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SHOULD WE ABOLISH THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION?

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The author hardly needs any identification to the readers of this Journal, of which he is Managing Director. As Professor of Law at Northwestern University he has made an intensive study of the subject matter of the present article. His first paper on the self-incrimination privilege appeared in this Journal in 1937. It was later revised and enlarged and appeared in book form in 1950 under the title "Self-Incrimination—What Can An Accused Person be Compelled to Do?"—*Editor.*

Until the televised Kefauver Committee hearings several years ago, relatively few people knew that there was such a thing as the constitutional privilege against self-incrimination. At that time this little lesson in civics came to the great mass of citizens in a rather sordid fashion. They learned it from the lips of gangsters like Tony Accardo, Joe Adonis, Joe Aiuppa, and Jack "Greasy Thumb" Guzik. As these fellows invoked their constitutional privilege in refusing to testify, some of them had difficulty in just parroting the words which their lawyers had written down for them to read when they took the witness stand. Although one hoodlum had been thoroughly coached as to what to say when he claimed his privilege of not incriminating himself, he mauled his statement rather badly when he said, "I refuse to answer on the ground that I might *discriminate* myself." They all knew, of course, that in this country no person can be required to testify or give evidence against himself, and that everyone—including a gangster—has the right to remain silent and say nothing regarding the crime for which he is suspected or accused. That fact is rather picturesquely recorded in the official report of the Kefauver Committee hearings. In it the reader will find this notation with reference to Joe Aiuppa: "Let the record show that the witness just sits there mute, chewing gum, saying nothing."[1]

Once again we are hearing a great deal about the self-incrimination privilege. During the recent Congressional hearings regarding Communist activities, there were daily reports in the press about witnesses who refused to testify because of a fear of self-incrimination. A number of such persons were at one time trusted officials in our Federal Government and many were other public employees or teachers in our tax supported institutions. When asked about their Communist affiliations or subversive activities, their answers were the same as the gangsters before the Kefauver Committee: "I refuse to answer on the ground I might incriminate myself."

Faced with this dual menace of Communism and gangsterism, many citizens have been asking themselves: Why should we accord such a privilege to the Communist, who is out to destroy the very government that gives him this right to refuse to answer incriminating questions? Why should we place this same protective cloak around the hoodlum who is himself no respecter of the rights or privileges of anyone

[1] Hearings Before a Special Committee to Investigate Organized Crime in Interstate Commerce, Part. 5, p. 1373 (1951).

else, and who is just as serious a menace to our democracy as his international gangster counterpart working under the direction of Moscow? If a person is innocent of the charge against him, why should he refuse to answer questions? And if he is guilty, why let him refuse?

The decisions we reach in this matter and the thinking we indulge in regarding these issues may be of tremendous consequence. Any judgment arrived at on the basis of aroused emotions rather than intelligent reasoning may well destroy the very thing we are trying to preserve—democracy itself.

How, then, did this privilege against self-incrimination ever come about? And why do we retain it in these critical times?

History and Policy of Privilege

For several hundred years prior to the founding of the American colonies, the English people were subjected to interrogation practices by which anyone could be required to appear and answer under oath questions regarding heresy and other matters involving his religious beliefs. This procedure was used to regulate the most intimate details of daily life, and much abuse and cruelty followed in its wake.

In the early part of the 17th century the life of the Puritans in England was made particularly miserable by this compulsory interrogation practice. They were thereby exposed as dissenters and their activities constantly suppressed. Those who left England for other lands were harassed with interrogation ordeals even as they waited on shipboard for their vessel's departure. The ones who remained in England and fought in Cromwell's army used all the resources they could muster in seeking an abolition of the practice of compulsory interrogations. The Puritan efforts met with success about the middle of the 17th century. From then on the principle prevailed that no one should be compelled to incriminate himself.

The settlement of the American colonies took place during the same period in English history when opposition to the compulsory interrogation procedure was most pronounced. Moreover, the colonies themselves had a short experience with compulsory interrogations. The same factors, therefore, which contributed to the abolition of the practice in England also accounted for a similar reaction in the colonies. It explains why the privilege was incorporated into the constitutions of the various states and into the federal constitution as well.

So much for the history of the privilege.[2] We may next inquire, why have we retained it so long after the initial reasons for its inception have disappeared. In other words, what are the policy reasons which justify or explain the existence of the privilege at the present time.

The privilege against self-incrimination exists mainly in order to stimulate the police and prosecution into a search for the most dependable evidence procurable by their own efforts. Otherwise there probably would be an incentive to rely solely upon the less dependable admissions that might be obtained during the course of a compulsory interrogation. As an English writer put it once while commenting upon the problem in India, if the police and prosecutor were relieved of this restriction,

[2] For further details and references see Inbau, *Self-Incrimination—What Can an Accused Person be Compelled to Do?* 1–6 (1950).

there would be a temptation "to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, rather than go about in the sun hunting up evidence."[3]

This policy reason, plus the persuasive force of history, renders it highly unlikely that the privilege will ever be abolished as one of our democratic concepts. Inquiry may be made, however, as to the possibility of attaching some limitations upon its use, without a risk to our essential civil liberties. In other words, can the use of the privilege be subjected to some modifications that will prevent or lessen its abuses by the Communists and gangsters while at the same time leaving the privilege unimpaired with respect to all the rest of us?

Suggested Limitations upon the Exercise of the Privilege

There is ample experience in our legal history—precedent, as the lawyers call it—in support of the view that the use of the privilege can be safely modified so that it will become less subject to mockery by the Communist and the gangster and still remain a sturdy bulwark in our democratic structure. An Illinois case offers a good illustration of the point.

