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NEW DIMENSIONS TO THE PRIVILEGE AGAINST SELF-INCRIMINATION: THE SUPREME COURT AND THE FIFTH AMENDMENT

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HISTORICALLY the Supreme Court of the United States has permitted individuals to assert the privilege against self-incrimination only within defined circumstances. The one judicial test is: will the answers incriminate directly or provide a link in the chain of evidence? This test has made it possible for the Court to identify those instances in which the privilege could not be asserted—situations in which there is no real danger that answers will lead to criminal prosecution.[1] Since the emphasis is on whether a criminal proceeding is a distinct possibility, the Court has decided that the privilege may not be asserted when a statute of limitations bars prosecution, or when the ground for refusing to answer is that the

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1 While some of these situations will be discussed in the text, others can be briefly noted at this time. One example is that the privilege may not be claimed if the individual has waived it. For example, if he takes the stand in his own defense, or if he voluntarily "answered as to materially criminating facts . . . he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate." Foster v. People, 18 Mich. 226, 276 (1896), cited by the Court with approval in Rogers v. United States, 340 U.S. 367, 370 (1951).

The Court has also ruled that the privilege is personal and may not be asserted to protect another. Brown v. Walker, 161 U.S. 591 (1896); United States v. Murdock, 248 U.S. 141 (1931); Vatjauer v. Commissioner of Immigration, 273 U.S. 103 (1927); and Smith v. United States, 337 U.S. 137 (1949).

A third instance is the Court's declaration that the privilege does not extend to corporate records. Books, records, and papers of a corporation are kept "in a representative rather than in a personal capacity [and] cannot be the subject of the privilege against self-incrimination, even though production of the papers might tend to incriminate personally." United States v. White, 322 U.S. 694 (1944); Rogers v. United States, 340 U.S. 367 (1951); McPhaul v. United States, 364 U.S. 372 (1960).

witness might subject himself to social disgrace. Where the statute of limitations bars prosecution, it is obvious that no criminal action is possible; therefore, the witness may be compelled to testify. The second reason, that is, the matter of social disgrace, has been no less obvious to the Court as an instance in which the claimed danger does not fall within its construction of the clause. However, such things as social disgrace and the possibility of loss of job have been sufficiently sound reasons in the judgment of some justices to urge a more liberal application of the privilege.[2]

While, then, a few argue that the self-incrimination clause of the fifth amendment should provide an absolute shelter for those who seek its protection, a majority of the members of the Court have adhered to the narrow construction. This was true, for example, in *Brown v. Walker* (1896),[3] with the Court specifically choosing a narrow rather than literal construction of the clause; and it had been apparent many years later when Justice Frankfurter rejected a request that the Court " 'return' to a literal reading" of the fifth amendment.[4]

The purposes of this paper are to determine (1) how broad are the areas within which the privilege may now be asserted? and (2) how do recent decisions differ from prior rulings in similar situations? To reach these purposes it will be necessary to consider how the privilege operates with respect to four specific matters: (1) the incorporation of the privilege into the due process clause of the fourteenth amendment, thereby making it operational against the states;[5] (2) the effect upon immunity statutes and the two sovereignties doctrine of the Court's "reading" the privilege against self-incrimination into the fourteenth amendment;[6] (3) the

2 In stating that the privilege only protects against criminal prosecution the Court has rejected various efforts to claim the privilege on grounds of social disgrace. However, Justice Field argued that nothing was more abhorrent than to compel a person, who had achieved status within society, "to reveal crimes of which he had repented, and of which the world had been ignorant." Brown v. Walker, 161 U.S. 591, 632 (1896). Similar objections have been voiced by Justices Black and Douglas in dissenting opinions in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 141 and 176 (1961).

3 The Court chose to construe the clause "as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment." 161 U.S. 591, 594 (1896).

4 Ullmann v. United States, 350 U.S. 422, 438 (1956). The sole concern of the clause "is, as its name indicates, with the danger to a witness" of being forced to incriminate himself. *Ibid.*

5 Malloy v. Hogan, 378 U.S. 1 (1964).

6 Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

prohibition on prejudicial comment on assertion of the privilege in state courts;[7] and (4) the relationship of the self-incrimination provision to statutes requiring the registration of members of proscribed organizations.[8] The first three subjects pertain in some way to the American federal-state system and may be considered together. The fourth relates largely to the federal government, especially to the problems created by the Internal Security Act of 1950, and will be discussed separately.

The Two Sovereignties Doctrine

In a number of decisions the Court had held that an individual could not claim the privilege against self-incrimination if he had been given immunity from criminal prosecution.[9] Such decisions had been in accordance with the Court's narrow construction of the self-incrimination clause, and in fact were applied even though the immunity was not perfect in that a witness' answers might be used against him by another sovereign.[10] Thus, the two sovereignties doctrine developed from these instances of individuals being caught between two governments. It also had a direct relationship to the question of whether the privilege could be successfully asserted. Its history should be examined to determine how it evolved and how it has been modified recently.

The Court has not always followed a two sovereignties rule in self-incrimination cases. Different positions had been taken in the various cases which arose between *United States v. Saline Bank* (1828)[11] and *Murphy v. Waterfront Commission* (1964).[12] Not until the 1930's had the two sovereignties doctrine been explicitly stated by the Court.[13]

Initially, in *Saline Bank*, there had been at least a suggestion

7 *Griffin v. California* overturns the practice in some states where court officers are permitted to make negative comments regarding a person's claim of the privilege. 380 U.S. 609 (1965).

8 Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

9 *E.g.*, Brown v. Walker, 161 U.S. 591 (1896), and Ullmann v. United States, 350 U.S. 422 (1956).

10 United States v. Murdock, 284 U.S. 141 (1931); Knapp v. Schweitzer, 357 U.S. 371 (1958).

11 26 U.S. 100 (1828).

12 378 U.S. 52 (1964).

13 United States v. Murdock, 284 U.S. 141 (1931); United States v. Murdock, 290 U.S. 389 (1933).

that the constitutional privilege could be asserted whenever a second sovereign was involved.[14] Yet that decision was all but overlooked by the Court in the next 100 and more years. Only *Ballmann v. Fagin* (1906)[15] acknowledged it as a precedent before the *Murphy* decision in 1964.

