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The Privilege Against Self-Incrimination Under the Constitution of the United States

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NOTES

THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE CONSTITUTION OF THE UNITED STATES

The growing importance of the use of the privilege against self-incrimination, particularly in regard to congressional investigations, makes it imperative that we understand its nature, scope, and origin, as well as inferences that may be drawn from its invocation.

This note does not purport to be an exhaustive study of this doctrine but rather an over-all glimpse of the privilege and an examination of certain unresolved questions that exist in the law today. It will be confined to the privilege as stated in the Fifth Amendment of the United States Constitution,[1] which applies to the Federal Government only.[2] Even so, many state cases may be applicable, since state constitutional provisions are often patterned after the federal provisions.

ORIGIN AND DEVELOPMENT

The genesis of the right against self-incrimination resulted from the abuses of the Star Chamber and the ecclesiastical courts in seventeenth century England. Chief among these abuses was the "ex officio" oath,[3] which provided an inquisitorial approach to criminal investigations. The court propounded whatever questions it thought might lead to a chargeable offense; the witness was forced to answer and was thus deprived of his civil rights.[4]

The event that seems to have precipitated the abolition of this oath was Lilburn's trial[5] before the Star Chamber.[6] The objection raised, however, was not against the forcing of a person to testify against himself but rather the inquisitorial technique employed. John Lilburn stated that he was unwilling to answer any further questions because the examiners were trying to ensnare him; since the things for which he was imprisoned could not be proved, they were

[1]The pertinent provision of the Fifth Amendment is: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[2]Feldman v. United States, 322 U.S. 487 (1944); Ensign v. Pennsylvania, 227 U.S. 592 (1913).

[3]1 HOLDSWORTH, HISTORY OF ENGLISH LAW 609 (3d ed. 1922).

[4]8 WIGMORE, EVIDENCE §2250 (3d ed. 1940).

[5]3 How. St. Tr. 1315 (1637).

[6]8 WIGMORE, EVIDENCE §2250 (3d ed. 1940).

attempting to get other information from the interrogation for which he could be prosecuted. He added that if he had been proceeded against by a complaint on the other matters he would have been willing to answer the questions in regard to them.

Shortly thereafter the Court of the Star Chamber and the Court of High Commission for Ecclesiastical Causes were abolished,[7] along with the use of the ex officio oath by any ecclesiastical court as to penal matters.[8] After the restoration of the Stuarts an act was passed barring the use by any ecclesiastical court of the ex officio oath or any oath compelling the accused to testify against himself in a criminal action.[9]

Although the original intent was to abolish the ex officio oath in ecclesiastical and Star Chamber tribunals, the claim developed that no man is bound to incriminate himself on any charge, no matter how properly instituted, in any court.[10] How this change in concept came about is not entirely clear, but one explanation, offered by Jeremy Bentham, is that it was an "association of ideas." The excesses of the Star Chamber and the ecclesiastical courts were so great that there was a tendency to destroy every vestige of the condemned practice, regardless of whether it was actually abusive.[11]

Other factors that may have contributed to this legal development were: (1) The same abuses tended to reappear under different names and were utilized by different courts;[12] (2) the penalties for violation of the statutes against the ex officio oath were so great that jurists may have tended to give a great deal of leeway to this rather uncertain rule.[13] Another historian has advanced the view that the privilege against self-incrimination developed from conditions that disappeared long ago and that our modern law is in fact derived from somewhat questionable sources.[14]

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[7] 16 CAR. I, cc. 10, 11 (1640).

[8] 16 CAR. I, c. 11, §4 (1640).

[9] 13 CAR. II, c. 12, §4 (1661).

[10] 8 WIGMORE, EVIDENCE 298 (3d ed. 1940).

[11] BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 456 (Bowring's ed. 1827).

[12] Trial of Lt. Col. John Lilburne, 4 How. St. Tr. 1270 (1649).

[13] 16 CAR. I, c. 11, §4 (1640): ". . . every person who shall offend contrary to this statute, shall forfeit and pay treble Damages . . . and the Sum of one hundred Pounds" and shall be "utterly disabled to be or continue in any Office or Employment in any Court of Justice whatsoever, or to exercise or execute any Power, Authority or Jurisdiction by force of any Commission or Letters Patents of the King . . . ."

