Notes

Examining the Policies for Applying the Criminal Defendant Privilege to Removal Actions

The United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[1] Over the years, these words have spawned a bifurcated "privilege," one aspect protecting the witness' right in any proceeding from being compelled to incriminate himself and the other aspect protecting the right of the accused in any criminal proceeding from being compelled to take the stand.[2] One commentator has summarized: "In the case of an ordinary witness the questions may be asked. He may then decide whether he will exercise the privilege. . . . On the other hand, the defendant in a criminal case has the privilege of refusing to give any testimony in the case."[3] The latter privilege, which will be referred to as the criminal defendant privilege, may apply in other contexts that resemble criminal actions. The recent public interest in using removal proceedings to remove derelict public officers invites discussion about whether such officers are entitled to invoke the criminal defendant privilege. This Note will determine whether the criminal defendant privilege not to take the stand in a particular case applies to judicial proceedings maintained to remove derelict public officers. Before proceeding to that analysis however, an inquiry into the history of removal proceedings is necessary.

I. A Brief History of Judicial Removal of Officers

The historical evolution of modern removal statutes may explain the uncertainty concerning the applicability of such procedural safeguards as the criminal defendant privilege to removal proceedings. At early English common law, a public official could be removed for misconduct or neglect either by a criminal action[4] or by

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[1]U.S. Const. amend. V.

[2]*See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); United States v. Housing Foundation of America, Inc., 176 F.2d 665, 666 (3d Cir. 1949).

[3]1 C. McCormick & R. Ray, Texas Law of Evidence § 432 (2d ed. 1956).

[4]4 W. Blackstone, Commentaries *141; J. Story, Commentaries on the Constitution of the United States § 800 (5th ed. 1891). This common law authorization of removal in a criminal action or in a totally independent action was undoubtedly the precursor of many state statutes mandating the same two mechanisms to deal with unworthy public officers. *See, e.g.*, Criminal Code of 1961 § 33-3, Ill. Ann. Stat. ch. 38, § 33-3 (Smith-Hurd Supp. 1979); Mont. Rev. Codes Ann. § 94-7-401 (Supp. 1977). Both statutes define the offense of official misconduct and provide penalties, including removal from office, without affecting any common law power of removal.

a writ of *quo warranto*, which theoretically could be brought by an individual in the King's name.[5] If a criminal action was brought, the public officer faced removal from office as well as a substantial fine.[6] In a *quo warranto* proceeding, judgment was rendered either for the King, in which event the officer was ousted, or for the officer, in which case he retained his office.[7] An officer removed by *quo warranto* also faced a nominal fine.[8] Although the writ was issued "for the King," the action was considered to be civil in nature because the penalty was intended to protect the public rather than punish the officer.[9] The *quo warranto* proceeding, however, possessed the serious drawback of being nonappealable.[10] Consequently, the writ in *quo warranto* was replaced by the writ in nature of *quo warranto*. The writ in nature of *quo warranto* originally was considered to be criminal in nature because the action was introduced by information filed by the government.[11] Nevertheless, the proceeding gradually assumed a civil flavor because the remedy was intended primarily to protect the citizenry.[12] Moreover, the proceeding lacked many of the procedural safeguards associated with criminal

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[5]*See* 3 W. BLACKSTONE, COMMENTARIES *264.

[6]4 *id.* at *141; J. STORY, *supra* note 4, § 800.

[7]3 W. BLACKSTONE, COMMENTARIES *263.

[8]Ames v. Kansas, 111 U.S. 449, 460-61 (1884) (quoting 3 W. BLACKSTONE, COMMENTARIES *263).

[9]*See* Ames v. Kansas, 111 U.S. at 460 (citing Rex v. Marsden, 3 Burr. 1812, 1817, 97 Eng. Rep. 1113, 1115 (K.B. 1765)); Annot., 119 A.L.R. 725, 726 (1939). *See also* BLACK'S LAW DICTIONARY 1131 (5th ed. 1979).

[10]3 W. BLACKSTONE, COMMENTARIES *263.

