Volume 55
Number 1 *Bicentennial Issue*

Article 15

9-1-1976

Constitutional Law -- Prison Disciplinary Proceedings and the Fifth Amendment Privilege Against Self-Incrimination

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Constitutional Law—Prison Disciplinary Proceedings and the Fifth Amendment Privilege Against Self-Incrimination

Any determination of the rights retained by prison inmates is complex because of the conflict between the interest in maintaining the basic fair treatment assured all individuals by constitutionally guaranteed freedoms and protections and the competing interest of the state in allowing prison officials sufficient discretion to administer a safe and effective prison system.[1] Prison disciplinary proceedings, in which officials can impose removal of good time credits,[2] punitive segregation[3] or other lesser punishments[4] for infractions of prison regulations, bring this problem into still sharper focus. The prisoner is in danger of a substantial loss of liberty in a procedure in which he is unprotected by the rights guaranteed to a defendant outside prison walls. Prison authorities, on the other hand, confront an individual suspected of rejecting their regulations and controls and therefore posing a serious threat to order and security within the institution.

In a 1974 case, *Wolff v. McDonnell*,[5] the United States Supreme Court examined prison disciplinary hearings for the first time and held that the due process rights of inmates are limited to those that pose little or no threat to the prison administration or the state's interest.[6] In *Baxter v. Palmigiano*[7] the Court was presented with the issue whether the

1. Discretion is necessary primarily to allow prison officials to act quickly to preserve control and to provide effective rehabilitation, security and a safe environment for prison employees as well as inmates. Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974).

2. Good time credits are granted in many prison systems for time served in prison without disciplinary sanctions, and reduce the length of sentence remaining to be served. Note, *Constitutional Law—Procedural Due Process in Prison Disciplinary Proceedings—The Supreme Court Responds*, 53 N.C.L. REV. 793, 793-94 (1975). *See generally* McGinnis v. Royster, 410 U.S. 263 (1973).

3. Punitive segregation or solitary confinement generally consists of restriction to a cell either full time or for most of each day, without opportunities for recreation or exercise and sometimes with a reduced diet and reduced access to reading matter. U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 50 (1967).

4. The lesser punishment most commonly used is loss of privileges for a given period of time. *Id. See also* Proposed Regulations Governing Procedures at the Adult Correctional Institutions, Rhode Island, *reprinted in* Morris v. Travisono, 310 F. Supp. 857, 874 app. (D.R.I. 1970).

5. 418 U.S. 539 (1974).

6. *See* text accompanying notes 40-44 *infra*.

7. 96 S. Ct. 1551 (1976).

fifth amendment privilege against self-incrimination[8] forbids the taking of a negative inference from the silence of a prisoner at a disciplinary hearing to which the privilege against self-incrimination applies.[9] In holding that such an inference is permissible,[10] the Court decreased the protection provided by the fifth amendment in the prison context, and in so doing took a further step in the process of limiting the rights of imprisoned individuals.

In *Baxter* the Court jointly considered two United States Court of Appeals cases challenging the constitutionality of prison disciplinary proceedings under 42 U.S.C. section 1983.[11] The first, *Clutchette v. Procunier*,[12] was an action brought by inmates of the California penal institution at San Quentin. The United States District Court for the Northern District of California found that the disciplinary proceedings violated the due process clause of the fourteenth amendment because they denied counsel to prisoners. Because of this denial the prisoners were forced to give up their constitutional privilege against self-incrimination in order to present a defense that could otherwise have been presented for them by a lawyer while they remained silent.[13] In its final consideration of the case,[14] the Court of Appeals for the Ninth Circuit affirmed, holding that an inmate faced with any form of discipline was entitled to notice of claimed violations, an opportunity to be heard and present witnesses, a hearing before a detached and neutral body, and a decision based on evidence introduced at the hearing.[15] The court also held that prison officials could, in their discretion, refuse

8. U.S. CONST. amend. V in pertinent part provides: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."

9. 96 S. Ct. at 1556.

