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A Philosophic Study of the Fifth Amendment

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A PHILOSOPHIC STUDY OF THE FIFTH AMENDMENT

by

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LIFE

I, John Timothy Kelley, was born February 19, 1926 in Saint Paul, Minn. We moved to Chicago in 1941, and I graduated from Saint George High School in 1944. Joined the Navy a month later, and eventually was assigned to the LST 974, Seventh Fleet, China Theatre.

Discharged in 1946, I enrolled in the pre-law program of Loyola University in Chicago. Transferred to the law school in 1943, and under the combined degree program, received a B.S.S.S. degree in February, 1950. Joined the Society of Jesus the following August. As a regent I taught Modern European History and Caesar at Saint Ignatius High School, Cleveland. At present am a first year theologian at West Baden College.
# Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. INTRODUCTION.</strong></td>
<td>1</td>
</tr>
<tr>
<td><strong>II. HISTORY OF THE FIFTH AMENDMENT.</strong></td>
<td>4</td>
</tr>
<tr>
<td>Oaths in ecclesiastical courts—Trial of John Lilburn—Subsequent English development—In the Colonies—Incorporation in the Constitution—Scope of the privilege—Compelling testimony under grant of immunity.</td>
<td></td>
</tr>
<tr>
<td><strong>III. IS THE FIFTH AMENDMENT A NATURAL RIGHT OF MAN.</strong></td>
<td>19</td>
</tr>
<tr>
<td><strong>IV. SHOULD WE RETAIN THE FIFTH AMENDMENT.</strong></td>
<td>43</td>
</tr>
<tr>
<td>Dilemma—Purpose of the Amendment—Arguments in support of the privilege—Opposition—Jeremy Bentham—Dean Griswold—Danger of torture—Rights of criminal—Privilege or shield—The presumption of innocence—Duty of testifying—Conflict with Sixth Amendment—Suggested modifications—Summary.</td>
<td></td>
</tr>
<tr>
<td><strong>V. PRESUMPTION OF GUILT AND IMMUNITY STATUTES.</strong></td>
<td>60</td>
</tr>
<tr>
<td>A. Analogous to silence of defendant—Situation twenty years ago—Duty of public officers—Slochower decision—Silence as evidence—Non-criminal proceedings—Effect of Rogers decision.</td>
<td></td>
</tr>
<tr>
<td>B. Adequacy of immunity statutes—History—Intent of Founding Fathers—Leading cases—Double jeopardy—Changes.</td>
<td></td>
</tr>
<tr>
<td><strong>VI. CONCLUSION.</strong></td>
<td>82</td>
</tr>
<tr>
<td><strong>BIBLIOGRAPHY.</strong></td>
<td>86</td>
</tr>
</tbody>
</table>
CHAPTER I

INTRODUCTION

Controversy over the Fifth Amendment has reached a crescendo in our time. Its manifest abuse by "Fifth Amendment Communists," as well as by some of the ranking figures of our national labor unions, and professional racketeers, causes every thinking American to pause and ponder these few words from the Bill of Rights of our Constitution: NO PERSON...SHALL BE COMPelled IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF.

Attention, then, is directed to the Fifth Amendment these days because of its use, or abuse, in Congressional investigations. It is not the purpose of this paper to question the right of congressional committees to conduct investigations. That right is well established. The question is, rather, whether it shall be brought to naught by the impregnable shelter of the Fifth Amendment?

Many, in conjunction with Time and Commonweal, say "yes" feeling that it is better that nine guilty go free than that one innocent be harmed through repeal of the privilege. Others, such as Richard Baker writing in the American Bar Journal, assert that the privilege against self-incrimination is an anachronism, born of a distant age and of prosecuting practices which no longer prevail. A third group, led by Judge Samuel Hofstadter of New York, would suspend the privilege in certain areas and substitute a guarantee of immunity from prosecution for any crime the witness may reveal in the course of the inter-
rognation. The last and most devoted group would not only retain the privilege, but insist that we draw no inference of guilt from its invocation. These last have as their eloquent spokesman the Dean of the Harvard Law School, Ernest Griswold, whose little book, The Fifth Amendment Today, has had an enormous influence not only on the lay public but on recent legal decisions.¹ This rather superficial volume has been devastatingly answered by Sidney Hook. However, neither author calls into question the need for such an Amendment nor its raison d'être, but generally confines his attention to the inferences of guilt that we may or may not draw from the plea of the Fifth Amendment.

The intellectual confusion surrounding this Amendment is further complicated by unblushing political bias. About thirty years ago liberal opinion in our nation welcomed congressional investigation of crime, monopoly, and graft, while deploring the occasional resort to the Fifth Amendment by some of the leading witnesses. Today, liberal thought takes a dim view of congressional investigations, especially of Communism, and so far from condemning those who plead the Fifth Amendment, they regard them instead as champions of civil liberties who have taken their stand on the basis of principle, or who have nobly disdained to inform on friends.

"What think ye of the Fifth Amendment?" has thus become one of the burning questions of the day. Now one will think more or less of the Amendment depending on whether or not it is a natural right of man. Analysis of natural law, natural rights, man and the State should yield the answer, revealing the privilege as a fundamental right or a merely rescindable rule of procedure.

¹ Sidney Hook, Common Sense and the Fifth Amendment (New York, 1957), 13.
Another approach, and the one which I have adopted, is to search the cases, commentaries, and legal literature for arguments which would indicate whether or not the right is natural.

The final question we will consider is also warmly disputed—whether invocation of the Amendment creates an inference sufficient to warrant discharge from key positions, and other civil penalties. In other words, was the Fifth Amendment intended not only to protect the individual from producing evidence of his own perfidy, but also to leave his reputation in the same pristine state after his invocation as before?

We will now take up the analysis of these three issues, that by weighing the evidence carefully, we may reach true and reasonable conclusions.
CHAPTER II

HISTORY OF THE FIFTH AMENDMENT

Whenever in the course of this thesis I shall refer to the Fifth Amendment I shall always intend that single clause which states that no person shall be compelled to be a witness against himself. This formula had its historical origins in English ecclesiastical and common law. The development, according to Wigmore, was along two distinct and parallel lines, "the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the 'ex officio' oath of the ecclesiastical courts; the second is the history of the opposition to the criminating question in the common-law courts, i.e., of the present privilege in its modern shape."

Prior to the time of William the Conqueror, bishops sat as judges in the popular courts. William put an end to this by requiring bishops to decide just those cases which came under ecclesiastical law. Thus sprang up a separate system and a double judicature, the ecclesiastical and the civil courts. Up to this time the compurgation system was still in full force in the popular and royal courts. Thus a defendant could clear himself by swearing to his own

2 Ibid. 280.
innocence and by bringing in a couple of oath helpers to do likewise. It is interesting to note that the new ecclesiastical courts were the first to do away with this practice. The oaths of Otho and Boniface in the years 1236 and 1272 respectively, were a distinct innovation and pledged the accused to answer truly. This was followed by an interrogation of the defendant concerning the essential details of the affair. The old compurgation oath consisted merely in daring and succeeding to pronounce a formula of innocence which operated of itself as a decision. The new oath, however, furnished material for the judge to reach his own personal conviction and decision.

As the years passed, the oaths of Otho and Boniface were so interpreted that the defendant could not be made the subject of a fishing expedition, but could only be interrogated if there were some sort of presentment, or witnesses, or bad repute. This was expressed in the Latin formula: "Licet nemo tenetur se ipsum prodere, tamen proditus per famam tenetur se ipsum ostendere utrum possit suam innocentiam ostendere et se ipsum purgare." While no one is required to betray himself, nevertheless one reputed to be guilty can be required to present himself and vindicate his innocence if he can. This dictum according to the historian Hallam had its origin in English common law. But like so many bulwarks

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3 Jusjurandum calumniæ in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiatur et causae celerius terminentur, statuimus præstari de cetero in regno Angliae secundum canonicas et legitimas sanctiones, obtenta consuetudine in contrarium non obstante. As quoted by Wigmore, 278. Author’s translation: We ordain and establish that henceforth in the Kingdom of England, in all cases civil or ecclesiastic, an oath to tell the truth shall be exacted under pain of canonical and legal penalty, in order that the truth may be more easily discovered and causes more quickly terminated, any practice to the contrary notwithstanding.

4 Wigmore, 281.
of human freedom, this bastion, too, began to decay. In the anxiety of fifteenth and sixteenth century England over the influx of heresy, judges came to demand less and less in the way of presentment or bad repute, and to subject any suspected person to interrogation under the oath to tell the truth.

The first man to challenge successfully this right to the ecclesiastical courts to examine a suspect "ex officio mere" was John Lilburn in 1637. Lilburn was suspected of importing and purveying heretical and seditious literature. When put on his oath to answer the questions of the court, he refused, and eventually his refusal was sustained. We must carefully note, however, that Lilburn's protest was against interrogation in the absence of a formal accusation, not against interrogation as such. In his trial he clearly states that he is perfectly willing to answer all questions properly placed, but that the present investigation was unlawful since he was never formally charged with any crime. Lilburn had never claimed the right to refuse absolutely to answer a criminating question; he had merely demanded a proper proceeding of presentment or accusation. But now this once vital distinction comes to be ignored.

Around 1650 defendants began to claim flatly that no man is bound to incriminate himself on any charge (no matter how properly instituted), or in any court (not merely in ecclesiastical or Star Chamber tribunals). Judges began to concede the claim and by the end of the seventeenth century the right was established and extended to include an ordinary witness as well as the party charged. But the privilege was a matter of judicial decision only. It was not included in

Lilburn's Trial, Howell State Trials, III, 1315 (1637).
either the English Bill of Rights or the Petition of Right, and of course had not even been thought of until long after Magna Carta. Or as Professor Wigmore puts it: "Whatever it was worth to the American Constitution-makers of 1789, it was not worth mentioning to the English Constitution-makers of 1689."\(^7\)

In equity courts the privilege was also becoming a fixture. In 1737 Lord Hardwicke in denying discovery in an action for rents and profits said that "there is no rule more established in equity than that a person shall not be obliged to discover what will subject him to a penalty or anything in the nature of a penalty."\(^8\) It seems fair to conclude that by the middle of the eighteenth century they were giving full recognition to the privilege in equity. The scarcity or non-existence of reported cases in which the privilege was applied in civil actions at common law may be explained by the fact that from the early 1600's to the middle of the nineteenth century parties were disqualified witnesses and so, at least after the middle of the 1600's, were interested parties.\(^9\)

Following the Revolution of 1688, as we have seen, English criminal procedure underwent a marked alteration, and the questioning of accused defendants soon ceased entirely. But while this change undoubtedly testifies to the growing influence of the maxim against self-incrimination, the manner in which it was effected was by extension from civil to criminal cases of the rule that a party is not a competent witness on account of interest. "The result was that

\(^7\)Ibid. 301.


\(^9\)Ibid.
henceforth the mouth of an accused, and his wife's as well, was closed whether for or against himself; and it is in this form that the immunity of accused persons passed to the American colonies, balanced, that is, by the corresponding disability. Not until 1878, following a similar reform in several of the states, was the right to testify in their own behalf, under oath, accorded defendants in the national courts.\footnote{Edward S. Corwin, "The Supreme Court Construction of the Self-Incrimination Clause," \textit{Michigan Law Review} XXXIX (November, 1930), 10.}

Since interrogation of the accused was not undertaken in the colonies after 1700, it was not one of the abuses which led to the American Revolution. As it was the correction of those abuses which was the primary purpose of the revolutionists, they were not gravely concerned with the privilege. It is not, for instance, mentioned in the Declaration of Independence, which lists twenty-nine grievances against the British Crown. Neither the Declaration of Rights by the Stamp Act Congress of 1765 nor that of the Continental Congress of 1776 included the privilege in their enumerations of fundamental rights. The section of the Northwest Ordinance corresponding to the Fifth Amendment omits the privilege.

The framers of eight of the original state constitutions and the creators of the Federal Constitution found no place for the privilege in their respective instruments. While Thomas Jefferson and Richard Henry Lee protested vigorously against the omission from the Constitution of freedom of religion, freedom of the press, the habeas corpus guarantee, trial by jury, etc., they were silent as the grave about the exclusion of the self-incrimination privilege.\footnote{The People Shall Judge, Staff of Soc. Sc. Dept., Univ. of Chi. (Chicago, 1950), I, 326.}
With this background it may seem a little singular that the privilege was incorporated into the American Bill of Rights at all. One view attributed the inclusion to French influence and points out that the subject was actively agitated there during the revolutionary period. Representatives to the National Assembly (Estates General) from every Department in France were instructed to insist upon a provision against self-incrimination. Other scholars feel that the stream of influence was toward France from America at that time. Perhaps we can conclude with Mr. Williams of the New York Bar that "an intermediate view seems equally tenable—the exchange of libertarian ideas between the United States and France in the decade of the 1730's."12

Whatever the flow of influence, the privilege against self-incrimination found its way into our Federal Bill of Rights drawn up in 1791. The first case under the Fifth Amendment did not arise until 1885, almost one hundred years later. Why the delay? Before answering this question we must answer that more fundamental question why the framers incorporated the Amendment at all since defendants had not testified at criminal trials for almost one hundred years (since 1700).