[11]Ames v. Kansas, 111 U.S. at 460; 3 W. BLACKSTONE, COMMENTARIES *263. Interestingly, Blackstone contended that an English statute, An Act for Rendering the Proceedings upon Writs of Mandamus and Informations in the Nature of *Quo Warranto* More Speedy and Effectual, 1710, 9 Anne, c. 20, §§ IV-VIII, permitted an information in nature of *quo warranto* to be filed by *any* person desiring to maintain an action against one who had allegedly usurped, intruded into, or unlawfully held any franchise or office in a city, borough, or town. 3 W. BLACKSTONE, COMMENTARIES *264. The person maintaining the action was styled the *relator* and in case of judgment for him the defendant was ousted and a fine assessed. *Id.* Blackstone's recognition that an individual could bring the suit undoubtedly influenced the development of the proceedings in the United States. The official titles of these proceedings often vary, although many courts hold that the action should be brought in the state's name. *See, e.g.*, Cline v. Superior Court, 184 Cal. 331, 342, 193 P. 929, 933 (1920); State v. Gooding, 22 Idaho 128, 130, 124 P. 791, 792 (1912); Meyer v. Tunks, 360 S.W.2d 518, 520 (Tex. 1962). People *ex rel.* Dorris v. McKamy, 168 Cal. 531, 143 P. 752 (1914), involved a judicial proceeding to remove Bakersfield's Marshall, McKamy, and was commenced on the accusation of the relator Dorris, a private citizen who was also known as an informer. Thurston v. Clark, 107 Cal. 285, 40 P. 435 (1895), decided by the same court as *McKamy*, is styled in sharp contrast, although the object of both suits was identical: removal of a derelict officer.

[12]*See* Ames v. Kansas, 111 U.S. at 460-61; 3 W. BLACKSTONE, COMMENTARIES *263.

cases because the fine was nominal[13] and because the writ contemplated a more summary procedure.[14]

American courts subsequently incorporated only the writ in nature of *quo warranto* into its common law.[15] As did the English courts, their American counterparts treated the writ as a civil matter[16] with minimal exception.[17] The adoption of modern removal statutes has, in large part,[18] replaced the writ system. However, the modern removal system inherits from its common law parents some of the uncertainty about whether a removal is criminal or civil in nature. Typically, judicial removal of a public officer may be instituted by a grand jury,[19] county attorney,[20] or private citizen upon a verified, written accusation.[21] Some removal statutes provide not only for removal but also fines.[22] A few courts view the fine as a penalty, justifying their conclusion that the removal proceeding is a criminal matter.[23] Other courts view such fines in the same light as those awarded in *quo warranto* proceedings—a mere incident of a civil action.[24] When the particular removal statute does not authorize a money judgment some courts contend that the statute is of some aid in determining whether the action possesses the attributes

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[13]Ames v. Kansas, 111 U.S. at 460-61 (quoting 3 W. BLACKSTONE, COMMENTARIES *263).

[14]3 W. BLACKSTONE, COMMENTARIES *263.

[15]*See, e.g.*, Standard Oil Co. v. Missouri, 224 U.S. 270, 282-83 (1912).

[16]*See id.* at 283; Ames v. Kansas, 111 U.S. at 461.

[17]*See* Standard Oil Co. v. Missouri, 224 U.S. at 283. The Court in *Standard Oil* stated that Rhode Island viewed the remedy and proceeding as criminal in nature (citing State v. Kearn, 17 R.I. 391, 22 A. 1018 (1891)). *See also* Ames v. Kansas, 111 U.S. at 461. The *Ames* Court listed Arkansas, Illinois, New Jersey, New York, and Wisconsin as having deemed the proceeding civil regarding all matters except jurisdiction and pleading. *Id.* (citing State v. Ashley, 1 Ark. 279 (1839); State v. Roe, 26 N.J.L. 215 (1857); People v. Jones, 18 Wend. 601 (N.Y. 1836); Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. 370 (N.Y. 1817); State v. West Wis. Ry., 34 Wis. 197 (1874)). *Cf.* Annot., 119 A.L.R. 725, 726 (1939) (*quo warranto* actions are civil and not criminal).

[18]Despite the number of states with statutory authority controlling judicial removal of public officers, a surprising amount of case law exists pertaining to writs in *quo warranto* and in nature of *quo warranto*. The principal question raised in these cases is whether the writ will lie. In most jurisdictions, *quo warranto* will not lie when a statutory method of removal exists because the statutory remedy is exclusive. State v. Wymore, 343 Mo. 98, 116, 119 S.W.2d 941, 949 (1938) (quoting State v. Wallbridge, 119 Mo. 383, 393, 24 S.W. 457, 459 (1893)).

