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VOICE IDENTIFICATION, WRITING EXEMPLARS AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

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The problems involved in defining the nature of the privilege against self-incrimination and in setting its limits have been much mooted in recent years. Though these problems have been brought into sharp focus by the present very urgent and certainly justified concern for our national security, they are problems which are inherent in the privilege itself. They have been with us for a long time.

One of these problems concerns the extent to which a person may refuse to participate in criminal proceedings brought against him. Doubtless not even the most liberal proponent of the privilege would claim that an accused person should be permitted to wear a mask in court and refuse to reveal his face to prosecution witnesses seeking to make an identification. Common sense rebels at the idea. On the other hand, compelling the accused to take the stand and answer under oath questions concerning the crime of which he is charged or ordering him to produce a personal diary in which he has entered incriminating matter—these are clearly violations of the privilege. It is between these polar cases that there lie the situations which have given our courts great difficulty. The same questions have, in different jurisdictions, been given different and irreconcilable answers. Can a person be made to try on clothing or to expose identifying body markings? Is it permissible to compel an accused to submit to a blood test to determine blood-alcohol content, or to submit to a physical or mental examination? Can he be compelled to make fingerprint and footprint impressions? These are only a few of the many possible cases.

It is the purpose of this article, first to examine two situations which are still open questions in almost every United States jurisdiction and which seem to fall almost exactly on the border-line between compelled conduct which violates the privilege against self-incrimination and that which does not.

1. Can a person be compelled to execute an exemplar of his handwriting for use against him in a criminal proceeding?

2. Is it a violation of the privilege to force a suspect to speak so that a voice identification can be attempted?

Then, after reviewing and commenting upon the case authority in this area, some suggestions will be made concerning the proper

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limits of the privilege against self-incrimination as applied to the compelled conduct of an accused.

HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION[1]

Before progressing further it will be well to examine briefly the history of the privilege against self-incrimination. A knowledge of the history of the privilege may prove helpful in determining how to interpret the various phrases in the federal and state constitutions which are the present-day embodiments of the privilege.

A. *The Development of the Privilege in England.*

The seeds of the controversy which eventually bore as fruit the privilege against self-incrimination were planted in the eleventh century. William the Conqueror required the bishops, who had been sitting as judges and presiding over suits in the popular courts, thereafter to decide cases according to ecclesiastical law.[2] From this enactment emerged two separate systems of English courts—the ecclesiastical courts and the common-law courts. Much of the early history of the privilege is concerned with the struggles for power between these two systems of courts.

The next landmark on the long road that the privilege against self-incrimination was to travel, resulted from an innovation in the practice of the ecclesiastical courts. In the early 1200s, chiefly by the decretals of Pope Innocent III, a new form of oath was substituted for the old compurgation oath.[3] The compurgation oath consisted of the accused swearing his own innocence, usually in company with oath-helpers. If this formula of innocence was successfully recited, it served as a decision in itself in favor of the accused.

A more satisfactory procedure was introduced in the ecclesiastical courts in the early thirteenth century. This was the inquisitorial or interrogatory oath which pledged the accused to answer truly questions asked by the judges. The oath, no longer determinative in itself, now served as a means of providing the judges with material for the rational solution of factual controversies.

There were various methods of initiating the proceedings by which an accused might be summoned before an ecclesiastical court and the new inquisitorial oath administered. The proceedings might

1. An elaborate presentation of the history of the privilege against self-incrimination is beyond the scope of this article. All that is attempted here is a setting-forth of the history sufficient to provide a background for a discussion of the policy and suggested treatment of the privilege. Throughout this section, citations are given to books and articles which treat the history of the privilege in much greater detail.

2. 8 WIGMORE, EVIDENCE § 2250, at 277 (3d ed. 1940) (hereinafter cited as WIGMORE).

3. *Id.* at 281.

be initiated by the complaint of a lay witness, or by private prosecutors functioning somewhat like a grand jury. An official complaint might be lodged. Finally, an ecclesiastical judge, by his own motion, might summon the accused and administer the oath. This last method, the "ex officio" oath, as it came to be called, might be administered because there was good reason to believe, from common report, that the accused was guilty of a specific offense. On the other hand, the ex officio oath might serve as the weapon of a fanatic, conducting sweeping investigations in which hundreds of persons might be made to answer under oath questions concerning vague or unspecified charges. This latter form of the ex officio oath became very popular in the persecution of heretics.

It was in the reigns of Elizabeth, James I and Charles I that the ex officio proceedings in the ecclesiastical courts found their widest and most obnoxious application.

Elizabeth, in 1558, created the Court of High Commission in Causes Ecclesiastical. The Court of the Star Chamber, formally created in 1487, was also activated. There followed a period of suppression of deviation from the established state religion in which the inquisitorial oath in its most extreme ex officio form was utilized in the ecclesiastical courts to badger, confound and convict suspected heretics.

In the midst of this ruthless persecution, a champion appeared to tilt against the power of the ecclesiastical courts. Sir Edward Coke became Chief Justice of the Common Pleas in 1606 and Chief Justice of the Kings Bench in 1613. Under his influence, it came to be the prevailing view in the common-law courts "that the ecclesiastical courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, 'ex-officio,' to penal charges."[4]

It is important to note that at this point there was no definite prohibition against the use of the inquisitorial oath itself, but merely against its ex officio application. Nor was there any limitation upon the use of the oath in the Star Chamber, which had far greater powers than the ecclesiastical courts. And nothing at all has been said as yet of the employment of inquisitorial procedure in the common-law as distinguished from the ecclesiastical courts.

These final chapters in the English history of the privilege were written after one of the most dramatic and significant events in the annals of personal liberties.

In 1637, John Lilburn, a young member of the Leveller sect, was arrested by order of the Star Chamber and charged with sending heretical books from Holland to England. When brought before the

4. *Id.* at 289.

court of the Star Chamber, Lilburn bravely defied that powerful tribunal, by refusing to take the inquisitorial oath. He said, "And withal I perceived the oath to be an oath of inquiry; and for the lawfulness of which oath, I have no warrant; and upon these grounds I did and do still refuse the oath."[5] He also demanded that he be confronted by his accusers.[6] When brought before the Star Chamber again, to be sentenced for contempt, Lilburn denied the charges against him,[7] but steadfastly refused to take the inquisitorial oath. Lilburn was fined 500 pounds and sentenced to be whipped and to stand in the pillory.[8] The sentence was carried out in 1638.

In 1640, Lilburn petitioned parliament for his release from prison and the petition was granted. In 1641, the House of Commons resolved "That reparation ought to be given to Mr. Lilburn for his imprisonment, sufferings, and losses sustained by that illegal sentence."[9] The same year saw the abolition of the Star Chamber and High Commission. In 1648, parliament voted 3,000 pounds in reparation for "the extraordinary sufferings and barbarous tyranny, that by colour of the said unjust decrees were inflicted upon the said . . . John Lilburn."[10]

Opinion against the inquisitorial oath had been building up slowly over many years. The notorious Lilburn affair acted as a catalyst to speed the process. As far as the ecclesiastical courts were concerned, "by the end of the 1600s, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture."[11]

The common-law courts were also affected. In jury trials, no oath was administered to the defendant because such an oath would be of decisive effect. It would afford too easy a method of self-acquittal. But though not sworn, defendants were freely questioned at trial by the judges and pressed for answers. Accused felons were compelled to submit to a preliminary examination by a justice of the peace. This examination was preserved and could be used at the trial. Compulsory self-incrimination under oath had its place in the examination by common-law officers of persons accused of misconduct during trial, or as bankrupts, Jesuits or abusers of warrants.[12] Some of these practices, notably the preliminary examination of accused felons, lingered on the scene long after Lilburn's ordeal. But as far as the trial itself was concerned, by the close of the seventeenth century, it came to be the established rule in the common-law

5. 3 How. St. Tr. 1315, 1321 (1637).
6. *Id.* at 1322.
7. *Id.* at 1325.
8. *Id.* at 1326.
9. *Id.* at 1342.
10. *Id.* at 1368.
11. 8 WIGMORE § 2250, at 292.
12. *Id.* at 294.

as well as in the ecclesiastical courts that no man was bound to incriminate himself on any charge, no matter how the proceedings against him were instituted—ex officio or otherwise.[13]

B. *The Development of the Privilege in America.*

There is no doubt that the events in England has a profound effect upon the development of the privilege against self-incrimination in America. Many colonists came to America for the very purpose of escaping the kind of persecution epitomized by the Lilburn affair. Large numbers of American lawyers and judges received their legal education in England; all looked to English common law as the foundation of their jurisprudence. But there were other forces at work in America, possibly sufficient in themselves to account for the establishment of the privilege in the new world.

