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249 So.3d 1278

District Court of Appeal of Florida, First District.

Omulepu v. Department of Health, Board of Medicine

District Court of Appeal of Florida, First District. | June 22, 2018 | 249 So.3d 1278 | 43 Fla. L. Weekly D1436 (Approx. 8 pages)

v.

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Appellee.

No. 1D17-1571

June 22, 2018

Synopsis**Background:** Physician appealed final order of Board of Medicine revoking his license to practice medicine following ALJ's finding of medical malpractice.**Holdings:** The District Court of Appeal, [Osterhaus](#), J., held that:[1](#) adverse inference drawn by ALJ, and accepted by the Board of Medicine, based on physician decision to remain silent at hearing **did not violate** physician's **Fifth****Amendment right** against compulsory **self-incrimination**, and[2](#) Department of Health's complaint did not fail to notice the charges against physician.

Affirmed.

[Makar](#), J., filed a concurring opinion.**West Headnotes (6)**[Change View](#)**SELECTED TOPICS**

Privilege of Witness

[Claim of Self-Incrimination Privilege](#)

Criminal Law

Evidence

[Purpose of Defendant Fifth Amendment Right](#)

Health

Regulation

[Meaning of Psychologist Licensing Statute](#)**Secondary Sources****PART 1301 - REGISTRATION OF MANUFACTURERS, DISTRIBUTORS AND DISPENSERS OF CONTROLLED SUBSTANCES**

Controlled Substances Hdbk. Part 1301

...Part 1301 (21 C.F.R. Part 1301) covers two distinct areas: (1) registration of handlers of controlled substances, such as practitioners, distributors, manufacturers and reverse distributors; and (2) se...

Rights as to notice and hearing in proceeding to revoke or suspend license to practice medicine

10 A.L.R.5th 1 (Originally published in 1993)

...A license to practice medicine has been considered a property **right** by the courts and, like other forms of property, the possessor of the **right** cannot be deprived of it without due process of law. Ther...**Validity of statute providing for revocation of license of physician, surgeon, or dentist**

1 Criminal Law

Adverse inference drawn by the ALJ, and accepted by the Board of Medicine, based on physician's decision to remain silent at hearing in response to evidence of medical malpractice, **did not violate** physician's **Fifth Amendment right** against compulsory **self-incrimination** in action revoking physician's license to practice medicine; Department of Health presented competent, substantial evidence that physician committed malpractice by puncturing the organs of two patients during their cosmetic surgery procedure, physician exercised his **right** to remain silent, physician was not forced to waive his **right** to remain silent, and as a result, the ALJ applied an adverse inference, however, the ALJ and Board of Medicine did not automatically find against him, rather, the adverse inference combined with other probative evidence supported the decision. [U.S. Const. Amend. 5; Fla. Stat. Ann. § 458.331\(1\)](#).

[1 Case that cites this headnote](#)



110	Criminal Law
110XVII	Evidence
110XVII(I)	Competency in General
110k393	Compelling Self-Incrimination
110k393(1)	In general

79 A.L.R. 323 (Originally published in 1932)

...The reported case for this annotation is Yoshizawa v. Hewitt, 52 F.2d 411, 79 A.L.R. 317 (C.C.A. 9th Cir. 1931).

[See More Secondary Sources](#)

Briefs

[Brief of Amici Curiae the American Medical Association and Medical Association of Georgia in Support of Petition for a Writ of Certiorari](#)

2000 WL 34014681
Richard M. DICTER, M.D., Petitioner, v. UNITED STATES OF AMERICA, Respondent.
Supreme Court of the United States
July 28, 2000

...FN* Counsel of Record FN1. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, amici curiae state that th...

[Petition for A Writ of Certiorari](#)

2000 WL 34014676
Richard M. DICTER, M.D., Petitioner, v. UNITED STATES OF AMERICA, Respondent.
Supreme Court of the United States
June 27, 2000

...FN* Counsel of Record Petitioner, Richard M. Dicter, M.D., was a defendant in the District Court and the appellant in the Court of Appeals. Respondent, who was the plaintiff in the District Court and t...