[19]*E.g.*, N.M. STAT. ANN. § 10-4-3 (1978).

[20]*E.g.*, UTAH CODE ANN. § 77-7-2 (1978).

[21]*E.g.*, IND. CODE § 5-8-1-35 (1976).

[22]Act of Mar. 14, 1853, ch. 29, § 4, 1853 Cal. Stats. 41 (repealed 1929); IDAHO CODE § 19-4115 (1979); IND. CODE § 5-8-1-35 (1976).

[23]*See, e.g.*, Daugherty v. Nagel, 28 Idaho 302, 308, 154 P. 375, 376 (1915).

[24]*See, e.g.*, Wheeler v. Donnell, 110 Cal. 655, 657, 43 P. 1, 1 (1896).

of a criminal action warranting special procedural safeguards.[25] Determining whether an action is civil or criminal, on the basis of a fine or the lack thereof, is a crude method of deciding whether procedural safeguards such as the criminal defendant privilege attach to a removal proceeding because it ignores the policies underlying that privilege.

II. Availability of Criminal Defendant Privilege in Removals

A. The Labeling Approach

The availability of the criminal defendant privilege in gray areas such as the removal proceeding is subject to debate because the United States Supreme Court has never clearly addressed the issue.[26] Nevertheless, the Court and some lower federal and state courts, have decided that the privilege generally applies in criminal,[27] quasi-criminal,[28] penal,[29] and forefeiture[30] proceedings. The courts have generalized that the inherently punitive nature of these

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[25]*See, e.g.*, Territory v. Sanches, 14 N.M. 493, 500, 94 P. 954, 956 (1908); Skeen v. Craig, 31 Utah 20, 26, 86 P. 487, 488 (1906).

[26]*See* State v. Marion Probate Court, 381 N.E.2d 1245 (Ind. 1978). Although dealing with the availability of the criminal defendant privilege in a civil commitment case, the Indiana Supreme Court stated that the question of whether one may refuse to testify in any proceeding which may result in the deprivation of his liberty had been expressly reserved by the United States Supreme Court. *Id.* at 1247 (citing McNeil v. Director of Patuxent Inst., 407 U.S. 245 (1972)).

[27]Boyd v. United States, 116 U.S. 616 (1886); Standard Oil Co. v. Roxana Petroleum Corp., 9 F.2d 453 (S.D. Ill. 1925) (dicta). In *Boyd*, the Court held the criminal defendant privilege applicable in a proceeding seeking the forefeiture of certain property that the defendant fraudulently obtained. 116 U.S. at 634. Recognizing the punitive aspect of the action, the Court reasoned that even though the action was civil in form, it was criminal in nature. *Id.* at 633-34. Viewing the privilege from the reverse perspective, the *Roxana* court held the privilege inapplicable in a patent infringement case. The court stated that the privilege pertains only to criminal cases and that a patent suit is not such a case. 9 F.2d at 455.

[28]Commonwealth v. Rohanna, 167 Pa. Super. Ct. 338, 74 A.2d 807 (1950). The court in *Rohanna* reversed the trial court decision compelling the defendant to take the stand in an action to compel support payments. *Id.* at 341, 74 A.2d at 809. Thus, "[i]n a . . . quasicriminal proceeding, the defendant may not be called . . . as on cross-examination or otherwise, in violation of his constitutional privilege." *Id.* at 340, 74 A.2d at 808.

[29]Lees v. United States, 150 U.S. 476 (1893). *Lees* involved the applicability of the criminal defendant privilege in a proceeding to collect a $1,000 penalty for violation of the importation and migration laws. The Court, recognizing the punitive aspect of the suit, pierced the civil form and held the privilege to be applicable. *Id.* at 480. *See also* note 37 *infra*.

[30]United States v. United States Coin & Currency, 401 U.S. 715 (1971). Emphasizing the punitive character of the action, the Court in *Coin & Currency* held the criminal defendant privilege available in an action seeking the forefeiture of money for failure to pay the appropriate gambling tax. *Id.* at 722.

matters requires extra procedural safeguards like the criminal defendant privilege.[31] On the other hand, the privilege is unavailable when the matter involves civil[32] or remedial[33] proceedings. Instead of being primarily punitive in character, civil and remedial matters serve other important societal objectives, thereby justifying relaxed and streamlined procedures.[34] In sum, courts have focused on the nature and effect of the proceedings, relying on criminal-civil and penal-remedial distinctions to determine whether the privilege applies.[35] As one might guess, the few state courts which have ruled on the applicability of the criminal defendant privilege in judicial proceedings to remove public officers have generally resorted to these classification devices.