10. *Id.* at 1558-59. Justice White wrote the opinion for the majority, with Justices Brennan and Marshall concurring in part and dissenting in part. Justice Stevens did not take part in the decision.

11. 42 U.S.C. § 1983 (1970) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

12. 328 F. Supp. 767 (N.D. Cal. 1971).

13. *Id.* at 777-78.

14. The Court of Appeals for the Ninth Circuit originally held that the minimum due process requirements for parole and probation revocations applied to disciplinary proceedings as well. 497 F.2d 809 (9th Cir. 1974). After the Supreme Court decision in Wolff v. McDonnell, 418 U.S. 539 (1974), rehearing was granted and the court of appeals' final decision was reported at 510 F.2d 613 (9th Cir. 1975).

15. 510 F.2d at 614, *aff'g in part* 497 F.2d 809 (9th Cir. 1974).

to provide an opportunity for confrontation and cross-examination, but written reasons for that denial were to be given to the prisoner or the denial would act as "prima facie evidence of abuse of discretion."[16] Finally, the court affirmed the district court's holding that *Miranda v. Arizona*[17] secured a prisoner's right to counsel in a disciplinary proceeding for activity violating state criminal laws as well as prison regulations.[18]

In the second case, Nicolas A. Palmigiano, an inmate of the Rhode Island Correction Institution, faced a disciplinary hearing for inciting a disturbance within the prison.[19] Prior to the hearing Palmigiano was informed that he might be prosecuted for a violation of Rhode Island criminal law, and that he could consult with his attorney but that the attorney could not be present during the hearing itself. He was also advised that he had a right to remain silent but that his silence would be held against him in the proceeding. Following the disciplinary hearing at which he remained silent, Palmigiano was placed in solitary confinement for thirty days and had his classification status downgraded. Palmigiano sued, claiming the proceeding violated his rights under the due process clause of the fourteenth amendment to the Constitution.[20] The United States District Court denied relief.[21] The original decision of the Court of Appeals for the First Circuit,[22] a reversal of the district court, was vacated by the Supreme Court in view of its decision in *Wolff*.[23] On remand, the First Circuit reaffirmed its initial holding,[24] finding that Palmigiano's fourteenth amendment due process rights were violated by the disciplinary procedure.[25] Furthermore it held that the protections required by *Miranda* and *Mathis v. United States*[26] to safeguard the privilege against self-incrimination in a custodial interrogation,

16. 510 F.2d at 616.
17. 384 U.S. 436 (1966).
18. 510 F.2d at 616.
19. Palmigiano, an inmate serving a life sentence for murder, was charged with urging other prisoners not to return to their cells for lock-up in the evening in order to register protest for the failure of the prison administration to provide medical assistance for a fellow prisoner who was violently ill. Palmigiano v. Baxter, 487 F.2d 1280, 1281 (1st Cir. 1973).
20. 96 S. Ct. at 1555.
21. *Id.* The district court decision is unreported.
22. Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973).
23. 418 U.S. 908 (1974).
24. 510 F.2d 534 (1st Cir. 1974) (per curiam).
25. *Id.* at 537.
26. 391 U.S. 1 (1968). *See* text accompanying note 69 *infra*.

including the presence of counsel, should have been provided to Palmigiano in light of the possibilities of future criminal prosecution.[27]

The Supreme Court reversed in both cases,[28] stating that *Wolff*'s limitation of the right to counsel at prison disciplinary hearings encompassed all such hearings, regardless of the possibility of future criminal prosecutions, and that neither *Miranda* nor *Mathis* was applicable since disciplinary proceedings are "not part of a criminal prosecution."[29] The Court further held that the practice of informing a prisoner of his right to remain silent but stating also that his silence would be used against him is invalid neither per se nor as applied in a civil proceeding of this sort.[30] The Court first reasoned that the fifth amendment does not apply to prevent the taking of adverse inferences from silence in civil actions, although it does forbid such an inference in a criminal case.[31] The Court then rejected the argument that *Baxter* fit within a group of civil cases[32] in which an inference of guilt taken from defendants' fifth amendment silence in the face of official questions had been invalidated, differentiating between those civil cases and the instant case on the ground that Palmigiano's silence alone did not automatically subject him to discipline.[33] Finally, the Court reiterated that "[m]utual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application" is necessary, and that this accommodation will limit the standard of rights necessary to constitute due process in all prison disciplinary hearings.[34]

The Supreme Court first utilized the "mutual accommodation" balancing process in the area of prison-related discipline in *Morrissey v.*

27. 510 F.2d at 536-37.

