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# Compulsion That Violates the Fifth Amendment: The Burger Court's Definition

**Larry J. Ritchie***

## I. INTRODUCTION

A few years ago Mr. Justice Rehnquist wrote: "At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . . .'"[1] A more accurate statement might have been made by transposing the words "concept" and "language" and inserting in the place of "schoolboy," the word "lawyer." Indeed, only ten years earlier the Court mentioned that "the law and the lawyers . . . have never made up their minds just what [the fifth amendment] is supposed to do or just whom it is intended to protect."[2]

In interpreting the bounds of the fifth amendment privilege, the Court has clearly defined much of its language. "No person" means that the privilege applies only to an individual, not to a corporation or other business entity.[3] "In any criminal case" would seem to suggest that compelling an individual to be a witness against himself is forbidden only in his criminal trial, but the Court has reasoned that in order to protect fully the rights of the accused at trial, the privilege must be extended to certain other proceedings,[4] for example, grand jury proceedings,[5] police custodial interrogations,[6] and even to activities outside the criminal process, such as civil proceedings,[7] investigations by administrative officials,[8] and legislative committee hearings.[9] The

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1. Michigan v. Tucker, 417 U.S. 433, 439 (1974).

2. Murphy v. Waterfront Comm'n., 378 U.S. 52, 56 n.5 (1964) (quoting from Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations*, 9 Bull. Atom. Sci. 181-82 (1953)).

3. *E.g.*, Bellis v. United States, 417 U.S. 85, 90 (1974).

4. Michigan v. Tucker, 417 U.S. 433, 440 (1974); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

5. Counselman v. Hitchcock, 142 U.S. 547 (1892).

6. Miranda v. Arizona, 384 U.S. 436 (1966).

7. McCarthy v. Arndstein, 266 U.S. 34 (1924).

8. ICC v. Brimson, 154 U.S. 447 (1894).

9. Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

privilege would be nullified if the state could require the suspect to give testimony at other proceedings which might eventually be used as evidence against him at a criminal trial.[10]

"To be a witness" means the act of testifying or giving testimony. The Court has limited the privilege to evidence that is testimonial or communicative in nature;[11] it "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."[12] And it is being a witness "against himself" that cannot be compelled.[13] A person can be compelled to disclose information about the crimes of others, for providing such evidence is a duty of citizenship.[14]

The critical language, "shall be compelled," however, has not been defined as consistently as the other phrases of the amendment. It is clear that only the government is forbidden from exerting compulsion, for the amendment does not regulate the actions of private individuals.[15] But because "compulsion" is a vague concept, the precise nature of the proscribed governmental activity has been subject to shifting interpretations. In recent years the Burger Court[16] has frequently dealt with the concept in such a way as to alter significantly previous definitions of forbidden governmental action, especially those developed by

10. Michigan v. Tucker, 417 U.S. 433, 440-41 (1974); Miranda v. Arizona, 384 U.S. 436, 466 (1966).

11. Schmerber v. California, 384 U.S. 757 (1966).

12. *Id.* at 764 (footnote omitted).

13. United States v. Mandujano, 425 U.S. 564 (1976); Rogers v. United States, 340 U.S. 367 (1951); Brown v. Walker, 161 U.S. 591, 600 (1896).

14. United States v. Dionisio, 410 U.S. 1, 9-10 (1973); United States v. Burr, 25 F. Cas. 38 (No. 14, 692e) (C.C.D. Va. 1807). In *Burr*, Chief Justice Marshall drew on English precedents for the long-accepted proposition that "the public has a right to every man's evidence."

15. *See* Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976); *id.* at 332 (Brennan, J., concurring in part, dissenting in part); Burdeau v. McDowell, 256 U.S. 465 (1921).

16. Warren Burger became Chief Justice on June 23, 1969. The other members of the Court at that time were Justices Black, Douglas, Harlan, Brennan, Stewart, White, and Marshall. (Justice Fortas's seat was vacant as a result of his resignation.) Throughout this Article, decisions characterized as "Burger Court" decisions refer to those handed down after the Chief Justice took office, although the individual members of the Court have, of course, changed since 1969. This Article concentrates, however, on the most recent decisions, which tend to reflect a firm majority acceptance of the changing view of the fifth amendment. The current Court is composed of Chief Justice Burger, and Justices Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens.

the policy-oriented Warren Court. The present Court's interpretation of the fifth amendment narrowly focuses on the amendment's historical purpose, thereby restricting the protections that the privilege could afford.

The history of the privilege against compelled self-incrimination has been thoroughly documented,[17] and the policy justifications for the adoption, extension, and contraction of the privilege have been frequently discussed and debated.[18] In *Murphy v. Waterfront Commission,*[19] the Warren Court listed the then recognized policies underlying the privilege:

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[20]

The Burger Court, however, has disregarded these policy-based considerations and focused almost exclusively on the major intention of the framers of the Constitution. In England the privilege was regarded as a mere rule of evidence.[21] In the United States it was elevated to a constitutional right in order to ensure an adversary or accusatorial system of criminal justice and to avoid the inquisitorial practices of the English Courts of Star Chamber and High Commission.[22] Those courts, seeking evidence to be used against a suspect, would command his appearance, place him under oath, and interrogate him. His answers could be used against him as evidence of a criminal offense. A guilty suspect who attempted to avoid self-accusa-

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17. *See, e.g.,* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE § 2250 (J. McNaughton rev. ed. 1961).

18. *See, e.g.,* E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959); 8 WIGMORE, *supra* note 17, § 2251; Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671 (1968).

19. 378 U.S. 52 (1964).

20. *Id.* at 55 (citations omitted).

21. *See* Brown v. Walker, 161 U.S. 591, 597 (1896).

22. *E.g.,* Andresen v. Maryland, 427 U.S. 463, 470-71 (1976); Garner v. United States, 424 U.S. 648, 655-56 (1976); Michigan v. Tucker, 417 U.S. 433, 439-40 (1974).

tion by lying was caught in another trap—his answers could be used against him as evidence of perjury. If he simply refused to answer, he could be held in contempt of court and imprisoned until he was ready to speak.[23] This was the so-called "cruel trilemma of self-accusation, perjury or contempt."[24] By focusing on this historical justification for the privilege[25] and ignoring other policy considerations, the Burger Court has narrowly defined the prohibited compulsion and gradually reversed the Warren Court's expansion of the scope of the privilege. This Article will examine the Burger Court's treatment of the privilege and describe its potential effects in specific situations in which a privilege claim may be raised. The first part of the Article will discuss the Court's literal reading of the language of the fifth amendment through an examination of cases dealing with immunity and compelled production of documents. Having concluded that the Court is narrowly focusing on proscribing the *use* of compelled testimony, rather than on the *act* of compelling it, the Article will then discuss the Court's treatment of an assertion of the privilege by a criminal defendant, by an arrestee, and by a grand jury witness.

## II. THE SCOPE OF THE PRIVILEGE

### A. THE ACT OF COMPULSION VS. THE USE OF COMPELLED TESTIMONY

The language of the fifth amendment, "No person . . . shall be compelled," suggests that it is the *act* of compulsion that is forbidden. But the modifying phrase, "to be a witness against himself," limits the prohibition: a person can be compelled to give information, unless in so doing he would disclose information that could be used against him. The Burger Court's focus on this limitation is the foundation upon which its narrowing of the scope of the privilege rests.

23. *See* 8 WIGMORE, *supra* note 17, § 2250.

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

25. The historical perspective of the Burger Court seems to be correct. *See* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). Decisions interpreting the privilege based only on English and colonial history, however, ignore or treat too lightly recent judicially developed policy justifications for the privilege, which attempt to ensure a responsive constitutional system basically consistent with the desires of the framers, who could not anticipate the variety of confrontations between the state and the individual in modern times.

For many years the Supreme Court has held that compelling even self-incriminating testimony by a threat of imprisonment for contempt does not violate the fifth amendment, as long as immunity co-extensive with the scope of the privilege is granted.[26] Immunity accommodates both the "imperatives" of the privilege and the "legitimate demands" of the government to compel testimony,[27] for unless a person's compelled testimony can be introduced as evidence against him in a criminal prosecution, the privilege is not infringed.[28]

But interpretations of the type of immunity necessary to protect the privilege have changed. In 1892, the Court indicated that a witness must be fully protected by "absolute immunity" from prosecution for the offense to which a question relates.[29] In 1972, in *Kastigar v. United States*,[30] the Burger Court repudiat-

26. Kastigar v. United States, 406 U.S. 441 (1972); Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

27. Kastigar v. United States, 406 U.S. 441, 446 (1972).

28. *Id.* at 448-49.

29. Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). In *Counselman*, the Court was faced with the government's contention that use immunity, granted under the Immunity Act of 1868, ch. 13, 15 Stat. 37, was sufficient to protect the fifth amendment right. The Court ordered a witness, in custody for refusal to answer questions after the statutory immunity was granted, discharged, stating that "[w]e are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States." 142 U.S. at 585. Very shortly after the *Counselman* decision, Congress drafted a transactional immunity statute designed to protect a person compelled to testify from prosecution "for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence. . . ." Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, 444. In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), the Supreme Court indicated that at least in some circumstances a grant of transactional immunity was not required. *Murphy* involved the possible federal use of evidence obtained after state immunity was granted in a state investigative hearing. After holding that a state cannot compel testimony from a witness threatened with subsequent federal prosecution, the Court concluded, "that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." 378 U.S. at 79. *See also* notes 30-31 *infra* and accompanying text.

30. 406 U.S. 441 (1972). In *Kastigar* the Court upheld the constitutionality of Title II of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 927 (codified at 18 U.S.C. §§ 6002, 6003 (1970)), which provided only for use immunity: a witness compelled to testify could subsequently be prosecuted but no direct or indirect use of his compelled testimony could be made. The Court held the statute valid on the premise that transactional immunity affords broader protec-

ed this doctrine by holding that "use immunity" is "co-extensive with the privilege."[31] A person granted use immunity must testify and answer incriminating questions or face a citation for contempt,[32] but neither his compelled testimony nor its fruits can be used by the government as evidence against him in a criminal trial.[33] Although he can be prosecuted, incriminating evidence must be secured from a legitimate source wholly independent of the compelled testimony.[34] The Court thus views the fifth amendment strictly as a protection against the state's use of compelled testimony, rather than as a protection against the act of compulsion itself.[35] Use immunity fulfills what the Burger Court sees as the primary constitutional purpose of the privilege: preserving an accusatorial system of justice in which the government must prove its case without the use of evidence forced from the mouth of the accused.[36]

This interpretation of the fifth amendment is also reflected in the "economic penalty" cases, in which the threat of being fired or losing government licenses or contracts for refusal to testify compels a person to incriminate himself. The Court has prohibited use of such testimony in a criminal prosecution,[37]

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tion than the constitutional privilege requires, and thus, "such immunity from use and derivative use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453.

For a history of immunity and Supreme Court cases dealing with it, see Dixon, *Comment on Immunity Provisions,* 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1405 (1970).

31. 406 U.S. at 453.

32. Shillitani v. United States, 384 U.S. 364 (1966).

33. Kastigar v. United States, 406 U.S. 441, 453 (1972). *See also* Hoffman v. United States, 341 U.S. 479, 486 (1951), stating that the privilege extends not only to answers that would themselves support a conviction, but also to those which would "furnish a link in the chain of evidence needed" for prosecution.

34. Kastigar v. United States, 406 U.S. 441, 460 (1972).

35. In *Kastigar* the Court stated:

> [The fifth amendment privilege's] sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

406 U.S. at 453 (footnote omitted).

36. For a discussion of this as one of the principles underlying the fifth amendment, see Malloy v. Hogan, 378 U.S. 1, 7-8 (1964).

37. Garrity v. New Jersey, 385 U.S. 493 (1967). The recognition

which may be characterized as "informal use immunity" since the protection is not conferred on the witness prior to testifying but by a motion to suppress at his criminal trial. In addition, a witness cannot be forced to execute a waiver of immunity prior to testifying by the threat of a job loss.[38] But a state employee can be fired for failure to answer questions relating to the performance of his official duties.[39] This is apparently inconsistent

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in *Garrity* and in more recent cases, *see* Baxter v. Palmigiano, 425 U.S. 308 (1976); United States v. Freed, 401 U.S. 601 (1971); Simmons v. United States, 390 U.S. 377 (1968); Miranda v. Arizona, 384 U.S. 436 (1966), of an exclusionary rule to protect the privilege is in sharp contrast to the cases in which the Court has criticized and weakened the exclusionary rule as a remedy for violations of the fourth amendment. *See, e.g.,* United States v. Janis, 96 S. Ct. 3021 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974). The appropriateness and wisdom of a particular remedy, however, must depend on the nature of the underlying right protected by that remedy. The fifth amendment by its very language seems to incorporate the remedy of exclusion, *see* United States v. Janis, 96 S. Ct. at 3027, the only effective remedy in the *Garrity* situation.

38. Lefkowitz v. Turley, 414 U.S. 70 (1973); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968). *See* note 39 *infra.*

The Court has mentioned the possibility that *Garrity* would nullify the effect of any waiver of immunity executed by a witness in response to such compulsion, but the issue has not yet been decided. *See* Lefkowitz v. Turley, 414 U.S. 70, 80-81 (1973); Gardner v. Broderick, 392 U.S. 273, 278-79 (1968).