Here in America, the colonists had their own bitter experiences with courts employing inquisitorial methods. The religious zeal which enabled colonists to brave the uncertainties of emigration in order to worship God in their own way, often led them to persecute, here in America, those of their fellows whose mode of worship differed from their own. In Virginia, for example, the ecclesiastical oath ex officio, was required and administered well into the seventeenth century.[14] The supreme colonial courts, composed of the Governor and Council, also conducted their proceedings in the most extreme inquisitorial manner. Such a proceeding was the one instituted in 1689 against William Bradford, who had published the Pennsylvania charter so as to inform the people of that colony of their rights.[15]

Another force at work had its origin on the continent of Europe. At the time of the American constitutional conventions in the 1780s, there was strong agitation in France against the inquisitorial features of the old regime. Jefferson was in Paris at this time. Wigmore and Pittman are of the opinion that the French enthusiasm for the privilege was due to American influence and not vice versa.[16] This view is given support by the fact that between 1776 and 1784, seven American states had inserted the privilege against self-incrimination in their constitutions or Bills of Rights.[17] But, "It may well have been a case of interaction, in which the American impulse was re-

13. *Id.* at 298.
14. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763, 780 (1935).
15. *Id.* at 785.
16. 8 WIGMORE § 2250, at 303; Pittman, *supra* note 14, at 764-65. *Contra,* Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment,* 15 LAW. GUILD REV. 41 (1955), which places the origin of the privilege almost exclusively in French and other continental sources.
17. Virginia, Pennsylvania, Maryland and North Carolina, all in 1776. Vermont in 1777, Massachusetts in 1780 and New Hampshire in 1784. The references are respectively, 2 POORE, UNITED STATES CHARTERS AND CONSTITUTIONS, 1909, 1542, 1 *id.* 818, 2 *id.* 1409, 1860, 1 *id.* 958, 2 *id.* 1282.

enforced by the enthusiasm of the French response."[18]

In 1791, the privilege against self-incrimination was embodied in the fifth amendment to the United States Constitution: "No person shall . . . be compelled in any criminal case to be a witness against himself." Today, forty-six state constitutions also contain provisions expressly recognizing the privilege.[19]

These state constitutional provisions are especially important because the fifth amendment privilege applies only to the federal government. The fourteenth amendment of the federal constitution does apply to the states, but neither its "privileges or immunities" nor its "due process" clauses have been interpreted as including those aspects of the privilege against self-incrimination which have thus far come before the Supreme Court of the United States.[20]

The various state constitutional provisions vary in phraseology. Fourteen states have provisions like the federal formulation which prohibits compelling a person to "be a witness against himself." Four other methods of stating the privilege have been utilized. The accused shall not be compelled to "give evidence against himself"; "accuse or furnish evidence against himself"; "testify against himself"; "give testimony tending . . . to criminate himself."[21]

In this article, the privilege against self-incrimination is treated as a unitary concept. No special attention is given to variations in phrasing among the federal and state constitutional provisions embodying this concept.[22]

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18. Williams, *Problems of the Fifth Amendment,* 24 FORDHAM L. REV. 19, 21-22 (1955).

19. The two states without such constitutional provisions are Iowa and New Jersey. Both of these states have accorded the privilege statutory recognition. IOWA CODE ANN. § 622.14 (1950). N. J. STAT. ANN. § 2A:81-5 (1952). The courts of both states have recognized the privilege as part of their common law. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902) (alternate holding); State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743 (1903) (dictum).

20. Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (dictum); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (dictum). *But see* Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (violation of due process to summarily dismiss professor at city college for utilizing the privilege before a federal congressional committee).

21. 8 WIGMORE § 2252 n.3 (excerpts from the various state constitutions).

22. Professor Wigmore has urged that, in determining the scope of the privilege against self-incrimination, nothing should turn upon variations in the phrasing of constitutional provisions. 8 WIGMORE § 2252. *But see* Wells v. State, 20 Ala. App. 240, 101 So. 624, *cert. denied,* 211 Ala. 616, 101 So. 626 (1924). In holding that it was error for the trial judge to compel the defendant to stand up for identification, the court said, "Probably the intention of the different states in adopting these provisions was the same; and yet, technically, some give greater protection to a defendant than others, for there is no doubt that strictly speaking the provision 'No person shall be compelled to testify against himself,' affords less protection than the others above mentioned." Wells v. State, *supra* at 242, 101 So. at 625. *Contra,* Note, 1 ALA. L.J. 187 (1926), stating that the conflicting views concerning the scope of the privilege against self-incrimination may be traced to differences in the wording of state constitutional provisions.

However, the cases concerning the question of when conduct on the part

C. *Comments Upon the History of the Privilege Against Self-Incrimination.*

Glancing back over the long course of history just reviewed, several factors stand out.

The privilege against self-incrimination came to be formulated in opposition to attempts to extract from an accused person a statement concerning his guilt or innocence. The proceedings in which an attempt is made to coerce the statement are judicial in nature. Police and other law enforcement officers are not involved. Finally, the use of torture to extract the statement plays no part in the forming of the privilege. The exclusionary rule concerning coerced confessions has a separate history covering a different period of time.[23] The importance of these historical factors in determining the modern limits of the privilege against self-incrimination will form the basis of much of the discussion that follows.

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of an accused is improperly compelled suggest that the decisions, for the most part, have turned upon the courts' concepts concerning the privilege against self-incrimination rather than upon variations in phraseology of state constitutions. For example, the Illinois, Louisiana, North Carolina, Texas and Washington constitutions all contained self-incrimination provisions like the Alabama provision ("give evidence against himself") when the following cases were decided contrary to the position taken in *Wells v. State:* People v. Curran, 286 Ill. 302, 121 N.E. 637 (1918) (defendant required to stand for identification); State v. Prudhomme, 25 La. Ann. 522 (1873) (defendant required to place his feet where they could be seen by a witness and the jury); State v. Vincent, 222 N.C. 543, 23 S.E.2d 832 (1943) (defendant required to stand for identification); Rutherford v. State, 135 Tex. Crim. 530, 121 S.W.2d 342 (1938) (defendant required to stand and remove glasses); State v. Clark, 156 Wash. 543, 287 Pac. 18 (1930) (defendant required to stand and walk over to witness). None of these courts placed any special emphasis on, or indeed, even quoted, the wording of the state constitution. The Washington court referred to the defendant's objection as one that "the court compelled the appellant to be a witness against himself." State v. Clark, *supra* at 547, 287 Pac. at 19. A Louisiana case decided after *State v. Prudhomme,* held that it was not error for the trial judge to compel the defendant to stand before the jury to have her height measured. The court cited with approval Wigmore's view that nothing should turn upon differences in phraseology in the various state constitutional provisions for the privilege against self-incrimination. State v. Roy, 220 La. 1017, 1025, 58 So.2d 323, 326 (1952). The Louisiana constitutional provision was still the same as the Alabama provision referred to in *Wells v. State* ("give evidence," LA. CONST. art. I, § 11).

On the other hand, the Georgia court in Blackwell v. State, 67 Ga. 76, 44 Am. Rep. 717 (1881), reached a result similar to that reached in *Wells v. State,* but the Georgia constitutional provision was different from the Alabama one and, in fact, very close to the provision quoted in *Wells v. State* as supposedly affording less protection to the accused than the Alabama provision. In *Blackwell v. State,* it was held error for the trial court to order the defendant to stand up so that a witness could see and describe where defendant's leg was amputated. At this time, the Georgia constitutional provision concerning self-incrimination read, "No person shall be compelled to give testimony tending in any manner to criminate himself." GA. CONST. art. I, § 2-106 (1877).

