

Index

A

Act of production doctrine, collective entities and, 54
Actions, performance of, 46–47, 51, 249
Adjudicatory proceedings, 69–70, 144–145
Administrative proceedings, 69–70, 144–145
Adverse inference, 108–116, 153–167
Affirmative relief, 168
Agency investigations, 144–145
Agent, of collective entity, 53
Alaska, 83
Ancillary proceedings, immunity and, 295
“Any criminal case,” 62–68
Appeal, 124
 waiver and, 224
Arrest, as custody, 78
Assertion
 clarity of, 205–206, 208
 nonverbal, 206–207
 quantity of speech in, 210–214
 refusal without, 204
 silence *vs.*, 204–207
 stigma and, 209
 unambiguousness of, 205–208
Assertion, validity of. *See* Validity, of
 Fifth Amendment assertion

Asset forfeiture proceedings, 134, 163–165
Assurances, false, 87
Attorney-client privilege, grand jury subpoena and, 101
Automobile accident, 150

B

Bank Secrecy Act, 274–276
Bankruptcy, 100, 254
Banks, 100–101
Barring, of prosecution, 20
Beards, 47
Bill of Rights, 3–4
Biometrics, 45–46
Blood-oxygen-level-dependent functional magnetic resonance imaging (BOLD-fMRI), 316
Brain function, 315–318

C

Car accident, 150
Cell phones, 45–46, 267
Chain of evidence, 16–17
Church of England, 1
Civil forfeiture proceedings, 134, 163–165
Civil hardships, 21–22

Civil proceedings, 69
 stays in, during parallel criminal proceedings, 173–180
 waiver and, 225–226, 255–256
 See also Noncriminal proceedings

Clothing, trying on, 47

Co-defendants, waiver and, 225

Collateral matters, 251–252

Collection of physical samples, 44–45, 48–49

Collective entities, 51–62

Commitment proceedings
 juvenile delinquency, 134
 mental health involuntary, 132–133

Communication, testimonial, 40–51

Communist Party, 5

Competency, *Miranda* rights and, 238–239

Competency hearing, 106

Compulsion
 informal, 24
 meaning of, 23–43
 private *vs.* government, 33–40
 subpoena *as*, 23
 voluntary testimony and, 203–204
 of waiver, 24, 128

Confession, involuntary, 24

Congressional proceedings, 145–148
 validity of assertion in, 195–200
 See also Legislative proceedings

Conspiracy, 18

Contempt finding
 in legislative proceedings, 196–198
 validity of Fifth Amendment assertion and, 187–188, 191, 196–198

Corporations. *See* Collective entities

Counsel, court-appointed, 105

Counsel comments, 113

Court of High Commission, 1–2

Court-appointed counsel, 105

Criminal case
 in Fifth Amendment, 62–68
 grand jury proceeding before, *as* separate proceedings, 222–223
 validity of assertion in, 189–194
 waiver in, 244–252

“Cruel trilemma,” 2

Custodial interrogation, 26, 72–91, 238, 240

Custodial settings, 77–78

Custody, defined, 76–77

D

Decryption, 267

Denaturalization proceeding, 254–255

Deportation case, 82

Deportation proceedings, 132, 210

Deposition, 141–143

Derivative use immunity, 43, 68, 141, 185, 263, 279–286, 301–308
 collective entities and, 58
 compulsion and, 10
 constitutionality of, 279–286
 grand jury proceedings and, 103
 Indian tribal proceedings and, 90
 limitations, 283
 pretrial proceedings and, 106
 probation and, 129
 state protections and, 11
 validity determination and, 186

Disciplinary proceedings, professional, 133

Disclosures, in self-incrimination, 15–16

- Discovery, 124
 in adjudicative hearing, 144–145
 invocation of Fifth Amendment as
 evidence in, 155
 in noncriminal proceedings, 137
- Distortion test, 233–234
- Divorce cases, 168
- DNA samples, 44–45
- Document production
 act of, 260–277
 Bank Secrecy Act and, 274–276
 foregone conclusion exception with,
 262–269
 in grand jury proceedings, and
 validity of assertion, 187
 immunity and, 293–294
 implicit authentication and, 265–267
 limits with, 259–260
 privacy and, 261–262
 privilege log and, 141
 reasonable particularity standard
 and, 264
 required records exception and,
 271–277
 self-reporting statutes and, 272–273
 third parties and, 270–271
 and validity of assertion, 200–201
 waiver and, 256–257
- Double jeopardy hearing, 105
- Due Process Clause, 5, 24, 84, 87
- Dyeing hair, 47
- E**
- Electroencephalography (EEG), 315
- Employees, 54–56, 157–158, 296–301
- Employment, government, 25
- F**
- Fact-detail test, 242–243
- Failure to invoke, 71
- False assurances, 87
- Federal Rules of Criminal Procedure,
 247–248
- Federal Rules of Evidence, 118, 173
- Fifth Amendment
 “any criminal case” in, 62–68
 collective entities and, 51–62
 elements of, 13–68
 failure to invoke, 71
 future of, 315–318
 history of, 1–5
 proceedings in which, may be
 asserted, 69–71
 testimonial communication in, 40–51
 values served by, 5–12
- Fingerprinting, 46, 50
- First Amendment, 52
- Florida, 83
- Foregone conclusion exception,
 document production and,
 262–269
- Foreign confessions, 88–89
- Foreign police, 89
- Forfeiture of rights, 26–27
- Former employees, 54–56, 157–158
- Fourteenth Amendment, 5, 24
- Fourth Amendment, 34, 44–45, 49, 104,
 106, 262
- Further incrimination test, 234–236
- G**
- “Garrity” immunity, 295–301
- Government employment, 25

