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Rebranding the Fifth Amendment Privilege: Its Widely Used Moniker – the "Privilege Against Self-Incrimination" – is Misleading

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We err when we refer to the Fifth Amendment Privilege as the "Privilege Against Self-Incrimination." That brand name simultaneously over- and under-promises the actual protection that the privilege provides. With the absence of any limiting words on the phrase "Self-Incrimination," the name claims that the privilege bars all varieties of compelled evidence. But because the privilege bars only compelled testimonial communications, the name "Privilege Against Self-Incrimination" over-promises the categories of evidence that the privilege protects. The name is misleading not just relating to types of evidence but also concerning the persons it protects. The privilege shields persons who are innocent – not only the guilty. Yet, the moniker describes a guilty-only version of its namesake and, thus, damns an innocent invoking witness by the following faulty logic: If the privilege is only available to avoid self-incrimination, then its invocation must signify that, through truthful testimony, a witness would inculpate herself. Anchored to "Self-Incrimination," the name reinforces the incorrect belief that the privilege does not protect the innocent and that invoking the privilege telegraphs guilt. Thus, the name under-promises whom the privilege shields. The privilege presently suffers under a misleading brand. In favor of accuracy, we should simply call it the "Fifth Amendment Privilege."

The Scope of the Fifth Amendment Privilege

The Fifth Amendment guarantees an evidentiary privilege with the following language:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .[2]

The privilege shields against compelled testimonial communications that would incriminate,[3] even if they would not provide direct evidence of guilt. "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[4] The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[5] The privilege is available not only in federal but

also in state prosecutions.[6] The government undertakes no simple task to overcome a claim that a prospective answer would "furnish a link" or otherwise assist a prosecution.[7]

A Witness Usually Must Invoke the Fifth Amendment Privilege

The Fifth Amendment Privilege coexists with the government's need in criminal cases to obtain evidence that can shed light on what is factually true. The privilege acts as an exception to the "generally applicable principle that governments have the right to everyone's testimony."[8] Like the attorney-client privilege, the Fifth Amendment Privilege subordinates evidence and, thus, the search for truth in a particular case, in furtherance of larger goals.[9] Although there is little debate that the privilege should preclude the punishment of contempt for refusal to speak,[10] there is a more robust dispute over whether the privilege should further preclude adverse inferences from silence in a criminal case.[11] The Fifth Amendment Privilege has been justified on moralist grounds as advancing several goals for their intrinsic value.[12] Thus, it "registers an important advance in the development of our liberty – 'one of the great landmarks in man's struggle to make himself civilized.'"[13] The Fifth Amendment Privilege has also been defended on consequentialist and utilitarian grounds.[14] Much has been written in this area.[15]

With limited exceptions, a witness confronted by the government must invoke the privilege affirmatively or do without its protection. The plight of such a witness – whom we'll describe as the "must invoke" witness – is decidedly unpleasant. Such "must invoke" witnesses are forced to choose whether to assert the privilege while many of them suffer under the erroneous belief that to do so marks oneself as guilty. The misunderstanding can lead such a witness to face the government unarmed at a time when the government can deploy all of its investigatory weapons. Even though "'no ritualistic formula is necessary in order to invoke the privilege,'"[16] a "must invoke" witness has to take action – must communicate an assertion of the privilege – necessarily after making a choice to do so, informed or otherwise. Thus, a "must invoke" witness does not automatically possess a right to silence.[17] A "must invoke" witness obtains the right to silence by the act of asserting the privilege. The consequence of the invocation requirement is that upon either failing or declining to invoke, the government is free to use the voluntary statements and even the silence of a "must invoke" witness against him.[18] The general invocation requirement "assures that the Government obtains all the information to which it is entitled."[19]

In the few situations where the privilege applies automatically, of course, these constitutional rules do not impose a need to decide whether to invoke. The Court has said that these situations are "narrowly defined."[20] First, a defendant at a criminal trial need not assert the privilege.[21] Second, a witness need not invoke the privilege when government compulsion precludes "a 'free choice to admit, to deny, or to refuse to answer.'"[22] Custodial police interrogation is likely the most widely known example here.[23] It is when traversing the extensive territory where it does not apply automatically that a misunderstanding of the privilege will be particularly dangerous to a "must invoke" witness.

