10-1-1978

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The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*

David M. O’Brien**

There is no witness so dreadful, no accuser so terrible as the conscience that dwells in the heart of every man.

Polybius, History, Book 18, Section 43

I. Introduction

Debate over the symbolic and practical value of the fifth amendment1 waxes and wanes with constitutional interpretation. The present controversy was fostered by dire predictions that the “Burger Court”2 would forge a “constitutional counter-revolution”3 in the area of criminal procedure and, in particular, fifth amendment litigation. Indeed, by contrast to the Warren Court’s liberal construction,4 the Burger Court demonstrates a proclivity for strict construction of the amendment and a redefinition of the value of the privilege against self-incrimination.5 Heretofore, the Burger Court’s reconsideration of the principles

* This article was written under a grant by the National Endowment for the Humanities.

** Chairman and Assistant Professor, Department of Politics and Government, University of Puget Sound; B. A. 1973, M. A. 1974, Ph. D. 1977, University of California, Santa Barbara.

1 The amendment provides: “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U. S. Const. amend. V.

2 The article adopts the conventional characterization of the “Burger Court” so as to refer to those decisions since the appointment of Warren Burger as Chief Justice on June 23, 1969. The designation of “Burger Court” decisions is appropriate because since the appointment of Chief Justice Burger the Court’s composition has changed—President Nixon appointed Harry A. Blackmun in 1970 and Lewis F. Powell and William H. Rehnquist in 1971; and, in 1975, President Ford appointed John Paul Stevens to the Court—with the consequence that recent appointees constitute a majority which has demonstrated a proclivity for re-evaluating and redefining the contours of the fifth amendment. For discussions of the Burger Court or, alternatively termed the “Nixon Court,” see S. Wasyly, Continuity and Change: From the Warren Court to the Burger Court (1977); Abraham, Of Myths, Motives, Motivations, and Morality: Some Observations on the Burger Court’s Record on Civil Rights and Liberties, 52 Notre Dame Law. 77 (1977).


4 Chief Justice Earl Warren urged the necessity of a liberal construction of the fifth amendment in Quinn v. United States, 349 U. S. 155, 162 (1955), stating: “A liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly—or begrudgingly—to treat it as an historical relic, at most to be tolerated—is to ignore its development and purpose.”


and policies underlying the privilege led to retail rather than wholesale revision of the Warren Court's construction of the fifth amendment. Nevertheless, the Burger Court's strict construction and re-evaluation of the privilege against self-incrimination suggests a contraction in the fifth amendment's contours as shaped by the Warren Court.

The Burger Court's refusal to extend fifth amendment guarantees, moreover, has implications for the developing constitutional law of privacy. Ironically, whereas the Burger Court considerably broadened the scope of the Warren Court's enunciated constitutional right of privacy, it has taken a dim view of "privacy" arguments for the privilege and consequently narrowed the contours of fifth amendment-protected privacy.

This article discusses recent Burger Court decisions in terms of their continuity with and departure from established principles and patterns of judicial construction of the fifth amendment and protected privacy. It is not enough to rest with Dean Wigmore's observation that "[t]he history of the privilege does not settle the policy of the privilege . . . [and, moreover, there] is no agreement as to the policy of the privilege against self-incrimination." A re-examination is all the more crucial since the history of and the principles and policies underlying the privilege guide constitutional interpretation.

A number of competing principles and policies justifying the adoption, extension, and contraction of the privilege have been frequently debated, yet only three rationales seem fundamental. The "fox hunter's reason" holds that the privilege is merely instrumental to guaranteeing a "fair" legal procedure, much as in a fox hunt certain rules give the fox a fair chance for its life. In contrast, the "old woman's reason" holds that self-incrimination is "hard" for an individual; indeed, it poses perilous moral and legal consequences which violate an individual's conscience and ultimately deny his human dignity. Whereas both of these rationales may be traced to Jeremy Bentham, the third rationale is of more recent vintage. Contemporary commentators argue that a privacy prin-
ciple, or what might be termed the “hermit’s reason,” justifies the privilege. The hermit’s rationale for the privilege is that compelled confessions are serious invasions of privacy and, that such invasions of privacy are to be taken seriously. Each of these rationales has important consequences for the values and “validity attributed to the fifth amendment inasmuch as they promote differing principles and policies which shape the contours of the privilege and protected privacy. An analysis of each rationale clarifies the normative import of the fifth amendment and illuminates the Burger Court’s reconsideration of the privilege and its applicability to claims of constitutionally protected privacy.

The following analysis seeks to elucidate judicial construction of the fifth amendment in order to show that the Burger Court’s retrenchment constitutes a return to and extension of pre-Warren Court principles and policies of constitutional interpretation. The crucial issue in either the extension or contraction of the privilege’s protection is what constitutes compulsion of self-incrimination. Examination of competing arguments for the fifth amendment focuses on three rationales—i.e., those of the fox hunter, old woman, and hermit—and their implications for determining the threshold requirement of compulsion of an individual’s self-culpability.

A discussion of cases treating fifth amendment-protected privacy explicates the Burger Court’s rejection of privacy arguments for the privilege. A further examination of cases dealing with private papers and documents, “required records,” and the contexts and circumstances in which individuals may enjoy the benefits of the privilege, emphasizes the Burger Court’s re-evaluation of the requirement of compulsion of self-incrimination, and concomitant reshaping of the contours of the fifth amendment. In terms of the three rationales for the privilege and in contrast to the Warren Court, Burger Court holdings indicate a rejection of the hermit’s rationale, a re-evaluation of the old woman’s rationale, and the tendency to tip the scales in favor of the fox hunter rather than the fox. The article concludes that the Burger Court is forging a narrow construction of the privilege’s applicability, based upon both a re-evaluation of the rationales for and a literal interpretation of the fifth amendment, and, thereby, diminishing the utility of an important constitutional guarantee and safeguard for personal privacy.


14 Prior to his appointment to the Supreme Court, Chief Justice Burger expressed his doubts about the practical feasibility and validity of the privilege: “I am no longer sure that the Fifth Amendment concept in its present form and as presently applied and interpreted [i.e., by the Warren Court], has all the validity attributed to it.” McDonald, A Center Report: Criminal Justice, 1 THE CENTER MAGAZINE 69-77 (Nov. 1968).
II. History and the Contours of the Fifth Amendment

A. Historical Background

Notwithstanding Wigmore's orthodoxy that the privilege "is but a relic of controversies and dangers which have disappeared," the historical development of the privilege reflects the concern that "[n]o one should be held by law to average law abidance, not to the utmost self-sacrifice." The fifth amendment's provision that "[n]o person ... shall be compelled in any criminal case to be a witness against himself" gave constitutional effect to the common law maxim: "Nemo tenetur prodere seipsum"—"No man is bound to betray (accuse) himself." The maxim can be traced to John Lambert, an obdurate heretic, who in 1537, while chained to a stake, protested the inquisitorial practices of ecclesiastical judges. Although the history of the maxim and its development into the contemporary privilege against self-incrimination has been well documented and debated, not until the middle of the seventeenth century was the principle that "no man is bound to accuse himself" firmly established as a rule of evidence in English common law. Yet, by the close of that century the principle as part of the common law tradition was incorporated into colonial legal systems. As Dean Levy's careful study of the history of the fifth amendment concludes, "By 1776 ... the principle [that a man is not bound to accuse himself] ... was simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a self-evident truth needing no explanation." The fifth amendment, like the fourth amendment, evolved in America out of the reception of the English common law and, in particular, its accusatorial system of criminal procedure.

The common law maxim that "no man is bound to accuse himself" provided the historical basis for the constitutional right guaranteed by the fifth amendment. Still, the drafters of the Bill of Rights were apparently unsure of the precise scope of the common law maxim. Initially, George Mason, as author of the Virginia Declaration of Rights, urged the constitutionality of the common law rule of evidence as part of accepted accusatorial procedure:

15 Wigmore, Nemo Tenetur Seipsum Prodere, 5 HARV. L. REV. 71 (1892).
17 See generally L. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 3 (1968); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 MICH. L. REV. 1 (1930); 8 J. WIGMORE, supra note 8, § 2251, at 295; Wigmore, supra note 15.
18 The Answers of John Lambert to the Forty-Five Articles, 5 THE ACTS AND MONU-
MENTS OF JOHN FOXE: A NEW AND COMPLETE EDITION 184 (Rev. Stephen Cahely ed.).
19 See generally L. LEVY, supra note 17; 8 WIGMORE, supra note 8, at § 2251; Silving, supra note 16.
20 See L. LEVY, supra note 17, at 333-400.
21 Six of the original thirteen states (Maryland, 1776; North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) included the principle in their constitutions or Bill of Rights, and in the remaining states the principle was recognized by their courts. See generally Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 VA. L. REV. 763 (1935).
22 L. LEVY, supra note 17, at 430.
23 For discussions of the historical basis of the fifth amendment in the evolution of the Anglo-American accusatorial system, see: L. LEVY, supra note 17, at 333; 8 J. WIGMORE, supra note 8 at § 2250; Pittman, supra note 21. For discussions of the interplay between the fourth and fifth amendments, see Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945 (1977).
That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.\(^{24}\)

Mason's formulation is not without ambiguity inasmuch as the guarantee appears within a list of enumerated rights of the accused and, consequently, fails to extend protection to anyone but the accused, nor in any proceeding other than a criminal prosecution. Moreover, since in seventeenth- and eighteen-century common law "the right applied to all stages of all equity and common-law proceedings and to all witnesses as well as to the parties," Mason's formulation provides "only a stunted version of the common" law maxim.\(^{26}\)

By comparison, James Madison's draft of the fifth amendment provided a guarantee which embraced the broad scope of the traditional common law maxim:

\[
\text{No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.}\]

Madison's proposal broadly applied to civil and criminal proceedings, as well as to any stage or forum of the legal process, including both legislative and judicial inquiries. Indeed, because Madison's proposal apparently collapses the maxim "No man is bound to accuse himself" with the maxim "No man should be a witness in his own case"—"Nemo debet esse testis in propria causa"—his formulation would "apply to any testimony that fell short of making one vulnerable, but that nevertheless exposed him to public disgrace or obloquy, or other injury to name or reputation," and, moreover, would extend protection to third party witnesses in civil, criminal, or equity proceedings. In this regard, Madison's proposal transcended the guarantees of most state constitutions in order to embrace the broadest practices at common law.\(^{29}\)

In committee, John Lawrence suggested that the clause constituted "a general declaration in some degree contrary to laws passed" and consequently should be "confined to criminal cases"; thereupon, the clause was amended

\(^{24}\) Section 8, Virginia Declaration of Rights, reprinted in 7 F. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3813 (1909). Even while the privilege was only a rule of evidence, the Supreme Court has stated: "The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen,'" Slochower v. Board of Education, 350 U.S. 551, 557 (1956). See also Brown v. Walker, 161 U.S. 591, 610 (1896); 349 U.S. at 161-62.

\(^{25}\) L. Levy, supra note 17, at 407.

\(^{26}\) Id.

\(^{27}\) Id. at 422.

\(^{28}\) Id. at 243-44.

\(^{29}\) See generally Pittman, supra note 21.
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without discussion and adopted unanimously. Thus, we have the fifth amendment's present formulation, "No person shall . . . be compelled in any criminal case to be a witness against himself."

B. The Text and a Strict Construction

The text of the fifth amendment indicates that the guarantee applies only "when the accused is himself compelled to act, either by testifying in court or producing documents." Inclusion of the phrase "in any criminal case" literally limits the scope of the guarantee, precluding invocation of the right during police interrogations and by parties and witnesses in civil and equity suits as well as witnesses before non-judicial proceedings, such as grand jury investigations. While a strict construction definitively, albeit narrowly, defines the scope of the amendment's protection, it provides no clear guidance for determining what constitutes compulsion of an individual's self-accusation. Nevertheless, commentators have inferred that the amendment, literally applied, protects against compelled self-incrimination alone, and not self-accusation which leads to infamy or public disgrace at trial and at no other stage of criminal proceedings. Accordingly, justifications for the privilege often center on the utility in preventing "the employment of a legal process to extract from the person's lips an admission of guilt," and protecting those suspected of crime from suffering the cruel and inhumane "trilemma of self-accusation, perjury, or contempt" at trial.

Although historically the Supreme Court rejected such a strict construction of the amendment's scope, the proclivity of modern jurists to refer to the amendment as conferring a privilege against self-incrimination imposes two restrictions that do not necessarily follow from a strict construction of the amendment.

First, the inference that the amendment grants only a privilege rather than a right has great jurisprudential significance. Privileges differ from rights: whereas privileges are granted and, hence, revocable by the government, rights are not granted nor do they derive from the government. Rather, rights impose limitations on the exercise of governmental power, thereby defining the relationship between citizens and the government. To be sure, the practice of rights in America depends on judicial and legislative legitimization of claims to rights, but the government does not create those rights, it merely validates claims of

30 Amendments reported by the House Select Committee, July 28, 1789, are printed in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 at 186-189, quoted and discussed by Levy, supra note 17, at 424-425.
32 See L. Mayers, Shall We Amend the Fifth Amendment? (1959); Mayers, The Federal Witness's Privilege Against Self-Incrimination, 4 AM. J. LEGAL HISTORY 107 (1960); Corwin, supra note 17.
33 8 J. Wigmore, supra note 8, § 2251, at 378.
35 See generally Levy, 84 J. OF POL. 1 (1969), and text accompanying note 43 infra.
36 For the classic analysis of rights, liberties, powers, privileges, and immunities, see: W. Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS (1919). See also J. Feinberg, SOCIAL PHILOSOPHY (1973); McCoskey, Rights—Some Conceptual Issues, 54 AUSTRAL. J. OF PHILOS. 99 (1976).
rights in litigated or contested circumstances. Therefore, "to speak of the 'privilege' against self-incrimination, degrades it, inadvertently, in comparison to other constitutional rights." Provisions of the amendment confer the same constitutional status of protection against the exercise of governmental power as do other guarantees of the Bill of Rights.

Second, a literal reading and strict construction of the amendment does not perforce confine its protection only to "self-incrimination"—"a phrase that had never been used in the long history of its origins and development." Since in criminal cases and individual's personal disclosures may expose him to civil liabilities or infamy, "[a] person can . . . be a witness against himself in ways that do not incriminate him." As Levy observes:

[T]o speak of a right against self-incrimination stunts the wider right not to give evidence against oneself . . . The previous history of the right, both in England and America, proves that it was not bound by rigid definition. . . . The "right against self-incrimination" is a shorthand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him. The clause extended, in other words, to all the injurious as well as incriminating consequences of disclosures by witness or party.

