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COMMENT

The Privilege Against Self-Incrimination — A Critical Reappraisal

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INTRODUCTION

Reports of trials in Hitler's Germany, in the Russia of Lenin, Stalin, and Khrushchev, and most recently in Castro's Cuba have been filled with confessions of alleged criminal defendants only too happy to serve both as prosecuting witnesses and defendants — a paradoxical situation fortunately not often occurring on the American scene.

The reason American jurisprudence has differed came into clear focus in our generation during the era of the Kefauver and McCarthy Committees, has continued to be evident with the McClellan Committee, and most recently has been viewed in the now notorious Billy Sol Estes matter. To the public generally, it manifested itself in the monotonous repetition by witness after witness of the ritualized formula, "I respectfully decline to answer on the grounds that my answer may tend to incriminate me in violation of my rights under the fifth amendment of the Constitution of the United States."

Totalitarian states, no matter the name they bear, always utilize coerced testimony wherever necessary to arrive at their desired verdicts because to them the ends justify the means. This is not true in the democratic republics of the world, and this is a principal distinction between freedom and dictatorship.

The balancing of the public good against the liberty of the private individual, or to state it another way, the issue of the collective power of the state versus the right of the liberty of the individual, has long been fought through the courts of our nation. On the one hand, there are those who feel that the individual must sacrifice his personal rights whenever they may seem to conflict with the public welfare. On the other hand, there are those who feel as strongly that it is the superiority of the right of the individual over that of the state, except in times of national emergency, that distinguishes the freedom of a democratic republic from that of a totalitarian state.

In this light some contend that prosecuting attorneys whose aims are to convict those who break laws ought not be hamstrung by being

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met time after time with reluctant witnesses who allegedly thwart justice by refusing to testify on the basis of the fifth amendment of the Constitution of the United States. Likewise, there are those who insist with equal vigor that this very right to silence guarantees freedom and justice and that the slightest denial of it opens the door to dictatorship.

Separation of power is a basic axiom of the government of the United States. With a fresh recollection of tyranny arising from monolithic government the drafters of the Constitution provided for three separate structures of power — executive, legislative, and judicial — and attempted to make each independent so that the judiciary, particularly, would stand as a buffer to protect the individual against the possibility of an overly zealous government. In this capacity, the courts on frequent occasions have been called upon to invoke the Constitution to protect the individual from the state.

This inquiry is directed at the privilege against self-incrimination guaranteed by the fifth amendment of the Constitution.

History of the Fifth Amendment[1]

The privilege against self-incrimination arose out of the power struggle between the kings and the bishops as early as the twelfth century. In moulding their feudal heritage into the modern nation, kings like Henry II attempted to limit the ecclesiastical courts. The bishops sought to question people on a variety of offenses, and the kings sought to confine them to ecclesiastical matters. The kings, therefore, supported the concept that a person should not be compelled to be a witness against himself in the ecclesiastical courts. They sternly resisted the invocation of this doctrine in their own courts, however, and the abuses of the Star Chamber have made their mark on history so as to always be a reminder to democratic civilizations of the danger of centralized government.

By the sixteenth century the idea had achieved the respectability of a Latin maxim, "*Nemo tenetur prodere se ipsum*," *i.e.*, "No one should be required to accuse himself." During this era, the maxim was little more than an idea. Over the next half century it was standard practice not only to force and coerce suspected persons into giving evidence against themselves, but also to torture them to insure it.

It was the defiance of "Freeborn John" Lilburne of England which established the privilege against self-incrimination as it is known today. In 1637 he was brought into the Star Chamber on a charge of importing certain heretical and seditious books. He refused to take the oath to answer truly, and the Council of the Star Chamber ordered him whipped.

1. See generally Griswold, *The Fifth Amendment: An Old and Good Friend*, 40 A.B.A.J. 502 (1954).

In 1638 the sentence was carried out. But Lilburne persisted in his refusal to testify, and in 1641 the House of Commons voted that the sentence was "illegal and against the liberty of the subject." Later, the House of Lords agreed and ordered an indemnity paid to Lilburne in a large amount by the standards of the day. This event established the privilege against self-incrimination as part of Anglo-Saxon jurisprudence. Thus, this formidable principle came to America with the earliest settlers.