The Privilege Protects Only Testimonial Communications

The privilege does not absolutely bar the government from compelling a person to supply evidence to a prosecution. Rather, "[t]he word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."[24] Even the Supreme Court has admitted that the "term 'privilege against self-incrimination' is not an entirely accurate description of a person's constitutional protection against being 'compelled in any criminal case to be a witness against himself'" because the name does not convey the privilege's limitation to testimonial evidence.[25]

The government may compel various non-testimonial but incriminating acts: "even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice."[26] The government may compel other such acts as: standing in a line-up;[27] assessing sobriety;[28] or signing a consent form for the release of bank records.[29] "[W]hether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case."[30] Although the Court's ad hoc approach has been criticized,[31] the existence of an entire class of evidence that the privilege permits the government to compel renders the name "Privilege Against Self-Incrimination" misleading.

The Privilege Protects Innocent Witnesses, Not Only The Guilty

The privilege entitles innocent witnesses to remain silent.[32] In a perfect world, the truthful statements of an innocent witness cannot be incriminating. But not all prosecutions are perfect. Experience and common sense know that prosecutions can be mistaken, or worse. Thus, for the privilege to fulfill its constitutional mandate, the existence of wrongful prosecutions requires that the privilege must extend to the innocent. The Supreme Court has noted that the privilege has long stood watch protecting the innocent: "The privilege, this Court has stated, was generally regarded [at the founding], as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."[33] The privilege is commonly invoked at a time before a witness has been convicted as result of a trial or guilty plea – a time at which a person is presumed by law to be innocent.[34] Persons who never are convicted and, thus, never are guilty of anything properly invoke the privilege.

Examining the phrase "Privilege Against Self-Incrimination" reveals its misleading focus on the guilty. The problem is that the word "incriminate" means to "show evidence or proof of involvement in a crime"[35] but the word does not distinguish between cases of factually correct and factually incorrect incrimination. Innocent persons can be: falsely incriminated during an investigation by a rumor; wrongly indicted by a grand jury upon a showing of probable cause; and wrongly convicted at trial upon proof beyond a reasonable doubt. But at none of these markers along the taxonomy of increasing evidentiary proof does the government demonstrate to an infallible certainty that a person is, in fact, guilty. Even though a person may be falsely incriminated, the phrase "Self-Incrimination" incorrectly speaks with certitude of guilt.[36]

Not surprisingly, the public has long mistaken the privilege as protecting the guilty only. Over 60 years ago, the Supreme Court said: "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."[37] Although almost 20 years later the Court said that "[a]t this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the [Fifth Amendment Privilege]"[38] the public's understanding that the privilege extends to the innocent has not improved.[39] One sage observer recently noted that: "Although the innocent can and should often take the Fifth, the public is likely to infer guilty motives."[40]

Perils arise for a "must invoke" witness who is benighted by the common misperception of the privilege. Such a witness may choose to answer government questions under the mistaken belief that she has only two alternatives: invoke the privilege and signal her guilt, on the one hand, or answer to avoid staining herself with guilt, on the other. Rational witnesses will eschew the course they conclude is riskiest,[41] that is, the alternative that they incorrectly believe will identify them as guilty and, rather, will provide answers. With a proper understanding of the privilege, a "must invoke" witness' alternatives are: invoke the privilege, deny assistance to the prosecution and skip the side order of culpability,[42] on the one hand, or answer and incur that course's many risks, on the other. A witness will be prudent to obtain the assistance of skilled counsel to weigh these alternatives in the circumstances presented. In many scenarios, speaking with government investigators is the path of greatest risk.

