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The Privilege against Self-Incrimination: Principles and Trends

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THE PRIVILEGE AGAINST SELF-INCRIMINATION: PRINCIPLES AND TRENDS

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SOURCES OF THE PRIVILEGE

In the United States, the privilege against self-incrimination is pervasive. The privilege is explicitly recognized not only in the Federal Constitution[1] but also in the constitutions of 48 of our states.[2] The two remaining states, Iowa and New Jersey, achieve the same result in different ways. Iowa, in the absence of an express constitutional provision, reads the privilege into the due process clause of its constitution.[3] New Jersey, on the other hand, grants the privilege by statute.[4]

Perhaps the most familiar wording of the privilege is that found in the Fifth Amendment to the Federal Constitution, which provides, among other things, that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." Many of the states, in wording their privileges, have copied the federal provision. Others have not.[5] Yet, both in general purport and in basic interpretation, all of the privileges, federal and state, essentially point in the same direction.

Although, because of their pervasiveness and rough uniformity, convenience might suggest that we mentally allow the various privileges to coalesce, an accurate discussion of "the" privilege in this country, in the broad sense, demands a threshold recognition that each of the 51 individual privileges marches forward with sturdy independence. Thus, each privilege is available only in the jurisdiction granting it. Of course, to claim anything more for the various state privileges would be to undermine prevailing constitutional notions of the proper role to be played by the individual states, both among themselves and in their relations with the federal government. And, although something more, in theory at least, might have been claimed for the federal privilege, it has been settled law for well over one hundred years that the Fifth Amendment privilege against self-incrimination, just as the other provisions of the Bill of Rights, is binding only upon the Federal government. As the United States Supreme Court reiterated near the turn of the century in *Brown v. Walker*, "[T]he [Federal] Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the federal courts, and are not applicable to the several states, except so far as the Fourteenth Amendment may have made them applicable."[6]

A review of the sources of the privilege would be incomplete without at least a brief consideration of the Court's reference, in *Brown v. Walker*, to the Federal Constitution's Fourteenth Amendment. For present purposes, the significant clauses of that amendment are these:

1) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States";[7] and
2) "nor shall any state deprive any person of life, liberty or property without due process of law. . . ."[8]

In the context of our discussion, these clauses translate into the following questions:

1) Is the privilege against self-incrimination a "privilege" or "immunity" of United States citizens which the states may not abridge? and
2) Should a state deny one his life, liberty or property without making the privilege available to him, would such a deprivation

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[1] U. S. CONST. amend. V.

[2] The state constitutional provisions are cited and quoted in 8 WIGMORE, EVIDENCE §2252 n.3 (3d ed. 1940).

[3] See Amana Society v. Selzer, 94 N.W.2d 337, 339 (Iowa 1959).

[4] State v. Zdanowicz, 69 N.J.L. 620, 55 Atl. 743 (1903). See also State v. White, 27 N.J. 158, 168-69, 142 A.2d 65, 70 (1958).

[5] For a brief summary of the language of the various constitutional provisions, see the text at notes 2 to 7 of McNaughton, *The Privilege Against Self-Incrimination*, which appears in the JOURNAL immediately following this article.

[6] 161 U. S. 591, 606 (1895). See also Feldman v. United States, 322 U. S. 487, 490 (1943).

[7] U. S. CONST. amend. XIV, §1.

[8] *Ibid.*

be without due process of law and hence a violation of the Fourteenth Amendment?

The short, well-known, fifty-year-old answer to both of these questions is "no"; the privilege against self-incrimination, as embodied in the Fifth Amendment, is not made applicable to the states by virtue of either of these clauses of the Fourteenth Amendment.[9]

The Supreme Court's narrow reading of "privileges" and "immunities" is acceptable to most as a correct adherence to the limited role accorded those terms by precedent. However, the Court's conclusion that the privilege is not inherent in due process is, to many, a debatable interpretation of that constantly expanding phrase. That this question probably will be revisited is evidenced by the fact that when the issue last came before the Supreme Court fourteen years ago, the minority favoring recognition of the privilege as a basic demand of Fourteenth Amendment due process had grown from one to four justices.[10]

Nor is the question stripped of practical significance by virtue of the fact that each state already has a privilege of its own. A decision that the Fourteenth Amendment required state recognition of a privilege against self-incrimination would permit the Supreme Court to become, for the first time, an overseer of state activities touching upon the privilege. And, although one might expect this oversight to be both benevolent and restrained, thus resulting in the fashioning of a Fourteenth Amendment privilege which would be something less than a mere carbon copy of the Fifth Amendment privilege, the potential of such a new federal power could not, of course, be ignored.