As a further indication that in practice nothing turns upon the peculiar wording of a state constitution, South Dakota's constitution phrases the self-incrimination clause in the "give evidence" form, but its amplifying statute is in the "witness against himself" form. S.D. CONST. art. VI, § 9; S.D. CODE § 34.2907 (1939).

23. 3 WIGMORE §§ 817-20; 8 WIGMORE § 2266.

WRITING EXEMPLARS AND VOICE IDENTIFICATION: CASE AUTHORITY

It may be that hard cases make bad law. Nevertheless, before attempting to formulate general rules intended to cover a particular area of the law, it is always well to review the difficult, borderline cases in that area. Such a review cannot help but clairfy a person's thinking on the problem at hand and will afford the rugged terrain needed to test any shining-new theories that may be stirring to life in his gray matter.

With this in mind, the writer intends in this section to review and comment upon the cases which deal with the two questions posed in the introduction to this article.

1. Can a person be compelled to execute an exemplar of his handwriting for use against him in a criminal proceeding?

2. Is it a violation of the privilege against self-incrimination to force a suspect to speak so that a voice identification may be attempted?

For convenience in treating the case authority, a distinction has been drawn between judicial and extrajudicial proceedings. The significance of this distinction is discussed under "Conclusions and Suggestions," *infra.*

A. *Writing Exemplars.*

1. *Extrajudicial compulsion.*

Police officers investigating a crime force a person, against his will, to execute a sample of his handwriting for comparison with the writing on an incriminating document. Does such compulsion violate the privilege against self-incrimination?

No state court has yet decided a case squarely holding one way or another on this question. There are numerous cases in which a suspect has voluntarily executed a sample of his handwriting for investigating officers.[24] Such cases, of course, do not present for de-

24. Keese v. State, 223 Ark. 261, 265 S.W.2d 542 (1954); People v. Smith, 113 Cal. App. 2d 416, 248 P.2d 444 (1952); People v. Gormley, 64 Cal. App. 2d 336, 148 P.2d 687 (1944); People v. Whitaker, 127 Cal. App. 370, 15 P.2d 883 (1932); State v. McDermott, 52 Idaho 602, 17 P.2d 343 (1932); Rand v. Ladd, 238 Iowa 380, 26 N.W.2d 107 (1947); State v. Renner, 34 N.M. 154, 279 Pac. 66 (1929); People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); State v. Scott, 63 Ore. 444, 128 Pac. 441 (1912); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); Sprouse v. Commonwealth, 81 Va. 374 (1886); State v. Owens, 167 Wash. 283, 9 P.2d 90 (1932); Magnuson v. State, 187 Wis. 122, 203 N.W. 749 (1925).

A slightly different situation is presented in cases in which the handwriting sample is obtained by using a document such as a bail bond or handwritten motion which the defendant has voluntarily executed for his own purposes. Such exemplars have invariably been held admissible in evidence. Shelton v. United States, 205 F.2d 806 (5th Cir.), *cert. dismissed,* 346 U.S. 892 (1953), *motion to vacate dismissal denied,* 349 U.S. 943 (1955) (handwritten motions filed by defendant appearing *pro se*); Reining v. United States, 167 F.2d 362 (5th Cir.), *cert. denied,* 335 U.S. 830 (1948) (signature on appearance bond); Hartzell v. United States, 72 F.2d 569 (8th Cir.), *cert. denied,* 293 U.S. 621 (1934) (signature on bail bond); Williams v. State, 27 Tex. App. 466, 11 S.W.

cision the question of the privilege. Several such cases, however, do contain dicta speculating as to what the result would be if such conduct were coerced.

In a California case,[25] decided by the court of appeal for the second district, the defendant had been convicted of forgery. After his arrest and while in police custody, the defendant had executed an exemplar of his handwriting which was subsequently introduced into evidence at the trial and compared with the alleged forgery. On appeal, the defense contended that it was error to admit the exemplar in evidence because there was no showing, either that the defendant had been warned that it might be used against him, or that it was given voluntarily. After noting that such a showing was in fact made, the court indicated that it was not necessary. Such a showing was necessary only in the case of a confession and writing exemplars were not confessions.[26] The privilege against self-incrimination was not mentioned, apparently because it was not considered applicable. This is clearly indicated in a subsequent case decided by the same court.[27]

Another case containing a dictum to the effect that a coerced writing exemplar is admissible in evidence is *State v. Lyle*.[28] After holding that it was proper for the trial judge to leave it to the jury to determine whether the sample of defendant's handwriting obtained after his arrest was given voluntarily, the court goes on to say: "Further, whether under the particular issue here joined the defendant was entitled to invoke the objection that this writing was in the nature of a confession or of incriminating evidence furnished against himself is at least doubtful. Where a person's handwriting is in dispute, such a writing, made *post litem motam*, is clearly open to the inference that

481 (1889) (defendant's signatures on applications for continuance and for attachments); Ferguson v. State, 61 Tex. Crim. 152, 136 S.W. 465 (1911) (signature on appearance bond—signature itself not in evidence, but testimony of one who witnessed the signing admitted); Hunt v. State, 33 Tex. Crim. 252, 26 S.W. 206 (1894) (signature on application for attachment); see also Lefkowitz v. United States Attorney, 52 F.2d 52 (2d Cir. 1931), *aff'd*, 285 U.S. 452 (1932) (Signature on request to be released on bail obtained by officer for undisclosed purpose of using it as writing exemplar—circuit court denies defendant's motion to suppress. This point not dealt with in Supreme Court opinion.).

Also to be distinguished are those cases in which the defendant, while in custody, has written a letter containing incriminating statements, the letter being intercepted and introduced in evidence against the defendant. Such a letter is utilized, not as an exemplar of the defendant's handwriting, but for the incriminating statements found therein. These letters have invariably been held admissible. Stroud v. United States, 251 U.S. 15 (1919); Hall v. State, 171 Ark. 787, 286 S.W. 1026 (1926); Sanders v. State, 113 Ga. 267, 38 S.E. 841 (1901); State v. Vey, 21 S.D. 612, 114 N.W. 719 (1908); State v. Booker, 68 W. Va. 8, 69 S.E. 295 (1910) (dictum); see also Rose v. State, 124 Tex. Crim. 377, 62 S.W.2d 121 (1933) (intercepted letter also used as exemplar).

25. People v. Whitaker, 127 Cal. App. 370, 15 P.2d 883 (1932).

26. *Id.* at 373, 15 P.2d at 884.

27. People v. Harper, 115 Cal. App. 2d 776, 252 P.2d 950 (1953) (discussed at pp. 495-97 *infra*).

28. 125 S.C. 406, 118 S.E. 803 (1923).

it is a self-serving act rather than a self-incriminating act on the part of the party whose handwriting is in controversy that it is for that reason, as a general rule, inadmissible on behalf of the writer."[29]

In other words, police officers may force the defendant to create a sample of his handwriting and introduce this sample into evidence for comparison purposes because the defendant could not so introduce a writing which he had executed after his arrest. It is submitted that this is a non sequitur. Under such reasoning, a confession obtained by means of torture would be admissible because the defendant could not introduce evidence of statements that he had made after the crime in which he denied his guilt.

Contrary to the California and South Carolina cases, the New Mexico Supreme Court has indicated that compelling a defendant, while in custody before trial, to execute an exemplar of his handwriting, does violate the privilege against self-incrimination. In the first point of its opinion in *State v. Renner*,[30] the court commented as follows upon a defense suggestion that the trial court should have instructed the jury to consider the exemplars only if it should find that they were made voluntarily: "Undoubtedly had defendant requested the trial court to give an instruction of the character suggested above, the court would have done so, or, upon refusal to do so, appellant could have preserved his record and assigned error in this court."[31]

That the court had the privilege against self-incrimination in mind when it said this, is demonstrated by the language in which it held admissible a signature executed by the defendant while on the stand under cross-examination. "Appellant here argues that the admission of the signature in evidence was in fact compelling the defendant to give evidence against himself, because the signature was not voluntarily made. The record, however, discloses that the signature was voluntarily made, therefore our holding under point 1 is equally applicable to the present question and decisive thereof . . . ."[32]

In *State v. Scott*,[33] the Supreme Court of Oregon, after deciding that writing exemplars executed by the defendant while in custody were made voluntarily, went on to indicate that if such conduct were compelled, the exemplar would be considered in the nature of a coerced confession and inadmissible.[34] The privilege against self-incrimination, as distinguished from the coerced confession rule, was not mentioned.