[14] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 342 (1883).

Like many legal concepts, the privilege against self-incrimination has been altered and modified in the course of history. When this privilege was written into the Constitution of the United States it was generally alluded to as a privilege against torture to obtain a confession[15] rather than a right to refrain from testifying against oneself.

Scope of Privilege

Only when his answers or his papers would tend to incriminate him under federal criminal law does the constitutional privilege against self-incrimination provide an exception to the individual's general duty to testify. The privilege is deemed waived unless specifically invoked,[16] and it extends to aliens as well as citizens.[17] It has been held applicable before a grand jury[18] as well as a congressional committee,[19] but it must be invoked by the witness himself and not by his counsel.[20]

A corporation is not held to be a person within the protection of the privilege.[21] Books and records, whether of a corporation[22] or an unincorporated association,[23] kept in a representative rather than a personal capacity, cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate their keeper personally.[24]

The question as to whether a particular refusal to answer will be held privileged – that is, does it actually subject the witness to federal criminal prosecution – is one on which there is considerable un-

[15]2 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1901).

[16]United States v. Murdock, 284 U.S. 141 (1931); Edwards v. United States, 131 F.2d 198 (10th Cir. 1942), *cert. denied*, 317 U.S. 689 (1942).

[17]United States *ex rel.* Rennie v. Brooks, 284 Fed. 908 (E.D. Mich. 1922).

[18]Blair v. United States, 250 U.S. 273 (1919).

[19]United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1951).

[20]*In re* Black, 47 F.2d 542 (2d Cir. 1931); *In re* Knickerbocker Steamboat Co., 136 Fed. 956 (S.D.N.Y. 1905).

[21]Hale v. Henkel, 201 U.S. 43 (1906); United States v. White, 137 F.2d 24 (3d Cir. 1943).

[22]Essgee Co. of China v. United States, 262 U.S. 151 (1923); Grant and Burlingame v. United States, 227 U.S. 74 (1913); Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911).

[23]United States v. White, 322 U.S. 694 (1944); *cf.* United States v. Fleischman, 339 U.S. 349 (1950); Brown v. United States, 276 U.S. 134 (1928).

[24]United States v. White, 322 U.S. 694 (1944).

certainty, since the courts neither require complete disclosure by the witness[25] nor accept his claim as final.[26] The witness is not excused from answering merely because he declares that in so doing he would incriminate himself. It is for the court to say whether his silence is justified[27] and to require him to answer if it clearly appears that his refusal is unwarranted. On the other hand, there are statements that the witness alone knows the substance of his evidence and hence is the best judge of whether answers to questions would open the door to criminal liability.[28] Also it has been held that a witness is not bound to explain why answers to apparently innocent questions might tend to incriminate him.[29]

The United States Supreme Court pointed out that the privilege against self-incrimination must be accorded liberal construction in favor of the right it was intended to secure.[30] It further stated, in *Hoffman v. United States:*[31]

> "However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."

Each case must be examined individually in light of the existing circumstances to determine whether the witness is misusing his privilege. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is used, that a responsive answer or an explanation of why it cannot be answered might constitute incriminating disclosures.[32] The rationale usually employed by the courts is that the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those that would

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[25]*In re* Friedman, 104 F. Supp. 419 (S.D.N.Y. 1952).

[26]Rogers v. United States, 340 U.S. 367 (1951).

[27]*Ibid.*

[28]*In re* Friedman, 104 F. Supp. 419 (S.D.N.Y. 1952); People v. Richter, 182 Misc. 96, 43 N.Y.S.2d 114 (City Mag. Ct. 1943).

[29]United States v. Jaffe, 98 F. Supp. 191 (D.D.C. 1951).

[30]Arndstein v. McCarthy, 254 U.S. 71 (1920); Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952).

[31]341 U.S. 479, 486 (1951).

