

Summer 1981

## Self-Incrimination and the Likelihood of Prosecution Test

John L. Jr. Hines  
*Northwestern University School of Law*

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

John L. Jr. Hines, Self-Incrimination and the Likelihood of Prosecution Test, 72 J. Crim. L. & Criminology 671 (1981)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## SELF-INCRIMINATION AND THE LIKELIHOOD OF PROSECUTION TEST

### INTRODUCTION

The fifth amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>1</sup> Literally, these words confer the privilege on witnesses whose testimony implicates them in the commission of a criminal act. Caselaw has demonstrated, however, that implication in the commission of a criminal act is not sufficient to trigger the privilege. Additionally, the witness' participation, if proven, must be punishable. As Justice Frankfurter stated, the central concern of the privilege against self-incrimination is, "as its name indicates, . . . the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal act."<sup>2</sup> Thus, where a statute of limitations has run,<sup>3</sup> or the witness has already incurred liability by previous testimony,<sup>4</sup> the fifth amendment affords no right of silence. Absent such absolute bars to liability, the Supreme Court has held in *Hoffman v. United States*<sup>5</sup> that a mere possibility of incrimination is sufficient to invoke the privilege.<sup>6</sup>

---

<sup>1</sup> U.S. CONST. amend. V. The availability of the privilege has been extended to grand jury witnesses and to parties in civil proceedings, whether the forum is judicial, administrative, or legislative. See *Kastigar v. United States*, 406 U.S. 441, 444 (1972); *Empsak v. United States*, 349 U.S. 190, 199-201 (1955); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *Counselman v. Hitchcock*, 142 U.S. 547, 563-64 (1892). The Supreme Court held the fifth amendment applicable to the states through the fourteenth amendment in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

<sup>2</sup> *Ullmann v. United States*, 350 U.S. 422, 438-39 (1956).

<sup>3</sup> See *Brown v. Walker*, 161 U.S. 591, 598 (1896); *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961).

<sup>4</sup> See *Rogers v. United States*, 340 U.S. 367, 374-75 (1951) ("After petitioner's admission that she held the office of Treasurer of the Communist Party of Denver, disclosure of acquaintance with her successor presents no more than a 'mere imaginary possibility' of increasing the danger of prosecution.") (citations omitted). Although the Court invoked the term "danger of prosecution," it made no pretense of examining prosecution likelihoods; rather, its concern focused on the criminating character of the evidence. See *id.* at 374. *Rogers* also invoked another rationale to support waiver: "[t]o uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." *Id.* at 371. See Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979).

<sup>5</sup> 341 U.S. 479 (1951).

<sup>6</sup> *Id.* at 486-87, 488. See notes 25-32 & accompanying text *infra*.

Following *Hoffman*, courts have determined the merits of a fifth amendment claim on the basis of two considerations: first, whether the witness' response might indicate his participation in criminal activities, and second, if these answers tend to indicate such participation, whether they could expose the witness to the possibility of prosecution.<sup>7</sup> Focusing on the possibility of prosecution, the federal judiciary, with one notable exception, has refused to consider the likelihood of prosecution as material to a privilege determination.<sup>8</sup>

This comment explores the validity of judicial unwillingness to examine prosecution likelihoods. The question addressed is whether, absent an immunity grant, a witness should be entitled to the privilege if the court determines that the possibility of prosecution is remote. The question is first examined from the perspective of the caselaw. In refusing to consider prosecution likelihoods, courts have drawn authority from *Hoffman*. This reliance on *Hoffman* is problematic. Courts have failed to address the distinction between the likelihood of testimony evidencing a criminal violation and the likelihood that the government would choose to prosecute if testimony did indicate a violation.<sup>9</sup> The

---

<sup>7</sup> *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086 (5th Cir. 1980); *In re Folding Carton Antitrust Litigation*, 609 F.2d 867 (7th Cir. 1979); *In re Brogna*, 589 F.2d 24 (1st Cir. 1978); *In re Master Key Litigation*, 507 F.2d 292 (9th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206 (1st Cir. 1973); *United States v. Seavers*, 472 F.2d 607 (6th Cir. 1973); *United States v. Goodman*, 289 F.2d 256 (4th Cir. 1961) (dictum); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

<sup>8</sup> *In re Folding Carton Antitrust Litigation*, 465 F. Supp. 618, 621 (N.D. Ill. 1979), *rev'd per curiam*, 609 F.2d 867. See notes 48-60 & accompanying text *infra*.

<sup>9</sup> The court *In re Corrugated Container Antitrust Litigation*, 620 F.2d at 1093, articulated in the context of correcting the district court's use of the term "incriminatory:"

[The district court] suggested that the deposition testimony would not be "incriminatory" since it would be "tainted." The existence of immunity or of derivative "taint" would have no bearing on the question whether testimony would be "incriminatory," however. Incriminatory testimony is simply testimony that suggests that the witness may have committed a crime. When incriminatory testimony is offered under a grant of immunity, the testimony remains incriminatory despite the immunity.

A series of decisions from the Second Circuit during the 1940s seemed to indicate judicial willingness to evaluate prosecution likelihoods. See *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942) (Hand, J.); *United States v. Cusson*, 132 F.2d 413 (2d Cir. 1942) (Hand, J.); *United States v. St. Pierre*, 128 F.2d 979 (2d Cir. 1942); *United States v. Weisman*, 111 F.2d 260 (2d Cir. 1940) (Hand, J.). The ambiguity of these decisions lay in their failure to distinguish the incrimination and prosecution questions.

In *Weisman*, the defendant was called before a grand jury investigating narcotics traffic from Shanghai. He refused to answer two questions: first, whether he received any cables at a restaurant in New York, and second, whether he knew anyone who had been in Shanghai during specified years. An article had appeared in a New York newspaper indicating the prosecutor's intention to indict for narcotics violations an advertising agency owner who had had previous underworld connections. The defendant fit the description. The court noted that the defendant was the object of more than casual interest on the part of the prosecutor, who presumably had additional evidence in his possession. In reversing the contempt order, Judge Hand stated, "Indeed, perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh." 111 F.2d at 263. Although the danger of

*Hoffman* Court's decision that testimony tending to indicate a possibility of liability triggers the privilege was rendered against a factual backdrop of a likely prosecution. The Court did not determine the status of the privilege where prosecution was unlikely. Appellate courts nevertheless have erroneously inferred from *Hoffman* that any possibility of prosecution is sufficient to trigger the privilege.<sup>10</sup>

In an attempt to bridge this lapse in reasoning, the issue is next examined from a policy and historical perspective. Over the centuries a plethora of rationales have been offered for the privilege. Courts and commentators have focused on three as paradigmatic: privacy, the dignity of the individual, and the balance between the individual and state.<sup>11</sup> Analysis of the constitutional status of the test may vary depending upon which of these three policies prevails. Rather than arguing the relative merits of these rationales, this comment focuses on the last in light of current Supreme Court emphasis.<sup>12</sup> The Court's construction of the balance between state and individual interests is not inconsistent with considering the likelihood of prosecution as relevant to the strength of a fifth amendment claim.