With a literal reading of the clause, then, the shorthand version of a privilege against self-incrimination appears unnecessarily to limit the scope of the fifth amendment.

A strict construction severely limits the contexts in which individuals may invoke the amendment and, in particular, the occasions on which individuals may legitimately claim fifth amendment-protected privacy. In other words, a strict construction promotes legitimization of privacy interests only when an individual is "compelled in any criminal case to be a witness against himself." The contours of fifth amendment-protected privacy, therefore, would be limited to the circumstances of an individual divulging personal information—not necessarily incriminating information—about his thoughts or engagements, under duress and compulsion of the government only in criminal cases.

The judicially fashioned contours of the fifth amendment and protected privacy, however, are broader than entailed by the logic of a literal reading of the amendment. As Justice Frankfurter once observed, "[T]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" Both the history of the amendment and judicial interpretation have ensured broader protection than suggested by a literal reading of the fifth amendment.

38 Levy, supra note 35, at 3 n.9.
39 Levy, supra note 17, at 427.
40 Id.
41 Id. at 425-427.
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C. The Supreme Court and the Scope of the Fifth Amendment

The primary effect of the fifth amendment is that in criminal trials the accused cannot be compelled to take the witness stand and, moreover, it is improper for judges to comment on the failure of the accused to testify. Witnesses must explicitly claim the right, otherwise they are considered to have tacitly waived it; yet they do not make the final determination of the validity of their claims to exercise fifth amendment guarantees. The Supreme Court has never accepted the historical principle that witnesses in civil suits may refuse to testify because of possible adverse affects on civil or proprietary interests, or because the result may be self-disgrace. Even in criminal cases, the accused may refuse to answer only questions tantamount to admissions of guilt or inexorably leading to self-incrimination, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

Although inclusion of the phrase “in any criminal case” in the fifth amendment literally limits the occasions when an individual may invoke his right against self-accusation to criminal trials, there exists compelling historical support that the framers bequeathed “a large and still growing principle.” As a matter of constitutional history, judicial policies tend to support the view that the fifth amendment’s clause “is as broad as the mischief against which it seeks to guard.” The Supreme Court extended the contours of the amendment’s applicability beyond criminal trials to grand jury proceedings as well as legislative investigations, and in some circumstances, to witnesses or parties in civil and criminal cases where truthful assertions might result in forfeiture, penalty, or criminal prosecution. The Warren Court’s landmark decision in Miranda v. Arizona “expanded the right beyond all precedent, yet not beyond its historical spirit and purpose” in extending the right to police interrogations at the time of arrest or in the station house. Thus, as a product of judicial decisions, the fifth amendment’s protection extends from the time the inquiry “has begun to

46 Hale v. Henkel, 201 U.S. 43 (1906); 161 U.S. 591.
48 Levy, supra note 35, at 19.
49 Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
50 See Lefkowitz v. Cunningham, 429 U.S. 893 (1977); 402 U.S. at 437; United States v. Kordel, 397 U.S. 1, 6 (1970); McCarthy v. Arndstein, 266 U.S. 34 (1924); 161 U.S. 591 (1896); 142 U.S. at 563; 116 U.S. 616 (1886); Marbury v. Madison, 5 U.S. 137 (1803).
52 See 266 U.S. 34; 5 U.S. 137.
53 384 U.S. 436.
54 Levy, supra note 35, at 38.
focus on a particular suspect through "custodial interrogation" to the trial itself as well as other quasi-judicial and non-judicial proceedings.

Judicial infidelity to the text of the constitution, however, is Janus-faced. Whereas constitutional interpretation broadened the scope of the fifth amendment's applicability in terms of the contexts in which an individual may invoke his right to remain silent, loose construction of the amendment also fostered policies which compromise fifth amendment protection.

Since 1896 the Supreme Court has upheld grants of immunity on the assumption that although the amendment permits a witness "to refuse to disclose or expose him[self] to unfavorable comments," its primary function is only "to secure the witness against prosecution which might be aided directly or indirectly by his disclosure." Consequently, an individual may be forced to forego the fifth amendment right to remain silent when offered immunity. The practical value of the amendment was further restricted by the Burger Court's legitimization of limiting immunity grants—so-called "transactional immunity"—to only "use" or "testimonial" immunity, barring only use of disclosed information in criminal trials. In addition to the policy of permitting grants of immunity to circumvent fifth amendment guarantees, the Burger Court continues to uphold so-called "implied consent" and "required record" statutes which impose upon privacy interests and may lead to self-incrimination. Moreover, the Burger Court endorses the policy distinction by which the amendment protects individuals' evidence only of a "testimonial" or "communicative" nature but not "real" or "physical" evidence, such as blood tests or handwriting samples.

The fifth amendment's guarantee, thus, has been circumscribed by judicial policies permitting grants of immunity, required records, and the distinction between real and testimonial evidence. The Burger Court promotes, but did not

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56 384 U.S. at 444.
58 161 U.S. 591.
59 Id. at 631.
60 In Ullman v. United States, 350 U.S. 422 (1956), the Court stated that grants of immunity "need only remove those sanctions which generate the fear of justifying invocation of the privilege" but not protect against infamy or disgrace. Id. at 431. See also United States v. Wilson, 421 U.S. 309 (1975); 406 U.S. 441; 161 U.S. at 631.
63 See 406 U.S. at 462 (Douglas, J., dissenting).
originate, these policies. Rather, the Burger Court’s extension of these policies is based upon a reconsideration and re-evaluation of the jurisprudential basis of the privilege against self-incrimination.

The contraction or extension of the scope of the fifth amendment and protected privacy depends upon judicial construction of the purposes and policies behind the amendment. In *Murphy v. Waterfront Commission* the Court perhaps most concisely elucidated the “complex of values” underlying the privilege against self-incrimination:

> 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-incrimination will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a “fair state-individual balance 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 “a shelter to the guilty,” has often “a protection to the innocent.”

From this “complex of values,” three basic rationales for the amendment may be discerned: (1) the necessity to maintain a responsible accusatorial system; (2) the desire to prevent cruel and inhumane treatment of individuals by forcing them into a “trilemma of self-accusation, perjury, or contempt”; and (3) the belief that compelled confessions are serious invasions of personal privacy. Significantly, each of these justifications for the fifth amendment implies different normative orientations toward the amendment and protection for personal privacy. The following section examines each of these rationales and their implications for judicial policies and construction of the privilege against self-incrimination and protected privacy.

III. The Rationales of a Fox Hunter, Old Woman, and a Hermit

A. The Fox Hunter’s Reason

The “fox hunter’s reason” was Jeremy Bentham’s phrase for the “preference for an accusatorial system rather than an inquisitorial system of criminal justice.” As Bentham characterizes the fox hunter’s reason;

> [It] consists in introducing upon the carpet of legal procedure the ideal of *fairness*, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law*: leave to run a certain length of way, for the express purpose of giving him a chance for escape.

66 378 U.S. 52.
67 Id. at 55. 350 U.S. at 426-29; 161 U.S. at 638-39.
68 378 U.S. at 55.
69 Id. 70 5 J. BENTHAM, supra note 10, at 238-39.
The fox hunter's rationale explicates the privilege against self-incrimination by drawing an analogy between a fox hunt and an accusatorial system of criminal justice. Just as in a fox hunt certain rules define permissible and impermissible ways by which fox hunters may capture the fox, so too rules of criminal procedure define an acceptable process for prosecuting suspects of criminal activity in an accusatorial system. Moreover, both the rules of the sport of fox hunting and rules of the adversary system of criminal prosecution are predicated upon the notion of fairness—fair treatment of the fox and the criminal suspect. The guarantee against self-accusation is justified as an "essential mainstay of our adversary system" precisely because an accusatorial system requires fair treatment of suspects of criminal activity. The analogy between fox hunts and accusatorial systems, thus, illuminates the basis for and function of the fifth amendment. Significantly, the fox hunter's rationale, as further discussed below, implies that the privilege against self-incrimination can not be justified on its own merits. Instead the privilege is only a rule and policy objective of accusatorial systems.

In what sense is the privilege a policy objective? How does the privilege serve the ideal of justice as fair treatment in accusatorial systems? According to the fox hunter's rationale, "the essence [of accusatorial systems and, hence, the privilege] is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labors of its officers, not by the simple, cruel expedient of forcing it from his own lips." As the Warren Court reiterated in *Miranda v. Arizona*:

> [T]he constitutional foundations underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," . . . to respect the inviolability of the human personality, our accusatorial system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by cruel, simple expedient of compelling it from his own mouth.

The guarantee against self-accusation is a policy objective of accusatorial systems because it functions as an instrument for securing and maintaining a "fair state-individual balance."

The normative import of the privilege therefore relates to its role in maintaining a relationship between the individual and the state aptly characterized as "equals meeting in battle." As Abe Fortas observed:

> 71 384 U.S. at 460.
> 72 Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961). In Rogers v. Richmond, 365 U.S. 534 (1961), the Court stated that, "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Id.* at 541. See also 431 U.S. 181; 427 U.S. at 484 (Brennan, J., dissenting).
> 73 384 U.S. at 460 (citations omitted).
The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. Equals, meeting in battle, owe no such duty to one another, regardless of the obligations that they may be under prior to battle. A sovereign state has the right to defend itself, and within the limits of accepted procedure, to punish infractions of the rules that govern its relationships with its sovereign individual to surrender or impair his right of self-defense. The fox hunter's rationale for the privilege, as Fortas explained, fundamentally derives from Hobbesian-Lockean precepts; "the privilege reflects the individual's attornment to the state and in a philosophical sense insists upon the equality of the individual and the state." Since the primary value is a relationship of equality between the individual and the state—specifically, securing a "fair fight" while maintaining an idealized relationship comparable to Hobbes's "war of every man against every man"—"the privilege against self-incrimination represents a basic adjustment of the power and rights of the individual and the state." The privilege serves merely as a policy objective of accusatorial systems in which the government must provide compelling proof of an individual's culpability without compelling the individual into self-incrimination.

The normative significance of the privilege against self-incrimination, therefore, centers on its instrumental value for other ends—securing conditions for a "fair fight" and maintaining a "fair state-individual balance"—and not as an end-in-itself. Before discussing the implications for judicial policy-making, a brief examination of various arguments, which presuppose that the privilege has only instrumental value, further clarifies the fox hunter's rationale and illustrates its importance in contemporary discussions of the privilege against self-incrimination.

The fox hunter's rationale underlines several main arguments for the privilege found in the literature debating the value of the fifth amendment. Foremost among the arguments is that historical abuses, exemplified by the Star Chamber, High Commission, and Inquisition, justify the adoption of the principle that "no man is bound to accuse himself" in securing a "fair fight" between the individual and the state in criminal prosecutions. As Wigmore, no friend of the privilege, came to admit, "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a

75 Fortas, supra note 74, at 98-99.
76 Fortas, supra note 74, at 95. See also 378 U.S. at 489; 384 U.S. at 459-60.
78 Fortas, supra note 74, at 97.
79 For a survey of arguments offered in support of the fifth amendment, see generally McNaughton, supra note 9, and Sowle, supra note 9. McNaughton concludes:
     The privilege, like the screw driver, is used for all sorts of reasons, most of them
     having little or no relation to its purpose. The significant purposes of the privilege
     remaining . . . are two: (1) The first is to remove the right to an answer in the hard
     cases of instances where compulsion might lead to inhumanity, the principal in-
     humanity being abusive tactics by a zealous questioner. (2) The second is to comply
     with the prevailing ethic that the individual is sovereign and that proper rules of
     battle between government and individual require that the individual not be bothered
     for less than good reason and not be conscripted by his opponent to defeat himself.
     McNaughton, supra note 9, at 150-151 (emphasis in original) (footnotes omitted).
80 See L. LEVY, supra note 17, at 266-330; 8 J. WIGMORE, supra note 8, § 2250, at 267-
295.
source of proof must itself suffer morally thereby.\textsuperscript{781} A corollary argument urges the usefulness of the fifth amendment's guarantee in frustrating "bad laws" and "bad procedures" relating to government inquiries into citizens' political and religious beliefs.\textsuperscript{82} Whether or not convincing, such arguments from history are designed to be persuasive since if individuals themselves are not permitted to limit governmental inquiries potentially serious abuses of power may result.\textsuperscript{83} Notwithstanding a history of prosecutorial abuses, McNaughton observes that it would be foolish and inefficient to allow witnesses themselves in all instances to frustrate governmental inquiries.\textsuperscript{84} Historical practices, moreover, do not settle the question of when and to what extent witnesses should be allowed to decide whether they should exercise their right to remain silent. Yet, absent an effective first amendment privilege,\textsuperscript{85} the fifth amendment does provide a concededly blunt but "particularly effective [device for] frustrating belief probes"—belief probes of the kind specialized in by the Star Chamber and, more recently, legislative committees during the McCarthy era.\textsuperscript{87}

Additionally, albeit related to arguments from history, some commentators argue that the fifth amendment actually defines the practical limits of governmental power.\textsuperscript{88} That is, a kind of "futility argument" urges that "truthful self-incriminating answers cannot be compelled, so why try?"\textsuperscript{89} The merit of the futility argument, however, remains dubious as controversy rages over whether witnesses will resort to brinkmanship when testifying\textsuperscript{90} (thereby giving advantage to the fox rather than the fox hunter) and, hence, whether other uses of the privilege can justify its prominence in accusatorial systems.

