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Abstract
This article examines the fifth amendment right against compelled self-incrimination, as compared to principles in confession law. These two areas of law are not the same. In 1966, however, the Supreme Court decision of Miranda v. Arizona announced that many of the principles involved in confession law also implicated the fifth amendment privilege against compelled self-incrimination. The popular impact of Miranda has resulted in the equating of confession law with the fifth amendment privilege. This article examines the history of the fifth amendment privilege, its application, and how it can be distinguished from other, related areas of law.

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Comments
This article is co-authored by the Honorable Charles E. Moylan, Jr., Associate Judge of the Maryland Court of Special Appeals

THE PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

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INTRODUCTION

Let it be said right up front: You have the right to keep your mouth shut. That seems clear enough. These words, however, suggest a simplicity that is by no means the actual case. In its concrete applications, the constitutional right to keep your mouth shut or the privilege against compelled self-incrimination is far from simple. In pertinent part, the fifth amendment provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .[1]

A. The Privilege is Not Confession Law

The constitutional privilege against compelled self-incrimination is not the same as the constitutional law dealing with the admissibility of confessions.[2] In 1966, however, the Supreme Court decision of *Miranda v. Arizona*[3] announced that many of the principles involved in confession law also implicated the fifth amendment privilege against compelled self-incrimination. The popular impact of *Miranda* has resulted in the equating of confession law with the fifth amendment privilege. The two bodies of law, however, are far from identical.

Their histories and traditions are distinct. The privilege was the result of an act of Parliament in 1641.[4] Confession law is comprised of a gradual accumulation of ad hoc decisions beginning in the early 1700s. The two bodies of law are implemented by different rules and serve different purposes.[5]

Since the two distinct legal traditions were joined together by the *Miranda* decision in 1966, frequent misunderstandings have resulted. A regular source of friction is that the phrase "privilege against compelled self-incrimination" has become a generic term embracing two very different concepts: 1) the traditional privilege in a courtroom setting, and 2) confessions

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1. U.S. CONST. amend. V.

2. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 329 n.43 (1968).

3. 384 U.S. 436 (1966). The oral admissions of four defendants, questioned by police in isolated rooms, were held inadmissable because the defendants were never given a full and effective warning of their rights at the outset of the interrogation. "The current practice of incommunicado interrogation is at odds with one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself." *Id.* at 457–58.

4. L. LEVY, *supra* note 2, at 281–82 and n.26.

5. *Id.* at 329 n.43.

given to interrogating police officers. When discussing the privilege against compelled self-incrimination, it is important to make it clear whether we are discussing confession law, or the traditional use of the privilege in the courtroom.[6]

Our only concern here is with the traditional use of the privilege in a courtroom setting. Where did it come from? What was it intended to do? Is it binding upon the states? What are the limitations on its availability?

The constitutional protection against compelled self-incrimination is alone in being called a "privilege." The first ten amendments, for instance, are collectively referred to as the Bill of Rights, not the bill of privileges. All of the other constitutional protections are referred to as "rights": the right to be secure against unreasonable searches and seizures,[7] the right to trial by jury,[8] the right of confrontation,[9] the right to counsel,[10] etc. Does the word "privilege" connote that it is somehow less than a right? The answer is most assuredly, "No."

The very use of the term "privilege" indicates that the privilege against compelled self-incrimination is a member of a larger family. The family is that of the testimonial privileges generally. The viewing of the constitutional guarantee in that fuller perspective tells us a great deal about its fundamental character. By understanding the essential nature of a testimonial privilege in the abstract, we come to know more fully the particular testimonial privilege against compelled self-incrimination.

Anglo-American common law does not start with a general right to silence, but with its opposite. People do not have a right to keep their mouths shut at all times and under all circumstances. As British Chief Justice Hardwicke expressed it in 1742, "[T]he public has the right to every man's evidence."[11] Just as there is an obligation to serve in the military in time of war and an obligation to do jury service, so too is there an obligation, as the price of membership in society, to furnish a court

6. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 21–22 (1955).
7. U.S. CONST. amend. IV.
8. U.S. CONST. amend. VII.
9. U.S. CONST. amend. VI.
10. *Id.*
11. 12 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 693 (1812) (from the British Parliamentary debate on the bill to indemnify evidence); *see also* 8 J. WIGMORE, EVIDENCE, § 2192 (McNaughton rev. 1961).

of law, civil or criminal, with all available knowledge that may assist in the search for truth.[12] The citizen will not be heard to complain that coming to court to testify will be inconvenient, embarrassing, scandalizing, costly or unpleasant in any number of ways. The general obligation is to testify.

Over the centuries, however, a limited number of exemptions have been carved out from the general obligation. We call these exemptions the testimonial privilege. Certain interests have been recognized as of transcendent importance even at the cost of losing otherwise desirable evidence. As a general rule, the goal is to protect certain confidential communications that society wants to encourage. Although the list of testimonial privileges grows or shrinks from state to state, it typically includes: the husband-wife privilege,[13] the attorney-client privilege,[14] the doctor-patient privilege (perhaps including a psychiatrist-patient and/or psychologist-patient coverage as well),[15] and the priest-penitent privilege.[16] By statute or by common law, the list is sometimes expanded to include such other testimonial privileges as the accountant-client privilege,[17] and the newspaper reporter-source privilege.[18]

The privilege against self-incrimination is included in the list of testimonial privileges, although it serves an interest other

12. United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* 8 J. WIGMORE, *supra* note 11, § 2192.

13. Trammel v. United States, 445 U.S. 40, 45 (1980); Blau v. United States, 340 U.S. 332, 333 (1951); Wolfle v. United States, 291 U.S. 7, 14 (1934).

14. *See* Upjohn v. United States, 449 U.S. 383 (1981); *Trammel*, 445 U.S. at 51 ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); Fisher v. United States, 425 U.S. 391, 403 (1976) (the purpose of the privilege is to encourage clients to make full disclosure to their attorneys); *see also* 8 J. WIGMORE, *supra* note 11, § 2228.

15. *See* Estelle v. Smith, 451 U.S. 454, 462 (1981); Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977) ("The physician-patient evidentiary privilege is unknown to the common law. In States where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons.").

16. *See Trammel*, 445 U.S. at 45; ALA. CODE § 12-21-166 (1975) (confidentiality of communications with clergymen); CAL. EVID. CODE § 1034 (West 1966) (privilege of clergymen); *see also* 8 J. WIGMORE, *supra* note 11, § 2394.

17. *See* Couch v. United States, 409 U.S. 322, 335 (1973) ("[N]o confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.") (citations omitted); *see also* Annotation, *Privileged Communications Between Accountant and Client*, 33 A.L.R.4th 539 (1984).

18. *See* Allfred v. State, 554 P.2d 411, 415 (Alaska 1976); ALASKA STAT. § 09.25.160 (1983).

than the protection of a confidential communication. Of all the privileges discussed, it alone is of constitutional dimension.

The common law places a duty on each witness to furnish all relevant and material information. Testimonial privileges are in derogation of this common law obligation.[19] As a result, these exceptions are viewed with general disfavor and are strictly construed.[20] Before any privilege may be successfully invoked, the witness claiming exemption from the obligation to testify must satisfy the court that all of the conditions precedent have been met. The elements of the privilege against compelled self-incrimination are:

1. No person
2. shall be compelled
3. in any criminal case
4. to be a witness
5. against
6. himself.

B. Origin of the Privilege

The entire fifth amendment, including the privilege, was drafted by the first session of the first United States Congress in 1789.[21] It was ratified by nine necessary states and made the "law of the land" in 1791.[22]

The inclusion of the privilege in the Federal Bill of Rights represented the constitutionalization of a cherished principle of English liberty first enacted by Parliament in 1641. The Latin maxim embodied by the privilege is "nemo tenetur seipsum prodere" or "nemo tenetur accusare seipsum . . . [n]o man is bound to accuse himself."[23] The principle was the English (and subsequently the American) reaction against an investigative and prosecutorial excess known as the "oath *ex officio*."

The oath *ex officio* was the brain-child of Pope Innocent III and the Fourth Lateran Council in 1215.[24] The agenda of that

19. United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* 8 J. WIGMORE, *supra* note 11, § 2192.

20. 8 J. WIGMORE, *supra* note 11, § 2192.

21. M. MELTZER, THE RIGHT TO REMAIN SILENT 86–87 (1972).

22. *Id.* at 88.

23. L. LEVY, *supra* note 2, at 42; Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 10 (1950).

24. *See generally* L. LEVY, *supra* note 2, at 43–82; M. MELTZER, *supra* note 21, at 26–36.

plenary council of bishops was concerned with the prevalence of heresy throughout Christendom. The chosen solution was the Inquisition.[25] Inquisitors were commissioned to discover the presence of heretics and to purge the Church of their unholy influence. The primary investigative weapon placed into the hands of the inquisitors was the oath *ex officio*.[26]

A suspected heretic was subjected to this official oath and sworn before God to tell the truth. Even where the inquisitor initially had little reason to suspect, let alone evidence capable to prove heresy, the inquisitor could require the suspect, under official oath, to reveal not only unknown actions but even secret thoughts or private doubts that might constitute heresy.[27] To a true believer, the swearing of a false oath before God entailed an eternity in hell. As a result, many victims of the inquisition willingly confessed their heresies even though their admissions condemned them to being burned at the stake. The inquisition was more than a case of defendants being compelled to incriminate themselves once charges were properly brought: it was frequently a case of the defendants being compelled to serve as their own accusers in the first instance.

The oath *ex officio* began to be employed by the inquisitors throughout continental Europe shortly after 1216.[28] The oath made its first appearance in England in 1236,[29] and became a very efficient investigative tool. By the 1500s, the oath was used regularly by the dreaded Court of High Commission to root out religious unorthodoxy.[30] The oath *ex officio* was so efficient in helping to stamp out religious dissent, that it was enthusiastically adopted by the Court of Star Chamber[31] for its campaign against political dissent, generally known as seditious libel.

Whereas the oath *ex officio* was accepted by continental Europe, it was vigorously opposed by Englishmen and became an object of widespread hatred. The accepted explanation for

25. L. LEVY, *supra* note 2, at 26; M. MELTZER, *supra* note 21, at 20, 26.
26. L. LEVY, *supra* note 2, at 23–24.
27. *Id.* at 23.
28. *Id.* at 19–29; *see generally* M. MELTZER, *supra* note 21, at 26–36.
29. L. LEVY, *supra* note 2, at 46.
30. *Id.* at 76, 119–20, 130–33, 182–83.
31. M. BERGER, TAKING THE FIFTH, 13 (1980); L. LEVY, *supra* note 2, at 182–204; M. MELTZER, *supra* note 21, at 40–41.