In 1637 the privilege against self-incrimination was involved in Massachusetts in the trials of Anne Hutchinson and John Wheelwright. In Pennsylvania in the case of William Bradford in 1689 the principle was clearly recognized. It was included in the Virginia Bill of Rights of 1776 drafted by George Mason, and thereafter found its way into the constitutions of most of the original states. It was incorporated into the fifth amendment of the Constitution of the United States in 1791, which provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Mr. Justice Stephen J. Field in 1896 in the Supreme Court of the United States in the case of *Brown v. Walker*[2] agreed with the appellant's counsel that the privilege is the ". . . result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other."[3] He continued by adding in succinct and emphatic language that the basis of the privilege is self-evident, stating: "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration."[4]

Development of the Privilege in United States Courts

Although the necessity of the privilege was recognized by the founding fathers of this country, many questions which arose in the legal mind after the adoption of the Bill of Rights remained to be answered. Did the privilege apply only to criminal proceedings in which the person exercising the privilege was a defendant? Did the privilege apply only to those questions whose answers would be tantamount to the confession of a crime or did it apply also to the surrounding circumstances of a crime? How is the decision to be made as to whether the privilege was sincerely invoked by the witness?

Chief Justice Marshall, while riding the circuit in the District of Virginia in 1807, presided over the trial of Aaron Burr for treason. In discussing the privilege the Chief Justice made the following comment:

2. 161 U.S. 591 (1896).
3. *Id.* at 637.
4. *Ibid.*

> . . . if the question be of such 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 determine 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.[5]

Thus, the Chief Justice held that the court had the duty of examining the question and if there was even a possibility that the answer might incriminate the witness, then the witness' statement that it might incriminate him must be accepted by the court and the privilege sustained.

Although the privilege was examined by many state courts during the nineteenth century,[6] the United States Supreme Court was not confronted with the many legal problems arising out of the terse language of the fifth amendment until 1892. In that year in the case of *Counselman v. Hitchcock*[7] the Court for the first time elaborated upon the privilege. It held that the privilege could be validly exercised by a person not only during a criminal trial, but also in any investigation, and furthermore, that the privilege could be validly exercised as to any questions concerning the surrounding circumstances of a possible crime. The syllabus of the case states:

> The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.
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> . . . .
>
> It is a reasonable construction of the constitution provision, that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.

The *Counselman* case was superseded in 1951 by *Hoffman v. United States*,[8] which is the leading case in the United States today. In its opinion, the Court set forth the following standard for guidance in the determination of whether a witness has properly invoked the guaranty against testimonial compulsion provided by the fifth amendment of the Constitution of the United States:

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so

5. United States v. Burr, 25 Fed. Cas. 38, 40 (No. 14,692d) (C.C. Va. 1807).

6. State v. Quarles, 13 Ark. 307 (1853); *Ex parte* Rowe, 7 Cal. 184 (1857); Higdon v. Heard, 14 Ga. 255 (1853); Bedgood v. State, 115 Ind. 275, 17 N.E. 621 (1888); Wilkins v. Malone, 14 Ind. 153 (1860); Emery's Case, 107 Mass. 172 (1871); State v. Nowell, 58 N.H. 314 (1878); La Fountaine v. Southern Underwriters Ass'n, 83 N. C. 132 (1880).

7. 142 U.S. 547 (1892).

8. 341 U.S. 479 (1951).

> does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' . . . However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'[9]

The "injurious disclosure" mentioned in the quotation refers to possible evidence of a federal crime. In *Blau v. United States*[10] the Supreme Court of the United States made it clear that the privilege against self-incrimination extends not only to those answers which might be admissions of a possible federal crime, but also to answers which might furnish a link in the chain of evidence needed to prosecute the witness for the crime.

Whereas the Court in the *Counselman* case had placed the emphasis upon the question propounded, the Court in the *Hoffman* case placed the emphasis upon the setting in which the question was asked. A problem presented in most proceedings is presenting sufficient evidence to the court to apprise it of the setting. Most of the reported cases concerning the invocation of the privilege arise out of a congressional or grand jury investigation. An abbreviated record of the proceeding is submitted which is frequently the only evidence considered by the court. Hoffman's attorneys ingeniously submitted, in connection with a petition for reconsideration of allowance of bail pending appeal, the affidavit of Hoffman which fully described the setting and to which were attached newspaper clippings. The Supreme Court of the United States held that the district court should have considered the petition as an application to vacate the contempt order, and on the basis of the additional information supplied, it further held that the application should have been granted. The Court concluded:

> In this setting it was not *'perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) *cannot possibly* have such tendency' to incriminate.[11]

Thus, the burden is placed upon the government to make it "perfectly clear" that the privilege was not validly invoked. The Court further

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9. *Ibid.* at 486-87.

