

2-1-1952

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Recommended Citation

Carl H. Imlay, *The Paradoxical Self-Incrimination Rule*, 6 U. Miami L. Rev. 147 (1952)
Available at: <http://repository.law.miami.edu/umlr/vol6/iss2/2>

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THE PARADOXICAL SELF-INCRIMINATION RULE

CARL H. IMLAY*

ORIGINS OF THE RIGHT

The Fifth Amendment to the American Constitution provides *inter alia* that no person ". . . shall be compelled in any criminal case to be a witness against himself. . . . Such provision is the complement of the Fourth Amendment which guarantees the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. Both were framed to protect the individual and render him inviolable against the ever increasing power of the state.¹ The framers were well aware that power corrupts and absolute power corrupts absolutely. The dignity of the individual was of paramount consideration, and while it was desired to invest the individual with the residuum of all power not expressly granted to the government, it was expedient to insure that man again would not be subjected to the inquisitorial methods adopted in early times for the discovery of crime. The political struggles in England, bringing in their wake trials for political crimes with star chamber methods, impressed upon the people the necessity of protection from unlimited inquiry into private affairs under the guise of law. It was the Fourth and Fifth Amendments that gave constitutional sanctity to the familiar saying that an Englishman's home is his castle, and rendered the individual impervious to the encroachment of the state.

But the right guaranteed to the individual in a criminal case not to be compelled to be a witness against himself did not originate with the framers of the Constitution. Although we like to think of our bill of rights as indigenous to our own soil, many of the rights evolved gradually and were given expression and permanence in the common law of England. It was not to secure the fundamental rights of man primarily that the framers of our Constitution met at the Annapolis and Philadelphia Conventions. The generating source of our Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check.² The bill of rights was only added later by popular demand. By the time that the Fifth Amendment was framed, the maxim *nemo tenetur seipsum accusare* had already become firmly engrained as a part of the common law of England, and as one of the basic human rights.

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1. *Boyd v. United States*, 116 U.S. 616 (1886).

2. Justice Wiley Rutledge, *A DECLARATION OF LEGAL FAITH* 25 (1947).

Cruel methods of interrogating persons had obtained in the continental system, and in England until the expulsion of the Stuarts from the British throne in 1688. While admissions or confessions of the prisoner when voluntarily made have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American Colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.³

There can be no doubt that long prior to our independence the doctrine that one could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguished attributes. In *Burrowes v. High Commission Court*⁴ Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. This right was thereafter well established as part of the common law.⁵

Aside from its incorporation as part of the Fifth Amendment to our Constitution, it is found in the bill of rights of all of the state constitutions.⁶

THE NATURE OF THE RIGHT

Probably no constitutional provision has been more criticised in late years than that of the self-incrimination clause, because of the prominence of congressional and grand jury investigations into large scale racketeering, and Communist activity. The hasty critic demands the logic of a rule that shields the witness from inquiry, and closes the door on embarrassing facts

3. *Brown v. Walker*, 161 U.S. 591, 596 (1896); *Boyd v. United States*, *supra* note 1.

4. *Bulst* 49 (1616).

5. *Felton's Case*, 3 How. St. Tr. 371 (1628); LORD HALE, *PLEAS OF THE CROWN* 304 (1st ed. 1736); GILBERT, *EVIDENCE* 139 (2d ed. 1760); 2 *HAWKINS' PLEAS OF THE CROWN* Ch. 31 (6th ed. by Leach 1787). See also *Brown v. United States*, 168 U. S. 568, 574-575 (1897).

6. *Stone, J. in State v. Ruff*, 176 Minn. 308, 223 N.W. 144 (1929).

of a sometimes sordid existence. Be it remembered, however, that the self-incrimination clause has a far deeper meaning than that of a shield between the felon and his sovereign. This provision is *in pari materia* with other great and basic rights, e.g., (1) the rule that a man is presumed innocent until proven guilty, and (2) the rule that the state in a criminal proceeding must prove its case beyond a reasonable doubt. To allow unfettered interrogation of a witness would shift the burden of proof in a criminal case, and would change the presumption of innocence. It is for this reason that our constitutional system allows an accused to stand mute while the state proves its case against him.

