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Immunity from Prosecution in the American Federal System

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NOTES

Immunity from Prosecution in the American Federal System

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people. . . .[1]

Every jurisdiction in the United States recognizes the privilege against self-incrimination. It is a part of the constitution of almost every state, and the common law of every other.[2] Nevertheless, each jurisdiction has found it necessary, or at least expedient, to compel testimony in spite of the privilege, via the enactment of immunity statutes.[3] At least in theory the immunity statute is not to be considered a compromise with the privilege. The state takes away the privilege, but it immunizes the witness from prosecution as a result of his compelled disclosures. It has been suggested that mere immunity from prosecution is no real substitute for the right of silence — that reputation and livelihood may suffer though immunity be granted[4] — but whatever the merits of this argument be, it has been universally rejected.[5]

In 1892 the Supreme Court, in *Counselman v. Hitchcock*,[6] announced the fundamental constitutional requirement of a federal immunity statute: since immunity is a substitute for the privilege against self-incrimination, it must be as broad as the privilege, effectively barring future prosecution. Because the privilege requires that a man's involuntary words may not be used to convict him, it would be expected that the same result is required of immunity statutes. "Legislation cannot detract from the privilege afforded by the Constitution."[7] Nevertheless, because of the multiplicity of jurisdictions within our country, this is not the case. So long as it is a state that compels the testimony and the federal government that convicts, or in some cases, the federal government that gives the immunity and a state that convicts, self-incriminating disclosures that a witness was forced to make may send him to jail. The Supreme Court has con-

1. Hoke v. United States, 227 U.S. 308, 322 (1913).
2. 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940) (Supp. 1959).
3. *Id.* at § 2281.
4. See Rogge, *Compelling the Testimony of Political Deviants* (Pts. 1, 2), 55 MICH. L. REV. 163, 375 (1956).
5. See Annot., 53 A.L.R.2d 1030 (1957), supplementing 118 A.L.R. 602 (1939).
6. 142 U.S. 547 (1892). Held: Immunity that merely excludes compelled testimony at subsequent trial is insufficient. Prosecution itself must be prevented.
7. *Id.* at 565.

sistently supported this rule and most state courts have adopted it. In 1958, sixty-six years after the *Counselman* decision, Mr. Justice Black was prompted to write:

> Indeed things have now reached the point . . . where a person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of each.[8]

It is the purpose of this article to examine the development of what Justice Black has thus characterized as an anomaly, and to comment upon the various doctrines that have been advanced to justify it.

The Early Federal Cases — Error and Indecision

In 1896, the validity of a federal immunity statute was again considered by the Supreme Court, in *Brown v. Walker*.[9] This time a witness had been granted immunity in a federal investigation of violations of the Interstate Commerce Act in Pennsylvania. He declined to answer questions because the immunity statute did not immunize him from Pennsylvania prosecution. The Court disposed of this argument upon two bases: first, that the statute was not expressly limited to immunity in federal courts, and that to the extent that it applied to the states the supremacy clause bound them to obey it;[10] and second, that even if a bare possibility remained that state prosecution might follow, such a possibility was so remote that it did not deserve consideration.[11]

There was nothing in *Brown v. Walker* to suggest that a claim of privilege under a more impending threat of state prosecution need not be recognized in a federal court. Accordingly, lower federal courts continued their former practice of allowing claims of privilege founded on incrimination under state criminal laws.[12]

The converse problem — threat of federal prosecution for matters disclosed under state granted immunity — received the attention of the Supreme Court in 1905. A witness in a Kansas trust-busting prosecution refused to testify as to a price-fixing agreement, for fear

8. Knapp v. Schweitzer, 357 U.S. 371, 385 (1958) (dissenting opinion).

9. 161 U.S. 591 (1896). An earlier case, United States v. Saline Bank of Virginia, 26 U.S. (1 Pet.) 100 (1828), appeared to involve this problem — a claim of privilege under Virginia law having been recognized in that case — but it was distinguished in Hale v. Henkel, 201 U.S. 43, 68 (1906) on the basis that the government's suit itself was brought under Virginia law so that the problem of incrimination under foreign law was not present.

