MASK FOR THE GUILTY AND SHIELD FOR THE INNOCENT: THE PRIVILEGE AGAINST SELF-INCRIMINATION IN FEDERAL AND CALIFORNIA ANTITRUST CASES

By Dylan I. Ballard[*]

I. Introduction

The constitutional right not to be a witness against oneself has become known as the "privilege against self-incrimination," but that is a significant overstatement. In the minds of jurors, invoking the Fifth Amendment is incriminating by its very essence.[1] Thus, while resort to the privilege can have benefits, they seldom include total avoidance of self-incrimination. This article discusses how, under current Fifth Amendment jurisprudence, the inherent incrimination that tends to accompany use of the privilege can be enhanced in sometimes surprising ways—ways that can differ markedly between criminal and civil cases, as well as between federal and state laws.

Antitrust law sits at both of these crossroads, addressing conduct that implicates laws both criminal and civil, state and federal. Antitrust practitioners may be confronted with the sometimes dramatically different repercussions of invoking the Fifth Amendment in these overlapping contexts. As explained below, while the U.S. Constitution demands that *criminal* juries be ordered not to infer guilt from invocation of the privilege, under federal law *civil* juries often are expressly *invited* to do so. This federal approach evinces a specific theory regarding the probative value of "taking the Fifth," prevalent among lawyers and lay people alike: while there occasionally can be legitimate reasons for an innocent person to refuse to testify, almost everyone who invokes the privilege does so because they are guilty. California law rejects this theory—or at least takes the view that juries cannot be entrusted with sifting the innocent invokers from the guilty—by prohibiting *all* juries, criminal and civil alike, from inferring guilt from silence.

This article also explores a significant concern in the antitrust context regarding the geographical limits on the constitutional privilege itself, as the U.S. Supreme Court has held that the privilege offers no protection at all from foreign prosecution. Accordingly, a purely domestic grant of immunity under federal and state laws likely is sufficient to compel a witness to testify, even if the witness' testimony is *certain* to result in criminal conviction in a foreign jurisdiction. There may have been a time when this was but a hypothetical concern for antitrust violators, but certainly no longer: criminal antitrust

---

[*] Dylan Ballard is an associate with Sheppard Mullin Richter & Hampton, LLP in the firm's San Francisco office. He specializes in complex business litigation and white collar criminal matters, with an emphasis on antitrust and unfair competition issues. The opinions expressed in this article do not necessarily reflect the views of Sheppard Mullin Richter & Hampton LLP or its clients.

1 C. Hendrick & D.R. Shaffer, *"Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality,"* 6 Bulletin of the Psychonomic Society, No. 5, 449 (1975); Donald B. Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78.841 (1980); *see also U.S. v. Waller,* 654 F.3d 430, 438 (3d. Cir. 2011) ("'the inference of guilt for failure to [make a statement] as to facts peculiarly within the accuseds knowledge [may be] natural and irresistible' to a jury") (quoting *Griffin v. California,* 380 U.S. 609, 614 (1965)).

dockets in the United States are now swollen with claims based on international and foreign conduct, and foreign antitrust enforcement has increased substantially in recent years. If the scope of the Fifth Amendment privilege does not expand with the globalization of antitrust law, it may cease to provide any sanctuary for a large and growing category of witnesses.

There are other aspects of Fifth Amendment jurisprudence that can be of particular concern in antitrust cases. Many antitrust defendants are corporations or other entities that enjoy no privilege against self-incrimination. Yet, in civil cases governed by federal law, they potentially can be tarred by an "imputed" adverse inference based on the invocations of their current or even former employees. This possibility can create an extra layer of cost-benefit analysis for a witness considering invoking the privilege: weighing not only the ramifications for the witness herself, but also for her current or former employer and, somewhat less directly, the employer's personnel.

II. The Privilege Against Self-Incrimination in Criminal Cases and the Fear of Foreign Prosecution

The Fifth Amendment privilege can be understood as a recognition of the probative limits of interrogation, whether it takes place in a police station or on a witness stand.[2] Even in the latter context, where safeguards are highest, common sense suggests that an incriminating performance can result for all sorts of reasons—nervousness, fear, anger, lack of sophistication, youth, mental illness, language or cultural issues, poor speaking ability—other than guilt.[3] It may be that juries generally are good at divining the true causes of witness behavior, but they are certainly not infallible, and it would not find be surprising for them to attach great significance to a defendant's performance as a witness.[4] It is therefore not unreasonable for an innocent person to fear self-incrimination. Even if this is uncommon in practice (a difficult phenomenon to measure), the Fifth Amendment reflects the judgment that the risk is intolerable where a defendant wishes not to take it, and the end result of compulsion could be a criminal conviction and deprivation of physical liberty. In this way, the privilege against self-incrimination stands an ironic pillar of a fact-finding system otherwise based fundamentally on testimonial evidence

---

2 *See, e.g.,* Akhil Reed Amar & Renee Lettow Lerner, *Fifth Amendment First Principles: The Self-Incrimination Clause* (1995), 93 Mich. L. Rev. Vol. 857, 900 (1995) (arguing that the privilege against self-incrimination reflects the judgment that "[c]ompelled testimony may be partly or wholly misleading and unreliable"); *In re Gault,* 387 U.S. 1, 47 (1967) ("The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth.").

