Assertion of the Constitutional Privilege Against Self-Incrimination in Federal Civil Litigation: Rights and Remedies

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The privilege against self-incrimination, embodied in the fifth amendment, may be asserted whenever an individual's testimonial evidence might tend to subject him to criminal responsibility, regardless of the nature of the proceeding. As a result, this privilege may threaten the integrity of federal civil litigation by threatening the equality of access to sources of proof. The purpose of this article is to explore the implications of the privilege in federal civil litigation and to examine the range of responsive judicial policies consistent with the values promoted by the privilege.

I. The Policy of the Privilege

History has been of little help in assessing the policies which support the privilege against self-incrimination. The privilege originated in early English religious and political disputes and rose in importance as a defensive weapon against prosecutions for heresy and sedition. In addition, during the
seventeenth century, the principle that no man should be forced to incriminate himself achieved general acceptance in the English courts, apparently due to an intuitive notion that it was improper to collect criminal evidence by this means. Accordingly, the privilege in England developed specifically in opposition to religious and political abuses, and generally in opposition to the collection of criminal evidence from the accused under oath. The privilege was subsequently included in the United States Constitution as a precept adopted from the then recent English legal tradition.

The Supreme Court has paid little, if any, attention to historical development of the privilege. With a slight bow to history, the Court declared that a "noble principle" such as the privilege against self-incrimination "often transcends its origins." Attempts to assess the policies underlying the privilege, therefore, have been more a matter of argument than of historical analysis. Wigmore, for instance, considered a dozen policies that had been advanced to support the privilege and concluded that two were primary: first, the prevention of torture or other inhumane treatment, and second, the contribution of the privilege to a fair balance between the state and the individual in the investigation and prosecution of criminal activity. On the latter point, Wigmore urged, and the Supreme Court has recently emphasized, that the privilege helped enforce the requirement that the state shoulder the entire load in prosecuting criminal cases.

Another closely related policy is that the individual must be protected from government abuse of its investigative and prosecutorial powers. This rationale rests, in part, on the notion that the privilege assures our accusatorial, rather than inquisitorial, system of criminal justice. In addition, this policy encompasses the concept that the privilege guards against po-
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Perhaps another expression of the same policy is the argument that the privilege against self-incrimination seeks to preserve individual privacy. However, it does so only to a peculiarly limited extent, that is, only insofar as compelled self-incrimination is threatened. Moreover, this right of privacy may be phrased in terms of privacy of individual belief, as in the sense discussed above, or in terms of the individual's right to be let alone until the government establishes probable cause for prosecution. Such references to privacy may simply reflect a modern restatement of other older, related values.

At times the Supreme Court has addressed the privilege as if it were an aspect of the constitutional right to privacy. In Fisher v. United States, however, the Court criticized the notion that the privilege could be cut "completely loose from the moorings of its language," to "make it serve as a general protector of privacy" except where compelled testimonial self-incrimination was involved. Thus, the constitutional privilege may not be construed to protect privacy beyond the limits imposed by the language of the fifth amendment, which in turn suggests that the Court is unwilling to utilize a privacy concept as an aid to construction of the privilege when there is some doubt whether the privilege applies.

Finally, the privilege establishes a fair method for the conduct of criminal trials. The state has the burden of establishing its case without the aid of testimony from the accused and the accused has the right to a favorable verdict without testifying as a witness in his own defense.

Unfortunately, in reviewing issues pertinent to the privilege, the United States Supreme Court has devoted little attention to discussion of the policies underlying the privilege. Perhaps the most comprehensive attempt to survey the un-

13. Id. at 401.
derlying policies of the privilege was offered by the Court in Murphy v. Waterfront Commission of New York Harbor:14

[The privilege] 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."15

The Supreme Court has subsequently held that the basic purposes of the privilege do not relate to protection of the innocent from conviction.16

II. APPLICATION OF THE PRIVILEGE IN PRACTICE

The Supreme Court has extended the scope of the privilege beyond simply protecting an accused from being compelled to bear witness against himself in a criminal proceeding. The scope of the privilege now includes any form of proceeding where an answer might tend to subject a witness to criminal penalties.17 The right to assert the privilege exists irrespective of the type of proceeding, that is, whether it be criminal or civil in nature.18 The privilege does not, however, protect a witness against the use of his testimony for purposes

15. Id. at 55 (citations omitted).
16. Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966). While the privilege may on occasion protect innocent parties, it does not serve to directly protect the truth-seeking function of the federal courts.
other than the imposition of criminal liabilities.\textsuperscript{19} Thus, if the witness were granted immunity, and thereby protected from the subsequent use of his testimony against himself in a criminal action, the protection afforded by the privilege would be satisfied,\textsuperscript{20} and the witness' testimony could be judicially compelled.\textsuperscript{21}

Several difficult questions arise in applying the privilege. The first question is who should make the determination that the privilege does or does not apply? In United States v. Burr,\textsuperscript{22} Mr. Chief Justice Marshall first declared that it is up to the court to determine whether any answer to a question could tend to incriminate the witness. The courts retain this function today in order to prevent assertions of the privilege founded on trifling or imaginary hazards of incrimination.\textsuperscript{23} The trial court can require an answer if it clearly appears that the witness is mistaken in his assertion of the privilege. In so doing, the court must rely on its own perception of the peculiarities of the case, as well as the facts in evidence.

A second difficult question is what standard should be used to regulate the assertion of the privilege. The modern standard governing fifth amendment claims is set forth in Hoffman v. United States.\textsuperscript{24} The Hoffman standard was lodged in sweeping terms:

\begin{itemize}
\item 19. Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896). In United States v. Apfelbaum, 100 S. Ct. 948, 954 (1980), the Court noted that the privilege does not extend to consequences of a noncriminal nature, "such as threats of liability in civil suits." However, as discussed in the text below, nonimmunized testimony cannot be compelled by threats of noncriminal consequences.

\item Furthermore, although the privilege protects the witness only against compelled testimony that might subject him to criminal liabilities, the latter phrase includes liabilities that, although civil in form, are in their nature criminal. A chief example is a forfeiture of property due to offenses committed by the owner. United States v. United States Coin & Currency, 401 U.S. 715 (1971); Boyd v. United States, 116 U.S. 616 (1886). See generally United States v. Ward, 100 S. Ct. 2636 (1980).


\item 22. 25 F. Cas. 38 (C.C. Va. 1807)(No. 14,692d).


