

Summer 1960

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### Recommended Citation

John T. McNaughton, The Privilege against Self-Incrimination, 51 J. Crim. L. Criminology & Police Sci. 138 (1960-1961)

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## THE PRIVILEGE AGAINST SELF-INCRIMINATION

### Its Constitutional Affectation, Raison d'Être and Miscellaneous Implications

JOHN T. McNAUGHTON

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The other day I was told by a scientist of an experiment in Professor Spemann's laboratory in Freiburg: Biologists removed from the pre-embryo of a lizard those cells which were ordained to be the lizard's *tail*. They grafted the stolen lizard cells onto the pre-embryo of a frog, grafting them on at a point where the frog's *nose* was destined to emerge. After the requisite period of time passed, the tadpole and then frog appeared. What do you suppose the frog had where its *nose* belonged? A lizard's—

—*nose!*

The privilege against self-incrimination has, I sometimes suspect, the awe-inspiring quality of those life cells. To a person observing its operation from distant space, the conclusion would be inescapable that the privilege contains a consciousness of the whole organism of a legal proceeding, and, while retaining some of its own unique characteristics, miraculously transmogrifies, adapts, assimilates to supply the organism what it needs.

One does not condemn the lizard's tail cells for producing a nose on the frog's face any more than one blames a blind man for reading with his hands. One should not blame the privilege against self-incrimination for demonstrating its infuriating capacity to frustrate an otherwise untrammelled inquisitor by supplying, in its own way, the absent decencies.

However, things are not this simple.

The privilege is not always ideally suited to supply what the organism needs (the frog would have fared better with a *frog's* nose). And the privilege sometimes supplies more than the organism needs. Like the mysterious life cells—which sometimes lose their sense of purpose and run riot, perhaps accounting for the disease called cancer—the mysterious privilege against self-in-

crimination, unguided by any clear purpose, sometimes runs riot.

[*"The" Privilege Is Many Things*]

All of this being the case, an assignment to discuss the privilege is a difficult one. There is, of course, no "the" privilege. The privilege is many things in as many settings. The privilege is a prerogative of a defendant not to take the stand in his own prosecution; it is also an option of a witness not to disclose self-incriminating knowledge in a criminal case, and in a civil case, and before a grand jury and legislative committee and administrative tribunal. It may also be a privilege to suppress substances removed from the body or admissions made in prior judicial proceedings or to the police. It is sometimes held to apply beyond incrimination under domestic law to incrimination under foreign law (but not to disgrace or to embarrassment of one's friends). It is applied to excuse nondisclosure of political and religious crimes; and it is applied to excuse nondisclosure of common-law crimes of violence. Beatniks, bums and ex-convicts are allowed to claim the privilege; so are persons whose habits of nonconformity are less obnoxious.

"The" privilege is lurking in all of these settings, and more. I have not time to treat all of the problems which come to mind. I have selected only two to discuss in any detail today. The first is [A] the role of the privilege as a constitutional doctrine. My thought in this regard is to assess the strength and nature of the strait jacket in which we find ourselves. The second is [B] the policy of the privilege. I will probe its purpose, which, like the purpose embedded in a life cell, determines its functions in new sets of circumstances.

First—

[A.] THE PRIVILEGE AS A CONSTITUTIONAL  
DOCTRINE

The federal Constitution and the constitutions of all but two states<sup>1</sup> include language relating specifically to self-incrimination. The language of the 5th Amendment, known to you all, is "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." This language appears verbatim in 16 state constitutions.<sup>2</sup> It appears with immaterial substitutions of synonymous words in 14 more state constitutions.<sup>3</sup> Different language coming to the same thing, but more clearly applying only to an accused in his own prosecution, exists in the constitutions of 11 other states.<sup>4</sup> That language, with insignificant variations, is, "In all criminal prosecutions, the accused shall not be compelled to give evidence against himself."

Accounted for therefore are 41. To the "left" of those 41 states are Iowa, which has no express provision but reads the privilege into its due process clause,<sup>5</sup> and New Jersey, which stubbornly insists that the privilege there is solely a creature of statute.<sup>6</sup> To the "right" are seven states with provisions not too different from the Massachusetts language, "No subject shall . . . be Compelled to accuse, or furnish evidence against himself."<sup>7</sup>

<sup>1</sup> Iowa and New Jersey. See text at notes 5 and 6.  
<sup>2</sup> Alaska, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Michigan, Minnesota, Nevada, New York, North Dakota, Ohio, South Carolina, West Virginia, Wisconsin. Also, Canal Zone and Puerto Rico.

<sup>3</sup> Colorado, Illinois, Indiana, Maryland, Missouri, Montana, Nebraska, New Mexico, Oregon, South Dakota, Vermont, Virginia, Washington, Wyoming.

<sup>4</sup> Alabama, Connecticut, Delaware, Kentucky, Maine, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, Utah.

<sup>5</sup> See *Amana Society v. Selzer*, 94 N.W.2d 337, 339 (Iowa 1959).

<sup>6</sup> See *State v. White*, 27 N.J. 158, 168-69, 142 A.2d 65, 70 (1958).

<sup>7</sup> Georgia, Kansas, Louisiana, Massachusetts, New Hampshire, Oklahoma, Rhode Island. The *Georgia* language—"No person shall be compelled to give testimony tending in any manner to criminate himself"—first appeared in the constitution of 1877. The *Kansas* provision—"No person shall be a witness against himself"—was in the original constitution adopted in 1859. The *Louisiana* provision is the same as the federal with this clause added: ". . . or in any proceeding that may subject him to criminal prosecution . . ." This broad form first appeared in the constitution of 1879. The *Massachusetts* language appears in text above. It antedated the federal constitutional provision by nine years. The *New Hampshire* constitution, except for a missing comma, has the Massachusetts provision. It dates from 1784. *Oklahoma's* constitution, dating from admission of the state to the Union in 1907, states that "No person shall be compelled to give evidence which will tend to incriminate him . . ." The *Rhode*

[Federal Provision Originally Narrow]

There is little to explain what the drafters of the federal Constitution meant by their words. We have a few indicia, however.<sup>8</sup> We have the words themselves. And we have the scant legislative history, the varying phraseologies used by the many states, and the practice of official questioning of suspects (not under oath) which continued for decades after the federal and many other constitutions were adopted. The probabilities, in my opinion, substantially favor the conclusion that the constitutional protection was originally intended only to prevent return to the hated practice of compelling a person, in a criminal proceeding directed at him, to swear against himself.<sup>9</sup>

This protection, until the end of the 19th century, was not litigated partly for the reason that for most of that time in most jurisdictions criminal defendants were submerged in a large class of persons disqualified as witnesses because of interest. The question of the application of the narrow constitutional clause never arose. The broader protection—of witnesses, and in civil cases—was given during the first years of this nation solely on the basis of well-established common law, without reference to constitutions. For example, prior to 1868 the privilege had been mentioned in only 15 reported federal cases,<sup>10</sup> and

*Island* language is, "No man in a court of common law shall be compelled to give evidence criminating himself." The word "criminating" was substituted for "against" between October 9 and November 18, 1841, during conventions preliminary to the adoption of the state's first constitution in 1842.

<sup>8</sup> For a discussion of these items of historical evidence, see the authorities cited in note 20 *infra*.

<sup>9</sup> See *Silving, The Oath* (pts. I & II), 68 *YALE L. J.* 1329, 1527 (1959), for an historical and analytical treatment of the role of the oath—the "self-curse"—in various legal systems including our own.

<sup>10</sup> *United States v. Saline Bank*, 26 U. S. (1 Pet.) 100 (1828); *United States v. Darnaud*, 25 Fed. Cas. 754 (No. 14918) (C.C.E.D. Pa. 1855); *United States v. Dickinson*, 25 Fed. Cas. 850 (No. 14958) (C.C. Ohio 1840); *Sanderson's Case*, 21 Fed. Cas. 326 (No. 12297) (C.C.D.C. 1829); *Bank of the United States v. Washington*, 2 Fed. Cas. 741 (No. 940) (C.C.D.C. 1828); *United States v. Craig*, 25 Fed. Cas. 682 (No. 14883) (C.C.E.D. Pa. 1827); *Devaughn's Case*, 7 Fed. Cas. 560 (No. 3837) (C.C.D.C. 1824); *United States v. Lynn*, 26 Fed. Cas. 1036 (No. 15649) (C.C.D.C. 1822); *United States v. Miller*, 26 Fed. Cas. 1254 (No. 15772) (C.C.D.C. 1821); *United States v. Smith*, 27 Fed. Cas. 1158 (No. 16332) (C.C.Conn. 1809); *Ex parte Lindo*, 15 Fed. Cas. 556 (No. 8364) (C.C.D.C. 1807); *United States v. Burr*, 25 Fed. Cas. 38 (No. 14692e) (C.C. Va. 1807); *United States v. Moses*, 27 Fed. Cas. 5 (No. 15824) (C.C.D.C. 1804); *Neale v. Coningham*, 17 Fed.

in none of those cases was the Constitution referred to, although in one of the cases a number of authorities, including an English statute, were cited by counsel for the witness.<sup>11</sup> State constitutional provisions were invoked by counsel in several state cases during the early and middle 19th century. However, an Arkansas case in 1853 was the first to assert that the constitutional privilege extended beyond the accused to a witness in a criminal case,<sup>12</sup> and an Indiana case in 1860 was the first to declare that the constitutional privilege applied in a *civil* case.<sup>13</sup>