The General Scope of the Privilege

Let us move from our review of the sources of the privilege into a brief and very general discussion of its scope.

The privilege, irrespective of the differences in wording which mark its various sources, seems clearly to bestow its protection upon a defendant on trial in a criminal case. However, it is ironic to note parenthetically that even as recently as 75 or 80 years ago, he who stood accused of a crime was the very one who did not need the protection of any such privilege. For, until the latter half of the nineteenth century, when legislatures began to change the testimonial status of the accused, the defendant was not a competent witness either for or against himself.[11]

Upon leaving the area of the accused and moving into the domain of the ordinary witness, the problems of interpretation become more difficult. One must strain a bit with the words of the various privileges in order to bring within their ambit a witness who is not, at the time he invokes the privilege, a defendant in a criminal case. To refine the problem in terms of a question: Is the privilege available to one who does not have the status of an accused but who is asked, under oath, to relate facts which, if divulged, might directly or indirectly result in his henceforth becoming an accused? Words such as "In all criminal prosecutions, the accused shall not be compelled to give evidence against himself," and, to a lesser extent, words such as "No person shall be compelled in any criminal case to be a witness against himself," seem either to compel or at least to suggest strongly that the privilege is available to a criminal defendant and to no one else. However, the cases are to the contrary. Out of a mixture of history, precedent and policy has come the well established doctrine that the ordinary witness is privileged not to answer incriminating questions.[12] Moreover, he not only may leave such questions unanswered at any stage of a judicial proceeding, criminal or civil, but also he may invoke his privilege in connection with other official proceedings, such as administrative hearings and legislative investigations.[13]

[9] Twining v. New Jersey, 211 U. S. 78 (1908).

[10] See Adamson v. California, 332 U. S. 46 (1947).

[11] For a discussion of this change and the reasons therefor, see 2 Wigmore, Evidence §579 (3d ed. 1940). The various statutes are collected in 2 *id.* §488 n.2.

[12] 8 Wigmore, Evidence §2252 (1)(a) ("A clause exempting a person from being 'a witness against himself' protects as well a *witness* as a *party accused* in the cause; that is, it is immaterial whether the prosecution is then and there 'against himself' or not. So also a clause exempting 'the accused' protects equally a mere witness.")

[13] See In re Lemon, 15 Cal. App.2d 82, 59 P.2d 213 (1936) ("When the Fifth Amendment to the Constitution of the United States was first proposed by Mr. Madison, the proposed provision read, 'No person . . . shall be compelled to be a witness against himself.' The accounts of the debates show that this was deemed to be too broad and the proposal was amended by adding the words 'in any criminal case.' . . . The wording of the proposal as amended may not have been happily chosen for undoubtedly the privilege intended to be given was the common-law privilege against self-incrimination in any proceeding, civil or criminal, and the courts have liberally construed the various constitutional provisions to confer such privilege. As stated by Wigmore in section 2252, at page 834, the variety of phrasing found in the various Constitutions 'neither enlarges nor narrows the scope of the privilege as already accepted, understood, and judicially developed in the common law.' The privilege

Since the various constitutional privileges accord protection to any "person," or to the "accused," or to a "witness," this would seem to imply that the privilege is not available to non-human entities. And the cases, which are not numerous, clearly point in this direction. Corporations were the first bloodless creatures to feel the sting of this literal reading of the privilege, and the rule there fashioned imposed upon the corporation a duty to deliver up its books and records for official inspection even though corporate criminality might thereby be disclosed.[14] Moreover, the net was held to be sufficiently large to catch also the agent who holds in a representative capacity corporate documents which incidentally disclose the agent's own criminality. He cannot, according to the rule, interpose a personal claim of privilege and thereby lock up the corporate file cabinets.[15] However, for some time the rationale of these corporate decisions was not completely clear. Were they primarily an outgrowth of the visitorial powers normally reserved to the sovereign who permits the corporation to be born? Or were they based upon a strict reading of the constitutional phraseology and its history? Clarification came in a 1944 decision of the United States Supreme Court which denied the privilege to an unincorporated association—a labor union. In this decision, *United States v. White*, the Court stated: "The test... is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."[16] The *White* case thus makes it clear that the general rule has a base much broader than the state's visitorial power over corporations.[17] However, the language of the decision, in seeming to place emphasis upon the size and impersonal nature of the artificial entity, rather than upon the mere fact of its non-human shell, raises certain additional questions. For example, is the privilege still available to the small partnership, or to the close corporation spawned by promises of tax savings?[18] Suffice it to say that although the basis of the rule and the direction in which it is proceeding have become clear, the exact scope of the doctrine is far from a settled question.