The right does not only include an accused in a criminal trial. A witness, as well as a party, is protected by the law from being compelled to give evidence that tends to criminate him or to subject his property to forfeiture.⁷ And this right extends to a witness in any investigation.⁸ A witness in a civil proceeding is entitled to claim the privilege.⁹ There is a distinction between the rights attending a defendant in a criminal trial and a witness. The defendant, of course, is not compelled to take the stand at all, whereas the witness is. An accused who voluntarily offers testimony upon any fact thereby waives as to all other relevant facts, because of the necessary connection between all, his constitutional privilege against self-incrimination.¹⁰ It goes without saying that the accused cannot be subpoenaed to testify against himself. The witness who is not the accused, however, stands on a different footing because he can be subpoenaed to take the stand. A witness who testifies in matters that may incriminate him must claim his constitutional privilege under the Fifth Amendment from being compelled in any criminal case to be a witness against himself or he will not be considered to have been "compelled."¹¹ If the privilege is not claimed by the witness, it is considered to be waived.¹² Once the witness has launched into testimony that incriminates him, he cannot renege and refuse to testify further because the privilege is then deemed to be waived as to that particular subject matter.¹³ And once the witness has testified in a proceeding, that testimony may be used against him in a retrial of the same case.¹⁴

The interdiction of the Fifth Amendment operates only where a witness is asked to give testimony which may possibly expose him to a criminal

7. *Boyd v. United States*, *supra* note 1; *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

8. *Arndstein v. McCarthy*, 254 U.S. 71 (1920).

9. *Karel v. Conlan*, 155 Wis. 221, 144 N.W. 266 (1913).

10. *Johnson v. United States*, 318 U.S. 189 (1943).

11. *United States v. Monia*, 317 U.S. 424 (1943).

12. *United States v. Murdock*, 284 U.S. 141 (1931); *United States ex. rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103 (1927); *Burrell v. Montana*, 194 U.S. 572 (1904). *But cf.* *United States v. Block*, 88 F.2d 618 (2d Cir.), *cert. denied*, 301 U.S. 690 (1937).

13. *Rogers v. United States*, 340 U.S. 367 (1950); *United States v. Harrison*, 121 F.2d 930 (2d Cir. 1941). See note 19 A.L.R.2d 378.

14. *Woerde v. United States*, 158 F.2d 651 (D.C. Cir. 1946).

charge. If the criminality has been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality which lingers only as a memory and involves no present danger of prosecution.¹⁵ Where there is an immunity statute which affords the witness absolute immunity from prosecution for any crime developed from such testimony, he cannot avail himself of the privilege.¹⁶ The immunity must be complete, however, and not merely partial.¹⁷ One cannot refuse to answer where the crime revealed is barred by the statute of limitations.¹⁸ The danger must be real and appreciable with reference to the ordinary operation of law, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.¹⁹

One of the important aspects of the privilege against self-incrimination in the Federal Constitution is that it does not apply to state action. A state can prosecute a witness for any answer he may give in a federal investigation or trial, even where he is given complete immunity by federal statute from prosecution. One cannot refuse to testify in a federal trial on the basis that his answers may incriminate him under state law.²⁰ Conversely one cannot refuse to testify in a state prosecution on the ground that he will be incriminated under a federal or foreign law. The refusal must in every case be grounded on the fact that the sovereignty of the court or investigating body could prosecute him for his criminatory answers. An immunity under state law given to a witness testifying in a state investigation does not prevent a federal prosecution for crimes revealed by the answers.²¹ Generally an immunity granted by one sovereign does not stay the power to prosecute of another sovereign.²²

The privilege is purely personal to the witness himself.²³ An officer of a corporation in whose custody are its books, is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity, and is not therefore protected against their production or against a writ requiring him as agent of the corporation to produce them.²⁴ Unless the witness himself is being

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

16. *Brown v. Walker*, 161 U.S. 591 (1896). For a history of the Congressional immunity statute see *United States v. Bryan*, 339 U.S. 323, 335-342 (1950).