The answer is simple. In the early state constitutions, as in the Fifth Amendment, immunity from self-incrimination is listed merely as one of a whole parcel of privileges which were in the main of interest to accused persons and to no others. That is to say, the problem being dealt with was the improvement of the lot of accused persons, a concentration of interest which was due to the tradition of the harshness of the common law in this respect and to the terrible

severity of the English penal code in the eighteenth century. At the same time since the constitutional provisions mentioned above did not overrule the common law in excluding an accused from the witness stand, their stipulation for his immunity taken by itself became pointless. If only, therefore, to save the framers of these provisions from the charge of having loaded them with a meaningless tautology, their language had to be given other than its literal significance, and the common law was at hand to supply this in rich measure. 13

Now the common law had already established by 1789 that the privilege protected witnesses as well as defendants; that it protected the incriminating papers of the defendant; that it protected the defendant and witnesses in civil proceedings from revealing matter which would subject them to criminal prosecution. For almost one hundred years then, until 1885, the criminal courts interpreted the Fifth Amendment in the light of common law. No appeal was ever made because the decisions of the common law were too well established. However in Boyd v. United States a specific provision of an act of Congress was involved, with the result that recourse against it to the common law unsupported by the Constitution would have been futile, for unsupported common law must yield to statutory law. 14

In the Boyd case the Supreme Court held that seizure or compulsory production of a man's private papers for use as evidence against him is equivalent to compelling him to be a witness against himself and therefore within the pro-

13 Both Boyd v. United States, and Counselman v. Hitchcock, infra, are replete with invocations of the common law.

hibition of the Fifth Amendment. Six years later, in Counselman v. Hitchcock, the same court held that the privilege extends to a witness called to testify before a grand jury investigating violations of the Interstate Commerce Law, and was not limited to cases of criminal prosecution against the witness himself. In that case the Court established the rule that the object of the Fifth Amendment was to "ensure that a person should not be compelled, when acting as a witness in any investigation to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters but is as broad as the mischief against which it seeks to guard." 15

In McCarthy v. Arndstein the privilege was further enlarged to embrace civil proceedings. Citing the Counselman case, the Supreme Court in 1926 held that "the privilege is not ordinarily dependent upon the nature of the proceedings, but rather may be invoked whenever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." 16

There remained one final question—whether the privilege could be stretched to embrace hearings in congressional investigations. An affirmative answer was given in 1955 in the three cases of Quinn v. United States, Emspak v. United States, and Bart v. United States. 17 Thus we see that a witness in any proceeding whatsoever in which testimony is legally required may refuse to answer any question when his answer might be used against him in a future legal

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15 112 US 517 (1890).
16 266 US 34 (1926).
criminal proceeding, or which might uncover further evidence against him.

To claim the privilege it is not necessary that your answer of itself would support a conviction, for it is sufficient that "answers to the questions asked . . . would have furnished a link in the chain of evidence needed in a prosecution of petitioned . . . ." The court here reasons, and I think rightly so, that a man convicts himself as effectively by revealing the missing piece, as by disclosing the entire puzzle of his crime.

The witness or defendant must explicitly claim (though in no fixed formula his constitutional immunity or he will be considered to have waived it; but he is not the final judge of the soundness of his claim. The process for determining the validity of the witness' claim was neatly summed up by Chief Justice John Marshall:

When a question is propounded it belongs to the court to consider whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate him, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgement because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judge would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, that if the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath, as it is one of these cases in which the rule of law must be abandoned, or the oath of the witness be received.19

The courts have further held that the privilege exists solely for the pro-

tection of the witness himself, and may not be claimed for the benefit of third parties. For the privilege is a strictly personal one and witness has no right to refuse to incriminate others. Indeed, if the witness knows that his associates have committed a serious crime, the refusal to disclose that fact makes the witness himself guilty of the crime of misprision of felony. The common sentiments of the American people place a high regard upon personal loyalty; the role of informer is a repugnant one. Loyalty to one's fellows is more immediate and consequently more compelling than the remote and generalized loyalty due to society as a whole. But regardless of these considerations of private morality and personal predilections, the government demands from its citizens their full cooperation in supplying information relevant to the proper concerns of government. It may even be necessary to testify against mother and father and immediate family which is perhaps harder than testifying against oneself, but the privilege does not protect them.

As we shall see later on, one of the objections against immunity statutes is that they fail to shield the witness from disgrace and the consequent loss of reputation and standing in the community. But as a matter of fact American Courts have always denied a witness the privilege of refusing to testify to a material issue when his only claim has been that his answer would result in disgrace. The principal case on the question of disgrace, Brown v. Walker, fortifies Wigmore's contention that there is a vast difference between privilege against disgrace and privilege against self-incrimination. In the instant

21161 US 591 (1893).
case, the witness was not subject to prosecution, and only the possibility of disgrace remained. Her testimony was material to the issue. The court reaffirmed the principle that a person can keep silent only when, by speaking, criminal action against the witness can result. "Where the effect of the question would be only to unvel the witness' past indiscretions, the court will not permit the witness' pride or reputation to block the administration of justice." 22

Possibly the best discussion against disgrace is by Mr. Justice Field in his dissent to Brown v. Walker, where he states that the intent of the framers of the Constitution was not alone to protect a witness against self-incrimination, but at the same time to save him "in all cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him such measure of self-respect." 23

The broadest privilege, that of refusing to answer a question on the grounds of disgrace even though the question is relative to the principal issues of the case, was allowed in one federal trial, that of United States v. James, cited by Justice Field in his dissenting opinion. 24 This view has found little if any acceptance elsewhere. The majority and best view supports the privilege against disgrace only where material issues or the veracity of the witnesses are not in question. 25

22 Ibid.
23 Ibid.
24 United States v. James, 60 Fed. 257 (1894).
The benefit of the Fifth Amendment was considerably restricted when the courts held that the clause does not protect the claimant if prosecution is barred by lapse of time, by statutory enactment, or by a pardon. Nor can the federal privilege be claimed by a witness in order to avoid incrimination and prosecution under a state law. This holding is based on the English rule that does not protect a witness against disclosing offenses in violation of the laws of another country. Our Supreme Court thus concluded that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving testimony on the ground that it will incriminate him.

Conversely, in state courts it is held that a witness must testify under an immunity statute even though he will thereby be exposed to federal prosecution. This interpretation was not introduced without a vigorous dissent from Justice Black who observed that "never since the Bill of Rights was adopted, until today, has this court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now."\

The holding of the Greenleaf case was qualified to some extent in Appliance—

29 In re Greenleaf, 28 NYS2d 28 (1941).
tion of Herlands, where a witness refused to answer certain questions on the
grounds of possible incrimination under the laws of New Jersey or of the Federal
Government, even though a statute granted him complete freedom from prosecution
in New York State in regard to any of the matters about which he might testify.
The court stated that his contention that he was not protected under the sta-
tute from possible prosecution in another jurisdiction was absolutely true, but
went on to say that a state is only required to protect the witness from prose-
cution in its own courts. However, if a witness could prove that the danger of
prosecution in another jurisdiction was real and substantial and the court was
satisfied of that fact from the evidence, then "it is the duty of the court,
under such circumstances, to protect the witness from any disclosure which
might expose him to prosecution in the foreign jurisdiction."\textsuperscript{32}

It should be noted that the federal rule is followed in the majority of
jurisdictions, wherein the courts take the view that possibility of incrimina-
tion under the laws of another state, or under federal laws, is not a basis for
the assertion of the privilege.\textsuperscript{33} However in all probability, considering the
nature of the present Supreme Court, this position will soon be liberalized.
We can expect a judicial declaration that congressional immunity statutes are
binding in both federal and state jurisdiction upon the theory that, as an act
of Congress, such statutes become the supreme law of the land, preventing state
as well as federal prosecution.

\footnotesize{\textsuperscript{31}121 NYS2d 402 (1953).}
\footnotesize{\textsuperscript{32}Ibid.}
\footnotesize{\textsuperscript{33}Cf. 53 Am Jur 53.}
If an accused takes the stand of his own initiative, then he must submit to cross-examination.\textsuperscript{34} If he fails to testify, unfavorable presumptions and inferences are not to be drawn other than such as may be drawn from his failure to explain incriminating facts that lie within his own peculiar knowledge, and neither the judge nor the prosecuting attorney may comment upon the failure of the accused to take the stand and testify.\textsuperscript{35} Indeed the judge should charge the jury that the failure of the accused to testify does not create any presumption against him and is not to be used by the jury to his prejudice.\textsuperscript{36}

The Fifth Amendment is of course a limitation on the federal power only, and has no application to proceedings under the authority of the state.\textsuperscript{37} This because the privilege against self-incrimination is not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden to abridge by the Fourteenth Amendment.\textsuperscript{38}

Before concluding this chapter I would like to summarize briefly this historical survey which we have made. No principle of the common law is more firmly established than that which affords to a witness the privilege of refusing to answer any question that will incriminate him. It may be invoked by

\begin{itemize}
  \item \textsuperscript{34}\text{Brown v. Walker.}
  \item \textsuperscript{35}\text{Cf. 53 Am Jur 31, 375.}
  \item \textsuperscript{36}28 U.S.C.A. 632.
  \item \textsuperscript{37}\text{Snyder v. Mass., 291 US 97, 90 ALR 575 (1933).}
  \item \textsuperscript{38}\text{Twining v. New Jersey, 211 US 73 (1908). Compare State v. Height, 117 Iowa 650, 91 NW 935, 59 LRA 437, holding that the exemption is required by due process of law. See also 58 Am Jur 44.}
\end{itemize}
the defendant or witness in any criminal proceeding or civil trial where the
answer to a question would yield evidence of a crime. The privilege is strictly
personal, for the protection of individuals and not corporations, nor for the
benefit of third parties. In considering a witness' claim of privilege against
self-incrimination, the federal courts will not take notice of the criminal laws
of another state or sovereignty. It is the rule in many jurisdictions that the
defendant's failure to testify in his own behalf cannot be taken as a circum-
stance indicating his guilt, nor can the prosecuting attorney comment upon it.
The privilege fails and the witness must testify where prosecution is barred by
lapse of time, pardon, grant of immunity, etc. Finally, the due process clause
of the Fourteenth Amendment does not include the right not to incriminate one-
self, and so the amendment is not binding upon the states. However most states
have adopted similar provisions in their own constitutions.
CHAPTER III

IS THE FIFTH AMENDMENT A NATURAL RIGHT OF MAN

It would be well to preface this chapter with a brief consideration of natural law and natural right according to the philosophia perennis.

The idea of natural law is a heritage of Christian and classical thought. It goes back beyond the philosophy of the eighteenth century to Suarez, Thomas Aquinas, Augustine, Cicero and the Stoics, and to the great moralists of antiquity: Aristotle, Plato, and Sophocles. "Antigone is the eternal heroine of natural law, which the ancients called the unwritten law, and this is the name most befitting it."¹

Man is possessed of a human nature. He is also gifted with intelligence by which he acts with an understanding of what he is doing. Thus he has the power to determine for himself the ends which he will pursue. However since man has a nature, and thus is fashioned in a certain determined way, he has certain determined ends which correspond with this nature.

This means that there is by very virtue of human nature "an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or natural law, is nothing more than that."²

Natural law, then, is the participation of a rational creature in the

²Ibid., 61.
eternal law of God, and by means of which he is directed toward his final end.

Or in the beautiful figure of St. Augustine, the eternal law is the seal, and the natural law is its impression in the rational nature of man, which in turn is an image of God. Thus at birth the natural law is in man only virtually.

By examining the nature of things with the light of his reason, man formulates the natural law in a code of moral principles. The general principles of this code cannot be invincibly unknown by normal mature persons, though its remote conclusions can be so unknown. The first moral principle—do good and avoid evil—is known to all.

"There are other common or general principles based on the first moral principle, following from it with immediate inference, or with mediate inference so simple and easy that no normal mature person can fail to make it." 3

To people of normal intelligence these common principles, such as the ten commandments, cannot be invincibly unknown.

Then there are the remote conclusions, sometimes called tertiary precepts, derived by a complicated reasoning process and enunciated in positive law. These can remain invincibly unknown even to intelligent people. There is room here for error as there is in any science, just as there is also room for the expansion and development which comes with centuries of study and application.

