Vanderbilt Law Review

Volume 1
Issue 2 *Issue 2 - February 1948*

Article 4

2-1-1948

To What Extent Does the Privilege against Self-Incrimination Protect an Accused from Physical Disclosures

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COMMENTS

TO WHAT EXTENT DOES THE PRIVILEGE AGAINST SELF-INCRIMINATION PROTECT AN ACCUSED FROM PHYSICAL DISCLOSURES?

The Federal Government and forty-six states have incorporated within their constitutions the common law privilege against self-incrimination. Iowa [1] and New Jersey,[2] the two exceptions, have accepted the privilege either by incorporation into their common law by judicial interpretation or by statute. Originally, this universal acceptance was an outgrowth of the thumb-screw and rack days of the star chamber in England, and the protection from physical torture by officers of the law to extract confessions was deemed such a fundamental right as to warrant constitutional safeguards.[3] However, since its adoption in this country, authorities both in and outside of the legal field have questioned the purpose and policy of retaining the privilege in any form.[4] Regardless of the merits of retaining or abolishing the privilege, as a practical matter the courts are continually faced with the problem of its scope in view of its historical origin and present day needs. It is the purpose of this comment to reflect the attitude of the various jurisdictions to the invocation of the privilege by an accused to exclude incriminating evidence obtained by compulsion relating to physical disclosures such as fingerprints, footprints and physical and mental examinations, as distinguished from "testimonial utterances." [5]

Scope

Although all jurisdictions concede that the privilege protects an accused from compelled "testimonial utterances," there is a pronounced divergence of opinion as to whether historically or presently it extends to the furnishing of evidence by means other than by word of mouth, i.e. as by removing or

1. See State v. Height, 117 Iowa 650, 91 N. W. 935 (1902) where the court construed the "due process" clause as including the privilege against self-incrimination. Also see McGovney, *Self-Criminating and Self-Disgracing Testimony Code Revision Bill,* 5 Iowa L. Bull. 174 (1920).

2. See State v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 743 (1903); Comp. Stat. 1910, Evidence § 8, Rev. Stat. 1937, § 2:97-6, 7.

3. For the historical development of the privilege against self-incrimination, see 8 Wigmore, Evidence § 2250 (3d ed. 1940); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination In America,* 21 Va. L. Rev. 763 (1935).

4. See Bentham, Rationale of Judicial Evidence, bk. 9, pt. 1, c. 3 (Brownings ed., vol. VII, p. 449 *et seq.*); 8 Wigmore, Evidence § 2251 (3d ed. 1940).

5. Compulsory "testimonial utterances" are words, oral or written, extracted from a person as a witness by the use of legal process.

replacing garments and shoes worn by the accused and using them against him.

In *Holt v. United States*[6] the accused was compelled to put on a blouse and the testimony of a witness that it fitted him was held to be admissible. Mr. Justice Holmes, speaking for the majority, declared, ". . . the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[7] The opposing view is set forth by Mr. Chief Justice Belt in his strong dissent in *State v. Cram*[8] decrying the further limitation of the privilege by the majority in holding that a compulsory blood test was admissible. "Other courts give a broader and more liberal interpretation to the Constitution and do not limit the privilege of immunity to the giving of oral testimony, but hold that it embraces as well the *furnishing of other evidence*, by the accused, which might aid in establishing his guilt.[9]

Although the majority of jurisdictions limit the privilege to testimonial compulsion, there are some jurisdictions which, through fear of an unlimited invasion of an individual's person, adhere to the broad and liberal application. In the former, the outstanding problem consists of defining the scope of "testimonial" compulsion. In the latter the problem becomes more complex since in order to prevent undue protection of criminals without endangering the innocent, the courts have been obliged to place illogical limitations upon their own rule.

These divergent views are more clearly illustrated by applying them to different factual situations and by observing the results.

Fingerprints and Photographs

Usually a person under arrest submits voluntarily to fingerprinting and photographing.[10] Once it is established to have been voluntary, the accused cannot assert that the privilege against self-incrimination has been violated, since he is deemed to have waived it,[11] even though he had no knowledge that they would be used against him.[12]

6. 218 U. S. 245 (1910).

7. *Id.* at 252, 253. Wigmore supports this view when he says, ". . . it is not merely any and every compulsion that is the kernal of the privilege, in history and in the constitutional definitions, but testimonial compulsion." 8 Wigmore, Evidence § 2263 (3d ed. 1940).

8. 160 P. 2d 283 (1945).

9. *Id.* at 293. Jones supports this view. 3 Jones, Evidence § 1391, p. 2537 (2d ed. 1926).

10. Fingerprinting and photographing are treated together, as the same principles are involved.

11. Moon v. State, 22 Ariz. 418, 198 Pac. 288 (1921); Rand v. Ladd, 26 N. W. 2d 107 (Iowa 1947); State v. Watson, 49 A. 2d 174 (Vt. 1946); State v. Johnson, 111 W. Va. 227, 164 S. E. 31 (1932), The court implied that even if fingerprints were obtained compulsorily, admissible.

12. Garcia v. State, 26 Ariz. 597, 229 Pac. 103 (1924).

Almost all jurisdictions permit the introduction as evidence of fingerprints, photographs or measurements taken under compulsion,[13] and many courts without a precedent have cited such cases as support for a holding that other physical evidence obtained under compulsion is admissible. In the leading case of *People v. Sallow*,[14] the New York court in sustaining the right of authorities to take fingerprints over the objection of the defendant, reasoned, "By the requirement that the defendant's fingerprints be taken there is no danger that the defendant will be required to give false testimony. The witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or exaggerate could produce or create a resemblance of her fingerprints or change them in one line, and therefore there is no danger of error being committed or untruth told."[15] So also the Circuit Court of Appeals for the Second Circuit,[16] in permitting an accused to be fingerprinted before arraignment under threat of force, even in the absence of a statute, said, with Judge Augustus Hand speaking for the court, "Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community . . . . The slight interference with the person involved in fingerprinting seems to us one which must be borne in the common interest."[17]

An opposing stand was taken in *People v. Hevern*,[18] in which case a statute impliedly commanding persons arrested for certain offenses to be fingerprinted was held violative of the privilege. "Concededly there may not be a compulsory written examination of a defendant as to his past career, and in my judgment he may not be compelled to make disclosure of his past life by the nod or nay of the head or the lines of his hands."[19]

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13. Shannon v. State, 207 Ark. 658, 182 S. W. 2d 384 (1944). The court held that authorities could force a defendant, released on bail, to return for the purpose of fingerprinting. Mabry v. Kettering, 92 Ark. 81, 122 S. W. 115 (1909); State *ex rel.* Bruns v. Clausmier, 154 Ind. 599, 57 N. E. 541 (1900); Downs v. Swann, 111 Md. 53, 73 Atl. 653 (1909); Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 Atl. 17 (1930) (modifying State v. Cerciello, 86 N. J. L. 309, 90 Atl. 1112 (1914); U. S. v. Cross, 20 D. C. 365 (1892), *aff'd*, 145 U. S. 571 (1892) (Prisoner's measurement taken and introduced in evidence against him); Shaffer v. U. S., 24 D. C. App. 417 (1904) (Photographs admissible unless excessive force has been employed); Conners v. State, 134 Tex. Cr. App. 278, 115 S. W. 2d 681 (1938); McGarry v. State, 82 Tex. Cr. R. 597, 200 S. W. 527 (1918).

