



1-1-1985

Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases

Dennis J. Bartlett

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Dennis J. Bartlett, *Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 Notre Dame L. Rev. 370 (1985).

Available at: <http://scholarship.law.nd.edu/ndlr/vol60/iss2/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases

Consider the following scenario: Plaintiff brings a civil suit against a corporate defendant based upon alleged acts of the corporation's former employee, Jones. The departure of Jones from the defendant's organization occurred before trial and was not on friendly terms. At trial, the plaintiff's attorney calls Jones to the stand knowing that Jones will invoke his fifth amendment privilege against self-incrimination. Plaintiff's counsel elicits Jones' invocation on the stand and argues in closing argument to the jury that inferences should be drawn against the defendant corporation based upon Jones' invocation. The trial judge instructs the jury that it is permitted to draw the inference that if Jones had answered, his response would have been unfavorable to the corporation.¹

This note explores a recent trend in which courts are allowing the fact-finder to draw adverse inferences from a witness's invocation of the fifth amendment privilege in a civil proceeding.² Courts allow the inference regardless of whether a relationship exists between the party to the suit and the witness who invokes the fifth amendment at the time of trial.

Part I of this note examines the history of the self-incrimination privilege in civil cases, the policies behind the privilege, and the circumstances in which the privilege may be invoked. Part II explores the abuses of the privilege in the civil context and the methods courts have used to prevent these abuses. Part III discusses the recent use of adverse inferences as a device to control the privilege, particularly when invoked by a non-party witness. Part IV argues that allowing adverse inferences, based upon a non-party witness's invocation of the privilege against self-incrimination, is unjustified. The prejudicial impact of the invocation simply outweighs the probative value of the invocation. Accordingly, the invocation of the fifth amendment privilege against self-incrimination by a non-party

1 Professor Heidt supports this approach. See Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062 (1982). Professor Heidt begins his work with two quotations: "By incantations a conjurer draws a circle around a person concealing all within from demons;" and "He could not draw a conjurer's circle around the whole matter [by relying on the privilege];" *Id.* at 1064.

2 This note analyzes whether such inferences are proper by focusing on two recent court of appeals cases: *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3417 (1984) (No. 84-338); *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).

witness, in no special relation with a party, should be kept from the finder of fact.

I. Background on the Privilege in Civil Cases

The privilege against self-incrimination has long existed in criminal cases.³ The Supreme Court extended the privilege to civil cases in *McCarthy v. Arndstein*,⁴ holding: "The privilege [against self-incrimination] is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."⁵

The scope of the privilege is broad. *Hoffman v. United States*,⁶ indicates the fifth amendment privilege may be invoked if the answer would be incriminating. Under the *Hoffman* standard, the invocation of the privilege against self-incrimination is not a confession of crime, and is permitted even though the invoking party has committed no crime.⁷ Courts generally must review these invocations to determine if they are proper under the circumstances. Nevertheless, given the wide latitude for invoking the privilege, some contend that, in effect, the decision to invoke is unreviewable.⁸

3 A full discussion of the history of the privilege against self-incrimination is beyond the scope of this note. For an excellent discussion of its history, see 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250 (McNaughton rev. 1961); E. CLEARY, MCCORMICK ON EVIDENCE §§ 114-117 (3d ed. 1984).

4 266 U.S. 34 (1924) (habeas corpus action to determine whether Arndstein could be held in custody for contempt because of his refusal to answer questions in a bankruptcy proceeding). The fifth amendment was first made applicable to the states through the fourteenth amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

5 266 U.S. at 40.

6 341 U.S. 479 (1951). The Court in *Hoffman* provided the formulation for a test of when the privilege against self-incrimination may be invoked, stating:

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. . . .

It is for the court to say whether his silence is justified, . . . and to require him to answer if "it clearly appears to the court he is mistaken."

Id. at 486 (citations omitted). For a discussion of how difficult it is for the court to make this determination, see note 8 *infra* and accompanying text.

7 See *Grunewald v. United States*, 353 U.S. 391 (1957) (no inconsistency between invocation of the fifth amendment and later protestations of innocence).

8 The *Hoffman* Court recognized the difficulty of policing invocations of the fifth amendment, noting: "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." 341 U.S. at 440 (quoting *United States v. White*, 322 U.S. 694, 698 (1944)). Professor Heidt argues that the wide instances of when the privilege may be invoked and its resistance to attack when invoked make it a self-policing system. Heidt, *supra* note 1, at 1065-71. Judge Stern, dissenting in *Lionti v. Lloyd's Ins. Co.*, 709 F.2d

To properly analyze the fifth amendment privilege in civil cases, courts must examine the policies underlying the privilege.⁹ In *Murphy v. Waterfront Commission*,¹⁰ the Supreme Court addressed the policies underlying the privilege:

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" 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 the self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," our own distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."¹¹

Professor Wigmore, no advocate of the privilege against self-incrimination, has identified four policy concerns underlying the privilege.¹² First, the privilege is supposed to frustrate bad laws

237, 245 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 490 (1983), stated: "Under the fifth amendment test, [of when a party may invoke] once a witness invokes the privilege it is nigh to impossible to determine why he has done so, or to overrule his refusal [to testify]."

⁹ McCormick states:

The continued vitality and general acceptance of the privilege depends upon the maintenance of sufficient flexibility to adjust the privilege to the different times and different contexts. . . . If the privilege is to remain viable it must retain such flexibility, and it must reflect an appropriate balance among the wide variety of policy factors as they are affected by the specific context in which it is invoked.

