Journal of Criminal Law and Criminology

Volume 89
Issue 4 *Summer*

Article 6

Summer 1999

Self-Incrimination--What Can an Accused Person be Compelled to do?

Fred E. Inbau

0091-4169/99/8904-1329
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 89, No. 4
Printed in U.S.A.

SELF-INCRIMINATION—WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO?*

FRED E. INBAU

In the course of criminal investigations and criminal prosecutions it frequently becomes important, or at least desirable, to require an accused person to perform some act or to submit to what might be termed an invasion of his bodily security. The usual situation arises from attempts to effect an identification of the accused, or to ascertain from an examination of his body certain facts tending to establish his guilt or innocence as a criminal offender. In such instances, to what extent does the constitutional privilege against self-incrimination afford protection to accused persons?

A discussion concerning the scope and limitations of the privilege against self-incrimination necessarily involves a consideration of its history and of the policy which justifies its existence. Of this, however, only a brief treatment is necessary for our present purpose. The principal objective of this paper is to present a review of pertinent legal decisions, analyzed and discussed under various classifications based upon factual situations. These classifications, however, are offered merely for the convenience and interest of the reader and not as any indication that each group of cases warrants the application of a different legal principle in interpreting the constitutional privilege.

I. HISTORY AND POLICY OF THE PRIVILEGE

The early English history of our present day privilege against self-incrimination is indeed a strange one. It developed about the middle of the seventeenth century as a restriction upon the cruel religious persecutions for heresy in the ecclesiastical courts, and primarily for the purpose of stripping such

* Originally printed in 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 261 (1937).

courts of their increasing authority, so that they might be kept within their proper status—beneath the dignity and authority of the common law courts.[1] Unlimited inquisitorial powers, permitting the administration of the oath "ex officio" and the compulsory examination of persons accused of heresy and of other offenses within the jurisdiction of the church courts, seemed to endanger the superior authority of the courts of common law.[2] In addition to this, of course, there existed a general disapproval of the practice, not so much because an accused was forced to testify against himself concerning the particular charge against him, but principally for the reason that such a practice permitted a general inquiry into a person's behavior and conduct, however unrelated they may be to the charge in question.

Not long after the abolition from the ecclesiastical courts of the oath "ex officio" and its attendant compulsory examinations, attention was focused upon the justification for even the common law courts to exercise such widespread authority. The result was a general reaction to the effect that no person should be bound to incriminate himself on *any* charge in *any* court. Common law courts began to concede this claim, first in criminal trials and later in civil proceedings. It soon became settled into the bed rock of English common law. By the latter part of the seventeenth century the privilege was so well established that apparently Parliament considered it unnecessary to include it in the Bill of Rights.[3]

On first impression it seems rather queer that this movement, started originally against a method of procedure in ecclesiastical courts, should produce in its ultimate effect a similar

---

[1] 4 Wigmore, Evidence (2d ed., 1923) § 2250. Unless otherwise indicated this citation is also authority for subsequent comments concerning the history of the privilege.

[2] Regarding the source of the maxim "*nemo tenetur prodere* (or *accusare*) *seipsum*"—"nobody is bound to accuse himself"—see Corwin, E. S., "The Supreme Court's Construction of the Self Incrimination Clause," 29 Mich. L. Rev. 1 (1930), and compare with Wigmore's version, *op. cit. supra* note 1.

[3] Pittman, R. C. "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America," 21 Va. L. Rev. 763, 764 (1935): "The implications to be found in Wigmore on Evidence . . ., and in the case of Twinning v. N. J., . . ., to the effect that the privilege against self-incrimination was never regarded in England as the constitutional landmark that our constitution makers of 1789 regarded it, seem unjustifiable. . . . By the time of the English Bill of Rights in 1689, the privilege had become so well established and universally recognized that to have inserted it would have been very much like re-affirming the law of gravitation." *Ibid.*, p. 774. Mr. Wigmore, in his 1934 Supplement to the Treatise (at p. 1008), has conceded that Mr. Pittman's conclusion, in view of the proof adduced, is correct.

rule against testimony in common law courts. In explaining this phenomenon Wigmore calls attention to the comments of Bentham to the effect that this was only a nature and inevitable development, suggested, of course, by the procedural change in the ecclesiastical courts, to safeguard against existing and potential common law abuses, which, after all, were not substantially different from those resulting from the exercise of arbitrary power in probing into a man's conscience on the subject of religion.

It should be understood that the privilege against self-incrimination and the rule excluding untrustworthy confessions are separate and distinct, as to origin, development, and principle. Frequently the two are confused and treated as identical. However, the history of each differs in origin by one hundred years, and obviously, as pointed out by Wigmore,[4] if the privilege, "fully established in 1680, had sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions." Moreover, the privilege was designed to cover only statements made in court under process as a witness, whereas the confession rule was intended to cover statements both in court and out. And finally, in regard to practical effects, the differences become quite apparent. It seems, therefore, that the sole relationship between the confession rule and the privilege is to be found in the general spirit and caution which the law gradually developed in the interest of accused persons.

The settlement of the American colonies took place about the time in English history when opposition to the "ex officio" oath of the ecclesiastical courts was most pronounced, and when the insistence upon the privilege against self-incrimination in the common law courts had begun to have its effect. Apparently the very reasons which contributed to the change in the English common law concept of the rights of accused persons largely accounted for the recognition of the privilege in the colonies, and for its incorporation in the federal constitution and in the constitutions of the several states.[5]

Although some of the details concerning the English and early American history of the privilege are obscure, it is perfectly clear that the primary purpose of the privilege was to put an

---

[4] *Op. cit. supra* note 1 at § 2266.

[5] *Op cit. supra* note 3 at p. 769.

end to the practice of employing legal process *to extract from a person's lips an admission of his guilt.*[6] And this interpretation must persist even under the view that the privilege is closely related to the confession rule both as to history and principle—which view is not altogether unreasonable as regards the adoption of the privilege in our federal and state constitutions.[7]

In examining the following collection of cases it is well to keep in mind not only the original purpose of the privilege but also the policy which justifies its existence *at the present time*:

> "It exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions."[8]

Were it not for this consideration it might well be contended that the privilege has outlived its usefulness.[9] Then again, however, we should not lose sight of the fact that "the exercise of the power to extract answers begets a forgetfulness of the just limitations of that power."[10] It may also become an additional incentive for law enforcement officers "to sit comforta-

---

[6] An early extension of the privilege encompassed the production of documents or chattels by an accused in response to a subpoena or other form of process "treating him as a witness." Of this Mr. Wigmore states: "For though the disclosure thus sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the identity or authenticity or origin of the articles produced." 4 Wigmore, Evidence (2d ed., 1923) § 2264.

[7] "This privilege against self-incrimination came up through our colonial history as a privilege against physical compulsion and against the moral compulsion that an oath to a revengeful God commands of a pious soul. It was insisted upon as a defensive weapon of society and society's patriots against the 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 sovereignty to confess his guilt of the fact charged." *Op cit. supra* note 3 at 783. "In all of the debates on the Federal constitution in the adopting conventions, there were but few allusions to the privilege, and, when mentioned, it was mentioned as a privilege against torture." *Ibid.*, p. 788.

For other references upon the history of the privilege, as well as the interpretation of the privilege generally, see Grant, I. A. C., "Self-Incrimination in the Modern American Law," 5 Temple L. Q. 368 (1931), and excellent comment in 17 Minn. L. Rev. 187 (1933).

[8] *Op. cit supra* note 1 at § 2263.

[9] For an excellent dissertation in favor of the abolition of the privilege, see Bentham, Rationale of Judicial Evidence, bk. 9, pt. 1, ch. 3 (Browning's Edition, Vol. 7, p. 449 *et seq.*).

[10] *Op. cit. supra* note 1 at § 2251.

bly in the shade rubbing red pepper into a poor devil's eyes rather than go about in the sun hunting up evidence."[11]

II. FOOTPRINTS

In discussing the admissibility of compulsory evidence regarding footprint comparisons it is necessary to distinguish between the type of case where a person's shoes are forcibly taken from him for the purpose of comparing them with tracks at the scene of a crime and the case where he is himself compelled to place his shoes or feet into the prints so that a comparison may be effected. Each situation involves the application of a different legal principle.

Under the established rule that anything of evidential value on or about the person arrested is a proper object of confiscation[12] the courts should have experienced little or no difficulty in upholding the admissibility of evidence obtained as the result of a comparison made with a shoe or shoes obtained from an accused person against his will. Nevertheless, many of the opinions rendered in cases involving the issue have been based upon a consideration of the constitutional privilege against self-incrimination. Practically all the cases held in favor of admissibility—that is, that there was no violation of the privilege against self-incrimination[13]—but the fact remains that the same result could have been reached by invoking the simple rule just mentioned.[14]

As regards the admissibility of evidence concerning footprint comparisons where the accused himself has been compelled to place his foot or shoe into a print—the type of case where the real issue is one of possible self-incrimination—the

---

[11] 1 Stephen, History of the Criminal Law (1883) 442, quoting the observations of a British officer concerning a practice of native police officers of India.

[12] *People v. Defore*, 242 N. Y. 13, 150 N. E. 585(1926); *Haywood v. United States*, 268 Fed. 795 (1920); *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429 (1902); *State v. Green*, 121 S. C. 230, 114 S. E. 317 (1922); *State v. Fowler*, 172 N. C. 905, 90 S. E. 408 (1916). Also see citations in 32 A. L. R. 686 (1924); 82 A. L. R. 782 (1933).

