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Casenotes: Criminal Law — Admission into Evidence of Defendant's Refusal to Submit to Blood-Alcohol Test Does Not Violate the Fifth Amendment Privilege against Self-Incrimination. *South Dakota v. Neville*, 103 S. Ct. 916 (1983)

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CRIMINAL LAW — ADMISSION INTO EVIDENCE OF DEFENDANT'S REFUSAL TO SUBMIT TO BLOOD-ALCOHOL TEST DOES NOT VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. *South Dakota v. Neville*, 103 S. Ct. 916 (1983).

Defendant refused to submit to a breathalyzer test<sup>1</sup> following his arrest for driving while intoxicated. Under South Dakota's refusal-as-evidence statute,<sup>2</sup> a defendant's refusal to submit to the test constitutes admissible evidence at trial. The trial court found the statute unconstitutional<sup>3</sup> and granted the defendant's motion to suppress the evidence of his refusal.<sup>4</sup> The Supreme Court of South Dakota affirmed<sup>5</sup> since it found that the statute violated both the federal and state privileges against self-incrimination.<sup>6</sup> To settle the growing confusion,<sup>7</sup> the

1. Defendant was informed of the state's implied consent law and was advised of his *Miranda* rights. The arresting officers, though, failed to warn him that evidence of his refusal could be used against him at trial. *State v. Neville*, 312 N.W.2d 723, 724 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983), *on remand*, 346 N.W.2d 425 (S.D. 1984) (since officers failed to advise Neville of the consequences of refusal, the Supreme Court of South Dakota suppressed evidence of his refusal on due process grounds). For the Court's treatment of the defendant's contention that the statute was fundamentally unfair under the due process clause of the fourteenth amendment, see *Neville*, 103 S. Ct. at 923-24; see also *Doyle v. Ohio*, 426 U.S. 610 (1976) (defendant's silence following *Miranda* warnings may not be used to impeach testimony); *United States v. Hale*, 422 U.S. 171 (1975) (prejudicial impact exceeds any probative value of evidence relating to pretrial silence).
2. The statute provides that: "If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, . . . and that person subsequently stands trial for driving while under the influence of alcohol or drugs, . . . such refusal may be admissible into evidence at the trial." S.D. CODIFIED LAWS ANN. § 32-23-10.1 (Supp. 1983). Under Maryland law, refusal to submit to a chemical analysis is not admissible into evidence at trial. See MD. CTS. & JUD. PROC. CODE ANN. § 10-309 (1984).
3. *State v. Neville*, 312 N.W.2d 723, 724 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983). As further support for its ruling, the state court recognized that the arresting officers had failed to advise the defendant of the possible use of the refusal at his subsequent trial and, in addition, found the refusal irrelevant to the issues before the court. *Neville*, 312 N.W.2d at 724.
4. Defendant informed the officers that he had been drinking "close to one case" by himself, *South Dakota v. Neville*, 103 S. Ct. 916, 919 n.3 (1983), and that his license had been revoked in a previous driving while intoxicated conviction. *Id.* at 918.
5. *State v. Neville*, 312 N.W.2d 723, 724 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983).
6. *State v. Neville*, 312 N.W.2d 723, 725-26 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983). "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; cf. S.D. CONST. art. VI, § 9 ("No person . . . shall be compelled in any criminal case to give evidence against himself."). In 1964, the Constitution's fifth amendment privilege was made applicable to the states through the fourteenth amendment due process clause. *Malloy v. Hogan*, 378 U.S. 1 (1964).
7. Compare *Dudley v. State*, 548 S.W.2d 706 (Tex. 1977) (refusal evidence inadmissible because of its testimonial nature) with *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969) (refusal admissible because it is not a testimonial statement), *cert. denied*, 397 U.S. 966 (1970) and *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966) (refusal evidence, as circumstantial evidence of consciousness of guilt, non-testimonial in nature).