"The idea of natural law, at first immersed in rites and mythology, differentiated itself only slowly, as slowly even as the idea of nature." 4

Now the idea of natural law implies the existence of such things as rights

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3 Austin Fagothey, S.J., Right and Reason (St. Louis, 1953), 159.

4 Maritain, 64.
and duties, for a large part of the natural law deals with the relations of justice between men. And a natural right is one which man should enjoy if he is to fulfill the obligation of achieving his final end, imposed upon him by the natural law. The same natural law which lays down our most fundamental duties is the very law which assigns to us our fundamental rights.

The question then is to determine whether the Fifth Amendment is such a vital component of the juridical order that, without, man would find serious difficulty in achieving his end.

In the previous chapter we completed a survey of the judicial development of a single clause of one amendment to the Constitution, which states that: "No person... shall be compelled in any criminal case to be a witness against himself." There are several observations that we can draw from this survey which will be of assistance in solving the question whether the Fifth Amendment is a natural right of man.

Certainly the Supreme Court has failed to follow a consistent policy with regard to the privilege. The efforts at first were in the direction of a liberal construction, as evidenced by the extension of the privilege from the defendant alone to witnesses, and from criminal cases alone to any proceeding whatsoever where the answer might subject the claimant to criminal prosecution.

An attempt to restrict rather than expand the privilege was later seen in rulings which permitted compulsory exhibition of the defendant's body, the wearing of certain clothing for the purpose of identification, medical examinations and foot and finger printing.® In holding that the possibility of prose-

cation in another jurisdiction does not give rise to the privilege, the courts have added a further limitation.

The effort today is once again in the direction of liberal construction. Chief Justice Warren recently indicated in the Watkins case the extremes to which the Supreme Court is prepared to go. The witness Watkins cooperated fully with the congressional investigating committee on all questions related to his own association with the Communist Party. However when questioned about the possible communist affiliations of his friends, Watkins simply refused to answer. He was convicted and sentenced for contempt. On appeal to the Supreme Court, the Fifth Amendment privilege was not raised by either party as an issue in the case, for Watkins had not claimed the privilege when questioned by the committee. But just as if it were an issue, Chief Justice Warren let it be known in his majority opinion that "any challenge to Watkins' right to invoke that privilege could not have prevailed before the Supreme Court." Here for the first time the Court indicates that the witness can claim the privilege in order to shield another, whereas the settled law has always been that the privilege is personal and no one can invoke the constitutional rights of another. Saint Thomas would also take issue with the dictum of the Watkins case for he declared that: "It is contrary to fidelity to make known secrets to the injury of a person; but not if they be revealed for the good of the community, which should always be preferred to a private good."

61 L.Ed.2d 1273 (1957).
7Ibid.
8S.T., II-II, 63, 1 ad 3.
Any effort to discover the rationale of the privilege is further hindered by such decisions as those which restrict the Fifth Amendment to defendants or witnesses in a federal jurisdiction, and not to any citizen in any jurisdiction, or those decisions which exact testimony (in exchange for immunity) in a federal court and permit the same testimony to be used later to convict the claimant in a state court; or those which honor the privilege where there is danger of prosecution but insist upon disclosure of the crime where threat of prosecution is non-existent because of pardon, immunity, etc.

So as we trace the development of the doctrine on the Fifth Amendment we find that no rationale clearly asserts itself throughout as the raison d'être of this curious privilege. Does it exist to protect a citizen from the revolting situation of condemning himself? No, because that is precisely what he does when his immunized testimony in the federal court is introduced into the state courts, and as one dissenting judge observed, it is small comfort to the witness that his abode for perhaps the next twenty years will be a state, and not a federal, penitentiary. Perhaps it exists to protect the witness' right to silence, to privacy, or to a good reputation? If so, these rights have been shamefully abused by immunity statutes and the like.

One conclusion we can reach from this survey of the leading decisions on the Fifth Amendment is that the courts have not considered the privilege as one of the fundamental, and therefore natural, rights of man. To confirm this judgement let us study the cases themselves and their commentaries.

To be sure, there have been jurists who wrote of the privilege in terms of a natural right. In the trial of John Lilburn the court said that "this oath is against the very law of nature for nature is always a preserver of itself, not a destroyer. But if a man takes this wicked oath, he destroys and undoes
himself, as daily experience doth witness." This is certainly strong language in favor of a natural right interpretation, but for good or ill, it was never adopted by our own courts.

The closest that an American jurist has come to such a clear enunciation of the privilege as a natural right is the dissenting opinion of Mr. Justice Field when he said: "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. It is plain to every person who gives the subject a moment's thought. A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement." Mr. Justice Field finds that there are two grounds for the rule against self-incrimination, one of policy and one of humanity. That of policy forbids placing the witness in a position where he would be under a strong temptation to commit perjury; that of humanity forestalls any effort to obtain a confession by duress, "every species and description of which the law abhors."

However Mr. Justice Field was unable to persuade the majority of his court or to influence the course of subsequent decisions. The one case above all others which indicates beyond dispute that our Supreme Court does not consider the privilege as a basic right of the American citizen is that of Twining v. New Jersey, decided in 1908 and never overruled. Since it is such an impor-

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9 Howell, State Trials, III, 1315 (1637); see also Bram v. United States, 168 US 532.
11 Ibid.
tant and far-reaching decision, we can afford to consider it carefully.

The defendant Twining, a director of a trust company, was indicted by the grand jury for having knowingly exhibited a false paper to the bank examiner with intent to deceive him as to the condition of the company. At the trial the jury was instructed by the court that they might draw an unfavorable inference against one of the defendants for his failure to testify in denial of the evidence which tended to incriminate him. The law of the State of New Jersey permitted such an inference to be drawn. The defendant was convicted and appealed to the Supreme Court where it was argued that the New Jersey statute permitting an adverse inference from the defendant's silence destroyed the privilege against self-incrimination. Therefore the question before the Court was whether such a statute did or did not violate the Fourteenth Amendment of the Constitution, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their lives, liberty, or property without due process of law. 13

The court's decision in this case was rendered by Mr. Justice Moody who argued that it is manifest from a review "of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land, or Magna Carta, or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process.

13 Amendment XIV: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.
It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. 14

After establishing the fact that the privilege originated as a rule of evidence, Mr. Justice Moody goes on to explore the question whether the privilege is of such a nature that it must be included in the very concept of justice. He asks if the privilege is a fundamental principle of liberty and justice which inheres in the very idea of a free government? His answer is that none of the great instruments which we are accustomed to consult for the enunciation of the fundamental rights of man made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta and "has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law." 15

From this Mr. Justice Moody concludes that the privilege does not fall within the historical meaning of due process of law, and asserts that it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. "Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. . . . It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above

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14 Twining v. New Jersey, 211 US 78.
15 Ibid.
and before constitutions themselves. 16

As a final blow the Court adds: "There seems no reason whatever for strain-
ing the meaning of due process of law to include this privilege because,
perhaps, we may think it of great value. The privilege being only a useful
rule of law and not a 'fundamental principle of liberty or justice' it can be
abolished by a state at will and without infringement of the Federal Constitu-
tion." 17

What the Court has here held is that the privilege against self-incrimina-
tion is not among the fundamental rights, privileges or immunities which the
Fourteenth Amendment guarantees to every citizen of the United States. Thus
the Court holds that this clause of the Fifth Amendment is a restriction of
Federal sovereignty only, and is in no way binding upon the states.

This reasoning was confirmed in the oft-quoted obiter dicta of Mr. Justice
Cardozo in Palko v. Connecticut. There he observed that: "The right to trial
by jury and the immunity from prosecution except as the result of an indictment
may have value and importance. Even so, they are not of the very essence of a
scheme of ordered liberty. To abolish them is not to violate a 'principle of
justice so rooted in the traditions and conscience of our people as to be
ranked as fundamental.' Few would be so narrow or provincial as to maintain
that a fair and enlightened system of justice would be impossible without them.
What is true of jury trial and indictments is true also, as the cases show, of
the immunity from self-incrimination. This too might be lost, and justice still

16 Ibid.
17 Ibid.
Justice Cardozo is one of the most respected justices to sit upon the Supreme Court. Yet it is his belief that the Fifth Amendment is not a natural right but a privilege, and furthermore, a privilege that could be abrogated. And if it were abolished, "no doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry." Such prominent jurists as Hughes, Brandeis, and Stone concurred in this opinion, as did Roberts and Black.

I believe another proof that the courts have not considered the privilege a natural right is the fact that it has been consistently held that defendants in a court-martial have no right to the privilege, despite the fact that they are citizens in the service of their country. Were it a natural right it could hardly be denied them.

Some writers would like to base the privilege against self-incrimination upon a man's natural right to silence, or to privacy, or to his good reputation. However this form of reasoning has not held up in the courtroom, and these rights have not been honored at the bar. For example in United States v. Thomas, the court declared that the rule that a witness cannot be compelled to give self-incriminating testimony has no application where prosecution would be barred by a statute of limitations, pardon, or grant of immunity.

The rights to silence, privacy and good reputation fared badly there as they did also in United States v. Orman where the court held that a witness before a congressional committee must rely, for protection against an undue invasion of his privacy, upon the requirement that the question be pertinent to the matter under inquiry by the committee, and if the question is pertinent, refusal to answer cannot ordinarily be justified on the ground that it is an invasion of privacy or that it may tend to disgrace the witness or otherwise render him infamous.\(^{21}\) The court reasoned that "the right to free speech is not absolute but must yield to national interests justifiably thought to be of larger importance. The same is true of the right to remain silent. When legislating to avert what it believes to be a threat of substantive evil to national welfare, Congress may abridge either freedom."\(^ {22}\)

In reaching this decision the court had no less authority than the United States Code which states: "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."\(^ {23}\)

The Orman case quoted above and the Federal Code are not so much a denial of the right to privacy as a statement that "when private affairs come into

\(^{21}\) 207 F.2d. 148 (1953).
\(^{22}\) ibid.
conflict with the public interest, the latter, and not the former, must prevail. But there are cases, a minority to be sure, which have reached the opposite conclusion. In United States v. Craig the court held that a witness is not bound to answer a question which may render him infamous, or may disgrace him. Justice Jackson, dissenting in Harris v. United States and speaking of the Fourth Amendment, said: "Of course this, like each of our constitutional guaranties, may often afford shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers, and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set at naught their command." The fact remains that the rights to privacy, silence and reputation have had short shrift at the hands of the courts. We have already seen that efforts to found the privilege upon the Fourteenth Amendment were struck down in Twining v. New Jersey. As we also saw, the courts had early and consistently held that, unlike the Fourteenth Amendment, the Federal Bill of Rights was a limitation upon the Federal Government only and not upon the states. Therefore the defense in the Twining case tried to include the Fifth Amendment among the privileges guaranteed to all citizens by the Fourteenth Amendment. This approach failed, but another, to my knowledge as yet untried, which might yield

26 331 US 145 (1946).
better results would be to base the refusal to testify upon the First Amendment guarantee of freedom of speech and of the press. The rule has become firmly established in the Supreme Court decisions that the rights of freedom of speech and of the press are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. 27 In Schaefer v. United States it was held that freedom of speech and freedom of the press are such intimate elements of liberty that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law. 28 It has even been held by one court that these rights cannot be lawfully surrendered to another by a citizen, and cannot lawfully be infringed, even momentarily, by individuals any more than by the State itself.

Having thus applied the First Amendment to all citizens by virtue of the Fourteenth Amendment, it could then be argued that the liberty to speak or write includes the corresponding right to be silent or to speak only when one may freely speak, and that such rights partake of the same inviolability as freedom of speech, and are insured under the same constitutional provisions. 30 "It would seem that the liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to freely speak." 31

This suggested argument holds then that the First Amendment, unlike the

28 251 US 666 (1919).
30 Cf. 11 Am Jur 1109-10.
Fifth Amendment, is a limitation upon the sovereignty of the states, as well as upon that of the Federal Government, for the Fourteenth Amendment has been held to include the First Amendment. It is then proposed that since the right to silence is inseparable from the right to speak, it, too, is part of the First Amendment and therefore among those rights guaranteed to all citizens by the Fourteenth Amendment. If this line of reasoning would prevail with the Supreme Court, it would have the effect of lending vast dignity to a privilege that has hitherto been regarded as merely a rule of evidence of dubious worth, and would make it available to every citizen in whatever jurisdiction.

But whatever course the court may take at some future date, certainly up to the present time it has not regarded the privilege as a natural right. Of course the opinion of the court, however instructive, is not necessarily correct. It may well be that the privilege is in fact a natural right, and so we would do well to weigh some of the scholastic views on the matter.

Most of the scholastic authors are inclined to base the privilege on the right to silence, and of these only one, the Italian jurist, Filangièri, clearly describes it as a natural right. Several use language which, I believe, can be so interpreted.