The process of labeling actions as worthy of the criminal defendant privilege, however, ignores the policies and reasons for invoking the privilege in the first place. The labeling device has already been rejected as an absolute standard for invoking the general witness privilege against self-incrimination. The United States Supreme Court, in *In re Gault*,[36] held that "the feeble enticement of the 'civil' label-of-convenience" was not dispositive of the alleged violation of Gerald Gault's witness privilege against self-incrimination because labeling disregards substance.[37] *Gault* involved a juvenile delinquency proceeding in which Gault was committed to an institution as a

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[31]*See* notes 27-30 *supra* and accompanying text.

[32]Capital Prods. Corp. v. Hernon, 457 F.2d 541 (8th Cir. 1972); Loufakis v. United States, 81 F.2d 966 (3d Cir. 1936). In *Capital Prods. Corp.*, the court decided that the criminal defendant privilege did not apply in a proceeding in aid of execution of judgment. 457 F.2d at 542. The plaintiff's interest in obtaining the defendant's answers outweighed the defendant's interest in remaining silent because "[t]here is no blanket Fifth Amendment right to refuse to answer questions in noncriminal proceedings." *Id.* Similarly, the court in *Loufakis* held that deportation proceedings are civil and that therefore the privilege did not obtain. 81 F.2d at 967.

[33]Commissioner v. Mitchell, 303 U.S. 391 (1938). In *Mitchell*, the Court considered a suit seeking an income tax deficiency and a 50% addition for fraud. *Id.* at 395. The Court held that the suit was remedial in nature because it was instigated primarily to protect the revenue and reimburse the government for its loss and investigatory expenses. *Id.* at 401. Also, the Court stated that in such a case "the defendant has no constitutional right . . . to refuse to testify." *Id.* at 403-04 (footnote omitted).

[34]*See* notes 32-33 *supra* and accompanying text; note 73 *infra* and accompanying text.

[35]*See* Thurston v. Clark, 107 Cal. 285, 40 P. 435 (1895); Daugherty v. Nagel, 28 Idaho 302, 154 P. 375 (1915); State v. Borstad, 27 N.D. 533, 147 N.W. 380 (1914); Meyer v. Tunks, 360 S.W.2d 518 (Tex. 1962).

[36]387 U.S. 1 (1967).

[37]*Id.* at 49-50. The Court reached a similar conclusion in Lees v. United States, 150 U.S. 476 (1893). Although recognizing that violations of an importation statute are grounds for a civil action, the *Lees* Court reasoned that "this, though an action civil *in form*, is unquestionably criminal *in its nature*, and in such a case, a defendant cannot be compelled to be a witness against himself." *Id.* at 480 (emphasis added).

juvenile delinquent. Gault subsequently requested an Arizona superior court to grant a writ of habeas corpus. The juvenile court judge testified at the habeas corpus hearing that he recalled that Gault had made certain admissions after being taken into custody. The superior court dismissed the writ. Gault's parents asked the Arizona Supreme Court to review the dismissal on a number of grounds, including fifth amendment violations, because Gault was not advised of his right not to incriminate himself when he made his admissions. The Arizona Supreme Court, however, ruled that Gault did not have a witness privilege in a delinquency proceeding.[38] On appeal, the United States Supreme Court reversed the Arizona Supreme Court.[39] In considering the fifth amendment issue, the Court observed that the general privilege not only assures that admissions are truthful statements and not the "mere fruits of fear or coercion" but also limits the state's power to overcome an individual's "freedom to decide whether to assist the state in securing his conviction."[40] The Court stated that the process of categorizing a claim as civil or criminal is an "entirely unrealistic" method of determining whether the fifth amendment applies,[41] reasoning that a delinquency commitment is nothing more than an incarceration that violates the broad fifth amendment guarantees of individual freedom.[42]

The principles enunciated in *Gault* provide convincing precedent for reaching similar conclusions about the criminal defendant privilege. Classification of a proceeding as criminal or civil may afford some assistance in deciding whether the criminal defendant privilege is available in a removal proceeding, but it is by no means determinative. The substance or nature of a judicial proceeding to remove a public officer represents only a starting point in determining whether the privilege applies.