Several Texas cases have held it error to admit in evidence a writing exemplar executed by a suspect while in police custody.[35] Each of

29. *Id.* at 432, 118 S.E. at 812.
30. 34 N.M. 154, 279 Pac. 66 (1929).
31. *Id.* at 158, 279 Pac. at 67.
32. *Id.* at 159, 279 Pac. at 68.
33. 63 Ore. 444, 128 Pac. 441 (1912) (decision below reversed on other grounds).
34. *Id.* at 449, 128 Pac. at 443.
35. Blackshear v. State, 123 Tex. Crim. 111, 58 S.W.2d 105 (1933); Click v.

these cases, however, rests upon the fact that the court regarded the writing exemplar as a "confession" within the meaning of a Texas statute prohibiting the use of a confession unless voluntarily made in writing and signed after a proper warning as to the rights of the accused. The constitutional privilege against self-incrimination is not mentioned. There is an indication, however, that even without the confession statute, compelling an accused to create a sample of his handwriting would be considered a violation of his privilege against self-incrimination. In *Beachem v. State*,[36] it was held that compelling a suspect in custody to speak for identification violated the Texas confession statute. Commenting upon a decision by the Commission of Appeals that such conduct had violated the suspect's privilege against self-incrimination, Judge Hawkins, presiding over and writing for the Court of Criminal Appeals wrote: "That question, [self-incrimination], under the facts here present, is so closely related and interwoven with a violation of our statute on confessions (Art. 727, C.C.P.) as to make both principles of law applicable. The present writer has preferred to discuss the incident complained of from the viewpoint of a violation of said Art. 727."[37]

In *State v. Seward*,[38] a Kansas case, the defendant, a seventeen-year-old forgery suspect, had executed handwriting exemplars while in police custody. The court says, "We have concluded that in view of the age of the defendant, the fact that he was held and questioned without his family being informed, and that he was not advised of his right to counsel, and that these specimens of his handwriting might be used against him all rendered these specimens inadmissible and it was error for the trial court to permit . . . the handwriting expert to use them in his testimony."[39] The court does not indicate on what legal principle this conclusion is based. In the section of the opinion immediately preceding, the court is discussing the coerced confession rule.

People v. Harper,[40] is the state case most nearly in point on whether or not compelling a suspect while in police custody to create a sample of his handwriting violates his privilege against self-incrimination. Police officers had entered the defendants' house without a search warrant, arrested the defendants and seized a number of "betting

State, 119 Tex. Crim. 118, 44 S.W.2d 992 (1931) (exemplar itself not admitted, but handwriting expert who had seen it based his testimony on it); Kennison v. State, 97 Tex. Crim. 154, 260 S.W. 174 (1924).

36. 144 Tex. Crim. 272, 162 S.W.2d 706 (1942); TEX CODE CRIM. PROC. art. 727 (1925).

37. *Id.* at 283, 162 S.W.2d at 711. Judge Hawkins also wrote the opinion in *Kennison v. State* and was a member of the court approving the opinions of the Commission of Appeals in *Click v. State* and *Blackshear v. State*. See note 35 *supra*.

38. 163 Kan. 136, 181 P.2d 478 (1947).

39. *Id.* at 146, 181 P.2d at 485.

40. 115 Cal. App. 2d 776, 252 P.2d 950 (1953).

markers" which were used to record bets on horse races. While the defendants were in custody, the police requested them to execute handwriting exemplars. The defendants complied, later claiming that they had done so only because they had been informed that no prosecution would be brought. The defendants were prosecuted for bookmaking. At trial, the writing samples were utilized for comparison with the writing on the "betting markers." In affirming the judgment of conviction, the California Court of Appeal for the second district stated broadly that the clauses in the California and United States constitutions embodying the privilege against self-incrimination "only protect a person from any unwilling testimonial disclosures and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an exemplar of his handwriting .... There is here no reliance to be placed upon any statement made by either of the defendants."[41]

Was the court correct, however, in stating that no reliance was placed upon any statement by the defendants? With sufficient practice and concentration, an expert penman with a knowledge of handwriting analysis might produce a sample of disguised handwriting which, when compared with his normal handwriting, would not appear, even to a qualified expert, to be written by the same person.[42] It is submitted, then, that implicit in the creation of the writing exemplar by the defendants in the *Harper* case was a statement to the effect that the exemplars were in their normal or natural handwritings. The police, in turn, relied on the defendants producing either normal samples, or ones so clumsily disguised that a competent expert could still identify them as stemming from the same hands that produced the writing on the "betting markers." That the reliance in the *Harper* case was justified does not mean that there was no reliance.

Moreover, in order to defeat an attempted handwriting identification,

41. *Id.* at 779, 252 P.2d at 952.

42. In describing a test conducted among members of his university classes, John J. Harris, a handwriting expert, tells of one student who succeeded "in completely changing from one natural handwriting to another. He could write both a modern commercial system and an individualized form of Spencerian. This illustrates the great capabilities of a few writers." Harris, *Disguised Handwriting*, 43 J. CRIM. L., C. & P.S. 685, 687 (1953).

"It is not suggested that a handwriting cannot be successfully disguised, but . . . to do this . . . is a task that is capable of performance by very few writers indeed." F. BREWSTER, CONTESTED DOCUMENTS AND FORGERIES 113 (1932).

"We do not believe, however, that the movements become so independent of the will that in forging or deliberately disguising the handwriting, where attention is preeminently displayed the attention would not be likely to counteract the effects of habit." WIGMORE, PRINCIPLES OF JUDICIAL PROOF 71 (1st ed. 1913).

"The difficulties attendant upon the determination of what the writer could or would do under the operation of the same muscular coordination when dissimulating, from what was done by the same person when writing habitually, at times causes the most experienced to grope with the matter presented as one walking in the dark." HAGAN, DISPUTED HANDWRITING 159 (1894).

an accused need not be so talented as to be able to successfully disguise his handwriting. When asked for a sample of his handwriting, the accused can produce an illegible series of scratches or print in block letters,[43] claiming that what he has produced is a true sample of his "handwriting." In such a situation, of course, the police should realize that the accused is lying.

In short, the creation of a handwriting exemplar is an act involving the veracity of the accused. He can lie. If he is talented enough to successfully disguise his handwriting, he may even deceive the police and throw them off the trail.

In this respect, handwriting exemplars are to be distinguished from fingerprints, body markings, blood tests and other examinations of the body of the accused, the results of which are not within the control of the accused.[44]

The United States Court of Military Appeals has reached a conclusion contrary to that of the California court. In *United States v. Rosato*,[45] the defendant, an enlisted man in the United States Army, had been summoned before an officer who was investigating an alleged offense. The officer ordered the defendant to print the alphabet. The defendant refused, stating that he did so on advice of counsel and on the ground that it would tend to incriminate him. The defendant was then tried by a general court-martial on the charge of willfully disobeying the lawful command of his superior officer.[46] He was convicted and the conviction affirmed by a board of review. The Court of Military Appeals reversed this conviction and dismissed the charge, holding that the order to print the alphabet was in violation of article 31 of the Uniform Code of Military Justice[47] and therefore void.

Article 31 reads as follows:

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43. "Pen-lettering in anonymous letters is usually adopted as a disguise and may be successful if adequate standard writings of the same kind cannot be obtained." OSBORN, QUESTIONED DOCUMENT PROBLEMS 140 (2d ed. 1946).

"One of the most difficult of the class of anonymous or disputed writing to identify is that which is hand-printed, and if it is correctly done, it may be impossible to fasten its authorship on to any particular person, especially if similar hand-printed standards are not available for comparison." F. BREWSTER, CONTESTED DOCUMENTS AND FORGERIES 114-15 (1932).