[Brief of Amici Curiae of a Coalition of Medical Associations and Societies; Pain, Palliative, and Elder Care Associations; and Distinguished Individual Pain, Palliative, and Elder Care Professionals in Support of Respondents%tc](#)

2005 WL 1707465
Alberto R. GONZALES, et al., Petitioners, v. STATE OF OREGON, et al., Respondents.
Supreme Court of the United States
July 18, 2005

2 Witnesses

Fifth Amendment privilege against compulsory **self-incrimination** may be asserted in proceedings to protect against any disclosures which the witness reasonably believes could be **used** in a criminal prosecution or could lead to other evidence that might be so **used**. [U.S. Const. Amend. 5](#).



410	Witnesses
410III	Examination
410III(D)	Privilege of Witness
410k297	Self-Incrimination
410k297(1)	In general

3 Criminal Law

In the criminal context, the defendant's silence may not be considered as evidence of guilt. [U.S. Const. Amend. 5](#).



110	Criminal Law
110XVII	Evidence
110XVII(M)	Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)4	Adoptive Admissions; Silence
110k410.32	Silence
110k410.33	In general

4 Health

A physician may not be disciplined by the Department of Health for an offense not charged in the administrative complaint.



198H	Health
198HI	Regulation in General
198HI(B)	Professionals
198Hk214	Disciplinary Proceedings
198Hk216	Complaint, petition, or pleading

5 Health

An Department of Health administrative complaint must afford reasonable notice to the



198H	Health
198HI	Regulation in General

...FN1. Pursuant to Sup. Ct. R. 37.3(a), the parties have consented to the filing of this brief and copies of the consent letters are submitted herewith. Pursuant to Sup. Ct. R. 37.6, counsel for amici st...

[See More Briefs](#)

Trial Court Documents**United States of America v. Minas**

2016 WL 2755851
UNITED STATES OF AMERICA, Plaintiff, v. Michael MINAS, Defendant.
United States District Court, D. Idaho.
Apr. 08, 2016

...Pending before the Court in the above entitled matter is Defendant Michael Minas' Motion to Dismiss the Second Superseding Indictment (Dkt. 97). Having fully reviewed the record, the Court finds that t...

U.S. v. Roberts

2020 WL 6488108
UNITED STATES OF AMERICA, v. Paul ROBERTS, MD, Defendant.
United States District Court, N.D. Alabama.
Sep. 14, 2020

...The defendant, PAUL ROBERTS, MD, was represented by Charles Scott Linton and Randy A. Dempsey. On motion of the United States, the court has dismissed the following counts of the superseding indictment...

U.S. v. Landt

2015 WL 10853543
UNITED STATES OF AMERICA, v. Leonard Craig LANDT, Jr.
United States District Court, N.D. Iowa.
Apr. 29, 2015

...John L. Lane Defendant's Attorney THE DEFENDANT: X pleaded guilty to count(s) 1 of the Indictment filed on October 30, 2014 pleaded nolo contendere to count(s) _ which was accepted by the court. was ...

[See More Trial Court Documents](#)

licensee of facts or conduct which warrant disciplinary action.	198HI(B) 198Hk214 198Hk216	Professionals Disciplinary Proceedings Complaint, petition, or pleading
6 Health Department of Health's administrative complaint did not fail to notice the charges against physician in action revoking physician's license to practice medicine following medical malpractice; the violations found by the Board of Medicine, medical malpractice in puncturing the internal organs of patients and failing to create or maintain accurate records regarding the concentration of epinephrine used , were consistent with the allegations, which also were proven with competent, substantial evidence. Fla. Stat. Ann. §§ 120.60(5), 458.331(1) .	 198H 198HI 198HI(B) 198Hk214 198Hk216	Health Regulation in General Professionals Disciplinary Proceedings Complaint, petition, or pleading

***1279** On appeal from the Department of Health, Board of Medicine. Magdalena Averhoff, Chair.

Attorneys and Law Firms

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Sarah Young Hodges, Chief Appellate Counsel; [Carrie B. McNamara](#), Katelyn R. Boswell, and [Mari H. McCully](#), Assistant General Counsels, Florida Department of Health, Tallahassee, for Appellee.

Opinion

Osterhaus, J.