14. 100 Misc. Rep. 447, 165 N. Y. Supp. 915 (N. Y. Cty. Ct. 1917).

15. *Id.* at 924.

16. United States v. Kelley, 55 F. 2d 67 (C. C. A. 2d 1932).

17. *Id.* at 68. The "public interest" angle was also employed in Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 Atl. 17, 18 (1930) where the court supports right of police to take compulsory fingerprints and photographs, "by the argument from convenience and from the public interest in permitting the courts to learn the truth of the question at issue."

18. 127 Mis. Rep. 141, 215 N. Y. Supp. 412 (1926).

19. *Id.* at 419. Although the Sallow Case, *supra* note 14, was decided by the New York court nine years previously, no mention of it is made. In this connection, note that in People v. Dennis, 131 Misc. 62, 226 N. Y. Supp. 689 (1928), People v. Hevern, *supra* note 18, was cited as authority for holding that a compulsory physical examination to determine intoxication violates the privilege, while People v. Sallow, *supra* note 14 again was not cited. *Accord*, De Mello v. Gabrielson, 34 Hawaii 459 (1937) where, in an action

Most states have enacted legislation controlling fingerprinting or photographing. One type makes it *mandatory* for authorities to take the fingerprints of certain classes of arrested persons with the limitation that they be returned upon acquittal.[20] Another type *authorizes* officers to take fingerprints or photographs with limitations.[21] And still another type merely provides for the taking of fingerprints of criminals after conviction.[22]

FOOTPRINTS

Today, regardless of the attitude taken by the courts as to the scope of the rule against self-incrimination, almost all jurisdictions permit the introduction of incriminating evidence obtained by the use of shoes forcibly taken from the accused after arrest. Though the courts in upholding the admission of such evidence have gone into elaborate discussions as to whether it violates the privilege,[23] it is submitted that the better and simpler foundation for admitting the evidence is the *real evidence rule*—the permission granted to officers to take from the accused after arrest such things on his person as may reveal the commission of the crime.[24]

But, when the courts do consider the scope of the privilege under these fact situations, it seems that they more readily accept the proposition that it extends only to testimonial compulsion. "Such evidence is not considered as making a person furnish evidence against himself. It is dependent upon physical facts and conditions and does not depend upon confessions, admissions or statements of the prisoner." [25] Once the court indorses this definition, the question remains, is such a restricted construction justified today? The

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for unlawful imprisonment, the compulsory taking of fingerprints and photographs of the plaintiff when not under arrest was held to be unconstitutional.

20. IOWA CODE c. 749.2 (1946); KANSAS STAT. c. 178 § 1 (1931).

21. S. D. CODE § 55.1606, 55.1607 (1939); MISS. CODE § 2610 (1942).

22. TEX. STAT. c. 181 § 14 (1935).

23. Myers v. State, 97 Ga. 76, 25 S. E. 252 (1895); Biggs v. State, 201 Ind. 200, 167 N. E. 129 (1929); State v. Jeffries, 210 Mo. 302, 109 S. W. 614 (1908); State v. Allen, 156 Kan. 717, 137 P. 2d 163 (1943); State v. Graham, 116 La. 779, 41 So. 90 (1906); People v. Breen, 192 Mich. 39, 158 N. W. 142 (1916); Younger v. State, 80 Neb. 201, 114 N. W. 170 (1907); State v. Barela, 23 N. M. 395, 168 Pac. 545 (1917); People v. Van Wormer, 175 N. Y. 188, 67 N. E. 299 (1903); State v. Ragland, 227 N. C. 162, 41 S. E. 2d 285 (1947); Gore v. State, 25 Okla. Cr. 214, 219 Pac. 153 (1923); State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924); Chase v. State, 97 Tex. Cr. 349, 261 S. W. 574 (1924); State v. Nordstrom, 7 Wash. 506, 35 Pac. 382 (1893). *See* Lee v. State, 27 Ariz. 52, 229 Pac. 939 (1924). Though upon the facts the court found shoes were voluntarily surrendered, it implies that evidence would be admissible if forcibly taken, State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906). Shoes voluntarily given, but court restricted use of privilege to "testimonial utterances."

24. Cody v. State, 167 Miss. 150, 148 So. 627 (1933) (only reason assigned); State v. Graham, 74 N. C. 646 (1876) (partial reason); State v. Nordstrom, 7 Wash. 506, 35 Pac. 382 (1893) (partial reason). Some states permit the introduction of such evidence although obtained by officers through illegal search and seizure, but in states which preclude introduction of illegally obtained evidence, not only is the privilege question involved but also whether taking of shoes constitutes an illegal search and seizure.

25. State v. Thompson, 161 N. C. 238, 76 S. E. 249, 250 (1912).

Oklahoma court in *Gore v. State*[26] declared, "The prohibition was not designed to protect those guilty of crime or to hamper or prevent the detection of crime, where the means employed have no tendency to fashion guilt upon innocent persons.[27] Here the act of giving up the shoe, by compulsion, has no direct tendency to implicate others who might be innocent or to force a confession.

To date only one state has not reversed its prior decisions in excluding this evidence by refusing to apply either the *real evidence rule* or the restrictive use of the privilege. In *Davis v. State*[28] the testimony of a witness that the accused had refused to take off his shoes for the purpose of comparison with tracks was held inadmissible because it violated the privilege. ". . . to conserve the spirit and purpose of the guaranty the accused cannot, directly or indirectly, be compelled to do an affirmative act, or to affirmatively say anything which may tend to criminate him." [29]

Generally, no distinction is made between the admissibility of evidence obtained by forcibly taking the shoes from the defendant and the admissibility of evidence obtained by compelling the defendant to make footprints, upon the rationale that in the latter case the accused does nothing with his shoes that could not have been done as well by others after the shoes have been taken from him.[30]

But in *State v. Griffin*,[31] where both sets of facts were placed before the court, the evidence relating to the forcible taking of the shoes from the accused was admitted on the basis that the officer, distinct from what the accused said or did, performed the act; but the evidence obtained from forcing the defendant to place his foot in a track was excluded on the ground that the fact appeared from the forced conduct of the accused—clearly testimonial compulsion.[32] If in truth, the modern basis in invoking the privilege is to

