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Penalizing the Civil Litigant Who Invokes the Privilage Against Self Incrimnation

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COMMENTARIES

PENALIZING THE CIVIL LITIGANT WHO INVOKES THE PRIVILEGE AGAINST SELF-INCRIMINATION*

In many circumstances an individual's conduct may result in both criminal and civil liability. Moreover, federal courts frequently hear concurrent criminal and civil actions arising from the same operative facts.[1] Most state crimes against persons or property also give rise to civil liability.[2] Conversely, civil litigants may be incriminated by collateral facts revealed during discovery or trial.[3]

For these reasons civil parties often seek protection of the fifth amendment privilege against self-incrimination.[4] Although the privilege is available in civil proceedings,[5] courts regularly impose sanctions upon parties who exercise it.[6] The purpose of this commentary is to examine the propriety of such sanctions in light of the evolving nature of the fifth amendment privilege. An examination of procedural alternatives by which a party's claim of the privilege may be unprejudicially honored and the manner in which constitutional issues of self-incrimination and due process may be avoided are also included.

AVAILABILITY OF THE PRIVILEGE IN CIVIL PROCEEDINGS

The privilege against self-incrimination, as expressed in federal[7] and state[8] constitutions appears to protect only criminal defendants.[9] However, the

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1. *E.g.*, FDIC v. Logsdon, 18 F.R.D. 57 (W.D. Ky. 1955) (Government plaintiff in both actions); Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953) (private plaintiff in civil action).

2. For example, trespassory taking of personal property may result in a larceny conviction and civil damages for conversion. Assault and battery is both a criminal and a civil wrong.

3. *E.g.*, Bauer v. Stern Fin. Co., 169 N.W.2d 850 (Iowa 1969), *cert. denied*, 396 U.S. 1008 (1970), where plaintiff in a conversion action refused to answer questions or produce records concerning cattle that had apparently been sold by plaintiff in violation of a security agreement with defendant; Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964), where a divorce plaintiff refused to comply with discovery requests for admissions dealing with his own adultery.

4. *See, e.g.*, United States v. Kordel, 397 U.S. 1 (1970); Simkins v. Simkins, 219 So. 2d 724 (3d D.C.A. Fla. 1969).

5. McCarthy v. Arndstein, 266 U.S. 34 (1934).

6. *E.g.*, Brown v. United States, 356 U.S. 148 (1958); Minor v. Minor, 240 So. 2d 301 (Fla. 1970).

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

8. *E.g.*, FLA. CONST. Decl. of Rights §12.

9. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

privilege may be claimed by witnesses or parties in civil litigation when there is danger of subsequent criminal prosecution.[10] The application of the privilege in civil cases is particularly important in those areas of regulated conduct where the federal government is empowered to bring both civil and criminal actions.[11]

In *Counselman v. Hitchcock*[12] the United States Supreme Court invalidated a federal statute[13] and provided that no "evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States." The Court noted that compelled testimony, even if excluded from subsequent judicial proceedings, might nevertheless lead to discovery of further incriminating evidence,[14] and held the privilege could be denied only if immunity from prosecution were granted. Subsequently, in *Murphy v. Waterfront Commission*[15] the Court clarified the scope of the required immunity by holding a witness may not be compelled to furnish incriminating testimony "unless the compelled testimony and its fruits cannot be used in any manner . . . in connection with a criminal prosecution against him."[16]

There are important distinctions between application of the privilege in civil and criminal matters.[17] While the criminally accused may decline to testify,[18] the witness in a civil case must answer all questions except those tending to incriminate him.[19] Moreover, a criminal defendant's silence may not be the subject of adverse inference or comment,[20] while the civil litigant enjoys

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10. McCarthy v. Arndstein, 266 U.S. 34 (1934). In North Carolina the possibility of punitive damages has been held sufficient to allow the privilege. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964). This holding is not in harmony with the generally recognized rule that the privilege protects against criminal penalties only. *See, e.g.*, United States v. Lewis, 10 F.R.D. 56 (D.N.J. 1950), where defendant in a federal government action to recover excess rent and treble damages was held not entitled to the privilege.

11. *E.g.*, 18 U.S.C. §77 (1970) (securities fraud). *See* United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965) (dictum disapproving Government's use of civil action for criminal discovery).

12. 142 U.S. 547 (1892).

13. Act of Feb. 25, 1868, ch. 13, §1, 15 Stat. 37.

14. *See* Hoffman v. United States, 341 U.S. 479 (1951).

15. 378 U.S. 52 (1964).

16. *Id.* at 79.

17. *See, e.g.*, American Cyanamid Co. v. Sharf, 309 F.2d 790 (3d Cir. 1962).

18. *E.g.*, United States v. Housing Foundation of America, 176 F.2d 665 (3d Cir. 1949). *See* U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself."

19. *E.g.*, Shaughnessy v. Bacolas, 135 F. Supp. 15 (S.D.N.Y. 1955). A corollary to this rule is the doctrine of inadvertent waiver. If a witness answers one question concerning an alleged criminal event, he must give the details. Rogers v. United States, 340 U.S. 367 (1951). This doctrine has been criticized as incompatible with the general principle that constitutional rights must be intelligently and voluntarily waived. *See* Rogers v. United States, 340 U.S. 367, 375 (1951) (Black, J., dissenting).