Critical to this conclusion, however, is the Court's instrumentalist interpretation of this rationale—approximating the utilitarian approach of Jeremy Bentham—which, as Professor O'Brien has pointed out, permits the Court to define outcome determinative terms according to its prevailing mood.<sup>13</sup> A better approach, supported by the amendment's history and the Hobbesian and Lockean traditions, is to view the privilege as protecting the inviolate right to self-preservation of the Anglo-American concept of government.<sup>14</sup> If the balance between state and individual interests is analyzed according to the latter approach, then the privilege is guaranteed by satisfying the *Hoffman* standard irrespective of the likelihood of prosecution.

---

prosecution figures prominently in the holding, its relevance appears limited to permitting inference of the availability of additional evidence to the prosecutor. Such an inference would thus bear ultimately on the criminalizing quality of the answers sought. See Falknor, *Self-Crimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479, 480-81, 481 n.8 (1952).

Federal court reliance on *Hoffman* is treated at notes 34-71 & accompanying text *infra*.

<sup>10</sup> See notes 83-96 & accompanying text *infra*.

<sup>11</sup> See notes 112-46 & accompanying text *infra*.

<sup>12</sup> See notes 120-36 & accompanying text *infra*.

<sup>13</sup> O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits and the Burger Court*, 54 NOTRE DAME LAW. 26, 54-72 (1978). See notes 120-22 & accompanying text *infra*. On Bentham's approach, see notes 115-16 *infra*.

<sup>14</sup> See notes 137-41 & accompanying text *infra*.

*HOFFMAN V. UNITED STATES*

In *United States v. Burr*,<sup>15</sup> Justice Marshall enunciated the first statement of the procedure for determining when a witness may invoke the privilege. The court's province is to determine in the first instance whether a witness' answer to a question will furnish evidence against him. If the judge concludes that the answer would disclose a fact which would form "a necessary and essential link in the chain of testimony . . . sufficient to convict him of any crime,"<sup>16</sup> the witness need not respond. The task of subsequent courts has been to refine the *Burr* standard for deciding whether a question is incriminatory, and, correspondingly, to determine the scope of a trial court's discretion to demand reasons from the claimant for invoking the privilege.

The leading case prior to *Hoffman* was *Mason v. United States*<sup>17</sup> which, in light of subsequent caselaw, used a comparatively rigid approach to the application of the privilege. The statute involved in that case criminalized participation in a card game played for money.<sup>18</sup> Defendants Mason and Hanson were arrested at a billiard hall on charges of violating the statute. At a grand jury hearing, they refused to answer whether there had been a card game at their own or at another table, and the district court held them in contempt. Affirming the district court, the Supreme Court stated that "[t]he constitutional protection against self-incrimination 'is confined to real dangers and does not extend to remote possibilities out of the ordinary course of law.'"<sup>19</sup> The Court concluded that the trial judge is in a better position to evaluate the critical facts than the reviewing court, "and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject."<sup>20</sup>

Although the *Hoffman* Court cited *Mason* to support its decision,<sup>21</sup> an appellate court judge, doubting *Mason's* vitality, stated soon after *Hoffman* that *Mason* would no longer be followed.<sup>22</sup> Courts and scholars since have likewise considered *Mason* dead.<sup>23</sup> Although this conclusion is dubious,<sup>24</sup> *Hoffman* invoked a significantly more liberal rule than *Ma-*

---

<sup>15</sup> 25 F. Cas. 38 (D. Va. 1807) (No. 14,692e).

<sup>16</sup> *Id.* at 40.

<sup>17</sup> 244 U.S. 362 (1917).

<sup>18</sup> *Id.* at 367 (citing COMP. LAWS ALASKA § 2032 (1913)).

<sup>19</sup> *Id.* at 365.

<sup>20</sup> *Id.* at 366.

<sup>21</sup> 341 U.S. at 486.

<sup>22</sup> *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952).

<sup>23</sup> See, e.g., *In re Brogna*, 589 F.2d at 27 (discussed in note 64 *infra*); M. BERGER, TAKING THE FIFTH 87-88 (1980).

<sup>24</sup> See notes 83-111 & accompanying text *infra*.

son as to what was incriminating and sharply reduced the discretion accorded to the trial judge.

*Hoffman* involved a federal grand jury investigation into racketeering and other federal crimes in the Eastern District of Pennsylvania. Summoned as a witness, Hoffman was held in criminal contempt after refusing to answer questions pertaining to his business and his knowledge of the whereabouts of one Weisberg. In overruling the Third Circuit's affirmance<sup>25</sup> of the contempt order, the *Hoffman* Court noted that Weisberg was one of eight subpoenaed witnesses who did not appear. The prosecutor had acknowledged that he was having trouble locating some major racketeers, presumably including Weisberg, whom Hoffman had admitted knowing for twenty years. The Court further noted Hoffman's long criminal record, which had been brought to the attention of the judge.

The Court held Hoffman was entitled to plead the fifth amendment to both sets of questions. In connection with the business questions, the Court noted that the chief occupation of some persons involved evasion of federal criminal laws, and that his response might have revealed Hoffman's involvement in proscribed activity. As to the Weisberg questions, the Court observed that an individual with a police record testifying at a grand jury investigation of racketeering might be hiding or helping to hide another person sought as a witness. The Court stated that the questions could have "forge[d] links in a chain of facts" sufficient for a conviction although they were not held incriminating per se.<sup>26</sup> The Court concluded with language that has apparently inspired appellate courts considering the likelihood of prosecution issue. "In this setting it was not '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such a tendency' to incriminate."<sup>27</sup>

After two more reversals following *Hoffman*,<sup>28</sup> a somewhat disgrun-

---

<sup>25</sup> United States v. Hoffman, 185 F.2d 617 (3d Cir. 1950).

<sup>26</sup> 341 U.S. at 488.

<sup>27</sup> *Id.* (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881) (emphasis in original)). "[T]he now prevailing general judicial attitude [is] that almost any conceivable danger is 'real and appreciable.'" C. McCORMICK, EVIDENCE § 123 (2d ed. 1972). See, e.g., Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1087 n.5 (5th Cir. 1979) (The privilege may be invoked where the witness "reasonably apprehends a risk of self-incrimination . . . though no criminal charges are pending against him . . . and even if the risk of prosecution is remote.").