10. Brown v. Walker, *supra* note 9, at 607.

11. *Ibid.* The British case, Queen v. Boyes, 1 Best & Sm. 311, 121 Eng. Rep. 730 (Q.B. 1861) was cited for this proposition.

12. See: *In re* Hess, 134 Fed. 109 (E.D. Pa. 1905); *In re* Graham, 10 Fed. Cas. 913 (No. 5,659) (S.D.N.Y. 1876); see also *In re* Franklin Syndicate, 114 Fed. 205 (E.D.N.Y. 1900); *In re* Feldstein, 103 Fed. 269 (S.D.N.Y. 1900); *In re* Scott, 95 Fed. 815 (W.D. Pa. 1899). In United States v. Lombardo, 228 Fed. 980 (W.D. Wash. 1915), the court reasoned that where a federal immunity statute was expressly limited to prosecutions "under the laws of the United States," the rule of *Brown v. Walker* did not apply.

that state immunity would not protect him from prosecution under the federal anti-trust laws. In *Jack v. Kansas*[13] it was held that state immunity could not bind the federal government, and that it was sufficient that a state merely provide adequate immunity from state prosecutions.

The following year, several cases again raised the question of federal immunity and state incrimination. The first of these, *Ballmann v. Fagin*,[14] was the only Supreme Court decision ever to uphold a claim of federal privilege upon an allegation of state incrimination. State prosecutions had been pending against the witness at the time, and the Court, not inconsistently with the theory of *Brown v. Walker*, held that the claim was justified. In this case the danger of incrimination in the state court was apparent. This decision has received no attention in subsequent cases.

Hale v. Henkel,[15] also decided in 1906, involved a grand jury investigation of violations of the Sherman Anti-trust Act. The Court, not mentioning *Ballmann*, said that "a danger so unsubstantial and remote" as state prosecution did not impair the immunity granted by the national government. Further, the Court said that British cases had reached the conclusion that "the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."[16]

While a third case on the subject of federal immunity and state incrimination arose in 1906, its decision in the Supreme Court[17] was upon authority of the *Hale* case, and it did not add to the law on the subject. *Hale v. Henkel* may be considered the terminal case of this early period. The next major decision on the effect of extra-jurisdictional incrimination upon the privilege against self-incrimination was not to be handed down until 1931, and it incorporated doctrinal changes that were only glimpsed in *Hale*.[18] Essentially, *Hale v. Henkel*, like *Brown v. Walker*, relied upon three bases. The first was the notion that prosecution by a state after federal immunity had been granted was too ridiculous a possibility to be entertained by the court; the second was that English law — from which our privilege derives — recognized threats of prosecution arising only from English criminal law; and finally, that English law was relevant in

13. 199 U.S. 372 (1905).

14. 200 U.S. 186 (1906).

15. 201 U.S. 43 (1906).

16. *Id.* at 68.

17. Nelson v. United States, 201 U.S. 92 (1906).

18. See United States v. Murdock, 284 U.S. 141 (1931). *Hale v. Henkel* made it quite obvious that under ordinary circumstances there was at least a strong presumption that prosecution in another jurisdiction was remote. One writer is of the opinion that the presumption was almost conclusive by the decision of *Jack v. Kansas*. See Grant, *Immunity From Self-Incrimination In a Federal System of Government*, 9 TEMP. L.Q. 57 (1935).

America. It must seriously be doubted that any one of these premises was correct.

The very fact that by the turn of the century both state and federal governments had anti-trust laws,[19] should have been some warning that the possibility of overlapping criminal jurisdiction was far from remote. Certainly *Ballmann v. Fagin* had provided the Court with an opportunity to see that such subsequent prosecution was more than an unlikely possibility. Moreover, the British authority cited was either not in point, or did not represent the prevalent British view.