26. 25 Okla. Cr. 214, 219 Pac. 153 (1923).
27. *Id.* at 155.
28. 131 Ala. 10, 31 So. 569 (1902).
29. *Id.* at 571. *Accord*, Anthony v. State, 7 So. 2d 513 (Ala. 1942). *Compare* Hicks v. State, 247 Ala. 439, 25 So. 2d 139 (1946) and Clark v. State, 240 Ala. 65, 197 So. 23 (1940), where the Alabama court in both instances admitted testimony of a state's witness as to the comparison of shoes taken from defendant's home and admitted by defendant to be his own with tracks found at the scene of crime, with no consideration of the *Davis* case, 131 Ala. 10, 31 So. 569 (1902) or the *Anthony* case, *supra*. It would seem that no distinction should be made between taking shoes from the defendant's person and his home.
30. State v. Graham, 116 La. 779, 41 So. 90 (1906); State v. Prudhomme, 25 La. Ann. 522 (1873); Johnson v. State, 55 Fla. 46, 46 So. 154 (1908); Magee v. State, 98 Miss. 865, 46 So. 529, 532 (1908), "He is not, in such cases, giving evidence. He is not testifying as a witness. He is not delivering any testimonial utterance." *Cf.* State v. Barela, 23 N. M. 395, 168 Pac. 545 (1917) where court held that defendant could be compelled before arrest to make tracks, but inferred that privilege might be violated if compulsion followed arrest or was granted by court sanction.
31. 129 S. C. 200, 124 S. E. 81 (1924). Decision contained dicta to effect that defendant could not be forced over his objection to put shoe on in court, though he could be forced in court to measure the shoe.
32. It is doubtful that the latter would come within the definition of testimonial compulsion. See note 5 *supra*.

force prosecuting officers to go out, search and obtain all extrinsic evidence tending to show that the defendant committed the offense, or to exclude evidence of doubtful veracity, a consequence of intimidation, does a logical distinction exist between forcibly taking shoes from the accused and forcing him to make footprints? According to *State v. Graham*,[33] the leading case in this field, the answer is *no*, for, as the court in effect stated, since confessions are excluded because they cannot be relied upon as guides to the truth, due to fears and hopes, "No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field." [34] A few states reject such evidence outright as forcing a man to give evidence against himself.[35]

Standing Up in Court

Courts are in almost complete accord in holding that an accused can be required to stand up in court for purposes of identification by a witness or by the jury, assigning one or more of the following reasons:[36]

1. It does not violate the privilege, since the accused is not performing an act which associates him with the perpetration of a crime.

2. Standing up in court is not within the scope of testimonial compulsion, since it does not involve oral or written utterances.

3. Since the defendant must appear at his trial, his physical features are with him and recognition of those features is not incriminating.

4. The court has inherent power to seat the accused in any direction or in any manner during the trial.

A few states have held otherwise.[37] However, recent cases in these states cast a doubt upon the present status of the rule in those states.[38]

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33. 74 N. C. 646 (1876).

34. *Id.* at 647.

35. Cooper v. State, 86 Ala. 610, 6 So. 110 (1889) (Witness could not testify that the accused had refused to make tracks); Daugherty v. State, 28 Ala. App. 453, 186 So. 780 (1939); Day v. State, 63 Ga. 668 (1879); Elder v. State, 143 Ga. 363, 85 S. E. 97 (1915); State v. Atkinson, 40 S. C. 363, 18 S. E. 1021 (1894); *See* Stokes v. State, 5 Baxt. 619 (Tenn. 1875).

36. People v. Goldenson, 76 Cal. 328, 19 Pac. 161 (1888); People v. Oliviera, 127 Cal. 376, 59 Pac. 772 (1899) (Accused required to stand to determine his size); Appelby v. State, 221 Ind. 544, 48 N. E. 2d 646 (1943); People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894); State v. Vincent, 222 N. C. 543, 23 S. E. 2d 832 (1943); Commonwealth v. San Juan, 129 Pa. Super. 179, 195 Atl. 433 (1937); Commonwealth v. Safis, 122 Pa. Super. 333, 186 Atl. 177 (1936); State v. DeCesare, 68 R. I. 32, 26 A. 2d 237 (1942); State v. O'Neal, 42 S. E. 2d 523 (S. C. 1947); Funderburgh v. State, 144 Tex. Cr. App. 35, 160 S. W. 2d 942 (1942); State v. Clark, 156 Wash. 543, 287 Pac. 18 (1930); State v. Fulks, 114 W. Va. 785, 173 S. C. 888 (1934); Swingle v. United States, 151 F. 2d 512 (1945).

37. Smith v. State, 247 Ala. 354, 24 So. 2d 546 (1946); Wells v. State, 20 Ala. App. 240, 101 So. 624 (1924); *see* Williams v. State, 98 Ala. 52, 13 So. 333 (1893); People v. Greenberg, 73 Cal. App. 2d 675, 167 P. 2d 214 (1946) (Court did not base decision on rule); Blackwell v. State, 67 Ga. 76, 79 (1881). Court held that defendant could not be required to stand on ground, "A defendant cannot be *compelled* to criminate himself by acts or words."

38. *Compare* Orr v. State, 236 Ala. 462, 183 So. 445 (1938) where court held that compelling accused to put on a coat or hat found in his possession at time of arrest, for

ACTS ASSOCIATING THE ACCUSED WITH CRIME

Suppose the defendant, accused of committing a crime, is required by the court or by officers to put on a coat or a hat, or to reveal marks or scars on his body. Would the privilege against self-incrimination be a valid defense against the inclusion of evidence so obtained? Logic, without infringing upon the spirit or purpose of the privilege, seems to require a negative answer even though an act is required on the part of the accused. Thus, forcing the accused to put on or to remove clothing in or out of court for purposes of identification,[39] to reveal marks, scars or wounds,[40] to place a handkerchief over his face so as to simulate the criminal,[41] to shave and to trim his hair so as to prevent a false appearance of insanity and to aid identification,[42] to remove a bandage from his hand to see if in fact a wound was evidenced,[43] to expose his body to an examination to determine the presence of blood,[44] or to scrape blood from under his fingernails,[45] have been held not violative of the privilege.

Actually, the decisions contrary to this view are negligible, for one such decision[46] in effect has been overruled,[47] and the exclusion in another was not based upon the privilege.[48]

In *Allen v. State*,[49] a recent Maryland case, the court flatly held that the defendant could not be compelled to try on a hat, since an affirmative act or experimentation by the accused *in open court* which might aid in establishing

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purpose of identification, did not violate the privilege, *with* Alabama cases, *supra* note 37. *Compare* People v. Greenberg, *supra* note 37, with People v. Goldenson, *supra* note 36. Also, *compare* Blackwell v. State, *supra* note 37, *with* Meriwhether v. State, 63 Ga. App. 667, 11 S. E. 2d 816 (1940). In latter case, the court, in holding that a defendant could be compelled to stand in a police line up for purpose of identification, distinguished *Blackwell* case, on ground defendant was not being compelled to do an *overt act* in process of identification, but merely to stand passively.

39. Holt v. United States, 218 U. S. 245 (1910); Orr v. State, 236 Ala. 462, 183 So. 445 (1938); People v. Clark, 18 Cal. 2d 449, 116 P. 2d 56 (1941); People v. Cammarata, 257 Mich. 60, 240 N. W. 14 (1932); Henrietta Robinson's Trial, 11 Amer. St. Tr. 528 (N. Y. 1854); State v. Rutherford, 104 W. Va. 427, 140 S. E. 147 (1927); *see* State v. Aspara, 113 La. 940, 37 So. 883 (1904).

40. O'Brien v. State, 125 Ind. 38, 25 N. E. 137 (1890); State v. Tettaton, 159 Mo. 354, 60 S. W. 743 (1900); State of Nevada v. Au Chuey, 14 Nev. 79 (1879); State v. Miller, 71 N. J. L. 527, 60 Atl. 202 (1905).

41. Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932).

42. People v. Strauss, 174 Misc. 881, 22 N. Y. S. 2d 155 (1940).

43. State v. Anica Garrett and Lucy Stanley, 71 N. C. 85 (1874).

44. McFarland v. United States, 150 F. 2d 593 (1945).

45. State v. McLaughlin, 138 La. 958, 70 So. 925 (1916).

46. State v. Jacobs, 50 N. C. 259 (1858). The court held that the defendant could not be required to stand so that the jury might see whether he was of a certain degree of color.

47. In State v. Vincent, 222 N. C. 543, 23 S. E. 2d 832 (1943), the court distinguished standing in court for identification from compelling the negro to stand by saying that the issue was the *identity* of the accused and not the *status* or *degree* of color. Obviously, both are the same.

48. Turman v. State, 50 Tex. Cr. R. 7, 95 S. W. 533 (1906) (Court based decision on ground that the defendant cannot be compelled to undergo an experiment before the jury): *Compare* Benson v. State, 69 S. W. 165 (Tex. 1902); Bruce v. State, 31 Tex. Cr. R. 590, 21 S. W. 681 (1893).

49. 183 Md. 603, 39 A. 2d 820 (1944).

his guilt violated the privilege. But the same court in *Shanks v. State* [50] permitted a state's witness to testify that blood taken from the accused's coat over his objection was of a certain type, on the ground the evidence was obtained by comparisons or experiments conducted *outside of court* by persons other than the accused and was presented in court through the lips of others than the accused. In view of this case, would not the Maryland court permit a state's witness to testify as to comparisons made by compelling the defendant *outside of court* to try on a hat, an affirmative act on the part of the defendant tending to incriminate? The *Shanks* [51] case seems to requir an affirmative answer. If so, is not the reasoning of the *Allen* [52] case fallacious, for it should be immaterial to the defendant whether incriminating evidence is compelled inside or outside of court, since whether it falls from the lips of a witness or is visually seen by the jury, it is nevertheless incriminating.

Speaking for Identification

Sometimes it might be material to require the accused to speak words so that a witness can identify his voice as being that of the criminal. Then the question is presented, are words thus spoken "testimonial utterances" and therefore within the immunity of the privilege? If the test be that the words spoken contain incriminating information, then this is not a case of "testimonial utterance," for the incrimination is derived from the quality of the voice, not the substance of the words. The probability that a threat of force or other inducement will affect the quality of the voice, and consequently the probative value of the evidence is remote as compared to a true confession, for actually, the accused has little power of control over the sound of his voice. While he can create ideas, normally he cannot create a new voice.

A Texas case [53] has held otherwise, namely, that an accused cannot be required to appear before a witness and to repeat certain words for purposes of identification. But the court, following *Apodaca v. State*,[54] based its decision on the ground that the privilege protects an accused from being forced to produce by his own independent act the incriminating evidence in contradistinction to the production of the evidence by the act of witnesses or officers.[55] Since the defendant, and not third persons, produces the evidence when he speaks, it is privileged. Therefore the court has not actually considered the core of the problem—*is this a testimonial utterance?* [56]

50. 45 A. 2d 85 (Md. 1945).
51. *Supra* note 50.
52. *Supra* note 49.
53. Beachem v. State, 144 Tex. Cr. R. 272, 162 S. W. 2d 706 (1942).
54. 140 Tex. Cr. R. 593, 146 S. W. 2d 381 (1940) (The defendant could not be compelled to perform certain acts to determine whether he was intoxicated).
55. For example, *see* Walker v. State, 7 Tex. App. 245 (1879) (Comparison of footprints permitted); or McGarry v. State, 82 Tex. Cr. R. 597, 200 S. W. 527 (1918) (Accussed could be fingerprinted against his will).
56. *Compare* Johnson v. Commonwealth, 115 Pa. 369, 373, 395, 9 Atl. 78, 81 (1887).

INTOXICATION

The cases in which the accused has been compelled to submit his body to an examination for the purpose of ascertaining intoxication are invaluable to the study of the privilege's scope because they illustrate, first, the most recent interpretations and the scope of the privilege, and second, a fear on the part of all courts and particularly by those courts limiting the scope of the privilege to testimonial compulsion, of an undue invasion of an individual's body by physical contact on the part of officers. In other words, the underlying consideration is the old adage, "give them an inch and they'll take a mile."

Suppose for example, the defendant is arrested for driving a car while under the influence of intoxicants and that while he is in jail, an officer or physician observes his actions and general demeanor. Can the officer or physician testify at the trial as to the results of the observations? No court will hold in this situation that the defendant was furnishing evidence against himself, even if the defendant objected to the observations.[57]

Again, suppose that the officer or police surgeon instead of merely observing, requires the same defendant to take a drunko-meter test, e.g. walk a straight line, put his hand to his nose, sign his name, make sudden turns, answer questions. Would the evidence from these tests violate the privilege?

In *Green Lake County v. Domes*,[58] where such a factual situation was presented, the court said "no" on the broad ground that the privilege did not extend to the exclusion of the accused's body but was limited to physical compulsion for the purpose of extorting testimonial evidence from him.[59]

In holding that drunko-meter tests did violate the privilege, the court in *Apodaca v. State* [60] declared, "Demonstration by an act which tends to self-incrimination is as obnoxious to the immunity guaranteed by the Constitution as one by words." [61] Thus the same basic conflict regarding the scope

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There the district attorney called upon defendant to stand and repeat certain words so a witness could identify his voice, which he did without objection. Though court held waiver on facts, it said, "If it should be sanctioned, what would prevent a person accused of having stolen property in his possession from successfully interposing a like plea of constitutional immunity, and thus thwarting any attempt to search for and recover the property? While the constitutional rights of those accused should never be violated, care must be taken not to deprive the commonwealth of any legitimate means of detecting and punishing crime."

57. Millican v. State, 143 Tex. Cr. R. 115, 157 S. W. 2d 357 (1941); People v. Dennis, 132 Misc. 410, 230 N. Y. Supp. 510 (1928).

58. 247 Wis. 90, 18 N. W. 2d 348 (1945).

59. The compulsion consisted of loading defendant into an officer's car and taking him to the physician's office over his objection. The court intimated that if the information in either the answers to questions propounded or in the writing on the paper should incriminate the defendant, the evidence is inadmissible as a testimonial utterance. See Noe v. Monmouth County Common Pleas Court, 6 N. J. Misc. 1016, 143 Atl. 750, 752 (Sup. Ct. 1928).

60. 140 Tex. Cr. R. 593, 146 S. W. 2d 381 (1940).

61. 51 *Id.* at 382. *Accord*, People v. Dennis, 131 Misc. 62, 226 N. Y. Supp. 689 (Sup. Ct. 1928); Booker v. Cincinnati, 5 Ohio Ops. 433, 1 Ohio Supp. 152 (1936).

of the privilege is apparent in these two cases—the old delineation between words and acts. But for an example of the confusion which is evidenced within one jurisdiction compare *People v. Dennis*[62] with *Schmidt v. District Attorney*.[63] In the *Dennis* case the court stated that compulsory examination of the accused to determine his condition violated the privilege, since compulsory finger printing before conviction is against the privilege in New York, while the *Schmidt* case implied that such a compulsory examination would not violate the privilege.

