

1969

Discharge in Bankruptcy and Self-Incrimination

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Discharge in Bankruptcy and Self-Incrimination, 37 Fordham L. Rev. 450 (1969).

Available at: <https://ir.lawnet.fordham.edu/flr/vol37/iss3/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

DISCHARGE IN BANKRUPTCY AND SELF-INCRIMINATION

I. INTRODUCTION

The federal Bankruptcy Act¹ expressly provides that refusal by a bankrupt in an insolvency proceeding to answer any material question approved by the court is a ground for denial of discharge of the bankrupt's debts.² Denials on this ground have been upheld by numerous courts, even where the bankrupts' refusals to answer have been based on the privilege against self-incrimination guaranteed by the fifth amendment.³ However, certain recent Supreme Court decisions,⁴ concerning situations arguably analogous to that of the bankrupt whose discharge is denied for a refusal to incriminate himself, have espoused the doctrine that "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'"⁵ amounts to an impermissible "penalty" that would reduce the privilege "to a hollow mockery."⁶ Has Congress attached such an unconstitutional penalty to a bankrupt's refusal to answer on these grounds by denying a discharge from his debts? Examination into the rationales of the Bankruptcy Act and the recent Court decisions which extend the fifth amendment privilege suggests that Congress may have done so.

II. BANKRUPTCY LEGISLATION

The ancient concept of bankruptcy stems from Biblical times⁷ and Roman law.⁸ The first English bankruptcy statute, to which American legislation on

1. The most recent comprehensive bankruptcy legislation is the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544-66. This Act has been substantially revised and amended by subsequent legislation, notably by the Chandler Act of 1938, ch. 575, 52 Stat. 840-940. These Acts, including all additions and amendments, are codified in 11 U.S.C. (1964).

2. Bankruptcy Act § 14c(6), 11 U.S.C. § 32(c)(6) (1964): "The court shall grant the discharge unless satisfied that the bankrupt has . . . in the course of a proceeding under this title refused . . . to answer any material question approved by the court" See 1 W. Collier, *Bankruptcy* ¶ 14.56 (14th ed. J. Moore & L. King 1968) [hereinafter cited as 1 W. Collier].

3. E.g., *In re Zaidins*, 287 F.2d 401 (7th Cir. 1961), aff'g 182 F. Supp. 543 (E.D. Wis. 1960). *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949); *In re Dresser*, 146 F. 383 (2d Cir. 1906). See 1 W. Collier ¶ 14.58; C. Nadler, *Bankruptcy* § 758 (2d ed. S. Nadler & M. Nadler 1965); 7 H. Remington, *Bankruptcy* § 3170 (6th ed. J. Henderson 1955) [hereinafter cited as 7 H. Remington]. The fifth amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V.

4. E.g., *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

5. *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (citation omitted).

6. *Slochower v. Board of Educ.*, 350 U.S. 551, 557 (1956).

7. 1 H. Remington § 1, at 4 (5th ed. J. Henderson 1950) [hereinafter cited as 1 H. Remington]: "The fifteenth chapter of Deuteronomy contains, quite explicitly stated, the first law known in history providing for the release of debtors from their debts, and, were the popular idea correct, the first bankruptcy law."

8. 1 H. Remington § 1, at 4-5; 9 Am. Jur. 2d *Bankruptcy* § 1 (1963); 8 C.J.S. *Bank-*

the subject may be traced,⁹ was enacted in 1542.¹⁰ This statute and its immediate successors were enacted to facilitate creditor collections,¹¹ and failed to differ in their treatment of honest and dishonest debtors or to provide for their discharge.¹² "The governing idea of the statutes was that the bankrupt was an offender; and the fact that they provided for no discharge of the bankrupt from his liabilities, as the result of bankruptcy proceedings, is characteristic of this governing idea."¹³ Moreover, English bankruptcy proceedings were available only to "traders," and then only when instituted by their creditors.¹⁴

The precarious status of seventeenth century English merchants, caused by wars and unfriendly tariffs, prompted new bankruptcy legislation favoring them.¹⁵ "The bankrupt had ceased to be regarded as necessarily a criminal."¹⁶ Parliament, finally recognizing that bankruptcies were inevitable in commercial intercourse, and that they could be caused by economic phenomena beyond an individual's control,¹⁷ provided discharge in 1705¹⁸ (although there is authority that the purpose of this addition was merely to induce greater cooperation from the bankrupt¹⁹). However, English legislation in effect until after the American Revolution was still restricted to involuntary proceedings brought against merchants.²⁰

The United States Constitution expressly conferred upon Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."²¹ Such legislation, first enacted in 1800,²² has remained substantially unchanged since the Bankruptcy Act of 1898,²³ although notable amendments and additions were provided by the Chandler Act of 1938.²⁴ The

ruptcy § 2 (1962). The term "bankrupt" is derived from the Latin words "bancus" and "ruptus" meaning broken table (the counters over which merchants transacted business were broken as a symbol of failure). J. MacLachlan, *Bankruptcy* § 25, at 20 n.1 (1956) [hereinafter cited as J. MacLachlan]; 8 C.J.S. *Bankruptcy* § 1, at 605 n.1 (1962). See generally Levinthal, *Early History of the Bankruptcy Law*, 66 U. Pa. L. Rev. 223 (1918).

9. 1 H. Remington § 2-3; 9 Am. Jur. 2d *Bankruptcy* § 2 (1963).

10. 34 & 35 Hen. 8, c. 4 (1542-43).

