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PROBLEMS OF THE FIFTH AMENDMENT

C. DICKERMAN WILLIAMS*

"No person... shall be compelled in any criminal case to be a witness against himself."
—(from the Fifth Amendment to the Constitution of the United States)

THE FREQUENT assertion of the Fifth Amendment by witnesses before Congressional committees has led to renewed interest in the privilege against self-incrimination. The subject is important, and the material voluminous. The questions yet unsolved are baffling and complex. The purpose of the present paper is to bring together in fairly condensed form material bearing on the Amendment's more controversial aspects to indicate areas of scholarship and of constructive legislation needed today.

The duty of the citizen to testify before lawful tribunals was expressed by Professor Wigmore in his great treatise on Evidence as follows:

"For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule:... This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to... From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution, and from law and order as indispensable elements of civilized life."

"... All privileges of exemption from this duty are exceptional, and are therefore to be disdained. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle..."

Today's most publicized exemption from the duty to testify is that pro-

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1. 4 Wigmore, Evidence § 2192 (2d ed. 1923). Repeated in substance in 8 Wigmore, Evidence § 2192 (3d ed. 1940). Emphasis has been added throughout, except where otherwise noted.
vided by the Fifth Amendment to the United States Constitution. It has been invoked by many who have been accused of espionage, conspiracy and membership in the Communist Party. It has obstructed legisla
tive and grand jury investigations, court trials and other searches for fact. Whether and how such obstruction may be avoided without sacrifice of fundamental principles, whether employers and the public may properly draw any inference from such invocation and, if so, what action they may take upon such inference, are questions under active discussion.

As the phraseology of the Amendment indicates, the privilege arose in criminal prosecutions. For centuries it had been the practice in Great Britain to interrogate an accused under oath. The disappearance of the practice is often attributed to the abuses of the Court of Star Chamber, especially in Lilburn's Case, but Lilburn's protest was against interrogation in the absence of a formal accusation, not against interrogation as such. The Protectorate abolished the Court of Star Chamber but did not abolish interrogation of the accused. Nevertheless objection to self-incriminating questions was expressed with more and more vigor in the latter part of the 17th century and finally gained acceptance as a matter of judicial decision soon after the Revolution of 1688. But the privilege was a matter of judicial decision only; it was not provided either in the English Bill of Rights or the Petition of Right, and, of course, had not even been thought of until long after Magna Carta.

As interrogation of the accused was not undertaken in the colonies after 1700, it was not one of the abuses which led to the American Revolution. As it was the correction of those abuses which was the primary purpose of the revolutionists, they were not gravely concerned with the privilege. It is not, for instance, mentioned in the Declaration of Independence, which lists twenty-nine grievances against the British Crown. Neither the Declaration of Rights by the Stamp Act Congress in 1765 nor that of the Continental Congress in 1776 included the privilege in their enumerations of fundamental rights. The section of the Northwest Ordinance corresponding to the Fifth Amendment omits the privilege. Professor Wigmore has even found it "a little singular" that under these circum-
stances, the privilege was included in the American Bill of Rights at all. His explanation in 1904 and again in 1923 was that the subject had been actively agitated in France in the 1780's. In February and March, 1789, there met throughout France assemblies to choose and to draft the instructions (cahiers) of the delegates of the Clergy and the Third Estate to the States-General summoned by Louis XVI in January of that year. In every district without exception the assembly of the Third Estate as a feature of its instructions demanded the abolition of compulsory sworn

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2. 3 How. St. Tr. 1315 (Star Chamber, 1637).
interrogation of the accused. In ninety-one districts the assemblies of the Clergy did the same. The members of the First Congress, which proposed this Amendment, had watched the development of the French Revolution with fascinated attention. 3

Between Professor Wigmore's Second and Third Editions, Mr. R. Carter Pittman published *The Colonial and Constitutional History of the Privilege against Self-Incrimination in America*. 4 Mr. Pittman demonstrated that the French had been exceedingly interested in the Bills of Rights of the various American States which had, beginning in June, 1776, declared themselves independent of the British Crown. Five of these had included the privilege in their Constitutions. 5 Mr. Pittman further showed that in the debates on the Declaration of Rights in the French National Convention in August, 1789, delegates referred to America as the "model" for France. He concluded that "the stream of influences was running towards France and not towards America at this time." 6 In his Third Edition Professor Wigmore accepted Mr. Pittman's analysis, 7 but that analysis, while disposing of the theory entertained by Professor Wigmore, does not affirmatively explain the adoption of the privilege.

An intermediate view, however, seems equally tenable. The exchange of libertarian ideas between the United States and France was active in the decade of the 1780's. The strength of the conviction of the French against compulsory self-incrimination indicated by the unanimity of the electoral assemblies of 1789 can hardly have failed to have had its repercussions in the United States, only five of which had included the privilege in their constitutions. It may well have been a case of interaction,

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3. 4 Wigmore, Evidence § 2250 (1st ed. 1904). Comment repeated in 4 Wigmore, Evidence § 2250 (2d ed. 1923) without change.
5. Id. at 764-5. The five were Massachusetts, New Hampshire, North Carolina, Pennsylvania and Virginia.
6. Id. at 765.
7. 8 Wigmore, Evidence § 2250 (3d ed. 1940). The mystery as to how the privilege got into our Bill of Rights, and the learned search on the part of Messrs. Wigmore and Pittman to solve it, contradict the view sometimes expressed that contemporary society has forgotten something familiar to the founding fathers, e.g., the remark of Chief Judge Magruder in Maffie v. United States: "Our forefathers, when they wrote this provision [referring to the privilege against self-incrimination] into the Constitution, had in mind a lot of history which has been largely forgotten today." 209 F.2d 225, 227 (1st Cir. 1954). It is true that George Mason of Virginia knew the history of the privilege, but there is no evidence that the other forefathers did; if there were such evidence the mystery of its inclusion in the Constitution would not exist, or, at least, would be more readily solved. Constant discussion of the subject because of its present controversial aspects has made the intelligentsia and bar of today far better acquainted with the history of the privilege than those of the late eighteenth century. Judge Magruder's assertion is the more remarkable in that he follows it with a citation to § 2250 of Wigmore.
in which the American impulse was reenforced by the enthusiasm of the French response. In any event there is sharp contrast between the unanimity of the district assemblies of France and the rather casual interest of the colonists, who failed to mention it in so many of their fundamental documents.

The nineteenth century heard vigorous attacks on the privilege. Bentham excoriated it. So did his disciple, Judge Appleton of Maine. Around the turn of the twentieth century, the difficulty in obtaining evidence in anti-trust and railroad rebate prosecutions led to a renewal of the agitation against the privilege.

Among the arguments on behalf of abolition of the privilege was that by Professor Terry, writing in the Yale Law Journal in 1906:

"... the crimes which are now most prevalent and injurious to the community are crimes of a fraudulent and secret nature, generally with an element of conspiracy or combination in them... The facts are usually known only to the criminals or accomplices. ..."8

Another advocate of abolition passionately asserted:

"Let the most ardent advocate of constitutional privilege to the criminal point out a single case in all the annals of American jurisprudence where an innocent man has been, or could have been, convicted because compelled to answer questions about the crime of which he was accused."9

On occasion, invocation of the privilege has aroused indignation in the most respectable circles. During the notorious Teapot Dome investigation, the New York Times was stirred to comment:

"Wonders of the Law! Yet now we are asked to believe that there is no lawful way of establishing by competent evidence what is known universally as sunrise. There must be some way of dispelling this ridiculous absurdity by the application of common sense. If there is not, the event will lead overwhelmingly to the famous assertion that the law is an ass."10

This remark represented a change in heart on the part of the Times. Originally it had been extremely hostile to the Teapot Dome-Daugherty investigations.

In 1908 the United States Supreme Court analyzed the privilege at some length and concluded that as a human right it was definitely second class.11 A New Jersey banker had been convicted of a violation of the

8. Terry, Constitutional Privilege against Forcing Self-Incrimination, 15 Yale L. J. 127, (1906).
laws of that State and sentenced to six years in prison. In the course of
the trial, the prosecuting attorney summed up vigorously on the defend-
ant's failure to testify. The banker appealed, asserting that such com-
ment was a deprivation of due process of law. The Court assumed for
purpose of argument that such comment by the prosecution was the
equivalent of compulsory self-incrimination, and on that hypothesis, over-
ruled the assertion that it violated due process. The opinion was written
by Justice Moody, an extremely able judge and a staunch "progressive,"
appointed by President Theodore Roosevelt whose Attorney-General he
had been. Undoubtedly, Justice Moody's views reflected to some extent
the indignation of the intellectuals of that day with the invocation of the
Amendment by corporation officials in anti-trust and rebate cases. The
opinion continually belittles the sanctity of the privilege, observing inter
alia:

"It [the privilege] has no place in the jurisprudence of civilized and free countries
outside the domain of the common law and it is nowhere observed among our own
people in the search for truth outside the administration of the law."\(^{12}\)

On a later occasion, the Supreme Court, at a time when its membership
included many jurists who have deservedly won reputations for their
devotion to civil liberty, rather scoffed at the privilege. The case was
*Palko v. Connecticut*.\(^{13}\) Justice Cardozo, writing for the Court, said:

"This [privilege against self-incrimination] too might be lost and justice still to be
done. Indeed, today as in the past there are students of our penal system who look
upon the immunity as a mischief rather than a benefit, and who would limit its scope,
or destroy it altogether. No doubt there would remain the need to give protection
against torture, physical or mental. Justice, however, would not perish if the accused
were subject to a duty to respond to orderly inquiry."\(^{14}\)

This language was concurred in by Justices Hughes, Stone, Brandeis,
Roberts and Black, among others.