The *Saline Bank* case originated as an equity action wherein the United States sought discovery and relief against the bank and its officials. A law of the State of Virginia forbade any company, not having a state banking charter, to trade or deal as a bank within the state's jurisdiction. Penalties, in the form of fines against such company and its officials, were prescribed in the Virginia statute. Consequently, the defendants in the action had insisted that they not be compelled to make disclosures whereby they might accuse themselves of criminal conduct under the law of Virginia.

The defendant's plea was sustained in both the United States District and Supreme Courts. Justice Marshall's decision, upholding the defendants' right to claim the privilege, is pertinent to this essay for two reasons: first, he had stated the rule regarding self-incrimination as being clearly "that a party is not bound to make any discovery which would expose him to penalties. . . ."[16] Second, the penalties which he had in mind were those prescribed in the Virginia law, for he had stated that the reason for the defendants' pleas had been that they would subject themselves to penalties under the statute of Virginia. Therefore, Marshall said, this case fell within the rule regarding a person's exposing himself to the danger of prosecution.

The Virginia statute declared it unlawful for an association or company to operate as a bank without a charter, and it authorized the State Attorney General to initiate an equity action against any association found in violation of the law. A proviso stated:

> [N]o disclosure made by any party defendant to such suit in equity, and no books or papers exhibited by him in answer to the bill, or under the order of the court, shall be used as evidence against him in any motion or prosecution under this law. . . .[17]

14 *Supra* note 11, at 104.
15 200 U.S. 186 (1906).
16 *Supra* note 11, at 104.
17 *Id.* at 101.

This immunity provision of the Virginia statute was not applicable in *Saline Bank*, since the proceeding involved there was not the kind to which the law had reference. Nor, in view of the specific language of the statute, could there have been a statutory construction declaring that the legislative intent was to protect a person against criminal prosecution, even though disclosure had been made within the jurisdiction of another sovereign. In view of these things, Justice Marshall's ruling takes on added significance, for it permitted nothing resembling the two sovereignties doctrine.

While it is true that Justice Marshall had not specifically rejected the two sovereignties doctrine, it was at least implicit that the Court would not permit one sovereign to benefit from discoveries made within the jurisdiction of another. That this implied ruling was generally disregarded by the Court before *Murphy v. Waterfront Commission* (1964)[18] becomes apparent in an examination of a number of decisions in the Nineteenth and Twentieth Centuries.

The first several cases of significance to this study were different from *Saline Bank* in that immunity statutes, national and state, posed specific problems. *Counselman v. Hitchcock* (1892)[19] had been one case in which the petitioner claimed the privilege against self-incrimination, even though a national immunity law was available. He refused to answer questions on the ground that the National Immunity Act[20] did not protect him against the danger of criminal proceedings in a state court. In this instance, the Court felt no urgent need to answer the question whether the petitioner had properly refused to make disclosures, since the national immunity statute was too narrow in its protection even as to the possibility of federal criminal proceedings.[21]

While the Court had refused to enter into a discussion of the matter of two sovereigns, it had announced that the statute

18 378 U.S. 52 (1964). *Ballmann v. Fagin* had been decided on other grounds, Holmes at least acknowledged Marshall's ruling in stating: "according to *United States v. Saline Bank* . . . he was exonerated from disclosures which would have exposed him to penalties of the state law." 200 U.S. 186, 195 (1906).

19 142 U.S. 547 (1892).

20 15 Stat. 37 (1868).

21 Counselman v. Hitchcock, 142 U.S. 547 (1892).

"must afford absolute immunity against future prosecution of the offense to which the question relates."[22] If this statement were broadly construed and applied, it would protect an individual against the possibility of being tried by a second sovereign on the basis of testimony which he had provided to the first. This was in the mind of the appellant in *Brown v. Walker* (1896).[23] But in that case a majority of the justices rendered a statutory construction which removed the possibility of prosecution in the state courts: the immunity provided was to be "general and to be applicable whenever and in whatever court such prosecution may be had."[24] Nor did the Court find an urgent need to meet the problem in *Hale v. Henkel* (1906),[25] since the possibility of prosecution by the second sovereign was too remote.[26]

Nothing explicit with regard to the two sovereigns issue had been stated before the two *Murdock* decisions of the 1930's. Justice Marshall's brief opinion in the *Saline Bank* case had suggested that the constitutional privilege operated. *Counselman v. Hitchcock* (1892) had resulted in the overthrowing of an immunity statute without discussing the two sovereignties issue. *Brown* had sustained as valid the 1893 National Immunity Act and had dismissed the question about the two sovereigns by way of statutory construction. And in the *Hale* case the Court had refused to discuss the matter by reason of the remoteness of the possibility that the witness would have testified himself into a state criminal action.

Despite a generally confused history relating to the matter of the two sovereigns, as reflected in a number of decisions other than those discussed above,[27] the Court presumed in *United States v. Murdock* (1931)[28] that the two sovereignties rule was established doctrine:

> This court has held that immunity against state prosecution is not essential to the validity of federal statutes, declaring that a

22 *Ibid.*
23 161 U.S. 591 (1896).
24 *Id.* at 595.
25 201 U.S. 43 (1906).
26 *Id.* at 69.
27 *E.g.*, Jack v. Kansas, 199 U.S. 372 (1905); Ballmann v. Fagin, 200 U.S. 186 (1906). And see Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A. L. Rev. 549 (1957).
28 284 U.S. 141 (1931).

> witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute.[29]

This pronouncement indicated that the two sovereignties rule had been previously enunciated and long followed, and that this doctrine was compatible with the constitutional provision against compulsory self-incrimination. Yet in the second *Murdock* case (1933)[30] the Court admitted that not until the previous decision "had it been settled" that a witness under investigation by a federal tribunal "could not refuse to answer on account of probable incrimination under state law."[31] At most this admission meant that, while there might have been confusion prior to 1931, there could be no longer be any question whether the privilege might be asserted under such circumstances. Moreover, the first decision had made it clear that this was a two-way arrangement: a witness could not claim the privilege before a United States tribunal on the ground that he might incriminate himself under state law; nor were state immunity statutes to be voided by reason of the possibility of subsequent federal prosecution.