28. 96 S. Ct. at 1560-61.

29. *Id.* at 1556, *citing* Wolff v. McDonnell, 418 U.S. 539, 566 (1974).

30. 96 S. Ct. at 1558-59.

31. *Id.* at 1557-58.

32. Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). *See* text accompanying notes 55-59 *infra.*

33. 96 S. Ct. at 1556-57. The majority opinion also reexamined the due process issue presented in *Wolff* in this changed context and reaffirmed the denial of cross-examination and confrontation to prisoners, refusing to require prison officials to provide written explanation of their discretionary decisions to forbid such actions. *Id.* at 1559. Further, the Court held unanimously that any holding regarding minimum due process standards when inmates are threatened with loss of privileges rather than the more serious forms of discipline would be premature on these facts. *Id.* at 1560. The Court also held that the district court inappropriately treated *Clutchette v. Procunier* as a class action within the contemplation of rules 23(c)(1) and 23(c)(3) of the Federal Rules of Civil Procedure without certifying it as such and identifying the class. *Id.* at 1554 n.1.

34. *Id.* at 1559, *citing* Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

Brewer.[35] The Court found in that case that due process applies to parole revocation hearings. After weighing and balancing governmental interests in efficient, inexpensive proceedings, as well as in the parolee's rehabilitation,[36] with the parolee's private interest, the parolee's due process rights were found to include: (1) preliminary and final hearings before neutral and detached bodies, (2) written notice of alleged violations, (3) the opportunity to be heard in person and to present witnesses and documents, (4) the opportunity to confront and cross-examine adverse witnesses, and (5) a written statement of the evidentiary basis and reasons for revocation.[37] *Gagnon v. Scarpelli*[38] applied similar due process requirements to probation revocation actions.[39]

In *Wolff v. McDonnell*[40] the Court declined to extend the full range of *Gagnon-Morrissey* due process requirements to disciplinary procedures for acts occurring within the prison that could lead to confinement in disciplinary cells and deprivation of good-time credits.[41] In view of the state's strong interest in maintaining order within the prison and in the rehabilitation of prisoners[42] the process of mutual accommodation in such instances creates less stringent due process requirements: (1) notice of the charges in sufficient time to prepare a defense, (2) opportunity to present witnesses and documentary evidence if it will not be hazardous to the safety or correctional goals of the prison, and (3) a written statement of findings of fact and reasons for the imposition of discipline.[43] The right of confrontation and cross-examination and the

35. 408 U.S. 471 (1972).

36. The government interest in rehabilitation can be used not only to cut down on the absolute right to counsel in order to make disciplinary hearings more adversary and less corrective, but also to support a great many other due process rights on the grounds that unfair treatment will have a negative effect on a parolee's attitudes and greatly decrease his chances of successful rehabilitation. 408 U.S. at 484. *See also* U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 830 (1969).

37. 408 U.S. at 489.

38. 411 U.S. 778 (1973).

39. *Gagnon* also added a requirement of counsel when the state authorities found a trained advocate would be necessary to present fairly the probationer's side of the case. Right to counsel is presumed in a number of situations. *Id.* at 783-91.

40. 418 U.S. 539 (1974).

41. *Id.* at 563-72.

42. In *Baxter* the state goal of rehabilitation was used by the Court solely as a rationale for cutting back the due process requirements. The arguments of note 36 *supra* seem to have been abandoned on the ground that rehabilitation is best promoted by a rapid, non-adversary hearing, even though the prisoner's belief in the fairness of the proceeding may be decreased.