Let us count the ways that things can go wrong when a witness talks to the government. If a witness has a defense to a criminal charge, say a defense of good faith to a charge of filing a fraudulent tax return, truthful statements will likely inculpate the witness on one or more elements of the offense – here, the witness' role in filing the false return – while leaving the government free to reject truthful statements that establish the witness' defense – good faith.[43] When a government prosecution – erroneously or otherwise – credits the false statements of a third party, the government will likely view contradictory but truthful statements as evidence of perjury, obstruction or of an underlying crime. Most of us do not have perfect recollections. Over the course of government questioning, in multiple sessions or even in a single session, a truthful witness' answers may not be internally consistent in every particular. The government may seize on such inconsistencies as evidence of a crime. Under the Court's decision in *Salinas*,[44] if the privilege is not interposed in response to government questions, even the silence of a "must invoke" witness may be used as evidence of a crime. Further, a witness' interests may not be the only ones at risk in the face of government questioning.

When the government is investigating conduct within the scope of a witness' employment, not only are the witness' interests at risk but so are her employer's. A corporation "can be criminally liable for the intentional malfeasance of an employee committed during the course of the employee's employment and in furtherance of the corporation's business."[45] Thus, particularly in white collar investigations, a "must invoke" witness' decision whether to assert the privilege or answer questions in response to a government inquiry carries heightened risks for the employer. A proper understanding of the privilege can mitigate these risks.

Further, the phrase "Self-Incrimination" risks infection of juror deliberations in certain civil cases. If the privilege has become an issue in a civil case, a judge may instruct a jury that it is permitted to draw an adverse inference from a witness' invocation of the privilege.[46] Jury instructions that use the name "Privilege Against Self-Incrimination"[47] risk injecting the public's misunderstanding of the privilege into those deliberations, particularly where the instruction does not inform the jury that the innocent may invoke the privilege.

Let's Not Call It the "Privilege Against Self-Incrimination"

If providing the general public with a complete explanation of the privilege would seem a Herculean task, perhaps we can borrow a lesson from the medical profession and first, do no harm.[48] Binding the privilege's name to "Self-Incrimination" does more than simply fail to aid the public to understand the correct dimensions of the privilege. The name over-promises by inaccurately suggesting that the privilege bars all compelled acts that could aid the prosecutor when it protects only compelled testimonial communications. The name also under-promises. Its current guilty-only description cements in the public's mind an incorrectly limited scope of the privilege's protection. Thus, even though the privilege also protects the innocent, the name "Privilege Against Self-Incrimination" misleadingly describes the privilege by using terms cabined to culpability. The name has been making mischief for decades, since at least 1924.[49]

Conclusion

Referring to the Fifth Amendment Privilege with the phrase "Self-Incrimination" is misleading. The name incorrectly claims that the privilege covers all types of evidence when it does not do so. It only protects against compelled testimonial communications. The belief that only the guilty may claim the protections of the privilege and, correspondingly, that claiming its protections carries a badge of guilt, is widely held and incorrect. This public misperception is entrenched by naming the privilege in terms that express only part of its scope – its protection of the guilty – while omitting what is at least equally important – that it also protects the innocent. The brand name "Privilege Against Self-Incrimination" should be retired.

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[2] United States Constitution, Fifth Amendment.

[3] "[T]he privilege protects a person only against being incriminated by his own compelled testimonial communications." *United States v. Doe*, 465 U.S. 605, 611 (1984) (citations omitted). Constitutionally sufficient compulsion can come from a government agent's mere question that would elicit an incriminating answer. *Salinas v. Texas*, 570 U.S. 178, 189 (2013) (plurality opinion) ("To be sure, someone might decline to answer a police officer's question in reliance on his constitutional privilege.").

In addition to seeking the exclusion of statements under the Fifth Amendment Privilege, a witness may also claim that the Fifth or Fourteenth Amendment Due Process Clause bars any of his statements that were involuntary.

Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("by virtue of the Due Process Clause 'certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.'" (citation omitted)); *Dickerson v. United States*, 530 U.S. 428, 434 (2000) ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."); Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U.L. Rev. 601, 611 (2006) ("There is currently little debate in the United States today on the standard used to determine the admissibility of confessions under the Due Process Clause. All agree that the voluntariness test was, and is likely to remain, the test to be used by trial judges."); Kamisar, *Remembering the "Old World" of Criminal Procedure*, 23 U. Mich. J.L. Ref. 537, 545-47 (1990).

[4] *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (citation omitted); *Hoffmann v. United States*, 341 U.S. 479, 486 (1951) (The Fifth Amendment Privilege "must be accorded liberal construction in favor of the right it was intended to secure." (citations omitted)).

[5] *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); *see also United States v. Balsys*, 524 U.S. 666, 672 (1998); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

[6] *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) ("the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.").

[7] "[T]he [Fifth Amendment P]rivilege's protection extends only to witnesses who have 'reasonable cause to apprehend danger from a direct answer.' That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. A danger of 'imaginary and unsubstantial character' will not suffice."

Ohio v. Reiner, 532 U.S. 17, 21 (2001) (per curiam) (citations omitted); Heidt, *The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1071 (1982) ("most assertions of privilege prove highly resistant to attack.").

[8] *Garner v. United States*, 424 U.S. 648, 655 & 658 n.11 (1976) (citations omitted); *see also Salinas*, 570 U.S. at 183 (plurality opinion).

[9] Kamisar, *supra* note 3, at 542 ("There is nothing new or unusual about subordinating the search for truth to other values and policies.").

[10] Seidmann & Stein, *The Right To Silence Helps The Innocent: A Game-Theoretic Analysis Of The Fifth Amendment Privilege*, 114 Harv. L. Rev. 430, 440 n.36 (2000) ("even the most ardent critics of the right to silence call only for removal of the rule against adverse inferences and do not advocate the removal of the contempt exemption." (citations omitted)).

[11] The Supreme Court has held that the privilege bars adverse inferences from a defendant's silence at trial, *Griffin v. California*, 380 U.S. 609, 614-15 (1965), and from a custodial suspect's silence after *Miranda* warnings, *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). There has been sustained criticism of the privilege's protection of adverse inferences. *Salinas*, 570 U.S. at 192 (Thomas & Scalia, JJ., dissenting) ("A defendant is not 'compelled . . . to be a witness against himself' simply because a jury has been told that it may draw an adverse inference from his silence."); Seidmann & Stein, *supra* note 10, at 440 n.36 (collecting critiques); U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General on Adverse Inferences From Silence*, 22 U. Mich. J.L. Ref. 1005, 1060-1107 (1989) (arguing that the privilege should not bar adverse inferences).

[12] "It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those

> suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load[;]' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life[;]' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations and internal quotation marks omitted); *see* Seidmann & Stein, *supra* note 10, at 435-36 (noting the privilege advances privacy, individualism and free agency); Heidt, *supra* note 7, at 1083 & n.87 (arguing that the privilege's justifications "apply with less force in civil cases between private parties than in criminal cases.").

[13] *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (footnote omitted). "Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies." *Id*. at 428.

[14] Seidmann & Stein, *supra* note 10, *passim*. These authors analyze the rule against adverse inferences using behavioral modeling and economic theory. *Id*. at 436 ("Such modeling is usually, but not exclusively, based on rational-choice theory."). They conclude that the rule protects the innocent because it incentivizes the guilty to remain silent instead of to lie. Thus, the rule "helps to distinguish the guilty from the innocent by inducing an anti-pooling effect that enhances the credibility of innocent suspects." *Id*. at 433.

[15] Kamisar, *supra* note 3, at 541 ("The problems of search and seizure and confessions have been with us for a long time. Indeed, so much has been said about these subjects in the last forty years that it is hard to say anything new (although that has not deterred many of us)." (footnote omitted)).