Now suppose, over defendant's objection, that a police surgeon extracts body fluid—blood or urine—from him. Will the evidence so obtained be admissible if material?[64] The *Apodaca*[65] and *Booker*[66] cases, among others,[67] are again authorities holding such evidence to be inadmissible as against the privilege.

A strict analogy cannot be drawn between requiring a defendant to take a drunko-meter test and a blood test, for in the latter case the mere fact that a hypodermic needle is injected into the accused's body subjects him to certain possible dangers such as an infection. The forced extraction of blood from the body as distinguished from mere observation by officers or acts on the part of the accused brings the problem closer to that region which the courts, whether they follow the liberal or restrictive construction of the privilege's scope, hesitate to sanction. Here is one of those extreme factual situations which some courts deem so repugnant to the concept of individual freedom that they refuse to stop with the rule against self-incrimination. Perhaps the root of the trouble is that the courts are confusing the rule of unlawful searches and seizures with the rule against self-incrimination. The question which they ask is "where in principle can we stop if we hold that the rule against self-incrimination will not exclude such evidence?" The distinction between these and other factual situations discussed which is so repugnant to the courts seems to be that the extraction of a substance from the body against the will of the accused necessarily involves an assault and battery. "The hypodermic needle was not inserted into the body of the defendant for the purpose of treatment. The doctor, upon request of the police officer, extracted the blood to be used in bringing about the conviction of the defendant. It was plainly an illegal act constituting an assault and battery upon the

62. 131 Misc. 62, 226 N. Y. Supp. 689 (Sup. Ct. 1928).
63. 8 N. Y. S. 2d 787 (1939).
64. For a discussion of the probative value of such tests, see Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191 (1939).
65. *Supra* note 60.
66. *Supra* note 61.
67. Bednarik v. Bednarik, 18 N. J. Misc. 633, 16 A. 2d 80 (1940); *see* Novak v. District of Columbia, 49 A. 2d 88 (D. C. 1946).

person of the defendant . . . ." [68] But does not the taking of a shoe or forcing the accused to put on a coat or hat necessarily constitute an assault?

There has been no case in which the court has squarely faced the problem and held that blood taken forcibly from the accused to determine intoxication is admissible, although a few courts have indicated that they would permit such evidence to be introduced, whether compulsory or voluntary.[69]

Granting that there is no case directly in point, one court,[70] in permitting a witness to testify that the accused refused to submit to a blood or urine test to determine the alcoholic content, used language to the effect that the privilege extends only to extractions from the person's own lips and disclosures by utterances. Other courts have adopted a similar attitude.[71] In *State v. Cram* [72] a physician was permitted to testify as to the results of a blood test which the court said was made under compulsion. After an automobile accident in which the defendant was rendered unconscious, he was arrested and taken into custody by the police. While he was still unconscious, at the request of an officer, the physician treating him extracted a sample of blood to determine its alcoholic content. At the trial a witness was permitted to testify as to the result of the blood analysis. The majority of the Supreme Court of Oregon held that the testimony did not violate the privilege against self-incrimination although they refrained from expressing an opinion as to whether an accused could be forced by the court to undergo a physical examination or to submit to a blood test. Apparently, after an exhaustive consideration of the cases, the court reached this conclusion by confining the privilege to testimonial utterances. It assigned as an additional reason the fact that the accused was not required to do an affirmative act, pointing out in citing *State*

68. State v. Cram, 176 Ore. 577, 160 P. 2d 283, 292 (1945), dissenting opinion of Chief Justice Belt. Also note the court's observation in Bednarik v. Bednarik, *supra* note 57 at 90, "To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy."; New York Laws of 1921 c. 726, 1941 Ops. Atty. Gen. (N. Y. Pg. 143). The Attorney General of New York, in advising the state police regarding the provision for the admission of blood, urine or saliva tests in intoxication cases, stated, "It is highly questionable whether any such implied authority (to use force) may be read into it involving as it must what may constitute a bodily assault to extract urine, saliva or blood from an unwilling person. The safeguarding of the body of a defendant from harm or attack is an important element in the administration of criminal law."

69. State v. Duguid, 50 Ariz. 276, 72 P. 2d 435 (1937); State v. Cash, 219 N. C. 818, 15 S. E. 2d 277, 278, 279 (1942). In the latter case, the court held the procurement of the specimen to be voluntary, but declared, "It is the rule in this jurisdiction that physical facts discovered by witnesses on information furnished by the defendant may be given in evidence, even where knowledge of such facts is obtained . . . by intimidation, duress, etc."

70. State v. Gatton, 60 Ohio App. 192, 20 N. E. 2d 265 (1938). *But cf.* Booker v. Cincinnati, *supra* note 51.

71. State v. Nutt, 78 Ohio App. 336, 65 N. E. 2d 675 (1946); State v. Benson, 230 Iowa 1168, 300 N. W. 275 (1941). In both these jurisdictions the prosecutor is permitted to comment upon the accused's refusal to testify. However statutes in at least two states, providing for the admission of such tests as evidence, state that the accused's refusal to permit the test shall not be admitted against him. Ore. Laws 1941 c. 430 § 1; 8 ORE. COMP. LAWS ANN. §§ 115-318a (Supp. 1943); ME. REV. STAT. c. 19 § 121 (1944).

72. 176 Ore. 577, 160 P. 2d 283 (1945).

v. Griffin[73] the distinction between evidence which is the result of a prisoner's affirmative act and evidence obtained without his active participation but against his will. Mr. Justice Brand, in a separate concurring opinion,[74] asserted that the basic problem does not involve the privilege against self-incrimination but rather the rule against the admissibility of illegally obtained evidence. Therefore, if the court finds that the taking of the blood is unlawful and not incident to a lawful arrest, the question whether such evidence is admissible or inadmissible is dependent upon that court's attitude toward illegally obtained evidence. In his opinion the taking of the blood was an unlawful trespass which rendered both the officer and physician liable criminally and civilly. "Many acts of officers in searching the body of an arrested person establish a prima facie case of assault and battery, but are not unlawful because justified by public policy under the police power . . . The common law which justifies the search of an arrested person and the removal of articles of his clothing has not established any justification for the taking of his blood." [75]

Another point which was not raised or considered by the court in the *Cram* case was whether the physician violated a duty flowing from the physician-patient relationship when he extracted the blood and gave it to the officer.

Where a coroner without a warrant of any kind and without the consent of the patient, took blood from the unconscious patient while he was in the operating room, and a blood test was sought to be introduced against him in a prosecution for driving while intoxicated, the court held, in *State v. Weltha*[76] that it was error to receive in evidence the blood sample and the testimony of experts based thereon—though the ground for exclusion was not that it violated the privilege against self-incrimination. "We cannot bring ourselves to approve such a course; and we find no authority which requires us to do so." [77]

Situations wherein the accused is forced to regurgitate incriminating objects which he has swallowed are closely analogous to the intoxication cases. In a recent California case,[78] evidence as to the narcotic content in substances which had been forcibly pumped from the defendant's stomach was held admissible in an action for the forfeiture of the defendant's car for illegally transporting narcotics. "It is our view that the privilege only protects the individual from any forced disclosures made by him, whether oral or written.