20. *See* Griffin v. California, 380 U.S. 609 (1965), where the Court reversed a murder conviction of a defendant whose failure to testify had been the subject of both comment by the prosecutor and instruction by the trial court that inference was proper.

no such privilege.[21] The major distinction, however, lies in the consequences resulting from its invocation. A criminal defendant's claim of the privilege is a neutral act — no effect may follow or inference be drawn from his failure to testify.[22] However, various consequences have been permitted in civil actions where plaintiffs[23] or defendants[24] have sought the protection offered by the fifth amendment privilege. Claim of the privilege has resulted in punishment for contempt,[25] adverse inference[26] or comment,[27] striking of testimony[28] or pleadings,[29] dismissal of complaints,[30] and entry of summary judgment in favor of the opposing party.[31] The imposition of such sanctions has continued in recent years, despite the trend toward absolute construction of constitutional rights[32] and the self-incrimination privilege[33] in criminal cases.

PLAINTIFF'S CLAIM OF THE PRIVILEGE

Appellate decisions involving civil plaintiffs seeking protection of the privilege against self-incrimination are infrequent, probably because of the likelihood of adverse treatment.[34] The courts have conceded the availability of the privilege, but have ignored or rationalized the constitutional infirmities associated with penalizing the claimant.[35] With few exceptions[36] state courts

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21. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).

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

23. *E.g.*, Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964); Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968).

24. *E.g.*, Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956); Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953).

25. Brown v. United States, 356 U.S. 148 (1958).

26. *E.g., In re* Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir. 1963); Sahn v. Pagano, 302 F.2d 629 (2d Cir. 1962), *citing* 8 J. WIGMORE, EVIDENCE §2272 (McNaughton rev. ed. 1961).

27. *See* Morris v. McClellan, 154 Ala. 639, 45 So. 641 (1908).

28. Berner v. Schlesinger, 11 Misc. 2d 1024, 178 N.Y.S.2d 135 (Sup. Ct. 1957), *aff'd,* 6 App. Div. 2d 781, 175 N.Y.S.2d 579 (1st Dep't 1958).

29. Rubenstein v. Kleven, 150 F. Supp. 47 (D. Mass. 1957). Defendant pleaded illegality as a defense to a breach of contract action and then refused to answer discovery questions concerning the alleged illegality.

30. *E.g.*, Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964); Laverne v. Incorporated Village of Laurel Hollow, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966).

31. Bauer v. Stern Fin. Co., 169 N.W.2d 850 (Iowa 1969).

32. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

33. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965).

34. *See, e.g.*, Minor v. Minor, 240 So. 2d 301 (Fla. 1970); Franklin v. Franklin, 356 Mo. 422, 283 S.W.2d 483 (1955).

35. *See, e.g.*, Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968), which failed to consider the questions raised by Spevack v. Klein, 385 U.S. 511 (1967), and similar cases. *See* Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation,* 42 VA. L. REV. 322, 335 (1966).

36. Simkins v. Simkins, 219 So. 2d 724 (3d D.C.A. Fla. 1969); Bishop v. Bishop, 157 Ga. 408, 121 S.E. 305 (1924). In *Simkins* a divorce plaintiff sought to suppress evidence

have held that a plaintiff's suit may be dismissed if he refuses to answer relevant questions on the ground of possible self-incrimination.[37]

Typical of such decisions are several Florida cases where plaintiffs seeking divorces have refused to answer questions concerning their alleged adultery[38] while seeking to prove their right to relief on other grounds.[39] The issue was ostensibly settled by the Florida supreme court in *Stockham v. Stockham.*[40] In affirming the dismissal of plaintiff's suit the court reasoned that the "exercise of the privilege would operate to further the action or claim of the [plaintiff] contrary to equity and good conscience."[41]

Extent of Plaintiff's Self-Incrimination Privilege

The self-incrimination privilege of the civil litigant has been recently expanded by the United States Supreme Court. The Court has held the fifth amendment privilege applicable to state proceedings through the fourteenth amendment, requiring adherence to federal court interpretations of the

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concerning his alleged adultery. The trial court, implying his actions would be dismissed if he refused, ordered him to answer deposition questions notwithstanding his claim of the self-incrimination privilege. The district court reversed on the basis of Spevack v. Klein, 385 U.S. 511 (1967). *Simkins* was later overruled by Minor v. Minor, 240 So. 2d 301 (Fla. 1970). The divorce plaintiff in *Bishop* invoked the privilege on cross-examination in response to questions concerning a former marriage, possibly bigamous. The appellate decision, reversing the dismissal of his suit, apparently turned on the fact that the questions asked were outside the scope of plaintiff's testimony on direct examination.