<sup>28</sup> United States v. Singleton, 343 U.S. 944 (1952); United States v. Greenberg, 343 U.S. 918 (1952). *Greenberg* clarified the breadth of the *Hoffman* rule. The witness responded affirmatively to the questions whether he knew any number of writers in Philadelphia, but declined to respond when asked their identity. The circuit court held the questions not incriminatory. 187 F.2d 35, 40 (3d Cir. 1951). On appeal, the Supreme Court remanded the case for consideration in light of the then recent *Hoffman* decision. 341 U.S. 944 (1951). In reaching the same conclusion on remand, the Third Circuit distinguished *Hoffman* as raising a strong pre-

tled Third Circuit in *United States v. Coffey*<sup>29</sup> articulated its understanding of the *Hoffman* rule. First, the defense must show how a seemingly harmless answer could be linked to the commission of a federal crime. The necessary showing is that the suggested linkage must not seem incredible in the circumstances. In determining the credibility of the linkage, the judge is free to consider the history and reputation of the witness. Most important was the court's statement of the spirit in which the rule was to be interpreted. "[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that . . . incrimination may be approached and achieved by obscure and unlikely lines of inquiry."<sup>30</sup> The Supreme Court subsequently approved the *Coffey* formulation in *Empsak v. United States*,<sup>31</sup> which result seemed to Justice Harlan "to verge on an abandonment of the rule that a valid claim of privilege exists only as to incriminatory questions."<sup>32</sup>

#### POST-HOFFMAN AND THE LIKELIHOOD OF PROSECUTION TEST

*Hoffman* has provided the touchstone for the categoric rejection of the likelihood of prosecution test by the federal courts of appeals.<sup>33</sup> The

---

sumption of violation of federal narcotics laws, whereas the numbers racket involved in *Greenberg* was an activity proscribed by state law to which constitutional immunity did not extend. 192 F.2d at 203. The circuit court dismissed Greenberg's argument that disclosure of his business would lead to questions about his income from that business which in turn might incriminate him in criminal violations of the Internal Revenue laws. The Supreme Court summarily reversed on the authority of *Hoffman*. 343 U.S. 918.

<sup>29</sup> 198 F.2d 438 (3d Cir. 1952).

<sup>30</sup> *Id.* at 440-41.

<sup>31</sup> 349 U.S. 190, 198 n.18 (1955). The Supreme Court quoted the *Coffey* formulation with approval again in *Malloy v. Hogan*, 378 U.S. at 13 n.9.

<sup>32</sup> 349 U.S. at 204 (Harlan, J., dissenting). Empsak was General Secretary Treasurer of the United Electrical, Radio & Machine Workers of America as well as editor of the Union's official publication. He appeared before the House Committee on Un-American Activities where he refused to answer a series of questions relating to his associates and their position in the union. In holding the questions to be within the scope of the privilege, the Court noted that each of the named individuals had been charged previously with having communist affiliations, that Empsak had been named as a communist at the trial of eleven principal leaders of the Party who were subsequently convicted under the Smith Act, and that newspapers reported that the Department of Justice would soon take "an important step" toward the criminal prosecution of petitioner." *Id.* at 200.

Justice Harlan premised his dissent on the principle that "if background facts can make an innocent question dangerous, they can also make a dangerous question innocent." *Id.* at 208. He then argued that in light of Empsak's position in the union, "it is difficult to see how the fact that Empsak knew some of these people or what position each held in the Union can rationally be said to support even an inference that he knew of their alleged communist affiliations, much less tend to prove that he himself had taken part in communist" activities. *Id.* at 210.

<sup>33</sup> See note 7 *supra*.

first case to deal with the issue was *United States v. Miranti*,<sup>34</sup> a Second Circuit decision which rejected the test outright. Miranti and five others were indicted for conspiring to obstruct justice. The government later decided not to prosecute Miranti and a codefendant, Bando, for obstruction of justice. Based on their detailed statements, the prosecution instead obtained convictions for conspiracy to remove a fugitive felon from New York state. After refusing to testify for the government at the trial of the other alleged conspirators, they were summoned to testify before a grand jury investigating related crimes. There they refused to testify on fifth amendment grounds and were cited for contempt.<sup>35</sup>

Although Miranti and Bando were still subject to liability for the substantive crimes,<sup>36</sup> the government argued that, once they had been put in jeopardy for conspiracy, they could not reasonably fear prosecution for the substantive offenses themselves. The court was thus "faced with the novel question whether or not a witness can invoke his privilege against self-incrimination where practically there is only a slight possibility of prosecution."<sup>37</sup> Reversing the contempt order, the court found "no justification for limiting the historic protection of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute."<sup>38</sup> Citing *Hoffman* and *Empsak*, the court declared the decision to be "in accord with recent Supreme Court decisions liberally construing the protections afforded by the Fifth Amendment."<sup>39</sup> *Mason*

---

<sup>34</sup> 253 F.2d 135.

<sup>35</sup> The government asked Miranti and Bando to acknowledge previous admissions which had served as a basis for their convictions. *Id.* at 136.

<sup>36</sup> They were potentially liable under 18 U.S.C. § 1503 (1948) (obstructing justice) and under 18 U.S.C. § 1073 (1948) (aiding a fugitive felon escape across state lines).

<sup>37</sup> 253 F.2d at 139.

<sup>38</sup> *Id.* (footnote omitted).

<sup>39</sup> *Id.* at 139 n.3. The court also cited *Curcio v. United States*, 354 U.S. 118 (1957); *Grunewald v. United States*, 353 U.S. 391 (1957); and *Trock v. United States*, 351 U.S. 976 (1956). In *Trock*, the defendant, convicted for contempt, had refused to answer questions before a grand jury relating to certain named individuals and his business connections with certain named entities. Two questions, later withdrawn, inquired whether the defendant had used the name of either an indicted individual who had not yet been apprehended, or the name of one thought to be his accomplice. 232 F.2d at 840. Citing *Hoffman*, the Court summarily reversed the Second Circuit's holding that the questions would have no direct tendency to link the witness with any criminal activity. 351 U.S. at 976.

In *Curcio*, the Court upheld the refusal of a Teamsters local officer to answer questions about union books which he had failed to produce in response to a subpoena *ad testificandum*. The grand jury was investigating racketeering in New York City. The Court first determined that the custodian of books may not refuse to produce them on fifth amendment grounds, but that he may refuse to answer incriminating questions pertaining to them in the absence of an immunity grant. The second issue, whether the questions were incriminating, was mooted by the government's concession that they were. Nevertheless, noting that the purpose of the



was distinguished as a case dealing "with questions . . . clearly not incriminatory."<sup>40</sup> The court supported its rejection of the likelihood of prosecution test with the further argument that assessing the practical possibility of prosecution resulting from incriminating answers is "impossible . . . because it depends on the discretion exercised by a United States Attorney or his successor."<sup>41</sup>

Facially, this argument is untenable because it presumes that a prosecutor's decision to prosecute is completely arbitrary. In most cases, this decision is rationally correlated to a set of relevant factors.<sup>42</sup> Apparently the *Miranti* court was simply voicing its fears about the margin of error necessarily associated with any given prediction. As long as there was some possibility of prosecution, the court would allow the witness to invoke the privilege for incriminating statements. Compelled testimony

---

investigation was the domination of the local union by racketeers, and the petitioner's previous record, the Court concluded there was "substantial ground for the Government's concession." 354 U.S. at 121.

Unlike the other four cases, *Grunewald* did not present a *Hoffman* issue. The case involved an alleged conspiracy to defraud the United States by fixing tax fraud cases. *Grunewald* stands for the proposition that where a witness' plea of the fifth amendment before a grand jury is consistent with his trial testimony, the government may not use the plea for impeachment. 353 U.S. at 419. The Second Circuit's citation may question the extent to which it was relying on the *Hoffman* principle rather than the spirit of the Supreme Court's fifth amendment construction.

