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Internal Revenue Form 1040 and the Fifth Amendment: Self-Reporting or Self-Incrimination, the Taxpayer's Dilemma

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NOTES

INTERNAL REVENUE FORM 1040 AND THE FIFTH AMENDMENT: SELF-REPORTING OR SELF-INCRIMINATION, THE TAXPAYER'S DILEMMA

> It is true that taxes are the lifeblood of any government, but it cannot be overlooked that that blood is taken from the arteries of the taxpayers and, therefore, the transfusion is not to be accomplished except in accordance with the scientific methods specifically prescribed by the sovereign power of the State, the legislature.*

I. INTRODUCTION

With minor exceptions the Internal Revenue Code requires every individual with an annual gross income of $750.00 or more to make,[1] verify,[2] and file[3] an income tax return with the Internal Revenue Service. Any failure to comply with these requirements may expose the taxpayer to criminal prosecution.[4] But in some instances the very

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* Musmanno, J., Urban Redevelopment Condemnation Case, 406 Pa. 6, 11, 178 A.2d 149, 151 (1962).

1. I.R.C. § 6011(a) provides as follows:
   (a) General Rule.—When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

2. I.R.C. § 6065 provides as follows: "Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

3. I.R.C. § 6012(a) provides in part as follows: "(a) General Rule.—Returns with respect to income taxes under subtitle A shall be made by the following:
   (1)(A) Every individual having for the taxable year a gross income of $750 or more except. . . ."

4. I.R.C. § 7201 provides that tax evasion shall be a felony, punishable by a fine of not more than $10,000, or imprisonment for not more than 5 years, or both. I.R.C. § 7203 provides that willful failure to file a return or supply information shall be a misdemeanor, punishable by a fine or not more than $10,000, or imprisonment for not more than 1 year, or both. I.R.C. § 7206 provides that fraudulent declarations made under penalty of perjury shall be a felony, punishable by a fine or not more than $5,000, or imprisonment for not more than 3 years, or both. I.R.C. § 7207 provides that whoever willfully supplies fraudulent returns, statements, or documents shall be subject to a fine of not more than $1,000, or imprisonment for not more than 1 year, or both.

information required on the return may tend to incriminate the taxpayer unless the fifth amendment privilege against self-incrimination[5] is asserted. The taxpayer faces uncertainty, however, because the precise scope of this privilege[6] with respect to the self-reporting of information under the Internal Revenue Code has not been fully delineated by the courts.

This note will examine the relevant provisions of the Internal Revenue Code in an effort to determine what is required of the taxpayer filing a return, as well as the criminal sanctions provided to compel compliance with these requirements. Then, turning to the fifth amendment for a brief look at its history, purpose, and application, the note will focus on the conflict between the privilege against self-incrimination and compulsory self-reporting under the Internal Revenue Code. Finally, the relevant case law affecting this conflict and an analysis of the current status as well as the possible future of this area of the law will be discussed.

Although what is said here may be applicable to other areas of self-reporting,[7] the principal focus will be on the filing of Internal Revenue Service (IRS) form 1040 by individual taxpayers.[8]

II. THE SETTING

A. SELF-REPORTING UNDER THE INTERNAL REVENUE CODE

The operation of any government is an expensive undertaking. Inevitably, the burden of providing the necessary funding falls squarely upon the shoulders of the governed. The United States government is no exception.[9] In order to obtain the tremendous amounts of money necessary to operate the federal government, Congress has enacted a wide variety of interrelated tax laws which comprise the Internal Revenue Code (IRC).[10] Probably the single most important subtitle of the IRC concerns the tax on individual income.[11] This tax alone provided an average of forty-five percent of all annual federal re-

5. U.S. CONST. amend. V provides in part as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself."

6. Although this portion of the fifth amendment may be characterized as either a "right" or a "privilege," for the sake of continuity it will herein be referred to as a privilege. For a decision holding that it is immaterial how it is characterized, *see* Graham v. Richardson, 403 U.S. 365, 375 (1971).

7. *See, e.g.*, California v. Byers, 402 U.S. 424 (1971) (hit and run statutes); Leary v. United States, 395 U.S. 6 (1969) (marijuana sales); Marchetti v. United States, 390 U.S. 39 (1968) (gambling excise taxes); Haynes v. United States, 390 U.S. 85 (1968) (illegal weapon registration); Albertson v. S.A.C.B., 382 U.S. 70 (1965) (registration of communists).

8. This note will not discuss the problems that may arise within the context of the income taxes levied upon partnerships, corporations, estates, trusts or cooperatives.

9. Total federal expenditures from the National Income Accounts in 1976 were estimated at $378.7 billion. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 229 (97th ed. 1976).