The British cases relied upon in the *Hale* and the *Brown* cases were *Queen v. Boyes*[20] and *King of Two Sicilies v. Willcox*.[21] In the *Boyes* case there was no allegation that the witness would incriminate himself under any foreign law. The argument was that although the witness had been pardoned, he could be impeached by the House of Commons. The ruling, however, was simply that the exercise of this extra-judicial device would not be probable. In *King of Two Sicilies v. Willcox*, the witness failed to prove that any foreign law had been violated. The issue resolved itself to whether the witness could claim the privilege simply because he was the subject of a foreign sovereign.[22] Even if the broad language in that case be accepted at face value, it was out of line with the accepted British rule. The British courts take the position that it is the actual probability of prosecution in the foreign jurisdiction, rather than the fact that the jurisdiction is foreign, that determines the application of the privilege against self-incrimination. This rule had been adopted before the *Brown* decision,[23] and has been applied not only to claims based upon the law of jurisdictions within the British federal system, but equally to claims based upon probable prosecution in America.[24] The leading reviewer of this aspect of British law, J. A. C. Grant, sets forth a plethora of British case law, and concludes:

> As early as 1749 it had been held by all the judges of the Court of Exchequer Chamber that a witness in an English Court need not answer questions when the answers might incriminate him under laws in effect in India, and an 1840 decision has been construed as extending the privi-

19. This was the basis of the problem in Jack v. Kansas, 199 U.S. 372 (1905).

20. 1 Best & Sm. 311, 121 Eng. Rep. 730 (Q.B. 1861).

21. 1 Sim. (N.S.) 301, 329, 61 Eng. Rep. 116, 128 (1851).

22. This view of the two cases was adopted in *In re* Watson, 293 Mich. 263, 291 N.W. 652 (1940); see also, Grant, *Federalism and Self Incrimination, Part II, Common Law and British Empire Comparisons*, 5 U.C.L.A. L. REV. 1, (1958); King of Two Sicilies v. Willcox is expressly distinguished in United States v. McRae, 37 L.J. (N.S.) 129, L.R. 3 Ch. App. 79 (1867).

23. See, for example, Heriz v. Riera, 11 Sim. 318, 59 Eng. Rep. 896 (Ch. 1840).

24. United States v. McRae, 37 L.J. (N.S.) 129, L.R. 3 Ch. App. 79 (1867); see also, East India Co. v. Campbell, 1 Ves. Sr. 246, 27 Eng. Rep. 1010 (1749) in which threat of incrimination in India was involved; and Brownsword v. Edwards, 2 Ves. Sr. 243, 28 Eng. Rep. 157 (1750).

> lege to cover the danger of prosecution under the laws of Spain, the witnesses being Spaniards. The contrary ruling . . . assuming, as I do, that it was a definite ruling — was unanimously overruled by the Court of Appeal in 1851.[25]

The error did not lie simply in inadequate study of British law; more truly it lay in the application of the rule derived from the British cases. As stated by the Supreme Court, the British rule was that the possibility of prosecution was of itself remote. Even had the British cases stood for that, it by no means followed that the proposition held true in America. The states are not a widely flung empire, and however firm may be the imaginary line that separates state from federal governments, it is unnecessary to travel to cross it. The conclusion is almost inescapable that regardless of the merits of the rule prescribed in these early cases, the reasoning they applied is less than convincing.

The Dual Sovereignty Doctrine

In 1931, the theory behind the Supreme Court's position, with regard to federal immunity statutes, underwent a slight change. In *United States v. Murdock*,[26] the holding went beyond prior decisions that the claim of federal privilege based on state incrimination was capricious. The Court, in that case, said:

> The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.[27]

Prior to the *Murdock* decision, it was still conceivable that where the danger of state prosecution was sufficiently established, that danger would support a claim of federal privilege. With this decision, that notion was buried. It was no longer the absurdity of the claim, but the nature of the privilege itself, that was held to preclude the claim of privilege.[28]

The reasoning behind the *Murdock* case was not clear — for to say that the privilege is satisfied by immunity from prosecution in the jurisdiction that grants the immunity is merely to beg the question; but a theory was supplied in *Feldman v. United States*.[29] Here a new issue was presented. Testimony compelled under a New York

25. Grant, *Federalism and Self-Incrimination, Part II, Common Law and British Empire Comparisons*, 5 U.C.L.A. L. Rev. 1, 22 (1958).

26. 284 U.S. 141 (1931).

27. *Id.* at 149.

28. That the theory had changed was recognized by the Supreme Court in the second *Murdock* case, in which it was said that not until the decision of the first case had it been "definitely settled" that a witness in a federal court could not refuse to answer "on account of probable incrimination under state law." United States v. Murdock, 290 U.S. 389, 396 (1933).

