and intensity of pressure the state may bring to bear upon an individual to reveal what the state wishes to know. At one extreme, pressure in the form of physical coercion might be exerted by the state to obtain damaging information from a suspect. The Supreme Court, however, has had little difficulty classifying physical force as impermissible compulsion.[7] Similarly, the threat of the criminal contempt sanction has been held to violate the privilege against self-incrimination.[8] Even many

[1] The relevant language provides that "no person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[2] *See generally* Berger, *The Unprivileged Status of the Privilege Against Self-Incrimination*, 15 AM. CRIM. L. REV. 191 (1978).

[3] The greatest ambiguity arises from the compulsion requirement, a standard which gives no indication as to how much pressure the fifth amendment is willing to tolerate. *See generally* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977). The "witness" requirement is of a similar character. While it suggests that compulsion upon the accused to assist the state at trial is barred, the Court has instead held that the term only applies to the act of being a witness in a testimonial or communicative sense. United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966).

[4] The "no person" language of the privilege against self-incrimination gives no indication that persons acting in a representative capacity in holding documents are barred from asserting the fifth amendment when served with a subpoena. The Court, however, has imposed such a qualification. Bellis v. United States, 417 U.S. 85 (1974).

[5] The historical development of the right to remain silent in British common law tradition and American colonial experience covers many centuries and is simply too vast to comprehensively assess. Nevertheless, substantial historical treatment of the privilege can be found in L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250 (McNaughton rev. ed. 1961); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

[6] The dispute over the policies behind the right to silence has been intense. McNaughton saw the privilege as: 1) protecting the innocent defendant from a bad performance on the stand; 2) avoiding burdening the courts with false testimony; 3) encouraging witness testimony by precluding their compulsory incrimination; 4) a recognition of the practical limits of governmental power; 5) preventing the use of procedures employed by such discredited institutions as the Star Chamber; 6) justified by history; 7) serving to avoid distasteful situations; 8) spurring the prosecutor to perform a complete investigation; 9) frustrating "bad laws" which infringe on political and religious beliefs; 10) deterring "fishing expedition" prosecutions; 11) preventing torture and inhumane treatment; and 12) contributing to a fair individual-state balance in criminal justice. J. WIGMORE, *supra* note 5, § 2251 at 310–18. Jeremy Bentham, in contrast, criticized the privilege as 1) confusing interrogation with torture; 2) being linked to institutions such as the Star Chamber and improperly discarded with those institutions; and 3) simply assumed to be proper, thus discouraging criticism. J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827); 7 THE WORKS OF JEREMY BENTHAM 446–66 (Bowring ed. 1843) *cited in* J. WIGMORE, *supra* note 5, § 2251, at 297 n.2. Most recently, the policy debate has focused upon the degree to which the fifth amendment protects privacy interests. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463 (1976) (Brennan, J., dissenting); Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

[7] In *Bram v. United States*, the Court held that "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence." 168 U.S. 532, 542–43 (1897). A similar result was achieved under the due process clause to control state criminal practice. Brown v. Mississippi, 297 U.S. 278 (1936).

[8] Legal compulsion to incriminate one's self as reflected in the contempt sanction is one of the historical sources of the fifth amendment. *See* Berger, *supra* note 2, at 193 n.9. The Court's rejection of such compulsion was ex-

far less coercive tactics have been deemed unconstitutional compulsion, particularly when employed by law enforcement officers.[9]

Despite the Court's unmistakable rejection of overt coercion to obtain admissions from a suspect,[10] and its special concern for the quality of the police interrogation process,[11] the Court has never intimated that information obtained as a result of any pressure, however slight, is barred by the privilege against self-incrimination. To the contrary, only pressure that amounts to compulsion is prohibited by the fifth amendment language. But, when the state seeks information and offers the individual being questioned the choice of providing it or facing a consequence, it is difficult to determine whether constitutional bounds have been exceeded.[12] Torture, the threat of being jailed, and coercive interrogation techniques may well deprive an individual of the ability to choose whether or not to give information; it is not clear that consequences of a lesser magnitude have the same effect.[13]

Judging how heavily the state may burden the decision to exercise or forego the fifth amendment privilege against self-incrimination is a concededly problematic undertaking.[14] Nevertheless, the formulation of a standard is essential to insure principled decisionmaking. Unfortunately, however, the Supreme Court has thus far avoided the task. The decisions from the Warren era suggest in very broad language that *any* burden on the exercise of the right to remain silent is forbidden,[15] while more recent rulings have barred only those penalties *automatically* imposed for assertions of the privilege.[16] Neither extreme, however, represents a satisfactory resolution of the conflicting interests involved. Rather, as argued below, the fifth amendment should stand as a presumptive barrier against the imposition of sanctions on those who claim their right to silence, allowing adverse consequences only when the state is pursuing a substantial state interest which it cannot achieve in alternative ways.

The Limits of the Privilege Against Self-Incrimination

Although the Court has avoided the establishment of standards to assess state imposed burdens on the fifth amendment, it has elsewhere defined precise limits to the scope of the privilege against

pressed in Murphy v. Waterfront Comm. of N.Y., where it stated that one of the foundations of the privilege is "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." 378 U.S. 52, 55 (1964). Testimonial immunity, however, eliminates the self-incrimination potential, Kastigar v. United States, 406 U.S. 441 (1972), and contempt penalties can then be imposed. *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966); Shillitani v. United States, 384 U.S. 364 (1966).

[9] *See e.g.,* Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (forfeiture of political party positions); Miranda v. Arizona, 384 U.S. 436 (1966) (police custodial interrogation).

[10] *See* notes 7-8 *supra.*

[11] The absence of legal compulsion in the police interrogation process would arguably justify exclusive use of the due process clause to control police questioning. *See* J. Wigmore, *supra* note 5, § 2252, at 328-29. The Court's *Miranda* decision not only rejected that restrictive view of the privilege, but also demonstrated a special concern in the affirmative warning requirements that it has refused to apply elsewhere. United States v. Mandujano, 425 U.S. 564 (1976) (grand jury). The special concern for police interrogation is a result of the secrecy of the process, Miranda v. Arizona, 384 U.S. at 448-50; opportunities for its abuse, *id.* at 445, *citing* National Commission on Law Observance and Enforcement (1931); and the inadequacy of case-by-case review, Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 Mich. L. Rev. 59, 102-03 (1966).

[12] The special problems created when tactics such as deception or promises of benefits are employed to obtain information are not treated herein. *See generally* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions,* 1975 Wash. U.L.Q. 275. The most recent Supreme Court pronouncement on the subject suggests that there is a great deal of leeway in the state's choice of tactics. *See* Oregon v. Mathiason, 429 U.S. 492 (1977); Berger, *supra* note 2, at 204-08. It is assumed throughout, however, that the individual is not being misled in the choices presented to him.

[13] In a sense, choice is always present since the individual can always remain silent and accept the dire consequence. However, it is apparent that the Court has not assessed the ability to choose from the perspective of heroes and martyrs.

[14] *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis,* 55 Tex. L. Rev. 193, 246-51 (1977); Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure,* 75 Mich. L. Rev. 1214 (1977).

