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THE MINIMALIST PRIVILEGE

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The Fifth Amendment's self-incrimination privilege is an unsolved problem. It casts a wide shadow over a variety of essential government activities, concerning criminal triials,[1] custodial interrogation,[2] legislative hearings,[3] grand jury investigations,[4] administrative investigations,[5] and government employment, among other things.[6] Judicial review that places substantial limits on essential government activity needs careful justification in order to be considered legitimate—careful justification that is lacking in the self-incrimination context. This lack of justification makes the self-incrimination privilege the problem child of the Bill of Rights.

The difficulty in justifying the right is compounded by the Supreme Court's interpretation of the privilege, most of which finds support in neither history nor the constitutional text. Since legislative history of the Fifth Amendment privilege adds little to our understanding,[7] the historical foundations of the Fifth Amendment privilege must come from its common law origins.[8] The privilege was first asserted by religious dissidents in the English ecclesiastical and prerogative courts of the Star Chamber and High Commission.[9] Such efforts were unsuccessful until Parliament abolished the prerogative courts and oath *ex officio* in the 1640s.[10] The privilege's ascendancy did little to change common law criminal procedure. English criminal procedure gave defendants powerful incentives to speak at trial because of the fact that

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1 *See* Griffin v. California, 380 U. S. 609, 615 (1965) (privilege forbids prosecutorial or judicial comment that silence is evidence of guilt).

2 *See* Miranda v. Arizona, 384 U. S. 436, 446-47 (1966).

3 *See* Quinn v. United States, 349 U. S. 155, 161 (1955).

4 *See* Counselman v. Hitchcock, 142 U. S. 547, 562-63 (1892).

5 *See* I.C.C. v. Brimson, 154 U. S. 447, 478-80 (1894).

6 *See* Lefkowitz v. Turley, 414 U. S. 70, 85 (1973).

7 *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1121-23 (1994) (discussing the history of the Fifth Amendment).

8 *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 677-78 (1968).

9 *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 316 (1998).

10 *Id.*

silence could be used against the accused.[11] Defendants had the same incentive to speak under American criminal procedure once the Fifth Amendment was adopted.[12] The intent behind the privilege was not to create a right to silence but rather to prohibit compelled incrimination under oath, torture, and possibly other forms of coercion like threats of punishment or promises of leniency.[13] Compelled incrimination from the accused was acceptable, so long as it was not under oath.[14] The Fifth Amendment, when viewed in the context of Anglo-American criminal procedure at that time, was no more than a guarantee against the state's "reimposing ex officio procedures or judicial torture."[15] Modern applications of the privilege, however, go far beyond its history.[16] The privilege's limited history cannot explain or justify its modern form.[17]

Other justifications fare no better. The Supreme Court's efforts to rationalize its expansive Fifth Amendment jurisprudence have been notably unsuccessful. The most substantial attempt, Justice Goldberg's famous defense of the privilege in *Murphy v. Waterfront Commission*,[18] has been refuted in detail.[19] Even the Supreme Court has backed away from *Murphy*'s more extravagant claims.[20] More recent efforts by the high court to articulate a justification are much more modest, although little better. One such claim is that a core purpose of the Self-Incrimination Clause is "preventing government overreaching."[21] This begs the question, as it merely assumes that compelled self-incrimination should be considered "government overreaching" without explaining why this is so. Requiring an indictment or information before prosecution,[22] the right to counsel,[23] and the reasonable doubt requirement for convictions[24] all limit the prosecution's ability to exert power over the accused. The privilege does little, if anything, to prevent actual government overreaching like overcharging or conviction upon scanty proof. The *Balsys* statement and similar ones

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[11] *Id*. at 317; Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2654−55 (1996).
[12] *See* Alschuler, *supra* note 11, at 2655−56; *see also* Penney, *supra* note 9, at 318−19.
[13] *See* Alschuler, *supra* note 11, at 2651. *But see* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. REV. 1063, 1078 (1986) (arguing that the common law privilege did not prevent the continued use of torture).
[14] *See* Penney, *supra* note 9, at 319.
[15] Penney, *supra* note 9, at 319.
[16] *See* John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications,* 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI., 138, 141 (1960). The fact that one of the leading evidence scholars made this claim before cases like *Miranda* and *Griffin* demonstrates just how far the privilege has strayed from its moorings.
[17] *See* Friendly, *supra* note 8, at 679.
[18] Murphy v. Waterfront Comm'n, 378 U. S. 52, 55 (1964).
[19] *See* Friendly, *supra* note 8, at 686-97; see also Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained*, 94 J. CRIM. L. & CRIMINOLOGY 243, 244 (2004) (calling the values cited in *Murphy* "striking in their vacuity and circularity").
[20] *See* United States v. Balsys, 524 U. S. 666, 691-92 (1998).
[21] *Id*. at 693.
[22] *See* Hurtado v. California, 110 U. S. 516, 538 (1884).
[23] *See* Gideon v. Wainwright, 372 U. S. 335 (1963).
[24] *See In re* Winship, 397 U. S. 358, 364 (1975).

from members of the Court[25] are symptomatic of the trite generalizations that plague defenses of the privilege.