Supreme Court granted a writ of certiorari. In *South Dakota v. Neville*,<sup>8</sup> the Court reversed and found the defendant's refusal to be an act uncoerced by the arresting officers<sup>9</sup> and thus outside the protection of the fifth amendment privilege against self-incrimination.

Challenges to refusal-as-evidence statutes arise from the privilege contained in the fifth amendment<sup>10</sup> that protects individuals against compulsory self-incrimination.<sup>11</sup> This constitutional privilege<sup>12</sup> had its genesis in the political and religious struggle involving the ecclesiastical courts in early England.<sup>13</sup> While the external policies that motivated the colonists to include this privilege against self-incrimination in the Bill of Rights remain rather vague and contradictory,<sup>14</sup> it is clear that the privilege protects the core values of safeguarding mental freedom<sup>15</sup> and protecting the respect for the "inviolability of the human

8. 103 S. Ct. 916 (1983).

9. *Id.* at 923. On remand, the Supreme Court of South Dakota held that the officer's failure to advise Neville of the consequences of refusal was a denial of due process. Accordingly, the court suppressed the evidence of his refusal. *State v. Neville*, 346 N.W.2d 425 (S.D. 1984); see *supra* notes 1 and 3.

10. For the text of the fifth amendment privilege, see *supra* note 6.

11. "The element of compulsion or involuntariness was always an ingredient of the right and, before the right existed, of protests against incriminating interrogations." *South Dakota v. Neville*, 103 S. Ct. 916, 922 (1983) (quoting W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 328 (1968)); accord *Fisher v. United States*, 425 U.S. 391, 397 (1976). The essence of the privilege lies in the testimonial nature of the proscribed compulsion; both the elements of compulsion and evidence of a testimonial nature are essential. *Id.*; see also Note, *Self Incrimination: Testimonial vs. Non-Testimonial Evidence*, 43 DEN. L.J. 501, 504-06 (1966) (quoting 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2263 (McNaughton rev. 1961)) (historically the privilege deplored the extraction from the accused of an admission of guilt through the employment of legal process).

12. See *Feldman v. United States*, 322 U.S. 487, 490 (1944) (fifth amendment is embodied in the "fundamental law of the land") (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914)); *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (privilege is a fundamental part of American sociological and legal ideology and any violation is contrary to the principles of free government).

13. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 927 (1979) (Professor Wigmore traced the history of the privilege against self-incrimination to the "protracted political and religious struggle against the ecclesiastical courts, the Star Chamber, and the *ex officio* oath required of persons summoned before those institutions. . . ."); cf. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 775 (1935) (the privilege in America resulted from colonial misrule and the Puritan experience). See generally J. WIGMORE, *supra* note 11, § 2250 (discussing historical perspective of the privilege).

14. See Pittman, *supra* note 13, at 763. An expansive summary enumerates seven policies reflected in the privilege, the most relevant of which are: "[o]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our sense of fair play which dictates 'a fair state-individual balance' . . . ; our respect for the inviolability of the human personality . . . ; [and] our distrust of self-deprecatory statements." *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964) (citations omitted).

15. Mental freedom is central to the privilege. See Arenella, Schmerber and the *Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 41-42 (1982); Grano, *supra* note 13, at 933-37.

personality.”<sup>16</sup>

The fifth amendment privilege has never been accorded a prophylactic effect<sup>17</sup> because the protection granted to the accused does not encompass all incriminatory evidence. It is an individual's mental privacy upon which the state absolutely may not intrude.<sup>18</sup> In a decision consistent with this theory, the Court in *Schmerber v. California*<sup>19</sup> declared that the inspection of body evidence, not of a testimonial or communicative nature,<sup>20</sup> was outside the scope of the privilege.<sup>21</sup> *Schmerber* held that the state may compel a suspect to submit to a blood-alcohol test.<sup>22</sup> In a controversial statement, however, the *Schmerber* Court further stated that this compulsion may lead to unavoidable testimonial byproducts included within fifth amendment protection.<sup>23</sup> This statement has led to diverse opinions among lower courts that have interpreted its meaning with regard to the admissibility of refusal evidence.<sup>24</sup>

A minority of courts have found the refusal-as-evidence procedure unconstitutional.<sup>25</sup> The refusal to submit to the breathalyzer test was

16. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

17. *See Schmerber v. California*, 384 U.S. 757, 762 (1966) (noting that the privilege has never been afforded its full scope); *South Dakota v. Neville*, 103 S. Ct. 916, 920, 923 n.15 (1983).