3 *See Baxter v. Palmigiano*, 425 U.S. 308, 327 (1976) (the self-incrimination privilege helps to protect the innocent person "who otherwise might be ensnared by ambiguous circumstances.").

4 For example, there is evidence that juries tend to place too much weight on certain types of impeachment evidence—such as prior convictions—making testifying an even riskier proposition for defendants prone to such impeachment, even if they are innocent. *See* John H. Blume, *The Dilemma of the Criminal Defendant With A Prior Record – Lessons From the Wrongfully Convicted,* 5 Journal of Empirical Studies, 477-505, 2008.

produced through examination—we believe such evidence is of essential value, except when the stakes are highest.[5]

The corollary to the privilege is that criminal juries are not to draw an "adverse inference" from a defendant's invocation of the privilege. This follows naturally from the judgment underlying the privilege—that there can be legitimate reasons, other than guilt, for a defendant to wish not to testify.[6] It is doubtful whether the average juror holds this view, however, and therefore there are real questions about whether instructions prohibiting an adverse inference have much practical effect, or are typically a mere "placebo."[7]

Unlike other constitutional protections, the privilege against self-incrimination can be mooted by the government through a grant of immunity,[8] based on the notion that if there is no risk of criminal liability, there can be no reasonable fear of self-incrimination.[9] Because liability for the same conduct can arise independently under state and federal laws, however, an issue arises when only one sovereign grants immunity.

The Cartwright Act, for example, provides that the California Attorney General may compel a witness to testify or otherwise provide evidence in response to a subpoena, notwithstanding the witness' invocation of the Fifth Amendment privilege, by first obtaining a court order granting the witness immunity from prosecution under *California l*aw.[10] Because state courts have no inherent power to grant immunity from *federal* prosecution, however, there was a time in the first half of the twentieth century—when it remained unsettled whether the Fifth Amendment privilege applied to the states—when such statutes placed a witness in an impossible position: either refuse to comply with the state subpoena and be charged with contempt, or respond to the subpoena and risk federal prosecution.[11]

In *Murphy v. Waterfront Comm'n,*[12] the Supreme Court finally eliminated this Catch-22 by creating a constitutional exclusionary rule prohibiting the federal government from making prosecutorial use of testimony or other evidence obtained by a state government,

---

5 Other evidentiary privileges, like the attorney-client privilege, are rooted in the protection of certain confidential relationships, not a recognition of the ultimate unreliability of adversarial examination itself.

6 *See Baxter, 425 U.S. at 327.*

7 *See Raffel v. United States,* 271 U.S. 494, 499 (1926) ("Every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence"); *see also* Wigmore, Evidence § 2272, p. 426 (McNaughton rev. 1961) ("What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of a crime.").

8 *Kastigar v. United States*, 406 U. S. 441, 448 (1972).

9 *United States v. Murdock*, 284 U.S. 141, 149 (1931) (stating that immunity "is equivalent to the protection furnished by the rule against compulsory self-incrimination.").

10 Cal. Bus. & Prof. Code §§ 16758, 16759.

11 *See Feldman v. United States*, 322 U.S. 487 (1944) (holding that testimony compelled by a state under a grant of state immunity could be introduced into evidence in a federal prosecution).

12 378 U.S. 52 (1964).

over a proper Fifth Amendment invocation, through a grant of state immunity.[13] In effect, a grant of state immunity constitutionally gives rise to a corresponding and imputed grant of federal immunity.[14] This rule applies in both directions (that is, it also applies to state prosecutions where there has been a grant of federal immunity),[15] and presumably applies horizontally (that is, between sister states), as well as vertically.