Other arguments for the privilege's utility indeed may be found in the literature. Supplementary arguments urge that the privilege protects innocent defendants from convicting themselves by bad performance on the witness stand;\textsuperscript{92} third party witnesses are encouraged to appear and testify since they need not fear self-incrimination;\textsuperscript{92} and, finally, as a consequence of the privilege, courts will not be burdened by false testimony.\textsuperscript{93} These arguments corroborate a further argument that the guarantee against self-incrimination contributes to "respect for the legal process."\textsuperscript{94} Respect for the legal process, however, may be only

\begin{thebibliography}{99}
\bibitem{781} J. Wigmore, \textit{supra} note 8, § 2251, at 296 n.1. By contrast in 1892, Wigmore wrote disparagingly of the privilege: "As to its intrinsic merits, then, may we not express the general opinion in this way, that the privilege is not needed by the innocent, and that the only question can be how far the guilty are entitled to it?" Wigmore, \textit{supra} note 15, at 86.
\bibitem{782} See McNaughton, \textit{supra} note 9, at 145; see also E. Griswold, \textit{The Fifth Amendment Today} 7-9, 61, 75 (1955); Kalven, \textit{Invoking the Fifth Amendment: Some Legal and Impractical Considerations}, 9 BULL. ATOM. SCIENTISTS 181, 182-183 (1953).
\bibitem{783} See Meltzer, \textit{supra} note 74, at 639-99, 701.
\bibitem{784} McNaughton, \textit{supra} note 9, at 143.
\bibitem{785} See generally O. J. Roche, \textit{The First and the Fifth} (1960).
\bibitem{786} McNaughton, \textit{supra} note 9, at 146.
\bibitem{788} See generally Meltzer, \textit{supra} note 74.
\bibitem{789} McNaughton, \textit{supra} note 9, at 143.
\bibitem{790} Id.
\bibitem{781b} See Wilson v. United States, 149 U.S. 60, 66 (1893); Meltzer, \textit{supra} note 74.
\bibitem{781c} See Meltzer, \textit{supra} note 74; Wigmore, \textit{supra} note 15.
\bibitem{781d} See Meltzer, \textit{supra} note 74; Ratner, \textit{supra} note 13, at 484, 487-489.
\bibitem{781e} See 384 U.S. at 459-460; 378 U.S. at 589. See also B. J. Wigmore, \textit{supra} note 8, § 2250, at 309; Fortas, \textit{supra} note 74, at 97; McNaughton, \textit{supra} note 9, at 144 n.34.
\end{thebibliography}
derivative\textsuperscript{95} inasmuch as the amendment necessitates that the government conduct competent and independent investigations. Still, regardless of whether the fifth amendment directly or indirectly contributes to respect for the legal process, the import of the argument emphasizes again the interplay between the fifth amendment and the values of the accusatorial system.\textsuperscript{96}

In identifying symbolic and practical uses of the privilege, the preceding arguments presuppose that the fifth amendment has only instrumental value and no intrinsic worth. Quite apart from the relative merits of each argument,\textsuperscript{97} together the arguments underscore the significance of the fox hunter's rationale for and evaluation of the fifth amendment. What, then, are the implications of the fox hunter's rationale and the preceding arguments for judicial policies toward the fifth amendment?

If the fifth amendment is understood to have only instrumental value, then its scope and applicability must be narrowly drawn because "the argument from the need to maintain an accusatorial system would only apply where there was some danger of prosecution."\textsuperscript{98} Consequently, where personal disclosures are not incriminating or where an individual receives immunity, claims under the amendment have no legitimacy. Grants of immunity are permissible and justifiable in accusatorial systems because immunity removes culpability for self-accusatory statements and, thus, leaves undisturbed the state-individual balance. The fair state-individual balance remains undisturbed, however, only in the sense that an individual is exculpable for accusatory self-disclosures. An individual's privacy interests are necessarily forfeited by grants of immunity, and furthermore, if an individual refuses to testify after being granted immunity from prosecution, he may be jailed for contempt.\textsuperscript{99} As Robert McKay observes:

Even though protection against certain harmful consequence is assured through a sufficient grant of immunity, the privacy interest is relinquished upon disclosure compelled in return for a grant of immunity. Moreover, there is no way to protect against the related hazard of damage to reputation. It is not easy to square the privacy interest (which arguably is) a prime purpose of the privilege with immunity statutes that require surrender of privacy.\textsuperscript{100}

In other words, while under the fox hunter's rationale the individual and the state ostensibly remain on equal footing, the individual faces the prospect of protecting personal privacy only when self-disclosures are incriminating. He

\textsuperscript{95} For a discussion of arguments that the privilege only derivatively or per se contributes to respect for the legal process see McNaughton, \textit{supra} note 9, at 144 n.34.


\textsuperscript{97} The relative merits of each of the preceding arguments has been debated in the literature; for a survey and brief discussion of the merits of each argument see, 8 J. Wigmore, \textit{supra} note 8, at § 2251; McNaughton, \textit{supra} note 9; Sowle, \textit{supra} note 9.

\textsuperscript{98} Gerstein, \textit{supra} note 13, at 88.

\textsuperscript{99} 412 U.S. 309.

\textsuperscript{100} McKay, \textit{supra} note 13, at 230.
must forego privacy interests when personal disclosures are self-accusatory but not self-incriminating and is required to testify upon a grant of immunity regardless of privacy interests at the risk of being jailed for contempt for refusal. In sum, given the fox hunter's jurisprudential basis for the fifth amendment, personal privacy receives little or no consideration and protection. Privacy interests are tangential, to say the least, and receive limited recognition, at best, if the fifth amendment merely embodies a policy objective of accusatorial systems.

Still, more fundamentally, given the fox hunter's rationale, the fifth amendment confers only a privilege and not a right against self-accusation. That is, the amendment may be extended or contracted depending upon judicial evaluations of its utility in different circumstances for maintaining an accusatorial system. This crucial implication of the fox hunter's rationale is well illustrated by Henry J. Friendly's argument:

What is important is that on any view the Fifth Amendment does not forbid the taking of statements from a suspect; it forbids compelling them. That is what the words say, and history and policy unite to show that is what they meant. Rather than being a "right of silence," the right, or better the privilege [sic], is against being compelled to speak. This distinction is not mere semantics; it goes to the very core of the problem.

As Friendly argues, the amendment's justification rests with its utility for prohibiting the government from compelling a person to be a witness against himself because only in compelling an individual does the government rupture the fair state-individual balance. The "very core of the problem" for judicial construction, therefore, becomes one of determining what constitutes personal compulsion. Yet, governmental compulsion may be a matter of degree, dependent upon the circumstances of governmental inquiries. Consequently, if the fifth amendment is justified only in terms of its utility and "compulsion is not a yes-or-no matter rather a continuum," then the privilege need not have the same contours in the police station as in the courtroom. Instead, the scope of the fifth amendment will vary with judicial evaluation of the degree of personal compulsion and the utility of the privilege relative to the maintenance of a fair state-individual balance.

Recent judicial efforts at line-drawing in evaluating the degree of governmental compulsion, moreover, indicate that the threshold requirement for effective exercise of the privilege is a demonstration of "genuine compulsion of testimony." As the Burger Court, in United States v. Washington, reiterated:

Absent some officially coerced self-accusation the Fifth Amendment

101 See text accompanying note 36 supra.
102 H. Friendly, Benchmarks 271 (1967).
103 Id. at 271-75.
104 Id. at 271-76. For the Burger Court's treatment of the issue of governmental compulsion in determining effective exercise of the privilege in different contexts see 431 U.S. 181; 427 U.S. 463; 425 U.S. 341; 424 U.S. at 654-655; 417 U.S. at 440; 412 U.S. at 222-227, 235-240, 246-247; 401 U.S. at 226. Compare discussions by the Warren Court in 384 U.S. at 479-480; 378 U.S. 478; 378 U.S. at 8; 365 U.S. 534.
105 H. Friendly, supra note 102, at 275.
106 417 U.S. at 440.
privilege is not violated by even the most damning admissions. . . . The constitutional guarantee is only that the witness be not compelled to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne.107

Hence, not only are the legitimate occasions for invoking the privilege limited to where an individual makes self-incriminating disclosures, but moreover effective exercise of the privilege remains conditional upon a showing that the government exerted "genuine compulsion" in securing an individual's statements of self-culpability.

The fox hunter's rationale, when endorsed in judicial construction of the amendment, therefore, severely limits the scope of the privilege and its protection for personal privacy. Indeed, given an instrumental basis, the amendment provides only a relative constitutional guarantee. As a relative constitutional guarantee, the fifth amendment confers only a privilege against self-incrimination and not a right against self-accusation. As such, the privilege against self-incrimination is context-dependent, and its effective exercise turns upon judicial evaluation of the degree of compulsion rather than self-accusation per se.

B. An Old Woman's Reason

Justice Douglas, dissenting in Ullmann v. United States,108 urged the unconstitutionality of immunity grants on the grounds that the fifth amendment embodies more than an instrumental value and policy objective of our accusatorial system:

The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. . . . [T]he Framers put it well beyond the power of Congress to compel anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved.109

Justice Douglas' rejection of the fox hunter's narrow perspective on the fifth amendment and alternative interpretation embraced what Bentham termed "an old woman's reason"110 for the privilege; namely, that a privilege against self-incrimination reflects the belief that it is cruel and inhumane to force a person to partake in his own undoing.

107 431 U.S. 181. In Garner v. United States, 424 U.S. 648 (1976), the Burger Court quoted approvingly United States v. Monia, 317 U.S. 424 (1943), to support its narrow construction of the fifth amendment: "The Amendment speaks of compulsion. It 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." 424 U.S. at 654-655. The Court added that the witness may also "lose the benefit of the privilege without making a knowing and intelligent waiver." Id. at 654 n.9. See also 412 U.S. at 222-27, 235-40, 246-47; 427 U.S. 463.

108 350 U.S. 422.

109 Id. at 445-46 (second emphasis added).

110 5 J. BENTHAM, supra note 10, at 230.
In Bentham’s view, “[t]he essence of [the old woman’s] reason is contained in the word hard: ‘tis hard upon a man to be obliged to criminate himself.” Of course, Bentham had few kind words for the old woman’s reason:

Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to, is, his being punished. What is not less hard upon him, is, that he should be punished. . . . Whatever hardship there is in a man’s being punished, that, and no more, is there in his thus being made to criminate himself.

According to Bentham, the old woman’s rationale is, to borrow one of his favorite phrases, a bit of “nonsense on stilts,” a mere pretense to reason, which if legally accepted “this plea of tenderness, this double-distilled and treble-refined sentimentality” would only serve the guilty and foster bad evidence. Notwithstanding Bentham’s curt dismissal of the old woman’s rationale, there exists considerable historical evidence that the rationale was an important jurisprudential basis for the development and establishment of a right against self-accusation. In the late sixteenth century, for example, Cartwright and other Puritan leaders attacked the ex officio oath on the grounds that:

Much more is it equall that a mans owne private faults should remayne private to God and him selfe till the Lord discover them. And in regard of this righte consider howe the Lord ordained wittnesses where by the magistrate should seeke into the offences of his subjects and not by oathe rifle the secrets of theare hearts.

Colonial common law practices and constitutional history demonstrate that a crucial basis for the fifth amendment was the belief that individuals should be protected “against physical compulsion and against the moral compulsion that an oath to a revengeful God commands of a pious soul.” As Zechariah Chafee observed, “Nothing else in the Constitution prevents government officials and policemen from exorting confessions from American citizens by torture and other kinds of physical brutality. . . .”

While history supports both the fox hunter’s and the old woman’s rationale for the fifth amendment, the old woman’s rationale, in contradistinction to the fox hunter’s instrumental evaluation of the amendment, finds the fifth amendment’s primary purpose in preventing the torture and inhumane treatment of individuals; a right against self-accusation respects the dignity of human beings. As David Louisell argues:

[The best justification [for the fifth amendment] is simply this: It is essentially and inherently cruel to make a man an instrument of his own

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111 Id. at 230.
112 Id. at 231.
113 Id. at 231-38.
114 See generally L. Levy, supra note 17; 8 J. Wigmore, supra note 8, at § 2250.
115 L. Levy, supra note 17, at 177.
116 Pittman, supra note 21, at 783 (emphasis added).
117 Z. Chafee, supra note 96, at 188.
condemnation. The human tragedy having evinced as much cruelty as it has, any nurtured sentiment against sadism is indeed a welcome brake on human passion, a valued friend, not likely to be discarded for newer ones.\textsuperscript{118}

In other words, the old woman’s rationale, contrary to that of the fox hunter, recognizes that the fifth amendment embodies an end-in-itself, namely, respect for the moral dignity of the individual. Hence, the fifth amendment does not confer merely a privilege, as upon the fox hunter’s rationale, but rather constitutionally denominates a right to remain silent.

According to the old woman’s rationale, the significance of the fifth amendment does not depend on its instrumental role as a policy preference of accusatory systems, rather it lies simply in the constitutional recognition that human beings should be respected. Moreover, the old woman’s rationale requires that we take rights seriously\textsuperscript{9} and not dilute a constitutional guarantee by transposing a privilege against self-incrimination for a right against self-accusation. If the practice of rights and, in particular, the fifth amendment’s guarantee is taken seriously, then “third degree” methods of interrogation, whether those employed by continental inquisitorial courts or modern grand juries and congressional investigating committees, are necessarily proscribed. So it is that the Court and its commentators\textsuperscript{20} often justify the fifth amendment in terms of respect for the dignity and inviolability of the individual not only to foreclose browbeating, bullying, and other “barbaric practices,”\textsuperscript{22} but also to preclude the trilemma of reluctant witnesses, i.e., forcing witnesses to “choose among the three horns of the triceratops (harmful disclosure, contempt, perjury).”\textsuperscript{22} Reluctant witnesses must choose among the alternatives of disclosure, a “stultifying thing”;\textsuperscript{23} bringing contempt upon themselves by not testifying, an “unnatural act” of inflicting injury on oneself;\textsuperscript{24} or perjuring themselves, which for religious persons also constitutes a sin against God.\textsuperscript{122} By illuminating the perilous moral consequences of confronting and compelling an individual to testify against himself, such arguments support the right against self-accusation and underscore the significance of the old woman’s rationale for the fifth amendment.

The old woman’s rationale, however, not only cautions judicial construction of the fifth amendment to foreclose the possibility of third degree interrogations and confronting witnesses with a cruel trilemma of testifying, bringing themselves into contempt, or committing perjury, according to the old woman’s

\textsuperscript{118} Louisell, Criminal Discovery and Self-Incrimination, 53 Calif. L. Rev. 89, 95 (1965).
\textsuperscript{121} See generally 5 J. Bentham, supra note 10; Griswold, supra note 120; Mayers, supra note 32; McNaughton, supra note 9, at 147.
\textsuperscript{122} McNaughton, supra note 9, at 147.
\textsuperscript{123} Id.
\textsuperscript{124} See also Griswold, supra note 120; Meltzer, supra note 74; McNaughton, supra note 9, at 148.
\textsuperscript{125} See generally Silving, supra note 16. As Fortas argues “Mea culpa belongs to a man and his God. It is a plea that cannot be extracted from free men by human authority.” See Fortas, supra note 74, at 100.
rationale, the fifth amendment moreover extends protection to any claim against compulsory self-disclosure. Hence, the Court need not engage in line-drawing with regard to the degree of governmental compulsion or attempt to define "genuine compulsion of testimony." Indeed, compelled disclosures, even on grants of immunity as Justice Douglas urged, constitute inhumane treatment because individuals are forced to overcome aversions to self-condemnation in publicly testifying and, thereby, foregoing as well their privacy interests.