18. Of paramount importance is the moral precept of mental freedom and the right of each individual to a “private enclave” free from government intrusion. *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). For identification of mental privacy as the primary value the fifth amendment seeks to protect, *see Arenella, supra* note 15, at 41-42 (*Schmerber* assumes that intrusion upon an individual's mental domain offends human independence and liberty more than intrusions upon the individual's body).

19. 384 U.S. 757 (1966).

20. *Id.* at 761. The Court upheld the constitutionality of state-compelled blood tests that provide physical evidence not implicating defendant's testimonial capacities. *Id.* at 765. The Court likened the evidence obtained from the test to that obtained from fingerprints, photographs, and measurements. *Id.* at 764. By contrast, Justice Brennan considered assertive conduct to be testimonial in nature, thus falling within the privilege. *Id.* at 763-64.

21. The Supreme Court has yet to define the precise contours of the fifth amendment privilege. *See supra* note 17.

22. *Schmerber*, 384 U.S. at 765.

23. *Id.* at 765-66 n.9. The statement is confusing because the first half of the footnote indicates that the state must forego any byproducts of the compulsion to take the test that may be deemed testimonial in nature. The second half of the footnote, though, indicates the propriety of analyzing the severity of the intrusion in determining the presence of compulsion prior to determining the testimonial nature of the statement.

24. Counsel in *Schmerber* failed to preserve for appeal the question of the admissibility of a defendant's unlawful refusal to submit to a blood-alcohol test. Evidence of the refusal was admitted without objection. The *Schmerber* Court, recognizing that the issue would arise again, intimated that general fifth amendment principles would apply. *Id.*

25. *State v. Neville*, 312 N.W.2d 723 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983). Some courts have focused primarily upon the testimonial nature of the refusal. *See, e.g., Gay v. City of Orlando*, 202 So. 2d 896, 898 (Fla. 1967) (refusal was a testimonial

construed as an unavoidable byproduct of the compulsion to take the test. Unlike body evidence, refusal evidence was considered a "tacit or overt expression and communication of the defendant's thoughts."<sup>26</sup>

Most courts, though, have declared the refusal evidence admissible on one of three theoretical bases. The courts espousing the first theory ignored *Schmerber's* equation of assertive conduct with testimonial evidence,<sup>27</sup> and found refusals to be physical in nature.<sup>28</sup> This refusal evidence was characterized as circumstantial evidence of conduct indicative of a defendant's consciousness of guilt<sup>29</sup> and, therefore, beyond the scope of fifth amendment protection. The second theory permitting admission of the refusal emphasized the absence of a constitutional right to refuse to submit to this test. Accordingly, these courts characterized the admission of a refusal as a legitimate statutory condition placed upon a matter of legislative grace.<sup>30</sup> A final theory supporting the majority outcome focused upon the lack of compulsion inherent in the imposition of the choice between submitting to a simple blood-alcohol test or having a refusal admitted into evidence.<sup>31</sup>

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byproduct falling within the privilege); *State v. Andrews*, 297 Minn. 260, 212 N.W.2d 863 (1973) (refusal relevant only in its testimonial aspect); *State v. Jackson*, 637 P.2d 1 (Mont. 1981), *vacated*, 103 S. Ct. 1418 (1983) (refusal testimonial in nature); *Dudley v. State*, 548 S.W.2d 706 (Tex. 1977) (refusal evidence communicative and testimonial in nature).