Father John R. Connery, S.J., Professor of Moral Theology at West Baden College, has recently traced the development of thought on this point by the leading moralists since St. Thomas Aquinas. Father Connery finds that moralists have always agreed that no one was bound to confess a completely hidden or occult crime. This right found expression in the common law of England with

the trial of John Lilburn, where it was held that no one could be interrogated except by indictment, and that one could not be indicted unless there were already some evidence abroad indicating guilt. Thus the crime was not a hidden one. Once legitimately introduced into the courtroom the defendant must answer truthfully a legitimate question put to him by one in authority. But what constitutes a legitimate question has been the subject of dispute over the centuries and the opinion favoring restriction of the question area has found increasing favor.

By the end of the sixteenth century it was considered a solidly probable opinion that at least where the death sentence awaited the defendant, he would not be obliged to give a direct answer to a judge who questioned him about his guilt. Several arguments were used to support this opinion, and the language employed indicates that this objectionable investigation is against nature itself: "The main argument seemed to be that a law should be humanly possible and accommodated to human weakness; otherwise, it is a useless law and serves only to burden consciences. These moralists go on to say that we cannot expect a man who knows that he would not otherwise be condemned to provide the testimony necessary for his conviction. Moral theologians also argued that no one should be obliged to cooperate in his own punishment. Going back to St. Thomas, they found that working on this principle he allowed a criminal to evade a court summons. He also allowed a condemned criminal to escape from jail if he could do so without violence. These theologians saw no reason why the same

33 Howell, State Trials, III, 1315 (1637).
principle could not be applied to a direct question regarding guilt."

The above reasoning was even more strikingly phrased by the Italian, Filangieri, who clearly implies that the privilege is a natural right: "Nature, whose laws are more ancient than the obscure and violent ordinances of legislators; nature, which never contradicts itself in its dispositions, and which in creating the body and the mind of man, has created invariably laws which ought to direct him; nature, which manifests its laws only by its instinctive movements which draw all men toward good at every moment of their lives—this same nature closes the mouth of the guilty man when the judge questions him about the truth of the accusation brought against him."

For the defendant is faced with this dilemma: the admission of guilt will entail either the loss of life or at least a part of the good. "It therefore demands either an effort superior to the contrary natural impulse, or an illusion which sees in the loss of one of these two things the acquisition of a much more precious good. In the one case the legislator demands...what is morally impossible; in the second case, he accepts...the statement of an insane person, of a man who is in the same mental condition as a suicide, who cuts himself off from life with his own hands because he believes that through the loss of existence, he will find a source of happiness or reach the end of his woes." 

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34 Connery, 132-3.


36 Ibid. 119.
Thus Filangieri concludes that the law is obliged to attach no significance to the admissions of the accused, for a completely useless testimony is one which is known to be falsified by nature itself. New York State has recently followed the same course declaring that no man can be convicted on his own confession alone.\textsuperscript{37}

The right to silence was based by Filangieri upon the uselessness of the coerced testimony. Other writers base the right upon the inviolability of the personal secret. They argue that every individual possesses a private and wholly personal domain, and apart from definite cases provided by law, he has the right to reject any attempt to infringe upon it.

The uselessness argument of Filangieri considers only the case in which the defendant is questioned about his guilt, overlooking the much more common situation in which the accused is questioned on the material details which will serve as pointers, perhaps against himself, but which since they are essentially verifiable, will allow the judge to establish a conviction with greater precision. "It cannot, therefore, be repeated too often... that the confession of the accused is neither an element of conviction nor an element of proof which can be decisive in a criminal case... But real questioning of the accused is a different matter. Its object is to search for objective elements of information, and in this form it is both necessary and legitimate."\textsuperscript{38}

A current and celebrated murder is a case in point. Three years ago a Dr. Samuel Sheppard was tried and convicted of the murder of his wife. He

\textsuperscript{37}People v. Roach, 215 N.Y. 592; the same is true in Illinois: Bartley v. People, 358 Ill. 617; People v. Massev, 400 Ill. 265.

\textsuperscript{38}Flood, 120.
never ceased to protest his innocence. Three years later a young felon in Florida created a sensation by asserting that he was the murderer of Marilyn Sheppard. His mere confession, however, was worthless; it was his replies to detailed and essentially verifiable questions that betrayed his innocence or guilt: what type of weapon? How many blows? How did you dispose of the club and the bloody clothes?\textsuperscript{39}

The other basis often used to defend the right to silence, is the claim of a man to his secrets. This, too, we must reject because it does not prove enough; it does not prove why he is entitled to his secrets.

It is my own belief that the most cogent argument that can be made for the natural right theory is to be found in the conclusions that can be drawn from the traditional teaching on detraction and the right to one's good reputation.

Detraction is the injurious attack upon the reputation of another through the unjust revelation of his hidden crime or defect. It differs from calumny in that what is said is actually true. Detraction is always a sin, mortal or venial depending upon the gravity of the matter revealed. It is a sin because it weakens or destroys another's good reputation, without which he will find it unduly difficult, if not impossible, to obtain the end of his existence.

Not only is a third party precluded from revealing the hidden sins and crimes of another, but as far as the natural law is concerned, "moralists have had trouble even establishing the liceity of self-defamation."\textsuperscript{40} A fortiori

\textsuperscript{39}Chicago Tribune, July 20, 1957, 1.

\textsuperscript{40}John R. Connery, S.J., "Morality and the Fifth Amendment," The Catholic Lawyer, III, 142.
the miscreant has the right, if not the duty, to remain silent. That this is a natural right seems to follow from the function of a good reputation.

God created man to acquire a certain fixed end which he will achieve by leading his life according to the Divine Will as made known to him by reason and revelation. Thus he has a fundamental right to his life and whatever else is necessary to live that life according to its proper nature. And since man is a gregarious being, he has an inalienable right to whatever is required to live an ordinary social life. But a good reputation is an element at least morally necessary for such a life, and so man has a natural right to his good name, as well as the right to refrain from revealing whatever would weaken that good name.\(^1\)

This reasoning seems fairly defensible and certainly explains why detraction is wrong and why the malefactor has no duty to accuse himself of his crime. But will this defense hold against an investigation launched by the State? Does a criminal stand in the same relation to the State as an innocent man whose rights are unimpaired? If so how does this attitude of silence square with the traditional moral teaching that the defendant must respond to a legitimate question asked by one in authority? And how does it square with a recent allocation of Pius XII on the problem of punishment?\(^2\) This problem has its beginning at the moment when a man becomes a criminal and is a reaction, required by law and justice, to the crime. The violated social order must be restored and it is the task of law and justice to re-establish the proper harmonies.

\(^{1}\) J. J. Farraher, S. J., *Detractio et Jus in Fama* (Rome, 1952), 16

\(^{2}\) Pope Pius XII, "Discourse to the Catholic Jurists of Italy," *Catholic Documents*, XVII, April, 1955.
mony between duty and the law.

"Punishment properly so-called cannot, therefore, have any other meaning and purpose than . . . to bring back again into the order of duty the violator of the law who has withdrawn from it. This order of duty is necessarily an expression of the order of being, of the order of the true and the good, which alone has the right of existence, in opposition to error and evil, which stand for that which should not exist." 43

The error and evil of which Pope Pius is speaking here is the unpunished state of the criminal, a state which does not automatically cease when the act itself is completed. "He remains the man who has consciously and deliberately violated a law which binds him, and simultaneously he is involved in the penalty. This personal condition endures, both in his relation to the authority on which he depends, or better, the human authority of public law in so far as this has a share in the corresponding penal process, and at all times also, in his relation to the supreme divine authority. Thus there is brought about an enduring condition of guilt and punishment which indicates a definite state of the guilty party in the eyes of the authority offended, and of this authority with respect to the guilty party." 44

Our Holy Father concludes with the statement that "the culprit's own good, perhaps even more so that of the community, demands that the ailing member become sound again. . . . Deliverance from guilt must therefore reintegrate the

43 Ibid.
44 Ibid.
relations disturbed by the culpable act.\textsuperscript{45}

It seems clear from the foregoing that our Pontiff considers the unpunished state of the criminal as a blight upon the social order, that it has no right to its existence, and that the disrupted balance must be restored. The key words are: "The culprit's own good demands that the ailing member become sound again." If this is so, how can we speak of a criminal's right, his natural right to silence, or of the right to defend his obnoxious state even though counter to his own good and that of the community?

We can assume here that the Holy Father is not speaking of a completely hidden crime, but of one which the State has knowledge. For in a completely unknown crime, the State as such suffers no injury. There may also be room for that other distinction between capital punishment and incarceration for a period of years, thus saving the solidly probable opinion "that at least where the death sentence awaited the defendant he would not be obliged to give a direct answer to a judge who questioned him about his guilt."\textsuperscript{46} With these exceptions I think it is clear that the miscreant's right to his reputation is a limited one and yields to the higher right of the State to seek evidence which will assist it in the proper pursuit of its duty—the maintenance of justice and order.

Another argument that the privilege against self-incrimination is not a natural right is drawn from a rapid, and by no means exhaustive, review of other jurisdictions where the civilization and culture are as advanced as our

\textsuperscript{45}\textit{Ibid.}

\textsuperscript{46}Connery, "The Right to Silence," 132.
own. Were the privilege a natural right we would expect to find it at least among the more enlightened codes of criminal procedure. However the privilege "has never gained favor on the European continent, not even among those countries which pride themselves on their democratic and liberal proclivities. It has never been allowed to become a part of their jurisprudence or court procedures. To the peoples of those nations, the notion that the principal character in a criminal investigation should be permitted to remain entirely mute while the authorities expend an endless amount of time, money, and energy seeking the solution of a crime, an effort which frequently proves futile, seems highly illogical. 47 Yet despite the denial in these lands of this basic right, as we choose to call it, who will say that the systems of justice prevailing in France, Holland, Sweden, or West Germany are inferior to ours, or any less fair, just, or humane? 48

The Code Justinian is regarded as one of the greatest achievements in history, while the law it codified was and remains the glory of the Roman people. Yet according to Roman law a judge was allowed to put a direct question to a defendant regarding guilt whenever (1) he was under infamy for the crime, or (2) when there was clear evidence, or (3) when a semi-complete proof could

47 "It should be observed however, that while European procedure permits and stresses the judicial examination of the accused, he is under no legal compulsion to answer." Selected Writings on the Law of Evidence and Trial, ed. William T. Fryer (St. Paul, 1957), 270. See also Ploscowe, "The Development of Present-Day Criminal Procedures in Europe and America," Harvard Law Review, XLVIII, 433; Hogg, "French Criminal Procedure," Canada Bar Review, XXXIII (1945), 846.

be brought against the defendant. The privilege against self-incrimination is conspicuous by its absence from this and other codes.

With regard to Canon Law, the noted constitutionalist Edwin Corwin writes: "I am assured by Father Louis Motry of the Catholic University, who is a recognized authority in the field, that no text of canon law contains the words of the maxim and this assurance is confirmed by a careful examination of Gratia's Institutiones Canonicae; Pithou's Corpus Juris Canonici, and Canons Le Code de Droit Canonique. The Canon Law has always recognized the general principle that a man should not be required to accuse himself in the first instance, attenuated by the qualification that one accused by a sufficiently authenticated rumor could be legitimately required to clear his reputation or have the charge taken as confessed." 50

In recent times the American Hierarchy submitted to UNESCO a "Declaration of Human Rights." 51 This document enumerates the basic rights of the individual, the family, the State, and the community of States. Included are the rights to work, collective bargaining, just wage, but nothing is said of a right not to incriminate oneself, although eighteen rights of the human person are defined.

Since we have now established, or hope we have, that the privilege is not a natural right, how then did it come into being? For the answer we must pic-

49 S.T. II-II, q. 69, a. 2.
ture ourselves at a criminal trial. The defendant is being asked some embarrasing questions about a recent theft. To the consternation of all he refuses to reply even though he has been warned that he must answer. A deadlock ensues. Prosecution knows that the defendant (or witness as the case may be) is hiding some pertinent information vital to the trial. At this point the prosecutor probably surrenders to the overpowering urge to extract a confession, and lacking the more subtle serums of today, he might have resort instead to the equally effective rack or knout. Now it was precisely to prevent this sort of thing that the privilege was introduced, a matter of public policy formulated by an enlightened social conscience which began to denounce and decry such methods. But it did not imply any implicit recognition of the defendant's natural right to silence. It was rather an enlightened rule of procedure designed to combat the extremes of the day, but of considerably less value in our own times when the danger of torture is so remote.
CHAPTER IV

SHOULD WE RETAIN THE FIFTH AMENDMENT

Sidney Hook, Professor of Philosophy at Columbia University, recently stated that he knows of no one who urges the abrogation of the Fifth Amendment. This is rather surprising, for even a cursory check on legal articles written on the subject reveals a deep and smoldering opposition to the Amendment amidst the legal profession. This opposition, at least in its more virulent form, dates from the time of Bentham, and evidence of its yet vigorous life can be found in the latest issue of the American Bar Association Journal.