[13] *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299 (1903); *Racketts v. State*, 23 Okla. Cr. R. 267, 215 Pac. 212 (1923); *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227 (1924); *Biggs v. State*, 201 Ind. 200, 167 N. E. 129 (1929); and other decisions cited in 64 A. L. R. 1092 *et seq.* Likewise, the results of a comparison of the measurements of a defendant's foot, made forcibly, with disputed tracks are also admissible: *State v. Smith*, 133 S. C. 291, 130 S. E. 884 (1925). But see *dicta* in *Bridges v. State*, 86 Miss. 377, 38 So. 679 (1905). *Contra* to majority rule stated above: *Davis v. State*, 131 Ala. 10, 31 So. 569 (1902).

[14] *See*, in this connection, comment in 5 N. C. L. Rev. 333 (1927).

weight of authority supports the proposition that such compulsory behavior or conduct does not violate the constitutional privilege, for the reason that the accused in such instances is "not testifying as a witness" nor is he "delivering any testimonial utterance."[15] The decisions in support of the minority view hold that such "enforced conduct" constitutes "testimonial compulsion."[16]

The unreasonableness of the minority view is very well exemplified by a decision rendered several years ago in a case which involved the admissibility of evidence as to footprints made (1) by compelling the accused to place his foot with shoe on, into a print at the scene of a crime, and (2) by a sheriff placing the accused's shoes into the prints subsequent to their forcible removal from the feet of the accused.[17] After a very thorough and exhaustive discussion of the problem presented by the second method, the court expressed its approval of the evidence resulting therefrom. It then devoted relatively little space in its opinion to the other and more important issue presented by the first method mentioned above, and abruptly concluded by holding that "this evidence falls on the wrong side of

---

[15] "In such cases the physical facts speak; not the defendant as a witness.... The test is as to whether the evidence is compulsorily given by the defendant under process as a witness." *State v. Barela*, 23 N. M. 395, 168 Pac. 545, L. R. A. 1918B, 844 (1917). "No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. Their resemblance was a fact calculated to aid the jury and fit for their consideration." *State v. Graham*, 74 N. C. 646 (1876). "He is not, in such cases, giving evidence. He is not testifying as a witness. He is not delivering any testimonial utterance." *Magee v. State*, 92 Miss. 865, 46 So. 529 (1908). Also see citations and discussion in 64 A. L. R. 1097 *et seq.* (1929). "The tendency of the more modern cases is to restrict the constitutional privilege against compulsory self-crimination [sic] to confessions, and admissions proceeding from the accused, and to open the door to the reception of all kinds of 'real evidence' or proof of physical facts, which speak for themselves." *State v. Graham*, 116 La. 779, 41 So. 90 (1908).

[16] *Day v. State*, 63 Ga. 667 (1879), and *Elder v. State*, 143 Ga. 363, 85 S. E. 97 (1915)—the latter holding that the mere fact that the defendant was "in custody" at the time, rendered the evidence inadmissible, even though there was no express objection; *Cooper v. State*, 86 Ala. 610, 6 So. 110 (1889); *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227 (1924). It is interesting to note that in *Lipes v. State*, 83 Tenn. 125 (1885), the Supreme Court of Tennessee reversed a case in which the trial court refused to permit the accused to exhibit his feet to the jury so that a comparison could be made with evidence prints—on the ground that this constituted "the best means of ascertaining the truth," which is "the object of the law," whereas in *Stokes v. State*, 64 Tenn. 619 (1875), the same court had decided it was a reversible error to merely request an accused to put his foot into a pan of mud so that the resulting impression could be compared with those at the scene of the crime.

[17] *State v. Griffin*, supra note 16; commented upon in 9 Minn. L. Rev. 158 (1925). Also see, to the same effect, *State v. Smith*, *supra* note 13.

the line of cleavage" and therefore its admissibility constituted reversible error.

III. EXAMINATION OF BODY FOR SCARS, MARKS, AND WOUNDS

The leading decision concerning the right to examine the body of an accused person for scars and other identifying features is one rendered by the Supreme Court of Nevada in 1879. In this case[18] the accused, on trial for murder, had been compelled to exhibit his arm to the jury so that an observation could be made of certain tatoo marks which formed the basis of an identification by one of the state's witnesses. Upon appeal the defendant alleged that this procedure violated his privilege against self-incrimination.

In a very able opinion the Supreme Court affirmed the ruling of the trial court and held that the privilege had not been violated. The opinion states that "none of the many reasons urged against the rack or torture or against the rule compelling a man 'to be a witness against himself' can be urged against the act compelling a defendant to have his arm exhibited in the presence of a jury" because "such an examination could not, in the very nature of things, lead to a falsehood." The court considered the privilege as a protection against compulsory verbal testimony only, and stated that "it would be a sad commentary upon the wisdom of the framers of our Constitution" to hold that they intended by the privilege against self-incrimination to "close the door of investigation tending to establish the truth" in such a case as this.

The courts of several other states have rendered decisions to the same effect, both as regards the examination of scars and marks for identification purposes and the examination of wounds where their nature and position may be of any probative value.[19] The extent to which the courts are inclined to go in

---

[18] *State v. Ah Chuey*, 14 Nev. 79 (1879).

[19] *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323 (1890); *State v. Garrett*, 71 N. C. 85, 17 Am Rep. 1 (1874). Also see: *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (1905); *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743 (1900); *Hooks v. State*, 97 Tex. Cr. R. 480, 261 S. W. 1053 (1924); *State v. Struble*, 71 Iowa 11, 32 N.W. 1 (1887); *State v. Jones*, 153 Mos. 459, 55 S. W. 80 (1900); *People v. Salas*, 61 Pac. (2d) 771 (Calif., 1936).

It is of interest to compare the *Garrett* case, *supra*, with a previous decision of the same court, *State v. Jacobs*, *infra* [note 35]. In the *Jacobs* case the court held that the privilege protected an accused from being compelled to stand up in court for inspection of the jury where it was sought to be determined whether he, a "free negro," fell "within the prohibited degree" covered by a statute pertaining to the "carrying of arms." In the *Garrett* case, the court held that a person

this respect is illustrated by an Indiana decision which sanctioned the forcible handcuffing of an accused person in order that an examination could be made of certain identifying marks on his body.[20]

IV. MEDICAL EXAMINATION OF SEXUAL ORGANS

A. PREGNANCY OR CHILD BIRTH DETERMINATIONS

In an early New York case involving a prosecution for infanticide the accused mother was subjected to a medical examination for the purpose of refuting her denial of recent pregnancy. To the introduction of medical testimony to this effect the defendant objected, on the ground that the examination had been made against her will and therefore it constituted a violation of her privilege against self-incrimination. Her contention was upheld by the Court of Appeals of New York which considered the examination tantamount to compelling the defendant to actually testify that she had been pregnant and had given birth to the murdered child.[21]

A contrary view was taken by the Supreme Court of the Philippine Islands in a somewhat similar and relatively recent case,[22] one in which a woman accused of adultery refused to submit to a medical examination to determine whether or not she was pregnant. As the result of her refusal to submit the defendant incurred a jail sentence for contempt of court. She petitioned the Supreme Court for a writ of habeas corpus, alleging that her constitutional privilege against self-incrimination accorded her immunity from any such examination. In a very well reasoned opinion the Supreme Court refused to grant the writ; consequently holding that the compulsory medical examination

---

suspected of arson and murder could be compelled to remove a bandage from her hand in order to determine whether or not she had been burned, as she alleged in an effort to avoid suspicion of setting the fire herself. To arrive at such a conclusion the court distinguished the *Garrett* case from the *Jacobs* case by stating that since the purpose of the jury view in the *Jacobs* case was to determine the defendant's degree of color, when the court required him to stand, he was thereby forced to become a witness against himself; whereas in the *Garrett* case, "not the prisoners, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation." This distinction, however, seems more illusory than real.

[20] *O'Brien v. State, supra* note 19.

[21] *People v. McCoy*, 45 How. Prac. (N. Y.) 216 (1873). See *State v. Eccles*, 205 N. C. 825, 172 N. E. 415 (1934), which held admissible the results of such an examination where voluntarily made.

[22] *Villaflor v. Summers*, 41 Phil. Is. 62 (1920).

would not impinge upon the constitutional privilege against self-incrimination:

> "Having disabused our minds of a too sensitive appreciation of the rights of accused persons, and having been able, as we think, to penetrate through the maze of law reports to the policy which lies behind the constitutional guaranty and the common law principle, we have come finally to take our stand with what we believe to be the reason of the case. * * *
>
> "The kernel of the privilege as disclosed by the text writers was testimonial compulsion.... The provision should be approached in no blindly worshipful spirit, but with a judicious apprehension of both its benefits and its abuses. * * *
>
> "Under the facts before us, to use torture to make the defendant admit her guilt might only result in inducing her to tell a falsehood. But no evidence of physical fact can for any substantial reason be held to be detrimental to the accused except in so far as the truth is to be avoided in order to acquit a guilty person. * * *
>
> "Between a sacrifice of the ascertainment of truth to personal considerations, between disregard of the public welfare for refined notions of delicacy, law and justice cannot hesitate. * * *
>
> "Fully conscious that we are resolving a most extreme case in a sense, which on first impression is a shock to one's sensibilities, we must nevertheless enforce the constitutional provision in this jurisdiction in accord with the policy and reason thereof, undeterred by merely sentimental influences. Once again, we lay down the rule that the constitutional guaranty is limited to a prohibition against compulsory self-incrimination."[23]

B. EXAMINATION FOR VENEREAL DISEASES

In the course of criminal investigations of rape cases where the victims have contracted venereal diseases as the result of such attacks, it becomes important, as part of a thorough investigation, to ascertain whether or not the accused persons are similarly afflicted. To determine this satisfactorily, of course, necessitates a medical examination of the sexual organs of the accused. Hence the possible objection that the examination constitutes a violation of the privilege against self-incrimination.

