
CHAPTER 1

The Purpose and Scope of the Fifth Amendment Right Against Compulsory Self-Incrimination

A Very Brief History of the Fifth Amendment

An adequate exploration of the origins of the Fifth Amendment privilege against self-incrimination extends well beyond the purpose of this book. However, as with the application of any constitutional right, it helps to have at least a rudimentary understanding of the history of the language when crafting arguments regarding its application. A student of the historical development of the right against self-incrimination would be well served to spend a few hours reading Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (1968), which remains an influential work. See *McKune v. Lile*, 536 U.S. 24, 56 (2002) (Stevens, J., dissenting). For a different point of view of the historical development of the privilege, one should read the essays collected in R. H. Helmholz et al., *The Privilege against Self-Incrimination: Its Origins and Development* (1997). See *United States v. Balsys*, 524 U.S. 666, 674 n.5 (1998).

The Supreme Court traces the roots of our Fifth Amendment right against self-incrimination to the protections the English courts and Parliament granted to those religious dissenters who were compelled to take oaths when called before the ecclesiastical courts, as well as the Court of High Commission and the Star Chamber. These courts used the “oath ex officio” to force heretics from the Church of England to swear before God to truthfully answer all questions, even before the heretics even knew the nature of

the accusations against them. By use of the oath in conducting their investigations of religious heresy, these courts left witnesses with the “cruel trilemma” of (1) refusing to take the oath, which constituted contempt and subjected the person to torture; (2) taking the oath and telling the truth about their religious beliefs, which, if heretical, was punishable by death; or (3) taking the oath and lying, which was also punishable by death. In other words, this inquisitorial system countenanced methods of interrogating persons designed to lead only to confessions. See generally *Andresen v. Maryland*, 427 U.S. 463, 470 (1976) (discussing the methods of the ecclesiastical inquisitions and the Star Chamber); *Griffin v. California*, 380 U.S. 609, 620 (1965) (noting that a suspect refusing to testify in front of the Star Chamber suffered “incarceration, banishment and mutilation”).

The English common law courts first sought to prohibit the use of the oath *ex officio* and the attendant inquisitorial methods of interrogating the accused by relying on the Latin maxim *nemo tenetur seipsum prodere* (or *nemo tenetur seipsum accusare*)—“no man is bound to accuse himself.” See *Brown v. Walker*, 161 U.S. 591, 596–97 (1896) (describing the maxim as a protest against the unjust methods used to extract confessions). Parliament eventually abolished the Court of High Commission and the Star Chamber and, in 1662, passed a law providing that “no man shall administer to any person whatsoever the oath usually called *ex officio* or any other oath whereby such persons may be charged or compelled to confess to any criminal matter.” By the late eighteenth century, as the English common law courts began to recognize the presumption of innocence, trial judges in criminal cases began to afford defendants the right not to incriminate themselves, establishing the privilege against self-incrimination as a fundamental rule of evidence.

The criminal procedures developed in England were transplanted in early colonial America, where judges adopted limits on the evidentiary use of involuntary pretrial confessions. After the Revolutionary War, as colonists sought to ensure that their individual rights in the courts were protected by written constitutions, at least six states drafted constitutions containing prohibitions against compulsory self-incrimination. Section 8 of the Virginia Declaration of Rights, one of the most influential of the early constitutions, declared “that in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . ; nor can he be compelled to give evidence against himself. . . .”

While the Constitutional Convention of 1787 adjourned without establishing a bill of rights, pressure grew for including the protection against self-incrimination and other individual liberties in the federal constitution. After Congress assembled in 1789, James Madison drafted a bill of rights, including a provision that “no person . . . shall be compelled to be a witness against himself.” Madison’s phrase was included in an article concerning

both civil and criminal proceedings. An amendment offered in the House of Representatives limited the right to criminal proceedings, which was left unchanged by the Senate in the final Bill of Rights. Unfortunately, references to the privilege against self-incrimination are scarce in the congressional proceedings surrounding the ratification of the Bill of Rights, and little explanation exists for the language finally adopted.