37. *E.g.*, Franklin v. Franklin, 356 Mo. 422, 283 S.W.2d 483 (1955). In those cases where defendant is granted a summary judgment the disposition is apparently on the merits. Kisting v. Westchester Fire Ins. Co. 290 F. Supp. 141 (W.D. Wis. 1968). Decisions where a plaintiff's complaint is dismissed have not made clear whether the trial court's dismissals were with or without prejudice. *E.g.*, Minor v. Minor, 240 So. 2d 301 (1970). One case held dismissal of a counterclaim, where the counterclaiming defendant had asserted the privilege, to be not on its merits. Zaczek v. Zaczek, 20 App. Div. 2d 902, 249 N.Y.S.2d 490 (2d Dep't 1964).

38. FLA. STAT. §798.01 (1969) proscribes living in an open state of adultery.

39. Minor v. Minor, 240 So. 2d 301 (Fla. 1970); Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964); Simonet v. Simonet, 241 So. 2d 720 (4th D.C.A. Fla. 1970); Cotton v. Cotton, 239 So. 2d 865 (4th D.C.A. Fla. 1970); Nuckols v. Nuckols, 189 So. 2d 832 (4th D.C.A. Fla. 1966); Lund v. Lund, 161 So. 2d 873 (2d D.C.A. Fla. 1964).

40. 168 So. 2d 320 (Fla. 1964).

41. *Id.* at 322. Other state courts have reached the same results, variously predicated upon the equitable doctrine of "clean hands." Bauer v. Stern Fin. Co., 169 N.W.2d 850 (Iowa 1969) (absence of a genuine issue of fact); Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483 (1955) (clean hands); Laverne v. Incorporated Village of Laurel Hollow, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966) (privilege should be used as a shield and not as a sword); *see* Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (Sup. Ct. 1958), *aff'd*, 7 App. Div. 2d 995, 183 N.Y.S.2d 868 (2d Dep't), *aff'd*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1959). One federal court has made the extreme statement, in dicta, that a plaintiff waives his self-incrimination privilege by filing his suit. Independent Prod. Corp. v. Loew's, Inc., 22 F.R.D. 266 (S.D.N.Y. 1958). *See also* Fleming v. Bernardi, 1 F.R.D. 624 (N.D. Ohio 1941). *But see* Stevens v. Marks, 383 U.S. 234 (1966), which condemned procedures resulting in mechanical waiver of the privilege.

privilege rather than to a vague due process standard.[42] Moreover, in *Garrity v. New Jersey*[43] and *Spevack v. Klein*[44] the Court disapproved of state procedures requiring parties to choose between assertion of their self-incrimination privilege and forfeiture of proprietary rights.

In *Garrity* two policemen, threatened with dismissal, waived their privilege against self-incrimination during a grand jury investigation. Their testimony was subsequently used to secure their conviction, but the Supreme Court later reversed on the ground that their disclosures had been compelled. In *Spevack* a lawyer was disbarred solely because he refused to testify or produce financial records at a judicial inquiry into his alleged professional misconduct. Reversing the disbarment, the Court held a lawyer could not be deprived of his livelihood because he exercised his right to remain silent. The Court stressed the severity of the coercive penalty and, in dictum, espoused an expansive view of the self-incrimination privilege, stating that no "penalty [may be imposed] which makes assertion of the Fifth Amendment privilege costly."[45]

In *Simkins v. Simkins*[46] a Florida court, relying upon this dictum, held the dismissal of a divorce plaintiff's complaint to be an unconstitutional "penalty" for assertion of the self-incrimination privilege. If a civil cause of action is viewed as a valuable property right and if *Garrity* and *Spevack* support the principle that a compelled election between assertion of the fifth amendment privilege and forfeiture of a property right is unconstitutional, the result in *Simkins* appears well-reasoned.

Simkins was overruled, however, by the Florida supreme court in *Minor v. Minor*.[47] The court distinguished the parties in *Garrity* and *Spevack,* who were involuntarily thrust into a compelled election, from the divorce plaintiff in *Minor* who was voluntarily seeking equity.[48] This distinction is superficially appealing, but civil plaintiffs seldom voluntarily seek situations requiring litigation.

A more logical distinction, in terms of the intent and function of the fifth amendment privilege, seems to be between "civil" actions in which the government is a party, such as *Garrity* and *Spevack,* and ordinary civil actions

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42. Malloy v. Hogan, 378 U.S. 1 (1964).

43. 385 U.S. 493 (1967).

44. 385 U.S. 511 (1967).

45. *Id.* at 515. Identical language was used in Malloy v. Hogan, 378 U.S. 1, 8 (1964), but *Spevack* was the first decision to apply such an absolute standard to a civil action. The precedential value of Justice Douglas' dictum is dubious; he was joined in the opinion by only three other justices. Mr. Justice Fortas, in his concurring opinion that provided the 5-4 majority for reversal, shied away from this expansive view.

46. 219 So. 2d 724 (3d D.C.A. Fla. 1969). "[T]he right of a resident of this state to prosecute a cause of action . . . is a valuable and substantial one . . . and the rule in *Spevack* and *Garrity* was not made to depend on the degree of severity of the penalty." *Id.* at 726. *But see* Headley v. Baron, 228 So. 2d 281 (Fla. 1969).

47. 240 So. 2d 301 (Fla. 1970).