\item 24. 341 U.S. 479 (1951).
\end{itemize}
If the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

... In this setting, it was not "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency" to incriminate.25

Hence, the privilege extends not only to answers that could directly incriminate the witness, but also includes those answers that could furnish a link in a chain of evidence sufficient to support prosecution. A witness, therefore, should rarely be challenged in his assertion of the privilege.26 The protection of the privilege is confined, however, to instances where the witness "has reasonable cause to apprehend danger from a direct answer."27

While the rigor of the Hoffman standard is apparent, in practice the standard is augmented by two sub-rules. First, the trial court is not permitted to require an in camera explanation by the witness to justify his assertion of the privilege. Thus, the court may not broaden the witness' disclosure beyond that which is permitted in open court.28 Second, the court cannot consider the practical likelihood that any compelled disclosure will ever actually be utilized in a prosecution. The court must content itself with ascertaining whether the disclosure might tend to support a legally potential prosecution.29

25. Id. at 486-87, 488 (emphasis added and citations omitted).
29. In re Corrugated Container Antitrust Litigation, 620 F.2d 1086, 1091-92 (5th Cir. 1980) (dictum); In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979) (and cases cited therein at 870). But see In re Folding Carton Antitrust Litiga-
A witness can, however, waive his right to assert the privilege. 30 Brown v. United States31 imposed a constructive waiver doctrine in the context of a civil proceeding. In Brown, the witness voluntarily testified in her own defense in a denaturalization suit. She was held in criminal contempt by the trial judge for her refusal to answer relevant questions on cross-examination. The Court held that Brown could not assert her privilege to block relevant cross-examination because she had waived the privilege by testifying on related matters during direct examination. The Court grounded this holding on the necessity of assuring fairness to the adversary, as well as preserving the integrity of the civil litigation:

[W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. . . . The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination, 465 F. Supp. 618, 625 (N.D. Ill. 1979) ("Sustaining a civil witness' refusal to testify on fifth amendment grounds every time an answer might give rise to some theoretically possible future criminal prosecution, no matter how remote, would signal a virtual end to discovery in civil cases. Assertions of the fifth amendment which, as a practical matter, are frivolous should not be allowed to frustrate discovery in civil cases.").

But where a theoretical possibility of prosecution is lacking, e.g., where the applicable limitation period has expired, the witness may not properly assert the privilege. Brown v. Walker, 161 U.S. 591, 598 (1896).

incrimination.\textsuperscript{32}

The Hoffman and Brown decisions thus demonstrate the Supreme Court's conviction that the privilege be accorded a "liberal construction in favor of the right it was intended to secure,"\textsuperscript{33} even though a "balance of considerations" will ultimately determine its limitations in the context of a civil proceeding.\textsuperscript{34}

Finally, it should also be noted that the privilege is available only to natural persons, as distinguished from corporate entities and the like.\textsuperscript{35} The privilege thus affords no protection against the production of corporate records by one who holds them in his corporate capacity, even though they may tend to incriminate the custodian personally.\textsuperscript{36} However, the custodians of corporate records or other managing agents retain their individual privileges not to testify concerning corporate matters that may tend to incriminate them in their individual capacities.\textsuperscript{37}

III. LIMITATIONS AND BURDENS ON THE ASSERTION OF THE PRIVILEGE

In the 1964 case of Malloy v. Hogan,\textsuperscript{38} the United States Supreme Court held that the fifth amendment proscription against self-incrimination applies to the separate states through the fourteenth amendment. Malloy emphasized that

\textsuperscript{32} Id. at 155-56. Mr. Justice Black argued, in dissent, that there were less restrictive alternatives to the criminal contempt sanction which could adequately protect the adversary and the court from a one-sided, distorted version of the truth. His remedial alternatives included an order striking the one-sided testimony, with a limiting instruction to the jury, and "where the prejudice to the opposing party was extreme and irremediable" the court might even enter judgment in the opposing party's favor. 356 U.S. at 160 (Black, J., dissenting). The majority disagreed that these were appropriate alternatives. 356 U.S. at 156 n.5.


\textsuperscript{34} Brown v. United States, 356 U.S. 148, 156 (1958).


\textsuperscript{36} United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911). These decisions would be supported today, even assuming that a corporation or similar legal entity could claim the privilege, by the later holding in Fisher v. United States, 425 U.S. 391 (1976) (compelled production of nonpersonal, business related papers is not offensive to the constitutional privilege).

\textsuperscript{37} Curcio v. United States, 354 U.S. 118 (1957).

\textsuperscript{38} 378 U.S. 1 (1964).
the privilege guarantees 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." This decision quickly produced a series of rulings which circumscribed the limitations or burdens which states had imposed on the assertion of the privilege. In *Griffin v. California*, for instance, the Court held that the privilege forbade either comment by the prosecution on the accused's failure to testify in his own criminal defense, or instructions by the trial court that such silence is evidence of guilt. The Court criticized such commentary as a "penalty" imposed by the trial court for the defendant's assertion of the privilege which was intended to cut down on the use of the privilege "by making its assertion costly." Outside the criminal area, the Supreme Court has focused upon the effect of the assertion of the privilege in matters of public employment and licensing. For example, in *Spevack v. Klein*, the Court held that a lawyer could not constitutionally be disbarred for his privileged refusal to comply with a subpoena issued in a disciplinary proceeding. A more important case was *Garrity v. New Jersey*, decided the same day as *Spevack*. In *Garrity*, certain public officers testified during an official investigation without asserting the privilege, thereby waiving it. They did so after a warning that they would be subject to discharge under state law if they declined to fully testify. The Supreme Court held that the officers' statements were coerced by the threatened loss of employment, thereby vitiating their waivers of the privilege, and making the use of their statements unconstitutional in a subsequent criminal trial. *Garrity* thus fashioned a constitutional "use" immunity for statements made under threat of removal from public employment. The Court subsequently made it clear that the immunity found in *Garrity* would prevent removals from public employment whenever a waiver of the privilege was demanded and the witness was not informed of

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39. Id. at 8.
41. Id. at 614.
42. 385 U.S. 511 (1967).
43. 385 U.S. 493 (1967).
44. Compare *Garrity* with notes 143-49 infra, and accompanying text.
his protection against use of his coerced statements in any subsequent criminal proceeding.\textsuperscript{45}

\textit{Garrity}, in a subsequent line of cases, has continued unimpeaded.\textsuperscript{46} Contemporaneously, however, the Court has produced a separate series of decisions addressing limitations and burdens on the assertion of other constitutional rights.

\textit{Simmons v. United States}\textsuperscript{47} was perhaps the starting point. At trial, statements made by the defendant at a hearing on his motion to suppress the fruits of an allegedly unconstitutional seizure were introduced as evidence of his own guilt. The Supreme Court reversed the defendant’s conviction, finding that the admission of such testimony would deter the presentation of fourth amendment claims. The Court concluded that “an undeniable tension is created”\textsuperscript{48} between fourth and fifth amendment rights unless the testimony offered by a defendant at his suppression hearing is inadmissible against him on the issue of his guilt at trial, assuming that he properly raises an objection to its use.

Shortly after \textit{Simmons}, the Court decided \textit{United States v. Jackson}.\textsuperscript{49} In \textit{Jackson}, a statute subjected the defendant to the risk of the death penalty if he chose a jury trial. He was not subject to the death penalty, however, if he submitted to a bench trial or pleaded guilty. The Court found that a statu-

\textsuperscript{45} Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation, 392 U.S. 280 (1968). \textit{See George Campbell Painting Corp. v. Reid}, 392 U.S. 286 (1968), where in contrast to the implied immunity found in \textit{Garrity}, the Court upheld the statutory imposition of adverse consequences upon a corporation receiving public business, where its president (a director and shareholder of a closely held corporation) declined to testify before a grand jury and to waive any immunity he may have possessed. The sanction was in form imposed upon the corporation, which lacked a constitutional privilege against self-incrimination and could not take advantage of the claimed invalidity of the sanction as if the sanction had been imposed directly upon the president. \textit{Compare Reid with Lefkowitz v. Turley}, 414 U.S. 70 (1973), which involved the same set of statutory provisions at issue in \textit{Reid}. The key distinction is that \textit{Reid} involved a contracting corporation, while the aggrieved parties in \textit{Turley} were architects receiving public business. As individuals, they were entitled to assert the personal privilege against self-incrimination.