39. *See* Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973); Gardner v. Broderick, 392 U.S. 273, 278 (1968). In *Lefkowitz* the Supreme Court held four New York statutes, which required government contractors to waive their immunity or face cancellation of their contracts and disqualification from future government contracts for five years, unconstitutional. In addition to holding the statutes invalid, the Court indicated that "given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." 414 U.S. at 84. The contractors in *Lefkowitz* could have been fired for refusal to answer questions put to them, as long as they were not required to waive immunity, and the threatened job loss for a refusal to answer would have constituted compulsion under *Garrity.* Evidence thus obtained would be inadmissible in a subsequent criminal proceeding against the contractor. Garrity v. New Jersey, 385 U.S. 493 (1967). *Compare* Slochower v. Board of Higher Education, 350 U.S. 551 (1956) *with* Lefkowitz v. Turley, 414 U.S. 70 (1973) *and* Gardner v. Broderick, 392 U.S. 273 (1968). *See also* Orloff v. Willoughby, 345 U.S. 83 (1953).

The *Lefkowitz* position is also implicit in other decisions. *See* Garner v. United States, 424 U.S. 648, 657, 660 n.14, 662 n.16 (1976); Maness v. Meyers, 419 U.S. 449, 472, 475 (1975) (White, J., concurring). In *Maness,* the Court reversed a contempt citation imposed on a lawyer who advised his client to rely on the fifth amendment and refuse to turn over material subpoenaed by a grand jury. The Court was concerned that turning over the material would "let the cat out of the bag" with

with the view expressed by the Warren Court in *Spevack v. Klein*,[40] where, without discussing informal use immunity,[41] the Court held that a lawyer who refused to testify at a bar disciplinary proceeding could not be penalized by disbarment for invoking the privilege.[42] In *Lefkowitz v. Turley*,[43] the Burger

no assurance of being able to put it back in, because no formal immunity had been granted and there were no state procedures that would permit suppression of the material at trial had the privilege in fact been violated. That being the case, the lawyer recommended in good faith that his client invoke the privilege and the Court reasoned that he should not be held in contempt for doing so. 419 U.S. at 462-63, 462 nn. 9-10, 467-68. Implicit in the Court's analysis, and explicit in Justice White's concurrence, 419 U.S. at 473-74, is the recognition that if the defendant had been informed of his immunity, he would have been required to answer questions put to him or suffer the consequences of his refusal.

The informal use immunity remedy would seem in many instances to do away with statutory procedures that require a prosecutor conducting a grand jury inquiry to apply to his superiors for authority to grant formal immunity to a witness. *See, e.g.*, 18 U.S.C. § 6003(b) (1970). Loss of protections now insured by statutory requirements, however, could be remedied by the formulation of procedures within the prosecutor's office to prevent a "runaway" prosecutor from taking action without the approval of his superiors.

40. 385 U.S. 511 (1967).

41. Garrity v. New Jersey, 385 U.S. 493 (1967), *see* note 37 *supra* and accompanying text, was decided the same day as *Spevack*. Justice White, dissenting in both cases, pointed out that the *Spevack* decision provided an unnecessary protection to lawyers in light of the *Garrity* rule. His reasoning was similar to the reasoning used in *Lefkowitz*, *see* note 39 *supra*, also written by him. Justice White noted that the *Spevack* decision

> would seem justifiable only on the ground that it is an essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions. But *Garrity* excludes such statements, and their fruits, from a criminal proceeding and therefore frustrates in advance any effort to compel admission which could be used to obtain a criminal conviction. I therefore see little legal or practical basis, in terms of the privilege against self-incrimination protected by the Fifth Amendment, for preventing the discharge of a public employee or the disbarment of a lawyer who refuses to talk about the performance of his public duty.

385 U.S. at 531 (footnote omitted).

42. The broad language used by the *Spevack* Court indicates a concern for preventing the act of compulsion. The Court's analysis begins by citing language from Malloy v. Hogan, 378 U.S. 1 (1964), which emphasizes " 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' " 385 U.S. at 514 (citation omitted). The Court then explains the nature of this "penalty" stating: "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 U.S. 609, the imposition of *any sanction* which makes assertion of the Fifth Amendment privilege '*costly*.' " 385 U.S. at 515 (emphasis added).

Justice Fortas, who concurred with the result in *Spevack*, wrote a

Court summarized its position without mentioning *Spevack*:

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. . . .
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> . . . .
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> [E]mployees of the state . . . may be compelled to respond to questions about the performance of their duties but only if their answers cannot be used against them in subsequent criminal prosecutions. . . .[44]

The question left open by *Lefkowitz* is whether a witness who has not been granted formal immunity and refuses to testify can avoid both disclosure and the threatened action of the state. It would be consistent with the Burger Court's rigorously literal view of the fifth amendment to permit the state to force disclosure, even without formally granting immunity. A motion to suppress at a subsequent criminal trial would provide sufficient protection. This interpretation of the effect of the privilege accommodates society's need for information, but rejects the notion that the fifth amendment is a "general protector" of privacy[45] or that the act of compulsion is the evil it addressed.[46]

The Burger Court's reliance on this interpretation is most explicitly demonstrated in the recent case of *Baxter v. Palmigiano*.[47] *Baxter* held that a prison disciplinary board may permissibly draw an inference of guilt from an inmate's refusal to

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separate opinion, reasoning that lawyers had no public duty to account to the state for their actions. He indicated that if the case had involved a state employee he would have allowed the state's coercive action. Using Fortas's rationale, *Spevack* is not inconsistent with the reasoning of *Lefkowitz* and other cases, *see* note 39 *supra* and accompanying text.

43. 414 U.S. 70 (1973). *See* note 39 *supra*.

44. 414 U.S. at 78-79.

45. Fisher v. United States, 425 U.S. 391, 401 (1976).

46. In addition to the immunity and economic penalty cases discussed above, several other cases lend some support to this proposition. *See* Fisher v. United States, 425 U.S. 391 (1976); United States v. Nobles, 422 U.S. 225 (1975); Couch v. United States, 409 U.S. 322 (1973). These cases generally stand for the proposition that an accused cannot contest the compulsion of testimony or material from a third person. If the act of compulsion were prohibited by the privilege, then the accused would be able to claim the fifth amendment privilege when evidence compelled from a third person was introduced against the accused at trial. Clearly, *Fisher, Nobles,* and *Couch* would not permit such a claim, nor does the language of the amendment itself. *Compare* Alderman v. United States, 394 U.S. 165 (1969) *with* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

47. 425 U.S. 308 (1976).

testify. The Court distinguished *Griffin v. California*,[48] which had held that neither prosecutor nor judge could urge the jury to draw such an inference from a criminal defendant's refusal to testify at his trial:[49]

> The State has not, contrary to *Griffin*, sought to make evidentiary use of his silence at the disciplinary hearing in any *criminal* proceeding. Neither has Rhode Island insisted or asked that Palmigiano waive his Fifth Amendment privilege. . . . This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege.[50]

The Court seems to reason that although the prison board's drawing an adverse inference may have amounted to compelling the inmate to testify, or penalizing his exercise of the privilege, it was not the sort of compulsion or penalty forbidden by the fifth amendment. Since only a civil proceeding was involved no compelled testimony *was being used* against the accused in a criminal prosecution.[51]

Even if the privilege is not interpreted to prohibit the act of compulsion, the due process clause, of course, limits the type of coercive conduct in which the government may engage; it may be to this clause that the Burger Court will turn to review certain types of coercive conduct that might once have been analyzed within the framework of the fifth amendment privilege.[52] Governmental compulsion must not offend the community's sense of decency and must comport with fundamental notions of fair-

48. 380 U.S. 609 (1965).

49. For a fuller discussion of *Griffin*, see text accompanying notes 82-85 *infra*.

50. 425 U.S. at 317 (emphasis added).

51. *See* Baxter v. Palmigiano, 425 U.S. 308, 326-27 (1976) (Brennan, J., concurring in part, dissenting in part), in which Justice Brennan argues that the *act* of compelling testimony, as well as *use* of that testimony in a criminal case, is forbidden by the fifth amendment privilege. Justice Brennan would allow testimony to be compelled by incarceration in immunity cases (although he would require transactional immunity) as long as the witness was informed of the existence of immunity at the time of the questioning. 425 U.S. at 335-36.

Informing the accused of his immunity in advance of his testimony, or demonstrating that he knew he would be immunized against use of his answers, would seem unimportant if the privilege were designed merely to protect the adversary system. The witness's subjective state of mind is relevant only to assessing the psychological pressure on the witness, or the degree of compulsion exerted. As long as the compulsion does not produce information that *is* used against the witness, the adversary system is protected and the privilege is not violated. Brennan's analysis therefore emphasizes other policies underlying the fifth amendment privilege.

52. *See* text accompanying notes 113-35 *infra*.

ness.[53] Thus, police torture of a defendant would not violate the fifth amendment privilege if the resulting confession were not used against him, but would violate the due process clauses of the fifth and fourteenth amendments. Compelling testimony by disbarment, job loss, or incarceration does not violate the privilege, if combined with adequate immunity, but could violate due process if the degree of compulsion were sufficiently high. The case law seems to indicate, however, that even imprisonment for refusal to answer questions after formal use immunity has been granted is not a due process violation,[54] perhaps on the theory that a witness could easily secure his release simply by answering the questions.

### B. Compulsion to Produce Documents and Private Papers

The Burger Court's analysis of the application of the privilege to documents and private writings not only reconfirms its literal interpretation of the privilege, but clearly indicates the extent to which that interpretation dilutes the privacy protection that the privilege could afford.[55] Certain documents, such as business records, letters, or a diary, may be testimonial or communicative and certainly can be as incriminating as the spoken word; thus, such documents should be protected by the privilege.[56] The Burger Court recently analyzed the scope of that

53. *See* Rochin v. California, 342 U.S. 165 (1952).

54. *See generally* Shillitani v. United States, 384 U.S. 364 (1966).

55. That one of the principles underlying the privilege is the protection of privacy has been enunciated in a number of Supreme Court decisions. In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), for example, the Court stated that the privilege reflects "our respect for the inviolability of the human personality and the right of each individual 'to a private enclave where he may lead a private life.'" *Id.* at 55 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (1956), *rev'd*, 353 U.S. 391 (1957)). *See also* Couch v. United States, 409 U.S. 322, 327 (1973); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Boyd v. United States, 116 U.S. 616, 630 (1886). Justice Brennan, concurring in Fisher v. United States, 425 U.S. 391, 414 (1976), noted that the Court's precedents stood for the proposition that protection of personal privacy was not merely a by-product, but a "factor controlling in part the determination of the scope of the privilege." *Id.* at 416.

56. The suggestion that private papers were shielded from forced disclosure was first made in Boyd v. United States, 116 U.S. 616 (1886): ". . . a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." *Id.* at 634-35. This pronouncement was reiterated or approved in a long line of cases, *see, e.g.*, Wilson v. United States, 221 U.S. 361, 377 (1911); United States v. White, 322 U.S. 694, 698-99 (1944);

protection in *Fisher v. United States*[57] and *Andresen v. Maryland.*[58]

In *Fisher*, the Internal Revenue Service issued subpoenas duces tecum to several lawyers, directing them to produce their clients' accountants' work papers, which were in the attorneys' possession. Each attorney refused to comply, and the government brought enforcement actions. The attorneys claimed that the privilege against self-incrimination gave them the right to refuse to turn over the documents. The Court held that if any compulsion existed, it was exerted on the lawyers, not the taxpayers. Since the privilege protects the *accused*,[59] the taxpayer's fifth amendment rights were not violated. The attorney-client privilege, however, would shield against disclosure of documents transferred to a lawyer for the purpose of obtaining legal advice if the client himself could have invoked the fifth amendment to refuse to produce them.[60]

In determining whether the taxpayer could have claimed the privilege, the Court recognized two forms of testimonial compulsion: compulsion to create the document and thus "testify" in writing, and compulsion to produce the subpoenaed document. After finding that the papers prepared by the accountant contained no testimonial declarations by the taxpayer, the Court noted that even if this were not the case, the documents were voluntarily written; production was the only thing compelled. The Court also acknowledged that the act of producing the papers had communicative aspects, and could be construed as "testimonial" on two grounds: production both implicitly authenticates the documents as those subpoenaed and admits the existence of the documents and the taxpayer's control or

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Couch v. United States, 409 U.S. 322, 330 (1973); Bellis v. United States, 417 U.S. 85, 87 (1974). For a general discussion of the protection of private papers, see Fisher v. United States, 425 U.S. 391, 414 (1976) (Brennan, J., concurring).

57. 425 U.S. 391 (1976). *See generally* 59 MINN. L. REV. 751 (1975).

58. 427 U.S. 463 (1976).

59. 425 U.S. at 397 (citing Couch v. United States, 409 U.S. 322, 328 (1973)).

60. 425 U.S. at 404. The Court notes that "[w]here the transfer is made for the purpose of obtaining legal advice, the purposes of the attorney-client privilege would be defeated unless the privilege is applicable." *Id.* The privilege was limited to situations where the client had fifth amendment protection, however, because in any other situation "even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney and their ability to obtain informed legal advice will remain unfettered." *Id.*

possession of them. The Court held, however, that since the accountants had prepared the documents, the taxpayers were not "competent" to authenticate them.[61] And since it is not illegal to possess accountants' work papers, the admission of existence and possession poses no threat of testimonial incrimination. The subpoena commanding production therefore did not compel the taxpayers to incriminate themselves, even though the contents of the documents were incriminating.