<sup>40</sup> 253 F.2d at 139 n.2. *But see* note 98 & accompanying text *infra*. Under *Hoffman* these questions assuredly would have been held incriminating. The court also distinguished *Brown v. Walker*, 161 U.S. 591, as dealing with the constitutionality of an immunity statute and its effect on state prosecutions for crimes based on disclosure before a federal grand jury. *See* notes 91-92 & accompanying text *infra*. The *Miranti* court stated that both cases are "totally inapposite on their facts and do not deal with situations where lack of fear of incrimination is based on the improbability of prosecution." 253 F.2d at 139.

<sup>41</sup> *Id.* *See* *United States v. Goodman*, 289 F.2d at 260. The Seventh Circuit in *United States v. Chase*, 281 F.2d 225, 229-30 (7th Cir. 1960), invoked the *Miranti* analysis in a virtually identical factual setting.

<sup>42</sup> These factors may include the political posture of the prosecutor, the type and age of the case, the cost of proceeding, the existence of alternative remedies, the potential for deterrence, the age, background, and record of the defendant, the chance of success and public opinion. *See generally* F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL and G. STARKMAN, *CASES AND COMMENTARIES ON CRIMINAL PROCEDURE* 582-91 (2d ed. 1980). Even critics of the disparate treatment of defendants flowing from discretionary decisions to prosecute have recognized that those criteria allow for predictability in individual cases. K. DAVIS, *DISCRETIONARY JUSTICE* 9-10 (1971).

Whether to prosecute or to refrain from prosecuting X may involve questions of justice, law, facts, policy, politics, and ethics. One question of justice may be whether prosecuting X is unfair where the known offenses of other parties who are not prosecuted are greater. A question of law may be a new one or the subject of conflicting decisions. The factual picture may be incomplete and agency members may have to fill it in through intelligent guesswork. A policy question which may divide agency members is whether the agency's resources may better be devoted to another area. A problem of politics may be appraisal of the capacity of X's supporters to retaliate. And a problem of ethics may be whether pressures applied on X's behalf are beyond the pale.

*Id.* at 24-25.

would be permitted only in the event that the then existing scope of immunity was broadened "in order to allow the prosecutor to bind the government not to prosecute and thereby protect the witness' rights in such situations."<sup>43</sup>

The Second Circuit thus viewed the likelihood of prosecution as an extraneous inquiry into the probable danger to witnesses resulting from a given line of questioning. For constitutional purposes, the probability question was answerable with the *Hoffman* inquiry into the incriminatory character of the evidence. Any lessening in the danger to the witness that might flow from considerations of prosecution possibilities was, according to the *Miranti* court, immaterial when posited in the context of the historic protections liberally construed by the Supreme Court.<sup>44</sup>

The *Miranti* court merely restated the problem in viscerally appealing language characteristic of cases responding to the McCarthy era.<sup>45</sup>

---

<sup>43</sup> 253 F.2d at 139. The operative statute, the Immunity Act of 1954, 68 Stat. 4, 18 U.S.C. § 3486, was repealed in 1970. Its replacement, the Witness Immunity Act of 1970, 18 U.S.C. §§ 6001-6005 (1976), no longer restricts immunity grants according to the type of case. Section 6002 states:

Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Under the statute, the United States Attorney has exclusive power to initiate immunity grants. 18 U.S.C. § 6003(b). Courts are thus precluded from granting immunity on their own or on the witness' motion. *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975), *cert. denied*, 423 U.S. 933 (1976); *United States v. Allstate Mortgage Corp.*, 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975). Apparently, the federal prosecutor can confer immunity in civil proceedings only where the government is a party. *See United States v. United States Currency*, No. 78-1162 (6th Cir. July 14, 1980); *Appeal of Starkey*, 600 F.2d 1043, 1046 (8th Cir. 1979); *In re Daley*, 549 F.2d 469, 479 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

The cases have made clear that the statute extends only to use and derivative use of compelled testimony. It does not confer so-called transactional immunity, which would bar prosecution of a witness for crimes revealed in his testimony. *Kastigar v. United States*, 406 U.S. 441. After granting immunity, however, the government must prove by a preponderance of the evidence that its evidence was derived from legitimate sources. *Id.* at 460-61. Courts have scrupulously guarded against impermissible use of immunized testimony. *See, e.g., United States v. Kurzer*, 534 F.2d 511, 517 (2d Cir. 1976).

<sup>44</sup> 253 F.2d at 139 n.3.

<sup>45</sup> Dean Erwin Griswold's book, *E. GRISWOLD, THE FIFTH AMENDMENT TODAY* (1955), provided a well of emotionally charged language invoked by countless courts and scholars during the 1950s and early 1960s. *See, e.g., id.* at 7, *quoted in Ullmann v. United States*, 350

The lack of certainty in estimating prosecution likelihoods is precisely what puts the constitutionality of such predictions at issue.<sup>46</sup> Although the materiality of prosecution likelihood to fifth amendment claims has been examined in a variety of contexts,<sup>47</sup> no court has carried the rejection of the test beyond assertion.

The only attack against the position of the Second Circuit recently came from the Northern District of Illinois in *In re Folding Carton Antitrust Litigation*.<sup>48</sup> Nine defendants in a civil antitrust action by the Depart-

---

U.S. at 426 (the privilege is "one of the great landmarks in man's struggle to make himself civilized"); E. GRISWOLD, *supra*, at 73, *quoted in* Malloy v. Hogan, 378 U.S. at 9 n.7 (The fifth amendment is "an expression of the moral striving of the community. . . a reflection of our common conscience, a symbol of America which stirs our hearts."). Judge Friendly writes that

[i]n the mid-1950's it was necessary to vindicate the privilege against self-incrimination . . . against the opprobrium that Senator Joseph McCarthy and others sought to heap on many who properly invoked it, particularly before legislative committees, and Dean Griswold earned the nation's gratitude by speaking out as he did. At the end of the 1960's it is necessary to vindicate the rights of society against what in my view has become a kind of obsession which has stretched the privilege beyond not only its language and history but any justification in policy, and threatens to go further still.

Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 671-72 (1968). See also Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 216, 217, 220, 223 (1968) (Griswold seems to concur in Friendly's characterization of his earlier work.).

<sup>46</sup> Drawing on the language of the amendment, the argument can be made that there is no issue because the language prohibits forcing a witness to testify against himself, therefore likelihoods of prosecution are irrelevant. To avoid inconsistency, however, a literalist would have to take account of the criminal case limitation. Of course, likelihoods of prosecution are irrelevant where a defendant is called to testify in his own criminal trial, and the language reflects this obvious fact in failing to refer to prosecution likelihoods. The linguistic argument loses force when beyond the literal comprehension of the words, the fifth amendment extends to civil contexts, for example. On the other hand, the elements of compulsion and possibility of punishment common to both situations might militate against disparate treatment arising from considerations of prosecution likelihoods and in favor of preserving the integrity of the language to the extent that it does not contemplate prosecution likelihoods. Moreover, the criminal case limitation might be read literally to include nonparty witnesses in a criminal case within the parameters of the fifth amendment coverage. The question becomes why a civil witness should be treated differently. But a strict reading of the criminal case limitation may also lead to the conclusion that the violation does not occur until the compelled testimony is introduced into the testificant's own criminal trial. Cf. M. BERGER, *supra* note 23, at 49 ("[T]here is nothing inherently wrong with the process of compulsory incriminatory interrogations; instead there is merely a need to confine it so that such questioning would not emerge in the subject's own criminal trial."). Under this interpretation, prosecution likelihoods would be highly relevant. A possible problem with this reading is that the compulsion occurs prior to the introduction of the evidence in the criminal proceedings, and the cases preclude compulsion only at the earlier point. The potential temporal conflict between "compelled" and "in any criminal case" that arises concomitantly with extension of fifth amendment protections to noncriminal proceedings, although for the most part resolved as a matter of policy in favor of the time of questioning, see note 1 *supra*, highlights that the language of the amendment cannot resolve the issue. Cf. Friendly, *supra* note 45, at 677 ("once 'in any criminal case' has been read out of the amendment, it has been all too tempting to take equal liberties with 'shall be compelled' and 'to be a witness against himself.'").