44. Also to be distinguished are those cases in which the accused is compelled to write, but not in order to obtain a true sample of his handwriting. In Green Lake County v. Domes, 247 Wis. 90, 18 N.W.2d 348 (1945), the defendant was compelled to write his signature in the presence of the arresting officer and a physician, as part of a test for intoxication. The court held that this did not violate the defendant's privilege against self-incrimination. See also The King v. Voisin, [1918] 1 K.B. 531 (C.A.), where the exemplar was used, not only as a sample of the defendant's handwriting, but also to determine whether or not he could correctly spell the words "bloody Belgian." When in such cases, the writing is not used as an exemplar of natural handwriting, there is no reliance upon the veracity of the defendant.

45. 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

46. Uniform Code of Military Justice art. 90, 64 STAT. 108 (1950), 50 U.S.C. § 684 (1952).

47. 64 STAT. 108 (1950), 50 U.S.C. § 602 (1952).

ART. 31. Compulsory self-incrimination prohibited.

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial.

The court interpreted article 31 as a codification of the privilege against self-incrimination expressed in the fifth amendment of the United States Constitution:[48]

> That no person in a criminal case may be compelled to be a witness against himself is a familiar keystone of our system of justice. From its origin in the early English common law, it was considered sufficiently woven into our concept of fundamental liberty to warrant its inclusion in the Constitution of the United States as the Fifth Amendment . . . . Dispelling any doubt of its application to the military services, Congress included the substance of the Fifth Amendment in the Uniform Code of Military Justice, as Article 31 . . . .[49]

The court distinguished the execution of a handwriting exemplar from other instances of compelled conduct, such as fingerprinting or an examination for body markings, which are not generally held to be a violation of the privilege against self-incrimination: "Such instances do not involve an affirmative conscious act on the part of the individual affected by the demand. Whereas the printing of the alphabet involves a conscious exercise of both mind and body, an affirmative action."[50]

The *Rosato* case was followed in *United States v. Eggers*,[51] decided by the same court a few months later. The defendant, suspected of forgery, had unwillingly created handwriting specimens after he had been ordered to do so in a pre-trial investigation. It was held error to have admitted these specimens in evidence. The court based its hold-

48. Paragraphs (b), (c) and (d) of article 31 give broader protection than is usually thought to be guaranteed by the privilege against self-incrimination. In United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953), a decision following the *Rosato* case, the court indicated that it was relying specifically on paragraph (a) of article 31.

49. 3 U.S.C.M.A. at 144-45, 11 C.M.R. at 144-45.

50. *Id.* at 147, 11 C.M.R. at 147.

51. 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

ing specifically on paragraph (a) of article 31.[52]

The court again distinguished the handwriting exemplar situation from other instances of compelled conduct, such as fingerprinting, in terms of "*passive* cooperation" involved in the latter as against "*active* participation and *affirmative* conduct" involved in creating a handwriting specimen.[53]

This distinction seems questionable. Following this reasoning, taking a blood sample from a person suspected of drunken driving would not violate the privilege against self-incrimination, but making him walk a white line would. It is true, of course, that if the active and affirmative conduct of an unwilling suspect is to be compelled, physical brutality or threats of such brutality will have to be utilized.[54] As indicated above, however,[55] the use of torture played no part in the formation of the privilege against self-incrimination. The exclusionary rule involving coerced confessions had a separate and later history.

Today, a person is protected by the due process clause of the fourteenth amendment against the use of evidence secured from him by state police brutality, even though the evidence does not constitute a confession or admission.[56] The due process clause, however, has not been interpreted as covering those aspects of the privilege against self-incrimination which have come before the Supreme Court for decision.[57]

The privilege against self-incrimination resulted from attempts to extract from a person's lips a true statement concerning his guilt. It is urged that the privilege is equally applicable to non-oral disclosures in which reliance is placed upon the veracity of the accused and which may aid in proving that he has committed a crime for which he can be punished.[58] But there does not seem to be any historical justification or modern necessity for extending the privilege to compelled conduct not involving the veracity of the accused. To do so would be needlessly to make the privilege against self-incrimination a vague and indefinite

52. "Undoubtedly it was the intent of Congress in this division of the Article to secure to persons subject to the Code the same rights secured to those of the civilian community under the Fifth Amendment to the Constitution of the United States—no more and no less." *Id.* at 195, 11 C.M.R. at 195.

53. *Id.* at 198, 11 C.M.R. at 198.

54. See MAGUIRE, EVIDENCE (1947). In discussing the privilege against self-incrimination, Professor Maguire comments at p. 108: "Do you have any inclination to contend that a distinction should be taken between non-verbal disclosures which involve no need to inflict suffering and those which could only be had from a resolutely resisting person by the use of brutality?"

55. See p. 491 *supra.*

56. Rochin v. California, 342 U.S. 165 (1952).

57. See p. 490 *supra.*

58. This is a rule for determining the kind of conduct which, when compelled, may violate the privilege against self-incrimination. There remains still the question of under what circumstances such conduct must be compelled in order to violate the privilege. In what forms of extrajudicial proceedings, if any, may the privilege properly be invoked? This question is discussed at pp. 508-10 *infra.*

constitutional catch-all. The due process clause stands guard ready to nullify the effects of compulsion that comes "too close to the rack and the screw."[59]

In *United States v. Ball*,[60] however, the Court of Military Appeals clearly indicated that it was not following this line of reasoning. The defendant, an army enlisted man, was suspected of the theft of a treasury check and forgery. After being warned generally, as provided by article 31 of the Uniform Code of Military Justice, that he need not make any statement regarding the offense and that any statement made might be used against him, the accused was requested by an investigating officer to prepare handwriting specimens. The defendant complied and the exemplars of his handwriting were admitted in evidence at his court-martial. Appealing the conviction, the defense contended that in addition to the general warning under article 31, the accused should have been specifically warned of his right not to make handwriting exemplars. Because this was not done, it was claimed that the exemplars constituted a "statement" obtained in violation of article 31 and therefore, according to 31(d), improperly admitted in evidence. The Court of Military Appeals rejected this argument and affirmed the judgment below. It said that a handwriting exemplar is not a "statement" within the meaning of either 31(b) or 31(d) and therefore no warning at all need be given before an exemplar is requested. It was not a statement, because there was no question of its truth or falsity, only of the manner in which it was made.[61]

It is interesting to compare this decision with that made by the same court in *United States v. Taylor*.[62] While searching the living quarters of an enlisted man suspected of possessing marijuana cigarettes, the inspecting officers asked the suspect to point out his own articles of clothing. The enlisted man indicated, among other items, an overcoat in which marijuana cigarettes were found. At the subsequent court-martial, testimony was admitted stating that the defendant had identified as his own the garment in which the cigarettes were discovered. The Court of Military Appeals reversed the judgment of conviction on the ground that the clothing identification by the defendant was a statement within the meaning of 31(b) and (d), and therefore the accused should have been warned of his rights under article 31 before being asked to make the identification. It is submitted that the same reasoning is applicable to the making of a handwriting specimen. In the *Taylor* case the accused said "this is my coat." In the *Ball* case he was saying, "this is my handwriting."[63]

59. Rochin v. California, 342 U.S. 165, 172 (1952).
60. 6 U.S.C.M.A. 100, 19 C.M.R. 226 (1955).
61. *Accord,* United States v. McGriff, 6 U.S.C.M.A. 143, 19 C.M.R. 269 (1955).
62. 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954).
63. *Cf.* State v. Mayer, 154 Wash. 667, 283 Pac. 195 (1929), holding that

2. *Judicial Compulsion.*

The writer has not been able to find any United States case which squarely decides whether it is a violation of an accused's privilege against self-incrimination to compel him, in a judicial proceeding, to execute a sample of his handwriting for comparison with the writing on an incriminating document.