Another distinguished citizen and one-time judge who has tended to
deprecate the privilege is Hon. Samuel Seabury. His picturesque language
was as follows:

"As we look at some of the uses which the criminal classes have made of constitu-
tional provisions, one might suppose that the far-seeing barons who wrung the Great
Charter from King John at Runnymede were intent upon safeguarding the twentieth
century racketeer, gangster, kidnaper, gunman and corrupt political leader in the
prosecution of their sinister vocations. . . . Let me refer to the privilege against self-
incrimination. It is not derived from Magna Carta, Bill of Rights or other great
charters which have marked the progress of English liberty . . . it is, as the Supreme
Court has held, not one of the basic and fundamental rights which is incapable of

\(^{12}\) Id. at 113.
\(^{13}\) 302 U.S. 319 (1937).
\(^{14}\) Id. at 325-6.
change by the people of any state. . . At least, it should be so modified that no public official or contractor, or other person engaged in the performance of public work, should be permitted to invoke it as a reason why he should not be called upon to explain his actions in connection with public affairs."

On another occasion Judge Seabury maintained that the privilege had led to "grave abuses" and was "not an inherent attribute of freedom." Although conceding with some reluctance that the privilege might have a legitimate function with respect to ordinary crime he pleaded that at least "the privilege be made inapplicable to cases where the subversion of the very processes of government is involved. . . ."

The excitement of the trust-busting era might well have led to a constitutional amendment had the privilege not been so limited by statute and judicial decisions as to be practically ineffective in so far as relevant to anti-trust prosecutions. Congress provided that any witness giving self-incriminating testimony in anti-trust and rebate cases should be immune from all prosecution. And the Supreme Court interpreted the Amendment as inapplicable to a subpoena requiring the production of corporate papers. In this way, prosecutors were able to require lesser employees to testify fully and to require even the highest corporate officers to produce the papers which were needed as evidence for a successful prosecution. The agitation against the privilege because of its repeated invocation in New York municipal investigations was resolved by legislation, discussed later herein, by which public employees who invoked the privilege were automatically dismissed.

The Extent of the Privilege

There has been much discussion of the extent of the privilege. The classic statement of the privilege as applicable to those who are not defendants in criminal prosecutions, is that the witness may not be required to reveal facts which "tend to incriminate" him. But what facts "tend to incriminate" him? The expression has been said to cover only facts innocent in themselves but nevertheless an essential element in a crime, such as, for instance, the facts proving the trustee status of a witness who has been guilty of embezzlement. Others have maintained that the privilege applies to any fact providing a clue to the commission of a crime, although not in itself even an essential element of the crime. The latter view would seem implicit in Counselman v. Hitchcock, holding insufficient an immunity statute which did not afford protection from crimes to which the witness's testimony would provide clues.

15. Quoted in 8 Wigmore, Evidence § 2275a (3rd ed. 1940).
16. 33 Colum. L. Rev. 1, 2 (1933).
In *Blau v. United States*\(^{20}\) the Supreme Court made what is presumably the authoritative current interpretation of the Fifth Amendment in this respect. In that case, the petitioner had been convicted of contempt for invoking the privilege when asked by a grand jury questions concerning her "employment by the Communist Party or intimate knowledge of its workings." That membership in that party was lawful had seemed sufficient to the lower courts to overrule the claim of privilege. But the Supreme Court said:

"Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act."\(^{21}\)

On the other hand, the Fifth Amendment does not afford protection against what might be called inspection. The accused cannot avoid identification by prosecution witnesses by staying away from the trial. He cannot avoid the taking of his finger prints, the measurement of other physical characteristics or the identification of his clothes and personal belongings. He cannot however be compelled to take affirmative action to facilitate identification, such as engaging in handwriting, or talking for the purpose of testing his voice.\(^{22}\)

In particular, a witness is not entitled by virtue of the Fifth Amendment to avoid giving evidence which will result in his disgrace. This question was decided by the Supreme Court in the leading case sustaining immunity statutes, *Brown v. Walker*.\(^{23}\) The Court said:

"A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."\(^{24}\)

This opinion seems to assume that by the mere invocation of the privilege the witness has represented that he has committed a crime—is a "self-confessed criminal." Therefore his reputation cannot, in the nature of things, be very good. He has not much left to lose. This attitude is con-

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\(^{21}\) Id. at 161.
\(^{22}\) 8 Wigmore, Evidence § 2265 (3d ed. 1940).
\(^{23}\) 161 U.S. 591 (1896).
\(^{24}\) Id. at 605.
consistent with the apparent fact that invocation of the Fifth Amendment does damage the reputation of the witness.

**CIRCUMSTANCES IN WHICH THE PRIVILEGE MAY BE INVOKED**

Certainly under the doctrine of these cases the witness as a usual matter may invoke the privilege if he has committed a crime and an answer to the question would *per se* reveal, or constitute a "link in the chain of evidence" necessary to convict. In recent years the public has frequently read of witnesses who invoke the Fifth Amendment particularly before Congressional committees, but thereupon issue statements to the press that they are innocent of any crime and invoked the Amendment because they feared that their answers would subject them to a "danger of prosecution," or words to that effect. This practice has recently received impressive sanction in the form of an article by Dean Erwin N. Griswold of the Harvard Law School, in which he maintains that a man innocent of any crime may rightfully use the privilege when questioned concerning past membership in the Communist Party.25

The rationale of this theory goes back to the English case of *Regina v. Boyes*,26 but its modern application has given that decision a reverse twist.

Prior to *Regina v. Boyes* the cases seem to take for granted that by a proper invocation of the privilege the witness represented that he had committed a crime which the answer would reveal, or would "complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction." The quotation is from an opinion by Chief Justice Marshall at the trial of Aaron Burr.27 This opinion would seem authoritative with respect to the law at the time of the adoption of the Amendment. The point was argued by eminent counsel for two days, and the Chief Justice expressed his views in a carefully considered opinion which defines what he said was "that course which it is conceived courts have generally observed." The Chief Justice continued:

"When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may *criminate himself*, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what

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25. 40 A.B.A.J. 502 (1954). This article and two others by Dean Griswold have since been reprinted in pamphlet form. The Fund for the Republic has given wide circulation to the pamphlet.
it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath, as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.28

In Regina v. Boyes the witness, Best, was called in a prosecution for bribery committed in an election to the House of Commons. Counsel handed Best a pardon from the Queen, which under the English rule he was required to accept.29 He claimed the privilege on the ground that, despite the pardon, he would be subject to impeachment by the House of Commons. The Court overruled the claim of privilege. Best then gave testimony that he had accepted a bribe, and the defendant, Boyes, was convicted. On a motion for a new trial the Court reconsidered the ruling, but upheld it, saying in an opinion by Chief Judge Cockburn:

"To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. . . . But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. . . . Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of."30

28. Id. at 40. According to the Oxford English Dictionary the word "criminate" is derived from the Latin word "criminare," which is translated "to accuse, charge with crime." The Dictionary defines "criminate" "to charge with crime, to represent as criminal; to prove (anyone) guilty of crime, to incriminate."


30. Supra note 26, at 330-331. The argument of defense counsel that the pardon from the Queen did not suffice was condensed by the reporter as follows: "Supposing, however, that the pardon makes the party a new man so far as prosecution by or in the name of the Crown is concerned, he is still liable to be proceeded against by impeachment, at the suit of the House of Commons, before the House of Lords, When the House of Commons impeached Lord Danby, the Crown, pending the impeachment, granted him a pardon; but the Commons denied the right of the Crown to do so (2 Hallam's Const. Hist. vol. 2, p. 411, 7th ed.); and afterwards it was enacted by the Act of Settlement, 12 & 13 W.3, c.2, s.3, entitled 'An Act for the further limitation of the Crown, and better securing the rights and liberties of the subject,' that no pardon of the Crown should be pleadable to an impeachment by the Commons in Parliament; 4 Blackst. C. 399. A pardon from the Crown, in order to be available in such a case, must be granted after trial of the impeachment, not while the impeachment is pending." Id. at 319-320.
A succession of United States cases approved or relied on the "reasonable danger" rule of *Regina v. Boyes*. Finally the Supreme Court in 1917, in *Mason v. United States*,31 citing many of these cases and quoting at length from Judge Cockburn's opinion, definitively adopted it.

The Court's ruling in *Regina v. Boyes* was, however, that even where his testimony revealed a crime, a witness could not invoke the privilege if there was not good reason to anticipate that a penal proceeding would be brought on the basis of that revelation. Its reasoning is now being applied to justify the refusal to give testimony that will not reveal a crime, or even a "link in the chain of evidence" of a crime—the witness having committed no crime—because of the witness's alleged anticipation of prosecution for a crime of which he is innocent.