<sup>47</sup> See note 64 *infra*.

<sup>48</sup> 465 F. Supp. 618. For an excellent recent discussion of the *Folding Carton* case, see

ment of Justice claimed the privilege in response to questions at depositions. The civil action followed the Justice Department's successful prosecution of a number of other individuals and corporations for criminal violations of the Sherman Act.<sup>49</sup>

Viewing the prosecution of these witnesses as only a "remote and speculative" possibility,<sup>50</sup> the district court premised its lengthy opinion compelling deposition testimony on the proposition that a witness may plead the fifth amendment only if there exists a "real danger" in responding to the questions.<sup>51</sup> A necessary condition to real danger, according to the district court opinion, is a "reasonable fear of prosecution."<sup>52</sup> The district court set out three steps to determine whether the witness has a reasonable fear of prosecution.<sup>53</sup> First, a court must determine whether the witness' answers to the questions would tend to indicate his participation in criminal activities. Second, it must decide whether prosecution is theoretically possible. For example, where a statute of limitations bars prosecution, the witness will not be entitled to plead the fifth amendment. Finally, if the court answers the first two inquiries in the affirmative, it must decide whether the threat of prosecution is merely a remote and speculative possibility.

Although the witness theoretically remained open to possible prosecution, the opinion emphasized that the Department of Justice's completed investigation of the *Folding Carton* criminal conspiracy was the most exhaustive in the history of the antitrust laws, involving the largest number of defendants in any case tried to a conclusion, and that federal authorities showed no interest in producing new indictments.<sup>54</sup> As to the minority of states with unexpired statutes of limitations, the court found the likelihood of their having "at this late date . . . the resources, time and interest to initiate an investigation and prosecution . . . to be 'trifling' at best."<sup>55</sup> Moreover, five of the witnesses had been granted immunity in return for testimony before the federal grand jury that returned the original indictments. An additional factor making prosecu-

---

Comment, *A Peek into Pandora's Box: Folding Carton and the Privilege Against Self-Incrimination in Civil Antitrust Action*, 13 U. MICH. J.L. REFORM 435 (1980). See also Morrison, *Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives*, 48 ANTITRUST L.J. 1421, 1424 (1979) (*Hoffman* provides appropriate test).

<sup>49</sup> *United States v. Consol. Packaging Corp.*, 575 F.2d 117 (7th Cir. 1978).

<sup>50</sup> *In re Folding Carton Antitrust Litigation*, 465 F. Supp. at 622.

<sup>51</sup> *Id.* at 621 (citing *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 480 (1972)). See *Rogers v. United States*, 340 U.S. at 374-75. See also notes 83-111 & accompanying text *infra* for a discussion of the real danger doctrine.

<sup>52</sup> 465 F. Supp. at 621.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 622. See also *United States v. Consol. Packaging Corp.*, 575 F.2d at 119 n.1.

<sup>55</sup> 465 F. Supp. at 622.

tion of the defendants unlikely was the heavy burden of proving an untainted prosecution.<sup>56</sup>

The court recognized the difficulty of predicting prosecution likelihoods and the historical unwillingness of courts to override the privilege where there exists only a minimal possibility of prosecution.<sup>57</sup> The district court, however, opined that cases such as *Miranti*, which reject the test outright, have "erroneously reconciled the recognized power of both the state and federal governments 'to compel residents to testify in court or before grand juries or agencies' . . . with the fifth amendment privileges of the witnesses."<sup>58</sup> The court expressed concern that sustaining the privilege on the grounds that prosecution is theoretically possible "would signal a virtual end to discovery in civil cases,"<sup>59</sup> and emphasized that in the event of subsequent prosecution the government would not be entitled to use the compelled testimony.<sup>60</sup>

---

<sup>56</sup> *Id.* at 623. See note 43 *supra*.

<sup>57</sup> 465 F. Supp. at 624. The court conceded that, in cases of limited geographical scope, securing binding commitments from the prosecutor would be a preferable mode of procedure. See *In re Arizona Dairy Prod. Litigation*, Civ. No. 74-569 (D. Ariz. November 23, 1977). See also Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (study of the Northern District of Illinois). The court stated, however, that such a procedure would be impractical in the case of a nationwide conspiracy. On the other hand, given the predictability of prosecution, such a procedural safeguard probably becomes less necessary as the geographical scope of the case decreases. Although application of prosecutorial discretion may be predictable within a given jurisdiction, prosecutorial policies and constraints may vary widely from jurisdiction to jurisdiction. See Mellon, Jacoby & Brewer, *The Prosecutor Constrained by his Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & C. 52 (1981). The authors compare fourteen state prosecutorial offices across the country and conclude that each operates according to one of several policy types.

<sup>58</sup> 465 F. Supp. at 623.

<sup>59</sup> *Id.* at 625.

<sup>60</sup> *Id.* See *Adams v. Maryland*, 347 U.S. 179, 181 (1954). The court quoted from *Kastigar v. United States*, 406 U.S. at 457 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964) ("a . . . witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by . . . officials in connection with a criminal prosecution against him.")). Federal statutes, however, confer the power to grant immunity exclusively on the executive. 18 U.S.C. § 6003(b). See note 43 *supra*. Arguably, by compelling testimony, the district court effectively granted immunity, thereby trespassing upon statutorily prescribed executive authority. *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086. But see *Little Rock School Dist. v. Borden, Inc.*, No. 79-1994 (8th Cir. June 10, 1980); Appeal of *Starkey*, 600 F.2d 1043. On the other hand, this argument presupposes that a fifth amendment right of silence has attached at the time of compelling testimony. If no constitutional right of silence exists, nothing precludes judicial compulsion of testimony to secure judicial proceedings from abuse. *United States v. United Fruit*, 410 F.2d 553 (5th Cir.), cert. denied, 396 U.S. 820 (1969). Thus, whether a judge, who finds prosecution a remote and speculative possibility, confers an unlawful grant of immunity by compelling a witness to testify is answerable only after determining whether the likelihood of prosecution is of constitutional import. The district court in *Folding Carton* seemed to say as much:

Granting the motions to compel does not, however, constitute an immunity grant. This

Recognizing the potential obstruction to civil discovery, the Seventh Circuit was nevertheless unwilling to make the privilege dependent on a judge's prediction of the likelihood of prosecution.<sup>61</sup> The court thus rejected the third step of the district court's inquiry and held that "[w]hen a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster."<sup>62</sup> Stating flatly that the fancifulness criterion is met only where there is an absolute bar to prosecution, the court explicitly aligned itself with *Miranti*<sup>63</sup> and indicated its readiness to grant the privilege upon a *Hoffman* showing.<sup>64</sup> Contrary to