---

[23] It is interesting to note that one of the judges, though concurring in the opinion, objected to the absence of any provision to insure ocular inspection only and to safeguard the defendant from being examined by means of any instruments. For a discussion of cases involving the utilization of instruments to obtain compulsory evidence see *infra* [Part XII] *et seq.*

Courts generally have held that emanations of this nature are violative of the privilege, unless submission is voluntary.[24] Some decisions have gone the extent of holding, in effect, that the accused must expressly voice his approval—mere silence and the absence of overt objection being insufficient.[25] And according to this strict view the mere fact that an accused thinks he is compelled to submit will suffice to render the results of the examination inadmissible:

> "When a man is under arrest, without counsel, and, speaking metaphorically, is standing in the shadow of a policeman's club, it requires something much more substantial than silence to justify an invasion of his constitutional right not to be compelled to furnish evidence against himself."[26]

Even assuming the unreliability and possible prejudicial effect of evidence a similar venereal infection in both victim and suspect—a factor which seems to make itself felt in some of the decisions[27]—the courts are unjustified in denying admissibility on the ground of self-incrimination.[28]

V. CHANGING WEARING APPAREL, AND THE ENACTMENT OF CRIMES—FOR PURPOSES OF IDENTIFICATION

A. CHANGING OF WEARING APPAREL

The weight of authority supports the proposition that an accused person may be compelled to change his wearing apparel

---

[24] *State v. Height*, 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437 (1902); *People v. Akin*, 25 Cal. App. 373, 143 Pac. 795 (1914). *McManus v. Commonwealth*, 264 Ky. 240, 94 S. W. (2d) 609 (1936); *Contra: U. S. v. Tan Teng*, 23 Phil. Is. 145 (1912).

[25] *People v. Corder*, 224 Mich. 274, 221 N. W. 309 (1924)—a 3-3 decision. See adverse criticism of this case in 27 Mich. L. Rev. 471 (1929), and in 29 Col. L. Rev. 214 (1929). To the same effect as Corder case see *Bethel v. State*, 178 Ark. 277, 10 S. W. (2d) 370 (1928), noted in 24 Ill. L. Rev. 487 (1929).

[26] *State v. Horton*, 247 Mo. 657, 153 S. W. 1051 (1913) (*dictum*). Accord: *State v. Newcomb*, 220 Mo. 657, 119 S. W. 405 (1909); *State v. Matsinger*, 180 S. W. 856 (Mo., 1915).

[27] For example, see *Bethel* case, *supra* note 25.

[28] Consider in this connection the general attitude regarding evidence of blood grouping similarity in cases involving paternity determinations. "Since the tests can only prove exclusion (that the accused *is not* the father), are the results which indicate mere possibility of paternity (that the accused *may* be the father) of sufficient value to be admitted in evidence? . . . While logically relevant as concomitant evidence, it seems that the possibility of prejudicial interference against the defendant is too great in return for the remote evdence [sic] of capacity. . . . For that reason scientific authorities advocate that the results of blood grouping tests be admitted in evidence only when they conclusively establish a fact, i. e., that the accused could not possibly be the parent." Muehlberger, C. W. and Inbau, F. E., "The Scientific and Legal Application of Blood Grouping Tests," 27 J. Criminal Law and Crim. 578 at p. 592 (1936).

for the purpose of permitting witnesses to a crime to observe the accused when dressed in clothing similar to that worn by the actual perpetrator of the crime.

Among the decisions to this effect is one rendered by the United States Supreme Court, in which it was held permissible for police authorities to compel a person accused of murder to put on a shirt found at the scene of the crime, in order to determine whether or not it fitted him.[29] Another such case, decided by the Supreme Court of Indiana, upheld the admissibility of identification testimony even though the accused, at the time of the identification, had over his face a handkerchief placed there by a police officer for the purpose of permitting the identifying witness to observe the accused when dressed the same way as the guilty person.[30]

It is of interest to compare a decision of the Supreme Court of Nevada with one rendered by the Supreme Court of Oklahoma upon this subject. In the Nevada case[31] the trial court had compelled the accused to take off his shirt, exhibit his arm to the jury, and then don a bullet-riddled shirt for the purpose of permitting the jury to determine whether or not the holes in the evidence shirt were in line with the scars and injuries on the accused's own body. Upon appeal this was held not to constitute a violation of his privilege against self-incrimination. In the Oklahoma case[32] the Supreme Court held that an accused can-

---

[29] *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021 (1910). In the opinion of the court, Justice Holmes remarked: "The prohibition of compelling a man in a criminal case to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." Also to the same effect: *Bruce v. State*, 31 Tex. Cr. R. 590, 21 S. W. 681 (1893); *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927). And see *Rogers v. State*, 180 Wis. 568, 193 N. W. 612 (1923); *Richardson v. State*, 151 So. 910 (Miss., 1934).

[30] *Ross v. State*, 20 Ind. 281, 182 N. E. 865 (1932). The accused also had a beard of several hours growth at the time of the identification, and this too he alleged to constitute a violation of his privilege against self-incrimination, since the beard resulted from his compulsory detention in jail.

[31] *State v. Oschoa*, 49 Nev. 194, 242 Pac. 582 (1926) noted in 24 Mich. L. Rev. 617 (1926). To the same effect: *Benson v. State*, 69 S. W. 165 (Tex. Cr. R. 1902).

[32] *Ward v. State*, 27 Okla. Cr. R. 362, 228 Pac. 498 (1924). The court also remarked: "The right intended to be provided by the constitutional provision that no person shall be compelled to give evidence which will tend to incriminate him is so sacred, and the pressure towards its relaxation so great that when the suspicion of guilt is strong and the evidence weak and obscure,

not be compelled (even while testifying in his own behalf, according to the facts of the case) to try on a coat found at the scene of a crime. The court distinguished this case from one involving a pre-trial effort to accomplish the same objective, on the ground that here "the compulsion complained of was against the defendant as a witness." "The difference is this," stated the court, "that when such comparisons and experiments are made outside the court, the evidence thereto falls from the lips of witnesses other than the defendant. . ., while, on the other hand, if the defendant is required to make such experiments and comparisons, no extraneous evidence is required, and the constitutional prohibition is thereby violated."

The historical origin of the privilege permits a distinction such as that made by the Oklahoma court between pre-trial compulsion and compulsion under legal process, although practically all courts at the present time consider the privilege as covering proceedings out of court as well as in court. Nevertheless, the Oklahoma decision is subject to criticism on two grounds. In the first place, since the enforced conduct of the accused did not constitute "testimonial compulsion"—*i. e.*, to paraphrase the court's own language, since the evidence did not "fall from the lips" of the accused—there is no justification for considering the trial court's ruling as a violation of the privilege. Secondly, the fact that the defendant had already testified in his own behalf should have been sufficient to dismiss without any further consideration the question of self-incrimination.

B. ENACTMENT OF CRIME

The police practice of requiring accused persons to enact simulated crimes for identification purposes—at least to the extent, for example, of standing near a window of a burglarized home, etc.—has received judicial approval in a few cases,[33] although there is some authority to the contrary.[34]

---

that it is the duty of the courts liberally to construe the prohibition in favor of personal rights, and to refuse to permit any steps tending toward their invasion."

[33] *State v. Neville*, 175 N. C. 731, 95 S. E. 55 (1918); *Slone v. State*, 121 Tex. Cr. R. 632, 50 S. W. (2d) 301 (1932). In the *Neville* case the court stated: "It was no more a violation of the constitutional rights of the prisoner to present himself to the prosecuting witness for identification in the place where the perpetrator stood than to make him stand up in court for the same purpose. Indeed, it was fairer to him to present him amid the surroundings where the occurrence took place." Also see *State v. Thompson*, 161 N. C. 238, 76 S. E. 249 (1912); *Thomas v. State*, 19 Ala. 187, 96 So. 182, 184 (1923). In *People v. Fisher, et al.*, 340 Ill. 216, 172 N. E. 743 (1930), sev-

VI. STANDING UP IN COURT

In 1858 the Supreme Court of North Carolina was called upon to determine whether or not there had been a violation of the privilege against self-incrimination in a case involving the prosecution of a "free negro" for "carrying arms," who had been compelled to stand up in court so that the jury could get a better view of him to determine if he were "within the prohibited degree" specified in the pertinent North Carolina statute. The court decided that the privilege had been violated.[35] It analogized this situation to one in which "an attempt is made to compel a defendant to produce in court a private paper which would be evidence against him," and then stated that the facts did not justify an exception "to that great conservative rule which the generous spirit of the common law has established for the protection of accused persons." The court further stated that although the right of the state to compel the presence of the accused at the trial may be recognized, it does not follow that he could be forced to stand or sit within view of the jury.

Although the effect of this decision has since been repudiated in North Carolina, it contributed to much of the confusion in later decisions pertaining to compulsory evidence generally. Moreover, it has a modern counterpart in a relatively recent Alabama case,[36] in which the term "give evidence against himself," as it appears in the Alabama constitution, is interpreted as a protection from any compulsory evidence and not merely the testimonial variety; and it is upon this basis that a distinction is made between the Alabama ruling and those of other states whose constitutions use the word "testify" in place of "evidence."[37] However, with the exception of this Alabama decision and one by the Supreme Court of Georgia,[38] there is practical

---

eral accused persons re-enacted a bank robbery, while under arrest and without protest, and this was held not to constitute a violation of the privilege against self-incrimination.

[34] *Aiken v. State*, 16 Ga. App. 848, 86 S. E. 1076 (1913).

[35] *State v. Jacobs*, 50 N. C. 259 (1858).