That is, the hypothesis of *Regina v. Boyes* was unwillingness on the part of prosecuting officers to proceed against an admitted criminal; the hypothesis of its present application is the willingness, assumed by the witness, of prosecuting officers to proceed against an innocent man. The validity of the application seems doubtful.

Dean Griswold's reasoning would extend the privilege to great lengths indeed. His hypothetical case is that of a professor who joined the Communist Party, participated solely in study group activities, eventually became disillusioned and left the party at the time of the outbreak of the Korean War. The professor is later questioned by a Congressional committee concerning past membership in the Communist Party. Dean Griswold continues:

"Persons have been prosecuted under the Smith Act for membership in the Communist party plus something else. If he [the professor] supplies the proof of his own membership in the Party, he does not know what other evidence may then be brought against him to show that he has committed a crime. Thus, an answer to the question will definitely incriminate him, that is, provide evidence which could be used in a prosecution against him."

Dean Griswold's statement of the basis for Smith Act prosecutions is remarkable in its apportionment of emphasis. The Smith Act forbids attempts to overthrow the Government by force. It makes no reference to the Communist Party and was, in fact, first invoked, to Communist enthusiasm, against Trotzkyites. Although we may assume that membership in the Communist party would be admissible evidence against an

31. 244 U.S. 362 (1917).
32. Supra note 25, at 505. Dean Griswold's article was written prior, and without reference, to the "Communist Control Act of 1954" approved August 24, 1954 (Public Law 637, 83d Congress, 2d Session). This Act appears to have no relevance to Dean Griswold's hypothetical situation; whether it would have relevance with respect to a person who remained in the Communist Party after August 24, 1954 has not been considered.
34. United States v. Dunne, 138 F. 2d 137 (8th Cir. 1943).
accused in a present day prosecution, per se it would be meaningless; such membership, and office in the party as well, are expressly declared by the Internal Security Act of 1950 not to constitute a violation of any criminal statute. As the opinions of the courts in Smith Act prosecutions of Communists make clear, the “something else” constitutes about one thousand parts of the government’s case to one for “membership.” Only longtime functionaries of the party, deep in its conspiratorial activities, have been prosecuted. According to experts on the subject there are about 700,000 ex-Communists in the United States, but there have been only a few score prosecutions under the Smith Act.

Unless the professor supposes with good reason that evidence showing he has violated the Smith Act exists and is available to the prosecutor—and no such supposition is made in the statement of facts—Dean Griswold’s conclusion is a non sequitur. How can a man who has committed no crime—like Dean Griswold’s professor—know what “evidence may then be brought against him to show that he has committed a crime?” The very fact that he is innocent negatives such knowledge.

Conceivably any fact could be woven into a chain of evidence of crime. Let us illustrate: X was in New York City on February 1, 1955. A number of crimes were committed in New York City on that day, but X participated in none of them and X knows of no evidence that he did. In some litigation X’s presence in New York on February 1, 1955 becomes relevant. He is asked where he was on that day. May he, on only these facts, plead the privilege because he doesn’t know of any evidence that he was guilty of any of those crimes? On Dean Griswold’s reasoning he could. If so, a witness would seem to be entitled to plead the privilege to any question and the administration of justice would be frustrated. But on the facts assumed, and without more, X’s fear would be fanciful.

If there were added to Dean Griswold’s hypothesis a disposition on the part of prosecutors to proceed under the Smith Act against witnesses who admitted only Communist Party membership per se, the claim might be warranted on the basis of the modern twist given to Regina v. Boyes. Similarly, on the hypothesis suggested above, X might be justified in claiming the privilege if prosecutors were engaged in proceedings against everyone who was in New York City on February 1, 1955 per se.

Dean Griswold does not hypothesize this additional circumstance, and, as we have seen, it does not exist. On the contrary, the sensational prosecutions of ex-Communists which have so much engaged the attention of

35. 50 U.S.C.A. 783 (f).
the public, such as those of Hiss and Remington, have resulted from a denial of party membership. The usual response of a Congressional committee to a witness who admits past membership, asserts he has left the Party, and identifies his former associates, is to thank and praise him. If there is a single instance of prosecution under the Smith Act following such testimony, Dean Griswold does not mention it.

It is of interest that Dean Griswold does not even suggest that his professor's fear is reasonable, and indirectly suggests that not a fear of prosecution, but an affirmative desire to obstruct the public's right to his evidence, constitutes the true motive for his invocation of the privilege. According to Dean Griswold:

"He [the professor] knows that a number of communists have been convicted under the Smith Act of 1940, and more have been indicted. Our teacher perhaps magnifies his own predicament. He sees the jail doors opening up if he himself gives the evidence that he was once a communist. . . . There are other factors that influence his conclusion. His own experience is an ordeal. He does not want his friends to be subjected to it. . . . By claiming the privilege against self-incrimination, he can refrain from naming any of his associates . . . his desire to protect them from having to experience his own predicament seems to him to have prevailing weight in the actual circumstances."

In short, our professor's claim of privilege is based in the last analysis, not on fear of prosecution—a fear which Dean Griswold treats rather lightly—but on social considerations.

Dean Griswold's presentation seems more persuasive that he himself regards ex-Communist professors as above the "duty to give what testimony one is capable of giving" than that his hypothetical professor was justified in his claim of the privilege.

Does the Privilege Apply to Congressional Investigations?

This discussion must open with an unequivocal assertion that the writer's consideration of the question is not intended to suggest any doubt in his mind that witnesses in such investigations are fully entitled to the privilege. Such investigations may be directed at misconduct; criminal prosecutions are an unusual but definitely occasional aftermath.

38. Supra note 25, at 505.

39. The personal disinclination of a witness to give information (i.e., to be an "informer") is of course diametrically opposed to the "fundamental maxim that the public [in the words sanctioned by Lord Hardwicke] has a right to every-man's evidence" (note 1, supra), or what Chief Justice Marshall called "the principle which entitles the United States to the testimony of every citizen." United States v. Burr, In re Willie, supra note 27. What an ex-Communist professor who testified frankly would face, and undoubtedly would very genuinely fear, is unpopularity in some sections of the academic community over being an "informer."
As Mr. Justice Jackson said in his concurring opinion in *Dennis v. United States*: 40

"But always, since I can remember, some group or other is being investigated and castigated here. At various times it has been Bundists and Germans, Japanese, lobbyists, tax evaders, oil men, utility men, bankers, brokers, labor leaders, silver Shirts and Fascists. At times, usually after dramatic and publicized exposures, members of these groups have been brought to trial for some offense." 41

The purpose of the discussion is rather to demonstrate the unsatisfactory nature of the legal justification for the assertion of the privilege in such investigations and the need for additional research and legislation that the privilege may be validly asserted both before Congressional committees and other tribunals with the least possible detriment to the investigation.

This question never has been squarely decided by the Supreme Court. Purportedly, the privilege is applicable only "in a criminal case." A legislative investigation is an effort to obtain information upon which to enact legislation and is not a criminal case.

The courts often turn to the abuses which legislation was designed to correct in order to interpret that legislation. Accepting the theory once entertained by Professor Wigmore that the Amendment was a response to pre-Revolutionary agitation in France, the Amendment certainly could not have been directed at legislative abuses, as the legislature of that country had not even met in the preceding 175 years.

Nor is it conceivable that the Amendment was directed at abuses by the colonial legislatures. The first five and presumably most irksome grievances listed by the Declaration of Independence related to the lack of respect shown by the British Crown for the colonial legislatures. In the modern vocabulary the principal cause of the American Revolution was the failure of the executive branch to cooperate sufficiently with the legislative. Many members of the First Congress had belonged to colonial legislatures; few, if any, had been Crown administrators. The right of legislative investigation had been among the colonials' most cherished protections against maladministration by Crown Governors.

The rule in England applicable to legislative witnesses has been described by Mr. Cushing as follows:

"It has already been seen, that a witness before either House or Parliament cannot excuse himself from answering any question that may be put to him, (with a single exception presently to be noticed,) on the ground that the answer would subject him to an action; or expose him to a criminal proceeding; . . . This difference, between proceedings in Parliament, and in the ordinary courts, has been established on grounds

41. Id. at 175.
of public policy, and is considered to be fundamentally essential to the efficiency of a parliamentary inquiry. But while the law of Parliament thus demands the disclosure of the evidence, it recognizes to the fullest extent, the principle upon which the witness is excused from making such disclosures in the ordinary courts of justice, and protects him against the consequences which might otherwise result from his testimony; the rule of Parliament being that no evidence given in either House can be used against the witness in any other place, without the permission of the House, which is never granted, provided the witness testifies truly.42

On the other hand, it is clear that in a debate in the House of Lords in 1742 on a bill to indemnify witnesses before an investigating committee of the House of Commons it was assumed that the privilege applied. Thus the Duke of Argyle, the chief advocate of the bill, maintained:

"On the present occasion, my lords, I pronounce with the utmost confidence, as a maxim of indubitable certainty, 'that the public has a claim to every man's evidence,' and that no man can plead exemption from this duty to his country. But those whom false gratitude or contracted notions of their own interest, or fear of being entangled in the snares of examination prompt to disappoint the justice of the public, urge with equal vehemence, and indeed with equal truth, that 'no man is obliged to accuse himself' and that the constitution of Great Britain allows no man's evidence to be extorted from him, to his own destruction."43

It is true that the investigation in question was distinctly criminal in nature, the subject being alleged embezzlements by the Chancellor of the Exchequer, the Earl of Orford (Robert Walpole), and apparently looking to his impeachment. That aspect of the investigation was not, however, regarded by the speakers in the House of Lords as relevant to the existence of the privilege.