\textsuperscript{46} Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973). In Lefkowitz v. Cunningham, the Court invalidated the statutory removal of unsalaried political party officeholders who refused to waive their privilege and to testify before a special grand jury. 431 U.S. at 804-09.

\textsuperscript{47} 390 U.S. 377 (1968).

\textsuperscript{48} Id. at 394.

\textsuperscript{49} 390 U.S. 570 (1968).
tory provision having no purpose or effect other than to penalize the exercise of one's constitutional right to a jury trial was patently unconstitutional. Implicitly adopting a "least restrictive means" test, the Court held that the challenged provision needlessly chilled the exercise of constitutional trial rights and was therefore unenforceable.

A process of retrenchment began shortly after Jackson. In Brady v. United States, the Court held that habeas corpus relief was unavailable to a prisoner who had pleaded guilty under the statute at issue in United States v. Jackson. The Court rejected the prisoner's claim that the death penalty provision condemned in Jackson operated to coerce his guilty plea, and held that Jackson did not alter the standard for evaluating a waiver of constitutional rights through a guilty plea. The test remained whether the waiver was voluntary, knowing, intelligent and exercised with sufficient awareness of the relevant circumstances and likely consequences. The Court concluded that under this test, the statute did not coerce an involuntary plea and the plea was intelligently made with advice of competent counsel. Subsequently, a number of decisions followed the Brady rationale in rejecting similar claims for relief from prior guilty pleas.

50. Id. at 581.
51. Id. at 582: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Thus the Court expressly refused the suggestion that burdens on constitutional rights are legitimate wherever they are merely incidental to a valid legislative purpose, and required that an alternative, less restrictive of constitutional rights, be adopted where available. The United States Supreme Court has found that statutes which curtail or burden the exercise of constitutional rights are valid only if the statute is the least restrictive means to a legitimate government end. Hence, the procedural means to a legitimate government end must be defined as narrowly as possible to prevent any unnecessary infringement of constitutional rights. NAACP v. Alabama, 377 U.S. 288, 307-08 (1964).
55. Id. at 756-58.
While the "guilty plea" cases, such as *Brady*, could have been distinguished, the Court has declined to do so. In *McGautha v. California*, for instance, the Court confronted a challenge to Ohio law, which provided for the joint determination of guilt and punishment in a single trial proceeding in capital cases. The petitioner contended that this scheme permitted him to remain silent on the issue of guilt only at the cost of surrendering his opportunity to address the jury on the sentencing question. Because his right to be heard on the sentencing issue may be viewed as an aspect of due process, petitioner submitted that the Ohio procedure created an intolerable conflict between constitutional rights, similar to the conflict condemned in *Simmons v. United States*.

However, Mr. Justice Harlan, author of the *Simmons* opinion, reasoned for the Court in *McGautha* that the burden on the petitioner's fifth amendment rights was insubstantial. *Simmons* was to be applied in view of *Brady* and the other "guilty plea" cases. Finding that criminal procedure and the legal system generally are replete with situations requiring the making of difficult judgments, the Court stated that a defendant's constitutional right to choose whichever option he prefers does not constitutionally forbid a requirement that he make a choice. "The threshold question," concluded the Court, "is whether compelling the election impairs to an appreciable extent any of the policies behind the rights in-

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493 (1967) as an example, he countered that the involuntary plea concept must also include a surrender of rights "influenced by considerations that the government cannot properly introduce," 397 U.S. at 802, such as the threat of an unconstitutional death penalty provision (or the threatened loss of public employment).

57. One option was to hold the result in United States v. Jackson prospective only. As the dissent noted, 397 U.S. at 807, the result of the *Brady* holding was that those who challenged the death penalty provision on direct appeal would prevail, while those who pled guilty were deprived of any remedy.

More practically, the *Brady* result could be explained in terms of the near impossibility of accurately detecting those instances in which "the death penalty scheme exercised a significant influence" on the decision to plead guilty. Cf. 397 U.S. at 808 (separate opinion). Given the possibly great lapses of time involved, and the near certainty that all testimony or other evidence is that of prisoner or his counsel, the fact-finding process would be greatly hampered.


The single proceeding required by Ohio law did not unconstitutionally limit or burden the defendant's right to remain silent on the issue of guilt by depriving him of his right to address the jury on the sentencing question. Subsequent decisions have tended to follow the lines established in McGautha. In determining the legitimacy of challenged practices, emphasis has often been placed upon whether a practice furthers rational, permissible state goals. The limitations and burdens have at times been found to be merely incidental to a state's legitimate purpose, even though Jackson rejected such an approach. In fact, Jackson has occasionally been interpreted as merely establishing that a challenged practice must not be a means of punishing or penalizing the assertion of constitutional rights. Moreover, since McGautha, there has been little effort to determine whether a less restrictive alternative would serve equally well a state's legitimate goals.

Nevertheless, Garrity and its progeny can be easily reconciled with the cases following from Simmons. In Garrity, the Supreme Court recognized the state's substantial interest in determining whether public employees were faithfully executing their duties. However, the Court found that these legitimate interests of the state would not be prejudiced by granting use immunity, which would allow the state to fully investigate the conduct of public employees. Waivers co-

61. 402 U.S. at 213.
62. Id. at 213-15.
66. Id. at 32-33 n.20. The fact that Jackson involved the death penalty has also been underscored. See Corbitt v. New Jersey, 439 U.S. 212, 217 (1978).
67. Ludwig v. Massachusetts, 427 U.S. 618 (1976), is perhaps the best example. Id. at 634-38 (Stevens, J., dissenting).
erced through threats of removal from public employment were viewed as wholly separable from the state's legitimate goals, and thus, as a needless burden which impaired the policy of the privilege.

IV. LIMITATIONS AND BURDENS ON THE ASSERTION OF THE PRIVILEGE IN CIVIL PROCEEDINGS

Garrity and its progeny had an immediate impact on the assertion of the privilege against self-incrimination in civil cases. During the period in which the Supreme Court was developing its approach to the burdens and limitations on the exercise of constitutional rights, including the privilege against self-incrimination, two cases in particular were decided which clarified the implications of Garrity on civil proceedings.

The first\(^2\) of the two cases concerned the misbranding and interstate shipment of drugs. The defendants were a corporation, its president, and vice-president. While the defendants were under criminal investigation, the government filed a civil suit for seizure of certain allegedly misbranded company products, and served extensive written interrogatories on the defendants. Before the interrogatories were answered, defendants were notified that the government contemplated criminal action against them in connection with the misbranded products.

After the defendants' objections to the interrogatories were overruled, and after their motion for a stay of the civil proceeding pending the outcome of the contemplated criminal action was denied, they filed answers to the interrogatories. The Sixth Circuit Court of Appeals later found that much of the information supplied in answer to the interrogatories was necessary to the government's criminal case.\(^3\) The criminal trial court, however, denied the defendants' motion to quash the indictment or to suppress all evidence and leads derived from the civil discovery.