[15] Griffin v. California, 380 U.S. 609, 614 (1965), held unconstitutional prosecutorial comments on a defendant's silence at trial and judicial acquiescence in the comments as a "penalty imposed by courts for exercising a constitutional privilege" cutting "down on the privilege by making its assertion costly." Elsewhere the Court had expressed its view of the privilege as a right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[16] *See e.g.,* Baxter v. Palmigiano, 425 U.S. 308 (1976) (adverse inference from invocation of the privilege against self-incrimination at a prison disciplinary hearing held constitutional).

self-incrimination. In turn, the fifth amendment only regulates burdens affecting interests that the privilege protects; claims falling outside the specific range of the self-incrimination clause must find protection elsewhere.[17]

The Court has, for example, interpreted the language of the privilege to exclude its application to organizations.[18] The fifth amendment provides that "no person" shall be compelled to incriminate himself, and the Court has chosen a literal construction of that phrase. Not only can organizations not assert the privilege, but their agents in possession of materials sought are similarly barred despite potential personal incrimination.[19] Most recently, in denying self-incrimination protection to a three-man law firm, the Court indicated that the governing standard is the capacity in which the papers sought are held rather than the character of the organization holding them.[20] The Court's treatment of assertions of privilege by organizations and their representatives provides an indication of the limiting effect that the "no person" qualification has on the fifth amendment. Organizations are not the only entities holding papers in a representative capacity, and when private material is turned over to another by its owner the self-incrimination protection need not necessarily follow the documents. Such is the current view of the Supreme Court:[21] the 'person' who cannot be compelled to incriminate himself is the accused; those who hold documents for him, but who would not be incriminated by them, cannot assert the privilege.

Rather than protecting the privacy of documents,[22] the Court has construed the privilege against self-incrimination to prevent obtaining documents in a prohibited manner from one who

[17] The Court, for example, has utilized the due process clause rather than the fifth amendment to invalidate the use of pretrial silence, following a *Miranda* warning, for impeachment use at trial. Doyle v. Ohio, 426 U.S. 610 (1976). Similarly, the absence of fifth amendment warning requirements in the grand jury, United States v. Mandujano, 425 U.S. 564 (1976), has caused resort to the supervisory power rationale to provide alternative regulation United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), *cert. denied,* 436 U.S. 937 (1978).

[18] *See, e.g.,* McPhaul v. United States, 364 U.S. 372 (1960) (Civil Rights Congress); United States v. White, 322 U.S. 694 (1944) (labor union); Wilson v. United States, 221 U.S. 361 (1911) (corporation).

[19] McPhaul v. United States, 364 U.S. 372, 380 (1960).

[20] Bellis v. United States, 417 U.S. 85 (1974). *See generally* 39 ALB. L. REV. 545 (1975); 3 HOFSTRA L. REV. 467 (1975). If one views the function of the privilege as narrowly embracing the protection of the "inner sanctum of individual feeling and thought," 417 U.S. at 91, the decisions are understandable. The danger lies in the fact, however, that the smaller the organization the greater the potential for organization documents to encompass individual feelings and thoughts. And, there is no guarantee that existing doctrine will recognize such distinctions. *But see* In re Grand Jury Proceedings, 558 F.2d 1299 (8th Cir. 1977).

[21] In Couch v. United States, 409 U.S. 322 (1973), the Internal Revenue Service directed a summons to the petitioner's accountant directing the production of all documents relating to the tax liability of the client. Couch sought to invoke the privilege against self-incrimination to bar production of the documents by her accountant, but was unsuccessful. The Court, however, viewed the privilege as "an intimate and personal one," 409 U.S. at 327, and noted that "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." *Id.* at 331. The Court specifically rejected ownership of documents as the relevant standard for the privilege, but did recognize that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsion upon the accused substantially intact." *Id.* at 333.

In Fisher v. United States, 425 U.S. 391 (1976), the taxpayer, unlike the petitioner in *Couch,* had retrieved his tax records from his accountant. But, in order to obtain legal advice, the documents were turned over to the taxpayer's attorney who asserted the self-incrimination clause in an effort to resist their production in response to an IRS subpoena. The Supreme Court, in language much stronger than that used in *Couch,* rejected this fifth amendment argument. The Court succinctly concluded that there was no violation of the fifth amendment in the production order because its "enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself." *Id.* at 397. Neither the fact that the taxpayer in *Fisher* had reasserted control over the documents nor the differing expectations of privacy and confidence one might have in turning documents over to an attorney rather than an accountant (due to the evidentiary privilege applicable to the former) was deemed sufficient to alter the result. Although *Fisher,* like *Couch,* included the possibility that fifth amendment protection might be available in situations of constructive possession or temporary relinquishment, *Id.* at 398, no indication was given as to what set of facts the Court would deem sufficient. To the contrary, the Court's decisions seem more in tune with a rule that "a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights." California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974).

[22] *See* Fisher v. United States, 425 U.S. 391, 426–28 (1976) (Brennan, J., concurring in the judgment); Comment, *A Paper Chase: The Search and Seizure of Personal Business Records,* 43 BROOKLYN L. REV. 489 (1976); Comment, *The Search and Seizure of Private Papers; Fourth and Fifth Amendment Considerations,* 6 LOY. L.A.L. REV. 274 (1973); Comment, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis,* 69 NW. U.L. REV. 626 (1974).

would be incriminated by their production. Thus, if an item can be obtained through a search and seizure, there is no compulsion and thus no fifth amendment violation.[23] Similarly, if the act of production is not incriminatory, the fact that the contents of the documents sought are incriminatory provides no basis for invocation of the privilege.[24] And finally, even if compulsion directs an incriminatory act by the accused, the privilege can be circumvented by a grant of testimonial immunity.[25]

It is important to recognize, however, that the privilege does not protect against all forms of incrimination. The specific language of the privilege barring compulsion "to be a witness" against oneself has been limited to evidence that is testimonial or communicative in character.[26] The Court has stated that the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."[27] Not only is the fifth amendment not a barrier to all forms of coerced assistance to the state, but it also makes no distinction between passive or affirmative aid.[28]

The only expansively interpreted provision of the privilege against self-incrimination has been the clause limiting its application to "any criminal case." Literally read, the language suggests that compulsory self-incrimination is forbidden only at the criminal trial stage of legal proceedings. Such a construction, however, would virtually eliminate the privilege against self-incrimination as a meaningful guarantee. Allowing the state to compel admissions at one proceeding for later use in a criminal trial would make the right to silence at trial an empty formality. The Court has, therefore, accepted the necessity of permitting assertion of the privilege in any setting in which self-incrimination may occur,[29] including the grand jury,[30] a congressional hearing,[31] or a civil proceeding.[32]

It has also been deemed necessary to extend self-incrimination protection beyond directly incriminating evidence to include information forming a link in the chain to such evidence.[33] And, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result for an

[23] In Andresen v. Maryland, 427 U.S. 463 (1976), the Court upheld the constitutionality of a search warrant for personal business papers. The Court noted that the items in question were voluntarily committed to writing, obtained by the police who conducted the search and seizure, and authenticated by a handwriting expert. *Id.* at 473. The only compulsion on Andresen was the inherent pressure to refute unfavorable evidence at trial and that was not considered to be a fifth amendment violation. Williams v. Florida, 399 U.S. 78, 83–84 (1970). This is in accord with Dean Wigmore's view of the privilege against self-incrimination. J. WIGMORE, *supra* note 5, § 2264, at 380.

[24] In Fisher v. United States, 425 U.S. 391 (1976), the Court permitted enforcement of a subpoena for the production of records held by the taxpayer's attorney and indicated that the records could also have been subpoenaed from the taxpayer himself. The Court felt that such an order directed to the taxpayer "does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Id.* at 409. The Court did concede that response to a documentary subpoena admits possession of the documents and may provide implicit authentication. Whether this provides the necessary incriminatory potential, however, must be judged on a case by case basis. *Id.* at 410–11. *See also* J. WIGMORE, *supra* note 5, § 2264, at 380. But, under the Court's theory, it would appear that only writings whose possession is intrinsically incriminating are likely to receive any fifth amendment protection, and this is certain to constitute a narrow sphere. Whether the first or fourth amendments will add anything to the Court's resolution was left undecided. 425 U.S. at 401 n.7.