[36] *Wells v. State*, 20 Ala. App. 240, 101 So. 624, 211 Ala. 616, 101 So. 626 (1924). Also see *Williams v. State*, 98 Ala. 52, 13 So. 333 (1893).

[37] For a discussion of the variance in the wording of the privilege in the state constitutions, see 4 Wigmore, Evidence (2d ed., 1923) § 2252 in which it is stated: "This variety of phrasing, then, *neither enlarges nor narrows* the scope of the privilege as already accepted, understood, and judicially developed in the common law. The detailed rules are to be determined by the logical requirements of the principle, regardless of the particular words of a particular constitution."

[38] *Blackwell v. State*, 67 Ga. 76, 47 Am. Rep. 717 (1881) (accused required to stand up and exhibit amputated leg, for identification purposes—held error). *Cf. State v. Prodhomme*, 25 La.

unanimity among the courts of other states in holding that the privilege offers no protection to an accused who may be compelled to stand up in court or place himself within full view of the jury.[39]

The basis for the majority ruling upon this matter is very well stated in an early New York opinion:

> "The history of the constitutional privilege referred to clearly demonstrated that it was not intended to reach a case like this. The main purpose of the provision was to prohibit the compulsory oral examination of the prisoners before trial, or upon trial for the purpose of extorting unwilling confessions or declarations implicating them in crime."[40]

VII. FINGERPRINTS AND PHOTOGRAPHS

A. FINGERPRINTS

Persons suspected or accused of criminal offenses usually submit voluntarily to the taking of their fingerprints for the purpose of comparison with prints found at crime scenes. Consequently, in such instances there is clearly no violation of the privilege against self-incrimination.[41] And this is also true notwithstanding the fact that the suspected or accused individual is unaware that the fingerprints are to be used as evidence against him.[42] Moreover, even where fingerprint impressions are obtained from a piece of paper given the accused ostensibly for the sole purpose of writing thereon, they may be used for comparison with prints found at the scene of a crime.[43] Where, however, a standard print is secured by compulsion, and testimony as to its identity with the evidence print is sought to be

---

Ann. 522 (1873), in which the accused was compelled to place his feet where they could be seen by the jury and witnesses.

[39] *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699 (1894); *State v. Reasby*, 100 Iowa 231, 69 N. W. 451 (1896); *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772 (1899); *State v. Ruck*, 194 Mo. 416, 92 S. W. 702 (1906); *People v. Curran*, 286 Ill. 302, 121 N. E. 637 (1919); *State v. Fulks*, 114 W. Va. 785, 173 S. E. 888 (1934); *Commonwealth v. Safis*, 122 Pa. Super. 333, 186 Atl. 177 (1936); *State v. Clark*, 156 Wash, 543, 287 Pac. 18 (1930) (accused required to stand up and walk over to the chair upon which prosecuting witness was sitting, in order to enable her to observe the accused for identification purposes).

[40] *People v. Gardner, supra* note 39.

[41] *Moon v. State*, 22 Ariz. 418, 198 Pac. 288, 16 A. L. R. 362 (1921); *State v. Johnson*, 111 W. Va. 653, 164 S. E. 31 (1932).

[42] *Garcia v. State*, 26 Ariz. 597, 229 Pac. 103 (1924).

[43] *State v. Cerciello*, 86 N. J. L. 309, 90 Atl. 1112, 52 L. R. A. (N. S.) 1010 (1914). The court in this case intimated that compulsory fingerprinting constituted a violation of the privilege. This *dicta*, however, was repudiated in *Bartletta v. McFeeley*, 107 N. J. Eq. 141, 152 Atl. 17 (1930).

used in a criminal case, then the real issue is raised regarding the constitutional privilege against self-incrimination.

In the leading case upon this subject,[44] a statute was involved which provided, among other things, that no person convicted under its provisions should be sentenced until fingerprint records were searched "with reference to the particular defendant," for the purpose of ascertaining whether or not there had been a prior conviction. Pursuant to this provision the defendant was compelled to submit to the taking of her fingerprints, which, when checked through the files, identified her as a fourth offender—thus incurring an increased penalty. The defense objected to the introduction of this evidence and contended that by requiring the defendant to have her fingerprints taken, and by the receipt of such prints in evidence, she was thereby compelled, in violation of her constitutional rights, to be a witness against herself in a criminal case. The objection was overruled, and from the conviction in the trial court the defendant appealed.

The appellate court, in sustaining the conviction, prefaced its opinion with the remark that the evidence had been received "in a criminal case." It then rendered an exhaustive opinion, reviewing analogous cases, such as those in which it had been held proper to compel accused persons to make footprints for comparison with those found at the scene of a crime, to submit to physical examinations for scars or wounds for purposes of identification, to exhibit tatoo [sic] marks to the jury, etc. The conclusion reached, and the reasons which prompted the court to so hold, are clearly stated in the following quotation from the opinion:

> "Nothing further is required in finger printing than has been sustained heretofore by the courts in making proof of identification. The steps are to exhibit the fingers of the hands and to permit a record of their impressions to be taken. The requirement that the defendant's finger prints be taken for the purpose of establishing identity is not objectionable in principle. There is neither torture, nor volition, nor chance of error. . . .
>
> "No volition—that is, no act of willing—on the part of the mind of the defendant is required. Finger prints of an unconscious person, or even of a dead person are as accurate as are those of the living. . . . By the requirement that the defendant's finger prints be taken there is no danger that the defendant will be required to give false testimony. The

[44] *People v. Sallow*, 100 Misc. 447, 165 N. Y. Supp. 915 (1917). See notes in 27 Yale L. J. 412 (1918) and 17 Col. L. Rev. 633 (1917).

witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her finger prints or change them in one line, and therefore there is no danger of error being committed or untruth told."[45]

Another case,[46] involving a prosecution for selling a quart of gin in violation of the National Prohibition Act, presents a rather interesting situation regarding the admissibility of fingerprint evidence. On the day of the defendant's arrest and before arraignment his fingerprints were taken without his consent. He then filed a petition praying for the return of the prints. His counsel contended that the right to take the fingerprints did not exist, because of the absence of a state or federal statute providing for it, and because fingerprinting subjected "a possible misdemeanant before trial and conviction" to "unnecessary indignity," and constituted a violation of his constitutional rights. The government contended that there was no need for a statutory provision, that fingerprinting was necessary to ascertain whether a defendant had been previously convicted so as to plead the prior conviction provision of the Prohibition Act, and that fingerprinting did not constitute an infringement of any of the defendant's constitutional rights. The district court sustained the contention of the petitioner and ordered the return of his fingerprints. Upon appeal, however, this order was reversed by the circuit court of appeals, holding the petitioner's contentions untenable, and stating that there existed a "general right of the authorities charged with the enforcement

---

[45] *Cf. People v. Hevern*, 127 Misc. 141, 215 N. Y. Supp. 412 (1926): "Fingerprinting is an encroachment on liberty of person. It is justifiable, as is imprisonment, upon conviction for crime, in the exercise of the police powers of the state, for the purpose of facilitating future crime detection and punishment. What can be its justification when imposed before conviction? * * * Concededly, there may not be a compulsory written examination of a defendant as to his past career, and in my judgment he may not be compelled to make disclosure of his past life by the nod or nay of the head or the lines of his hands." The opinion in the *Hevern* case did not cite or mention the decision in the *Sallow* case quoted above. The *Hevern* decision was rendered by the City Magistrate's Court of New York City and County of Bronx, South District; the *Sallow* case, by the Court of General Sessions of the Peace New York County.

Also see *People v. Jones*, 296 Pac. 317 (Calif. App., 1931), which cited with approval *People v. Sallow, supra*, although upon the facts in the case the accused had not objected to the taking of his prints. By way of *dicta* the court said: "Such evidence is not the evidence of the defendant, but is the evidence of a competent witness, and while it is based upon an examination of the defendant, it is no more inadmissible than would be the testimony of one who certified to the existence of a scar."

[46] *United States v. Kelly*, 55 Fed. (2d) 67 (1932).

of the criminal law to employ fingerprinting as an appropriate means to identify criminals and detect crime."

Although there are relatively few decisions concerning compulsory fingerprinting, it is reasonable to presume that the admissibility of such evidence is already established. Many courts, in passing upon the self-incrimination aspects of other types of evidence, mention compulsory fingerprinting by way of justifying their conclusion of admissibility. Moreover, numerous state statutes make it mandatory for law enforcement officers to take fingerprints of accused person.[47] In light of these facts it seems unlikely that any appellate courts, with few possible exceptions, will hold that an accused cannot be required to submit to the taking of his fingerprint impressions.

B. PHOTOGRAPHS

An excellent illustration of the importance of photography in criminal investigations and criminal prosecutions, as well as one calling for a decision upon the self-incrimination aspect of such evidence, is to be found in a case in which an appeal had been taken to the Court of Appeals for the District of Columbia.[48] Photographs had been made of the accused at the time of his arrest on a charge of murder. Upon his trial a witness used these photographs to identify the accused, rather than decide upon the basis of his features at that time, because during the interim between his arrest and trial he had grown a full beard. The accused objected to the introduction of the photographs for this purpose, alleging a violation of his constitutional privilege against self-incrimination. The trial court overruled the objection, and upon appeal this ruling was affirmed, for the following reasons mentioned in the court's opinion:

> "It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mask, in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be a matter of regret to

[47] For example see General Statutes of Kansas (1935) § 21-2501; Louisiana Code of Criminal Procedure (1928) Art. 701; Michigan Compiled Laws (1929) § 568.