29. 322 U.S. 487 (1944).

immunity statute, to the effect that Feldman had been kiting checks, was introduced in a federal prosecution against him for using the mails to defraud. The lower court refused to exclude the evidence, and the Supreme Court affirmed, saying:

> The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be.[30]

Of course the constitutionality of the state grant of immunity need not have been considered since it was not in question. It had been held earlier that even improperly obtained state evidence is admissible in federal courts if there has been no collusion by federal officers. In fact, that was one ground of this decision.[31] The court did, however, comment upon the grant of immunity:

> The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court. . . .[32]

Arising out of the *Murdock* and *Feldman* cases is the doctrine that the legal separation of state from national governments prohibits the recognition of each other's criminal law for the purposes of the privilege against self-incrimination. The concept of federalism underlies the most recent decisions as well.

The Supremacy of Federal Law

Before considering the final stage in the development of the dual-sovereignty doctrine, adherence to chronological order demands inspection of the one area in which federal immunity has been held to bind the states. It will be recalled that the first Supreme Court decision involving the conflict between federal immunity and state incrimination[33] held, at least in the alternative, that a federal statute could grant binding immunity from state prosecution. This holding was reaffirmed in *Adams v. Maryland*,[34] in 1954. Granted immunity, a witness before a Senate committee investigating crime con-

30. *Id.* at 490.

31. *Id.* at 492.

32. *Id.* at 493. Wigmore takes a similar approach. His argument is essentially that: (1) "It is not in the power or duty of one State, or of its Courts, to be concerned in the criminal law of another State. For the former, there is but one law, and that is its own. . . . A constitution is intended to protect the accused against the methods of its own jurisdiction and no other;" and (2) that practical considerations preclude recognition of the foreign law: "The Court of one State knows nothing of the policies and rules of other systems; and it adds great burdens in attempting to master them." 8 WIGMORE, EVIDENCE § 2258 (3d ed. 1940). It is submitted that the first argument assumes the question, and the second is simply contrary to fact. American courts do, and sometimes are constitutionally required to, look at the law of other American courts in everyday conflict of laws problems.

33. Brown v. Walker, 161 U.S. 591 (1896).

34. 347 U.S. 179 (1954).

fessed to operating a lottery, and was subsequently convicted on the basis of this testimony by the state of Maryland. The federal immunity statute provided that testimony before the Senate could not be used "in any criminal proceeding in any court."[35] The conviction was reversed in the Supreme Court, upon the construction that "any court" includes state tribunals, and upon the theory of *Brown v. Walker,* that federal law takes precedence by reason of article VI of the Constitution.

The statute construed in the *Adams* case did not bar subsequent prosecution, but only the use of compelled testimony.[36] The decision that the evidence thus compelled was inadmissible in state courts left open the question of whether a federal immunity statute could constitutionally bar state prosecution. This question was considered in *Ullmann v. United States,*[37] two years later. The petitioner tried to evade testifying upon matters of national security before a federal grand jury. He had been granted immunity under a statute which bars prosecution on account of any transaction concerning which the witness is compelled to testify, "in any court." He based his claim of privilege, in part, upon the likelihood of state prosecution, and further argued that since Congress had no power to prevent enforcement of state criminal law, he could still be subsequently prosecuted by the state. The Court held that while the federal authority exercised was more drastic than that upheld in *Adams v. Maryland,* Congressional power to conduct national defense was sufficient to justify the grant of complete immunity.[38]

Several questions remain unanswered by either the *Adams* or *Ullmann* cases. To the extent that the latter case depended upon the power of Congress over defense and security, rather than simply upon the supremacy clause, it might not apply in any area over which the federal interest is less pervasive. Moreover, neither of these decisions negate the proposition established in the *Murdock* case[39] that federal immunity need not extend to state courts to be sufficient, and *Ullmann* did not involve a direct attack upon a state prosecution. If, in the future, such a prosecution is directly tested, it is still possible that the bulk of that opinion may be regarded as *dictum.*

The Current Issue: Assertion of the Federal Right in the State Courts

Since 1958 two cases have arisen which add to the problem of immunity from prosecution in a federal system a new facet: whether

35. 18 U.S.C. § 3486 (1952), Rev. Stat. § 859 (1875).