The old woman's rationale thus provides an alternative to the fox hunter's jurisprudential basis for the fifth amendment. The old woman's justification of the fifth amendment in terms of respect for the dignity and inviolability of the individual contrasts sharply with the fox hunter's instrumental evaluation and view of the fifth amendment as merely a policy objective of accusatory systems. Concomitantly, the implications of the old woman's rationale for judicial construction of the scope of the fifth amendment differ radically from those fostered by the fox hunter's rationale. Since the fifth amendment is interpreted to embody an end-in-itself, not merely an instrumental value, judicial interpretation must take seriously the notion of a right and in particular, a right against self-accusation. It is therefore extraconstitutional to diminish the practical value of the fifth amendment by construing the amendment to confer a privilege against self-incrimination and not a right against self-accusation. If the fifth amendment does not confer a privilege but a right, then it is also wrong for Supreme Court Justices to fashion the contours of the amendment to different circumstances upon their construction of what constitutes "genuine compulsion of testimony" or, in other instances, to allow the constitutional guarantee to be superceded by immunity grants. Furthermore, the old woman's rationale points to the ultimate dilemma which the fox hunter's rationale poses for constitutional interpretation: the fifth amendment is justified in terms of its instrumental value for securing and maintaining a fair state-individual balance; yet, judicial construction of the amendment's relative utility may lead to a narrow context-dependent privilege against self-incrimination, with its effective exercise turning on judicial evaluation of the degree of governmental compulsion on an individual, so that individuals, while criminally exculpable, still may face public disgrace, infamy, and self-condemnation, thus, dubiously remaining on an equal footing with the state.

Notwithstanding these arguments for and the moral appeal of the old woman's rationale, it too poses a paradox for constitutional interpretation of the fifth amendment. The old woman's rationale arguably "confronts the clear fact that the rule against self-incrimination is psychologically and morally unacceptable as a general governing principle in human relations." Defenders of the fox hunter's rationale, such as Sidney Hook, often appeal to common sense in countering the old woman's moralism: "Let any sensible person ask himself whether he would hire a secretary, nurse, or even a sitter for his children, if she

126 417 U.S. at 440. See text accompanying note 105 supra.
127 350 U.S. at 440 (Douglas, J., dissenting).
128 See text accompanying note 35 supra.
129 417 U.S. at 440.
130 Louisell, supra note 118, at 95.
refused to reply to a question bearing upon the proper execution of her duties with a response equivalent to the privilege against self-incrimination. Friendly reiterates the argument:

No parent would teach such a doctrine to his children; the lesson parents preach is that a misdeed, even a serious one, will generally be forgiven; a failure to make a clean breast of it will not be. Every day people are being asked to explain their conduct to parents, employers, and teachers. The old woman's rationale indeed leads to paradox: on the one hand, the right against self-accusation is justified by its acknowledgement of the moral dignity and inviolability of the individual, and, on the other hand, the justification runs contrary to moral and social practices. In other words, an individual's non-disclosure would be morally acceptable and justifiable in legal proceedings but not in family affairs or social relationships.

The paradox of the old woman's rationale, moreover, becomes more pressing with regard to claims of fifth amendment-protected privacy. The old woman's rationale, unlike the fox hunter's, assures extensive fifth amendment protection for privacy interests as derivative of the intrinsic worth of individuals. Claims to privacy or non-disclosure of personal thoughts or engagements have merit because of their derivation from, or association with, respect for the dignity of individuals, which itself requires that individuals not be forced to suffer the pain of self-accusation and condemnation. Like the fox hunter's rationale, the old woman's rationale recognizes only the instrumental value of personal privacy, albeit for a different end: whereas the former rationale found validity in the utility of privacy interests when associated with an equilibrium between the individual and the state, the latter rationale recognizes personal privacy as an essential aspect of the dignity and conscience of individuals. Moreover, unlike the fox hunter's rationale, the old woman's rationale legitimates claims of protected privacy whenever and wherever individuals are compelled inhumanely and regardless of immunity from legal culpability to disclose personal information. Although fifth amendment-protected privacy under the old woman's rationale rests on moral principle and, hence, may not justifiably be forfeited by grants of immunity, protected privacy suffers the paradox of the old woman's rationale: non-disclosure of personal information which is self-accusatory or self-incriminating may not be legally compelled, but may be compelled, on ethical grounds, by an individual's lover, parents, friend, or employer.

C. A Hermit's Reason

As an alternative to the rationales of the fox hunter and old woman, con-

131 S. Hook, Common Sense and the Fifth Amendment 73 (1963).
132 Friendly, supra note 9, at 73.
133 A similar paradox arises with pleas of mental insanity. At times, defendants plead criminal insanity at trial and, consequently, are not held responsible nor punishable for their actions as part of their treatment. See generally H. Fingarette, The Meaning of Criminal Insanity (1972); R. Laing, The Divided Self (1965).
134 See text accompanying note 169 infra.
temporary commentators have proposed that a privacy principle, or what might be termed the "hermit's rationale," serves as the jurisprudential basis for the fifth amendment. The hermit's rationale for the fifth amendment holds that compelled confessions are serious invasions of privacy and, furthermore, that invasions of privacy are to be taken seriously. To compel disclosure of personal information not only disturbs the fair state-individual balance and denies the dignity of man, but also diminishes the intrinsic worth of personal privacy.

For the hermit, the normative significance of individual privacy is an end-in-itself which attains constitutional expression and protection in the guarantee of the fifth amendment. As Leonard Ratner, some twenty years ago, urged:

The privilege against self-incrimination is a constitutional facet of the right of privacy. The right of each individual to remain unmolested in the absence of independent evidence connecting him with the commission of a crime is but an aspect of the limitation which the privilege places upon the powers of the police. The privilege reflects the further principle, however, that a person's own knowledge of whether or not he has any connection with a criminal act is possible to him and should not be subjected to compulsory disclosure.\(^{135}\)

That a privacy principle underlies the fifth amendment was increasingly acknowledged during the years of the Warren Court.\(^{136}\) In particular, Justice Douglas urged the import of the value of privacy and its relation to the fifth amendment:

Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. . . . That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing. This is his prerogative, not the State's.\(^{137}\)

Yet, if as Justice Douglas suggests, the fifth amendment constitutionally embodies a privacy principle, how is it that this principle has gained currency in only the last twenty years? Indeed, critics of the Supreme Court's acceptance of fifth amendment-protected privacy point out that the fox hunter's and old woman's rationales have historical support in the development of common and constitutional law, whereas privacy, let alone a right of privacy, was neither recognized in seventeenth- and eighteenth-century common law nor given express recognition in the Bill of Rights.\(^{138}\) Although not entirely persuasive, Judge Frank correctly countered such criticisms by observing that "[t]he critics of the Supreme Court, however, in their over-emphasis on the history of the Fifth Amendment, overlook the fact that a noble principle often transcends its origins,

\(^{135}\) Ratner, supra note 9, at 488-89.
\(^{136}\) See 384 U.S. at 460; 381 U.S. at 484; 382 U.S. at 416; 378 U.S. at 55. See also 322 U.S. at 698; 322 U.S. at 489-90; 116 U.S. at 630.
that creative misunderstandings account for some of our most cherished values and institutions. . . .” Fortunately, Judge Frank, unlike Justice Douglas, further explicated the relationship between the fifth amendment and the value of personal privacy in countering supporters of the fox hunter’s rationale and critics of the hermit’s justification for the fifth amendment:

They ignore the fact that the privilege—like the constitutional barrier to unreasonable searches, or the client’s privilege against disclosure of his confidential disclosures to his lawyer—has, *inter alia*, an important “substantive” value, as a safeguard of the individual’s “substantive” right of privacy, a right to a private enclave where he may lead a private life.40

Judge Frank thus makes explicit the import of and crucial difference between the rationales of the fox hunter and the hermit. Whereas the fox hunter views the fifth amendment as merely a procedural rule deriving its instrumental justification from its utility within an accusatorial system, the hermit’s rationale justifies the fifth amendment in terms of a constitutional principle or right which fidelity to the Constitution requires that we take seriously.

In contrasting the fox hunter’s and hermit’s rationales, and cautioning the Court to take seriously the privacy justification, Judge Frank, like Ratner and Justice Douglas, does not indicate the implications of the hermit’s rationale for judicial construction of the contours of the fifth amendment and protected privacy. Indeed, too often proponents of the hermit’s rationale simply assert the normative significance of fifth amendment-protected privacy, but fail to articulate definite consequences for constitutional interpretation. Hence, there justifiably may be misgivings about “creative misunderstandings [which] account for some of our most cherished values and institutions”41 when the nature of, and means for maintaining, those cherished values and institutions are not comprehended. Creative misunderstandings, no matter how “creative,” lead only to further misunderstanding and confusion. The Warren Court’s endorsement of a privacy rationale for the privilege, for example, ironically led to the denial of claims to fifth amendment-protected privacy. The Warren Court acknowledged that “the federal privilege against self-incrimination reflects the Constitution’s concern for the essential values represented by ‘our respect for the inviolability of human personality and of the right of each individual’ to a private enclave where he may lead a private life”42 only to deny the retroactivity of the no-comment rule in *Griffin v. California.*43 Previously, the Court had employed a privacy rationale to deny the retroactivity of the exclusionary rule under the fourth amendment.44 Acknowledgement of the import of a privacy rationale for the fifth amendment is not sufficient; instead a perspicuous view of the implications of the rationale for judicial construction is required.

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140 *Id.* at 581-82 (Frank, J., dissenting).
141 *Id.*
142 382 U.S. at 446.
143 380 U.S. at 614.
Robert McKay, drawing from the Supreme Court’s dicta concerning the interrelationship of the fourth and fifth amendments, argues that a privacy principle underlies the fifth amendment’s proscription of compelled self-disclosures:

The limitation on searches and seizures prohibits only that which is “unreasonable,” thus leaving the privacy of the home imperfectly secured in order to accommodate genuine necessities of the state. But the privacy of the mind, at least against the compulsion of self-accusation, is absolute. It is not sound as a modern expression of the original urge to protect freedom of conscience, that mind-freedom should be complete? Moreover, this respect of the fifth amendment appears as a logical corollary to the protections accorded to speech, press, and conscience in the first amendment.

McKay’s statement that “the privacy of the mind, at least against compulsion of self-accusation, is absolute” interpreted normatively is little more than bare assertion. It points, however, to a crucial implication of the hermit’s rationale, namely, grants of immunity should not be permitted to supersede the strictures of the fifth amendment. McKay admits it is “not easy”—“impossible” is a more accurate adjective—“to square the privacy interest as a prime purpose of the privilege with immunity statutes that require surrender of privacy.” Nevertheless, the critical questions remain: what is the distinctive relationship between the fifth amendment, as opposed to the first and fourth amendments, to privacy interests? and what are the criteria and consequences for judicial construction of the amendment?

McKay elaborated by discussing the connection between the guarantees of the first and fifth amendments:

The First Amendment notion that no man may be compelled to worship or to speak in any particular way—or at all—may be regarded as an enlarged version of the more specific Fifth Amendment notion that no man shall be required to convict himself out of his own mouth.

First amendment-protected privacy indeed may be broader—i.e., the range of privacy interests which may be asserted under the amendment—than that...
guaranteed by the fifth amendment. Yet the first amendment literally only prohibits Congress from legislating on the establishment or free exercise of religion or otherwise "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."\textsuperscript{150} Strictly construed, the first amendment does not guarantee the privacy of what people profess or do; citizens may be required to make some disclosures. The fifth amendment does not simply guarantee a smaller version of the first amendment, rather it serves a significantly distinct function, namely, guaranteeing that individuals will not be compelled by the state to bear witness against themselves. McKay's argument for personal privacy, moreover, appears circular: a privacy rationale is asserted as justifying the fifth amendment, yet McKay argues from the amendment (or amendments) to the constitutional protection of personal privacy. Actually, McKay hedges his argument by concluding:

\begin{quote}
In sum, from all the welter of reasons given in justification of the privilege against self-incrimination, it seems to me that only two have any probative force, and they are perhaps opposite sides of the same coin: (1) preservation of official morality, and (2) preservation of individual privacy.\textsuperscript{161}
\end{quote}

Thus, McKay appears to merge the rationales of the fox hunter and hermit.\textsuperscript{152} In so doing, McKay emphasizes that the fifth amendment protects privacy interests associated with "the privacy of the mind," but fails to specify when and by what criteria individuals should be allowed to exercise the fifth amendment in order to protect their privacy interests.

Individuals may have a wide range of privacy claims co-extensive with their expectations and interests in limiting access by others, including the government, to their thoughts and engagements.\textsuperscript{153} Consistent with this perspective that the fifth amendment safeguards "one's mental and emotional state including: per-


\textsuperscript{151} McKay, supra note 13, at 213-14.

\textsuperscript{152} Erwin Griswold, in articulating his version of a privacy rationale for the fifth amendment, also collapses the privacy argument with that basing the privilege on its instrumental role in accusatorial systems and utility for maintaining the "distribution of power" between the state and individual. See Griswold, supra note 120, at 221, 224-25.

sonal thoughts, beliefs, ideas and information.” Michael Dann endeavors to clarify the functions of the fourth and fifth amendments and their respective guarantees for personal privacy:

[T]here are significant differences between the fourth and fifth amendment safeguards. The amendments differ in the general nature of the evidence prohibited. Unlike the fifth, the fourth amendment emphasizes protection against official intrusion into one's physical, as opposed to mental psychological, privacy. . . . Also, while the fourth amendment only prohibits, as a means by which the state can obtain evidence, "unreasonable" searches and seizures, the fifth absolutely prohibits the state from obtaining certain types of evidence against a person's will.