Nevertheless, four courts have resorted to a number of definitional devices to determine whether the criminal defendant privilege applies to removal proceedings. The four courts are split as to the availability of the privilege.

The California Supreme Court considered the availability question in *Thurston v. Clark*,[43] decided in 1895. The informer, Thurston,

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[38]*In re* Gault, 99 Ariz. 181, 407 P.2d 760 (1965), *rev'd*, 387 U.S. 1 (1967).

[39]*In re* Gault, 387 U.S. 1, 59 (1967).

[40]*Id.* at 47. The fifth amendment witness privilege against self-incrimination represents "the respect a government—state or federal—must accord to the dignity and integrity of its citizens." Miranda v. Arizona, 384 U.S. 436, 460 (1966). The witness privilege embodies "values reflecting the concern of our society for the right of each individual to be let alone." Tehan v. Shott, 382 U.S. 406, 416 (1966).

[41]387 U.S. at 49.

[42]*Id.* at 49-50.

[43]107 Cal. 285, 40 P. 435 (1895).

instituted a statutory action[44] for the removal of the sheriff of Glenn County for official misconduct. Over the sheriff's objections, the trial court compelled the defendant to take the stand. The sheriff subsequently was removed from office. On appeal, the supreme court in considering the privilege issue hesitated to classify the action, stating that it was "a nondescript, but resembling somewhat a *qui tam* action."[45] The court held, however, that the proceeding had as "its aim and object, a process for the punishment of crime,"[46] and that the criminal defendant privilege applied in "all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish persons charged with the commission of public offenses."[47] The court did not define the "crime" the defendant had committed, thus intimating application of the common law rule that misconduct in office was a criminal offense.[48] The court apparently disregarded the civil form of the proceeding and emphasized its criminal nature. Therefore, the California Supreme Court held that the trial court committed reversible error in compelling the defendant to testify. The foundation of *Thurston* is two-fold: first, a judicial proceeding to remove a public officer affords a public, as opposed to a private, remedy; second, removal is essentially a punishment for misconduct in office. In effect, the *Thurston* court classified the removal proceeding as a criminal matter, justifying the application of the criminal defendant privilege.

In *Daugherty v. Nagel*,[49] the Supreme Court of Idaho in 1915 reached the same result as the *Thurston* court. Nagel, a member of the Board of Bonner County Commissioners, was accused of malfeasance in office. His removal was sought by a Bonner County resident and taxpayer. At trial, the defendant objected to being called as a witness, contending that the removal proceeding was in nature and effect a criminal prosecution within the meaning of the self-incrimination provision of the Idaho Constitution.[50] The objection was sustained, and the issue was appealed. The Idaho Supreme Court upheld the lower court, applying the rationale developed in *Thurston*.[51]

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[44]Act of Mar. 14, 1853, ch. 29, § 4, 1853 Cal. Stats. 41 (repealed 1929).

[45]107 Cal. at 289, 40 P. at 436. A *qui tam* action is one brought by an informer under a statute establishing a penalty for the commission or omission of a certain act and is maintained for the state as well as for the informer. BLACK'S LAW DICTIONARY 1126 (5th ed. 1979).

[46]107 Cal. at 289, 40 P. at 436.

[47]*Id.*, 40 P. at 437.

[48]*See* note 4 *supra* and accompanying text.

[49]28 Idaho 302, 154 P. 375 (1915).

[50]IDAHO CONST. art. I, § 13.

[51]Under the Idaho removal statute, IDAHO CODE § 19-4115 (1979), the taxpayer must allege that the officer "has been guilty of charging and collecting illegal fees for

One year prior to *Nagel*, the Supreme Court of North Dakota reached the opposite result in *State v. Borstad*.[52] At trial, the defendant was called as a witness by the plaintiff and was compelled to take the stand. Although the North Dakota Supreme Court reached a different result, the court approached the problem in much the same manner as the California court in *Thurston*, stating that the removal proceedings were "neither civil nor criminal, but of a character peculiar to themselves."[53] The *Borstad* court, however, concluded that the removal statutes[54] contained their own due process of law. The court explained that such construction was necessary to avoid "technicalities" that might undermine the public's efforts to remove incompetent and dishonest officials. The court observed that "[t]he object of the statute[s] is to protect the public from corrupt officials, and not to punish the offenders,"[55] thereby excusing the need for procedural safeguards such as the criminal defendant privilege.[56] In considering the officer's due process rights under the removal statute, the court held that the removal statute authorized examination of the challenged officer, that the action was civil, and that therefore the trial court did not err in compelling the officer to take the stand.[57] The judgment of removal was accordingly affirmed. Despite the difference in result from the *Thurston* court, the *Borstad* court also applied a labeling approach, emphasizing that a removal proceeding is a civil matter designed to protect the public rather than punish the officer.