48. *See* Minor v. Minor, 240 So. 2d 301 (Fla. 1970), adopting the rationale of the district court, Minor v. Minor, 232 So. 2d 746, 747 (2d D.C.A. Fla. 1970).

involving two private parties. One of the most important functions of the privilege is "to protect individuals from abuse by government of its powers of investigation, arrest, trial, and punishment."[49] However, where a lawsuit is between two private parties, neither side possesses the broad investigatory power of the government. Thus, since no possibility of abuse of governmental power exists in civil cases, absolute interpretation of the self-incrimination appears not as necessary as in criminal actions where the government is a party.[50]

The Supreme Court appears to have retreated somewhat from the expansive view of the fifth amendment privilege expounded in *Garrity* and *Spevack*. In *Gardner v. Broderick*[51] and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*,[52] involving grand jury investigations of alleged misconduct of public employees, the employees were summoned, advised of their right to remain silent, and then asked to sign waivers of immunity. They refused and were dismissed after being told a refusal to sign would result in termination of employment. The dismissals were reversed on the ground that they were imposed "not for failure to answer relevant questions about . . . official duties, but for refusal to waive a constitutional right."[53] This holding does not clearly retreat from the view that no penalty may be imposed upon one who invokes the privilege against self-incrimination. However, the Court in dictum did repudiate the broad implications of *Spevack* by stating that the fifth amendment privilege would not bar the dismissal of a public employee who refused to answer questions "specifically, directly, and narrowly relating to the performance of his official duties."[54] This reasoning appears to revert to the more traditional approach that the fifth amendment privilege protects only against consequences criminal in nature.[55] While the government employees, according to *Gardner* and *Sanitation Men*, must be immune from criminal prosecution if compelled to furnish incriminating evidence, they would not be immune from the non-criminal penalty of dismissal for refusal to testify.

Since dismissal of a civil plaintiff's suit is a non-criminal sanction, it would appear permissible to compel him to "elect" between invoking his privilege to prosecute in his suit or compelling waiver of the privilege. Nevertheless, an inflexible rule to this effect seems to treat a plaintiff's due process right to a judicial hearing of his case too summarily.

Plaintiff's Due Process Right. The importance of a civil plaintiff's due

49. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484 (1957).

50. *See* Note, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L. FORUM. 75, 83.

51. 392 U.S. 273 (1968).

52. 392 U.S. 280 (1968).

53. Gardner v. Broderick, 392 U.S. 273, 278 (1968).

54. *Id.* at 277-78.

55. *See, e.g.*, United States v. Lewis, 10 F.R.D. 56 (D.N.J. 1950). *But see* Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964) & note 10 *supra*. *See generally* 8 J. WIGMORE, EVIDENCE §§2255, 2281 (McNaughton rev. ed. 1961).

process guarantee was acknowledged by the Supreme Court in *Societe Internationale v. Rogers*.[56] There, a Swiss holding company sought to recover property from the United States Government. Plaintiff failed to comply with a discovery order because Swiss law prohibited release of the particular information. The United States Supreme Court reversed the lower court's dismissal of the plaintiff's complaint. The Court stressed that plaintiff's "inability" to comply with the order was "fostered neither by its own conduct nor by circumstances within its control,"[57] and held that dismissal of the action would constitute a violation of due process. While it may be argued that a plaintiff claiming possible self-incrimination is not unable to submit to discovery, *Societe Internationale* does place due process limitations upon a court's power to penalize plaintiffs[58] who, in good faith, refuse to supply certain information.[59]

Balancing of Interests. A trial court is faced with a peculiar and difficult problem where a plaintiff seeks the protection of the fifth amendment privilege: honoring plaintiff's guarantee of his day in court and his self-incrimination privilege, while simultaneously attempting to avoid prejudice to the defendant resulting from suppression of relevant evidence. Under existing law the plaintiff's self-incrimination privilege in this situation is probably not absolute,[60] yet mechanical dismissal of his complaint may violate his due process right.[61] The existence of such competing interests indicates the desirability of a balancing-of-interests approach.[62]

A balancing approach has apparently played an implicit role in the Florida cases, especially when the results have been justified in terms of "equity and good conscience."[63] Although the balancing of competing interests may not have changed the result in any of these cases, allowing the cases to stand for an inviolable rule may result in injustice for some future plaintiffs.

Most cases where plaintiffs have sought to invoke the self-incrimination

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56. 357 U.S. 197 (1958).

57. *Id.* at 211.

58. It should be noted that the Court in dictum treated plaintiff's position as analogous to that of a defendant in that plaintiff sought recovery of property summarily seized by the Government. *Id.* at 210.

59. *Cf.* Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Hovey v. Elliott, 167 U.S. 409 (1897).

60. *See* text accompanying notes 34-55 *supra.*

61. *Cf.* Societe Internationale v. Rogers, 357 U.S. 197 (1958).

62. Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (Sup. Ct. 1958), *aff'd*, 7 App. Div. 2d 995, 183 N.Y.S.2d 868 (2d Dep't), *aff'd*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1959).