My purpose here is to ventilate the controversy in an effort to reach an intelligent, informed conclusion as to the merits of the Amendment and its suitability in modern America.

Opposition to the privilege is often framed in the form of a dilemma: If the privilege is for the benefit of the innocent, why do they need it? Or if for the benefit of the guilty, why do they deserve it? What is the point of letting them utilize this privilege if they are indeed guilty? This does present a problem, for if the guilty do not deserve the privilege, and the innocent do not need it, then what is it doing in the Constitution at all?

1Sidney Hook, Common Sense and the Fifth Amendment (New York, 1957), 13.
This is a difficult question and one which forces us to reappraise the real function of the Amendment. By going to the cases we discover that its purpose is "to protect the innocent members of society at large from uncalled for invasions of privacy which would attend the use of indiscriminate periodic inquisitions by the prosecutor as a means of discovering whether crimes might have been committed. . . . A second subsidiary purpose of the privilege. . . . is the protection of the innocent from the coercive measures of the over-zealous police officer. If every man has his price, so every man has his breaking point, the point where it is easier to give the interrogator the answer he seeks than to insist upon the truth." 2

Clearly, then, this constitutional privilege grows out of the high regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity, and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused the evidence necessary to convict him, or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture or other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. "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. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against the iniquitous methods of prosecution. It protects the individual from any

disclosure, in the form of oral testimony, documents, or chattels sought by legal process against him as a witness."\(^3\)

Lord Camden, in 1765, stated the philosophy behind the privilege we later embodied in our Fifth Amendment in these words: "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust."\(^4\)

A similar attitude has been adopted by the American courts where the privilege has been described as "one of the great landmarks in man's struggle to make himself civilized. It is the handmaid of the abolition of torture, and has its roots deep in twelfth century legal thinking. Its fundamental thesis is that you cannot extract evidence from one charged with a crime on which to convict him. It is contrary to every principle of legal philosophy to coerce one to reveal his guilt."\(^5\)

Bernard Meltzer, writing in the University of Chicago Law Review, defends the Amendment upon different grounds, for he believes that "the privilege at the trial stage today is not the bulwark of the innocent, not the barrier against torture, and not the spur of the police. It is the reflection of the law's unwillingness to command the impossible, of its respect for the law of self-preservation invoked by Lilburn. It is also perhaps a reflection of a humane attitude which saves even the guilty from a harsh choice among perjury,

\(^3\)United States v. White, 322 US 694, 152 ALR 1202 (1943)
\(^4\)Entick v. Carrington, Howell, State Trials, XIX, 1029.
\(^5\)Boynton v. State, 75 So.2d, 211.
A more practical approach has been taken by Sir John F. Stephen who observed that those in old England who found themselves faced with the "ex officio" oath denounced it as contrary to the law of God and the law of nature, while they considered the maxim "nemo tenetur seipsum prodere" to be in accord with both the laws of God and nature. "The real truth," Sir Stephen asserts, "was that those who disliked the oath had usually done the things of which they were accused." Although Sir Stephen thus finds the privilege highly advantageous to the guilty, he would retain it as contributing greatly to the dignity and apparent humanity of a criminal trial. His most compelling argument, however, is reached after a study of seven trials, four English and three French. In French courts the defendant could be questioned, in the English he could not. Sir Stephen found that "in every one of the English cases the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases, notwithstanding which far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which anyone can represent as cruel or undignified." One wonders, though, whether seven cases is a fair sampling and whether all other factors had been eliminated.

Moving upon more modern times we find that the New York Constitutional Convention Committee, after making a thorough study of the privilege, drew up

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7 John F. Stephen, History of the Criminal Law, as quoted in Wigmore, 313.
8 Ibid.
a comprehensive list of its advantages:

(1) One purpose of organized society is to secure to each citizen his right to privacy. The constitutional clause inhibiting self-incriminatory testimony is directed to this end.

(2) The existence of the privilege confers upon the criminal trial—and for that matter, upon every investigatory proceeding—an aspect of dignity, humanity, and impartiality which the contrasted inquisitorial process is too apt to lack. . . . It is agreed with Hallam that the privilege is a "generous maxim" of our law, generous to the witness and to the accused.

(3) The privilege also serves as a disciplinary measure directed against the legislature and legislative investigatory commissions. Since . . . it is a barrier between the individual whose self-incriminatory testimony is sought and the power of the government to obtain his testimony, it precludes the constitutionality of any law which attempts to authorize any type of discovery proceeding without also providing an immunity or amnesty to the testifying witness. Therefore antecedent to the adoption of any such law, there always is required a balancing of interests—whether the benefits to be obtained by procuring the testimony of criminals would be greater or less than the evils which would follow from exempting them forever from prosecution for the crimes disclosed by their testimony. Thus the people are spared ill-considered legislation purporting to authorize expeditionary proceedings and investigations that can be instituted for no other purpose than to appease groups, satisfy curiosity, or harass the unpopular.

(4) The privilege serves to stimulate prosecuting officers to an independent search for evidence. . . . In the absence of the privilege, prosecuting attorneys might, not unnaturally, rely on the opportunity to obtain the defendant's testimony at the trial; they might, similarly, abate their search for independent evidence; there is thus good reason to fear that the prosecution would try to prove its case solely through the accused. An officer in India once expressed this tendency on the part of prosecuting officers as follows: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into the poor devil's eyes than to go about in the sun hunting evidence."

In proof that this danger of compulsion is scarcely less real today than in colonial India the reader is referred to the famous and shocking case of a few years ago wherein the defendant's home had been raided without warrant, and

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to protect himself he swallowed several capsules of dope that were on his bedstand. The capsules were later extracted by a stomach pump and used in evidence against the defendant. Speaking for the court, Justice Frankfurter declared: "It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation... Nothing could be more calculated to discredit law and thereby brutalize the temper of a society."\(^{10}\)

Thus far we have considered about as strong a defense of the privilege as can be found anywhere. It is now time to hear the advocates of abolition, the foremost of whom is Jeremy Bentham, the great legal and social reformer of another century. His opinion takes on great significance when we realize that nearly every reform which he championed for the law of evidence came to pass within three generations. "We might almost regard his condemnation of any rule as presumptive evidence of its ultimate downfall."\(^{11}\)

Aquinas-like, Bentham set up the best defense of the privilege that he could, and then proceeded to demolish it with his ridicule and reason. The first was "the old woman's reason," which could be summed up in the one word "hard." It is "hard" upon a man to be obliged to incriminate himself. So too is punishment, observes Bentham, but no one has suggested that as a suf-

\(^{10}\)Rochin v. People of California, 72 Sup. Ct. 205 (1952).

\(^{11}\)Wigmore, 304.
icient reason for destroying prisons.

The second defense is the "fox-hunter's reason," which feels that the law should be at least as handicapped as the hounds. That the defendant should be given a sporting chance in the same sense as in a contest is patently absurd and surely must find little support beyond the limited circle of anti-vivisectionists.

The third defense, and the last with which we will be concerned, is favored by those who confound interrogation with torture. Bentham declares that "the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be if instead of being a defendant, he were an extraneous witness. Whatever he chooses to say, he is at full liberty to say."12

This confusion of interrogation with torture is common even today. Dean Griswold implies in his little book that without the Fifth Amendment we would be exposed to the police methods of the totalitarian state.13 "If we are not willing to let the amendment be invoked, where over time are we going to stop when police and prosecutors or chairman want to get people to talk?"14

Does the Dean really think that this privilege is the only defense left to the defendant against the unbridled power of the State? If so, what happens in those instances where the defendant is held to have waived his privilege against the Fifth Amendment? Is he now tortured, harrassed and badgered?

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14 Griswold, The Fifth Amendment Today, as quoted by Hook, 58.
Certainly not; nor would he have been had the privilege never been his in the first place. For under our present system of trial procedure in an orderly courtroom, with defense counsel always present, the danger of torture is simply so remote that it can be utterly discounted. Therefore to link torture with interrogation is to introduce an anachronism which will gain little credence among the sober-minded.

Professor Wigmore made a nice distinction in his reply to the above arguments of Bentham. He pointed out that Bentham had failed to distinguish between interrogation of an individual before indictment, and the questioning of an accused after indictment. Wigmore seems to agree that the privilege is not so essential in the latter case but certainly is in the former. Questioning without indictment was the abuse that first gave birth to the privilege, for it signifies an examination on mere suspicion without prior presentment or other formal accusation.

It is Professor Wigmore's fear that such a system is certain to be abused. In confirmation of this he might have referred to a fairly recent book on Constitutional Law. Its author found that "the privilege does not protect against third-degree coercion. Third-degree torture is one of the disgraces of the United States. It takes many different forms: sometimes it consists of threats... solitary confinement... whipping or the use of boxing gloves... rubber hose... water cure, etc. If there is anything that the accused ought to be protected against it is third-degree compulsion as practiced by the police of the United States. Yet the privilege against self-incrimination will not avail a poor victim in the hands of the police. A technical reason given is that the protection is available only in a criminal prosecution and that at
the time third-degree practices occur there is not yet any criminal prosecution. 15

Since such practices can flourish now with the Fifth Amendment, so too they could and would without the Fifth Amendment. But in both cases outside the courtroom. The solution then lies not in the Fifth Amendment, but in those steps which will utterly exclude forced testimony from the courtroom, thus eliminating all incentive for the use of third-degree methods.

Bentham found the privilege unnecessary and an impediment to justice at the trial stage, so he sought to eliminate it from both the trial and the pre-trial stages. Professor Wigmore found the privilege absolutely essential at the pre-trial (pre-indictment) stage, implied that it was not too important at the trial stage and yet concluded that it should be retained in both. Did neither perceive the possibility of retaining the privilege at the pre-trial stage so that no one could be questioned without indictment but once the State had shown sufficient cause for indictment, then the accused would be questioned at his trial, under the orderly supervision of the judge?

The American Law Institute in its Model Code of Evidence, seems to support this view, for there it is said: "If we assume the continuance of trial by an impartial jury before a competent judge in public, it is difficult to understand how an accused represented by competent counsel can be unfairly treated by being required to testify. He may need protection against police and prosecutor but he can hardly need protection against judge and jury whose

15 H. E. Willis, Constitutional Law of the United States (Bloomington, 1936), 521.
action is subject to review by an appellate court."\textsuperscript{16}

Professor Wigmore finds another fatal and fundamental error in Bentham's position: "Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. . . . The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. . . . Thus the legitimate use grows into the unjust abuse. For the sake then, not of the guilty but of the innocent accused and of conservative and healthy principles of judicial conduct, the privilege should be preserved."\textsuperscript{17}

Wigmore admits that the defendant is the most fertile source of information, but insists that if we quiz him under oath our system of justice will decay and crumble. As the professor confesses elsewhere, his argument is empiric, and therefore open to the fallacy of mistaking a mere accidental association for a cause. And I think that that is just what he has done, for I see no necessary connection between compulsory self-disclosure and the decay of the administration of justice. It seems safe to say that interrogation alone would result in conviction in only a minority of cases, which leaves the department plenty of room for legwork to keep up its moral fibre.

After all, if the evidence of the defendant alone is sufficient to convict him, why should the prosecuting attorney be sent scurrying about seeking additional evidence. With a crime wave engulfing the country, we would do well to do all we can to expedite trials rather than impede them. Moreover the

\textsuperscript{16} American Law Institute, Model Code of Evidence (Philadelphia, 1942), 130.

\textsuperscript{17} Wigmore, 308.
prosecuting attorney can never be sure just what information he will be able to extract from the defendant, and so he cannot afford to gamble the success of his case and his reputation on this one source of information, if others are also available to him.

A professor of law at Chicago University has studies this "lazy prosecutor" argument and finds that it "slights some important considerations, such as the necessity of showing probable cause before the trial is initiated; the reluctance of prosecutors, intent on their record of convictions, to rely on the possibility of the defendant's convicting himself; the fact that effective interrogation presupposed careful investigation; and the fact that the most careful investigation may be ineffective without interrogation of the suspect. Moreover, it plays down the protection provided for the defendant by the court and counsel."\(^{18}\)

A frontal attack was made upon the amendment in 1910 by the Wisconsin branch of the American Institute of Criminal Law and Criminology. This body believed that "the provision of our Constitution that 'No person shall be compelled in any criminal case to be a witness against himself' has outlived its usefulness, and should be abolished, and that thereby one hiding-place of crime would be destroyed."\(^{19}\)

The New York Constitutional Convention, besides listing the advantages of the Fifth Amendment, drew up a set of grievances:

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\(^{18}\) Meltzer, 687

\(^{19}\) Quoted in Wigmore, 313.
(1) The privilege is a hiding place for crime. Overwhelming difficulties confront the government today in the detection and prosecution of crime. In the case of a large number of offenses the proof is difficult, if not impossible, of ascertainment without the testimony of individuals accessory to the act. . . . Every day in some court of some city, an uncontrolled resort to the privilege results in a miscarriage of justice. Legal writers are of the opinion that the rule has become a most effective technicality available to the criminal to escape punishment and hinder prosecution.