Dann correctly stresses that the fourth amendment only limits governmental access to "reasonable" searches and seizures, and the fifth amendment provides an absolute bar to compelled incriminating personal disclosures. Dann, however, mistakenly finds that the amendments differ "in the general nature of the evidence prohibited." Dann's identification of privacy interests in "physical" seclusion with the fourth amendment's safeguards and "mental" privacy with the fifth amendment's guarantee bespeaks a false dichotomy between privacy interests associated with the respective amendments. Privacy is an existential condition of life which may be compromised by either causal access, intrusions which influence or causally affect individuals' engagements or future relationships, or interpretative access, intrusions which obtain information about individuals' thoughts and engagements. Causal and interpretative access are analogous to, but not identical with, the so-called mind-body distinction since both forms of access are interdependent ways in which individuals' privacy may be compromised. The fourth amendment's regulation of governmental searches and seizures ostensibly provides a broad protection for individuals' interests in causal privacy—governmental intrusion upon and interference with individuals' "persons, houses, papers, and effects"—and interpretative privacy—governmental intrusions designed to gather information about individuals' engagements. The fifth amendment's guarantee prohibits the government from compelling an individual to be a witness against himself by disclosing personal information, thereby protecting interpretative or informational privacy associated with self-accusatorial disclosures. In addition causal privacy is protected insofar as governmental demands for personal disclosures, no less than governmental intrusions into a person's "constitutionally protected area" under the fourth amendment, causally affect his engagements and future relationships.

The constitutionally significant difference between the fourth and fifth amendments, therefore, lies in their respective restrictions upon and regulation of the ways by which the government may obtain incriminating evidence and coterminously invade individuals' privacy. Dann's dichotomy between physical

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154 Dann, supra note 13, at 611.
155 Id. at 602.
156 For an elaboration of this analysis, see O'Brien, supra note 153, at 75-79. See also Garrett, The Nature of Privacy, 18 PHILOSOPHY TODAY 263 (1974).
and mental privacy and two kinds of evidence protected under the amendments is too simple and therefore misleading. Differences between privacy interests protected under either amendment derive not from the kinds of evidence safeguarded, but rather from the distinctive ways in which the amendments define the manner by which the government may legitimately obtain access to individuals' lives in order to secure culpable evidence. Since the crucial difference between the fourth and fifth amendments relates not to the nature of the evidence sought, but to the manner by which the government may obtain evidence, judicial interpretation of the respective amendments' restrictions upon the exercise of governmental power becomes crucial for each amendment's substantive guarantees and safeguards for personal privacy.

Still, the hermit's rationale, and McKay's and Dann's arguments in particular, are subject to the criticism that "while the impact of claiming the privilege can result in the protection of certain aspects of one's privacy, privacy will not explain the Fifth Amendment privilege." Similarly, Bernard Meltzer argues: "There is no coherent notion of privacy that explains the privilege; rather it is the privilege that produces a degree of privacy by insulating the suspect or defendant to produce oral or documentary evidence." To be sure, personal privacy receives protection whenever claims asserted under the amendment are found legitimate; privacy and rights of privacy are not synonymous. The fifth amendment, even when justified solely on the fox hunter's rationale, provides in some instances derivative protection for privacy interests. What nevertheless remains obscure in such criticisms is the demand for an "explanation" of the fifth amendment in terms of privacy. Justifications differ from explanations: the privacy rationale may provide compelling reasons for validating claims under the amendment, yet not explain the patterns of judicial construction and application of the amendment. Indeed, neither the fox hunter's nor the old woman's rationales provide explanations as such for the fifth amendment.

Perhaps what most perturbs critics of the privacy rationale is that every day individuals are compelled to disclose personal information about their thoughts and engagements, so why talk about privacy as a basis for the fifth amendment? In short, the hermit's rationale can be useful and comforting only for hermits. Judge Friendly's criticisms of the privacy rationale exemplify this view. Friendly finds that "to such extent as the privacy proponents offer any explanations of their thesis, they are disturbing in the last degree" and assumes quick defeat of the rationale merely because testimonial compulsion and grants of immunity are part and parcel of our accusatorial system. In satisfaction, Friendly cites the Supreme Court's approval of Wigmore's observation: "For more than three centuries it has been recognized as a fundamental maxim that the public . . . has

159 Meltzer, supra note 74, at 687 (emphasis added).
160 See O'Brien, supra note 153, at 75-76.
161 See text accompanying notes 99 and 133 supra.
163 Friendly, supra note 9, at 688.
a right to everyman’s evidence.” Fundamentally, Friendly revels in assuming that privacy must be absolute and therefore “the privacy theory . . . [must] lead to the absurd conclusion that the state cannot compel evidence from anybody.” Friendly nevertheless rejoices in the defeat of a straw man.

The hermit’s rationale need not entail protection of every privacy claim under the fifth amendment. As Robert Gerstein argues:

The right of privacy cannot be understood as embodying the rule that “privacy may be never violated.” The alternative is to look at the right of privacy not as an absolute rule but as a principle which would establish privacy as a value of great significance, not to be interfered with lightly by governmental authority.

Gerstein accepts Fried’s analysis of privacy “as the control we have over information about ourselves,” but departs from his view “that a man cannot (i.e., should not) be forced to make public information about himself. . . . Thereby his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist.” Gerstein suggests: “If the argument for privacy is made so broad as to sweep away tax returns, accident reports, and the capacity to compel testimony on personal matters in civil cases, for example, it must surely be rejected.” The privacy of individuals’ thoughts and engagements has intrinsic worth, yet not every claim of privacy must be protected.

Gerstein, unlike McKay, Dann and Fried, furthermore endeavors to define the kinds of disclosures of personal information which should receive fifth amendment protection. Gerstein argues:

I think we are dealing here with a special sort of information, a sort of information which it is particularly important for an individual to be able to control. . . . It is not the disclosure of the facts of the crime, but the mea culpa, the public admission of private judgement of self-condemnation, that seems to be of real concern.

Gerstein’s argument that the fifth amendment protects only against compelled disclosures of personal information which force an individual to make a judgement as to his own culpability leads back, however, to the paradox of the old woman’s rationale. Characteristically, Friendly overstates his counter argument:

Far from being a moral doctrine, the privacy justification is about as immoral as one could imagine. To be sure, there may be offenses, for example, fornication and adultery, where the individual’s right to be left alone may transcend the state’s interest in solving them. . . . [Yet] can it be

164 Id. at 689 n.90.
165 Id. at 689.
166 Gerstein, supra note 13, at 89.
167 Fried, supra note 13, at 482. For a critique of Fried’s analysis of privacy see O’Brien, supra note 153, at 71-73.
168 Fried, supra note 13, at 488.
169 Gerstein, supra note 13, at 89.
170 Id. at 90-91.
171 See text accompanying note 130 supra.
seriously argued that when a murder or rape or kidnapping has been committed, a citizen is morally justified in withholding his aid simply because he does not want to be bothered and prefers to remain in a "private enclave" from which the state has cause to believe he departed in order to do violence to another?172

Friendly's argument has merit and may prove convincing if one accepts his particular vision of the areas and extent to which the government should pursue the legal enforcement of public morality.173 Nevertheless, Friendly concludes that the privacy argument is immoral only because he interprets the argument in an extreme form, namely, that privacy in legal and social practice entails an unqualified mutual noninterference among individuals.174

Contrary to Friendly, the hermit's rationale does not necessarily entail an ideal of unconditional noninterference among individuals. Instead, the privacy argument holds that the government should respect the moral autonomy of individuals. Therefore, governmental intrusions—intrusions whether in the form of searches and seizures or demands for self-disclosure—should be circumspect and limited.175 The hermit's rationale, like that of the old woman, is based on moral principle and not, as the fox hunter's rationale, policy considerations.176

Notwithstanding the moral appeal of the hermit's rationale, privacy arguments provide ambiguous and incomplete guidance for the Court's determination of the contours of the fifth amendment. Failure to articulate independent standards for exercising the privilege suggests that the hermit's rationale may not usefully serve as the primary jurisprudential basis for the fifth amendment. Rather, the hermit's rationale may serve as an ancillary justification. It is not surprising that proponents of the hermit's rationale rely on other justifications for the privilege when fashioning their privacy arguments. McKay's argument, for example, combined the rationales of the fox hunter and the hermit so that the fifth amendment extends protection to claims of privacy while according consideration to the needs of law enforcement. In other words, the hermit's rationale serves to limit the extent to which policy considerations should control the applica-


175 In other words, the privacy argument attempts to make explicit what remains implicit in our "liberal regime"; namely, that by design the legal parchment of the United States Constitution and Bill of Rights consecrated the founding principle of limited government—which implies that both the governors and the governed are subject to the rule of law and "that governmental powers stop short of certain intrusions into the personal life of the citizen." Emerson, Nine Justices in Search of a Doctrine, 64 MICH. L. REV. 219, 299 (1965). "Liberal regime" refers not only to the legal parchment of our Constitution but also to the sources and way of life in America. The "liberal regime" has been defined as "the regime devoted to the principle that the purpose of government is the securing of the equal right of every individual to pursue happiness as he understands it." T. PANOLES, MONTESEGUI'S PHILOSOPHY OF LIBERALISM I (1973). See also J. CROPSEY, POLITICAL PHILOSOPHY AND THE ISSUES OF POLITICS 1-15 (1977); L. STRAUSS, NATURAL RIGHT AND HISTORY 135-38 (1953).

176 For a discussion of the difference between arguments from policy and principle, see DWORKIN, supra note 119, at 14-80.
tion of the privilege. That is, there are good reasons under the fox hunter's evaluation for not limiting the effective exercise of the privilege to those contexts of third-degree interrogations which manifest "genuine compulsion of testimony." Still, good reasons for extending the contours of the fifth amendment to one context, e.g., custodial interrogations, may not hold for another context, e.g., tax returns or accident reports. Gerstein's argument combining the hermit's and old woman's rationales, however, illustrates how the privacy argument may serve as an ancillary basis yet not entail absolute fifth amendment protection for personal privacy. The hermit's rationale, thus, as an independent unconditional basis for the fifth amendment proves unacceptable, but as an ancillary justification it may serve as a crucial consideration in judicial construction of the contours of the fifth amendment.

The preceding discussion suggests that the fox hunter's, old woman's, and hermit's rationales by themselves are insufficient in justifying the fifth amendment. While each rationale provides a significant analysis and justification for the fifth amendment, each neglects too much. Certainly, as Gerstein argues, "The case for allowing the privilege would be strongest when all of these purposes would be served by its application." The import of the rationales for constitutional interpretation is nevertheless demonstrated by the fact as observed by Justice Harlan, that "[t]he Constitution contains no formulae within which we can calculate the areas ... to which the privilege should extend, and [that] the Court has therefore been obliged to fashion for itself standards for the application of the privilege." The following section shows that the Burger Court's treatment of the fifth amendment is predicated upon a re-evaluation of the principles and policies underlying the privilege. Specifically, it is argued that the Burger Court's treatment fosters a narrow construction of the privilege and diminishes protection of interests in personal privacy.

IV. Principles, Policies, and the Burger Court's Construction of the Fifth Amendment

While a number of commentators observe that the Burger Court is evolving a narrow construction of the fifth amendment, Jerold Israel maintains that "neither the record of the Court nor the tenor of its majority decisions, taken as a whole, really supports a broad movement towards restricting the protections afforded the accused." To the contrary, the Burger Court's treatment of the fifth amendment in a number of areas collectively indicates a major re-evaluation and revision—revision, admittedly, on a retail rather than wholesale scale—of the

177 417 U.S. at 440.
178 Gerstein, supra note 13, at 88.
179 385 U.S. at 522 (Harlan, J., dissenting).
fifth amendment and, in particular, a broad construction of the amendment as promoted by the Warren Court and, in recent years, in dissenting opinions of Justices Douglas, Brennan, and Marshall. The Court's re-evaluation of the amendment, moreover, when explicated in terms of the preceding discussion of competing jurisprudential rationales, appears as a major revision in constitutional interpretation with wide-ranging significance for civil liberties and protected privacy under the fifth amendment.

The basic tenets of the Burger Court's treatment of the privilege stem from its view that "the fundamental purpose of the fifth amendment [is] the preservation of an adversary system of criminal justice." Accordingly, the Burger Court's treatment of the fifth amendment may be expected to manifest, and thus be explicated in terms of, a jurisprudence comparable to that of the fox hunter's instrumental evaluation of the justification for the privilege. The fox hunter's rationale, as earlier suggested, fosters an analysis of the privilege in terms of policy considerations of an accusatorial system. In contrast to the broad construction promoted by the old woman's and hermit's rationales which view the fifth amendment as denominating a constitutional principle or right, an instrumental evaluation fosters a narrow construction. It limits the criteria for determining the constitutive elements of "personal compulsion" in terms of the degree of governmental pressure exerted on an individual to testify and the kinds of evidence legitimately protected by the amendment, as well as the circumstances or contexts for raising fifth amendment claims.

The Burger Court's treatment and narrow construction of the privilege, furthermore, minimizes, if not rejects, the old woman's and hermit's rationales. Indeed, the Burger Court not only narrowly defines "personal compulsion" and the circumstances for invoking the privilege, but also adheres to a policy of extending fifth amendment protection only "to the person, not to information that may incriminate him." Hence, in Bellis v. United States, the Court validated a fifth amendment claim to quash a subpoena duces tecum propounded against an individual for production of private papers, but in Couch v. United States, it refused to recognize any fifth amendment claim extending to a taxpayer's accountant, and subsequently, in Fisher v. United States, further restricted invocation of the amendment by allowing Internal Revenue Service summons of an individual's attorney for third-party financial records prepared for the individual. The Court's narrow construction thus provides illiberal protection for personal privacy inasmuch as it holds that the fifth amendment "does not in any way protect expectations of privacy, but rather serves exclusively to

182 See, e.g., 409 U.S. at 338-44 (Douglas, J., dissenting).
183 See, e.g., 427 U.S. at 484-94 (Brennan, J., dissenting).
184 See, e.g., 409 U.S. at 344-51 (Marshall, J., dissenting).
185 424 U.S. at 655.
186 See text accompanying note 70 supra.
187 See text accompanying notes 119 and 135 supra.
188 See text accompanying notes 238 and 315 infra.
189 See text accompanying notes 196-238 infra.
190 See text accompanying notes 266-316 infra.
191 409 U.S. at 328.
193 409 U.S. 322.
prevent the state from compelling an individual to personally produce self-incriminating evidence.\textsuperscript{9195}

This section examines the basic tenets of the Burger Court's treatment and evolving narrow construction of the fifth amendment. More specifically, it discusses recent cases dealing with the Court's redefinition of "personal compulsion" and constitutionally protected privacy with regard to private papers, required records, and the contexts and circumstances in which individuals may claim the benefits of the privilege.