The result is that a single aggressive enforcer can, at least in theory, wield an expansive immunity power. By being the first to grant a witness immunity, one enforcer can obtain evidence for use in prosecuting others while barring all other sovereigns from prosecuting the witness based on the compelled evidence or its "fruits." It might be thought that this would engender mini-crises of federalism, with state and federal enforcers interfering with or negating the other's efforts. At least in real world antitrust practice, however, this seems to happen rarely, if ever. Almost all criminal antitrust enforcement in the United States is conducted or overseen by the U.S. Department of Justice's Antitrust Division,[16] which therefore makes the large majority of immunity decisions. While many state Attorneys General are actively involved in civil enforcement, there does not appear to be frequent state-federal conflict regarding immunity decisions made in such proceedings, perhaps because the states often coordinate their efforts with those of the federal enforcement agencies,[17] or because many state proceedings focus on local conduct or are commenced after a parallel federal investigation has already made significant progress. The upshot is that, while a witness can take comfort that a grant of immunity will protect against use of compelled information in both state and federal jurisdictions, she should not expect to be able to play sovereigns against each other, avoiding a prosecution by one enforcer by convincing another to grant her immunity.

Even though the state-federal Catch-22 has been eliminated, a major dilemma still confronts a certain, increasingly significant class of potential Fifth Amendment invokers—those who face criminal exposure in foreign jurisdictions. The Supreme Court in *United*

---

13 *Id.* at 79.

14 The extent of immunity available can differ slightly under federal and state law without violating the Fifth Amendment. The federal immunity statute, 18 U.S.C. § 6002, prohibits the federal government from using "testimony or other information compelled under [a grant of immunity]… (or any information directly or indirectly derived from such testimony or other information)… against the witness in any criminal case." This is known as "use and derivative use" immunity and is weaker than the full-blown "transactional" immunity available under the Cartwright Act, which protects the witness "from prosecution for offenses to which compelled testimony relates." *See Kastigar v. United States,* 406 U.S. 441, 443 (1972) (holding that "use and derivative use" immunity is all the Fifth Amendment requires).

15 *See Murphy,* 378 U.S. at 53, n.1 ("Since the privilege is now fully applicable to the State and to the Federal Government, the basic issue is the same whether the testimony is compelled by the Federal Government and used by a State, or compelled by a State and used by the Federal Government.").

16 *See* SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 1024 (7TH ED. 2012), VOL. II, P. 1024 (stating that in the antitrust realm, "[s]tates rarely pursue criminal prosecutions").

17 At least in the criminal context, state and federal cooperation in enforcement has been formalized. *See* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, PROTOCOL FOR INCREASED STATE PROSECUTION OF CRIMINAL OFFENSES (1996).

States v. Balsys[18] held that the privilege against self-incrimination does not encompass a reasonable fear of prosecution by a foreign sovereign, essentially because extending the privilege in this way would make it impossible for domestic governments to moot the privilege through a grant of immunity.[19] Unlike state governments, who are bound by the privilege (through the Fourteenth Amendment) no less than the federal government, foreign governments are neither bound by the U.S. Constitution nor domestic grants of immunity; therefore, a domestic sovereign can never independently guarantee a witness protection from foreign prosecution.[20] In effect, the Court has held that the geographical reach of the privilege is coextensive with the immunity power of domestic sovereigns.

But this begs the question. Why must domestic governments always have the power to nullify the Fifth Amendment privilege through immunity? Why is it constitutionally intolerable for there to be situations where a witness with a reasonable fear of foreign prosecution simply cannot be compelled to testify, domestic immunity or no? Clearly such a result could hinder domestic law enforcement, but it is hard to see why the Fifth Amendment privilege—an individual safeguard *against* government power—should have anything to do with preserving the government's enforcement abilities. If, as suggested above, the privilege is in large part a recognition of the ultimate unreliability of compelled testimony, it does not seem to matter whether the potential consequence of compelling such testimony is punishment by a domestic government or a foreign one.

In any event, the Supreme Court outlined another possible argument for sparing a witness (with the right facts) from this impossible situation:

> This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood. If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign."[21]

The Court held that such an argument could not be made in *Balsys*, which involved an alleged former Nazi, primarily because there was no showing that a "system of complementary substantive offenses" existed between the United States and foreign nations.[22]

---

18 524 U.S. 666 (1998).

19 *Id.* at 692–93.

20 *Id.*

21 *Balsys,* 524 U.S. at 698.

22 *Id.* at 699–700.