10. 340 U.S. 159 (1950).

11. Hoffman v. United States, 341 U.S. 479, 488 (1951).

suggested that affidavits might be submitted during a contempt hearing for the purpose of developing the setting.

By placing emphasis on the setting and by directing the trial judge to be governed "as much by his personal perception of the peculiarities of the case as by the facts actually in evidence," a broader range of inquiry was established which was more subjective than the test proffered by Chief Justice Marshall and adopted by the Court in the *Counselman* case.

Although objective and relatively simple to apply, the *Counselman* test ignored one important consideration, *i.e.,* that an innocent question may be fraught with danger. Several circuit courts of appeals have commented on this vital factor which fortunately would seem to be cured by *Hoffman.* In *Brunner v. United States*[12] the Court of Appeals for the Ninth Circuit observed: "Even a question which is at first sight an innocent one may require an answer which will constitute a link in a chain of evidence leading to conviction of the witness."[13] And in *Poretto v. United States*[14] the Court of Appeals for the Fifth Circuit stated:

> Questions taken out of their context may seem harmless on their face; but, to a notorious violator of the criminal laws, an answer to any one of them may seem fraught with clues to proof of illegal activities for which he might be prosecuted and convicted.[15]

And in *Maffie v. United States*[16] the Court of Appeals for the First Circuit stated:

> The witness may be willing to answer certain formal preliminary inquiries, as to matters generally known, such as his name, residence, age, *et cetera.* But he may have a justified apprehension of danger in answering further. He may not have the acuteness to see what an innocuous-looking question, put by a resourceful cross-examiner, is leading up to. Yet he might not be unreasonable in believing that the question was asked for a purpose, and that the purpose was to lead him into a booby trap in which he would make some disclosures useful to the prosecution in weaving a case against him. Just where the line should be drawn in such a case, in the application of the privilege, might be a question; but it is certainly clear that it should be drawn well short of the point where the interrogator might have a substantial chance of striking pay dirt.[17]

The Court in the *Hoffman* case in recognizing that not only a question but also a situation may be perilous, therefore, took a more sophisticated view than its predecessors. However, the lower federal courts have

12. 190 F.2d 167 (9th Cir. 1951).
13. *Id.* at 168.
14. 196 F.2d 392 (5th Cir. 1952).
15. *Id.* at 396.
16. 209 F.2d 225 (1st Cir. 1954).
17. *Id.* at 229.

had a great deal of difficulty in applying the *Hoffman* test, as is evidenced by the following cases, in which the lower courts overruled the exercise of the privilege against self-incrimination and were reversed by the Supreme Court on the authority of *Hoffman* or *Blau: Trock v. United States;*[18] *Curcio v. United States;*[19] *Simpson v. United States;*[20] *Wollam v. United States*;[21] and *MacKenzie v. United States.*[22]

The Supreme Court has indicated that great liberality should be exercised in favor of the witness in determining whether the privilige against self-incrimination should be sustained. There has not been a single case since *Hoffman,* except in those cases where waiver or immunity was established, in which the Supreme Court has affirmed a lower court which overruled the exercise of the privilege against incrimination by a witness before an investigating body. This is understandable since the investigating body, whether it be a grand jury or a congressional committee, is investigating crime or other nefarious activities detrimental to the welfare of the United States, and presumably the witness has been summoned because he has information concerning these activities. If he has information, then it is likely that he is involved in the activities, if not as a participant, at least as an aider and an abettor. Therefore, in any setting such as a grand jury investigation, it is unlikely that the court can assert with the perfect clarity required of it by the Supreme Court that an answer to a question cannot possibly have a tendency to incriminate the witness.