There are numerous cases in which a defendant has been compelled on cross-examination to execute such a writing exemplar. But these cases proceed on the theory that the accused has waived whatever privilege he might have had by taking the stand and denying that he executed the incriminating writing.[64]

In *State v. David*,[65] a Missouri case, the defendant's signature on his testimony at a coroner's inquest was used for comparison with the signature on a druggist's poison record. It was held that there was no error because the defendant's testimony at the inquest had been

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one defendant was not entitled to an instruction that no presumption or inference of guilt could be taken from the fact that he failed to take the stand and testify in his own behalf. The defendant had voluntarily executed handwriting exemplars in the presence of the jury and the exemplars were introduced in evidence by the defense. The court said, "Mayer [the defendant], in legal effect, said to the jury, when he made these samples of his handwriting in their presence, 'These are my handwriting,' as plainly as if he had orally there so told the jury." *Id.* at 672, 283 Pac. at 197.

The result in *Ball* also seems contrary to the Texas decisions in which it was held that a handwriting exemplar was a "confession" within the meaning of the Texas statute making any confession inadmissible which was not made voluntarily in writing and after a proper warning as to the suspect's rights. See pp. 494-95 *supra.*

Cases in which handwriting exemplars executed by the accused during pretrial investigation have been held inadmissible in evidence on other than constitutional grounds are beyond the scope of this article. See, *e.g.*, State v. Miller, 47 Wis. 530, 3 N.W. 31 (1879), in which it was held that no exemplar could be admitted in evidence which was not already "in the case" for some purpose other than handwriting comparison. *Accord*, Regina v. Aldridge, 3 Fost. & Fin. 781, 176 Eng. Rep. 358 (Nisi Prius 1863).

64. United States v. Mullaney, 32 Fed. 370 (C.C.E.D. Mo. 1887); Commonwealth v. Craig, 19 Pa. Super. 81 (1902); State v. Vroman, 45 S.D. 465, 188 N.W. 746 (1922) (decision below reversed on other grounds); Long v. State, 120 Tex. Crim. 373, 48 S.W.2d 632 (1931) (decision below reversed on other grounds); Bradford v. People, 22 Colo. 157, 43 Pac. 1013 (1896) (alternate holding); State v. Barnard, 176 Minn. 349, 223 N.W. 452 (1929) (alternate holding); *accord*, Rex v. Whittaker, 2 West W. Rep. 706, 42 Can. Crim. Cas. 162 (Alberta S. Ct. 1924); see also, Mann v. State, 33 Ala. App. 115, 30 So.2d 462, *cert. denied*, 249 Ala. 165, 30 So.2d 466 (1947) (held within proper scope of cross-examination, privilege not mentioned); People v. Klopfer, 61 Cal. App. 291, 214 Pac. 878 (1923) (defendant had written his name on cross-examination, held not error for trial judge to order him to write it again and write it faster); State v. Gordon, 32 N.D. 31, 155 N.W. 59 (1915) (objection made held not sufficient to raise issue of the privilege). *But see* Rex v. Grinder, 11 B.C. 370 (1905) (no indication that defendant on direct examination had denied making incriminating writing. Cited with disapproval by Rex v. Whittaker, *supra*); Bernudez v. Castillo, 64 Phil. 483 (1937) (in administrative investigation, complaining witness cannot be compelled to copy letters she has denied writing.); People v. Sturman, 209 Mich. 284, 176 N.W. 397 (1920) (dictum) (apparently on theory that exemplar would be extrinsic evidence); Rex v. Henderson, 18 Can. Crim. Cas. 245 (dictum) (cited with disapproval by Rex v. Whittaker, *supra*).

65. 131 Mo. 380, 33 S.W. 28 (1895).

voluntary. *Cox v. State*,[66] a Texas case involving an exemplar executed during a grand jury proceeding, rested on the same ground. In *Bell v. State*,[67] another Texas case involving a writing sample made before a grand jury, the decision turned on the defense's failure to demonstrate that the grand jury proceeding had any reference to the crime for which the defendant was eventually prosecuted.

The Court of Military Appeals has issued a considered dictum in a case involving a writing exemplar compelled during trail. In *United States v. Morris*[68] the defendant was charged with the theft of a watch. The defendant did not take the stand to testify regarding the merits, although he did testify on the issue of whether a confession that he had signed while he was in custody was given voluntarily. The trial counsel (prosecutor) asked the defendant, who was not on the stand at the time, to write his signature on a blank piece of paper. A defense objection that no expert witnesses had been called to make a handwriting comparison was overruled and the defendant wrote as requested. This writing was compared with the writing on a pawn ticket. A board of review disapproved of the court-martial findings of guilty on the ground that the accused had thus been compelled to incriminate himself. The Court of Military Appeals, however, reinstated the sentence. It cited the *Eggers* case and stated that it had been error to compel the accused to write his signature. The objection made was deemed sufficient, under the circumstances, to raise the self-incrimination issue. But the court held that the error was not prejudicial. The confession, which was properly admitted in evidence, contained the accused's signature in eight different places. The compelled signatures were merely cumulative evidence.

Beltran v. Samson & Jose,[69] a case decided in the Philippine Islands, does present a square holding on the issue of whether a judicially compelled writing exemplar violates the accused's privilege against self-incrimination. A provincial official, Jose, petitioned Samson, a judge, for an order directing Beltran to appear before Jose and take dictation in his own handwriting. This writing was to be compared with that in certain forged documents with a view to filing an information against Beltran. The order was granted and Beltran petitioned for a writ of prohibition. The Supreme Court of the Philippine Islands granted the writ, stating:

> 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.

66. 126 Tex. Crim. 202, 70 S.W.2d 1005 (1934).
67. 99 Tex. Crim. 61, 268 S.W. 168 (1924).
68. 4 U.S.C.M.A. 209, 15 C.M.R. 209 (1954).
69. 53 Phil. 570 (1929).

> 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 the falsifier.[70]

The court did not specifically base its decision on the ground suggested above by the present writer[71]—that the writing exemplar would constitute a testimonial act in which reliance was placed upon the veracity of the accused. It should be noted, however, that the reason why the accused cannot be compelled to furnish an incriminating document which he rightfully has in his possession in an individual capacity is that he might, at any time, be required to swear that the document was authentic.[72] Similarly, a writing exemplar constitutes an implied statement by an accused that it is his natural handwriting.

B. *Voice Identification.*

1. *Extrajudicial Compulsion.*

Is an accused's privilege against self-incrimination violated if, while he is in custody, police officers compel him to speak so that a witness may identify his voice?

There have been several cases in which a witness has testified at trial concerning a voice identification made while the accused was in custody, but in which the issue of the privilege was not raised by the defense[73] or in which the speaking was apparently voluntary.[74]

In *Beachem v. State,*[75] the Texas Court of Criminal Appeals reversed a conviction based upon testimony of a voice identification. The defendant, while in police custody, had been compelled to repeat words suggested by a robbery victim. The victim thereupon identified the defendant as the robber. The reversal was based upon a Texas statute prohibiting the use of a confession, unless made in writing voluntarily and after a proper warning as to the accused's rights.[76] Though the decision, therefore, is not solid authority on the self-incrimination issue, Judge Hawkins, writing for the court, did indicate that the privilege might afford an alternate ground for decision.[77]

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70. *Id.* at 577.
71. See pp. 496-97, 499-500 *supra.*
72. 8 WIGMORE § 2264, at 364.
73. Wilkins v. State, 29 Ala. App. 349, 197 So. 75, *cert. denied,* 240 Ala. 52, 197 So. 81 (1940); Orr v. State, 225 Ala. 642, 144 So. 867 (1932) (decision below reversed on other grounds); Mack v. State, 54 Fla. 55, 44 So. 706 (1907).
74. State v. Williams, 245 Iowa 494, 62 N.W.2d 742 (1954) (conflicting evidence as to compulsion); Lenoir v. State, 197 Md. 495, 80 A.2d 3 (1951); Commonwealth v. Derembeis, 120 Pa. Super. 158, 182 Atl. 85 (1935) (decision below reversed on other grounds).
75. 144 Tex. Crim. 272, 162 S.W.2d 706 (1942).
76. TEX. CODE CRIM. PROC. art. 727 (1925).
77. Judge Hawkin's remarks are quoted at p. 495 *supra. But see* McKee v. State, 118 Tex. Crim 479, 42 S.W.2d 77 (1931); Briscoe v. State, 106 Tex. Crim. 402, 292 S.W. 893 (1927); Barnes v. State, 106 Tex. Crim. 394, 292 S.W.