Our discussion thus far has indicated that, for purposes of analysis and clarity, the privilege can and should be divided into two parts: (1) the privilege of an accused person and (2) the privilege of an ordinary witness. Perhaps it will now be profitable to discuss separately and in slightly more detail these two branches of the privilege.

The Privilege of the Accused

As indicated above, the words of the various constitutional provisions clearly cover the defendant in a criminal case. However, to record accurately the dimensions of this shelter for the accused, one must take cognizance, also, of those statutes which, during the last century, wiped away the testimonial incompetence of the criminal defendant. This legislation did not merely bestow competency where previously there was none. It usually provided, in addition, that notwithstanding his newly-won status, the accused could elect not to utilize it, that is, he could be called as a witness at his own request and not otherwise.[19] This, of course, is something more than the ordinary witness's option to pick and choose, at his peril, among a field of incriminating as well as non-incriminating questions. It is, instead, a somewhat broader shield, a shield designed to accomplish a complete prohibition of inquiry, if the accused so elects. Thus, the statutes granted something more than a mere privilege against self-incrimination;

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then is... accorded to all witnesses in all proceedings and has no relation to the rights of parties...." See also McCarthy v. Arndstein, 266 U. S. 34 (1924) (civil proceeding); Emspak v. United States, 349 U. S. 190 (1955) (legislative hearing); Smith v. United States, 337 U. S. 137, 150 (1949) (administrative proceeding).

[14] Wilson v. United States, 221 U. S. 361 (1911).

[15] *Id.* at 382.

[16] 322 U. S. 694, 701 (1944).

[17] The principle has been applied to a political party, Communist Party of the U. S. v. Subversive Activities Control Board, 223 F.2d 531 (D.C. Cir. 1955), to a partnership, United States v. Onassis, 133 F. Supp. 327 (S.D. N.Y. 1955), and to the board of trustees of the Bail Fund of Civil Rights Congress of New York, Field v. United States, 193 F.2d 86 (2d Cir. 1951).

[18] In In re Subpoena Duces Tecum, 81 F. Supp. 418, 421 (N.D. Cal. 1948), the court refused to apply the *White* doctrine to a small family partnership. The court stated: "It may be that some partnerships, which have a large number of partners... might... take on the habilaments of an association or corporation. But certainly this small family partnership does not reach such a stature."

[19] The words of Ill. Rev. Stat., ch. 38, §734, are typical: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise...: Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness...."

they granted, instead, a privilege not to testify at all. Perhaps a question is appropriate at this point: Is this broader privilege of the accused not to testify at all, as opposed to the narrower privilege of the ordinary witness not to incriminate himself, merely a creature of legislative grace, and thus subject to legislative withdrawal? Or, on the other hand, are these statutes actually codifications of a broader constitutional privilege for the accused? Demands for a narrowing of the privilege may someday cause legislatures to present this question to the courts. It strikes me as a point upon which reasonable men, and indeed reasonable courts, could differ.[20]

Upon returning from conjecture as to the status of these statutes to the more immediate problem of their interpretation, we at once meet the question of who can qualify as an accused person. Is the term to be read narrowly and thus limited to one against whom formal criminal proceedings have been instituted? Or are the statutes broad enough to cover also the potential defendant as, for example, the prime suspect who is ordered to appear before the grand jury or at the coroner's inquest? Although there is some authority to the contrary, most courts read the term "accused" literally; hence, the suspect, or potential defendant, cannot refuse to be sworn, although he may, of course, refuse to answer all incriminating questions which are put to him.[21]

Let us assume, however, that we have a situation in which an accused, on trial for a criminal offense, has decided to invoke his privilege to remain off the stand. To what extent can the prosecution seek to dent or perhaps even to strip away part of this suit of armour which encases the defendant?