(2) It has developed the "immunity bath" mischief. The detection and conviction of criminals has so effectively been hampered by this license that in order to secure some evidence, the Legislature has had to pass various statutes granting amnesty to criminals. . . . and infinite mischief has been the result.

(3) Only the guilty have use for the privilege. The natural way of finding out whether a person has committed a certain act is to ask him about it, and if he denies it, to make him explain any circumstances pointing to him as the person who did it. Once a criminal trial ceases to be a game, what evidence is likely to be so informing as that of the party alleged by the State to have committed the act under investigation.

(4) Today the accused person's rights are amply protected without the privilege. Unless torture is confounded with interrogation, there is no reason for the privilege today. With the publicity given to criminal trials, the rule that a defendant shall be represented by counsel, the facilities for appeal after verdict, the scrutiny applied to the record by the appellate courts, the liberality with which the pardoning power is exercised, the conviction of innocent men is practically unheard of. . . . The necessity of guarding against governmental viciousness has ceased, and the rule is simply a convenient loophole for guilty parties to escape punishment.

(5) The provision has outlived its social utility. The impression now held by the public is that criminal defense is a game consisting of the introduction of technicalities. 20

However this New York Constitutional Convention adjourned without making any changes in the privilege against self-incrimination. The new Constitution of 1939 repeats the language of the old New York Constitution.

One of the most outspoken attacks on the amendment was delivered by Mr.

Carman in the Minnesota Law Review: "The law reeks with judicial eloquence about fair trials and the rights of the criminal. But there never was a fair crime committed; nor a criminal entitled to any rights whatsoever arising from any crime committed by him, although he may still claim the benefit of the wrongs inherent in this archaic constitutional privilege of concealing the evidence of his guilt—of stabbing in the back the very government under which he claims such privilege. . . . In a well ordered society, to speak of the rights of a criminal appertaining to his crime is a perversion of both language and logic. There can be no such thing. A criminal has no such rights under any government worthy of respect until he has first paid the penalty for his crime."21

Mr. Carman believes that the privilege is the common shield of the criminal of both high and low estate, offering a doorway to immunity for the injuries which both have inflicted upon the people of our land. "Remove it; make criminal trials a common sense investigation of the guilt or innocence of the accused, about which he knows the most and naturally should be the first to testify and disclose his knowledge; abolish all rules of evidence that are rooted in such constitutional privileges of the criminal—including the illogical presumption that the accused is innocent until proved guilty, which is equivalent to presuming that the grand jurors who indicted him were either stupid or corrupt—and the crime problem would cease to be such."22


22 Ibid.
Mr. Richard C. Baker, a member of the New York Bar, would also like to abolish the Fifth Amendment, and denies that to do so would injure our cherished presumption of innocence until proven guilty. "It is alleged that without this exemption the defendant would be required to exculpate himself. Nothing, however, is farther from the truth. In most states, even if the immunity did not exist, the prosecution would still be called upon to bear the burden of proof in a criminal proceeding, and also to convince the jury of the defendant's guilt beyond a reasonable doubt. The absence of the immunity might make it easier for the State to prove certain facts, but would not in itself shift the onus of establishing his innocence to the accused."²³

Abolition of the privilege might make the job of prosecutor a little less burdensome then, but Mr. Baker can find nothing morally, ethically, legally, or constitutionally wrong with making a conviction less difficult for the prosecution, so long as it is just as sound.

Professor Wigmore speaks of the duty of giving what evidence one is capable of giving. Chief Justice Marshall in the trial of Aaron Burr referred to the principle "which entitles the United States to the testimony of every citizen." This duty is essential to the orderly functioning of society. The right of subpoena, that is the right to require other people to give evidence, is fundamental not only to the welfare of the State but to the protection of the citizen. Indeed, the defendant's right of compulsory process in criminal trials, the right of subpoena, is a provision of the Bill of Rights, Article Six. Therefore when we allow a witness to plead the Fifth Amendment, we may

be depriving the defendant of his rights under the Sixth Amendment.

Logically why should not a person charged with a crime be obliged to give what explanation he can of the affair? Why should he have the privilege of silence? Does he not owe a duty to the public the same as any other witness? If he is innocent he has nothing to fear; if guilty, to jail with him. The most formidable objection to this reasoning is that without the privilege we reopen the door to torture. But this argument is simply not realistic and ignores the other safeguards adequate and available to the defendant. Centuries ago when the privilege was introduced the judge was the prosecutor, too, and there was no jury trial, nor right to counsel, nor appellate system such as we have today.

In this whole area we are dealing with intangibles, and a strictly logical, completely satisfying conclusion defies and eludes us. The immensely respected American Law Institute has indicated that the privilege has served its purpose and seen its day. On the other hand, the New York State Bar Association, a body of national prestige and influence, adopted in 1953 the report of its Committee on Civil Rights which embodied this resolution: "That the constitutional privilege against self-incrimination continues to be a vital safeguard of individual freedom, and the Bar should educate the public as to its importance and discourage both those who would restrict its application and those who would abuse it by asserting it improperly."24

In the face of such eminent authority on both sides, I take a somewhat middle course. I remain convinced that in regard to a defendant, the privilege

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24 Quoted by Louis Waldman, "The Fifth Amendment, Shield or Sword," Vital Speeches, XXII, 189.
no longer serves a useful function in modern Anglo-American jurisprudence. In our concern for the one innocent victim, we are permitting not nine, but ninety-nine guilty to escape from justice. At that I have read many hypothetical, but not one factual account of an innocent person wholly incapable of proving his innocence, and who escaped immurement only because of the privilege. Where are those innocent that it protects?

I suggest then, that the Fifth Amendment requires some modification. In the concrete, I would withdraw the option of taking the stand from the defendant at the trial stage, but would reserve the privilege to him at the pre-trial stage, by insisting that no person be compelled to be a witness against himself until "properly presented," that is until formally indicted by a grand jury or other established authority.

Witnesses too should retain their claim to the privilege if asked an incriminating question, for theoretically they are not even under suspicion of crime and have not been indicted for any misdeed. Were this not so, the trial of the defendant could quickly become a pretext for getting at the witness. This is in accord with the age old principle that no one need disclose his own hidden crimes: "While no one is required to betray himself, nevertheless one reputed to be guilty can be required to present himself and vindicate his innocence if he can." 25

Only if the crime has been sufficiently bruited about to warrant indictment, can the suspect be questioned about his guilt.

25 Supra, 5.
To summarize this position: The defendant may claim the privilege until formally indicted. A witness may claim the privilege whenever his answer would incriminate him. This privilege would be available to the witness whether questioned in a civil or criminal court or before a congressional committee.

With these distinctions in effect, I feel sure that criminal trials would be less frustrating and abortive, and that the courts in our land would reach a new and exalted scale in the dispensation of genuine justice, where all acquittals would be based on evidence, not on ignorance.

At the same time those rights and liberties of our people would be preserved which guarantee to each of us freedom from any arbitrary intrusion in our private lives by the fearsome power of the State.
CHAPTER V

PREJUMPION OF GUILT AND IMMUNITY STATUTES

A.

DOES INVOCATION OF THE FIFTH AMENDMENT CREATE
A PRESUMPTION OF GUILT?

We have already seen that the privilege against self-incrimination should be withdrawn from defendants but retained for witnesses. Our next concern is to determine whether the plea of the privilege by a witness gives rise to an inference of guilt which would justify an employer in firing him, or refusing to hire him, etc. Notice that we are not seeking to use this plea as evidence of guilt leading to conviction, for our witness is not on trial. The precise issues, then, that we are seeking to solve are whether the plea of the Fifth Amendment creates a presumption of guilt, and if it does, whether that presumption can be used against the witness in other areas such as employment.

In solving these questions we shall have recourse in part to those cases where the defendant has taken advantage of the privilege. He does not plead it in so many words, but the reason a defendant cannot be compelled to take the stand is because he cannot under the present Constitution be compelled to be a witness against himself in a federal court. So whatever the courts have said about the inference of guilt which can or cannot be drawn from the failure of
the defendant to testify can be said with equal force of a witness who pleads the Fifth Amendment.

Twenty years ago this problem we now deal with appeared to have been solved:

Until members of the Communist Party began invoking the Fifth Amendment, the moral issue seemed plain enough. The right to a specific post in private or public employment is not a civil right. This is particularly true where an individual holds a position of public or private trust. Winning and holding such positions of trust are contingent upon fulfillment of certain qualifications. These qualifications are not merely technical proficiency but extend to traits of character. They include recognition and acceptance of the moral obligations that go with the post. Among them are the honorable fulfillment of one's duties, candid and above board behavior on all matters pertaining to the tasks that are involved. At the very least, an individual in a position of trust must so comport himself that he does not undermine confidence in himself or the institution that in the public eye he represents. Any body may keep out of jail by invoking the privilege against self-incrimination. But there are many posts in which we may legitimately require standards of conduct higher than those sufficient to keep out of jail.

And the solution agreed upon was that an employee might have a constitutional right to silence but he had no such right to his job. In 1939 in the case of Christal v. San Francisco, it was held that the holder of a government benefit or grant would be permitted the use of the Fifth Amendment but denied further enjoyment of the benefit. Here several policemen invoked the privilege when questioned about the magnitude of their bank accounts. The Police Commissioner dismissed them from the force; they appealed and the court declared: "Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was

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1Sidney Hook, Common Sense and the Fifth Amendment (New York, 1957), 72-3.

wholly inconsistent with their duty as police officers.\textsuperscript{3} An Illinois court held that use of the privilege was "conduct unbecoming an officer" of the Police Department of the City of Chicago.\textsuperscript{4}

Thus, as Sidney Hook pointed out, it did seem clear that the plea of the Fifth Amendment was incompatible with a position of trust. However with the advent of the Communist conspiracy and the efforts of the government to expose the extent of their infiltration, the whole area has somehow been reopened to debate. Prior to that time the Fifth Amendment was so closely associated with the criminal element that the courts could denounce the privilege as "one not resorted to by honest men."\textsuperscript{5} But now that the spotlight has shifted over from graft and corruption to the ideology of the liberal left, resting upon the intellectual elite of education, science, and art, somehow the very same plea gives rise to a very different connotation. We are now asked at times to suspend our judgment; at others, to see in the plea the cry of wounded innocence, or a ringing challenge to despotic power by a martyr for civil liberties.

One of the leading proponents of a "stainless" Fifth Amendment is Dean Griswold of the Harvard Law School, whose recent book on this subject has enjoyed wide circulation and exerted great influence. The Dean asserts that the plea of the privilege reveals nothing about the guilt or innocence of the claimant himself. In support of this, the Dean proposes three or four hypothetical cases in which the witness is innocent by hypothesis, yet for one

\textsuperscript{3}Ibid.
\textsuperscript{4}339 Ill. App. 33; 33 N.E.2d. 723 (1949).
\textsuperscript{5}United States v. Mammoth Oil Co., 14 F.2d. 705 (1926).
reason or another pleads the privilege. And of course as the Dean points out, to infer from the plea that these men were guilty would be manifest error since by hypothesis they are innocent.

Sidney Hook counters by asking what a normal person would do when faced with a pointed gun? His normal reaction will be alarm and an effort to get out of range, for the overwhelming weight of experience teaches that such a situation could be mortally dangerous. Now if we assume by hypothesis that the gun is empty then all the flurry and scurry appears a little ridiculous, but not unreasonable, for the victim does not know that the gun is empty and harmless, but relies on experience which says that it is dangerous. So too experience teaches that the majority of people who plead the Fifth Amendment are shielding guilt. "The psychological tendency to draw an adverse inference from the invocation of the privilege is not innate. It has been acquired as a result of experience. It is so strong that it would hardly be an exaggeration to characterize it today as natural or normal. Because of the place of the privilege in the rules of procedure, the laws of some but not all states warn expressly against the natural tendency to draw an adverse inference if the defendant does not testify in his own behalf to rebut an accusation."6

One can construct hypotheses of innocence ad infinitum. The point at issue is whether they correspond with experience. It is rather strange that after a life in the law, Dean Griswold must have recourse to hypothesis, rather than cases to support his contention.