10. The Internal Revenue Code comprises Title 26 of the United States Code.

11. Subtitle A, I.R.C. §§ 1-2000, deals with the individual income tax.

ceipts from 1970 to 1976.[12]

The structure created by the IRC for the taxation of individual incomes is based on a system of self-reporting.[13] There is legal compulsion, to be sure, but basically the government depends upon the good faith and integrity of each potential taxpayer to disclose honestly and truthfully all necessary information.[14] With minor exceptions this system requires the filing of a return[15] by every individual having gross income during the taxable year of $750 or more.[16] IRS form 1040 is prescribed for general use in making such returns[17] and must be filed with the District Director of the Internal Revenue Service[18] on or before the fifteenth day of the fourth month following the close of the tax year.[19] This return must contain the taxpayer's social security number,[20] complete address,[21] and must be signed[22] and verified as true and correct under penalty of perjury.[23] Although these are the only requirements specifically set out in the IRC and Treasury Regulations, it is not enough to file a blank form 1040 containing only the taxpayer's name, address, social security number, and signature.[24] The reason for this is language found in section 6011 of the IRC, which states that "[e]very person required to make a return or statement *shall include therein the information required by such forms or regulations.*"[25] Arguably this broad language could require the taxpayer to answer every question put to him on form 1040 regardless of its nature, relevance, or effect. Further, criminal sanc-

12. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 228 (97th ed. 1976).

13. United States v. Bisceglia, 420 U.S. 141, 145 (1975).

14. *Id. Accord*, United States v. Paepke, 550 F.2d 385, 391 (7th Cir. 1977).

15. "Return" as used here is a work of art under the Internal Revenue Code. It encompasses not only the filing of the form, but also that the form shall be complete. Treas. Reg. § 1.6011-1(a) provides in part as follows: "(a) General rule. Every person subject to any tax, . . . under subtitle A of the Code, shall make such returns . . . as are required by the regulations in this chapter. The return . . . shall include therein the information required by the applicable regulations or forms." And Treas. Reg. § 1.6011-1(b) provides in part as follows: "(b) Use of prescribed forms. . . . Each taxpayer should carefully prepare his return and set forth fully and clearly the information required to be included therein. Returns which have not been so prepared will not be accepted as meeting the requirements of the Code." For judicial language to the same effect, *see infra* note 24.

16. *See* I.R.C. § 6012(a), *supra* note 3.

17. Treas. Reg. § 1.6012-1(a)(6) (1977).

18. Treas. Reg. § 1.6091-2(a) (1977).

19. I.R.C. § 6072(a); Treas. Reg. § 1.6072-1(a) (1977).

20. I.R.C. § 6109.

21. I.R.C. § 6017A.

22. I.R.C. § 6061; Treas. Reg. § 1.6061-1(a) (1977).

23. *See* I.R.C. § 6065, *supra* note 2.

24. The general requirements in this area were discussed in United States v. Porth, 426 F.2d 519, 523 (10th Cir. 1970) as follows: "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." *Citing* Florsheim Bros. v. United States, 280 U.S. 453 (1930); Sanders v. Commissioner, 225 F.2d 629 (10th Cir. 1955); Nat'l Contracting Co. v. Commissioner, 105 F.2d 488 (8th Cir. 1939); Virginia L. Reiman, 37 TAX CT. MEM. DEC. 621 (P-H) (1968).

25. I.R.C. § 6011(a) (emphasis added). *See also* Treas. Reg. §§ 1.6011-1(a) and (b), *supra* note 15.

tions are provided for taxpayers that fail to comply with these requirements. IRC section 7203 makes it a misdemeanor to willfully fail to file a return, or supply any information required by law or regulation.[26] Also, section 7206(1) provides that a willful and perjurous verification is a felony,[27] as is a willful attempt to evade the tax under section 7201.[28] Civil penalties may also attach for a failure to provide the taxpayer's social security number[29] or complete address.[30]

It requires only the barest analysis to realize that a taxpayer has little choice when annually confronted with IRS form 1040. It is criminal for him to attempt to evade the tax[31] or to refuse to file any return at all.[32] Likewise, it is criminal for him to refuse to furnish all of the information requested[33] or to willfully answer incorrectly.[34] Thus, to avoid criminal liability under the IRC, the taxpayer is compelled to answer fully and truthfully all questions asked on form 1040. For most taxpayers this statutory duty will result only in the payment of their share of income taxes. But for some, the information to be furnished on form 1040 may tend to incriminate the taxpayer in some respect.[35] For the taxpayer faced with this Hobson's Choice, the question becomes whether there is a tenable alternative available to compulsory self-incrimination. This dilemma will be considered more fully later in this note within the context of the privilege against self-incrimination.

B. THE FIFTH AMENDMENT

The fifth amendment provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness

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26. I.R.C. § 7203 provides in part as follows:
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . , keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such a return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

27. I.R.C. § 7206. *See supra* note 4.
28. I.R.C. § 7201. *See supra* note 4.
29. I.R.C. § 6676(a) provides a penalty of $5 for each such failure unless it is shown to be "due to reasonable cause."
30. I.R.C. § 6687(a) provides a penalty of $5 for each such failure unless it is shown to be "due to reasonable cause."
31. *See* I.R.C. § 7201, *supra* note 4.
32. *See* I.R.C. § 7203, *supra* note 26.
33. *Id. See also* Treas. Reg. §§ 1.6011-1(a) and (b), *supra* note 15.
34. *See* I.R.C. § 7207, *supra* note 4. *Accord*, I.R.C. § 7206, *supra* note 4; Treas. Reg. §§ 1.6011-1(a) and (b) (1977).
35. *See, e.g.*, Garner v. United States, 424 U.S. 648 (1976) (listed occupation as professional gambler); United States v. Sullivan, 274 U.S. 259 (1927) (occupation was bootlegger); United States v. Paepke, 550 F.2d 385 (7th Cir. 1977) (income from narcotics); United States v. Egan, 459 F.2d 997 (2d Cir. 1972) (whether taxpayer also filed a return in the prior year).