Much energy has been expended by prosecutors in an effort to persuade the courts to limit the privilege of the accused to freedom from testimonial compulsion, thus leaving the prosecution free to compel the defendant's assistance in connection with the production of non-testimonial evidence. Under this dichotomy, the defendant could not, of course, be compelled to take the stand and testify (or to produce in court, under judicial order, private papers and perhaps other objects); however, the accused could be compelled to stand up in court in order to facilitate a witness's identification of him, to display a scar, to don certain apparel, to assume a certain position and, perhaps, even to provide a specimen of his handwriting or his voice. If generalization is possible in this uncertain borderland of the privilege, it is to the effect that the prosecutors have met with a fair degree of success. The efforts of defendants to block such courtroom demonstrations (and, in the same vein, to suppress the results of demonstrations and tests conducted outside the courtroom) frequently have been unavailing.[22] However, the decisions are far from uniform. Professor McCormick, in an attempt to bring order out of apparent conflict, has suggested that some courts appear to draw a line between enforced passivity on the part of the accused and enforced activity on his part. That is, they have regarded as unprivileged those things involving passive submission, while recognizing as privileged those activities requiring the active cooperation of the accused.[23] Inasmuch as this shadowy corner of the privilege provides an ideal battleground for those who would limit the privilege and those who would expand its scope, we can safely assume that it will be productive of conflict for some time to come.

In another area of potential limitation upon the privilege, defendants have met with considerably more solicitude, particularly at the hands of the legislatures. Many jurisdictions, in an effort to minimize the disagreeable legal consequences flowing from an invocation of the privilege, have provided by statute that the failure of the accused

[20] One court has considered the question and held that the broader privilege of the accused has a constitutional foundation. See United States v. Housing Foundation of America, 176 F.2d 665, 666 (3d Cir. 1949) ("Compelling the defendant Westfield to take the stand and to testify in a criminal prosecution against him is so fundamental an error that the judgment must be reversed and a new trial ordered. . . . The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him. Both come within the protection of the . . . 5th Amendment . . . The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. We need only say in this case that the accused was required to take the stand and to testify over his objection and in violation of his right protected both by the Constitution and the common law.").

[21] In re Lemon, 15 Cal. App.2d 82, 59 P.2d 213 (1936); Post v. United States, 161 U. S. 583, 587 (1894). *Contra*: State v. Allison 116 Mont. 352; People v. Gillette, 126 App. Div. 665, 111 N.Y.S. 133 (1908) (for later legislative and judicial developments concerning the New York situation, see People v. Steuding, 185 N.Y.S.2d 34 (App. Div. 1959)).

[22] The cases are collected in INBAU, SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? (1950). See also MAGUIRE, EVIDENCE OF GUILT §2.04 (1959).

[23] See MCCORMICK, EVIDENCE §126 (1954).

to take the stand shall not be made a subject of comment and shall not create any presumption against him.[24] However, in recent years the outcry for repeal of such legislation has been substantial, and several states have seen fit to allow comment, although, to be sure, the inference thus permitted is merely a prop under other evidence pointing toward guilt, rather than a substitute for it.[25] Moreover, it should be noted that those who would do away with the no-comment statutes must be something more than merely effective lobbyists. They must also contend with the courts, for several statutes permitting comment have been declared unconstitutional on the ground that to comment is to coerce, and to coerce is to compel, albeit in a somewhat indirect way.[26]

In concluding our discussion of the privilege of the accused, let us focus our attention upon the defendant who, rather than remaining mute, elects instead to take the stand in his own behalf. The cases hold that by offering himself as a witness, the accused thereby assumes an obligation to respond to all relevant inquiries concerning the crime charged.[27] The phrase, "relevant inquiries concerning the crime charged," is broader than might at first appear. Thus, it may include within its coverage not only questions directly related to the offense with which the defendant is charged, but also inquiries concerning other unprosecuted misdeeds of the accused, so long as such extrinsic offenses appear to bear upon some aspect of the principal crime, such as motive, intent, premeditation, and so forth.[28] Generalization becomes more difficult, however, when we inquire into the propriety of questioning the defendant concerning misconduct which bears directly upon the question of his credibility, and thus only indirectly upon the question of his guilt. Some courts permit such questioning, thus requiring that the defendant witness step our entirely from behind his shield.[29] Other courts hold, however, that once the prosecutor begins to inquire into criminal conduct of the defendant bearing solely upon his truth-telling potential, the accused may, by a claim of the privilege, turn away the questions.[30]

[24] For example, Illinois provides: "[The defendant's] neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect." ILL. REV. STATS., ch. 38, §734.

[25] California effected the change by constitutional amendment ("... 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 the jury...." CALIF. CONST., Art. I, §13.). Iowa and Vermont have statutes permitting comment.

[26] See In re Opinion of the Justices, 300 Mass. 620, 15 N.E.2d 662 (1938), and State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936). *Contra*: State v. Baker, 115 Vt. 94, 53 A.2d 53 (1947), and State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939).