17. Cf. *Clickstein v. United States*, 222 U.S. 139 (1911); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

18. *Brown v. Walker*, *supra* note 16.

19. *Mason v. United States*, 244 U.S. 362 (1917).

20. *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *United States v. Murdock*, *supra* note 12; *Ensign v. Pennsylvania*, 227 U.S. 592 (1913); *Brown v. Walker*, *supra* note 16.

21. *Jack v. Kansas*, 199 U.S. 372 (1905).

22. *Queen v. Boyes*, 1 Best and S. 311 (1861); *King of the Two Sicilies v. Willcox*, 7 St. Tr. (N.S.) 1049, 1068 (1720); *State v. Thomas*, 98 N.C. 599, 4 S.E. 518 (1887).

23. *United States v. White*, 322 U.S. 694 (1944); *Goldstein v. United States*, 316 U.S. 114 (1942).

24. *Essgee Co. of China v. United States*, 262 U.S. 151 (1923). The right does protect against the production of incriminating documents of a private nature however. *Boyd v. United States*, *supra* note 1.

called upon to incriminate himself, the fact that someone else may be incriminated is not sufficient to exclude evidence.²⁵ In short, the privilege only allows the witness to protect himself from being "hoist by his own petard."

The privilege does not extend to a corporation.²⁶ It has also been held that radio recordings made some years before to be played over the air, when played in court in a treason prosecution, did not violate the defendant's right not to be compelled to be witness against himself.²⁷

An important aspect of this constitutional right has been recently revealed in connection with inquiry into Communist Party membership. The Supreme Court in *Blau v. United States*²⁸ held that it is a violation of the Fifth Amendment to compel a witness who objects on the ground of self-incrimination to testify before a grand jury in response to questions concerning his employment by the Communist Party or intimate knowledge of its operations when there is in effect a statute such as the Smith Act, 18 U.S.C. 2385, making it a crime to advocate, or to affiliate with a group which advocates overthrow of the government by force, and it is immaterial whether answers to the questions asked would have been sufficient standing alone to support a conviction, when they would have furnished a link in the chain of evidence needed in a prosecution of the witness for violation of the Smith Act. The full implications of the *Blau* case are not yet understood and will undoubtedly be revealed as cases arise. It might be observed, however, that a great variety of questions might furnish such a link and it is hoped that the implications of this case will not be extended so as to inhibit disclosures which do not afford a clear causal connection between an answer and the fact of illegal membership in the Communist Party.

THE ANOMALIES OF ITS APPLICATION

Like any other constitutional right, this right guaranteed by the Fifth Amendment does not exist in a vacuum. It arises in the course of trials, grand jury investigations, and lately, in the course of legislative investigation. The government, state, or committee attorney will ask a question, the witness will refuse to answer, and a trial judge will be called on to determine whether there is any showing of incrimination. This is not a difficult decision where the very nature of the question calls for an incriminating answer, e.g., "Did you shoot John Doe?" It is not difficult either where the very nature of the proceeding reveals the incriminating nature of the question, as, where in a grand jury investigation of a murder, the witness is asked whether he owns a Colt automatic. The real difficulty arises where

25. *United States v. Johnson*, 165 F.2d 42 (3d Cir. 1947), *cert. denied*, 332 U.S. 852 (1948).

26. *Porter v. Mueller*, 156 F.2d 278 (2d Cir. 1946).

27. *Gillars v. United States*, 182 F.2d 962 (1950).