73. *Supra* note 23.
74. 176 Ore. 577, 160 P. 2d 283, 289 (1945).
75. *Id.* at 291, Chief Justice Belt (*Id.* at 294) dissented on ground that both the constitutional guarantee against illegal search and seizure and the privilege were violated as "it is shown by uncontradicted evidence that the defendant, while in the custody of the law, was compelled by an unlawful act to furnish evidence to be used against himself."
76. 228 Iowa 519, 292 N. W. 148 (1940). The majority in the *Cram* case distinguished this case by noting that the defendant was not under arrest.
77. *Id.* at 149.
78. People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 168 P 2d 443 (1946).

It is limited to the protection against testimonial compulsion . . . it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material." [79] The court qualified its decision by refusing to express an opinion, first, as to whether an accused could be ordered by a court to submit to such a physician examination, and secondly, as to whether the method used by the officers to obtain the evidence was legal, since illegally obtained evidence is admissible in California.[80]

The accused, in a Texas case,[81] was arrested for receiving and concealing stolen rings. A flouroscopic examination conducted against his vigorous protests revealed that the rings were in his stomach, and again contrary to his wishes, he was forced to eliminate them by the use of an enema. The court held that the rings were admissible evidence on the ground that the officers had a legal right to arrest one suspected of committing a felony in their presence, and to make such a reasonable search as would permit them to ascertain whether or not the accused possessed the stolen property. The court reasoned that if an accused can be forced to place his foot in foot-tracks found at the scene of the crime, the method employed in the present case to obtain the rings was not unreasonable and therefore not illegal.[82]

Physical Examinations

The same principles involved in factual situations where substances—blood, urine or objects—are taken from within the body of the accused and used against him, underlie those situations where a physical examination is made of the accused's private parts to determine the presence of a venereal disease or of a previous pregnancy and the results used against the defendant. In both cases the body of the accused produces the incriminating evidence, and in neither case does the probative force of the evidence depend upon the credibility or testimony of the accused. Since the physical facts speak for themselves, there is again no need to force the prosecuting officers to search for other extrinsic evidence to prove the fact. Yet the numerical weight of authority holds that the privilege against self-incrimination is violated when an accused is forced to submit his private parts to a physical examination by a court appointed physician. In an early case, *People v. McCoy*,[83] the prisoner,

79. *Id.* at 451.

80. *Accord,* U. S. v. Ong Siu Hong, 36 P. I. 735 (1917). The court held that the privilege had not been violated when the defendant, accused of an opium offense, was forced to discharge morphine from his mouth.

81. Ash v. State, 139 Tex. Cr. R. 420, 141 S. W. 2d 341 (1940).

82. Note the anomalous situation which seems to exist in Texas—an accused cannot be compelled to walk a straight line or otherwise perform an affirmative act which might tend to prove intoxication, Apadoca v. State, *supra* note 50, though he may be forced to give up evidence which is within his body under the right of officers to make a reasonable search and seizure.

83. 45 How. Pr. 216 (N. Y. 1873). *But see* the statement of the court in People v. Sallow, 100 Misc. Rep. 447, 165 N. Y. Supp. 915, 921 (Gen. Sess. N. Y. C. 1873). "The

under arrest for murdering her bastard child, was forcibly examined by order of the coroner for the purpose of determining whether she had recently been pregnant and delivered of a child. The court excluded the testimony of the physician, asserting, "They might as well have sworn the prisoner, and compeled her, by threats, to testify that she had been pregnant and been delivered of the child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." [84] Similarly, in the leading statutory rape case,[85] where the defendant had been examined over his objection for a contagious disease and the testimony of the physician admitted as showing that the defendant might have communicated the disease to the prosecutrix by the alleged rape, the court held the privilege had been violated. Two grounds were assigned: first, a person cannot be compelled to exhibit those portions of his body which are usually covered; and second, such an examination constitutes an unreasonable search and seizure.[86]

Even under these fact situations, a few courts recently have applied the restrictive construction of the privilege by limiting, in effect, its scope to "testimonial utterances." And so the testimony of a physician in a statutory rape case,[87] as to the results of an examination compulsory made of the accused's private parts to ascertain whether he had gonorrhea was admissible. The Nevada court, following the principles enunciated in *State v. Ah Chuey*,[88] refused to extend the privilege to physical disclosures. Again, evidence obtained from a physical examination compelled under the Selective Service Act was admissible and not violative of the privilege.[89] And the court could order

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ruling in the case of People v. McCoy . . . in so far as it held that the evidence as to the condition discovered by a compulsory physical examination of the defendant was not admissible in evidence, must be considered overruled by the authorities cited."

84. 45 How. Pr. 216, 217 (N. Y. 1873).

85. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902).

86. In Iowa, illegally obtained evidence is inadmissible. *Accord,* Bethel v. State, 178 Ark. 277, 10 S. W. 2d 370 (1928). Since the defendant admitted the sexual intercourse and defended that the prosecutrix had consented, the testimony as to the infection did not tend to prove the rape, but only to "prejudice, degrade, and humiliate" the defendant before the jury. People v. Akin, 25 Cal. App. 373, 143 Pac. 795 (1914) (no reason assigned); McManus v. Commonwealth, 264 Ky. 240, 94 S. W. 2d 609 (1936) (such evidence is "illegal and incompetent"); State v. Matsinger, 180 S. W. 856 (Mo. 1915); State v. Horton, 247 Mo. 657, 153 S. W. 1051 (1913); State v. Newcomb, 220 Mo. 54, 119 S. W. 405 (1909). *See* People v. Corder, 244 Mich. 274, 221 N. W. 309 (1928) (waiver of privilege on facts). *Compare* cases involving the right of health officers under the police power of the state to compel examinations for venereal diseases. Wragg v. Griffin, Sheriff, 185 Iowa 243, 170 N. W. 400 (1919); Rock v. Carney, 216 Mich. 280, 185 N. W. 798 (1921).

87. Skidmore v. State, 59 Nev. 320, 92 P. 2d 979 (1939). *Accord,* Martinez v. State, 96 Tex. Cr. R. 138, 256 S. W. 289 (1923) (no reason assigned or cases cited).