11. 8 W. Holdsworth, *A History of English Law* 236 (1926); J. MacLachlan § 26; C. Nadler, *supra* note 3, at § 1; 1 H. Remington § 3; 9 Am. Jur. 2d *Bankruptcy* § 3 (1963).

12. 8 W. Holdsworth, *supra* note 11, at 243.

13. *Id.*

14. *Id.* at 244.

15. 11 W. Holdsworth, *A History of English Law* 444-45 (1938); 1 W. Blackstone, *Commentaries* 807 (Andrews 4th ed. 1899).

16. 11 W. Holdsworth, *supra* note 15, at 445 (footnote omitted).

17. See authorities cited in note 15 *supra*.

18. 4 Anne, c. 17 (1705); see 11 W. Holdsworth, *supra* note 15, at 445; J. MacLachlan § 26; 1 H. Remington § 5.

19. J. MacLachlan § 26.

20. J. MacLachlan § 27; 1 H. Remington § 6; 9 Am. Jur. 2d *Bankruptcy* § 3 (1963).

21. U.S. Const. art. I, § 8.

22. Act of April 4, 1800, ch. 9, § 1, 2 Stat. 19.

23. See note 1 *supra*.

24. *Id.*

statute of 1800, like its English predecessors, proceeded upon the assumptions that the debtor was dishonest and that bankruptcy was intended solely to benefit creditors:

It followed in its main features and even in its wording the English bankruptcy laws, and was essentially a law *against* debtors, framed along the lines of suppressing fraudulent and criminal practices rather than along the lines of providing a general system for the rational administration and equitable distribution of insolvent estates, no provision at all being made for one voluntarily to become a bankrupt, the distinguishing feature of the later bankruptcy laws, without which a bankruptcy law cannot be said to have arrived at the full stature of a general system of administering insolvent estates. Indeed, like the laws that had gone before it in England, its operation even adversarially was limited; only traders, merchants, underwriters and brokers being within its purview.²⁵

Although discharge was provided in this statute, "it was necessary that two-thirds of the creditors, in number and amount, (with claims of \$50 or more), who had proved their claims, consent to the discharge."²⁶ However, the second bankruptcy act, enacted in 1841,²⁷ permitted the debtor to bring voluntary proceedings on his own behalf and "recognized . . . the justice of granting to the honest debtor . . . a discharge and release from his remaining debts—the justice of lifting from his shoulders the burden of hopeless debt that otherwise would have obliged him either to abandon all business enterprise or else to do business under cover of another's name."²⁸ Provisions for discharge continued in the 1867 Act²⁹ and were also included in our present-day law, the Bankruptcy Act of 1898.³⁰ The bankrupt is now entitled to discharge "unless he has committed an offense punishable by imprisonment under the provisions of the criminal code relating to bankruptcy, or unless he has disobeyed the bankruptcy court or obtained credit on false financial statements, or failed in certain other respects to maintain minimum standards safeguarding the integrity of the proceedings."³¹

The commentators appear to agree that the purposes of current bankruptcy legislation are twofold: first, to secure an equitable division of the debtor's assets and distribute them among his creditors; and, second, to provide for the

25. 1 H. Remington § 7, at 16 (footnote omitted).

26. 1 W. Collier ¶ 14.01[1], at 1246.

27. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440. See C. Warren, *Bankruptcy in United States History* 69-87 (1935) for an excellent discussion of the congressional debates that culminated in the enactment of the 1841 Act.

28. 1 H. Remington § 8, at 17-18.

29. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517; see 1 W. Collier ¶ 14.01[1], at 1247; 1. H. Remington § 9.

30. See note 1 *supra*. The present Bankruptcy Act provides: "'Discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act." Bankruptcy Act § 1(15), 11 U.S.C. § 1(15) (1964).

31. J. MacLachlan § 20, at 16 (footnote omitted). The Bankruptcy Act § 14c, 11 U.S.C. § 32(c) (1964), as amended, 11 U.S.C. § 32(c)(8) (Supp. III, 1968), contains eight grounds for denial of a discharge.

discharge of honest debtors.³² Even though discharge has historically been accorded secondary status as a reason for bankruptcy, the fact that it may occupy such a position should not depreciate its importance. Discharge was provided, not solely to encourage cooperation by the debtor, but more importantly, "[t]he whole philosophy of modern bankruptcy law recognizes that a debtor may become a victim of economic or political or social conditions over which he has no control."³³ Moreover, decisional law has at times accorded discharge the primary role in bankruptcy legislation,³⁴ thus leading to an inference that twentieth century legislators have placed more emphasis on the needs of the debtor than their creditor-oriented predecessors. Furthermore, socio-economic considerations should not be ignored: "[B]ankruptcy [legislation's] . . . aim is not merely release from the pressure of debt, but social and economic rehabilitation as well."³⁵ It seems, then, that discharge has been transformed into a fundamental principle of modern bankruptcy law. So important is discharge that the present Act makes application for it automatic: "The adjudication of any person, except a corporation, shall operate as an application for a discharge"³⁶

According to the procedure of the present Act, after filing his petition for bankruptcy, or after his creditors have done so, the bankrupt must prepare and file with the court detailed schedules and include therein all his creditors, the amount due them, as well as all his own assets.³⁷ Thereafter a first meeting of the creditors, over which the judge or referee presides, is held.³⁸ At this meeting the bankrupt is examined regarding his schedules,³⁹ and it is here, for instance, that the bankrupt's discharge may be denied under the grounds established by section 14c(6)⁴⁰—for refusal to answer a material question, even though the bankrupt asserts his privilege against self-incrimination as the basis for his refusal to answer.⁴¹ In addition, the court may be confronted with the assertion of the bankrupt's fifth amendment privilege at a subsequent meeting of the