The second situation had been present in *Feldman v. United States* (1944),[32] for the petitioner, who had answered questions with regard to criminal activities under state law, found that his immunized testimony had been used against him by the national government. In answering Feldman's objections to the use of his testimony, the Court applied both the silver platter[33] and national supremacy doctrines. With respect to the first of these the Court said that the national government had not compelled discovery, therefore, the evidence was not barred merely because it had been given under cover of the state's immunity statute.[34] Under the second doctrine the Court insisted that state laws may not operate

29 *Id.* at 149.

30 290 U.S. 389 (1933).

31 *Id.* at 396.

32 322 U.S. 487 (1944).

33 In *Mapp v. Ohio* Justice Clark defined the "silver platter" doctrine as one "which allowed federal judicial use of evidence seized in violation of the Constitution by state agents." 367 U.S. 643, 653 (1961).

34 *Supra* note 32, at 492. This doctrine followed the Court's reasoning in an earlier search and seizure case: "What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such (state) officials." Weeks v. United States, 232 U.S. 383, 388 (1914).

to prevent the United States from acting in its authorized capacity.[35]

No matter which of the three doctrines might be applied, a dilemma persisted. If a witness were to refuse to answer incriminating questions, he placed himself in jeopardy of a contempt citation. And if he did answer the questions, he ran the risk of being prosecuted by the other sovereign. The Court was to become increasingly aware of this dilemma. One situation reflecting this problem was found in *United States v. Kahriger* (1953),[36] a case in which the danger of prosecution by the second sovereign was the central issue. The 1951 Wagering Tax Act required those who purchased the federal gambling stamp to register with Internal Revenue and to provide specific information.[37] To the bookmaker, the revenue feature of this statute was secondary in importance to the objective of obtaining information, since the data provided on the registration form was to be made available to state authorities. Kahriger had claimed the privilege of the fifth amendment in refusing to register. The Court ruled against him, stating that the act was prospective rather than retrospective, and that it did not require him to make disclosures about offenses already committed. On the other hand, Justices Black and Douglas saw the act in a different light: it was "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison."[38]

In the following year, the Court was faced with the applicability of the two sovereigns doctrine in another situation in which both national and state governments were interested in a gambler's activities. Adams, a resident of Maryland, had cooperated fully with a congressional committee investigating organized crime in the United States. His cooperation had been obtained under a national immunity act; however, his testimony was also used against him by the State of Maryland in a proceeding under

35 Feldman v. United States, 322 U.S. 487 (1940). It is at least worth mentioning that John Marshall, the author of the national supremacy doctrine, had been faced with an identical situation in *Saline Bank*, yet he did not permit this doctrine to stand as an obstruction to defendant's claim of the privilege. 26 U.S. 100, 104 (1828).

36 345 U.S. 22.

37 26 U.S.C. § 4412 (1954).

38 *Supra* note 36, at 36.

its anti-gambling laws. *Adams v. Maryland* (1954)[39] was to prove an exception to the application of the two sovereigns doctrine, and it was not consonant with prior rulings in the *Murdock* and *Feldman* decisions. In the *Adams* case the Court ruled that Congress intended that the immunity provision extend to both state and national governments, since it forbade the use of such testimony "in any criminal proceeding . . . in any court. . . ."[40]

At least by implication this represented an application of the national supremacy doctrine. Congress may make a national law operate in such a way as to affect state laws or policies, a ruling which had been enunciated many years earlier by Chief Justice Marshall in *Cohens v. Virginia* (1821).[41] Yet this was not in accord with the *Murdock* and *Feldman* decisions with respect to immunity statutes, for they suggested that neither sovereign might interfere with legitimate functions of the other.

If, in the decisions which began with *United States v. Murdock* (1931),[42] the Court seemed to be unduly harsh in permitting the existence of a dilemma for persons caught between the two sovereigns, it might best be explained in terms of the Court's idea about the price which we must pay for federalism.

To some persons, especially those caught in the dilemma, the price we pay for federalism is too high. Included in these costs is the possibility, as noted by the Michigan Supreme Court, that federal rights will be weakened:

> It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution.[43]

No less concerned about the high cost of federalism were Chief Justice Warren and Justices Douglas and Black, as revealed in their dissenting opinions in *Knapp v. Schweitzer* (1958),[44] and *Mills v. Louisiana* (1959).[45]

39 347 U.S. 179 (1954).
40 *Id.* at 181, 18 U.S.C. § 3486 (1948).
41 6 Wheat. 264 (1821).
42 *Supra* note 28.
43 People v. Den Uyl, 318 Mich. 645, 651, 29 N.W.2d 284, 287 (1947).
44 357 U.S. 371, 382 (1958).
45 360 U.S. 230, 231, and 236 (1959).

In each of these cases, there had been some degree of collusion between state and national officials, a factor which added a new kind of question to the issue of immunity acts and the two sovereignties doctrine. Knapp, a partner in a New York firm engaged in interstate commerce, had refused to cooperate with a state grand jury investigating bribery of labor union officials, and conspiracy and extortion in labor relations. He contended that the New York Immunity Act could not protect him against prosecution under the national Labor Management Relations Act of 1947.[46] The United States law also made it a crime for an employer to give money or things of value to labor union officials.[47] The *Knapp* case was in the pattern of others. It involved a situation in which both state and national laws defined similar conduct as crimes, and both state and national officials were interested in obtaining information relevant to the commission of offenses and the effectiveness of law enforcement. But there had been one element of difference in *Knapp* in that the United States Attorney for the Southern District of New York had publicly announced his intention to cooperate with state officials investigating unfair labor practices. His announced intention was a promise of cooperation generally and had not been stated specifically with respect to Knapp's conduct.