Possibly the First Congress, influenced by the French agitation but unwilling to restrict legislative prerogatives, consciously limited the privilege to criminal prosecutions, and so indicated by the inclusion of the phrase "in a criminal case." The phrase was specifically inserted by amendment on the floor of the House of Representatives, not having been included in the original committee draft. Representative Lawrence of New York, who made the motion to amend, argued that the

"clause contained a general declaration, in some degree contrary to laws passed. He alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for the purpose; which amendment being adopted, the clause as amended was unanimously agreed to. . . ."44

The express "in some degree contrary to laws passed" is indeed mystifying and apparently has never been clarified by scholars. It has been

42. Cushing, Lex Parliamentaria Americana § 1001 (2d ed. 1866).
43. 12 Cobbett, Parliamentary History 675 (1742). App. I of Taylor, Grand Inquest (1955), published since this article was originally written, discusses the British practice at some length.
44. 1 Annals of Congress 753 (1789).
suggested that the reference was to the Judiciary Act of 1789. Section 15 of that Act required that parties to civil litigation produce relevant books and papers. The Act was not approved by the President until September 24, 1789. But Representative Lawrence made his motion on August 17, 1789. If Mr. Lawrence sought to reconcile Section 15 and what became the Fifth Amendment, did he have in mind criminal litigation as distinguished from civil litigation, or criminal liability as distinguished from civil liability? The phraseology suggests the former alternative.

Some weight to that view is added by the form which the privilege had taken in the state constitutions then in effect. In three of the states the privilege was expressly limited to "criminal prosecutions" (Virginia, Pennsylvania and North Carolina); in the remaining two (Massachusetts and New Hampshire) the privilege was expressed in more general form, although in each instance the context would suggest that it was intended to apply only in criminal prosecutions. Nevertheless it was subsequently held in Massachusetts that the privilege applied in legislative investigations. The Virginia Bill of Rights was the first in point of time, and its author, George Mason, was the leading advocate of embodying such restrictions in fundamental documents.

The resolutions of the conventions of the various states ratifying the Constitution may also be of relevance. Eleven states had ratified the Constitution by August, 1789 when the Fifth Amendment was formulated by Congress. Several state conventions demanded that a Bill of Rights be added to the Constitution, and Congress adopted the first nine amendments in response to these demands as its own resolution, proposing the amendments to the states, expressly declares. In only two instances, Virginia and New York, was the privilege among the items which the ratifying conventions proposed to be included in the Bill of Rights. In each instance the convention limited the privilege to "criminal prosecutions."

45. 49 Col. L. Rev. 87, 92 (1949).
46. 1 Stat. 73, 82.
47. 1 Stat. 93.
48. 1 Annals of Congress 753 (1789). The Judiciary Bill was not discussed in the House until August 24 (id. at 782). The author of the Note in the Columbia Law Review searched the Journals of the Continental Congress, of which Lawrence was a member, and also the laws of New York, with which Lawrence was presumably familiar, but found nothing relevant.
49. Emery's Case, 107 Mass. 172 (1871).
50. 1 Stat. 97 ("The Conventions of a number of States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added."
51. 1 Elliott, Debates on the Federal Constitution 328; 3 id. 658 (2d ed. 1866).
Nevertheless, the Supreme Court in *McCarthy v. Arndstein* held that the constitutional privilege applied in civil as well as criminal proceedings. The *Arndstein* case related to an examination under Section 21a of the Bankruptcy Act. Unfortunately the Court’s opinion merely lays down general propositions without revealing its reasoning and without discussion of the many subsidiary questions necessary to decide before the conclusion can be reached. The only case cited was *Counselman v. Hitchcock*. In that case, the Court had said:

“The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”

The investigation which gave rise to the *Counselman* case was, however, an investigation by a grand jury. That is to say, it was an investigation by an arm of a court looking to the discovery of crime and to the indictment and consequent prosecution of the offenders in that court, in short, the first phase of a criminal case. In *Counselman v. Hitchcock* the Court drew a distinction between the Fifth and Sixth Amendments as follows:

“A criminal prosecution under article 6 of the amendments, is much narrower than a ‘criminal case,’ under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.”

In a more recent case, *United States v. Monia*, the Supreme Court, again considering the relevance of the Fifth Amendment to a grand jury investigation, repeated this view: “The Fifth Amendment declares that ‘No person . . . shall be compelled in any criminal case to be a witness against himself.’ An investigation by a grand jury is a criminal case.” The Court cited *Counselman v. Hitchcock* as authority.

Although it is dangerous to take too seriously a statement on a point not the ultimate question at issue, there is perhaps some significance in the fact that the Court rested its conclusion that the Fifth Amendment applied on the ground that a grand jury investigation was a criminal case, and not on the ground that the Amendment applies in any inquiry.

A legislative investigation is much more remotely connected with criminal prosecutions than a grand jury investigation. A legislature has no power to prosecute; it cannot levy fines or impose sentences; it functions with an entirely different purpose. The Supreme Court has said that Congress may investigate for a legitimate purpose despite the incidental

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52. 266 U.S. 34 (1924).
53. 142 U.S. 547 (1891).
54. Id. at 562.
55. Id. at 563.
56. 317 U.S. 424 (1943).
57. Id. at 427.
revelation of wrong-doing. It has never said that it may investigate for purpose of criminal prosecutions by it.

Thus, in *McGrain v. Daugherty*, the Court refused a writ of habeas corpus to a witness arrested for contempt because he had disobeyed the process of the Senate. His excuse was that the Senate intended to use his testimony at a trial of Attorney-General Daugherty, brother of the recalcitrant witness. The Court quoted with approval the following rhetorical question of Senator George:

"If the Senate has the right to investigate the department [of justice], is the Senate to hesitate, is the Senate to refuse to do its duty merely because the public character or the public reputation of some one who is investigated may be thereby smirched, to use the term that has been used so often in debate?"

The Court concluded:

"We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part."

Although Congressional investigations have frequently resulted in criminal prosecutions, as did the investigation of the Department of Justice in the *Daugherty* case, that result remains unusual—a by-product. The reverse is true of a grand jury investigation which is the first step "in a criminal case," the issue before the grand jury being whether or not a particular "criminal case" shall be terminated or shall continue. So that applicability of the Amendment to Congressional investigations cannot be regarded as wholly settled.

An additional difficulty in the application of the privilege lies in the doctrine that the assertion of the privilege may be overruled when the circumstances fail to indicate that "a direct answer . . . may incriminate the witness."

Witnesses before Congressional committees have in recent years invoked the privilege under the most unlikely circumstances. In his book *The Strange Case of Alger Hiss*, the Earl Jowitt, Lord Chancellor of Great Britain under the Labor Government, comments as follows:

"The principle [of pleading self-incrimination] does seem to me to have been carried to ridiculous lengths. For instance, Ullman, a friend of Harry Dexter White, when asked whether he played tennis, answered that he objected to answer on the ground that he might be incriminated—at which there was laughter in the committee room. There was more laughter when Pressman was asked whether he was a member of the

59. Id. at 179.
60. Id. at 179-180.
American Legion and declined to answer on the same ground. It is right that a judge
should not probe too deeply into the reasons which prompt a witness to say he fears
self-incrimination, but I cannot imagine any judge in this country allowing this objec-
tion to prevail to such a ridiculous extent. 62

Of the great number of witnesses who have invoked this privilege
before recent Congressional investigating committees, none have been
indicted for any crime at all, so far as the writer has discovered, except that
in a few instances witnesses have been indicted on the theory that they were
not entitled to invoke the privilege. This fact suggests that witnesses have
invoked the privilege without just cause. 62a In particular, witnesses appear
to disregard the erasure of crime by the statute of limitations. When prose-
cution is barred by lapse of time, or for any other reason, the privilege no
longer applies. 63

Rejection of the claim of privilege on the ground of the absence of
reasonable apprehension of danger requires decision by a judicial tribu-
nal. Historically, that requirement offered no substantial difficulty for
the witness was in court when he invoked the privilege. The Court imme-
diately ruled as it would on any other question of evidence. But if a
Congressional committee rejects the claim of privilege, the controversy
must somehow be gotten into the courts. Under existing legislation this
requirement may and probably will block the inquiry. In the Daugherty
case, 64 the witness defied Congress in May, 1924; the duty to testify was
finally adjudicated in January, 1927, when the Supreme Court held that
the writ of habeas corpus should be dismissed. The Senate investigation
was over and Mal Daugherty never did in fact testify. In that particular
instance, evidence gained from other sources had led to a criminal prose-
cution, but if Mal Daugherty's testimony had been crucial his recalcitrant
attitude might have saved his brother.