[48] *Shaffer v. United States*, 24 App. Dist. Colum. 417, 196 U. S. 639, 25 Sup. Ct. 795, 49 L. Ed. 631 (1904).

have its use unduly restricted upon any fanciful theory or constitutional privilege."[49]

This decision apparently represents the only criminal case passing squarely upon the subject of compulsory photography.[50] Nevertheless, for reasons similar to those mentioned regarding compulsory fingerprinting, there no longer seems to be any question but that an accused person may be compelled to submit to the taking of his photograph.

In addition to the few criminal law decisions concerning the admissibility of evidence obtained by compulsory fingerprinting and photography there are a number of civil law decisions upholding the general right of police authorities to fingerprint and photograph an accused before trial and conviction.[51] Some courts have indicated, however, that after acquittal an accused is entitled to have his fingerprints and photographs expunged from the police records.[52]

---

[49] The same reasoning applies, of course, in support of the admissibility of Bertillon measurements. *United States v. Cross*, 20 Dist. Colum. 365 (1892).

[50] *Commonwealth v. Morgan*, 159 Mass. 375, 34 N. E. 458 (1893), and *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782 (1892), both involved the admissibility of photographs of accused persons, but in neither of which is the self-incrimination question squarely raised.

[51] "The right of the police to fingerprint and photograph is powerfully supported by the argument from convenience and from the public interest in permitting the courts to learn the truth of the questions at issue. The right is also upheld by custom. * * * There is a close analogy between searching the person of a prisoner and fingerprinting him. Both acts have for their purpose the obtaining of evidence against him; in both is his person subjected to some handling beyond what is required for preventing escape. The right to search a prisoner is generally upheld. * * * If the police have no right to fingerprint and photograph a person before conviction, they would seem to be equally without such right after conviction. * * * The next question is this: In what cases can the police ... fingerprint a prisoner? The principle involved is the same if the question is: What prisoner may they search?" *Bartletta v. McFeeley*, 107 N. J. Eq. 141, 152 Alt. [sic] 17 (1930). Also: *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73 (1900). In *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739 (1909), the court, after sustaining the right of compulsory fingerprinting, stated: "We must not be understood ... to countenance the placing in the rogues' gallery of the photographs of any person not a habitual criminal, who has been arrested, but not convicted, on a criminal charge, or the publication under those circumstances of his Bertillon record." *Cf. Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906) and *Itzkovitch v. Whitaker*, 117 La. 708, 42 So. 708, 42 So. 228 (1906), in which it was held that unless there exists some necessity for taking an accused person's photograph (e. g., for purposes of identification or detection) it is unlawful to do so. *Hawkins v. Kuhne*, 153 App. Div. 216, 137 N. Y. Supp. 1090, 208 N. Y. 555, 101 N. E. 1104 (1912), is sometimes considered as authority for the proposition that the fingerprinting of an accused person before conviction is unlawful. The decision is not altogether clear, but it seems that the real issue was one of false arrest. If that be so then, of course, the fingerprinting was illegal.

[52] See collection of cases in 83 A. L. R. 127 (1933). In practically all such cases, however, the courts held that the form of action was inappropriate, although the abstract right of an acquitted person to the return of his fingerprints was apparently recognized. Also see cases cited *supra*

VIII. HANDWRITING

The mere fact that a person is under arrest at the time he complies with a request of law enforcement officers to make a specimen of his handwriting for purposes of comparison with a questioned document has been generally held not to affect the admissibility of such a standard for any reason of compulsory self-incrimination.[53] A similar view also prevails as to the absence of any warning such as that usually given prior to the signing of a formal confession.[54] There are a number of state and federal appellate court decisions to the effect that an accused who takes the witness stand in his own defense may be required on cross-examination to furnish a specimen of his handwriting for comparison with a pertinent incriminating document.[55] The basis for such rulings is, of course, the general principle of

---

note 51, and, in this connection, Kidd, A. M., "The Right to Take Fingerprints, Measurements and Photographs," 8 Calif. L. Rev. 25 (1919).

Some states, by statute, have decreed the return or destruction of fingerprints and photographs in the event of acquittal. See Code of Iowa, (1935) § 13417-b1; Michigan Compiled Laws (1929) § 568.

[53] *Magnuson v. Sate*, 187 Wis. 122, 203 N. W. 749 (1925); *State v. Owens*, 167 Wash. 283, 9 Pac. (2d) 90 (1932); *State v. Scott*, 63 Ore. 44, 128 Pac. 441 (1912); *State v. Renner*, 34 N. M. 154, 279 Pac. 66 (1929); *State v. Lyle*, 125 S. C. 406, 118 S. E. 803 (1923) (*dicta*). This has been held even in a case where the accused showed "some reluctance" to write: *Sprouce v. Commonwealth*, 81 Va. 374 (1886).

[54] *People v. Whitaker*, 127 Ca. App. 370, 15 Pac. (2d) 883 (1932); *State v. McDermott*, 52 Idaho 602, 17 Pac. (2d) 343 (1932); *Rex v. Voisin*, 1 K. B. 531 (1918), 1 A. L. R. 1298.

There is considerable confusion in the Texas courts as to the admissibility of a standard of writing obtained from a person under arrest and without warning. *Accord* with the general rule: *Hunt v State*, 33 Tex. Cr. R. 252, 26 S. W. 206 (1894); *Ferguson v. State*, 61 Tex. Cr. R. 152, 136 S. W. 465 (1911); *Rose v. State*, 124 Tex. Cr. R. 377, 62 S. W. (2d) 121 (1933); *Cox v. State*, 126 Tex. Cr. R. 202, 70 S. W. (2d) 1005 (1934). *Contra: Kennison v. State*, 97 Tex. Cr. R. 154, 260 S. W. 174 (1924); *Blackshear v. State*, 123 Tex. Cr. R. 111, 58 S. W. (2d) 105 (1933); *Click v. State*, 119 Tex. Cr. R. 118, 44 S. W. (2d) 992 (1931). See 3 Texas L. Rev. 485 (1925). The *Kennison* case and others to the same effect attempt to make a distinction between the situation where the standard obtained has "no apparent connection" with the charges against a defendant (as in the *Hunt* case) and one in which there is such a connection, for example, where an accused is requested to make a reproduction in his own handwriting of the questioned document. The distinction is clearly unsound, but the latest Texas decisions upon this question still endeavor to reconcile the two views. See for example, *Rose v. State, supra.*

[55] *United States v. Mullaney*, 32 Fed. 370 (1887); *Clark v. United States*, 293 Fed. 301 (1923); *Commonwealth v. Craig*, 19 Pa. Sup. Ct. 81 (1902); *Hall v. State*, 171 Ark. 787, 286 S. W. 1026 (1926); *State v. McKowen*, 126 La. 1075, 53 So. 353 (1910); *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013 (1896); *Rex v. Whitaker*, 3 D. L. R. (1924) 63. In *People v. Klopfer*, 61 Cal. App. 291, 214 Pac. 878 (1923) the trial court apparently thought the defendant was attempting to disguise his handwriting when requested on cross-examination to execute a standard and for that reason ordered that it be written "again and faster." This was held proper. Even a Texas court was unable "to draw the fine distinction that the accused may give testimony with his lips or by gestures, and be cross-examined as to same, but that he may not be asked to give manual demonstration of matters material." *Long v. State*, 120 Tex. Cr. R. 373, 48 S. W. (2d) 632 (1932).

waiver (*assuming* the application of the privilege otherwise) plus the added fact that the procedure itself constitutes legitimate cross-examination where the issue of handwriting identification is an element in the case.[56]

Apparently the only appellate court decision passing squarely on the general proposition of the constitutionality of compelling a person to execute a standard of his handwriting is one rendered several years ago by the Supreme Court of the Philippine Islands.[57] The case involved a petition for a writ of prohibition to be directed at a trial judge who ordered the petitioner to furnish a specimen of his handwriting for purposes of a comparison being made with certain documents which were alleged to be falsified by the petitioner. The order had been granted at the request of the prosecuting attorney before any formal charges had been filed against the petitioner, and the specimen of handwriting was to consist of a dictated transcript of the contents of the questioned document. Alleging such a procedure to be a violation of his constitutional privilege against self-incrimination, the petitioner sought to have the authorities restrained from enforcing the court order.

The Supreme Court, in a very thorough opinion, upheld the petitioner's contention and granted the writ of prohibition, for reasons apparent in the following excerpt from the opinion:

> "Writing is something more than moving the body, or the hand, or the fingers; writing is not a purely mechanical act, because it requires the application of intelligence and attention; and in the case at bar writing means that the petitioner herein is to furnish a means to determine whether or not he is the falsifier, . . . Except that it is more serious, we believe the present case is similar to that of producing documents or chattels in one's possession. * * *
>
> "We say that, for the purposes of the constitutional privilege, there is a similarity between one who is compelled to produce a document, and one who is compelled to furnish a specimen of his handwriting, for in both cases, the witness is required to furnish evidence against himself.
>
> "And we say that the present case is more serious than that of compelling the production of documents or chattels, because here the witness is compelled to *write and create*, by means of the act of writing, evidence which does not exist, and which may identify him as a falsifier."

The court distinguished the present case from two previous ones concerning this subject of self-incrimination on the

---

[56] See particularly *United States v. Mullaney*, *Commonwealth v. Craig*, and *Hall v. State*, *supra* note 55.

[57] *Beltran v. Samson and Jose*, 53 Phil. Is. 570 (1929).

ground that in the one, involving a compulsory pregnancy examination,[58] the accused was not required to do any "positive act," and in the other the forcing of an accused to discharge some morphine from his mouth did not constitute a "testimonial act."[59] It seems clear, however, that the "creation" aspect of the instant case formed the principal source of the court's objection.