[27] 8 WIGMORE, EVIDENCE §2276(2) (3d ed. 1940).

[28] *Ibid.*

THE PRIVILEGE OF THE ORDINARY WITNESS

To round our our discussion of the privilege, let us turn now to a discussion of the privilege of the ordinary witness.

Although, again, generalization is difficult and perhaps may be misleading, I will risk the following statement of the scope of protection usually accorded an ordinary witness: An ordinary witness, unlike the accused, cannot refuse to take the stand; however, once on the stand, the ordinary witness is privileged not to disclose facts involving criminal liability, or its equivalent, in the jurisdiction in which the disclosure is sought. Or, to state the rule negatively: The ordinary witness cannot be required to give answers or to furnish, and authenticate by his oath, personal documents which will create the danger of his conviction of a crime in the jurisdiction seeking such answers or documents.

Further formulation of the doctrine can perhaps best be achieved by a consideration of what is not covered by the witness's privilege.

The reference to "criminal liability" and to "conviction of a crime" in the foregoing statement of the witness's privilege is a reflection of certain basic limitations which find general support in the cases. Thus, the courts hold that the witness must give answers which might subject him to civil liability, at least so long as the civil liability involves penalties intended to be remedial rather than punitive.[31] Moreover, the witness generally is not privileged to shrink from answers which, although nonincriminating, would tend to disgrace or degrade him.[32]

However, the most limiting aspect of the general rule, at least potentially, is that portion which holds that the witness is not protected against

[29] People v. Casey, 72 N.Y. 393, 398, 399 (1878).

[30] State v. Bragg, 140 W.Va. 585, 601-02, 611, 87 S.E.2d 689, 700, 704 (1955).

[31] Boston & M. Ry. Co. v. State, 75 N.H. 513, 77 Atl. 996 (1910); 8 WIGMORE, EVIDENCE §2254 (3d ed. 1940).

[32] In re Vince, 2 N.J. 443, 67 A.2d 141 (1949); 3 WIGMORE, EVIDENCE §987 (3d ed. 1940).

factual disclosures which create a danger of criminal liability in jurisdictions other than the one in which the privilege is claimed. By virtue of this limitation, the privilege is thus not available to a witness in a state or federal proceeding who fears incrimination only under the laws of a foreign country,[33] or to a witness in a state proceeding who fears incrimination only under the laws of another state or under federal law,[34] or to a witness in a federal proceeding who fears incrimination only under state law.[35] Several additional comments concerning this portion of the general rule seem to be in order. For one thing, the earlier decisions supporting this limitation are leavened by allusions to the remoteness of potential prosecution in another jurisdiction.[36] However, later decisions leave one with the feeling that, although the aspect of remoteness was once looked upon as a question of fact, it has now hardened into a presumption of law.[37] We should also note that the limitation imposed by the general rule is clearly an outgrowth of policy, for the words of the various constitutional provisions certainly do not compel such a result. Thus, it is not surprising that there is some authority contrary to the general rule. The following statement from a 1947 decision of the Supreme Court of Michigan captures the rationale of the minority courts:

> "We are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or federal jurisdictions. . . . It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a federal criminal prosecution."[38]

A highly practical comment may be appropriate at this point: Because court and counsel generally are not free to compel the witness to disclose the exact geographical locus of his fear, the limitation we are discussing may be more apparent than real. Reality swiftly returns, however, when the so-called witness immunity statutes, which are discussed below, come into play.

Assuming, then, that the witness possesses a privilege of the approximate scope just suggested, it is appropriate to consider next the test to be applied by the courts in determining when a particular question may go unanswered on the ground that a response would tend to incriminate the witness.

It is a general rule in the state courts that an invocation of the privilege will be sanctioned only where it appears probable that the witness has committed a crime under the law of the forum and that the fact called for constitutes or forms an essential part of that crime.[39]

In the federal courts, on the other hand, the witness will find that his refusals to answer are considered in light of somewhat more liberal criteria. There, the witness is free to conceal not only incriminating facts but also clues or leads to such facts, that is, sources or means by which evidence of the witness's criminal complicity may be obtained. The United States Court of Appeals for the Third Circuit recently set forth the federal approach in these terms:

> "It is enough [to justify a claim of the privilege] that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. . . . In performing this duty, the judge cannot be a skeptic, but must be acutely aware that in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry."[40]

Closely related to our present discussion is the problem of waiver. Just as a witness may balk too soon, so too may he balk too late. Thus, one can observe today an increasing tendency on the part of the well-coached witness to stop early lest he be enticed onto the trail of a transaction which, under the doctrines of waiver, he may be forced to follow through to its bitter end. One might properly characterize this current spate of witness timidity as unduly cautious, and perhaps even

[33] Republic of Greece v. Koukouras, 264 Mass. 318, 164 N.E. 345 (1928).