against himself."[36] This simple clause is the embodiment of centuries of legal evolution[37] and today stands as one of the principal underpinnings of our accusatorial system of criminal justice.[38] Although undoubtedly an obstacle to the ascertainment of truth,[39] this much revered provision evidences to a large extent our notions of fair play and substantial justice.[40]

1. *Nature of the Privilege*

From the early years of our Republic the self-incrimination clause has been afforded a liberal construction in favor of the right it was intended to secure.[41] The privilege is a personal one[42] and is available to both witnesses and accused alike.[43] It is more than a mere rule of procedure[44] and has been held to be a fundamental right, protected against the states by virtue of the fourteenth amendment.[45] But it is not an absolute right to refuse to give any testimony at all.[46] Rather, the privilege is available only to safeguard a witness's right not to be compelled to give testimony[47] that may tend to incriminate him.[48] It is the potential effect of the answer, not the nature of the proceeding, that determines the availability of the privilege.[49] Further, the answer need not be sufficient in itself to incriminate. The privilege should attach as well to insulate testimony that may furnish a "link in the chain" of evidence necessary to incriminate.[50] The privilege is

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36. U.S. CONST. amend. V.

37. For an exhaustive history of the fifth amendment *see generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961).

38. Malloy v. Hogan, 378 U.S. 1, 7 (1964). For a thorough examination of the purposes behind the fifth amendment, *see* 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961).

39. *Compare* United States v. Brunewald, 233 F.2d 556, 581 (2d Cir. 1956) (Frank, J., dissenting). *See also* 8 J. WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961).

40. 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961).

41. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). *Accord*, Hoffman v. United States, 341 U.S. 479, 486 (1950).

42. Couch v. United States, 409 U.S. 332, 338 (1973).

43. Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892). *See also infra* note 46.

44. B. SCHWARTZ, CONSTITUTIONAL LAW 227 (1972), *citing* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

45. Malloy v. Hogan, 378 U.S. 1 (1964). *See also* Griffin v. California, 380 U.S. 609 (1965).

46. A "witness" and an "accused" are treated differently with regard to the effect of the fifth amendment privilege. For the accused, the privilege is equivalent to a right to remain silent; whereas for the witness that can be compelled to give testimony, the privilege acts as a shield only against compelled self-incrimination. B. SCHWARTZ, CONSTITUTIONAL LAW § 127 (1972). A taxpayer completing form 1040 under penalty of perjury is not an accused, therefore the privilege does not permit a refusal to give any information at all. United States v. Malnik, 489 F.2d 682 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974); United States v. Manno, 118 F. Supp. 511, 517 (N.D. Ill. 1954).

47. Counselman v. Hitchcock, 142 U.S. 547 (1892); Boyd v. United States, 116 U.S. 616 (1886). *See also* Schmerber v. California, 384 U.S. 757, 764 (1966).

48. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); Hale v. Henkel, 201 U.S. 43, 67 (1906).

49. Hoffman v. United States, 341 U.S. 479 (1951).

50. California v. Byers, 402 U.S. 424, 459 (1971) (Black, J., dissenting); Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); United States v. Burr, 25 F. Cas. 38, 40-41 (C.C. Va. 1807) (No. 14,692(e)).

not self-executing and therefore may be lost if not timely asserted.[51] Consequently, any information freely and voluntarily given plainly has not been compelled, and therefore is no longer within the ambit of the privilege.[52]

2. *Invoking the Privilege*

A witness need only invoke the privilege against self-incrimination to receive its protection. "No ritualistic formula or talismanic phrase is essential in order to invoke the privilege. All that is necessary is an objection stated in language that may reasonably be understood as an attempt to invoke the privilege."[53]

The burden is first upon the witness to determine whether he wishes to assert the privilege.[54] If testimony is given without claiming the privilege, the witness is deemed to have given the information voluntarily, and can no longer claim benefit of the privilege.[55] If the witness chooses to assert the privilege, he cannot be compelled to incriminate himself. [56] Likewise, a civil penalty may not attach to a valid claim of privilege.[57]

3. *Qualifications and Exceptions*

The decision concerning the assertion of the privilege is not for the witness alone; the court plays a critical role in determining whether the witness can make a valid claim of privilege. For rather obvious reasons the witness cannot be permitted to act as final arbiter of whether, or to what extent, he will testify.[58] Recognizing this, Chief Justice Marshall held in *United States v. Burr*[59] that it was the province of the court to determine when an answer may tend to incriminate the witness and therefore permit an assertion of the privi-

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51. Maness v. Meyers, 419 U.S. 449, 466 (1975); United States v. Kordel, 397 U.S. 1, 7-10 (1970); United States v. Monia, 327 U.S. 424, 427 (1943).

52. Maness v. Meyers, 419 U.S. 449 (1975).

53. 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 55A.21, at 124 (1976), *citing* Emspak v. United States, 349 U.S. 190 (1955).

54. In United States v. Burr, 25 F. Cas. 38, 40-41 (C.C. Va. 1807) (No. 14,692(e)), Marshall, C.J., stated as follows:

> It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be; and, if he says on oath that he cannot answer without accusing himself, he cannot be compelled to answer.