---

Court's decision is exclusively premised on a judicial determination that, as a practical matter, there is solely a theoretical and no actual possibility that these witnesses could be prosecuted for any activities with respect to which they might testify. Our decision is in no way based on an evaluation of the advisability, fairness, or wisdom of any prosecution

465 F. Supp. at 625.

<sup>61</sup> *In re Folding Carton Antitrust Litigation*, 609 F.2d at 872. This case was the appeal of R. Harper Brown, whom the district court had compelled to testify in a separate opinion adopting the reasons previously set forth in the district court opinion discussed above. Brown, defendant in a civil action for damages brought by the Department of Justice for alleged violation of the false claims and antitrust laws (*United States v. Alton Box Bd. Co.*, No. 76-C-1638 (N.D. Ill. 1976)), refused on fifth amendment grounds to respond to questions at civil deposition after stating his name and address. The district court granted a motion to compel testimony, but in the subsequent deposition Brown again, after providing additional information about his educational background, refused to answer questions. Holding that Brown did not have sufficient fear of prosecution to justify his assertion of the privilege, the district court held him in contempt. Brown, president of Container Corporation of America, had already been named along with 49 other executives and 23 folding carton producers in an indictment charging a one-count misdemeanor violation for conspiring to fix prices between 1964 and 1970. *United States v. Consol. Packaging Corp.*, 575 F.2d 117. Brown had pleaded *nolo contendere*, and the district court imposed a sentence of 15 days incarceration, a \$15,000 fine, and a mandatory probation project. Brown remained open to state and federal charges arising both from the same facts as his earlier indictment if an additional element were needed to prove these charges, and from activities occurring after 1974. 609 F.2d at 869-70, 871.

<sup>62</sup> *Id.* at 871.

<sup>63</sup> *Id.* at 872.

<sup>64</sup> *Id.* The Seventh Circuit did not cite *Hoffman* for this proposition, but *Miranti* and subsequent caselaw leading to *Folding Carton* make clear that the rejection of the likelihood of prosecution test draws its primary support from *Hoffman*. The First Circuit considered the issue in *United States v. Johnson*, 488 F.2d 1206. In that case the defendant, charged with distributing cocaine, sought testimony from a codefendant who had previously pleaded to the same charge. Invoking the fifth amendment, the codefendant refused to testify. The First Circuit relied on *Miranti* and upheld the assertion of the privilege on the grounds that the codefendant was still subject to possible state and federal prosecutions for conspiracy. The court first announced the *Hoffman* rule, and then in a footnote stated that "[n]either the practical unlikelihood of further prosecution, nor the Assistant United States Attorney's denial of an intention to charge conspiracy, negated Perry's [the codefendant's] privilege." *Id.* at 1209 n.2.

The First Circuit also considered the question of prosecution likelihoods in *In re Brogna*, 589 F.2d 24, where a witness at a grand jury investigation pleaded the fifth amendment to questions about her connection with individuals allegedly involved in racefixing schemes. Noting that the government's evidence showed leading underworld figures may have con-

the district court, the Seventh Circuit held that exclusion of compelled evidence is "solely remedial" and not justificatory of a "decision which contravenes the fifth amendment's protection."<sup>65</sup>

The Seventh Circuit's decision was forcefully affirmed by the Fifth Circuit in *In re Corrugated Container Antitrust Litigation*.<sup>66</sup> Two executives, previously granted use immunity in return for grand jury testimony to alleged antitrust violations in the corrugated container industry, refused to answer questions as nonparty witnesses at deposition in a subsequent action brought by purchasers of corrugated products against the witnesses' employers. Despite the trial court's findings that the deposition questions were either taken verbatim from the transcripts of the immu-

---

ducted illegal business from her house, the court held on the authority of *Hoffman* that the trial "court should have sustained her claim without more." *Id.* at 27. *Mason v. United States* was distinguished as an old case urging "an approach inconsistent with *Hoffman* and all the cases that have followed it." *Id.* Turning to the question of prosecution likelihood, the court held the fact "unimportant . . . that Brogna was not a 'target' of the investigation." Prosecutorial assurances could not bind the government, "at least in such a way as to provide the encompassing immunity required to negate a claim of privilege." *Id.* at 28. The court quoted language from *United States v. Washington*, 431 U.S. 181 (1977), which stated that "[W]itnesses who are not grand jury targets are protected from compulsory self-incrimination to the same extent as those who are. . . . [T]arget witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination . . . ." *Id.* at 189.

*United States v. Seavers*, 472 F.2d 607, involved a defendant who, having pleaded guilty to transporting a stolen automobile across state lines in violation of the Dyer Act, 18 U.S.C. § 2312 (1948), asserted the privilege when called to testify as a witness at the trial of another accused of aiding and abetting him. The court upheld the privilege with respect to questions relating to the acquisition and possession of the vehicle because of the possibility of state prosecution for the theft. Unwilling to assume that "dual prosecutions do not take place," the court stated that the danger of prosecution was not "an imaginary or unsubstantial contingency." 472 F.2d at 611. The court adopted the quoted language from *United States v. Harmon*, 339 F.2d 354, 359 (6th Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), which in turn relied on *Hoffman*.

The Ninth Circuit found the test unacceptable in *In re Master Key Litigation*, 507 F.2d 292, where the defendants, four manufacturers of contract hardware, allegedly conspired to fix prices at inflated levels. Although neither state nor federal prosecutors appeared interested in bringing charges, the court observed that the witness, president of one of the defendant manufacturers, did not receive an immunity grant or any assurances that he would not be prosecuted. Drawing its authority directly from *Hoffman*, the court concluded that "the right to assert one's privilege against self-incrimination does not depend on the *likelihood*, but upon the *possibility* of prosecution." *Id.* at 293 (emphasis in original).

See also *Camelot Group, Ltd. v. V.A. Krueger Co.*, 486 F. Supp. 1221 (S.D.N.Y. 1980); *Priebe v. World Ventures, Inc.*, 407 F. Supp. 1244 (C.D. Cal. 1976); *United States v. Ward*, 314 F. Supp. 261, 263-64 (E.D. La. 1970); *In the Matter of Universal Lunches, Inc.*, 2 Bankr. Rptr. 58 (E.D.N.Y. 1979).

<sup>65</sup> 609 F.2d at 872 n.11. But see note 60 *supra*. If prosecution likelihood is constitutionally pertinent to fifth amendment determinations, a subsequent prosecution is theoretically conceivable without the witness' fifth amendment right having been violated during the proceeding at which testimony was compelled based upon a perceived improbability of prosecution. Subsequent exclusion would not remedy a constitutional violation, but would rather protect constitutional interests in the first instance.