63. Stockham v. Stockham, 168 So. 2d 320, 322 (Fla. 1964). FLA. STAT. §798.01 (1969), which was the basis of the plaintiff's self-incrimination claim, prohibits living in an "open state of adultery." Isolated acts of adultery, as usually charged in a divorce pleading, would presumably not constitute a crime under the statute. While the court could not question the plaintiff's claim of the privilege under the "links-in-the-chain" doctrine of Hoffman v. United States, 341 U.S. 479 (1951), it might have been felt that the plaintiff was utilizing the privilege purely for tactical advantage.

privilege have arisen out of discovery procedure.[64] The usual scope of permissible discovery is extremely broad, extending far beyond matters that would be relevant at trial.[65] Therefore, evidence sought to be suppressed by a plaintiff may not be relevant to the facts in issue. If a trial court cannot consider the relevance of the privileged testimony and the degree of prejudice to the defendant resulting from its suppression, the plaintiff may be unjustly deprived of due process.[66] Morever, even if the privileged evidence would be admissible at trial, adverse inference[67] or comment[68] may result from a civil party's claim of the self-incrimination privilege.[69] Trial courts should be permitted to consider the beneficial effect that might accrue from such inference or comment.

The Supreme Court has endorsed the balancing of interests approach[70] while passing upon a party's claim of the attorney-client privilege during discovery. Such an approach should apply, a fortiori, to the cherished constitutional privilege against self-incrimination. Evidentiary matters are traditionally the subject of broad judicial discretion.[71] When civil plaintiffs invoke the fifth amendment privilege, the exercise of this discretion should not be foreclosed by an arbitrary or mechanical rule.

Defendant's Claim of the Privilege

While generally treated less harshly than plaintiffs, defendants who assert the self-incrimination privilege are nevertheless subject to various sanctions. In *Brown v. United States*[72] the Supreme Court extended the criminal law rule of constructive waiver[73] to civil litigation. After taking the stand voluntarily in her own behalf, a civil defendant was held to have waived the privilege for purposes of cross-examination. The Court distinguished the party

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64. *See, e.g.*, United States v. Kordel, 397 U.S. 1 (1970); Minor v. Minor, 240 So. 2d 301 (Fla. 1970).

65. Fed. R. Civ. P. 26(b) permits discovery of all matters "relevant to the *subject matter* . . . in the pending action." (Emphasis added.)

66. *Cf.* Societe Internationale v. Rogers, 357 U.S. 197 (1958).

67. *E.g.*, Sahn v. Pagano, 302 F.2d 629 (2d Cir. 1962).

68. Morris v. McClellan, 154 Ala. 639, 45 So. 641 (1908).

69. This rule, based upon United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923), is of dubious constitutionality. *See* text accompanying notes 72-81 *infra*. *See also* Griffin v. California, 380 U.S. 609 (1965).

70. *See* Hickman v. Taylor, 329 U.S. 495, 497 (1947), where the Court states: "Examination into a person's files and records . . . must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into . . . privacy. . . . At the same time, public policy supports reasonable and necessary inquiries. Properly *to balance these competing interests* is a delicate and difficult task." (Emphasis added). The Fifth Circuit has adopted a balancing approach in cases where plaintiff invokes one of the qualified evidentiary privileges. *See* Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561 (5th Cir. 1964).

71. *See, e.g.*, Miller v. Alexandria Truck Lines, Inc., 273 F.2d 897 (5th Cir. 1960); Mutual Life Ins. Co. v. Zimmerman, 75 F.2d 758 (5th Cir. 1935).

72. 356 U.S. 148 (1958).

73. Fitzpatrick v. United States, 178 U.S. 304 (1900).

who testifies involuntarily and "must be able to raise a bar . . . when his immunity becomes operative," from the defendant in *Brown*, who had "the choice . . . not to testify at all."[74]

Although the defendant in *Brown* was imprisoned for criminal contempt, the sanction most often imposed upon the defendant claiming the privilege during cross-examination is that of striking his entire testimony.[75] Striking such testimony may be justified, apart from any constructive waiver theory, on the basis of the due process rights of the plaintiff. If the defendant's testimony is not subject to distillation by complete cross-examination, the testimony is incompetent and should be excluded in fairness to the plaintiff.[76] As the Court in *Brown* stated:[77]

> The 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.

Brown and the decisions dismissing the actions of plaintiffs claiming the privilege[78] have emphasized that such parties waive the self-incrimination privilege by their voluntary election to place themselves before a tribunal. Whatever the merits of this argument as applied to plaintiffs and to defendants who voluntarily testify in their own behalf, it is not applicable to the civil defendant testifying involuntarily. The distinction drawn in *Brown* therefore implies that a defendant's assertion of the privilege during compelled testimony should carry no adverse consequences.

The general rule, however, is that a civil defendant's exercise of the fifth amendment privilege during open trial may support an inference of guilt.[79] This rule has been explained on two grounds. First, since the self-incrimination privilege provides protection against only criminal consequences, adverse judgment in a civil action is outside the scope of the fifth amendment's protection.[80] Second, the adverse inference results "not from the assertion of the privilege but from the silence of the party in the face of other uncontradicted, adverse evidence."[81]

The constructive waiver doctrine and the rule allowing adverse inference from a civil party's claim of the self-incrimination privilege appear to be supported by logic and precedent.[82] However, the combination of the two doc-

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74. Brown v. United States, 356 U.S. 148, 155 (1958).