[25] The Court has held that a grant of testimonial immunity provides sufficient protection to allow the state to compel the production of the information it seeks. Kastigar v. United States, 406 U.S. 441 (1972). The immunity, however, must encompass both use and derivative use of the evidence. Counselman v. Hitchcock, 142 U.S. 547 (1892). But, if the same evidence is obtained from an independent source it may be admitted over fifth amendment objection. *See, e.g.,* United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

[26] United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966).

[27] Schmerber v. California, 384 U.S. 757, 764 (1966).

[28] Mr. Justice Fortas sought to distinguish the display of an individual in a lineup from further volitional acts that might be required of him. His argument that affirmative aid is barred by the fifth amendment was rejected. United States v. Wade, 388 U.S. 218 (1967) (Fortas, J., dissenting in part).

[29] The fifth amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[30] United States v. Mandujano, 425 U.S. 564 (1976); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[31] Watkins v. United States, 354 U.S. 178 (1957).

[32] McCarthy v. Arndstein, 266 U.S. 34 (1924).

[33] Blau v. United States, 340 U.S. 159 (1950).

assertion of privilege to be valid."[34] But, failure to claim the privilege or the provision of partial information may be deemed a waiver of fifth amendment rights.[35]

Much of the doctrine that now governs fifth amendment decisions appears to be a reflection of the historical origins of the privilege against self-incrimination.[36] The state is thus barred from torture and placing suspects in the "cruel trilemma of self-accusation, perjury or contempt,"[37] but little more. The Court has also refused to utilize the privilege to protect broader privacy interests,[38] and the narrowed scope of the Court's fifth amendment decisions is the result. Yet, given all the qualifications which the Court has imposed upon the privilege against self-incrimination, one might anticipate a clear and consistent policy of protection for fifth amendment interests when they are validly claimed. But, as the case law and supporting analysis indicate, such is not the case. Not only has the scope of the privilege been narrowed, but the state has been permitted to coerce individuals into forgoing its exercise, and no persuasive rationale explains the Court's policy.

Regulating Fifth Amendment Burdens

A. The Absolutist Position

The compulsion requirement of the privilege against self-incrimination and its interpretation by the Court, provides some support for the view that the fifth amendment is an absolute barrier to state imposed burdens on the right to remain silent. Simply stated, any state action which "compels" self-incrimination violates the privilege. The meaningfulness of this approach, however, is tied to the Court's conception of compulsion. Moreover, the Court may feel constrained to read the requirement narrowly in light of the fact that state actions so classified would be totally barred.[39]

In selected instances the Court has used absolutist language to reject a burden imposed by the state on the privilege against self-incrimination. Such was the case in *Griffin v. California*,[40] where the Court held that the fifth amendment bars comment upon a defendant's failure to testify. The Court characterized comments upon a defendant's trial silence and judicial acquiescence in those comments as "a penalty imposed by courts for exercising a constitutional privilege" and objected to the fact that it "cuts down on the privilege by making its assertion costly."[41]

The Court's decision in *United States v. Jackson*[42] similarly reflects a broad view of judicial power to reject unconstitutional compulsion. *Jackson* held the capital punishment provision of the federal kidnapping statute unenforceable because only the jury could impose it, a sentencing structure which served to deter assertion of the right to plead not guilty and be tried by a jury. The Court noted that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right."[43] Like *Griffin*, the death pen-

[34] Hoffman v. United States, 341 U.S. 479, 486–87 (1951)

[35] Provision of partial information may be deemed a waiver because of the Court's concern for "distortion of facts by permitting a witness to select any stopping place in the testimony." Rogers v. United States, 340 U.S. 367, 371 (1951). As a result, "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." *Id.* at 373. The Court's waiver analysis has, however, been subject to criticism. *See generally* Dix, *supra* note 14.

Elsewhere, as to witnesses, the Court has held that testimony in response to official questioning is not compelled self-incrimination. United States v. Kordel, 397 U.S. 1 (1970). Similarly, responses on a tax return are not compelled self-incrimination. Garner v. United States, 424 U.S. 648 (1976). In such cases, the privilege must be invoked to be applicable, although the Court has been less willing to rely on a waiver theory for this analysis. *Id.* at 654 n.9.

[36] *See* Ritchie, *supra* note 3, at 385–86.

[37] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[38] The Court has stated that: "The Framers addressed the subject of personal privacy directly in the Fourth Amendment.... They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination." Fisher v. United States, 425 U.S. 391, 400 (1976).

[39] In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court held that the fifth amendment was not offended by a procedure in which prison disciplinary defendants facing potential criminal charges suffered an adverse inference in the prison proceeding if they exercised the privilege against self-incrimination. In contrast, the dissent put forward a persuasive argument that the compulsion was "obvious." *Id.* at 333 (Brennan, J., dissenting). The Court's narrow reading of compulsion may well be partly out of a concern that the traditional use of adverse inferences outside of the criminal trial not be undercut, a result that might arguably have followed had the inference been barred in the prison context. *Id.* at 319. *See also* Williams v. Florida, 399 U.S. 78 (1970) (fifth amendment no bar to pretrial notice of alibi defense).

[40] 380 U.S. 609 (1965).

[41] *Id.* at 614. Since then the Court has held that a no adverse inference instruction given over the defendant's objection does not constitute impermissible comment on the defendant's failure to testify nor does it amount to "compulsion" forbidden by the fifth amendment. Lakeside v. Oregon, 435 U.S. 333 (1978).

[42] 390 U.S. 570 (1968).

[43] *Id.* at 583.

alty provision of the statute constituted an intolerable burden upon the exercise of the fifth amendment.[44]

The language in *Griffin* and *Jackson* suggests that the state may not penalize the assertion of fifth amendment rights, but does not explain why such penalties are barred. On the one hand, the penalties might be so severe as to cause all information obtained as a result of them to be considered compelled; such would be the case if the state presented an individual with the choice of revealing information or submitting to torture.[45] But, there are few penalties which so uniformly result in the deprivation of free choice and the elimination of the ability to resist. Indeed, the Court's unwillingness to invalidate guilty pleas secured under the kidnapping statute prior to *Jackson*[46] and the numerous decisions refusing to overturn convictions despite improper prosecutorial comment,[47] may indicate that the Court does not believe that the *Jackson* and *Griffin* penalties only produce "compelled" admissions.

It is also possible to take the Court literally and read *Griffin* and *Jackson* as barring the imposition of any consequence whatsoever on the assertion of the privilege against self-incrimination. Included would be penalties which alone produce compulsion, as well as others, which may exert pressure in favor of disclosure, but can be resisted. In effect, such an approach would implicitly read the compulsion requirement of the fifth amendment as encompassing a broad array of state tactics since it is only *compulsion* to be a witness against oneself that the privilege forbids. Seemingly, under this view, any state actions that undercut an individual's pure and free choice to assert or forego the privilege would be barred, and compulsion would then control not only situations where the only real choice available was self-incrimination, but also those in which the alternatives were not equally advantageous.[48]

A position barring any consequence for the assertion of fifth amendment rights is attractively simple and seemingly offers unwavering protection for the right to remain silent. Both benefits may, however, be more illusory than real. If the rule is unyielding, it may well sacrifice important state interests in its application, and to avoid such a result the courts would undoubtedly find that what appear to be penalties imposed on the right to silence are really something else.[49]

Beyond the potential deceptiveness of the theory barring all state imposed consequences for assertion of the privilege, it must also be stated that neither history nor precedent support so expansive a reading of the fifth amendment. The British origins of the privilege against self-incrimination are found in cases of physical torture and administration of the coercive oath *ex officio*,[50] while the American case law has focused upon abusive interrogation techniques.[51] Both traditions are far removed from

[44] Of similar character was the Court's decision in Brooks v. Tennessee, 406 U.S. 605 (1972). There, the Court held the Tennessee rule requiring the defendant to testify before his other witnesses to be a violation of the fifth amendment. The Court felt the rule to be a contradiction of the defendant's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964). *Brooks*, *Jackson* and *Griffin* all reflect special concern for the defendant's right to remain silent at his criminal trial. *See* Berger, *supra* note 2, at 195–201.