E. CLEARY, MCCORMICK ON EVIDENCE § 118, at 288 (3d ed. 1984).

¹⁰ 378 U.S. 52 (1964). In *Murphy*, petitioners were granted immunity from prosecution under state law but not under federal law and were held in contempt when they refused to answer grand jury questions. The Supreme Court held that one jurisdiction may not compel a witness to give answers which might incriminate him under the laws of another jurisdiction absent an effective immunity provision. *Id.* at 79.

¹¹ *Id.* at 55 (citations omitted).

¹² See generally J. WIGMORE, *supra* note 3, § 2251, at 310-17. Twelve policy justifications are identified, but Wigmore attributes real weight only to the last four. The twelve identified policies are:

(1) It protects the innocent defendant from convicting himself by a bad performance on the witness stand; (2) It avoids burdening the court with false testimony; (3) It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves; . . . (4) The privilege is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try; . . . (5) The privilege prevents procedures of the kind used by the infamous courts of Star Chamber, High

and bad procedures.¹³ As Wigmore notes, this argument proves too much, because the privilege will frustrate good laws and good procedures.¹⁴

A second policy argument suggests that the privilege prevents the government from using its substantial powers to ferret out wrongs.¹⁵ This policy argument applies in the civil context as well as the criminal context because while the government's ability to use discovery is not directly implicated in suits between private parties, nothing but the privilege prevents the government from sitting back and enjoying the fruits of incriminating statements made in civil cases.

A third argument asserts that "the privilege prevents torture and other inhumane treatment of a human being."¹⁶ McCormick describes this policy as follows: "To place an individual in a position in which his natural instincts and personal interests dictate that he should lie and then to punish him for lying, or for refusing to lie or violate his natural instincts, is an intolerable invasion of his personal dignity."¹⁷ Not all writers on the subject find this choice burdensome,¹⁸ but whatever merit this argument has in the criminal context, it should apply equally to the civil context.

Finally, Wigmore notes that "[t]he Privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individ-

Commission and Inquisition; (6) It is justified by history, whose tests it has stood; the tradition which it has created is a satisfactory one; . . . (7) The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes; (8) It spurs the prosecutor to do a complete and competent independent investigation; . . . (9) The privilege aids in the frustration of "bad laws" and "bad procedures," especially in the area of political and religious belief; [10] The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society; . . . (11) The privilege prevents torture and other inhumane treatment of a human being; . . . [and] (12) The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.

Id. (citations omitted).

¹³ *Id.* at 313.

¹⁴ *Id.*

¹⁵ Wigmore calls this "the fishing expedition" reason which could put us all in jail if carried to the extreme. *Id.* at 314-15.

¹⁶ *Id.* at 315-16.

¹⁷ E. CLEARY, *supra* note 9, § 118, at 287.

¹⁸ Bentham referred to this cruel trilemma as the "old woman's reason" because only an old woman would find this choice burdensome. J. WIGMORE, *supra* note 3, § 2251, at 297 n.2. See also O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 58 NOTRE DAME LAW. 26 (1978).

ual to shoulder the entire load.”¹⁹ Because the government is not normally a party in a civil suit, this policy would seem inapplicable. This policy concern, however, also contemplates that the adversarial process should be fair.²⁰ Thus, the notion that the privilege against self-incrimination preserves the fairness and integrity of the judicial system applies both to civil and criminal proceedings.

Arguably, the policy reasons for the use of the privilege in civil cases are not as strong as those in the criminal area, but valuable goals are served by extending the protections of the fifth amendment to civil cases. These protections should not be abrogated. Applying the privilege in civil cases is more difficult, however. Determining what evidentiary value to accord the assertion of the privilege in the civil context is problematic.

Two proposed rules highlight the different values assigned to the privilege against self-incrimination. The Supreme Court’s proposed standard strongly protects the privilege and makes no distinction between civil and criminal cases,²¹ whereas the proposed Model Code of Evidence Rule allows comment upon the exercise of the privilege against self-incrimination and allows all reasonable inferences to be drawn by the fact-finder.²² Neither of these all-or-nothing views prevails.²³

The fundamental difference between the two approaches is the evidentiary value given the invocations. Those supporting the Supreme Court’s approach argue that any evidentiary value in the

19 J. WIGMORE, *supra* note 3, § 2251, at 317.

20 McCormick states: “Apart from its value to individuals, whether innocent or guilty, the privilege also serves broader functions. It encourages respect for and protects the dignity of the judicial system.” E. CLEARY, *supra* note 9, § 118, at 287.

21 The Supreme Court’s proposed rule is:

SUPREME COURT STANDARD 513: COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION;

(a) *Comment or inference not permitted.*—The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(b) *Claiming privilege without knowledge of jury.*—In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) *Jury instruction.*—Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

20 U.S. DIG. FED. RULES OF EVID. 493 (Lawyers’ ed. 1975).

22 The Model Code’s proposed Rule 233 is:

If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences therefrom.

2 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE § 513, at 513-3 (1982).

23 State adoption of these proposed rules of evidence has run the gamut from accepting the Supreme Court Standard, accepting the Model Code approach, or accepting some hybrid of the two approaches. See J. WEINSTEIN & M. BERGER, *supra* note 22, § 513[03], at 513-7 to 513-10.

invocation is outweighed by the invocation's prejudicial impact; while those favoring the Model Code approach suggest there is evidentiary value to the invocation and that this value outweighs any prejudicial impact.²⁴

The policy background, while limited, permits the examination of the problems that may be caused by extending the privilege against self-incrimination into the civil context. It also permits an analysis of the courts' attempts to deal with these problems.