More recent cases are also dilatory. In United States v. Bryan, 65 the
witness defied Congress on April 4, 1946. The contemptuous nature of
that defiance was finally adjudicated on May 8, 1950. In Lawson v.

62a. Taylor, op. cit. supra, note 43, also reaches this conclusion. Id. at 201. He attributes
the phenomenon to bad advice from lawyers. This condition he blames on "leading lawyers
of 'conservative' outlook" for their alleged failure to accept such witnesses as clients. Id. at
205: In the absence of evidence that the witnesses ever attempted to retain such lawyers—
and Mr. Taylor offers none—a more probable explanation would seem to be that the wit-
nesses in question went in the first instance as well as finally to the lawyers who represented
them at the hearings.
63. 4 Wigmore, Evidence § 2279 (3d ed. 1940). This doctrine was recently applied in the
United States District Court for the Southern District of New York in a highly publicized
proceeding involving Frank Costello, a noted figure in the investigations conducted in 1950-
1951 by a committee of the United States Senate of which Senator Kefauver was chairman.
1955] PROBLEMS OF THE FIFTH AMENDMENT

United States,66 the corresponding dates were October 27, 1947 and June 5, 1950.

Presumably, a statute could be so drawn that a judicial ruling could be obtained with reasonable expedition. An investigating committee might, for instance, be authorized to institute a summary proceeding in the courts of the District of Columbia.

Waiver is another aspect of the privilege to which Congressional investigation is ill-adapted. That the privilege may be waived has never been doubted.67 The waiver may take the form of contract, express or implied. Thus, it has been held that acceptance of confidential employment implies a waiver of the privilege because the privilege is inconsistent with the duty to account.68

The question usually arises when the privilege is claimed after a witness has given some testimony. Has that testimony waived the privilege not to testify to something else? When the defendant in a criminal prosecution takes the stand, he unquestionably waives the privilege in so far as concerns the particular offense with which he is charged. The precise extent of the waiver in other respects is in considerable dispute.69 The Congressional witness is more comparable to the court witness who is not a party to the litigation; he is present merely to contribute such information as he may have to an issue or problem before the tribunal, not to win a lawsuit. As to the latter type of witness, the courts hold that if the witness testifies at all in relation to a given subject, he "must submit to a full, legitimate cross-examination in reference thereto."70

The basic objective of the doctrine of waiver is that a witness may not give a description of an incident and avoid the testing of that description by the customary techniques of cross-examination.

It can readily be seen that many witnesses before Congressional committees testify in ways that present nice questions of waiver. Does a witness who makes an introductory statement condemning the committee upon the implied hypothesis that he is innocent thereby waive the privilege?71 Does a witness waive the privilege when he goes further and expressly asserts innocence and denounces the accuser? These questions have not been pressed by Congressional committees, possibly because of the obvious delay which judicial consideration would involve. Here again, legislation is needed to expedite determinations.

67. 8 Wigmore, Evidence § 2275 (3d ed. 1940).
68. Greene v. Weaver, 1 Sim. 404 (Ct. Ch. 1827).
69. 8 Wigmore, Evidence § 2276 (3d ed. 1940).
70. Ex parte Senior, 37 Fla. 1, 19 So. 652, 656 (1896).
71. This course of action was pursued in August, 1948 by a number of witnesses charged by Elizabeth Bentley and Whittaker Chambers.
Despite the awkwardness of applying the Fifth Amendment to Congressional investigations under present statutory procedures, committees invariably allow the privilege, presumably relying on Counselman v. Hitchcock. Vice-President Nixon, when a member of the House, did on one occasion raise the question and assert the desirability of a Supreme Court test.

In summary then, the privilege against self-incrimination in testimony before Congressional committees is at present unsatisfactorily defined. The privilege should be clarified by legislation which will include provision for a prompt judicial determination of the validity of a claim of privilege.

Inferences Ordinarily Drawn from Silence

In considering what inferences may properly be drawn from invocation of the Fifth Amendment, it is helpful to analyze the inferences which the courts can properly draw under analogous circumstances. It is a general rule in the weighing of evidence that whenever a litigant is peculiarly able to offer testimony on any subject, his failure to do so gives rise to the inference that the testimony, if given, would be unfavorable to his cause. As Lord Mansfield put it:

"It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

Accordingly unfavorable inferences have been drawn under the most varied circumstances: the failure of the defendant to produce in court a jewel whose value was in question; the failure of a defendant in an automobile collision case to call two people who were riding with him; the failure of a defendant in a real property action to call the party through whom he claimed title.

The rule applies even in criminal cases with respect to witnesses other than the defendant himself. Thus the defendant's failure to produce his wife when there is evidence that she had some knowledge of the incident warrants an adverse inference; the failure of the state to produce the owner of a car being used to transport liquor has the same effect.

In criminal cases in those jurisdictions in which the Fifth Amendment

72. 142 U.S. 547 (1891).
73. N.Y. Herald Tribune, Sept. 6, 1948, p. 3, col. 6-7.
75. Armory v. Delamire, 1 Strange 505 (K.B. 1722).
79. Johnson v. State, 199 Ind. 73, 155 N.E. 196 (1927).
or similar provision applies, the defendant cannot be called to the witness stand; and his failure to testify gives rise to no inference and cannot be made the subject of comment. Yet the defendant's speech, silence, or other conduct outside of the courtroom and of legal custody with respect to a crime of which he is accused have long been regarded as admissible evidence at his trial. In State v. Bartlett the court said:

"From time immemorial the reply or the silence of the accused person, when charged, has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue, or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidences of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings and silence. He never has been, and is not now, compelled to furnish the Court the evidence of the existence of these facts. If it be said, these are the voluntary acts of the prisoner, the manifest answer is, they are not more so than the refusal or neglect to testify. When found in the possession of stolen property and inquired of concerning it, he must speak or be silent. When found with the implements used in a recent burglary and interrogated in reference to them, he must answer or be silent. When found with the bloody instruments of a foul murder, and he is called upon to explain his possession, he must answer or be silent. There is no escape from this. He is in the strait betwixt the two. He must speak or be silent. Yet in all these cases, it has been the uniform practice of the Court to admit in evidence the conduct of prisoners upon such occasions, and it never has been held an infringement of the rule referred to."

Many of the cases in this field expound what is known as the doctrine of "consciousness of guilt," an expression used to characterize conduct evidencing a fear of prosecution. Some of these decisions seem to go very far. In Lindsay v. People evidence that the defendant turned pale when arrested was received as showing guilt, but might not an innocent man turn pale when arrested? The theory on which such evidence is admitted was explained in the charge to the jury in Starr v. United States, as follows:

"The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as evidence of guilt, because he is an eyewitness to the occurrence; he knows how it did transpire; he is presumed to have consciousness of that act. . . . It is a principle of human nature—and every man is conscious of it, I apprehend—that if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct a man who is conscious that he has done an act which is innocent, right and proper.

80. 55 Me. 200 (1867).
81. Id. at 217-218. (Emphasis by the court).
82. 63 N.Y. 143 (1875).
83. 164 U.S. 627 (1897).
The truth is—and it is an old scriptural adage—'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.'

The consciousness of guilt doctrine is usually invoked, as in the Starr case, so as to introduce evidence of flight. The principle has been held also to warrant receipt of evidence of fear when identified; of fear when found with stolen property; of fear when arrested; of readiness to deliver up a hog alleged to have been stolen; of attempted suicide; of attempted suicide while in jail; and of failure to take a natural interest in the crime.

Similarly, other conduct indicating consciousness of a weak case is admitted. The general rule was stated in State v. Reed, as follows:

"There is no reason, if he is innocent, for withholding a single truth; there is every reason for uttering it, if innocent. If guilty, if he does not confess, the resort in all cases is, or must ever be, to falsehood, evasion or silence. . . . Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence, of greater or less inculpatory force."

On this theory, there has been admitted evidence of false stories; of feigning insanity; of false explanation of suspicious circumstances; of false denial of previous arrest; of giving a false name; of attempted subornation of perjury and bribery of a juror; of false entries in an account; of killing an eyewitness; and of intimidation of a witness. The list could be greatly enlarged. These cases closely resemble those turning on consciousness of guilt; the narrow distinction is between "consciousness of a weak case" and fear of prosecution.