The rules of evidence, jury trials, and all the machinery of justice are

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6Hook, 63.
not proof against occasional injustice. The law does not demand of a jury that they find the defendant guilty with metaphysical certainty, nor even moral certainty, but only that the guilt of the defendant be established beyond reasonable doubt. So too the presumption of guilt arising from the plea of the Fifth Amendment is not conclusive, for not every one who pleads the privilege is shielding guilt, but must we therefore act as though no one were?

The Supreme Court recently indicated that we must. In Slochower v. Board of Education of the City of New York, a City College professor had been dismissed under a New York City Municipal Charter provision requiring the discharge, without notice or hearing, of a municipal employee utilizing the privilege against self-incrimination in refusing to answer legally authorized inquiries as to his official conduct. In his appearance before a congressional committee investigating matters of national security, refused to answer questions regarding past membership in the Communist Party, and was subsequently fired in accord with the Charter provision. Five members of the United States Supreme Court held that the dismissal was improper because no inference of a witness' guilt of past membership in the Communist Party may be drawn from his refusal, on the ground of possible self-incrimination, to answer questions of a congressional committee respecting such membership.

The majority opinion was written by Mr. Justice Clark who asserted that the New York Charter abridged a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process because

7100 L.Ed. 698 (1955).
the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment.

Furthermore the Court condemned thepractice of imputing a sinister meaning to the exercise of the privilege. "In Ullman v. United States, we derided the assumption that those who claim this privilege are either criminals or per-jurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise would be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury... A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."\(^8\)

In a dissenting opinion by Mr. Justice Reed, in which Justices Minton and Burton concurred, it was said that a legally authorized body has a right to demand that citizens furnish facts pertinent to official inquiries, and although the duty to respond may be refused for personal protection against prosecution, a refusal to furnish such information can properly be considered to stamp a public employee as a person unfit to hold certain official positions.

In his separate dissent, Mr. Justice Harlan declared that teachers who have refused to answer questions concerning their official conduct are no longer qualified for public school teaching, on the ground that their refusal to answer jeopardizes the confidence the public would have in its school system.

Mr. Louis Waldman finds that "the use of the Fifth Amendment as a means of convicting people in the public eye is disturbing and frightening and is doubly

\(^8\)Ibid. 699.
wrong. It does great injustice to the person so described. And at the same
time it degrades this constitutional privilege in the minds of the public. 9

Mr. Waldman's argument finds support in the case of Burdick v. United
States which held that the privilege supposes "only a possibility of a charge
of crime and interposed protection against the charge, and reaching beyond it,
against furnishing what might be urged as evidence to support it."10 And so
it is not necessarily a sense of guilt that entitles a person to properly plead
the privilege. Fear of prosecution is sufficient, for it is a menace to the
peace, good name, and dignity of an individual even if the trial should result
in acquittal. Thus the facts which a witness hides behind the Fifth Amendment
may not be proof of guilt but still sufficiently incriminating to expose him
to prosecution.

John Cogley, writing in *Commonweal*, cites further reasons for caution
before drawing any conclusions from a plea of the privilege. He declares that
"situations must be taken into account before any conclusions are reached.
There is no unavoidable, inescapable, inevitable conclusion to be reached merely
because someone has invoked the Fifth Amendment. It is as illogical to conclude
automatically that he is guilty of the thing charged as it would be to conclude
that he is innocent of it. The circumstances of a congressional hearing are
special indeed and each case varies. The matter depends much on the nature of
the implied charges, the character of the committee and its counsel, and the
real—as distinct from the nominal—purposes of the committee."11

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10236 US 79, 94 (1914).
This tolerant, liberal attitude towards the Fifth Amendment which the foregoing opinions and articles have expressed was not always in vogue. In State v. Bartlett, the court declared that "an inference does arise undeniably. It is evidence the force of which may depend upon circumstances."\(^{12}\) "Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. ... The rights of accused are not invaded or denied by proper comment upon his silence."\(^{13}\) For apart from the Fifth Amendment, it is a general principle of the law of evidence that silence gives rise to an adverse inference. In fact an eminent lawyer has described silence as "one of the most powerful inferences, if not the most powerful inference, in human affairs."\(^{14}\) Even in criminal cases where the silence of the accused is based upon an implicit appeal to the Fifth Amendment, some states, as Ohio, provide in their constitutions that the jury may draw such inference as it sees fit from the failure of the defendant to testify in his own behalf, and that in summation the prosecution may comment on this silence of the defendant.

However in other states it is forbidden by statute to draw an adverse inference from the silence of the defendant in a criminal trial. Professor Greenleaf of Harvard was, at the time these statutes were introduced, the author of the leading treatise on the law of evidence. He made the following interesting comment: "It may be doubted whether a statute which prohibits any such inference is not nugatory as contrary to the human mind. A statute that upon

\(^{12}\) 55 Me. 200 (1867).

\(^{13}\) Parker v. State, 39 Atl. 651 (1898).

proof that the sun was shining, no inference that it was light should be drawn by the jury, if not against the constitution of a State, is against the nature of things. 15

It would seem safe to say that Professor Greenleaf would join Great Britain, Ohio, New Jersey, and a few other states in allowing comment to the jury about an inference so natural. The inference is also allowed in California by constitutional amendment, so that the pertinent article now reads: "No person shall be compelled to be a witness against himself in any criminal case. . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or jury." 16

The interesting case of Admiral Dewey Adamson v. California arose under this particular article of the California Constitution. 17 At his trial, Adamson pleaded the privilege as guaranteed by the State Constitution. The court allowed comment as was also permitted by the same Constitution. Adamson appealed on the now familiar argument that comment violated the Fifth Amendment of the Federal Bill of Rights which had been incorporated (he argued) in the rights guaranteed to every citizen by the Fourteenth Amendment. The Supreme Court rejected the argument, citing Twining v. New Jersey as authority. In his majority opinion, Mr. Justice Reed said: "However sound may be the legislative

15 Greenleaf, Evidence, 14th ed. (Boston, 1883), I, 451.
16 Constitution of California, Article 1, §13.
17 91 L.ed. 1903 (1943).
conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon the defendant's failure to explain or deny it. The prosecution's evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little, if any, weight. But the facts may be such as are necessarily in the knowledge of the accused; in that case a failure to explain would point to an inability to explain. 18

And in a separate concurring opinion Mr. Justice Frankfurter declared that "sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the immutable principles of justice as conceived by a civilized society is to trivialize the importance of due process." 19

The federal law of the United States expressly forbids comment upon the silence of the accused. 20 But this exclusion is clearly a matter of policy and not a denial that the silence has evidentiary value, for the Supreme Court, as in the Adamson case, has said that the silence of the accused is genuine evi-

18 Ibid.
19 Ibid.
dence which can be submitted to the jury where there is not an express statutory provision to the contrary.

This attitude, of course, has not found universal acceptance. In Colorado the Supreme Court of the State held that if an inference is drawn from silence there is a practical abrogation of the constitutional provision that no man is to be compelled to incriminate himself. "For if the silence is to be taken as evidence of guilt, the defendant's option is of little avail; he is practically forced to testify, and once upon the stand may be required to give the very testimony upon which his conviction shall rest." But cases so holding are in a minority. And it must be noted that even here the inference is rejected not because it is invalid, but because it is deemed to conflict with the right of the accused not to incriminate himself.

When we look to the rule in non-criminal proceedings we find that almost without exception it is the general holding that an adverse inference always follows from an invocation of the Fifth Amendment. In United States v. Mammoth Oil Co. the court asked: "Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? Why is this plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart?"

So we have seen that in both civil and criminal cases the plea of the Amendment always gives rise to an inference of guilt, but that in a criminal

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21Patite v. People, 8 Colo. 518, 9 Pac. 622 (1895); see also Maffie v. United States, 209 F.2d. 225, and Opinion of the Justices, 126 N.E.2d. 100.

22Ill. F.2d. 705, 729 (1926).
case the inference arising out of the silence of the accused cannot be called to the attention of the jury and made the subject of comment, except in those few states which so permit. However the inference is nonetheless real and perceptible even there, for it is not a mere coincidence that in the great majority of criminal cases the jury finds guilty any defendant who has failed to take the stand. "None of the courts and none of the authorities... can deny that in every case in which the defendant refuses to take the stand the fact will be noticed by the jury and that the jury will draw the natural inferences therefrom."

That such a real and valid inference can be drawn has also long been recognized by the legal profession. The American Law Institute in its Model Code of Evidence states that the rule should be: "If an accused in a criminal action does not testify, the judge and counsel may comment upon the accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom. Comment: This has been accepted nowhere at common law except in Maine and possibly New Jersey and Connecticut. In most states a statute or the current interpretation of a constitutional or statutory provision prohibits all comment and inferences. Such enactments have usually prevented the evolution or development of a common law doctrine in this country. In Iowa comment is now permitted as a result of the repeal of a statute which forbade such comment."

It seems clear then that the plea of the Fifth Amendment in whatever situation always creates a presumption or inference of guilt. The presumption

23 Andrew A. Bruce, "Failure of the Accused to Testify," Michigan Law Review (December, 1932), 230.

24 American Law Institute, Model Code of Evidence, Rule 201, (3).
is not conclusive but it does have evidentiary value, more or less depending upon all the facts and circumstances. One of the facts or circumstances which will always have to be considered, especially in the investigation of Communism, is the holding of the Rogers case.25 Under examination, the witness Rogers answered a few questions about present communist membership, but then pleaded the Fifth Amendment when pressed about prior membership. The court held that once Rogers chose to answer any question on this matter, she waived her privilege as to all questions on the matter. In the light of this case, if a witness were asked if she were a Communist Party member in the year 1900 (twenty-five years, say, before she was born), she would have to plead the Fifth Amendment and refuse to answer. The question is hardly incriminating, but if she answers it, she may be asked about membership in the year 1945, and perhaps this reply would be considerably more embarrassing. I am afraid this decision is an unfortunate extension of the sound rule in criminal law that when an accused takes the stand he must remain for cross-examination. There we can see why an accused should not be allowed to tell all the good things while maintaining a discreet silence about the bad. However to apply the same rule to witnesses can only have the effect of drying up the font. But good or bad, we can see that the holding of the Rogers case is a very important circumstance to be considered in weighing the value of the inference.

This settled, we can go on to consider the second question: whether an employer in a sensitive field may fire an employee who invoked his privilege when called as a witness before the court or congressional committee. We know

that this plea gives rise to an inference of guilt, but can we use that inference to fire the employee? Mister Justice Holmesthought so when he held that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." The highest court of Massachusetts thought so when it held that a teacher employed to serve "at discretion" in the Boston Public Schools could be dismissed for refusing to answer, on the ground of the privilege against self-incrimination, the questions of a subcommittee of the United States Senate as to whether he was a member of the Communist Party. The Supreme Court of the United States at least used to think so (before the Solorsower decision) when it held that the fact that divulging past or present membership in the Communist Party might under some circumstances amount to self-incrimination did not divest the government of power to require answers as a condition of continued employment.

In addition, the Presidents of Harvard and Dartmouth, as well as the American Association of University Professors have all publicly stated that the plea of the Fifth Amendment creates an inference of guilt as a matter of common sense. If a faculty member invokes the Fifth Amendment, his institution cannot ignore the possible significance for itself of these matters. It must be said that the aforementioned do not consider the plea as tantamount to resignation as the New York Charter did, but rather as a matter inviting full inves-

29 Hook, Common Sense and the Fifth Amendment (New York, 1957), 71, 89, 95.
tigation which could lead to termination of services if the facts warrant.

Professor Sidney Hook describes the Slochower decision as one of the most scandalous opinions in the history of the Supreme Court. When the court declared that Slochower's plea of the Fifth Amendment created no inference of guilt, it was shockingly unrealistic. When it denied the right of the local government to establish norms of fitness for its personnel, it greatly curtailed the already diminishing authority of state and local government. It can only be hoped that in the future the case will be distinguished and restricted to the narrow holding that a statute which provides for automatic dismissal without hearing is unconstitutional as a violation of due process, but that the right of the states to dismiss communists from sensitive posts after proper hearing has in no way been impaired.

In conclusion, since the plea does create a presumption of guilt, the sounder opinion by far, it seems to me, would permit an employer to dismiss any employee who pleads the Fifth Amendment, if the nature of the office is such that the occupant must be above suspicion. No one questioned the right of George Meany, President of the A. F. of L., to fire David Beck from the Executive Council of the Union when he habitually resorted to the Fifth Amendment during an investigation of Union funds. The substitution of Communist Party membership for financial malfeasance as the field of inquiry does not really change the nature or character of the plea. A presumption of guilt arises in both cases and will have greater or less value depending upon all the circumstances. But value it has, and existence too.
THE ADEQUACY OF IMMUNITY STATUTES

Legislatures of State and Federal governments have felt it necessary from time to time to pass immunity statutes which empower the government, when confronted by a plea of the Fifth Amendment, to offer complete immunity to the witness or defendant in exchange for the critical information. The immunity is complete. It extends beyond the testimony given and reaches to the crime itself. The immunity may be granted at the option of the State, while the individual has no choice but to accept if tendered him.