II. Abuses of the Privilege in the Civil Context and Judicial Responses

The use of the privilege in civil cases has been criticized on a number of grounds. McCormick identifies three: (1) We do not need it anymore because its basic premise, the threat of torture, is no longer realistically present; (2) the privilege is enacted at too great a cost to the truth; and (3) the privilege may be impossible to implement effectively, i.e., inferences are inevitable.²⁵

Professor Heidt explains the problems a plaintiff may face in proving his case because of invocations of the fifth amendment privilege against self-incrimination: "Current Fifth Amendment jurisprudence sacrifices the determination of truth, the policies underlying liberal discovery, and the vindication of public and private rights to an extent rarely appreciated."²⁶ According to Heidt, the privilege enables defense counsel to resist discovery and slow the suit down because of the wide instances when it may be invoked and its resistance to attack when invoked.²⁷ These problems stem

24 The conflict between the Model Code and the Federal Rules has been described as:

If the view is taken that privileges are an impediment to the fact finding process but that experience has proven that they cannot be completely eliminated, then additionally fostering them through prohibiting comment is deemed undesirable. This seems to have been the rationale of the Model Code However, . . . [there is] the view that if the privileges are considered valuable enough to adopt, then they are also worth effectuating. The proposed [Federal] Rules also entertain this viewpoint.

Comment, *Federal Rules of Evidence and the Law of Privilege*, 15 WAYNE L. REV. 1286, 1370 (1969).

25 E. CLEARY, *supra* note 9, § 118, at 286.

26 Heidt, *supra* note 1, at 1064. While Professor Heidt notes that organizational entities have no fifth amendment privilege, the corporation can use the privilege of its employees. *Id.* at 1067. FED. R. CIV. P. 26(b)(1) provides that privileged information is not discoverable, so no sanctions may be imposed for resisting discovery by claiming the privilege. Heidt also notes the four ways in which invocations of the privilege are traditionally attacked: (1) on the ground that prosecution is barred by double jeopardy; (2) on the ground that the response will not incriminate; (3) on the ground that prosecution is barred by a statute of limitations; and (4) on the ground that prosecution is barred by past grants of use immunity. While all of these provide at least some control over the invocations of the privilege, Heidt finds them ineffective. Heidt, *supra* note 1, at 1071-82.

27 See notes 6, 8 *supra* and accompanying text.

from the *Hoffman* standard of when the privilege can be invoked.²⁸ Permissible instances are broad and the judge has little information on which to base a determination of the propriety of the invocation.²⁹ Arguably, the system is essentially self-policing and open to abuse by the unscrupulous.

Courts have employed different methods to control the perceived inequities of allowing a fifth amendment invocation in civil cases. In addition to allowing adverse inferences, courts have also used immunity and procedural controls.

Professor Heidt suggests that use immunity cannot adequately control fifth amendment invocations in civil cases.³⁰ Heidt indicates that use immunity "opens up plaintiff's discovery . . . at the cost of foreclosing the government's opportunity for later prosecution. Assuming trial courts may grant use immunity in private civil cases, they should not so encroach on a domain traditionally reserved for prosecutions without legislative direction to do so."³¹ Heidt's point is perhaps debatable because the statute of limitations on the criminal offense could expire before the civil suit is tried. But because the privilege also applies at the discovery stage,³² Heidt's argument is not without merit.

Courts also resort to other methods of controlling invocations in civil proceedings. In some cases, the court found it appropriate to stay the civil proceeding until the threat of criminal prosecution ended.³³ Not all courts are willing to do this, however. In *Arthurs v. Stern*,³⁴ for example, a physician indicted by a grand jury for dispensing illegal prescriptions sought a stay of the disciplinary hearing until the criminal charges had been cleared up. The court

28 If a witness's invocation of the fifth amendment is challenged, it would seem quite easy to construct a hypothetical in which the answer to a question could furnish a "link in a chain of circumstantial evidence."

29 See note 8 *supra* and accompanying text.

30 Heidt, *supra* note 1, at 1100. Use immunity compels a witness to give self-incriminating testimony, but provides that such testimony and the fruits of it may not be used in subsequent prosecutions of the witness. Transactional immunity gives the witness complete protection against prosecution for any offense about which the witness testifies. 81 AM. JUR. 2D *Witnesses* § 59 (1976). As a practical matter, it is difficult to prove evidence is not a fruit of the testimony given under a use immunity grant. So, while the use of immunity is an effective weapon against the failure of proof the privilege can cause, the cost to society is great, unless it can be established that the interest of society in prosecuting for this offense is minimal. Heidt notes that granting immunity is traditionally a function of the executive branch, not the judicial branch. Heidt, *supra* note 1, at 1100-02.

31 Heidt, *supra* note 1, at 1102.

32 See note 33 *infra*.

33 See, e.g., *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979) (proper response to plaintiff's invocation of the fifth amendment privilege in discovery was a stay and not an automatic dismissal); *Dienstag v. Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970) (proper response to defendant's invocation of the fifth amendment privilege in discovery was a stay).

34 560 F.2d 477 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

refused to impose a stay, noting: "In civil cases, the state may not force incriminating testimony from a citizen by threatening penalties or automatic unfavorable judgments. But this principle does not control when the only consequence of silence is the danger that the trier of fact will treat silence as evidence of guilt."³⁵ Courts in civil cases are also willing to impose costs on parties due to invocations. In criminal cases, it is well settled that one cannot make the invocation of the privilege "costly" to the defendant,³⁶ meaning that no adverse consequences may flow from the assertion. Recently, the concept that the assertion could not be made too costly in civil cases has been upheld by the Supreme Court in *Lefkowitz v. Cunningham*.³⁷ In *Lefkowitz*, the Court struck down a New York statute which required a public official to waive his privilege during a grand jury investigation or be fired and barred from public office for five years. The Court felt that imposing such consequences upon the person invoking the fifth amendment was unconstitutional because the imposed penalty made the assertion too costly. On the civil side, however, it is not clear that this is the rule; courts have been willing to impose "costs" on parties who assert their fifth amendment privilege.³⁸

The courts have struggled with these methods of controlling the privilege against self-incrimination. The problem with judicial responses to abuses of the privilege is that the solutions may be worse than the abuses themselves. The difficulty lies in the potential prejudicial impact which may occur if the fact-finder learns of the invocation. Courts want to avoid the "layman's natural first suggestion . . . that resorting to privilege in each instance is a clear confession of crime."³⁹ The jury is likely to draw this inference regardless of whether the case involved is a criminal or civil case.