26. *Dudley v. State*, 548 S.W.2d 706, 707 (Tex. 1977); *State v. Neville*, 312 N.W.2d 723, 726 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983); Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074, 1082-85 (1969) (evidence considered inferior, unduly prejudicial, and relevant only in its testimonial aspect, i.e., the fear that it will provide evidence of the suspect's guilt).
27. The *Schmerber* Court characterized a nod or shake of the head as equivalent to spoken words because both are communicative acts. *Schmerber*, 384 U.S. at 761 n.5; *see supra* note 20.
28. *See State v. Neville*, 312 N.W.2d 723 (S.D. 1981) (Wolman, J., dissenting), *rev'd*, 103 S. Ct. 916 (1983); *see also Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969) (refusal to submit to a blood test not a testimonial statement), *cert. denied*, 397 U.S. 966 (1970); *People v. Sudduth*, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966) (refusal not testimonial in nature) (citing *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966)), *cert. denied*, 389 U.S. 850 (1967); *State v. Dugas*, 252 La. 345, 211 So. 2d 285 (1968) (refusal to give bodily evidence admissible), *cert. denied*, 393 U.S. 1048 (1969).
29. In *People v. Ellis*, the seminal case for introducing refusal evidence, Chief Justice Traynor of the Supreme Court of California emphasized the absence of a constitutional right to refuse in these situations. Analogizing this evidence to escape from custody, false alibi, flight, suppression of evidence, and tacit admissions, he found the refusal to be circumstantial evidence of consciousness of guilt of a non-testimonial nature. *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
30. *See, e.g., Welch v. District Court of Vt.*, 594 F.2d 903, 905 (2d Cir. 1979) (placing conditions on a statutory right to refuse is constitutional); *State v. Welch*, 136 Vt. 442, 443, 394 A.2d 1115, 1116 (1978) (right to refuse is statutory in nature, with no constitutional premise); *State v. Brean*, 136 Vt. 147, 152, 385 A.2d 1085, 1088 (1978) (legislature granted more "protection" than constitutionally required and therefore may properly condition its exercise).
31. *People v. Thomas*, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978). While finding the refusal to be testimonial, the court held that it was admissible,

In *South Dakota v. Neville*,<sup>32</sup> the Supreme Court relied on this final theory and held that a suspect's refusal to take a breathalyzer test was not an act coerced by the police officers.<sup>33</sup> The *Neville* Court noted the frequency of accidents involving drunk drivers<sup>34</sup> and the resulting compelling state interest in highway safety.<sup>35</sup> The statutory power to refuse<sup>36</sup> was characterized as an effort to avoid violent confrontations between the police and recalcitrant inebriates.<sup>37</sup> The admission of refusal evidence, along with the one year revocation of driving privileges, was deemed a legitimate legislative penalty for refusing to submit to a lawfully imposed test.<sup>38</sup> Furthermore, while the majority seemed to favor the characterization of refusal evidence as physical in nature,<sup>39</sup> the *Neville* Court recognized the difficult gradations in the responses of suspects,<sup>40</sup> and therefore declined to base its decision on that theory.<sup>41</sup> Instead, the Court focused upon the absence of the compulsion ingredient and the values triggering the protections of the fifth amendment.<sup>42</sup> As a result, the Court left the testimonial/physical evidence distinction elusively vague.

The *Neville* Court found that the state never actually compelled

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regardless of whether it was testimonial, as long as the defendant was not compelled to refuse to take the test. *Id.* at 107, 385 N.E.2d at 587, 412 N.Y.S.2d at 849.

32. 103 S. Ct. 916 (1983).

33. *Id.* at 923.

34. *Id.* at 920; *see also* Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (number of highway fatalities attributable to alcohol consumption are comparable to wartime fatalities).

35. *Neville*, 103 S. Ct. at 920 (quoting Mackey v. Montrym, 443 U.S. 1, 17-18 (1979)).

36. A distinction is made between the "power" of a suspect to refuse to submit to the breathalyzer test versus the "right" to so refuse. The State argued that the suspect had the power to refuse under state law, but had no absolute or constitutional right to refuse. Brief for Petitioner at 10, *Neville*, 103 S. Ct. 916; *see* *People v. Thomas*, 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978).