English resistance to the oath *ex officio* specifically and to the inquisitorial system generally is that the English had the benefit of an alternative model, the Common Law.[32]

For hundreds of years England had two parallel legal systems. One system was that of the ecclesiastical courts, which throughout the Middle Ages was as large and influential as that of the King's courts. It applied both the substance and the procedure of Church Law or Canon Law, which was a direct descendant of the Roman legal system.[33] That system of law, still dominant in most of Europe, is known as Continental or Civil Law, from the *Corpus Juris Civilis* of the Emperor Justinian.[34]

By the 1150s, however, England developed a rival system, which came to be known as the Common law. Common Law was practiced in the King's courts and essentially handled non-Church matters. The difference between the two systems was dramatic in the case of prosecution for crime. The ecclesiastical courts utilized the inquisitorial system, where the functions of charging, prosecuting and judging were joined in the single person of the judge.[35] The Common Law courts, by contrast, utilized the accusatorial system.[36] Protection for a defendant was in part guaranteed by the fragmentation of functions. A grand jury was responsible for bringing charges. A prosecutor marshalled the evidence for the King. A judge presided over the trial. A petit jury rendered the verdict.[37]

With the Disestablishment of the Roman Catholic Church by Henry VIII in 1536,[38] the ecclesiastical court system as it had

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32. L. LEVY, *supra* note 2, at 194.

33. G. RADCLIFFE AND G. CROSS, THE ENGLISH LEGAL SYSTEM 32 (G. Cross and G. Hand 5th ed. 1971) [hereinafter ENGLISH LEGAL SYSTEM] "The law [the ecclesiastical courts] administered was the canon law of the Church, to be found in the decrees of Popes and Councils, and the writings of the Fathers, their procedure was derived from that of the Roman Law, and from their decisions an appeal lay to the Papal Curia at Rome." *Id.*

34. "A collective designation of the Emperor Justinian's Codification, used first in the edition by Dionysius Gothofredus (Godefroy) in 1583. The denomination embraces the INSTITUTIONES, the DIGESTA (or PANDECTAE), the CODEX (CODEX IUSTINIANUS) and the NOVELLAE. No collective title was given to his codification by Justinian himself." A. BERGER, 43 ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 417 (1953).

35. ENGLISH LEGAL SYSTEM, *supra* note 33, at 107–08.

36. *Id.*

37. *Id.* at 67–68.

38. *See* A. CALDER, REVOLUTIONARY EMPIRE 37–38 (1981).

previously existed came to an end in England. Its procedures, however, were perpetuated by the so-called Prerogative Courts, the most notable of which were the court of High Commission and the Court of Star Chamber. In these Prerogative Courts, as in the ecclesiastical courts before them, the oath *ex officio* was regularly employed both to make defendants accuse themselves and, following the bringing of formal charges, to incriminate themselves.[39] The Common Law courts, whose accusatorial system placed the burden upon the State both of bringing charges and of proving the offense, never permitted use of the oath *ex officio*.

The rivalry between the two competing systems came to a head in the early decades of the 17th Century. The legal battle was one theater in a larger confrontation that culminated in the English Civil War of the 1640s. That war was fought on three fronts—one political, one religious, and one legal.[40] The political clash was between the Royalists, believing in the divine right of Kings, and Parliamentarians, pushing for increasing democratization. On the religious front, the Royalists were generally aligned with the established Church of England. The Parliamentarians generally championed the cause of dissenting religious groups, Roman Catholic on the right and Puritan on the left. The third front was legal. The Royalists relied heavily on the Prerogative Courts of High Commission and Star Chamber and their use of the inquisitorial instrument of the oath *ex officio*. The Parliamentarians, led on this issue by Lord Coke, exalted the Common Law courts and their utilization of the accusatorial system of justice.[41]

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39. ENGLISH LEGAL SYSTEM, *supra* note 33, at 107–08. In the Star Chamber:

> [T]he defendant was examined by interrogatories based on his answer and was liable to be required to take an oath to speak the truth on the matters objected against him. Meanwhile the evidence of other witnesses was taken by affidavit, with the result that the defendant had no opportunity of cross-examining them. Both defendant and witnesses might (if need be) be examined under torture. All of this was in marked contrast to the common law procedure, which did not admit of torture, and where such evidence as was admissable at all was in general given only at the trial. Finally, in the Star Chamber the whole issue of fact was left to the decision of the court, whereas at common law it was submitted to the jury.

Id. *See generally* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769–74 (1935).

40. *See generally* Pittman, *supra* note 39, at 769–73. The author discusses the colonial development of the self-incrimination privilege by tracing English developments into the colonies.

41. EARL OF BIRKENHEAD, FOURTEEN ENGLISH JUDGES 39–40 (2d ed. 1926).

The spark that lit the fuse was struck in 1641 with the conviction of a popular Parliamentary leader, John Lilburn, by the Court of Star Chamber. The court had utilized the hated oath *ex officio* to obtain a questionable verdict. Popular reaction exploded against the Royalist cause and Parliament seized control of the government. Among its first acts were the abolition of the Court of High Commission, the abolition of the Court of Star Chamber and the outlawing of the use of the oath *ex officio*. The principle that "No man shall be required to accuse himself" became a first principle of English liberty.

That principle, as part of a common heritage, was carried to the English colonies in North America. It was ultimately included in the Constitution of a new nation, 150 years after its first enactment by Parliament. With the exception of New Jersey and Iowa,[42] every American state has a constitutional privilege against being compelled to be a witness against one's self. These privileges are largely verbatim with the fifth amendment and generally interpreted to be identical with it. How then did the federal expression of the principle come to dominate so completely the common field?

As with other provisions of the Federal Bill of Rights, the question soon arose whether the fifth amendment privilege was binding on the states through the due process clause of the fourteenth amendment. Initially, the Supreme Court concluded that the privilege, though highly desirable, was not so fundamental as to be necessarily binding on the states. Rather, the states were left to their own devices, both as to whether to have such a constitutional protection and, if they did, as to how to interpret such a protection. In 1908 the Supreme Court in *Twining v. New Jersey*, first considered whether the fifth amendment privilege, theretofore binding only on the federal government, was such "an immutable principle of justice" as to be binding on the sovereign State of New Jersey.[43] The Supreme

42. These states also provide the protection of the privilege against compelled self-incrimination but do so as part of the common law rather than by way of constitutional provision. State v. Zdanowicz, 69 N.J.L. 619, 622, 55 A. 743, 744 (N.J. 1903) (affirming the common law doctrine against compelled self-incrimination); State v. Height, 117 Iowa 650, 661, 91 N.W. 935, 938 (1902) (finding implied privilege under state constitution's due process provision).

43. 211 U.S. 78, 113 (1908). The Supreme Court stated that:

> [I]t would be going too far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked

Court concluded that it was not.[44]

The Court reaffirmed the holding of *Twining v. New Jersey* in 1934[45] and 1961.[46] However, in the 1964 decision of *Malloy v. Hogan*[47] the Supreme Court reversed those earlier precedents and held that the privilege against compelled self-incrimination would be fully binding upon the states as a protection incorporated within the due process clause of the fourteenth amendment:

> We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.[48]

Since 1964, therefore, the study of the privilege against compelled self-incrimination has been almost exclusively the study of the embodiment of that privilege as found in the fifth amendment.

C. The Right to Testify Distinguished

The privilege not to be compelled to testify and a right to testify are by no means the same. The existence of a particular right never implies the necessary existence of its converse. The right to trial by jury does not imply a right to a non-jury trial. The right to a speedy trial does not imply a right to a delayed trial. The right to confront one's accusers does not imply a right to avoid such confrontation. Historically, the existence of a fifth amendment privilege against being compelled to be a witness against oneself did not suggest the existence of a corollary right to be a witness in one's own behalf.

At the time the fifth amendment was enacted and for almost

> with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law. . . .

Id.

44. *Id.* at 114.

45. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness . . . .").

46. Cohen v. Hurley, 366 U.S. 117, 127–28 (1961). Since *Twining v. New Jersey*, the Court's position has been that a defendant does not have a federal constitutional right not "to incriminate himself in the state proceedings. . . ." *Id.* at 127.

47. 378 U.S. 1 (1964).

48. *Id.* at 6.

one hundred years thereafter, it was the universal rule throughout the common-law world that criminal defendants were not competent to testify in their own defense. This rule of testimonial incompetence rested upon the belief that criminal defendants, because of overriding self-interest, generally would not be believable and capable witnesses on the subject of their own guilt.[49] It was only a nineteenth century reform movement, championed by Jeremy Bentham and Sir James Stephen in England, and later John Appleton in the United States,[50] that gradually brought about the removal of this testimonial disqualification. The reform, however, was statutory and not constitutional.

In 1859, Maine became the first American state to legislate testimonial competence for a criminal defendant.[51] Between 1866 and 1900, every other American state and territory, with the exception of Georgia, passed similar statutes rendering criminal defendants competent to testify.[52] The United States Congress in 1878 conferred the statutory right to testify in the federal courts, although Parliament did not remove the testimonial disqualification in Great Britain until 1898.[53]

In the 1961 case of *Ferguson v. Georgia*,[54] the Supreme Court declined to strike down as unconstitutional the Georgia law deeming a criminal defendant incompetent to testify.[55] Georgia law allowed a defendant to give unsworn testimony. The defendant was not subject to cross-examination and jurors were free to give the defendant's testimony whatever weight they deemed appropriate.[56] The Georgia Legislature finally removed the testimonial disqualification in 1962.

In 1987, the Supreme Court, in the case of *Rock v. Arkansas*,[57] recognized for the first time the existence of a constitutional

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49. Ferguson v. Georgia, 365 U.S. 570, 573 (1961).

50. *Id.* at 575–83. The theory behind this movement was that, " '[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals.' " *Id.* at 575 (citation omitted).

51. *Id.* at 577.

52. *Id.*

53. *Id.* at 577–78.

54. 365 U.S. 570 (1961).

55. *Id.* at 596.

56. *Id.* at 571.

57. 483 U.S. 44 (1987). In *Rock*, the Supreme Court ruled that the Arkansas per se rule excluding posthypnosis testimony impermissibly infringed on the right of a defendant to testify on his or her own behalf. *Id.* at 62.

right in a defendant to testify. The Court discussed three possible sources for that right. It advanced the possibility of the due process clause of the fourteenth amendment,[58] of the right to compulsory process of the sixth amendment, and as a necessary corollary of the fifth amendment privilege.[59] The Court did not make clear whether those were three alternative and self-sufficient bases for the right or whether the three partial predicates somehow combined to support an amalgamized right that could not rest upon any one of them alone. With respect to the right to testify, the Supreme Court said:

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process. . . ."
> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," is a right to testify himself, should he decide it is in his favor to do so. . . .
> The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.[60]

By elevating statutory enactments of testimonial competence into a constitutional right to testify, the Supreme Court may have done more than it realized. The tactical decision of a criminal defendant to sit mute, which prior to *Rock* required nothing more by way of justification than the competence to stand trial, may now give rise to perplexing constitutional questions as to whether there was "an intentional relinquishment or abandonment of a known right"[61] to testify. With " 'courts indulg[ing] every reasonable presumption against waiver' of fundamental constitutional rights"[62] and because "[p]resuming waiver from a silent record is impermissible,"[63] the heretofore simple decision of a competent defendant to sit

58. *Id.* at 51.
59. *Id.* at 52–53.
60. *Id.* at 51–52 (citations omitted).
61. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
62. *Id.*
63. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

silent may generate interminable appellate and post-conviction review. Will every election not to take the stand necessitate a waiver hearing? When a merely statutory rule of testimonial competence is promoted to the status of a constitutional right, that may be the unforeseen but inevitable consequence.