Also at odds with the results in *Thurston* and *Nagel* is the 1962 decision of the Texas Supreme Court in *Meyer v. Tunks*.[58] Meyer,

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services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office." 28 Idaho at 307, 154 P. at 376. The court construed the statute as authorizing institution of the suit by a taxpaying private citizen only when malfeasance or nonfeasance was charged. *Id.* at 308-09, 154 P. at 377. Hence, the judgment for the defendant was affirmed. *Id.* at 312, 154 P. at 378. The decisions in *Thurston* and *Nagel* were based in part upon the United States Supreme Court's reasoning in Boyd v. United States, 116 U.S. 616 (1886), that a civil information, filed against Boyd for evasion of import taxes, was criminal in substance and effect because a forfeiture was incurred. *Id.* at 634-35. The Court therefore held that compelling Boyd to produce his private books and papers violated the criminal defendant privilege. *Id. See also* note 27 *supra.*

[52]27 N.D. 533, 147 N.W. 380 (1914).

[53]*Id.* at 537, 147 N.W. at 381.

[54]N.D. CENT. CODE §§ 44-10-01 to -21 (1978).

[55]27 N.D. at 537, 147 N.W. at 381 (citing Ponting v. Isaman, 7 Idaho 283, 62 P. 680 (1900)). *Ponting* was virtually overruled by *Nagel* and its companion line of cases. *See* Daugherty v. Nagel, 28 Idaho at 307, 154 P. at 376.

[56]27 N.D. at 537-38, 147 N.W. at 381-82.

[57]*Id.*

[58]360 S.W.2d 518 (Tex. 1962). During the pendency of the removal action, Meyer was under indictment for bribery and for false representations in his campaign expense and contribution statement.

the sheriff of Jefferson County, sought to overturn the lower court's refusal to quash the adverse party's application to depose Meyer in a removal action pending against him for official misconduct. Meyer contended that the criminal defendant privilege precluded the compulsory taking of his deposition. The court denied his petition for mandamus and held that the Texas version of the fifth amendment[59] did not apply to removal proceedings. The court stated that the character of the proceeding was determined "by the object sought to be accomplished and the nature of the judgment to be entered."[60] The court held that the object of the suit was "not to punish the officer for his derelictions or for the violation of a criminal statute but to protect the public in removing from office by speedy and adequate means those who have been faithless and corrupt and have violated their trust."[61] The court contradicted itself by declaring that "the law imposes no *other penalty*."[62] Thus, the court implicitly recognized the punitive element of a removal proceeding. Nevertheless, the court considered the punitive element to be outweighed by other factors, stating that "the Legislature has plainly provided that [a removal proceeding] . . . is to be tried under the Rules of Civil Procedure rather than of the Code of Criminal Procedure."[63] Despite ambiguities in the analysis, the *Meyer* court's holding that the matter is civil in nature typifies the definitional logic rejected by the United States Supreme Court in *Gault*. In short, these four decisions overemphasize the character of the action and ignore important policy considerations in determining whether the criminal defendant privilege applies.

B. A Policy Approach

Properly viewed, privileges are an ineffective means of discovering the truth; instead, they protect important societal interests.[64] Indeed, society's interest in not forcing defendants in criminal cases to testify against themselves overrides the strong probability that they could furnish valuable and necessary evidence. Although courts and scholars have devoted considerable attention to analyzing the underlying policies of the self-incrimination privilege, generally, they have ignored the justification for an additional privilege for criminal defendants. These sources have not distinguished the

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[59]*See* TEX. CONST. art. I, § 10.

[60]360 S.W.2d at 520.

[61]*Id.*

[62]*Id.* (emphasis added).

[63]*Id.* at 521.