55. 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 55A.21, at 124 (1976), *citing* Emspak v. United States, 349 U.S. 190 (1955).

56. 25 F. Cas. 38, 40-41 (C.C. Va. 1807) (No. 14,692(e)).

57. Garrity v. New Jersey, 385 U.S. 493 (1967).

58. If this were permitted it would allow an obstreperous witness to unilaterally claim the privilege against compulsory self-incrimination on every question. This would effectively permit witnesses to refuse to testify at all and would result in a complete breakdown of the administration of justice. Further, this is far more than was intended to be protected under the fifth amendment. *See generally supra* note 40.

59. 25 F. Cas. 38 (C.C. Va. 1807) (No. 14,692(e)).

lege. Although this remains true today, the courts have unfortunately used varying standards to determine when the risk of incrimination will be sufficient to permit a valid assertion of the privilege.[60] Thus, once a witness indicates an intent to claim the privilege, the court must determine whether the answer may present "substantial hazards of self-incrimination."[61] If this is found, the assertion of privilege is valid. If it is found not to exist, the asserted privilege is invalid and the desired answer may be compelled under the court's contempt power. Should this finding of "no privilege" be overturned on appeal, the exclusionary rule[62] will attach to preclude use of the improperly compelled answer in any subsequent criminal proceeding.[63]

An important exception to the implied rigidity of the privilege concerns the granting of immunity. Essentially this permits the governmental authority seeking the privileged information to grant the witness full and complete immunity from criminal prosecutions arising from his statements in order to compel his otherwise privileged testimony.[64] As early as 1892, however, the Supreme Court held in *Counselman v. Hitchcock*[65] that in order to withstand a constitutional challenge, the immunity granted must be fully coextensive with the privilege it supplants. Consequently, once the witness has validly asserted the privilege against self-incrimination, the testimony may only be compelled in return for a coextensive immunity to criminal prosection. If the witness nevertheless is compelled to answer, his answers will be inadmissible in any subsequent criminal action in which he is defendant. For the witness, the result should be the same; his own testimony will not lead to his incrimination.[66]

C. CONFLICT: THE TAXPAYER'S DILEMMA

As was pointed out above, the IRC generally requires taxpayers to file IRS form 1040.[67] It further requires the taxpayer to answer all the questions on that form.[68] Still further, it makes it criminal for the taxpayer to fail to either file the form or answer the questions con-

60. *See, e.g.*, California v. Byers, 402 U.S. 424 (1971) (substantial hazards of incrimination); Marchetti v. United States, 380 U.S. 39 (1968) (real and appreciable danger); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (reasonable cause to apprehend danger); McCarthy v. Arndstein, 266 U.S. 34 (1924) (substantial risk of incrimination).

61. This terminology is that used in California v. Byers, 402 U.S. 424 (1971).

62. For an examination of the role the exclusionary rule plays in this area, *see generally* 8 J. WIGMORE, EVIDENCE § 2283 (McNaughton rev. 1961).

63. Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); Bram v. United States, 168 U.S. 532 (1897); Boyd v. United States, 116 U.S. 616 (1886).

64. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). Immunity to criminal prosecution such as would supplant the fifth amendment privilege against self-incrimination is a statutory area. The federal immunity statutes may be found at 18 U.S.C. §§ 6001-6005 (1970).

65. 145 U.S. 547 (1892). *Accord*, Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey, 406 U.S. 472 (1972); Hale v. Henkel, 201 U.S. 43 (1906).

66. For an examination of the purpose of immunity statutes within this area, *see generally* 8 J. WIGMORE, EVIDENCE §§ 2281-2282 (McNaughton rev. 1961).

67. Treas. Reg. § 1.6012-1(a)(6) (1977).

68. *See* I.R.C. § 6011, *supra* note 1. *Accord*, Treas. Reg. §§ 6011-1(a) and (b) (1977).

tained therein.[69] But the effect of some of these answers may be to incriminate the taxpayer.[70] Thus, the position of a taxpayer completing form 1040 has been held comparable to that of a witness compelled to appear before a grand jury.[71] Neither stand accused of any crime, yet both are compelled to give testimony. In addition, both could be placed in a position of compelled self-incrimination. But, absent the grant of immunity discussed above, the fifth amendment privilege against self-incrimination is available to the grand jury witness.[72] It should likewise be available to the taxpayer.

Even if the privilege is asserted, the taxpayer nevertheless finds himself in a more perilous position than does the witness appearing before the grand jury. For although the grand jury witness is given a judicial ruling on the validity of his claim of privilege (followed by the opportunity to change his mind and testify) *prior* to any possibility of sanction for refusing to testify pursuant to the now invalid assertion of privilege, no such preliminary judicial ruling or "second chance" is available to the taxpayer.[73] Therefore, when a taxpayer is faced with the choice of whether to incriminate himself by answering truthfully all questions on form 1040, or to incriminate himself under the IRC by failing to answer truthfully all of the questions, the fifth amendment privilege should be available to solve this dilemma.[74] But the taxpayer is still not out of the woods. It is entirely possible that the IRS will contend that when the taxpayer claimed the privilege against self-incrimination in lieu of answering the question, he thereby failed to file an acceptable "return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner,"[75] and is subject to criminal prosecution.[76] Because the tax-