The Court's discussion of the circumstances in which compelled production is permissible reconfirms its basic view of the scope of the privilege. Although the witness may be forced to produce documentary evidence by a subpoena duces tecum, as long as no testimonial aspects of that act are used as evidence against him in a criminal prosecution (for example, as authentication), his privilege is preserved. But beyond its reconfirmation of this view in the context of documentary subpoenas, *Fisher* had other implications. Although the Court expressly disclaimed reaching the issue of the fifth amendment's application to private papers, since no such papers were involved in the case,[62] nevertheless, its emphasis on the fact that the documents were voluntarily written[63] clearly suggested that private papers enjoyed no special protected status. As previous Supreme Court cases have suggested,[64] however, the testimonial content of private writings

61. 425 U.S. at 413. Whether this statement is accurate from an evidentiary point of view is not as certain as the Court seems to believe. *See* C. McCormick, Evidence §§ 222, 224, 225, & 228 (2d ed. 1972).

62. 425 U.S. at 414.

63. *Id.* at 409-10.

64. *See* note 56 *supra*. Justice Marshall, concurring in *Fisher*, characterized the majority opinion as a "wholly new approach" to the analysis of documentary production. 425 U.S. at 430. He stated:

> The Fifth Amendment basis for resisting production of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, as we previously have suggested, but in the tacit verification inherent in the act of production itself that the document exists, is in the possession of the producer, and is the one sought by the subpoena.
>
> This technical and somewhat esoteric focus on the testimonial elements of production rather than on the content of the evidence the investigator seeks is . . . contrary to the history and traditions of the privilege against self-incrimination both in this country and in England, where the privilege originated.

*Id.* at 431.

Marshall, nevertheless, tried to reconcile the majority's approach with the need for continued protection of private papers, noting that under the majority's rationale, since production would verify the existence of private documents, and there was an "inverse relationship between the private nature of a document and the permissibility of assuming its

logically seems to entitle them to greater protection than that accorded ordinary objects, or writings that have been communicated to others. *Fisher* implied nonetheless that private papers would be shielded only from forced production, as the Court defined production, not from compelled disclosure.

This apparent narrowing of the privacy interests protected by the fifth amendment was later made explicit in *Andresen v. Maryland.*[65] A lawyer's private business records, notes, and communications were seized pursuant to the execution of a valid search warrant. The Court held that since the records were voluntarily written, they were not compelled; since the police seized them, there was no compelled production; and since they were authenticated at trial by a handwriting expert, the defendant was not compelled to authenticate them. The Court reasoned that while the fifth amendment prevents compelling a person to aid in furnishing incriminating evidence, it does not shield private information from disclosure;[66] the lawyer whose office was searched was not subjected to the cruel trilemma of self-accusation, perjury, or contempt.

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existence," the very act of admitting that the private papers existed would be testimonial and therefore subject to a claim of privilege. *Id.* at 433.

Even under the rationale of earlier cases, however, private papers would be subject to special protection only if they were kept strictly private; if written or spoken thoughts are freely and voluntarily conveyed to another, they lose their claim to protected status. Couch v. United States, 409 U.S. 322, 332 (1973). Nevertheless, third persons may not be forced to disclose certain communications protected by other evidentiary privileges—such as the attorney-client privilege invoked in *Fisher*, or the marital or doctor-patient privileges.

The free and voluntary disclosure rationale underlies the "misplaced trust" cases in which an accused confides in an informer or a government agent and reveals incriminatory information. He is not compelled to do so. In such situations, the Court has rejected assertions that a party has a constitutionally protected expectation that the person with whom he converses is not a government agent. *See, e.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966).

65. 427 U.S. 463 (1976).

66. In *Fisher*, which the Court relied upon in *Andresen*, the Court said that:

> Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described'" . . . ; the First Amendment . . . ; or evidentiary privileges such as the attorney-client privilege.

425 U.S. at 401 (footnotes and citations omitted).

The determining factor in the applicability of the privilege to documents has long been thought to be their content.[67] Private papers clearly contain "testimonial" evidence; unlike real evidence (the gun, mask, or contract) or identification evidence (fingerprints or voice recognition), private writings derive from the mind of the accused, and are a "mere physical extension of [his] thoughts and knowledge."[68] In *Fisher* and *Andresen*, the Burger Court appears to be disregarding the testimonial nature of private papers and drawing an artificial distinction between speech and writing: the privilege prohibits compelling a person to *speak* and incriminate himself but does not prohibit compelled revelation of *written* thoughts.

Perhaps the Court has taken too literally the maxim that the privilege protects the accused from being convicted on evidence forced "out of his own mouth,"[69] for the apparent distinction between speech and writing is highly suspect. Compelling a person to write out evidence to be used against him in his criminal prosecution, for instance, is obviously as unconstitutional as compelling him to deliver the evidence orally. But under the Burger Court's rationale, the person who "voluntarily" keeps an account of his criminal activities in a private diary or a sole proprietor who keeps a personal account of his illegal as well as his legal business transactions is not protected from disclosure of these written records. If the privilege was designed to safeguard against an inquisitorial system that forces an individual to reveal his private mental activity, then Justice Brennan's comments in his concurring opinion in *Fisher* ring true:

> Many of the matters within an individual's knowledge may as easily be retained within his head as set down on a scrap of paper. I perceive no principle which does not permit compelling one to disclose the contents of one's mind but does permit compelling the disclosure of the contents of that scrap of paper by compelling its production. Under a contrary view, the constitutional protection would turn on fortuity, and persons would, at their peril, record their thoughts and the events of their lives. The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions however invalidly imposed.[70]

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67. *See* notes 56 & 64 *supra*.
68. Andresen v. Maryland, 427 U.S. 463, 486 (1976) (Brennan, J. dissenting).
69. Malloy v. Hogan, 378 U.S. 1, 8 (1964).
70. 425 U.S. at 420.

It may be that the Court in *Andresen*, despite its reliance on the voluntary creation of the documents, was not drawing the artificial distinction between spoken and written self-incrimination attributed to it above, but rather was reasoning that a "lawful" search does not involve "compulsion" because the witness is not forced to "aid in the discovery, production, or authentication of [the] incriminating evidence."[71] It is true that an individual is not literally forced to perform the testimonial act of *producing* papers seized pursuant to a valid search warrant. But, as Brennan points out in his dissent,[72] a search warrant, like a subpoena, is merely a means of using the legal process to force a person to disclose self-incriminating knowledge. Compulsion is certainly present whether Andresen hands boxes of records to the authorities or stands by and watches while they are carted away in a lawful search. The Court's approach sanctions the "circumvention" of the fifth amendment, to use the phrase of Justice Brennan, who said: "[A] privilege protecting against the compelled production of testimonial material is a hollow guarantee where production of that material may be secured through the expedient of search and seizure."[73]

## III. APPLICATION OF THE PRIVILEGE

Although the Burger Court's strict reading of the fifth amendment appears to be based on an accurate assessment of the principal intent of its framers, it may not be simply a rejection of policy-based interpretations that previous Courts used to expand the scope of the privilege; it may be one aspect of a different policy-based interpretation that assigns greater weight to society's need for information about criminal activities. That this apparent shift in values is the cause, rather than the result, of the Court's historical interpretation, is evidenced by the Court's attempts to delineate permissible government conduct in situations within the scope of the privilege. The remainder of this Article will explore the Court's treatment of the privilege when asserted by a criminal defendant at trial, an accused under interrogation, and a witness before a grand jury.

71. 427 U.S. at 473-74. The Court stated: "Finally we do not believe that permitting the introduction into evidence of a person's business records seized during an *otherwise lawful search* would offend or undermine any of the policies underlying the privilege." *Id.* at 475-76 (emphasis added).

72. *Id.* at 485-89.

73. *Id.* at 486.

A. THE RIGHT OF A DEFENDANT

1. *The Right to Silence*

At the heart of the fifth amendment is the defendant's privilege not to take the stand in his criminal prosecution. The privilege against self-incrimination applies to *any* fact that can be used in a proceeding aimed at charging the person with a specific crime: thus the accused in a criminal case need not answer any questions, for "at least on the prosecution's assumption, [all answers] are incriminating."[74] A defendant cannot even be called to be sworn.[75] Thus, the literal language of the fifth amendment ensuring freedom from compulsion also grants a criminal defendant the right to remain silent at trial.

If the defendant does choose to testify at trial, he must answer all questions addressed to him by the prosecutor or the judge.[76] He may not selectively refuse to answer certain questions because the answers might be incriminating:

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74. 8 WIGMORE, *supra* note 17, § 2260.

75. *Id.* § 2268(2). *Cf.* White v. Echeles, 352 F.2d 892 (7th Cir. 1965) (co-defendant cannot call other co-defendant to the stand).

76. There may be an exception for questions about the defendant's criminal activities for which he has not been tried and which are unrelated to the charges at issue, asked solely for the purpose of impeaching his credibility. *See* FED. R. EVID. 608(b), which provides that giving testimony by an accused or other witness does not operate as a waiver of the privilege against self-incrimination when the witness is examined with respect to matters relating only to credibility. McCormick and Wigmore suggest that one standard by which to measure the extent of a waiver by a testifying witness is to assume that he waives the privilege completely as to *all* aspects of the offense with which he is charged. C. MCCORMICK, EVIDENCE § 131 (1954); 8 WIGMORE, *supra* note 17, § 2276. This view is not universally accepted, however

> If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

Tucker v. United States, 5 F.2d 818, 822 (8th Cir. 1925). *See also* sources cited in 3 WEINSTEIN'S EVIDENCE ¶ 611[03]-34 n.7 (1975). As Weinstein points out, cases such as *Tucker* merely assume that the scope of the privilege is co-extensive with the permissible scope of cross-examination, without inquiring whether the policy of the privilege is best served by compelling the defendant to respond to any question once he has voluntarily testified or by allowing him to remain silent after partial disclosure. 3 WEINSTEIN'S EVIDENCE ¶ 611[03]-36 (1975). Where wide-open cross-examination is permitted and the witness does not determine the area of disclosure, a more searching inquiry as to whether the accused may refuse to answer certain questions on the stand is needed.

> [A witness who testified voluntarily] cannot reasonably claim that the Fifth Amendment gives him not only this choice [to refuse to testify] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.[77]

A defendant who elects to testify is sometimes said to have waived the privilege.[78] The term "waiver" may accurately refer to a knowing and intelligent renunciation of a right,[79] but in this situation the defendant's relinquishment of the right is in a sense imposed on him. Failure to take the stand may lead the jury, unaided by suggestions from the prosecutor or the judge, to infer guilt, even if instructed not to do so.[80] Nevertheless, forcing a defendant to elect between testifying completely and not taking the stand at all is not forbidden compulsion, for no other procedure can satisfactorily protect all of the defendant's rights.[81]

2. *Penalizing the Exercise of the Right*

While the desire to respond to the government's evidence is inherent in any trial system, the state may introduce into that

77. Brown v. United States, 356 U.S. 148, 155-56 (1958). *See also* Caminetti v. United States, 242 U.S. 470 (1917); Fitzpatrick v. United States, 178 U.S. 304 (1900). In *Caminetti* the Court stated that the accused who chooses to take the stand "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." *Id.* at 494. The sanction for the testifying defendant who refuses to tell all could be adverse comment by the prosecutor and judge or a contempt citation.

78. *See, e.g.*, Harrison v. United States, 392 U.S. 219, 222 (1968) (dictum); Johnson v. United States, 318 U.S. 189 (1943); Raffel v. United States, 271 U.S. 494 (1926); 8 WIGMORE, *supra* note 17, § 2276.

79. *See* Garner v. United States, 424 U.S. 648, 654 n.9 (1976).

80. See Bruno v. United States, 308 U.S. 287, 294 (1939), where the Court discusses the notion that instructing the jury not to draw such an inference from the defendant's silence at his trial may actually have the opposite result of focusing the jurors' attention on the accused's silence and lead them to speculate on the possible explanations for it, including guilt. *Cf.* United States v. Grunewald, 233 F.2d 556, 571, 572-73 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).

81. The only other protective rule would be to prohibit the defendant in all cases from testifying at his own trial—a rule which prevailed in this country until less than a century ago. *See* Ferguson v. Georgia, 365 U.S. 570, 577 (1961). There were two reasons for the long life of the disqualification rule: the possible untrustworthiness of the defendant's testimony, *id.* at 573-75, and the threatened erosion of the privilege against self-incrimination if the defendant could testify. *Id.* at 578-79. The harshness of not allowing a defendant to testify in his own behalf,

system other factors that militate against remaining silent. It may attach adverse consequences to the defendant's exercise of the right or force him to choose between two constitutional rights. Such practices may violate the fifth amendment by compelling the defendant to take the stand or may be so unfair as to violate due process guarantees. Because these constitutional protections overlap, the Supreme Court has often failed to delineate the precise basis upon which it is deciding the constitutionality of certain state trial procedures that arguably infringe one or both rights. A comparison of the holdings of the Warren Court and the Burger Court in several cases involving such procedures indicates, however, that the latter is giving greater weight to the state's interests and, although the doctrinal basis of the decisions remains unclear, is less inclined to extend the protections that the fifth amendment privilege could afford.