28. 340 U.S. 159 (1950).

during a general grand jury investigation,²⁹ or a legislative committee hearing, a witness is asked a question perfectly colorless on its face. Until some showing is made of how the answer could be incriminating, only the witness can see the casual connection between his answer and some crime. Take for example the case of a witness who is called before a grand jury which is investigating criminal activity generally in a locality. The witness is asked what his occupation is. Suppose his occupation is trafficking in narcotics. The nature of the question does not reveal its incriminating nature in such a case. Nor does the nature of the proceeding. He is naturally presumed to be innocent of crime. If he explains how the question would incriminate him, his very explanation may in some cases incriminate him. Thus the situation is a paradox. Certainly a witness cannot be the sole judge of his own answers. And yet there is nothing to indicate to the court how the answer would be incriminating. If an investigation is a federal one, he may want to protect himself from some state prosecution (which he has no right to do), or to shield some friend or organization (which he has no right to do either). The better rule is to require that in order to exercise his right, he must in some way indicate to the court circumstances which suggest that his answer might be criminatory.

The courts in this country were early faced with the problem of how to distinguish between a *bona fide* claim of privilege and an attempt to use the privilege for ulterior motives. During the trial of Aaron Burr, his secretary Willie³⁰ was called by the government to identify a letter written in cipher. He refused to answer a question as to whether he understood the cipher at the time the question was asked. The conclusion of Chief Justice Marshall was that the answer would not criminate him since it asked only for his present knowledge rather than knowledge at the time he was alleged to have copied the letter. The latter, the court believed, would have implicated him in a charge of treason. However, it is obvious that under certain circumstances even the witness' present knowledge might implicate him since it might have been derived from knowledge at the time he made the copy. It seems probable that if the witness had stated that any knowledge he presently had was the same as that he had at the time of the copying, his plea of privilege would have had to be upheld for he would then have provided the court with the additional circumstances that there was a real danger that his answer would incriminate him. In the absence of that showing the witness was required to answer. Chief Justice Marshall announced the following rule (pp. 38-40):

When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which

29. A grand jury can question witnesses and conduct an investigation without reference to any particular crime, and without an indictment before it. *Cf. Hale v. Henkel*, 201 U.S. 43 (1906).

30. *In re Willie*, Fed. Cas. No. 14,692e (D.C. Ky. 1807).

entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. . . . When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be.

Later cases have made explicit that which was implicit in *In re Willie*; namely, that whenever it does not appear from the nature of the question or the evidence already before the court at the time the question is asked that the answer can imperil the witness, even though it is possible that the answer can incriminate the witness, his bare claim of the privilege is not sufficient. The witness must go further and indicate in some way that his claim has a real foundation in fact, and is not made in bad faith. A case frequently cited as expounding this rule is *The Queen v. Boyes*.³¹ Cockburn, C.J. there stated at 329-330:

. . . It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made mala fide, should be received as conclusive.

With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn v. The London Dock Company*, 10 Exch. 698, 701, and acted upon by V. C. Stuart, in *Sidebottom v. Adkins*, 3 Jur. N.S. 631, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

This language was quoted with approval in *Brown v. Walker*³² and *Mason v. United States*.³³ Professor Wigmore refers to the decision by Mr. Justice Mitchell in *State v. Thaden*,³⁴ which in turn adopts the rule expressed in *The Queen v. Boyes* as one which "leaves nothing to be added, and (which) ought to remain the last word in the development of the rule."³⁵ It is abundantly clear that the witness must make some showing as to how his answer would incriminate him. The difficulty lies in the nature of the showing. This difficulty was well expressed by Judge Learned Hand in *United States v. Weisman*.³⁶

Obviously a witness may not be compelled to do more than

31. 1 B. & S. 311, 121 Eng. Rep. 730 (1861).

32. *Brown v. Walker*, *supra* note 3.

33. *Mason v. United States*, *supra* note 19.

34. 43 Minn. 253, 45 N.W. 447 (1890).