32. J. MacLachlan §§ 20-21; C. Nadler, *supra* note 3, § 729; 1 H. Remington § 17; see 1 W. Collier ¶ 14.01[6], at 1259.

33. C. Nadler, *supra* note 3, § 2; see 7 H. Remington § 2993.

34. See 1 H. Remington § 17, citing *Hardie v. Swafford Bros. Dry Goods Co.*, 165 F. 588 (5th Cir. 1908); 1 W. Collier ¶ 14.01[6], at 126 n.42, citing *Shelby v. Texas Improvement Loan Co.*, 280 F.2d 349 (5th Cir. 1960), and *In re Rinker*, 107 F. Supp. 261 (D.N.M. 1952).

35. 1 H. Remington § 17, at 37-38, citing *Bank of Elberton v. Swift*, 268 F. 305 (5th Cir. 1920): "Congress enacted the bankruptcy statute in the exercise of a public policy, for the benefit, not of debtors and creditors, but of society at large." 268 F. at 303.

36. Bankruptcy Act § 14a, 11 U.S.C. § 32(a) (1964). Before 1938, individuals as well as corporations had to make separate application for a discharge. 7 H. Remington § 2995, at 45.

37. Bankruptcy Act § 7a(8)-(9), 11 U.S.C. § 25(a)(8)-(9) (1964).

38. *Id.* § 55, 11 U.S.C. § 91 (1964).

39. *Id.* §§ 7a(1), 10, 55b, 11 U.S.C. §§ 25(a)(1), 28, 91(b) (1964).

40. See note 2 *supra*.

41. See note 3 and accompanying text *supra*.

creditors, at a hearing upon objections to his discharge,⁴² or at any other proceedings calling for the cooperation of the debtor.⁴³

III. SELF-INCRIMINATION: PAST AND PURPOSES

The privilege against self-incrimination was the product of two distinct, yet parallel, strains of jurisprudence running through English history from the thirteenth century.⁴⁴ On the one hand there originated "the opposition to the *ex officio* oath of the ecclesiastical courts,"⁴⁵ and, on the other, there developed "the opposition to the incriminating question in the common law courts."⁴⁶ Such oppositions culminated in a common law recognition of the privilege against self-incrimination.⁴⁷ In England the privilege remained a mere segment of the common law, but in America it was elevated to a constitutional standard through its inclusion in seven state constitutions before 1789.⁴⁸ This nation's first Congress in that year found the need for such a privilege compelling enough to include in the Bill of Rights that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ."⁴⁹

The purported meaning and scope of the privilege is clearly one of the most controversial issues of modern constitutional jurisprudence.⁵⁰ Although the word-

42. See Bankruptcy Act § 14b, 11 U.S.C. § 32(b) (1964), as amended, 11 U.S.C. § 32(b) (Supp. III, 1968).

43. Bankruptcy Act § 7a, 11 U.S.C. § 25(a) (1964), providing the duties of the bankrupt, illustrates numerous situations in which the bankrupt may be called upon to cooperate.

44. 8 J. Wigmore, *Evidence* § 2250, at 269-70 (J. McNaughton rev. ed. 1961) [hereinafter cited as J. Wigmore].

45. *Id.* at 269 (emphasis omitted). The "ex officio" oath was a procedure first employed in the ecclesiastical courts in 1236 by which a party was required to tell the truth when confronted by questions posed by the court under threat of punishment by torture. C. McCormick, *Evidence* § 120, at 252-53 (1954) [hereinafter cited as C. McCormick]; J. Wigmore § 2250, at 270-71. However, there was authority that at least a specific accusation must have been first made against the accused or that the judge must have demonstrated "notorious suspicion" regarding the individual's activities. Thus the maxim evolved that "[n]o man shall be compelled to make the first charge against himself." C. McCormick § 120, at 253 (emphasis omitted). Opposition to this oath culminated in Lilburn's Trial (1637-45) which resulted in the passage by Parliament of legislation abolishing the oaths administered by the ecclesiastical courts. C. McCormick § 120, at 254; J. Wigmore § 2250, at 282-84.

46. J. Wigmore § 2250, at 269 (emphasis omitted). That no privilege against self-incrimination existed at common law prior to Lilburn's Trial is uncontested. However, after that event and the abolition of the "ex officio" oath in the ecclesiastical courts, the defendants' claim of the privilege came to be gradually recognized by the common law judges. C. McCormick § 120, at 254-55; J. Wigmore § 2250, at 289-90. This privilege has never been included in any English charters or statutes. C. McCormick § 120, at 255; J. Wigmore § 2250, at 292.

