Introduction

The U.S. Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. While this portion of the Fifth Amendment, most often referred to as the “privilege against self-incrimination,” contains only 15 words, its application can be deceptively complex. The clause has generally defied a comprehensive theoretical justification and, instead, has been aptly described as “an unsolved riddle of vast proportions, a Gordian Knot in the middle of our Bill of Rights.” See Akhil Reed Amar and Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995). Application of the Fifth Amendment right against self-incrimination is dependent on the factual setting in which the privilege is asserted, with the values served by the privilege often balanced against the competing interests at stake.

This book is designed primarily to elucidate the contours of the Fifth Amendment privilege against self-incrimination in practice and to provide a guide for both the civil litigator who may confront the privilege infrequently as well as the criminal lawyer who seeks to advance his or her client’s interests through creative application of the Fifth Amendment. The book makes no attempt to harmonize the often disparate and sometimes contradictory interpretations of the privilege and is not intended to advance an argument for one interpretation versus a competing interpretation. Rather, it attempts to organize and explain the relevant case law so that lawyers may more effectively advise and represent their clients. It is intended to be a starting point for lawyers (and for interested clients), but not the last word on any of the issues addressed.

Many fundamental issues raised by the Self-Incrimination Clause remain unsettled. The separate discussion in Chapter 2 of *McKune v. Lile*, 536 U.S. 24 (2002), for instance, is intended to highlight the degree to
which issues relating to the definition of the word “compelled” remain subject to debate. Similarly, we expand in Chapter 2 of this book our discussion of the implications of *Chavez v. Martinez*, 538 U.S. 760 (2003), where the Supreme Court ruled that the Self-Incrimination Clause is not violated unless and until a person’s compelled self-incriminating testimony is actually used against him in a criminal case.

The privilege against self-incrimination may be asserted whenever the speaker reasonably fears that self-incriminating disclosures may later be used against him or her. Although the Self-Incrimination Clause limits itself to criminal cases, this second edition focuses on the practical aspects of Fifth Amendment assertions in all types of proceedings. We address the manner in which courts have treated assertions of the Fifth Amendment in civil cases, in legislative hearings and investigations, and in response to regulatory and administrative agency demands, as well as in interactions with the police (both before and after custody) and during grand jury and criminal case proceedings (Chapter 3).

The words that must be used to properly invoke the Fifth Amendment privilege and the procedures used by courts to decide the validity of a Fifth Amendment assertion may influence a witness’s decision to utilize the privilege. Thus, the nuts and bolts of asserting the privilege, and the procedures used by courts for deciding the validity of those assertions, are given attention in Chapters 4 and 5.

Because the legal consequences of asserting the privilege against self-incrimination in non-criminal proceedings are different than when the privilege is asserted in criminal cases, we devote a separate chapter, Chapter 6, to those issues.

There continues to be a stigma associated with invoking the Fifth Amendment privilege. As we explain in Chapter 7, this stigma is often exaggerated because the privilege is designed as much to protect the innocent as the guilty.

The case law regarding waiver of the Fifth Amendment, particularly outside the context of custodial interrogation, remains confusing. By discussing a few general principles and then describing how courts approach issues of waiver in various contexts, this book attempts to make sense of this body of law. We also highlight a recent case in which
the authors were involved that generated a national debate about when claims of innocence could constitute a waiver of the right to remain silent (Chapter 8).

It is well settled that the Fifth Amendment protection for documents is limited to the incriminating aspects of the compelled act of producing them. Chapter 9 highlights several of the issues that remain in controversy under the act of production privilege, including the foregone conclusion doctrine and the required records exception.

Finally, in Chapter 10, we review some of the critical issues associated with immunity, focusing primarily on the federal immunity statute and applicable federal court decisions.

This second edition follows the format of the first edition, but gives expanded treatment to some subjects. This includes the right to compel access to encrypted materials, Chapters 2 and 9, and the struggle to define the limitations imposed on government use—especially derivative use—of immunized statements, Chapter 10. Although the second edition, like the first, is not intended to be comprehensive, we have attempted to add case citations, both new and old, that a reader would find useful to consider. As with the first edition, we focus primarily on federal cases, but have noted state cases, particularly where they appear to differ from federal law. We welcome readers to bring our attention to interesting cases we either missed or failed to appreciate, in hopes that future editions of the book may benefit from their inclusion.