The United States Court of Military Appeals, in *United States v. Noce*,[78] issued a dictum stating that testimony concerning a voice test conducted under extrajudicial compulsion is not admissible in evidence. The army wives on a military post had been annoyed by telephone calls in which their anonymous caller used obscene language. The defendant, an army enlisted man, was caught in the act of making one of these calls. The investigating officer who caught the defendant ordered him to repeat certain words over the telephone. A monitor on the other end, who had heard the abusive telephone call just completed, listened to the compelled voice test and identified the defendant as the anonymous caller. This identification was not referred to during the subsequent court-martial and no evidence concerning it was offered. The Court of Military Appeals stated that the order compelling the defendant to speak over the telephone was illegal because it violated the defendant's privilege against self-incrimination. If evidence concerning this voice test had been offered, it would have been inadmissible. Since no use had been made of the illegal evidence at trial, however, the compelled voice test did not taint the conviction based upon proper evidence.

State v. Taylor,[79] a South Carolina case, contains the only clear holding on the admissibility of evidence concerning a voice test compelled during pre-trial investigation. The defendant was taken into custody, suspected of having committed rape. He and four other suspects were lined-up in the police station with their backs to the rape victim and compelled to repeat certain words which the victim said her attacker had uttered. At trial, the victim testified that during this test she recognized the defendant as her attacker, basing her identification on his voice, size and clothing. The Supreme Court of South Carolina reversed the conviction on the ground that the voice test in the police station had violated the defendant's privilege against self-incrimination. Evidence concerning the test was therefore inadmissible. The court cited as authority *State v. Griffin*,[80] in which it was held error to admit in evidence a sheriff's statement that when he had asked the defendant to place her foot in a track, the defendant responded by attempting to obliterate the track. The court in the *Griffin* case indicated that all evidence concerning the enforced conduct of a defendant was inadmissible.[81]

Again it is urged that it is unnecessary and unwise to extend the privilege against self-incrimination to cover all compelled conduct.[82]

548 (1927), in all of which the defendant apparently spoke voluntarily, but was not warned as required by the confession statute. These cases are not cited in the *Beachem* case.

78. 5 U.S.C.M.A. 715, 19 C.M.R. 11 (1955).
79. 213 S.C. 330, 49 S.E.2d 289 (1948).
80. 129 S.C. 200, 124 S.E. 81 (1924).
81. *Id.* at 215-16, 124 S.E. at 86.
82. See pp. 499-500 *supra*.

Only compelled conduct which places reliance on the veracity of the accused and which may aid in convicting him of a crime for which he can be punished should be within the scope of the privilege.[83] It would seem that a compelled voice test does meet this requirement. As is the case in the execution of handwriting exemplars, a direction to an accused to speak for identification purposes implies a command that he speak in his normal voice. When the accused speaks, he is making the statement, "This is my voice." Since, in practice, voice identifications are usually made by inexpert laymen, the suspect who disguises his voice has an even greater chance of defeating identification that the suspect who attempts to disguise his handwriting.

2. *Judicial Compulsion.*

The writer has not found a case decided by any state appellate court which decides whether it is a violation of an accused's privilege against self-incrimination to compel him to speak for identification during a judicial proceeding.

The Pennsylvania Supreme Court expressly left the question open in *Johnson v. Commonwealth.*[84] While the defendant was on trial for murder, the district attorney asked him to stand up and repeat certain words. A witness, then on the stand, had testified that the murderer had uttered these words on the night of the crime. The defendant promptly complied without any objection being made. The court decided that this constituted a waiver of any possible objection. Judge Sterrett, the writer of the opinion, however, indicated that he believed the rights of the accused would not have been violated even if a timely objection had been made:

> He was not asked, much less compelled, "to give evidence against himself." . . . To hold that this was a violation of the clause in section 9 of the declaration of rights which declares the accused "cannot be compelled to give evidence against himself," would, in my judgment, be a strained construction of that instrument. If it should be sanctioned, what would prevent a person accused of having stolen property in his possession from successfully interposing a like plea of constitutional immunity, and thus thwarting any attempt to search for and recover the property?[85]

It is suggested that this is a non sequitur. There is a world of difference between compelling an accused to make a true statement concerning an incriminating fact (the natural sound of his voice) and conducting a search under proper authority. Searching a suspect's

83. The reader is reminded again that this is a test for determining the type of compelled conduct which is capable of violating the privilege. Whether the privilege is applicable, even to this type of compelled conduct, in all manner of proceedings, judicial or otherwise, is another question and is discussed at pp. 508-10 *infra.*

84. 115 Pa. 369, 9 Atl. 78 (1887).

85. *Id.* at 395, 9 Atl. at 81.

house does not require any testimonial utterance on his part.[86]

The United States Court of Military Appeals has passed upon the question of a judicially compelled voice test. In *United States v. Greer*,[87] the defendant was accused of assault with a dangerous weapon. At trial, the prosecutor asked the accused to read a sentence from the Manual for Courts-Martial so that the victim of the assault might make a voice identification. Over objection by the defense counsel, the accused was required to read as requested. The Court of Military Appeals ordered a rehearing on the ground that the accused had been deprived of his privilege against self-incrimination as embodied in article 31 of the Uniform Code of Military Justice and cited as authority the *Rosato* and *Eggers* cases.[88]

CONCLUSIONS AND SUGGESTIONS

Having reviewed some of the more difficult cases involving compelled conduct, an attempt will now be made to state some conclusions and offer some suggestions concerning the privilege against self-incrimination.

Determining what an accused person can be compelled to do, without violating his privilege against self-incrimination, involves, it is suggested, two basic problems. First, it must be decided what conduct may be within the scope of the privilege. Then, it is necessary to indicate whether compelling such conduct will always violate the privilege. Or is the privilege applicable only under certain circumstances in certain forms of proceedings?

A. *Conduct That May be Within the Scope of the Privilege.*

As indicated in the above discussion, the present writer suggests that the privilege against self-incrimination may apply to any statement which an accused person is compelled to make and concerning which reliance is placed upon his veracity. (This assumes, of course, that the statement may aid in proving that the accused committed a crime for which he can be punished.) In other words, the privilege may apply to any compelled conduct which the accused "can so control as to use it as a means of conveying ideas."[89] Conduct which the

86. Commonwealth v. Valeroso, 273 Pa. 213, 116 Atl. 828 (1922), decided that a trial judge erred in permitting the district attorney, in open court and before the jury, to ask the defendant to produce a letter. The court quoted the dictum in the *Johnson* case and said, "While we do not pass upon the precise question in that case now, yet the question we are considering bears a close analogy to it." *Id.* at 221, 116 Atl. at 831.

87. 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

88. Discussed pp. 497-500 *supra*.

89. MORGAN & MAGUIRE, CASES AND MATERIALS ON EVIDENCE 449 n.25 (1951). This is not to be taken to mean that a statement compelled while the accused is under the influence of certain drugs or strapped to a lie detector cannot violate the privilege. Under such circumstances, reliance is still placed upon

accused cannot so control does not, no matter how or when compelled, violate the privilege.[90]

This rule finds support in the historical development of the privilege against self-incrimination. The privilege grew out of attempts to force a person to tell the truth about an alleged offense and thereby supply the needed proof against himself. Nowhere in this long history, is there found the suggestion that conduct not involving the veracity of the accused may be within the scope of the privilege.

The policy justifying the existence of the privilege also lends support to this concept. The basic reason justifying the availability of the privilege to an accused person is stated by Wigmore as follows: "The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources."[91]

A conviction based upon statements made by the accused will always raise questions as to why the accused made the statements. Was he really guilty? Was he taking the blame for someone else? Was he so frightened that he was willing to say anything? On the other hand, requiring the prosecutor to prove guilt beyond a reasonable doubt in open court, using evidence not dependent upon the veracity of the accused, gives to the verdict a persuasiveness and a moral force that it could not otherwise have.