75. *E.g.*, Berner v. Schlesinger, 11 Misc.2d 1024, 178 N.Y.S.2d 135 (Sup. Ct. 1957), *aff'd*, 6 App. Div. 2d 781, 175 N.Y.S.2d 579 (1st Dep't 1958).

76. *See* Note, *supra* note 35, at 336.

77. Brown v. United States, 356 U.S. 148, 156 (1958) (emphasis added).

78. *E.g.*, Minor v. Minor, 240 So. 2d 302 (Fla. 1970).

79. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).

80. *See e.g.*, 8 J. WIGMORE, EVIDENCE §§2255, 2281 (McNaughton rev. ed. 1961).

81. *See* Ratner, *supra* note 49, at 476. This rationale is inapplicable to discovery proceedings, since before trial there is no adverse evidence before the trier of fact.

82. *See* text accompanying notes 72-81 *supra*.

trines places the civil defendant who is in danger of self-incrimination in a dilemma.[83] He may decline to testify and suffer adverse inference or he may elect to testify and risk possible self-incrimination. Such a compelled choice between two disadvantageous alternatives has been disapproved by the Supreme Court,[84] and any waiver of the fifth amendment privilege occurring under such circumstances would appear to be involuntary.[85]

One commentator has suggested that the *Garrity*[86] and *Spevack*[87] decisions cast doubt upon the constitutionality of the constructive waiver theory espoused in *Brown v. United States*.[88] Overruling *Brown*, however, would result in the anomalous situation of a civil defendant having broader fifth amendment protection with respect to voluntary testimony than a criminal defendant.[89] The remaining alternative is to retreat from the rule that a civil party's silence on self-incrimination grounds may properly support adverse inference or comment.[90] The elimination of this rule would tend to square the procedures governing the fifth amendment privilege in civil actions with those operative in criminal actions.

Pretrial Proceedings: Procedural Alternatives To Avoid Constitutional Issues

A substantial majority of civil parties' assertions of the privilege against self-incrimination arise during pleadings and discovery.[91] The rules of civil procedure governing these proceedings may attach harsh consequences to a party's claim of the privilege.[92] Although some courts have interpreted the rules strictly at the expense of the fifth amendment privilege, constitutional issues may often be avoided by reasonable construction of the rules.

Pleadings. Federal Rule of Civil Procedure 8(d) provides that an aver-

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83. Comment, *Self-Incrimination in Bankruptcy Proceedings*, 117 U. PA. L.F. 1003 (1969).

84. *E.g.*, Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Spevack v. Klein, 385 U.S. 511 (1967).

85. *Cf.* Gardner v. Broderick, 392 U.S. 273 (1968).

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

87. Spevack v. Klein, 385 U.S. 511 (1967).

88. 356 U.S. 148 (1958). *See* Note, *supra* note 50, at 91.

89. *See* text accompanying notes 75-77 *supra.*

90. Aside from any constitutional issue raised by allowing such an inference, it may be argued that there is insufficient logical connection between a party's assertion of the privilege and the inference to be drawn, so that the claim of the privilege is legally irrelevant. A party who is in fact innocent of the crime for which guilt would be inferred may nevertheless have valid reasons for invoking the privilege. *See* 8 J. WIGMORE, EVIDENCE §2272 n.1 (3d ed. 1961), for a concise statement of this and other arguments for and against allowing inference from a civil party's claim of the privilege.

91. *See, e.g.*, United States v. Kordel, 397 U.S. 1 (1970); Minor v. Minor, 240 So. 2d 301 (Fla. 1970).

92. *See, e.g.*, de Antonio v. Solomon, 41 F.R.D. 447 (D. Mass. 1966); Amana Soc'y v. Selzer, 250 Iowa 380, 94 N.W.2d 337 (1959).

ment is deemed admitted when not denied in a required responsive pleading. Where a party invokes the fifth amendment privilege in a responsive pleading some variance has occurred in the application of rule 8 (d) and similar state rules.[93] While there is no question that the privilege is available during pleading,[94] the federal courts have generally interpreted rule 8 (d) literally, treating invocation of the privilege as an admission of those allegations not denied.[95] The leading case, *de Antonio v. Solomon*,[96] justified this interpretation on the basis that "pleadings . . . are generally not admissible in a criminal prosecution as proof of the facts therein alleged."[97] This reasoning, however, overlooks the public nature of pleadings and hence the possibility that they might become public court records and thus factual links in the chain of evidence[98] necessary to prove a criminal charge. Moreover, the pleadings would be admissible in a later criminal prosecution to show the existence and scope of the prior civil action.[99]

Some courts in states with rules of civil procedure patterned after the federal rules have adopted the less stringent approach of allowing the claim of the privilege to operate as a denial of the alleged facts.[100] This appears to be the logical way of avoiding constitutional issues when applying federal rule 8 (d) and its state counterparts. New York, whose rules require verification of all pleadings, has likewise avoided constitutional problems through a statute permitting filing of unverified answers in situations where the privilege applies.[101]

Discovery. The Florida[102] and Federal[103] Rules of Civil Procedure limit the scope of discovery to matters not privileged. Although the rules contain no definition for "privileged," the courts have applied general evidentiary principles to give meaning to the term.[104] The self-incrimination privilege has been held applicable to depositions[105] and interrogatories to parties.[106]

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93. *E.g.*, FLA. R. CIV. P. 1.110 (c).