[45] Torture would also constitute a due process violation. *See e.g.*, Chambers v. Florida, 309 U.S. 227, 237–38 (1940). Mental coercion is also barred. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[46] *Jackson* did not hold all guilty pleas under the federal kidnapping statute to be compelled; rather, it categorized the structure as one in which guilty pleas were needlessly encouraged. 390 U.S. at 583. In light of this, the Court could subsequently uphold the constitutionality of pleas accepted under the statute. Brady v. United States, 397 U.S. 742 (1970).

[47] The courts either hold such comments to be harmless error or deem them cured by jury instructions. *See, e.g.*, Lussier v. Gunter, 552 F.2d 385 (1st Cir. 1977); State v. Sawicki, 173 Conn. 389, 377A.2d 1103 (1977); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976).

[48] The Court's statements in *Griffin* that the privilege bars making its assertion "costly," 380 U.S. at 614, and in *Malloy* that the decision to speak must be "unfettered" and without penalty, 378 U.S. at 8, represent the most supportive language for this view.

[49] California v. Byers, 402 U.S. 424 (1971), perhaps best illustrates this problem. There, the Court upheld the constitutionality of the California "hit and run" statute, similar to those in force in all the states and the District of Columbia. It is certainly arguable, as reflected in Mr. Justice Harlan's concurrence, that a requirement that drivers identify themselves after an accident is too important a state interest to sacrifice. Instead, the plurality chose to treat the case as one in which the risk of self-incrimination was insubstantial. Baxter v. Palmigiano, 425 U.S. 308 (1976), in which the Court refused to consider the use of an adverse inference from silence in a prison disciplinary hearing as an unconstitutional penalty, is similar in character.

[50] *See generally* sources cited *supra* note 5. The history reflects primary concern for physical and legal compulsion.

[51] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Bram v. United States, 168 U.S. 532 (1897). Before incorporation of the fifth amendment and its application to the states in Malloy v. Hogan, 378 U.S. 1 (1964), the issue was also treated as a due process requirement to

the variety of lesser consequences that the invocation of the privilege may entail, and it does not seem appropriate to place them all in the same category. Severe penalties may negate free choice, but minor sanctions necessarily do not. The compulsion language of the privilege bars the state from depriving its citizens of the ability to choose between self-incrimination or silence, thereby placing them between the "rock and the whirlpool."[52] Requiring individuals to make difficult decisions, but not impossible ones, is not so clearly barred.[53]

It appears more likely that the burdens on the fifth amendment found in *Griffin* and *Jackson* were rejected for reasons unrelated to a concern for their inherently compulsive character or a desire to proclaim a ban on any consequence for assertion of the privilege. Exactly what characteristics of the penalties made them exceed constitutional bounds, however, is left unclear.[54] Instead, the Court used language suggestive of theories that even further analysis will not support. Perhaps the reason, as Mr. Justice Harlan observed, is that due "in part to the flagrant facts often before the Court" its cases disclose that the language in many of the opinions overstates the actual course of decision.[55] Yet, this does not help us to assess what consequences the state may validly impose.

B. Barring Coerced Waivers

In another series of fifth amendment cases, the Supreme Court was faced with a variety of state penalties imposed upon individuals who refused to waive the protection of the privilege against self-incrimination. At issue were state statutes and policies requiring officials or agents in the public sector to respond to questions propounded in an investigation of their activities. In addition, waivers of the privilege were demanded. The uniform invalidation of these tactics, however, conceals how little real protection the Court is willing to afford to those who wish to exercise their right to silence.

Garrity v. New Jersey[56] was the first of the waiver-penalty decisions. This 1967 case involved a New Jersey probe into the alleged fixing of traffic tickets by local police officers. The officers were questioned about their involvement after being warned that their answers could be used against them in a criminal proceeding and that state law subjected them to removal from office for failure to respond in such an inquiry. The questions were answered and the answers were, in turn, used in a subsequent criminal prosecution.

The opinion of the Court characterized the statements obtained from the police as coerced and therefore inadmissible.[57] The reason was that the "choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."[58] Similarly, the Court rejected the notion that the privilege had been waived in light of the duress laden choice facing the police officers.[59]

Obviously, the decision whether or not to exercise the privilege against self-incrimination is made more difficult when a consequence follows assertion of the right. Whether or not the consequence has as its purpose the encouragement of fifth amendment waivers, it cannot avoid having such an effect. This should not, in and of itself, result in "compelled" self-incrimination unless the mere fact that the choice of silence or self-incrimination—made more difficult by the consequence—is sufficient to constitute compulsion. In other words, a decision such as *Garrity* suggests that only a freely made choice of self-incrimination is constitutional, and the fact that the accused must weigh an additional state imposed consequence in his decision means that his choice can no longer be a free one.

Whereas *Garrity* was concerned with the admissibility of statements obtained without a grant of immunity and upon threat of dismissal, it did not resolve the question of whether the state could impose the consequence of dismissal if the individual being questioned chose to remain silent. Even though *Garrity* established that such statements are unconstitutionally compelled, barring their use in a criminal prosecution solves the fifth amendment problem and would presumably then authorize the

utilize only voluntary statements. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959); Watts v. Indiana, 338 U.S. 49 (1949).

[52] Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926).

[53] McGautha v. California, 402 U.S. 183, 213 (1971).

[54] The common feature of *Griffin, Jackson* and *Brooks*, the focus upon the right to silence at trial, is not a sufficient explanation of the decisions in light of *McGautha*, where the burdening of the right by precluding one who exercised it from addressing the sentencer on the issue of punishment was upheld.

[55] Miranda v. Arizona, 384 U.S. 436, 509–10 (1966) (Harlan, J., dissenting).

[56] 385 U.S. 493 (1967).

[57] *Id.* at 497–98.

[58] *Id.* at 497.

[59] "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.* at 498.

imposition of the consequence. *Garrity* is thereby converted into an unofficial grant of immunity, rather than serving as a barrier to the imposition of sanctions for silence.

Spevack v. Klein,[60] decided the same day as *Garrity*, presented the opportunity to review the imposition of a *Garrity*-type sanction. The petitioner in *Spevack* was disbarred for refusing to provide information to a judicial inquiry after claiming the privilege against self-incrimination. As a result of *Garrity*, however, such statements are inadmissible. But in rejecting the disbarment penalty, the *Spevack* Court hinted that ultimate suppression is not sufficient to satisfy the privilege.[61] Not only is the state, therefore, precluded from utilizing the results of impermissible sanctions, but even the sanction itself may not be imposed. By focusing upon the coerced character of the statements obtained in *Garrity* and the invalidity of pressure used to obtain such statements in *Spevack*, the Court cast some doubt upon the ability of the state to call upon its servants to account for their conduct. Only Mr. Justice Fortas in *Spevack* suggested that dismissal for failure to respond in an official inquiry was proper as long as there was no coerced waiver of the privilege against self-incrimination.[62] And, by 1968, with Mr. Justice Fortas writing the majority opinions,[63] this became the accepted doctrine.[64]

The Court also clarified in its 1968 decisions the role that immunity should play in judging the validity of coercive state sanctions imposed upon those who remain silent. It had been previously established in *Garrity* that statements resulting from coercive sanctions are inadmissible, thus effectively conferring testimonial immunity. But, the existence of immunity by operation of law, particularly where the individual being questioned is not informed of it or is led to believe there is no immunity, did not save the sanctions.[65] The position was reaffirmed in the Court's 1973 decision in *Lefkowitz v. Turley*.[66] The opinions seem to suggest that only a refusal to respond after a formal grant of immunity can justify imposing a sanction for such refusal.