In *Griffin v. California*[82] the Warren Court held that the judge or prosecutor could not comment on the accused's silence and invite the jury to draw adverse inferences from it. This practice was characterized as

> a penalty imposed . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. . . . What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.[83]

Stewart noted in dissent that compulsion seemed to be the focus of the majority's inquiry, but it was not entirely clear how the defendant was "compelled" to testify, since he did not speak.[84] Notwithstanding Stewart's dissent, perhaps the better explanation of *Griffin* is that it did not involve a finding of compulsion at all, but was based on a due process rationale.[85]

In *Simmons v. United States*,[86] the Warren Court considered a procedure in which the defendant, to establish his stand-

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however, spurred legislatures to enact laws granting the defendant the right to testify. *See generally* Ferguson v. Georgia, 365 U.S. 570, 598 (1961) (Frankfurter, J., concurring); *id.* at 601 (Clark, J., concurring). Justices Frankfurter and Clark felt that not allowing the accused the right to testify under oath in his own behalf would violate the due process clause. *Id.*

82. 380 U.S. 609 (1965).

83. *Id.* at 614 (citation omitted).

84. *Id.* at 620-23.

85. *See generally* McGautha v. California, 402 U.S. 183, 226 (1971) (Douglas, J., dissenting), *vacated on other grounds*, 408 U.S. 941 (1972); McCormick, *supra* note 61, § 131, at 277.

86. 390 U.S. 377 (1968).

ing to challenge the constitutionality of a police seizure, had to admit ownership of the property seized and thereby incriminate himself. That testimony was later introduced against him at trial. The Court reasoned that it "may be true" that "as an abstract matter" there was no violation of the fifth amendment: "A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit."[87] Nevertheless, when the benefit which the defendant might gain was another constitutional right, the necessity of choosing between those rights created an "undeniable tension." The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another,"[88] and held that the defendant's testimony at the motion to suppress could not be used against him at trial.[89] The Court's language rejecting the notion that the defendant was "compelled" suggests that *Simmons* was premised largely on considerations of fundamental fairness.

The same year that *Simmons* was decided, the Court analyzed the validity of the Federal Kidnapping Act,[90] using similar reasoning. The statute at issue in *United States v. Jackson*[91] gave only the jury the power to impose the death sentence. A defendant could plead not guilty and demand a jury trial at the risk of receiving the death penalty, or plead guilty and be sentenced by a judge to a term of imprisonment.[92] The appellees in *Jackson* had chosen a jury trial and received the death sentence. They argued that the statutory scheme was invalid because it made the death penalty the price of exercising their constitutional rights. The Court agreed, holding that the sentencing provisions penalized, discouraged and chilled the de-

87. *Id.* at 393-94 (footnote omitted).

88. *Id.* at 394.

89. *Id. See also* Jackson v. Denno, 378 U.S. 368, 389 & n.16 (1964); United States v. Carignan, 342 U.S. 36, 38 (1951).

Justice Black, who dissented from the Court's holding in *Simmons* that the defendant's testimony could not be used at trial, 390 U.S. at 395, would have held that requiring the defendant to make such an election, combined with the additional pressure of possibly losing a benefit, does not compel the defendant to testify in violation of the fifth amendment. Justice White also dissented, 390 U.S. at 399, "substantially for the reasons given by Mr. Justice Black. . . ."

90. 18 U.S.C. §§ 1201-1202 (1970).

91. 390 U.S. 570 (1968).

92. 18 U.S.C. § 1201(a) (1970).

fendants' exercise of their sixth amendment right to trial by jury and their fifth amendment right not to plead guilty.[93] The Court did not state expressly that a defendant would be "compelled" by the sentencing provisions to incriminate himself, and in fact noted that the flaw in the statute was not that it *coerced* guilty pleas but that it *needlessly encouraged* them.[94]

The Burger Court's consideration of certain state trial procedures similar to those considered by the Warren Court reveals an equally unclear analytical approach but seems to indicate a shift in the Court's view toward state imposed penalties. In *Brady v. United States*,[95] the Court confronted the same statute that was at issue in *Jackson*. The defendant, who pled guilty before *Jackson* invalidated the sentencing provisions, alleged that his plea was coerced by those provisions, thus violating his right not to plead guilty. In upholding the validity of the plea, the Court noted the lower court's finding that the plea was triggered not by the fear of death, but by a co-defendant's decision to testify against the accused.[96] Moreover, the Court characterized the less severe sentence as a "benefit" given a defendant who recognizes the strength of the government's case and conserves "scarce judicial and prosecutorial resources"[97] by pleading guilty; it declined to hold "that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty. . . ."[98]

*Crampton v. Ohio*,[99] like *Simmons*, involved a claim that the defendant could exercise one constitutional right only at the expense of losing another. In Ohio, the jury both determined guilt and set punishment. The defendant claimed he had a due

93. If the defendant had requested a bench trial and the prosecution agreed, the statute would have "chilled" only the right to trial by jury. *See* Singer v. United States, 380 U.S. 24 (1965).

94. 390 U.S. at 583.

95. 397 U.S. 742 (1970).

96. *Id.* at 749. This method of analysis comports with later decisions of the Court, analyzing the facts on a case-by-case basis to determine if compulsion actually occurred. *Cf.* text accompanying notes 175-78 *infra*.

97. 397 U.S. at 752.

98. *Id.* at 751. *See also* North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

99. 402 U.S. 183 (1971). *Crampton* is a companion case to McGautha v. California, 402 U.S. 183 (1971). The formal citation would be to *McGautha*, but for the sake of clarity, the case will be referred to as *Crampton* in text.

process right to be heard on the issue of punishment without being forced to testify on the issue of guilt. The unitary trial procedure and the requirement that the defendant who elects to testify must answer all questions precluded him from doing so. Thus, he argued, he would be compelled to testify against himself on the issue of guilt in order to exercise his right to testify on the issue of punishment. Justice Harlan, who also wrote the opinion in *Simmons*, called the reasoning of *Simmons* into question to the extent that it was based on the theory of a "tension" between constitutional rights.[100] He noted that the Constitution does not forbid requiring a defendant to choose between rights—"the threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[101] Turning to whether the unitary trial procedure infringed the fifth amendment privilege, Harlan concluded that no policies underlying the privilege were violated when the defendant yielded to the pressure to testify, for the pressure was no different from that inherent in the criminal trial process.[102] Considering whether a defendant who remains silent is deprived of any rights, Harlan assumed the existence of a due process right to address the issue of punishment but concluded that Ohio did not restrict that right. The defendant could freely present evidence on the issue, and his counsel could argue to the jury for mercy. The state was not required to permit the defendant to make a personal plea to the jury for mitigation of punishment.[103]

If the Burger Court is basing its analysis in these cases primarily on the concept of compulsion, that concept seems to have changed since the Warren Court decisions. The pressure placed on the defendant in *Jackson* and *Brady*—coercion to plead guilty by the desire to avoid the death penalty—and that in *Simmons* and *Crampton*—sacrificing one constitutional right for another—seem indistinguishable. The decisions can be explained only by assuming that the Burger Court requires a showing of a higher degree of coercion before proscribed compulsion will be found. But the recent case of *Brooks v. Tennessee*[104] suggests that com-

100. *Id.* at 212.
101. *Id.* at 213.
102. *Id.* at 214-17.
103. *Id.* at 217-20.
104. 406 U.S. 605 (1972). In the later case of Baxter v. Palmigiano, 425 U.S. 308 (1976), *see* text accompanying notes 47-51 *supra*, the penalty analysis was considered inapplicable. The Court held that a prison disciplinary board's evidentiary use of a prisoner's refusal to testify did not

pulsion may not be the Court's primary concern in these cases, for *Brooks* returned to the type of analysis used in *Griffin* and struck down a state trial procedure as a "penalty."

*Brooks* involved a state statute that required a defendant to testify immediately after the close of the government's case, before he presented any other evidence, or to forfeit the right altogether. The Court recognized that the state had a legitimate interest in preventing the defendant from adapting his testimony to that of his witnesses, but found that the state's procedure was "not a constitutionally permissible means of ensuring his honesty."[105] It held the statute unconstitutional because, as in *Griffin*, it imposed a penalty on the defendant's exercise of his "initial" right to remain silent by depriving him of his later right to testify in his defense.[106] Chief Justice Burger dissented, noting that the defendant did not testify at trial, and the statute therefore did not compel him to do so.[107] The only burden on the defendant's choice of whether or not to testify was the requirement that he choose at a particular time. Such a burden, Burger reasoned, imposed to accommodate a legitimate state interest, did not significantly increase the ordinary compulsion present in every criminal case.[108]

Perhaps the apparent doctrinal confusion in the cases from *Brady* to *Brooks* can be explained as a developing due process

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penalize his exercise of the privilege. It distinguished *Griffin* by noting that in that case a refusal to testify was used as evidence in a criminal trial, not in a civil proceeding. While pressure on the accused would exist in both cases, where the testimony is compelled in a civil proceeding, the privilege could still be protected by a motion to suppress in a future criminal trial. Thus, evidentiary use of a valid exercise of the privilege is a penalty only where such use occurs in a criminal proceeding. *See also* text accompanying notes 26-54 *supra.*

If this analysis of *Palmigiano* is correct, then, as there suggested, 425 U.S. at 334-35, if a grand jury witness is granted formal immunity but refuses to testify, using his refusal as evidence against him at his later criminal trial is not a penalty. Because he was granted immunity, he could not properly invoke the privilege. Allowing the claim of privilege by a grand jury witness who is *not* formally granted immunity to be used as evidence against him at his criminal prosecution seems to present a due process question; the fairness of such a procedure might depend on whether he was informed of the availability of informal use immunity. *Cf.* Doyle v. Ohio, 426 U.S. 610 (1976) (silence after Miranda warning). *See generally* Maness v. Meyers, 419 U.S. 449, 472, 475 (1975) (White, J., concurring); note 51 *supra.*

105. 406 U.S. at 611.
106. *Id.* at 611 n.6, 612.
107. *Id.* at 614.
108. *Id.* at 614-15.

concept of constitutional rights as property rights. The state may impose certain burdens or conditions on the defendant's exercise of his rights where the state has a legitimate reason for doing so. The defendant may therefore have to pay a price to remain silent, or may choose to forego the right because the price is too high. Where the state's goal is valid, and deterring exercise of the right is only an incident of the state's procedure rather than its primary purpose,[109] the defendant can be required to either pay or lose his right. The guiding principle of decision in these cases—the general due process considerations of fairness and decency—would apply whether or not the defendant actually testified. This analysis thus focuses not on delineating the degree of compulsion assumed to be inherent in certain trial proceedings, but on a balancing of state and individual interests. It may permit the Court to avoid the appearance of arbitrariness involved in finding that a certain set of circumstances does or does not result in compulsion violative of the privilege.

It is not yet clear, however, which analysis—property right or degree of compulsion—the Burger Court will adopt. In the end, which analysis the Court chooses, or whether it chooses at all, may not have great significance. If the Court reasons that the fifth amendment prohibits only a certain degree of compulsion, it is likely to find acceptable any particular price the state may impose to further its legitimate goals. And the acceptable degree of compulsion may in turn depend on the strength of the societal interest involved, and the apparent fairness of the criminal process at issue. It is clear, however, that either analysis could be used to expand the range of permissible government conduct with respect to individuals within the criminal justice system.

### B. Application of the Privilege to an Accused

#### 1. *Compulsion Exerted at Police Interrogations*

The Burger Court's treatment of the Miranda rule[110] is important both because it has specific implications for the ultimate fate of the rule itself, and because it sharply illuminates several of the familiar themes underlying the Court's approach

109. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 32 & n.20 (1973); Brooks v. Tennessee, 406 U.S. 605, 615 (1972) (Burger, C.J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); note 212 *infra*.

110. *See* notes 136-46 *infra* and accompanying text.

to the fifth amendment privilege. The Court's changing concept of compulsion, its tendency to rely on flexible due process standards to protect rights that are intertwined with the privilege, and its balancing of individual and societal interests, are all reflected in the cases dealing with the precedent set by *Miranda v. Arizona*.[111] In order to fully understand the Court's approach, it is necessary to review the background to the *Miranda* decision itself.

The fifth amendment provides not only the right to be free from compelled self-incrimination, but the right to due process of law. Few Supreme Court cases dealt with allegedly involuntary confessions prior to the twentieth century,[112] but in 1897 in *Bram v. United States*,[113] the Court implied that coerced confessions were to be analyzed under the self-incrimination clause:

> In criminal trials, in the courts of the United States, whereever [*sic*] a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."[114]

Despite this language, however, many viewed the privilege as inapplicable to police interrogations that resulted in confessions.[115] Since the privilege was not held to apply to the states until 1964 in *Malloy v. Hogan*,[116] and was viewed in federal cases as protection against legal compulsion, such as court orders requiring an accused to testify,[117] police practices were for

111. 384 U.S. 436 (1966).

112. *See, e.g.*, Wilson v. United States, 162 U.S. 613 (1896); Sparf v. United States, 156 U.S. 51 (1895); Hopt v. Utah, 110 U.S. 574 (1884).

113. 168 U.S. 532 (1897).

114. *Id.* at 542.

115. *See* McCORMICK, *supra* note 61, § 125 & sources cited at 266 n.62; 8 WIGMORE, *supra* note 17, § 2252, at 329 & n.27. *See generally* Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

116. 378 U.S. 1 (1964).

117. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547 (1892). Miranda v. Arizona, 384 U.S. 436 (1966), was the first case in which the Court held the privilege against compelled self-incrimination applicable to an accused in custody who was subjected to police interrogation. Between Bram v. United States, 168 U.S. 532 (1897), and *Miranda* there were some federal cases suggesting that the privilege applied to confession cases, *see* Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963); Wan v. United States, 266 U.S. 1 (1924); Hardy v. United States, 186 U.S. 224 (1902), but *Miranda* was the first clear holding on the issue.

Until Malloy v. Hogan, 378 U.S. 1 (1964), state coerced confession cases were treated under the fourteenth amendment due process clause. *Malloy* was said to perform "a shotgun wedding of the privilege to the confessions rule." *Herman, The Supreme Court and Restrictions on Police Interrogations*, 25 OHIO ST. L.J. 449, 465 (1964).

some time tested under due process standards in both state and federal cases.

*Brown v. Mississippi*[118] was the first case the Court decided that involved interrogation by state, rather than federal, police. Brown's conviction for homicide, based on a confession obtained through physical torture, was reversed; Brown had been deprived of the fair trial guaranteed by the fourteenth amendment due process clause because his conviction was grounded on untrustworthy evidence. In the next thirty years, there were over thirty decisions involving allegedly coerced confessions. It was during these years that the "voluntariness" doctrine matured. The Court was first concerned with confessions coerced by physical brutality,[119] but soon began to disapprove the use of psychological coercion as well.[120] Various police interrogation techniques were scrutinized to determine whether they deprived the accused of his "free choice to admit, to deny, or to refuse to answer."[121] That the trustworthiness or reliability of a confession was not the Court's major concern is illustrated by cases such as *Spano v. New York*.[122] In *Spano*, the police had used sophisticated interrogation techniques to induce a confession, including having a policeman who was a childhood friend of the accused play on his trust and arouse his sympathy by falsely saying his job was in jeopardy. In reversing Spano's conviction, the Court noted that society's aversion to involuntary confessions turns on a "deep-rooted feeling that the police must obey the law," lest life and liberty be endangered by the police methods themselves.[123]

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118. 297 U.S. 278 (1936).

119. *See, e.g.*, White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

120. *See, e.g.*, Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Chambers v. Florida, 309 U.S. 227 (1940).

121. Lisenba v. California, 314 U.S. 219, 241 (1941).

122. 360 U.S. 315 (1959).

123. 360 U.S. at 320-21. For other examples of court condemnation of police trickery, see Escobedo v. Illinois, 378 U.S. 478 (1964) (defendant falsely told that a co-defendant had confessed to robbery and said that defendant was the one who shot the victim); Lynumn v. Illinois, 372 U.S. 528 (1963) (police falsely told defendant that she would lose public assistance and custody of her children unless she cooperated, in which case they would recommend leniency); Rogers v. Richmond, 365 U.S. 534 (1961) (police chief falsely told defendant that he was going to take defendant's wife into custody).

The present Court seems to have a greater tolerance for trickery, judging from Oregon v. Mathiason, 97 S. Ct. 711 (1977) (police falsely told defendant that his fingerprints were found at the scene of the burglary), Michigan v. Mosley, 423 U.S. 96 (1975) (police falsely told

The confession cases thus involved two different notions of due process: it offends due process to secure a conviction on the basis of untrustworthy evidence, and more importantly, police conduct that offends "the community's sense of fair play and decency"[124] violates the due process guarantee.[125] The latter notion of due process is the basis of most of the involuntary confession cases, but it is a difficult standard to apply. In *Rochin v. California*,[126] for example, the police saw the accused swallow something immediately prior to his arrest. He was taken to a hospital where his stomach was forcefully "pumped" for evidence of possession of narcotics. Justice Douglas, who thought the case should have been decided by applying the privilege against self-incrimination, stated aptly in his concurring opinion the difficulty of finding a due process violation:

> The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised. . . . Yet the Court now says that the rule which the majority of the states have fashioned violates the "decencies of civilized conduct." To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration.[127]

In many of the coerced confession cases, the finding that "community standards of fair play and decency" were offended by police conduct can be readily disputed. The hanging and beating in *Brown v. Mississippi*[128] surely constitutes such an affront, but does it really offend civilized standards of decency to

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defendant that a co-defendant had confessed to participation in a homicide but had named defendant as the one who had actually shot the victim), and Frazier v. Cupp, 394 U.S. 731 (1969) (police falsely told defendant that they had arrested defendant's alibi witness who had confessed to participation in the crime), in which the Court upheld the convictions without criticizing the police trickery involved.

124. Rochin v. California, 342 U.S. 165, 173 (1952).

125. Estelle v. Williams, 425 U.S. 501 (1976) is a good example of a recent case in which the Court confused the notions of due process and compulsion. The defendant alleged that he was denied his due process right to a fair trial because he was tried in prison garb, which denigrated the presumption of his innocence. The Court, saying that wearing that garb was not inherently prejudicial, held that the defendant would have been denied due process only had the state "compelled" him to wear the clothing. Since the defendant failed to object to the situation at trial, the Court found no governmental compulsion but rather a waiver by the defendant, even though he may have been unaware of any right to be tried in civilian clothes. *See also id.* at 515 (Brennan, J., dissenting).

126. 342 U.S. 165 (1952).

127. 342 U.S. at 177-78.

128. 297 U.S. 278 (1936). *See* text accompanying note 118 *supra.*

refuse to allow an accused to call his wife until he has signed a confession?[129] Does it offend the community's sense of fair play when, instead of supplying a doctor to treat the suspect's sinus attack, the state sends in a psychiatrist whose skilled and subtle questioning leads to a confession?[130] Perhaps in answering these questions affirmatively, the Court was accurately assessing the community's sense of justice, but it is more likely that the Court was grafting onto due process the concept of compulsion underlying the privilege against self-incrimination.[131] The language of many of the cases supports this assumption.[132] In *Rogers v. Richmond*,[133] for example, the Court said that when a defendant has been "subjected to pressures to which, under our accusatorial system, an accused should not be subjected," the due process clause has been violated. Moreover, in the voluntariness cases, the Court was concerned not only with police conduct, but with the subjective state of mind of the accused.[134] The latter is much more important in determining whether the accused was actually "compelled" to incriminate himself by police action than in determining whether police conduct offends civilized standards of decency. When the Court in *Malloy* held that the self-incrimination privilege applied to the states, it seemed to admit that its more recent coerced confession cases[135] were primarily concerned not with due process but with the privilege itself.

The first case to hold that the privilege against compelled self-incrimination applied to police interrogation techniques was *Miranda v. Arizona*.[136] In each of the four companion cases in-

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129. *See* Haynes v. Washington, 373 U.S. 503 (1963).

130. *See* Leyra v. Denno, 347 U.S. 556 (1954).

131. The privilege was held applicable to the states in 1964 in Malloy v. Hogan, 378 U.S. 1 (1964).

132. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320-21 (1959); Lisenba v. California, 314 U.S. 219, 241 (1941).

133. 365 U.S. 534, 541 (1961).

134. *See* National Legal Aid and Defender Association Newsletter, Sept. 1965, for a breakdown of the factors affecting voluntariness in 27 confession cases decided prior to *Miranda*.

135. *See* Malloy v. Hogan, 378 U.S. 1, 6-7 (1964), where, after noting the distinction between the due process rationale of Brown v. Mississippi, 297 U.S. 278 (1936), and the compulsion rationale of the federal cases beginning with Bram v. United States, 168 U.S. 532 (1897), the Court discussed the abandonment of the distinction and the marked shift to the federal standard in state cases beginning with Lisenba v. California, 314 U.S. 219 (1941). *Compare* Justice Harlan's dissenting opinion, Malloy v. Hogan, 378 U.S. 1, 14, 15 n.1 & 17-20 (1964) *with* the Court's position in Malloy v. Hogan, *supra*.

136. 384 U.S. 436 (1966). One week after the *Malloy* decision, the

volved in *Miranda*, the defendant had been arrested, taken to the police station, and interrogated for various lengths of time—only two hours in Miranda's case. In each case the police secured confessions that were used at trial to obtain a conviction. And in each case the Court held that the confession was compelled from the accused in violation of the privilege. After discussing police interrogation techniques and police manuals explaining the use of psychological legerdemain to secure a confession,[137] the Court, recognizing that the confessions might not have been involuntary in traditional terms,[138] stated the premise on which the opinion is based:

> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officials during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.[139]

Having found that compulsion was inherent in custodial interrogation, the Court proceeded "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[140] To offset the inherent compulsion, the Court devised procedural safeguards: police must, prior to any questioning, advise an accused of his rights[141] and secure an express waiver of those rights. Admitting that the Constitution did not require adherence to any particular solution to the problem, the Court nevertheless stated that the specific warnings and waiver procedure must be observed at least until "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it"[142] could be shown. The Court considered the safeguards

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Court, in Escobedo v. Illinois, 378 U.S. 478 (1964), dealt with a police interrogation case in which the application of the privilege was again mentioned. The court, however, limited the decision to the specific facts of that case, the most important of which was that the suspect had asked for and been denied an opportunity to consult with his lawyer.

137. *See generally* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967).

138. 384 U.S. at 457.

139. *Id.* at 461.

140. *Id.* at 441-42.

141. The now familiar warnings were summarized by the Court as follows: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

142. 384 U.S. at 467. The Court encouraged Congress and the states

fundamental to the privilege;[143] the compulsion to speak resulting from the coercive stationhouse environment and the nature of the questioning[144] would be dispelled by the warnings to the accused, who might otherwise think, out of ignorance or fear, that he had to answer the questions.

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to develop their own procedural safeguards. *See* 384 U.S. at 467, 490. Interestingly, Congress enacted legislation in the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501 (1968), which, rather than establishing alternative procedural safeguards to insure the protection of the privilege against self-incrimination, was an apparent attempt to overrule *Miranda* and reinstate the voluntariness standard.

143. 384 U.S. at 476.

144. The Court did not limit the necessity for *Miranda* warnings to the stationhouse but required police to advise the accused of his rights prior to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 (footnote omitted). The accompanying footnote stated that "this is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." 384 U.S. at 444 n.4.

This language was broadened in Mathis v. United States, 391 U.S. 1 (1968), and Orozco v. Texas, 394 U.S. 324 (1969). In *Mathis*, a penitentiary inmate made incriminating statements to an Internal Revenue Service agent who was conducting a routine tax investigation. The Court held these statements inadmissible for failure to give *Miranda* warnings even though the accused was in jail for an offense entirely separate from that under investigation. In *Orozco*, four police officers entered the suspect's room at a boarding house at 4 a.m., woke him up, and began questioning him without giving *Miranda* warnings. It was held that the accused was deprived of his freedom of action in a significant way and thus his statements had to be excluded from evidence.

Some commentators felt that the Court's next step would be to extend *Miranda* to situations where the citizen was interviewed in his house by a revenue agent, since the nature of the questioning seemed to be more important than the place of the questioning in determining the existence of psychological coercion. *See, e.g.*, Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 675-76 & n.25 (1968). The Burger Court has declined to so extend *Miranda*, however, and has adopted a strict construction of "custodial interrogation." *See* Beckwith v. United States, 425 U.S. 341 (1976).

In another cutback of *Miranda*, the Burger Court summarily reversed an Oregon supreme court decision that had held that interrogation at police headquarters, behind closed doors, of a burglary suspect who was told he was under suspicion for the crime but was not arrested, was a custodial interrogation within the meaning of *Miranda*. The defendant's confession was held inadmissible because *Miranda* warnings were not given. The Supreme Court's summary reversal indicates that "custodial interrogation" will be defined very narrowly indeed, apparently requiring actual arrest before *Miranda* warnings are necessary, and thus permitting police, by the use of delaying tactics, to induce a confession before arrest. *See* Oregon v. Mathiason, 275 Ore. 1, 549 P.2d 673 (1976), *rev'd*, 97 S. Ct. 711 (1977). *Compare* Michigan v. Mosley, 423 U.S. 96 (1975) *with* Mathis v. United States, 391 U.S. 1 (1968).

If the police failed to give warnings and obtain a waiver, *Miranda* disallowed the prosecution's use of any statements of the accused, whether inculpatory or exculpatory, either in its case-in-chief or on cross-examination:

> In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.[145]

*Miranda* thus assured the accused of informal use immunity, a familiar remedy for violations of the privilege.[146]

Broad informal use immunity as a remedy for a violation of *Miranda*, however, was short-lived. The Burger Court, in *Harris v. New York*,[147] held that, despite police failure to give full *Miranda* warnings, the prosecution could use the defendant's statements to impeach his testimony at trial. The Court asserted that this was necessary to prevent uncontradicted introduction of perjured testimony: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense free from the risk of confrontation with prior inconsistent utterances."[148] This reasoning seems to assume the reliability or trustworthiness of the earlier statement; indeed, the Court pointed out that in the case at bar there was no claim that the statements were coerced or involuntary. In short, the use of statements obtained in violation of *Miranda* was not barred for all purposes "provided of course that the trustworthiness of the evidence satisfies legal standards."[149]

Three explanations for the *Harris* Court's reasoning seem possible. First, established rules of evidence allow impeachment of a witness by prior inconsistent statements when he is afforded an opportunity to explain or deny such statements.[150] The theory underlying this rule is that a witness could not be telling the truth on both occasions and such cross-examination gives the jury a better chance to assess his credibility. While the

145. 384 U.S. at 477.
146. *See* note 37 *supra* and accompanying text.
147. 401 U.S. 222 (1971).
148. *Id.* at 226.
149. *Id.* at 224. The Court acknowledged that certain statements in *Miranda* could be construed as barring the use of uncounseled statements for any purpose, but dismissed the language as unnecessary dictum. *Id.*
150. *See, e.g.*, FED. R. EVID. 613; MCCORMICK, *supra* note 61, §§ 34-38.