On appeal, the Sixth Circuit held that the decision to answer the interrogatories was in no sense voluntary.\(^4\) The court

\(^3\) Id. at 572.
\(^4\) Id. at 573.
believed that the defendants had three options open to them after the trial court had overruled the corporation's objections to the interrogatories: (1) they could have persisted in their refusal to answer, which almost certainly would have resulted in the loss of the civil action, (2) they could have answered falsely, subjecting them to a perjury prosecution, or (3) they could have answered truthfully, supplying the government with evidence for use in its criminal prosecution. The court of appeals held that it was unconstitutional to force the natural person defendants—the president and vice-president—to elect one of these three choices, because these choices unduly burdened the defendants' constitutional privileges as outlined in Garrity. The individual defendants were unconstitutionally put to a choice of either answering the interrogatories fully or suffering a loss of their property. In addition, the court rejected an argument that defendant Kordel, the president and dominant corporate personality, suffered no infringement of his privilege because he personally made no claim to the seized property and signed no answers to interrogatories. The court reasoned that the corporation was merely the device through which defendant Kordel sold his products. However, the court affirmed the corporation's criminal conviction, noting that it possessed no constitutional privilege of its own.75

The Supreme Court reversed in United States v. Kordel76 and reinstated the individual defendants' convictions. The Court noted that defendants' counsel never asserted any fifth amendment objection to the interrogatories, and indeed, expressly disavowed any self-incrimination issue with respect to the corporation. Thus, the court of appeals erred in describing

75. Id. at 575. The Supreme Court later indicated that the corporation's conviction was originally reversed in the court of appeals, then reinstated on the government's petition for rehearing. United States v. Kordel, 397 U.S. 1, 3 n.2 (1970). The Supreme Court denied the corporation's certiorari petition. 395 U.S. 935 (1969).

Once having agreed with the settled principle that a corporation receives no protection from the self-incrimination clause (note 35 supra, and accompanying text), it is remarkable that the court did not correct its discussion of Kordel's rights, 407 F.2d at 575. The appellate court in effect pierced the corporate veil in defendant Kordel's favor, allowing him to assert his individual privilege with respect to interrogatories addressed to his corporation, the sole claimant in the civil action. Kordel did not personally sign the answers on behalf of the corporation; they were signed by codefendant Feldten, the corporate vice-president.

the options available to the individual defendants; a fourth option was the assertion of their constitutional privilege. 77 Further, the Court found that the absence of any corporate privilege against self-incrimination does not bar an individual assertion of the privilege, where appropriate, in civil proceedings. 78 In the event that no corporate agent could have signed answers to the interrogatories without risking self-incrimination—a very unlikely situation 79—the Court was willing to assume that the appropriate remedy might have been a protective order postponing civil discovery until the conclusion of the criminal action. However, the record demonstrated that "nobody associated with the corporation asserted his privilege at all." 80

As to defendant Kordel, who never signed any answers to interrogatories, the Court concluded that not only was he not in a position to claim the privilege, but, given the manner in which corporations must act, that is, through agents, the corporation could not be viewed as asserting the privilege on Kordel's behalf. 81 The Court further ruled that the trial court

77. Id. at 7. Fed. R. Civ. P. 26(b)(1) is clear that privileged matters are not discoverable. However, the law generally requires that the privilege specifically be asserted. E.g., Garner v. United States, 424 U.S. 648, 653-56 (1976); United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 112-13 (1927).


79. Fed. R. Civ. P. 33(a), in pertinent part provides that "if the party served is a public or private corporation or a partnership or association" then the interrogatories shall be answered by "any officer or agent, who shall furnish such information as is available to the party."

As the Court noted in Kordel, 397 U.S. at 8, the corporation is obligated to appoint an agent who can answer the interrogatories without fear of self-incrimination, furnishing such information as is available to the corporation. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973) (and the knowledge of its officers and employees, relative to the subject matter of the action, is imputed to the corporation for this purpose); United States v. 3963 Bottles, More or Less, Etc., 265 F.2d 332 (7th Cir. 1959); United States v. 42 Jars, Etc., 162 F. Supp. 944 (D.N.J. 1958), aff'd 264 F.2d 666 (3d Cir. 1959). The last two decisions cited agree that even the corporation's attorney would be an adequate agent for this purpose of preparing and signing the answers.

80. 397 U.S. at 9.

81. Id. at 10: "The Government brought its libel against the goods; the corporation, not Kordel, appeared as claimant. The Government subsequently prosecuted Kordel as an officer of the company. If anyone has sought to cut through the corporate facade so far as the Fifth Amendment privilege is concerned, it is Kordel: he has, in effect, attempted to fashion a self-incrimination claim by combining testimony that he never gave and an assertion of the privilege that he never made with another
was not constitutionally obliged to stay the civil action pending the outcome of any possible criminal proceedings. In addition, the government's conduct was not found to offend due process principles.

*United States v. Kordel* demonstrates that the fifth amendment privilege does not bar the pursuit of civil remedies against an individual when he is under the shadow of potential criminal action. There is nothing unconstitutional about requiring an individual either to assert his privilege or to waive it during a civil proceeding. The use of his testimony in a subsequent criminal proceeding is permissible if the individual waives his privilege by failing to assert it in the civil proceeding. The privilege, even if broadly interpreted as in *Garrity*, does not exempt the individual from the ordinary burdens of a civil proceeding. However, if an individual chooses to assert his constitutional privilege in a civil action, he will be deprived of any benefit that his testimony might have given him, since *Brown v. United States* construed a voluntary offer of testimony as a waiver of the privilege. Because his chances for a successful claim or defense may therefore be jeopardized, his decision to assert the privilege is not without civil consequences.

The difficult decision of whether to assert the privilege raises another question relevant to civil litigation: may an adversary in a civil action comment in closing argument upon the failure of the defendant to testify in the proceeding? In other words, should any legal weight be given to the defendant's silence in the face of adverse evidence? In *Palmigiano v. Baxter*, this question arose in the context of a prison disciplinary proceeding. A plaintiff brought a civil rights action pursuant to 42 U.S.C. section 1983, alleging deprivations of his procedural rights in the administration of prison disci-

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assertion of the privilege that his company never had."
82. 397 U.S. at 11.
83. Id.
84. 397 U.S. at 12-13.
86. An assertion of the privilege has never been conceived of as a substitute for exculpatory or affirmative evidence in a civil proceeding. See *In re Sterling-Harris Ford, Inc.*, 315 F.2d 277 (7th Cir. 1963); *Sahn v. Pagano*, 302 F.2d 629 (2d Cir. 1962).
87. 487 F.2d 1280 (1st Cir. 1973).
He contended that, just before his disciplinary hearing commenced, he was warned by a deputy warden that his silence could be used against him. Plaintiff alleged that his right against self-incrimination was infringed at the hearing because he was not assured of use immunity with respect to incriminating testimony, and that he was penalized for his silence. 89

In its initial decision, 90 the court of appeals held that Gar- rity and its progeny applied. In the court's view, the plaintiff was faced with the dilemma of either remaining silent "and risking greater punishment from the disciplinary board" 91 or speaking out and risking self-incrimination in a subsequent criminal proceeding. The court concluded that a prisoner facing disciplinary action is entitled to use immunity for statements made at his disciplinary hearing, and should be notified of this right at the outset. 92

The Supreme Court remanded the case for consideration in light of an intervening decision, 93 and the court of appeals reaffirmed its earlier decision, but not without some major modifications. 94 The court withdrew any suggestion that a prisoner is constitutionally entitled to use immunity for his statements at a disciplinary hearing. 95 Moreover, the court withdrew its finding that prison officials may compel a pris-
oner's testimony where use immunity has been granted. However, the court again held that a prisoner's silence at a disciplinary hearing may not be used against him at that time or in any future proceeding.