After ratification, the courts initially understood the amendment to simply affirm the common law protections afforded defendants against improper methods used for gaining confessions. However, by the end of the nineteenth century, the modern concept of a witness's right to remain silent became well established, at least in the federal courts. See *Counselman v. Hitchcock*, 142 U.S. 547 (1892), and *Brown v. Walker*, 161 U.S. 591 (1896) (cases upholding the constitutionality of federal transactional immunity statutes that prevented prosecution in exchange for compelling self-incriminatory disclosures). During the McCarthy era of the 1950s, the Fifth Amendment became the basis for invalidating numerous excesses in the government's attempt to discover and punish Communist Party membership and affiliation. By the 1960s, the Fifth Amendment right against self-incrimination was recognized, in *Malloy v. Hogan*, 378 U.S. 1 (1964), to apply to the states through the Fourteenth Amendment and came to be described as "the essential mainstay of our adversary system." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

Values Served by the Fifth Amendment

In light of the deep historical origins of the Fifth Amendment, the Supreme Court has often stated that the Fifth Amendment should "be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). In *Ullmann v. United States*, 350 U.S. 422 (1956), Justice Frankfurter, in upholding the federal immunity act that eliminated the witness's right to remain silent, more fully elucidated this proposition by stating:

This constitutional protection must not be interpreted in a hostile or nig-gardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naive or disregardful of the interests of justice. . . . They made a judgment, and expressed it in our fundamental law, that it were better for an occasional crime to go unpun-ished than that the prosecution should be free to build up a criminal case,

in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application.

Id. at 426–27 (citation and quotation omitted).

This “liberal construction” contrasts with the manner in which courts construe common law privileges, such as the attorney-client privilege. The strict construction of common law privileges is justified on the basis that the effect of these privileges is both to impede the full discovery of the truth and to deprive the public of their right to evidence. See *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting Wigmore regarding the fundamental maxim that the public has the right to every man’s evidence in the context of a witness’s failure to comply with a congressional subpoena); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (in refusing to sustain a claim of executive privilege, the Court noted that “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth”); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (requiring a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth” to justify a husband-wife privilege) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960)); *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (upholding the privilege protecting communications between a psychotherapist and her client despite starting “with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional. . . .”) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Despite the fact that the Fifth Amendment similarly interferes with the general principle that society is entitled to every man’s evidence, it is thought to promote certain fundamental values justifying such interference.

The values thought to justify the privilege against compelled self-incrimination are cataloged in *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 54–55 (1964), the companion case to *Malloy v. Hogan*, 378 U.S. 1 (1964). There, Justice Goldberg, in deciding “the fundamental constitutional question of whether, absent an immunity provision, one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction,” opened the analysis by describing the values and purposes of the privilege as follows:

It 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 respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life;” 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.”

Murphy, 378 U.S. at 54–55 (citations omitted).

Although courts often repeat the rhetoric of Justice Goldberg, subsequent decisions rarely bear out his statement of values. Indeed, a more recent Supreme Court has remarked that “the scope of the privilege does not coincide with the complex of values it helps to protect.” *Doe v. United States*, 487 U.S. 201, 213 n.11 (1988). See also *Schmerber v. California*, 384 U.S. 757, 762 (1966) (“[T]he privilege has never been given the full scope which the values it helps to protect suggest.”). Indeed, in *United States v. Balsys*, 524 U.S. 666, 691–92 (1998), the Supreme Court criticized *Murphy*’s expansive recitation of the purposes and policies of the Fifth Amendment. The *Balsys* majority specifically rejected *Murphy*’s previous “ambitious conceptualization of personal privacy underlying the Clause,” *id.* at 684, and instead opined that its core purpose was simply to “prevent government overreaching.” *Id.* at 693. In *Balsys*, the Supreme Court found the purposes served by the Fifth Amendment failed to justify extending its scope to fear of *foreign* prosecution, a result overturning substantial prior precedent. *Id.* at 696.