A majority of the members of the Court admitted that if a national officer were "a party to the compulsion of testimony by state agencies, the protection of the fifth amendment would come into play. . . ."[48] However, the Court continued, it was not necessary to decide that issue in *Knapp*, since the record was "barren of evidence that the State was used as an instrument of federal prosecution or investigation."[49]

The *Knapp* decision reaffirmed the two sovereignties doctrine through a discussion about the "price to be paid for our federalism." Individuals might regard this as too high a price, the Court said, but:

> [Against] it must be put what would be a greater price, that of

46 § 302 of the Labor Management Relations Act of 1947, 61 Stat. 136, 157.
47 29 U.S.C. § 186 (1947).
48 *Supra* note 44, at 380.
49 *Ibid.*

> sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.[50]

Even while restating the two sovereignties doctrine the Court warned national officials not to take advantage of this recognition of the State's autonomy in order to evade the Bill of Rights.[51] In view of this warning we might properly ask—How much evidence of collusion must there be?

There had been little by way of an answer to this question in *Mills v. Louisiana* (1959).[52] However, the three dissenters were satisfied that there had been ample evidence of collusion between national and state authorities. Chief Justice Warren claimed that the decisions in *Knapp* and *Feldman*, when taken in conjunction, meant that a person could be convicted of a federal crime on the basis of compelled testimony in a state investigation:

> Such opportunities will not go unused unless the courts are vigilant to protect the rights of persons who find themselves faced with such coaction of federal and state prosecuting agencies. Such vigilance becomes increasingly required as the Federal Government, through prosecutions for tax evasion, moves into the criminal areas regulated by the States.[53]

What evidence was there that "such coaction" had been present in the *Mills* case? To answer this question we might look to the facts of the case as well as to the materials brought to light by Chief Justice Warren.

Mills and others, police officials of the city of New Orleans, were suspected of having accepted bribes from persons conducting lotteries in violation of state law. These officers had been called before a grand jury and, under authority of state law, were offered full immunity from state prosecution for crimes, other than perjury, which might be brought to light by their answers. They still refused to answer the questions, claiming the privilege of the fifth amendment. At the time that the state grand jury was sitting, national officials and a United States grand jury were inquiring into the possibility that some police officers had evaded payment of federal taxes, a felony under national law.

50 *Supra* note 44, at 381.
51 *Supra* note 44, at 380.
52 360 U.S. 230 (1950).
53 *Id.* at 233.

Chief Justice Warren noted that each of the appellants "had been required to execute, and had executed, waivers of the statute of limitations" with respect to federal tax liabilities during the years in question.[54] Moreover, the parties had stipulated that at the time of the investigation there had been cooperation between national, state and local officials regarding public bribery on the part of certain members of the New Orleans Police Department and income tax evasion, felonies under the law of the United States of America and the State of Louisiana.[55] Evidence of collusion in the *Mills* case had been established. Nevertheless, the majority of the Court dismissed the appeal on authority of the *Knapp* decision.

In the *Knapp* case the Court restated what had been true since *Twining v. New Jersey* (1908):[56]

> The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.[57]

Over a period of many years the Court had refused to "read" the privilege against self-incrimination into the due process clause of the fourteenth amendment;[58] consequently, the individual was not at liberty to assert this privilege in a state court proceeding or before another agency of the state. During the period 1923 to 1961, the Court examined state court proceedings merely to determine whether there were violations of fundamental principles of liberty and justice. This meant, then, that states were not required to operate according to specific procedural safeguards such as those found in the fourth, fifth, sixth, and eighth amendments.

While this doctrine was consistent with the Supreme Court's ruling in *Barron v. Baltimore* (1833)[59] that the Bill of Rights was not applicable to the states, it also permitted two different standards to operate within the United States. Not until the 1960's did

54 *Supra* note 52, at 232.
55 *Ibid.*
56 211 U.S. 78 (1908).
57 Knapp v. Schweitzer, 357 U.S. 371, 380 (1958).
58 *E.g.*, Adamson v. California, 332 U.S. 46 (1947), and Cohen v. Hurley, 366 U.S. 117 (1961).
59 7 Pet. 243 (1833).

the Court begin to correct this situation, roughly four decades after it first began to inquire into state judicial proceedings.[60]

It is reasonable for us to presume that the Court's persistent refusal to incorporate the privilege into the fourteenth amendment, and thereby permit two standards, had been responsible for its positions in *United States v. Murdock* (1931),[61] *Feldman v. United States* (1944),[62] and the *Knapp* and *Mills* cases. This presumption proceeds first from the fact that there cannot be consistent adherence to principle where different standards of official conduct are permitted. Second, while judges might claim, as they did in *Hurtado v. California* (1884),[63] that time produces new procedural safeguards (in lieu of the self-incrimination clause) as adequate substitutes for time-tested ones, in many instances these are not really alternatives. A judge might be a suitable alternative to jurors, or an information serve in place of an indictment. But, in the absence of the privilege against self-incrimination or a prohibition on double jeopardy, no alternative safeguard is available to the defendant. Third, since the Court was faced with a situation in which federal procedure was examined in light of specific requirements (privilege against self-incrimination), whereas state court proceedings were examined in light of abstract principles (fundamental principles of liberty and fairness), it was bound to be confused whenever both sovereigns were simultaneously involved.

The Court's refusal to impose a single standard left unanswered a question raised by Justices Black and Douglas. Can a state court, they asked, "override a claim of a federal right seasonably raised in the state proceeding," without destroying or nullifying that right?[64] An answer to this question was forthcoming five years later in cases out of Connecticut[65] and New Jersey.[66]

As recently as 1961, the Court had been called upon to answer

60 Moore v. Dempsey, 261 U.S. 86 (1923), was followed by the Scottsboro Boys cases, 287 U.S. 45 (1932), and 294 U.S. 587 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Palko v. Connecticut, 302 U.S. 319 (1937).

61 284 U.S. 141 (1931).

62 322 U.S. 487 (1944).

63 110 U.S. 516 (1884).