Recognizing the problems inherent in allowing the invocation of the fifth amendment in civil cases, the Supreme Court decided *Baxter v. Palmigiano*.⁴⁰ In *Baxter*, a prisoner remained silent at a disciplinary hearing and this silence was used against him at the hearing. The First Circuit had held that this was impermissible because

35 *Id.* at 478 (citations omitted). Thus, the court, relying on *Baxter v. Palmigiano*, 425 U.S. 308 (1976), refused to issue a protective order under FED. R. CIV. P. 30(b). *But cf.* *United States v. Kordel*, 397 U.S. 1, 9 (1970) (in which the Supreme Court appeared to validate the notion of protective orders as a means of preventing civil cases from becoming a tool for criminal discovery).

36 *See* *Griffin v. California*, 380 U.S. 609, 614 (1965) (privilege is not to be cut down by making its assertion costly).

37 431 U.S. 801 (1977).

38 *See* notes 49-55 *infra* and accompanying text for a discussion of Supreme Court tolerance for the imposition of costs in civil cases.

39 8 J. WIGMORE, *supra* note 3, § 2272, at 426.

40 425 U.S. 308 (1976).

the fifth amendment through the fourteenth amendment prohibited the state from making assertion of the privilege this costly.⁴¹ The Supreme Court reversed, holding that here silence alone did not cause an automatic guilty decision. Rather, the decision was based on other substantial evidence in the record.⁴² The *Baxter* Court went on to conclude: "The Fifth Amendment does not preclude the inference where the privilege is claimed by a *party to a civil cause*."⁴³

In *Baxter*, the Supreme Court had to distinguish a prior line of cases which it did not wish to overrule.⁴⁴ In these cases, the Court had held that statutes which required parties to civil proceedings to waive their fifth amendment privilege or face automatic imposition of severe economic sanctions were unconstitutional.⁴⁵ Justice Brennan in *Baxter*, concurring in part and dissenting in part, found the majority opinion inconsistent with the Court's previous *Garrity* line of cases.⁴⁶ Brennan considered the crucial factors to be the imposition of a severe sanction, thirty days in solitary confinement in *Baxter*, and the fact that the government was a party to the action.⁴⁷ If it were simply a case of drawing adverse inferences against invoking parties, Brennan stated:

I would have difficulty holding such an inference impermissible in civil cases involving only private parties. But I would hold that compulsion violating the privilege is present in any proceeding, criminal or civil, where a *government official* puts questions to an individual with the knowledge that the answers might tend to incriminate him.⁴⁸

The Supreme Court followed the *Baxter* decision in *Lefkowitz v. Cunningham*,⁴⁹ where the Court held that a New York statute violated the parties' fifth amendment privilege.⁵⁰ The majority relied

41 *Id.* at 316.

42 *Id.* at 317.

43 *Id.* at 318 (quoting 8 J. WIGMORE, EVIDENCE, § 2272, at 439 (McNaughton rev. 1961)).

44 See notes 51-54 *infra* and accompanying text.

45 The Supreme Court tried to distinguish *Baxter* from these other cases on the grounds that in the other cases, the invocation alone caused an automatic imposition of severe economic sanctions. 425 U.S. at 317.

46 Justice Brennan had difficulty reconciling *Baxter* with the *Lefkowitz* line of cases stating: "Since the Court does not overrule the *Garrity-Lefkowitz* group of decisions, those precedents compel the conclusion that this constituted impermissible compulsion." 425 U.S. at 333 (Brennan, J., dissenting). See also Judge Stern's dissent in *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 246 n.5 (1983) where Judge Stern stated: "I read *Baxter* and *Lefkowitz v. Cunningham* . . . to say that such inferences, while clearly costly, are acceptable until they become too costly."

47 425 U.S. at 331, 333.

48 *Id.* at 334.

49 431 U.S. 801 (1977).

50 In *Cunningham*, a New York statute provided that if an officer of a political party

on *Lefkowitz v. Turley*,⁵¹ *Garrity v. New Jersey*,⁵² *Gardner v. Broderick*,⁵³ and *Uniform Sanitation Men v. Commissioner of Sanitation*⁵⁴ to reach this result and dealt with *Baxter* only by reference in a footnote.⁵⁵

Together *Baxter* and *Cunningham* seem to hold that inferences can be drawn against invoking parties in civil litigation when other evidence supporting the result exists. The proper weight to accord these inferences has been left to the lower courts to decide.⁵⁶

III. Lower Courts' Expansion of Adverse Inferences as a Weapon Against Invocations

Even before *Baxter*, the lower courts struggled with a number of issues concerning adverse inferences as a method of controlling fifth amendment invocations in civil cases. For example, lower courts have had to consider how strong an inference should be granted. The courts have not reached a consensus. In *National Acceptance Co. of America v. Buthelter*,⁵⁷ the court maintained that a defendant's claim of the fifth amendment was not an admission of the

refused to testify in front of a grand jury he lost his office and was barred from holding any other party or public office for five years. The appellee, an attorney, lost his office when he refused to waive his immunity. The Supreme Court held this statute violated his right to be free from compelled self-incrimination. *Id.* at 802 n.1.