I. The Fifth Amendment Privilege

A. Waiver of the Privilege

A waiver of privilege is the intentional relinquishment of a known right. In the context of the fifth amendment, when a defendant chooses to take the stand to testify, the defendant relinquishes the right against compelled self-incrimination. When the defendant voluntarily testifies, there are two types of silence which can be used against the defendant: first, the silence the defendant exercised on the street before, during and after the arrest; second, the silence the defendant exercises after taking the stand in court.

The defendant's on-the-street silence can be used against the defendant three different ways in court. First, on cross-examination, the prosecutor can use the defendant's silence to impeach the defendant's credibility. Second, the prosecutor can argue any inference from the defendant's silence in closing argument. Finally, the judge may instruct the jury to consider the defendant's silence in their deliberations.

Defendants who take the stand in their own defense frequently give a self-serving explanation of their conduct that is not in any way incriminating. By taking the stand, however, they subject themselves to the risk of a cross-examination that could become very incriminating. As the prosecutor's questions move ever more closely toward sensitive areas, may the defendant suddenly invoke the fifth amendment privilege? The Supreme Court said "no." In *Brown v. United States*,[64] the Court explained that by taking the stand voluntarily, a defendant waives the right not to be subsequently compelled to respond to probing cross-examination. Were a defendant to balk at responding to cross-examination, the coercive sanctions of the court could be employed: a citation for contempt could be issued or adverse comment to the jury could properly

64. 356 U.S. 148 (1958).

be made or both. The rationale was explained by Justice Frankfurter:

> [The accused] has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.[65]

A defendant who voluntarily takes the stand waives the privilege against compelled self-incrimination. The defendant is not only open to cross-examination, but also to the use against him of his earlier silence. That option to remain silent may have been constitutionally protected when exercised but loses its shield when the defendant subsequently takes the stand.

Raffel v. United States illustrates how silence in a previous trial can be used against the defendant in a second trial.[66] At his first trial, Raffel chose not to take the stand and therefore left in question the validity of an incriminating admission made at the time of his arrest.[67] His failure to make a timely denial could not be commented upon at his first trial because it would have infringed upon his constitutional right to silence. At his subsequent trial, however, Raffel voluntarily took the stand in his own defense and denied having made the incriminating admission. On cross-examination, his earlier failure to deny the admission was used to impugn the credibility of his later denial. The Supreme Court ruled that when Raffel voluntarily took the stand it operated as a total waiver of the privilege:

> [T]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. He may be examined for the purpose of impeaching his credibility. His failure to deny or explain evidence of incriminating circum-

65. *Id.* at 155–56.
66. 271 U.S. 494, 499 (1926).
67. *Id.* at 495.

> stances of which he may have knowledge, may be the basis of adverse inference, and the jury may be so instructed. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.[68]

The Supreme Court continued:

> [T]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness.[69]

What *Raffel* established with respect to the lowering of the shield against the use of prior trial silence, *Jenkins v. Anderson*[70] established with respect to the use of pre-arrest silence on the street. Dennis Jenkins was tried for first-degree murder. At his trial, he took the stand and claimed he killed the victim in necessary self-defense. The prosecution, on cross-examination and in jury argument, made devastating use of the fact that Jenkins neither remained at the scene nor went to the police to report the attack upon him and his killing of his assailant in self-defense.[71] He, indeed, allowed two weeks to go by before offering his explanation of the killing to anyone in authority. The Supreme Court did not have to consider whether pre-arrest silence was in any way protected by the fifth amendment privilege. The Court held that Jenkins waived his fifth amendment privilege by his subsequent decision to take the stand in his own defense:

> [A] defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."
>
> Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We concluded that the Fifth Amendment is not violated by the use of prearrest silence to

68. *Id.* at 496–97 (citations omitted).
69. *Id.* at 499. *See also* Grunewald v. United States, 353 U.S. 391, 423 (1957).
70. 447 U.S. 231 (1980).
71. *Id.* at 233.

impeach a criminal defendant's credibility.[72]

The Supreme Court reiterated the basic evidentiary principle that silence may have significant relevance:

> [C]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.[73]

B. The Defendant-Privilege v. The Witness-Privilege

The fifth amendment privilege is made up of many privileges, all of which have common characteristics, but also differ in critical respects:

> [T]here is no agreement as to the policy of the privilege against self-incrimination. This is partly because there is no 'the' privilege. It is many things in as many settings. The privilege is a prerogative of a defendant not to take the stand in his own prosecution . . . ; it is also an option of a witness not to disclose self-incriminating knowledge in a criminal case, and in a civil case, and before a grand jury and legislative committee and administrative tribunal. . . .[74]

The defendant-privilege is the total and unfettered right to sit silent throughout the course of a criminal trial. For the prosecutor or the judge even to call the defendant to the stand would engage the gears of the privilege.

The witness-privilege, by way of contrast, is not nearly so sweeping. A witness summoned to testify at a civil or criminal trial, before a grand jury or at a legislative hearing does not have the right to sit silent throughout the questioning. The privilege against compelled self-incrimination is not self-executing. The witness must take the stand and answer questions as they are propounded. If the witness wishes the benefit of the privilege with respect to any particular answer, it is the responsibility of the witness to invoke the privilege. Even if the privilege is successfully invoked with respect to a particular answer, it does not operate to end the examination of the witness. The questioning may go on with respect to other matters and the witness has a continuing responsibility to invoke the privilege, when appropriate, on a question-by-question basis.

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72. *Id.* at 238 (citations omitted).
73. *Id.* at 239 (citations omitted).
74. 8 J. WIGMORE, *supra* note 11, § 2251 at 296.

In *United States v. Mandujano*,[75] the Supreme Court explained that:

> [T]he witness must invoke the privilege, however, as the "Constitution does not forbid the asking of criminative questions. The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment."[76]

II. COMPONENTS OF THE FIFTH AMENDMENT

To invoke successfully the testimonial privilege against being compelled to be a witness against oneself, the reluctant witness must satisfy the court that each of the six components of the privilege, spelled out in the constitutional provision, is present.

A. Person: "No Person . . ."

The first component requires the court to identify whether the reluctant witness is a member of the class for whose protection the privilege was established. The subject of the constitutional guarantee is a "person." Who or what constitutes a "person" within the contemplation of the fifth amendment privilege?

The due process clause of the fourteenth amendment also uses the term "person," as it provides, "[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law."[77] For fourteenth amendment purposes, however, it was determined in *Santa Clara County v. Southern Pac. R.R.* that a corporation was a corporate "person" entitled to the guaranteed liberty of the fourteenth amendment.[78] Presumably, such a corporate "person" would also enjoy the benefit of the due process clause of the fifth amendment. The double jeopardy protection of the fifth amendment was extended to a corporate "person" or artificial entity in the case of *United States v. Martin*

75. 425 U.S. 564 (1976).
76. *Id.* at 574–75 (citation omitted).
77. U.S. CONST. amend. XIV (emphasis added).
78. 118 U.S. 394, 396 (1886).

Linen Supply Co.[79]

When it comes to the fifth amendment privilege, however, the word "person" takes on a more familiar meaning. It is available only to a natural person, as a member of the species *homo sapiens*. Perhaps this restriction was inevitable because it is difficult to imagine anything other than a natural person as a "witness." In any event, since *Hale v. Henkel*[80] in 1906, where the Supreme Court held that an officer of a corporation could not refuse to testify as a witness against the corporation, the Court has regularly restricted the availability of the testimonial privilege to natural persons.[81] In *United States v. White*[82] the Court said flatly, "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."[83] The opinion of the Supreme Court elaborated on the principle:

> [T]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. . . . It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.[84]

In 1974, the Supreme Court in *Bellis v. United States*[85] reiterated the personal limitation on the availability of the privilege against self-incrimination. After reviewing numerous decisions, the Court concluded:

> These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."[86]

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79. 430 U.S. 564, 568 (1977) (discusses the applicability of the fifth amendment double jeopardy provision with respect to a defendant corporation).

80. 201 U.S. 43 (1906). Similar holdings were rendered in Rogers v. United States, 340 U.S. 367, 371 (1951) and Wilson v. United States, 221 U.S. 361, 364 (1911).

81. *Hale*, 201 U.S. at 51.

82. 322 U.S. 694 (1944).

83. *Id.* at 699 (citations omitted).

84. *Id.* at 698.

85. 417 U.S. 85 (1974).

86. *Id.* at 89–90 (citation omitted).

It is clear that if the defendant in a criminal case is a corporation or some other artificial entity,[87] the defendant would not be eligible to invoke the privilege by arguing that the compulsory production of documents requires the entity to be a witness against itself.

B. Compulsion: "shall be compelled . . ."

The compulsion component of the fifth amendment privilege has generated as many Supreme Court decisions as all of the other five components combined. The operative word of the entire privilege is "compelled." There is no constitutional right not to be a witness against yourself. There is only the constitutional right not to be *compelled* to be a witness against yourself. The constitutional guarantee, growing out of our aversion to the inquisitorial use of the oath *ex officio*, was not intended to shield individuals from self-incrimination. Rather, its purpose is to shield individuals from compulsion.

Self-incrimination may take many forms. There is, of course, voluntary and knowledgeable self-incrimination. There is inadvertent self-incrimination. There is self-incrimination compelled by private persons. There is self-incrimination compelled by government. Quantitatively the most prevalent, however, is stupid self-incrimination. Far from creating barriers against voluntary but stupid self-incrimination, society welcomes it. Indeed, without it the war on crime would probably be a lost cause. Former Chief Justice Joseph Weintraub of the Supreme Court of New Jersey explained the distinction in 1968:

> There is no right to escape detention. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. . . . [A]s to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. . . .

87. Examples of artificial entities include: a partnership, church, political party, social club, etc.

> . . . It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process.[88]

The Constitution does not, by requiring that a trial judge issue warnings or insist upon a knowledgeable waiver, shield defendants from voluntarily incriminating themselves. The constitutional shield only comes into play to bar the use of official coercion. As Chief Justice Burger explained in *United States v. Washington*,[89] "[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."[90]

The 1966 case of *Hoffa v. United States*[91] illustrates this requirement. The former Teamster "boss" Jimmy Hoffa was on trial for a Taft-Hartley Act violation. James Partin, a former Teamster colleague of Hoffa who was serving a federal sentence in Louisiana, contacted the federal authorities and offered to act as an informer.[92] In an effort to build a better case against Hoffa, the government released Partin from confinement on the condition that he become an undercover agent against Hoffa. Pursuant to the deception, Partin insinuated himself into Hoffa's entourage and was welcomed into the "defense camp" as a "faithful servant."[93] Partin obtained significant incriminating evidence which he secretly turned over to the FBI. When this information was ultimately used against Hoffa, Hoffa raised the fifth amendment privilege against self-incrimination.[94]

In response to Hoffa's claim that his incriminating disclosures to Partin violated his privilege against compelled self-incrimination, the Supreme Court explained that although the government may have hoped for such revelations, encouraged such revelations, and even "set a trap" to procure such revelations, it did not compel the revelations. The Court stated:

> But since at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of

88. State v. McKnight, 52 N.J. 35, 52–53, 243 A.2d 240, 250–51 (1968).
89. 431 U.S. 181 (1977).
90. *Id.* at 187.
91. 385 U.S. 293 (1966).
92. *Id.* at 317 (Warren, C.J., dissenting).
93. *Id.* at 319 (Warren, C.J., dissenting).
94. *Id.* Hoffa also raised constitutional objections based upon the fourth amendment and the sixth amendment right to counsel. Only the fifth amendment claims concern us here.

> Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion.
>
> In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case.[95]

The absence of compulsion also explains the results that have been reached by the Supreme Court in a series of cases involving so-called "participant monitoring."[96] These are cases in which undercover agents or informants engage sellers of narcotics, gamblers and corrupt officials willing to receive bribes in incriminating conversations while secretly recording those conversations on hidden recorders or transmitters. In addition to fourth amendment claims that were raised in those cases, claims were made that the deception produced compelled self-incrimination. On each occasion, the Supreme Court responded that although the electronically monitored incriminating statements were made unwittingly, they had not been compelled.

1. Court Ordered Testimony

The court has the power to compel a witness to testify. First, the court determines whether a privilege exists. If there is no privilege, the court may order the witness to testify. Second, if the order is not obeyed, the court may hold the witness in contempt.

In the 1959 case of *Brown v. United States*,[97] a witness who had been summoned to appear before a grand jury refused to answer the grand jury's questions. The witness was not yet in contempt of court because the grand jury itself is not competent to rule upon the availability of the privilege and a judge is

95. *Id.* at 303–04 (footnote omitted).

96. *See* United States v. White, 401 U.S. 745 (1971) (narcotics conviction based on statements made to an informer); Osborn v. United States, 385 U.S. 323 (1966) (attempted bribery of a member of a jury panel); Lopez v. United States, 373 U.S. 427 (1963) (attempted bribery of an Internal Revenue Agent); On Lee v. United States, 343 U.S. 747 (1952) (damaging statements secretly recorded between defendant and undercover agent).

97. 359 U.S. 41 (1959).

not present during grand jury proceedings. Therefore, the witness was entitled to refuse to answer any questions until ordered to answer by a judge.[98]

A grand jury must present the issue of privilege to the court. If the court rules in the witness' favor, that ends the matter. The Court stated in *Brown* that "[e]ven after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer."[99]

Once the court has ruled that the privilege is not available and has ordered the witness to answer the question, if the witness then returns to the grand jury room and persists in the refusal to answer, the witness will then be "in direct disobedience of the court's order . . . [and will be] for the first time guilty of contempt."[100]

2. *Collateral Compulsion*

Ordinarily, the instrument of compulsion contemplated by the fifth amendment privilege when testimony is being sought is some type of action by the court. Compelling agents are usually a contempt citation or the threat of adverse comment to the jury. A series of Supreme Court cases in the 1960s, however, established that sanctions imposed outside the courtroom, or collateral compulsion, can also be compelling agents within the contemplation of the privilege. In *Garrity v. New Jersey*,[101] the Supreme Court held that threatening police officers with removal from office for failure to testify before a grand jury investigating governmental corruption represented compulsion forbidden by the fifth amendment. The Court held that the improperly obtained grand jury testimony could not be used against the officers in subsequent criminal trials.[102]

In *Spevack v. Klein*,[103] however, the Court held that a lawyer could not be disbarred for invoking the privilege and refusing

98. A court may impose civil sanctions of fines or imprisonment on a witness who refuses to comply with a court order and is held in contempt. *In re* Grand Jury Impaneled, 529 F.2d 543 (3d Cir. 1976), *cert. denied*, 425 U.S. 992 (1976); 18 U.S.C. § 401 (1988); 28 U.S.C. § 1826 (1982 & Supp. V 1987).

99. 359 U.S. at 50.

100. *Id.*

101. 385 U.S. 493 (1967).

102. *Id.* at 500.

103. 385 U.S. 511 (1967).

to testify at a judicial inquiry. The imposition of the sanction of disbarment was deemed to be an impermissible penalty for invoking the constitutional right to remain silent.[104]

Similarly, in *Gardner v. Broderick*,[105] the Court held that a New York City policeman had been improperly dismissed from his job for refusing to waive his privilege against self-incrimination when called to testify before a grand jury investigating police corruption. The Court stated 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."[106]

3. Peripheral Compulsion

Certain courtroom procedures peripherally involving the privilege have been examined by the Supreme Court to see if they have a constitutionally prohibited "chilling effect" upon the exercise of the privilege.

In *Brooks v. Tennessee*,[107] the Court turned its attention to a Tennessee statutory requirement that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."[108] Under the Tennessee law, if the defendant was not his own first witness, he was thereafter precluded from taking the stand.[109] The Supreme Court pointed out that a defendant might, as a tactical judgment, have a legitimate desire to remain silent at the time he opened his case but that subsequent events might persuade him that his testimony could be helpful. The threat that his latter option to testify might be forever foreclosed if he initially chose to sit silent was deemed to be an unconstitutional burden upon the exercise of that right:

> The rule, in other words, "cuts down on the privilege [to remain silent] by making its assertion costly."
>
> . . . Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take

104. *Id.* at 514–15.
105. 392 U.S. 273 (1968).
106. *Id.* at 279.
107. 406 U.S. 605 (1972).
108. *Id.* at 606.
109. *Id.* at 609–10.

> into account the very real and legitimate concerns that might motivate a defendant to exercise his right of silence.[110]

On the other hand, when the state has a strong case against the defendant, this puts tactical pressure on the defendant to testify, but that is not compulsion within the contemplation of the constitutional privilege. This is true even when the state's case has the benefit of a permitted inference of guilt arising from some suspicious behavior of the defendant which is "unexplained." In *Barnes v. United States*,[111] the permitted inference was that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference . . . that the person in possession knew the property had been stolen."[112] That inference is virtually indistinguishable from the almost universally recognized inference that the unexplained possession of recently stolen goods may give rise to the conclusion that the possessor was the thief. The defendant in *Barnes* challenged an instruction to the jury about the inference on the ground that it pressured him to forego invoking the privilege and required him to come up with some explanation for the recent possession. The Supreme Court rejected the notion that the evidentiary significance of the State's case unconstitutionally burdened the exercise of the privilege:

> Petitioner also argues that the permissive inference in question infringes his privilege against self-incrimination. The Court has twice rejected this argument. . . .
> The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination.[113]

An example of a constitutionally prohibited "chilling effect" is adverse comment to the jury on a defendant's decision not to testify. The landmark case was *Griffin v. California*[114] in 1965. In the pre-*Griffin* days, the trial judge ironically was as frequently the culprit as was the prosecuting attorney. California practice was typical of that of many states. Article I, section 13 of the California Constitution provided that a defendant's

110. *Id.* at 611–12 (citations omitted).
111. 412 U.S. 837 (1973).
112. *Id.* at 839–40.
113. *Id.* at 846–47 (citations omitted).
114. 380 U.S. 609 (1965).

failure to explain or deny any evidence "in the case against him may be commented upon by the court and by counsel, and may be considered by the court or by the jury."[115] In the trial of Eddie Dean Griffin for capital murder, the trial judge instructed the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.[116]

Picking up on the judge's instruction, the prosecutor dwelt at length on the failure of Griffin to take the stand. His argument concluded:

> These things he has not seen fit to take the stand and deny or explain.
> And in the whole world, if anybody would know, this defendant would know.
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.[117]

The Supreme Court referred to such adverse comments by judge and prosecutor alike as "a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws."[118] The Supreme Court in *Griffin* held:

> It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[119]

115. *Id.* at 610 n.2.
116. *Id.* at 610.
117. *Id.* at 611.
118. *Id.* at 614 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).
119. 380 U.S. 609, 614 (1965) (citation omitted).

> We . . . hold that the Fifth Amendment, . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.[120]

Having prohibited adverse instructions permitting juries to take a defendant's failure to testify as an inference of guilt, the Supreme Court turned its attention to the favorable instruction that the jury should not draw any inference of guilt from a defendant's failure to testify. In *Lakeside v. Oregon*,[121] the judge instructed the jury, over the defendant's objection, that no adverse inference should be drawn.[122] The defendant had requested that no instruction at all be given. The defense theory was that without an instruction, the jury might possibly forget that the defendant had not testified or might erroneously conclude that he was not permitted to do so. The defense fear was that any comment upon the defendant's decision, even a constitutionally correct one, would serve only to remind the jury that the defendant had not testified. It preferred to "let sleeping dogs lie."[123] The Supreme Court held that although it would not have been improper for the trial judge to accede to the defendant's request and to give no instruction at all, no constitutional right was actually violated when a correct instruction was given, even over the defendant's objection.[124]

In *Carter v. Kentucky*,[125] the Supreme Court dealt with the reverse situation. In *Carter*, the defendant requested an instruction. The Supreme Court held that when such an instruction is requested, it is constitutionally required that it be given:

> No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.[126]

In the 1978 case of *Lockett v. Ohio*,[127] the Supreme Court held that the prosecutor's closing argument remarks, that the

120. *Id.* at 615.
121. 435 U.S. 333 (1978).
122. *Id.* at 334.
123. *Id.* at 335.
124. *Id.* at 340–41. The Court noted that Lakeside's argument would require the Court to decide constitutional issues based on speculative assumptions. *Id.* at 340.
125. 450 U.S. 288 (1981).
126. *Id.* at 303.
127. 438 U.S. 586 (1978).

State's evidence was "unrefuted" and "uncontradicted," did not amount to comment on the defendant's failure to testify.[128]

4. *Characteristics of Compulsion*

a. *Compulsion Operates Directly Upon the Person Invoking the Privilege*

Probably the single most salient characteristic of the compulsion component is that the compelling influence must be brought to bear directly upon the person claiming the privilege. As Justice Holmes expressed in *Johnson v. United States*,[129] "[a] party is privileged from producing the evidence but not from its production."[130] A person is not shielded from being incriminated by the compelled testimony of neighbors, friends, close relatives, business associates, or even the defendant's own agents and employees, but only from being personally forced to provide the incriminating testimony.

In *Couch v. United States*,[131] Internal Revenue Service Agents subpoenaed business records from Lillian Couch's accountant. Ms. Couch had turned over the records to her accountant over the course of fourteen years which enabled the accountant to prepare her tax returns. The accountant initially invoked a fifth amendment privilege against providing the records. Ms. Couch also claimed that the privilege prevented the compelled records from being used against her at trial. The Supreme Court denied both of their claims.[132] Compulsion, the threat of contempt if the subpoena was not honored, was present with respect to the accountant, but the records in no way incriminated him. The records, on the other hand, incriminated Ms. Couch but no compulsion had been brought to bear upon her. She was not required to do anything.[133]

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128. *Id.* at 595. The Court stated:

> Lockett's own counsel had clearly focused the jury's attention on her silence, first, by outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the "next witness. . . ." [I]t seems clear that the prosecutor's closing remarks added nothing to the impression that had been already created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand.

Id.

129. 228 U.S. 457 (1913).

130. *Id.* at 458.

131. 409 U.S. 322 (1973).

132. *Id.* at 336.