The problem is that there is little substantial justification for the privilege in its modern form. The standard justifications for the modern privilege are now almost routinely dismissed.[26] The privilege has been attacked as unjustified by such respected figures as Cardozo, Pound, Corwin, and Wigmore.[27] These attacks, addressing the faults of the standard justifications for the privilege like *Murphy*'s "cruel trilemma," the privacy rationale, or preserving the accusatorial system, need not be reproduced in full here. Briefly, the privacy rationales fail to distinguish why only incriminating testimony is privileged rather than all testimony, or all incriminating evidence in the person's possession.[28] The "cruel trilemma" of perjury, self-incrimination, or contempt, is not cruel because only a guilty suspect must worry about the first two alternatives, and people in other situations are compelled to make similarly difficult choices.[29] Achieving a balance between the state and the individual is irrational. The goal of criminal procedure is rather to minimize the conviction of the innocent,[30] and the privilege is not necessary to prevent torture.[31] Dolinko's article is the most comprehensive attack on the privilege and, along with Friendly's, one of the classics in the field.[32] More recent attempts to rationalize the privilege are interesting, but they provide little real support for the modern Fifth Amendment

Amar and Lettow fashion an immunity-based privilege with a historical fabric. They argue for a "decisive step" in the law of the privilege, "that a person's (perhaps unreliable) compelled pretrial statements can never be used against him in a criminal case but that reliable fruits of such statements virtually always can be."[33] The government would be able to compel answers "in a civilized pretrial hearing" in which the answers would be inadmissible, but the fruits of the interrogation generally would be admissible.[34]

This interpretation of the privilege emphasizes reliability, which the authors assert is "the heretofore elusive rationale of the Self-Incrimination Clause."[35] The

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[25] *See, e.g.*, Chavez v. Martinez, 538 U. S. 760, 801 (2003) (Ginsburg, J., dissenting) (arguing that the privilege protects individuals from arbitrary government power).
[26] *See, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 885 (1995); Dolinko, *supra* note 2, at 1070−1107; Allen & Mace, *supra* note 23, at 244; Donald Dripps, *Foreword: Against Police Interrogation and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 811-18 (1988); William J. Stunz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988) Friendly, *supra* note 12, at 682-97; McNaughton, *supra* note 20, at 142-48.
[27] *See* Friendly, *supra* note 8, at 672−73.
[28] *See* Dolinko, *supra* note 13, at 1107−08; Friendly, *supra* note 8, at 687-89.
[29] *See* Dolinko, *supra* note 13, at 1093−94; Friendly, *supra* note 8, at 1075-76.
[30] *See* Dolinko, *supra* note 13, at 1076.
[31] *See id*., at 1077−79.
[32] *See* Stunz, *supra* note 27, at 1228, n. 1.
[33] Amar & Lettow, *supra* note 27, at 858.
[34] *Id*., at 858−59.
[35] *Id*., at 900.

fruit is distinguished from the compelled testimony because the former is inherently more reliable than the latter.[36] The split between the two is also consistent with the constitutional text[37] and with the historical privilege. The modern version of the privilege developed slowly in England and early America.[38] Even after the ratification of the Bill of Rights, the accused could be questioned by the magistrate, and any failure to answer could be used against him at trial. Testimonial immunity was common in America until the Supreme Court's decision in *Counselman v. Hitchcock*,[39] which strengthens the historical case for this conception of the privilege.[40]

Although perhaps initially appealing, this mix of reliability and history promises too much and delivers too little. While reliability is certainly a worthy goal, its relationship to the Self-Incrimination Clause is at best tangential. There is little reason to invoke reliability to distinguish between testimony and its fruits. All trial testimony is compelled, yet this fact by itself does not make such testimony unreliable. Confrontation and cross-examination are the primary means of ensuring the reliability of witnesses.[41] Although the text of the Confrontation Clause is limited to criminal cases,[42] confrontation is still the norm in civil trials.[43] This raises the question of why compelled incriminating testimony should be considered so unreliable that it should be treated differently from its fruits or all other testimony.

The Amar and Lettow article only provides summary support on this point. The authors argue that compelled testimony may be partly or wholly unreliable: Even an innocent person may say seemingly inculpatory things under pressure from trained inquisitors. Since the physical fruits are much more reliable evidence, they can be brought before the jury even though the compelled confession is unreliable.[44]

The notion that the privilege protects the innocent defendant from conviction through poor testimony has been addressed before, and Amar and Lettow give no reason to change this conclusion. The Supreme Court has claimed that the privilege is not justified by protecting the innocent.[45] Dolinko's article effectively rebuts any claim that reliability justifies the privilege. He concedes that the privilege could protect an innocent defendant who makes a poor witness, or, more likely, one with prior convictions which could allow the jury to convict on the basis of the criminal record.[46] However, since jurors are likely to equate silence with guilt, the innocent defendant is