47. See note 46 *supra*.

48. C. McCormick § 120, at 256. See generally Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935).

49. U.S. Const. amend. V.

50. "There is no agreement as to the policy of the privilege against self-incrimination.

ing of the fifth amendment applies the privilege only to criminal proceedings, the Supreme Court has extended the protection "to all judicial or official hearings, investigations or inquiries where persons are called upon formally to give testimony."⁵¹ Although all of these states except Iowa and New Jersey have constitutional language providing for a privilege similar to that found in the federal Bill of Rights,⁵² it was not until 1964 that the federal provision was made applicable to the states.⁵³ Generally the privilege has been sustained on grounds of protection to the individual against torture, compulsion and invasion of privacy.⁵⁴ Opponents of the privilege have argued, however, that only the guilty benefit and that it is counter to any rational system of investigation.⁵⁵

Recently, self-incrimination has undergone revolutionary development by the Supreme Court. In *Malloy v. Hogan*,⁵⁶ the Court, reasoning that the fourteenth amendment's due process clause had incorporated the privilege against self-incrimination found in the fifth amendment, held the privilege binding on the states.⁵⁷ Consequently the federal standard for determining whether a refusal to

This is partly because there is no 'the' privilege. It is many things in as many settings. The privilege is a prerogative of a defendant not to take the stand in his own prosecution; it is also an option of a witness not to disclose self-incriminating knowledge in a criminal case, and in a civil case, and before a grand jury and legislative committee and administrative tribunal. It is alleged by some to apply to suppress substances removed from the body, to confessions and to facts tending to disgrace. It is sometimes held to apply beyond incrimination under domestic law to incrimination under foreign law. Suggestions as to the policy of 'the' privilege are lurking in all these settings and more." J. Wigmore § 2251, at 296-97 (citations omitted).

51. C. McCormick § 123, at 259 (citation omitted); see, e.g., *Quinn v. United States*, 349 U.S. 155 (1955); *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See generally J. Wigmore § 2252.

52. J. Wigmore § 2252, at 319 & n.1.

53. *Malloy v. Hogan*, 378 U.S. 1 (1964). See also *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

54. J. Wigmore § 2251, at 315-18. Other arguments in favor of the privilege include danger of blackmail, subjection of the accused to perjury, and the need for independent investigation. C. McCormick § 136, at 288-90. See the extended discussion of authorities in J. Wigmore § 2251, at 297 n.2; cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized a constitutional right of privacy.

55. J. Wigmore § 2251, at 297 n.2; see Mr. Justice Cardozo's statement in *Palko v. Connecticut*, 302 U.S. 319, 326 (1937): "Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry."

56. 378 U.S. 1 (1964).

57. *Id.* at 8. Previous authority had held that this provision was not applicable to the states. *Cohen v. Hurley*, 366 U.S. 117 (1961); *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908). *Malloy* is in line with the present court practice of "selective incorporation", that is, deciding on a case-by-case basis whether or not a specific provision of the Bill of Rights shall be included in the due process clause of the fourteenth amendment, and thus made applicable to the states. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to trial by jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment right against unreasonable search and seizure). The Court has

answer was justified on self-incriminatory grounds became applicable to state proceedings, wherein consideration would henceforth have to be given to the question, in the Court's words, whether "a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."⁵⁸ "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . ."⁵⁹ Subsequently, in *Griffin v. California*,⁶⁰ where the petitioner had been convicted of murder following a trial during which the prosecution had commented upon his failure to testify, the Court reversed the conviction, citing *Malloy* for the proposition that federal standards governing the privilege against self-incrimination were binding on the states. Applying such standards the Court stated: "[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws. It is a *penalty* imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion *costly*."⁶¹ This key concept of "penalty," mentioned in *Griffin*, has become the core rationale of subsequent cases in which the Court has tried to delineate a federal standard.

*Garrity v. New Jersey*⁶² involved the convictions of the state police officers for conspiracy. The officers had been called before a special state commission investigating the "fixing" of traffic tickets. When questioned, they were threatened that if they refused to answer they would be subject to removal from office. The officers testified and their statements were subsequently used as a basis for their criminal convictions. In reversing, the Court stated that "[t]he choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the *penalty* of self-incrimination is the antithesis of free choice to speak out or to remain silent."⁶³ More generally, the Court found that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a *price*."⁶⁴

In *Spevack v. Klein*,⁶⁵ decided the same day as *Garrity*, it appeared that petitioner, a member of the bar, refused to produce certain records or to testify before a judicial inquiry into alleged "ambulance-chasing" on grounds that to

rejected the "total incorporation" doctrine found in, e.g., *Adamson v. California*, *supra*, at 68 (dissenting opinion), that the due process clause includes all of the guarantees of the Bill of Rights.

58. 378 U.S. at 12 (citations omitted).

59. *Id.* at 11 (citations omitted).

60. 380 U.S. 609 (1965).

61. *Id.* at 614 (citation and footnote omitted) (emphasis added).

62. 385 U.S. 493 (1967).

63. *Id.* at 497 (emphasis added).

64. *Id.* at 500 (emphasis added). In effect the Court found the statements were the product of coercion, and were thus not "voluntary." *Id.* at 497-98; cf. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964). Furthermore, the Court failed to find any waiver of the officers' rights, since their decision was made under duress. 385 U.S. at 498-99.

65. 385 U.S. 511 (1967).

do so would violate his privilege against self-incrimination. The New York courts ordered petitioner disbarred on the basis of *Cohen v. Hurley*,⁶⁶ a decision which had denied the assertion of the privilege on nearly identical facts. The Supreme Court in *Spevack*, again relying on *Malloy v. Hogan*,⁶⁷ overruled *Cohen*. The New York appellate division had distinguished *Malloy* on the ground that no lawyer was involved in that case.⁶⁸ But the Supreme Court said: "[W]e conclude that . . . the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a *price* for asserting it."⁶⁹ The New York Court of Appeals had affirmed petitioner's disbarment not only on the authority of *Cohen*, but also on the premise that the privilege had no application to written records which petitioner had been held under a duty to produce.⁷⁰ However, the Court found that petitioner was under no such duty because the documents demanded were his financial records and could not be termed "the pleadings, records and other papers" required to be retained by New York law.⁷¹ The Court also dwelled, as it had in *Garrity*, on the coercion inherent in the facts of the case: "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege."⁷²

What is the substance of this coercive *penalty* or *price* that the Court has so often noted? "Penalty" is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'⁷³ It is not explicitly clear from this statement in *Spevack*, or the statements in any other decision, what this penalty involves. The Court does point out, however, in both cases, the "coercion" and "compulsion" inherent in any procedure which forces the individual to testify rather than forfeit a substantial pecuniary benefit, *e.g.*, employment and the means of livelihood.⁷⁴ Can failure to allow discharge in bankruptcy amount to such a penalty?