88. 14 Nev. 79 (1879); see note 40 *supra.*

89. Bratcher v. U. S., 149 F. 2d 742 (C. C. A. 4th 1945), *cert. denied,* 325 U. S. 885 (1945).

that a female defendant charged with adultery submit to a medical examination to determine whether she was pregnant.[90]

A slightly different view has been taken by some courts of physical examinations of an accused's private parts in cases where the defense of insanity has been interposed. Thus, in a case [91] where the defendant, accused of uxoricide, pleaded sadistic insanity, a court order providing for a physical examination of the defendant's private parts to adjudge whether he was sexually abnormal was held proper. "The purpose of making the order was to enable the court to arrive, if possible, at the truth of the existence or nonexistence of certain physical facts, which the defendant had introduced into the case in his defense . . . ." [92]

Mental Examinations

The problems attending cases where the accused has interposed the defense of insanity and has been compelled to submit to a mental examination by alienists differ from those presented by cases involving only physical facts, for a thorough mental examination necessitates conversation or oral utterances on the part of the accused. And, unlike compelling an accused to speak for purposes of identification, the content or information given by the accused's spoken words is one of the bases for an alienist's opinion. The use of compulsion in the form of duress, inducements, threats of force and the like might affect the veracity of the information and consequently lessen the probative value of the alienist's opinion, since the accused has control over what he may say. This is not strictly analogous to a physical examination of the defendant's body or the use of things owned by him, for a person cannot change the marks and scars on his body or the resemblance of his shoe to footprints. Setting aside the element of waiver, this consideration brings a mental examination close to being a true testimonial utterance protected by the privilege against self-incrimination.

But there are also other considerations present which should be given weight before classifying such utterances as true confessions. Starting with the hypothesis that the object of admitting or excluding certain evidence is to place the best and most reliable evidence before the jury so that the truth may be elicited, if in insanity cases only testimony of physicians chosen by the

90. Villaflor v. Summers, 41 P. I. 62 (1920). *See* Territory v. Chung Nung, 21 Hawaii 214 (1912). *Cf.* People ex rel. Baker v. Strautz, 386 Ill. 360, 54 N. E. 2d 441 (1944) where the court held constitutional as a valid exercise of the police power an act authorizing the court to order an examination of any person coming before it charged with a crime who appeared to be suffering from a communicable disease and to commit such a person to an institution if found to have the disease.

91. State v. Petty, 32 Nev. 384, 108 Pac. 934 (1910). But note that Nevada had already committed itself to the liberal view by holding in State v. Ah Chuey, *supra* note 40, that an accused could be compelled to display marks and scars on body, usually covered, in court to the jury for identification.

92. *Id.* at 937. *Accord,* State v. Coleman, 96 W. Va. 544, 123 S. E. 580 (1924).

accused was permitted, because of the factor of self-interest, the evidence before the jury would have less probative value than if, in addition, the testimony of impartial physicians appointed by the court were also admitted.[93] Another argument advanced is that the privilege was designed to exclude only evidence which supplies a link in the chain of evidence that the defendant committed the act the law denounces, and that it has no application to an inquiry into the defendant's mental responsibility at the time the act was committed. The defendant himself has raised the issue of insanity and has invited an inquiry into his own mental condition. Upon making this claim, he should not be able to frustrate a complete examination and investigation, but should be deemed to have waived any rights he had under the privilege clause.[94]

Statutes providing for the appointment by the court of disinterested physicians to examine or investigate the sanity of the accused have generally been upheld, particularly when the statute refrains from designating of what the examination will consist.[95]

Most cases in which the accused seeks to exclude the testimony of state appointed alienists by demanding an application of the privilege can be disposed of by finding on the facts that the accused voluntarily acceded to the examination.[96] There is also no difficulty where the opinion of the alienist has been predicated upon observation alone, without recourse to conversa-

93. In Noelke v. State, 214 Ind. 427, 15 N. E. 2d 950, 954 (1938) the court said, "Witnesses appointed by the court to examine and observe one who is accused of crime and who has filed a plea of insanity to the charge affords the court and jury testimony as free from influence and prejudice as is humanly possible to obtain."

94. Argument of the counsel for the state in Jessner v. State, 202 Wis. 184, 231 N. W. 634, 636 (1930). In State v. Petty, *supra* note 91, the court also based testimony of a physician as to results of a mental examination on waiver. The court, in State v. Cochran, 203 S. W. 2d 707 (Mo. 1947) based admissibility of such testimony as to defendant's sanity on waiver, distinguishing mental examinations from physical examination in rape cases, note 86 *supra*, thereby making it possible in Missouri for an accused to be compelled to submit to an examination when he defends on the ground of insanity, but not otherwise.

95. Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946) (Statute constitutional, since it did not provide for defendant to do an affirmative act); Ingles v. People, 92 Colo. 518, 22 P. 2d 1109 (1933); Wymer v. People, 114 Colo. 43, 160 P. 2d 978 (1945); Noelke v. State, 214 Ind. 427, 15 N. E. 2d 950 (1938) (Court stated examination under statute must be confined to constitutional limitations but it did not define those limitations); Commonwealth v. Di Stasio, 294 Mass. 273, 1 N. E. 2d 189 (1936); Jessner v. State, 202 Wis. 184, 231 N. W. 634 (1930) (Statute constitutional, for it was construed as permitting only such an examination and investigation as would be consistent with the privilege and searches and seizures clauses). *Cf.* People v. Chapman, 301 Mich. 584, 4 N. W. 2d 18 (1942) where court held that a statute providing for appointment of psychiatrists to determine whether an accused is a criminally psychopathic person did not violate privilege because it applies only to criminal cases and this case is a civil inquest concerning accused's mental condition and sexual deviations. *But cf.* People v. Dickerson, 164 Mich. 148, 129 N. W. 199 (1910) where court held unconstitutional as violating due process a statute providing for appointment by court in a homicide case of experts where any issues involved expert knowledge.

96. People v. Bundy, 168 Cal. 777, 145 Pac. 537 (1914) (absence of counsel did not affect voluntary character); People v. Strong, 114 Cal. App. 522, 300 Pac. 84 (1931) (no objection by defendant); Blocker v. State, 92 Fla. 878, 110 So. 547 (1926) (even though defendant's counsel absent); Commonwealth v. Millen, 289 Mass. 441, 194 N. E. 463 (1935); State v. Church, 199 Mo. 605, 98 S. W. 16 (1906) (no objection by defendant);

tion.[97] Dicta in several cases assert that an examination for insanity against the will of the accused does not violate the privilege, though the court does not state expressly whether an examination including oral utterances on the part of the accused would be permitted.[98] In a recent Alabama decision,[99] where the court had appointed a commission of experts to examine the defendant for insanity, the experts were permitted to testify as to their opinion derived from their examination. The examination included an interrogation of the defendant. Though the court resolved that there was no evidence of the use of compulsion, it indicated that the method used in the examination did not infringe the privilege clause, for ". . . there was no affirmative act or declaration of defendant offered against him, but only the expert opinion reached by the doctors as the result of their examination." [100]

On the other hand, a few cases have directly held that the court cannot appoint alienists with a view to their testifying as to the sanity of the accused.[101] In one case [102] an expert was permitted to testify that the defendant had refused his request to submit to an insanity examination, though the court said at the same time that the defendant could justly complain had he been forced to undergo the examination.

People v. Furlong, 187 N. Y. 198, 79 N. E. 978 (1907); Wehenkel v. State, 116 Neb. 493, 218 N. W. 137 (1928) (no objection by defendant); Jessner v. State, 202 Wis. 184, 231 N. W. 634 (1930). *See* People v. Austin, 199 N. Y. 446, 93 N. E. 57 (1910).