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[36] *Id*., at 922.
[37] *Id*.
[38] *Id*. at 897.
[39] 142 U. S. 547 (1892).
[40] Amar & Lettow, *supra* note 4, at 911-15.
[41] Maryland v. Craig, 497 U. S. 836, 845-46 (1990).
[42] U. S. Const. Amend. VI ("In all criminal prosecutions . . .").
[43] 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 and § 1395 (Chadbourn rev., 1974).
[44] Amar & Lettow, *supra* note 30, at 900−01.
[45] Baxter v. Palmigiano, 425 U. S. 308, 319 (1976); Tehan v. United States *ex rel*. Schott, 382 U. S. 406, 416 (1966). *Contra* Withrow v. Williams, 507 U. S. 680, 692 (1993) (quoting Murphy).
[46] Dolinko, *supra* note 2, at 1075.

usually better off taking the stand.[47] Since the benefit of silence is so small to the innocent defendants, the privilege does little to protect them.[48] A better protection for innocent defendants that is much less costly to society would be limits on impeachment through prior convictions.[49]

While the privilege at best minimally protects the innocent, it substantially benefits the guilty. Like any privilege, the Fifth Amendment suppresses relevant evidence by preventing the state from using the defendant's own words to help convict him or her. As Dolinko properly notes, most criminal defendants are in fact guilty.[50] While recent scholarship asserts that the conviction of the innocent is much higher than presumed,[51] these studies contain substantial problems, including great overstatements of the actual numbers involved.[52]

Professor Giveleber's study relies primarily on extrapolating rates of convicting the innocent from a survey of criminal justice practitioners and surveys of the disagreement between judges and juries on the accuracy of verdicts.[53] These estimates range from a 0.5% false conviction rate to a rate of 7.9% under the most aggressive assumptions.[54] Furthermore, even Professor Giveleber notes that this theory is unverifiable.[55] In the end, he admits that it is impossible to know how many innocents are convicted.[56] Also, Professor Giveleber admits that *Miranda* most immediately helps the guilty and makes it harder for the innocent to be heard.[57]

The greatest risk to reliability from abandoning the privilege is not from falsely incriminating testimony, but from falsely exculpatory testimony. Indeed, one justification offered for the privilege is that compelling potentially incriminating tes-

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[47] *See id*. & n. 67, *citing* United States v. Grayson, 438 U. S. 41, 58, n. 5 (1978) (Stewart, J., dissenting); Lakeside v. Oregon, 435 U. S. 333, 340 & n.10 (1978); *accord* LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 26 (1959).
[48] Dolinko, *supra* note 17, at 1075.
[49] *Id*.
[50] *Id*. at 1076 & n.72
[51] *See*, *e.g.*, Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 78–81 (1987) (claiming an intolerable risk of executing the innocent in capital cases); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interroga tion*, 88 J. CRIM. L. & CRIMINOLOGY 429, 493 (1998) (arguing that false confessions leading to the conviction of the innocent "threaten the quality of criminal justice in America"); Daniel Giveleber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997) (arguing that the American system creates significant risk of convicting the innocent).
[52] *See* Paul Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL'Y 523, 525 (1999) (finding that Leo & Ofshe's study misidentifies guilty parties as factually innocent); Stephen Markman & Paul Cassell, Comment: *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (pointing out severe flaws in Bedau-Radelet Study).
[53] Giveleber, *supra* note 8, at 1338–46.
[54] *Id*. at 1343.
[55] *Id*. at 1345.
[56] *Id*. at 1346.
[57] *Id*. at 1379.

timony gives the defendant too much incentive to commit perjury.[58] This is similar to Murphy's "cruel trilemma"[59] and is not a valid justification for the privilege, since the guilty defendant is placed in the "trilemma" only because he or she has committed a crime.[60] While the prospect of perjury can threaten the reliability of criminal trials, this can be addressed through cross-examination.

Amar and Lettow's article has many interesting ideas for reforming the privilege. Their procedure for examination by magistrate could help criminal investigation with minimal risk of improper interrogation tactics, so long as it supplements, rather than replaces, police interrogation.[61] They have not, however, unearthed the Holy Grail of the self-incrimination privilege. If there is a justification for the privilege, it must come from another source.

Descriptive theories of the self-incrimination privilege represent an interesting variation in the quest for justification. Allen and Mace's article finds a "powerfully explanatory positive theory" for the privilege.[62] Their theory of the Fifth Amendment privilege is that "the government may not compel disclosure of the incriminating substantive results of cognition that themselves (the substantive results) are the product of state action."[63] The authors contend that this theory, unlike any other, "explains all of the cases."[64] Even if this assertion is true, it is not enough to justify the Supreme Court's great expansion of the self-incrimination privilege.

Allen and Mace use their descriptive theory to replace what they see as a lack of any theoretical justification for the privilege.[65] They find this situation to be the "mirror" of the Fourth Amendment in lacking a general theory of justification, but with both Amendments yielding "relatively predictable results."[66] While there may be no overall theory that ties together all of the Supreme Court's Fourth Amendment precedents, this does not mean that the Fourth Amendment is itself unjustified. Unlike the self-incrimination privilege, privacy justifies the Fourth Amendment. "The knock at the door whether by law but solely on the authority of police did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the constitutional documents of English-speaking peoples."[67] Privacy, the idea that certain parts of one's life should be free from government intrusion, is worth protecting. The Fourth Amendment's limitations on government searches and seizures undoubtedly protect individual privacy.[68] Its