[34] See Jack v. Kansas, 199 U.S. 372 (1905).

[35] Hale v. Henkel, 201 U. S. 43 (1906).

[36] See, e.g., Brown v. Walker, 161 U. S. 591, 606 (1896).

[37] See, e.g., United States v. Murdock, 284 U.S. 141 (1932).

[38] People v. Den Uyl, 318 Mich 645, 651, 29 N.W.2d 284, 287 (1947). To the same effect, see Com. v. Rhine, 303 S.W.2d 301, 304 (Ky. 1957), and State ex rel Mitchell v. Kelly, 71 S.2d 887 (Fla. 1954).

[39] The cases are collected and discussed in McCormick, Evidence §129 (1954).

[40] United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952). See also Hoffman v. United States, 341 U.S. 479, 488 (1951).

improper, in light of the established doctrine that waiver occurs only where the witness has disclosed at least one incriminating fact concerning a particular transaction.[41] But perhaps as the definition of "incriminating" tends to become broader, it supports in its wake a correspondingly broad concept of waiver.[42] At any rate, the waiver-motivated refusals proceed apace and with a minimum of judicial interference.

A discussion of the privilege of the ordinary witness would be incomplete without at least brief reference to a significant by-product of the so-called witness immunity statutes which have been enacted by both the federal and state governments.[43] Under such a statute, the government involved may grant to a witness immunity from prosecution growing out of any testimony given by the witness. After thus removing the danger of incrimination, the sovereign involved may compel the witness to disclose fully the details of any matters or transactions under investigation. Of course, the breadth of this immunity may be somewhat illusory. A particular state can do no more than grant immunity from prosecution by it; it cannot, of course, grant immunity from prosecution by other states or by the federal government. On the other hand, the federal government, at least in areas of national concern, may grant immunity against both federal and state prosecution;[44] however, as a matter of policy, it may not always choose to do so.

Let us take the case, then, of a witness who, under a grant of immunity from state prosecution, is compelled to answer questions put to him by state authorities. Although the information given cannot later afford the basis for a state prosecution of the witness, quite possibly the information may subsequently be utilized elsewhere, as, for example, in a federal court prosecution of the witness for violations of federal law incidentally disclosed in his state testimony. Notwithstanding this forbidding possibility, the witness generally will not be permitted to invoke his state privilege since he has been granted full immunity against subsequent state prosecution.[45] Nor can he invoke his federal privilege since, under United States Supreme Court rulings mentioned earlier, the Fifth Amendment is available only in federal proceedings.[46] Moreover, the federal government, according to the Supreme Court, is entitled to use, in a subsequent federal prosecution, testimony compelled by state authorities under a grant of immunity from state prosecution.[47] It readily can be seen, then, that out witness is on the horns of an uninviting dilemma: Either (1) he can, notwithstanding the grant of state immunity, refuse to answer, whereupon he may be jailed by the state for contempt, or (2) he can answer the state authorities, whereupon he may find that he has in effect confessed himself into a federal penitentiary. Thus, a state government and the federal government—two independent sovereigns acting legally within their respective spheres of authority —can, by virtue of the total effect of their separate actions, deny to a witness his general privilege not to incriminate himself, although both sovereigns are constitutionally required to preserve just such a privilege.[48]

[41] See 8 WIGMORE, EVIDENCE §2276(1) and (2)(b) (3d ed. 1940).

[42] This is particularly true if waiver is held to occur when one discloses a fact he properly could have withheld under claim of privilege.

[43] The statutes are collected in 8 WIGMORE, EVIDENCE §2281 (3d ed. 1940).

[44] See Ullmann v. United States, 350 U.S. 422 (1956).

[45] See Jack v. Kansas, 199 U.S. 372 (1905).

[46] See notes 9 and 10 *supra*. See also Knapp v. Schweitzer, 357 U.S. 371 (1958).

[47] Feldman v. United States, 322 U.S. 487 (1944).

[48] The difficult problems in this area are fully explored in Knapp v. Schweitzer, 357 U.S. 371 (1958), and Mills v. Louisiana, 360 U.S. 230 (1959).