The Fifth Circuit and the First Circuit quickly recognized the gravamen of the *Hoffman* decision as is evidenced by the opinions in *Poretto* and *Maffie,* which dwelled upon the setting rather than the questions. As the court stated in the *Maffie* case:

> But for the reasons previously indicated we think it is clear that the district court need not believe, from the evidence before it, that the particular witness was a participant in the crime, in order to give a broad scope to the privilege against self-incrimination. It is enough that the witness had reasonable ground to fear that he was suspected by the prosecuting officials of being implicated somehow in the criminal transaction, and that he was being summoned before the grand jury in the hope that some incriminating disclosures could be extracted from him. That was certainly the case here.[23]

The Third Circuit, which was reversed twice by the Supreme Court

18. 232 F.2d 839 (2d Cir.), *rev'd,* 351 U.S. 976 (1956).
19. 232 F.2d 470 (2d Cir. 1956), *rev'd,* 354 U.S. 118 (1957).
20. 241 F.2d 222 (9th Cir. 1957).
21. 244 F.2d 212 (9th Cir. 1957).
22. 244 F.2d 712 (9th Cir. 1957). Cases cited in footnotes 20, 21, and 22 *rev'd collectively* in Simpson v. United States, 355 U.S. 7 (1957).
23. Maffie v. United States, 209 F.2d 225, 232 (1st Cir. 1954).

on the authority of *Hoffman,* finally devised an objective test. As it stated in *United States v. Coffey*:

> It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant.
>
> Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather he must be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry.[24]

This procedure was adopted by the Eighth Circuit in *Isaacs v. United States*[25] and apparently approved by the Supreme Court in *Emspak v. United States.*[26]

Therefore, counsel, in representing a witness in a contempt hearing, in addition to placing sufficient material in the record for the purpose of establishing the setting, must be prepared to demonstrate that the question or questions propounded to the witness when connected with other information which might be obtained could involve the witness in a prosecution for a federal crime.

Although the complaint may be made that an excessive burden is placed upon the government and the court by the present state of the law upon the privilege against self-incrimination, such a complaint was effectively answered by Mr. Justice Clark in the *Hoffman* opinion when he stated:

> If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty. 'The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.'[27]

WHITTLING THE PRIVILEGE

Waiver

Although the Supreme Court has consistently supported the exercise of the privilege, its present position on the doctrine of waiver, in the words of the dissent of Mr. Justice Black in *Rogers v. United States,*[28]

24. 198 F.2d 438, 440 (3d Cir. 1952).
25. 256 F.2d 654 (8th Cir. 1958).
26. 349 U.S. 190, 198 n. 18 (1954).
27. Hoffman v. United States, 341 U. S. 479, 489-90 (1951).
28. 340 U.S. 367 (1951).

has the effect of "whittling away the protection afforded by the privilege."[29]

Like other constitutional rights, the privilege against self-incrimination must be claimed or it is deemed waived.[30] Almost any language is sufficient to invoke the privilege,[31] and the Court has stated that courts must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights."[32]

Once the witness takes the stand and starts talking, he may have forfeited his right to invoke the privilege. In *McCarthy v. Arndstein*[33] the Court held that a disclosure made by a witness not amounting to an actual admission of guilt or of incriminating facts does not deprive him of his privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.

Thus, the witness may stop if he has not convicted himself, or so it seemed, until the decision in *Rogers* was handed down. Mrs. Rogers had admitted before a Denver grand jury that she had been the treasurer of the local Communist Party. She was asked to whom she turned over the records of the Party after she left office. She refused to answer, invoking the fifth amendment after she had consulted a lawyer. The Court held that by revealing the fact of membership in the Communist Party she had waived the privilege and could not refuse to answer questions concerning the details connected with the incriminating fact. In *Blau v. United States*[34] Mr. Justice Black observed that membership in the Communist Party would serve as a link in the chain of evidence in a prosecution for violation of the Smith Act. In the *Rogers* opinion Mr. Justice Vinson played a cruel joke upon Mr. Justice Black by reading Black's opinion in *Blau* to state that the disclosure of Communist activity is a criminating fact as to violations or conspiracy to violate the Smith Act.

The Court added that although an incriminating disclosure may have been made, the witness is not necessarily precluded from invoking the privilege as to questions, the answers to which might further incriminate the witness.

The problem with the *Rogers* case is that it does not explain the extent of a criminating fact. An admission that a person is a Communist is not by itself enough to sustain a conviction under the Smith Act. It does not even constitute an element of the crime. The disclosure of one's

29. *Id.* at 376.

30. United States v. Monia, 317 U.S. 424 (1943); United States v. Murdock, 284 U.S. 141 (1931).

31. Quinn v. United States, 349 U.S. 155 (1955).

32. Johnson v. Zerbst, 304 U.S. 458, 464 (1937), quoted with approval in connection with the waiver of the privilege in Emspak v. United States, 349 U.S. 190, 198 (1955).