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[58] *See* Stunz, *supra* note 4, at 1293.
[59] Murphy, *supra* note 23, at 55.
[60] *Id*. at 4.
[61] Amar & Lettow's scheme permits police interrogation. Amar & Lettow, *supra* note 30, at 908-09.
[62] Allen & Mace, *supra* note 23, at 246.
[63] *Id*. at 246.
[64] *Id*.
[65] *Id*. at 245−46.
[66] *Id*. at 246.
[67] Wolf v. Colorado, 338 U. S. 25, 28 (1949).
[68] *See* Payton v. New York, 445 U.S. 573, 589 (1980); Johnson v. United States, 333 U. S. 10, 14 (1948).

guarantees "are not mere second class rights but belong in the catalog of indispensable freedoms."[69] If we were to write a new constitution, there are good reasons to include a prohibition "against unreasonable searches and seizures."[70] No adequate reason has been given to include a self-incrimination privilege. If it were not present in a new constitution, the Fifth Amendment privilege would not be missed.[71]

While the Self-Incrimination Clause might not be missed, it will not and should not be repealed. The privilege is part of the Bill of Rights and is ingrained in our culture. Amending the Constitution should not be undertaken lightly, and the Bill of Rights should not be changed absent the most compelling justification. The privilege's lack of adequate justification, however, should govern its interpretation. Until an adequate justification is found, the privilege should be interpreted in a narrow, minimalist fashion. This approach has the advantage of keeping fidelity to the privilege while minimizing its costs. It is not a judicial repeal of the privilege[72] but rather an appreciation of the limits on what courts should do.

The phrase "judicial minimalism" was coined by Cass Sunstein to describe"a distinctive form of judicial decisionmaking."[73] It is a form of judicial humility in which a judiciary aware of its own limits "seeks to decide cases on narrow grounds. . . avoid[ing] clear rules and final resolutions."[74] Sunstein's minimalism seeks "to bracket debates between liberals and conservatives,"[75] and "leave fundamental issues undecided."[76] Substantively, this [minimalism or "the minimalist judge"] accepts several "core" constitutional ideas like the constitutional protection of a broad right to political dissent, clear rules of access to courts, and freedom from religious discrimination, torture, and "subordination based on race and sex."[77] This minimalism is neither a general theory of judicial restraint nor a form of originalism. Instead, it is a commitment to a set of animating ideals, most importantly "the principal of political equality."[78] These ideals are "preconditions to a well-functioning constitutional democracy."[79] Rather than constraining courts or providing a general justification for judicial review, this minimalism is intended to promote the deliberative process and democracy.[80] Sunstein's minimalism has been very influential, spawning

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[69] Brinegar v. United States, 338 U. S. 160, 180−81 (1949) (Jackson, J., dissenting).
[70] U. S. CONST. amend. IV.
[71] *See* Palko v. Connecticut, 302 U. S. 319, 325−26 (1937), *overruled by* Benton v. Maryland, 395 U. S. 784, 794 (1969).
[72] *See* Susan Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1359−60 (2003).
[73] CASS R. SUNSTEIN, ONE CASE AT A TIME ix (1999).
[74] *Id*.
[75] *Id*. at x.
[76] *Id*.
[77] *Id*. at x−xi.
[78] *Id*. at xi.
[79] *Id*.
[80] *See id*. at xiv.

a growing body of writings[81] and the endorsement of two prominent federal judges.[82]

While a fascinating theory, Sunstein's is not the best approach to a minimalist privilege. A more restrictive form of minimalism should be used for the Fifth Amendment. While the constitutional text must be honored, the Self-Incrimination Clause should not go much further than the text requires, if it goes further at all. A restrictive minimalism prevents the state from compelling incriminating statements through the threat of contempt at trial or similar proceedings, but little more. Interpretation of the text should be made in the context of this minimalist approach. A restrictive, textual approach is the best way to honor the Constitution while minimizing the privilege's harm to society.

The Supreme Court does not take a restrictive, textual approach to the privilege, but two recent decisions are consistent with this type of minimalism. In *Chavez v. Martinez*[83] the high court addressed whether a federal civil rights action could be maintained for an alleged Fifth Amendment violation resulting from police interrogation that was never used to incriminate the suspect.[84] Martinez was interrogated by Chavez, a patrol supervisor, while being treated for gunshot wounds he received in an altercation with police that left him blind and paralyzed below the waist.[85] While Martinez was in considerable pain during the questioning, this resulted from his injuries rather than the questioning He was never charged with any crime and was never incriminated with his answers.[86]

The high court rejected his Fifth Amendment claim. The plurality opinion held that the lack of any incriminating consequences from the interrogation made the Fifth Amendment claim untenable.[87] The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[88] Since Martinez was never prosecuted or compelled to be a witness against himself, the plurality held that the Fifth Amendment claim contradicted the constitutional text.[89] Martinez asserted that the Fifth Amendment's "criminal case" extended to "the entire criminal investigation process, including police interrogations."[90] The plurality rejected this argument, holding that under the Fifth Amendment, a criminal case at