37. *Neville*, 103 S. Ct. at 921. Police have two measures for dealing with non-cooperation: (1) to admit the refusal into evidence; or, more frequently, (2) the use of force. Note, *supra* note 26, at 1082.

38. *Neville*, 103 S. Ct. at 921. By characterizing the admission of refusal evidence as a legitimate condition upon a statutory privilege, the Court thus recognized the second theory in the majority position. *See supra* note 30.

39. Justice O'Connor stated that the Court found considerable force in the analogies to flight and suppression of evidence made by Chief Justice Traynor. *Neville*, 103 S. Ct. at 921-22; *see supra* note 29. The Court thus favors the theory characterizing refusals as physical in nature as opposed to the testimonial evidence theory propounded by the minority jurisdictions.

40. *Neville*, 103 S. Ct. at 922 (difficult to distinguish between physical and testimonial evidence).

41. *Id.* at 921-22.

42. *Id.* at 923. In sum, the Court recognized all three theories permitting the admission of refusal evidence. It chose, however, to rest its decision on the third theory, which emphasized the absence of coercion in the state's action. For a discussion of the policies behind the fifth amendment privilege, *see supra* note 14 and accompanying text.

the suspect to refuse to take the test,<sup>43</sup> but instead offered him a choice between submitting to the test or having his refusal admitted into evidence. While recognizing that the existence of a choice does not necessarily obviate the compulsion inquiry,<sup>44</sup> the *Neville* Court nevertheless discovered no inherent compulsion in the state's offer of a choice between submitting to the simple, painless breathalyzer test or having the refusal admitted into evidence.<sup>45</sup> Moreover, the Court found no hindrance of fifth amendment values<sup>46</sup> in offering the suspect this choice, albeit a difficult one,<sup>47</sup> and thus indicated that the refusal evidence was outside the protection of the defendant's privilege against self-incrimination.<sup>48</sup>

The *Neville* decision represents an attempt to allay certain fifth amendment misconceptions generated by the often quoted footnote in *Schmerber*.<sup>49</sup> A minority of jurisdictions, finding the refusal as evidence procedure unconstitutional, based their analyses on the first half of the footnote.<sup>50</sup> These courts found the coercion necessary to trigger the protections of the fifth amendment privilege in the state's ability to force a suspect to submit to a blood-alcohol test.<sup>51</sup> Thus, while the state did not compel the suspect to refuse to take the test, it forced him to make a choice. According to these courts and certain commentators, the state cannot lawfully impose this decision upon the defendant because the fifth amendment "protects people from being put to certain choices."<sup>52</sup>

The *Neville* Court, however, emphasized the second half of the

43. *Neville*, 103 S. Ct. at 923.

44. *Id.* at 922. Some choices are clearly proscribed by the fifth amendment values. The choice imposed by the "cruel trilemma" certainly offends fifth amendment policies. See *supra* notes 13-14 and accompanying text.

45. *Neville*, 103 S. Ct. at 923.

46. In contrast to the prohibited choices imposed by the cruel trilemma of self-incrimination, perjury, or contempt, the choice of whether to submit to a severely painful test, or to submit to a test that violated a suspect's religious beliefs, the state may offer a suspect the choice of submitting to a blood-alcohol test or having his refusal used against him at trial without offending fifth amendment values. *Id.*

47. *Id.* at 923.

48. *Id.*

49. *Schmerber v. California*, 384 U.S. 757, 765-66 n.9 (1966). For a discussion of the two subparts of the footnote, see *supra* note 23.

50. Minority jurisdictions emphasized the following statement that: "If [the state] wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test . . ." *Schmerber*, 384 U.S. at 765-66 n.9 (emphasis in original).

51. The refusal evidence was thus deemed an "unavoidable by-product" of compelling a person to submit to the test. *Id.* Given the initial compulsion to submit to the test, these courts indicate that anything the suspect says that may be characterized as testimonial must be excluded as a byproduct of this compulsion.