Court's deference to this rule of evidence would be understandable, such a rule cannot supersede the fifth amendment's unqualified mandate.

Second, the Court may have engaged in a balancing process to determine just what the fifth amendment protects against. In recent cases the language of the Burger Court suggests that the scope of the privilege may be determined by applying a test similar to that used in search and seizure cases, in which society's interests in acquiring information and apprehending criminals are weighed against the individual's interest in privacy.[151] For instance, in *Kastigar v. United States*,[152] the Court stated that immunity is required if there is to be a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." In *Lefkowitz v. Turley*[153] the Court indicated that the economic penalty cases[154] rested on a "reconciliation of the well-recognized policies behind the privilege . . . and the need of the State, as well as the Federal Government, to obtain information 'to assure the effective functioning of government.' "[155] Finally, in *Baxter v. Palmigiano* the Court declined to extend the *Griffin* no-comment rule[156] to a prison disciplinary proceeding where the accused refused to testify, partly because "disciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime."[157]

Unlike the fifth amendment however, the fourth amendment prohibition is qualified: only "unreasonable" searches and seizures are proscribed. In *Miranda*, the Warren Court rejected the argument that society's need for interrogation outweighs the privilege; it indicated that the right to be free from compulsion could not be abridged.[158] Nevertheless, while it is true that "the Fifth Amendment does not distinguish among type or degrees

151. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 81 (1973); Kastigar v. United States, 406 U.S. 441, 446 (1972). See generally Carroll v. United States, 267 U.S. 132, 149 (1925), and Boyd v. United States, 116 U.S. 616 (1886), for a discussion of this balancing test in the search and seizure context.

152. 406 U.S. 441, 446 (1972).

153. 414 U.S. 70 (1973).

154. *See* notes 37-44 *supra* and accompanying text.

155. 414 U.S. at 81 (quoting from Murphy v. Waterfront Comm'n, 378 U.S. 55, 93 (1964)).

156. *See* text accompanying notes 82-83 *supra*.

157. 425 U.S. 308, 319 (1976). *See also* text accompanying notes 47-51 *supra*.

158. *See* Miranda v. Arizona, 384 U.S. 436, 479-80 (1966).

of compulsion,"[159] whether it prohibits "'inducement of any sort'" as suggested by Justice Brennan[160] and *Bram v. United States*,[161] is not clear. The Burger Court may thus be using the concept of "compulsion" to insert a balancing test into fifth amendment adjudication: the degree of compulsion exerted on an individual is weighed against society's need for the information. *Harris*, in distinguishing a violation of *Miranda* from a coerced or involuntary confession, may have used such a balancing process. The logical extension of that approach, however, is drastic; it would seem to permit the Court to find that even though the privilege was infringed, the need for the statements obtained excused the constitutional violation.

Third, and most probable, the Burger Court may simply have reasoned that violating *Miranda* does not necessarily violate the privilege. The state could not use pre-trial statements obtained in violation of the fifth amendment against a defendant at trial, whether in the case-in-chief or on cross-examination,[162] but could use statements elicited in violation of *Miranda*. That the Court was implicitly making this distinction in *Harris* is evidenced by its reference to the absence of a claim that the statements were coerced or involuntary.[163]

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159. Baxter v. Palmigiano, 425 U.S. 308, 333 (1976) (Brennan, J., dissenting).

160. *Id.* (quoting from Bram v. United States, 168 U.S. 532, 548 (1897)).

161. 168 U.S. 532, 548 (1897).

162. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966). See also Garner v. United States, 424 U.S. 648 (1976), where the Court, in deciding whether earlier statements of the defendant used by the prosecution to impeach his trial testimony were obtained in violation of the privilege, apparently assumed that if the privilege were violated, impeachment use was forbidden.

163. If this is not the meaning of *Harris*, then it would seem that Kastigar v. United States, 406 U.S. 441 (1972), is in for some pruning. Under that decision, a grand jury witness given use immunity can be compelled to testify about his criminal activities because the testimony cannot be used against him in a criminal prosecution in *any* way, either directly or indirectly. If *Harris* means that statements compelled from an accused in violation of the privilege can be used in a derivative fashion to impeach a defendant at his trial, it would seem to follow that statements compelled from an immunized witness by the threat of incarceration for refusal to answer could be used to impeach that witness at his criminal trial. The only distinction seems to be that there is informal use immunity in one case and formal use immunity in the other, a distinction without import. The "use and derivative use" immunity of *Kastigar* would have to be changed to "direct use" immunity.

It is noteworthy that several state courts in interpreting their own state constitutional privilege against self-incrimination have refused to

In *Michigan v. Tucker*[164] the Court explicitly distinguished between a violation of *Miranda* and a violation of the privilege. Prior to interrogation the police had given the defendant, arrested for rape, three of his four *Miranda* warnings, but failed to inform him of the right to have counsel appointed if he was unable to afford a lawyer. The defendant indicated that he understood his rights and did not want an attorney. In reply to police questioning, he stated that he was with a friend at the time of the rape. When the police contacted the friend, he provided, rather than an alibi, information implicating the defendant in the crime, and the friend's testimony was introduced at trial. Tucker argued that this was a forbidden derivative use of his own compelled statement to the police.

The Court disagreed, finding that the *Miranda* procedural safeguards had been disregarded, albeit inadvertently, but that the privilege against compelled self-incrimination had not been infringed. In distinguishing a violation of *Miranda* from a violation of the privilege, the Court said that the latter must involve an element of *coercion*.[165] The Court gave examples of coerced confession cases involving "severe pressures" that were not comparable to any pressures involved in Tucker's case[166] and spoke of involuntary statements as if they were the equivalent of statements obtained by police compulsion.[167]

In both *Harris* and *Tucker*, the Court seems to be reasoning that a statement must be involuntary before its use will contravene the fifth amendment guarantee. This appears to be an outright rejection of *Miranda*'s finding that the compulsion inherent in custodial interrogation violates the privilege. The *Miranda* safeguards were necessary in order to dispel the inherent compulsion; in *Harris* and *Tucker*, the Court found no compulsion even though *Miranda* safeguards were disregarded. The existence of

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follow the *Harris* result. *See* cases cited in Baxter v. Palmigiano, 425 U.S. 308, 339 n.10 (Brennan, J., concurring in part, dissenting in part).

164. 417 U.S. 433 (1974).

165. *Id.* at 448.

166. *Id.*

167. *Id.* at 445, 448-49. The Court used a similar analysis the following year in Oregon v. Hass, 420 U.S. 714, 722-23 (1975), which upheld impeachment use of statements obtained in violation of *Miranda:* "There is no evidence or suggestion that Hass' statements . . . were involuntary or coerced. He properly sensed, to be sure, that he was in "trouble"; but the pressure on him was no greater than that on any person in like custody or under inquiry by any investigating officer." *See also* Michigan v. Mosley, 423 U.S. 96, 104 (1975).

coercion apparently depends on the existence of factors in addition to custodial questioning itself.[168]

If the fact of custodial interrogation and its accompanying psychological pressures does not alone violate the privilege and additional coercion must be shown, then the procedural safeguards required by *Miranda* are not "fundamental with respect

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168. *See* Oregon v. Mathiason, 275 Ore. 1, 549 P.2d 673 (1976), *rev'd*, 97 S. Ct. 711 (1977); note 144 *supra*. The treatment of the concept of deterrence in *Harris* and *Tucker* also illustrates the Burger Court's distinction between *Miranda* and the privilege against compelled self-incrimination. Exclusion of evidence obtained as a result of an unconstitutional police detention is regarded as an appropriate remedy to deter future violations. In *Harris* the Court rejected the argument that impeachment use of statements obtained in violation of *Miranda* would encourage impermissible police conduct; it reasoned that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case-in-chief." 401 U.S. at 225. Similarly, the Court in *Tucker* reasoned that derivative use of information obtained as a result of a good faith violation of *Miranda* was permissible; prohibiting such use would do little to deter improper police conduct. 417 U.S. at 446-48. Since the interrogation at issue in *Tucker* had taken place before the *Miranda* decision, the deterrence rationale lacked force: the police had acted in complete good faith. The Court also refused to apply the "fruits of the poisonous tree" doctrine of Wong Sun v. United States, 371 U.S. 471 (1963), to exclude the evidence because no abridgement of the defendant's constitutional privilege had occurred. 417 U.S. at 445-66. Had the fifth amendment been violated, the principle underlying *Kastigar* would seem to forbid derivative use of the statement. *See* Kastigar v. United States, 406 U.S. 441, 445 (1972); Hoffman v. United States, 341 U.S. 479, 486 (1951); text accompanying notes 30-33 *supra*.

The reasoning of these cases is similar to that used in United States v. Calandra, 414 U.S. 338 (1974), where the Court found that although evidence obtained in violation of the fourth amendment could not be used at trial, it could be used at a grand jury hearing; applying the exclusionary rule to such proceedings would have no significant "incremental deterrent effect." *Id.* at 351. While this reasoning may be appropriate when applied to fourth amendment privacy interests or to due process violations, it cannot logically be applied to the fifth amendment privilege against self-incrimination. *See* United States v. Janis, 96 S. Ct. 3021, 3027 (1976), which distinguishes the fourth amendment exclusionary rule remedy from the "direct command" of exclusion in the fifth amendment. The exclusionary rule is only a partial remedy for violation of the search and seizure rules. When the police fail to satisfy the reasonableness requirement the fourth amendment is violated; suppression of the fruits of the search does not prevent or undo the illegality. When the police compel the accused to make incriminating statements, however, his privilege against self-incrimination is not yet infringed; it is only when these statements are used against him at trial that a violation occurs. *See* text accompanying note 28 *supra*. Thus, prohibiting use of the compelled statements *prevents* a violation of the privilege. If, in violating *Miranda*, the police do not necessarily violate the privilege, then the Court's discussion of deterrence makes sense only if the Court is honoring or creating an exclusionary rule for violation of the *Miranda* safeguards alone.

to the Fifth Amendment privilege."[169] Rather than being co-extensive with the scope of the privilege, the safeguards amount to no more than a protective device or "prophylactic standard" to guard against possible *future* compulsion.[170] The Court has created similar protective devices for use in lower federal courts[171] on the basis of its supervisory power to promulgate such rules in the absence of a contrary statute. But in state cases the Court has no supervisory power.[172] Unless the Constitution furnishes some basis for the *Miranda* rules, the Court cannot impose them on the states.[173] *Harris* and *Tucker* may therefore be seen as cautious steps in the direction of overruling the 10-year-old *Miranda* decision.[174]

Whatever may be the ultimate implications of *Harris* and *Tucker*, they at least demonstrate the Burger Court's rejection of the inherent coercion notion and a willingness to undertake a

169. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

170. Michigan v. Tucker, 417 U.S. 443, 446 (1974).

171. *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1942). *McNabb* and *Mallory* require exclusion in federal courts of any statement obtained by the police from an arrestee during a period of "unnecessary delay" between his arrest and presentment before a magistrate.

172. *See* Michigan v. Tucker, 417 U.S. 433, 462-63 (1974) (Douglas, J., dissenting). *See generally* Griffin v. United States, 336 U.S. 704, 717-18 (1949).

173. Referring once again to the discussion of deterrence in *Tucker*, *see* note 168 *supra*, if there is, as the Court finds, no violation of the Constitution, then the only possible unlawful police action to be deterred is a violation of the prophylactic safeguards of *Miranda*. But if the safeguards are not required by the Constitution and are not the result of a proper exercise of the Court's supervisory power, then the police are being deterred from doing something the Court has no power to prevent them from doing in the first place.

174. *See, e.g.*, Kent, *Harris v. New York—The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357 (1971); Pelander, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188 (1975).

Last term, the Court had an opportunity in Beckwith v. United States, 425 U.S. 341 (1976), to overrule *Miranda*. In *Beckwith* two Internal Revenue Service agents had gone to a private home where Beckwith occasionally stayed and questioned him for three hours regarding the possibility of criminal tax fraud. The issue presented was whether certain statements Beckwith made during the interview should be suppressed since the full *Miranda* warnings were not given. Rather than overruling *Miranda* or clarifying *Harris* and *Tucker*, the Court held that this questioning was not custodial and therefore the warnings were not required. The Court recognized that coercion could be present in noncustodial interrogation but found none in this case. This term the Court once again had the opportunity to overturn *Miranda* in *Brewer v. Williams*, 45 U.S.L.W. 4287 (1977), but, in a 5-4 decision, avoided the issue by deciding the case on other grounds.

case-by-case determination of the presence of coercion,[175] a process similar to the pre-*Miranda* voluntariness cases.[176] Whether or not the accused was given his *Miranda* warnings would be only one factor to be considered in judging whether the police had exerted compulsion sufficient to trigger constitutional protection.[177] Even if the accused were completely ignorant of his rights, it would seem that he could still voluntarily, that is, without compulsion or coercion, confess.[178]

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175. *See generally* United States v. Jackson, 390 U.S. 570, 591 (1968) (White, J., dissenting).