IV. THE RELATION OF SELF-INCRIMINATION TO BANKRUPTCY

A. *Effect of Section 7a(10): Use of Bankrupt's Testimony in a Subsequent Criminal Proceeding*

The Bankruptcy Act provides in section 7a(10) that:

The bankrupt shall . . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order,

66. 366 U.S. 117 (1961).

67. 378 U.S. 1 (1964).

68. 385 U.S. at 514.

69. *Id.* (emphasis added).

70. *Id.* at n.1.

71. *Id.* at 515-19.

72. *Id.* at 516 (emphasis added). See note 64 *supra*.

73. 385 U.S. at 515.

74. See notes 64 & 72 and accompanying text *supra*.

submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; *but no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge . . .*⁷⁵

A literal interpretation of section 7a(10) suggests that a bankrupt would have no need, and more importantly, no right to claim his privilege against self-incrimination, unless he testifies at a "hearing upon objections to his discharge" which is governed by the "except" clause, because adequate immunity obviates the possibility of incrimination.⁷⁶ "This is so when the witness has already been convicted or acquitted of the offense, when he has been pardoned, or when prosecution has been barred by the statute of limitations."⁷⁷ However, in order for the danger of prosecution to be removed, *complete immunity* from prosecution must be provided.⁷⁸ The language of section 7a(10) merely provides that the relevant testimony will be immune from use, but omits any reference to *immunity from prosecution*.⁷⁹ Thus, although the actual testimony of the bankrupt, except that given by him in a hearing upon objection to his discharge, is inadmissible in a subsequent criminal action, there is no guarantee that he will not be prosecuted for a crime he may reveal by his testimony. Apparently, therefore, the bankrupt is not afforded protection coextensive with that furnished by the privilege against self-incrimination. Accepting this conclusion, the decisions have upheld his right to claim the privilege, in spite of the protection afforded by 7a(10).⁸⁰

75. Bankruptcy Act § 7a(10), 11 U.S.C. § 25(a)(10) (1964) (emphasis added). See 1 W. Collier ¶ 7.21.

76. See C. McCormick § 135; J. Wigmore §§ 2279-84.

77. C. McCormick § 135, at 284 (footnotes omitted).

78. *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See C. McCormick § 135; J. Wigmore § 2283. The federal immunity act is contained in 18 U.S.C. § 3486 (1964), as amended, 18 U.S.C. § 3468 (Supp. III, 1968). See *Ullmann v. United States*, 350 U.S. 422 (1956) and *Brown v. Walker*, 161 U.S. 591 (1896) for cases upholding immunity statutes as non-violative of the Constitution. Note, however, that a witness may not be forced to testify under a state grant of immunity when he has not been accorded immunity under federal law. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). See J. Wigmore § 2281, at 495 n.11 for an extensive list of state immunity statutes.

79. Wigmore distinguishes between "immunity-from-use" and "immunity-from-prosecution" statutes. The former "provide . . . that self-incriminating disclosures may be compelled but that the testimony shall not afterwards be used against the witness in any judicial proceeding." J. Wigmore § 2281, at 495 n.11 (emphasis omitted). The latter "provide that disclosure is compellable but that the witness shall not be prosecuted or subject to any penalty on account of any matter concerning which he was required to produce evidence." *Id.* Wigmore categorizes § 7a(10) as an "immunity-from-use" statute. *Id.*

80. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court construed a similarly worded statute as failing to nullify petitioner's right to claim the privilege against self-incrimination because the statute was found to be not as broad in scope as the fifth amend-

Further, whatever limited protection may be given by 7a(10), such protection is restricted to "testimony" and "[i]t is well settled that the restriction . . . pertains only to oral testimony and does not prevent the introduction of the bankrupt's written schedules [in a subsequent criminal proceeding]."⁸¹ It does not forbid the bankrupt from asserting his privilege against self-incrimination by refusing to introduce written material. Nevertheless, to what extent does the privilege apply? Although written documents do not constitute "testimony" for purposes of section 7a(10),⁸² "testimonial compulsion" within the meaning of the privilege includes "the production of documents or chattels by a person . . . in response to a subpoena, or to a motion to order production, or to other form of process relying on his moral responsibility for truth-telling . . ."⁸³ At least the last quoted phrase would seem to make the privilege applicable to written documents and schedules required of the bankrupt by the court. However, the courts have not yet permitted a bankrupt to file bank schedules under invocation of the privilege, holding "that the privilege should be asserted against a specific question, not toward the schedules as a whole . . ."⁸⁴ In addition,