[From *Counselman to Arndstein to Quinn*]

In the federal sphere, it was not until after Congress tampered with the privilege and the resulting immunity statute was put to the test in 1892 that it had to be decided whether the privilege as applied to a witness in a criminal proceeding was assured by the Constitution or merely by the common law. The Supreme Court in *Counselman v. Hitchcock* held that the privilege of a witness before a grand jury was constitutionally guaranteed and was therefore beyond the power of the legislature to alter.<sup>14</sup> On the facts, this holding was an easy exegesis because the testimony sought might have exposed Counselman to prosecution for the very crimes being investigated by that grand jury—perhaps to an indictment by that grand jury. The dictum was broad, however. It was that “[t]he object [of the constitutional provision] was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”<sup>15</sup>

*Counselman* was cited three decades later by the

Court in *McCarthy v. Arndstein* to support the further holding that the privilege as applied in *civil* judicial proceedings was also constitutionally guaranteed.<sup>16</sup> And after another generation of three decades, the Court in 1955, consistent with its expanding philosophy of the privilege if not with the federal constitutional language (nor arguably, with what was the common law), surprised no one when in *Quinn v. United States* and *Emspak v. United States* it held that a witness before a legislative committee could find sanctuary in the third clause of the 5th Amendment.<sup>17</sup>

Thus the constitutional privilege by the cases mentioned has been extended to all official interrogations except perhaps those by the police.<sup>18</sup> And by *Hoffman v. United States*, as will be indicated later,<sup>19</sup> it has been extended to disclosures the protection of which I am sure would have shocked the early judges.

[A Strait Jacket, Retail]

The series of decisions by the Court illustrates, I think, a statement attributed to Mr. Justice

<sup>16</sup> 266 U. S. 34, 40, 42 (1924). Mr. Justice Brandeis, delivering the opinion of the Court, said, “The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. It protects, likewise, the owner of goods which may be forfeited in a penal proceeding. See *Counselman v. Hitchcock* . . . [Arndstein, a bankrupt being examined as to his assets pursuant to statute] may, like any other witness, assert the constitutional privilege; because the present statute fails to afford complete immunity from prosecution.”

<sup>17</sup> *Emspak v. United States*, 349 U. S. 190 (1955); *Quinn v. United States*, 349 U. S. 155 (1955). Construing the more inclusive state constitutional language mentioned earlier at note 7, both Massachusetts and New Hampshire late in the 19th century had held that the privilege applied in behalf of witnesses before legislative committees. *Emery's Case*, 107 Mass. 172, 9 Am. Rep. 22 (1871); *State v. Nowell*, 58 N. H. 314 (1878). The Wisconsin court, in *In re Falvey*, 7 Wis. 630 (1858), had avoided such a holding, pointing out that historically there was no privilege applicable before parliamentary inquiries and that the statute authorizing the inquiry granted immunity from subsequent use of the facts disclosed in any event. See CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES 397 (2d ed. 1863). Cushing held that there was no privilege in parliamentary inquiries, but that disclosures could not be used as evidence in criminal prosecutions.

<sup>18</sup> See text at note 56.

<sup>19</sup> See text at note 58.

Cas. 1266 (No. 10067) (C.C.D.C. 1802) (dissent); *United States v. Gooseley*, 25 Fed. Cas. 1363 (No. 15230) (C.C. Va. 1790?).

<sup>11</sup> *United States v. Miller*, 26 Fed. Cas. 1254 (No. 15772) (C.C.D.C. 1821). Curiously, the federal constitutional privilege was applied by a state court, in *Higdon v. Heard*, 14 Ga. 255 (1853), to a civil party against whom equitable discovery was sought. At that time there was no constitutional privilege in Georgia, and the court held that the common law privilege was inapplicable because of a Georgia statute requiring that discovery relating to gaming be made. The court said that the effect of the federal constitutional privilege was not to privilege disclosure in the state civil proceeding but rather was to prevent the use in a subsequent prosecution of the self-incriminating disclosures compelled.

<sup>12</sup> *State v. Quarles*, 13 Ark. 307 (1853).

<sup>13</sup> *Wilkins v. Malone*, 14 Ind. 153 (1860).

<sup>14</sup> 142 U. S. 547 (1892).

<sup>15</sup> *Id.* at 563.

Frankfurter. In response to a student's question whether courts make law, the then Professor Frankfurter is reported to have said, "Legislatures make law wholesale. Courts make law retail." In this series of cases, the Court "retailed" Congress out of the "wholesale" business.

The constitutional strait jacket is on.

Indeed, although there are a few areas in which a few tucks could be taken—for example, a re-definition of "incrimination" to include disgrace, personal harm, foreign risks and the like; or a holding that the plea of privilege itself "tends to incriminate"; or inclusion of the taking of body fluids—it is difficult to see how the next generation can continue the pace and deliver anything significant say in 1984, a year already marked for reasons not unrelated to our discussions in this Northwestern University Law School centennial celebration.

With the decisions of the last 70 years in mind, I cannot and do not take the position that the privilege against self-incrimination, as we now know it, is not a constitutional doctrine. *It certainly is*. Nor do I suggest that the law on the complex subject should be controlled by a literal reading of 15 words penned five generations ago. *It certainly should not*. My point, rather, is one which I am by no means the first to make.<sup>20</sup> It is quite simply that, except for the narrow proscription of compulsory sworn testimony from an accused in a criminal proceeding directed at him, the privilege has become a constitutional doctrine only piece by piece and relatively recently. And in the process, the constitutional privilege has incorporated and exceeded the common law privilege against self-incrimination.

### [Three Conclusions]

Now, three conclusions follow:

—[1] One is that any statements in judicial opinions which justify recognition of the privilege on the ground that the Founding Fathers might otherwise be shocked at the treatment being

<sup>20</sup> See, e.g., MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 183-227 (1959); CORWIN, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 191-96 (1930); Pittman, *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956).

For contrary views on the scope of the original constitutional doctrine, see Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 LAW. GUILD REV. 41 (1955); Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 COLUM. L. REV. 87, 90-94 (1949).

accorded their great Charter are nonsense. Not one in a hundred modern privilege cases falls within their 5th Amendment intentions.

—[2] The second conclusion is that the fact that the privilege is now a constitutional doctrine does not really put us in an escape-proof strait jacket. While the principle is now largely off limits to legislatures (the only bodies equipped to deal with the problem in a comprehensive way), it is obviously not beyond change. In this year 101 of Darwin's "Origin of Species," we must recognize that the privilege, perhaps by a series of what Judge Frank called "creative misunderstandings," has evolved and continues to evolve apace.<sup>21</sup> The pace is set by the Supreme Court of the United States, and the state supreme courts, like metal shavings in a magnetic field, fall into pattern.

—[3] The third conclusion is that the privilege, receiving as it does no guidance from the constitutional language, must receive guidance from some underlying policy or policies—from some

<sup>21</sup> "The critics of the Supreme Court, however, in their over-emphasis on the history of the Fifth Amendment privilege, overlook the fact that a noble privilege often transcends its origins, that creative misunderstandings account for some of our most cherished values and institutions; such a misunderstanding may be the mother of invention." Frank, J., dissenting in *United States v. Grunewald*, 233 F.2d 556, 581 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957). The social value of such "misunderstandings" is emphasized by Holmes: "If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow." HOLMES, *THE COMMON LAW* 37 (1881).

Dealing with an analogous point, Mr. Justice Frankfurter had the following to say: "Law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of its origin. What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede. The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions." *Green v. United States*, 356 U.S. 165, 189 (1958) (concurring opinion). And Mr. Justice Brennan, speaking of the development of the federal rule excluding unconstitutionally obtained evidence, recognized the role which may be played by judicial mistake: "[T]he Court in *Boyd v. United States*, [116 U.S. 616 (1886),] and in subsequent cases has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said [by Wigmore] to be erroneous history; if it was, it was even less than a harmless error; it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts." *Abel v. United States*, 362 U.S. 217, 255 (1960) (dissenting opinion).

deeply felt sentiments worthy of constitutional recognition.<sup>22</sup>

So to the second part of my paper:

[B.] THE POLICY OF THE PRIVILEGE

There is no agreement as to the policy of the privilege against self-incrimination. Indeed, almost as many purposes have been suggested as there are exceptions to the hearsay rule, or as there are uses for a screw driver. Compare the screw driver. The screw driver at our house is used to pry tops off cans, to gouge holes in wood, to dig pits for tulip bulbs, to score lines and occasionally even wrong-end-to to drive tacks. Once, after hearing strange noises, I searched the house for a prowler who was not there, clutching a screw driver in my fist. But those things are not what a screw driver is for. Better suited for those purposes are the lid-flipper, chisel, trowel, pencil, hammer and knife respectively. A screw driver was created and survives as a tool because it is the thing best suited to drive screws.