The Court's waiver-penalty decisions give no real indication as to why the penalties were declared invalid. The only similarity had been the economic character of the penalties, including loss of government employment, disbarment, and a five-year ban from government contracts.[67] Yet, these economic sanctions are not necessarily equivalent in their impact, although the Court believed that a waiver obtained "under threat of loss of contracts would have been no less compelled than a direct request for the testimony without resort to the waiver device. A waiver secured under threat of substantial economic sanction cannot be termed voluntary."[68]

The Court, however, has not stopped its line of decisions with "substantial economic sanctions." The 1977 ruling in *Lefkowitz v. Cunningham*[69] applied the waiver-penalty principle to a political party official called to testify before a grand jury about his conduct in office. For refusing to waive the privilege against self-incrimination, the official lost his party positions and was barred from regaining them or any other public office for five years. None of the positions from which the official was removed were salaried; therefore, a label of "substantial economic sanction" could not have been applied to the state policy. Instead, the Court found that removal from office was precluded because

[60] 385 U.S. 511 (1967).

[61] The petitioner in *Spevack* faced questioning with the belief that his answers would be used against him. First, when Spevack was questioned, *Garrity* had not yet been decided; second, Cohen v. Hurley, 366 U.S. 117 (1961), had ruled the privilege unavailable in similar circumstances; third, a waiver of immunity was demanded. Under these conditions, where Spevack had good reason to believe he enjoyed no immunity, it would have been unfair to uphold the penalty on the theory that suppression of the evidence was available. Nevertheless, the Court made no mention of *Garrity* in its decision.

[62] 385 U.S. at 519 (Fortas, J., concurring in the judgment).

[63] Uniformed Sanitation Men Ass'n. v. Comm'r of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968).

[64] In *Gardner*, Mr. Justice Fortas wrote:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, ... the privilege against self-incrimination would not have been a bar to his dismissal.

392 U.S. at 278.

[65] The conditions present in *Spevack*, were not present in *Gardner*. Nevertheless, the Court held that "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." 392 U.S. at 279.

[66] 414 U.S. 70, 80–81 (1973).

[67] Spevack v. Klein, 385 U.S. 511 (1967), involved disbarment. Lefkowitz v. Turley, 414 U.S. 70 (1973), concerned a ban on government contracting for five years, and the remaining cases dealt with government employees.

[68] 414 U.S. at 82–83.

[69] 431 U.S. 801 (1977).

the sanction was "potent"[70] and "inherently coercive."[71]

It is difficult to imagine that the grand jury witness in *Cunningham* was "compelled" to incriminate himself in the same sense as the police officers in *Garrity*. Indeed, the fact that Cunningham asserted his right to remain silent suggests that the compulsion was far less effective. And, if the *compulsion* is not "*compelling*," how is the fifth amendment violated?

Perhaps the answer to this question lies in another unifying thread in the *Garrity* line of decisions. In each instance, the state penalty was concededly dramatic and either imposed or threatened to impose a consequence solely as a result of the invocation of the privilege against self-incrimination. The simple refusal to provide information without a grant of immunity was the exclusive triggering device. The Court may well have perceived this to be an unfair imposition on the constitutional right to remain silent. Rather than reaching a judgment on the constitutionality of the sanction based exclusively on the degree of compulsion it engenders, the Court may also have been weighing the fairness of imposing the sanction automatically upon assertion of the privilege against self-incrimination.[72] The implications of such an approach include the possibility that sanctions which are not automatically imposed, even if severe, may well survive constitutional challenge. Such a result would undercut much of the fifth amendment protection the waiver-penalty principles appear to provide.

That the Court is willing to tolerate substantial burdens on the privilege against self-incrimination as long as they are not automatically triggered by its assertion is demonstrated by the ruling in *Baxter v. Palmigiano*.[73] There, the Court considered a challenge by Rhode Island prison inmates to the constitutionality of prison disciplinary procedures.[74] Included in the practices attacked were the rules applicable to prison disciplinary cases in which inmates also faced potential criminal prosecution. In such cases, inmates were warned of their right to remain silent, but also informed that the disciplinary board would draw an adverse inference from invocation of that right. The Court of Appeals had held that the fifth amendment barred an adverse inference in such circumstances,[75] but the Supreme Court disagreed and reversed.

Initially, the *Palmigiano* Court found no difficulty in distinguishing *Griffin v. California*[76] which had barred comment on the defendant's failure to testify in his criminal trial. Very simply, *Griffin* held that no evidentiary use of silence can be made in a criminal proceeding, and that is the limit of the decision.[77]

The *Garrity* line of cases presented more of a challenge and sparked a bitter dissent from Mr. Justice Brennan. The *Palmigiano* Court majority characterized the waiver-penalty decisions as situations "where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State."[78] In *Palmigiano*, remaining silent did not automatically trigger prison discipline; rather, the adverse inference it generated "was given no more evidentiary value than was warranted by the facts surrounding his case."[79] Moreover, the Court suggested that the

[70] *Id.* at 805.

[71] *Id.* at 807. *But see* United States ex rel. Sanney v. Montanye, 500 F.2d 411 (2d Cir.), *cert. denied*, 419 U.S. 1027 (1974) (threat of loss of driver's assistant job held for a few days held not sufficiently coercive).

[72] *See* Ritchie, *supra* note 3, at 392–93.

[73] 425 U.S. 308 (1976). *See generally* Comment, *Prison Disciplinary Proceedings and the Privilege Against Self-Incrimination*, 55 N.C.L. REV. 254 (1977).

[74] The Court rejected special procedures for inmates facing prison discipline and potential criminal prosecution including a right to counsel, 425 U.S. at 314–15, and a right to a statement of reasons for and review of a denial of cross-examination, *Id.* at 420–23. Instead, the disciplinary procedures of Wolff v. McDonnell, 418 U.S. 539 (1974), were reaffirmed. The Court refused to consider the application of due process safeguards to the loss of prison privileges. 425 U.S. at 423–24.

[75] The court below recognized that use of immunity would resolve the fifth amendment problem. Palmigiano v. Baxter, 510 F.2d 534 (1st Cir. 1974).

[76] 380 U.S. 609 (1965).

[77] Mr. Justice Brennan read *Griffin* as part of a series of cases barring the imposition of penalties on the assertion of fifth amendment rights, not as a special rule prohibiting comment on a defendant's silence at trial. 425 U.S. at 330–31 (Brennan, J., dissenting). There are hints elsewhere, however, that the Court is interpreting *Griffin* narrowly. In particular, the Court has held that the state may not use a defendant's pretrial silence after a *Miranda* warning for impeachment purposes. Doyle v. Ohio, 426 U.S. 610 (1976). But, its ruling was based on the due process clause, not the fifth amendment. The dissenting position, unchallenged by the majority, distinguished *Griffin* as a case involving the "prosecution's use of the defendant's silence in its case-in-chief." *Id.* at 628 (Stevens, J., dissenting). *Doyle* reflects no suggestion of *Griffin* as a general bar to fifth amendment penalties.