ment privilege. Although the statute in that case protected the petitioner from the "use" of his testimony in a criminal proceeding against him, as does § 7a(10) of the Bankruptcy Act, the Court recognized the leads or connections to other evidence which might be uncovered. *Id.* at 585. Petitioner could not be forced to testify, or punished for his failure to do so unless Congress were to "afford absolute immunity against future prosecution . . ." *Id.* at 586. *Brown v. Walker*, 161 U.S. 591 (1896) involved a statute that did provide complete immunity and the Court refused to reverse a contempt conviction for failure to answer. Relying on the authority of Counselman, a bankruptcy court in *In re Scott*, 95 F. 815 (W.D. Pa. 1899) construed § 7a(10) as failing to provide complete "immunity from prosecution" and upheld the bankrupt's right to remain silent. In *United States v. Goldstein*, 132 F. 789 (W.D. Va. 1904) another court refused to accept the contention that the filing of a voluntary petition in bankruptcy amounted to a waiver of defendant's constitutional privilege and recognized that the condition upon which he could claim the privilege was denial of discharge. *McCarthy v. Arndstein*, 266 U.S. 34 (1924) arose out of a refusal to testify in an examination conducted by a bankruptcy court. The Court stated that the privilege "applies alike to civil and criminal proceedings" and upheld the right of the bankrupt to refuse to testify. 266 U.S. at 40. A contrary result was reached in *Johnson v. United States*, 228 U.S. 457 (1913), where the Court held that a bankrupt could not refuse to surrender books and records to a trustee, for to do so would contravene a property right vested in the trustee. The *McCarthy* Court distinguished the *Johnson* decision by noting that the constitutional privilege dealt solely with the procedural law, which included evidence and witnesses. 266 U.S. at 41-42. See 1 W. Collier ¶ 7.21, at 1013 n.1 for a complete set of citations. But see *Mackel v. Rochester*, 102 F. 314 (9th Cir. 1900).

81. 1 W. Collier, ¶ 7.13, at 996.

82. See note 81 and accompanying text *supra*.

83. J. Wigmore § 2264, at 379 (emphasis omitted).

84. *Moller, The Bankrupt and the Fifth Amendment Privilege*, 10 S. Tex. L.J. 75, 81 (1968), explaining the rationale of *In re U.S. Hoffman Can Corp.*, 373 F.2d 622 (3d Cir. 1967). However, the author argues that in light of *Grosso v. United States*, 390 U.S. 62 (1968), and *Marchetti v. United States*, 390 U.S. 39 (1968), "the Bankruptcy Court would be compelled to accept a blank schedule" should the questions form a "link in the chain of evidence." *Moller, supra*, at 81.

the right of the bankrupt to claim the privilege in regard to his own books and records kept as part of his business operation has not been sustained on the theory that a refusal to deliver them to a receiver or a trustee would violate the latter's property right in the material.⁸⁵ Since the decisions concerning written testimony appear incompatible with the privilege against self-incrimination, they are in need of re-examination.⁸⁶

Finally, it should be pointed out that the protection afforded by 7a(10) is inapplicable to testimony furnished by the bankrupt in a hearing upon objections to his discharge. Since it is natural that the privilege is most frequently asserted in such hearings, there is not even available the limited protection of 7a(10) for that portion of the testimony which is most likely to be incriminating.

B. *Refusal of Discharge under Section 14c(6)*

The Bankruptcy Act provides, in section 14c(6), for the denial of discharge in bankruptcy proceedings when the debtor refuses to answer a material question approved by the court.⁸⁷ That a bankrupt failed to answer on the ground that the reply might incriminate him has been held to be no defense to this provision.⁸⁸ Although the bankrupt is, of course, free to assert the privilege and can not be held in contempt for so doing,⁸⁹ the inevitable result is denial of discharge under section 14c(6).⁹⁰ In upholding this result, where a bankrupt claims the privilege against self-incrimination, the courts have placed a restrictive interpretation on the term "discharge" by labeling it a *privilege*⁹¹ to which Con-

85. *Dier v. Banton*, 262 U.S. 147 (1923); *Johnson v. United States*, 228 U.S. 457 (1913); see 1 W. Collier ¶ 7.21, at 1021-22; note 80 *supra*. But see Moller, *supra* note 84, at 88-91.

86. See the criticisms of Moller, *supra* note 84, at 81, 90-91.

87. See note 2 and accompanying text *supra*. Note that discharge cannot be denied if the bankrupt refused to answer an immaterial question, *In re Lenweaver*, 226 F. 987 (N.D. N.Y. 1915), or if the court failed to approve the material question. *In re Kolb*, 151 F.2d 605 (2d Cir. 1945). Once the bankrupt's objections to a refusal to answer are overruled, however, he must answer. *In re Weinreb*, 153 F. 363 (2d Cir. 1907). Also, even though the bankrupt subsequently answers after a first refusal to do so, he may be denied his discharge. *In re Schwartz & Co.*, 201 F. 166 (S.D.N.Y. 1912). See generally 1 W. Collier ¶ 14.58, at 1430-32.