35. 8 WIGMORE, EVIDENCE 406 (3d ed. 1940).

36. 111 F.2d 260, 262 (2d Cir. 1940).

show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

The *Weisman* case clearly laid down the principle that when there is no showing from the evidence or the nature of the proceeding as to how an answer to a question could incriminate the witness, that witness has a burden of showing to the court in some manner how the question could incriminate him.

Recently in *United States v. Hoffman*,³⁷ the Supreme Court again had the situation of a witness found in contempt for failure to answer questions which were *prima facie* innocent, and the criminatory character of which was not revealed to the court by the previous testimony or surrounding facts. The facts were these:

A grand jury of the Eastern District of Pennsylvania undertook an investigation of frauds on the United States Government involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses. Hoffman appeared as a witness before this grand jury and refused to answer certain questions on the asserted ground that his answers might incriminate him of a federal offense. The questions and answers are as follows:

Q. What do you do now, Mr. Hoffman?

A. I refuse to answer.

Q. Have you been in the same undertaking since the first of the year?

A. I don't understand the question.

Q. Have you been doing the same thing you are doing now since the first of the year?

A. I refuse to answer.

Q. Do you know Mr. William Weisberg?

A. I do.

Q. How long have you known him?

A. Practically twenty years I guess.

Q. When did you last see him?

A. I refuse to answer.

Q. Have you seen him this week?

A. I refuse to answer.

Q. Do you know that a subpoena has been issued for Mr. Weisberg?

A. I heard about it in Court.

37. 341 U.S. 479 (1951).

Q. Have you talked with him on the telephone this week?

A. I refuse to answer.

Q. Do you know where Mr. William Weisberg is now?

A. I refuse to answer.

Later Hoffman and his counsel appeared in open court and the Government challenged Hoffman's claim of privilege. The court, after hearing the questions and answers and after hearing argument by Hoffman's counsel, found that there was no real and substantial danger of incrimination of a federal offense, and ordered him to reappear before the grand jury and answer the questions. Hoffman further refused to answer the questions, and an order finding him guilty of criminal contempt was signed, committing him to five months' imprisonment. No showing was made by Hoffman as to how the answers could incriminate him. It was not until after the order adjudging him guilty of contempt was signed, he had noted an appeal, and bail pending appeal was denied that Hoffman produced any showing at all. At that time he filed a Petition for Reconsideration of Allowance of Bail Pending Appeal and attached an affidavit setting forth, *inter alia*, that when he refused to answer the questions he had assumed that the grand jury and the court "were cognizant of, and took into consideration, the facts of which he based his refusals to answer," that he had "since been advised, after his commitment, that the Court did not consider any of said facts," and "considered only the bare record." This affidavit then went on to state that the investigation was stated, in the charge of the court to the Grand Jury, to cover "the gamut of all crimes covered by federal statute; that Hoffman had been publicly charged with being a known underworld character, and a racketeer with a twenty-year police record, including a prison sentence on a narcotics charge; that while waiting to testify before the Grand Jury he was photographed with the head of the Philadelphia office of the United States Bureau of Narcotics; that he was questioned concerning the whereabouts of a witness who had not been served with a subpoena and for whom a bench warrant was sought by the Government prosecutor." Hoffman further contended that it was on the basis of these facts that he had based his refusal. In support of these averments Hoffman attached clippings from local newspapers of dates current with the grand jury proceedings, reporting the facts asserted in the affidavit. The United States Court of Appeals for the Third Circuit granted the motion to strike this matter and affirmed the conviction.³⁸ With respect to the question regarding Weisberg, the Third Circuit held unanimously that "the relationship between possible admissions in answer to the questions . . . and the proscription of [pertinent federal criminal statutes (18 U.S.C. 371, 1501)] would need to be much closer for us to conclude that there was real danger in answering." As to the questions concerning Hoffman's business, the Third Circuit observed that "It is now quite apparent that the appellant