51 414 U.S. 70 (1973) (The Supreme Court struck down a New York statute which required state contractors to waive immunity and privilege or lose existing contracts and be barred for five years from contracting with the state.).

52 385 U.S. 493 (1967) (The Court held unconstitutional a forfeiture-of-office statute where police officers who refused to waive immunity and answer questions during an investigation were automatically removed from office.).

53 392 U.S. 273 (1968) (police officer could not be dismissed solely because he refused to waive his fifth amendment privilege).

54 392 U.S. 280 (1968) (State of New York could not force employees to choose between their constitutional rights and their jobs).

55 431 U.S. at 808 n.5. Footnote 5 of the majority's opinion states:

Baxter v. Palmigiano is not to the contrary. That case involved an administrative disciplinary proceeding in which the respondent was advised that he was not required to testify, but that if he chose to remain silent his silence could be considered against him. *Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to an imposition of sanctions.

Id. (citations omitted).

56 For an example of some of the procedural issues involved, see *National Acceptance Co. of Am. v. Buthelter*, 705 F.2d 924 (7th Cir. 1983) (claim of privilege in answer to complaint not an admission). See also *De Antonio v. Soloman*, 42 F.R.D. 320, 322 (D. Mass. 1967) (no summary judgment for defendant's failure to produce incriminating document at discovery). FED. R. CIV. P. 8(d) treats defendant's claim of the privilege as equivalent to a specific denial. *Hughes Tool Co. v. Meier*, 489 F. Supp. 354, 375 (D. Utah 1977); 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1280, at 360-61 (1969). See notes 57-62 *infra* and accompanying text for a discussion of the weight to be given these inferences.

57 705 F.2d 924, 932 (7th Cir. 1983).

plaintiff's allegations and, accordingly, would not support a motion for summary judgment.⁵⁸ The court decided that treating the invocation as an admission is not permissible because *Baxter* indicates this is a constitutionally impermissible cost.⁵⁹

Nevertheless, the court in *Young Sik Woo v. Glantz*⁶⁰ indicated that, in at least certain instances, the inference drawn by the invocation will support a summary judgment or a directed verdict.⁶¹ In *Young Sik Woo*, the defendant claimed that invocation of his privilege against self-incrimination "insulates him against plaintiff's Rule 56 thrust."⁶² The court held that since an inference can be drawn at trial under *Baxter*, nothing prevents the inference from being drawn at the "paper trial contemplated by Rule 56."⁶³ The court then noted the criteria needed before a *Baxter* inference could be drawn: (1) the case must involve a civil action; (2) the party seeking the inference must have a prima facie case without it; and (3) the person invoking must be a party and not a mere witness.⁶⁴ But later cases reveal that these criteria may not be as widely recognized as the court in *Young Sik Woo* believed.

As courts have expanded the permissible circumstances under which inferences may be drawn, they have attacked the *Young Sik Woo* requirement that the invoking witness must be a party before an inference may be drawn. The rule was first extended to allow inferences where the invoker is an employee or agent of the party against whom an inference is sought.⁶⁵ Courts and commentators rationalize this by treating the invocation as a vicarious statement of the employer.⁶⁶ While Heidt, a proponent of this extension, recog-

58 *Id.* at 931.

59 *Id.* at 932.

60 99 F.R.D. 651 (D.R.I. 1983).

61 The court noted the costs under the *Garrity-Lefkowitz* line of cases all involved FED. R. Civ. P. 37 sanctions for failure to make discovery. The court held a FED. R. Civ. P. 56 motion for summary judgment is a disposition on the merits and adverse inferences may be considered as a factor. 99 F.R.D. at 652-53.

62 *Id.* at 651.

63 The court also cites with approval 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2018, at 148 (1970), which provides: "In some cases if a party claims the privilege and does not give his own evidence, there will be nothing to support his view of the case and a finding against him or even a directed verdict or grant of summary judgment will be proper." *Id.* at 653.

64 99 F.R.D. at 653 n.3. The court relies on Moxham, *A Comment Upon The Effect Of Exercise of One's Fifth Amendment Privilege in Civil Litigation*, 12 N. ENG. L. REV. 265, 267 (1967).

65 See Heidt, *supra* note 1, at 1119-26. See also *E. H. Boerth Co. v. LAD Properties*, 82 F.R.D. 635 (D. Minn. 1979); notes 66-69 *infra* and accompanying text.

66 This rationale is explained by Heidt who suggests four justifications for treating employee invocations as vicarious statements of employers: (1) Employees are not likely to risk their job by giving false statements, but they have every motive to exculpate an employer if they can; (2) Reliability of vicarious statements is supported by the probability that the speaker will be informed when the subject concerns matters within the scope of employment. Invocations share this when the triggering question concerns an employee's work;

nizes that allowing the inference may seem inequitable, he believes there are measures a party can take to mitigate the harshness.⁶⁷ Heidt indicates that inferences are needed to prevent employers from pressuring employees into invoking "early and often."⁶⁸ Courts seem to accept the view that inferences may be drawn against employers for employee/agent invocations even if they are not adequately explaining the rationale for this position.⁶⁹

The leading case allowing inferences against an employer based upon an employee's invocation of the fifth amendment is *Ralph Hegman Co. v. Transamerica Insurance Co.*,⁷⁰ where the court allowed an inference to be drawn against a surety where the bonded person invoked the fifth amendment. The court stated that if the jury could have drawn inferences against the employee because of his assertion of the privilege, there was no sound reason "why the jury should not be permitted to draw the same inferences in considering the substantially identical claim of the plaintiff against appellant."⁷¹ This court felt a different result might be required if there was no relationship between the witness and the party.⁷²

When courts allow inferences to be drawn against present employers or sureties, the policy concerns underlying the privilege are not undermined.⁷³ But when the relationship is severed between the witness and the party *before* the witness's invocation, allowing the inference is improper. The courts, by extending *Baxter* to this context, do not aid the fact-finding process, but instead injure the adversarial process.