36. Thus, the statute was unconstitutional under Counselman v. Hitchcock, 142 U.S. 547 (1892); see note 6 *supra.*

37. 350 U.S. 422 (1956).

38. *Id.* at 435-36.

39. 284 U.S. 141 (1931).

the federal privilege of the fifth amendment can be asserted in a state prosecution. By way of background it should be remembered that *Jack v. Kansas*[40] held that states cannot grant immunity from federal prosecution, and that the fifth amendment itself is not binding upon the states.[41] The contention of the claimants in the current cases is somewhat different.

Knapp v. Schweitzer[42] involved a witness who had been questioned by a New York grand jury in an inquiry pertaining to bribery of labor representatives. He had refused to answer upon the ground that section 302 of the Taft-Hartley Act made such activity a federal crime,[43] and contended that the fifth amendment gave him the right to refuse to testify as to the commission of a federal crime in any court. His argument was rejected. The Court reasoned that:

> To recognize such a claim would disregard the historic distribution of power as between Nation and States in our federal system.
>
> The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation.[44]

Further, the Court stated that the "amendment can no more be thought of as restricting action by the States than as restricting the conduct of private citizens."[45]

Participation by federal officers in the state investigation had been raised in *Knapp v. Schweitzer,* but the only allegation of collaboration in that case was that the United States Attorney had announced an intent to cooperate with the state grand jury, and the matter was not seriously considered. However, in *Mills v. Louisiana,*[46] the stipulated facts were that the Louisiana authorities, the United States Attorney, and the Internal Revenue Service had collaborated in the state grand jury investigation of bribery of public officials.[47] The majority opinion ignored the collaboration issue and decided the case upon the authority of *Knapp v. Schweitzer.* Chief Justice Warren's dissent pointed out that in *Knapp,* it had been said:

> Of course the Federal Government may not take advantage of this recognition of the States' autonomy in order to evade the Bill of Rights. If a federal officer should be a party to the compulsion of testimony by

40. 199 U.S. 372 (1905).

41. See Twining v. New Jersey, 211 U.S. 78 (1908).

42. 357 U.S. 371 (1958).

43. Section 302(a) of the Taft Hartley Act makes it a misdemeanor for an employer to make payments to his employees' representative. 29 U.S.C. § 186(a) (1952), 61 Stat. 157 (1947).

44. Knapp v. Schweitzer, 357 U.S. 371, 375 (1958).

45. *Ibid.*

46. 360 U.S. 230 (1959).

47. *Id.* at 231-33 (dissenting opinion).

> state agencies, the protection of the Fifth Amendment would come into play.[48]

Another dissent, written by Mr. Justice Douglas,[49] added that *Feldman v. United States*[50] permitted federal courts to accept evidence compelled under state immunity statutes, so that now it is too late to wait until the federal proceeding to object. Mr. Justice Douglas concluded that so long as the *Feldman* rule stood, the states should be bound to recognize the federal privilege in order to adequately protect the federal right.

Accepting as true the stipulation that there was state-federal collaboration in *Mills v. Louisiana,* the present situation is indeed serious. The immunity statute, which began as a full substitute for the privilege against self-incrimination, may now be used as a device to prosecute persons who would otherwise have been beyond the reach of testimonial compulsion. It must be hoped that this decision will not be used as authority for the exclusion of claims of federal privilege in all situations regardless of the extent of collaboration, for should that come to pass, the fifth amendment would become practically a nullity in any matter of sufficient weight to warrant cooperation. Irrespective of any personal opinion as to the value of the privilege against self-incrimination, the fifth amendment remains a part of the Constitution. It is hardly proper in a constitutional system for the government to be able to circumvent it by connivance — nor would such circumvention lend to national dignity. It seems difficult to believe that our federal form of government is so self-defeating that this consequence is inevitable.