64 Mills v. Louisiana, 360 U.S. 230, 237 (1959).

65 Malloy v. Hogan, 378 U.S. 1 (1964).

66 Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

the question, may a witness claim the privilege of the fifth amendment in a state court proceeding?[67] At that time the Court again held that the privilege could not be claimed and relied upon precedents going back to the *Twining* decision of 1908.[68] Yet in 1964, in *Malloy v. Hogan*,[69] the Court announced that the fourteenth amendment provided the petitioner with the protection of the self-incrimination clause of the fifth amendment. The *Malloy* decision was part of a pattern which began with *Mapp v. Ohio* (1961).[70] Instead of judging state court proceedings in light of fundamental principles of liberty and justice, lying at the base of American civil and political institutions,[71] the Court began to demand that state authorities and courts operate within the limits of specific procedural safeguards.[72]

While, then, the *Malloy* decision was only one instance in which a provision of the Bill of Rights was declared operational against the states through the fourteenth amendment, the dissenters argued that its possible adverse effect upon the federal system more than outweighed whatever merits it might have. They believed that the majority's decision involved serious consequences "for the sound working of our federal system in the field of criminal law."[73] Support for this argument was found in *Murphy v. Waterfront Commission* (1964),[74] a decision whereby the Court repudiated the two sovereignties doctrine insofar as it pertained to immunity statutes and self-incrimination.

As was previously discussed,[75] Justice Marshall had early ex-

67 Cohen v. Hurley, 366 U.S. 117 (1961).

68 *Id.* at 128.

69 378 U.S. 1 (1964).

70 367 U.S. 643. In the *Mapp* decision the Court made the exclusionary rule (exclusion of evidence illegally obtained) mandatory against the states under the fourteenth amendment in the same way that it had previously operated against the national government.

71 Palko v. Connecticut, 302 U.S. 319, 328 (1937).

72 Included within this category other than *Mapp* are *Gideon v. Wainwright*, 372 U.S. 335 (1963)—all who are charged with felonies in state courts have right to counsel; *Robinson v. California*, 370 U.S. 660 (1960)—applies eighth amendment's prohibition on cruel and unusual punishment to states; *Malloy v. Hogan*, *supra* note 65, and *Pointer v. Texas*, 380 U.S. 400 (1965)—extend the sixth amendment's right to confront witnesses to state court proceedings. The *Murphy* case and *Griffin v. California*, 380 U.S. 609 (1965) are consequences of extending the privilege against self-incrimination to witnesses in state proceedings.

73 378 U.S. at 27.

74 378 U.S. 52 (1964).

75 *Supra* at notes 14 and 15.

pressed the view that the fact that two sovereignties were involved should not preclude a defendant from receiving complete protection against self-incrimination.[76] Only Justice Holmes' reference in 1906 to the *Saline Bank* decision had been significant with respect to Justice Marshall's opinion. In *Ballman v. Fagin*,[77] Justice Holmes cited the bank decision in exonerating the witness "from disclosures which would have exposed him to the penalties of the state law."[78] On that occasion there had been an acknowledgement of a constitutional doctrine which was certainly not apparent in other decisions, especially when the two sovereignties rule became fixed.[79] But this constitutional doctrine was reestablished in the *Murphy* case. The Court reasserted Justice Marshall's ruling, stating that the privilege against self-incrimination protects a witness in a federal court from being compelled to give testimony which could be used against him in a state court.[80] Moreover, what had once been true in *Saline Bank* with respect to the operation of the privilege in federal courts was now made true in state courts as well. To understand the implications of this decision, we should consider the *Murphy* case more fully.

The two petitioners, Murphy and Moody, had been summoned to testify before the Commission. An investigation had been instituted to determine the causes of a work stoppage at the Hoboken piers. Immunity laws of both New York and New Jersey were invoked to protect the witnesses against criminal action in state courts. Nevertheless, they refused to give testimony on the ground that state immunity laws could not protect them against criminal prosecution under federal laws. Both civil and criminal contempt judgments were pronounced by the court of first instance, and while the New Jersey Supreme Court reversed the criminal contempt conviction on procedural grounds, it sustained the civil judgment on the authority of *Knapp v. Schweitzer* (1958),[81] and other cases applying the two sovereignties doctrine.[82]

76 United States v. Saline Bank, 26 U.S. 100 (1828).
77 200 U.S. 186 (1906).
78 *Id.* at 195.
79 United States v. Murdock, 284 U.S. 141 (1931), and 290 U.S. 389 (1933).
80 378 U.S. 52, 77-8.
81 357 U.S. 371 (1958).
82 Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931).

This was to be the proper moment for an appeal to the United States Supreme Court, since there was now an opportunity to consider the two sovereignties doctrine at the same time that the privilege against self-incrimination was being made applicable against the states through the fourteenth amendment.

Both the *Malloy* and *Murphy* decisions were rendered on the same day. The first, of course, was responsible for the repudiation of the *Twining* precedent; and the second provided the Court with an opportunity to reverse every deviation from Marshall's opinion in *United States v. Saline Bank* (1828).[83] Justice Goldberg both reiterated Justice Marshall's rule and announced a new doctrine:

> We hold that the constitutional privilege against self-incrimination protects a State witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.[84]

Several consequences became possible with the *Murphy* decision. First, by making complete the protection of immunities laws, the Court had introduced a variation on the two-way arrangement prescribed in the first *Murdock* decision. There the Court had said that the privilege could not be asserted before a United States tribunal on the ground of possible incrimination under state law; nor were state immunity statutes to be voided by reason of possible federal prosecution. Now, both national and state immunity statutes had to operate to protect the witness against the other sovereign. Second, since this was a two-way arrangement, there would no longer be a need for national laws to extend immunity provisions to state court proceedings, as had been the case in both *Brown v. Walker* (1896),[85] and *Adams v. Maryland* (1954).[86] Third, the *Murphy* decision represented a specific repudiation of any of the several doctrines (two sovereignties, silver platter and national supremacy) which had been stated in previous cases. Finally, no longer in the area of self-incrimination would the Court declare that the unfortunate dilemmas faced by individuals were part of the price which must be paid for federalism.

83 26 U.S. 100 (1828).
84 378 U.S. at 77.
85 161 U.S. 591 (1896).
86 347 U.S. 179 (1954).

Prejudicial Comment on the Assertion of the Privilege

These immediate consequences of repudiating *Twining* and other decisions were followed in 1965 with another, the Court's refusal to permit prejudicial comment when defendants claimed the privilege against self-incrimination. Privileges similar to that of the fifth amendment are found in state constitutions. But six states, New Jersey, Iowa, California, Connecticut, Ohio and New Mexico permitted inferences to be drawn from a person's refusal to testify.[87] In fact, such had been the actual issue in *Twining v. New Jersey* (1908).[88] There, the trial court judge, acting under authority of state law, had advised the jurors that they might take into consideration the defendant's refusal to take the stand in his own defense. It had been in conjunction with answering the question whether the New Jersey law allowing comment violated the fourteenth amendment that the Court had refused to "read" the privilege of the fifth into the fourteenth.