Dr. Osakatukey Omulepu appeals a final order of the Board of Medicine revoking his license to practice medicine. Dr. Omulepu argues that the decision violated his **Fifth Amendment rights** by incorporating an adverse inference against him based on his decision to remain silent at his formal hearing in response to evidence of medical malpractice. He argues additionally that the administrative complaint failed to properly charge him and that the evidence did not support the charges filed by the Department of Health. We disagree with these arguments and affirm.

I.

In 2016, the Department filed an administrative complaint against Dr. Omulepu seeking disciplinary action against his medical license. The Department alleged in a nine-count complaint that Dr. Omulepu violated [§ 458.331\(1\), Florida Statutes \(2014\)](#). According to the allegations, during a three-day period in May 2015, four of Dr. Omulepu's [liposuction](#) patients experienced severe post-surgery complications requiring hospitalization. The Department asserted that in all four cases, Dr. Omulepu deviated from the standard of care by **using** an improper concentration of [epinephrine](#) in a surgical solution that is **used** to reduce bleeding and failing to maintain accurate medical records of the concentration of [epinephrine](#). See [§ 458.331\(1\)\(m\) & \(t\), Fla. Stat.](#) It also alleged medical malpractice against Dr. Omulepu for puncturing the internal organs of two of the patients. See [§ 458.331\(1\)\(t\), Fla. Stat.](#)

The complaint led to a formal hearing before an administrative law judge in October 2016. After the hearing, the ALJ issued recommended findings of fact and conclusions of law that Dr. Omulepu committed medical malpractice and violated the medical records law. Specifically, the ALJ found that Dr. Omulepu committed medical malpractice by puncturing the internal organs of two patients by an “improper angling of the [cannula](#) during the procedures.” In reaching this conclusion, the ALJ relied partly upon an adverse evidentiary inference against Dr. Omulepu because he declined to testify or explain how the organ punctures occurred. In addition, the ALJ found in Dr. Omulepu's favor as to the charges of **using** an improper concentration of [epinephrine](#) to control bleeding in four patients, but found that he ***1280** failed to create and keep medical records accurately reflecting the concentration of [epinephrine](#) given to them. The ALJ recommended that Dr. Omulepu be disciplined with a fine, probation, and costs.

The Board of Medicine then took up the recommended order, approving and incorporating almost all of it into its Final Order. The Board rejected, however, the discipline recommended by the ALJ. Due to the severity of the injuries to Dr. Omulepu's patients within the span of a single day, it decided to revoke his license to practice medicine. Dr. Omulepu timely appealed.

II.

A.

1 Dr. Omulepu contends first on appeal that the Board erred by accepting the ALJ's adverse inference because he remained silent about the medical malpractice charges at his formal hearing. He asserts that this adverse inference violated his **right** not to incriminate himself under the **Fifth Amendment** to the United States Constitution. We disagree.

2 3 The **Fifth Amendment** states that “[n]o **person** ... shall be compelled in any criminal case to be a witness against himself.” [U.S. Const. amend. V](#). This privilege may be asserted in proceedings to protect “against any disclosures which the witness reasonably believes could be **used** in a criminal prosecution or could lead to other evidence that might be so **used**.” [Kastigar v. United States](#), 406 U.S. 441, 445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In the criminal context, the defendant's silence may not be considered as evidence of guilt. [Marston v. State](#), 136 So.3d 563, 569 (Fla. 2014) (quoting [Griffin v. California](#), 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)).

The Florida Supreme Court has recognized the **Fifth Amendment right** against **self-incrimination** to apply in the context of professional license revocation cases because they are “penal” in nature. [State ex rel. Vining v. Fla. Real Estate Comm’n.](#), 281 So.2d 487, 491 (Fla. 1973). Agreeing that [Vining](#) applies here, the Department asserts that the scope of the **Fifth Amendment's** protection is nevertheless circumscribed in civil cases like this one. It argues that, unlike the criminal context, the **Fifth Amendment** protection in civil cases allows fact-finders to consider a defendant's silence as evidence of guilt. The Department's argument is backed by the opinion of the United States Supreme Court in [Baxter v. Palmigiano](#) that “the **Fifth Amendment** does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Various federal courts have noted that [Baxter](#) applies “forcefully in medical discipline cases.” [Arthurs v. Stern](#), 560 F.2d 477, 478 (1st Cir. 1977) (agreeing with [Baxter](#) in a medical disciplinary proceeding that “the trier of fact [may] treat silence as evidence of guilt”); see also [MacKay v. Drug Enf’t Admin.](#), 664 F.3d 808, 820 (10th Cir. 2011) (citing [Baxter](#) and affirming the revocation of a