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[81] *See, e.g.*, Christopher J. Peters, *Assessing the New Minimalism*, 100 COLUM. L. REV. 1454, 1455 n.9 (2000).
[82] *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1825 (1998).
[83] 538 U. S. 760 (2003).
[84] *Id*. at 764−65 (plurality opinion). The plaintiff also alleged a violation of his Fourteenth Amendment substantive due process right to be free from coercive questioning. *See id*. at 765.
[85] *See id*. at 763−64.
[86] *See id*. at 764.
[87] *See id*. at 766.
[88] U. S. Const. amend. V.
[89] *Martinez*, 538 U.S. at 766.
[90] *Id*.

least required the initiation of proceedings against the accused.[91] While statements made during police interrogation before the initiation of proceedings may be suppressed, "it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs."[92] Since his answers to the interrogation were never used against him in a criminal case, Martinez was not compelled to be a witness against himself, and therefore the Fifth Amendment was not violated.[93]

Tying the privilege to the criminal trial is an appropriately minimalist interpretation of the Fifth Amendment. The plurality derived its holding from the constitutional text, which spoke clearly to the context of Martinez's claim.[94] The Fifth Amendment protects against compelled self-incrimination and nothing more. It is therefore a "trial right."[95]

The plurality sought to reconcile this approach with the Court's self-incrimination precedent; characterizing the Fifth Amendment privilege as a trial privilege is consistent with precedent allowing the government to compel testimony in a criminal case so long as the witness is not the target of the proceeding.[96] In addition, even potentially incriminating evidence can be compelled so long as immunity is appropriately granted.[97] While the government cannot penalize a criminal defendant for invoking the privilege at trial,[98] it can sanction public employees and government contractors who invoke the privilege.[99]

The greatest obstacle to the plurality's reasoning came from decisions allowing the privilege to be asserted outside of a criminal trial.[100] It characterized these decisions as prophylactic rules designed to protect the core of the Self-Incrimination Clause.[101] While these rules protected the privilege, they did not expand the scope of the Fifth Amendment right.[102]

This opinion shows commendable restraint. The principle that the privilege can only be used at trial could be a vehicle to attack *Miranda* or the other pretrial invocation cases. Rather than attacking these cases directly, the plurality opinion chose

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[91] *Id*.
[92] *Id*. at 767.
[93] *Id*.
[94] *See id*. at 766.
[95] United States v. Verdugo-Urquidez 494 U. S. 259, 264 (1990); *Martinez*, 538 U.S. at 767.
[96] *Martinez*, 538 U.S. at 768 (citing Minnesota v. Murphy, 476 U. S. 420, 427 (1984)); Kastigar v. United States, 406 U. S. 441, 443 (1992).
[97] *See Martinez*, *supra* note 92, at 768; Brown v. Walker, 191 U. S. 591, 602−604 (1896); *Kastigar*, 406 U.S. at 458.
[98] *See Griffin*, *supra* note 2, 52, at 614.
[99] *See Chavez*, *supra* note 92, at 768.
[100] *See, e.g.*, Maness v. Meyers, 419 U. S. 449, 464 (1974) (upholding the privilege in the context of a civil trial) ; Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).
[101] *Martinez*, 538 U.S. at 770-71.
[102] *See id*. at 773.

the narrower path of distinguishing them.[103] While the Court's decision to label *Miranda* a prophylactic rule has helped to fuel the intense controversy surrounding that decision,[104] it was not necessary to address that issue in order to decide the case. By sticking to a narrow but natural reading of the text, the plurality opinion in *Chavez* shows the proper approach to the privilege.

Justice Souter's concurrence came close to the plurality on the Fifth Amendment issue, except for concluding that a greater "degree of discretionary judgment" than found in the plurality was needed to decide the case.[105] While the self-incrimination claim was "well outside the core of Fifth Amendment protection," this "alone is not a sufficient reason to reject Martinez's claim."[106] Citing Justice Harlan's dissent in *Miranda*, the concurrence asserted that the Clause could be extended beyond its "bare guarantee . . . if clearly shown to be desirable means to protect the basic right against the invasive pressures of contemporary society."[107] This justified the Court-created rules that go beyond the core of the Fifth Amendment.[108] In essence, these are prophylactic rules, in which the Court goes beyond the Fifth Amendment where the "core guarantee" of the privilege, or the Court's ability to protect it, is "at some risk in the absence of such complementary protection."[109]

The concurrence held that Martinez's claim was not an appropriate vehicle for recognizing a new prophylactic rule. The cost of turning every interrogation that produced an inadmissible statement into a potential civil rights action was unacceptably high.[110] It would be a revolutionary practice that would add little to the enforcement of the privilege.[111] This combination of the high cost and minimal benefit counseled against extending the Fifth Amendment in this case.[112]

The difference between the plurality and Justice Souter's concurrence is like the difference between jumping into the water and wading in: although the concurrence didn't go as far as the plurality, it still got wet. While striving to find a sound constitutional footing for using the privilege outside the courtroom, the concurrence

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[103] A direct attack was largely out of the question in light of recent precedent. *See* Dickerson v. United States, 530 U. S. 428, 443−44 (2000) (declining to overrule *Miranda*).