[32]Hoffman v. United States, 341 U.S. 479 (1951).

furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.[33]

LIMITATIONS

There are two main limitations on the use of the privilege against self-incrimination. One is that it may not be invoked through fear of prosecution under a state criminal law.[34] To this general rule there has been one exception made by a lower federal court, which held that, when a congressional committee conducts an investigation of organized crime that includes inquiries to discover evidence of offenses against state laws, witnesses are entitled to immunity against self-incrimination as to violations of state laws.[35] This general limitation is becoming more important with the ever-growing overlapping of governmental functions and the increase of inter-governmental co-operation.

The waiver doctrine constitutes the second and more ambiguous limitation of the privilege. Once a witness has disclosed incriminating facts he may not invoke the privilege in order to withhold the details. Therefore, if the privilege is invoked too late it is waived. If a witness refuses to answer a question that is not incriminating, however, he may be guilty of contempt of court. An examination of this question requires an inspection of the latest United States Supreme Court decision on waiver, *Rogers v. United States*.[36] The Court held that because Mrs. Rogers had testified that she had been treasurer of the Communist party in Denver she had waived the privilege and must state to whom she gave certain papers. The Court said that disclosure as to fact waives the privilege as to detail. Mr. Justice Black in a strong dissent criticized the holding on two grounds:[37]

> ". . . today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view

[33]Blau v. United States, 340 U.S. 159 (1950).

[34]United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1951); Banks v. State, 18 Ala. App. 376, 93 So. 293 (1921).

[35]United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952).

[36]340 U.S. 367 (1951). For further discussion of the difficulties inherent in the waiver doctrine see the opinions in United States v. St. Pierre, 132 F.2d 837 (2d Cir. 1942); 8 WIGMORE, EVIDENCE §2276 (3d ed. 1940).

[37]340 U.S. 367, 378 (1951).

> makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

He also pointed out that Mrs. Rogers' answer might have incriminated her further because it might have provided additional evidence upon which her conviction under the Smith Act[38] for advocating forcible overthrow of the government could depend.

When the Privilege Does Not Apply

The privilege against self-incrimination clearly does not apply for the protection of others than the witness.[39] Furthermore, it may not be used to spare the witness disgrace or embarrassment.[40] It does not extend to cases, such as courts-martial, arising in the land or naval forces of the United States;[41] other and similar safeguards are provided by the Uniform Code of Military Justice.[42] The privilege against self-incrimination must only be claimed upon reasonable belief that grounds for it exist and not merely for fanciful reasons.[43] The Court has also validated immunity statutes that require a witness to give incriminating testimony but exempt him from prosecution for any matter upon which he testifies.[44] There has been considerable controversy, however, as to the effectiveness, as well as the wisdom, of immunity statutes.[45] Testimony may be compelled if prosecution against the witness is barred by the lapse of time or a pardon.[46] Nor

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[38]54 Stat. 670 (1940), as amended, 18 U.S.C. §§2385, 2387 (1952).

[39]Rogers v. United States, 340 U.S. 367 (1951); United States v. Singleton, 193 F.2d 464 (3d Cir. 1952); United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1951).

[40]Brown v. Walker, 161 U.S. 591 (1896); United States v. Thomas, 49 F. Supp. 547 (W.D. Ky. 1943).

[41]*Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

[42]64 Stat. 118 (1950), 50 U.S.C. §602 (1952).

[43]United States v. Raley, 96 F. Supp. 495 (D.D.C. 1951). It should also be realized that for the court to be able to tell the exact reason why a witness invokes the privilege is very difficult. See United States v. Herron, 28 F.2d 122, 123 (N.D. Cal. 1928): "The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same." Apparently, however, the court meant that, if the witness has a legitimate right to invoke, his motive is not to be questioned.

[44]Glickstein v. United States, 222 U.S. 139 (1911); Robertson v. Baldwin, 165 U.S. 275 (1897).

[45]King, *Immunity for Witnesses,* 40 A.B.A.J. 377 (1954).