176. *See* text accompanying notes 113-30 *supra.*

177. *See generally* Beckwith v. United States, 425 U.S. 341, 347-48 (1976); Davis v. North Carolina, 384 U.S. 737 (1966).

178. This was recognized in *Miranda* itself with regard to the person not yet in custody or deprived of his freedom of action in a significant way, but subjected to police questioning as a part of the investigation of a crime. 384 U.S. at 477. The Court also stated that volunteered statements and confessions remain "a proper element in law enforcement." *Id.* at 478.

The Burger Court took an analogous approach a year before the *Tucker* decision in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The issue was whether the prosecution must demonstrate that a person who consented to an otherwise illegal search of his person or property was aware that he had a right to refuse consent. The easiest if not the only way to demonstrate clearly the existence of such knowledge would be to advise the suspect of his right to refuse and secure his express waiver. The Court has long been concerned that the suspect's "consent" to search might be nothing more than his submission to a claim of lawful authority. *See, e.g.,* Bumper v. North Carolina, 391 U.S. 543 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921). In other words, the consent might have been either physically or psychologically coerced, thus rendering the search not truly a product of "voluntary" consent. *Schneckloth* held that a showing of a knowing and intelligent waiver by the suspect was unnecessary, because the underlying policies of the fourth amendment were satisfied as long as the suspect's consent was "voluntary" according to the definition developed in the confession cases. The fourth amendment is concerned with police intrusion into privacy; balancing society's interests against the interest of individual privacy, such an intrusion is acceptable when there is a valid search warrant and in certain other circumstances, including warrantless consent searches. *See* note 151 *supra* and accompanying text. While a man's home is his castle, he can surely allow others to enter it; as long as he consents freely, even if he was unaware of his right to refuse entry to the police, a warrantless search is valid. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973). His lack of knowledge will only be one factor in making the voluntariness determination. Consent search cases must therefore be reviewed on a case-by-case basis, examining all of the circumstances—a review similar to the "totality of the circumstances" test for voluntary confessions. *See, e.g.,* Fikes v. Alabama, 352 U.S. 191, 199 (1957).

Once the notion of inherent coercion is rejected, the same analysis is applicable to stationhouse interrogations, for, as Justice Marshall stated in his dissent in *Schneckloth:*

[T]he information [conveyed by the *Miranda* warnings] is

2. *Penalizing the Exercise of the Right by the Evidentiary Use of Silence in Custody*

One facet of *Miranda* not yet restricted by the Burger Court is the use at trial of the defendant's refusal to answer questions at the police station. In *Miranda*, the Warren Court stated:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf.* Griffin v. California, 380 U.S. 609 (1965); . . .[179]

Although use at trial of the arrestee's silence to urge the jury to draw an inference of guilt is precluded by *Griffin*, the Burger Court was faced with the argument that stationhouse silence can be used to attack a testifying defendant's credibility in *Doyle v. Ohio*[180] and *United States v. Hale*.[181] The argument rests both on the general principle of *Harris* that a defendant should not be able to testify free from the traditional truth-testing devices available on cross-examination, and on the reasoning of an older case, *Raffel v. United States*[182] that the defendant who elects to testify waives the privilege.

In *Raffel*, a government agent testified to an incriminating statement made by the defendant, who did not take the stand to deny the attribution. The trial ended in a hung jury. When the agent repeated his testimony at the retrial, the defendant took the stand and denied having made the statement. The government impeached his testimony by noting that he had remained silent at the first trial. The Court, in allowing the impeachment, relied on the established rule that a defendant completely waives his immunity by offering himself as a witness. The Court observed that the rule it was adopting would not deter defendants from remaining silent at their first trial, because the possibility of a second trial would then seem remote,

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> intended only to protect the suspect against acceding to the other coercive aspects of police interrogation. While we would not ordinarily think that a suspect could waive his right to be free of coercion, for example, we do permit suspects to waive the rights they are informed of by police warnings, on the belief that such information in itself sufficiently decreases the chance that a statement would be elicited by compulsion.

412 U.S. at 281.

179. 384 U.S. at 468 n.37.
180. 426 U.S. 610 (1976).
181. 422 U.S. 171 (1975).
182. 271 U.S. 494 (1926).

and they would feel far greater pressure to testify at the first trial from the possibility that the jury would infer guilt from their silence.[183]

The government's efforts to extend *Harris* and *Raffel* to permit impeachment use of stationhouse silence were unsuccessful; the Court did not reach the issue in either *Hale* or *Doyle*. In *Hale*, the police had given the arrestee *Miranda* warnings and he remained silent. The Court, resting its decision on its supervisory power over lower federal courts, held that the impeachment use of the accused's pretrial silence was improper because the prejudicial impact of the evidence outweighed its probative value. In *Doyle* the police told the defendant that he had the right to remain silent and that anything he said might be used against him. Since this necessarily implied that his silence would not be used against him, subsequent use of that silence as impeaching evidence was unfair and a denial of due process. The majority cited *Harris* approvingly[184] but did not mention *Raffel*.

Although the Court has thus been able to avoid ruling on impeachment use of stationhouse silence, it may be forced to decide the issue if *Miranda* is ultimately overruled. If *Miranda* warnings are not required,[185] a case may arise in which the warnings were not given and the prosecution, relying on *Raffel*, uses the accused's stationhouse silence to impeach his testimony. As Justice Stevens noted in *Doyle*:

> [U]nless and until this Court overrules *Raffel v. United States* . . . I think a state court is free to regard the defendant's decision to take the stand as a waiver of his objection to the use of his failure to testify at an earlier proceeding or his failure to offer his version of the events prior to trial.[186]

What the Court will decide when it faces this issue is uncertain. *Hale* and *Doyle* might indicate an unwillingness to reject the *Raffel* rationale. But there are a number of arguments, based partly on the Burger Court's own decisions, against extending *Raffel* even if *Miranda* is overturned.

First, unlike the defendant in *Raffel*, a person who has just been arrested will be fully conscious of the strong possibility of a jury trial. Knowing that his silence could be used against him would pressure him to speak. This pressure is not merely that

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183. *Id.* at 494-99.
184. 426 U.S. at 617.
185. *See* text accompanying notes 169-74 *supra*.
186. Doyle v. Ohio, 426 U.S. 610, 632-33 (1976) (Stevens, J., dissenting) (citation and footnote omitted).

inherent in custodial interrogations; rather, it adds to the coercive environment. This additional coercion could be sufficient to trigger the privilege.

Second, despite *Raffel*, a testifying defendant's waiver of his right to silence does not perforce extend back in time to his invocation of the right to remain silent at the police station, for two distinct rights are involved. The Court recognized in *Leary v. United States*[187] that a defendant who testifies at trial does not retroactively waive his prior reliance on the privilege. Leary did not waive his fifth amendment challenge to the Marijuana Tax Act[188] when he testified about matters that he claimed he could not be compelled to divulge under the Act's registration requirements. The right Leary asserted was "not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act."[189] Similarly, the right asserted by a testifying defendant who refused to answer questions at the police station is not the right of an accused to remain silent at trial, but instead, the right not to have his previous silence used as impeachment evidence against him.

Third, extension of *Raffel* to stationhouse silence would clearly involve a penalty on an accused's exercise of the privilege. He would have to choose either to remain silent or to answer police questions in order to preserve his right to testify at trial without being impeached by his prior silence. This is similar to the choice involved in *Brooks v. Tennessee*,[190] where the defendant had to elect to testify at the outset of his case or not at all, a procedure that impermissibly penalized him. The defendant's right to silence at the stationhouse is similarly penalized by depriving him of the full benefits of his right to testify; he cannot fully exercise both rights.[191]

Despite these arguments, extension of *Raffel* to permit impeachment use of stationhouse silence would not be inconsistent with the apparent philosophy of the present Court. If an accused spoke to police, a mere allegation that he was compelled by the fear that his silence would be used to impeach him might not

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187. 395 U.S. 6 (1969).

188. Act of Aug. 16, 1954, ch. 736, 68A Stat. 560 (repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, title III, § 1101(b)(3)(A), 84 Stat. 1292 (1970)).

189. 395 U.S. at 28.

190. 406 U.S. 605 (1972).

191. *See* text accompanying notes 82-109 *supra*.

be sufficient to show a violation of the privilege, particularly if the Court, as it seems wont to do, examined the totality of the circumstances to determine whether actual compulsion was present. If an accused refused to speak to police, and chose to testify at trial, the Court could hold that the state's interest in preventing perjury outweighed his interest in precluding trial use of his silence. Moreover, impeachment use of silence might not be viewed as a penalty at all; the accused would be free to testify if he felt his testimony was strong enough to withstand the inferences that might be drawn from his previous silence.

### C. The Right of a Witness to be Free of Compelled Self-Incrimination

Because the fifth amendment protects only against compelled self-incrimination, a witness cannot invoke the privilege unless his answers may tend to incriminate him. Thus, the ordinary witness does not have an absolute right to refuse to testify;[192] the prosecution may freely interrogate him even on potentially incriminating matters and it is up to the witness to assert his fifth amendment rights.[193]

Recently, in *Garner v. United States*,[194] the Burger Court discussed the ordinary witness rule in a situation in which the wit-

192. *See, e.g.*, Garner v. United States, 424 U.S. 648 (1976); United States v. Kordel, 397 U.S. 1 (1970); Rogers v. United States, 340 U.S. 367 (1951).

193. United States v. Mandujano, 425 U.S. 564, 574-75 (1976). Although, theoretically, the jury, grand jury, or any other body before whom the privilege is invoked could draw adverse evidentiary inferences from a witness's refusal to answer questions, the inferences do not violate the fifth amendment because the exercise of the privilege is not used as evidence in a criminal trial. *See* text accompanying notes 47-51 *supra*. *Compare* Baxter v. Palmigiano, 425 U.S. 308 (1976) *with* Griffin v. California, 390 U.S. 609 (1965). This leads to a variety of interesting questions beyond the scope of this Article: Can the defendant in a criminal prosecution call a person involved in the case to the witness stand who will then invoke the privilege in front of the jury, refuse to answer questions, and by inducing the jury to draw adverse inferences against the witness shift blame away from the accused? Can the prosecutor call a person to the stand who is so intimately involved with the defendant (possibly a co-defendant being tried separately) that his claim of the privilege in front of the jury and the adverse evidentiary inferences derived therefrom will damn the defendant by association? *See generally* United States v. Lacouture, 495 F.2d 1237 (5th Cir. 1974), *cert. denied*, 419 U.S. 1053 (1974); Bowles v. United States, 439 F.2d 536, (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 680-81 (1968).

194. 424 U.S. 648 (1976).

ness himself was the subject of the government's interrogation. Garner was prosecuted for a conspiracy involving the use of interstate communication facilities for illegal gambling. The government attempted to impeach Garner by introducing income tax returns on which he had reported substantial income from gambling. Garner argued that his tax return should have been excluded because his incriminating answers were compelled by the threat of prosecution for failure to file a tax return. The Court held that Garner, when filing his return, was in the position of an ordinary witness and had to claim the privilege at the time of filing; once the requested information was disclosed, the privilege was lost. The Court quoted approvingly from *United States v. Monia:*[195] "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been compelled within the meaning of the Amendment."[196]

Loss of the fifth amendment privilege by disclosure of information has been called "waiver," but, as stated in *Garner*, the use of that term in this context is not analytically sound: "[I]t seems desirable to reserve the term 'waiver' in these cases for the process by which one affirmatively renounces the protection of the privilege. . . ."[197] The Court also stated that a witness "may lose the benefit of the privilege without making a knowing and intelligent waiver."[198] Thus, a witness who is unaware that he can refuse to answer incriminatory questions apparently cannot subsequently argue for suppression of his answers on the ground that he did not knowingly and intelligently waive his right. He may argue instead that his answer was compelled, or "involuntary," but this argument is also unlikely to succeed because the voluntariness of a witness's answers depends on different considerations than the voluntariness of the answers of an accused.[199]

*Garner* explains the different type of analysis that is applied to the ordinary witness's privilege. Since "the fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice,"[200] the privilege is not im-

195. 317 U.S. 424, 427 (1943).
196. 424 U.S. at 654-55.
197. *Id.* at 654 n.9.
198. *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 222-27, 235-40, 246-47 (1973)).
199. *See* Garner v. United States, 424 U.S. 648, 654 n.9 (1976).
200. 424 U.S. at 655.

plicated unless the government's questioning subverts that system and becomes inquisitorial. In an inquisitorial process, the purpose of questioning an individual is to secure evidence to be used against him at his own criminal prosecution. "[T]he inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought."[201] When the government questions a witness for other purposes, however, the integrity of the adversary system is not threatened. "Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled."[202] Thus, Garner was not compelled to be a witness against himself simply because he had to file a tax return; income tax reporting is required of the public at large and the government was unaware that Garner's particular answers would be self-incriminating. Only after the witness claims the privilege, putting the government on notice that the answer may be incriminating, can compulsion in violation of the fifth amendment arise, for it is at this point that the process becomes inquisitorial.

Since, according to this analysis, there is no compulsion until the witness claims the privilege, an assertion by a witness who did not claim the privilege that his answers were "involuntary" will in most cases be unsuccesful. Such a witness is in the same legal situation as a person who walks into a police station and confesses to a crime. Thus, in discussing the voluntariness issue, the Court pointed out that Garner could not claim that his will was overborne by the government; he was under no pressure in completing his tax returns.[203] Moreover, the threat of prosecution for failure to file did not make his choosing to disclose "involuntary," for a timely privilege claim would have been a defense to prosecution.[204] Apparently, the Court will consider

201. *Id.* at 657.