Two Chicago police captains were assigned to investigate a gang killing which resulted from gambling syndicate activities. Both captains had been disciplined shortly before this assignment because of the existence of widespread gambling in the sections of the city under their command. Now, ironically enough, they were ordered to solve a murder committed by the same hoodlum element whose activities the two captains had left undisturbed to such an extent as to warrant their prior suspension from active police duties. The investigation they conducted produced some results and evidence which appeared to be of a more or less synthetic nature, and suspicion arose that perhaps the captains were deliberately falsifying certain evidence. They were called before a grand jury, to be questioned about their case investigation and activities. But they refused to testify—on the ground that they might incriminate themselves!

Following the captains' claim of their self-incrimination privilege, they were fired from the Chicago police force. They appealed to the Illinois courts, alleging a denial of their constitutional rights. The Illinois appellate court held that although the captains, as citizens, had a constitutional right not to testify, once they refused to do so they lost their right to retain their civil service status as police officers. In other words, they did not have to testify; nor did the people of Chicago have to put up with them as police officials.[4] As Supreme Court Justice Oliver Wendell Holmes once said in another case situation, no one has a constitutional right to be a policeman.[5]

The same line of legal reasoning that was used in this case of the two police captains can also be employed in the present case situations involving federal and state officials or employees suspected of disloyalty or treasonable conduct. This would mean, therefore, that in a legal and properly conducted investigation into such

[3] Stephen, *History of Criminal Law* 442 (1883).

[4] Drury v. Hurley, 339 Ill App. 33, 88 N.E. 2d 728, 402 Ill. 243, 83 N.E. 2d 575 (1949), noted in 38. J. Crim. L. & Criminology 613 (1948).

[5] Mc Auliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

matters by a legislative committee, grand jury, or court, any governmental employee who invokes the privilege against self-incrimination will thereby forfeit his right to remain in his governmental office or position. By all means, let him have the privilege; but divorce him from his job, either on the ground of his being a bad security risk, or simply for the reason that the public has the right to insist upon a higher grade of citizenry from anyone on its payroll or representing the public interest. In fact, we may by appropriate legislation even bar such a person from holding any public office in the future. New York already has such an "official good conduct" provision in its constitution, although it was intended originally to facilitate the removal of "corrupt" officials rather than serve as an aid in investigations into subversive activities.[6]

Another legal principle which could be safely utilized to good advantage in curbing Communist and gangster abuses of the privilege is to grant immunity from prosecution to certain suspects who invoke the privilege and then require them to disclose what they know about others who are engaged in similar activities. The basic idea here is that in order to find and convict the most important and most dangerous criminals it is worth the price to say to a less serious offender: "The government will waive its right to prosecute you for what you have done, but it wants the facts and information you have regarding the other persons involved in this criminal activity." It is not uncommon for prosecuting attorneys to resort to this practice even without any specific statutory authorization. They merely make "a deal" with one of several offenders whereby the prosecutor agrees not to prosecute him in return for his testimony regarding the guilt of the other offenders. The objection to this arrangement is that it is "under the table," so to speak, and is subject to abuse both by the prosecution and the witness.

Many states already have laws authorizing the granting of immunity to witnesses in certain types of case situations—usually in hearings conducted by administrative law commissions (e.g., commerce commissions, insurance commissions, etc.); and a few states have a general immunity statute for use in regular criminal trials. Such laws have been upheld as constitutionally valid.[7] The only important constitutional requirement is that the immunity must be complete in every respect. In other words, an immunity statute is invalid if it merely assures the witness that what he says under compulsion will not be used against him in a subsequent criminal prosecution. He must also be given a guarantee that he will not even be prosecuted for any offense about which he is asked to testify. This legal requirement accounts for the fact that practically all of the hoodlums who defied the Kefauver Committee eventually escaped the contempt penalties imposed upon them. The courts ruled that the old

[6] Article 1, §6, which reads, in part, as follows: "Any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the Attorney General."

[7] See Hill and Walker, *"Legislation Concerning Alibis, Perjury, Self-Incrimination Immunity, Official Conduct, and Grand Juries,"* 39 J. Crim. L. & Criminology 629, at p. 639–643 (1949).

immunity statute under which the Committee had acted was fatally defective because it gave the witness no guarantee against a future prosecution; it only protected him from the later use of the actual statements which would constitute his enforced testimony. Of all the defiant witnesses only Frank Costello went to jail and he did so because he walked out on the Committee rather than do what his fellow hoodlums had done and stand by his self-incrimination privilege.[8] Had he relied upon the privilege he would not have been convicted.

There is need for federal as well as state legislation which will provide for the granting of complete immunity to persons who claim their privilege against self-incrimination before any legislative committee, grand jury, or court. The law should be general in application so that it can be used in the investigation and prosecution of all major criminal offenses—including gangsterism and subversive activity.[9]

Conclusion

We can considerably reduce the amount of mockery now leveled at our self-incrimination privilege, and we can better preserve it, by the enactment of "official good conduct" and "immunity" legislation of the types herein suggested. And this can be accomplished without the risk of losing our basic civil liberties.

[8] U. S. v. Costello, 198 F. 2d 200 (1952).

[9] The 1954 session of Congress passed an immunity act, but it is restricted in its scope to investigations and prosecutions for subversive activities. (Public Law 600, approved August 20, 1954; 62 Stat. 833) This act contains, however, certain safeguards against the unwarranted grant of immunity to persons who should not be permitted to escape prosecution in this manner. For instance, before a witness at a committee hearing can be granted immunity two thirds of the members of the full committee must approve; and before a federal district attorney may accord immunity to a witness, the Attorney General's approval is required. Any general immunity statute should incorporate comparable safeguards.