133. *Id.* at 329.

The Supreme Court stated that the fifth amendment privilege is a *personal* privilege.[134] "[I]t adheres basically to the person, not to information that may be incriminating him."[135] The Court explained:

> In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. In the present case, no "shadow of testimonial compulsion upon or enforced communication by the accused" is involved.[136]

In terms of fifth amendment significance, the distinction between an accountant and an attorney is a distinction without a difference. *Fisher v. United States*[137] was the logical follow-up to *Couch v. United States*. In *Fisher*, taxpayers that had been interviewed by Internal Revenue Agents and, perhaps alerted to their vulnerability under *Couch*, reclaimed various documents that had been turned over to their accountants to assist in preparing tax returns. The documents were then transferred by the suspects to their lawyers. When the Internal Revenue Service learned the whereabouts of the documents, it served summonses upon the attorneys directing them to produce the documents.[138] The attorneys refused to comply, claiming that the production would violate the clients' fifth amendment privilege against compelled self-incrimination and also their attorney-client privilege.[139]

The Supreme Court denied the claim based on fifth amendment grounds because, as in *Couch*, the compulsion was not brought to bear upon the taxpayers. "The taxpayers' fifth amendment privilege is, therefore, not violated by enforcement of the summonses directed toward their attorneys."[140]

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134. *Id.* at 328 (emphasis in original).
135. *Id.*
136. *Id.* at 329 (citations omitted).
137. 425 U.S. 391 (1976).
138. *Id.* at 394.
139. *Id.* at 395.
140. *Id.* at 397.

The special status of the taxpayers' agent as an attorney, although highly relevant for sixth amendment purposes, is meaningless in terms of the fifth amendment. The reason the fifth amendment does not apply is very simple: the person compelled was not the person incriminated and the person incriminated was not the person compelled. The Supreme Court explained:

> [E]nforcement 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. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege.[141]

Couch and *Fisher* are cases where the fifth amendment privilege was not available because the compulsion was exerted upon the defendant's agents rather than upon the defendant personally. *Andresen v. Maryland*[142] is a case where no compulsion was exerted on anyone. The defendant, Peter Andresen, was an attorney who also conducted a real estate business. The state's real estate fraud investigation revealed that Andresen, while acting as a settlement attorney, had defrauded a purchaser.[143] Pursuant to a search warrant, agents of a bi-county fraud unit searched both his law office and his real estate office. They obtained a number of incriminating files, some of which had been produced by the defendant in his own handwriting. These documents contributed to his ultimate conviction of false pretenses and fraudulent misappropriation by a fiduciary. The Supreme Court acknowledged that the defendant's records were both incriminating and consisted, in significant part, of statements made by him. "There is no question that the records seized from petitioner's offices and introduced against him were incriminating. Moreover, it is undisputed that some of these business records contain statements made by petitioner."[144]

Holding that seizure of the records and their use at trial in no way "compelled petitioner to testify against himself in violation of the Fifth Amendment"[145] the Supreme Court went to

141. *Id.* (citations omitted).
142. 427 U.S. 463 (1976).
143. *Id.* at 465.
144. *Id.* at 471 (citations omitted).
145. *Id.*

the heart of the privilege. The privilege is not a shield against a defendant's being incriminated. It is only a shield against a defendant's being compelled, as a witness, to be the instrument of his own incrimination. The focus is upon a person as a witness, not upon a person as a defendant.

In *Andresen*, the defendant was neither compelled nor even requested to do anything. While the searches and seizures that led to his incrimination were taking place, he stood idly by as a passive observer. The Supreme Court contrasted this situation from the very different situation where a suspect, served with a subpoena for records, is required to produce them:

> Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentification of incriminating information, a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.[146]

b. Compulsion Must be Contemporaneous With Act of Testifying

In *Fisher* the subpoena which required the production of documents was directed to an agent of defendant Fisher. In *Andresen* the documents were obtained by a search warrant which did not require the defendant to produce anything. In 1984, the Court dealt with the case of *United States v. Doe*.[147] In *Doe*, the defendant was similarly required by subpoena to provide records which he had created himself. Milton Reid was suspected of submitting fraudulent bids and price quotes to a county office and its municipal entities. Reid was subpoenaed to produce business records before an investigative grand jury. The suspect moved to quash the subpoenas on the ground that compliance would violate his privilege against compelled self-incrimination. On the major issue, the Court ruled against Reid.[148]

There was no question but that to comply with the subpoena would be to submit to an act of compulsion. The compelled

146. *Id.* at 473–74 (citation omitted).
147. 465 U.S. 605 (1984).
148. *Id.* at 612.

production, however, was the production of documentary or physical evidence, not of testimony. Compliance with the subpoena would not "force him to restate, repeat or affirm the truth of [the documents'] contents."[149] The subpoena forced the suspect to incriminate himself by furnishing physical or documentary evidence of his guilt; it did not, however, force him to be a witness, the only act shielded by the privilege.

The actual writing of the incriminating statements, on the other hand, was the functional equivalent of a communicative or testimonial act while the writing was in progress. That *de facto* equivalent of testimony, however, was not compelled. "Where the preparation of business records is voluntary, no compulsion is present."[150] It is not enough that a suspect be compelled to produce documentary evidence of an earlier testimonial act. It is required that the testimonial act itself have been compelled.

In the typical case of incriminating business records, the suspect is in the exasperating dilemma that the incriminating records, when produced, were testimonial but not compelled, but are now, when subpoenaed, compelled but not testimonial. To be constitutionally forbidden, the compulsion must produce present testimony and not simply non-testimonial evidence of earlier testimony.

C. Criminal Case: "in any criminal case . . ."

The adverbial phrase "in any criminal case" was, before being pinned down by the interpretive process, capable of widely varying definition. The first phase of "fleshing out" its meaning went very definitely in favor of broadening the scope of the protection. Initially, it might quite plausibly have been claimed (and, indeed, it was so claimed) that the only forum in which the privilege would be available was an actual criminal case against the person invoking the privilege. Under such an interpretation, the privilege would not have been available to a person summoned to be a witness before an investigative grand jury, before a legislative committee, in a civil trial, or even at the criminal trial of some other defendant. This would

149. *Id.* The Court also noted that whether the records are in the defendant's possession is irrelevant in determining whether creation of the documents was compelled. *Id.*

150. *Id.* at 610.

have been so even if the testimony thus compelled might have been used against the witness in a subsequent criminal trial of that witness.

Early on, the Supreme Court declined to give a narrow interpretation to the phrase "in any criminal case" which would have drained the privilege of most of its vitality. In *Counselman v. Hitchcock*,[151] the witness Charles Counselman had been summoned to appear before a grand jury investigating possible criminal violations of the Interstate Commerce Act.[152] To certain questions, Counselman objected stating that the answer would tend to incriminate him.[153] The government argued that a grand jury investigation was not a criminal case within the contemplation of the fifth amendment privilege. The Supreme Court reasoned that the privilege was available in any forum, civil or criminal, legislative or judicial, investigative or adjudicative, so long as the testimony there compelled might later be used against the witness "*in any criminal case*":

> The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case.[154]

The key difference between the issue here and the production of incriminating business records is that the legal compulsion would be producing the testimony in the first instance even though the incriminating use of the testimony might come later. In the business records situation, the incriminating testimony (the writing of the records) had been voluntary in the first instance.

Even in the wake of *Counselman v. Hitchcock*, the government could still have argued for a relatively narrow reading of the phrase "in any criminal case" on the ground that the privilege

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151. 142 U.S. 547 (1892).

152. *Id.* at 548.

153. *Id.*

154. *Id.* at 562. The Court pointed out that the Constitution contains the phrase "any criminal trial" rather than "a criminal trial." Thus, it concluded that the provision must be broadly interpreted in favor of the right it was intended to secure. *Id.*

would not be available when the compelled testimony was sought in a civil case. *McCarthy v. Arndstein*[155] laid that possibility to rest. The forum before which Arndstein had been summoned was a civil bankruptcy proceeding.[156] The Supreme Court held that it was nonetheless an appropriate forum for invoking the privilege, so long as the compelled testimony might plausibly be offered against the witness in a subsequent criminal proceeding:

> The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.[157]

The second phase of interpreting the meaning of the phrase has been far more restrictive. A series of cases from 1923 to the present has made it clear that the forum in which the compelled testimony is ultimately used must literally be a criminal trial. It is not enough that harsh sanctions result from some other proceeding. In the case of *United States ex rel. Bilokumsky v. Tod*,[158] the forum was a deportation hearing. Bilokumsky, an illegal alien, took the advice of counsel and refused even to state his name, when questioned by the immigration inspector.[159] The immigration inspector drew an inference from that silence adverse to Bilokumsky and issued a warrant for his deportation.[160] In a criminal case, of course, the drawing of such an inference would be forbidden by the privilege. Justice Brandeis pointed out in *Bilokumsky*, however, that silence is frequently highly relevant and that, unless protected by the privilege, silence may be afforded its normal evidentiary significance.[161] Notwithstanding the heavy sanction of depor-

155. 266 U.S. 34 (1924).
156. *Id.* at 35.
157. *Id.* at 40. *See also* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (discussing McCarthy v. Arndstein, 266 U.S. 34 (1924)).
158. 263 U.S. 149 (1923).
159. *Id.* at 152.
160. *Id.* at 153–54.
161. *Id.*

tation that could flow from the hearing, the Supreme Court held unequivocally that a deportation proceeding was not a criminal case. The privilege was not, therefore, available. Unprivileged silence may legitimately incur a heavy evidentiary cost:

> Silence is often evidence of the most persuasive character. . . . He, presumably, knew whether or not he was a citizen. . . . There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify in this subject had a tendency to prove that he was an alien.[162]

The Court further noted:

> [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature. . . . There is no provision which forbids drawing an adverse inference from the fact of standing mute. . . . Since the proceeding was not a criminal one, Bilokumsky might have been compelled by legal process to testify whether or not he was an alien.[163]

In the course of ordinary life, silence frequently possesses significant probative value. Imagine a parent, hearing a sudden crash, walking into a kitchen and confronting two children of tender years, as they stand over the shattered remnants of a cookie jar. In response to the stern and accusing look, one child looks up and says, "Mommy, I didn't do it." The other child looks down and says, "I'm not talking." That silence speaks volumes and there is nothing sinister or oppressive about giving it, even in court, the weight that common sense dictates it deserves. The Supreme Court has held that silence is entitled to the weight it would ordinarily possess except in those special cases where it is privileged. Therefore, no adverse comment may be made upon it and no adverse inference may be drawn from it. The Supreme Court observed, in *United States v. Hale*:[164]

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162. *Id.*

163. *Id.* at 154–55.

164. 422 U.S. 171 (1975) (prosecutor's cross-examination question which caused defendant to admit he had remained silent after arrest carried with it an intolerably prejudicial impact).