69. *See* I.R.C. § 6011, *supra* note 26.
70. *See supra* note 35.
71. Garner v. United States, 424 U.S. 648, 652 n.7 (1976).
72. Malloy v. Hogan, 378 U.S. 1 (1964).
73. Garner v. United States, 424 U.S. 648 (1976). *Compare* Maness v. Meyers, 419 U.S. 449, 460-61 (1975).
74. Garner v. United States, 424 U.S. 648 (1976); United States v. Sullivan, 274 U.S. 259 (1927); United States v. Paepke, 550 F.2d 385 (7th Cir. 1977).
75. United States v. Porth, 426 F.2d 519, 523 (10th Cir. 1970). *See also* Treas. Reg. § 1.6011-1(b) (1977). This is also the precise language used in an IRS letter to Garner concerning his 1973 tax returns which read as follows:

> Tax year 1973
>
> Dear Mr. and Mrs. Garner:
>
> We received a Form 1040, U.S. Individual Income Tax Return, for the above year from you, but it is not acceptable as your income tax return. A taxpayers return, which does not contain any information relating to the taxpayer's income from which the tax can be computed, is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner. The statutory requirements for filing and the criminal penalty for noncompliance are given on the back of this letter.
>
> This letter constitutes notice to you of the legal requirements concerning filing of income tax returns. Noncompliance may subject you to prosecution under Internal Revenue Code Section 7203, which is reproduced on the back of this letter.
>
> Blank Forms 1040 are enclosed for your convenience.

Although only Garner's 1965, 1966, and 1967 returns were involved in Garner v. United States, 424 U.S. 648 (1976), it is interesting to note that on his 1973 return Garner claimed

payer has no forum available to predetermine the validity of his asserted privilege (where, if it were held invalid, he would have the opportunity to change his return), he, unlike the grand jury witness, must risk a criminal conviction in order to test his claim of privilege.[77]

Thus the ultimate question is as follows: When may a taxpayer claim the fifth amendment privilege against self-incrimination on his form 1040 income tax return without being subject to criminal prosecution? In an effort to provide an answer to this question, this note will now analyze the relevant case law.

III. CASE ANALYSIS AND THE EMERGING DOCTRINE

The case of *Garner v. United States*[78] is the latest Supreme Court pronouncement in the area of self-incrimination via self-reporting. Because an understanding of the Court's rationale in that case requires an analysis of prior decisions important to this area, the *Garner* case will be used as a vehicle for the ensuing analytical journey.

A. AVAILABILITY OF THE PRIVILEGE ON FORM 1040

Garner v. United States was a nontax criminal prosecution for conspiracy to use interstate transportation and communication facilities to "fix" sporting contests. Although Garner maintained that his contact with the other gambler-conspirators was innocent, the government sought to disprove this by introduction of his form 1040 income tax returns for three prior years. In these returns Garner had listed earnings from "gambling" and "wagering", as well as listing his occupation as "professional gambler" on one return.[79] The returns were admitted into evidence over Garner's fifth amendment objection and a conviction resulted. Garner appealed, arguing that the privilege against self-incrimination should permit him to exclude the returns at trial notwithstanding his failure to claim the privilege on the form. Sitting *en banc*, the ninth circuit held that failure to claim the privilege on the return itself defeated Garner's subsequent fifth amendment claim.[80] On a writ of certiorari, the Supreme Court affirmed.[81]

In their analysis and decision of *Garner* the Supreme Court first

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his fifth amendment privilege to the question concerning his "occupation." Petitioner's Supplement and Addendum to Petition for Writ of Certiorari with Exhibits, Exhibit C at 4-5, Garner v. United States, 424 U.S. 648 (1976).

76. *See* I.R.C. § 7203, *supra* note 26.

77. Garner v. United States, 424 U.S. 648, 663-664 (1976); Maness v. Meyers, 419 U.S. 449, 460-461 (1975). This difficult situation has variously been called the "taxpayer's trilemma," Maness v. Meyers, 419 U.S. 449, 460-461, and the "cruel trilemma," United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973); United States v. Egan, 459 F.2d 997, 997-998 (2d Cir. 1972).

78. 424 U.S. 648 (1976).

79. *Id.* at 649-50. *But see infra* note 120.

80. Garner v. United States, 501 F.2d 228 (9th Cir. 1972).

81. 424 U.S. 648 (1976).

turned to their 1927 decision of *United States v. Sullivan*.[82] Sullivan was a prohibition era bootlegger who was convicted of failure to file an income tax return. Arguing for a reversal, Sullivan contended that because his income was illegally earned, the filing of an income tax return would have been self-incriminating. Speaking for the Court, Mr. Justice Holmes affirmed the conviction by stating as follows: "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."[83]

Mr. Justices Holmes' language clearly indicates that the privilege is available to taxpayers on their tax returns. It was not until later, however, that the question of how to make the objection was finally answered. Following the rationale applicable to other witnesses claiming the fifth amendment,[84] a flurry of circuit court decisions have held that a "blanket" claim of privilege to the entire form 1040 is invalid, and that a proper claim of privilege requires the taxpayer to note objection to individual questions on the return.[85]

The *Garner* court relied upon *Sullivan* to find by implication that Garner also could have claimed the fifth amendment privilege to potentially incriminating questions on his tax returns. Generally, this alone would suffice to defeat any subsequent claim of privilege by Garner. This follows because Garner had the opportunity to claim the privilege on his tax return, and instead provided the information. As a rule such uncompelled information will no longer be subject to a claim of privilege.[86] Had this been Garner's lone argument he would have lost simply because his claim of privilege had been untimely, having been made after a voluntary disclosure of otherwise privileged information.