88. See note 3 and accompanying text *supra*.

89. See text section IV A and accompanying footnotes *supra*.

90. See note 3 and accompanying text *supra*.

91. "[I]t is within the power of Congress to grant or to 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 of property, but is a matter of favor, to be accepted upon such terms as Congress sees fit to impose." *In re Dresser*, 146 F. 383, 385 (2d Cir. 1906). Discharge was also denied on grounds that the bankrupt had obtained credit through a fraudulent statement forbidden by the Act in § 14c(3), 11 U.S.C. § 32(c)(3) (1964), as amended, 11 U.S.C. § 32(c)(8) (Supp. III, 1968). See *In re Nachman*, 114 F. 995, 997 (D.S.C. 1902), decided before the inclusion in 1903 of § 14c(6) in the Act, which stated in dictum that Congress had the power to enact such a provision; *Kaufman v. Hurwitz*, 176 F.2d 210, 211 (4th Cir. 1949); *In re Zaidins*, 182 F. Supp. 543, 545 (E.D. Wis. 1960), *aff'd*, 287 F.2d 401 (7th Cir. 1961); *In re Bauknight*, 14 F.2d 674 (S.D. Fla. 1926); *In re Williams*, 286 F. 135, 137 (W.D.S.C. 1921) (report of special comm'r). "[W]hatever the formal trappings in which the issue of

gress can attach conditions as it sees fit, namely, those requiring full disclosure. In this regard, courts have failed to recognize discharge as a fundamental policy consideration of the Bankruptcy Act, disregarding the fact that modern bankruptcy legislation is motivated not solely by advantages that may be accorded creditors, but also by the interest of debtors and society at large.⁹²

C. *Effect of Spevack and Garrity on Section 14c(6)*

As previously mentioned,⁹³ the *penalty* forbidden to be placed on the assertion of an individual's fifth amendment privilege includes "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'"⁹⁴ "In this context 'penalty' is not restricted to fine or imprisonment."⁹⁵ Applying this sweeping language from *Spevack*, it appears that section 14c(6) may effect an impermissible penalty. Whenever a court asks a bankrupt a question, the answer to which will incriminate him under bankruptcy law,⁹⁶ the bankrupt will lose his discharge whether he answers or not,⁹⁷ even if his silence follows an invocation of the privilege. To so sanction him with a denial of discharge when he asserts the privilege is to place an onerous penalty upon the assertion of his privilege.

The decisions that have labeled discharge a "mere privilege" have apparently proceeded upon the antiquated assumption that bankruptcy legislation was enacted solely for the benefit of creditors.⁹⁸ They have disregarded the fact that bankruptcy, and in particular, discharge, was also intended to benefit the bankrupt himself, as well as society at large. These courts have also disregarded "the

discharge may be presented, many strict decisions best consist with the underlying concept that a discharge is a statutory privilege to be enjoyed only upon compliance with the statute" J. MacLachlan § 101, at 88-89. But see C. Nadler, *supra* note 3, § 730, at 602 (footnotes omitted): "Some courts consider it a privilege, while other courts hold it a right, for a bankrupt to be granted a discharge." The use of the word "privilege" in connection with § 14c(6) should not be confused with the use of that same word in referring to the privilege against self-incrimination. In the former context, "privilege" is used in contrast to the term "right," while in the latter situation, the word "privilege" is employed because of its historical derivation as such before it was enacted into a constitutional right appearing in the fifth amendment.

92. See text section II and accompanying footnotes *supra*.

93. See note 78 and accompanying text *supra*.

94. 385 U.S. at 515; see *Griffin v. California*, 380 U.S. 609, 614 (1965); notes 60-61 and accompanying text *supra*.

95. 385 U.S. at 515.

96. Bankruptcy Act § 14c(1)-(4), 11 U.S.C. § 32(c)(1)-(4) (1964), as amended, 11 U.S.C. § 32(c)(1)-(4) (Supp. III, 1968).

97. A bankrupt can refuse to answer, in which case his discharge will be denied under § 14c(6), or he can answer and reveal his criminal activities. In the latter situation, not only will the bankrupt leave himself open to subsequent criminal prosecution, but in addition his discharge may still be denied since § 14c also provides that certain conduct, for example, failure to keep financial records, concealing property, or fraudulent transfers, may also be grounds for denial of a discharge. See note 96 and accompanying text *supra*.

98. See the discussion in section II *supra*.

significant provision which has persisted in the statute that the discharge, unless it is proved to be barred, 'shall' be granted.⁹⁹ Thus, the very language of section 14c states that the bankrupt is entitled to a discharge, unless certain objections are proven, leading to the conclusion that "[d]ischarge is a legal right . . ."¹⁰⁰ The wording of the statute is mandatory, compelling the court to grant a discharge unless the objections are proven. Such language is clearly inconsistent with the term "privilege," which connotes mere judicial and legislative favor.

Obviously no bankrupt has a constitutional right to discharge, for he possesses merely a statutory right found in the Bankruptcy Act. By the same token, no one has any right guaranteed by the Constitution to enjoy the status of a particular occupation, such as lawyer or policeman.¹⁰¹ As Justice Holmes stated in *McAuliffe v. Mayor of New Bedford*:¹⁰² "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹⁰³ The decisions prior to *Garrity* and *Spevack* allowed employment in the public sector to be conditioned upon terms dictated by the governmental employer, notably the surrender of certain constitutional guarantees as the price of employment.¹⁰⁴ In this regard the public employment decisions proceeded analogously to those concerning bankruptcy discharge. They labeled public employment a "privilege" bestowed as the employer saw fit.¹⁰⁵ However, the Court in *Garrity* "rejected the Holmes 'right-privilege' distinction as inappropriate in consideration of the constitutional question before the court."¹⁰⁶ Thus, the Court bypassed the distinction between privilege and right and held the

99. 7 H. Remington § 2993, at 44 (footnote omitted) (emphasis added).