*Lionti v. Lloyd's Insurance Co.*⁷⁴ illustrates the confusion in this

(3) The employer has access to information that refutes or explains the inference; and (4) The assertion is inherently more reliable because it is made under oath. Heidt, *supra* note 1, at 1120-21. See also 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 426, at 318-22 (1980). But see notes 100-06 *infra* and accompanying text for a discussion of why this rationale should not be extended to the invocations of ex-employees or agents.

67 Heidt, *supra* note 1, at 1121-22. Heidt points to the following: (1) The employee's duty to reveal this information to the corporate agent appointed to reply to interrogatories on the matter; (2) The party should be able to influence the employee's decision to invoke; and (3) Corporate defendants are often held responsible for the behavior of employees during the course of litigation.

68 *Id.* at 1123.

69 See *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984); *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983); *Popular Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *E. H. Boerth v. LAD Properties*, 82 F.R.D. 635 (D. Minn. 1979); *Ralph Hegman Co. v. Transamerica Ins. Co.*, 293 Minn. 323, 198 N.W.2d 555 (1972).

70 293 Minn. 323, 198 N.W.2d 555 (1972).

71 *Id.* at 326, 198 N.W.2d at 557.

72 *Id.* at 326, 198 N.W.2d at 558. The court stated: "The question of whether the same rule should apply to a non-party witness who is totally unrelated to either party in an action is not necessarily controlled by the above analysis."

73 See notes 67-68 *supra* and accompanying text.

74 709 F.2d 237 (3d Cir.), *cert. denied*, 104 S. Ct. 490 (1983).

area. In *Lionti*, the plaintiff sued to collect insurance proceeds after the plaintiff's restaurant burned down and the defendant refused to pay the fire insurance claim. A former employee of the plaintiff invoked his fifth amendment privilege on the stand when asked about the origins of the fire, thus creating the impression that the ex-employee, not the plaintiff, had started the fire. The defendant then introduced the testimony of one of its agents, who repeated that the ex-employee had told him that the ex-employee had nothing to do with the fire but that the employer had asked the employee's advice on how one would start a fire that would destroy the restaurant. At trial, this hearsay was held admissible as a prior inconsistent statement with the ex-employee's invocation. Therefore, it could only be used to impeach.⁷⁵

On appeal, the Third Circuit considered only the propriety of the insurance agent's testimony, not the evidentiary value of the ex-employee's invocation, and found that the admission of the testimony was harmless error given the great weight of evidence supporting a verdict for the defendant.⁷⁶ Judge Stern dissented: "Whether there is evidential value in a non-party witness's invocation of the fifth amendment privilege in a civil case is an issue no court of appeals has ever squarely addressed."⁷⁷ Arguing that the majority opinion impliedly assumed there is evidentiary value in these invocations, Judge Stern stated:

Provided that such behavior [non-party witness invocation] is not the responsibility of either party, it does not work any unfairness which requires penalization. To the contrary, it is by allowing inferences from a witness's refusal to testify that one party will be harmed, and in a manner that is beyond his power to control. While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case.⁷⁸

Two recent court of appeals cases also allowed inferences to be drawn against parties based upon others' invocations of their privilege against self-incrimination. Both *Rosebud Sioux Tribe v. A & P Steel, Inc.*,⁷⁹ and *Brink's Inc. v. City of New York*,⁸⁰ allowed the adverse inference even though the relationship between the party and the invoking witness had ended.⁸¹

⁷⁵ *Id.* at 241.

⁷⁶ *Id.* at 244.

⁷⁷ *Id.*

⁷⁸ *Id.* at 246.

⁷⁹ 733 F.2d 509 (8th Cir. 1984), *cert. denied*, 53 U.S.L.W. 3417 (1984) (No. 84-338).

⁸⁰ 717 F.2d 700 (2d Cir. 1983).

⁸¹ In *Rosebud Sioux Tribe*, the invoking witness, Richard Lone Dog, had been receiving

Brink's originally involved an action by Brink's against the City of New York to recover money under a contract for the collection of parking meter receipts. The City cross-claimed against Brink's, alleging that Brink's had negligently allowed thefts of the receipts. Brink's asserted a third-party claim against its ex-employees based upon the City's claim against Brink's. At trial, the City won a large award. Brink's appealed based partially upon the drawing of inferences from ex-employees' invocations of their fifth amendment privilege.⁸² Brink's contended the trial court had erred in allowing the City to call the witnesses knowing they would invoke the privilege in response to specific questions, and in allowing the City's counsel to rely upon these invocations in summation.⁸³