medical doctor's registration to dispense controlled substances). Florida cases also echo the rule from *Baxter*. See, e.g., *Vasquez v. State*, 777 So.2d 1200, 1203 (Fla. 3d DCA 2001); *Atlas v. Atlas*, 708 So.2d 296, 299 (Fla. 4th DCA 1998). The Florida Supreme Court in *Boedy v. Department of Professional Regulation*, 463 So.2d 215, 218 (Fla. 1985) for example, found it constitutionally permissible to deny authority to practice medicine “to a physician who asserts the privilege against **self-incrimination** if his claim has prevented full assessment of his fitness and competency to practice.” The *Boedy* opinion noted that

***1281** [w]hen a conflict arises between the **right** of a physician to pursue the medical profession and the **right** of the sovereignty to protect its citizenry, it follows that the **rights** of the physician must yield to the power of the state to prescribe reasonable rules and regulations which will protect the people from incompetent and unfit practitioners.

Id. at 217; cf., *Borrego v. Agency for Health Care Admin.*, 675 So.2d 666, 668 (Fla. 1st DCA 1996) (affirming the revocation of a medical license against a **Fifth Amendment** double jeopardy claim because the sanction was “remedial rather than punitive,” and noting that a medical license “is ... a privilege granted by the sovereign, which may be withdrawn to ‘preserve the public health, morals, comfort, safety and the good order of society’”) (quoting *State ex rel. Munch v. Davis*, 143 Fla. 236, 196 So. 491, 493–94 (1940)).

In this case, the Department presented competent, substantial evidence that Dr. Omulepu committed malpractice by puncturing the organs of two patients during their cosmetic surgery procedures. In the face of this evidence, Dr. Omulepu exercised his **Fifth Amendment right** to remain silent. He wasn't forced to waive this **right**. In view of his silence, the ALJ applied an adverse inference, citing *Baxter*. The ALJ and Final Order did not, however, as a “consequence of [Dr. Omulepu's] silence automatically [find him] guilty of the infraction with which he has been charged.” *Baxter*, 425 U.S. at 317, 96 S.Ct. 1551. Rather, the adverse inference combined with other probative evidence that advanced the Department's case—expert **testimony** identifying the improper angling of the **cannula**, multiple punctures of patient organs, and Dr. Omulepu's admission to a patient's mother that he'd “messed up” with a new cannula—supported the Board's ultimate decision. Under these circumstances, the adverse inference drawn by the ALJ, and accepted by the Board's Final Order, **did not violate** Dr. Omulepu's **Fifth Amendment rights**.

B.

We likewise affirm with respect to Dr. Omulepu's other claims involving the sufficiency of the evidence and alleged disparities between the administrative complaint and evidence deduced at the hearing. We recognize that a physician may not be “disciplined for an offense not charged in the complaint.” *Trevisani v. Dep’t of Health*, 908 So.2d 1108, 1109 (Fla. 1st DCA 2005); *Ghani v. Dep’t of Health*, 714 So.2d 1113 (Fla. 1st DCA 1998). An administrative complaint must “afford ‘reasonable notice to the licensee of facts or conduct which warrant’ disciplinary action.” *Cottrill v. Dep’t of Ins.*, 685 So.2d 1371, 1372 (Fla. 1st DCA 1996) (quoting § 120.60(5), Fla. Stat.). Here, contrary to Dr. Omulepu's assertions, the administrative complaint did not fail to notice the charges against him. The violations found by the Board—medical malpractice in puncturing the internal organs of patients (see counts I and II of the Second Amended Complaint), and failing to create or maintain accurate records regarding the concentration of epinephrine **used** (see counts VI through IX)—were consistent with the allegations, which also were proven with competent, substantial evidence.

III.