As a consequence, not all privileges under state constitutions operated as did that of the fifth amendment, since the state was at liberty to decide whether prejudicial comment was permissible. But this also meant that there were two different procedural standards present within the United States. At the national level, as indeed in most states, unfavorable presumptions could not be created by a defendant's assertion of the privilege.[89] Moreover, the United States Supreme Court, on occasion, had condemned

[78] Although the California and Ohio Constitutions specifically prohibit compulsory self-incrimination, they also qualify the privilege by permitting comment. In Art. I, § 13 of the California Constitution it is provided that the defendant's "failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by the counsel, and may be considered by the court or the jury." The Ohio Constitution stipulates that the defendant's failure to testify may be considered by the court and jury and may be made the subject of comment by counsel." Art. I, § 10.

In Connecticut the constitutional privilege (Art. I, § 9) had been qualified by rulings of the state courts. Judges, but not prosecutors, could make prejudicial comment. State v. Henno, 119 Conn. 29, 174 Atl. 181 (1934). The Constitution of New Mexico also prohibits compulsory self-incrimination (Art. II, § 15); but the privilege is qualified by statute (N.M. Stat. Ann., § 41-12-19).

Neither the New Jersey nor the Iowa Constitutions prohibit compulsory self-incrimination. Under rulings of their respective state courts prejudicial comment had been permitted. See State v. Corby, 28 N.J. 106, 145 A.2d 289 (1958), and State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939).

[88] 211 U.S. 78 (1908).

[89] 18 U.S.C. § 3481 (1964).

> the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment. . . .[90]

On the other hand, a different principle was permitted by *Twining*. An attempt had been made in 1947 to overturn *Twining*. Adamson, a person charged with murder under California law, had refused to testify in his own defense. By taking the witness stand he might have made a convincing statement about his innocence, but he would also have made it possible for the prosecution, on cross-examination, to ask him about three previous convictions. A dilemma was present for the defendant under these circumstances; if he waived the privilege by testifying in his own behalf, he made possible the impeachment of his defense by inviting questions about previous convictions; yet if he remained silent, the prosecution was no less advantaged by the state law permitting prejudicial comment.[91] The defendant was convicted. He appealed to the Supreme Court, urging that it proclaim non-self-incrimination as "a fundamental national privilege or immunity protected against state abridgment" by the provisions of the fourteenth amendment.[92] The Court, consistent with its prior declarations, ruled that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice.[93]

The decisions in the *Twining* and *Adamson* cases were to stand until 1965. Those precedents recognized, in effect, two different legal principles because of the differences in practices within national and state judicial systems, and even differences as to practices among the states. On the authority of the *Twining* and *Adamson* decisions, the trial court judge in a later California murder case commented to the jury:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he

90 Slochower v. Board of Education, 350 U.S. 551, 557 (1956). And see Frankfurter's equally strong rebuke. Ullmann v. United States, 350 U.S. 422, 426 (1956).

91 Adamson v. California, 332 U.S. 46 (1947).

92 *Id.* at 49.

93 *Supra* note 91, at 53.

> fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.[94]

On the one hand, there had been the trial judge's explicit statement to the jury that Griffin had a right to claim the constitutional privilege. On the other hand, there had been the foregoing comment that unfavorable inferences might be drawn from Griffin's refusal to testify. On appeal to the Supreme Court in *Griffin v. California*,[95] the quoted comment by the judge was held to be reversible error.

Griffin appears as a logical extension of the Court's decision in *Malloy v. Hogan* (1964).[96] Actually, the *Griffin* case was more closely related to *Twining v. New Jersey* (1908),[97] since the central issue in each was that of prejudicial comment, not whether the fourteenth amendment embodied the privilege of the fifth. *Malloy v. Hogan* overturned *Twining* insofar as the latter held that the federal privilege was not available in a state court. But whether prejudicial comment was to be permitted had been, in some states, a legislative rather than a constitutional matter. Even at the national level it was possible to question whether the amendment itself or the statute[98] prohibited presumptions of guilt.

No problem existed as far as the Supreme Court was concerned. What the national statute did, declared Justice Douglas, reflected the "spirit of the Self-Incrimination clause" in forbidding prejudicial comment.[99] Therefore, even in the absence of a statutory prohibition, the Constitution would protect the defendant; and the same principle was applied to the states under the fourteenth amendment.

Within the brief span of eleven months, June 15, 1964 to April 28, 1965, and through the decisions of the *Malloy*, *Murphy*, and *Griffin* cases, the Court had reversed a number of precedents.

94 Griffin v. California, 380 U.S. 609, 610 (1965).
95 *Ibid.*
96 378 U.S. 1 (1964).
97 211 U.S. 78 (1908).
98 18 U.S.C. § 3481 (1964).
99 Griffin v. California, 380 U.S. 609, 615 (1965).

The consequence of these decisions was that the self-incrimination clause had come to provide a protection unknown in previous years. These decisions also reflected the viewpoints of the dissents in the cases of the 1950's. Similarly, viewpoints in dissenting opinions were also to become acceptable to the majority as the Court turned its attention to still another matter, the relationship of compulsory registration requirements to the constitutional prohibition on self-incrimination.

Statutory Registration Requirements and the Privilege

The foregoing discussion focused upon the relationship of the privilege against self-incrimination to questions produced by the federal system. In this section we will consider the relationship of the privilege to statutory registration requirements, a matter which has been essentially a national concern, although, as demonstrated in *United States v. Kahriger* (1953),[100] it might involve federal questions as well. The *Kahriger* case had arisen from the National Wagering Tax Act. Bookmakers were required to purchase a stamp in each year in which they intended to accept wagers, and they were also required to file registration forms with the Internal Revenue Service. Since the information provided on these forms was available to state authorities, Kahriger refused to comply with the registration requirements. His claim that the privilege was available in such circumstances was invalidated by the Court on the ground that the law was prospective rather than retrospective. It was not necessary, therefore, for Kahriger to make disclosures of past gambling offenses which might be used against him in the state court. He was only required to make disclosures as to his future intentions.[101]

The Wagering Tax Act is but one of several national laws requiring that certain categories of persons register with an agency of the United States Government. Other examples are laws requiring the annual registration of aliens,[102] quarterly registration of

100 345 U.S. 22 (1953).