[16] *Salinas*, 570 U.S. at 181 (plurality opinion) (quoting *Quinn v. United States*, 349 U.S. 155, 164 (1955)).

[17] Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. Chi. Legal F. 255, 260 ("it is evident that the 'right to remain silent' that most Americans think they possess does not exist."). Justice Douglas believed that the Fifth Amendment Privilege confers an absolute right of silence: "[T]he Fifth Amendment was written in part to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will." *Ullmann*, 350 U.S. at 449 (Douglas, J., dissenting). His interpretation has not found a majority on the Court. *See, e.g.*, *Kastigar*, 406 U.S. at 462 (holding that 18 U.S.C. § 6002, the general federal immunity statute, does not run afoul of the Fifth Amendment Privilege); *Salinas*, 570 U.S. at 189 (plurality opinion) (holding the that privilege "does not establish an unqualified right to remain silent." (internal quotations omitted)).

[18] *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (The privilege "does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been compelled within the meaning of the Amendment." (internal quotations omitted and citing *United States v. Monia*, 317 U.S. 424, 427 (1943))).

[19] *Garner*, 424 U.S. at 658 n.11.

[20] *Id*., 424 U.S. at 656.

[21] *Griffin*, 380 U.S. at 614-15. The *Griffin* Court precluded the government from arguing a criminal defendant's silence to a jury because the privilege "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* ("comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws.") (footnotes, citation and internal quotation marks omitted); *see Doyle*, 426 U.S. at 618 (After a suspect receives *Miranda* warnings, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to

impeach an explanation subsequently offered at trial."); *cf.* Duane, *The Extraordinary Trajectory of Griffin v. California: The Aftermath of Playing Fifty Years of Scrabble with the Fifth Amendment*, 3 Stanford J. Crim. L. & Pol. 1, 5 (2015) ("the aftermath of *Griffin* is a spectacularly chaotic farrago of opinions of such complexity that only one practicing attorney in a thousand can accurately summarize all of them off the top of her head.").

[22] *Garner*, 424 U.S. at 657 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)); *see Salinas*, 570 U.S. at 185 (plurality opinion).

[23] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Dickerson*, 530 U.S. at 444 (holding "that *Miranda* announced a constitutional rule that Congress may not supersede legislatively" and declining to overrule it); *but see* Garrett, *Remaining Silent After Salinas*, 80 U. Chi. L. Rev. Dialogue 116, 116-17 (2013) ("Over the past four decades, the Court limited *Miranda*'s reach in a death-by-a-thousand-cuts accretion of rulings." (collecting cases)).

[24] *Hubbell*, 530 U.S. at 34.

[25] *Id*.

[26] *Id*. at 35 (footnotes omitted).

[27] *United States v. Wade*, 388 U.S. 218, 222 (1967).

[28] *Pennsylvania v. Muniz*, 496 U.S. 582, 590-91, 602-04 (1990).

[29] *Doe v. United States*, 487 U.S. 201, 215-16 (1988) (relying on the consent form's particular language and stating: "By signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit the authenticity of any records produced by the bank." (citations omitted)).

[30] *Id*. at 214-15 (citation omitted).

[31] "[B]oth the meaning of this [testimonial evidence] limitation and its underlying rationale are problematic. As the Supreme Court has acknowledged, both the production and the nonproduction of physical evidence have certain communicative aspects that are functionally similar to testimony. In some cases, this acknowledgment has led to an expansion of the privilege. In other cases, however, ostensibly similar expansionist attempts have failed. The Court thus has gradually eroded the distinction between testimonial and physical evidence and replaced it with a complex doctrine. This doctrine has lacked an organizing principle."

Seidmann & Stein, *supra* note 10, at 475 (footnotes omitted).