43. 418 U.S. at 564-67. For criticism of this view see Millemann, *Prison Disciplinary Hearings and Procedural Due Process*, 31 MD. L. REV. 27, 42 (1971).

right to counsel were found not to be required by due process on the grounds that these rights would produce delay, put an adversary cast on the proceeding that would reduce its rehabilitative value, and limit the discretion of the prison administration in such a way as to compromise the security of the institution.[44]

Although the rights of prisoners have only been considered by the Supreme Court in the recent past,[45] the fifth amendment privilege against self-incrimination has a long history of protection by the federal courts.[46] According to its language, the fifth amendment applies only to criminal trials.[47] One of its primary purposes is to protect against inquisitorial abuses of widespread government interrogation and investigation.[48] If the criminal limitation were strictly applied, however, the fifth amendment would be robbed of its effectiveness since incriminatory answers could be demanded in non-criminal "investigatory" procedures and then utilized in a criminal trial with the very effect that the amendment is designed to avoid.[49] Theoretically, the privilege against self-incrimination should protect any person who is being coerced by governmental authorities to testify to matters that might tend to incriminate him.[50] The protection extends not only to questions whose answers are incriminating per se, but to those whose answers would contain information that could either constitute a "link in the chain" of evidence that might incriminate defendant or give the authorities information that could reasonably be expected to lead to the discovery of such evidence.[51]

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44. 418 U.S. at 567-70.

45. The federal courts have traditionally been reluctant to respond to inmate complaints and interfere with prison administration. *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

46. *See, e.g.*, Arndstein v. McCarthy, 254 U.S. 71 (1920); Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Burr, 25 F. Cas. 38 (C.C.D. Va. 1807).

47. *See* note 8 *supra* for the relevant text. The fifth amendment protection against self-incrimination was made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

48. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484 (1957). The privilege originated in England as a response to the procedures of the Star Chamber, which not only demanded that defendants give testimony that would lead to their convictions, but which tortured those who refused to speak under oath. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 2-4 (1955).

49. Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322, 323 (1966).

50. Counselman v. Hitchcock, 142 U.S. 547 (1892): *See also* Ratner, *supra* note 48, at 493.

51. Maness v. Meyers, 419 U.S. 449 (1975); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547 (1892).

The protection does not extend to prevent a defendant who remains silent from being damaged by the presence of unrefuted evidence tending to show his guilt. The natural inference arising out of the presence of such evidence[52] creates a dilemma for the defendant who must choose between presenting a defense and exercising his self-incrimination privilege. However, the inference taken from unrefuted evidence has generally been considered to be insufficiently coercive to create a threat to the fifth amendment privilege. Commentators have suggested that the inference is constitutionally acceptable because it arises out of the strength of the evidence presented and not out of defendant's exercise of his constitutional right.[53]

The fifth amendment does not forbid self-incrimination altogether. Rather, it forbids any governmental action that would coerce a citizen to incriminate himself involuntarily.[54] The Supreme Court has recently invalidated two types of behavior that impermissibly threatened the free use of the fifth amendment privilege. In *Griffin v. California*[55] the Court held it to be unconstitutionally coercive to advise juries that they can draw an unfavorable inference from defendant's silence at his criminal trial. Such an inference would not only be a coercive penalty making the "assertion of the Fifth Amendment privilege 'costly,' "[56] but would effectively negate the application of the privilege as a protection both for the innocent who fear that ambiguous answers to selected questions or their nervous appearance on the witness stand would tend to incriminate them and for the guilty who want to leave the full burden of

52. Some states allow comment on the use of the privilege in civil litigation. *See, e.g.*, Morris v. McClellan, 154 Ala. 639, 45 So. 641 (1908), *cited with approval in* Hinton & Sons v. Strahan, 266 Ala. 307, 96 So. 2d 426 (1957). The majority do not permit comment, but do allow the jury to draw an inference from a party's silence. *See, e.g.*, Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953).

53. *See, e.g.*, Ratner, *supra* note 48, at 476; Comment, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L.F. 75, 79.

54. In Boyd v. United States, 116 U.S. 616 (1886), the Court stated its policy as follows:

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id. at 635. This statement was quoted with approval in Spevack v. Klein, 385 U.S. 511, 515 (1967).