> In most circumstances silence is so ambiguous that it is of little probative force. . . . Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.[165]

Whether silence is to be afforded its normal evidentiary relevance or whether use of it is constitutionally taboo is a function of whether the forum in which it is to be used is a criminal proceeding. *Baxter v. Palmigiano*[166] in 1976 closely paralleled the *Bilokumsky* decision of 1923 except that the forum was a prison disciplinary board rather than a deportation hearing. Nicholas Palmigiano was an inmate at the Rhode Island Adult Correctional Institution, serving a life sentence for murder. He was charged with disrupting prison operations and with inciting a disturbance which might have resulted in a riot. He was advised by the hearing officer that he had a right to remain silent during the hearing but if he remained silent, his silence would be held against him. He remained silent.[167] The disciplinary board's decision was that he had perpetrated the infraction of prison regulations and would be placed in "punitive segregation" for 30 days.[168] He complained to the Supreme Court that the use of silence against him violated his fifth amendment privilege.

The court stated that the prison disciplinary proceeding was not a criminal trial. "Disciplinary proceedings in State prisons, however, involve the correctional process and important state interests other than conviction for crime."[169] The use of Palmigiano's silence against him was, therefore, permissible because his silence was not dispositive of his guilt but "was given no more evidentiary value than was warranted by the facts surrounding his case."[170] This being a civil case, the Supreme Court concluded:

> Our conclusion is consistent with the prevailing rule that

165. *Id.* at 176.
166. 425 U.S. 308 (1976).
167. *Id.* at 312–13.
168. *Id.* at 313.
169. *Id.* at 319.
170. *Id.* at 318.

> the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*."[171]

The line between a criminal case and a civil case involving some characteristics of a criminal case is at times difficult to draw. In *United States v. Ward*[172] and *Allen v. Illinois*,[173] the Supreme Court furnished helpful guidelines. The Court indicated that deference would be given to the expressed intent of the legislature as to whether one of its laws is civil or criminal in purpose. In the *Ward* case, the legislature was the Congress of the United States;[174] in the *Allen* case, it was the General Assembly of Illinois.[175] The legislative intent, although deserving of significant deference, is not necessarily dispositive. "[W]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."[176] The Court approaches the possible overriding of the legislative intent cautiously. "In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.' "[177]

In the *Ward* case, a provision of the Federal Water Pollution Control Act required the person in charge of vessels at onshore or off-shore facilities to report any discharge of oil or other hazardous substances into the water. L.O. Ward, of L.O. Ward Oil and Gas Operations, followed the statute and reported to the Environmental Protection Agency that his company had spilled oil from an oil retention pit near Enid, Oklahoma into the Arkansas River Project. Ward was assessed a civil penalty of $500. Before the Supreme Court, he claimed the requirement that he report the violation which subjected him to the $500 penalty, violated his fifth amendment privilege. The Court considered "whether Congress, despite its

171. *Id.* (emphasis in original) (quoting 8 J. WIGMORE, *supra* note 11, at 439).
172. 448 U.S. 242 (1980).
173. 478 U.S. 364 (1986).
174. 448 U.S. at 244.
175. 478 U.S. at 365.
176. 448 U.S. at 248–49.
177. *Id.* at 249 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' "[178] The Court concluded that the mere existence of a monetary penalty was not sufficient for the Court to override the expressed intent of Congress.

Allen v. Illinois[179] thoroughly charted the civil-criminal boundary-line. Terry Allen was initially indicted by the State of Illinois for criminal assault. The State subsequently filed a petition to have Allen committed under its Sexually Dangerous Persons Act. The criminal charges were not pursued. Under the provisions of the Act, a trial court ordered Allen to submit to two psychiatric examinations. Although the psychiatrists were not allowed to introduce the statements Allen made to them at his hearing, they did use his compelled responses as a partial basis for their conclusions that he was a sexually dangerous person.[180] The intermediate appellate court in Illinois vacated his commitment, holding that his fifth amendment privilege had been violated. The Supreme Court of Illinois reversed, holding that since a proceeding under the Act was "essentially civil in nature," the privilege was not available.[181] The Supreme Court of the United States affirmed the Illinois Supreme Court.[182]

Allen's claim was that the proceeding under the Sexually Dangerous Persons Act was itself "criminal" so as to entitle him to the testimonial privilege.[183] In considering whether the proceeding was criminal, the Supreme Court began by noting that the question is "first of all a question of statutory construction. Here, Illinois has expressly provided that proceed-

178. *Id.* at 249 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

179. 478 U.S. 364 (1986).

180. Two psychiatrists concluded that Allen was "mentally ill and had criminal propensities to commit sexual assaults." *Id.* at 366.

181. Illinois v. Allen, 107 Ill.2d 91, 100, 481 N.E.2d 690, 694 (1985).

182. 478 U.S. at 368.

183. *Id.* The Court stated:

> What we have here, then, is not a claim that petitioner's statements to the psychiatrists might be used to incriminate him in some future criminal proceeding, but instead his claim that because the sexually-dangerous-person proceeding is itself "criminal," he was entitled to refuse to answer any questions at all.

Id.

ings under the Act 'shall be civil in nature'. . . ."[184] After giving deference to the legislative determination, however, the Supreme Court must still formulate its own analysis:

> As petitioner correctly points out, however, the civil label is not always dispositive. Where a defendant has provided "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied.[185]

The Supreme Court noted that under the Illinois Act, a number of procedural safeguards usually associated with criminal trials were provided. Among these were the right to counsel, the right to demand a jury trial, the right to confront and cross-examine adverse witnesses, and the requirement that a person's status as a sexually dangerous person be proved beyond a reasonable doubt.[186] The presence of such safeguards did not, however, transform the proceedings into something criminal in nature. The Court concluded that "the State has indicated quite clearly its intent that these commitment proceedings be civil in nature; its decision nevertheless to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights available there."[187]

The Supreme Court further pointed out the fact that confinement may result will not itself require a finding that the proceeding is criminal in nature. In this regard, it found it necessary to repudiate its earlier broad dicta in the case of *In re Gault*.[188] In *Gault*, a fifteen-year old boy was charged with making obscene telephone calls. After a juvenile court hearing, he was sent to the state school for juvenile delinquents. The Supreme Court reversed and held that the juvenile hearing did not provide the constitutional safeguards of due process and fair treatment. The Court applied criminal constitutional law standards, even though the state had said the action was

184. *Id.* (citations omitted) (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).

185. Allen v. Illinois, 478 U.S. 364, 369 (1986) (quoting *Ward*, 448 U.S. at 248–49).

186. 478 U.S. at 371.

187. *Id.* at 372.

188. 387 U.S. 1 (1967).

civil.[189] Although the *Gault* decision still stands, the Court narrowed the broad sweep of dicta:

> First, *Gault*'s sweeping statement that "our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty," is plainly not good law. Although the fact that incarceration may result is relevant to the question whether the privilege against self-incrimination applies . . . involuntary commitment does not itself trigger the entire range of criminal procedural protections.[190]

A critical factor in the *Allen v. Illinois* decision was that the Illinois Legislature had "disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement."[191] From those provisions, the Supreme Court concluded that the Illinois Act "does not appear to promote either of 'the traditional aims of punishment—retribution and deterrence.' "[192]

Notwithstanding the provision of safeguards typically associated with a criminal case, monetary sanctions, deportation, or the deprivation of liberty for a purpose other than punishment, a legislative determination that a law is "civil in purpose" will be afforded great deference. If the proceeding where compelled testimony is to be used is ultimately found to be civil rather than criminal, there is no fifth amendment privilege.

D. Testimony: "to be a witness . . ."

The key word is "witness." There is no such thing as a constitutional right against compelled self-incrimination. There is only a privilege not to be compelled to be a witness against oneself. The genus "self-incrimination" is far broader than the included species "testimonial self-incrimination." The antidote to loose constitutional thinking is constant reference back to the fact that it is a *testimonial privilege* being analyzed, to the history of reaction against the oath *ex officio* that gave birth to the privilege in the first instance, and to the precise words of the constitutional guarantee itself. The focus is not upon a

189. *Id.* at 12–13.
190. Allen v. Illinois, 478 U.S. 364, 372 (1986) (citations omitted).
191. *Id.* at 370.
192. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

person in the status of a defendant who may be unfairly incriminated, but upon a person in the status of a witness who may be compelled to be the instrument of their own incrimination. The core purpose of the privilege is witness-oriented rather than defendant-oriented.

Justice Holmes was an articulate harbinger of the testimonial privilege as early as 1910. More than a half century was to transpire, however, before the Supreme Court zeroed in on this particular component of the fifth amendment privilege in 1966. The harbinger case was *Holt v. United States*.[193] The defendant was compelled, prior to trial, to model a blouse so that investigators could determine whether the crime-related blouse fit the suspect defendant. The defendant claimed that this compelled him to be a witness against himself. The Court dismissed the claim as "an extravagant extension of the Fifth Amendment."[194] Justice Holmes observed:

> [T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.[195]

Fifty-six years went by before the Court took up the issue again in *Schmerber v. California*.[196] On the night of November 12, 1964, Armando Schmerber and a companion had been drinking at a tavern and a bowling alley. As Schmerber was driving the two of them away from the bowling alley at about midnight, the car skidded, crossed the road, and struck a tree. Both men were injured and taken to the hospital for treatment. Schmerber was ultimately convicted in the Los Angeles Municipal Court of driving while intoxicated. The key evidence against him was a chemical analysis of his blood; a blood sample was taken from him at the hospital at the direction of the police and over his objection.

In addition to other constitutional claims involving the fourth amendment, the sixth amendment right to counsel and

193. 218 U.S. 245 (1910) (defendant was found guilty of murder and sentenced to life in prison after assaulting and killing a man with an iron bar).

194. *Id.* at 252.

195. *Id.* at 252–53.

196. 384 U.S. 757 (1966).

the fourteenth amendment, Schmerber maintained that compelling him to yield up the incriminating blood sample was an unconstitutional violation of his fifth amendment privilege. The Supreme Court readily acknowledged that there had been both compulsion and incrimination, but found that Schmerber had in no way been compelled "to be a witness." The Court established the principle that the use of a defendant's body for purposes of physical identification is not "evidence of a testimonial or communicative nature."[197] Unless a defendant is somehow compelled to reveal, through words or actions, the contents of his thought process, he has not been compelled "to be a witness." The Supreme Court catalogued a wide variety of compelled uses of the body which would not be shielded by the privilege because they are not communicative or testimonial in nature. The Court noted:

> [B]oth federal and state courts have usually held that it 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. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that the compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.[198]

Conversely, the Court strongly suggested that certain uses of the body which might appear to be non-communicative would actually have a testimonial quality and thus be shielded:

> Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it

197. *Id.* at 761. Justice Brennan added that a dissent in *Schmerber* suggests that the blood test report was communicative or testimonial. Others had to testify concerning the report when the blood test was performed and this communicated facts about the petitioner's condition to the jury. *Id.* at 761 n.5.