33. 262 U.S. 355 (1922).

34. 340 U.S. 159 (1950).

associates, however, would be extremely helpful to the prosecution. Therefore, the holding of the *Rogers* case when viewed upon its facts constitutes a shocking inroad upon the privilege against self-incrimination since the Court seems to be of the opinion that the disclosure of a single fact which may be evidence of a crime requires the disclosure of additional facts even though such disclosure may furnish additional ammunition to the prosecution.

As Mr. Justice Black stated in his dissent:

> Moreover, today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it.[35]

The Court of Appeals for the Ninth Circuit refused to read such an extreme conclusion into the *Rogers* case. In *Hashagen v. United States*[36] it explained the *Rogers* decision:

> Rogers does hold that the doctrine of constructive waiver will come into operation whenever a single incriminatory fact has been admitted, though all of the necessary elements or even the evidentiary facts required for conviction have not been so admitted.
>
> Yet where there has been such a partial disclosure, it is difficult to determine just how much has been waived. To be sure, the witness must disclose the waived 'details' of the criminating fact, but where is the line drawn between a mere detail of the admitted criminating fact and a further criminating, yet still protected fact? . . . .
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> The answer, we think, is found in this statement from the Rogers case:
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> '* * * The Court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures. As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination.'
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> The touchstone in Rogers, is the adjective 'further,' and thus an admission of a criminating fact may waive the privilege as to the details of that fact so long as they do not *further* incriminate, but where those details would so incriminate, *the privilege is not waived.*[37] (Emphasis added.)
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> . . . .
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> But allowing that this admission is a criminating fact, a second problem faces us: whether the particular questions asked this witness 'presented a reasonable danger of further crimination in light of all the circumstances,' or whether the incriminatory fact already admitted encompassed the probable answers to the seven questions so that those answers could not reasonably result in further danger to the witness.[38]

35. Rogers v. United States, 340 U.S. 367, 378 (1951).
36. 283 F.2d 345, 352 (9th Cir. 1960).
37. *Ibid.*
38. *Id.* at 354.

Therefore, the court concluded that even though an incriminating fact may have been disclosed, the witness is entitled to invoke the protection of the fifth amendment unless it is perfectly clear to the court that the answers attempted to be elicited were so closely related to the disclosed fact that they were implied in the disclosed fact and would not provide the prosecution with additional new material.

The Ninth Circuit's conclusion is certainly more consistent with the basic precepts of American democracy than is that of the *Rogers* opinion.

Some doubt has been expressed as to the efficacy of *Rogers* today.[39] To date the Supreme Court has not taken the opportunity to review *Rogers,* but so long as the decision stands this writer agrees with the following comment of Dean Erwin N. Griswold of the Harvard Law School: "Under the *Rogers* case the only really safe advice a lawyer can give his client is to claim the privilege at the earliest possible moment, so as to be sure to avoid a charge of waiver."[40]

Waiver of the privilege will also be inferred if the witness takes the stand to testify voluntarily as to the matters made relevant on direct examination. Such was the holding in *Brown v. United States.*[41] The majority of the Court in *Brown* was concerned about the fact that a witness (a party in this case) would present a distorted picture upon direct examination which could not be disputed if cross-examination were thwarted by the invocation of the privilege against self-incrimination. The value of such testimony before a court or jury, of course, would be dubious, and the probability that such testimony would be harmful is almost certain. On the other hand, the witness may be unaware of the danger that may arise out of his direct examination and may unwittingly, by being forced to answer because of his waiver in voluntarily testifying, place himself in jail. The *Brown* decision, therefore, constitutes a serious erosion of the fifth amendment.

State Violation Revealed in Federal Tribunal

Another even more serious inroad upon the privilege against self-incrimination is found in the well-established proposition that a witness is denied the use of this privilege and may not invoke it before a federal tribunal where the offense which the witness fears might be disclosed by his being forced to answer consists of a possible violation of a crime under state law rather than federal law.[42]

39. United States v. Courtney, 236 F.2d 921 (2d Cir. 1956); United States v. Portell, 245 F.2d 183 (7th Cir. 1957).

40. Griswold, *The Fifth Amendment: An Old and Good Friend,* 40 A.B.A.J. 502, 535 (1954).

41. 356 U.S. 148 (1958).