[46]Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Thomas, 49

does a witness' fear of possible perjury seem to be a valid ground for invocation, since the courts have held that the immunity afforded by the Fifth Amendment relates to the past and is not license for the commission of perjury.[47]

Use of the Fifth Amendment merely as a means of political protest – for instance, a non-communist refusing to testify as to his communist affiliations because he believes that the investigation is being improperly conducted – seems to be contrary to the intent of the privilege. Since the witness supposedly is not afraid of criminal prosecution, he has defaulted on his obligation to be frank with the authorities. Furthermore, this type of witness is throwing fuel on the fire he seeks to extinguish, because even though a congressional committee must recognize the privilege the mere use of it may be taken by the public as an admission of guilt.[48]

Inferences that May Be Drawn from the Use of the Privilege

The public generally assumes that a person will not invoke the Fifth Amendment unless he is guilty, and consequently is distressed that such measures are available for the protection of "criminals." If the assumption is to be made that use of this immunity is a silent confession of guilt, then in many respects it provides no real protection. Therefore one might ask, What inferences may properly be drawn when the privilege is invoked? In a criminal action no inferences of guilt may be drawn,[49] and the prosecution is not allowed to refer to the failure of a witness to testify.[50] Once the accused voluntarily takes the witness stand the privilege is waived,[51] and inferences

F. Supp. 547 (W.D. Ky. 1943).

[47]Glickstein v. United States, 222 U.S. 139 (1911); Claiborne v. United States, 77 F.2d 682 (8th Cir. 1935).

[48]"We think that a jury might well find as a fact that the natural result of Cole's refusal to say whether he was or had been a member of the Communist party was to give the Committee, and the public generally, the impression that he was a Communist, – that his refusal was for the purpose of concealing his actual membership in the party. The event showed that this is exactly the interpretation which the public did place upon the conduct of Cole . . .," Loew's, Inc. v. Cole, 185 F.2d 641, 649 (9th Cir. 1950), *cert. denied,* 340 U.S. 954 (1951).

[49]". . . his failure to request to be a witness in the case *shall not create any presumption against him,*" Wilson v. United States, 149 U.S. 60, 65 (1893).

[50]United States v. Sprengel, 103 F.2d 876 (3d Cir. 1939); *see* Tomlinson v. United States, 93 F.2d 652, 656 (D.C. Cir. 1937).

[51]Banning v. United States, 130 F.2d 330 (6th Cir. 1942), *cert. denied,* 317 U.S. 695 (1943); United States v. Harrison, 121 F.2d 930 (3d Cir. 1941), *cert. denied,*

may be drawn for the jury by the prosecutor.[52]

The judge may not comment upon the accused's refusal to testify.[53] But if comment is improperly made, either by the prosecutor or the judge, a new trial need not be granted ipso facto.[54] The trial judge must not only control the counsel but must also remedy the effect of his impropriety.[55] If the accused is harmed by the inference a new trial will be ordered.[56] When no comment has been made it is not considered proper to instruct the jury to disregard the inferences. To ask the layman to nullify his own reasoning powers would be ineffectual and "tends towards confusion and a disrespect for the law's reasonableness."[57] No inference may be drawn from the accused's failure to testify at a preliminary or other prior examination[58] or from the nonproduction of privileged documents.[59] Comment may be made that certain evidence or accusations are undenied.[60] There are some contrary decisions, however, particularly when the accused is the only person who could possibly deny the evidence.[61] Even though the prosecutor may not be granted the prerogative of drawing direct inferences from the refusal to testify, nevertheless the inference may be just as clearly shown by the statement that certain evidence or facts have not been denied. An analysis of the practical effect of the privilege leads even a staunch supporter of the doctrine to confess, "The bare inference [of guilt] is indeed inevitable . . . ."[62]

If the much-heralded privilege against self-incrimination appears

314 U.S. 661 (1941); Cravens v. United States, 62 F.2d 261 (8th Cir. 1932), *cert. denied,* 289 U.S. 733 (1933).

[52]Tomlinson v. United States, 93 F.2d 652 (D.C. Cir. 1937), *cert. denied,* 303 U.S. 646 (1938); Krotkiewicz v. United States, 19 F.2d 421 (6th Cir. 1927); United States v. De Pietro, 36 F. Supp. 389 (W.D.N.Y. 1941).

[53]McKnight v. United States, 115 Fed. 972 (6th Cir. 1902).

[54]Pendleton v. United States, 216 U.S. 305 (1910).

[55]McKnight v. United States, 115 Fed. 972 (6th Cir. 1902).

[56]Wilson v. United States, 149 U.S. 60 (1893).