Now consider the privilege against self-incrimination. Here are the dozen policies which have been advanced as its justification.<sup>23</sup>

<sup>22</sup> On the point of guidance (or lack of it) given the courts by the policies of the privilege against self-incrimination, Professor Kalven had this to say: "[T]he law and the lawyers despite endless litigation over the privilege have never made up their minds just what it is supposed to do or just whom it is intended to protect. . . . [S]ince the privilege is enshrined in the Bill of Rights, has a long history, and has complex potentialities, it cannot quite so readily be assumed that attempts to use it today against a new problem are obviously beyond its traditions or legitimate potentialities." Kalven, *Invoking the Fifth Amendment: Some Legal and Impractical Considerations*, 9 BULL. ATOM. SCIENTISTS 181, 182-83 (1953).

<sup>23</sup> The following books, reports, opinions and articles are presented alphabetically by author. Each deals favorably or unfavorably with one or more of the policies stated in my list in the text. As the reasons for the privilege are presented in the text below, the appended footnotes indicate the authors to whose writing I suggest you go for useful comment on the point.

AMERICAN BAR ASSOCIATION COMMITTEE ON IMPROVEMENTS IN THE LAW OF EVIDENCE, *Report*, 63 REPORTS OF THE AMERICAN BAR ASSOCIATION 570, 591 (1938).  
ALI MODEL CODE OF EVIDENCE rules 201(1), 203, comment on 201(1) (1942).

BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), 7 THE WORKS OF JEREMY BENTHAM 446-47, 449, 451-52, 454-55, 466 (Bowring ed. 1843).

Boudin, *The Constitutional Privilege in Operation*, 12 LAW. GUILD REV. 128, 149 (1952).

Cardozo, J., in *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

CHAFEE, THE BLESSINGS OF LIBERTY 186-90 (1956).  
Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 542-50 (1956).

[Three Makeweights]

[1] *One*: It protects the innocent defendant from convicting himself by a bad performance on the witness stand.<sup>24</sup>

Field, J., in *Wilson v. United States*, 149 U.S. 60, 66 (1893).

Fisher, *The Fifth Amendment and Forced Confessions*, 71 CHRISTIAN CENTURY 945 (1954).

Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91, 98-99 (1954).

Frank, J., dissenting in *United States v. Grunewald*, 233 F.2d 556, 580-82, 587-91 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957).

GRISWOLD, THE FIFTH AMENDMENT TODAY 7-9, 61, 75 (1955).

Kalven, *Invoking the Fifth Amendment: Some Legal and Impractical Considerations*, 9 BULL. ATOM. SCIENTISTS 181, 182-83 (1953).

Livingston, *Introductory Report to the Code of Criminal Procedure*, 1 WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 332, 355-56 (1873).

MAGUIRE, EVIDENCE OF GUILT 12-14 (1959).

Martin, J., in *Aiuppa v. United States*, 201 F.2d 287, 300 (6th Cir. 1952).

MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 229-31 (1959).

McCORMICK, EVIDENCE 156, 253, 255-56 (1954); *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 221-22 (1956).

McKenna, J., dissenting in *Wilson v. United States*, 221 U.S. 361, 393 (1911).

Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 689-99, 701 (1951).

Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY L.J. 267, 274-76 (1956).

NEW JERSEY COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE, REPORT TO THE SUPREME COURT 58 (1955).

NEW YORK CONSTITUTIONAL CONVENTION COMMITTEE, 9 PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION 920, 922-24, 926, 928-30 (1938).

Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & C. 1014, 1015, 1017 (1934).

Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783 (1935).

Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484, 487-89 (1957).

STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 342-43, 441-42, 535, 543-44, 565-66 (1883) (views first expounded in 1 JURIDICAL SOCIETY'S PAPERS 456, 470 *et seq.* (1857)).

TRAIN, COURTS, CRIMINALS, AND THE CAMORRA 19 (1912).

Warren, C. J., in *Quinn v. United States*, 349 U.S. 155, 161-62, 164 (1955).

Weinstein, *The Law's Attempt to Obtain Useful Testimony*, 13 J. OF SOCIAL ISSUES 6, 9 (1957).

8 WIGMORE, EVIDENCE §2251 (3d ed. 1940).

WISCONSIN COMMITTEE ON TRIAL PROCEDURE, REPORT TO AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY (WISCONSIN BRANCH) (1910).

<sup>24</sup> Discussed in Clapp, Field, Livingston, Meltzer and Ratner.

[2] *Two*: It avoids burdening the courts with false testimony.<sup>25</sup>

[3] *Three*: It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves.<sup>26</sup>

These first three reasons may have something to them. The screw driver handle after all does drive tacks. But are they not obvious make-weights?<sup>27</sup>

<sup>25</sup> Discussed in Frank and Meltzer.

<sup>26</sup> Discussed in Chafee, Maguire, Meltzer, Ratner and Wigmore.

<sup>27</sup> [1] The nervous-innocent-person argument can have application only to criminal defendants; the privilege does not protect civil parties and third-party witnesses, nervous or otherwise, from being called to the witness stand. There is of course always a chance that an innocent criminal defendant, by his poor witness-stand performance, will convict himself. To take the stand with such a possibility, however slight, in mind must be a frightening experience. But does the risk of a miscarriage of justice for this reason exceed the risk of a miscarriage of justice because of the inference which will surely be drawn from the defendant's failure to testify? Probably not. Strangely enough, then, the privilege in the mass of cases of frightened innocent defendants (if it influences them at all) probably has a net tendency to seduce them into convicting, not saving, themselves by their silence.

[2] The privilege does not at a bargain price give the tribunal significant *protection against false testimony*. Consider first [a] where the privilege is *waived*: There are practical considerations, including the inference usually drawn from the claim of privilege, which often press reluctant defendants to testify and reluctant witnesses to answer incriminating questions. The testimony given in these instances may or may not be perjured. It is not more likely to be truthful because of the existence of the waived privilege. Then consider [b] where the privilege is *claimed*: There certainly are situations where, but for the privilege, the tribunal would be given perjured testimony. But there are also situations where, but for the privilege, the tribunal would be given truthful testimony. The question here is, Does the privilege, in the instances where it is claimed, on balance leave the trier of fact in a better or worse position for purposes of finding truth? This question was faced and decided, rightly in my opinion, when the disqualification of interested persons as witnesses was abolished. Evidence may be biased or even perjured. But it should not be excluded on this ground, especially not at the option of the interested witness. From the point of view of truth-finding, it is better to hear a witness, cross-examine him, and give his testimony whatever weight it appears to deserve. To the extent that the avoidance-of-perjury argument is aimed not at improving the quality of information available to the court, but rather at avoiding the inhumanity of putting the witness in the position where he is for practical purposes forced to lie, to commit a serious crime against God, the point is covered explicitly in Reason 11.

[3] The argument that the privilege *encourages testimony* of course has no application to the criminal defendant, who must appear in court anyway and

[The "Futility" Argument]

[4] *Four*: The privilege is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try.<sup>28</sup>

This argument may deserve more attention than I give it in this paper. But I am unwilling to accept the idea that the limits of the principle of compulsory testimony shall be set without regard for the *legitimacy* of the witness' refusal to disclose. Furthermore, I do not agree that this futility argument applies to enough witnesses in enough situations to account for anything approaching the present privilege against self-incrimination: Is it clear that most witnesses in most situations would elect to remain silent or to perjure themselves in order to avoid making self-incriminating disclosures? Nor am I persuaded by the collateral point that because many people would provide perjurious answers it is intolerably unfair to insist upon disclosure from the honest witness. And, finally, what problems of Game Theory, of Brinkmanship, do we invite if we admit to witnesses at large that the limits of compulsory disclosure are at the point where they no longer succumb to the threat of punishment?

I like to think—though I may be wrong—that the latent merits in this Reason 4 may be found not in the *fact* of contumacy but rather in the *justifications* for it. The justifications, if any, appear elsewhere in the list of reasons.

[Appeals to Prejudice and Reverence]

[5] *Five*: The privilege prevents procedures of the kind used by the infamous courts of

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who, if he testifies, waives his privilege. The argument has little or no application to parties in civil litigation, whose presence and testimony for practical purposes are compelled by tactical considerations. Those who advance this argument do so only with respect to third-party witnesses. And, as to them, there is not much reason to think that a potential witness, *with* a choice whether or not to appear at the inquiry, would be influenced to do so by the existence of the privilege. It is no pleasure to have to claim the privilege—to run the risk of having it denied and to bear the consequences of the inferences drawn from the claim if it is allowed. Indeed, if, as this argument implies, the value of the privilege is to be measured in terms of total information gotten from third-party witnesses, the privilege probably produces for the court a net loss. This is so because a person *without* a choice whether to appear—one who cannot avoid appearing—may be excused by the privilege from giving information which otherwise might be extracted.

<sup>28</sup> Suggested in Meltzer.

Star Chamber, High Commission and Inquisition.<sup>29</sup>

[6] *Six*: It is justified by history, whose tests it has stood; the tradition which it has created is a satisfactory one.<sup>30</sup>

These last two statements are platitudes. They are not reasons at all—at least not in the sense that they provide us with a rationale useful in deciding future difficult cases.<sup>31</sup>

[*Off-Point Arguments*]

[7] *Seven*: The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized and regrettable scenes.<sup>32</sup>

[8] *Eight*: It spurs the prosecutor to do a complete and competent independent investigation.<sup>33</sup>

Reasons seven and eight are merely statements,

<sup>29</sup> Discussed in Bentham, McCormick and Warren.

<sup>30</sup> Discussed in Bentham, Griswold, Maguire, McCanna and Warren.