[104] *Dickerson* did not change *Miranda*'s prophylactic status. *See* United States v. Patane, 542 U.S. 630, 124 S. Ct. 2620, 2627−28, 159 L. Ed. 2d 667, 676−77 (2004). However, neither did *Dickerson* address *Miranda*'s conundrum: how does a rule that is broader than the Fifth Amendment, see *Withrow v. Williams*, 507 U. S. 680, 690−91 (1993), apply to the states? See Klein, *supra* note 11, at 1338-39. The propriety of using prophylactic measures to like *Miranda* to extend the judiciary's reach to activities that do not violate established constitutional norms is vigorously disputed. *See, e.g.*, JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW 173−98 (1993); Joseph Grano, *Prophylactic Rules in Criminal Procedure. A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100 (1985).

[105] Chavez v. Martinez, 538 U. S. 760, 777 (2003) (Souter, J., concurring).

[106] *Id*.

[107] *Id*.

[108] *See id*. at 778

[109] *Id*.

[110] *See id*. at 778−79.

[111] *See id*. at 779.

[112] *See id*.

was unwilling to extend the privilege outside the trial in this case. The only substantive difference it has with the plurality is its willingness to keep civil remedies in reserve if the privilege's exclusionary rule fails to protect Fifth Amendment rules.[113] Since this will not be a problem in the overwhelming majority of the cases, there is little practical difference between the two opinions.

Chavez is a "new approach" to the privilege "with real implications for the future."[114] Professor Klein correctly notes that after *Chavez*, many of *Murphy*'s justifications for the privilege are left in tatters.[115] Holding that the privilege is not violated without the use of incriminating evidence at a criminal proceeding cannot be squared with justifying the privilege through privacy, human dignity, or preventing the cruel trilemma.[116] The remaining potential justifications for the privilege—reliability and respect for the accusatorial system—fare no better.[117] Reliability is too weak a reed to bear the weight of the privilege,[118] and the preference for an adversarial system is a circular argument.[119] Hopefully, the *Chavez* decision is a harbinger of a newly minimalistic approach to the Fifth Amendment privilege.

Justice Kennedy, penning the main dissent to the Fifth Amendment potion of *Chavez*,[120] understood the decision's implications for the justifications for the privilege. The opinion recognizes "academic support" for the result from authorities demonstrating the lack of justification for the privilege.[121] This, however, was "not convincing" to Justice Kennedy.[122] While the Star Chamber may not make a return, the risk of torture "is not so easily banished."[123]

The threat of torture cannot justify either the dissent or the privilege. Even if the "theory that when past abuses are forbidden the resulting right has present meaning"[124] is a legitimate method of interpreting the Constitution, it dodges the questions of what the Constitution should mean and why it has that meaning. While Justice Kennedy's dissent answers the "what" question with a civil rights action for

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[113] *See id*. at 779. The concurrence may have had in mind the practice of custodial interrogation intentionally contrary to *Miranda*. *See* Missouri v. Seibert, 542 U. S. 600 (2004) (Souter, J., plurality opinion). Where police officers deliberately disregard *Miranda*, civil remedies may be the only possible deterrent. *Cf.* People v. Peevy, 17 Cal. 4th 1184, 1188 (1998) (admitting statement to impeach witness's credibility where the interrogating police officer deliberately failed to honor the witness's request for counsel with the objective of securing impeachment evidence).

[114] Carolyn J. Frantz, *Chavez v. Martinez's Constitutional Division of Labor,* 2003 Sup. Ct. Rev. 269, 280.

[115] *See id*. at 290.

[116] *See id*.

[117] *See id*.

[118] *See supra* notes 50–66 and accompanying text.

[119] *See id*. at 291; Dolinko, *supra* note 17, at 1076.

[120] A majority of the Court also ruled to remand the case to the Ninth Circuit for further consideration of Martinez's substantive due process claim. *See* Chavez v. Martinez, 538 U. S. 760, 779-80 (2003).

[121] *See id*. at 795 (Kennedy, J., concurring and dissenting).

[122] *See id*.

[123] *Id*.

[124] *Id*. at 795.

pretrial violations of the Fifth Amendment, it does not effectively answer the question of why we should recognize this right. While we will never be completely rid of the risk of torture or physical coercion by the government, this rationale explains too sparsely and assumes too much.

The Fifth Amendment privilege regulates far more than torture in its current form.[125] If prohibiting torture is the sole justification for the privilege, then most Fifth Amendment decisions from the Court cannot stand. Since torture took place even after the common law development of the privilege, the historical basis for this justification for the privilege is shaky.[126] It is no surprise, then, that the right to be free from torture and other coercive forms of interrogation resides in substantive due process rather than the Fifth Amendment.[127] Indeed, the two cases cited by Justice Kennedy for the torture prevention rationale for the privilege are due process cases.[128] Since the government can torture without the intent of obtaining incriminating evidence, it makes sense to house the prohibition against torture in a constitutional provision that is not inextricably bound to self-incrimination.

Substantial swaths Fifth Amendment precedents are at odds with a minimal privilege limited to actual incrimination at trial or through compulsory process. For example, *Griffin*'s expansive definition of compulsion is clearly inconsistent with a minimalist privilege. Historically, there was no right to silence, only a right to be free from being compelled to speak.[129] At common law and under American procedure at the founding, a defendant's silence at trial was tantamount to a guilty plea since most defendants were not represented by counsel.[130] While English and American courts would have drawn an adverse inference from the silence, this would have been the least of the defendant's worries.[131] Inferring guilt from silence at trial is a logical deduction that juries make even after *Griffin*,[132] making *Griffin* a prime candidate for reconsideration under a minimalist privilege.