55. 380 U.S. 609 (1965).

56. Spevack v. Klein, 385 U.S. 511, 515 (1967), *citing* Griffin v. California, 380 U.S. 609, 614 (1965).

proving their criminal activity on the state.[57] Any inference taken from silence amounts to an assumption that those who avail themselves of the privilege are either guilty or are perjurors who are using the privilege to block investigations and protect others although they have no personal fear of incrimination.[58]

The second form of coercion was discussed in a group of civil cases, two of which were *Garrity v. New Jersey*[59] and *Lefkowitz v. Turley*.[60] These cases concerned economically oriented civil sanctions that were automatically imposed on those claiming the privilege against self-incrimination before a government investigation.[61] Such penalties were not actual inferences of guilt taken at the hearings where defendants' testimony was desired, but rather cousins to such inferences—assumptions that any person who could not testify freely and fully was guilty of something and therefore an unsuitable employee who should be removed from his or her job. The Supreme Court held that these collateral inferences were coercive in their non-rebuttable, automatic nature, and that the privilege may not be "condition[ed] by the exaction of a price."[62] Arguably the common factor in these cases is that the government acted in all of them both as interrogator and imposer of penalties.[63] Protection against such a use of governmental power harks back to the fifth amendment's original purpose of protection from government inquisition

57. Slochower v. Board of Higher Educ., 350 U.S. 551, 557-58 (1956), *modified*, 351 U.S. 944 (1956) (per curiam).

58. *Id.* at 557.

59. 385 U.S. 493 (1967).

60. 414 U.S. 70 (1973). The other cases in the group are: Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

61. In *Slochower*, a statute required termination of employment of any city employee who did not answer questions related to official conduct. *Garrity* involved police who were forced to answer questions or lose their jobs. *Spevack* involved an attempt at automatic disbarment of a lawyer who claimed the privilege. In *Gardner*, discharge of policemen was threatened if they failed to sign waivers of immunity before appearing before a grand jury. Finally, the New York contracts in issue in *Lefkowitz* required contractors to waive immunity and answer questions concerning state contracts or lose the right to contract with the state for five years.

62. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). This line of cases had two related holdings: first, that such coerced testimony could not be used at a subsequent criminal trial, and second, that it was not permissible to penalize someone for remaining silent despite coercion to talk. *Compare id.* at 497-98, *with* Slochower v. Board of Higher Educ., 350 U.S. 551, 557-58 (1956).

63. Comment, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L.F. 75; *cf.* Comment, *Constitutionality of Administrative or Statutory Sanctions Upon the Exercise of the Privilege Against Self-Incrimination*, 36 FORD. L. REV. 593 (1968).

and abuse of governmental power to punish those who failed to cooperate.[64]

The fifth amendment right was extended to situations of custodial interrogation by the Supreme Court's decision in *Miranda v. Arizona*.[65] Because of the inherently coercive nature of custodial interrogation, *Miranda* required that the individual subject to such questioning be first informed of his right to remain silent and the fact that any statement made can be used against him in a criminal trial.[66] To ensure that defendant is aware of his fifth amendment right and is not coerced into giving up his opportunity to exercise it, he was granted the right to consult a lawyer and to have him present at any time during questioning.[67] *Mathis v. United States*[68] applied the *Miranda* procedures to custodial interrogation when the reason for custody was unrelated to the investigation taking place and when the investigation itself was routine rather than accusatory.[69] Failure to give *Miranda* warnings produces the immediate result of barring any self-incriminating evidence from use at a future criminal trial unless the government can prove a voluntary waiver of fifth amendment rights.[70]

In *Baxter* the Supreme Court looked for the first time at the relationship between the fifth amendment privilege against self-incrimination and prison disciplinary hearings. In reconsidering the due process issue of confrontation and cross-examination, the Court rejected the argument that the accommodation reached in *Wolff*[71] should be modified because