The Supreme Court reversed. The Court took an important first step in stating, without discussion, that prison disciplinary hearings are not criminal proceedings. Accordingly, the rule of Griffin v. California was not directly applicable. The Court then considered the question of whether it is permissible to attach evidentiary weight to a party's silence in a civil proceeding, assuming that he is entitled to assert the privilege. The Court held that an affirmative answer to this question does not contradict the principle of Garrity and its progeny. In those cases, the Court said, the state directly sought to compel testimony without granting immunity, through the imposition of threats and reprisals in cases where the individual failed to freely testify. In the present case, the state had not insisted or even asked that the prisoner waive

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96. The court's remarkable position is as follows:
[W]e now realize that allowing prison officials to coerce testimony where they wish by extending immunity has awesome implications. It cheapens the Fifth Amendment. Immunity could be given where it would be scant recompense for the consequences of coerced testimony. There is also the institutional problem. Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior decision did not take such considerations into account. 510 F.2d at 536. Perhaps the appellate court was justified in its perception that compelling testimony upon a grant of use immunity "cheapens" the Fifth Amendment, but that issue was no longer open to dispute in 1974. See notes 20-21, supra, and accompanying text. Only two years previously the Supreme Court had held that use immunity satisfies the constitutional requirement, reaffirming that immunity statutes have "become part of our constitutional fabric." Kastigar v. United States, 406 U.S. 441, 447 (1972) (quoting Ullmann v. United States, 350 U.S. 422, 438 (1956)). Kastigar confirms that use immunity is constitutionally adequate recompense for the consequences of coerced testimony.


98. While a disciplinary hearing is not a conventional criminal proceeding, it is arguable that a proceeding in which the prisoner risks a substantial further deprivation of liberty is sufficiently criminal that the Griffin rule should apply. See notes 40 & 41 and accompanying text, supra. Compare with note 19, supra, and text accompanying. Plaintiff was placed in punitive segregation as a result of this proceeding. 425 U.S. at 313. A detailed examination of this question is beyond the scope of this article.


100. The Court has since viewed Baxter as stating a rule for civil proceedings generally. See Lefkowitz v. Cunningham, 431 U.S. 801, 807 n.5 (1977).
his privilege. He was informed of his right to remain silent, but was also told that his silence could be used against him. The state did not automatically find him guilty of a disciplinary offense. His silence alone was not sufficient to support an adverse decision by the disciplinary board. The silence of a party to a civil proceeding may be given such evidentiary weight as is warranted by the facts without "penalizing" him for his assertion of the privilege. The court of appeals had focused solely upon the prisoner's fifth amendment interest and, consequently, its rule had "little to do with a fair trial and derogate[d] rather than improve[d] the chances for accurate decisions." 

The dissent criticized the Court's approval of a rule permitting adverse inferences in civil actions, emphasizing that such inferences may well be acceptable in civil cases involving only private parties, but arguing that the privilege is infringed upon where a government official knowingly seeks information that may be self-incriminating and then draws adverse inferences from the individual's privileged decision to remain silent. Because a fundamental purpose of the privilege is to guard against governmental inquisition of suspected criminals, the dissent reasoned that a rule permitting adverse inferences would aid, and even encourage, government circumvention of our adversary system.

The rules to be derived from both *Kordel* and *Baxter* are consistent with *Simmons v. United States* and the more recent cases concerning the burdening of constitutional rights. Neither *Kordel* nor *Baxter* punish or penalize one who asserts the privilege against self-incrimination, and in that sense the *Garrity* line of cases is inapposite. Also, neither rule needlessly burdens an assertion of the privilege because each is fully supported by a legitimate public interest. In *Kordel*, the strong public interest in timely and efficient enforcement of statutory obligations was recognized. In *Baxter*, the Court

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101. *Compare with* note 91, supra.
102. 425 U.S. at 319.
103. 425 U.S. at 334 (Brennan, J., dissenting).
105. 397 U.S. 1, 11 (1970) (footnote omitted):
The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibil-
implicitly concluded that a general rule permitting adverse inferences in civil proceedings, as described above, would further the likelihood of a fair trial and justice.

Kordel and Baxter also do not impair to any appreciable extent the policies underlying the privilege. As Brown v. United States demonstrates, even where the government is a participant in the civil litigation and a threat of self-incrimination is apparent, the privilege will not be construed in disregard of the interests of the adversary or the interests of the judicial process in ascertaining the truth. A degree of tension between the state's interests and an individual's right to remain silent is inevitable, and a rule that simply immunizes one who asserts the privilege from the conventional rules of civil justice would overreach the policies of the privilege and frustrate the civil enforcement of federal law. The civil process confers no special powers on the government as litigant. The judicial process itself is a safeguard against political, religious, or other forms of persecution. The rigorous Hoffman standard for overruling unjustified assertions of the privilege still applies with full force in civil litigation, and the principles expressed in Garrity prohibit judicial devices that punish or penalize one who asserts the privilege in civil litigation.

Kordel and Baxter merely demonstrate that an assertion of the privilege in a civil proceeding is not without rational, legitimate consequences.

106. See notes 97-101 supra, and accompanying text.

107. 425 U.S. at 319: "It is important to note here that the position adopted by the Court of Appeals is rooted in the Fifth Amendment and the policies which it serves. It has little to do with a fair trial and derogates rather than improves the chances for accurate decisions."


110. Compare with notes 68-71 supra, and accompanying text.
In two particular areas, the federal courts have been groping for an appropriate method of analysis to use in solving privilege problems. The first problem area concerns the distinction between plaintiffs and defendants in civil proceedings and the different consequences which flow from their respective assertions of the fifth amendment privilege. The second concerns the inability of an artificial legal entity, such as a corporation, to assert the personal privilege against self-incrimination.

Various courts have held that a plaintiff who asserts the fifth amendment privilege is rightly treated less favorably than is a defendant who asserts the privilege.\textsuperscript{111} Since it is the plaintiff who seeks to disturb the status quo through litigation, the shield afforded by the privilege cannot be converted into a plaintiff's sword. Many federal courts have derived this proposition from\textit{ Lyons v. Johnson,}\textsuperscript{112} an appellate decision which utilized the shield/sword metaphor.\textsuperscript{113} \textit{Lyons} was a civil rights action in which the plaintiff, proceeding\textit{ pro se}, resisted any and all discovery on grounds of the fifth amendment privilege. Faced with either abandonment of the discovery process or dismissal of the plaintiff's claim, the court chose the latter. While a party may assert the privilege in response to specific discovery requests, he cannot, for example, refuse to be deposed altogether.\textsuperscript{114} Nonetheless, a number of federal district courts chose to follow\textit{ Lyons} in less justifiable circumstances.\textsuperscript{115} Some courts have held that a plaintiff construc-

\begin{itemize}
\item \textsuperscript{112} 415 F.2d 540 (9th Cir. 1979), \textit{cert. denied}, 397 U.S. 1027 (1970).
\item \textsuperscript{113} Id. at 542: "Her obtaining of this shield, however, could not provide a sword to her for achieving assertion of her claims against defendants without having to conform to the processes necessary to orderly and equal forensic functioning."
\item \textit{But see} Campbell v. Gerrans, 692 F.2d 1054 (9th Cir. 1979).
\item \textsuperscript{114} E.g., Nat'l Life Ins. Co. v. Hartford Accident and Indemnity Co., 615 F.2d 595 (3d Cir. 1980); United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974), \textit{cert. denied}, 420 U.S. 925 (1975); Foss v. Gerstein, 58 F.R.D. 627 (S.D. Fla. 1973). This point is intuitively apparent, because otherwise the court is deprived of any meaningful opportunity to determine whether the party's fear of self-incrimination is justified.
\end{itemize}
tively waives the privilege by filing a lawsuit, while other courts have simply concluded that it is unfair for a plaintiff to have his lawsuit and his privilege too.\(^{116}\)