202. Garner v. United States, 424 U.S. 648, 655 (1976).

203. *Id.* at 657-58.

204. Garner also argued that even if a valid privilege claim would be a defense to conviction, the threat of prosecution *alone* impermissibly burdened his choice of whether to assert his rights. The Court rejected this argument. *Id.* at 663-65.

Garner's situation was distinguished from the facts in Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968), involving prosecutions for failure to file returns required of gamblers in connection with occupational and excise taxes on gambling. In those cases *any* disclosures made on such a return directed at a class

answers involuntary only if a "witness" could have been prosecuted for invoking a valid claim to the privilege.

The explanation of the rights of a "witness" in *Garner* seems reasonable as applied to the facts of that case, but the Court's language is broad and not restricted to taxpayers. The *Garner* analysis may be inapt in other contexts, especially when a witness is subpoenaed to testify before a grand jury. The mere fact that he is called to testify often suggests some suspicion on the part of the government that he is somehow involved in criminal activity;[205] the witness may therefore be a virtual defendant, and would seem to be entitled to protections more analogous to those of an accused than those of an ordinary witness.

Nevertheless, in *United States v. Mandujano*[206] four members of the Burger Court applied the *Garner* witness rule to a putative defendant, a man the prosecutor knew had attempted to sell heroin to a government agent. Mandujano was subpoenaed to testify before a grand jury investigating narcotics traffic in San Antonio approximately six weeks after the attempted narcotics transaction. When questioned, he denied knowledge of any narcotics traffic and further, denied the attempt to sell heroin. A little over a month later, Mandujano was indicted for attempting to sell heroin and for perjury before the grand jury. The issue before the Court was whether the statements made to the grand jury should have been suppressed in Mandujano's perjury prosecution because he was not given *Miranda* warnings prior to testifying.[207]

The Court held that Mandujano had a duty to appear and give testimony at the grand jury proceeding. He had no right to answer untruthfully, however, and his testimony was properly admitted in the perjury prosecution.[208] This holding is clearly

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of persons suspected of criminal activities would be incriminating; thus, those taxpayers were placed in the position of accused suspects and had the right to remain silent or to refuse to file the return.

205. Murphy v. Waterfront Comm'n, 378 U.S. 52, 102 (1964) (White, J., concurring). Such suspicion is not necessarily present when a witness, for example, the police officer, a victim of a crime, or an accountant, is subpoenaed.

206. 425 U.S. 564 (1976).

207. The prosecutor told Mandujano that he was required to answer all questions that were not incriminating and that he could consult with counsel outside the grand jury room. Although Mandujano stated he could not afford counsel, the prosecutor did not say one could be provided for him. *See id.* at 567-68.

208. *Id.* at 576-77; *id.* at 584-85 (Brennan, J., concurring); *id.* at 609 (Stewart, J., concurring).

correct; the fifth amendment does not include the privilege to lie.[209] The plurality opinion written by Chief Justice Burger, however, goes further, and indicates a willingness to apply the *Garner* rule to all grand jury witnesses, whether or not the prosecutor knows that the witness's answers may incriminate him.[210]

The plurality opinion reasons that the grand jury's need for information requires that it be empowered to compel testimony even from those suspected of criminal activity.[211] Thus, although the fifth amendment protects against compulsion of self-incriminating testimony, "the witness must invoke the privilege . . . as the 'Constitution does not forbid the asking of criminative questions.' "[212] If the witness claims the privilege, the prosecutor can either go on to other questions or, after a judicial determination that the claim is bona fide, grant immunity and compel the witness to answer. If immunity is not conferred, testimony compelled after a legitimate invocation of the privilege may be suppressed when the government attempts to use it against the witness in a criminal trial.[213]

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209. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." Bryson v. United States, 396 U.S. 64, 72 (1969). *See also* United States v. Knox, 396 U.S. 77, 82 (1969).

210.
> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.

425 U.S. at 574-75 (quoting United States v. Monia, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting)).

211. 425 U.S. at 571-75.

212. *Id.* at 574 (quoting United States v. Monia, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting)). This is similar to the language of Chaffin v. Stynchcombe, 412 U.S. 17, 32 & n.20 (1973), where the Court said that state procedures which have a legitimate purpose will not be considered penalties on the exercise of a constitutional right even if they incidentally deter the defendant from exercising the right. It is when such deterrence is the only purpose of the state procedures that an impermissible penalty exists.

If this sort of reasoning is carried over to the situation of the putative defendant who is subpoenaed before the grand jury, the result may be that as long as the prosecution does not subpoena him *only* for the purpose of gaining information to be used against him in a criminal prosecution, the putative defendant must answer the subpoena and testify, claiming the privilege on a question-by-question basis.

213. 425 U.S. at 576.

If the witness knows he can invoke the privilege, the procedure outlined by the Chief Justice appears to afford adequate protection against compelled self-incrimination. But if the witness does not know he can refuse to answer, he is faced with something akin to the "cruel trilemma." Moreover, if the prosecutor is aware that truthful answers will probably incriminate the witness, the witness's difficulty is, unlike the situation in *Garner*, imposed with the state's knowledge. If the *Garner* opinion's analysis of the reasons for the difference between the rights of a witness and those of a defendant is correct, then it would seem appropriate to distinguish a putative defendant called before a grand jury from other witnesses. Possibly the best method for determining whether a witness is a putative defendant would be to apply the objective standard of probable cause for arrest.[214] The putative defendant should be given formal immunity, or, at the very least, be advised of his right to refuse to answer questions, thus avoiding the creation of an inquisitorial process. *Mandujano* could be considered consistent with this analysis and with *Garner* because the warnings given to Mandujano were sufficient to ensure that he knew of the right.[215]

Nevertheless, the plurality opinion does not appear to view knowledge of the right as constitutionally required. The appeals court had held that Mandujano's statements to the grand jury should have been suppressed because he was not given *Miranda* warnings.[216] The plurality rejected this approach, saying that the *Miranda* standards "were aimed at the evils seen by the court as endemic to police interrogation of a person in custody," and should not be applied to judicial inquiries where the presence of impartial observers diminishes the potential for prohibited coercion.[217] This view is consistent with the Court's apparent rejection of the inherent compulsion notion. Although, as Justice Brennan points out, the grand jury's exercise of its power to compel attendance and testimony is a "classic instance of judicial compulsion,"[218] it does not rise to the level prohibited by the fifth amendment unless it actually compels the witness to answer the incriminating questions. Thus, the issue becomes whether the grand jury witness gave his incriminating answers

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214. Suggested by Mr. Justice Brennan in his concurring opinion in *Mandujano*. *Id.* at 598.

215. *See* note 207 *supra*.

216. United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974).

217. 425 U.S. at 579.

218. *Id.* at 592 n.7 (concurring opinion).

voluntarily.[219] This analysis raises the difficult issue of the witness's subjective state of mind, and will probably involve the Court in a case-by-case analysis of "voluntariness" once again.[220]

## IV. CONCLUSION

What has the Burger Court left of fifth amendment protections to the individual? What direction will the Court take in the future? These are not easy questions to answer because of the Court's piecemeal approach to the privilege. It has given

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219. The consideration of whether an answer in such a situation was "voluntary" is different than the "voluntary" answer given by an ordinary witness discussed in *Garner*. *See* text accompanying notes 203-04 *supra*. There, all answers of a witness were considered voluntary because the government did not know they might be incriminating; here, the government's knowledge of the possible incriminating nature of the answers makes the quest inquisitorial. Consider the situation of a police officer questioning bystanders at the scene of the crime. A general "what happened?" question could not result in an involuntary answer. *See* Miranda v. Arizona, 384 U.S. 436, 477-78 (1966). But when a bystander replies, "I shot him," further questioning by the police may result in answers that are involuntary or compelled.

The voluntariness determination could be more easily made if the witness had counsel prior to and/or during the grand jury proceeding. The court has previously suggested that an individual has a right to counsel in order to effectively understand and claim his rights secured by the privilege. Maness v. Meyers, 419 U.S. 449, 468 (1975); Miranda v. Arizona, 384 U.S. 436, 469-70 (1966). While such a right might include the appointment of counsel in the case of an indigent defendant, the witness before a grand jury is probably entitled only to consult with retained counsel. In any event, it is clear that there is no sixth amendment right to counsel during a grand jury proceeding. *See* United States v. Mandujano, 425 U.S. 564, 581 (1976); Kirby v. Illinois, 406 U.S. 682 (1972); *In re* Gorban, 352 U.S. 330 (1957).

220. The Court has accepted certiorari and heard argument in two cases in which the issue is whether a witness before a grand jury must be warned of his rights before being questioned. United States v. Washington, 328 A.2d 98 (D.C. 1974), *cert. granted*, 426 U.S. 905 (1976) (No. 74-1106); United States v. Wong, No. 74-1636 (9th Cir., Sept. 23, 1974), *cert. granted*, 426 U.S. 905 (1976) (No. 74-635). This question was not reached in *Mandujano*, since some warnings had been given. 425 U.S. at 582 n.7. *See* note 207 *supra*. If *Harris, Tucker*, and *Bustamonte*, *see* notes 147-78 *supra* and accompanying text, indicate the direction the Court will take, warnings will probably not be held constitutionally required.

The Court could constitutionally require warnings under the due process clause to insure fair proceedings, *see* United States v. Wong, *supra*, rather than as a requirement imposed by the fifth amendment privilege. Or in *Wong* the Court could exercise its supervisory power over federal courts to impose a non-constitutional requirement for warnings; such a rule, however, would not be applicable to the District of Columbia local courts involved in United States v. Washington, *supra*. *See* Griffin v. United States, 336 U.S. 704, 717 (1949).

little guidance to lower courts, prosecutors, or police. But certainly the intermittent doses of restrictive interpretations disclose a tendency to treat the patient by limiting his lifestyle.

When the issue is alleged pre-trial abuses, the privilege apparently offers no protection against the state's act of compulsion; only use of the defendant's compelled testimony in his criminal prosecution is forbidden. The Court may be moving toward a rule that would allow the privilege to be claimed in advance of trial only by a motion to suppress compelled testimony. The determination of the existence of compulsion prior to trial would be necessary only in this context. Furthermore, the Court has strictly limited the protection of private documents. The government may seize a person's diary by executing a valid search warrant or by issuing a subpoena commanding the person to turn over his diary as long as that act of production is not used as evidence of existence and possession of the diary or as authentication evidence.

As for compulsion exerted on a defendant to take the stand and testify at his criminal trial, the Court does recognize that there are some procedures which, if allowed to stand, will impermissibly pressure a defendant to testify and will penalize the nontestifying defendant's exercise of his right. The pressure to testify must be significantly different from that inherent in the trial process, however, and the Court will apparently weigh the jurisdiction's legitimate purpose for imposing the procedure in determining whether it violates the privilege or due process.

The Court will apparently resolve the issue of compulsion where the accused is subjected to police interrogation by examining the totality of the circumstances in each case for the presence of coercion, as was done prior to *Miranda*. The requirement of *Miranda* warnings prior to questioning may be doomed. The Burger Court in *Harris* and *Tucker* indicated its rejection of both the Warren Court's factual premise that compulsion is inherent in custodial questioning and its constitutional premise that the fifth amendment requires that the government give warnings and obtain a waiver prior to such questioning. Advising an accused of his rights will return to its pre-*Miranda* status as merely one factor to be considered in determining coercion. Certain forms of psychological coercion, such as honeyfogling and trickery by falsehood, recognized in the past as being improper, may in the future be viewed as acceptable government behavior, for the Court tends to require a higher

degree of coercion to support a finding of impermissible compulsion. Indeed, it is conceivable that the Burger Court could return to due process as the constitutional basis for exclusion of police-coerced statements, and limit the protections of the privilege to judicial or quasi-judicial proceedings.

Where an ordinary witness, one not an accused, answers the questions of a government official, his responses are conclusively deemed voluntary or not compelled because there is no inquisitorial process directed against him; the government is not seeking evidence to be used against the witness in his criminal prosecution. Apparently the same rule may hold true even when the witness is a putative defendant, although it would seem that the Court will have to determine the intent of the prosecutor more carefully. If the government's only purpose, or possibly one of its purposes, in questioning the witness is to obtain evidence to be used against him in his criminal prosecution, then the court must treat him as an accused and determine whether his answers were compelled. Warnings given to such a witness may tend to dispel any coercion and thus be one factor in making the determination, but it is not likely that warnings will be constitutionally required.

It seems that the Burger Court is seeking to arrive at a literal interpretation of the fifth amendment: a rule that the privilege simply protects the right of a criminal defendant not to take the stand and not to have statements, previously compelled from him, introduced into evidence against him at trial. While this approach may give the government more investigative alternatives in detecting and apprehending criminals, it does so by sacrificing one of the protections that shield the individual from his much stronger adversary. It is no accident that the self-incrimination clause became known as a "privilege." Like other privileges, it protects and fosters a particular relationship deemed worthy of protection—the relationship between an individual and his government—even at the expense of losing reliable evidence. Individual human dignity will surely suffer if the Court continues to restrict the protection offered by the fifth amendment and to ignore its role as a bulwark against abuses of governmental power unimagined by the framers of the Constitution.