A specimen of handwriting, obtained for purposes of comparison with a questioned document, can logically be considered as nothing more than mere physical evidence. It differs very little, in principle, from a fingerprint impression secured by compulsion for purposes of comparison with a fingerprint found at the scene of a crime. The purpose for which it is desired is not to make a study of the handwriting to determine the mental attitude or character of the accused as bearing upon his guilt or innocence—as would be the case, let us say, if a pseudo-scientific graphological (character reading) examination were made—but merely to observe whatever physical, habit-formed peculiarities may be present in a specimen which will serve as *identification* data. In this respect it is very similar to an accused person's gait or limp which he may be required to exhibit for identification purposes. For these reasons a specimen of handwriting should not be confused with *incriminating documents as such*—that is, any inculpatory writings in possession of the accused, the production of which are sought by process against him as a witness.[60] In the one case an accused's admission of

---

[58] *Villaflor v. Summers*, 41 Phil. Is. 63 (1920), *supra* [note 22].

[59] *United States v. Ong Siu Hong*, 36 Phil. Is. 735 (1917), *infra* [note 79].

[60] It may be argued, of course, that the situation as regards the compelling of an accused to make a specimen of his handwriting is so closely related, in principle, to the rule pertaining to documents and chattels (see *supra* note 6) that it too should come within the scope of the privilege.

In this connection, see *State v. Mayer*, 154 Wash. 667, 283 Pac. 195 (1929) which held that the accused's production in evidence of specimens of handwriting made in the presence of the jury, introduced to negative the prosecution's contention that he wrote the incriminating documents in question, constituted "testimony," even though the accused had not been formally sworn and had not taken the witness stand in his behalf; and for the reason the accused deprived himself of his right to an instruction that no inference was to be drawn from his failure to testify. "We are of the opinion," said the court, "that when Mayer so made these samples of his handwriting before the jury, he was, in legal effect, testifying in his own behalf, just as if he had made such samples out of the presence of the jury, and then brought them into the presence of the jury and there testified that they were samples of his handwriting. * * * Mayer, in legal effect, said to the jury, when he made the samples of his handwriting in their presence, 'There is my handwriting,' as plainly as if he had orally there so told the jury."

guilt may be spelled out in written language and be just as effective in incriminating him as would be his own testimonial admission, whereas in the other situation only the physical characteristics of the handwriting are of any significance, and it would be immaterial that the production of a specimen of handwriting requires any "creation" or "positive act" on the part of the accused. The constitutional privilege was intended to cover the former situation, for otherwise it would be a meaningless phrase, but its historical origin and development indicate that it was not contemplated or designed to cover the latter.

IX. VOICE IDENTIFICATION

Many occasions may arise in the course of criminal investigations or criminal trials in which it becomes desirable to have an accused person speak for the purpose of a comparison being made between his voice and that of a criminal offender. The most obvious situation, of course, is that where the victim of a crime or a witness to it is called upon to identify an accused as the guilty person whose voice was heard at the time of the commission of the offense. Then, too, a comparison may be desired between the voice of an accused and the recorded voice of a criminal obtained from a tapped telephone wire or by means of a dictagraph. In such instances as these, can an accused person be compelled to speak?

Apparently there are no appellate court decisions passing squarely upon this issue. However, in an early Pennsylvania case there is *dictum* to the effect that an accused person may be required to repeat certain words which had been spoken by the perpetrator of a crime, so as to assist a witness in court to form an opinion as to the identity of the accused.[61]

So long as the accused is not required to discuss the crime itself or his own possible incrimination, but merely to furnish a sample of his voice as "identification data," there appears very little justification for considering such compulsory behavior as a violation of his privilege against self-incrimination. The reasons in support of this view are precisely the same as those previously discussed with regard to handwriting specimens.[62]

---

[61] *Johnson v. Commonwealth*, 115 Pa. 369, 9 Atl. 78 (1887).

[62] According to Professor Wigmore, the requirement that an accused speak for identification purposes "is no more than requiring the revelation of a physical mark." 4 Wigmore, Evidence (2d ed., 1923) § 2265. Also see note in 5 N. C. L. Rev. 333 at p. 339 (1927), in which the author

X. INSANITY

The very nature of a psychiatric examination—requiring "utterances" from the person so examined—creates a very interesting and somewhat perplexing problem in so far as the privilege against self-incrimination is concerned. A compulsory psychiatric examation unquestionably comes much closer to the true scope of the privilege than most of the types of cases previously discussed. At the same time, however, the insanity issue presents a much greater sociological factor for consideration. It requires but little imagination to conceive of the effect of a rule of law prohibiting the state from inquiring into the mental status of an accused who offers in his defense a plea of not guilty by reason of insanity, and who is himself permitted to utilize the results of psychiatric examinations in support of his contention. Nevertheless, what course is open to the courts, and particularly to those which are inclined to adhere to the all inclusive view regarding the extent to which the constitutional privilege affords protection against compulsory evidence?

As a general rule, it seems that the courts which have been confronted with this problem of self-incrimination in insanity cases have deliberately avoided, in so far as possible, the real issues involved. For instance, in one case,[63] in which the results of a psychiatric examination were objected to because the sheriff had taken the accused from the jail to "a room outside of the jail" for the purpose of the examination, the only reason given by the appellate court for rejecting the contention of the accused that such a procedure violated his privilege against self-incrimination, was the fact that "this practice of allowing experts to make examinations of the prisoner as to his mental condition is the ordinary procedure in cases where the defense of insanity is interposed." In another case,[64] the contention of an accused that his privilege had been violated was disposed of as follows: "It certainly would be a strange doctrine to permit one charged with a public offense to put in issue his want of mental capacity to commit the offense, and in order to make his plea of want of capacity invulnerable prevent all inquiry into his mental state or

---

states: "Communications should be admitted when the words that are spoken are not incriminating in themselves. Though verbal communications are very close to testimonial utterances, when used alone for identification of voice they are quite similar to specimens of handwriting and should be subject to the same rules."

[63] *People v. Truck*, 170 N. Y. 203, 63 N. E. 281 (1902).

[64] *State v. Cerar*, 60 Utah 208, 207 Pac. 597 (1922).

condition." And in another[65] the court stated: "We fail to see wherein the accused was forced to give evidence against himself. He was forced to do nothing. He was looked at and spoken to; but even a cat may look at a queen, and no one need answer when spoken to unless he wishes to do so." What cogent reasons—all three—for upholding the admissibility of evidence allegedly obtained by compulsion and, according to the accused's contention, in violation of a constitutional privilege!

Another excellent illustration of the reluctance of the courts to bring this issue out into the open is to be found in a Vermont case which held that the commitment of an accused person to a psychiatric institution "for observation" did not violate his privilege against self-incrimination.[66] The basis for the ruling, as well as an indication of the limitations placed upon the extent of the "observations," is to be found in the following quotation from the court's opinion:

> "It was as lawful to confine the accused in the asylum as in the jail and very likely it was more comfortable for him. He could be observed by anyone at either place and such persons could testify without conflicting with the respondent's constitutional rights; otherwise one under indictment could insist upon strict seclusion and being unseen. He was not obliged to do anything or say anything at the asylum, but if he did, any observer, including the superintendent, might testify as to his sanity based upon what he saw or heard the accused say while in confinement in the hospital."[67]

---

[65] *State v. Genna*, 163 La. 702, 112 So. 655 (1927). Also see *dictum* in *State v. Coleman*, 96 W. Va. 544, 123 S. E. 580, 582 (1924): "Ordinarily the result of a physical examination made without consent of the accused is not admissible in evidence, *but* we find the weight of authority in this country is to the effect that *where the defense of insanity is made*, evidence of the facts disclosed by a physical and mental examination of accused by physicians either prior to or during the trial, with or without his consent, does not violate the constitutional privilege of accused not to be a witness against himself." (Italics added.)

[66] *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077 (1901).

[67] Italics added. *Accord: Ingles v. People*, 92 Colo. 518, 22 Pac. (2d) 1109 (1933) (*dicta*). But see *Jessner v. State*, 202 Wis. 184, 231 N. W. 634, 71 A. L. R. 1005 (1930), which casts some doubt upon the constitutionality of a Wisconsin statute providing for commitments for observation. Also see *Mikeska v. State*, 79 Tex. Cr. R. 109, 182 S. W. 1127 (1916), in which it was held that: "By no conceivable freak of the imagination could it be conceived that his [the defendant's] acts, conduct, and demeanor during the trial were not and would not be noticed by the jury, and considered by them in passing on the issue of his insanity, and we think that the experts could take into consideration, in giving an opinion as to his sanity, his acts, conduct, and demeanor on the trial as well as his acts, conduct, and demeanor on other occasions."

In this connection also consider the *dictum* in *People v. Strong*, 114 Ca. App. 522, 300 Pac. 84 (1931), upholding the constitutionality of a section of the California Penal Code authorizing the court to appoint alienists to examine an accused person. As regards the objection that this section violated the defendant's privilege against self-incrimination the court said: "Nothing in the section compels him to submit to an examination. If he does so the action is purely voluntary.

To hold that an accused who is committed to an institution is "not obliged to do anything or say anything" seems a rather feeble excuse for avoiding the real issue, although such judicial rationalization apparently serves very well to avoid any "strange doctrine." Nevertheless, this should be unnecessary under a proper interpretation of the constitutional privilege.

It would have been much more desirable for the courts in these cases to have held that although the privilege protects the accused from supplying any testimonial link in the chain of evidence to establish the conclusion that he committed the crime in question, *it has no application to an inquiry as to his mental responsibility at the time the act was committed;* for even though an accused's ultimate guilt depends upon his mental condition at the time of the commission of the act, it has no bearing upon the questions of whether he actually committed it.[68] The reasonableness of this analysis is obvious when we realize that a psychiatric examination does not necessitate any inquiry as to the accused person's innocence or guilt of the crime charged. An expert in mental diseases can make a complete and thorough psychiatric examination by observing and interviewing an ac-

---

To assert his constitutional rights all that is required is for him to stand mute, *and possibly, also, to refuse to permit the examination,* when the appointed expert undertakes to proceed; and whether he does so or not there is no compulsion." (Italics added.)