Balsys was decided in 1998. It can be argued that something very much like the "cooperation" envisioned by the Court now exists—or is at least arising—among international antitrust enforcers. International cartel cases now make up a substantial percentage of the Antitrust Division's open grand jury investigations,[23] and foreign enforcers are increasingly taking advantage of stronger and better developed criminal laws in their own jurisdictions to pursue international antitrust conduct. A number of foreign jurisdictions—including the European Union, China, Canada, Japan, Australia, Brazil, Ireland, Korea, New Zealand, Israel, the Netherlands, South Africa, Mexico, and Russia—have or are in the process of adopting laws that, like the Sherman Act, make cartel behavior and other similar antitrust violations a criminal offense.[24] Accordingly, the Antitrust Division now cooperates closely with a number of foreign enforcers when investigating international conduct, and has done so routinely for at least the last decade. Indeed, the United States has entered into formal bilateral agreements regarding antitrust cooperation with many of the above jurisdictions, which typically require the parties to share information relevant to each other's investigations and proceedings, coordinate parallel investigations of the same company, conduct, or transaction, and consult with each other to resolve conflicts arising from enforcement efforts.[25]

This increased international cooperation has two primary repercussions for a witness considering invocation of the Fifth Amendment in a federal or state antitrust investigation concerning international conduct. First, the probability of foreign antitrust criminal prosecution is greater than it was even ten years ago. Second, such a witness has an increasingly plausible argument that the state of affairs posited by the Supreme Court fifteen years ago—"substantively similar criminal codes" among domestic and foreign jurisdictions, the use of domestic immunity to aid foreign investigation efforts—is fast approaching in the antitrust context, if it has not already arrived. Therefore, the privilege against self-incrimination has much less meaning in many antitrust cases because it does not safeguard against compelled incrimination under foreign laws. The rule should be that where a witness can demonstrate a reasonable fear of foreign prosecution based on her testimony, she cannot be compelled to testify absent a grant of immunity from the relevant foreign jurisdictions. As the law presently stands, however, witnesses with a reasonable fear of foreign prosecution have no choice when granted domestic immunity—they must incriminate themselves.

---

23 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Presented at the ABA Section of Antitrust Law Annual Spring Meeting (Mar. 26, 2008) http://www.justice.gov/atr/public/speeches/232716.pdf (as of the end of 2007, over 50 of the Division's 135 ongoing investigations involved international cartel activity).

24 *See* Belinda A. Barnett, Sr. Counsel to the Deputy Ass't Att'y Gen., Antitrust Div., Criminalization of Cartel Conduct—The Changing Landscape, Presented at the Joint Federal Court of Australia/Law Council of Australia Workshop (Apr. 3, 2009), http://www.justice.gov/atr/public/speeches/247824.pdf.

25 *See, e.g.,* Memorandum of Understanding on Antitrust and Antimonopoly Cooperation, U.S.-P.R.C., (July 27, 2011), available at http://www.justice.gov/atr/public/international/docs/273310a.pdf; Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., (June 4, 1998), available at http://www.justice.gov/atr/public/international/docs/1781.pdf.

III. The Privilege Against Self-Incrimination In Civil Cases, Including the Differences Between Federal And California Law

The privilege against self-incrimination is equally available in civil cases to prevent compelled self-incrimination,[26] but invoking the privilege in a civil case can have very different repercussions. As explained, *criminal* juries, whether convened in a federal or state proceeding, *must* be instructed not to draw an adverse inference from invocation of the privilege. Under federal law, however, *civil* juries may be expressly *permitted* to draw such an adverse inference, if two prerequisites are met.[27] First, the proponent of the inference must demonstrate that the inference—*i.e.,* that the withheld testimony or evidence would have been "unfavorable"[28]—is supported by "independent evidence."[29] Second, the proponent must show that there is a "substantial need" for the evidence sought from the witness, and that there is no less burdensome way to obtain it.[30] In addition, where permitted, an adverse inference may be drawn only as broadly as the parameters of the question or questions that elicited the invocation of the Fifth Amendment.[31] Thus, assertion of the privilege in response to the question "Have you ever exchanged pricing information with a competitor?" arguably can justify only the inference that the witness has previously exchanged pricing information with a competitor. The ultimate decision of whether to make an adverse inference instruction is within the district court's discretion.[32]

If the Fifth Amendment reflects the judgment that compelled testimony can be unreliable, why does federal law allow courts to effectively penalize civil defendants for refusing to provide it? The prevailing answer is that we are more willing to tolerate unreliability in civil cases, as evidenced by the lower burden of proof.[33] Moreover, the federal requirement of "independent evidence" to support an adverse inference instruction arguably acts as something of a safeguard against unreliability—though it obviously is not a full substitute for the complete protection provided in criminal cases

---

26 *Kastigar v. United States,* 406 U.S. 441, 444 (1972); *McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924); *Chavez v. Martinez,* 538 U.S. 760, 770 (2003).

27 *Baxter v. Palmigiano,* 425 U.S. 308, 317 (1976) (the Fifth Amendment does not prohibit adverse inference in a civil case); *Nationwide Life Ins. Co. v. Richards,* 541 F.3d 903, 911-12 (9th Cir. 2008).

28 *See* ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, G-18 (2005 E\ed.).