[57]WIGMORE, EVIDENCE 416 (3d ed. 1940).

[58]Loewenherz v. Merchants' & Mechanics' Bank of Columbus, 144 Ga. 556, 87 S.E. 778 (1916); State v. Bailey, 54 Ia. 414, 6 N.W. 589 (1880); Boyd v. State, 84 Miss. 414, 36 So. 525 (1904); Bunckley v. State, 77 Miss. 540, 27 So. 638 (1900); Smithson v. State, 127 Tenn. 357, 155 S.W. 133 (1913); Parrott v. State, 125 Tenn. 1, 139 S.W. 1056 (1911).

[59]8 WIGMORE, EVIDENCE 419 (3d ed. 1940).

[60]Gargotta v. United States, 77 F.2d 977 (8th Cir. 1935); Jamail v. United States, 55 F.2d 216 (5th Cir. 1932); Shea v. United States, 251 Fed. 440 (6th Cir. 1918).

[61]Morrison v. United States, 6 F.2d 809 (8th Cir. 1925); Linden v. United States, 296 Fed. 104 (3d Cir. 1924).

[62]8 WIGMORE, EVIDENCE 424 (3d ed. 1940).

at times to be a nebulous safeguard for the accused in a criminal action, its practical effectiveness is even less potent in the field of extra-judicial activities. Courts unhesitatingly affirm the discharge of public employees because they have claimed the privilege before quasi-judicial bodies.[63] The privilege of public employment is subject to reasonable terms laid down by the proper authorities.[64] The rationale behind the dismissal of public officials for invocation of the Fifth Amendment is based upon two theories: (1) Their duty to their position has been breached;[65] (2) there is an inference of guilt.[66] The New York City charter[67] providing for the dismissal of any employee who refuses to co-operate with and testify in regard to the affairs, government, or property of the city before a legislative committee or court has been upheld.[68] A hearing prior to dismissal is not required.[69] This policy was officially adopted by the Federal Government in a recent executive order that made "refusal of Federal employees to testify before Congressional Committees on ground of possible self-incrimination a basis for their dismissal from their Government jobs."[70]

There is a growing tendency among professional groups,[71] particularly within the academic profession,[72] to draw inferences of guilt

[63]Christal v. Police Comm'n of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); Goldway v. Board of Higher Educ., 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942).

[64]Adler v. Board of Educ. of City of New York, 342 U.S. 485 (1952); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951).

[65]Christal v. Police Comm'n of San Francisco, 33 Cal. App.2d 564, 92 P.2d 416 (1939).

[66]"Its use should not be considered as affording the witness a certificate of good character," Scholl v. Bell, 125 Ky. 750, 796, 102 S.W. 248, 261 (1907).

[67]N.Y. City Charter, c. 14, §903 (1935).

[68]Koral v. Board of Educ. of City of N.Y., 197 Misc. 221, 94 N.Y.S.2d 378 (Sup. Ct. 1950); Goldway v. Board of Higher Educ., 178 Misc. 1023, 37 N.Y.S.2d 34 (Sup. Ct. 1942).

[69]Koral v. Board of Educ. of City of New York, *supra* note 68, at 224, 94 N.Y.S.2d at 382. "Perhaps this is because such acts are usually matters of public record or otherwise capable of ascertainment beyond dispute."

[70]N.Y. Times, Oct. 15, 1953, p. 1, col. 5.

[71]"However, any lawyer, teacher, or government employee who thus invokes the Fifth Amendment disqualifies himself from the practice of his profession." Jameson, N.Y. Times, Sept. 25, 1953, p. 10, col. 6.