[68] This very analysis was urged upon the Wisconsin Supreme Court in *Jessner v. State, supra* note 67. The court stated that "the cogency of this contention is appreciated, but, as we prefer to base our decision on other grounds, we express no opinion with reference thereto." The examination of the defendant was found to have been made "with and by the consent of the defendant."

In this connection consider the concurring opinion of Justice Strom in *Blocker v. State,* 92 Fla. 878, 110 So. 547 (1926), a case in which a psychiatric examination was made of an accused without his attorney's knowledge, although apparently without any specific objection on the part of the accused himself: "On the whole, it seems that the substantial weight of authority now sanctions the admissibility of testimony offered by the state concerning the mental condition of the accused, if relevant to the issue, even though the testimony be based wholly or in part upon a mental and physical examination of the accused without his consent, and in the absence of his counsel, *provided, however,* the extent and nature of the examination be reasonable and lawful under all the circumstances, and some other constitutional right or immunity of the prisoner is not thereby violated with all of which the examination now under consideration seems to be in accord." Also see *State v. Spangler,* 22 Wash. 636, 159 Pac. 810 (1916), where there is some indication that perhaps this court also sensed the real problem when it stated in its opinion, as part of its reason for upholding the admissibility of the results of an examination made without knowledge of the defendant's attorneys, that "no evidence was offered of any act done by the appellant or statement made by him." In addition, see *Mikeska v. State, supra* note 67: "If the conversation detailed by the witness [a jailer] had any bearing on the question of [the defendant's] guilt or innocence of the crime charged against him, it would be clearly inadmissible, but as it did not and could not have any bearing on that issue, but would only have a tendency to aid the jury in passing on the question of his plea of insanity, the testimony was admissible."

cused without at any time even so much as mentioning the crime in question. If the situation were otherwise, that is, if an accused were required to discuss the crime itself, then concededly the privilege would be applicable on the ground that statements thus made by him are equivalent to *testimonial* compulsion, since he would thereby be compelled to talk about the crime itself and consequently his own incrimination. Fortunately, however, this is unnecessary.

Apropos of this analysis it is of interest to consider a decision of the California Court of Appeals.[69] Under the California Penal Code, when a defendant pleads "not guilty by reason of insanity," as well as simply "not guilty," he must be tried on both pleas. If found guilty, then the insanity issue is passed upon, either before the same or another jury. In the instant case, after the defendant had been found guilty and at the time of his trial before the same jury on the insanity plea he was compelled to "give testimony relating to the issues presented by that plea." Upon appeal from his conviction the defendant asserted that this constituted a violation of his privilege against self-incrimination. His contention was upheld by the appellate court which reversed the case and remanded it for retrial—*but only upon the insanity issue.* The verdict upon the "not guilty" plea was permitted to stand.

The reasons advanced by the California court in support of its decision seem extremely illogical. The court held that the rights of a defendant under the statute were no different from those under the previous procedure of one complete trial, and that since prior to the enactment of the statute an accused could not be compelled to testify regarding his sanity, such a practice would not be tolerated under the statutory procedure. Yet its decision in this case sustained the validity of the verdict on the guilty plea, reversed the conviction on the insanity plea, and ordered a new trial upon only the one issue, that of insanity. Such a ruling seems incompatible with the theory of "one complete trial," for if the defendant's rights remained the same then he was entitled to a reversal on both grounds; if not, then the reasons advanced by the court to justify its ruling are untenable.

According to the analysis suggested previously it seems that after a verdict upon a plea of not guilty had been entered

[69] *People v. Lamey*, 103 Cal. App. 66, 283 Pac. 848 (1930).

against an accused, as in this California case, he may thereafter be compelled to take the witness stand upon his trial on a plea of not guilty by reason of insanity. And the same analysis should apply, apparently with greater justification, in a case where for purposes of execution of sentence a court is confronted with a determination of a convicted persons' present mental status. Yet even in this latter situation the Supreme Court of Illinois failed to recognize the real problem involved.[70]

By way of summary it may be stated that the decisions have been quite uniform in admitting in evidence the results of psychiatric examinations allegedly made under compulsion. In most instances, however, it appears that consideration of expediency alone determined the ultimate ruling of the court rather than an analysis of the privilege itself as permitting the utilization of such evidence.[71]

XI. DETECTION OF DECEPTION TESTS

Although at the present time the results of detection of deception tests are inadmissible in evidence,[72] except possibly

---

[70] *People v. Scott*, 326 Ill. 327, 157 N. E. 247 (1927). The defendant in this case had been convicted of murder, but was later adjudged insane. Sometime after his commitment to an insane institution he was tried again on the issue of his present mental status. The trial court permitted "the state to show by the doctors appointed by the court to examine the defendant that he refused to allow them to examine him touching the matter of his insanity." Upon appeal from a verdict adjudging him sane and therefore subject to execution the defendant appealed, alleging the foregoing action of the trial court as error. The appellate court upheld his contention. The basis for the ruling in this respect, however, is not very clear. There were numerous errors in the record and this particular question was given very little attention. The court merely said: "This was a privilege that the law guaranteed to the defendant. There is no law in this state that authorizes or permits a court, either on his own motion or on motion of a party to any civil suit or proceeding, to appoint alienists to examine a defendant . . . with a view of qualifying them to testify as the court's witness for or against such party as to his mental or physical condition."

[71] Excepted from this class, of course, are cases in which it clearly appears that the examinations were submitted to voluntarily or at least without any express objection on the part of the defendant, or where they were made without the consent or knowledge of the defendant's attorney, though without objection from the defendant himself, or where the examinations were made after the defendant had testified in his own behalf and therefore waived his privilege: *State v. Church*, 199 Mo. 605, 98 S. W. 16 (1906); *Commonwealth v. Di Stasio*, 1 N. E. (2d) 189 (Mass., 1936); *People v. Krauser*, 315 Ill. 485, 146 N. E. 593 (1925); *People v. Bundy*, 168 Calif. 777, 145 Pac. 537 (1914); *State v. White*, 113 Wash. 416, 194 Pac. 390 (1920); *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9 (1890); *Waters v. State*, 119 So. 248 (Ala. App. 1928); *State v. Petty*, 32 Nev. 384, 108 Pac. 934 (1910).

[72] *Frye v. United States*, 293 Fed. 1013, 34 A. L. R. 145 (D. C., 1923); *State v. Bohner*, 210 Wis. 651, 246 N. W. 314 (1933); *State v. Hudson*, 289 S. W. 920 (Mo., 1926). Also see Inbau, F., "Scientific Evidence in Criminal Cases: II. Methods of Detecting Deception," 24 J. Criminal Law and Crim. 1140 (1934).

where opposing attorneys stipulate and agree to have the tests made and to permit the results to be received in court,[73] their potential value and possible subsequent judicial acceptance merit a discussion of the question as to whether or not an accused person could be required to submit to an examination of this nature.

A. THE "LIE-DETECTOR"

The name "lie-detector" has been inaptly applied to a type of instrument which records changes in blood pressure, heart beat, respiration, and other physiological processes, and by means of which attempts are made to diagnose deception. In the hands of experienced examiners such an instrument has been found to permit an accurate diagnosis of deception.[74]

During the course of a so-called "lie-detector" test the person being examined is not required to discuss the subject under investigation, except in so far as he must respond to the examiner's questions by either "yes" or "no." And even these responses may be dispensed with if necessary, without materially affecting the results of the test.[75]

Since the physiological reactions obtained by this technique, and even the "yes" and "no" answers, are not used testimonially, that is, "as statements of facts to show their truth," it may well be argued that there should be no legal obstacle to a compulsory examination of this nature.[76] The analogy to compulsory fingerprinting and to many of the other types of cases previously discussed seems to have some validity. And this is particularly true if the "lie-detector" tests are conducted in such a way as to obviate the "yes" and "no" responses of the ac-

---

[73] In two recent criminal cases in Wisconsin a trial court permitted detection of deception evidence to be used, where the tests were made under such conditions. For a discussion of these two cases see Inbau, F., "Detection of Deception Technique Admitted as Evidence," 26 J. Criminal Law and Crim. 262 (1935); and 26 *ibid.* 758 (1936).

[74] For description of the instrument and a discussion of its accuracy, see Inbau, F., "The Lie-detector,'" 40 Scientific Monthly 81 (1935). As to its limitations and the technique involved, See Keeler, L., "Debunking the 'Lie-detector,'" 25 J. Criminal Law and Crim. 153 (1934).

[75] See article cited *supra* note 72.

[76] See, in this connection, McCormick, C., "Deception Tests and the Law of Evidence," 15 Cal. L. Rev. 484 (1927), 2 Am J. Police Sci. 388 (1931). Also see note in 40 Harv. L. Rev. 842 (1931), in which the author suggests that as regards the "lie-detector" test "since the words spoken do not in themselves express ideas, they would not be testimony in any ordinary sense, and consequently should not be excluded."

cused—thereby eliminating any semblance of "testimonial utterances."

B. "TRUTH SERUM"

Several drugs, which are capable of producing a mental state wherein consciousness is affected to the extent that a person's reactions are somewhat automatic, have been used in an effort to detect deception and elicit the truth. Among these are scopolamine and sodium amytal—sometimes known as "truth-serums."