But Garner's principal contention was that his statements on form 1040 were in fact compelled, and not voluntary. If this could be shown, Garner's claim of privilege at trial should have been upheld and his income tax returns excluded. This follows from the principle that a witness protected by the privilege may refuse to disclose the privileged information unless a coextensive immunity to criminal prosecution is granted to supplant the privilege.[87] If the witness is nevertheless compelled to answer, absent such immunity his answers

82. 274 U.S. 259 (1927).
83. *Id.* at 263.
84. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
85. *See, e.g.*, United States v. Jordan, 508 F.2d 750 (7th Cir. 1975); United States v. Daly, 481 F.2d 28 (8th Cir. 1973); United States v. Porth, 426 F.2d 519 (10th Cir. 1970); Heligman v. United States, 407 F.2d 448 (8th Cir. 1969).
86. Maness v. Meyers, 419 U.S. 449, 466 (1975); United States v. Kordel, 397 U.S. 1, 7-10 (1970); United States v. Monia, 327 U.S. 424, 427 (1943).
87. Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. New Jersey, 406 U.S. 472 (1972); Hale v. Henkel, 201 U.S. 43 (1906); Counselman v. Hitchcock, 142 U.S. 547 (1892).

will be held inadmissible against him in any subsequent criminal prosecution.[88] It is therefore apparent that the fifth amendment protects not only the witness's right to remain silent absent immunity, but also prohibits the use in subsequent criminal actions of statements improperly compelled absent such immunity.

B. FORM 1040: VOLUNTARY OR COMPELLED ANSWERS

Although Garner answered the questions on the return instead of claiming his available privilege, he should nevertheless have been permitted to raise the claim of privilege to exclude his tax returns at trial if he had been under such compulsion that he was denied a "free choice to admit, to deny, or to refuse to answer."[89] In arguing that his answers on form 1040 were so compelled, Garner urged three alternative grounds: first, the answers amounted to coerced confessions in that he had not made any knowing and intelligent waiver of his privilege; second, because an assertion of the privilege also would have been incriminating, an objection at trial should be held sufficient; and third, the possibility of prosecution upon claiming the privilege compels disclosure and chills reliance upon the privilege.

1. *Coerced Confessions*

Relying upon *Miranda v. Arizona*[90] and its progeny, Garner argued that his answers on form 1040 were actually coerced without his having made a knowing and intelligent waiver of his privilege against compulsory self-incrimination. This being true, Garner argued the privilege should have been available to him at trial to exclude the coerced, self-incriminating statements made on his form 1040 returns. The Court, however, easily distinguished Garner's position in completing his income tax returns from one making statements while under the pressures of custodial interrogation, as in *Miranda*.[91] The dangers to the adversary system of justice safeguarded by *Miranda* were inherent in the unprotected custodial interrogation setting. These dangers were nowhere present in *Garner;* the Court pointed out that a taxpayer could complete his tax return at his leisure, and with the aid of legal counsel if he desired it.[92] Thus the taxpayer is far removed from the compelling psychological and physical factors encompassed by the rule in *Miranda*.

88. Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); Bram v. United States, 168 U.S. 532 (1897); Boyd v. United States, 116 U.S. 616 (1886).
89. Lisenba v. California, 314 U.S. 219, 241 (1941). *Accord*, Garrity v. New Jersey, 385 U.S. 493, 496 (1967).
90. 384 U.S. 436 (1966). *See also* Michigan v. Mosley, 423 U.S. 96 (1975); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
91. 384 U.S. at 467.
92. Garner v. United States, 424 U.S. 648, 658 (1976).

2. *Filing of the Return as Self-Incriminating*

In 1968 the Supreme Court decided the companion cases of *Marchetti v. United States*[93] and *Grosso v. United States*.[94] These decisions held the gambler's occupational and excise taxes and the wagering excise tax schemes to be unenforceable when met with a claim of the fifth amendment privilege in a prosecution for failure to comply. In reaching this decision, the Court found that the registration and taxing scheme[95] required disclosures only of gamblers—an area permeated with criminal statutes—and hence was directed only at those "inherently suspect of criminal activities."[96] Therefore, although a failure to register was criminal, compliance required self-incrimination under the numerous laws proscribing gambling.[97] Viewed in this light the Court held the fifth amendment privilege against compulsory self-incrimination to be a complete defense in a prosecution for noncompliance.

In 1971 the Court held in *Mackey v. United States*[98] that, although the scheme held unenforceable in *Marchetti* acted to compel answers, *Marchetti* would not be held retroactive so as to cloak with privilege at trial those answers given under the gambler's excise tax scheme prior to the *Marchetti* decision.