<sup>31</sup> [5] The naked association of compulsory self-incrimination with the unpopular *Star Chamber* produces no valid conclusion. Not everything about the Court of the Star Chamber or the other inquisitorial courts was bad (they were, for example, quite efficient!). The requirement of self-incrimination, if it is bad, is bad for reasons not stated in this argument. To the extent that the argument is elliptical—intending to assert that there should be interrogation only after formal presentment, or that interrogations should be humane, or that proceedings which further “bad” law are bad—the argument is more specifically made elsewhere.

[6] The argument that the privilege is good because it is supported by *history* and by the *constitutions* must be treated with deference. The statement is true. And if the question is whether the privilege should be abolished in its entirety, it properly puts the burden of proof on the iconoclast. But the argument, without particulars, is not meaningful when the question is how to construe the privilege in particular cases. It is, as I said in the text, a platitude which, in judicial opinions, is an acceptable substitute for reasons. True, with expert opinion on the policy of the privilege in such discord, it is unlikely that the majority of an appellate court could agree on a statement of meaningful reasons; and, more important, it is likely that the bar and public to which the judicial opinion is addressed will accept the reference to history with much less criticism than they would any set of particular reasons the court could devise. Nevertheless, palatable as it may be, Reason No. 6 is no more than an appeal to reverence just as, in Reason No. 5, reference to the Star Chamber is an appeal to prejudice. The real reasons must be found elsewhere.

<sup>32</sup> Discussed in Clapp, Frank, Maguire, Meltzer, N.Y. Committee and Stephen.

<sup>33</sup> Discussed in Chafee, Clapp, Maguire, Meltzer, N.J. and N.Y. Committees, Stephen and Wigmore.

in less satisfactory terms, of more basic rationales to be mentioned at the end of the list.<sup>34</sup>

In my opinion, the policies central to the privilege against self-incrimination can be identified by discussing only the four reasons yet to come. I offer for your consideration my analysis of those reasons, an analysis in which I still have some confidence despite the wounds it suffered from the rapiers of my colleagues at the Harvard Law School who were kind enough to read an early draft of this paper.

<sup>34</sup> [7] The privilege does contribute to *respect for the legal process*. But respect is derivative. Any respect engendered by the privilege is respect reflecting favorable opinion as to the values honored by the law in this area of its fact-finding procedures. Those values, unstated in this argument, must be the reasons for the privilege.

[8] The argument that the privilege is good because it spurs the prosecutor to make an *independent investigation*, it should be noted, has no significant application to claims of privilege by parties or witnesses in civil proceedings or by third-party witnesses in criminal trials. Its reasoning is limited to claims by defendants in criminal cases and by suspects in preliminary inquiries. But more important: The argument, although phrased in terms of what the privilege *encourages*, obviously intends to imply only that there is something bad which the privilege *deters*. Assuming the truth of the implied proposition that existence of the privilege does cause additional independent investigation, can this additional investigation be the aim of the privilege? It cannot be. The ultimate objective, other things being equal, cannot be to require the prosecutor to do his job in a hard rather than an easy way! On the contrary, other things being equal, it is quite desirable that the prosecutor and the police allocate their limited resources so as to seek out the evidence most easily obtainable and most indicative of truth.

What is the hidden meaning in the argument? [a] Does it relate to *efficiency*? Is it that absent such an independent investigation some cases will come out wrong, presumably acquitting guilty defendants? No. The privilege is not given to the accused in order to guarantee that the state's case against him will be better. [b] Does the hidden meaning of the argument relate to *conduct toward the accused*? Yes, surely it does. The proponents of the argument reason as follows: [i] Government should acquire evidence necessary for prosecution of criminals; [ii] government should not have the right to get evidence from the suspect; therefore, [iii] government should get evidence from “independent investigation.” This conclusion, which as indicated *sprang from* the principle that government should not have the right to get evidence from the suspect, is then advanced as a reason for the principle that government should not have the right to get evidence from the suspect! The reasoning is of course circular.

The fundamental question remains: Why not have the right to get the evidence from the suspect? Because it would upset the “fair” state-individual balance or would lead to the successful prosecution of “bad laws”? Because it is not humane or may lead to torture? The true reasons are only negatively implied.



[*The 5th as a 1st Amendment Privilege*]

[9] *Nine*: The privilege aids in the frustration of "bad laws" and "bad procedures," especially in the area of political and religious belief.<sup>35</sup>

This reason has appeal, especially now in what most of us hope is the twilight of an era of irresponsible legislative investigating committees and especially when we recognize that the history of the privilege clearly shows that it sprang from attempts to frustrate valid (but bad) belief-control laws.

The reason is difficult to handle.

On the one hand, it seems clear that the privilege is useful to frustrate official inquiries which have *evil* objectives only because it is useful sometimes to frustrate official inquiries *no matter what* the objectives. Does the law wish to tolerate a device the purpose of which is to make law unenforceable? Well, we know that the law does not exclude such a possibility. That is one of the principal functions of the jury, especially in criminal cases.<sup>36</sup> But the law would be foolish if it put the discretion to frustrate, the safety valve, in the hands of the person least likely to use it properly—the witness

<sup>35</sup> See Boudin, Chafee, Frank, Kalven, Griswold, Pittman and Stephen.

<sup>36</sup> Professor Henry Hart was the author of the following dictum: "It is important to proper administration of the law that the public believe in the humanity and justice of decisions. This value the law seeks to serve partly through the institution of the jury trial. The jury, representing 'the people,' is deliberately inserted as a kind of cushion between the individual on the one hand and the coercive power of the state on the other. The jury, always in criminal cases, and within broad limits in civil cases, is allowed to thwart the law's commands—in effect to find the facts untruthfully—if it is not satisfied with the justness of the commands as applied to the case in hand." Hart and McNaughton, *Evidence and Inference in the Law*, 87 DAEDALUS: J. AM. ACAD. OF ARTS & S. 40, 50 (1958).

The suggestion has been made that, historically, the two devices of the jury and the privilege combined to frustrate "bad law." "This privilege against self-incrimination . . . was insisted upon as a defensive weapon of society and society's patriots against laws and proceedings that did not have the sanction of public opinion. In all the cases that have made the formative history of this privilege and have lent to it its color, all that the accused asked for was a fair trial before a fair and impartial jury of his peers, to whom he should not be forced by the state or sovereign to confess his guilt of the fact charged. Once before a jury, the person accused needed not to concern himself with the inferences that the jury might draw from his silence, as the jurors themselves were only too eager to render verdicts of not guilty in the cases alluded to." Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 783 (1935).

being compelled to disclose, the person whose interest it is to thwart the proceeding no matter how "good" its objective. There seems to be no escape from the conclusion that one who employs the privilege solely to frustrate a valid proceeding is misusing the privilege, that he is in fact practicing a form of civil disobedience.

On the other hand, civil disobedience is sometimes honorable. Consider the civil disobedience of Jesus Christ, George Washington, Mahatma Gandhi and Albert Bigelow, the Quaker who in 1958 attempted to sail his boat, the "Golden Rule," into the Eniwetok testing grounds. (The civil disobedience of Willard Uphaus, a person well-known to this afternoon's other American panelist, Attorney General Wyman, is now attending the judgment of history.) Civil disobedience frequently leads to improvements in the law. Should persons who are less frank than say Gandhi about their disruptive objectives—perhaps because to them martyrdom offers no irresistible appeal—be condemned out-of-hand for achieving their ends by misusing the privilege against self-incrimination?

Things being as they are in some grand jury and legislative committee inquiries, I am satisfied that this Reason No. 9 cannot be dismissed. Adequate 1st Amendment protections are absent: There is no solid tradition of official self-restraint in the "anti-belief" area and no established privilege not to disclose matters related closely to religious, political and moral belief and activities.<sup>37</sup>

<sup>37</sup> Such a "1st Amendment privilege" may just now be in its infancy. See *Barenblatt v. United States*, 360 U.S. 109 (1959) (5 to 4 decision), for a discussion of *Watkins v. United States*, 354 U.S. 178 (1957), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and other cases in point. In *Barenblatt v. United States*, the petitioner, a teacher, refused to answer questions asked by a subcommittee of the Un-American Activities Committee. The questions related to his present and past membership in the Communist Party, his past membership in certain organizations, and whether he knew a certain person "as a member of the Communist Party." The opinion at page 126 recognized a qualified privilege: "Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Later, at page 134, the opinion concluded that "the balance between the individual and the governmental interests here at

I am reluctant therefore to condemn the "misuse" of the device which has always been particularly effective to frustrate "belief probes" and which is often the only device available to do the job. I am reluctant even though the device is much too blunt and thus is available to frustrate proper as well as improper proceedings, proper as well as improper questions.

It should be acknowledged, however, that the "1st Amendment" reason for the 5th Amendment privilege is by definition limited to free-speech, -religion and -assembly situations. It has no application in normal day-to-day criminal investigation and prosecution. None. If the judges would only recognize this one truth and treat the "1st Amendment" 5th Amendment cases separately, at least half of the confusion and nine-tenths of the emotion enmeshing the privilege against self-incrimination would be dissipated.

(Ask yourselves: How many civil libertarians in this audience would be concerned—really concerned—with the 5th Amendment privilege if there were an adequate 1st Amendment privilege? And how many criminal lawyers here represented are delighted to have the 1st Amendment-5th Amendment confusion continue so your clients can undeservedly reap its harvest?)