94. *E.g.*, *In re* Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir.), *cert. denied*, 375 U.S. 814 (1963).

95. *E.g.*, de Antonio v. Solomon, 41 F.R.D. 447 (D. Mass. 1966). *See also* Amana Soc'y v. Selzer, 250 Iowa 380, 94 N.W.2d 337 (1959).

96. 41 F.R.D. 447 (D. Mass. 1966).

97. *Id.* at 449.

98. *See* Hoffman v. United States, 341 U.S. 479 (1951).

99. 2 F. WHARTON, CRIMINAL EVIDENCE §628 (12th ed. 1955); *see* Peters v. Lines, 275 F.2d 919 (9th Cir. 1960).

100. *E.g.*, Ridge v. State *ex rel.* Tate, 206 Ala. 349, 89 So. 742 (1921); State v. Myers, 244 Miss. 778, 146 So. 2d 334 (1962).

101. N.Y. CIV. PRAC. §3020 (a) (McKinney 1963); *see* Magowan v. Magowan, 39 Misc. 2d 983, 242 N.Y.S.2d 336 (Sup. Ct.), *aff'd mem.*, 19 App. Div. 2d 947, 245 N.Y.S.2d 976 (1st Dep't 1963).

102. FLA. R. CIV. P. 1.280 (b).

103. FED. R. CIV. P. 26 (b).

104. *See* Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 745 (1939).

105. *E.g.*, Simkins v. Simkins, 219 So. 2d 724 (3d D.C.A. Fla. 1969).

106. *See* United States v. Kordel, 397 U.S. 1 (1970) (dictum).

Prior to the July 1970 revision of the Federal Rules of Civil Procedure, a conflict of authority developed over whether the fifth amendment privilege was available to a party served with request for admissions.[107] The Florida position,[108] and that of at least one federal court,[109] was that the privilege was not available. These courts relied on the rule's statement that a party's admission "is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."[110] This rather doctrinaire reliance upon the rule's use-restriction provision ignores the fact that admissions, while inadmissible in a later criminal proceeding, may furnish "a vital, factual link in the chain of evidence"[111] leading to criminal prosecution.[112] Other federal courts have recognized this fact and, accordingly, have permitted invocation of the privilege.[113]

The constitutional question of whether the rules furnish sufficient "immunity" to compel a party's response to requests for admission has perhaps been obviated by the 1970 revision of the discovery rules. Federal rule 36(a),[114] governing admissions, now incorporates by reference the limitation of the scope of discovery to matters "not privileged," expressed in rule 26(b). This limitation is now expressly intended to govern the scope of all discovery devices.[115]

There has been substantial federal litigation involving concurrent civil and criminal actions arising out of the same operative facts.[116] If the same party is defendant in both actions the liberal discovery allowed in civil actions presents a problem.[117] Unless the defendant can postpone discovery in the

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107. *Compare* United States v. Lewis, 10 F.R.D. 56 (D.N.J. 1950), *with* FDIC v. Logsdon, 18 F.R.D. 57 (W.D. Ky. 1955).

108. Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964).

109. United States v. Lewis, 10 F.R.D. 56 (D.N.J. 1950) (alternative ground for decision).

110. FED. R. CIV. P. 36(b); FLA. R. CIV. P. 1.370(b). In Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964), the court emphasized this rule when holding a plaintiff's action properly dismissed upon his invocation of the self-incrimination privilege. Minor v. Minor, 240 So. 2d 301 (Fla. 1970), and other cases relying upon *Stockham* to reach the same result may be distinguished, since they involved other forms of discovery, to which the rule's use-restriction doctrine is inapplicable.

111. FDIC v. Logsdon, 18 F.R.D. 57, 58 (W.D. Ky. 1955); *cf.* Hoffman v. United States, 341 U.S. 479 (1951).

112. In order to compel testimony, despite claim of the privilege, the witness must be guaranteed that his testimony and the fruits thereof may not be used against him. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

113. FDIC v. Logsdon, 18 F.R.D. 57 (W.D. Ky. 1955); United States v. Fishman, 15 F.R.D. 151 (S.D.N.Y. 1953) (dictum).

114. This rule corresponds to FLA. R. CIV. P. 1.370.

115. FED. R. CIV. P. 26(b) (advisory committee notes on 1970 amendment).

116. *E.g.*, United States v. Kordel, 397 U.S. 1 (1970) (drug labeling); United States v. Linen Supply Institute, 18 F.R.D. 452 (S.D.N.Y. 1955) (antitrust).