29 *See, e.g., Baxter,* 425 U.S. at 317; *Doe v. Glanzer,* 232 F.3d 1258, 1264 (9th Cir. 2000); *Securities Exchange Comm'n v. Colello,* 139 F.3d 674, 678 (9th Cir. 1998) (stating that whether permitting adverse inference was reversible error "turns on whether [the proponent] presented additional evidence."); *Pedrina v. Chun,* 97 F.3d 1296, 1300-1301 (9th Cir. 1996) (stating that no inference could be drawn where inference was "undermined" by other evidence).

30 *See, e.g., Nationwide Life Ins.,* 541 F.3d at, 912.

31 *Glanzer,* 232 F.3d at 1266 & n. 2.

32 *Id.* at 1264.

33 *See* Amar & Lerner, *supra* note 2, at 924 ("We insist on proof beyond a reasonable doubt in criminal but not civil cases precisely because we are so much more concerned about erroneous criminal convictions. For the same reason, we are particularly concerned with unreliable evidence being introduced against a criminal defendant.").

(nor is it intended to be).[34] Simply put, federal law adjudges that a refusal to testify is not sufficiently probative of guilt to be considered under a beyond-a-reasonable-doubt standard, but can be sufficiently probative where the standard is by-a-preponderance-of-the-evidence, when corroborated by independent evidence.

The bright-line prohibition of adverse inferences in criminal cases is designed to reduce the likelihood that juries will draw an adverse inference in cases where the witness is actually innocent.[35] But in so doing it also protects the guilty—an overbreadth we tolerate in criminal cases because we think it preferable to free the guilty than imprison the innocent. By contrast, the express allowance of adverse inferences in civil cases reflects the opposite concern, that absent a permissive jury instruction juries will *fail* to draw an adverse inference where the witness is actually guilty. It is questionable whether this latter concern is sufficiently compelling to justify an instruction that makes it *virtually certain* that the jury will infer guilt from silence.

The popular wisdom is that all juries, when left to their own devices, naturally tend to draw an adverse inference. If this is true, there would seem to be little risk that, without permission from the court, juries will fail to draw such an inference *often enough*, particularly in those cases where the witness' guilt is supported by independent evidence (a precondition for the inference under federal law). It could be argued, then, that the federal instruction expressly permitting adverse inferences in civil cases has little if any meaningful effect on *guilty* invokers of the Fifth Amendment, while depriving *innocent* invokers of the privilege of whatever small chance they may have had of avoiding self-incrimination.

The federal rules governing adverse inferences can be especially pernicious for corporate parties. Corporations and other organizations, along with individuals asked to testify or produce records solely in their representative capacity, have no Fifth Amendment privilege.[36] But under federal law, an *employee's* personal invocation of the Fifth Amendment can in civil cases result in an adverse inference against a corporate party.[37] Indeed, even a *former* employee's invocation can be effectively imputed to her former employer in a civil case.[38]

---

34 There is a potential countervailing concern that the risk of an adverse instruction in a civil case will deter or "chill" proper invocations of the privilege. This concern is not directly accounted for by the federal rule, presumably because a witness' fear of criminal exposure is assumed to greatly exceed any fear of civil liability.

35 *See supra* note 33.

36 *Bellis v. United States,* 417 U.S. 85, 89-90 (1974) ("The privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.") (quoting *United States v White,* 322 U.S. 694, 701 (1944)); *accord Amato v. U.S.,* 450 F.3d 46, 48 n. 2 (1st Cir. 2006). Individuals asked to testify or produce records solely in their representative capacity likewise have no Fifth Amendment privilege. *Id.*

37 *See LiButti v. United States,* 107 F.3d 110, 124 (2d Cir. 1997).

38 *See, e.g., Brinks v. City of New York,* 717 F.2d 700 (2d Cir. 1983); *RAD Services, Inc. v. Aetna Casualty and Surety Co.,* 808 F.2d 271, 275 (3d Cir. 1986).

As with other issues concerning adverse inferences, the trial court has significant discretion in determining whether to give an instruction expressly permitting the jury to draw an adverse inference against an organizational party based on a current or former employee's invocation of the privilege, and there is no exclusive list of factors that must be considered.[39] The Second Circuit has articulated a four-factor approach that has been widely cited by other courts, the thrust of which appears to be whether the employee or former employee is likely to have invoked the privilege in an attempt to avoid incriminating her current or former employer.[40] Specifically, the Second Circuit has advised trial courts to consider (1) the nature of the relationship between the witness and the party, (2) the degree of control exercised by the party over the witness, (3) whether the party and witness share a common interest in the outcome of the litigation, and (4) the role of the witness in the litigation.[41] The upshot of these factors is clear: if the circumstances indicate that a witness is sufficiently loyal to or aligned with a party that it could reasonably be inferred that the witness invoked the privilege to avoid revealing information detrimental to that party, the jury may regard the invocation as if it was made by the party itself.