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stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." See also *Uphaus v. Wyman*, 360 U.S. 72 (1959) (5 to 4 decision), involving the refusal on 1st Amendment grounds to produce records before the state attorney general, who was authorized by joint resolution of the legislature to conduct investigations. The records allegedly showed the names of persons who had attended a "World Fellowship" camp, a camp at which a number of Communists spoke. Uphaus' conviction for contempt was affirmed.

Compare *Bates v. City of Little Rock*, 361 U.S. 516 (1960), in which a refusal to make disclosure was upheld on 1st (via 14th) Amendment grounds. Little Rock and North Little Rock passed tax ordinances requiring local organizations to disclose their members and contributors. The custodians of the NAACP records were convicted and fined for refusing to make the disclosures. The repressive effect of the ordinance upon the NAACP and its members was uncontraverted. The Supreme Court reversed the convictions, holding that "the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause." *Id.* at 527. Compare also *Talley v. California*, 362 U.S. 60 (1960), in which it was held unconstitutional to punish a person for failure to comply with an ordinance requiring handbills to bear the names and addresses of the persons responsible for them.

[*Privilege to Commit Crime?*]

The next reason for the privilege may be a hybrid, sharing some attributes with Reason 9 just mentioned and some with Reason 12 yet to come. Or it may be no reason at all. I tender it gingerly and (at the present stage of my thought on the subject) without approval. It is—

[10] *Ten*: The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.

The concern here is mainly with the "fishing expedition," with what Wigmore called the "unlawful process of poking about in the speculation of finding something chargeable."<sup>38</sup>

The pure "poking about" fishing expedition has a peculiar odious characteristic: The fishing expedition, if allowed, could put all or any of us in jail!

Each of us, after all, is a criminal more or less.<sup>39</sup> But as to most of our crimes we are, practically speaking, the indispensable threshold witnesses. There is just no one who knows nearly as much as we ourselves about *where* to go to find *what* evidence of *which* crimes! It could go without saying that the law does not intend that all of these crimes be prosecuted. The existence of the great majority of them is known only to their

<sup>38</sup> 8 WIGMORE, EVIDENCE §2250, at 284 (3d ed. 1940).

<sup>39</sup> H. L. Mencken pointed out that "society, in order to protect the weak and botched against the bold and original, has had to proclaim certain human acts, under certain circumstances, as too dangerous to be permitted, and hence as what we call criminal. Most of us aspire to the majority of those acts in secret, and some of us commit them surreptitiously, but the man who performs them in such a manner that the fact becomes notorious is a menace to the security of the rest of us, and we go through the solemn hocus-pocus of seizing him and trying him, and pump up indignation over his rascality, and finally visit upon him the thing called punishment." Mencken, *A Mencken Chrestomathy*, in VOICES IN COURT 540 (Davenport ed. 1958).

And Professor Schwartz made the following observation: "The paradoxical fact is that arrest, conviction, and punishment of every criminal would be a catastrophe. Hardly one of us would escape, for we have all at one time or another committed acts that the law regards as serious offenses. Kinsey has tabulated our extensive sexual misdeeds. The Bureau of Internal Revenue is the great archive of our false swearing and cheating. The highway death statistics inadequately record our predilection for manslaughter. 100% law enforcement would not leave enough people at large to build and man the prisons in which the rest of us would reside." Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

perpetrators and perhaps to persons in *pari delicto* or who for other understandable reasons prefer that the misdeed be forgotten. A system of criminal law enforcement which punished, or even detected, all such crimes would be insufferable. Similarly, it would be a frightening situation if the system were constructed so that the prosecutor had it within his power to select from all of the crimes of all of us the ones to pursue. A license to wiretap our brains could, as I indicated a moment ago, put us all, or any chosen ones of us, in the dock if not in a cell.

The place to nip this specter may be in the bud—by depriving the state of authority to compel self-incriminatory disclosures. The probable-cause requirements, with the privilege tacitly built in, prevent the fishing expedition in regular criminal proceedings. Sometimes, however, in grand-jury, legislative and administrative-agency inquiries, where there is no probable-cause requirement, there is only the privilege to perform this function.

Only two reasons remain. In them, I suggest, must be found the essence of policy of the privilege against self-incrimination applicable in the normal day-to-day criminal investigation and prosecution.

[*Avoidance of Inhumane Treatment*]

[11] *Eleven*. The privilege prevents torture and other inhumane treatment of a human being.

An aspect of civilization is an aversion to the knowing infliction of suffering—an aversion to cruelty. Modern man insists that beef cattle be killed in a humane way and he is revolted by the method used on geese to produce *pate de foie gras*. He no longer hangs his felons in public (if at all), and he no longer takes the rod to his child.

What bearing does all this have on the privilege against self-incrimination?

This: The law, it is said, will not authorize compulsory disclosure if the situation falls within a class in which inhumane force is likely to be brought to bear to overcome the person's reluctance to disclose or where the private interests affected are so great that it would be inhumane to compel it.

[a] "*Third degree*" methods<sup>40</sup> employed by the ancient continental inquisitional courts of course fall within the proscribed kinds of force. And the

<sup>40</sup> See A.L.I. Code, Bentham, Cardozo, Chafee, Clapp, Griswold, Maguire, Mayers, McCormick, Moreland, N.J. Committee, Pittman, Pound, Stephen and Train.

torture occasionally employed by the antecedents of our own criminal courts is unacceptable to us today. It is said that a modern American court or grand jury or investigating agency or legislative committee or some new creation authorized to compel disclosures might, but for the privilege, revert to such barbaric practices. This I simply do not believe. I dismiss the argument.

[b] Short of torture, what abuses of the witness loom? There is *browbeating* or *bullying*.<sup>41</sup> When a legal right to an answer exists, one can expect the presiding official to allow the questioner wide latitude in his attempts to extract relevant information of any kind from a witness reluctant for any reason. The latitude, at least in legislative-committee and grand-jury investigations and in hearings before magistrates, frequently includes bullying and browbeating. This of course is quite obnoxious to civilized sensitivities. Perhaps there is something to the thought that when the state is putting questions, the answers to which will disclose criminal activities by the witness, we are very likely to find an especially high insistence checked by an especially high reluctance and consequently too frequent resort to verbal abuse rather than to orderly contempt proceedings in an attempt to break the stalemate. If so, the privilege against self-incrimination has found a partial justification.

[*A Reluctant Witness' Trilemma*]

[c] What about the feeling that it is inhumane to force a witness to *choose among the three horns of the triceratops* (harmful disclosure, contempt, perjury)?<sup>42</sup> The first thing to observe is that the problem is not peculiar to the situation in which self-incriminatory disclosure is demanded. In one degree or another it is a problem inherent in the principle of compulsory testimony. Witnesses reluctant for whatever reason face this trilemma.

[i] The distinguishing point where self-incriminatory disclosures are demanded, according to some people, seems to be that the trilemma may be resolved in favor of *disclosure*! That is, that the witness' "will" will have been broken. Or, put another way, that the witness will have been forced to do a "stultifying" thing.<sup>43</sup>

Is there an elusive something to this point?

<sup>41</sup> See A.B.A. Committee, A.L.I. Code, Bentham, Cardozo, Chafee, Clapp, Mayers, Meltzer, N.Y. Committee, Pound and Stephen.

<sup>42</sup> See Bentham, Frank, Martin and Meltzer.

<sup>43</sup> Suggested by Fisher and Frank.

The thought seems to be that, whereas a truly voluntary confession of wrongdoing does the confessor immense psychological good, its opposite produces the opposite. The point, it seems to me intuitively, has merit, if any, only when the disclosure is [A] a confession, [B] made involuntarily, [C] of conduct reprehensible in the witness' own mind, [D] by a witness whose ability psychologically to rehabilitate himself—to "live with" his having done the reprehensible thing—will be impaired by adding to his *commission* of the reprehensible act his *admission* that he committed it. Perhaps I should add, as another relevant factor, the audience to which the disclosure is made: [E] The larger and the more comprehending this audience is and the more important the opinions of this audience are to the witness, the more "stultifying" the disclosure would seem to be.

The elusive something, then, that there may be to this "self-stultification" point is in any event very limited. At the very most it applies only to unambiguous confessions of quite reprehensible misdeeds—not to "clues" and the like, remotely implying minor turpitude.

[ii] According to others, the point which distinguishes the compulsion of self-incriminatory disclosures seems to be that the trilemma will probably be resolved by the witness in favor of *perjury*, and that this is an "intolerable invasion of his 'personality'."<sup>44</sup> The thought is that it is inhumane to force a religious witness to violate his sacred oath—to commit a crime against God. And I suppose that a kindred argument could be presented that it is inhumane to force *any* witness, religious or otherwise, to violate the "categorical imperative"—to break faith with his rational commitment to truth-telling as a necessary moral principle.

Before I received the responses of my colleagues to the early draft of this paper, I believed that this inhumanity-of-coerced-perjury point was not too important. I am still of that mind with respect to the agnostic and atheistic witness. I underestimated, however, the importance attributed by many to the religious consideration. Perhaps my reaction was the result of my own experiences with witnesses in action. Perjury is commonplace.