64. Ratner, *supra* note 48, at 484-87.
65. 384 U.S. 436 (1966).
66. *Id.* at 467-69.
67. *Id.* at 469.
68. 391 U.S. 1 (1968).
69. *Id.* at 4-5. Mathis was in prison serving a state sentence when subjected to a routine federal tax investigation. Although he was incarcerated on a different charge, and it was possible that no criminal charges would arise out of the investigation, the Court found that the protective rights of *Miranda* applied and that any information given in that investigation was barred from future prosecution. *Id.* at 5.
70. Miranda v. Arizona, 384 U.S. 436, 476 (1966). The theory behind this action is that the coercive nature of the situation itself endangers the fifth amendment privilege. Barring the use of coercively obtained evidence is only a partial solution in view of the intention of *Miranda* to protect the fifth amendment privilege. It is arguable that exclusion of tainted evidence is insufficient and that any jurisdiction failing to utilize the *Miranda* procedures or their equivalent to protect the fifth amendment could be directed to extend immunity to those who had been coerced into incriminating themselves. The idea of deliberate defiance of *Miranda* on the assumption that the evidence would be inadmissible at a crminal trial but might be of other value presents an entirely different set of problems. *See generally* Turner & Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759, 770-71 (1972).
71. For a discussion of *Wolff*, see text accompanying notes 40-44 *supra*.

an inmate's interest is weightier when he is faced with possible criminal prosecution. The Court found instead that the interest of the state still outbalanced individual interests, and that prison officials must be left with full discretion in these areas.[72]

Although recognizing that the fifth amendment privilege was applicable to the *Baxter* interrogation despite its civil nature because of the possibility of future criminal proceedings,[73] the Court found that the disciplinary proceeding was neither criminal in itself nor as a stage of a pending criminal prosecution. The type of coercive inference forbidden from criminal trials by the strict holding of *Griffin* was therefore correctly found to be inapplicable in this circumstance.[74]

In addition, Justice White, writing for the majority, saw *Baxter* and the *Garrity-Lefkowitz* line of decisions as analytically separable.[75] In those cases the refusal to testify alone resulted in a governmental sanction. In *Baxter*, by contrast, silence was assumed to have a connotation but would not result in discipline in the absence of other evidence.[76] Justice Brennan, in the dissenting portion of his opinion, asserted that *Baxter* demonstrates the same use of an impermissible government sanction as a penalty for the use of the fifth amendment found in the earlier cases.[77]

Neither of these arguments is lacking in logic. *Baxter* is indeed a very different type of case from *Garrity*, and is not only distinguishable but should be distinguished on the grounds mentioned by White. There is a difference between a statute or contract that invalidly provides a set penalty for constitutionally protected action and an administrative hearing, similar in many ways to a trial, in which some inference taken from an inmate's silence will become part of the evidence that might result in disciplinary action. This difference prevents *Garrity* and the cases following it from serving as adequate precedent for a decision striking down the *Baxter* procedures.

The analysis of Justice Brennan, although it erroneously attempts to tie *Baxter* into this group, shows a deeper insight into the problem

72. 96 S. Ct. at 1559-60.

73. Both the majority opinion and the dissent agree that the fifth amendment applied to Palmigiano. *Compare* 96 S. Ct. at 1557 (majority opinion), *with* 96 S. Ct. at 1561 (dissenting opinion).

74. 96 S. Ct. at 1557. For a discussion of the philosophy behind the *Griffin* holding, see text accompanying notes 52-58 *supra*.

75. 96 S. Ct. at 1557.

76. *Id.*

77. *Id.* at 1562-65 (Brennan, J., dissenting in part).

presented. The question before the Court was not whether the situation presented in *Baxter* involves the *Garrity-Lekowitz* type of coercion,[78] but rather whether the procedure used there was impermissibly coercive in itself. The majority made no comment on the relationship of the facts of *Baxter* to the philosophy espoused in *Griffin*,[79] which forbade any action that will make the exercise of the fifth amendment "costly." Nor did the Court recognize the apparent inequity of considering constitutionally protected silence to be an inference of guilt when it was intended to benefit the innocent.