198. *Id.* at 764.

seeks to guard."[199]

One year after *Schmerber*, *United States v. Wade*[200] and *Gilbert v. California*[201] picked up the theme. Although those identification cases were concerned primarily with the sixth amendment right to counsel, the Court addressed the fifth amendment issue of self-incrimination. Both Billy Joe Wade and Jesse James Gilbert were bank robbers. Wade was required to stand in a lineup to be identified by two of his victims. He was further required, as were the other persons in the lineup, to apply strips of adhesive tape diagonally to each cheek. He was further required, as were the others, to speak the words that the victims remembered from the robbery scene, "put the money in the bag."[202] In addition to his other claims, Wade maintained that these compelled uses of his body and his voice required him to incriminate himself in violation of the privilege. The Supreme Court quickly dismissed any applicability of the privilege to his required presence in a police lineup:

> We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have.[203]

Although requiring a suspect to speak certain words might resemble compelled testimony, the Supreme Court noted that the use of his voice in that manner was only for an identifying physical characteristic.[204] Had he been required to be the author of the words, there might have been a testimonial or communicative component. As long, however, as he is a mere actor or automaton speaking words chosen for him by others, the use of his voice is no more testimonial than the display of his face.

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199. *Id.* (citation omitted).

200. 388 U.S. 218 (1967) (the defendant was placed in a lineup without notice to his counsel, identified by two bank employees and subsequently convicted of bank robbery).

201. 388 U.S. 263 (1967) (the defendant was placed in a lineup without notice to his counsel, identified by witnesses and subsequently convicted of armed robbery and murder of a police officer).

202. 388 U.S. at 220.

203. *Id.* at 222.

204. *Id.* at 222–23.

Gilbert v. California[205] added the additional wrinkle that the furnishing to a grand jury of handwriting samples is no more testimonial than the speaking of dictated words. Whereas Wade had demanded orally that his victim "put the money in the bag," Gilbert had passed a note to the teller demanding money and then ran from the bank leaving the note behind. The Supreme Court concluded, "A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its [the privilege's] protection. No claim is made that the content of the exemplars was testimonial or communicative matter."[206]

In 1973 *United States v. Dionisio*[207] followed *United States v. Wade* and said that not only could a defendant's oral statement be used in a police line-up, a recording of the defendant's voice could also be used for purposes of a grand jury.[208]

In *California v. Byers*,[209] the Supreme Court considered the fifth amendment implications of the California stop-and-report law, which required a driver involved in an accident to stop at the accident scene and to give his name and address. Byers claimed that the California law compelled him to be a witness against himself. The Supreme Court concluded that the required act of stopping was not testimonial in nature. With respect to the disclosure of name and address, it could hardly claim that it was not testimonial but dismissed it nonetheless as not significantly incriminating:

> [A] driver involved in an accident is required to stop at the scene; second, he is required to give his name and address. The act of stopping is no more testimonial—indeed less so in some respects—than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or blood. Disclosure of name and address is an essentially neutral

205. 388 U.S. at 266–67.

206. *Id.* (citation omitted).

207. 410 U.S. 1 (1973). The grand jury subpoenaed twenty people to make voice recordings for identification purposes. The Supreme Court held that compelled production of voice exemplars did not violate the fifth amendment privilege against self-incrimination because they were only used for identification, not for testimonial purposes. *Id.* at 18.

208. *Id.* at 5.

209. 402 U.S. 424 (1971).

act.[210]

Usually we think of testimony as either the written or spoken word. *South Dakota v. Neville*[211] established the principle that even non-verbal conduct can be testimonial. Mason Henry Neville was stopped on a South Dakota highway and ultimately convicted of drunken driving. Under South Dakota's "implied consent" law, a motorist has the option to refuse to take a test for blood-alcohol content. That option is burdened in that the fact of refusal is admissible in evidence and may be commented upon at trial.[212] Neville refused to take the blood alcohol content test and that refusal was used against him at his trial. On appeal, before the Supreme Court, he claimed that his fifth amendment privilege was violated.

The Supreme Court held that the privilege was not available.[213] The primary interest of this case lies in the reasoning used by the Court to reach its result. The Court pointed out that many American jurisdictions, following the lead of California, have reasoned that the refusal to submit to a test is a physical act rather than a communicative act and have refused to apply the privilege for that reason. The Supreme Court preferred not to follow that line of analysis. It reached the same result by reasoning: 1) that under *Schmerber v. California* there was no constitutional right to refuse to submit to a test; 2) that South Dakota's extension of a right to refuse was an act of statutory grace; and 3) that the option to take the test or to refuse it was voluntary and not compelled.[214] Although finding no compulsion, the Supreme Court nonetheless concluded that the act of refusing was itself communicative or testimonial in character:

> The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states "I refuse to take the test," to the respondent here, who stated "I'm too drunk, I won't pass the test." Since no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal, we prefer to rest our decision on this ground, and draw pos-

210. *Id.* at 431–32 (citations omitted).
211. 459 U.S. 553 (1983).
212. *Id.* at 555–56.
213. *Id.* at 563.
214. *Id.* at 559–60.

sible distinctions when necessary for decision in other circumstances.[215]

E. Incrimination: "against . . ."

There is no testimonial privilege against acknowledging one's participation in a crime. The only constitutional reason why a person may not be compelled to be a witness is that the compelled testimony will incriminate that person. Incrimination means more than establishing the historic fact that one participated in a crime. Incrimination means formal conviction of crime and consequent exposure to the risk of state imposed punishment.

There is no privilege against compelled testimony that will subject the witness to mere infamy or disgrace. "If the answer of the witness may have a tendency to disgrace him or bring him into disrepute, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer. . . ."[216] By the same token, a fear of reprisal for the compelled testimony will not give rise to the privilege.[217]

If, for any number of reasons, the threat of literal incrimination is not present, there is no constitutional privilege. If, for instance, the statute of limitations has run for a crime which the witness is compelled to reveal, there is no privilege. *Brown v. Walker*[218] established as early as 1896 that, "[I]f a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer."[219] *Hale v. Henkel*[220] in 1906 held to a similar effect, "If the testimony relate to criminal acts long since past, and

215. *Id.* at 561–62. Justice O'Connor added that "[m]any courts have found no self-incrimination problem on the ground of no coercion, or on the analytically related ground that the State, if it can compel submission to the test, can qualify the right to refuse the test." *Id.* at 562 n.13.

216. Brown v. Walker, 161 U.S. 591, 598 (1896).

217. Peimonte v. United States, 367 U.S. 556, 559 n.2 (1961). If two people witness an offense, and one is an innocent bystander and the other is an accomplice who is later imprisoned, the accomplice has no more right to remain silent than the innocent bystander. The fear of reprisal does not give an immunized prisoner relief from testifying any more than an innocent bystander. *Id.*

218. 161 U.S. 591 (1896) (witness subpoenaed by a grand jury refused to answer questions on the grounds that the answers would incriminate him).

219. *Id.* at 598 (citations omitted).

220. 201 U.S. 43 (1906). A witness subpoenaed by a grand jury inquired whether the grand jury had any lawful right to question the witness. When the witness

against the prosecution of which the statute of limitations has run . . . the amendment does not apply."[221]

The double jeopardy clause of the fifth amendment ensures that once a person is convicted of a crime against the state or nation, that person cannot be tried again for the same crime. The double jeopardy bar operates to remove the threat of incrimination, thereby disqualifying the person who has already been tried from claiming the privilege.[222] Once an individual has been acquitted of a criminal charge, that person may never be placed in jeopardy again for that crime. If called upon to testify about the criminal activity, the witness has no possible fear of incrimination and will not be exempted from the duty to testify. By the same token, a person already convicted of a particular crime may be compelled to testify as that person may not again be placed in jeopardy for the same act.

The Supreme Court has not yet determined the point when the danger of incrimination is sufficiently past to bar resort to the privilege. As a general rule, one who has been convicted but not yet sentenced is deemed to be still at risk. At the other end of the spectrum, when direct appeal has been exhausted with respect to a conviction, the person convicted is generally deemed to be beyond the point of further risk, even though there is a possibility of the first conviction being reversed on collateral review.[223]

Just as a former acquittal or a former conviction will obviate any risk of further incrimination, so will a pardon, including a pardon conferred in advance of trial or conviction.[224] If former President Richard Nixon, for instance, were summoned to testify about events involving the Watergate scandal, the fifth amendment privilege would not be available to him because of the blanket pardon conferred upon him by President Ford. Where there is no danger of actual incrimination, there is no

learned that the grand jury was not investigating a specific charge against anyone, the witness declined to answer any questions. *Id.*

221. *Id.* at 67.

222. Reina v. United States, 364 U.S. 507, 510–14 (1960) (United States Supreme Court upheld conviction of criminal contempt for person who invoked his privilege against self-incrimination and refused to testify after being granted immunity).

223. The defendant may be prosecuted again if the court on appeal reverses the conviction based on errors in the proceedings. United States v. Ball, 163 U.S. 662 (1896).

224. Peimonte v. United States, 367 U.S. 556, 558–61 (1961) (privilege not available where witness has been granted immunity from future prosecution).

privilege. "[I]f the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed."[225]

1. Immunity

A highly litigated aspect of the component of incrimination is the issue of immunity to a witness. If a witness possesses information which is protected by a privilege, but useful to the prosecutor, the prosecutor can compel the testimony simply by immunizing the witness. As *Ullmann v. United States*[226] described the trade-off, "Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."[227] The perplexing problem has been how broad the grant of immunity must be in order to displace the danger. The answer to that question has only slowly evolved.

The early and unsophisticated grapplings with the problem of immunity were hampered by the assumption that immunity came only in two forms: 1) use immunity and 2) transactional immunity. Use immunity means simply that the testimony which is compelled will not directly be used against the witness at a subsequent criminal trial of that witness. Transactional immunity means that the witness whose testimony is compelled will be broadly guaranteed that no prosecution may proceed with respect to any crime revealed by the testimony.

The Congress of the United States just before the turn of the 20th Century sought to give investigators and prosecutors access to otherwise privileged testimony by conferring upon them the power to grant use immunity.[228] In 1892, in *Counselman v. Hitchcock*,[229] and again in 1896, in *Brown v. Walker*,[230] the Supreme Court held that mere use immunity was not broad enough to displace the danger of self-incrimination. In both cases, the witness refused to answer questions propounded by a grand jury. The witnesses were found to be in contempt of court, ordered to pay a fine and taken into custody

225. Brown v. Walker, 161 U.S. 591, 599 (1896) (citations omitted).

226. 350 U.S. 422 (1956) (suspected spy who was granted immunity refused to testify and was convicted of contempt and imprisoned).

227. *Id.* at 439.

228. Compulsory Testimony Act, 49 U.S.C. § 46 (1982) (Act was first passed by Congress in 1893).

229. 142 U.S. 547, 564, 585–86 (1892).

230. 161 U.S. 591, 608–10 (1896).

until they would answer the questions. The Court reasoned that even if the compelled testimony could not be used directly against the reluctant witness, that testimony might nonetheless furnish valuable "leads" or clues to other incriminating evidence that the government would never have discovered but for the compelled testimony. Since the witness would, in terms of risk of incrimination, be in a worse position after having been compelled to testify, the limited grant of use immunity was not adequate to shield the witness from danger.

More than half a century passed before the Supreme Court addressed the problem again. During that time, it appeared that use immunity was not sufficient to overcome the privilege and that, therefore, nothing short of transactional immunity would suffice. Transactional immunity was difficult for the prosecution to grant, because a broad "immunity bath" did more than maintain a witness's status quo. It put the witness in a far better position than the witness had been in before the testimony was compelled. It removed the possibility that the prosecution could proceed against the witness on the basis of independent evidence of guilt without resorting to any use of the compelled testimony.