- Government reporting demands,
responses to, 148–153, 272–273
- Grand jury proceeding, 67–68, 93–104
criminal trial after, as separate
proceedings, 222–223
evidence previously obtained in
violation of Fifth Amendment and,
102–104
procedures for invoking Fifth
Amendment in, 94–100
subpoenas in, that incriminate others,
100–102
testimonial waiver in, 241–244
transactional immunity in, 99
validity of assertion in, 183–189
- Grant of immunity, 23–24
- Guardianship proceedings, 135
- Guilty plea
in deportation proceedings, 132
right to remain silent and, 225
waiver by, 244
- H**
- Hair dye, 47
- Hair samples, 44
- Handwriting samples, 47, 49–50
- Hardships, civil, 21–22
- Heretics, 1–2
- Home, as custody, 78
- I**
- Immigration proceedings, waiver in,
254–255
- Immunity
ancillary proceedings and, 295
court authority to grant or deny,
309–313
documents obtained through,
293–294
“Garrity,” 295–301
government abuse and, 311–313
indictment and, 292
“letter,” 301–308
perjury and, 284–285
transactional, through legislation,
280–281
use of evidence obtained through,
286–293
See also Derivative use immunity; Use
immunity
- Impeachment
from invocation of Fifth Amendment,
82–84
and validity of assertion, 192–193
- Implicit authentication, document
production and, 265–267
- Incrimination
and barring of prosecution, 20
future conduct and, 19
likelihood of, 18
sufficient, 19
threat of, 14–15
- Indian Civil Rights Act, 90
- Indian tribal courts, 90
- Informant, undercover, 86
- Innocence
assertion of, as waiver, 236–237
invocation of Fifth Amendment and
claim of, 17–18
- Innocent parties, assertion by, 215–217
- Insurance coverage, 171–172
- International jurisdictions, 21
- Interrogation
custodial, 26, 72–91

- foreign, 88–89
- noncustodial, 27–28, 91–93
- voluntariness and, 86–87
- Investigations, agency, 144–145
- Investigatory proceedings, 69–70
- Involuntary commitment proceedings, 132–133
- Involuntary confession, 24
- J**
- “Joint venture” doctrine, 38–39
- Jury instruction, on invocation of Fifth Amendment, 113–115
- Juvenile delinquency commitment proceedings, 134
- K**
- Kastigar* hearing, 290, 292–293, 301
- Knowing waiver, 229–237
- L**
- Legislative proceedings
 - assertion in, 145–148
 - validity of assertion in, 195–200
 - waiver in, 252–253
 - See also* Congressional proceedings
- “Letter” immunity, 301–308
- License, professional, 25
- Likelihood of incrimination, 18
- Limited liability corporation (LLC), 56–57
- Link in a chain, 14, 16–17, 217
 - demonstration of, 18
 - government reporting demands and, 150
 - waiver and, 231–232
- LLC. *See* Limited liability corporation (LLC)
- M**
- Malpractice insurance, 171–172
- Massachusetts Declaration of Rights, 3
- McCarthy era, 5
- Measurements, 46
- Mental competency examination, 106
- Mental health involuntary commitment proceedings, 132–133
- Miranda* rights
 - competency and, 238–239
 - invocation of, 205–207
 - waiver of, 78, 81, 208, 237–241
- Mobile devices, 45–46
- Monetary penalty imposition proceedings, 133
- Mustache, 47
- N**
- Nemo tenetur seipsum prodere*, 2–3
- Noncriminal proceedings
 - adverse inference in, 153–167
 - assertions of Fifth Amendment right in, 135–145
 - criminal proceedings *vs.*, 130–153
 - legal consequences of assertion in, 153–167
 - nonlegal consequences of assertion in, 167–173
 - sanctions for invocation in, 167–173
 - validity of assertion in, 194–200
- Noncustodial interrogation, 27–28, 91–93
- Nonverbal assertion, 206–207
- P**
- P300-MERMER, 315
- Parallel civil and criminal proceedings, 173–180