100. *Id.* at n.7, citing *In re Farrow*, 28 F. Supp. 9. (S.D. Cal. 1939); C. Nadler, *supra* note 3, § 730, at 602-03: "It would seem from the fact that this provision [§ 14c] has been so recast in the present Act, it was the legislative intent to create a statutory right . . ." (footnotes omitted); see cases cited by C. Nadler, *supra*, at n.8.

101. See, e.g., *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

102. *Id.*

103. *Id.* at 220, 29 N.E. at 517; see King, *Constitutional Rights and the Bankruptcy Act*, 72 Com. L.J. 315, 316 (1967); Moller, *supra* note 84, at 84-85. But see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968): "While the concept of 'privilege' underlying Holmes' epigram remains nominally intact, its implications for positive law have been gradually eroded." *Id.* at 1442. "If, under a functional analysis, the conclusion reached by Justice Holmes in 1892 is no longer viable, then Holmes' own methodology should be used to label an individual's interest in his public status a 'right' directly protected against unreasonable regulation. Such unreasonableness need involve only the lack of a sufficient connection with an adequately compelling public interest to warrant subordinating the individual interest under the circumstances." *Id.* at 1462. See also Comment, *Constitutionality of Administrative or Statutory Sanctions upon the Exercise of the Privilege Against Self-Incrimination*, 36 Fordham L. Rev. 593 (1968).

104. See cases cited in Comment, *supra* note 103, at 597 n.45.

105. See text at Section IV B and accompanying footnotes *supra*.

106. Weistart, *The Interaction of Constitutional Privilege and Statutory Immunity in Bankruptcy Examinations*, 53 Minn. L. Rev. 29, 51 (1968), citing 385 U.S. at 499.

conditions imposed in *Garrity* and *Spevack* to have been unconstitutional penalties. Analogously, should discharge still be deemed a privilege, as public employment was in *Garrity* and *Spevack*, this consideration should no longer afford a justification for a denial of discharge when a bankrupt raises his constitutional privilege against self-incrimination in refusing to answer.

Indeed, in *Garrity*, and to some extent in *Spevack*, there was an element lending strength to the position which the Court refused to take; this element is probably lacking in the case of the bankrupt whose assertion of the privilege costs him discharge. The Court characterized *Spevack* as a licensee of the state and an officer of the court,¹⁰⁷ though it refused to deem him an "agent" of the state.¹⁰⁸ While it is arguable whether such status made him a fiduciary¹⁰⁹ of the state, *Garrity* as a policeman clearly assumed a fiduciary relationship to that body. However, it is questionable whether a bankrupt may be deemed a fiduciary to the state, or to his creditors, trustee or receiver, despite the disclosure standards of section 7.¹¹⁰ While the existence of a fiduciary duty of course makes more reasonable some sanction upon use of the privilege, the *Garrity* Court refused to find assertion of the privilege violative of that duty, thus suggesting that a bankrupt, whose fiduciary duty, if any, may be weaker in quality than that found in *Garrity*, should possess more right to claim the privilege. While a denial of discharge does not threaten a bankrupt with forfeiture of any particular status (*e.g.*, policeman or lawyer), he is faced with similar economic loss if he asserts his privilege. Without a discharge of his obligations, the bankrupt may never gain a status more fundamental than vocational status: the opportunity to retain the assets he may subsequently acquire.¹¹¹

It can be argued that in filing a voluntary petition a bankrupt submits himself to the conditions that Congress may impose upon discharge, irrespective of such rights. This argument lacks persuasion, however, when it is contrasted to the involuntary proceeding, wherein the bankrupt has not surrendered his assets by his own choice. That the right to claim a constitutional guarantee should turn on whether or not the bankrupt has initiated the proceedings is an unrealistic assumption leading to a dual standard,¹¹² particularly since "[t]he privilege is not waived by filing a voluntary petition, nor by filing sworn schedules of assets and liabilities."¹¹³

V. CONCLUSION

Disallowance of discharge in bankruptcy for failure to answer a material question is an impermissible "penalty" forbidden by the rationale of *Spevack* and

107. 385 U.S. at 520 (Fortas, J. concurring). But see Underwood, *The Fifth Amendment and the Lawyer*, 62 Nw. U.L. Rev. 129, 131 (1967).

108. See Restatement (Second) of Agency § 1 (1958).

109. *Id.* at § 13: "An agent is a fiduciary with respect to matters within the scope of his agency." See *id.* at comment a.

110. Bankruptcy Act § 7, 11 U.S.C. § 25 (1964).

111. See King, *supra* note 103, at 316; Moller, *supra* note 84, at 85.

112. See King, *supra* note 103, at 316.

113. *Id.* at n.15; see 1 W. Collier ¶ 7.21, at 1015.

Garrity when the bankrupt asserts his right against self-incrimination as the reason for his refusal to answer. It is a "costly sanction" for the assertion of a constitutional guarantee, the invocation of which may not be contravened by conditions imposed on its exercise. Should Congress feel that full disclosure is inherently necessary for the administration of the bankrupt's estate, it should grant complete immunity to the bankrupt from criminal prosecution for any relevant crime that he may disclose, thus denying him the opportunity to raise self-incrimination.¹¹⁴ The immunized bankrupt who still refuses might be compelled to testify.¹¹⁵ However, as the law now stands, the bankrupt's privilege against self-incrimination is severely impaired by the exaction of a "price" for its assertion.

114. This could easily be effected by according the bankrupt "immunity from prosecution" in § 7a(10) for any crimes he may reveal, including any disclosed at a hearing upon objection to his discharge. See Section IV A and accompanying footnotes *supra*.

115. See note 77 *supra*.