[78] 425 U.S. at 318.

[79] *Id. See also* Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Raffel v. United States, 271 U.S. 494 (1926); Bilokumsky v. Tod, 263 U.S. 149 (1923).

fatal flaw in the *Garrity* line of cases was that the individuals' "failure to respond to interrogation was treated as a final admission of guilt,"[80] a factor which had been important in the due process analysis of many of the 1950's loyalty oath cases.[81]

Mr. Justice Brennan's dissent rejected the fairness theory of the majority in favor of a compulsion analysis. He maintained that "the premise of the *Garrity-Lefkowitz* line was not that compulsion resulted from the automatic nature of the sanction, but that a sanction was imposed that made costly the exercise of the privilege."[82] As a further qualification, however, the dissent added that the burden in *Palmigiano* was a sufficiently "substantial sanction,"[83] to justify invoking the waiver-penalty theory.

Although Justice Brennan did not seek to define the limits of his view of the waiver-penalty theory, it is nevertheless clear that his analysis is more protective of self-incrimination interests than the majority's fairness rationale. The fairness theory, much like the compulsion approach, will preclude, allowing the assertion of the right to remain silent to be the sole basis for invoking a penalty;[84] but it will not stop the state from using the exercise of the privilege as a factor contributing to the imposition of a penalty. The majority may well have been restricting the concept of compulsion to the severe abuses which generated the privilege against self-incrimination,[85] and thereby rewriting the *Garrity* cases to fit its due process style analysis. Compulsion, then, amounts to only that which truly forces self-incrimination and other sanctions which unfairly penalize the privilege by being exclusively the result of its exercise. If so, it is a theory which may permit very heavy pressure indeed on the decision to exercise or forego the right to remain silent.

C. Balancing the Privilege

There is a middle ground between an absolutist approach to evaluating burdens on the right to remain silent and a theory which does no more than bar the automatic imposition of certain sanctions upon invocation of the privilege. Reflected in several Supreme Court decisions,[86] the alternative involves a balancing of state and individual interests in assessing the permissibility of penalizing the exercise of fifth amendment rights. Presumably, not every penalty would be subjected to a balancing process of this sort. In particular, those penalties truly coercive in the sense of compelling self-incrimination would run afoul of the fifth amendment regardless of the justifying state interest. Resistable, but harsh penalties, however, would be measured by this standard.

Crampton v. Ohio[87] presents the most extensive treatment by the Court of a balancing theory of the fifth amendment. There, the defendant Crampton was convicted of first degree murder in Ohio and sentenced to death. Both the guilt determination and sentencing assessment were performed in a single proceeding, a procedure which forces the defendant to risk self-incrimination in order to address the sentencer on the issue of punishment.

Unquestionably, the situation facing Crampton required "the making of difficult judgments,"[88] but the Court did not consider the pressure as amounting to unconstitutional compulsion. As indicated above, only inherently coercive consequences; perhaps only those that are virtually irresistable, fit within the traditional compulsion standard. This leaves lesser burdens to be measured by a process

[80] 425 U.S. at 318.

[81] In Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), *modified*, 351 U.S. 944 (1956) (per curiam), the Court reversed the firing of a Brooklyn College professor for invoking the fifth amendment to questions relating to his Communist affiliations in a federal hearing. The Court said that "we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the fifth amendment." 350 U.S. at 557. Implicitly, the Court was recognizing that one of the interests that the privilege serves is to protect the innocent. *See generally* E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). The Court, however, found little difficulty in distinguishing *Slochower* and allowing dismissals following invocation of the privilege where the hearing was a local one, Beilan v. Board of Educ., 357 U.S. 399 (1958); where the reason was alleged to be doubt as to reliability, Lerner v. Casey, 357 U.S. 468 (1958); insubordination, Nelson v. County of L.A., 362 U.S. 1 (1960); or obstruction of the investigation, In re Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

[82] 425 U.S. at 331 (Brennan, J., dissenting).

[83] *Id.* at 326 .

[84] This is demonstrated by the fact that the Court invalidated automatic dismissal in Lefkowitz v. Cunningham, 431 U.S. 801 (1977), decided after *Palmigiano*.

[85] *See* notes 50-51, *supra*.

[86] *See, e.g.*, California v. Byers, 402 U.S. 424 (1971); Crampton v. Ohio, 402 U.S. 183 (1971); Simmons v. United States, 390 U.S. 377 (1968). *Crampton* and its companion case, McGautha v. California, 402 U.S. 183 (1971), both raised issues relating to jury sentencing in capital cases. *Crampton*, however, presented an additional fifth amendment issue. References herein will be to *Crampton*.

[87] 402 U.S. 183 (1971).

[88] McMann v. Richardson, 397 U.S. 759, 769 (1970), *cited in* 402 U.S. at 213.

of balancing which, for the Court, involved the question of "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[89] And, the Court utilized only a single page in concluding that fifth amendment history and policy were not offended by the unitary trial practice in capital cases.[90]

The only precedent creating difficulty for the Court's theory was its decision in *Simmons v. United States*.[91] There, a criminal defendant had moved to suppress critical government evidence. At the suppression hearing, the defendant testified to his possessory interest in the items seized in order to establish standing, and these admissions were used against him at trial after his motion to suppress was denied. Finding it "intolerable that one constitutional right should have to be surrendered in order to assert another,"[92] the Court held that testimony in a fourth amendment suppression hearing may not be used over objection to prove guilt at trial. Where the choice is between two constitutional rights, there is a "tension"[93] created which precludes use of the testimony at trial, despite the fact that the testimony might be viewed as voluntary in the traditional sense.[94]

Application of the *Simmons* constitutional tension theory to the facts of *Crampton* poses something of a problem. On one side of the balance is the right to remain silent, but the other side reflects interests that the Court was not willing to concede were of constitutional magnitude, including the asserted right to address the jury on the issue of punishment.[95] But, rather than debate the constitutional character of the competing choices, the Court instead disclaimed the constitutional tension theory entirely in favor of a balancing analysis.

There are aspects of the balancing theory which provide an attractive resolution to fifth amendment burden problems. First, such an approach avoids the potentially arbitrary application of an absolute barrier theory. Since the fifth amendment only bars compulsory self-incrimination, the Court would have to stretch the concept of compulsion dramatically to cover lesser burdens on the privilege, and no standards readily suggest themselves for this task. Balancing also avoids the rather formalistic *Palmigiano* analysis in which the automatic character of a penalty is rejected, but where the severe sanctions of a non-mandatory character may then survive challenge.

What balancing does not do, however, is adequately protect fifth amendment rights.[96] The process appears to permit a superficial assessment of the effect of the penalty on self-incrimination interests. Beyond that, the balance will only be judged after it is determined that such interests are impaired "to an appreciable extent,"[97] a status that may be difficult to reach given the analysis the Court undertook. And finally, apparently no significance is attached to the absence of a state interest behind the penalty.

A Presumptive Barrier Theory

The Supreme Court's recent fifth amendment decisions have restricted development of the privilege against self-incrimination, and in some respects have actually reversed precedent to cut back upon traditional protections.[98] In light of the narrowed scope into which the right to remain silent has been compressed, and as a result of a compelling need to protect those interests reflected in the privilege against self-incrimination from an increasingly intrusive society, whatever fifth amendment coverage there is demands as much support as society can tolerate.