52. The fifth amendment serves to protect persons from being forced to choose between serving as the instruments of their own demise or being penalized for refusing to do so. See Westen & Mandell, *To Talk to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521, 522 (1982).

*Schmerber* footnote<sup>53</sup> in analyzing whether the severity of the non-testimonial procedures produced testimonial byproducts violative of the fifth amendment. In disregarding the testimonial/physical evidence distinction, the Court recognized the non-threatening nature of the breathalyzer test.<sup>54</sup> It reasoned that because the test is so safe and painless, the proffered choice was not among those prohibited by the fifth amendment, and hence would not hinder its underlying values.<sup>55</sup> The Court recognized, however, that the privilege may bar refusal evidence if the proffered alternative is a test so "painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession.'"<sup>56</sup> The *Neville* Court thus took a position regarding the two instances represented by these government-imposed choices,<sup>57</sup> but failed to provide clear guidance as to what other choices may collide with the fifth amendment.

The *Neville* decision may signal a new direction in the Supreme Court's analysis of fifth amendment cases. Instead of merely relying upon difficult testimonial/physical evidence distinctions, the Court will apparently balance the interest of the state against the severity of any infringement upon the individual defendant's interests. This balancing analysis prevails throughout *Neville*. At the outset, in discussing the tragic frequency of drunk-driving accidents,<sup>58</sup> the Court recognized a compelling state interest in highway safety.<sup>59</sup> The opinion then focused on the individual's interests represented by the fifth amendment core values of mental freedom<sup>60</sup> and an entirely adversarial, as opposed to inquisitorial, system of justice.<sup>61</sup> Having recognized the interests involved, the Court viewed the coercion issue as depending on the degree or severity of the non-testimonial procedures in light of the diminished scope of the fifth amendment privilege.<sup>62</sup>

In this respect, *Neville* may act as a harbinger of a burden-balancing model<sup>63</sup> in determining the true scope of the fifth amendment privi-

53. *Schmerber*, 384 U.S. at 765-66 n.9 ("Indeed, there may be circumstances in which the pain, danger or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search' . . . .").

54. See *supra* note 45 and accompanying text.

55. See *supra* note 46 and accompanying text.

56. *Neville*, 103 S. Ct. at 922-23; *Schmerber*, 384 U.S. at 765 n.9. This choice was likened to the penultimate evil of the cruel trilemma created by the ex officio oath in the ecclesiastical courts. *Neville*, 103 S. Ct. at 922-23.

57. The first instance is the *Neville* scenario in which no constitutional right was burdened because none was exercised. The second instance is the choice imposed by the historical evil of the cruel trilemma.

58. *Neville*, 103 S. Ct. at 920; see *supra* notes 34-35 and accompanying text.

59. *Neville*, 103 S. Ct. at 920; see *supra* note 35.

60. *Neville*, 103 S. Ct. at 920; see *supra* notes 15-16 & 18 and accompanying text.

61. An adversarial system of justice, with a fair state-individual balance, requires the state to employ its own independent efforts to produce evidence against a suspect. See *supra* note 14 and accompanying text.

62. See *supra* note 17.

63. For the argument that the Court has previously employed a balancing analysis in

lege.<sup>64</sup> This model is necessary for the development of a "coherent normative theory"<sup>65</sup> explaining why people are protected from being put to certain choices.<sup>66</sup> Until this model is clearly delineated, confusion and unpredictability will persist among the lower courts in fifth amendment law, and these courts will continue to "balance without a scale."<sup>67</sup>

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an ad hoc, covert manner, *see* Arenella, *supra* note 15, at 52-56. The absence of clear historical purposes and values behind the fifth amendment renders the development of this model difficult.

64. According to this model, if a court determines that the state's interest in compelling the choice is outweighed by the costs to the individual's privilege, then the proffer of this choice violates the fifth amendment. *Id.* at 53-54 n.118.

65. *Id.* at 38.

66. *Id.* at 56.

67. *Id.*