The Second Circuit began its analysis with Federal Rule of Evidence 501.⁸⁴ While the court noted that Supreme Court Standard 513-1 indicated an intent to strengthen the privilege, the court felt the rule did not distinguish between criminal and civil cases.⁸⁵ The court stated that, in this case, Brink's benefited from the inference in its third-party claim against its ex-employees. But as an original party defendant, it preferred not to have the inference drawn. For unclear reasons, the court stated that this shows the inappropriateness of a bright-line rule in civil actions.⁸⁶ This reasoning is obvious make-weight since the ex-employees would be judgment-proof to Brink's for the amount of money involved. Citing *Baxter* as precedent that there is no constitutional mandate against allowing inferences in this case, the court accepted Professor Heidt's argument: "The fact that the invokers of the privilege are no longer employees of the defendant does not necessarily bar admittance of their refusals to testify as vicarious admissions of their former employer, Professor Heidt argues, . . . and we see no reason for a different result."⁸⁷

payoffs from an agent of the defendant corporation, A & P Steel. Lone Dog's relationship with the defendant had ended by the trial date. *Brink's* involved an ex-employee's invocation at trial when questioned about alleged thefts of parking meter receipts. In neither case was there evidence that the invoking witness owed some special duty to the party at the time of the invocation. See also *Popular Grove Planting and Refining Co. v. Bache Halsey Stuart Inc.*, 465 F. Supp. 585 (M.D. La. 1979) (Prior to trial, employee had been fired for acts upon which he based his invocation and an inference was drawn against the former employer.).

82 717 F.2d at 707.

83 *Id.*

84 FED. R. EVID. 501 provides: "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts in light of reason and experience."

85 See note 21 *supra*.

86 717 F.2d at 708.

87 *Id.* at 710 (citing Heidt, *supra* note 1, at 1119-20 n.214) (citations omitted). In fairness to Heidt, the court omitted key language from this footnote. Heidt would require some factor which suggests that the former employee retains some loyalty to the former

The majority then considered the question of whether the prejudicial impact of the ex-employees' invocations outweighed their probative value. The court summarily held that the probative value outweighed the prejudicial impact.⁸⁸

In a compelling dissent, Judge Winter noted the severe problems with the majority's approach: "This holding allows juries to draw prejudicial inferences from leading questions put to witnesses, denies parties the right to cross-examine, and is an invitation to sharp practice."⁸⁹ Judge Winter argued that in this case the prejudicial impact outweighed any probative value. The only evidentiary value was derived from the fact-specific questions posed by the City's attorney because, given the *Hoffman* standard of when the privilege may be invoked, it cannot be inferred what the party's answer might be. Posing questions which suggest the answer "yes" when no answer is given "inevitably invites jurors to give evidentiary weight to questions rather than answers."⁹⁰ In addition, the party against whom the inference will be drawn is denied the right to effective cross-examination.⁹¹ Unlike the majority, Judge Winter felt that *Baxter* applied only when a witness who is a *party* to the action invokes the privilege, not when a *non-party* witness invokes.⁹²

*Rosebud Sioux Tribe v. A & P Steel, Inc.*⁹³ also addressed the issue of drawing adverse inferences against a party based on the invocation of a witness no longer in any special relationship with the party.⁹⁴ In *Rosebud*, the Eighth Circuit granted the Tribe's rule 60(b) motion for a new trial based, in part, on the trial court's failure to allow the Tribe to call a witness who intended to invoke the fifth amendment. The Tribe had hoped to draw adverse inferences against the defendant based upon the witness's invocation.⁹⁵ The

employer. Nevertheless, the court chose to ignore this point. Heidt cites *Ralph Hegman Co. v. Transamerica Ins. Co.*, 293 Minn. 323, 198 N.W.2d 535 (1972), as supporting his proposition. In this author's view, this is an overly expansive reading of the holding.

88 717 F.2d at 710. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

89 717 F.2d at 715 (Winter, J., dissenting).

90 *Id.* at 716 (An example of this problem is the actual testimony in this case to which Judge Winter points.).

91 *See id.* at 716 (Judge Winter's hypothetical example of a series of questions that is the best that a prospective cross-examiner could hope to accomplish to defeat the adverse inference).

92 *Id.* at 718.

93 733 F.2d 509 (8th Cir. 1984).

94 *Id.* at 512 (The invoking witness, Richard Lone Dog, had never been directly employed by the defendant corporation, A & P Steel, but he was receiving payoffs from Michael Strain and the ultimate source of these funds was A & P Steel.).

95 The facts of this case are quite complicated, so a synopsis of the events and chief characters follows: Strain, an attorney employed by the Tribe, was instrumental in ob-

court of appeals reversed, holding that denying the Tribe this opportunity was error because: "The policies supporting the Fifth Amendment apply with even less force when a non-party witness testifies in a civil proceeding and thus, the Amendment should not work to preclude an adverse inference in this situation."⁹⁶ In effect, the court held that there is evidentiary value in a non-party's assertion of the fifth amendment privilege. The Eighth Circuit stated that the trial had given A & P Steel an unfair advantage: "By introducing into evidence Lone Dog's favorable deposition testimony, A & P made Lone Dog its principal witness and, simultaneously, effectively precluded the opportunity for cross-examination."⁹⁷ The simpler solution would be to allow neither the deposition nor the invocation into evidence. Federal Rule of Evidence 403 provides ample grounds for denying admission of either the deposition or

taining a government grant to fund a new irrigation project for the Tribe. Driving Hawk, Chairman of the Tribe, entered into contract negotiations with Don McPherson, Vice-President of A & P Steel, for construction of the project and a contract was signed on June 21, 1977. Strain then formed Frontrunner Associates, a corporation which received money from A & P Steel and made payments to Driving Hawk and Richard Lone Dog, Chairman of Tribal Land Enterprises (T.L.E.). T.L.E. is a subsidiary of the Tribe which manages all tribal lands. Pearce, President of A & P Steel, knowing Strain was the Tribe's attorney, went ahead and hired Strain as a consultant to A & P Steel on the irrigation project. On June 29, 1978, allegations of fraud, corruption, and nepotism were made concerning the project. The Tribal Council passed a resolution suspending sign-offs and payments until an investigation was completed. Driving Hawk kept issuing checks until they bounced. The Tribe sued A & P Steel in the United States District Court for the District of South Dakota for fraud, conspiracy, breach of contract, and breach of warranties arising out of the contract. The jury returned a verdict for A & P Steel on its cross-claim in the amount of \$74,000. 733 F.2d at 511-13.

