

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 & 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 highly 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. It intends to guide both the civil litigator, who may confront the privilege infrequently, and the criminal lawyer who seeks to advance a client’s interests through creative application of the Fifth Amendment. The book makes only limited attempts to harmonize the often disparate and sometimes contradictory interpretations of the privilege and advances an argument for one interpretation versus a competing interpretation only sparingly. Instead, 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 meaning of the word “compelled” remain subject to debate. Chapter 2 also contains a discussion of the implications of *Chavez v. Martinez*, 538 U.S. 760 (2003), where a plurality of the Supreme Court ruled, at least for the purpose of a later civil suit, 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.

Despite the uncertainty created by *Chavez v. Martinez* as to when the Self-Incrimination Clause is violated, it is well settled that the privilege against self-incrimination may be asserted whenever the speaker reasonably fears that compelled self-incriminating disclosures may later be used against him or her. This third edition therefore continues to focus on the practical aspects of Fifth Amendment assertions in all types of proceedings. Chapter 3 addresses 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, criminal trial proceedings, and post-sentencing probation and parole. Although the third edition addresses the exclusionary rule created in *Miranda v. Arizona*, the discussion is intentionally limited and readers are encouraged to seek guidance elsewhere about *Miranda*’s complex and substantial progeny.

The importance of expressly invoking the right to remain silent was highlighted by the Supreme Court decision in *Salinas v. Texas*, 570 U.S. 178 (2013). Thus, 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 are addressed 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, a portion of Chapter 3 is devoted to those issues and contains an expanded discussion of an area of law that remains unsettled: when a proceeding labeled as civil should actually be considered to be criminal for purposes of the right against self-incrimination.

There continues to be a stigma associated with invoking the Fifth Amendment privilege. This stigma is often exaggerated, because the privilege is designed as much to protect the innocent as the guilty. To highlight this point, Chapter 6 is devoted to the topic of stigma.

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, Chapter 7 attempts to make some sense of this disparate body of law.

It appears settled that the Fifth Amendment protection for documents is limited to the incriminating aspects of the compelled act of producing them. Chapter 8 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.

Chapter 9 addresses some of the critical issues associated with immunity, focusing primarily on the federal immunity statute and applicable federal court decisions. As with the second edition, the chapter refers to state cases only when they appear to differ from federal law.

Chapter 10 concerns the issue of brain imaging and the right against self-incrimination. The technology is no longer in its infancy, and the legal issues presented by its potential acceptance in courts are on the horizon. A new Epilogue contains a brief critique of Justice Clarence Thomas’s views on the meaning of the Fifth Amendment Self-Incrimination Clause, with the goal of furthering the debate about his “originalist” interpretation of the Self-Incrimination Clause.