[72]"[I]nvocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his University an obligation to re-examine his qualifications for membership in its society," Resolution unanimously adopted by the American Association of Universities, 9 BULL. ATOMIC SCIENTISTS 190 (June 1953).

or misconduct from the mere use of this constitutional right. This view appears anomalous, since historically the development of the privilege against self-incrimination was for the protection of the innocent.[73] Two basic arguments for the preservation of the privilege are:

(1) Some individuals cannot safely take the witness stand, even though they are absolutely innocent of the crime charged. They become frightened and nervous when they try to explain suspicious circumstances and therefore act confused and embarrased, thus increasing their appearance of guilt.[74]
(2) The abuses which might result from a system of inquisition must be prevented, particularly when an offense has not yet been formally charged. This is especially necessary for the protection of the innocent.[75]

Dean Erwin N. Griswold, in a speech before the Massachusetts Bar Association,[76] gave several examples of how the privilege against self-incrimination could be employed by an innocent witness before a congressional sub-committee investigating communism. The first involved an idealist who joined the Communist party during the middle 1930's. His communist activities consisted primarily of membership in a study group in which discussions were kept on a high intellectual plane. He never engaged in espionage or sabotage and never saw or heard of such activities by any member of his group. Later, after the true nature of the party began to reveal itself, he became troubled and drifted away from the group. He is no longer a member of the Communist party, but admission that he was in the past might lead to his conviction under the Smith Act. A second example concerned a liberal who joined and aided various groups with high-sounding ideals. He had no knowledge that these groups had any communist infiltration, but they were later called "front" organizations. He never was a communist but his association with groups declared subversive might lead a jury to believe that he was a member of the Communist party. His truthful denial could result in a charge of perjury. In both cases the witnesses were innocent, but

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[73]"The rule was intended for the protection of the innocent, and not for that of the guilty," Bartlett v. Lewis, 12 C.B.N.S. 249, 265 (1862).

[74]Wilson v. United States, 149 U.S. 60, 66 (1893).

[75]8 WIGMORE, EVIDENCE 307 (3d ed. 1940).

[76]Harvard Law School Record, Feb. 11, 1954, p. 2, col. 2.

the waiving of their privilege could lead to self-incrimination.

Even strong advocates of the doctrine against self-incrimination admit that there is no justification for the protection of criminals and that the privilege has meaning only as a safeguard for the innocent. "The privilege cannot be enforced without protecting crime; but that is a necessary evil inseparable from it, and not a reason for its existence."[77]

Many defenders of the privilege admit that on the trial level, where there are other safeguards afforded the defendant, "there is some merit to the impatience with a rule that protects the defendant from his failure to then explain."[78] But it is pointed out:[79]

> ". . . the preliminary investigation as distinguished from the formal trial presents a different and stronger case for the privilege. . . .
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> "The point, I think, is not merely that it leads to police inefficiency to rely on the suspect himself as the chief source of evidence; nor is the anticipated evil of such a rule merely a fear of torture in some form. It is rather, as Dean Wigmore has so effectively put it, the evil of exposing all members of the public, the innocent and the suspicious looking as well as the guilty, to premature and indiscriminate official inquiry."

An earlier advocate of the doctrine has stated:[80]

> "Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; first, the petty judicial officer becomes a local tyrant and misuses his direction for political or mercenary or malicious ends; secondly, a blackmail is practised by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid. The modern system of formal presentment needs no defense. In this aspect the privilege against self-incrimination is, in history and in policy,

[77]8 WIGMORE, EVIDENCE 317 (3d ed. 1940).

[78]Kalven, *Invoking The Fifth Amendment,* 9 BULL. ATOMIC SCIENTISTS 181, 183 (June 1953).

[79]*Ibid.*

[80]8 WIGMORE, EVIDENCE 308 (3d ed. 1940).

its just complement, in so far as it exempts all persons from being compelled to disclose their supposed offenses before formal process of charge is had."

Thus, according to its advocates the protective strength of the privilege comes into play most forcefully at the pre-trial level, where the principles of due process are not so firmly entrenched as in the trial itself.

Several issues concerning the privilege against self-incrimination remain unresolved. First, when may the privilege be invoked? Does it depend entirely upon the witness or may the court prohibit its use unless shown that the invocation is proper? Second, at what point is the privilege waived? The witness is caught between Scylla and Charybdis — if he invokes the privilege too soon he is guilty of contempt, if too late it is lost. Finally, there is a tendency to consider the mere use of this constitutional right as synonymous with guilt or, at best, serious misconduct. This is particularly ironic, inasmuch as the basic intent of the doctrine is to protect the innocent and since the privilege originated as a protest against inquisitorial trials and investigations which stripped a witness of his due process rights.

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