A different trend had its inception in suits challenging tax jeopardy assessments.\(^{117}\) By statute,\(^{118}\) injunctions are rarely available to restrain federal tax assessments,\(^{119}\) in part because it is desired that litigation against the tax collector be confined to a refund action.\(^{120}\) Jeopardy assessments are often utilized against taxpayers engaged in illegal activities.\(^{121}\) As a


Now what about privileges in private litigation? Some, such as the attorney-client privilege, could not normally be held to be waived by bringing or defending a suit, for in the attorney-client situation the privilege is designed to promote confidential relations that may well deal with the very suit in question. But assume that plaintiff seeks to replevy some bonds and his title is the basic issue; and to a properly framed and relevant question concerning ownership he refuses to answer on the ground that his answer might tend to incriminate him. While it would be reasonable not to compel a disclosure and thus respect his claim to that extent, does fairness not demand that plaintiff's action be stayed, for reasonable time, to permit him to change his mind and, in the absence of a change, to dismiss his action? In the converse situation if the defendant invokes the privilege, does fairness not demand that plaintiff's claim of title be taken as admitted?

This passage is memorable, if not for the waiver theory, then because Moore envisions no distinction between the position of a plaintiff and a defendant. In his view, both adversaries should be subject to this waiver theory, on grounds of fairness.

118. 26 U.S.C. § 7421(a).
119. A typically unsuccessful example is Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975).
121. In considering the 1976 amendments to existing tax legislation, the House and Senate Committee reports called attention to a G.A.O. report which concluded that "most" jeopardy and termination assessments were being utilized against taxpayers engaged in illegal activities. H.R. REP. No. 94-658, 94th Cong., 1st Sess. 302 (1975); S. REP. No. 94-938, 94th Cong., 2d Sess. 362-63 (1976). Both are reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3198-99, 3792-93.
result, such taxpayers are forced to bring a refund action and thereby become plaintiffs. Hence, if refund actions could be dismissed because a plaintiff asserted his fifth amendment privilege, many plaintiffs would have no judicial recourse against an unjustifiable or excessive assessment.\footnote{122}

In several such instances,\footnote{123} the government has sought dismissal of the refund action following the plaintiff's assertion of the privilege in response to relevant discovery. The appellate courts have uniformly rejected the government's position.\footnote{124} Recognizing the plaintiff's due process right in his property, these courts have proposed a variety of remedies. For example, after a complaint is timely filed, the proceedings might be stayed until the conclusion of any related criminal action, or until the expiration of all applicable criminal litigation periods.\footnote{125} Alternatively, the government could secure a grant of use immunity for a plaintiff's testimony.\footnote{126}

This approach has not been restricted to tax assessment cases; there are other situations where an individual must become a plaintiff to recover property wrested from him by the government.\footnote{127} However, even in dissimilar situations, the dismissal of a plaintiff's complaint for his assertion of the self-incrimination privilege to block relevant discovery has been viewed as an unconstitutional punishment or penalty for exercising one's right to remain silent.\footnote{128} Such dismissals have also been viewed as a deprivation of a plaintiff's due process

\begin{itemize}
\item \footnote{122}{The 1976 Tax Reform Act included a relevant amendment, 26 U.S.C. § 7429.}
\item \footnote{123}{Thomas v. United States, 531 F.2d 746 (5th Cir. 1976); Shaffer v. United States, 528 F.2d 920 (4th Cir. 1975). See Iannelli v. Long, 487 F.2d 317 (3d Cir. 1973), \textit{cert. denied}, 414 U.S. 1040 (1973).}
\item \footnote{124}{Id.}
\item \footnote{125}{See Iannelli v. Long, 487 F.2d 317 (3d Cir. 1973), \textit{cert. denied}, 414 U.S. 1040 (1973).}
\item \footnote{126}{Id.}
\item \footnote{127}{See Iannelli v. Long, 487 F.2d 317 (3d Cir. 1973), \textit{cert. denied}, 414 U.S. 1040 (1973).}
\item \footnote{128}{Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), \textit{petition for rehearing denied}, 611 F.2d 1026 (5th Cir. 1980); Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979) (limiting scope of court's prior decision in Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969), \textit{cert. denied}, 397 U.S. 1027 (1970)); Justice v. Laudermilch, 78 F.R.D. 201 (M.D. Pa. 1978).}
\end{itemize}
The question remains, however, whether a plaintiff's privilege against self-incrimination and his right to procedural due process outweigh his adversary's due process rights and the public's interest in ascertaining the truth. Some courts have assumed that any judicial response to a valid assertion of the privilege offends the Garrity principle. One appellate court has held that the trial judge must balance the competing constitutional and procedural rights. The court reasoned that dismissal was generally an improper sanction for plaintiff's assertion of the privilege against relevant discovery, but might be warranted as a remedy to prevent unfairness. However, dismissal would be appropriate only when other less burdensome remedies would be ineffective in preventing unfairness to a defendant. Thus, the appellate court concluded that the plaintiff's deposition should be stayed until the applicable criminal statute of limitations had expired.

The second, more limited, problem concerning the privilege in civil cases arises from the rule that artificial legal entities cannot assert the privilege. For example, when a corporation is a party to a civil proceeding, its adversary is entitled to serve interrogatories upon it and to depose its directors, officers and other managing agents. While the corporation has

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129. Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1087-88 (5th Cir. 1979), petition for rehearing denied, 611 F.2d 1026 (5th Cir. 1980).
130. E.g., Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979); Justice v. Laudermilch, 78 F.R.D. 201 (M.D. Pa. 1978).
131. Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), petition for rehearing denied, 611 F.2d 1026 (5th Cir. 1980).
132. 608 F.2d at 1087 n.6.
133. Id.
134. The Wehling court's ruling carefully left open a variety of options: (1) Defendant might seek a lesser remedy than dismissal upon a showing that it was prejudiced by the stay, and if it were deprived of crucial information which otherwise would have been available then even dismissal might be appropriate; (2) All discovery not implicating plaintiff's privilege should proceed, and defendant could choose to waive the remaining discovery and proceed to trial; and (3) The court acknowledged possible difficulties if plaintiff is indicted (for example, just before the statute of limitations runs) and briefly discussed some factors to be considered by the trial judge then in determining whether or not to extend the stay. Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), petition for rehearing denied, 611 F.2d 1026 (5th Cir. 1980).
no privilege against self-incrimination, its personnel may assert their privilege individually with respect to corporate matters in proper circumstances.\textsuperscript{137} Arguably, the corporation may be subjected to discovery sanctions where corporate agents refuse to provide relevant information, even if those individuals justifiably fear personal self-incrimination.\textsuperscript{138}

The principles applied to the distinction between assertions of the privilege by plaintiffs and assertions by defendants are also pertinent to this question. While a corporation possesses no constitutional privilege, it does have a due process right to a judicial determination of its claims or defenses.\textsuperscript{139} Even though the burden of sanctions upon the corporation may not present a \textit{Garrity}-type problem,\textsuperscript{140} the corporation should be accorded \textit{Garrity}-type protection where the failure to provide relevant information stems from the fifth amendment rights of corporate personnel. Some federal courts, however, have rejected this view.\textsuperscript{141}

A narrow emphasis on the applicability of the fifth amendment privilege threatens to distort the judgment at issue. The distinctions drawn between plaintiffs and defendants, and individuals and artificial entities, may obscure rather than clarify the underlying values at stake.