Now this does not seem to apply directly to writing exemplars and voice identification. It might be claimed that the instances in which a man could successfully imitate the handwriting or voice of another, even if he wanted to, would be too rare to make anything turn upon

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the accused's veracity. In fact, measures have been taken to insure this veracity.

Another way of treating the "truth serum"—lie detector problem is to say that such devices involve probing the contents of the accused's mind. Such probing of the private thoughts of an individual is detestable and constitutes a violation of the privilege against self-incrimination.

The writer has no quarrel with this "right of privacy" rationale of the privilege against self-incrimination, except as it may exclude writing exemplars and voice identification tests from the scope of the privilege. Such exclusion is not necessary, however, even under this rationale. When an accused is requested to project his mental image of his natural handwriting or voice, the contents of his mind are being probed. It is suggested that whenever an accused is compelled to make a statement involving his veracity, the contents of his mind are being probed and the two tests, though stated in different words, are really the same.

90. This rule would exclude from the scope of the privilege fingerprinting, taking of foot or shoe impressions, examination for body markings, trying on clothing, taking blood tests and making other physical examinations—in short, the kind of conduct which will result in the production of "real" evidence. Whether such conduct will violate other constitutional provisions, such as the due process clause, or whether it will result in evidence that will be inadmissible because of low credibility or because it violates some other rule of evidence, is another matter and beyond the scope of this article.

91. 8 WIGMORE § 2251, at 309.

them. But there is another factor. A guilty person may be ordered to tell the truth, to speak in his natural voice or write in his normal handwriting, but there is no assurance that he will do so. In fact, the expectation is that he will lie if he realizes that he can. Then what is the use of a rule which would punish a person for not telling the truth, not speaking or writing normally, under such circumstances? If he lies, the proof acquired is worthless. If an attempt is then made to punish him for lying, resort will have to be made to proof which could have been used in the first place. That is, in order to prove that the accused has lied, it will be necessary, either to produce specimens of his natural voice or handwriting, or to call on a witness who is familiar with the accused's voice or handwriting and who can now testify that what the accused has produced was not done in a normal manner. Specimens so produced could have been used in the first place. Testimony of a witness familiar with the accused's handwriting, likewise, could have been employed directly to determine whether the incriminating document in question was in the accused's handwriting. Of course, testimony by one witness concerning the accused's natural voice will not enable another witness to make a voice identification. If such testimony is used to punish the accused for failure to speak normally, the investigatory process will have made a criminal, not aided in the solution of a crime.[92]

B. *Proceedings in Which the Privilege May Be Invoked.*

This last consideration brings us to the second basic problem in setting the limits of the privilege against self-incrimination as it concerns the compelled conduct of an accused. Given that the accused is compelled to make a statement in which reliance is placed upon his veracity and which may aid in proving that he has committed a crime for which he can be punished, under what circumstances will this violate his privilege against self-incrimination?

It is suggested that the privilege against self-incrimination is not involved unless the accused can legally be punished in some manner for failing to make a true statement. The most obvious instance is that of a person testifying under oath. If he makes a false statement, he may be punished for perjury. If he refuses to make any statement at all, and if the privilege does not apply, he may be punished for contempt.

But the privilege should be available to anyone in danger of being legally punished for refusing to make a true statement that might

92. This argument is also applicable to some extent to testimony by a person ordered to testify under an immunity statute which provides penalties for perjury. The expectation that such a person will lie, however, is less than it would be if the true statements he makes might be used to convict him of a crime for which he could be punished.

incriminate him, not just to persons testifying under oath. A soldier, ordered by his superior officer to execute a handwriting exemplar, or to speak for identification, should be protected by the privilege from prosecution for failure to obey the order. A civilian should be able to invoke the privilege against a statute which requires, for instance, that all persons charged with forgery, execute, upon request, specimens of their natural handwriting, and which provides criminal penalties for refusal. A statement made under such an order or such a statute would be the equivalent of testimony under oath. If the accused refused to make any statement, he could be punished. If it could be demonstrated that a statement he did make was false, he could be punished for non-compliance with the order or statute, though not for perjury, if no oath had been administered.

If, after pleading the privilege, an accused involuntarily makes a statement under such an order or statute, because he fears the legal penalties of refusal, his statement should be treated the same as evidence given by an accused on the witness stand after his plea of the privilege against self-incrimination has been improperly overruled.[93]

But what of the ordinary police investigation? Suppose a suspect is compelled by police to make an incriminating statement. He could not have been legally punished if he had refused to talk, but he made the statement because he was hurt, or afraid, or both. Does the privilege against self-incrimination prevent that statement from being used against the suspect in a subsequent criminal prosecution?

There is no historical justification for extending the privilege into this area. The privilege was developed in order to protect persons from legal punishment for refusal to make incriminating statements. John Lilburn, who suffered the birth pains of the privilege, suffered them under legal sentence.

Professor Morgan has urged that the privilege against self-incrimination should be available in the ordinary police investigation: "The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger."[94]

This examination of accused felons by the committing magistrates,

93. "[I]f . . . a trial judge improperly compels a witness to testify by overruling the latter's claim of privilege against self-incrimination, the evidence thus extracted may not normally be used against the witness in a subsequent proceeding, but he is not immunized from prosecution for criminality revealed in that testimony. This qualified protection seems sufficient, for the witness under these circumstances might resolutely refuse to testify in the first instance, and obtain freedom by habeas corpus if committed for contempt." MAGUIRE, EVIDENCE 112-13 (1947).

94. Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 27 (1949).

however, continued long after the Lilburn affair and the establishment of the privilege against self-incrimination in England. Not until 1848 was a statute passed requiring that the accused be warned that he did not have to answer the magistrate's questions.[95] This statute seems more properly a step in the relatively late development of the exclusionary rules concerning coerced confessions than in the development of the earlier privilege against self-incrimination. Certainly extrajudicial interrogation involving various forms of compulsion played no part in the formation of the privilege. The coerced confession rule, which deals with such extrajudicial interrogations, was developed independently of and at a substantially later date than the privilege against self-incrimination.[96]

If, then, an accused is to be protected from incriminating statements made during an ordinary police investigation, the protection should be accorded by considering any such statement an admission and expanding, in jurisdictions where expansion is necessary, the exclusionary rules governing coerced confessions to cover such admissions. It is unnecessary to accord such protection by forcing the privilege against self-incrimination into an area where it was never intended to and never has operated. It is unwise because such extension of the privilege beyond its historical and logical bases will make it even more vulnerable to the attacks of its critics and, in the end, serve only to weaken it.

The privilege against self-incrimination should, however, protect any person who, compelled by the threat of legal punishment, makes a statement in which reliance is placed upon his veracity and which may be used to convict him of a crime for which he can be punished. Such an interpretation of the privilege seems fully in accord with its history[97] and policy and, it is suggested, is the minimal one necessary for its effective operation.[98]

The personal liberties that we cherish are fragile entities. They survive because they are protectively encased in a stout bundle of

95. 11 & 12 VICT., c. 42, § 18 (1848).
96. 3 WIGMORE §§ 817-20; 8 WIGMORE § 2266.
97. *Contra,* Pittman, *The Fifth Amendment,* 42 A.B.A.J. 509 (1956). Mr. Pittman argues that, if the privilege is given its correct historical interpretation, it will be limited to actual criminal cases tried in court.
98. But what of cases holding that an official of a corporation or other organization can not successfully invoke the privilege when ordered to produce records of the organization? *E.g.,* United States v. White, 322 U.S. 694 (1944). These cases might be considered as an exception to the rule stated above. The present writer suggests that they are explainable on a waiver theory, like cases involving statutes that require certain records to be kept (*e.g.* narcotic records) or that certain information be made available by a person involved in an automobile accident. See Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951), involving a hit-and-run statute, in which the court discusses the waiver theory, but says, "We prefer to rest our decision on the ground that the tendency of the required information to incriminate the defendant is too remote to form the basis for a claim of privilege." *Id.* at 756, 97 N.E.2d at 196.

sticks—our constitutional rights and privileges. Remove one stick and then another because this bundle seems too bulky, too heavy to use for some purpose of the moment, and the bundle will soon become thin enough to be cracked over the knee of any petty tyrant who chances to local or national authority.