84. Id. at 631.
85. State v. Dennis, 119 Iowa 688, 94 N.W. 235 (1903).
86. People v. Farrington, 140 Cal. 656, 74 Pac. 288 (1903).
87. Levison v. State, 54 Ala. 520 (1875).
88. People v. Farrington, 140 Cal. 656, 74 Pac. 288 (1903).
89. Levison v. State, 54 Ala. 520 (1875).
90. People v. Farrington, 140 Cal. 656, 74 Pac. 288 (1903).
91. Smith v. State, 42 Tex. 444 (1875).
95. 62 Me. 129 (1874).
96. Id. at 145-146.
102. State v. Reinhart, 26 Ore. 466, 38 Pac. 822 (1895).
FAILURE TO DENY MISCONDUCT IN CIVIL LITIGATION

The preceding paragraphs have shown that silence in court on a material issue, or, when charges of criminal conduct are involved, silence out of court or other behavior indicating reluctance to meet the issues fairly, warrant adverse inferences. We now come to what is perhaps the closest approximation of an invocation of the Fifth Amendment: silence in civil litigation in the face of suggestions of dishonorable conduct. Here we find that courts reach the most severe conclusions. Perhaps the civil proceeding which most closely resembles a criminal prosecution is one to remove a public official on the ground of misconduct. In such a proceeding the Supreme Judicial Court of Massachusetts has said:

"Instant impulse, spontaneous anxiety and deep yearning to repel charges thus impugning his honor would be expected from an innocent man. Refusal to testify himself or to call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to the respondent. It is conduct in the nature of an admission. It is evidence against him. This principle of law has long been established and constantly applied. The reason is that it is an attribute of human nature to resent such imputations. In the face of such accusations, men commonly do not remain mute but voice their denial with earnestness, if they can do so with honesty. Culpability alone seals their lips."

Childs v. Merrill was a civil suit for conversion on allegations of facts constituting a crime. When the defendant's deposition was taken, he pleaded the privilege. At the time of trial, the privilege was no longer available because the statute of limitations had run. He took the stand, and the plaintiff sought to show defendant's plea of the privilege at the deposition. The Supreme Court of Vermont held the plaintiff entitled to do so, saying:

"The fact that the witness availed himself of the privilege on some former occasion tended to show an admission of guilt, and it seems to us illogical to say that one may be examined in relation to all the facts and circumstances in a case, but not in respect to an admission as to such facts."

United States v. Mammoth Oil Co. was an aftermath of the Congressional investigation into a lease of oil lands by the late Secretary of the Interior Albert B. Fall to the Sinclair Oil Company, the "Teapot Dome" investigation. After Congressional committees had exposed most of the relevant facts, the Government brought suit to cancel the lease on the theory that Sinclair had bribed Fall by the payment of $230,500 in Liberty bonds in a roundabout way. Various witnesses associated with

103. The cases are collected in 2 Wigmore, Evidence § 289 (3d ed. 1940).
105. 66 Vt. 302, 29 Atl. 532 (1894).
106. Id. at 303, 29 Atl. at 533.
107. 14 F. 2d 705 (8th Cir. 1926).
the oil company gave evasive testimony or did not testify at all. Everhart, the son-in-law of Fall, invoked the Fifth Amendment. The District Judge conjectured a number of reasons consistent with innocence for these refusals and failures to testify and dismissed the suit. The Court of Appeals took a different view. That Court said in part:

"The silence and evasions in this suit suggest many pertinent inquiries. Why should Osler refuse to disclose the connection, if any, of Sinclair with this company [referring to the Continental Trading Company, Ltd., from which Everhart had received the bonds]? Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart? . . . Men with honest motives and purposes do not remain silent when their honor is assailed . . . Is a court compelled to close its eyes to these circumstances? . . . These gentlemen have the right to remain silent, to evade, to refuse to furnish information, and thus to defy the government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall and the failure of Sinclair to testify."

The Court of Appeals reversed the decree, cancelled the lease, denied any credit of the defendants for their large expenses in the exploitation of the tract but required a full accounting for all the oil taken. The Supreme Court affirmed the decision of the Court of Appeals.

In the criminal case of Holt v. State a similar result was reached. There a co-defendant who had failed to testify at his own trial—which had been severed—and had been acquitted, was called again by the defense. It was held that this invocation of the privilege could be used to discredit him on cross-examination.

**THE PROPRIETY OF ACTION BASED UPON INVOCATION OF THE FIFTH AMENDMENT**

From the preceding discussion, the following principles may be formulated:

In civil litigation, the courts regard failure to deny, in court or out of court, conduct which gives rise to civil liability as affirmative evidence of that conduct. Further, the courts do so whether or not such conduct, in addition to giving rise to a civil liability, constitutes a criminal offense.

In criminal prosecutions, the courts regard not only failure to deny, outside of court or other official inquiry, as an imputation of guilt, but also proof of acts either indicating fear of prosecution or tending to obstruct prosecution, as affirmative evidence of guilt.

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108. Id. at 729.
110. 39 Tex. Cr. 282, 45 S.W. 1016 (1898).
If these propositions validly state the attitude of the courts, it is not surprising that the public draws adverse conclusions when a witness, confronted with a question which either in itself or in context suggests a possibility of his misconduct, asserts that his answer would tend to incriminate him as a ground for maintaining silence!

In so doing the public does not act unconstitutionally, according to Professor Wigmore. He says:

"A due respect for the privilege is perfectly consistent with a strict contempt for the guilty offender, and does not require or condone his protection as an end good in itself or good under any circumstances. . . . The good which it aims at consists in that general fact and system, and not in the individual application of it to a given claimant. That effects mostly harm,—a particular harm which we suffer for the larger good."

In other words the privilege benefits society through the compulsion which it exerts on enforcement officers to prove their cases by external evidence, rather than by confessions extracted from suspects. But it does not mean that a given individual, found in a compromising situation, shows his innocence by failing to make a full disclosure. Consistently with this reasoning, both legislatures and courts have authorized action based upon invocation of the privilege.

The United Nations panel of jurists has advised its Secretary-General:

"There can be no doubt that in the United States of America, it is not contrary to the Constitution for legislative or other consequences affecting employment to follow from the exercise by an employee of some constitutional right or privilege."

In 1937, the City of New York adopted a revised charter. The Commission which drafted the charter included such distinguished citizens as Charles E. Hughes, Jr., son of the Chief Justice, and himself at one time Solicitor-General of the United States, and Thomas D. Thacher, also a

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111. 8 Wigmore, Evidence § 2251 (3d ed. 1940).

112. N.Y. Times, Dec. 1, 1952, p. 1, col. 5. The panel rationalized this attitude by saying:

"In our opinion, a person who invokes this privilege can only lawfully do so in circumstances where the privilege exists. If in reliance upon this privilege a witness refuses to answer a question, he is only justified in doing so if he believes or is advised that in answering he would become a witness against himself. In other words, there can be no justification for claiming this privilege unless the person claiming the privilege believes or is advised that his answer would be evidence against himself of the commission of some criminal offense.

"It follows from this, in our opinion, that a person claiming this privilege cannot thereafter be heard to say that his answer, if it had been given, would not have been self-incriminatory. He is in the dilemma that either his answer would have been self-incriminatory, or, if not, he has invoked his constitutional privilege without just cause. As, in our opinion, he cannot be heard to allege the latter, he must by claiming privilege have admitted the former. Moreover, the exercise of this privilege creates so strong a suspicion of guilt that the fact of its exercise must be withheld from a jury in a criminal trial." Id. at p. 4, col. 4.

former Solicitor-General and later a Judge of the Court of Appeals of New York. Section 903 of their revised charter provided that "if any . . . employee . . . shall refuse to waive immunity . . . his term or tenure of office or employment shall terminate."\textsuperscript{113}

The following year, the State of New York revised its Constitution. Among the provisions which the Convention altered was Article 1, Section 6, which includes the privilege against self-incrimination. Section 6 was revised to provide in effect that any public official who availed himself of the privilege before a grand jury should thereby forfeit his office.

The validity of Section 903 was challenged before the Supreme Court of New York in \textit{In re Goldway},\textsuperscript{114} a case arising out of an investigation by a committee of the New York Legislature. The court, sustaining the statute, said:

\begin{quote}
"The privilege against self-incrimination is not as ancient as many of our other constitutional safeguards; indeed, it may be said to be of comparatively recent origin. Taking account of its genesis, some competent students of constitutional limitations have suggested that it has outlived its sanction; and that now, it is more mischievous than salutary in its operation. Respectable authorities may readily be invoked in support of its extinction; and it is generally agreed, I think, that in all events, it should be withdrawn altogether from public officers and employees whose official conduct is under scrutiny. However all this may be, it is clear that the statute under attack here is not violative of any constitutional restriction since there is no denial of the privilege against self-incrimination.