[32] "[O]ur precedents dictate that the [Fifth Amendment P]rivilege protects the innocent as well as the guilty . . . ." *Reiner*, 532 U.S. at 18, 21 (holding "that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth." (citation omitted)); *Carter v. Kentucky*, 450 U.S. 288, 299-300 (1981) ("the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent." (citation and internal quotations omitted)); *Grunewald v. United States*, 353 U.S. 391, 421 (1957) ("one of the basic functions of the privilege is to protect *innocent* men" (citation omitted)); *Slochower v. Board of Higher Ed.*, 350 U.S. 551, 557-58 (1956) ("a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." (citation omitted)).

[33] *Quinn*, 349 U.S. at 161-62 (citations, internal quotations and footnote omitted).

[34] "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895); *Taylor v. Kentucky*, 436 U.S. 478, 486 (1978) ("an instruction on

the presumption of innocence simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial." (footnote and citation omitted)). Further, a person who has been convicted of one crime may assert the privilege with respect to other alleged crimes. *Murphy*, 465 U.S. at 426.

[35] Merriam-Webster Dictionary (as of June 11, 2018 at https://www.merriam-webster.com/dictionary/incriminate).

[36] Moving along the evidentiary taxonomy again, a person may also be: exonerated by a rumor; exonerated by a lack of probable cause; or exonerated by an absence of proof beyond a reasonable doubt. Creating a similar problem, the word "exonerate" conveys innocence but does not differentiate between factually correct and incorrect exoneration. Thus, we could switch to a misleading focus on the innocent by using the name "Privilege Against Self-Exoneration." Although this new name would correctly convey the innocent person's right to refuse to give exculpatory answers to the government, its lopsided focus on the innocent would be equally as misleading as its sibling "Privilege Against Self-Incrimination."

[37] *Ullmann*, 350 U.S. at 426 (1956) (footnote omitted).

[38] *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

[39] As an indication of how deeply rooted is the public's belief that asserting the privilege will identify oneself as guilty, we can look at the choices of custodial subjects who, via *Miranda's* warnings, receive less than a complete explanation of the privilege. After hearing those warnings, approximately 80 percent of suspects waive their rights. Kamisar, *The Miranda Case Fifty Years Later*, 97 B.U.L. Rev. 1293, 1300 & n.44 (2016) (collecting studies). The custodial suspect's adversary – the government – administers *Miranda*'s warnings rather than defense counsel who can fully explain the privilege. *Miranda*'s warnings are incomplete. Notably, although *Miranda* requires that warnings to a custodial suspect include that "he has a right to remain silent [and] that any statement he does make may be used as evidence against him," *Miranda* does not require a warning that his silence may not be used against him. *See Miranda*, 384 U.S. at 444. It's not much of a leap to conclude that without a full understanding of the privilege, many custodial subjects continue to incorrectly believe – even after *Miranda* warnings – that silence will mark them as guilty. "While many reasons certainly contribute to the willingness of *Mirandized* suspects to talk to the police, a major factor undoubtedly is that many suspects naturally believe, albeit incorrectly, that remaining silent will make them 'look guilty' and will be used against them as evidence of guilt." Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 Minn. L. Rev. 781, 783-84, 793 (2006) (footnotes omitted) (proposing that "the first two [*Miranda*] warnings, relating to the right to silence, should be buttressed by a new 'right to silence' warning that provides something to the effect of: 'If you choose to remain silent, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.'"). *See also Salinas*, 570 U.S. at 189 (plurality opinion) (noting the existence of "popular misconceptions" about the privilege).

The Washington Post has reported that in 2016, then-candidate Trump criticized "Hillary Clinton aides for exercising their right not to self-incriminate during a congressional investigation into her private email server. 'The mob takes the Fifth,' Trump said at one campaign rally. 'If you're innocent, why are you taking the Fifth Amendment?'" Brown & Helderman, *Michael Cohen to invoke Fifth Amendment right in Stormy Daniels case*, Washington Post, April 25, 2018 (as of June 11, 2018 at https://www.washingtonpost.com/politics/cohen-says-he-would-invoke-his-fifth-amendment-right-in-stormy-daniels-case/2018/04/25/c72a5c5a-48d9-11e8-827e-190efaf1f1ee_story.html).