Before trial, the Tribe had taken a deposition of Lone Dog which contradicted the Tribe's complaint. At trial, Lone Dog had been advised to claim the fifth amendment and the trial court, in an *in camera* hearing, sustained A & P's objection to the Tribe's attempt to call Lone Dog to the stand solely for the purpose of having him invoke the privilege in front of the jury. A & P was then allowed to read Lone Dog's deposition into evidence over the Tribe's objection. Unknown to the Tribe, Lone Dog had, in a separate investigation, given grand jury testimony which showed he had lied at the previous deposition. Lone Dog also testified about payoffs he had received from Strain. He testified that Strain had advised him to give false testimony at the deposition. The Tribe did not become aware of this grand jury testimony until November 1982, two months after judgment was entered against them in the case. *Id.* at 514-15.

The Eighth Circuit held that this was new evidence, of such a nature that a new trial would probably produce a new verdict, and ordered a new trial. *Id.* at 517. The court went on to discuss the trial court's ruling that Lone Dog was unavailable as a witness and could not be called to the stand by the Tribe. An unavailable witness is defined under FED. R. EVID. 804(a)(1): "(a) Definition of unavailability—'Unavailable as a witness' includes situations in which the declarant—(1) is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." The Eighth Circuit concluded that the Tribe should have been allowed to call Lone Dog to the stand despite his known intention to invoke. The court concluded that, because this was a private action, *Baxter* permits the drawing of inferences based upon the witness's invocation. *Id.* at 522. The court cited with approval *Heidt*, *supra* note 1.

96 733 F.2d at 521.

97 *Id.* at 522.

the invocation.⁹⁸

IV. The Lack of Sound Underpinnings for the Extension

The cases do not offer an adequate explanation of why evidentiary weight should be attributed to non-party invocations of the privilege. The best that can be said is that the actions underlying the lawsuit occurred when the invokers stood in some special relationship with a party.⁹⁹ Presumably, courts are allowing inferences based upon this past relationship, treating the invocations as "vicarious statements of employers."¹⁰⁰

The courts, however, have failed to consider whether the justifications which allow adverse inferences to be drawn against employers apply when an ex-employee invokes the privilege. Once the employment relationship is severed, there is little justification for allowing adverse inferences.¹⁰¹ Heidt's argument that employee invocations have increased reliability¹⁰² does not apply when the relationship has ended before the invocation. Heidt's first point is true—employees will tend not to jeopardize their jobs with false statements that discredit their employers.¹⁰³ But the exact opposite may be true if the employee was fired or departed on unfriendly terms.

The second reason suggested is that if the question triggering the invocation concerns the employee's duties, the invoker is well informed, thus increasing the reliability of the assertion.¹⁰⁴ This argument lacks merit when extended to ex-employees. The mere fact that the person has knowledge does not make the invocation more reliable. Only when this knowledge is combined with a duty not to injure the party against whom the inference will be drawn does the invocation have heightened reliability. Then, presumably, the invoking party will weigh the risks of prosecution to himself against the potential harm to himself caused by his invocation.

Third, Heidt argues that the employer has access to information which it can offer to explain away the invocation.¹⁰⁵ This argument assumes that the informed employer knows or can force the ex-employee to explain why the invocation is made—a dangerous

98 For the text of FED. R. EVID. 403, see note 90 *supra*.

99 At trial, however, even the indicia of loyalty Heidt would require appear absent in both *Brink's* and *Rosebud Sioux Tribe*. See notes 87, 89 *supra*.

100 Both *Brink's* and *Rosebud Sioux Tribe* relied upon Heidt, *supra* note 1, to justify the extension. Heidt argues that the policy support for this extension is found in treating the invocations as vicarious statements of the employer. See notes 66-67, 70-72 *supra*.

101 See notes 102-06 *supra* and accompanying text.

102 See note 66 *supra*.

103 Heidt, *supra* note 1, at 1120.

104 *Id.*

105 *Id.* at 1121.

assumption given the wide latitude of when a person may invoke the privilege. In the case of an ex-employee, the employer must explain away a negative inference without having any leverage to force the invoker to explain his actions.

Finally, Heidt suggests the invocations have added value because they are made under oath.¹⁰⁶ This again appears to be make-weight. The notion that the solemnity of the oath increases reliability would support evidence allowing the inference in criminal as well as civil cases. In addition, the significance of the oath is at least subject to questions.

None of these reasons presents a compelling answer to Judge Stern's or Judge Winter's analysis. In the end, by allowing inferences, the courts give evidentiary weight to the questions asked by counsel. It is one thing to allow these inferences when the person invoking owes a duty to the party who stands to lose if he claims his fifth amendment privilege. It is quite another to allow the inference against a party who has absolutely no control over the invocation being made. The fifth amendment protects our adversarial system. In both *Rosebud* and *Brink's*, the party with the sympathetic case prevailed, but at a significant cost to the fairness of the adversarial process.

V. Conclusion

Baxter opened the door to controlling abuses of the fifth amendment privilege in civil cases. In civil cases, most agree that some controls must be placed on the fifth amendment's ability to frustrate the discovery and fact-finding processes. These needs do not justify the lengths to which some courts have gone. The fairness of the judicial process is undermined if courts allow inferences to be drawn against a party when a non-party witness in no special relationship with a party at the time of trial invokes the fifth amendment.

Dennis J. Bartlett

106 *Id.*