Although some fairly encouraging results have been obtained by the use of these so-called "truth-serums" experimentally and even in actual criminal investigations the percentage of accuracy at the present time is not very high.[77] Perhaps eventually this technique may be improved to an extent to justify consideration of its results as evidence in criminal cases. If and when this should occur, could a person be compelled to subject himself to such an examination?

Since evidence obtained from a person under the influence of "truth-serums" is of a testimonial nature—and pertaining to that person's own possible incrimination—it seems quite clear that this type of case would fall within the scope of the privilege against self-incrimination.[78] The difference between this class of evidence and that obtained by means of "lie-detectors" is obvious, in so far as the privilege against self-incrimination is concerned.

XII. EXTRACTING EVIDENCE FROM WITHIN THE BODY

(Blood Grouping Tests; Blood and Urine Tests for Alcoholic Intoxication; Etc.)

To what extent must an accused person tolerate an invasion of his bodily security? How far may police authorities and judicial tribunals go in extracting physical and non-testimonial evidence from within the body of an accused? For example, may a stomach pump be used on an accused without his consent for the purpose of obtaining a specimen of his stomach contents, in order, let us say, to make an analysis to determine the nature of

---

[77] For a somewhat detailed discussion of "truth serums" see Inbau, F., *op. cit. supra* note 72 at pp. 1153-1158 (1934). In addition to references contained therein see note in same Journal, volume 26 at p. 449 (1935) and also Mosier, M., and Hames, E., "The Identification of an Amnesia Victim by the use of Scopolamine—an Experiment," at pp. 431-438.

[78] See in this connection, McCormick, *op. cit. supra* note 76 and p. 406.

food recently consumed by him, and thereby either verify or disprove his assertions that he last ate a certain kind of food different from that known to have been consumed by the guilty person at or about the time of the commission of the crime in question—a plausible situation in light of modern methods of scientific crime detection?

One court has held that an accused person's privilege against self-incrimination is not violated by his being forced to discharge from his mouth some morphine which he had concealed there when arrested for its possession.[79] Another decided that scrapings from underneath the fingernails of an accused may be removed for analysis without violating any of his constitutional rights or privileges.[80] These cases, however, involve only slight invasions as distinguished from the rather extreme hypothetical case mentioned previously, or those in which blood or other fluids or substances are attempted to be removed from within the body.

A. BLOOD GROUPING TESTS

Blood grouping tests are of particular value in cases involving paternity determinations, to ascertain whether or not it were *possible* for an accused person to have been the father of an alleged offspring.[81] The scientific reliability of such tests is unquestioned, but their value is somewhat limited because they can only establish the fact of exclusion; in other words, the test results offer no proof that a certain person *is* the father of a child whose parentage is in question. And much the same limitations are present as regards the source of a given specimen of blood. The tests may determine the fact that the specimen *could not* possibly have originated from a certain person's body, because of the difference in groupings, but here again the only absolute proof is that of exclusion.

Ordinarily the question of compulsory evidence as regards blood grouping tests is not likely to arise, for the reason that courts, statutes, and scientific authorities all refuse to admit the result of a test if offered to evidence affirmatively the *possibility*

---

[79] *United States v. Ong Siu Hong*, 36 Phil. Is. 735 (1917).

[80] *State v. McLaughlin*, 138 La. 958, 70 So. 925 (1916).

[81] For a discussion on both the scientific and legal aspects of blood grouping test generally, see Muehlberger, C. W., and Inbau, F., "The Scientific and Legal Application of Blood Grouping Tests." 27 J. Criminal Law and Crim. 578 (1936).

of paternity or of the origin of a given specimen of blood;[82] while if the result indicates *impossibility*, the accused is benefitted thereby and is not apt to allege a violation of his privilege against self-incrimination in the procurement of a sample of his blood for comparison purposes. There are certain types of cases, however, in which blood grouping evidence may establish *conclusive proof* against an accused and in which the courts may be called upon to consider whether or not he can be compelled to furnish a sample of his blood for such an analysis. Suppose, for example, that at the time of the arrest of an accused person there is blood upon a weapon found in his possession, or upon his clothing, which the police suspect as having originated from the victim of a murder or other crime of violence, but which the accused claims to be his own blood, the result of a nose bleed or of a minor injury to himself. It would then become worthwhile and indeed important to have blood group test made to determine whether or not the specimen *could* have come from the accused himself. Of course, if the result of the test indicated the blood to be of the same group this would only prove that the defendant *might* be telling the truth, since both his blood and that of the victim may belong to the same group. However, should the result indicate that the specimen *could not* have come from the accused then the police and prosecution would be equipped with a valuable bit of evidence pointing toward his guilt. But, suppose the accused relies upon his constitutional privilege and refuses to furnish a sample of his blood for this purpose?

The analogy between the taking of a specimen of blood and the types of compulsory evidence previously discussed seems basically valid in support of the view that such a procedure does not violate the privilege against self-incrimination. Moreover, although such evidence is obtained by means of a "needle" (e.g., to puncture the ear lobe), there is no more danger of harmful effects upon the person's health than might accrue from the utilization of a similar technique in an ordinary or routine medical examination; and consequently the individual interest of bodily security should likewise yield to the public interest in ascertaining the truth or falsity of the assertions of the accused. Nevertheless, it is reasonable to presume that at least in some states the accused in our hypothetical case would not be

[82] *Op. cit. supra* note 81 at p. 590.

deterred from explaining to the jury that the blood from a cut finger was responsible for the blood on his knife or that the blood stains on his shirt resulted from a nose bleed—even though it might be possible to establish as a scientific fact that all this was absolutely false. The "needle" in the case is just as apt to bring about such a decision as is the notion that there has been a violation of the privilege against self-incrimination.[83]

B. TESTS FOR ALCOHOLIC INTOXICATION

Chemical tests of blood and urine are available for the purpose of ascertaining the fact or extent of alcoholic intoxication.[84] Less scientific and more superficial tests are in ordinary use, of course, such as those in which a person accused of drunkenness is required to attempt to walk a chalk line, or to touch the tip of his nose with his finger, or to repeat a difficult word arrangement. In either class of tests the question may be presented as to whether or not these various methods impinge upon an accused's privilege against self-incrimination.

There is strong *dictum* in an Ohio court of Common Pleas decision to the effect that a person accused of driving an automobile while intoxicated cannot be subjected to a urine analysis or be made to walk a chalk line or perform other such feats for the purpose of determining the extent of his intoxication.[85] In the opinion of this particular court the privilege against self-incrimination offers protection from compulsory examinations of this nature. The court stated, however, that if only an "observation" is made of an accused person while he is confined in a hospital or jail then his observers may testify regarding the actions of the accused and also render an opinion as to his intoxication.

It will be recalled that in the group of insanity cases previously discussed this "observation" theory was also used to avoid a "strange doctrine." Apparently it will serve equally well for ra-

---

[83] See, in connection with the use of "instruments" on an accused, *Villaflor v. Summers*, 41 Phil. Is. 63 (1920), discussed *supra* [note 22] and Note 23.

[84] For discussion of this subject see: Muehlberger, C. W., "Forensic Chemistry," Outline of Scientific Criminal Investigation (1935) 15 (published by the Scientific Crime Detection Laboratory, Northwestern University School of Law); Bogen, E., "Drunkenness: A Quantitative Study of Acute Alcoholic Intoxication," J. Am. Med. Ass'n., *89*:508 (1927).

[85] *Booker v. City of Cincinnati*, 5 Ohio Law Reporter 433 (1936). In this case the court held that although the defendant's privilege had been violated, evidence obtained by other means clearly established his guilt.

tionalization in cases involving tests for alcoholic intoxication; for in addition to the use of this theory in the foregoing Ohio decision, we find it being applied in a New York case to uphold a conviction where a physician testified as to the defendant's condition on the basis of an examination which the court chose to call an "observation."[86]

For reasons discussed in the preceding section and in other parts of this paper it seems that the privilege against self-incrimination should be no obstacle to the admissibility of evidence of intoxication obtained by any of the foregoing methods.[87] The only type of situation in which the privilege appears applicable is illustrated by the facts in an Alabama case[88] where *interrogatories* were propounded of a person as to how many drinks he had and what he had been drinking—an examination calling for testimonial utterances.

In so far as the privilege against self-incrimination is concerned there seems to be no limit to the extent an accused person must tolerate an invasion of his bodily security. There may be and are, of course, other considerations which will impel a court to define certain limitations. Nevertheless, there is no justification for invoking the privilege against self-incrimination for this purpose. Other and more appropriate legal principles are available.

---

[86] *People v. Dennis*, 131 Misc. 62, 226 N. Y. Supp. 689 (1928), 132 Misc. Rep. 410, 230 N. Y. Supp. 510 (1928): "Since the physician merely saw the defendant after his arrest, but made no physical examination *other than such as could be made by observation and conversation*, there was no error in admitting the testimony." (Italics added.)

[87] For *dictum* to the effect that general medical examination does not violate the privilege, see *Moe v. Monmouth County Common Pleas Court*, 143 Atl. 750, aff'd 150 Atl. 920 (N. J., 1928): "The tenth reason urged for a reversal is that the court below violated the constitutional rights of the prosecutrix in subjecting her to an examination by a physician without her consent. This reason seems to have been abandoned, for it is not argued in the brief, and *moreover there is no merit in the contention.*" (Italics added.)

As to the right to compel an accused to repeat a difficult word arrangement, see the discussion herein under the topic "Voice Identification." The same, and even more forceful reasons can be urged in support of the admissibility of evidence obtained from the word arrangement test.

[88] *Ex parte* Frankel, 17 Ala. 563, 85 So. 878 (1920). See comment on this case in 10 Temple L. Q. 314 (1936), in which the author interprets this case as authority for the proposition that no tests for drunkenness may be administered without the consent of the accused.