For these reasons, we affirm the Board of Medicine's final order.

[Lewis, J.](#), concurs; [Makar, J.](#), concurs with opinion.

[Makar, J.](#), concurring.

Today's decision holds for the first time that a physician's exercise of his constitutional **right** against **self-incrimination** permits an adverse inference to be drawn ***1282** against him in an administrative disciplinary action based on his failure to **use** reasonable care in treating patients. Guidance is long overdue on this topic. The practice has been to permit administrative law judges to draw adverse inferences from a physician's silence, but when and how that is done is filled with nuance, qualifications, and unanswered questions. See generally Matthew C. Lucas, *Balance of Silence: Weighing the Right to Remain Silent Against the Right of Access to Florida Civil Courts*, 22 U. FLA. J.L. & PUB. POL'Y 1 (2011) (overview of three important issues that arise when the **Fifth Amendment** privilege is invoked in civil proceedings: “(i) whether to stay the civil lawsuit **prior** to the completion of parallel criminal proceedings; (ii) how to weigh discovery disputes and access to information against a party's **Fifth Amendment** privilege; and (iii) what substantive effect, if any, a litigant's refusal to testify has on the outcome of the civil proceedings”).

The “constitutional struggle” between a litigant's **right** to remain silent and society's interest in adjudicating a civil dispute, as Judge Lucas framed it in his article, *id.* at 23–24, arises “in even more pronounced ways” as a civil case progresses. Two of the leading supreme court

cases underlying today's decision reflect that struggle: *Boedy v. Department of Professional Regulation*, 463 So.2d 215 (Fla. 1985) and *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla. 1973). Neither arose in the context of medical negligence, but both provide helpful parameters for future physician disciplinary cases.

Boedy involved a physician, but his **Fifth Amendment** claim was a **right** to refuse to submit to *any* mental and physical examinations. At issue was his fitness to practice generally, rather than his exercise of care as to patients. In this context, our supreme court held that “it is constitutionally permissible to deny authority to practice medicine to a physician who asserts the privilege against **self-incrimination** if his claim has prevented full assessment of his fitness and competency to practice.” *Boedy*, 463 So.2d at 218. The court reasoned that although the “**Fifth Amendment** privilege against **self-incrimination** protects the accused from being compelled to testify against himself[,] [it] does not extend to the exclusion of evidence of his physical or mental condition when such evidence is otherwise admissible, even when the evidence is obtained by compulsion.” *Id.* at 217. The reasons why the privilege didn't apply were two-fold: the physician's competence was at issue, not his guilt or innocence, and a statute explicitly protected the physician's interest against compelled **testimony** providing that “neither the **testimony** received from a physician, nor the orders subsequently entered on the basis of that **testimony** may be **used** against the physician in any other administrative, civil or criminal proceeding.” *Id.* at 218.

Unlike Dr. Boedy, Dr. Omulepu was not required to give up his testimonial privilege in this disciplinary proceeding. Instead, he exercised that **right**, the question presented being the evidentiary value of his silence as to his provision of medical care. On this point, *Boedy* signaled that a tradeoff exists in physician discipline cases between the exercise of the privilege and the retention of the “benefits of the status of being a licensed physician.” *Id.* In *Boedy*, the balance was struck to compel the mental and physical examinations of the physician but protect against their **use** in any legal proceedings thereafter. The balance here, in contrast, is not to compel **testimony** but to allow an adverse inference from the decision to remain silent, which raises potential constitutional implications such as those discussed in *Vining*, next discussed.

***1283** In *Vining*, the supreme court held that a statute, which compelled a realtor to file a sworn answer to allegations against him or lose his license by default, amounted to a coercive deprivation of the **Fifth Amendment right** to withhold **testimony** in an administrative proceeding. 281 So.2d at 491–92 (“The basic constitutional infirmity of the statute lies in requirement of a response under threat of license revocation or suspension,

which amounts to compelling the defendant to be a witness against himself" under the state and federal constitutions.). In doing so, the court made clear that the **Fifth Amendment** "right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood." *Id.* at 491. Further, it surmised that "a legislative enactment allowing but not requiring a defendant to answer would not be constitutionally objectionable, but we are not confronted with such a provision here." *Id.* at 492.