[40] Whittington, *Don't Subpoena Testimony from the President*, Lawfare, May 4, 2018 (as of June 11, 2018 at https://www.lawfareblog.com/dont-subpoena-testimony-president).

[41] A person making a rational choice will act by "choosing the best means to the chooser's ends" and will select for efficiency and utility. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1551 (1998).

[42] There are potential consequences in invoking the privilege beyond avoiding assisting the government's theory of prosecution. Invoking the privilege may impact, among other things, the witness': 1) decision whether to testify as a criminal defendant; 2) criminal penalty after a finding of guilt; 3) civil liability; 4) employment; and 5) reputation. *See* Duane, *supra* note 21, at 6 (characterizing the answers found in the Court's decisions following *Griffin* as "Sometimes. But not always. It depends on about a dozen variables. And we are still working on the list of those variables, making them up and continuously changing the list as we go along. No, seriously. We really are." to the question "[W]hen would it be permissible to tell a jury that a party in a civil or criminal case had exercised his Fifth Amendment privilege, or to permit the jury to use that fact as evidence of guilt?"). These topics are beyond the scope of discussion here.

[43] *See Cheek v. United States*, 498 U.S. 192, 201-03 (1991) (holding that subjective good faith is a defense to a charge of willfully filing a fraudulent tax return). Another example is a claim of self-defense to a homicide charge. *See Jenkins v. Anderson*, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting) ("In order for petitioner to offer his explanation of self-defense, he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide.").

[44] *Salinas*, 570 U.S. at 181 (plurality opinion).

[45] Resnik & Dougall, *The Rise of Deferred Prosecution Agreements*, New York Law Journal, December 6, 2006 (as of June 11, 2018 at https://dougallpc.com/pdf/The_Rise_of_Deferred_Prosecution_Agreements.pdf) ("Further, under federal common law such vicarious corporate criminal liability can attach regardless of the employee's position within the corporation." (footnotes omitted)).

[46] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment [Privilege] does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them" (citation omitted)).

[47] Colorado's pattern civil jury instruction on the adverse inference uses the name "Privilege Against Self-Incrimination:"

> You may, but are not required to, draw an inference that the answer to any question that (name of party) refused to answer by asserting (his) (her) Constitutional privilege against self-incrimination would have been unfavorable to (him) (her). You should not decide (name of party's) (claim) (damages) (liability or non-liability) based solely on (his) (her) assertion of (his) (her) privilege against self-incrimination.

Colorado Civil Pattern Jury Instruction 3:5A (as of June 11, 2018 at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Civil_Jury_Instructions_Committee/Chapter%203.pdf).

[48] Wikipedia, *Primum Non Nocere*, (as of June 11, 2018 at https://en.wikipedia.org/wiki/Primum_non_nocere).

[49] *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (Brandeis, J.) ("privilege against self-incrimination"); *Ullmann v. United States*, 350 U.S. 422, 426, 438 (1956) (Frankfurter, J.) ("privilege against self-incrimination"); *Kastigar v. United States*, 406 U.S. 441, 442 (1972) (Powell, J.) ("privilege against compulsory self-incrimination"); *Salinas*, 570 U.S. at 181, 191, 200 ("privilege against self-incrimination" (Alito, J.), "privilege against compulsory self-incrimination" (Thomas, J.), "privilege against self-incrimination" (Breyer, J.)) *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014) (Scalia, J.) ("privilege against self-incrimination"); 18 U.S.C. § 6002 (Thomson Reuters 2018) (in the general federal immunity provision, enacted in 1970, Congress calls it the "privilege against self-incrimination"). Earlier cases called it the "Privilege of Silence." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) ("privilege of silence"); *Brown v. Walker*, 161 U.S. 591, 602 (1896) ("privilege of silence").