The Federalism Rationale

Since the demise of the doctrine that prosecution in another jurisdiction is remote,[51] the decisions have, in one form or another, been based upon the concept that the federal form of government necessitates limitation of the privilege to questions of incrimination under the jurisdiction that grants the immunity.[52] Little more has been said than that the two spheres are separate, and that contrived immunity in one jurisdiction should not bind the other.[53] It is submitted that these arguments either beg the question or are directed at "strawmen" rather than at the real issues.

Federalism in America is not an abstract philosophy superimposed upon an otherwise independent Constitution. To the contrary,

48. *Id.* at 231-36 (dissenting opinion).
49. *Id.* at 236-39 (dissenting opinion).
50. 322 U.S. 487 (1944).
51. See United States v. Murdock, 284 U.S. 141 (1931).
52. See Feldman v. United States, 322 U.S. 487, 490, 493 (1944).
53. *Ibid.*

it is the result of the summation and balancing of the various provisions of the Constitution. The limits of the American federal concept are derived, in this setting, by examining the proper function of the fifth and fourteenth amendments. One does not discern the limits of the constitutional amendments by employing some extraneous concept of dual sovereignty. The real issues in a determination of whether the state and the federal governments must look to each other's criminal laws under the privilege are (1) the proper scope of the fifth amendment, and (2) to what extent the privilege against self-incrimination is binding upon the states. It is suggested that neither of these issues has received adequate attention.

Federalism and Federal Immunity

Where the fifth amendment requires interference with state prosecutions, the supremacy clause should permit state prosecutions to be curtailed. The proper consideration is whether the privilege against self-incrimination, as embodied in the fifth amendment, is satisfied with less than complete immunity. The theory that the privilege, as adopted from the law of England, did not look to the law of other jurisdictions has been definitively exploded. Before the passage of the fifth amendment, it was already the law of England that it is the probability of incrimination in fact, rather than incrimination under a particular jurisdiction, that controls the application of the privilege.[54]

The conclusion must follow that the rule is American made — rather than intrinsic in the privilege itself. Nothing prevents the Supreme Court from declaring the fifth amendment unsatisfied by a federal immunity statute that grants less than full protection from prosecution in state courts, or from ruling out a state grant of immunity that would impinge upon the exercise of the fifth amendment in federal courts. *United States v. Murdock* and similar cases represent nothing more than federal constructions of the fifth amendment, which are neither supported by history nor sensible in practice. It is not lightly to be presumed that a constitutional privilege is easily circumvented, and it probably matters little to the victim of the present situation that federal immunity protects him in the federal courts while he is preparing his defense to a state prosecution. It would seem that such an anomaly would be permitted only if the chance of its occurring is slight, or if this result were inevitable. Obviously, it is too late to argue that the chance of subsequent prosecution is slight. Nor is the result inevitable since the Supreme Court can at will construe the fifth amendment to require federal immunity to be complete. J. A. C. Grant, in his treatment of this problem, suggests that the present rule is the result of an immature approach to the concept of federalism:

54. See notes 22, 23, and 24 *supra.*

> The real cause of our departure from the true English tradition has been a strange concept of federalism that views nation and state as *rivals.* Almost all American judicial thinking seems to be couched in these terms. Australia, Canada, and India have avoided this mistake and regard them, instead, as colleagues. It is they, not we, who seem to have heeded the warning of a great American, Alexander Hamilton, who in Number 82 of *The Federalist* insisted that "the state governments and the national government, . . . are . . . kindred systems, . . . parts of ONE WHOLE." Acceptance of such an approach should be helped in other fields as well as we enter what should be an era of even greater governmental cooperation.[55]

Federalism and State Immunity

The problem with regard to state immunity statutes is much more complex. The reasoning in the *Murdock* case, of course, would hold that state privilege is, by definition, satisfied by state immunity; but this is no more true of the state privilege than it is of the fifth amendment. The initial question, however, upon which any further analysis rests, is whether the privilege against self-incrimination is any part of due process of law under the fourteenth amendment. The only Supreme Court case on the subject at hand which discusses this issue is *Knapp v. Schweitzer.*[56] The Court did not examine the issue anew, but merely declared: "that such a claim is without merit was settled in *Twining v. New Jersey* . . . ."[57] It is true that *Twining v. New Jersey*[58] so held, but that decision — landmark though it is — deserves reconsideration in the context of immunity from prosecution. The *Twining* case was decided in 1908, and espoused a view of due process of law that is far narrower than the present construction of that phrase. It was assumed in *Twining* that due process of law was satisfied largely by purely procedural considerations — and the Court reasoned that the privilege did not rank in importance with requirements of notice, hearing, and jurisdiction of the court. The full growth of what is now termed substantive due process had not then been achieved.[59]