<sup>44</sup> *United States v. Grunewald*, 233 F.2d 556, 591 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957). See *Silving*, *supra* note 9, at 1346, for a report of the views to this effect of Franciscus Memmius, expressed in 1698 as a result of an inquiry ordered by Pope Innocent XII.

It is too commonplace to be thought of by the average witness as a soul-destroying experience. In any event, the religious argument could in many circumstances be met in a manner more sensible than a grant of privilege. It could be met by eliminating the oath—a procedure followed, I understand, quite commonly on the Continent.

[d] Last of the inhumanities the avoidance of which is said to justify the privilege is that of compelling a witness to commit the "unnatural act" of *inflicting injury on himself*.<sup>45</sup> True, Shakespeare considered it important that the king be forced to drink the very wine he had poisoned to kill Hamlet, and Olsen and Johnson thought it necessary to have the slain duck fall on the hunter's head. The element of hoist-with-his-own-petard incongruity, which in legitimate drama provides poetic justice and in vaudeville creates humor, on a witness stand undoubtedly produces an increment of cruelty. However, it is by no means clear to me that that increment of cruelty, by itself, comes to much. Nor is it clear to me that the cruelty incident to compelling a witness to harm himself outweighs the need for disclosure in enough cases to justify unqualified privilege whenever self-incrimination is involved.

[*Right to be Let Alone and to a Fair Fight*]

[12] *Twelve*: The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.<sup>46</sup>

There is a strong policy in favor of government's leaving people alone, and there is a complementary strong policy which demands that any contest between government and governed be a "fair" one. It follows that the government should not disturb the peace of an individual by way of compulsory appearances and compulsory disclosures which may lead to his conviction unless sufficient evidence exists to establish probable cause. Obviously, if the individual's peace is to be preserved, the government must obtain its *prima facie* case from sources other than the individual. According to Dean Wigmore, there was a moment

<sup>45</sup> See Frank, Griswold, Meltzer, Stephen and Weinstein.

<sup>46</sup> See Bentham, Clapp, Fortas, Griswold, Pound and Ratner.

in the early 1600s when the privilege, in its primordial state, was assumed to go no further than this; it was not doubted that a suspect could be made to respond to questions once he was properly accused; it was just that a person could not be compelled to provide the *first* evidence against himself.<sup>47</sup>

The principle was not long so limited, in any event.

In the 1641 flood, which ostensibly was aimed at the fishing expedition and which therefore swept away the Courts of Star Chamber and High Commission and of course the hated oath *ex officio*, the ground was washed from under all compulsory self-incrimination.<sup>48</sup> Since 1680 it has been assumed that, even though probable cause has been established (and the peace of the individual may be disturbed to the extent that he is required to stand trial), nevertheless the government cannot compel self-incriminatory disclosures.

That not only the oath *ex officio* but all authority to compel self-incriminatory disclosures was extinguished in the final decades of the 17th century may be attributable to the revolution in political thought which was occurring at the time. The sovereign king was being supplanted by the sovereign individual. This philosophy, dominant now for three centuries, naturally nurtures the concept that the individual may not be conscripted to assist his adversary, the government, in doing him in. It would not be a "fair fight."<sup>49</sup>

(It might be worth saying in this connection that the original privilege against self-incrimination probably was, in the time of the emancipation of the individual from tyranny of kings, "one of the great landmarks in man's struggle to make himself civilized."<sup>50</sup> This opinion was stated

<sup>47</sup> 8 WIGMORE, EVIDENCE §2250, at 293-96 (3d ed. 1940).

<sup>48</sup> 8 *id.* §2250, at 292-93.

<sup>49</sup> Jeremy Bentham called this argument the "fox hunter's reason." BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827), 7 THE WORKS OF JEREMY BENTHAM 454 (Bowring ed. 1843). That the feeling is part of our culture is confirmed by the unwritten code which governs every fight in the great American morality plays, the TV westerns. Inroads on this sentiment have slowly been made in litigation on the civil side. Inroads are not yet perceptible on the criminal side.

<sup>50</sup> GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955). The dean, in his speech delivered at this centennial celebration on May 13, 1960, confirmed, I think, that he is a "Reason Niner" (for explanation, see my text *supra* at and following note 35). It is out of respect for the freedom-of-belief arguments he and others persuasively present that I urge the development of an adequate 1st Amendment privilege—one which would precipitate the mud out of the 5th Amendment water.

by Dean Erwin Griswold in a speech directed at the excesses of (what I have called) "belief probes" in the early- and mid-1950s. The language has been quoted frequently by the courts. I remind you, however, that times, problems and especially the privilege against self-incrimination have changed almost beyond recognition in the past three centuries. Today our nation is one of expanding, mixing and mobile populations, complex interdependencies, shortening cultural roots and, incidentally, a homicide rate 10 times that in England. I suggest that, in this context, the privilege against self-incrimination—at least in its modern shape, doing much more than frustrating "belief probes"—may be an expensive gesture indeed. It may in most applications be an example of man's casuistic insistence upon being civilized to a fault.)

Well, those are the dozen reasons given.

The reasons, obviously, are not mutually exclusive; there is much overlapping. Furthermore, the proponents and detractors of the dozen reasons have not always put them just as I have, and have frequently gone into much more detail in their discussions, but I think that this list of 12 exhausts the reasons for the privilege against self-incrimination appearing in legal literature. Unless, of course, we add two, with the significant numbers 0 and 13, which are, Number 0, that the privilege has *no* justifying policy;<sup>51</sup> and, Number 13, that much, much more testimony should be privileged anyway, so we should accept the privilege against self-incrimination, crude as it is, and be thankful for small favors.

The former needs no explanation. The latter needs a good deal of explanation because it is possible that it is at this point where those for and those against the privilege against self-incrimination really join issue.

#### [Reason Number 13?]

This much I will say today about "Reason 13": The present system of compulsory attendance and

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However, since there is not yet such a 1st Amendment privilege to which they can resort and since the privilege against self-incrimination at its beginning certainly performed a Reason 9 function, my chances of persuading "Reason Niners" to relinquish their grip on the fringes of the 5th Amendment are probably about as good as those of persuading Southerners to quit calling themselves Democrats.

<sup>51</sup> See TRAIN, COURTS, CRIMINALS, AND THE CAMORRA 19 (1912); WISCONSIN COMMITTEE ON TRIAL PROCEDURE, REPORT TO AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY (Wisconsin Branch) (1910); ALI MODEL CODE OF EVIDENCE, comment on rule 201(1) (1942).

disclosure is unbearably inflexible. It is based on the black-and-white idea that practically speaking the only limit to testimonial compulsion is relevancy, with little regard given by the law to the inconvenience of attending and none to the risks to reputation, fortune, friends and even life which can be wrought by compelling a human being to make a disclosure which might be of only the slightest legitimate importance to the inquisitor.

A paper could be given on this point alone.<sup>52</sup>

<sup>52</sup> Since the early days of Elizabeth I, when one ran serious risk of a suit for maintenance if he testified in a case, things have changed drastically but by almost imperceptible degrees. Now one may be jailed or sued for failure to attend or testify. The reasoning is that "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (Moody, J.). And "[t]he suppression of truth is a grievous necessity at best . . . ; it can be justified at all only when the opposed private interest is supreme. . . ." *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir. 1937) (L. Hand, J.).

As a consequence there are very few rules which permit nondisclosure on grounds that compulsory disclosure would invade an interest of *the witness*—that is, on grounds that disclosure would cause undue harm to *the witness* or to something or someone dear to him. There seems to be a privilege not to disclose theological opinions, and there may be a privilege not to disclose trade secrets. The husband-wife incompetency, in one of its formulations, is a privilege of one spouse not to testify against the other. In many jurisdictions there lingers a privilege not to submit to physical examination. That, unless we admit the privilege against self-incrimination to the category, is all. There is no clear-cut privilege not to disclose political opinions (see note 37 *supra*). Nor is there a privilege against disclosing facts which tend to lead to self-degradation, -assassination or -bankruptcy. There is no privilege against doing in a mother, brother or child, or against making disclosures which will lead to the felling of a favorite tree or to the gassing of a beloved dog.

The law takes the position that the relationship between the degree of materiality of the evidence and the degree of anguish caused the witness by its disclosure is irrelevant. Even the catchall Rule 45 of the Uniform Rules of Evidence ignores this consideration. Disclosure must be made.

A useful purpose would be served by a thorough analysis of the whole concept of compulsory testimony. Among the questions to be asked are: (1) What are the "hard-core" areas in which the need for information or the harm to the witness is always so great or so small as to require that disclosure be compelled or privileged, as the case may be? (2) How should the judge inform himself adequately to exercise discretion intelligently—a significant problem where disclosure even to the judge is resisted by the witness? (3) To what extent would "judge-shopping" and loss of respect for the courts result from discretion being exercised in one way by one judge and in another way by another judge? (4) What difficulties in planning a case would be caused by the fact that parties cannot know in advance whether the affected evidence will be admitted? (5)

It should be noted, however, that the injustice caused by this inflexibility of the system is not, on balance, alleviated by the privilege. The privilege itself is inflexible; it is unqualified. Even when limited to its proper uses, it is far too broad: In order to insure that a great private interest is protected when the public need for information is small, it denies a great public need when the private interest is small. Also, being limited to self-incrimination, the privilege is too narrow to alleviate the injustices of the inflexible system in other areas where public need conflicts with private interests. It is both too broad and too narrow to have a positive net value.