42. Hutcheson v. United States, 369 U.S. 599 (1962); United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906).

The whole purpose behind the fifth amendment is vitiated by this rule since a person may incriminate himself just as effectively by disclosures concerning crimes under state law as under federal law. During a trial or a congressional investigation the state officers may be present taking careful notes. The grand jury meets in secrecy, but generally the United States Attorney who is present is on better than speaking terms with his counterpart in the state.

In *Hutcheson v. United States*[43] the Supreme Court dodged an opportunity to reconsider its position on the grounds that the petitioner had not invoked the fifth amendment. Although the fifth amendment may not be available to a witness, he may be able to argue in those circumstances where the federal tribunal is invading issues within the jurisdiction of the states, that the congressional committee is inquiring into matters not pertinent to its legislative purpose,[44] or that the grand jury is inquiring into matters outside its authority.[45]

As was demonstrated in *Hutcheson,* however, in which the petitioner unsuccessfully tried to rely upon pertinency under the first amendment rather than possible self-incrimination under the fifth, such reliance is at best insecure since the jurisdiction of the federal government frequently overlaps with that of the state government.

Immunity

Another concept whittling away at the privilege against self-incrimination is that of immunity. Where a witness has been granted immunity co-extensive with the privilege, he need no longer fear incrimination and so he may be compelled to answer.[46] The statute granting immunity is ineffective if it leaves the witness subject to prosecution.[47] But it need not protect the witness from prosecution under state law.[48]

Immunity statutes are undesirable because they serve as a strong temptation to an accused to say whatever is required of him to avoid prosecution. Such statutes put far too much power in the hands of the prosecutor since he alone can then decide which persons may be relieved of guilt in return for testimony against others he selects to prosecute. The temptation to prevarication is obvious.

43. 369 U.S. 599 (1962).

44. Russell v. United States, 369 U.S. 749 (1962); Watkins v. United States, 354 U.S. 178 (1957); Sinclair v. United States, 279 U.S. 263 (1929).

45. Brown v. United States, 245 F.2d 549 (8th Cir. 1957).

46. Brown v. United States, 359 U.S. 41 (1959).

47. Counselman v. Hitchcock, 142 U.S. 547 (1892).

48. Hale v. Henkel, 201 U.S. 43 (1906).

It would appear that whenever the Supreme Court has an opportunity to appraise objectively the constitutional questions arising under the privilege against self-incrimination, without pressure or passion, it recalls the American heritage and the history of the American immigrant, who forged the nation, and, as a consequence, renders a decision which protects the individual from the violation of his constitutional privilege of not being compelled to be a witness against himself.

In the few instances where the Supreme Court appears to have allowed encroachments on this privilege, an analysis of the facts of each particular case, or the time during which it arose, generally indicates that either the fact situation was so distinctive as to prompt the result or the temper of the times created the setting which produced the ruling.

The *Rogers* case arose at the height of the investigations of Communism. These investigations were certainly justified, but were used by certain individuals for political gain and to create a fever throughout the land rather than for national protection. The interesting fact is that as the passionate clamor subsided and reason was substituted for fear, courts began to recognize the encroachment created by *Rogers* in its ruling on waiver of the privilege. Therefore, the courts attempted to find ways of distinguishing the fact situations in order to return to the intent of the framers of the Constitution who originally enacted the amendment. In this regard the enlightened decisions of the Ninth Circuit in the *Hashagen* case and the Second Circuit in the *Courtney* case are most illuminating. Add to this the fact that the Supreme Court has been reluctant to impute waiver in any case brought before it since *Rogers,* which involves any witness who was not a voluntary one, and it becomes apparent that *Rogers* has been restricted to the narrow area of cases in which a witness has previously testified to what is tantamount to a confession of a vital element of a federal crime. Even then, the waiver is restricted to questions involving that one element alone.[49] When one considers that the Supreme Court since its rulings in *Hoffman* and *Blau* has unanimously sustained the rights of every witness in every case brought before it to claim his privilege against self-incrimination, it is fair to assume that the Supreme Court is not about to enlarge the *Rogers* doctrine. And this is as it should be.