Moreover, the Court failed to distinguish between an inference of guilt arising out of the silence itself—an inference that would be in apparent conflict with the history of the fifth amendment privilege and with its purpose and philosophy as expressed in *Griffin*—and an inference arising out of unrefuted evidence.[80] If the inference was taken from defendant's silence, the majority did not adequately explain its approval. The assumption was made that the fifth amendment permits the taking of an inference against a party in a civil action who refuses to testify,[81] although the Supreme Court had never previously approved this practice. No recognition was given to the idea that such inferences are permissible only because they are taken from unrefuted evidence, which is not protected by the fifth amendment, and not from the silence itself.[82] Furthermore, the knowledge that Rhode Island disciplinary decisions "must be based on substantial evidence manifested in the record of the disciplinary proceeding"[83] did not settle the question since it is unclear whether silence was or was not evidence manifested in the record. If the *Baxter* inference was an inference solely from the weight of the unrefuted evidence and therefore permissible, the facts of the case demand an investigation both of the sufficiency of the other evidence to support the decision of the disciplinary board[84] and of the coercive

78. For a discussion of the coercion involved in those cases, see text accompanying notes 59-64 *supra*.

79. 380 U.S. at 614.

80. *See* text accompanying notes 53-58 *supra*.

81. 96 S. Ct. at 1558.

82. *See* Comment, *Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination*, 24 U. FLA. L. REV. 541, 549 (1972); Comment, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L.F. 75, 79 (1968). *Cf.* Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322, 340-41 (1966).

83. 96 S. Ct. at 1557, *quoting* Morris v. Travisono, 310 F. Supp. 857, 873 (D.R.I. 1970).

84. The disciplinary board's decision was based on reports of prison officials and Palmigiano's silence. The majority speaks as if the silence did carry some independent

and misleading nature of the statement that Palmigiano's silence "would be held against him."[85] The Court's decision was apparently made without consideration of any of these problems.

The application of *Miranda* and *Mathis*[86] to prison disciplinary proceedings was summarily dismissed in the Court's consideration of the availability of counsel. The assurance of counsel was not considered a fifth amendment protection at all, although both the First and Ninth Circuits had based their decisions on the theory and rule of *Miranda* and *Mathis*.[87] As the courts of appeals found, the situation in *Baxter* approximated that found inherently coercive in *Mathis*. In both cases officials questioned a man in prison whose custody was based on a charge other than that involved in the questioning. In both cases the questions were part of an investigation that could conceivably lead to criminal charges, but no criminal charges had yet been brought in either, and there was a possibility in each that no prosecution would ever begin. In *Mathis*, the Court found that the possibility that criminal prosecutions might result was sufficient to require full *Miranda* protections, including the presence of counsel to guard against erosion of the fifth amendment privilege.[88] In *Baxter*, on the other hand, the Court held that the interrogations were not part of a criminal proceeding.[89] This analysis is insufficient to distinguish *Baxter* from *Mathis*, which applied full *Miranda* protections to a custodial interrogation although the investigation was a routine one unrelated to the reason for defendant's imprisonment. Further, it ignores the fact that the essence of *Mathis* and *Miranda* was the protection of the fifth amendment privilege against self-incrimination, not the assurance of the right to counsel under the sixth and fourteenth amendments.[90]

The Court had previously held that custodial interrogation is inherently coercive and produces a clear threat to the fifth amendment

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weight, although they assume that it would be insufficient in itself for a decision to discipline. *See* 96 S. Ct. at 1559 n.4, 1564-65 n.6.

85. *Id.* at 1555. Some indication of the Court's inattention to the power of this phrase is that the decision initially described the pronouncement as being that the inmate's silence *would* be held against him, and later said that Palmigiano was told that his silence *could* be held against him—a considerably weaker, less intimidating, less coercive warning. *Compare id.* at 1555 *with id.* at 1556.

86. *See* text accompanying notes 65-70 *supra* for a discussion of these cases.

87. 96 S. Ct. at 1556.

88. 391 U.S. at 4-5.

89. 96 S. Ct. at 1556.