This entire body of case law regarding "imputed" or "vicarious" adverse inferences seems an entirely unnecessary doctrinal diversion. The Fifth Amendment privilege is personal, and so should be any inference that flows from its invocation. A witness may not refuse to testify because she fears, however reasonably, that her testimony will incriminate her employer or any person other than herself. Nor is there any basis for assuming that an invocation of the Fifth Amendment is necessarily *motivated by* a fear of incriminating one's current or former employer. If a witness has a reasonable fear of incriminating *herself* (which she must have to properly invoke the privilege), that should be all the motivation she needs. Arguably, a witness' invocation of the Fifth Amendment reliably supports only the inference that the witness' testimony would have incriminated *the witness*. It does not necessarily support a further inference that the testimony would be unfavorable to her employer. That may or may not be true, but it is not a basis for invoking the privilege, has no logical bearing on the witness' decision to invoke the privilege, and should not be inferred on the basis of the invocation alone.

Of course, a witness' invocation of the privilege, and the potentially resulting inference that her answer would have incriminated her, can be relevant to a party-employer's liability. But whether this is true in a particular case is a question of admissibility to be decided by the court, *e.g.,* under Federal Rules of Evidence 401 and 403. An instruction asking the jury to decide whether a witness is "sufficiently associated with" a party[42] essentially abdicates this question of admissibility to the jury.

---

39 *See LiButti,* 107 F.3d at 123 (proposing several "non-exclusive factors" to be considered when making this determination).

40 *See, e.g., id*. at 124; *SEC v. Monterosso*, 746 F. Supp. 2d 1253, 1263-64 (S.D. Fla. 2010); *John Paul Mitchell Sys. v. Quality King Distribs., Inc*., 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000); *U.S. Ex Rel. Hockett v. Columbia/HCA Healthcare*, 498 F. Supp. 2d 25 (D.D.C. 2007).

41 *Id*. at 123-124.

42 ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases G-20 (2005 Ed.) .

If the Court decides that an adverse inference against *the witness* is relevant to the case and otherwise admissible, then the jury should be instructed that it is permitted to draw *that* inference. The inference, if drawn, then becomes but another piece of evidence in the case that may be construed and weighed by the jury as it sees fit. There is no reason to further instruct the jury that it may construe the inference as evidence against the party-employer, just as we would not instruct a jury that it "may" construe other pieces of seemingly unfavorable evidence against a particular party. Juries weigh and construe evidence as part of their essential function; absent a compelling reason, it is improper and possibly prejudicial to isolate certain pieces of evidence and instruct the jury on how it "may" construe them.

These problems do not arise under California law (nor that of most other states), which prescribes the same rule for both criminal and civil cases: *every* jury must be instructed not to draw an adverse inference from an invocation of the Fifth Amendment.[43] California law thus reflects the judgment that invocations of the privilege are never sufficiently probative of guilt to be admitted as evidence, even under the lower burden of proof applied in civil cases. Adverse inference instructions are always improper.

For this reason, California courts also observe a bright-line bar in both criminal and civil cases on the calling of witnesses at trial whose entire testimony is to consist of invocations of the Fifth Amendment. The California Supreme Court has reasoned that the only possible purpose of such testimony is to invite the jury to draw the very adverse inference that is forbidden under California law.[44] By contrast, because federal courts have discretion to allow adverse inferences in civil cases, they are typically more willing to require witnesses, even where it is known they will provide no substantive testimony, to take the stand and invoke the privilege in the presence of the jury.[45] To be sure, federal law requires any party seeking an adverse inference to ask the witness all relevant questions, because the scope of the inference is coterminous with the scope of the questions asked.[46] But this principle does not necessitate live testimony, as the party seeking the inference can just as easily establish the scope of the inference through a written deposition[47] or by stipulation. Indeed, it could be argued that such methods are preferable to live testimony because they give the Court absolute control over what questions and invocations are actually presented to the jury, thereby ensuring that improper or irrelevant questions will not result in unnecessary prejudice.

Accordingly, the primary (and perhaps sole) basis for requiring a witness to invoke the Fifth Amendment through live testimony is that such testimony can, in some cases,

---

43 *See* Cal. Evid. Code §913(a); *People v. Holloway,* 33 Cal.4th 96, 131-132 (2004); *Oiye v. Fox,* 211 Cal. App. 4th 1036, 1054 n. 6 (2012).

44 *See People v. Holloway,* 33 Cal. 4th 96, 131-132 (2004); *People v. Frierson,* 53 Cal. 3d 730, 743 (1991); *People v. Johnson,* 39 Cal. App. 3d 749, 760 (1974).