38. 185 F.2d 617 (3d Cir. 1950).

could have shown beyond question that the danger was not fanciful." That court did hold that the data submitted in the supplemental record "would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy." But it concluded that the information offered in support of the petition for reconsideration of bail "was not before the court when it found appellant in contempt, and therefore cannot be considered now." Thus limited to the record originally filed, the majority of the court was of the opinion, with respect to the business questions, that "the witness here failed to give the judge any information which allowed the latter to rule intelligently on the claim of privilege for the witness simply refused to say anything and gave no facts to show why he refused to say anything." One judge dissented, concluding that the District Court knew that "the setting of the controversy" was "a grand jury investigation of racketeering and federal crime in the vicinity" and "should have adverted to the fact of common knowledge that there exists a class of persons who live by activity prohibited by federal criminal laws and that some of these persons would be summoned as witnesses in this grand jury investigation."

The Supreme Court in reversing the Third Circuit held:³⁹

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367 (1951), and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple v. Commonwealth*, 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine*, 74 Fed. 954, 960 (C.C.S.D. Ohio 1896).

The Supreme Court held in effect that the notoriety of the particular grand jury investigation of "rackets" in the district that "will run the gamut of all crimes covered by federal statute" should have put the court on notice of the criminatory character of the questions. As far as the *Weisberg* questions are concerned the Court held that they were intended to adduce the contacts that Hoffman had with a notorious fugitive witness. The Court said of these questions:⁴⁰

The three questions [about Weisberg] if answered affirmatively, would establish contacts between petitioner and Weisberg during

39. 341 U.S. 479, 486 (1951).

40. *Hoffman v. United States*, *supra* note 37 at 488.

the crucial period when the latter was eluding the grand jury; and in the context of these inquiries the last question might well have called for disclosure that Weisberg was hiding away on petitioner's premises or with his assistance. Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.

The Supreme Court also held that the District Court should have considered the supplemental record based on newspaper clippings showing that Hoffman was a notorious "underworld character and racketeer" filed two weeks after the contempt order.⁴¹

It is the opinion of this writer that the *Hoffman* case weakens the standard set forth in *United States v. Weisman*⁴² by Judge Learned Hand which requires a witness to show affirmatively how an answer could criminate him of a federal crime where that is not otherwise shown. That Hoffman had a genuine fear of such a consequence is pure speculation. He may have wished to shield others, or he may have been shielding himself from state prosecution for some crime violative of state law — neither of which purposes entitled him to assert the privilege. The only fact before the court which revealed in any way how Hoffman could be incriminated by the questions was that he was a witness before a grand jury investigating the broad field of federal law violations. It is difficult to understand how that fact alone could apprise the court of the criminatory nature of the colorless questions asked. The evidence of newspaper publicity was submitted two weeks after the contempt order was signed, and by usual standards, should have been rejected. The *Hoffman* holding is hardly a clear guide for trial judges to follow in weighing the fact of the criminatory character of a question. If the judge, having no showing of the criminatory character of a particular question, must speculate as to whether a possible answer could "forge links in a chain of facts imperiling [a witness] with conviction of a federal crime,"⁴³ it will be very difficult to obtain the testimony of any recalcitrant witness. If the appellate court delves into conjecture in reading the cold pages of a record, it can label practically any question criminatory.

Another case illustrating the same difficulties was that of *United States*

41. It is a far cry from the *Hoffman* holding to that of *Mason v. United States*, *supra* note 19. There a witness was called before a grand jury investigating gambling. After he had testified that he had been sitting at a card table in a billiard parlor with certain defendants, the witness was asked (1) was there a game of cards being played at the table and (2) was there a game being played at another table. Another witness was asked (1) if he saw anyone there playing "stud poker" or "pangini," and (2) if at this same time he saw anyone playing a game of cards at the table where he was sitting. The Supreme Court held that refusal to answer these questions was contempt because there was no showing that under Alaska law it was criminal to sit at a table where cards are being played, or to join in such game unless played for something of value. The Court in that case held:

Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

42. Note 36 *supra*.

43. *Hoffman v. United States*, *supra* note 37, at 488.

v. Greenberg.⁴⁴ There the witness was subpoenaed as a witness before a grand jury investigating violations of various federal laws. He was asked the question "Are you in the numbers business now?" and he refused to answer. After testifying that he knew numbers writers around 1133 West Diamond Street in Philadelphia, he was asked "Who?", and he refused to answer. In connection with questions about a certain telephone at the same address he stated he did not use it "for my lawful business". He was then asked the questions: "Do you use it for any other business?", "and what business do you use it for?". He refused to answer these questions.

Initially it should be observed that the operation of a numbers business *per se* is not violative of federal law, and the questions on their face do not come within the federal privilege. Greenberg, however, contended that his answers might tend to incriminate him of criminal violations of the internal revenue laws relating to the income tax and the withholding of income and social security taxes from employees' wages should it be established that he was in the numbers business. The Third Circuit affirmed the contempt order, and held:⁴⁵

Accordingly the witness 'must show the court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith.'

The Court found that the trial judge was justified in concluding that a direct answer could not reasonably form a link in that chain and held:⁴⁶

Where, as here, the question was innocent on its face all that the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them.

As far as the questions relating to his business were concerned the court held that a witness may not decline to state his business, although itself not unlawful under the federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business and that subsequent questions with respect to the conduct of his business may develop the delinquencies. There was no showing either as to how his knowledge of other numbers writers would incriminate him under the federal internal revenue laws.

However, the Supreme Court granted Greenberg's petition for a writ of certiorari and *per curiam*, vacated the Third Circuit judgment and remanded the case to that court for reconsideration in the light of *Hoffman v. United States*.⁴⁷ The Third Circuit has again reconsidered the issue⁴⁸ and has held that the *Hoffman* case was distinguishable. In *Hoffman* the

44. 187 F.2d 35 (3d Cir. 1951).

45. *Id.* at 39.

46. *Id.* at 39.

47. Note 37 *supra*.

48. This opinion (Appeal No. 10,336) has not been reported as yet.

witness was notoriously engaged (according to newspaper stories) in a business violative of federal law. In *Greenberg* such was not the case. While the "numbers business" is violative of state law, that does not incriminate him of a federal law, the *sine qua non* of assertion of the privilege.⁴⁹ The Third Circuit concluded:

In the absence of any contention on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in Hoffman's case as wholly inapplicable.

In another recent case, *Alexander v. United States*,⁵⁰ the defendant was asked (1) if he knew the names of the officers of the Los Angeles County Communist Party and (2) if he knew the table of organization and the duties of the county officers of the Los Angeles County Communist Party. The Ninth Circuit held that refusal to answer these questions was not contempt because the court was apprised of the following facts showing their criminatory character: (1) A previous witness had characterized the defendant as a "Soviet espionage agent," (2) although the above questions were innocent on their face, their association with previous questions obviously incriminating under the Smith Act⁵¹ established the criminatory link, (3) there was a current move by the Attorney General to round up leaders of the Communist Party as shown by indictments against eleven Communist leaders in New York, and various newspaper articles, and (4) there was a "peculiar selectivity" by service of subpoenas on fifteen persons in Los Angeles at seven o'clock in the morning for testimony that morning, showing that there was a local campaign to prosecute Los Angeles Communists. The causal connection between the questions asked and possible prosecution under the Smith Act is thus clearly shown in the *Alexander* case. Facts were presented which demonstrated to the court the criminatory character of questions which on their face were colorless (the mere knowledge of Communists or Communist organization is not *per se* illegal).