These immunity statutes have a two hundred year history in England and have been popular in the United States at least half that time. Their obvious function is to obtain the evidence which the State finds indispensable for legislation or prosecution, but which hitherto was inaccessible behind the Fifth Amendment. In balancing the rights of the individual against the exigencies of the State, the immunity statute was devised as an equitable compromise. A compromise and not a complete substitute—for the position of the witness is undeniably altered, and that for the worse. Before, he could plead the privilege and risk only the inference of guilt, which is never conclusive and always to some degree uncertain. But once immunized, he must tell the whole story of his infamy, in all its details, leaving no room for doubt or the benign interpretation.

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The great conflict over these immunity statutes rages over the intent of the Founding Fathers as to the scope of the Amendment. Those in favor of the statutes insist that the Fathers meant only that the defendant should not be made to convict himself. The opponents insist that the Amendment was designed to protect reputation and honor and privacy, all of which may have as much, and perhaps more, value than mere physical freedom. To the former an immunity statute is entirely adequate; to the latter a grave injustice.

The question here is to determine the intent of the legislators, and since that is the function of the judiciary, let us turn to the cases. Before doing so, however, it might be observed that our inquiry into this field has only an academic value, for there is no likelihood—not even under the present Supreme Court—that the uniform decisions of seventy-five years will ever be overthrown. But we can expose the difficulties and perhaps suggest a few modifications.

The leading case is Brown v. Walker, decided in 1895, where the defendant claimed that he need not reply to interrogation even though there was a federal statute granting him full immunity from prosecution. The court admitted that the statute could not shield the defendant from the personal disgrace and opprobrium which would follow upon the exposure of his crime, but decided that if the proposed testimony was material to the issues of the trial, then the fact that his answers might tend to degrade him did not exempt him from the duty of disclosing the same.

A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he himself esteemed to be of such little value. The safety and welfare of the entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may
think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secures legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. 31

Perhaps the best defense ever formulated of the Fifth Amendment and the rights of the individual was that of Mr. Justice Field in his dissenting opinion to the holding of Brown v. Walker. He maintained that the framers of the Fifth Amendment intended to save the witness in all cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect. The constitutional privilege reflects "the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others. What can be more abhorrent... than to compel a man who had fought his way from obscurity to dignity and honor to reveal crimes of which he had repented and of which the world was ignorant. And it is very justly urged that a statute is not a full equivalent under which a witness may be compelled to cover himself with the infamy of a crime, even though he may be armed with a protection against its merely penal consequences." 32

Mr. Justice Field could cite as authority for his position the case of United States v. James, decided in the federal courts the year before. 33 There Judge Grosscup held that the immunity statute involved violated the Fourth and Fifth Amendments. The Judge believed that the Fifth Amendment secured to the

32 Ibid.
33 60 F. 257 (1894).
individual his right of silence against the right of the government to seek out
data for an accusation; that it was meant to protect the witness against the
practical effect of outlawry, as well as the law-inflicted penalties and for-
feitures. If not, the government could probe the secrets of every conversa-
tion or society by extending pardon to one of its participants, and thus turn
him into an involuntary informer. "The oppression of crowns and principalities
is unquestionably over, but the more frightful oppression of selfish, ruthless,
and merciless majorities may yet constitute one of the chapters of future his-
tory. In my opinion, the privilege of silence, against criminal accusation,
guaranteed by the Fifth Amendment, was meant to extend to all the consequences
of disclosure." 34

Turning for a moment to a more recent case, we find the same question
coming up again in Ullman v. United States. 35 Here the immunity statute under
attack was that passed by Congress in 1954 seeking to expedite investigation in
the area of national security. The petitioner sought to distinguish Brown v.
Walker on the ground that "the impact of the disabilities imposed by federal
and state authorities and the public in general—such as loss of job, expulsion
from labor unions, state registration and investigation statutes, passport in-
eligibility, and general public opprobrium—is so oppressive that the statute
does not give him true immunity." 36

34 Ibid.
36 Ibid.
Mister Justice Frankfurter replied in his majority opinion that "the interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply."37

In a strong dissent, Mr. Justice Douglas, with Justice Black concurring, pointed out the numerous disabilities created by federal law that attach to a person who is a communist—ineligibility for employment in the federal government or defense facilities, etc. These, he insisted, are forfeitures within the meaning of American cases and as much protected by the Fifth Amendment as criminal prosecution itself. But since these forfeitures are not prevented by the immunity statute, it must be struck down. For as the court had held in Counselman v. Hitchcock, an immunity statute, to be valid, must "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard."38

Another objection to immunity statutes is that they are often no guarantee even against prosecution and imprisonment. Federal immunity does not bind state prosecutors, nor does state immunity bind federal prosecutors. This result is based on the legal fiction that federal courts cannot be expected to take notice of the laws of the states and vice versa. The injustice to any witness whose misdeed was a crime in both jurisdictions is manifest! His immunized testimony in the federal court can be taken down by a state prosecutor and used

37 Ibid.
38 142 US 547 (1891).
to convict him in a subsequent state trial, or vice versa.

As I indicated earlier it would be impractical at this late date to attempt to overthrow the bed-rock foundation of immunity statutes, nor would it be wise; for however great the harm to the individual, the benefits to the State and the common good are overriding. I also believe that the majority view, holding immunity statutes an adequate substitute for the Fifth Amendment, represents the mind of the Founding Fathers. As a simple test of this, why were the words "in a criminal case" deliberately added to the Amendment upon the motion of Mr. Lawrence? The reasonable answer seems to be that reached by the courts—the intention of the men who drew up the Amendment was only to shield a defendant from the onus of furnishing the evidence that would convict him of a crime; any other consequences must be borne by him.

To make sure that a defendant or witness is protected from self-conviction, I would suggest a law of Congress making any immunity statute binding upon both state and federal authorities. It would also have to provide that immunity could not be offered to a witness without the prior consent of the Justice Departments of both sovereignties.

That should eliminate one objection to immunity statutes. The other, concerning the disgrace and infamy of the witness, cannot be wholly eradicated. But I should think that the harmful consequences could be controlled and greatly reduced. In England the testimony of a witness before Parliament is not allowed to go beyond the walls. Not long ago masked refugees testified before our

40Ibid. 593.
Congress, and the fact that their identity was known but to a very few did not seem to impair the value of their testimony. Admittedly there may be times when testimony would have no value unless the source were disclosed, but intelligent safeguards would minimize the damage to the reputation of the immunized witness.

A proper regard for the dignity and worth of the individual and due consideration for the value of his good name, should make us abhor wanton destruction of a fellow man, and seek by every means to return the witness to society as little harmed as possible.

These measures, while short of the ideal, would go a long way to protect the witness from all the perils to which the immunity statutes have exposed him.
CHAPTER VI

CONCLUSION

This final chapter will consist of a summary of the facts and findings of this topic. The privilege against self-incrimination derives from the maxim "Nemo tenetur prodere seipsum"—nobody is bound to accuse himself. This privilege developed in England where until well into the nineteenth century, there were three distinct systems of courts: common law, equity, and ecclesiastical, each of which had developed over the centuries its own mode of procedure.

It was during the period of the English Commonwealth that the privilege became general. Its immediate origin was in protest against a procedural oath of the ecclesiastical courts, the oath ex officio. The practice before such courts was than anyone accused per famam, usually by two witnesses, had to deny the charge by oath even before trial or stand accused by his own silence.

The trial of John Lilburn focused the attention of England on the ex officio procedure. Four years later, 1641, the Star Chamber and the Court of High Commission and the ex officio procedure were abolished. The effect was felt in the common law courts and, according to some, became such an integral part of common law criminal procedure during the subsequent years that it was taken for granted and not even mentioned in the Bill of Rights of 1639.
In America the privilege gained ground steadily even to this day, but not without increasing opposition. So much attention has been called to the privilege of late as to warrant a study of its nature and function, which this thesis has sought to do. The first question to arise was whether the Fifth Amendment was a natural right. It seemed clear upon investigation that the American courts had never considered it so, refusing consistently to include it among the basic rights guaranteed to all American citizens by the Constitution.

Among scholastics there has not been too much work done on this particular point of a natural right not in incriminate oneself. All we could do was argue from analogy. If every man has a natural right to his good reputation, then perhaps he also has a natural right to refrain from disclosing anything that would destroy that reputation.

Of course that is the whole question. Does a criminal have such a right and Saint Thomas would answer "no." The problem really goes deeper. In the eyes of the State, a man is not a criminal until convicted. Therefore to say that a criminal does not have a right to silence may be clear enough, but does a suspect have no such right? For who can know who is a criminal until trial and conviction? Short of this we run the risk of unjustly denying to an innocent party what we could justly deny to a criminal if we knew he were a criminal, which we do not. Mr. Justice Brandeis expressed this well in Olmstead v. United States:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred as against the Government, the right to be let alone—the most
comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

On the other hand, a suspect is a suspect precisely because there is a fair amount of evidence associating him with the crime. It is possible that at this point the common good intervenes in favor of unshackling the police power of the State at the expense of private interests—here, those of the suspect. The risk involved is evident and the solution requires a nice balancing of interests. Many other jurisdictions, thus far at least, have cast up the balance and found it wanting in regard to the privilege.

It has been my own conclusion that the privilege is not a natural right. This in turn raised the second question, whether the Amendment should be retained nevertheless. After a review of all the arguments for and against, it seemed best to deny the right to a defendant at the trial proper, preserving it to him at all times prior to the trial. Witnesses, however, would remain fully protected. The defendant lost his right to silence, in my opinion, when sufficient evidence was offered to warrant an indictment. This is not true of a witness. No evidence of any guilt on his part has been presented and so his right to the privilege should remain unimpaired.

The evidence of the witness, it is true, may be vital for the national interest, the common good. In this case, the witness must yield his right to the privilege in favor of the more urgent right of the State to his testimony. In return it seems just that the State grant immunity for any crimes revealed.

1277 US 438 (1928).
The State in addition should take whatever steps are necessary to shield the witness as far as possible from any loss as a result of his cooperation.

With these observations and reservations, I conclude this by no means definitive treatment of some fascinating aspects of the Fifth Amendment.
BIBLIOGRAPHY

I. PRIMARY SOURCES

A. BOOKS


B. ARTICLES

---. "Morality and the Fifth Amendment," The Catholic Lawyer, III (April, 1957), 137-142.
Pius XII, Pope. "Discourse to the Catholic Jurists of Italy," Catholic Documents, XVII (April, 1955).


II. SECONDARY SOURCES

A. BOOKS


Fagothey, Austin. Right and Reason. Saint Louis, 1953.


Staff of Social Science Department, University of Chicago. The People Shall Judge. Chicago, 1950.


B. ARTICLES


Mann, M. E. "To What Extent Does the Privilege Against Self-Incrimination Protect an Accused from Physical Disclosures?" Vanderbilt Law Review, I (1947), 243-261.


**TABLE OF CASES CITED**

Adamson v. California. 91 L.Ed. 1903 (1948).


Bartley v. People. 353 Ill. 617.


Boyd v. United States. 116 US 616 (1885).

Boynton v. State. 75 So. 2d. 211.


Burdick v. United States. 236 US 79 (1914).

Christal v. San Francisco. 92 P. 2d. 416.


Faxton v. School Committee. 120 N.E.2d. 772 (1954).


Harris v. United States. 331 US 115 (1946).
In re Greenleaf. 28 NY2d. 23 (1941).
McAuliffe v. New Bedford. 29 N.E. 517 (1892).
Maffie v. United States. 209 F.2d. 225.
Mariwether v. State. 8 S.E.2d. 72 (1940).
Parker v. State. 39 Atl. 651 (1898).
People v. Roach. 215 N.Y. 592.
Petite v. People. 9 Pac. 622 (1895).
Schaefer v. United States. 251 US 466 (1917).
Slochower v. Board of Education. 100 Led. 693 (1955).
State v. Bartlett. 55 Me. 200 (1867).
State v. Height. 91 N.W. 935.


United States v. James, 60 Fed. 257 (1894).

United States v. Mammoth Oil Co., 14 F.2d. 705 (1926).


United States v. White, 322 US 694.

The thesis submitted by John Timothy Kelley, S. J. has been read and approved by three members of the Department of Philosophy.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

March 3, 1955
Date

Signature of Adviser