117. FED. R. CIV. P. 26(b) limits the scope of discovery to all matters "relevant to the subject matter involved in the pending action."

civil case until termination of the criminal case, the government has a means of indirect criminal discovery, which would be unavailable under the federal criminal rules and the fifth amendment. The majority of courts facing this problem have utilized the discovery rule allowing protective orders[118] and have granted stays of all discovery pending disposition of criminal charges.[119]

As previously noted,[120] a constitutional issue arises when a civil plaintiff attempts to invoke his self-incrimination privilege in response to requests for discovery. This issue could be largely avoided if protective orders were extended to plaintiffs as well as defendants. Both the federal[121] and Florida[122] rules provide that the trial court may grant any protection, "which justice requires,"[123] including the sealing of a deposition.[124] The use of such an order would allow the defendant his discovery, but would keep the results confidential and prevent the government from using the fruits of civil discovery in criminal investigations.[125] Disclosure of discovered information by the defendant should be punishable by contempt.[126]

Protective orders have been issued in favor of defendants seeking to avoid discovery,[127] but there appears to be no reason why the practice cannot be extended to benefit plaintiffs. Orders may be granted "for good cause shown . . . to protect a *party or person* . . . from annoyance, embarassment, oppression, or undue burden . . . ."[128] There is no express indication that the term "party" is confined to defendants. A few federal courts have held a compelled discovery involving possible self-incrimination to a defendant would be "oppressive" and would "infringe on constitutional rights."[129]

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118. FED. R. CIV. P. 26 (c); FLA. R. CIV. P. 1.310 (c).

119. *E.g.*, Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); National Discount Corp. v. Halybaugh, 13 F.R.D. 236 (E.D. Mich. 1952). Both cases involved private party plaintiffs in the civil action. The courts thus recognized the possibility that private discovery might be misused by the Government. *But see* United States v. Simon, 373 F.2d 649 (2d Cir.), *vacated,* 389 U.S. 425 (1967), reversing the district court's order granting a stay of discovery pending disposition of criminal charges. The court implied that the defendant could only invoke the fifth amendment privilege in response to specific questions.

120. *See* text accompanying notes 62-71 *supra.*

121. FED. R. CIV. P. 26 (c).

122. FLA. R. CIV. P. 1.310 (c).

123. FED. R. CIV. P. 26 (c); FLA. R. CIV. P. 1.310 (c).

124. FED. R. CIV. P. 26 (c); FLA. R. CIV. P. 1.310 (c).

125. *See* Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders To Avoid Constitutional Issues,* 3 U. SAN FRANCISCO L. REV. 12 (1968).

126. United States v. American Radiator & Standard Sanitary Corp., 1967 Trade Cases No. 72,311 (3d Cir. 1967).

127. *E.g.*, Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964).

128. FED. R. CIV. P. 26 (c) (emphasis added).

129. *E.g.*, Perry v. McGuire, 36 F.R.D. 272, 273 (S.D.N.Y. 1964); United States v. Linen Supply Institute, 18 F.R.D. 452 (S.D.N.Y. 1955). *See* United States v. Kordel, 397 U.S. 1 (1970), which strongly implied that a protective order staying discovery in a civil case pending disposition of a criminal indictment would be proper.

Where the plaintiff in a civil action asserts his fifth amendment privilege, a trial court has no power to grant immunity from prosecution[130] and therefore may not require plaintiff to divulge the information he seeks to suppress.[131] The court's only alternative, if the information is relevant and its suppression would substantially prejudice the defendant's case, is to dismiss the plaintiff's complaint.[132] The protective order allows, in effect, a grant of immunity to the plaintiff. Since the order precludes the government from utilizing plaintiff's testimony or the fruits thereof, the practice of using protective orders would probably meet constitutional standards for required immunity.[133] Plaintiff could then be required either to comply with discovery requests or accept dismissal of his suit.

CONCLUSION

Because civil and criminal matters are often intertwined, civil litigants are likely to continue their frequent claims of the fifth amendment privilege against self-incrimination. Allowing any adverse consequences to flow from assertion of the privilege raises difficult questions of competing interests: the parties' right to assert the privilege of self-incrimination, the due process rights of both parties, and the duty of the court to reach a rational decision upon all available relevant evidence. Any arbitratry rule, honoring one of these interests to the exclusion of others, appears unwise. It seems preferable to allow the trial court to weigh these competing interests in light of the particular circumstances, especially in those situations in which a plaintiff invokes the privilege.

Most cases in which a civil party claims the privilege arise in the pleadings or during discovery. Courts that have penalized parties asserting the fifth amendment privilege during these pre-trial proceedings have ascribed more importance to the rules of civil procedure than to the fifth amendment. Many of the constitutional issues raised by such sanctions may be largely avoided through exercise of existing procedural alternatives.

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130. Ensign v. Pennsylvania, 227 U.S. 592 (1913).

131. *See* United States v. Kordel, 397 U.S. 1 (1970); McCarthy v. Arndstein, 266 U.S. 34 (1934); Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964).

132. *See, e.g.*, Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968); Cotton v. Cotton, 239 So. 2d 865 (4th D.C.A. Fla. 1970).

133. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).