Accordingly, as we will see in many sections below, courts often balance, either explicitly or implicitly, the right of a party to assert the Fifth Amendment privilege against competing social goals, particularly the government’s need to obtain evidence and to maintain criminal convictions. The Supreme Court has explicitly balanced the legitimate interests of the state against the purposes served by the Fifth Amendment—often to the consternation of dissenting justices—in the following cases:

- *McKune v. Lile*, 536 U.S. 24, 37 (2002) (Plurality weighed state’s “vital interests in rehabilitation goals and procedures within the prison system” in deciding to uphold a state program requiring inmates in sexual abuse treatment to admit prior criminal conduct.)
- *Baltimore Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555–56 (1990) (holding that a mother was required to produce her child at the demand of the Department of Social Services, even though production might incriminate her, because production was part of a non-criminal regulatory regime which served important public policies)

- *California v. Byers*, 402 U.S. 424, 427 (1971) (Plurality upheld a law making it a crime to leave the scene of an automobile accident without giving name and address by “balancing the public need on the one hand, and the individual claim to constitutional protections on the other.”)
- *United States v. White*, 322 U.S. 694, 699–700 (1944) (In ruling that the right against self-incrimination was purely personal and could not “be utilized by or on behalf of any organization,” the Court noted the “impossibility” of enforcing many federal and state laws if organizations were allowed to use “the cloak of the privilege” to prevent disclosure of the organization’s records and documents.)

Of course, an equally compelling argument can be made that the framers had already balanced the interests to be served by the privilege against self-incrimination against competing governmental interests and that no further balancing is authorized by the language of the Fifth Amendment.

- *Braswell v. United States*, 487 U.S. 99, 129 (1988) (Kennedy, J., dissenting) (“The majority’s abiding concern is that if a corporate officer who is the target of a subpoena is allowed to assert the privilege, it will impede the Government’s power to investigate corporations, unions, and partnerships, to uncover and prosecute white-collar crimes, and otherwise to enforce its visitatorial powers. There are at least two answers to this. The first, and most fundamental, is that the text of the Fifth Amendment does not authorize exceptions premised on such rationales.”)
- *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (In holding that Fifth Amendment prohibits use of a person’s immunized testimony to impeach the person’s credibility when he testifies as a defendant in a criminal trial, majority remarked that balancing of interests was prohibited by Fifth Amendment.)

State courts are free to construe their state constitutions in a manner that provides greater protection than that provided by the comparable provisions of the United States Constitution. Thus, it is not uncommon for state courts to interpret their state constitutional protections against compelled self-incrimination in a manner more protective of the individual than United States Supreme Court precedents. A few examples include:

- *State v. Knapp*, 287 Wis. 2d 86, 113, 700 N.W.2d 899, 913–14 (2005) (disagreeing with *United States v. Patane*, 542 U.S. 630 (2004) and holding that the Wisconsin Constitution precludes admission of physical evidence obtained as a direct result of an intentional *Miranda* violation)
- *State v. Daniels*, 182 N.J. 80, 97, 861 A.2d 808, 819–20 (2004) (While United States Supreme Court held in *Portuondo v. Agard*, 529 U.S. 61

(2000) that the United States Constitution does not proscribe prosecutorial comment concerning a testifying defendant's ability to tailor his testimony to that of another witness, fair trial principles prohibit such comments in New Jersey prosecutions.)

- *State v. Thrift*, 312 S.C. 282, 297–98, 440 S.E.2d 341, 350–52 (1994) (rejecting *Kastigar v. United States*, 406 U.S. 441 (1972) and holding that state constitution requires transactional immunity to preserve a person's rights against compulsory self-incrimination)
- *State v. Reed*, 133 N.J. 237, 250, 627 A.2d 630, 637 (1993) (interpreting New Jersey's right against self-incrimination founded in common law and statute to require police officers to inform a suspect that an attorney is present and waiting to talk to him, contrary to Supreme Court's decision in *Moran v. Burbine*, 475 U.S. 412 (1986))
- *Commonwealth v. Doe*, 405 Mass. 676, 679, 544 N.E.2d 860, 862 (1989) (rejecting *Braswell v. United States*, 487 U.S. 99 (1988) and holding that under the Massachusetts Constitution, a corporate custodian may refuse to produce corporate documents if the act of production would incriminate the custodian personally)
- *State v. Santiago*, 53 Haw. 254, 265–67, 492 P.2d 657, 663–64 (1971) (disagreeing with *Harris v. New York*, 401 U.S. 222 (1971) and holding that prosecutor may not impeach the defendant with statements made in the absence of *Miranda* warnings under the Hawaii Constitution)