97. State v. Genna, 163 La. 701, 112 So. 655 (1927); Commonwealth v. Di Stasio, 294 Mass. 273, 1 N. E. 2d 189, 195 (1936), "The notion that a person accused may not be subjected to the observation of witnesses and jurors is a perversion of the rule against self-crimination." People v. Kemmler, 119 N. Y. 580, 24 N. E. 9 (1890); State v. Eastwood, 73 Vt. 205, 50 Atl. 1077, 1079 (1901), ". . . otherwise one under indictment could insist upon strict seclusion and being unseen." *See* Noelke v. State, 214 Ind. 427, 15 N. E. 2d 950, 953 (1938).

98. State v. Nelson, 162 Ore. 430, 92 P. 2d 182 (1939); State v. Coleman, 96 W. Va. 544, 123 S. E. 580 (1924) (Defendant pleading insanity compelled to submit to a physical examination consisting of an X-ray of his head). And *see* Commonwealth v. Millen, 289 Mass. 441, 194 N. E. 463 (1935) (Evidence as to mental examination admissible, since doctor did not testify concerning any statement or information given by defendant respecting the crime).

99. Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946).

100. *Id.* at 194. Therefore, the court seems to make a distinction between offering directly testimony of the defendant and the use of such information as a basis for ascertaining another issue, i.e. insanity, on the ground that the former is an affirmative act by the defendant, the latter is not. But *cf.* People v. Furlong, 187 N. Y. 198, 79 N. E. 978, 984 (1907) where a stenographer's minutes of questions and answers were permitted to be read. The dissent said, "The effect upon the jury of reading the stenographer's minutes in their presence was equivalent to placing the defendant upon the stand and compelling him to testify against himself." Note that Alabama is one of the states holding that an accused cannot be compelled to do any physical act which might incriminate. *See,* for instance, Williams v. State, *supra* note 37 (accused cannot be compelled to stand for identification); Davis v. State, *supra* note 28 (accused cannot be compelled to give up shoes for comparison with footprints).

101. People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927). The court did not discuss the privilege aspect, but based its conclusion on ground that the effect of including the testimony would be to prejudice the jury against the defendant. *But cf.* People v. Chrisoulas, 367 Ill. 85, 10 N. E. 2d 382 (1937) where court admitted testimony of physician as to defendant's insanity because he had not been appointed by the court. *See* Hunt v. State, 248 Ala. 217, 27 So. 2d 186, 194 (1946) (dissenting opinion).

102. Burgunder v. State, 55 Ariz. 411, 103 P. 2d 256 (1940).

DECEPTION TESTS

Recent advances in the field of psychiatry have brought about the development of new techniques which can greatly aid the criminal investigator or prosecutor in discovering the truth and in breaking down the lies of a guilty suspect without endangering those who are innocent. One of these techniques calls for the use of hypnotic drugs in order to lower the inhibitions of the subject.

It is clear that to force an accused without his consent to submit to the use of the drugs for the purpose of obtaining a confession would be to force him to make a "testimonial utterance." But suppose that an accused who has entered a plea of insanity is compelled to take such an hypnotic drug and while in a delirious dream state is examined by alienists. Could the alienist testify as to his opinion of the accused's insanity founded upon interrogations made at that time? The use of information so obtained by the alienist is subject to the same comments expounded in connection with all insanity examinations requiring oral utterances, except that in this case, assuming that "truth serums" are scientifically reliable in removing inhibitions, the words of the accused should be without his control.

In *People v. Esposito*,[103] two defendants, on trial for murder, under a statute petitioned the court to make an order permitting the employment of two psychiatrists to testify on their behalf at the expense of the county. The order and appointment were made. During the course of the examination, metrazol and sodium amytal, two so-called "truth serums," were administered to remove the defendant's inhibitions because the doctors believed that the defendants were shamming and malingering insanity. Testimony of a doctor as to their insanity based upon the reactions of and information obtained from the defendants while subject to the drugs was held to be admissible. "Since they desired to present their claims that they were not legally responsible for their acts because of mental defect, they were subject to the use of methods set up objectively by the medical profession for the proper determination of such claims." [104] It is not clear whether the court meant that any defendant pleading insanity subjected himself to this method of examination, or whether this method could be used only when the defendant consented to an examination by court appointed psychiatrists. But the court did hold that the use of this method could not be challenged by the court since there was evidence that these drugs were frequently used in psychiatric examinations.[105]

103. People v. Esposito, 287 N. Y. 389, 39 N. E. 2d 925 (1942).

104. *Id.* at 928. The court specifically refrained from passing on the question of whether testimony of the psychiatrist was admissible to establish a confession or admission of guilt uttered by the subject while under the influence of the drug or whether, if offered, it would violate the immunity from self-incrimination.

105. *Contra:* State v. Hudson, 289 S. W. 920, 921 (Mo. 1926). Testimony of a doctor that he had administered a "truth-telling'" serum and that the defendant had denied his guilt while under its influence was held to be inadmissible, such testimony being "in the present state of human knowledge, unworthy of serious consideration."

Another technique which has been developing to aid the criminal investigator in ferreting out the truth is the "lie-detector." Although there is authority for the view that, without transgressing the privilege, the results of a lie-detector test should be admissible against a defendant who has been compelled to take the test,[106] the majority of jurisdictions exclude any evidence derived from such a test, even if it is favorable to the defendant, and he has taken the test voluntarily, on the ground that its scientific reliability has not yet been proved.[107] No jurisdiction has allowed the use of a detector on the defendant without his consent.[108]

In conclusion, it must be observed that the above division was used only for the sake of convenience in presenting the material and that the scope of the privilege as applied to the use of compulsion to obtain an incriminating physical fact cannot be discerned through an analysis of a single group of cases. A pattern can be found in almost any one state which reveals the extent to which that state will permit the privilege to be exercised. This pattern varies according to that state's interpretation of the basic and historical meaning of the privilege against self-incrimination. It is manifest that in certain extreme cases the courts are using the privilege in order to protect an accused from a bodily invasion, and in so doing, they have distorted its logical and historical purpose.

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106. Inbau, *Self-Incrimination—What Can an Accused Person be Compelled to Do?* 28 J. CRIM. L. & CRIMINOLOGY 261, 287 (1937); 37 HARV. L. REV. 1138 (1924).

107. Frye v. U. S., 293 Fed. 1013 (D. C. 1923); State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947); People v. Becker, 300 Mich. 562, 2 N. W. 2d 503 (1942); State v. Cole, 354 Mo. 181, 188 S. W. 2d 43 (1945); Commonwealth v. Jones, 341 Pa. 541, 19 A. 2d 389 (1941); People v. Forte, 167 Misc. 868, 4 N. Y. S. 2d 913 (1938) *aff'd*, 279 N. Y. 204, 18 N. E. 2d 31 (1938); State v. Bohner, 210 Wis. 651, 246 N. W. 314 (1933); State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947); Le Fevre v. State, 242 Wis. 416, 8 N. W. 2d 288 (1943). *Contra:* People v. Kenny, 167 Misc. 51, 3 N. Y. S. 2d 348 (1938).

108. People v. Sims, 395 Ill. 69, 69 N. E. 2d 336 (1946). The court held that is was reversable error to admit statements by defendant made while lie-detector apparatus was on her arm, though detector was not working, since a lie-detector may never be used on a defendant without her consent.