It should be clear by now that the policy underpinning the privilege is anything but clear. The most I can hope to have achieved is to have "left the darkness entirely unobscured." That was the remark reportedly made by Whitehead about an exposition by Russell. Perhaps a little more than that is possible. I can give you my own view, good at least for the present moment, in capsule form.

#### [The "Real" Reasons]

It is my opinion that the privilege, like the screw driver, is *used* for all sorts of reasons, most of them having little or no relation to its purpose. The significant purposes of the privilege remaining

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In what respect are the criteria different in court, grand juries, and legislative committees?

The analysis might produce conclusions, for example, that legislative investigating committees should have no power to compel disclosures at all, and that judges in courts should have wide discretion in any particular instance to excuse or compel disclosure as the balance of need for information and private interests of the witness appears to indicate.

Compare the statements of Circuit Judge Edgerton and Professor McCormick with respect to the related question of privileged communications:

"I think a communication made in reasonable confidence that it will not be disclosed, and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding, whether the trusted person is or is not a wife, husband, doctor, lawyer, or minister." *Mullen v. United States*, 263 F.2d 275, 281 (D.C. Cir. 1958) (Edgerton, J., concurring).

"Even if we concede that there is ground for some protection for these privileged confidences greater than the interest of secrecy for such unprivileged relations as parent and child, brother and sister, or employer and confidential secretary, it surely goes too far to place the screen before such protected confidences without regard for what the countervailing need for the evidence may be in the interest of justice. A wholesale rule of privilege whatever the need for disclosure is a crude and clumsy handling of the problem." McCormick, *Law and the Future: Evidence*, 51 Nw. U. L. Rev. 218, 220-21 (1956).

after the 1st Amendment albatross has been cut free (as it must be before the matter can be discussed rationally<sup>53</sup>) are two: [1] The first is to remove the right to an answer in the hard cores of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner.<sup>54</sup> [2] The second is to comply with the prevailing ethic that the individual is sovereign and that proper rules of battle between government and individual require that the individual not be bothered for less than good reason and not be conscripted by his opponent to defeat himself.<sup>55</sup>

Now, finally, to a quick expression of opinion on a miscellany of points:

### [C.] MISCELLANEOUS PROBLEMS

[1] In what proceedings should the privilege apply? It follows from the purposes of the privilege just mentioned that the privilege should be available only in proceedings in which the government is the interrogator. That is, it plays little or no role in normal civil litigation. It serves one or both of its principal policies, mainly as to suspects but also as to third-party witnesses, in criminal proceedings of all kinds. It probably plays its most important role in free-wheeling legislative investigations where both policies of the privilege are applicable and, incidentally, where there is rarely a demonstrable need for the disclosure.

#### [*Privilege in the Police Station?*]

[2] Does the privilege apply in the police station? No, it does not.<sup>56</sup> But this is a quibble. Both

<sup>53</sup> See the discussion of Reason 9 *supra* in text at note 35.

<sup>54</sup> This is included in Reason 11 *supra*.

<sup>55</sup> This is Reason 12 *supra*.

<sup>56</sup> Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy.

The contrary arguments—those favoring extension of the privilege to police interrogations—should be stated, however. There are several: (1) That, while there is no legal obligation to disclose to police, the police may successfully misrepresent that there *is* such a legal obligation; and that, while there may be no legal sanction for contumacy in a police investigation, there may be an *illegal* one, and that the methods to compel disclosure threatened or used by police may be more fearsome than those threatened or used by a court. Since police, like courts, are agents of the state, the argument runs, it would not be illogical to hold that any self-incriminating disclosures obtained by police as a consequence of coercion or of successful

policies of the privilege which I accept, as well as most of those which I reject, apply with full force to insure that police in informal interrogations not have the right to compel self-incriminatory

misrepresentation that disclosure was obligatory be treated in the same manner as self-incriminating disclosures improperly obtained by a court. (2) That American police in their investigations perform the function of the old English committing magistrate, before whom the privilege did apply. (3) That, although constitutional language in this area is not too helpful, the self-incrimination clause in no instance grants, in terms, a "privilege" to be free from legal compulsion, but in most instances states simply that the person shall "not be compelled to give evidence against himself." The objective of police interrogation of a suspect is of course to induce him in a sense to give evidence against himself. (4) That the confessions doctrine has not yet in all jurisdictions been extended to exclude evidence of coerced *admissions* of facts or of *silence* from which one might infer guilt, as contrasted with evidence of coerced *confessions* admitting all elements of the crime. According to the argument, the privilege should be extended to exclude evidence of such admissions and silence.

Federal decisions on the point are in conflict despite *Bram v. United States*, 168 U.S. 532 (1897). In that case (at 542) Mr. Justice White declared that, "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" The *Bram* case, a curious one in which the "coerced confession" seems to have been neither a confession nor coerced and, furthermore, one in which the statement was obtained by an officer of a foreign government, purports to be a square holding that coerced confessions are excluded by the privilege against self-incrimination. The *Bram* case was cited with approval in *Bullock v. United States*, 122 F.2d 213, 215 (D.C. Cir. 1941) (dictum of Edgerton, J.), and the same result was reached in *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955). Nevertheless, dicta in a number of federal cases treat the point as still undecided. E.g., *United States v. Carignan*, 342 U.S. 36, 41 (1951); *Upshaw v. United States*, 335 U.S. 410, 414 n.2 (1948); *Helton v. United States*, 221 F.2d 338, 341 (5th Cir. 1955). In one federal case there is dictum clearly implying that the privilege has no application to police interrogations. *Wood v. United States*, 128 F.2d 265, 268 (D.C. Cir. 1942).

State cases are similarly in conflict. See, e.g., *People v. Simmons*, 28 Cal.2d 699, 716, 719, 720, 172 P.2d 18 (1946) (privilege applies); *People v. Shroyer*, 336 Ill. 324, 168 N.E. 336 (1929) (privilege applies); *People v. Fox*, 319 Ill. 606, 150 N.E. 347 (1926) (privilege does not apply); *State v. Height*, 117 Iowa 650, 91 N.W. 935 (1902) (privilege applies); *Clafin v. State*, 154 Kan. 452, 119 P.2d 540 (1941) (privilege applies); *People v. Owen*, 154 Mich. 571, 118 N.W. 590 (1908) (privilege does not apply); *Matter of Schmidt v. District Attorney*, 225 App. Div. 353, 357, 8 N.Y.S.2d 787 (1938) (privilege applies); *Abston v. State*, 139 Tex. Cr. 416, 417, 141 S.W.2d 337 (1940) (privilege applies); *Owens v. Commonwealth*, 186 Va. 689, 43 S.E.2d 895, 898 (1947) (privilege does not apply).

Both the Model Code of Evidence (Rule 203) and the Uniform Rules of Evidence (Rule 25) would extend

answers. Whether the result is reached by pointing out the elementary fact that police have not been given the authority to compel disclosures of any kind or whether the result is put on the ground that the person questioned is "privileged" not to answer makes little difference. Answers should not be compelled by police. There is a desperate need for an acceptable substitute for police interrogation of suspects. I hope that this conference will contribute something toward that need.

[*Two-Sovereignty Rule*]

[3] What about the two-sovereignty rule? The domestic interrogator is not spurred by any "conviction hunger" when the requested disclosure incriminates only under foreign law; so the risk of inhumane treatment is not unusually high. The government questioning and the witness being questioned are not "at war" where the only incrimination is under foreign law; so the sentiments establishing "rules of battle" are inapplicable. Assuming my assessment of the policies underlying the privilege to be correct, then, the privilege has no relevancy where no crime of the forum is involved, where disclosures involving foreign crimes are of no more interest to the interrogator than any other disclosures compelled of the witness.

It might be added that even if my analysis of policies is wrong, and the purpose of the privilege is to excuse the witness from the unpleasantness, the indignity, the "unnatural" conduct of denouncing himself, there is a strong argument that

the privilege to police interrogations in the following language: "[E]very natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him. . . ." (Emphasis added.) The Model Code (Rule 232) and the Uniform Rules (Rule 38) continue that "Evidence of a statement or other disclosure is inadmissible against the holder of the privilege if the judge finds that he had and claimed a privilege to refuse to make such disclosure but was nevertheless required to make it." For such provisions to serve their desired beneficial purpose, present methods of police questioning would have to be altered drastically, causing without doubt a substantial reduction in effectiveness. Procedures would have to be adopted to insure that the suspect was made aware of his privilege, perhaps by a warning such as that used in England and required by the Code of Military Justice, 10 U.S.C. §831(c) (Supp. V, 1958). It might also require a right to counsel and a verbatim record of proceedings at the interrogation. On these points, see Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 695-98 (1951); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & C. 1014 (1934.)

incrimination under foreign law should nevertheless be disregarded. Recognition of such a risk as a basis for privilege would put the interrogating sovereign in the position of being unable, even by granting the fullest immunities within its power, to compel what may be essential information. This result may not be intolerable, but it is quite inconvenient.