With this background Garner's second argument was based upon an interpretation of *Mackey* that, although probably not air-tight, may have deserved more thought than the Court was willing to give it. It was Garner's contention that Mackey was not immunized at trial against the use of his concededly compelled answers simply because *Marchetti* was held not to be retroactive. He further argued that had Mackey made his disclosures after *Marchetti* they could not have been used against him at trial. This would follow from reasoning that because *Marchetti* permitted assertion of the privilege at trial to defeat a prosecution for failure to register, it would also permit Mackey's assertion of the privilege at trial to defeat use of his answers given under a statute deemed unenforceable in *Marchetti*.[99] If this were true, Garner was situated in exactly the same position as was Mackey in his hypothetical. Therefore, Garner argued that his tax returns should have been excluded at trial.

But the Court distinguished *Mackey* by saying only that "we do not think that case should be applied in this context,"[100] and only saw

93. 390 U.S. 39 (1968), *overruling* United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955).
94. 390 U.S. 62 (1968).
95. *See, e.g.*, I.R.C. §§ 4401, 4411, 4412.
96. Marchetti v. United States, 390 U.S. 39, 52 (1968).
97. For a rather complete compilation of the various state statutes dealing with gambling, *see* Marchetti v. United States, 390 U.S. 39, 45 nn.5 & 6 (1968).
98. 401 U.S. 667 (1971).
99. Garner v. United States, 424 U.S. 648, 659 (1976). *But see infra* note 101.
100. 424 U.S. at 659.

fit to treat the intricacies of Garner's argument on *Mackey* in a footnote.[101] Instead, the Court relied upon *Marchetti* and distinguished the *context* of the potentially incriminating questions. Whereas the tax forms in *Marchetti* were directed at a group "inherently suspect of criminal activities,"[102] the form 1040 income tax returns in *Garner* are "neutral on their face and directed at the public at large."[103] In concluding that Garner was not compelled to incriminate himself by completing and filing his tax returns, the Court said as follows: "The great majority of persons who file income tax returns do not incriminate themselves by disclosing their occupation. The requirement that such returns be completed and filed simply does not involve the compulsion to incriminate considered in *Mackey*."[104] It has been pointed out by one commentator on this decision that to have the existence of a constitutional privilege turn on the type of tax return involved is "unconvincing."[105]

3. *Potential Section 7203 Prosecution Compels Disclosure*

Garner's final contention was that although the privilege is available to taxpayers on their tax returns, the ominous possibility of a criminal prosecution under IRC section 7203[106] acts to compel the taxpayer to make potentially incriminating disclosures rather than claim the privilege.

In *Garrity v. New Jersey*[107] police officers were summoned to appear during an investigation of police corruption. Although informed that they could claim the privilege in answering questions, they were also told they would be discharged from employment if they did so. Their incriminating statements were then used against them in subsequent criminal prosecutions. In holding these statements inadmissible, the Supreme Court found that the threat of discharge for relying upon the privilege acted to foreclose a free choice to remain silent, thus compelling the self-incriminating statements contrary to the protective purpose of the privilege.[108]

From this, Garner argued that a taxpayer is placed in a situation very similar to the police officers in *Garrity;* the privilege is avail-

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101. *Id* at 659 n.13.
102. Marchetti v. United States, 390 U.S. 39, 52 (1968).
103. Garner v. United States, 424 U.S. 648, 660-661 (1976), *citing* Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965).
104. *Id.* at 661. *But see* 424 U.S. at 661 n.15, where the Court chooses to ignore Garner's argument that special calculations that may tend to incriminate him are required only of gamblers filing form 1040.
105. Saltzman, *Supreme Court's Garner Decision Puts Illegal Income Earners in a Bind*, 44 J. TAX. 334, 336 (1976).
106. I.R.C. § 7203 proscribes the willful failure to file a return or supply information. *See supra* note 26.
107. 385 U.S. 493 (1967).
108. *Id.* at 497-98.

able to them but they leave themselves open to criminal penalty for exercising it. Consequently, Garner argued that answers given on an income tax return are likewise compelled, and therefore require exclusion at any subsequent criminal prosecution.

The Supreme Court distinguished *Garrity*, however, by pointing out that the police officers were being penalized for a valid exercise of the privilege, whereas a taxpayer making such a valid claim of privilege could not be convicted of a section 7203 violation. The Court held this was implicit from dicta in *Sullivan* stating that the objection could have been made in the return.[109] Additionally, the Court stated as follows: "The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by [section] 7203's statutory standard of 'willfulness.' "[110] Pursuing this further, the Court then elaborated in a footnote by stating as follows: "Because [section] 7203 proscribes 'willful' failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith."[111]

Although apparently willing to hold that a good faith erroneous claim of privilege will suffice to defeat a prosecution under section 7203, the majority opinion in *Garner* seems to disregard this in holding that a taxpayer is never constitutionally entitled to a preliminary ruling on the validity of his claim of privilege. The majority held that because a valid and timely claim of privilege cannot be the basis for a section 7203 conviction, the preliminary ruling is not required to provide the taxpayer with the free choice to remain silent.[112]

The concurring opinion in *Garner* would have resolved this point by simply holding that because a good faith erroneous claim of privilege is a defense to a section 7203 prosecution, the taxpayer is therefore not denied a free choice to claim the privilege. Accordingly, the concurring opinion was concerned that the preliminary hearing question was even reached by the majority, saying as follows:

> It is one thing to deny a good-faith defense to a witness who is given a prompt ruling on the validity of his claim of privilege and an opportunity to reconsider his refusal to testify before subjecting himself to possible punishment for contempt. . . . It would be quite another to deny a good-faith defense to someone like [Garner], who may be denied a ruling

109 Garner v. United States, 424 U.S. 648, 662 (1976), *citing* United States v. Sullivan, 274 U.S. 259 (1927).

110. Garner v. United States, 424 U.S. 648, 662-63 (1976) (footnote omitted).

111. *Id.* at 663 n.18, *citing* United States v. Murdock, 290 U.S. 389 (1933). This case is commonly referred to as *Murdock II*.