[64]MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 72 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

witness privilege from the criminal defendant privilege when explaining the rationale for the policies.[65] Nevertheless, a few commentators and courts have suggested some rather convincing reasons for the criminal defendant privilege. Viewing the criminal defendant privilege as a necessary ingredient of the American criminal system, Dean Wigmore has suggested that the privilege satisfies the notion that no one should be convicted unless the prosecution has borne the entire burden of proof.[66] If the defendant were compelled to take the stand, he could relieve the prosecution of that burden. Although the defendant would retain the witness privilege not to answer incriminating questions, a genuine fear exists that the defendant would be so intimidated on the stand that he would be incapable of effectively exercising that privilege.[67] Ostensibly, the criminal defendant privilege is intended to equalize the criminal process by removing the inherent advantage that prosecutors would enjoy by compelling the defendant to be a source of proof.[68]

Dean McCormick has suggested that the defendant's mere presence on the stand may create an appearance of guilt.[69] The pressures inherent in a criminal proceeding are likely to make the defendant excessively timid and nervous in responding to the prosecutor's questions. As a result, a defendant's speech or mannerisms may be misconstrued as signs of guilt. Thus, the criminal defendant privilege reflects society's awareness that all individuals, regardless of their innocence, can be found guilty by misleading appearances and impressions created by a criminal proceeding.

Perhaps the most important policy underlying the criminal defendant privilege is the human instinct of self-preservation.[70] In Dean McCormick's words, "[t]o place an individual in a position in which his natural instincts and personal interests dictate that he should lie and then to punish him for lying, or for refusing to lie or violate his natural instincts, is an intolerable invasion of his personal dignity."[71] Absent the privilege, the state theoretically can force one to commit perjury and then impose a punishment for such an indiscretion.[72] Therefore, the privilege preserves an individual's integrity.

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[65]*See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 458-61 (1966); E. GRISWOLD, THE 5TH AMENDMENT TODAY 73 (1955), *noted in* Malloy v. Hogan, 378 U.S. 1, 9 n.7 (1964).

[66]*See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 295 n.1 (McNaughton rev. 1961).

[67]*See* Wilson v. United States, 149 U.S. 60 (1892).

[68]*See* MCCORMICK, *supra* note 64, § 118, at 252.

[69]*Id.*

[70]*See* Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 692-93 (1951).

[71]*See* MCCORMICK, *supra* note 64, § 118, at 252.

[72]United States v. Grunewald, 233 F.2d 556, 591 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).

In sum, the criminal defendant privilege serves some important societal objectives: equalization of the criminal process, elimination of misleading appearances of guilt, and self-preservation. These societal objectives are naturally implicated without the need for an intricate weighing process in criminal actions, which are primarily punitive in nature. These objectives, however, are less forceful and perhaps even irrelevant in civil actions which accomplish goals other than punishing a defendant.[73] Consequently, the criminal defendant privilege has no theoretical basis for application in civil proceedings. Some actions, however, contain civil as well as criminal or penal elements. Attempts to classify these hybrid actions into civil and criminal categories for purposes of extending procedural safeguards such as the criminal defendant privilege overlook the underlying policies for applying the privilege.

Logic and consistency demand that courts analyze whether the policies of the criminal defendant privilege apply in certain gray areas. If a proceeding contains civil as well as criminal elements, then the courts should examine whether the policies for the privilege are implicated and, if so, whether they are outweighed by competing policies favoring a civil proceeding without such procedural safeguards.

The removal action, as the Texas Supreme Court noted in *Meyer*, possesses civil and criminal traits.[74] The action is civil in nature because it protects the public from corrupt and incompetent officials.[75] Even so, the action is also criminal in character because it strips an individual of his office as well as imposes a fine.[76] Because the action contains these divergent elements, the court should consider whether the policies for the criminal defendant privilege are involved and whether they outweigh any countervailing reasons for not extending the privilege.

At first blush, a removal proceeding does not implicate the policies behind the criminal defendant privilege. To be sure, the proceeding does not involve a prosecution and conviction in the ordinary sense. Moreover, not all persons are subject to removal proceedings. The action, however, is analogous to a criminal proceeding; in lieu of incarceration, a judgment of removal is entered with an accompanying fine.[77] Because of the defendant officer's stake in the outcome of the

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[73]*See, e.g.*, Meyer v. Tunks, 360 S.W.2d at 520 (court determined that removal action was civil in nature because of its primarily protective purpose).

[74]*Id. See also* text accompanying notes 62-63 *supra*.

[75]State v. Borstad, 27 N.D. at 537, 147 N.W. at 381; Meyer v. Tunks, 360 S.W.2d at 520. *See also* text accompanying notes 56 & 62 *supra*.