A solution to the problem, at least where it appears that there has been cooperation between the local inquisitors and foreign prosecutors, appears to be emerging. It is not to privilege disclosure but rather in some manner to prevent its use by the foreign government.<sup>57</sup>

[*What "Tends to Incriminate"?*]

[4] What, for purposes of the privilege, "tends to incriminate"?<sup>58</sup> Any fact requested of a criminal defendant by the prosecution at his trial, if relevant, is on the prosecution's own assumption incriminating. It of course does not follow that a criminal defendant should be spared having the questions put to him and having to plead the privilege. The incorporation of this fringe benefit, however, another accident in the development of the constitutional/common-law privilege, is sensible enough. But what is the rule of general application? It should be this: A fact tends to incriminate only [a] if its disclosure would increase the probability that the witness will be convicted of a crime, and [b] if after its disclosure the witness will be in substantial danger of conviction of the crime. This definition could, of course, extend to any "clue" fact which increases the probability that a "subordinate" fact will be discovered and thus that an "ultimate" fact, and the "crime," will be proved. The difficulty here nowadays lies in the failure of the courts, first, to adhere to the test that the risk be *substantial*,<sup>59</sup> and, second, to

<sup>57</sup> Discussion of this possibility, most recently suggested by *Mills v. Louisiana*, 360 U.S. 230 (1959), is the main object of a recent article of mine, *McNaughton, Self-Incrimination Under Foreign Law*, 45 VA. L. REV. 1299 (1959).

<sup>58</sup> The leading case on this point is *Hoffman v. United States*, 341 U.S. 479 (1951).

<sup>59</sup> See *Emspak v. United States*, 349 U.S. 190, 203 (1955) (dissenting opinion of Harlan, J.); *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 735-36 (Me. 1959) (Webber, J.: "So many persons have claimed the privilege in recent years for reasons based upon political convictions or upon their personal philosophy as to the proper scope of inquiry and examination rather than upon honest fear of self-incrimination, that the probabilities that might otherwise have tended to support such a presumption [that the plea was in good faith] have been greatly diminished.")



require that the claimant make a decent *showing* that the test has been met. The progeny of *Hoffman v. United States* have distended the privilege so far that it is now virtually impossible to think of a question in any way relevant to a criminal investigation to which any witness could not successfully plead the privilege.<sup>60</sup> Indeed, it is now difficult logically to avoid the conclusion that the plea of privilege itself tends to incriminate!<sup>61</sup>

<sup>60</sup> See, e.g., *Courtney v. United States*, 236 F.2d 921 (2d Cir. 1956), which applies the principle of *Hoffman v. United States*, note 58 *supra*. A witness before a grand jury refused to name persons to whom he was forced by business considerations to pay small amounts of tribute. His conviction for contempt was reversed on the ground that disclosure would supply clues which might lead to his conviction for not filing information returns required by the Internal Revenue Code. This possibility of incrimination played no part in the witness' refusal to answer and was not even unearthed until after his appearances before the grand jury.

<sup>61</sup> See the writings of Professors Byse, Kalven and Ratner on the point. They would all, as I read them, permit a plea of privilege when the true answer would be "No" to the question, "Are you now or have you ever been a member of subversive organization A?" Professor Ratner would allow the plea on the straightforward ground that, if privilege could be pleaded only when the true answer would be "Yes," then the plea of privilege would itself provide the very clue against which the privilege was designed to protect. That is, the plea would itself be self-incriminating. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 490 (1957). Professor Kalven takes essentially the same position. UNIVERSITY OF CHICAGO ROUND TABLE, Aug. 23, 1953, p. 4. Professor Byse apparently would allow the plea, although the true answer would be "No," only if the question as to subversive organization A was in a series of questions—for example, as to membership in subversive organizations A, B, C, D, etc.—at least one of which (say as to C) would call for a truthful answer of "Yes." His reasoning seems to be that the contrast between the plea of privilege as to question C and the negative answers as to questions A, B and D serves to equate the plea with a "Yes" answer. Byse, *Teachers and the Fifth Amendment*, 102 U. PA. L. REV. 871, 876 (1954).

There is of course merit to the observations of these scholars. Their proposal that a witness be permitted in effect to employ "ringer" or "red herring" pleas in order to dilute the clue-giving nature of the plea may be justified. It is similar to the device used in *Arabian Nights*: Putting an X on every door deprives the X on the door of the intended victim of its significance. On the other hand, that we are driven by logic to such devices might suggest that the whole concept of allowance of privilege to avoid "clues" has gotten entirely out of hand.

Compare the point made by Dean Griswold. He suggests that a plea of privilege is proper (at least if the question relates to membership in the Communist Party) because a truthful "No" answer may put the witness in the position where "in his own interest he may have to undertake to state and explain his membership and activities in the various front organizations." GRISWOLD, *THE FIFTH AMENDMENT TODAY* 19 (1955).

Compare also a quite different kind of "No" answer.

### [Immunity Statutes]

[5] How broad must an immunity be? The Supreme Court in *Counselman v. Hitchcock* said that an immunity statute, "to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."<sup>62</sup> This has been assumed to be the law. It should not be, however. The "fruit of the poisonous tree" doctrine has sufficed in the areas of search and seizure<sup>63</sup> and wiretap.<sup>64</sup> While the considerations are not exactly the same, that doctrine should suffice here. A statute which proscribes the use, directly or indirectly, of the compelled disclosure should be held constitutional.

In conclusion—

### [The Desirable Course]

[6] What would I like to see done with the privilege?

Well, first, let me emphasize that one does not advise surgery lightly—not unless the need is patent. Furthermore, one does not, when he performs the surgery on one part of the body, do it without regard for the impact on other parts of the body. The same is true of surgery on an institution integral to the legal organism. As Judge Learned Hand, speaking of the institution of trial by jury, once said, "Like much else in human affairs, its defects are so deeply enmeshed in the

This phenomenon appears where a question is asked the answer to which *negatively* has incriminating implications. Thus if it is known that a crime was committed at noon in the northeast quadrant of a circle and that the witness was somewhere in the circle that noon, the fact that he was *not* then in the *southwest* quadrant is, by a process of subtraction, an incriminating fact. Or if it is known that the witness was in the northeast quadrant at some time during the day, the fact that he was *not* there at 6 *p.m.* is, by the same process of subtraction, an incriminating fact. The privilege properly covers such "subtractive" facts. It is important to distinguish from this type of question, which usually appears in a pin-pointing series and each of which truly elicits an incriminating fact, the question mentioned earlier which usually appears in an open-ended series and which does not involve the subtractive process.

See *Communist Party v. Subversive Activities Control Board*, 223 F.2d 531, 548-49 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U. S. 115 (1956) ("a witness cannot refuse to take the stand on the ground that pleading the privilege will itself tend to incriminate him").

<sup>62</sup> 142 U. S. 547, 586 (1892).

<sup>63</sup> *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

<sup>64</sup> *Nardone v. United States*, 308 U. S. 338, 341 (1939) (this case was the source of the "fruit of the poisonous tree" phrase).

system that wholly to disentangle them would quite kill it."<sup>65</sup>

Nevertheless, I wish for surgery.

Before I wished too much change in the privilege itself, however, I would be pleased to see one or more developments along these lines: [a] First, some form of a 1st Amendment privilege, which would relieve the 5th Amendment privilege of its illicit but apparently necessary burden in "belief probes."<sup>66</sup> [b] Second, a grant of some discretion to judges to compel or excuse disclosures as the competing interests indicate.<sup>67</sup> And [c], third, elimination of the oath for criminal suspects and defendants (and perhaps elimination of penalties for false testimony and contempt by them as well).

Those developments should come first.

Then, as for the privilege itself, [a] I would like to see a reversal in the constitutional drift—and if necessary constitutional amendment in juris-

<sup>65</sup> *Jorgensen v. New York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir. 1947).

<sup>66</sup> See note 37 *supra* for evidence of the Supreme Court's struggle with this problem.

<sup>67</sup> See note 52 *supra* on this point. Wigmore suggests that the trial judge has inherent power "to decline to compel production [of a document] where in the case in hand the document's utility in evidence would not be commensurate with the detriment to the witness . . ." He cites no authority. 8 WIGMORE, EVIDENCE § 2211 (3d ed. 1940). A minor addition to Uniform Rule of Evidence 45 would achieve the objective suggested in the text.

dictions where amendment is not out of the question—with a hope that all that would eventually remain of the privilege would be its function as a complement of the requirement of probable cause. That is, one would be privileged, as John Lilburn insisted, not to provide the *first* evidence against himself. [b] I would leave the witness-abuse problem entirely to the due process clause, with *Rochin v. California*<sup>68</sup> and the offspring of *Brown v. Mississippi*<sup>69</sup> providing the starting points for reasoning. Such a rule would be almost as prophylactic and much less wasteful. It would not flush the baby down the drain with the bath water.

The changes would probably stir emotions only during a relatively short transitional period. Like the medieval citizens who at first clung to trial by ordeal and raised the equivalent of "due process" objections to jury fact-finding,<sup>70</sup> we would probably adjust to and prefer the new procedures. Scholars meeting at the bicentennial of Northwestern University School of Law in the year 2060 would look back and wonder what the fuss was all about.

<sup>68</sup> 342 U. S. 165 (1952).

<sup>69</sup> 297 U. S. 278 (1936). The principle was applied most recently in *Spano v. New York*, 360 U. S. 315 (1959), and in *Blackburn v. Alabama*, 361 U. S. 199 (1960).

<sup>70</sup> PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125 (5th ed. 1956).