Absolutely barring any consequence whatsoever upon invocation of the privilege is seemingly the most protective shield for fifth amendment interests. However, the rigidity of such an approach invites skepticism as to its ultimate practicality. Among the options available to undercut the theory are artificial and natural impediments which distinguish the privilege[99] and refusals to classify important state sanctions as consequences of remaining silent.[100] And finally, there may well be consequences of sufficient importance so as to justify requiring an election between them and the

[89] 402 U.S. at 213.
[90] *Id.* at 214–15.
[91] 390 U.S. 377 (1968).
[92] *Id.* at 394.
[93] *Id.*
[94] *Id.* at 393–94.
[95] 402 U.S. at 217–18. The Court's more recent attentiveness to the death penalty suggests that a bifurcated trial might now be constitutionally required. Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).
[96] "[T]his balancing inevitably results in the dilution of constitutional guarantees." California v. Byers, 402 U.S. 424, 463 (1971) (Black, J., dissenting). Arguably, balancing has resulted in the same dilution in fourth amendment decisions. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (Brennan, J., dissenting).
[97] Crampton v. Ohio, 402 U.S. 183, 213 (1971).
[98] Most directly undercut has been one of the classic criminal procedure decisions, Boyd v. United States, 116 U.S. 616 (1886).
[99] *See* Berger, *supra* note 2, at 199–201.
[100] *See* note 39 *supra*.

privilege against self-incrimination.[101] Without a complete catalogue of all such consequences, a decision in favor of an absolute barrier theory may well be unjustified.

The waiver-penalty theory has similar deficiencies. As currently reflected in the *Palmigiano* and *Garrity* line of decisions, its protective shield for fifth amendment interests is illusory. As long as the traditional lines of compulsion are not crossed and automatic sanctions are not imposed for invocation of the privilege, very severe pressures on the decision to exercise or forego the privilege will be tolerated.

The balancing theory reflected in *Crampton* would be more accurately characterized as a weighted balance against the fifth amendment. This is demonstrated by the threshhold level of impairment required by the Court to invoke the balancing process, and the limited analysis of privilege policies it was willing to undertake.[102] The approach is one readily adaptable for the purposes of circumventing those interests that the privilege against self-incrimination is designed to guard.

Despite the weaknesses of existing theories, it remains possible to devise a sensitive accommodation between the privilege against self-incrimination and the interests encompassed in various kinds of state consequences imposed on those who exercise the right to remain silent. Given the limited range of currently recognized self-incrimination situations, the accommodation should reflect a presumptive barrier weighted against the sanction, and demand a meaningful analysis of underlying state and individual interests. Properly administered, a presumptive barrier theory would insure protection not only against traditional forms of compulsion, which existing theories similarly guard against, but also against less burdensome sanctions which the alternatives do not effectively regulate.

The purpose of the state sanction should be the initial consideration and also be of major significance. As a matter of policy, those penalties which are directed towards coercing testimony rather than fulfilling other goals should not be enforced.[103] It makes no sense to have a right to remain silent, and yet permit the state to seek purposfully to circumvent it. The fact that we may allow the state for other unrelated but significant reasons to impose a consequence upon assertion of the privilege in no way justifies permitting the state to use its sanction for the purpose of securing testimony.

The preliminary requirement of a purpose unrelated to securing a waiver of the privilege will undoubtedly create difficulties in its application. By hypothesis, all of the state consequences that we are concerned with will in some way burden the decision whether or not to remain silent; absent such an impact, no fifth amendment problems are created. How, then, does one separate those consequences whose impact on that decison is their very purpose from those whose impact is simply a side effect?

The assessment of purpose is not an unfamiliar judicial role. Granting that the line is not and cannot be precise, the task nevertheless requires a realistic weighing of the factors underlying the sanction. How strongly does the state desire and need the information sought for its purposes? Is the state interest such that it would prefer the information rather than having to impose the sanction? The more these questions are answered in a way that demonstrates a valid non-incriminatory use for the information, the more reason there is to allow the state interest to be entered into the balance.[104]

The *Palmigiano* factual circumstances provide an excellent illustration of a suspicious state goal which should not survive a purpose analysis. As can be questioned from that case what function does an adverse inference from silence at a prison disciplinary hearing serve other than either to force the inmate to talk without having to grant him immunity or deter him from defending himself? Allegedly, it would assist the trier of fact in resolving the question of whether a prison infraction occurred,[105] but by the Court's own admission an automatic finding of guilt could not be based on

[101] *See* note 49 *supra.*

[102] *See* notes 89-90 *supra.*

[103] In considering the federal kidnapping statute, for example, the Court has noted that "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581 (1968).

[104] Hit and run statutes exemplify a strong interest in the acquisition of information for non-criminal uses including apportioning civil liability and reaching license revocation decisions. California v. Byers, 402 U.S. 424, 430-31 (1971). That should certainly save them from automatic invalidation. But, the mere fact that the state seeks *both* civil and criminal redress should not be deemed a sufficient justification to override fifth amendment interests. Lefkowitz v. Cunningham, 431 U.S. 801, 808-09 (1977).

[105] Presumably, this is what the Court meant when it stated that "silence was given no more evidentiary value than was warranted." Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). *See generally* Colloquium, *Legislative Motivation,* 15 San Diego L. Rev. 925 (1978).

the inmate's silence.[106] Thus, since other evidence of guilt is required, the adverse inference really is not essential for determination of an infraction and the purpose, even if not articulated by the state, must be deemed to be impermissible.[107] Given a presumption in favor of an unimpeded right to remain silent, it is appropriately the state's burden to demonstrate the justification behind its goal.

Once the validity of the state's goal is established, the next inquiry must focus upon the availability of alternatives to achieve it. Such a requirement insures that there is no *needless* interference with the privilege against self-incrimination. In *Crampton,* for example, the defendant's decision whether to testify on the issue of punishment was burdened by the risk of self-incrimination that he faced on the question of guilt. The simple alternative of a bifurcated trial would remove the burden, and no persuasive reason to maintain the unitary proceeding would exist.[108] Consequently, the state procedure would not survive constitutional challenge.

Finally, assuming a state purpose not directed towards the securing of incriminatory information for criminal purposes and the absence of alternatives to the particular state sanction, an analysis of the individual and state interests would then be undertaken. The Court's efforts at a balancing approach thus far have been woefully deficient in the interest analysis task,[109] due undoubtedly to the fact that the balance was weighted against the right to silence. Shifting the burden of justification to the state, in contrast, should call for a deeper probe into what social values are promoted by the fifth amendment.[110] Beyond that, the presumption theory would have the further effect of demanding an accounting from the state of what it is seeking to accomplish and why.

The full presumptive barrier analysis, when applied to the waiver-penalty cases, would have produced the same result as the Court's rulings, but for different reasons. First, the "potent sanctions" do not amount to traditional forms of compulsion and thus could not be invalidated for that reason.[111] The goals of the sanctions do reflect a real state interest in requiring public officials to account for their conduct in office,[112] and therefore, the sanctions do not run afoul of the purpose inquiry. While there are alternatives for acquiring the information, and these alternatives would have to be pursued in a criminal context,[113] the state can support its claim that its interest in insuring responsible public service, given the civil context of the inquiry, need not require that the alternatives be pursued.

That leaves the interest analysis, and it is here that the state cannot meet its burden of overcoming the presumptive barrier to penalizing the fifth amendment. The state's interest in responsible public service and an accounting from officials in the public sector is concededly strong. But, its efforts to secure these goals are undertaken in a civil context which includes, most importantly, a lower standard of proof. It is thus less in need of information directly from the official involved that may also be self-incriminatory.[114] Arrayed on the other side of the equation are interests protected by the privilege including forcing the state to make its case without assistance from the accused, and the right to a "private enclave"[115] into which the state may not intrude. Privacy of thought and personality and fairness in the balance of power between the state and the individual rest on one side of the scale, while the public accounting goal in its civil context rests on the other. Even if the balance is not conceded to be in favor of the privilege, the fact that the state must overcome a presumption resolves the issue against the state imposed sanction.