45 *See, e.g., Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.,* 45 F.3d 969, 978 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.,* 819 F.2d 1471, 1482 (8th Cir. 1987); *Rosebud Sioux Tribe v. A&P Steel, Inc.,* 733 F.2d 509, 521-522 (8th Cir. 1984); *U.S. v. McAllister,* 693 F.3d 572 (6th Cir. 2012).

46 *Glanzer,* 232 F.3d at 1266 & n.2.

47 *See* Fed. R. Civ. Proc. 31.

have greater probative value than a written deposition or stipulation. Even where a jury is given an adverse inference instruction, it is always up to the jury to determine whether the inference should in fact be drawn. The specific question the jury must answer in this regard is whether the witness likely invoked the privilege because she is guilty, or for some other reason (*e.g.*, the fear that one is simply an unpersuasive witness) that is not probative of guilt. Arguably, then, observing the witness invoke the privilege in person could assist the jury by shedding some light (in the form of gestures, tone of voice, *etc.*) on the witness's motivations. As discussed, the witness' performance on the stand could just as easily mislead the jury into concluding that the witness is guilty when she is, for example, merely nervous. The same concerns that can reasonably motivate an innocent person to refuse to testify in her own defense can reasonably motivate a reluctance to invoke the privilege in the presence of the jury. This decision thus implicates the same balancing of probative value and prejudicial effect on which so many other evidentiary issues often turn.[48] This is a scary prospect for Fifth Amendment invokers in federal civil cases, because few judicial inquiries are less predictable than a district court's idiosyncratic application of Federal Rule of Evidence 403.

These sharp splits between federal and California adverse inference rules can make choice of law issues crucial. Federal courts generally apply state privilege rules to state law claims and federal privilege rules to federal law claims.[49] In cases with a mixture of federal and state claims, however, it would obviously be unworkable to instruct the jury, for example, that it is permitted to draw an adverse inference with respect to one claim, but is prohibited from doing so with respect to another (perhaps substantively identical) claim. To solve this problem the federal courts have adopted a bright-line rule, at least in the majority of cases where state claims are combined with federal claims based on supplemental jurisdiction,[50] that federal privilege rules are applied to all claims, on the theory that it is the federal claims that provide the anchor for establishing federal jurisdiction.[51]

---

48 *See Federal Deposit Ins. Corp., 45 F.3d at 978.*

49 FED.R.EVID. 501.

50 *See* FED.R.EVID. 501. The answer is less clear in cases involving a mixture of federal claims and state claims where supplemental jurisdiction cannot be established. The lack of case law addressing this scenario is probably attributable to its rarity: state and federal claims are most often conjoined in a single case because there are underlying facts in common that would justify supplemental jurisdiction over the state claims. In those cases where federal and state claims *are* litigated together despite insufficient factual overlap (*i.e.,* the state law claims are in federal court only on the basis of diversity jurisdiction), there is some authority arguably suggesting that the court is indeed required to give two different (and contradictory) adverse inference instructions: the federal rule for the federal claims and the state rule for the state claims. *See id.,* Conf.Rep. No. 1597, 93d Cong., 2d Sess., p. 7 (1974) ("State privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense."). Given the obvious problems with this approach, however, it seems doubtful that any Court would actually implement it, especially when dealing with such a stark split between state and federal law.

51 *See* FED. R. EVID. 501; S. Comm. on Judiciary Rep. No 93-1277, at 11 (1974) ("Federally evolved rules on privilege should apply since it is Federal policy which is being enforced.").

Of course, this arguably would not be the result if the federal "anchor" claims were dismissed before trial, leaving only state law claims.[52] In that situation no choice of law problem arises, and the general rule that state privilege rules govern state law claims would seem to apply. This is important because antitrust defendants can have potentially unique opportunities for whittling a federal case down until it consists solely of state law claims.[53]

In the wake of the Class Action Fairness Act ("CAFA"),[54] it is now much easier to remove class actions asserting state law claims to federal court.[55] In the antitrust context this often means indirect purchaser damages claims, which are barred by federal antitrust laws but available under many state antitrust schemes. Indirect purchasers often bring state law damages claims in federal court along with a federal claim for injunctive relief under Section 16 of the Clayton Act to prevent "continuing" violations of the Sherman Act—typically as their sole federal cause of action—in part because it allows them to assert supplemental jurisdiction as an alternative theory of subject matter jurisdiction, in addition to diversity jurisdiction (under CAFA or otherwise).[56] Such injunctive relief claims may go unchallenged at the pleading and summary judgment stages, despite the fact that in some cases—like those where the alleged antitrust violation occurred well before the complaint was filed or has clearly ended—the basis for an allegation of "continuing" harm can be questionable. By eliminating a lone federal injunctive relief claim, however, and thereby leaving only state law claims, a defendant can potentially obviate the choice of law issue entirely and ensure that generally friendlier state law rules of privilege apply to the entire case.[57]