"The Legislature did not purport to abrogate the right; it undertook to exercise its discretion as to the wisdom of retaining in public service an employee who exercised the privilege when his official acts are under review. It cannot be said that it is so manifestly unreasonable as to be beyond its constitutional competency for the State to determine that it is not salutary for it to continue in its employ a person who obstructs an investigation into his public conduct by a refusal to waive immunity. Clearly it is a legislative prerogative—and not for the courts to review its wisdom—to say that it is proper that public officials should not be permitted to hold office and at the same time shield themselves by a claim of privilege in the course of an investigation of their official acts. . . . Whether the claim of privilege should be a valid ground for dismissal, becomes a matter for the controlling wisdom of the law-making power. For the right to hold public employment is a privilege which may reasonably be qualified by legislative action; and I conceive that such a qualification as set forth in Section 903 may not be said to be so unreasonable as to justify the courts in striking down the statute."\textsuperscript{116}
\end{quote}

The \textit{Goldway} case has been followed in several decisions applying Section 903.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{113} N.Y.C. Charter § 903 (1937).
\item \textsuperscript{114} 178 Misc. 1023, 37 N.Y.S. 2d 34 (1942).
\item \textsuperscript{115} Id. at 1024-1025, N.Y.S. 2d at 36.
\end{itemize}
Similarly, in bankruptcy cases the courts regularly deny discharges to bankrupts who invoke the Fifth Amendment when questioned by creditors about their affairs. In the leading case of In re Dresser,\textsuperscript{117} the court said:

"The contention for the appellant is that to enforce Clause 6 [which denies a discharge to a bankrupt who refuses to answer a material question] under the circumstances of this case would deprive the bankrupt of his constitutional right of immunity from self-incrimination. . . . We entertain no doubt that it is within the power of Congress to grant or refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, or a right or property, but is a matter of favor, to be accepted on such terms as Congress sees fit to impose."\textsuperscript{118}

In In re Weinreb,\textsuperscript{119} discharge was denied although the bankrupt at a later examination waived the privilege and answered the question. The view of the Dresser and Weinreb cases is universally followed.\textsuperscript{120}

Another analogy is provided by the cases which uphold discharge based upon the invocation of constitutional political rights. The language of Justice Holmes in McAuliffe v. New Bedford\textsuperscript{121} has often been quoted. In that case, the Supreme Judicial Court of Massachusetts sustained the discharge of a police officer for engaging in political activity in violation of civil service rules. Justice Holmes, at that time a member of the Massachusetts court and author of the opinion, said:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."\textsuperscript{122}

A more recent case to the same effect is United Public Workers v. Mitchell,\textsuperscript{123} in which the Supreme Court upheld the validity of the Hatch Act. That Act forbids Government employees to take "any active part in political management or in political campaigns." In other words, government employment was conditioned on a waiver of the right of political activity, and certainly, in a democracy, a more basic right cannot be conceived.

In Christal v. San Francisco,\textsuperscript{124} the court in the absence of statute or

\textsuperscript{117} 146 Fed. 383 (2d Cir. 1906).
\textsuperscript{118} Id. at 385.
\textsuperscript{119} 153 Fed. 363 (2d Cir. 1907).
\textsuperscript{120} Kaufman v. Hurwitz, 176 F. 2d 210 (4th Cir. 1949) is a recent application of the doctrine.
\textsuperscript{121} 155 Mass. 216, 29 N.E. 517.
\textsuperscript{122} Id. at 220, 29 N.E. at 517-518.
\textsuperscript{123} 330 U.S. 75 (1947).
\textsuperscript{124} 33 Cal. App. 564, 92 P. 2d 416 (1939).
regulation upheld the dismissal of a police officer who had invoked the privilege, saying:

"As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. . . . We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, or of any specific rule relating to 'conduct becoming an officer.'"\(^{125}\)

Nevertheless, the argument has recently been advanced that further employment should not be denied because of invocation of the privilege. In a note in the Pennsylvania Law Review entitled Mandatory Dismissal of Public Personnel and the Privilege against Self-Incrimination,\(^{128}\) an unidentified author or authors maintain that the inference of guilt may not properly be drawn because on occasion the privilege is invoked by innocent men. It is suggested that invocation may be rested on "an abhorrence of unrestrained inquiry into beliefs" or by fear of examination "generally unhindered by the ordinary rules of evidence which guide the interrogation of witnesses in court."\(^{127}\)

The Note is more realistic than Dean Griswold in not attempting to suggest that the claim is invoked because the witness's testimony would incriminate or expose him to a risk of prosecution. In other words—although the Note does not pursue the analysis to this conclusion—the invocation of the Amendment is what Chief Justice Marshall said was "in conscience and in law as much perjury as if he had declared any other untruth upon his oath."

It may be of course that a conscientious citizen will genuinely entertain more of "an abhorrence of unrestrained inquiry into beliefs" than of perjury. Yet the government has constantly inquired into men's beliefs but never until recently did it occur to anyone to abhor it. For instance, in the State of New York, the public authorities have regularly inquired into the political beliefs of registered voters for over fifty-five years. Under the New York Election Law every voter, upon registration, is questioned . . .

\(^{125}\) 92 P. 2d at 419. The same result has been reached in other cases involving police officers. Souder v. Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931); Drury v. Hurley, 339 Ill. App. 33, 88 N.E. 2d 728 (1949). In the Drury case the Supreme Court of Illinois held that dismissal under such circumstances did not involve any constitutional question, but rather "whether or not. . . . refusal constituted conduct unbecoming an officer." 402 Ill. 243, 83 N.E. 2d 575, 576 (1949). To the same effect is Canteline v. McClellan, 282 N.Y. 166, 25 N.E. 2d 972 (1940). In this case there was, however, the New York Constitutional provision to which reference has been made at page 44.

\(^{126}\) 101 Pa. L. Rev. 1190 (1953).

\(^{127}\) Id. at 1199.
as to the political party with whose "principles" he is "in general symp-
athy,"\textsuperscript{128} So far as the law reports indicate no voter has ever objected,
and in New York several million voters register annually. Punishment for
beliefs as such is a different matter. It is of some interest that the article
in the University of Pennsylvania Law Review gives no illustration of this
abhorrence other than by a cross-reference to another article in the same
volume dealing with loyalty oaths.\textsuperscript{129} This other article cites the reasoning
of several teachers who were unwilling to take a loyalty oath, but none
of the reasoning is apposite to the invocation of the Fifth Amendment.
Inquiries into beliefs by Congressional committees are far less "unre-
strained" than those by New York election authorities. Conventionally,
in so far as they have given rise to pleas of the Fifth Amendment, they
have related, not to beliefs, as such, but to espionage or Communist Party
membership. Certainly questions as to espionage are not inquiry into
"beliefs." Communist Party membership is also different from "beliefs,"
although, like espionage, it may be a result of "beliefs." Inquiry into
external acts is hardly to be abhorred, still less forbidden, because those
acts were induced by beliefs. Joining the Communist Party is an act. The
horror could be better understood if the inquiry related merely to inquiry
into philosophical Communism. Investigations, judicial proceedings and
literature proclaim that the Communist Party is the Soviet Union's prin-
cipal recruiting officer for domestic espionage agents.

The truth is that matters of the utmost privacy are properly investi-
gated if they appear to have relevance to subjects of public concern.
Thus a man's diet would ordinarily be his own business, but if it developed
that one had been regularly eating foods which gave an immunity to a
poison from which a close associate had died, the police could not be
blamed for looking into the question. Again, one's emotions deserve pri-
vacy, yet if the object of emotional attachment is the wife of another man
the law attaches liability to inquiry, or, if she should prove to be a foreign
agent, the F.B.I. would be warranted in taking interest. The same rea-
soning justifies inquiry into Communist Party membership, viz., intimate
relationship with the matters of conceded public concern. Even the prac-
tice of religious belief may be made criminal under circumstances invol-
ving no national danger.\textsuperscript{130}

\textsuperscript{128} N.Y. Election Law § 174. The requirement was introduced by C. 473, § 3 of the
Laws of 1899. The immigration laws provide that beliefs shall be a criterion in several in-
stances. 8 U. S. C. A. §§ 1101, 1182(a), 1251(a) and 1427(a). Political association is oc-
casionally a statutory criterion of fitness for public office. 15 U. S. C. A. §§ 41, 78(d). The
propriety of Congressional inquiry into beliefs is upheld in Barsky v. United States, 167 F.2d
241 (D.C. Cir. 1947) and Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949).

\textsuperscript{129} 101 Pa. L. Rev. 480 (1953).

\textsuperscript{130} Davis v. Beason, 133 U.S. 333 (1890) upheld a conviction for polygamy, a feature
of the defendant's religion.
The abhorrence must therefore be regarded as an eccentricity. One can admire the eccentric who makes sacrifices that he may persist in his views, but it is hardly appropriate to endanger the national safety so that he can practice his ideology without sacrifice.

The other theory on which the writer of the Pennsylvania Note conjectured the invocation of the privilege before investigating committees by innocent men was fear of examination "generally unhindered by the ordinary rules of evidence which guide the interrogation of witnesses in court." Again, it is impossible to say that the privilege has never been invoked by an innocent man on this ground. It seems odd, however, that a Law Review would speak so sympathetically of perjury induced by fear of a technique of examination lawful in the tribunal hearing the witness, a tribunal before which countless witnesses have been and are regularly being examined, and whose rules of procedure have been formulated and may be revised by democratic processes. And it can very readily be said that so fearful a witness is irrational. The giving of testimony before any tribunal exposes the witness to distasteful experiences, but that has never been thought to warrant exemption from subpoena. The difficulty faced by the non-litigant witness in court is that while so much of his testimony as is relevant may serve to discredit him, the explanation may be irrelevant and the witness therefore barred from making it. And examiners in an adversary proceeding, which a court proceeding usually is, are often ruthless. On the other hand, a witness before an investigating committee ordinarily has full opportunity to give his side of the matter, although the use which he makes of it is often to denounce the Committee. The witness in a court proceeding who invoked the Amendment because of the rules of evidence would be on stronger moral ground.