An illustration of a sanction that would survive the presumptive barrier analysis is provided by the Wisconsin legislation governing motor vehicle license revocations. The relevant statute provides for

[106] 425 U.S. at 317.

[107] Mr. Justice Brennan complained that "it cannot be denied that the disciplinary penalty was imposed to some extent, if not solely, as a sanction for exercising the constitutional privilege." 425 U.S. at 332 (Brennan, J., dissenting).

[108] While recognizing the recommendations in favor of bifurcated trials, the Court did not feel a unitary proceeding offended the Constitution. Crampton v. Ohio, 402 U.S. 183, 221 (1971). The opinion does not suggest a justification for the choice of the unitary trial.

[109] *See, e.g.,* Baxter v. Palmigiano, 425 U.S. 308, 318–19 (1976); Crampton v. Ohio, 402 U.S. 183, 214–15 (1971).

[110] *See* note 6 *supra.*

[111] *See* notes 50-51 *supra.* Moreover, not all could be classified as inherently coercive. *See* note 71 *supra.*

[112] Gardner v. Broderick, 392 U.S. 273, 278 (1968).

[113] The available alternatives include a grant of use immunity and the utilization of other techniques of investigation such as search and seizure and placement of informants. These, however, are far more burdensome and offer no guarantee of success as compared to the alternatives of unitary or bifurcated trials in *Crampton.*

[114] *See, e.g.,* Baxter v. Palmigiano, 425 U.S. 308, 432 n.6 (1976) (Brennan, J., dissenting).

[115] Murphy v. Waterfront Comm'n of N.Y., 378 U.S. 52, 55 (1964).

an automatic one-year revocation of the driver's license of one who fails to "stop and render aid ... in the event of a motor vehicle accident resulting in the death of or personal injury to another or in serious property damage."[116] The statutory purpose of rendering assistance is an obviously valid one and there are no equivalent alternatives. Moreover, there is no demand for the provision of further incriminatory information and, unlike the hit-and-run statute considered by the Supreme Court,[117] the consequence is a civil license revocation rather than a criminal penalty. In balance, the state's interest in insuring that accident victims receive aid, backed up by a threatened civil sanction, outweighs the individual interest in avoiding the potential incrimination which might arise from complying with the statute.

It may well appear that a presumptive barrier theory will allow the state little room to penalize an individual's exercise of the privilege against self-incrimination. Given the narrowed scope of the fifth amendment, however, that is as it should be. Rather, the theory and its application insures maximum protection for the right to remain silent where the right still exists, while leaving enough room for those special state interests that may outweigh the privilege. Only traditional forms of compulsion would be barred without any attempt at balancing. No further protection for the state is warranted, and hopefully very few such state goals will be deemed to satisfy the standard.

Conclusion

The difficulty that the Court has had in developing a standard to govern the imposition of sanctions for the exercise of the privilege against self-incrimination is partly a reflection of its uncertainty as to the proper role the right to silence should have in our system of justice. There is a continuum of pressure tactics that the state can employ to coerce information, and regulating the continuum requires that fundamental policy decisions be made on the relative scope of state power and individual freedom. In undertaking such a task only some of the judgments, those which reflect the extremes of the continuum, can be made without provoking substantial dissension. The resolution of other conflicts, particularly those in the middle of the range of state coercive tactics, is far more difficult. And, even if the Court has been forced to resolve specific cases of this sort, it has understandably sought to avoid framing a standard which would force it to answer basic allocation of power questions at the same time.

If one concentrates upon the most recent of the Supreme Court's fifth amendment cases, it is apparent that the Court is losing some of its ambivalence towards the right to remain silent. Uncertainty, however, has given way to restrictiveness in virtually every setting in which fifth amendment issues arise.[118] The result is a narrowed scope for the right to remain silent, but that is an outcome that need not bring along with it greater leeway for the state to coerce self-incrimination within the privilege's new scope limits.

The theories the Court has used to regulate state imposed burdens on the fifth amendment reflect alternating protectionism for and indifference to the privilege against self-incrimination. The Court's most recent narrowing of the scope limits of the right to silence, however, has carried over into its regulation of burdens imposed on the exercise of that right. The Court's disaffection for the privilege against self-incrimination is indicated by its willingness to recognize the right in only a narrowed set of circumstances and to approach the imposition of consequences on the exercise of the right in a formalistic manner.[119]

If the privilege against self-incrimination does not encompass important interests deserving of protection, there need be no particular concern over the Court's indifference to it. The character of the privilege decisions suggests that with the exclusion of the overt forms of compulsion from which the privilege historically emanated, the Court does not see enough value in the privilege to deviate from traditional limits. The Court has willingly halted the use of force in the extraction of information;[120] the fact that a range of privacy results is treated as merely an incidental side effect rather than as an independent value protected by the privilege.[121]

With this framework, the Court's indifference to state pressures on the privilege becomes more understandable. The burdens permitted by the current doctrine are, from the Court's perspective,

[116] Wis. Stat. Ann. § 343.31(1)(d) (West 1971).

[117] California v. Byers, 402 U.S. 424 (1971).

[118] *See, e.g.,* Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976).

[119] Baxter v. Palmigiano, 425 U.S. 308 (1976); California v. Byers, 402 U.S. 424 (1971).

[120] Included in the prohibition is the inherent compulsion of police custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966).

[121] *See, e.g.,* Fisher v. United States, 425 U.S. 391, 399 (1976).

neither unfairly imposed nor likely to compel self-incrimination in the traditional sense. The fact that our "private enclave" may dissipate is simply not relevant since fifth amendment privacy protection is only an afterthought.[122]

By contrast, a presumptive barrier theory to regulate fifth amendment burdens gives privacy protection a central role in the privilege against self-incrimination. It takes as its cue precedent which the current Court rejects.[123] And, if it accurately reflects the importance of privacy in the right to remain silent, it is a vastly superior theory as against the Court's alternatives to protecting core fifth amendment values. Moreover, it protects an interest which has an increasing need for such protection in a more crowded and intrusive society than that which originally spawned the privilege.

What the presumptive barrier theory does not do, however, is create an absolute barrier. And, in not doing so, there is the risk that the leeway given for state regulation will be improperly expanded. But, by the same token, even an absolute barrier theory could be manipulated to achieve the same ends. Assuming conscientious interpretation, however, the presumptive barrier theory is no more than an admission that we do not have a complete catalogue of all existing and potential fifth amendment consequences. In the absence of such a catalogue, we should be reluctant to reject categorically the possibility of any consequence being imposed following exercise of the privilege. If there is a recognition of what the privilege achieves for society, the risk that the presumptive barrier theory will permit unwarranted infringements is minimal. In the final analysis, the theory represents a reasonable accommodation of individual and state interests upon which the privilege against self-incrimination can operate.

[122] The narrow approach of the Court to the fifth amendment stands in marked contrast to recent fourth amendment analysis. Thus, while the fifth amendment is tied to its history, the Court has recognized that search and seizure abuses which were not a serious concern to the framers are still controlled by the fourth amendment. No compelling logic for the inconsistency readily suggests itself. *See* United States v. Chadwick, 433 U.S. 1 (1977).

[123] Boyd v. United States, 116 U.S. 616 (1886) (fifth amendment prevents the compelled production of private documents).