[76]*See* Meyer v. Tunks, 360 S.W.2d at 520. *See also* note 22 *supra* and accompanying text.

[77]*See* note 22 *supra* and accompanying text.

removal proceeding, the defendant's interest in self-preservation is seriously threatened. The officer will be confronted with the dilemma of telling the truth, thereby facing removal, or lying to protect himself, thereby committing perjury. In addition, the accused officer justifiably may be apprehensive about testifying. This apprehension may create the appearance of guilt. Moreover, the accused officer may be so intimidated that he will be unable to invoke the witness privilege. Such a result may relieve the prosecutor of the burden of establishing guilt. Clearly, the policies of self-preservation, elimination of misleading appearances of guilt, and equalization of the removal process are implicated and therefore justify the application of the criminal defendant privilege to a removal proceeding.

Because these policies are involved, consideration must be given to the competing policies weighing against the application of the criminal defendant privilege in removal proceedings. Indeed, *Borstad* and *Meyer* held that the privilege is not required in removal proceedings because of the public's interest in removing corrupt officials.[78] The Idaho Supreme Court in *Borstad* explicitly stated that procedural safeguards create technical obstacles which impede citizen efforts to remove incompetent and dishonest officers;[79] yet, elementary principles of due process and procedural fairness demand more consideration for the rights of an accused official in a removal proceeding. The "inequality" of process and the misleading appearance of guilt created by an official taking the stand, as well as the need to preserve individual integrity, are considerations that outweigh the public interest in streamlined procedures. The inconvenience of recognizing this procedural safeguard is an inadequate reason for erroneously destroying an otherwise innocent official's public career. In brief, the public interest in removing dishonest officials can be accomplished effectively without denying the officer an important privilege.

III. Conclusion

Quasi-penal, quasi-criminal, special, and statutory are just a few of the designations made by various courts confronted with the problem of characterizing a removal suit. Whether this wide divergence in treatment is due to the common law rule that misconduct in office constitutes a crime,[80] or to "some peculiar feature of the [removal] statute . . . not common to that of [other states],"[81] the

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[78]27 N.D. at 537, 147 N.W. at 381; 360 S.W.2d at 520.

[79]27 N.D. at 537-38, 147 N.W. at 381-82.

[80]*See* note 4 *supra* and accompanying text.

[81]State v. Medler, 17 N.M. 644, 647, 131 P. 976, 977 (1913).

cause is essentially immaterial to whether the criminal defendant privilege applies.

Although a removal proceeding affords a public rather than a private remedy, classifying the removal action as civil ignores the policies that may be violated if the criminal defendant privilege does not apply. Self-preservation, equalization of the removal process, and elimination of misleading appearances of guilt outweigh competing policies favoring a streamlined removal proceeding. Accordingly, the privilege should apply. The application of the criminal defendant privilege to a removal proceeding conforms with Justice Powell's view that some noncriminal and nonpecuniary sanctions deserve the same procedural safeguards which are accorded criminal matters.[82] Such a viewpoint recognizes that labels are a poor substitute for sound reasoning.[83]

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[82]*See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (Powell, J., concurring). For instance, in the case of a drunken-driving or hit-and-run conviction, the punishment does not generally include imprisonment. Losing one's driver's license is the most common result. Depending on the individual's circumstances, the loss of a driver's license may be a more severe punishment than a brief incarceration. Consequently, a more sophisticated consideration of the policies underlying the additional safeguards afforded in criminal actions should be engaged in whenever "the deprivation of property rights and interests is of sufficient consequence." *See id.* at 48-49.

[83]One might argue that courts may weigh these policies differently, depending on the status or importance of one's office. Arguably, public interest in the removal of officers may vary according to an officer's position of trust. An officer holding an important office affecting public security or welfare may not warrant the same procedural safeguards because of the public's overwhelming interest in removing corrupt officials. Technical impediments, such as the criminal defendant privilege, may delay, if not shortcircuit, citizen efforts to remove incompetent and dishonest officials; yet, drawing a distinction on the basis of an individual officer's position is highly artificial. The position will be important to an accused official, regardless of its relative status or elevation in the governmental scheme. The stigma of being removed from office on any level implicates the policies favoring the extension of extra-procedural safeguards. In fact, the stigma may increase proportionally to the prestige and position of higher office. Thus, courts should weigh the policies in the same manner for any official, notwithstanding any difference in authority.