A. Personal Compulsion and Private Papers

The Burger Court's jurisprudence and narrow construction of "the fundamental purpose of the fifth amendment [as] the preservation of an adversary system"\textsuperscript{196} lead to a redefinition of the threshold requirement for exercising the privilege, namely, a demonstration of "genuine compulsion of testimony"\textsuperscript{197} or "whether, considering the totality of the circumstances, the free will of the witness was overborne."\textsuperscript{198} The implications and significance for the contours of the fifth amendment are well illustrated by the Burger Court's treatment of claims to fifth amendment-protected privacy with regard to private papers, documents, and business records.

To be sure, the Supreme Court long adhered to a distinction between individuals and corporations in applying fifth amendment guarantees so that only "natural" persons and not corporations could claim protection.\textsuperscript{199} Moreover, since the amendment was viewed as establishing a personal right, it was often held that an individual must own or possess the records in order to assert a fifth amendment claim.\textsuperscript{200} The Burger Court, however, has firmly established, on policy considerations, that "a party is privileged from producing . . . evidence, but not from its production."\textsuperscript{201} Individuals may claim fifth amendment privacy interests and, for example, quash an administrative subpoena duces tecum requiring them to produce papers or documents in which they may have privacy interests.\textsuperscript{202} They have, however, no legitimate expectations of privacy or fifth amendment claims against compulsion of testimony in papers held by a banking

\textsuperscript{195} Comment, Iowa L. Rev., supra note 180, at 1339.
\textsuperscript{196} 424 U.S. at 655.
\textsuperscript{197} 417 U.S. at 440.
\textsuperscript{198} 431 U.S. at 188.
\textsuperscript{199} See Bellis v. United States, 417 U.S. 85 (1974); McPaul v. United States, 364 U.S. 372 (1960); United States v. Fleishman, 339 U.S. 349 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); United States v. White, 323 U.S. 694, 701 (1944); Wilson v. United States, 221 U.S. 361 (1911); 201 U.S. 43. In \textit{Bellis}, the Burger Court reiterated: "These decisions . . . reflect the Court's consistent view that the privilege against self-incrimination should be limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." 417 U.S. at 91-92 (quoting 322 U.S. at 701).
institution, their accountants, or their attorneys.

In Couch, the petitioner was denied any reasonable expectation of privacy and claim under the fifth amendment to intervene when the Internal Revenue Service summoned petitioner's accountant for the petitioner's business records. The Court held that, “no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.” While the Court discussed concurrently rather than independently fourth and fifth amendment protections for privacy and thereby collapsed the issues of reasonableness of individuals’ expectations of privacy and governmental compulsion of personal disclosures, the Court noted, as an exception, that claims under the fifth amendment might be legitimate where individuals retained “constructive possession” of the materials, albeit held by a third party. Although refusing to establish a per se rule to that effect and declining to specify the types of recognizable forms of constructive possession, the Court emphasized: “Possession bears the closest relationship to the personal compulsion forbidden by the fifth amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line.” The Burger Court thus appeared to overrule sub silentio earlier decisions regarding ownership as a prerequisite for fifth amendment claims where an individual retains possession of the papers or documents. Indeed, citing Perlman v. United States, the Court concluded that “...the criterion for Fifth Amendment immunity remains not the ownership of property, but the ‘physical or moral compulsion exerted.’” The Court further stated:

We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsion upon the accused substantially intact.

204 409 U.S. 322.
205 425 U.S. 391; see also 425 U.S. 435.
206 409 U.S. at 336.

207 The Burger Court, however, rejects the so-called “convergence theory” of the fourth and fifth amendments in protecting personal privacy. In Andresen v. Maryland, 427 U.S. 463, 472 (1976), the Court identified Boyd v. United States, 116 U.S. 616 (1886) with the convergence theory of the amendment. In dicta in Boyd, the Court observed that the fourth and fifth amendments “run almost into each other” and, thereupon, concluded that, “We have been unable to perceive that ... the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” Id. at 633. Boyd’s finding that the amendments were complementary not in the sense of adjacent guarantees but in the sense of independently demarcated and alternative guarantees, which at times are contiguous in providing overlapping and intersecting protection for personal privacy, thus promoted a broad construction of the fifth amendment and protected privacy based on the nature of the materials and not, as with the Burger Court’s analysis, upon the manner or degree of governmental compulsion exerted on the individual. See 378 U.S. 52; 367 U.S. at 656-57; 366 U.S. at 154; Davis v. United States, 328 U.S. 582 (1946); 322 U.S. at 489-90; Gambino v. United States, 275 U.S. 310 (1927); Agnello v. United States, 269 U.S. 20 (1925); 255 U.S. 298; 232 U.S. at 391-95; 168 U.S. at 543-44.
208 409 U.S. at 333.
209 Id. at 331.
210 See, e.g., 322 U.S. 694.
211 Perlman v. United States, 247 U.S. 7 (1918).
212 409 U.S. at 336 (quoting 247 U.S. at 15) (emphasis added).
213 409 U.S. at 336-37.
In 1976, the Court proved it would not only strictly construe the requirement of compulsion of testimony, but also would narrowly interpret "constructive possession" of private papers. In *Fisher v. United States*, taxpayers under investigation for possible civil or criminal liability under federal income tax laws obtained from their accountants documents related to their accountants' preparation of their tax returns, and they transferred the documents to their attorneys. Subsequently, the Internal Revenue Service served summonses on their attorneys, but they refused to comply. The Court, relying on *Couch*, held that individuals have no valid fifth amendment claims against their attorneys' production of such documents because "enforcement of the summons involved . . . would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself." The Court held that attorneys' production of papers was not constitutive of individuals' personal compulsion, nor do individuals retain constructive possession of such documents.

Individuals may have expectations of privacy in papers and documents held by their attorneys, but where individuals retain no constructive possession they have no legitimate claims under the fifth amendment. In *Fisher*, the Court thus reiterated its ruling in *United States v. Nobles* that the fifth amendment protects only against "compelled self-incrimination, not [the disclosure of] private information." Moreover, Justice White, writing for the Court, emphasized its rejection of privacy arguments for the privilege:

The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination. . . . We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protection of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment.

*Fisher*, like *Couch*, underscores the Burger Court's narrow construction of the fifth amendment and its limited protection of personal privacy. Although the amendment literally suggests safeguards for individuals' privacy expectations in papers, at least where their production would constitutively force the individual to be a witness against himself, the Burger Court's strict application of the amendment limits protection to only those situations where an individual orally divulges or produces written materials containing incriminating information. Hence, even where individuals have reasonable expectations of privacy in papers and turn those papers over to their legal agents, they do not retain constructive possession, and the forced production of the papers does not constitute compulsion prohibited by the fifth amendment. As Ritchie commented: "The Burger

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214 425 U.S. 391.  
215 Id. at 398 (quoting Hale v. Henkel, 201 U.S. 43, 69-70 (1906)) (emphasis in original).  
216 422 U.S. at 233 n.7. See also 427 U.S. 463.  
217 425 U.S. at 400-01.  
218 See text accompanying note 41 supra.
Court's analysis of the application of the privilege to documents and private writings not only reaffirms its literal interpretation of the privilege, but clearly indicates the extent to which that interpretation dilutes the privacy protection that the privilege could afford.219

The fifth amendment arguably does extend greater protection to personal privacy than the Burger Court's interpretation recognizes. Couch and Fisher, as Justice Brennan observes, "is but another step in the denigration of privacy principles settled nearly 100 years ago in Boyd v. United States."220 Indeed, the Court in the late nineteenth and early twentieth centuries extended the guarantees of both the fourth and fifth amendments to claims of personal privacy and thereby prohibited governmental access to vast amounts of personal information.221 Historically, judicial interpretation of the fifth amendment paralleled in most instances the broad protection afforded by common law practices.222 Hence, judicially enforced fifth amendment guarantees extended protection against compelled personal disclosures transcending that provided by a literal reading of the amendment.223 Boyd thus stands as a watershed for a broad construction of the amendment. It recognized that the amendment guarantees a constitutional right, not simply a procedural rule, and that it extended to interests in personal privacy. Therefore, a liberal mandate existed for extending the fifth amendment not only to the defendant in criminal proceedings, but to witnesses in criminal, civil, grand jury, legislative and administrative proceedings.224 As the Court reiterated in 1892, in Counselman v. Hitchcock: "[t]his provision must have a broad construction in favor of the right which it was intended to secure. . . . The privilege is not limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."225 The Boyd-fostered broad construction acknowledges that the fifth amendment may serve functions not suggested by a literal reading, yet logically related to the amendment's proscription of compelled personal disclosures because the amendment is construed to embody a constitutional principle or right. Consequently, the fifth amendment's protection should extend not only to defendants and witnesses when compelled to elicit incriminating personal information, but also where individuals have privacy interests in materials possessed by third parties and sought by administrative agencies.

Dissenters from the Burger Court's interpretation maintain, as did Justice Bradley in Boyd, that "the Fourth and Fifth Amendments delineate a 'sphere of privacy' which must be protected against governmental intrusion."226 Indeed, dissenting in Couch, Justice Douglas parted with Justice Brennan, who held that as a precondition of evoking the fifth amendment, "reasonable steps" be taken by an individual to secure the privacy of materials not in his possession.227

219 Ritchie, supra note 180, at 393.
220 425 U.S. at 414 (Brennan, J., dissenting).
221 See cases cited in note 207 supra.
222 See text accompanying notes 43-57 supra.
223 Compare text accompanying notes 31 and 43 supra.
224 See cases cited in note 57 supra.
225 142 U.S. at 562.
227 Id. at 337 (Brennan, J., concurring).
Douglas urged that a "Fifth Amendment claim [is] valid even in absence of personal compulsion so long as [the] accused has a reasonable expectation of privacy in articles subpoenaed."228

Justice Marshall's dissenting opinion in *Couch*, however, remains more helpful in understanding both the significance of the Burger Court's narrow analysis of the privilege and how a broad construction of the amendment could provide extensive safeguards for personal privacy. Justice Marshall began his dissent by reviewing alternative interpretations of *Boyd*, pointing out that the Burger Court's reliance on *Boyd* failed to focus "on the obvious concern of the case, the desire of the author of documents to keep them private."229 Part of the Burger Court's difficulty in addressing the safeguards for privacy interests in private papers, Marshall suggested, derived from interpreting the interplay between the fourth and fifth amendments:

The Fourth and Fifth Amendments do not speak to totally unrelated concerns. . . . Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Where the amendments "run almost into each other," I would prohibit the Government from entering. The problem, as I see it, is to develop criteria for determining whether evidence sought by the Government lies within the sphere of activities that petitioner attempted to keep private.230

Thereupon, Justice Marshall proposed an analysis of fifth amendment-protected privacy similar to that of the fourth amendment formulated by Justice Harlan.231

Justice Marshall specified four criteria for analyzing claims to fifth amendment-protected privacy. The first criterion "is the nature of the evidence."232 Justice Marshall observes that "[d]iaries and personal letters . . . lie at the heart of our sense of privacy" and should receive fifth amendment protection, whereas there exists no constitutional bar to the seizure of letters between co-conspirators of a crime.233 Yet, where non-personal documents are not used in the furtherance of a crime, Justice Marshall would extend fifth amendment protection. The second consideration lies with the activities of the person to whom the papers were given, and the third, the purposes for which the papers are transferred. Finally, Justice Marshall urged the Court to "take into account the steps that the author took to ensure the privacy of the records."234

According to Justice Marshall, then, the reasonableness of individuals' claims and expectations of informational privacy in papers and records under the fifth amendment becomes contingent on several factors: the nature of the documents (e.g., compare diaries and letters of extortion); what recipients of personal information do with it (e.g., compare attorneys' uses and trustees in a bankruptcy); the purposes of voluntarily relinquishing personal information to another (e.g., compare attorneys or accountants' use in preparation of in-

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228 Id. at 343-44 (Douglas, J., dissenting).
229 Id. at 346 (Marshall, J., dissenting).
230 Id. at 349-50 (Marshall, J., dissenting).
233 Id.
234 Id. at 350-51 (Marshall, J., dissenting).
individuals’ tax liability with copies of documents for use in blackmailing); and
the steps which individuals take to secure the privacy of their information (e.g.,
compare placing papers in a safe-deposit box for years with filing them in a
business office or handing them over to an attorney).

Justice Marshall’s analytical framework for fifth amendment-protected
privacy bears a family resemblance to Boyd’s broad construction of constitutionally
protected privacy. Justice Marshall’s analysis, like Boyd and its progeny,
provides extensive protection for personal privacy commensurate with the contexts and expectations of privacy, upon a consideration of the government’s need for evidence of criminal activity and the right of individuals to define for themselves a “zone” of privacy, i.e., to place limits on their disclosures and access by others to personal information and engagements. Moreover, the government
would be prohibited from circumventing and, thereby, nullifying the fifth
amendment’s guarantee “by finding a way [e.g., as with administrative summons
to third parties] to obtain the documents without requiring the owner to take
them in hand and personally present them to the government agents.”

By contrast to a broad construction of the fifth amendment based upon the
recognition that it guarantees a constitutional right extending some protection
to privacy interests, recent Burger Court decisions significantly limit the amend-
ment’s protection. To be sure, the Burger Court’s treatment is not without
precedent.” Instead, the Court appears to consider as controlling only those
cases which support its re-evaluation of the jurisprudential basis for the fifth
amendment and protected privacy by “disregarding the testimonial nature of private papers and drawing an artifical distinction between speech and writing:
the privilege prohibits compelling a person to speak and incriminate himself but
does not prohibit compelled revelation of written thoughts.” In other words,
the Court confines fifth amendment protection to situations in which an in-
dividual is compelled to disclose incriminating information orally or by personally relinquishing private papers or documents. As the Court, in Andresen v.
Maryland, reiterated, “unless incriminating testimony is ‘compelled,’ any invasion of privacy is outside the scope of the Fifth Amendment’s protection . . .”