101 *Id.* at 32.

102 Registration requirements for aliens are found in 8 U.S.C.A. §§ 1301, 1302, 1303, 1304, 1305, and 1306 (1964).

lobbyists[103] and registration of those who seek to promote the interests of foreign governments.[104] None of these examples has an immediate and direct relationship to the self-incrimination clause. Bookies might indeed expect to be placed under surveillance by state authorities as a consequence of registering in accordance with the wagering statute; but their disclosures do not relate to offenses already committed. Criminal sanctions will not follow in the wake of disclosures that a man is an alien, a lobbyist, or the representative of foreign governmental interests.

But not all registration statutes fall within the same category regarding criminal sanctions. The Internal Security Act of 1950 imposes registration requirements upon leaders and members of certain organizations, and there can be immediate and severe consequences for those who disclose membership.[105] Under the terms of this Act, the Subversive Activities Control Board is empowered to identify communist-action or communist-front organizations,[106] as defined in the law.[107] Within thirty days after the Board has taken this first step, the officers of the organization are required to register with the Department of Justice, providing such information as is called for on the registration forms.[108] There is also a statutory requirement that individual members of the identified organization register if (1) the leaders failed to do so; or (2) their names were not included on the list filed by the officials of the organization.[109] The Act also prescribes severe penalties for failure to register.[110]

An individual is faced with a dilemma in view of these requirements. If he fails to register, there is the likelihood that criminal sanctions will be imposed for violating the statute's explicit requirements. If he does register as a member of a com-

103 Lobbyists are required to register with the Secretary of the Senate and the Clerk of the House. 2 U.S.C.A. § 267 (1964).

104 Foreign propagandists and representatives of foreign governments, except as stipulated in law, are required to register under the provisions of 22 U.S.C.A. § 612 (1964).

105 See *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 15-18 (1960), for the consequences of disclosing membership.

106 50 U.S.C.A. § 791(e) (1964).

107 These organizations are identified in the public policy section of the law, 50 U.S.C.A. § 781, and are defined in § 782 (1964).

108 50 U.S.C.A. §§ 786-788 (1964).

109 50 U.S.C.A. § 787 (1964).

110 Penalties for failure to register are prescribed for organizations in 50 U.S.C.A. § 794(a), and for individuals in (b) (1964).

munist action organization, he faces the possibility of criminal prosecutions under the Smith Act,[111] as well as the disability features of the Internal Security Act.[112] Loss of job or other social sanctions are not, of course, justifiable reasons for claiming the privilege; but the self-incrimination clause is surely brought into play by reason of the strong possibility of criminal action under national laws.

A long, often confused, pathway led from the adoption of the Internal Security Act in 1950 to the Court's disposition of one self-incrimination issue in 1965. One decision, *Communist Party v. Subversive Activities Control Bd.* (1961),[113] is especially pertinent to this essay. In that case, the Court was called upon to answer several constitutional questions, including one arising from the registration requirement. The Communist Party was the first of the communist-action organizations identified by the Board. Its officials refused to register the organization as required by law, claiming the privilege of the fifth amendment as a bar to this statutory requirement. In its argument the Party claimed that its officers were deprived of an opportunity to assert the privilege, since persons who go forward to claim it call attention to themselves as surely "as if they had in fact filed a registration statement."[114] A divided Court decided that the issue had been raised prematurely. But even while stating that the constitutional issue was not yet ripe, the Court proceeded to discuss the matter in some detail.

Admittedly, this was not an easy matter for judicial disposition. The privilege is no more an absolute right than any other found in the Constitution, a fact apparent in the Court's classifications of instances in which non-self-incrimination may not be asserted. Secondly, the issue of ripeness has been important to justices who subscribe to the principle of self-restraint, fearful

111 This 1940 statute makes it a crime to advocate the violent overthrow of government in the United States; and it also defines as a crime willful membership in any organization, the purposes of which are advocacy and violent revolutionary means to reaching their goals. 18 U.S.C.A. § 2385 *et seq.* (1964).

112 *E.g.*, inability to hold nonelective governmental office, 50 U.S.C.A. § 784 (1964). Denial of passports to members in violation of the act was held unconstitutional in *Aptheker v. Rusk*, 378 U.S. 500 (1964).

113 367 U.S. 1 (1961).

114 *Id.* at 107.

than an over-zealous use of judicial power might do violence to the democratic principle of majority rule and to the principle of separation of powers.[115]

That part of the Court's decision, which turned upon the matter of prematurity of the constitutional issue, left open the question whether the statutory requirements were in conflict with the self-incrimination clause. At least the Court had directed itself to a discussion of a possibly related ruling in *United States v. Sullivan* (1927).[116] However, for reasons which should be mentioned, the pertinency of the *Sullivan* case to the *Communist Party* case was questionable.

Sullivan, who was suspected of violating the Volstead Prohibition Act,[117] had refused to file an income tax return on the ground that he might incriminate himself. In this instance, he was faced with the question whether the required information would provide, directly or indirectly, disclosures about activities in violation of the prohibition statute. The Court ruled that the fifth amendment was not available to persons required to file income tax returns. However, Justice Holmes offered a partial concession to the defendant in stating:

> If the form of return provided called for answers that the defendant was privileged from making, he could have raised the objection in return, but could not on that account refuse to make any return at all.[118]

How pertinent is a concession of this nature to other statutory requirements, such as those of the Internal Security Act of 1950? The taxpayer has a certain anonymity in that he is but one of

115 Justice Brandeis stated the key elements of the doctrine of judicial self-restraint in *Ashwander v. TVA*, 297 U.S. 288 (1936). He stated: "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." In summary, these rules are (1) there must be an actual controversy; (2) constitutional questions will be answered only if the need arises; (3) the narrowest possible constitutional rule will be formulated; (4) if some nonconstitutional issue can be the basis for deciding the case, the Court will answer it rather than the constitutional question; (5) the party bringing the action must have standing to sue; (6) the party raising the constitutional question may not have benefited from the statute in question; and (7) if possible to dispose of the case by way of a statutory construction, the Court will do so rather than decide the constitutional question.