VI. \textsc{Reconciliation of the Privilege in Civil Proceedings}

The due process interests of each party and the judicial interest in ascertaining the truth are at the heart of any attempt to reconcile the fifth amendment privilege with civil litigation. Any assertion of the privilege in a civil proceeding implicates competing constitutional and procedural rights.\textsuperscript{142}

\textsuperscript{137} Curcio v. United States, 354 U.S. 118 (1957).
\textsuperscript{140} \textit{See} George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968).
\textsuperscript{141} \textit{See} note 138 \textit{supra}.
\textsuperscript{142} Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084 (5th Cir. 1979), \textit{petition for rehearing denied}, 611 F.2d 1026 (5th Cir. 1980).
Consequently, rather than emphasizing decisive ultimate values, a range of solutions must be considered, even if not all of the solutions are suitable in every situation.

An initial option might be to allow the trial judge to compel the witness to answer relevant questions over his assertion of the privilege, with the understanding that under Garrity, the compelled testimony and its fruits would be excluded in any subsequent criminal proceeding. This approach would, in effect, constitute an indirect judicial grant of use immunity, since the trial judge would compel the testimony knowing full well that the testimony could not be used in a subsequent criminal action.

The federal courts, however, have uniformly rejected any judicial grant of immunity based upon nonconstitutional considerations. Because the power to grant immunity has traditionally been funneled by statute through a designated group of federal officials, the courts have viewed this authority as denied to federal judges. The federal immunity statute reserves only a ministerial role for the judiciary, thereby preventing judges from making the necessary nonconstitutional policy judgments which enter into a decision to grant immunity. Situations to be distinguished, however, are those where the trial judge erroneously overrules an assertion of the privilege; where testimony is compelled under a state immunity grant that would otherwise subject the witness to federal prosecution; and, perhaps, where due process requires the immunization of a witness whose testimony is essential to a criminal defense. The judiciary has fashioned rights of immunity in these circumstances only because it is constitutionally required. Thus, any judicial decision to expand the

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143. 385 U.S. 493 (1967).
144. In re Corrugated Container Anti−trust Litigation, 620 F.2d 1086, 1094−95 (5th Cir. 1980); In re Folding Carton Antitrust Litigation, 609 F.2d 867, 872 n.11 (7th Cir. 1979) (dictum); In Re Daley, 549 F.2d 469 (7th Cir.), cert. denied, 434 U.S. 829 (1977); Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969).
**Garrity** immunity is unauthorized and reversible error.\(^1\)

Another proposed option is to allow the trial judge to compel testimony subject to a protective order barring public access to the testimony.\(^2\) Testimony given pursuant to a civil protective order may be insulated from civil discovery.\(^3\) However, due to the powers of a grand jury,\(^4\) a civil protective order could not assure nondisclosure to criminal discovery. Moreover, this proposal assumes that **Garrity** would bar the admission of the testimony, or its fruits, in a criminal proceeding if the protective order were violated.\(^5\) In view of the cases denying that there is judicial power to grant immunity,\(^6\) an attempt to compel testimony by simply granting a

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149. *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 872 n.11 (7th Cir. 1979) (dictum).

What if the witness' testimony previously has been compelled under a grant of use immunity in a criminal proceeding, and that testimony is utilized in questioning the witness during a civil proceeding? It would appear that any testimony so elicited in the civil proceeding is "tainted" by its derivation from the prior compelled testimony, and cannot subject the witness to a risk of subsequent prosecution since its exclusion would be required.

Various courts have held that, accordingly, the witness cannot refuse the testimony in the civil proceeding on fifth amendment grounds, since the inevitability of the "taint" removes the threat of self-incrimination. Little Rock School Dist. v. Borden, Inc., [1980-2] TRADE CAS. (CCH) ¶ 63,522 (8th Cir. Sept. 9, 1980); *In re Starkey*, 600 F.2d 1043 (8th Cir. 1979); *Patrick v. United States*, 524 F.2d 1109, 1120 (7th Cir. 1975) (alternative holding). *Contra, In re Corrugated Container Anti-trust Litigation*, 620 F.2d 1086 (5th Cir. 1980).

Once a witness has submitted immunized testimony, the incremental hindrance of the prosecutor's function if that testimony is used in a civil proceeding must be slight. If a subsequent criminal proceeding is to be brought (other than for perjury in the immunized testimony), the government is already committed to its heavy affirmative burden of proving that its evidence is not derived from the immunized testimony or its fruits by demonstrating an independent, legitimate source for it. *Kastigar v. United States*, 406 U.S. 441, 460 (1972). Further, the option of securing a separate grant of immunity for the civil proceeding (thus respecting executive prerogatives to the utmost) may not even be available, as discussed in the text below.


154. *See* notes 144-49 *supra*. 
PRIVILEGE AGAINST SELF-INCrimINATION

Since the discretion to grant immunity falls exclusively within the executive branch of government, a request could be made that the prosecutor secure a grant of immunity for the purposes of the civil proceeding. Where the government is not a participant in the civil litigation, however, no grant of immunity can or will be extended, although this interpretation is not required by the text of the immunity statute. The possibility of a grant of immunity remains open when the government is a participant in the civil proceedings.

Assuming circumstances in which the testimony cannot be compelled, one alternative may be to stay the potentially incriminatory discovery until all criminal actions have terminated and all applicable criminal statutes of limitation have run. Kordel, however, established that a civil defendant is not constitutionally entitled to a stay of the civil proceeding simply because he fears self-incrimination. But, this does not rule out, as Kordel recognized, the possibility that a stay may be appropriate for nonconstitutional policy reasons. Therefore, a stay of the potentially incriminatory discovery is certainly available as an alternative to more intrusive remedies. However, a stay can be far from a perfect solution. While a plaintiff may be expected to prefer a speedy disposition, once his fear of self-incrimination has eased, a civil defendant may have no desire to proceed. For instance, long delays may discourage plaintiffs from going forward with even meritorious claims because of burdensome financial


158. 397 U.S. at 11. Appellate decisions rejecting constitutional claims of this sort are common. See, e.g., Diebold v. Civil Service Comm’n, 611 F.2d 697 (8th Cir. 1979); United States v. White, 589 F.2d 1283 (5th Cir. 1979); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977); DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970). But cf. S.E.C. v. Stewart, 476 F.2d 755 (2d Cir. 1973) (mandamus petition refused).

159. 397 U.S. at 12 n.27.

consequences.