112. 424 U.S. at 665.

> on the validity of his claim of privilege until his criminal prosecution, when it is too late to reconsider.[113]

The holding we are left with in *Garner* is that the taxpayer did have an opportunity to claim the privilege against compulsory self-incrimination on his tax returns, and further, his answers were not compelled simply because a potential section 7203 prosecution was available to test whether his claim of privilege was in fact valid.

C. THE AFTERMATH OF *Garner v. United States*

A first reading of *Garner* leaves the impression that the Court is willing to hold that an erroneous claim of privilege made in good faith is sufficient to withstand a criminal prosecution under IRC section 7203. But if this be true, why were two justices so concerned about denying taxpayers a hearing on the validity of their claims of privilege when they had conceded such would be unnecessary where a good faith defense was permitted?[114] If ultimately a good faith defense is not permissible in a section 7203 prosecution, the Court has placed the taxpayer in the very tenuous position of asserting his fifth amendment privilege at the peril of criminal prosecution should his claim subsequently be held invalid. Indeed, this would appear to be a price too high to pay for a good faith, albeit improper, claim of privilege under the fifth amendment. But the Supreme Court has not yet been squarely presented with this question. Should that occur, it would be encouraging if the Court would follow the course it appears willing to accept in the above mentioned footnote of *Garner*, that an erroneous claim of privilege, made in good faith, will suffice to withstand a section 7203 prosecution.[115]

It also appears that none of the lower federal courts have been faced with this issue since *Garner* was decided in early 1976. But at least one circuit court opinion appears willing to carry the rationale of the privilege beyond the "occupation" question involved in *Garner*. Chief Judge Tone of the Seventh Circuit Court of Appeals, concurring in *United States v. Paepke*,[116] stated in dicta as follows: "He could also, I believe, have declined to state even the amount of his income if that fact alone might have tended to incriminate him, ..."[117] It must be noted, however, that this statement would not excuse failure to pay the tax itself; rather, it would be apposite only in those circumstances where a statement of the amount of a taxpayer's income would in itself be incriminating.

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113. *Id.* at 667-68 (concurring opinion) (citation deleted).
114. *Id.*
115. *See supra* note 111, and text accompanying.
116. 550 F.2d 385 (7th Cir. 1977).
117. *Id.* at 394.

It is yet too early to pinpoint the precise effect *Garner* may have on the law. And although the exact holding of the majority in *Garner* may be subject to some doubt, the cases leading up to that decision indicate that it probably should be read in its broader sense. If the lower federal courts adopt this view it will effectively remove taxpayers from the altogether unrealistic position of being subject to criminal prosecution for good faith claims of privilege subsequently held to be invalid.

IV. CONCLUSION

The requirement of the IRC that individuals earning $750.00 in any year must file a tax return is broadly directed at the public at large and not at a particular group inherently suspect of criminal activities.[118] Consequently, the fifth amendment does not provide a defense for the taxpayer refusing to file an income tax return.[119] But if the form of return provided calls for answers that may incriminate, or furnish a link in the chain of evidence necessary to incriminate, the taxpayer may claim the privilege against compulsory self-incrimination directly on such return.[120] The privilege may not, however, be claimed as to the entire form; rather, it may be claimed only as to individual questions on the return.[121]

The Supreme Court appears to have held in *Garner* that the criminally enforceable tax structure provided by the IRC does not act to "compel" disclosure from taxpayers.[122] Therefore, when a taxpayer makes disclosures on his return instead of claiming the fifth amendment privilege, his answers are no longer privileged and may be used against him in any subsequent criminal prosecution.[123] Viewed in this light, the Court may have made the privilege more attractive to taxpayers if its apparent holding, that a good faith erroneous claim of privilege will withstand a section 7203 prosecution, is followed in the future.

In any event, commentators on the subject of compulsory self-reporting are in basic agreement that some type of "use restriction" should be placed upon the information the government demands from its citizens.[124] Properly applied, such a restriction may go far to in-

118. Garner v. United States, 424 U.S. 648, 660-61 (1976).
119. United States v. Sullivan, 274 U.S. 259 (1927).
120. *Id.* at 263. It is interesting to note that Garner did claim his fifth amendment privilege to the inquiry concerning "occupation" on his 1973 form 1040 income tax return. Petitioner's Supplement and Addendum to Petition for Writ of Certiorari with Exhibits, Exhibit C at 4, Garner v. United States, 424 U.S. 648 (1976).
121. *See supra* note 85.
122. Garner v. United States, 424 U.S. 648, 656-57 (1976).
123. *Id.* at 665.
124. *See generally* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103; McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193.

sure that the fundamental rights of the individual are not sacrificed upon an altar of administrative efficiency or found wanting in a balance with governmental curiosity.

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