116 274 U.S. 259 (1927).

117 Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.

118 *Supra* note 116, at 263.

many millions of Americans who annually file income tax returns. He does not, therefore, call attention to himself as does the member of a communist-action organization required to register with the Department of Justice. Secondly, the taxpayer is permitted to assert the privilege with respect to some questions while preparing the return; but there is no corresponding stage in the process of registering as a member of a communist-action organization. For the latter, if the privilege is to be asserted at all, it must be at the time that he is directed by the Subversive Activities Control Board to register as a member of a proscribed organization. Otherwise, the mere act of identifying one's self as a member of a communist-action organization is an invitation to criminal prosecution.[119]

Nothing in the *Sullivan* decision suggests even a remote possibility that registration requirements of the Internal Security Act are compatible with the self-incrimination clause. This imperfect relationship of *Sullivan* to the question at hand caused Justice Frankfurter, in the *Communist Party* case, to comment "that the applicability of the *Sullivan* principle here may raise novel and difficult questions" as to the scope of the self-incrimination clause.[120] The Court's ruling that the constitutional issues "should not be discussed in advance of the necessity of deciding them,"[121] had left unanswered both the questions and the pertinency of *Sullivan.*

Answers to both of these matters were forthcoming four years later when the Court turned its attention to one statutory requirement—registration of individual members. This portion of the statute came into operation following the failure of the leaders of the Communist Party to register. In accordance with the statute, the Attorney General had initiated actions against individuals believed to be members of the Party. The action was commenced when, on request of the Attorney General, the Board ordered

119 This will probably depend upon whether he is an "active" member as per the Court's definition in *Scales v. United States,* 367 U.S. 203 (1961), or a "passive" member as in *Noto v. United States,* 367 U.S. 290 (1961). Regardless of these definitions, the Smith Act does define as a crime willful membership in any organization, the purpose of which is the violent overthrow of government. 18 U.S.C.A. § 2385 (1964).

120 Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 109 (1961).

121 *Ibid.*

William Albertson and Roscoe Q. Proctor to register. An order to this effect was affirmed by the Court of Appeals, District of Columbia Circuit.[122] Now, unlike the situation in *Communist Party v. Subversive Activities Control Bd.* (1961),[123] the privilege against self-incrimination was seasonably raised at the time that registration was actually required.

In *Albertson v. Subversive Activities Control Bd.* (1965),[124] the United States relied upon the *Sullivan* decision, arguing that the appellants were at liberty to answer some questions, and to "claim the privilege on the form as to others"; but they could not "fail to submit a registration statement altogether."[125] The Court described as misplaced this reliance upon *Sullivan.* The Court said that Justice Holmes' declaration:

> was based on the view, *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second,* that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim.[126]

Neither of these, the Court stated, was applicable to the *Albertson* case. The board is a tribunal, and it is in the position to judge the merits of appellants' claim to the privilege. Moreover, there was nothing frivolous about the claim, since the registration forms required information of an incriminating nature.[127]

An immunity clause was included in the Internal Security Act. This provided that an admission of membership would not constitute, *per se,* a violation of either the Internal Security Act or any other criminal statute, nor could the required information from one of the forms, IS 52a, "be received in evidence" against a registrant in any criminal action.[128] Not even this provision saved the registration requirement from the limitations imposed by the self-incrimination clause. The Court held that it was incomplete

122 Albertson v. Subversive Activities Control Bd., 332 F.2d 317 (D.C. Cir. 1964).
123 *Supra* note 113.
124 382 U.S. 70 (1965).
125 *Id.* at 78.
126 *Supra* note 124, at 79.
127 The Court made reference to possible action under 18 U.S.C. § 2385 (1964) or under 50 U.S.C. § 783(a) (1964). It also mentioned *Scales v. United States,* 367 U.S. 203 (1961).
128 50 U.S.C. § 783(f) (1964).

and did not meet the test as defined many years earlier in *Counselman v. Hitchcock* (1892),[129] since it did not preclude the use of information from another form, IS 52, as evidence, nor did it prevent the use of any of the information from either form "as an investigatory lead."[130]

The disposition of this matter of registration requirements and an individual's right to claim the privilege was not even suggestive of how the Court might respond to the other matter of the statute's calling upon organizational leaders to register. But *Albertson* was in accord with the other recent fifth amendment cases which had extended the protection of the privilege.

Conclusion

Not too many years ago, just prior to the *Malloy, Murphy, Griffin,* and *Albertson* decisions, it was reasonable to ask whether the self-incrimination clause had not been too narrowly interpreted. Such decisions as *Knapp v. Schweitzer* (1958),[131] and *Mills v. Louisiana* (1959),[132] when added to certain "communist" cases of the 1950's, might properly lead one to suspect that there was scant protection to be gained from the fifth amendment. In a real sense the Court was merely following guidelines that had been established as early as the case of *Brown v. Walker* (1896).[133] Yet, the fear that the privilege might be so "watered down" as to constitute no longer an effective safeguard was present for the libertarians on the Court (Warren, Black, and Douglas), and for others. Such a fear was in the background when Chief Judge Magruder proposed that if:

> it be thought that the privilege is outmoded in the conditions of the modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.[134]

Developments in 1964 and since have indicated that the Court is no longer following a policy of whittling down the clause. Instead

129 142 U.S. 547 (1892).
130 *Supra,* note 124 at 80.
131 357 U.S. 371 (1958).
132 360 U.S. 230 (1959).
133 161 U.S. 591 (1896).
134 Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954).

it has moved in the direction of requiring that the privilege against self-incrimination provide a much broader protection than had been found in a number of years, the kind of protection which had once been advocated by the Court's leading laissez faire exponent, Justice Stephen Field, and more recently by the Court's most prominent libertarians, Justices Black and Douglas.