An obvious takeaway from *Vining* is that license-deprivation is penal in nature, thereby confirming that other professionals, such as attorneys and physicians, retain their **Fifth Amendment** privilege in the face of administrative disciplinary proceedings. Less obvious is the court's holding that the statute at issue effectively shifted the burden of proof from the Real Estate Commission to the realtor, an unconstitutional result under the court's analysis. *Id.* By parallel reasoning, other forms of proof or procedure that shift the evidentiary burden—such as a presumption of negligence—could be subject to invalidation.

Applied here, the question is whether allowing an adverse inference from Dr. Omulepu's silence can be drawn without crossing the line into invalid burden-shifting. On this point, an adverse inference is unlike a presumption because it merely allows the fact-finder to infer a fact that is rationally related to facts established in the record; it does not require that an inference be adverse, nor does it shift the burden of proof. But the concept has the potential to be misconstrued as allowing an adverse inference to become an independent fact that by itself can meet the burden of proof to establish substandard patient care, which it cannot. For example, in *Scott v. Department of Professional Regulation*, 603 So.2d 519 (Fla. 1st DCA 1992), *opinion clarified* (Aug. 12, 1992), a license-suspension order was reversed because it was based entirely on an inadmissible hearsay report. The nurse failed to appear at the hearing or respond to the complaint against her, but doing so "did not relieve the [Department] of its obligation to substantiate the charges by presenting sufficient evidence." *Id.* at 520. Had Nurse Scott chosen to appear, but invoked her privilege and refused to testify, a similar result would have been likely: sufficient record evidence—apart from any adverse inference—would have been necessary to support license-suspension. See, e.g., *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 780 (Fla. 4th DCA 2006) ("The adverse inference instruction does not relieve a party from its burden of proof at trial.").

As to Dr. Omulepu's silence, the administrative law judge not only drew from it an adverse inference that malpractice occurred, but also concluded that it was the "only inference" to be drawn in the case based on other evidence independently establishing that Dr. Omulepu

had acted negligently; indeed, Dr. Omulepu had tacitly admitted to doing so by telling a patient's mom that he'd "messed up" the surgery. Sufficient record evidence—apart from the adverse inference from the physician's silence—supported the factual findings of substandard medical care, making the adverse inference supplemental (and ***1284** probably unnecessary) to affirm in this case (or making it harmless error if the adverse inference had been impermissibly drawn).

The point is that an inference must be rooted in and flow directly from record evidence establishing professional misconduct; an inference alone cannot establish liability. See, e.g., *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1304 (11th Cir. 2009) ("[A] dismissal following the assertion of the **Fifth Amendment** violates the Constitution where the inferences drawn from **Fifth–Amendment**–protected silence are treated as a substitute for the need for evidence on an ultimate issue of fact."). As Judge Lucas said on this point:

The effect of the adverse inference is not without limits. For example, under federal law, a court may not enter summary judgment or dismiss a complaint based solely on a party's assertion of the **Fifth Amendment** and the adverse inference against the litigant's silence. This follows from the basic proposition that whatever inference or persuasiveness it may give rise to, silence, by itself, is not a substitute for evidence. Nor has any reported Florida decision upheld adjudication in favor of a plaintiff's claim absent some evidence in addition to the defendant's **Fifth Amendment** objection.

Balance of Silence, at 36 (footnotes omitted). Simply put, an administrative complaint of medical negligence against a physician who chooses to exercise a **Fifth Amendment** privilege cannot support discipline without adequate supporting evidence of the claimed misconduct; the physician's silence is insufficient to shift or meet the regulator's evidentiary burden.

A final note is that **Fifth Amendment** jurisprudence as it applies to criminal trials versus civil proceedings is starkly different. Silence is protected vigilantly in the former (to prevent government overreach in criminal cases) but loathed in the latter (because society expects people to defend themselves against false charges). This gulf signifies an ongoing need to discern where to draw the "line between unlawful compulsion against one party's **right** to

remain silent and infringement of another party's **right** of access to the court” as Judge Lucas has written. *Id.* at 43. “Drawing it inescapably involves a question of judgment.” *Id.*

All Citations

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