Other cases are equally contrary to a minimalist application of the Fifth Amendment privilege. The Supreme Court's "extravagant and unworkable" rule holding that the threat of removal from government employment was Fifth Amendment compulsion[133] is far beyond the text and history of the privilege.[134]

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[125] *See supra* notes 2, 52–57 and accompanying text.
[126] *See* Dolinko, *supra* note 17, at 1078–79.
[127] *See id*. at 1079.
[128] *See* Chavez v. Martinez, 538 U. S. 760, 795 (2003) (Kennedy, J., dissenting) (citing *Screws v. United States*, 325 U. S. 91 (1945)); Brown v. Mississippi, 297 U. S. 278 (1936).
[129] *See* Alschuler, *supra* note 15, at 2653.
[130] *See id*. at 2653–55.
[131] *See id*. at 2653.
[132] *See* Greenwalt, *supra* note 52, at 40 ("[I]nferences from [a defendant's] silence . . . [are] natural consequences of his choice to remain silent."); Friendly, *supra* note 12, at 699 ("[T]he jury very likely draws an inference against [a defendant who] fails to testify").
[133] *See* Amar & Lettow, *supra* note 30, at 868.

Compulsion should be limited to the threat of contempt or other criminal sanction. This ties the privilege more closely to its text and history, making its interpretation much more manageable, and limiting its burden on society.

A restrictive definition of compulsion is also inconsistent with *Miranda*. Whatever level of compulsion is inherent to the police station, it is not the same as the certainty of contempt and criminal sanction. Indeed, if the interrogation room is so inherently compulsive, then why may unrepresented suspects give valid *Miranda* waivers during custodial interrogation?[135] While there is no direct historical analog to the police interrogation that sparked *Miranda*,[136] it is enough to note that *Miranda* stretches the definition of compulsion far beyond the text or history of the privilege. Given *Miranda*'s broad definition of compulsion and that *Miranda* suppresses voluntary confessions,[137] *Miranda* is inconsistent with a minimalist privilege.

This does not mean that *Miranda* should or will be overruled. *Miranda* is not the only means of regulating police interrogation with constitutional law. The due process voluntariness test applies in addition to *Miranda*.[138] A chief advantage that *Miranda* is supposed to have over the due process test is that *Miranda*'s standard is more focused and easier to follow. [139] While *Miranda* has no justification under the Fifth Amendment, it may have a role to play in administering the due process standard.

The *Miranda* decision was based on the allegedly inherently compelling pressures of the police station.[140] Although the realities of the police station do not equal Fifth Amendment compulsion, a confession obtained at a stationhouse is less likely to be voluntary than one obtained under other circumstances. Another aspect of custodial interrogation that motivated the *Miranda* Court was the difficulty in penetrating the privacy surrounding the interrogation room.[141] The combination of

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[134] The "no worse off" rule of these cases, see, e.g., *Lefkowitz v. Turley*, 414 U. S. 70 (1973); *Gardner v. Broderick*, 392 U. S. 273 (1968), simply extend *Griffin* outside the criminal trial. *See* Amar & Lettow, *supra* note 4, at 868. If *Griffin* is untenable, then so is any extension of it.

[135] *See* Donald A. Dripps, *Supreme Court Review: Forward: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. Crim. L. & Criminology 699, 722 (1988).

[136] *See* Alschuler, *supra* note 15, at 2669.

[137] *See* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 391 (1996) (estimating that *Miranda* leads to " 'lost cases' against roughly 28,000 serious violent offenders and 79,000 property offenders and produces plea bargains to reduced charges in almost the same number of cases"). *But see* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 502 (1996) (disputing Cassell's methodology and results). No matter what the exact number of suppressed voluntary confessions is, *Miranda* does help the guilty by suppressing valid confessions. *See supra* note 70 and accompanying text. Under a minimalist self-incrimination privilege, this and *Miranda*'s elastic concept of compulsion are enough to condemn the decision.

[138] *See, e.g.*, Oregon v. Elstad, 470 U. S. 298, 307-08 (1985); Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 877 (1981) (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980)).

[139] *See* Schulhofer, *supra* note 148, at 879–80.

[140] *See* Miranda v. Arizona, 384 U.S. 436, 457–58.

[141] *See id*. at 448.

the difficulty in applying the voluntariness standard[142] with the difficulties in regulating the interrogation room could justify a due process *Miranda*. However, *Miranda* has been controversial since its inception.[143] There are compelling arguments that its cost in lost voluntary confessions is not worth any gains from its purported simplicity or its protection against compelled confession.[144] It is likely that *Miranda* is not worth saving. If it is to be saved, however, the decision would be on a sounder theoretical footing under due process than under the Fifth Amendment.