Twining v. New Jersey, to the extent that it considered the history of the privilege against self-incrimination, underestimated its importance in British jurisprudence. The Court said that the privilege was not mentioned in any of the great British documents.[60] It has since been pointed out that:

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55. Grant, *Federalism and Self-Incrimination, Part II, Common Law and British Empire Comparisons,* 5 U.C.L.A. L. Rev. 1, 25 (1958).

56. 357 U.S. 371 (1958).

57. *Id.* at 374.

58. 211 U.S. 78 (1908).

59. For an example of the more modern treatment of due process and state criminal procedure, in terms of "civilized conduct," see Rochin v. California, 342 U.S. 115 (1952); *compare* Breithaupt v. Abrams, 352 U.S. 432 (1957).

60. 211 U.S. at 105-08.

> By the time of the English Bill of Rights of 1689 the privilege had become so well established and universally recognized that to have inserted it would have been very much like re-affirming the law of gravitation.[61]

Perhaps even more important is the fact that the issue present in the immunity cases simply was not before the court in *Twining*. That case involved the constitutionality of the inference of guilt from the exercise of the privilege — comment — and not compulsory disclosure. It would have been quite possible to decide the case upon the basis that the inference was consistent with the privilege. In fact, had the inference been unreasonable, its application would have violated the principle of due process that a state may not apply an unreasonable inference,[62] irrespective of the self-incrimination issue.

In 1947, the Supreme Court again considered the constitutionality of comment upon the exercise of the privilege in a state court, and specifically refrained from deciding the case upon the broad assumption applied by an earlier court in *Twining*. This more recent case, instead, turned upon the logic of the inference made.[63] Even if it be conceded that the opinion in the *Twining* case is not almost entirely dictum, the decision went far beyond the necessities of the case and thus violated a cardinal tenet of Supreme Court practice in constitutional cases. Certainly that decision should not be relied upon — as it was in *Knapp v. Schweitzer* — for the proposition that the essence of the privilege, as well as some of its federal incidents, is no part of the fourteenth amendment.

Of course, to reject *Twining v. New Jersey* is not to conclude affirmatively that the privilege is binding upon the states. No such conclusion can be supported within the confines of a few paragraphs. The point is that the issue deserves reconsideration. The evaluation of the privilege in relation to the fourteenth amendment ought to be made upon the basis of a new look at the historical development of the rule, and its utility in modern society. Certainly, there is enlightened opinion extant to the effect that the privilege is of such importance as to be essential, inferentially, to due process of law.[64] Mere citation to an old case on another point does not satisfactorily deal with this crucial issue.

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61. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

62. Morrison v. California, 291 U.S. 82 (1934).

63. Adamson v. California, 332 U.S. 465 (1947).

64. For a well-worded argument that the privilege is a fundamental safeguard of human dignity, see GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). See also, Boyd v. United States, 168 U.S. 532 (1897), in which the Supreme Court said that compulsory self-incrimination was "contrary to the principles of a free government." The contrary view is suggested in MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 102-13 (1947).

What Other Courts Have Done

While the lower federal courts for a time assumed that they were free to allow claims of privilege based upon sufficiently established allegations of incrimination under state law,[65] they have considered themselves bound by the *Murdock* decision to reject all such claims. They have not been unanimously content, however, with their fetters. In *Marcello v. United States,* a court of appeals said:

> The doctrine is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitutional privilege has been safeguarded because the penitentiary into which his answer may land him is under the supervision of the state instead of the federal government.[66]

Although the majority of state courts have rejected claims of privilege founded upon the danger of federal incrimination, in accordance with the decisions of the Supreme Court,[67] a few recently have departed from this position. The leading case, for what has become a distinct minority view, is the Michigan decision, *People v. Den Uyl.*[68] The rule promulgated in this case is that where there is a probability of prosecution in the foreign jurisdiction, a claim of privilege founded upon that probability may be recognized. Since the claimant in the *Den Uyl* case had already been indicted by a federal court, and the questions put to him in the state court could have incriminated him in the federal case, he was permitted to refuse to answer. The court said:

> It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal prosecution.[69]

Of course, where there is no federal case pending during the state proceedings, the danger is less imminent. Under those circumstances, the Michigan court does not recognize the danger as sufficient to support a claim of privilege.[70] Several other states have since adopted the Michigan rule.[71]

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65. See note 12 *supra.*

66. 196 F.2d 437 (5th Cir. 1952).

67. See Annot., 82 A.L.R. 1380 (1933), supplementing 59 A.L.R. 895 (1929). Recent cases in accord with the majority are: State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956); and Application of Herlands, 204 Misc. 373, 124 N.Y.S.2d 402 (Sup. Ct. 1953). The latter case presents the argument that any other rule would enable racketeers to avoid prosecution by extending operations beyond the states. This argument fails in that the contrary view is not necessarily that prosecution of inter-jurisdictional crime is barred, but rather that in some cases, immunity be granted.

68. 318 Mich. 645, 29 N.W.2d 284 (1947).

69. *Id.* at 651, 29 N.W.2d at 287.

70. *In re* Watson, 293 Mich. 263, 291 N.W. 652 (1946).

71. Florida: Boynton v. State, 75 So. 2d 211 (1954); State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (1954). Kentucky: Commonwealth v. Rhine, 303 S.W.2d 301 (1957). Louisiana:

CONCLUSION

Far from becoming less of a danger, the possibilities of state-federal collaboration to avoid the privilege against self-incrimination have multiplied. This decade has seen a tremendous expansion of state and local legislation into the area of subversion, which has been extensively covered by federal law.[72] On the other hand, the federal gambling tax disclosure provisions are quite obviously designed to compel disclosure of state crime, and they have been used to this end.[73] While it has been suggested that this is most appropriately an area for comity and accommodation,[74] it would appear that such dilution of the constitutional privilege as the majority view permits, is justifiable only if the constitutional requirements of federalism so necessitate. The arguments to date have been unconvincing. The rule as originally laid down by the Supreme Court was founded upon misinterpretation of foreign law, and upon the illogical application of the mistakenly assumed foreign rule to the different situation in this country. The subsequently-developed doctrine, that a federal system requires freedom to disregard incrimination in other jurisdictions, begs the question. Consideration of the historical purpose of the privilege, its importance today, and its place in due process might well require a modification of the current position of the Supreme Court. If such reconsideration is not forthcoming, it is not unlikely that the privilege will become a mere shell. As the highest court of Kentucky has said:

> We believe that to render effective the . . . privilege against self-incrimination, it is essential that it apply to prosecutions by the United States as well as to those by the Commonwealth. To hold otherwise would be to ignore the fact that our citizens are in a very real sense, as well as in a technical one, citizens of both the State of Kentucky and of the United States.[75]

To permit the granting of immunity effective in only one jurisdiction, in a nation composed of many, is to permit the emasculation of the privilege against self-incrimination. So long as we recognize the privilege, we should strive to prevent its protection from becoming a mere illusion.

JOSHUA J. KANCELBAUM

State v. Dominguez, 228 La. 284, 82 So. 2d 12 (1955); State *ex rel.* Doran v. Doran, 215 La. 151, 34 So. 2d 844 (1949). The present status of the rule in Louisiana is rendered uncertain by State v. Ford, 233 La. 992, 99 So. 2d 320 (1957), which may have limited the application of the earlier cases to their facts.

72. See compilation in Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 177 (1956).

73. See Boynton v. State, 75 So. 2d 211 (Fla. 1954); *Cf.* United States v. Kahriger, 345 U.S. 22 (1953); discussion in Grant, *Federalism and Self-Incrimination, Part I, United States v. Murdock Revisited*, 4 U.C.L.A. L. REV. 549, 575 (1957).

74. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 42 (1949); Note, 22 MO. L. REV. 75 (1957).

75. Commonwealth v. Rhine, 303 S.W.2d 301 (Ky. 1957).