90. *See* Mathis v. United States, 391 U.S. 1, 4-5 (1968); Miranda v. Arizona, 384 U.S. 436, 458-66 (1966).

privilege any time an individual faces the possibility of self-incrimination at future criminal proceedings. *Baxter* was a case of custodial interrogation, and the consensus of the Court was that the fifth amendment applied.[91] It therefore defies logic to decide that the *Miranda* rights, set up as protections against threats to the privilege and affirmed in a similar situation in *Mathis,* do not apply in *Baxter.* When the Court eliminated the requirement of counsel in *Wolff,* it did so through the use of a balancing test appropriate to limit the reach of the sixth amendment through the due process clause. In *Baxter* the Court erroneously extended the sixth amendment/due process balancing test to a situation where the presence of counsel was required as a protection for the fifth amendment privilege against self-incrimination. Utilization of a valid limitation of the due process clause to remove any portion of the privilege against self-incrimination tarnishes the respected position of broad construction and expansive application it has occupied throughout its history.

The privilege against self-incrimination has always been liberally construed because a strict construction limits its effectivness.[92] In its treatment of prison disciplinary hearings, the Supreme Court cut sharply into the philosophic underpinnings of the privilege by yielding to the assumption that a party claiming that privilege is guilty or is committing perjury.[93] *Baxter* affects a small class of people, but for those prisoners the Court has taken action that could reduce the privilege to "a hollow mockery."[94] Moreover, the area in which the Court has chosen to limit severely both the absolute application and the effectiveness of the fifth amendment is one in which the privilege is probably the most necessary:

> Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.[95]

The Court held in *Wolff* that prisoners faced with disciplinary hearings were denied the instrumentalities of confrontation, cross-examination, and counsel necessary to present a defense. After *Baxter,* an inmate is

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91. *See* note 73 and accompanying text *supra.*

92. Garrity v. New Jersey, 385 U.S. 493, 515 (1967), *quoting* Boyd v. United States, 116 U.S. 616, 635 (1886).

93. Slochower v. Board of Higher Educ., 350 U.S. 551, 557-59 (1956).

94. *Id.* at 557.

95. Grunewald v. United States, 353 U.S. 391, 422-23 (1957).

forced to speak and risk incriminating himself both at the disciplinary hearing and possibly in future criminal proceedings[96] or to keep silent and accept the burden of giving up his defense while presenting an admission of his guilt to the disciplinary board.[97] The combined effect of the two decisions is to place the prisoner in a procedural vise from which there is no foreseeable release.

ELLEN KABCENELL WAYNE

Equal Credit Opportunity Act Amendments of 1976—An Overview of the New Law

As the American consumer credit industry has grown, lawmakers repeatedly have turned to legislation and regulation in an effort to control abuse and discourage the development of unfair credit policies.[1] Part of this effort is represented by the Equal Credit Opportunity Act Amendments of 1976,[2] passed in March, 1976, only five months after the original legislation became effective.[3] The most ambitious and controversial amendments expand the existing ban on discriminatory credit-granting procedures, impose new disclosure requirements on lending institutions and increase the statutory limits on creditor liability. Creditors insist that these amendments and the corresponding regu-

96. In light of the Court's view that *Miranda* is completely inapplicable to this situation, it is unclear whether the absence of protection for the fifth amendment privilege would cause self-incriminatory testimony given at a disciplinary procedure to be excluded from a later criminal trial.

97. 328 F. Supp. at 778.

1. Legislation in this area includes the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 1730f, 1831b, 2601-2617 (Supp. V 1975), and the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1691f (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976). The latter encompasses the Truth in Lending Act, 15 U.S.C.A. §§ 1601-1667e (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976), the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976), and the Equal Credit Opportunity Act, 15 U.S.C.A. 1691-1691f (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976).

2. Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C.A. §§ 1691-1691f (West Supp. Pamphlet No. 2, pt. 1 1976)) (amending Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-1691e (Supp. V 1975)) [hereinafter cited as amendments].

3. The original Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (Supp. V 1975), became effective Oct. 28, 1975. Pub. L. No. 90-321, § 707, 88 Stat. 1525 (1974).