If the incriminating testimony involves a continuing criminal offense or conspiracy, then the necessary length of the stay may be impossible to determine because only a criminal trial would define the point at which the statute of limitations period would expire.\textsuperscript{161} Also, the witness may argue that the testimony might furnish a link in a chain of evidence implicating him in an incomplete offense. In fact, given the limited permissible inquiry into the validity of a privilege claim,\textsuperscript{162} the trial court often may not be able to fix the duration of a stay with reasonable certainty. Hence, a discovery stay may often be unsatisfactory, thus forcing the trial court to consider other alternatives. Moreover, the other party should be entitled to proceed to trial without the privileged testimony,\textsuperscript{163} and may be entitled to some ancillary relief.

Another viable alternative is the Baxter rule\textsuperscript{164} which permits the fact finder to consider a party's assertion of the privilege, even though there may be some confusion as to precisely what may be inferred from the assertion. Baxter held that a party's silence, in the face of adverse evidence, may be given whatever weight the finder of fact deems it deserves under the circumstances. The inference, however, does not arise from the mere assertion of the privilege, but from the party's failure to come forward in rebuttal at trial with evidence within his power to produce.\textsuperscript{165} Thus, opposing counsel may properly

\textsuperscript{161} When a conspiracy offense is at issue, it must be shown that the conspiracy still existed and that at least one overt act (where one is an element of the offense) occurred within the applicable limitation period prior to the return of the indictment. Grunewald v. United States, 353 U.S. 391, 396-97 (1957); United States v. Nowak, 448 F.2d 134 (7th Cir.), cert. denied, 404 U.S. 1039 (1972). Evidence of unlawful agreement and of other conduct occurring beyond the limitation period prior to the return of the indictment is admissible as showing the scheme and intent. E.g., United States v. Ashdown, 509 F.2d 793 (5th Cir.), cert. denied, 423 U.S. 829 (1975).

\textsuperscript{162} 18 U.S.C. § 3282 (1976) provides a five year limitation period for noncapital federal offenses, except where a different period is fixed by statute. Pursuant to 18 U.S.C. § 3281 (1976), there is generally no limitation period for federal capital offenses.

\textsuperscript{163} Wehling v. Columbia Broadcasting Sys., 611 F.2d 1026, 1027 (5th Cir. 1980). This point is implicit in United States v. Kordel, 397 U.S. 1 (1970), which held that the individual defendants could have asserted their fifth amendment privileges in response to discovery, where appropriate, but also that these defendants were not constitutionally entitled to a stay of the civil action pending the criminal outcome.

\textsuperscript{164} See 425 U.S. 308 (1976).

\textsuperscript{165} See Ratner, Consequences of Exercising the Privilege Against Self-Incrimi-
argue that his client's evidence is undisputed and determinative due to the opposing party's assertion of his right to remain silent, and the fact finder may give this factor such weight as he deems appropriate.

Another remedy to be considered by the trial court is an order which precludes the party asserting the privilege from offering other evidence that bears on the points covered by the refused testimony. This remedy prevents any utilization of the privilege to produce a favorably incomplete showing on factual issues. However, such an order may effectively preclude a claim or defense where, for example, the refused testimony relates to the central issues in a lawsuit. In order to utilize such a remedy, the trial court must obtain a comprehensive understanding of the disputed factual questions and their relative importance. An order dismissing the action, or even a default judgment, may be justified after weighing all the relevant factors.

Access to related proof from other sources may mitigate any unfairness that results from a party claiming the privilege. However, the court should consider the probative value of the refused testimony, and may conclude that a party's access to other proof is inadequate. The evaluation of a dispute is a slippery task at the discovery stage, and is perhaps better reserved for consideration near the time of trial. If a witness


166. Contrast the rule for criminal trials, Griffin v. California, 380 U.S. 609 (1965). In Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 213 (1958), where no fifth amendment privilege was involved (but the failure to produce documents was involuntary), the Court noted the possibility that "in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events."


has made his privileged information available to one party, however, another party should be permitted to discover it without need of a special ruling.\(^{171}\)

The nature of the proceeding and the parties may be a relevant consideration in framing an appropriate remedy. Because the fifth amendment privilege was created as a protection against governmental abuse of individuals, the courts may be less receptive to civil remedies that indirectly discourage a party from asserting his privilege where the government is the adverse party. Similarly, the due process clause of the fifth amendment is intended to prevent arbitrary government action against private persons. Although the government is also entitled to a fair trial,\(^{172}\) the courts may be more reserved in fashioning remedies to protect a party's assertion of his privilege when the civil interests of the government, rather than those of a private party, are at stake. Where a civil proceeding by the government is closely linked to the enforcement of a criminal law,\(^{173}\) or where a private plaintiff sues to recover property taken from his possession by the govern-

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171. If, for example, a present or former employee of a corporate defendant has discussed his knowledge with corporate counsel, then the adversary can discover the information. The corporation cannot assert the constitutional privilege in response to interrogatories, and must appoint an agent who can sign the answers without fear of self-incrimination. Even the corporation's attorney can be a sufficient agent for purposes of preparing and signing answers. *See* note 79 *supra*. The answers to interrogatories must, pursuant to Fed. R. Civ. P. 33(a), give such information as is available to the corporation. Such information would include information known to its corporate counsel. Hickman v. Taylor, 329 U.S. 495, 504 (1947) (dictum); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1210-11 (8th Cir. 1973). While the discovery may implicate some individual in criminal activity, the person signing answers to interrogatories or answering deposition questions cannot assert the privilege for another person who is so implicated, and the person implicated cannot interpose the privilege to block discovery from another. *In re* Folding Carton Antitrust Litigation, 76 F.R.D. 417, 419 (N.D. Ill. 1977). *See* Fisher v. United States, 425 U.S. 391, 396-401 (1976).

172. The work product doctrine should not bar production of any such statement given to corporate counsel, because the substantial need/undue hardship exception to Fed. R. Civ. P. 26(b)(3), would apply. Thus, the other party should be able to discover the gist of the information through interrogatories. *See* Hickman v. Taylor, 329 U.S. 495, 513 (1947). This reasoning is, of course, subject to the distinction, for attorney-client privilege purposes, between the "communication" itself and the substantive information conveyed, Upjohn Co. v. United States, 101 S. Ct. 677 (1981), assuming that the attorney-client privilege might otherwise apply.

ment, remedies which burden the private party's assertion of the privilege are sure to be less favored. Conversely, a private party seeking affirmative relief against the government, which is available only on account of waiver of the government's sovereign immunity, may expect a more rigorous remedy for his assertion of privilege.

VII. CONCLUSION

Assertion of the fifth amendment privilege against self-incrimination may have important ramifications in federal civil proceedings. In considering an appropriate response to a party's assertion of the fifth amendment privilege in civil litigation, a court must limit itself to the goals of fairness to the adversary and due regard for the judicial duty to ascertain the truth. Notions of deterrence have no place in this process.

The trial judge must seek the remedy that best reconciles these legitimate goals with the assertion of the privilege and which, at the same time, has the least restrictive impact upon the party asserting the privilege. Needless impositions upon the freedom to assert the privilege are impermissible. A deft


[Petitioner's position is more analogous to that of a defendant, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed by the Alien Property Custodian without the opportunity for protest by any party claiming that seizure was unjustified under the Trading with the Enemy Act. (emphasis in original).]


The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

176. Thus the rationale of National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), does not apply.

nition of the court's rightful role when the privilege is properly asserted in federal civil litigation is an important first step towards reconciling these goals with this important constitutional privilege.