B. Personal Compulsion and Compelled Disclosures

As an exception to the broad contours of the fifth amendment fostered by

235 Id. at 337 (Brennan, J., dissenting).
236 Throughout the twentieth century a number of decisions rejected the broad view of
the fifth amendment fostered and promoted by Boyd and its progeny. See 327 U.S. 186; 322
U.S. at 701; 228 U.S. at 459; 221 U.S. 361; 201 U.S. at 72, 74. Compare cases cited in note
207 supra.
237 In Fisher, 425 U.S. at 405-14, the Burger Court actually extended the doctrine that
the fifth amendment protects only “testimonial” and not real or physical evidence. The Court
reasoned that since the accountant’s workpapers were not the taxpayer’s, they did not constitute
testimonial declarations nor did their seizure constitute personal compulsion of the taxpayer;
rather the written documents were analogous to blood, handwriting, and voice samples previously
held admissible, See 410 U.S. at 8; 402 U.S. at 433-34; 388 U.S. at 221-23; 388 U.S. 263;
238 427 U.S. at 477. Andresen supplements Couch and Fisher by dealing with an element of
personal compulsion not previously addressed. The Court held that the fifth amendment
provides no protection against a search warrant for business records otherwise immune from
subpoena, thereby, further confining the construction of personal compulsion and the privilege
protection.
Boyd and its progeny in the late nineteenth and early twentieth centuries, a doctrine of "required records" which precluded the privilege's protection for personal disclosures developed. In this area, the Burger Court's decisions appear consistent with the prevailing historical trend in constitutional interpretation. Indeed, the Court's treatment extends the doctrine so as to more strictly define the nature of personal compulsion and thereby, contract the scope of the fifth amendment.

Dicta in Wilson v. United States first suggested that the fifth amendment had no applicability where recordkeeping was required by law in order to provide information for governmental regulation. The doctrine of required records, however, was not fully developed until 1948 in Shapiro v. United States. Shapiro held that records required to be kept under the regulatory power of Congress had "public aspects," and thus, personal information contained therein was not subject to fifth amendment protection. Twenty years later, in Grosso v. United States, the Court clarified the doctrine:

The premises of the doctrine, as it is described in Shapiro, are evidently three: first, the purpose of the United States's inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render at least analogous to public documents.

The broad doctrine espoused in Shapiro was subsequently supported in California v. Byers, where a plurality upheld California's "hit-and-run" statute requiring a driver of a motor vehicle involved in an accident to stop at the scene and give his or her name and address. The Court observed that "the disclosure of inherently illegal activity is inherently risky. . . . But disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in [serious criminal cases]. Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.

The Burger Court thereby severely limited fifth amendment safeguards for personal privacy by denying protection for custodians of records and by upholding the government's requiring of statements concerning criminal activity, e.g., as with reporting and registration requirements. Accordingly, many of the Court's commentators found the required records doctrine to "swallow the privilege whole in relation to written documents" and, thereupon, diminish the constitutional protection afforded personal privacy. As McKay observed, "A government that can roam at will through all records that it may demand

239 See note 221 supra.
240 221 U.S. at 380.
241 335 U.S. at 32-36.
243 402 U.S. 424.
244 Id. at 431.
247 McKay, supra note 13, at 217.
to inspect because it may demand that they be kept is not a government that is bound to respect individual privacy.\textsuperscript{248}

Certainly, privacy arguments for the privilege can be taken too far; privacy interests can justifiably be invalidated by interests in securing and maintaining civil order, e.g., as with accident reports.\textsuperscript{249} The Burger Court's policy preference regarding the fifth amendment, however, demonstrates a proclivity to dismiss all privacy interests when construing the nature of personal compulsion with regard to required records. Consider, for example, recent decisions construing the effective exercise of the privilege with regard to compelled personal disclosures required in filing tax returns.\textsuperscript{250}

Personal income tax returns have long been held to be required records since the Internal Revenue Service's requirements are derived from the government's taxing power.\textsuperscript{251} In 1927, in \textit{United States v. Sullivan},\textsuperscript{252} the Court established that the fifth amendment is not a defense against prosecution for failing to file an income tax return. Several years later, the problem posed by illegal income earners and reporting requirements of filing tax returns was again raised in \textit{Murdock v. United States},\textsuperscript{253} where a taxpayer filed a return claiming certain deductions but refused to answer on fifth amendment grounds Internal Revenue Service questions concerning the deductions; whereupon, he was prosecuted for willful failure to supply the necessary information. The Supreme Court reversed the district court's dismissal of the indictment\textsuperscript{254} and subsequently held that even though Murdock's previous claim was invalid, a "good faith" claim of the privilege would negate any willfulness of failure to supply information and bar conviction.\textsuperscript{255} Nevertheless, pursuant to \textit{Sullivan}, the government's taxing power appears paramount, outweighing any individual's claim to privacy interests in non-disclosure of financial information.\textsuperscript{256}

During the Warren Court, however, some limitations were imposed upon statutes relating to record keeping and required registration.\textsuperscript{257} In particular, the Warren Court recognized that obligations of illegal income earners to register and pay occupational and wagering excise taxes created "real and appreciable" hazards of self-incrimination. This is significant since part of the Internal Revenue Service's statutory scheme requires it to disclose information to federal and state law enforcement officers. In \textit{Marchetti v. United States},\textsuperscript{258} the Court struck down a statute requiring gamblers to register and to submit monthly information concerning their wagering activities, holding that failure to supply wagering information was justified under the fifth amendment since the information was not customarily kept, the reports had no "public records" aspects, and

\textsuperscript{248} Id.
\textsuperscript{249} See 402 U.S. 424; text accompanying note 165 supra.
\textsuperscript{250} See 424 U.S. 648; text accompanying note 263 infra.
\textsuperscript{252} Id.
\textsuperscript{253} United States v. Murdock, 284 U.S. 141 (1931).
\textsuperscript{254} Id.
\textsuperscript{255} Id. at 148-51.
\textsuperscript{256} 345 U.S. 22.
\textsuperscript{257} See Hayes v. United States, 390 U.S. 85 (1968); 390 U.S. 39; 345 U.S. 22 (holding that gamblers are not protected from required registration).
\textsuperscript{258} 390 U.S. at 47.
moreover, the requirements were directed at a "select group inherently suspect of criminal activities."\textsuperscript{259} In dicta, noting the necessity of a broad construction of the privilege and protected privacy, the Court remarked that "[t]he Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege."\textsuperscript{260}

By contrast, the Burger Court's treatment appears to strictly and literally interpret the nature of personal compulsion and disregard the forfeiture of privacy interests in compelled disclosures required by filing tax returns. Justice Brennan, dissenting in \textit{Beckwith v. United States},\textsuperscript{261} observed that the Court's analysis fails to recognize that the "practical compulsion to respond to questions about [an individual's] tax returns is comparable to the psychological pressures described in \textit{Miranda}."\textsuperscript{262} Justice Brennan's criticisms of the Court's narrow construction of personal compulsion is well illustrated by its 1976 decision in \textit{Garner v. United States}.\textsuperscript{263} In \textit{Garner}, the Court held that a taxpayer earning illegal income and not desirous of exposure to criminal charges for failure to file a tax return must claim the privilege against self-incrimination on his tax return. If, however, incriminating information is disclosed on the return and the privilege is not asserted, then the taxpayer forfeits his or her expectations of privacy and in any future criminal case may not exercise the fifth amendment guarantee.

\textit{Garner} epitomizes the Burger Court's literal construction of personal compulsion and how it circumscribes fifth amendment-protected privacy. Garner, in filing his federal income tax returns, reported his occupation as a "professional gambler." Subsequently, Garner was indicted for conspiracy involving the use of interstate transportation and communications facilities to "fix" sporting contests and transmit bets. At trial, in order to establish Garner's guilt, the government not only introduced testimony of his co-conspirators and telephone toll records, but also his tax returns. Garner's objections were overruled and he was eventually convicted. Before the Supreme Court, Garner first relied upon \textit{Miranda} in arguing that his failure to claim the privilege against self-incrimination on his tax returns was not a knowing and intelligent waiver. The Court, however, observed that he had prepared his tax returns in the leisure and privacy of his home and, therefore, the \textit{Miranda} safeguards developed in the context of custodial situations were not applicable. The Court emphasized that "[u]nless a witness objects, a government ordinarily may assume that its compulsory processes are not eliciting testimony that [the individual] deems to be incriminating."\textsuperscript{264} Second, Garner relied on \textit{Mackey v. United States},\textsuperscript{265} in which the Court held that \textit{Marchetti} and \textit{Grosso} were non-retroactive, arguing that his post-disclosure claim provided sufficient protection for his disclosures on his tax returns. Here, Garner's argument failed insofar as Mackey's returns had been directed at persons "inherently suspect of criminal activities," whereas his own

\textsuperscript{259} 390 U.S. 39.  
\textsuperscript{260} Id. at 57.  
\textsuperscript{261} 425 U.S. 341.  
\textsuperscript{262} Id. at 349-50 (Brennan, J., dissenting).  
\textsuperscript{263} 424 U.S. 648.  
\textsuperscript{264} Id. at 655.  
\textsuperscript{265} 401 U.S. 667.
were directed towards the general public.

Significantly, the Court disregarded the fact that Garner’s disclosures, made for one purpose, i.e., filing his income tax return, were being used by the government for another purpose, i.e., in a criminal prosecution. Indeed, the Court presumes that such governmental uses of personal information do not threaten the fair state-individual balance reflected in an accusatorial system. “Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.” Garner, thus, underscores other Burger Court rulings strictly construing the requirement of personal compulsion necessary for effective exercise of the privilege. In United States v. Kordel, the Court held that a witness under compulsion to make disclosures who reveals incriminating information instead of claiming fifth amendment protection loses the privilege’s benefits, and in Schneckloth v. Bustamonte the Court ruled that individuals may also “lose the benefit of the privilege without making a knowing and intelligent waiver.”

The Burger Court’s narrow construction severely contracts the scope of the fifth amendment-protected privacy and, in particular, diminishes the practical value of the privilege and individuals’ privacy interests in financial matters. More specifically, an irrebuttable presumption exists requiring taxpayers to make basic disclosures fundamental to neutral reporting requirements. Only an individual or a group suspected of criminal engagements may not be required to supply information relating to those engagements. Protection of individuals’ privacy interests in financial disclosures by claims under the fifth amendment will not bar prosecution, but conviction will not follow, regardless whether the claim is valid, if it was asserted in “good faith.” If, however, incriminating information is disclosed on a tax return and the privilege is not raised, then the taxpayer forfeits his or her expectations of privacy and in any future criminal prosecution may not rely on the amendment.

C. Contexts and Circumstances of Personal Compulsion

Concomitant with evolving a narrow construction of personal compulsion, the Burger Court’s treatment of the fifth amendment restricts the contexts and circumstances in which individuals may enjoy the benefits of the privilege. Notwithstanding prosecutorial anticipation and civil libertarian trepidation that Miranda would be overturned, the Burger Court has not departed from the Warren Court’s premise in Miranda, namely, that “interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” Instead, the Burger Court appears to be

266 266 424 U.S. at 655.
267 267 397 U.S. 1.
268 268 412 U.S. 218.
269 269 Id. at 222-27, 235-40, 246-47.
270 270 384 U.S. at 467.
re-evaluating the necessity of full *Miranda* warnings in every situation and, by distinguishing *Miranda* requirements (as mere "prophylactic rules") from the fifth amendment's constitutional guarantee, sharply defining the contexts and circumstances which require that individuals be given *Miranda* warnings or enjoy fifth amendment protection.

Prior to *Miranda*, courts permitted individuals at trial to claim fifth amendment protection and prohibit the introduction of self-incriminating statements obtained through police interrogation only upon showing "a totality of circumstances evidencing an involuntary . . . admission of guilt." Five members of the Warren Court, however, enlarged the scope of the fifth amendment's protection upon the recognition that "[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." As Ritchie observes, "In *Miranda*, the Warren Court rejected the argument that society's need for interrogation outweighs the privilege; it indicated that the right to be free from compulsion could not be abridged." Indeed, the Court reasoned that the fifth amendment's justification in terms of maintaining a fair state-individual balance requires the government "to shoulder the entire load" in proving an individual's culpability.

Whereas the Warren Court's evaluation and broad construction fostered procedural safeguards in order to ensure the practical value of individuals' rights under the fifth amendment, the Burger Court's policy orientation and narrow construction finds *Miranda* a "procedural [as distinguished from constitutional] ruling," and thus permits prosecutorial use of an individual's incriminating statements made without the benefit of full *Miranda* warnings or a "knowing and intelligent" waiver of fifth amendment protection. In *Michigan v. Tucker*, the Court emphasized that the "protective guidelines" of *Miranda* were designed to "supplement" the privilege, and "these procedural safeguards were not themselves rights protected by the Constitution but were instead

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271 *Miranda v. Arizona*, 384 U.S. 436 (1966), held that in order to safeguard the fifth amendment privilege, an individual in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer, to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Id. at 467-73.

272 See cases cited in 412 U.S. at 53.

273 373 U.S. at 514.

274 384 U.S. at 476.

275 Ritchie, supra note 180, at 414. See also 384 U.S. at 479-80.

276 384 U.S. at 460 (quoting 8 WIGMORE, supra note 8, at 347).

277 In *Miranda v. Arizona*, the Court observed that "our contemplation cannot be only of what has been but of what might be. Under any other rule a constitution would indeed be as easy of application as it would have little value and be converted by precedent into impotent and lifeless formulae. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction." 384 U.S. at 443. See also 217 U.S. at 379.

278 430 U.S. at 438 (Blackmun, J., dissenting).


280 See, e.g., 412 U.S. 218. See also 431 U.S. 174.

281 417 U.S. 433.
measures to ensure that the right against compulsory self-incrimination was protected." 282 Hence, both because the Burger Court narrowly construes personal compulsion and views *Miranda* requirements as not constitutionally mandated, but only procedural safeguards based on policy considerations, law enforcement has considerable flexibility in prosecuting individuals on the basis of their incriminating statements since deviations from *Miranda* will not necessarily offend the fifth amendment.