<sup>66</sup> 620 F.2d 1086.

nized testimony, or were so closely related in subject matter or so clearly derived from the immunized testimony as to be thoroughly tainted,<sup>67</sup> the Fifth Circuit, relying on *Hoffman*,<sup>68</sup> found that the witness had a reasonable fear of prosecution and reversed the district court's order compelling testimony.<sup>69</sup> Noting the exclusionary rule that operates after an erroneous privilege ruling to prevent introduction of that evidence against the witness,<sup>70</sup> the Fifth Circuit stated that the district court had effectively granted immunity "of its own accord," contrary to the provisions of the immunity statute.<sup>71</sup>

*Corrugated Container's* diatribe against judicial overstepping in fifth amendment cases culminates a twenty year line of appellate decisions which have uniformly rejected the likelihood of prosecution test.<sup>72</sup> There are three main reasons for federal court refusal to adopt a likelihood of prosecution test. First, the judge may err in his prediction, and if he does so err, any exclusionary rule operative in a subsequent proceeding would be remedial only of the prior constitutional violation.<sup>73</sup> Second, by compelling testimony because the chance of prosecution appears remote, a judge effectively grants immunity, and thereby usurps a function statutorily conferred exclusively on the Justice Department.<sup>74</sup> Finally, it is argued that the purpose of the privilege is to protect the witness from having to assist in his own prosecution. Despite exclusion, the compelled testimony may stimulate new lines of inquiry leading to

---

<sup>67</sup> *In re Corrugated Container Antitrust Litigation*, No. 80-1284 (S.D. Tex. March 6, 1980); *id.*, No. 80-1307 (S.D. Tex. March 6, 1980); *id.*, No. 80-1388 (S.D. Tex. March 19, 1980).

<sup>68</sup> The court did not cite *Hoffman*, but relied heavily on *Folding Carton* and *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084. Citing *Hoffman* and *In re Master Key Litigation*, 507 F.2d 292 (discussed in note 64 *supra*), the *Wehling* court stated that a witness may invoke the privilege when "reasonably apprehend[ing] a risk of self-incrimination . . . though no criminal charges are pending against him . . . and even if the risk of prosecution is remote." 608 F.2d at 1087 n.5.

<sup>69</sup> After determining that there was more than a fanciful risk of prosecution, the court held that neither the immunity statute nor the court's inherent powers permitted it to make a prospective determination that future testimony would be tainted. *Accord*, *In re Folding Carton Antitrust Litigation*, 465 F. Supp. at 628 (the burden of disproving taint, however, bears on the likelihood of prosecution). *Contra*, *Appeal of Starkey*, 600 F.2d 1043. *Starkey* involved a factual situation proximate to that in *Corrugated Container*. Holding that the witness would not be subject to prosecution for testimony delivered at deposition because of taint, the court explicitly reserved the question whether courts should assess the likelihood of prosecution. *Id.* at 1046. In light of the Eighth Circuit's willingness to permit a court to make a prospective taint determination, however, an adoption of a likelihood of prosecution test would not be surprising.

<sup>70</sup> 620 F.2d at 1094.

<sup>71</sup> *Id.*

<sup>72</sup> See notes 7 & 64 *supra*.

<sup>73</sup> See, e.g., *In re Folding Carton Antitrust Litigation*, 609 F.2d at 872 n.11; *United States v. Miranti*, 253 F.2d at 139. See also notes 41-43 & accompanying text *supra*.

<sup>74</sup> See notes 46 & 60 *supra*.



prosecution and conviction.<sup>75</sup>

The first two objections necessarily contain an assumption that the likelihood of prosecution test is unconstitutional. As to the first, its rejection of the test on the grounds that prosecution may take place is circular. The label "remedial," used to characterize exclusion in an unforeseen subsequent proceeding, likewise suggests that speculating about future executive action is unconstitutional. But the so-called remedial nature of exclusion is determinable only after deciding that such speculation is unconstitutional. Moreover, unlike the exclusionary rule involved in the case of fourth amendment violations,<sup>76</sup> exclusion in fifth amendment cases is self-executing because of its explicitly stated concern with compelling a witness to testify against himself "in any criminal case."<sup>77</sup>

The second objection, that assessing prosecution likelihoods amounts to a de facto judicial immunity grant in violation of the Immunity Act, does not in any event displace a constitutional inquiry. A judge is not granting immunity, but rather is simply ensuring the integrity of the judicial process, if the witness is not entitled to the privilege in the first instance.<sup>78</sup> The latter determination is precisely the function of the court.<sup>79</sup> The constitutional materiality of prosecution likelihoods is then analytically anterior to, rather than derived from, considerations of statutory immunity.<sup>80</sup>

The third objection, despite its appeal, confuses the operation of the privilege with its rationale.<sup>81</sup> Consequent to pleading the privilege, the witness may protect information known to him from falling into the hands of the government. In some teleological sense, this result may be

---

<sup>75</sup> See Comment, *supra* note 48, at 451.

<sup>76</sup> See generally Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 343 (1980).

<sup>77</sup> U.S. CONST. amend. V. See note 46 *supra*.

<sup>78</sup> See *In re Corrugated Container Antitrust Litigation*, 620 F.2d at 1095 (Johnson, J., dissenting); *In re Folding Carton Antitrust Litigation*, 465 F. Supp. at 625. See also note 60 *supra*.

<sup>79</sup> *Hoffman v. United States*, 341 U.S. at 487; *United States v. Melchor Moreno*, 536 F.2d 1042, 1046 (5th Cir. 1976).

<sup>80</sup> Of course this constitutional issue need not be reached if in a given case the court premised its refusal to grant the privilege on the advisability, fairness, or wisdom of prosecution, rather than on absence of constitutional entitlement. Compelling testimony on these grounds is solely within the sphere of executive authority. See *In re Daley*, 549 F.2d 467, 479 (7th Cir. 1977).

<sup>81</sup> The statement of purpose underlying this objection is a platitude providing no useful guidance in difficult cases. This is apparent, for example, in that compelling testimony might increase the efficiency of the criminal process. See, e.g., McKay, *Self-Incrimination and the New Privacy*, 1967 S. CT. REV. 193, 208. An adequate statement of rationale must provide insight as to why values such as efficiency occupy a subordinate place when considering one individual's right to silence.

a purpose of the amendment. However, an adequate statement of rationale should provide direction as to the circumstances in which the witness is entitled to the privilege. Surely the privilege is available at a criminal defendant's own trial. The words of the fifth amendment say that much. What they do not tell is how to get from "in any criminal case" to legislative, administrative, or other civil cases.<sup>82</sup> This broadening of the amendment's scope is attained only by recourse to the reasons behind the amendment. The pertinent inquiry, then, is whether the concerns guaranteeing the privilege in the paradigmatic case of defendant's assertion at trial also guarantee the privilege in other contexts where prosecution appears remote.

In addition to raising the above objections, the federal judiciary has nearly unanimously relied on *Hoffman v. United States*. As the next section of this comment demonstrates, *Hoffman* is an inappropriate source of authority. Briefly stated, *Hoffman* provides little guidance for determining the constitutional status of prosecution likelihoods because it addressed a different problem—the practical problem of ascertaining from the witness whether there are endangering facts without destroying the privilege. Assessing prosecution likelihoods does not necessarily entail this latter dilemma because the relevant variables may be analyzed largely without answers from the witness.