- Parental rights, 32
- Parole meeting, 79
- Parole proceedings, 125–130
- Passwords, 267
- Penal *vs.* regulatory, acts of Congress
as, 131
- Penalty, in assertion of Fifth Amendment,
25–26
- Penalty cases, 25
- Penalty imposition proceedings, 133
- Performance of physical actions, 46–47,
51, 249
- Perjury, 22–23, 284–285
- Phones, 45–46, 267
- Photography, 46
- Physical actions, performance of, 46–47,
51, 249
- Physical samples, collection of, 44–45,
48–49
- Police car, as custody, 79
- Police interrogation. *See* Custodial
interrogation
- Polygraph, 79, 128
- Post-trial proceedings, 120–125
- Pretrial proceedings, 102–108
- Prisoners, 29–32, 78–79, 154. *See also*
Parole
- Privacy, document production and,
261–262
- Private compulsion, 33–40
- Privilege log, 140–141, 200
- Probable cause, 82
- Probation officer, 79, 230
- Probation proceedings, 125–130
- Probation revocation proceeding, 82
- Proceedings in which Fifth Amendment
may be asserted, 69–71
- Professional disciplinary proceedings, 133
- Professional license, 25
- Proffer agreements, 308
- Prosecutor comments, 80–82, 109–112
- Psychiatric commitment proceedings,
132–133
- Psychiatric examination, as custody, 78
- R**
- Reasonable particularity standard, 264
- Refusal, without assertion, 204
- Regulatory *vs.* penal, acts of Congress
as, 131
- Reporting demands, responses to
government, 148–153, 272–273
- Required records doctrine, 153, 271–277
- Retrial, waiver and, 224–225
- Revolutionary War, 3
- Rights, forfeiture of, 26–27
- S**
- Samples, physical, collection of, 44–45,
48–49
- Sanctions, for invocation, in civil
proceedings, 167–173
- School, as custody, 78
- Search warrant, 82
- Securities and Exchange Commission
(SEC), 170–171, 180
- Self-incrimination, meaning of, 13–23
- Self-reporting statute, 272–273
- Sentencing, 82, 121–124
waiver and, 225

- Separate proceedings doctrine, waiver
and, 220–227
- Settings, custodial, 77–78
- Sex offender registration proceedings,
134–135, 152–153
- Sex offenders, 28–31, 125, 127
- Shaving, 47
- Silence, assertion *vs.*, 204–207
- Sixth Amendment, 34, 36, 40, 67, 94,
104, 117, 119, 122, 250–251
- Sobriety test, 12, 41, 50
- Sole proprietor, 54
- Speech, demonstration of, 47–48
- Star Chamber, 1–2
- Statute of limitations, 20–21
- Stays, in civil cases during parallel
criminal proceedings, 173–180
- Stigma
as exaggerated, 215
innocent parties and, 215–217
and quantity of speech in assertion,
208–209, 211–214
- Subpoena, 23
- T**
- Tattoos, 50
- Tax returns, 101, 148–149, 151–152
- Testimonial communication, 40–51
- Third parties, document production and,
270–271
- Thomas, Clarence, 319–324
- Torture, 322
- Trial witness, Fifth Amendment rights of,
117–120
- Tribal courts, 90
- U**
- Undercover informant, 86
- Urine samples, 44
- Use immunity, 263
collective entities and, 58
compulsion and, 10, 39
constitutionality of, 279–286
grand jury proceedings and, 99, 103,
186
Indian tribal court proceedings and, 90
informal, 301–308
limitations, 283
and meaning of “any criminal case,”
66
and meaning of self-incrimination, 19
pretrial proceedings and, 106
probation and, 129
state protections and, 11
validity determination and, 186
- V**
- Validity, of Fifth Amendment assertion
appearance of witness and, 199–200
burden of proof in, 182–183
in camera hearing for, 184–185
contempt finding and, 187–188, 191,
196–198
in criminal proceedings, 189–194
document production and, 200–201
in grand jury proceedings, 183–189
impeachment and, 192–193
in legislative proceedings,
195–200
main case on, 181–182
in noncriminal proceedings, 194–200

Values, served by Fifth Amendment,
5–12

Virginia Declaration of Rights, 3

Voice, 47–48

Voluntariness, of waiver, 227–228

Voluntariness test, 84–88

Voluntary testimony, 203–204

W

Waiver

appeal and, 224

in bankruptcy proceedings, 254

civil proceedings and, 225–226,
255–256

co-defendants and, 225

collateral matters and, 251–252

compulsion of, 24, 128

in criminal trials, 244–252

defined, 219

in denaturalization proceeding,
254–255

distortion test and, 233–234

document production and, 256–257

fact-detail test with, 242–243

further incrimination test with,
234–236

general principles with, 219–237

in grand jury proceedings, subsequent
criminal case and, 222–223

in grand jury proceedings, testimonial,
241–244

inferring, 232–233

innocence assertion as, 236–237

in legislative proceedings, 252–253

link in a chain and, 231–232

“link in a chain” standard and, 17

of *Miranda* rights, 78, 81, 208,
237–241

need not be knowing, 229–237

by pleading guilty, 244

probation and, 31

as proceeding-specific, 219–227

retrial and, 224–225

sentencing and, 225

separate proceedings and, 220–227

Sixth Amendment and, 250–251

subsequent proceedings and, 220–222

as voluntary, 227–228

witness control over, 231

for witnesses, 250

Witness

appearance of, and validity of
assertion, 199–200

in civil case, 142–144

trial, Fifth Amendment rights of,
117–120

waiver for, 250