The only example cited in the Note of a witness who has ever suffered from lack of court rules of examination is Owen Lattimore. But in the Lattimore case the principal count relates to a statement which the witness insisted on making at the opening of the hearing—rather to the displeasure of the Committee, as the statement included many strictures upon it. The Note further maintains that committee examiners often ask questions the answers to which are fully covered by evidence they already possess, citing the Lattimore case. Such questions undoubtedly were asked of Lattimore, but they are also constantly asked in court proceedings—in fact in all types of proceedings in which evidence is taken. Such questions are favored by trial lawyers because they serve either or both of two purposes: they test the credibility of the witness, and they tend to force him to make admissions valuable to the examiner as the predicate either of argument or further questions.

131. Supra note 126, at 1199.
In passing, it is perhaps in order to make another comment on the Pennsylvania Note. The writer of that Note condemns the dismissal of a government employee for invocation of the Amendment in investigations involving loyalty on the ground that invocation has not established disloyalty. This argument, like others arguing against action based upon invocation of the privilege, overlooks the fact that silence in the face of a suggestion of given conduct, constitutes in itself evidence of that conduct. This proposition has been demonstrated in the preceding discussion. It is true that the silence is permitted by the Amendment, but that fact in no way detracts from the evidentiary force of the silence. The dismissal is not for the exercise, as such, of a constitutional privilege but because the employee has, by silence, to some extent made out a case against himself of criminal conduct. That the silence, because of the Amendment, may not be used to convict him of crime does not, as we have seen from the Pelletier\textsuperscript{132} and Mammoth Oil\textsuperscript{133} cases, among others, mean that it may not for other purposes have the evidentiary force that it would have apart from the Amendment. What the force may be depends, as is true of all evidence, on the circumstances; but in respect of public employees the force may properly be regarded as conclusive because of an employee's duty of loyalty to his employer as such—a duty quite apart from the citizen's duty of loyalty to his country.

**Express Waiver: A Possible Solution**

In view of the many protests against dismissal of employees who invoke the Amendment, as illustrated by the Pennsylvania Note, and against loyalty oaths, it may be desirable to seek some solution of the problem of employee loyalty more satisfactory than dismissal for invocation of the Amendment.

*United States v. Field*\textsuperscript{134} inspires a suggestion. In that case, the court held, with one dissent, that a surety on a bail bond impliedly waived the privilege with respect to "questions directly pertinent to the whereabouts of the fugitives or to clues to trace down their whereabouts."\textsuperscript{135} The court said in part:

"It is not a new thing to hold that the privilege may be limited in various ways by a previous obligation otherwise assumed. Examples of limitations validly set upon its exercise are found in the various requirements for the disclosure of information set by the state as a correlative of the pursuit of certain activities. Thus doctors must report deaths and their causes, druggists must show their prescription lists, mine owners must report details of accidents in their mines, and motor vehicle operators

\textsuperscript{132} See note 104 supra.
\textsuperscript{133} See note 108 supra.
\textsuperscript{134} 193 F. 2d 92 (2d Cir. 1951).
\textsuperscript{135} Id. at 101-102.
must report details of collisions on the highway . . . [citations]. Various examples are also given in Shapiro v. United States, which is itself important because of its holding that the records required to be kept by OPA regulations under the wartime price controls were not subject to the privilege. 136

In the light of this reasoning, the argument could be forcefully made that the mere acceptance of government or educational employment impliedly waived the privilege in so far as relating to questions of loyalty to this country.

It is true that in the Field case the court expressly disclaims the intention to carry its reasoning so far, saying:

". . . obviously the principle cannot be pressed to hold that all acceptance of office carries an obligation to perform without resort to the constitutional protection. Else a public officer or judge must disclose all bribes, a bank official all embezzlements. . . ." 137

It seems by no means obvious to the present writer why the acceptance of public office or bank employment should not entail a duty to disclose all conduct closely related to the discharge of the office or employment, in which category bribes and embezzlement surely fall. Such a duty does not seem to go nearly so far as Shapiro v. United States, 138 requiring a merchant, who enjoyed no special privilege or position of honor or trust, to disclose black market transactions.

Whatever waiver may be implied by the acceptance of employment, certainly waiver could be contracted for at the time employment is undertaken, if it be made sure that the employee thoroughly understands what he is doing. 139 It is true that, as Judge Frank points out in his dissent in the Field case, 140 there are many constitutional rights that cannot be bargained away. On the other hand, express waiver of the privilege against self-incrimination has never been struck down. If waiver may be implied under such circumstances as existed in the Field case, as the majority of the court decided, it surely could be expressly contracted away.

136. Id. at 100.
137. Id. at 101.
138. 335 U.S. 1 (1948). The writer strongly disagreed with the Shapiro case at the time and still does.
139. Light will probably be thrown on the subject of express waiver when the Supreme Court decides Regan v. New York, argued November 18, 1954. 23 U.S. Law Week, 3141. In this case a police officer signed an express waiver and testified. Later he resigned, refused to testify further and was convicted of contempt. The Supreme Court then granted certiorari. There was no opinion by the New York courts.
140. 193 F. 2d 108. Judge Frank's dissent went on the difference between oral and written evidence. A more valid distinction in the writer's opinion, and more strongly supported by the cases, is the difference between testimony relating to duties voluntarily assumed and other testimony. It is for this reason that the writer agrees with the minority in the Shapiro case and the majority in the Field case.
The reader of Fifth Amendment literature cannot fail to be impressed by the subjective character of the approach often displayed. When business men and crooked politicians were under fire, comment on the Fifth Amendment in the law reviews and periodicals read by the intelligentsia was very hostile. Since the Amendment has come to be invoked by intellectuals in the last few years, there has been a flood of highly sympathetic comment in the same publications.

Fortunately, the courts have on the whole adhered to principle. Yet some judicial opinions cause a certain wonder. Would Justice Moody have been so unsympathetic to the Amendment in *Twining v. New Jersey*\(^1\) if he had not only a short time previously as a government prosecutor lost the *Armour* case because of repercussions of the Amendment? Would Justice Cardozo, Justice Black and their associates have spoken so lightly of the privilege in *Palko v. Connecticut*\(^2\) if they had not a few years previously lived through its frequent use by witnesses involved in the Seabury investigation of municipal corruption in New York and in Senate investigations of business men?\(^3\) Contrariwise, would so many law

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141. 211 U.S. 78 (1908).
143. Although the investigations of questionable commercial practices conducted by Justice Black when a member of the United States Senate were rarely, if ever, marked by invocations of the Fifth Amendment, a number of business men displayed an evasive attitude and a lack of candor. This failure to cooperate greatly irked Justice Black, and he asserted his point of view in an article entitled "Inside a Senate Investigation," published in the February, 1936 issue of Harper's Magazine. The article was primarily an attack on those who fail to make a frank disclosure to Congressional committees. The article began with the following quotation from Woodrow Wilson: "If there is nothing to conceal then why conceal it? ... Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety" (p. 275). Justice Black continued: "Whenever a congressional committee inspects the so-called private papers of a corporation official the cry goes up that this is an outrageous invasion of the rights of private citizens [p. 275]. ... Slowly business executives have built up the fiction that they have a right to enjoy some special privilege of secrecy [p. 276]. ... The fight on investigations begins before the investigation begins [p. 276]. ... Instantly the pressure is put on Washington [p. 277]. ... No one need be troubled lest investigations be too hastily and casually invoked p. [278]. ... The job which confronts an investigating committee is a formidable one indeed [p. 278]. ... [Investigators] must be honest and resolute. They have to face attempts to frame them or tempt them or discredit them [p. 279]. ... [An investigation] would be quite simple if the interests involved would come forward with a frank willingness to furnish the truth. But very often they dare not furnish the truth. It is too damning. Therefore every conceivable obstacle is put in the way of the investigators [p. 280]. ... Not only are papers found to be missing, but witnesses have a way of disappearing [p. 282]. ... Just as persons and firms have been reluctant to exhibit their papers before the hearings, so they now reveal the same resistance to answering questions [p. 283]. ... Of course many merely insist that the question relates to personal and private matters [p.
professors of today be so highly indulgent towards those who invoke the Amendment if they did not resent, at least subconsciously, investigation of behavior which in their opinion was inspired by motives of idealism? 283] . . . This sort of thing taxes severely the patience of an investigator. It accounts often for what newspaper enemies of investigations often refer indignantly to as the bullying and badgering of witnesses [p. 284]. . . . Witnesses have declined to answer questions from time to time. The chief reason advanced has been that the testimony related to purely private affairs. In each instance with which I am familiar, the House and Senate have steadfastly adhered to their right to compel reply, and the witness has either answered or been imprisoned [p. 284]. . . . Washington, with its hundreds of lobbyists, social and otherwise, has the habit in certain circles, of entertaining and lionizing, any of their group who make any gesture of defiance of an investigating committee [p. 285]. . . . Public investigating committees . . . have always been opposed by groups that have or seek special privileges. The spokesmen of these greedy groups never rest in their opposition to exposure and publicity. That is because special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity [p. 286]. . . .