A more satisfactory middle ground was suggested by the Court in *Murphy v. Waterfront Commission*[231] in 1964. That case advanced the idea that if Congress were to create a form of immunity that represented "use plus derivative use" protection, that would be sufficient to displace any danger. Recourse to the more sweeping transactional immunity would no longer be required. The guarantee would simply have to be that the prosecution would neither use the compelled testimony directly nor use it indirectly as a lead to other evidence. Congress picked up upon the suggestion and created the device of "use plus derivative use" immunity.[232] The constitutionality of this device came before the Supreme Court and passed muster in *Kastigar v. United States*[233] in 1972. The Supreme Court

231. 378 U.S. 52, 53–54 (1964) (witnesses refused to testify after receiving immunity because the immunity only extended to state court and not federal court and the Court held that the immunity granted by the state government must apply to the federal government).

232. 18 U.S.C. §§ 6002–03 (1988).

233. 406 U.S. 441, 442 (1972) (immunized witness refused to answer questions claiming the scope of immunity was not coextensive with the scope of the privilege against self-incrimination and therefore insufficient).

observed:

> We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[234]

The guarantee against the derivative use of compelled testimony is not simply a bar to the use of the testimony as a lead for further investigation. *New Jersey v. Portash*[235] established that immunized testimony not only may not be used by the prosecution in its case in chief, but may not be used even in rebuttal to impeach the credibility of a witness's voluntary testimony.

On the other hand, neither use immunity nor derivative use immunity protects a witness from a subsequent perjury prosecution if the testimony given under compulsion is false. There

234. *Id.* at 453 (footnote omitted). Conceptually, the idea of "use plus derivative use" immunity is simple to grasp. The only difficulty it has encountered is the practical evidentiary problem for the prosecutor of proving that no derivative use was made of the compelled testimony. The standard method that has evolved for proving independent grounds of conviction is for the prosecution to set out in writing the proof of guilt it already possesses and to place that evidence under seal with the judge or the clerk of the court before compelling a witness's testimony. If this procedure is followed, then it is a simple matter for the prosecution to establish that it already possessed the evidence of guilt it will offer at trial. The problem, however, of how to prove something is more properly the subject matter of evidence than of constitutional law.

235. 440 U.S. 450, 459–60 (1979) (witness's testimony before a grand jury under a grant of immunity can not be used to impeach the witness in a subsequent criminal trial).

is no paradox in this limitation. The privilege being displaced extended to testimony with respect to earlier criminal activity. Perjury in the course of present testimony, by contrast, would represent a totally new crime rather than privileged testimony about earlier crime. The Supreme Court has consistently recognized that use immunity is no shield for perjury.[236]

Since the immunity need be no broader than the danger it displaces, the ways in which it may be limited are many. The employment of "use plus derivative use" immunity rather than transactional immunity is one such limitation. Another is illustrated by the case of *United States v. Doe*,[237] a case already discussed in dealing with the non-testimonial character of business records. The Supreme Court in that case held that the business records of a sole proprietor were not privileged because, although the writing of the records was testimonial in character, the writing, when done, was voluntary rather than compelled. The compulsion, occurring at a later time, was for the production of physical documents and not of fresh testimony. The Court did hold, however, that the act of production itself had a testimonial quality in a more limited respect. Compliance with the subpoena for the records was communicative to the extent it identified the records produced as those particularized in the subpoena, that it identified those records with the person producing them and that it authenticated them. The Supreme Court held that production could not be compelled unless a limited grant of immunity was conferred, which would preclude the prosecution from offering the fact of production to supply the necessary linkage of authentication. The substance of the documents was not entitled to immunity. The state would be required to resort, on the other hand, to an alternative proof of authentication such as handwriting analysis.

Ordinarily, the decision to confer immunity on a reluctant witness lies within the exclusive prerogative of the prosecuting attorney. In certain limited circumstances, however, use immunity is available to a defendant for the asking. Prior to 1968, many defendants were placed in the horns of a dilemma

236. United States v. Apfelbaum, 445 U.S. 115, 127 (1980); Glickstein v. United States, 222 U.S. 139, 141–42 (1911). *Cf.* United States v. Knox, 396 U.S. 77, 79–80 (1969) (no privilege where taxpayer lied when filling out tax forms).

237. 465 U.S. 605, 606–07 (1984).

when they contemplated pressing constitutional claims for the exclusion of evidence. The testimony they gave in trying to establish entitlement to a constitutional protection would sometimes come back to haunt them on the merits of guilt or innocence. In *Simmons v. United States*,[238] three defendants were indicted for a savings and loan robbery. The FBI seized incriminating evidence in a warrantless search. One defendant waived his fifth amendment privilege to remain silent in order to testify that the evidence was seized in violation of his fourth amendment right against unreasonable search and seizure.[239] *Simmons* held that a defendant could take the stand at a hearing on a suppression motion for the limited purpose of pressing his constitutional claim and would, in effect, enjoy use immunity with respect to that testimony. The prosecution would be barred from using that testimony against the defendant on the merits of guilt or innocence.

2. *Incriminating Testimony, Records and Reporting*

A witness is not entitled to the testimonial privilege simply by making the bald and unsupported assertion that the testimony will be incriminating. On the other hand, it would be self-defeating to require a witness to provide incriminating testimony in order to demonstrate that the testimony, if compelled, would be incriminating. The case that sought a reasonable accommodation of the competing interests was *Hoffman v. United States*.[240] The Court recognized that the ultimate determination must be made by the judge and not by the witness. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the Court to say whether his silence is justified. . . ."[241] The Court also recognized the hazard of going to the other extreme. "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."[242]

238. 390 U.S. 377 (1968).
239. *Id.* at 380–81, 394.
240. 341 U.S. 479 (1951).
241. *Id.* at 468 (citation omitted).
242. *Id.*

The Supreme Court further noted that an answer, to be privileged, need not directly "support a conviction under a . . . criminal statute" but would be sufficiently incriminating if it "would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime."[243] A great deal has to be left to the discretion of the judge called upon to determine the availability of the privilege:

> To sustain the privilege, 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. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."[244]

The distinction between a remote possibility of incrimination, which is basically unprotected, and a significant likelihood of incrimination, which is protected, is illustrated by the case law on the subject of "Required Records," that must be kept as a matter of state or federal law and "Required Reporting or Registration." As a general proposition, if the purpose of a statute is essentially neutral in character, a person is not relieved from general compliance with the statute by claiming that compliance would violate the privilege against compelled self-incrimination.

In *United States v. Sullivan*,[245] the claim was made, but rejected by the Supreme Court, that the required filing of an income tax return would be incriminating. The Court noted that the taxpayer might have interposed an objection to a specific incriminating question but was not relieved from filing the return generally. A similar result was reached in *Shapiro v. United States*,[246] with respect to a law requiring that records be kept for official instruction, during wartime, under the Emergency Price Control Act. The Court held that the required record-keeping was legitimate, if the records are required for valid ad-

243. *Id.*

244. *Id.* at 486–87.

245. 274 U.S. 259 (1927) (taxpayer must report income earned from illegal liquor sales but need not report the source of the income if it would incriminate the taxpayer).

246. 335 U.S. 1 (1948) (fruit wholesaler must produce subpoenaed sales invoices and other records kept by the wholesaler as required by the Price Control Act).

ministrative purposes, are of a type normally kept by the person subpoenaed, and have some public aspect to them.

On the other hand, where required reporting and required record-keeping is aimed at a selective group inherently suspected of criminal activity, the requirements run afoul of the fifth amendment privilege. Thus, the Supreme Court struck down a requirement that Communists register with the government in *Albertson v. Subversive Activities Control Board*.[247] It struck down the required registration of gamblers in *Marchetti v. United States*.[248] It similarly invalidated a requirement that firearms be registered by those who had violated other provisions of the National Firearms Act in *Haynes v. United States*[249] and a provision requiring the registration of those who paid excise taxes on wagering in *Grosso v. United States*.[250] In *Leary v. United States*,[251] the Supreme Court voided the self-reporting provisions of the Marijuana Tax Act, which mandated informing authorities about drug possession for tax purposes.

F. Self: "himself . . ."

Whatever other statutory or common law testimonial privileges may exist, there is no constitutional privilege against being compelled to be a witness against one's husband or wife, one's son or daughter, one's mother or father, one's brother or sister, one's friend, one's neighbor, one's church, one's political party, or one's partnership, company or corporation. There is only a constitutional privilege against being compelled to be a witness against oneself.

Hale v. Henkel[252] and *United States v. Murdock*[253] held early on that there was no privilege, even as an officer, not to incriminate one's company or corporation. *Rogers v. United States*[254] held that even a dedicated member of the Communist Party was not privileged from incriminating the Party. Unless there is the danger of personal incrimination, there is no privilege.

Perhaps the classic illustration of this principle is the case of

247. 382 U.S. 70 (1965).
248. 390 U.S. 39 (1968).
249. 390 U.S. 85 (1968).
250. 390 U.S. 62 (1968).
251. 395 U.S. 6 (1969).
252. 201 U.S. 43 (1906).
253. 284 U.S. 141 (1931).
254. 340 U.S. 367 (1951).

Roberts v. United States.[255] Roberts had already been convicted of a narcotics violation. At sentencing, his attorney made an impassioned plea that he was a redeemed citizen for whom incarceration would serve no purpose. The sentencing judge put Roberts to the test. In effect, Roberts was told that if he "bared his soul" and revealed to the police everything he knew about the illicit drug trade, probation might be his. If, on the other hand, he chose to "stone-wall" it, he faced the likelihood of a lengthy sentence. It was made clear that he personally ran no risk of further incrimination. He was being asked only to incriminate many, many others. He declined and received a sentence. He claimed that the stark alternative had a "chilling effect" on his fifth amendment privilege.

The Supreme Court held in *Roberts* that there was no privilege not to incriminate others. It held further that cooperation in the war on crime was an acid test of good citizenship and, therefore, eligibility for probation. "Concealment of crime has been condemned throughout our history. . . . [G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship."[256] The Court further stated:

> This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, the criminal defendant no less than any other citizen is obliged to assist the authorities. . . . By declining to cooperate, petitioner rejected an "obligatio[n] of community life" that should be recognized before rehabilitation can begin. . . . Few facts available to a sentencing judge are more relevant to "the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with society."[257]

CONCLUSION

There is no general right to silence. The general obligation is to come forth as a witness and furnish all available information. There are limited exemptions from this general duty.

255. 445 U.S. 552 (1980).
256. *Id.* at 557–58.
257. *Id.* at 558.

They are the testimonial privileges. As departures from the norm, they are generally in disfavor. All necessary conditions must be established before a testimonial privilege is available. One of those testimonial privileges is constitutional. Its necessary conditions are spelled out in the constitutional provision itself:

1. No person
2. shall be compelled
3. in any criminal case
4. to be a witness
5. against
6. himself.

ADDITIONAL READING LIST

The William Mitchell Law Review used these sources to verify the historical information in the Criminal Constitutional Law Trilogy. The Editorial Board hopes this list will be helpful for readers who would like more information about the Bill of Rights.

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