The debate over *Miranda*'s validity is only hypothetical at this point. *Dickerson*'s rationale for upholding *Miranda* is unsatisfactory,[145] and it demonstrates that the Court is unwilling to reconsider *Miranda* no matter how costly or poorly reasoned that decision may be. If *Miranda* is not to be reconsidered by the current Supreme Court, then many other Fifth Amendment decisions are also likely to survive under *stare decisis*. Even if the high court does not reconsider its self-incrimination jurisprudence, minimalism can check unwarranted expansion of the privilege, as *Chavez* demonstrates. Although not explicitly minimalist, the Fifth Amendment portion of *Hiibel v. Sixth Judicial District Court*[146] shows restraint that is consistent with this approach.

Hiibel addressed Fourth and Fifth Amendment challenges to a Nevada law which made it a crime for a suspect stopped under reasonable suspicion to refuse a police request to identify himself. [147] The majority dismissed Hiibel's self-incrimination claim because his refusal was not based on any "articulated real and appreciable fear" of incrimination.[148] Absent a showing that the name itself was somehow incriminating or would be used in a chain of evidence against him, he had no valid self-incrimination interest protecting his right to remain silent.[149]

Like *Chavez*, this is a narrow interpretation of the privilege. The dissent correctly notes that identity can be very useful in a criminal investigation.[150] Although it can serve purposes unrelated to obtaining incriminating evidence, like officer safety,[151] identity is mostly useful in discovering whether the suspect is wanted for a crime or may have committed a crime. The majority's decision to require a higher risk of incrimination is inconsistent with the view that the Fifth Amendment privilege

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[142] *See* Schulhofer, *supra* note 138, at 869-72 (listing six difficulties with the "voluntariness" test); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 69-75 (1980) (discussing and criticizing the voluntariness test).
[143] *See* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.5(d) (2004) (cataloguing the vigorous debate over *Miranda*).
[144] *See generally* Cassell, *supra* note 138; Gerald M. Caplan, *Questioning* Miranda, 38 Vand. L. Rev. 1417 (1985).
[145] *See supra* note 105 and accompanying text.
[146] 542 U.S. 177, 124 S. Ct. 2451 (2004).
[147] *Id*. at 2455−56.
[148] *Id*. at 2461.
[149] *Id*.
[150] *See id*. at 2464 (Stevens, J., dissenting).
[151] *See id*. at 2458 (majority opinion).

protects a "broad constitutional right to remain silent."[152] A general right to silence is inconsistent with the history of the privilege.[153] Since the privilege is absolute once extended[154] and lacks justification, it should only apply where the threat of incrimination is high. The rejection of a broad right to silence in *Hiibel* again shows the proper use of minimalism in a Fifth Amendment context.

The Supreme Court changes doctrine more often through evolution than through revolution. The high court moved from its initial refusal to apply the Fourth Amendment exclusionary rule to the states[155] to applying it to them[156] in a series of decisions over the intervening 12 years.[157] Federal habeas corpus is another example, as the high court retreated from the very expansive application of the Great Writ in *Fay v. Noia*[158] and other decisions in the 1960's[159] to a much more restricted interpretation of federal habeas over a 30-year period.[160] While *Dickerson* shows that a Fifth Amendment revolution is unlikely, *Chavez* and *Hiibel* show the prospect for an evolution of the privilege to a much narrower interpretation. While some may view this as an improper judicial repeal of the Fifth Amendment privilege,[161] this development merely gives force to the long-recognized fact that the privilege is the Constitution's emperor with no clothes.

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[152] *Id*. at 2642 (Stevens, J., dissenting).
[153] *See* Alschuler, *supra* note 11, at 2653.
[154] *See* New Jersey v. Portash, 440 U. S. 450, 459 (1979) (rejecting balancing approach to the privilege).
[155] *See* Wolf v. Colorado, 338 U. S. 25 (1949).
[156] *See* Mapp v. Ohio, 367 U. S. 643 (1961).
[157] *See id*. at 657 ("our holding . . . is not only the logical dictate of prior cases"); 1 WAYNE R. LAFAVE ET AL., SEARCH AND SEIZURE § 1.1(d) &-(e) (4th ed. 2004) (describing development of Fourth Amendment law from *Wolf* to *Mapp*).
[158] 372 U. S. 391, 438-39 (1963) (holding that a procedural default in state court does not bar habeas review unless the petitioner has deliberately bypassed state procedures).
[159] *See, e.g.*, Kaufman v. United States, 394 U. S. 217, 224 (1969) ("[T]he power of inquiry on federal habeas corpus is plenary."); Townsend v. Sain, 372 U. S. 293, 313 (1963) (delineating six circumstances under which a federal court must grant an evidentiary hearing to a habeas applicant).
[160] *See, e.g.*, Coleman v. Thompson, 501 U. S. 722, 750 (1991) (effectively overruling *Fay v. Noia*); Teague v. Lane, 489 U. S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."); Wainwright v. Sykes, 433 U. S. 72, 87 (1977) barring habeas review of a waived objection to the admission of a confession at trial absent a showing of "cause" and "prejudice"); Stone v. Powell, 428 U. S. 465, 494 (1976) ("In sum, we conclude that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, [habeas relief is unavailable] on the ground that evidence obtained in an unconstitutional search or seizure was introduced at [the] trial.").
[161] *See* Klein, *supra* note 72, at 1359–60.