---

52 Such a dismissal can lead to a remand of the case to state court. *See* 28 U.S.C. § 1367(c)(3). However, federal courts may retain supplemental jurisdiction over state law claims even after the federal anchor claims are dismissed. *Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991). In antitrust cases, moreover, state law claims are often brought in federal court on the basis of both supplemental and diversity jurisdiction (under CAFA or otherwise), providing an alternative basis for jurisdiction even if the federal anchor claims disappear. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, M.D.L No. 1917 Docket No. 437, Indirect Purchaser Pls. Consolidated Am. Compl., ¶¶ 7, 8. (N.D. Cal.)

53 For example, Sherman Act claims might be dismissed based on the *Illinois Brick* doctrine, but the Cartwright Act claims remain because indirect purchaser s have standing to sue under California law. *See Clayworth v. Pfizer,* 49 Cal. 4th 758 (2010).

54 Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–1715.

55 *See, e.g., Lewis v. Verizon Communications,* 627 F.3d 395, 398 (9th Cir. 2010) (CAFA "significantly expanded federal jurisdiction in diversity class actions."); *Lowery v. Alabama Power Co.*, 483 F.3d 1184,1197 (11th Cir. 2007) ("Congress expressly intended CAFA to expand federal diversity jurisdiction over class actions").

56 *See, e.g., In re Cathode Ray Tube (CRT) Antitrust Litig.,* M.D.L No. 1917 , Indirect Purchaser Pls. Consolidated Am. Compl., ¶ *5.*

57 Because privilege rules are largely similar across the states, this typically would be true even where a plaintiff brings antitrust and other claims under the laws of a number of states.

IV. Conclusion

The privilege against self-incrimination is sometimes lamented for protecting the guilty at least as often as it protects the innocent.[58] In reality, it protects neither of these groups particularly well. Juries generally assume that any invocation of the Fifth Amendment is evidence of guilt, on the theory that an innocent person would not hesitate to defend herself. There is therefore an inherent risk to invoking the privilege—a risk that can only be justified by a strong, rational fear that the witness' testimony would meaningfully increase the chances of a criminal conviction.

The notion that innocent people do not take the Fifth is overbroad, but not devoid of truth— there are certainly times when a witness invokes the privilege simply because she wishes not to reveal (at least not explicitly) that she is guilty of a crime. The key differences between California and federal Fifth Amendment jurisprudence are driven largely by disagreement as to how common an occurrence this really is. Federal law reflects the view that it is quite common indeed, which is why civil juries are often permitted to assume, in effect, that concealment of criminal conduct is exactly what is going on. California law, by contrast, adjudges that taking the Fifth is not sufficiently probative of guilt even to be admitted under the lower burden of proof of a civil case.

A witness expecting to invoke the Fifth Amendment in a federal civil case should be prepared for the worst. If there is any doubt that a jury will interpret assertion of the privilege as evidence of guilt, that doubt is all but erased when the court affirmatively instructs the jury that it may do so. And any doubt surely vanishes when, as can occur in federal cases, the witness is required to take the stand and utter a series of Fifth Amendment invocations in the presence of the jury. Even if the witness deems these risks bearable, she must consider the possibility that her invocation will have unwanted collateral effects on others who may have no say in her decision, such as her current or former employer. For all of these reasons, the decision to invoke the privilege in a federal civil case is almost never an obvious one, even when the witness has a real and compelling fear of future criminal prosecution. For the same reasons, a witness in this position has a strong incentive to explore all tactical options that might lead to the application of gentler state law privilege rules.

But even in cases governed by California law, which does as much as any jurisdiction to minimize the risks associated with taking the Fifth, a major disincentive remains: a witness can still be forced to testify under a grant of federal or state immunity, even if the witness remains completely prone to *foreign* prosecution based on her testimony. This is a particularly alarming prospect in the antitrust context, where allegations of global conduct are becoming the norm, and foreign enforcement efforts have increased exponentially in recent years. Indeed, of all the burdens currently placed on Fifth Amendment invokers, the lack of protection against foreign prosecution may be the most unfair, because it leaves a certain category of witnesses with exactly two terrible options: invite foreign prosecution, or commit perjury. That is just an internationalized version of the dilemma the Fifth Amendment exists to prevent.

---

58 *See Murphy,* 378 U.S. at 55 (privilege can be "a shelter for the guilty").