In light of the history of the United States and the overriding belief of its founders in the freedom of the individual and "the inherent cruelty of compelling a man to expose his own guilt,"[50] the Court in *Hoffman* and *Blau* has interpreted *Counselman* so that not only the questions pro-

49. Hashagen v. United States, 283 F.2d 345 (9th Cir. 1960).

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

pounded but the setting in which they are asked are of vital importance, and one must now be considered in light of the other and not alone. Thus, the question which may appear innocuous need not be answered if counsel for the witness can show how a prosecutor might possibly use the answer to such a question to build a link in a chain leading to the possible violation of a federal statute.[51] The Supreme Court now seems to have adopted this logical test.[52]

The case of *Brown v. United States*[53] clearly indicates that a witness who has anything to hide can never testify voluntarily in any matter unless he is willing to risk imprisonment for contempt, or confession and its consequent punishment. This is a dilemma which it seems is in direct conflict with the intent manifested by the authors of the Constitution when they adopted the fifth amendment.

CONCLUSION

As the law now seems to be, if a witness to an accident testified voluntarily in a personal injury case, and he were to be cross-examined by a lawyer who inquired into matters which might link the witness to some crime under the guise of checking the credibility of the witness, and the witness tries to protect himself against thus being compelled to be a witness against himself, a court might be unable to afford the witness the protection of the fifth amendment because of the *Brown* waiver rule as to voluntary testimony. It would seem that the witness ought to be allowed under such circumstances to plead the fifth amendment. Such act would vitally shake his testimony in the minds of court or jury. But to require him to answer because of such an alleged waiver seems in direct conflict with traditional American abhorrence of compelling a man to expose his own guilt.[54]

The present interpretation of the law which now seems to compel witnesses before federal tribunals to expose their guilt of state crimes, although not federal ones, is equally abhorrent. It is difficult to believe that Madison, Franklin, and the other creators of the Constitution ever intended such an interpretation of the fifth amendment. It is earnestly hoped that when this question is again properly presented to the Supreme Court a contrary interpretation of this ruling may be forthcoming as occurred relative to the fourth amendment in *Mapp v. Ohio*.[55] It is unfortunate that Hutcheson did not plead the fifth amendment in his case, for then this issue might have been squarely met and properly resolved.

51. United States v. Coffey, 198 F.2d 438 (3d Cir. 1952).
52. Emspak v. United States, 349 U.S. 190 (1955).
53. 359 U.S. 41 (1959).
54. Brown v. Walker, 161 U.S. 591 (1896).
55. 367 U.S. 643 (1961).

Finally, the enactment of additional comprehensive immunity statutes could constitute the greatest danger to freedom, liberty, and democracy yet to be faced by the nation. It is difficult to imagine any step that could be taken that could more quickly lead to totalitarianism than giving to any prosecuting official power to grant immunity. The age of the beneficent despot, it is hoped, is gone. But what could happen if the power to grant immunity were given to a man with political or personal ambition of any sort? He alone could select who should live and who should die, a power thus far reserved to courts and juries in certain restricted areas. By granting immunity and freedom to one wrongdoer in consideration of his condemning another by naming him an accomplice, the streets would be filled with guilty criminals who falsely accuse the innocent at the whim of the prosecutor to save themselves. Can anyone doubt that a criminal facing imprisonment or death would fail to do anything where merely for granting the request he became immune to prosecution and thus punishment? Would not the prosecutor thus usurp the power of a jury to find guilt and of a judge to sentence by granting immunity to those who might have to face trial? Would not the granting of immunity guarantee perjury and thus insure guilt of the innocent?

It is submitted that intelligent, objective, fair-minded analysis of the constitutional privilege against self-incrimination in the light of the intent of its framers can lead but to the one conclusion: it was designed to guarantee freedom of the individual. The decisions of courts, with a few exceptions, seem intent on maintaining the freedom protected by this privilege. Indications are that whenever encroachments have been made as a result of the frailty of man, the courts have, in the process of a comparatively short time, been able by interpretation and re-evaluation to compensate and adjust for momentary error and to put individual freedom again in its proper prospective. Such has been, is, and it is hoped will continue to be the role of the judiciary in America. With the Constitution as its guide, this writer has faith that the courts will continue to protect the individual's freedom in spite of those who attempt to gain coerced testimony under the guise that the end justifies the means.

The most recent matter which drew the attention of the American people to the ritualized "I refuse to answer" was the Billy Sol Estes case. On May 23, 1962, Estes chanted this familiar theme as he was questioned, innocously at times, at a federal receivership hearing. Brought before United State District Judge R. E. Thomason, the judge told Estes, "It is difficult to see how the questions would incriminate you. But we still have a Constitution."[56]

56. Cleveland Plain Dealer, May 24, 1962, p. 1, col. 3.