Accordingly, in *Harris v. New York*, 283 the Court held that statements, inadmissible against the defendant in the prosecution’s case because of the failure to satisfy the procedural safeguards required by *Miranda*, may, if their trustworthiness satisfies legal standards, be used for impeachment of the defendant’s trial testimony. In dissent, Justice Brennan argued that *Miranda* had settled the issue, reiterating its holding that “statements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.*" 284 Chief Justice Burger, for the five-member majority, however, was apparently more concerned that “[t]he shield provided by *Miranda* [would] be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. 285 In *Oregon v. Hass*, 286 the Court extended *Harris* to permit the defendant’s impeachment by use of statements obtained while he was in police custody and after he had requested a lawyer but before the lawyer was present. The Court further diminished the safeguards required by *Miranda* in *Michigan v. Tucker*, 287 ruling that the fifth amendment was not violated by the prosecution’s use of testimony of a witness discovered as the result of the defendant’s statements to police given without *Miranda* warnings. Again, in the following year, in *Michigan v. Mosley*, 288 the Court upheld police interrogation, after a two-hour interval, of an individual who had earlier exercised his right to remain silent. In *Miranda*, the majority held:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. 289

282 *Id.* at 443-44.
283 401 U.S. 222.
284 *Id.* at 230. (Brennan, J., dissenting) (emphasis added).
286 420 U.S. 714.
287 417 U.S. 433.
288 423 U.S. 96.
289 384 U.S. at 473-74 (footnote omitted).
The Burger Court, however, over the dissenters' objection that "Miranda established a virtually irrebuttable presumption of compulsion . . . and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime,"\(^{290}\) construed the critical *Miranda* safeguard at issue to require only that police "scrupulously honored" a person's "right to cut off questioning."\(^{291}\) Notwithstanding the view of some of the Court's commentators, such as Jerold Israel, that "Tucker, Mathiason, and perhaps even Mosley did not significantly detract from the basic *Miranda* ruling,"\(^{292}\) Justice Brennan candidly observed that *Mosley* "virtually empties *Miranda* of principle, for plainly the decision encourages police asked to cease interrogation to continue the suspect's detention until the police station's coercive atmosphere does its work and the suspect responds to resumed questioning."\(^{293}\)

That the Burger Court's construction of the contours of the privilege's protection entails significant erosion of *Miranda* safeguards is underscored by its 1977 *per curiam* ruling in *Oregon v. Mathiason.*\(^{294}\) In *Mathiason*, the suspect, a parolee, following a police request, voluntarily went to the police station where, even though he admitted committing a crime, he was informed that he was not under arrest and allowed to leave after the questioning. The Court rejected the Oregon Supreme Court's opinion excluding the confession as having "read *Miranda* too broadly,"\(^{295}\) and, over Justice Marshall's contention in dissent that coercive elements were "so pervasive"\(^{296}\) as to require *Miranda* warnings, concluded that the suspect was not in "custody" in the police station and, hence, *Miranda* warnings were not required.

Although the Burger Court has not overturned *Miranda per se*, it has significantly diluted the practical value of *Miranda*'s procedural requirements and the feasibility of fifth amendment protection by permitting in *Harris* and *Hass* prosecutorial use of individuals' self-accusatorial statements and, in *Tucker*, *Mosley*, and *Mathiason*, by sanctioning considerable flexibility in police interrogation of criminal suspects.\(^{297}\) The Burger Court departs from *Miranda* in part because, as with its treatment of the exclusionary rule and the fourth amendment,\(^{298}\) it views *Miranda*'s requirements as procedural rules based on policy and not constitutional principle. More fundamentally, the Court permits departures from *Miranda* because it promotes a strict construction of the privilege and demonstration of personal compulsion necessary for enjoying the privilege's

\(^{290}\) 423 U.S. at 114 (Brennan, J., dissenting).
\(^{291}\) Id. at 104.
\(^{292}\) Israel, * supra* note 181, at 1375. By contrast Ritchie argues that, "In both *Harris* and *Tucker*, the Court seems to be reasoning that a statement must be involuntary before its use will contravene the fifth amendment guarantee. This appears to be an outright rejection of *Miranda*'s finding that the compulsion inherent in custodial interrogation violates the privilege. The *Miranda* safeguards were necessary in order to dispel the inherent compulsion; in *Harris* and *Tucker*, the Court found no compulsion even though *Miranda* safeguards were disregarded."
\(^{293}\) See note 180 * supra*.
\(^{294}\) 423 U.S. at 112, 118.
\(^{295}\) 429 U.S. 492.
\(^{296}\) Id. at 493.
\(^{297}\) Id. at 498 n.3 (Marshall, J., dissenting).
\(^{298}\) But see 430 U.S. 387.
\(^{298}\) *See, e.g.*, 46 U.S.L.W. 4229 (1978); 428 U.S. at 458-59; 428 U.S. 465; 414 U.S. at 348; 403 U.S. at 414-15 (Burger, C.J., dissenting); 394 U.S. at 174-75.
benefits. The Warren Court’s broad interpretation of the fifth amendment led to an extension of the benefits of the privilege against self-incrimination and imposition of Miranda safeguards not only to station house interrogations but to any context of “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

By contrast, the Burger Court’s strict construction of the nature of personal compulsion promotes the privilege’s protection only when “considering the totality of the circumstances, the free will of the witness is overborne.” The Court’s treatment thus signifies a retrenchment to pre-Miranda rulings so that the fifth amendment protects against only police interrogations in contexts in which the “totality of circumstances evidenc[es] an involuntary . . . admission of guilt.” As Ritchie comments, “the Court has taken too literally the maxim that the privilege protects the accused from being convicted on evidence forced ‘out of his mouth,’” and, therefore, has rendered insignificant the psychological pressures that bear upon individuals in police custody, or without full Miranda warnings, or a knowing and intelligent waiver of their rights, or after renewed questioning following lengthy periods of detention.

The Burger Court’s strict construction, moreover, fosters not only retrenchment in fifth amendment protection for individuals in contexts of custodial interrogation, but also the refusal to extend the contours of the privilege to non-custodial interviews and questioning.

In Beckwith v. United States, the Court considered the issue whether Internal Revenue Service special agents, investigating criminal income tax violations, must give Miranda warnings in non-custodial interviews with taxpayers. Two Internal Revenue Service special agents visited Beckwith in a private residence in order to question him about his income tax liability and, before beginning their questions, gave him the standard Internal Revenue Service warning that they could not compel him to answer or submit any incriminating information, rather than informing him that he had a right to remain silent.

While Chief Justice Burger, for the majority, agreed that in such instances the taxpayer is already the “focus” of a criminal investigation, he construed Miranda to safeguard only against the compulsion inherent in custodial interrogations, as distinguished from non-custodial interviews as in Beckwith. Narrow construction of the nature of personal compulsion thus allowed the Court to avoid serious consideration whether, in dissenting Justice Brennan’s words, “[i]nterrogation under conditions that have the practical consequence of compelling the taxpayer

299 384 U.S. at 444. See also 394 U.S. 324; 391 U.S. 1.
300 431 U.S. at 188.
301 373 U.S. at 514.
302 Ritchie, supra note 180, at 397 (quoting 378 U.S. at 8).
303 425 U.S. 341.
304 The Internal Revenue Service agents read Beckwith the following warning: “Under the fifth amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.” 425 U.S. at 344. Compare the requirements specified in 384 U.S. 436.
305 425 U.S. at 345-46.
to make disclosures, and interrogation in 'custody' having the same consequences, are . . . peas from the same pod.\(^{306}\) Hence, in *Beckwith*, as in *Garner*,\(^{307}\) the Court limited the contours of the privilege's protection by its narrow construction of personal compulsion and *Miranda*'s procedural safeguards; it emphasized that "[p]roof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive."\(^{308}\)

The Court continued to confine sharply the contours of fifth amendment protection by further underlining the distinction between custodial and non-custodial interrogations in *United States v. Mandujano*,\(^{309}\) *United States v. Washington*,\(^{310}\) and *United States v. Wong*.\(^{311}\) In *Mandujano*, Chief Justice Burger, for the Court, held that the fifth amendment does not require suppression in a perjury prosecution of false statements made to a grand jury by an individual who was not given *Miranda* warnings when called to testify, even though he was a "putative" or "virtual" defendant. Chief Justice Burger emphasized that individuals have an absolute right to decline to answer questions during an in-custody police interrogation, but before a grand jury (a non-custodial context) have an absolute duty to answer all questions because of their obligation imposed by taking an oath to testify.\(^{312}\) Notwithstanding the import of privacy arguments for the privilege's protection in such contexts, the Court added that, "[n]or can [the privilege] be invoked simply to protect the witness's interests in privacy. Ordinarily, of course, a witness has no right of privacy before the grand jury."\(^{313}\)

In *Washington*, an individual suspected with others of possible theft was subpoenaed to appear as a witness before a grand jury. While given a series of warnings, including the warning that he had the right to remain silent, he was not informed in advance of his testimony that he was a potential defendant in danger of indictment and, subsequently, was indicted for theft. Chief Justice Burger, writing for the majority, observed that the fifth amendment privilege extends to grand jury proceedings, but does not require suppression of an individual's incriminating testimony unless it was obtained by "genuine compulsion."\(^{314}\) Again reiterating the Court's narrow construction of personal compulsion and fifth amendment protection, Chief Justice Burger emphasized "the need for showing overbearing compulsion as a prerequisite to a Fifth Amendment violation."\(^{315}\) Thus, *Washington*, as *Tucker, Garner, Beckwith, and Mandujano*,

306 425 U.S. at 348.  
308 425 U.S. at 350 (emphasis added).  
309 425 U.S. 564.  
310 431 U.S. 181.  
311 431 U.S. 174. *See also* 415 U.S. 239 (held that admission of defendant's false exculpatory statements, made to secure free counsel, as evidence of his knowledge that deposits in a "Totten trust" bank account were incriminating, and as evidence of willfulness in making the statements before a grand jury with knowledge of their falsity, did not violate the privilege against self-incrimination).  
312 425 U.S. 564. Chief Justice Burger's argument dismisses without consideration the old woman's rationale for the privilege. *See* text accompanying note 108 *supra*. On the relation of the privilege to the oath to tell the truth, *see generally* Silving, *supra* note 16.  
313 425 U.S. at 572-73 (quoting 414 U.S. at 353).  
314 431 U.S. at 187 (quoting 417 U.S. at 440).  
315 431 U.S. at 190.
reaffirmed the Court's strict construction of the protection and benefits of the fifth amendment. "The constitutional guarantee is only that the witness not be compelled to give self-incriminating testimony. The test is whether considering the totality of the circumstances the free will of the witness was overborne."316

V. Conclusion

The Burger Court's treatment of claims to fifth amendment protection, with regard to private papers, required records, and the application of Miranda requirements to custodial and non-custodial interrogations, indicates the proclivity toward strict construction and narrowing of the contours of the fifth amendment. While prosecutors, police, and conservatives may rejoice in the Burger Court's "law and order" policy orientation, civil libertarians may find consolation because the Court has not overturned Miranda, rather only engaged in retraction from the liberal jurisprudence318 of the Warren Court.

Civil libertarians, moreover, could perhaps applaud the Burger Court's efforts to return to a strict construction of the fifth amendment guarantee. Unfortunately, the Burger Court's strict construction appears to be the result of its law and order policy orientation towards the privilege against self-incrimination, rather than an attempt to reconstruct a right against self-accusation upon a literal reading of the amendment's guarantee that, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."319 The Court's strict construction fails to foster a literal interpretation; this is exemplified by the Court's refusal to consider the consequences of compelled personal disclosures in Couch, Fisher, Andresen, and Garner, as well as the practical ways in which an individual may be compelled to be a "witness against himself." Instead, the Court's strict construction, e.g., in Harris, Tucker, Mosley, Mathiason, Beckwith, Mandujano, and Washington appears only to lead to a literal interpretation of personal compulsion and, hence, the opportunity to circumscribe fifth amendment protection.

The Burger Court's contraction of the benefits and protection of the fifth amendment guarantee, furthermore, reflects a fundamental reconsideration and re-evaluation of the amendment's jurisprudential basis. Schultz, Couch, Fisher, Nobles, and Andresen underscore the Burger Court's rejection of privacy arguments for the privilege.320 In contrast to the Warren Court's extension of the contours of fifth amendment-protected privacy,321 the Burger Court's strict construction protects only "compelled self-incrimination, not [the disclosure of] private information,"322 so that "unless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of the Fifth Amendment."323

316 Id. at 189.
319 See text accompanying note 35 supra.
320 See text accompanying notes 191-95, 202-19, 236-38, 245-48, 312 supra.
321 See text accompanying notes 136-37, 142, 214-35, 258-60 supra.
322 422 U.S. at 233 n.7.
323 427 U.S. at 477.
diminishing utility of the fifth amendment guarantee for claims to constitutionally protected privacy in the Burger Court's analysis is further promoted by its re-evaluation of the merits of the old woman's rationale and concomitant literal interpretation of personal compulsion requiring a "showing [of] overbearing compulsion as a prerequisite to a Fifth Amendment violation." Thus, the Burger Court focuses primarily on what was termed the fox hunter's rationale for the privilege against self-incrimination, namely, its role in "the preservation of an adversary system of criminal justice." Indeed, the Burger Court's law and order policy orientation accords, if not prompts, its focus on the fox hunter's instrumental evaluation of and justification for the privilege. The Burger Court's treatment of the fifth amendment guarantee, hence, not surprisingly circumscribes protection for personal disclosures with respect to private papers and required records, condones both police practices that deviate from and thereby dilute Miranda and the prosecutorial use of individuals' incriminating statements which result from such police practices, as well as tolerates "police trickery" in obtaining individuals' self-accusatorial statements. Civil libertarians, therefore, may well applaud the Burger Court's endeavor to return to a strict construction of the Constitution but lament that its law and order policy orientation fosters a fundamental jurisprudential shift and contraction in the contours of the fifth amendment and protected privacy.

324 See text accompanying note 108 supra.
325 97 S. Ct. at 1820.
326 See text accompanying note 69 supra.
327 424 U.S. at 655.
328 See text accompanying notes 194-201 supra.
329 See text accompanying notes 239-68 supra.
330 See text accompanying notes 270-316 supra.
331 See, e.g., Oregon v. Mathiason, 97 S.Ct. 711 (1977) (police falsely told defendant that his fingerprints were found at scene of the burglary); Michigan v. Mosley, 423 U.S. 96 (1975) (police falsely told defendant that a co-defendant had confessed to participation in a homicide but had named the defendant as the one who had shot the victim); Frazier v. Cupp, 394 U.S. 731 (1969) (police falsely told defendant that they had arrested defendant's alibi witness who had confessed to participation in the crime).