The basic difficulty with the *Hoffman* doctrine is that it liberalizes the privilege to the point where there is no compulsion on the witness asserting it to do more than prove that the "atmosphere" of a particular investigation puts the trial court on notice of the criminatory character of any question that may be asked. He does not have to come forward, as in the *Alexander* case and affirmatively demonstrate specifically the criminatory aspects of the questions asked. He can merely claim that as the grand jury was investigating various federal crimes, the unuttered answer to an innocent question would supply the missing link establishing the perpetration of such a crime. Such a bald assertion hardly demonstrates the realities of the situation to the trial judge.

It might be argued that the court is reasonably apprised of the crim-

49. Cf. *United States v. Murdock*, *supra* note 12 at 149; 290 U.S. 389, 396 (1933).

50. 181 F.2d 480 (9th Cir. 1950).

51. 18 U.S.C. § 2385 (1946).

inatory character of a question by newspaper publicity given to a particular defendant. In the *Hoffman* case such evidence was not demonstrated to the judge until after the order adjudging the defendant in contempt had been signed. There is, however, something offensive in this type of showing. The more notorious the criminal, the more publicity he gets in the local tabloids. If he is allowed to bring such newspaper columns into court to demonstrate the fact that he is "alleged" to be a certain type of criminal or engaged in a particular criminal enterprise, he can thus demonstrate facts entitling him to refuse to answer questions asked in a grand jury or legislative committee investigation. Circumstances could be imagined where a criminal could actually give out press releases to some tabloids which are not beyond printing anything, and thereby protect himself from being questioned. The less notorious criminal would not be as well protected. Recently a Senate Committee was investigating the "Amerasia Case." Certain questions were asked a witness which were innocent on their face. Although the witness refused to answer these questions, asserting his privilege, he maintained he had no duty to make any showing that the questions were criminatory. The court in *United States v. Jaffe*,⁵² however, refused to find him in contempt on the basis that reasonable grounds for apprehension existed justifying his refusal. Twenty-nine newspaper articles and a Scripps-Howard bulletin were found by the court to illustrate the criminality of the questions. The court observed that these articles would not be admissible in evidence but were admissible to show comments that may have reasonably caused apprehension to a witness. The court said:⁵³

The flood of such newspaper publicity for many weeks immediately prior to the testimony of this defendant with reference to his connection with the Amerasia case, his reputed connection with Communist activities, and association with persons engaged in furthering Communist objectives is abundantly revealed in exhibits filed in the instant case.

This type of showing could certainly encourage the worst features of criminal reporting.

CONCLUSION.

Today more than ever is there need for clear definitions to guide the *nisi prius* court in its administration of the great caseload of criminal actions. This is especially true of a rule of constitutional origin. Its limits and qualifications must be defined to insure a uniformity of application, and a standard of legal predictability. In safeguarding the constitutional privilege of remaining mute to a question, the answer to which would forge a link with a crime, some objective standards must be maintained to insure that a witness cannot refuse to answer contumaciously. The standard set forth in *United States v. Weisman*⁵⁴ seems the most wise. That rule would require

52. 98 F. Supp. 191 (D.C. D.C. 1951).

53. *Id.* at 194.

54. Note 36 *supra*.

that when a question is asked which does not bear the badge of criminality, the witness, in order to avail himself of the privilege, must suggest in some way the causal link between an answer and some crime. He must "be content with the door's being set a little ajar" in order to claim the privilege. It is not possible to suggest any universal way this can be done, but it would seem that something beyond the mere "atmosphere" of the investigation should be adduced to show the criminatory character of the questions. It would also be preferable to require some showing beyond newspaper articles to establish this fact. The *Alexander* case suggests the way a witness may make such an offer of proof. Clearer objective standards are vitally requisite in this area of conflicting rights.

Correction: The sentence beginning "Weekly benefits . . ." under the heading Workmen's Compensation in 6 *MIAMI LAW QUARTERLY* 59 (1951) should read: Weekly benefits in unemployment insurance are increased from a maximum of \$15 to a maximum of \$20.