#### UNITED STATES V. MASON AND THE REAL DANGER DOCTRINE

Central to understanding the federal judiciary's misapplication of *Hoffman* is a recognition of *Hoffman's* acceptance of *United States v. Mason*.<sup>83</sup> *Hoffman* held that compelling testimony is impermissible unless it is "perfectly clear" that the evidence "cannot possibly" tend to incriminate the witness.<sup>84</sup> *Hoffman* cited *Mason* for its facially stricter proposition that the fifth amendment "protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."<sup>85</sup> The two strands of *Hoffman* are not inconsistent. The second speaks to a set of circumstances which are sufficiently dangerous to warrant application of the privilege. *Mason* described the presence of these circumstances as real danger.<sup>86</sup> The first describes the burden of proving these circumstances. In rejecting the likelihood of prosecution

---

<sup>82</sup> U.S. CONST. amend. V. See note 1 *supra*.

<sup>83</sup> 244 U.S. 362.

<sup>84</sup> 341 U.S. at 488 (quoting from *Temple v. Commonwealth*, 75 Va. at 898 (1881) (emphasis in original)). See notes 25-27 & accompanying text *supra*.

<sup>85</sup> 341 U.S. at 486. See 244 U.S. at 365.

<sup>86</sup> 244 U.S. at 365 (quoting *Heike v. United States*, 227 U.S. 131, 144 (1913); *Brown v. Walker*, 161 U.S. at 599, 600 (1896)).

test, federal courts have wrongly employed the proof standard to empty the phrase "real danger" of its content.

The *Mason* real danger doctrine sprung from cases rejecting claims that immunity from prosecution was not an adequate substitute for the privilege.<sup>87</sup> In *Regina v. Boyes*,<sup>88</sup> the witness refused to answer questions after the Solicitor General granted him a pardon under the Great Seal. The witness contended that, although the pardon would protect him against every other form of prosecution, it would not protect him against parliamentary impeachment.<sup>89</sup> He further contended that the bare possibility of legal peril was sufficient to entitle him to protection. The court responded with language quoted in *Mason*:

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.<sup>90</sup>

Premising its decision solely on the unlikelihood of parliamentary impeachment, the court indicated a willingness to consider prosecution likelihood.

The Supreme Court initially approved the English approach in

---

<sup>87</sup> See Wolfram, *Peril, Pursuit and the Privilege Against Self-Incrimination: The Problem of the Apparently Innocuous Question*, 5 SYRACUSE L. REV. 127, 131 n.18 (1954).

<sup>88</sup> [1861] 1 B.&S. 311.

<sup>89</sup> *Id.* at 319, 320. "An impeachment is a criminal proceeding by the House of Commons against any person." 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAWS* 379 (3d ed. 1922). The House of Lords passes judgment in accordance with the vote of its majority and, on the demand of the House of Commons, it passes sentence. *Id.* at 379-80. The proceeding was reserved primarily "for great men and great causes." *Id.* at 379. It was devised to prevent ministers of the crown from breaking the law and to ensure the supremacy of the law over all. *Id.* at 380, 382. The first instance of impeachment was in 1376 and the last in 1805 in the case of Lord Melville. Impeachment fell into disuse because it was awkward and dilatory, but it is, and was at the time of the *Boyes* case, still legally possible. *Id.* at 380, 385.

The King by royal pardon was unable to prevent impeachment. "A pardon could be pleaded to an indictment; but an indictment was a proceeding taken in the king's name. An impeachment was a proceeding taken in the name of the Commons; and he could no more stop it by granting a pardon than he could stop a criminal appeal brought by a private person." *Id.* at 383 (citation omitted).

<sup>90</sup> 1 B.&S. at 330, quoted in 244 U.S. at 365-66. The Court went on to state:

We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify withholding of evidence essential to the ends of justice.

1 B.&S. at 330-31, quoted in 244 U.S. at 366.

*Brown v. Walker*,<sup>91</sup> also cited in *Mason*. In that case, the witness argued that a federal immunity grant could not supplant the privilege because the immunity would not extend to state prosecutions. The Court held that the statute involved did protect against state prosecution, and thus prosecution likelihood did not directly affect the decision as it had in *Boyes*. Nevertheless, the Court noted in dicta that "even granting that there were [*sic*] still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in the *Queen v. Boyes* . . . is not a real and probable danger."<sup>92</sup>

Adopting the so-called dual sovereignty rule in the early 1930s, the Court went further than *Brown* in order to resolve a conflicting line of decisions by holding that the federal privilege did not in any event extend to testimony incriminating under state law.<sup>93</sup> When the Court reversed itself in *Murphy v. Waterfront Comm'n of New York Harbor*,<sup>94</sup> holding that the privilege extends to testimony in one jurisdiction, state or federal, which might be incriminating under the laws of the other, the Court left open the materiality of prosecution likelihoods.<sup>95</sup>

<sup>91</sup> 161 U.S. 591.

<sup>92</sup> *Id.* at 609 (citation omitted). The Court urged a practical construction of the fifth amendment:

It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice.

*Id.* at 596. *Cf.* *Jack v. Kansas*, 199 U.S. 372, 380-82 (1905) (case held that under the fourteenth amendment a witness could not refuse to testify in a state proceeding where there is no real danger of federal prosecution).

<sup>93</sup> *United States v. Murdock*, 284 U.S. 141, 149 (1931). Compare *United States v. Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100, 102, 104 (1828), and *Ballmann v. Fagin*, 200 U.S. 186, 195-96 (1906), with *Hale v. Henkel*, 201 U.S. 43, 68-69 (1906).

<sup>94</sup> 378 U.S. 52.

<sup>95</sup> Prior to *Murdock*, a number of federal and state courts followed the *Boyes* and *Brown* approach to interjurisdictional possibility of prosecution in interpreting the scope of both federal and state privilege provisions. See, e.g., *In re Graham*, 10 F. Cas. 913 (S.D.N.Y. 1876) (No. 5,659); *In re Hess*, 134 F. 109 (E.D. Pa. 1905) (discussed in *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. at 63 n.8). These cases and the majority of federal courts considering the question, however, ruled in favor of conferring the privilege on the witness. One explanation for this pattern is that "the danger of prosecution . . . has been considered to be impending rather than remote." Annot., 82 A.L.R. 1380, 1382 (1933). A number of state cases, however, adopted the *Brown* approach against granting the privilege. See, e.g., *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N.E. 349 (1903); *Doyle v. Hofstader*, 257 N.Y. 244, 177 N.E. 489 (1931). See also Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A. L. REV. 549, 554-63 (1957); McNaughton, *Self-Incrimination Under Foreign law*, 45 VA. L. REV. 1299, 1301-07 (1959); Annot., 154 A.L.R. 994 (1945); Annot., 59 A.L.R. 895 (1929). *Brown* and the cases cited above considered likelihoods of foreign prosecution relevant to forum privilege grants. The interjurisdictional context would not appear to diminish the authority of these cases unless the standard was purely cross-jurisdictional, concomitant with recognition of, or at least confusion with respect to, dual sovereignty. This was

*Hoffman* left the *Mason* real danger doctrine intact, and the doctrine continues to receive confirmation in Supreme Court decisions.<sup>96</sup> *Hoffman's* contribution was a more liberal approach to real danger proof requirements. Nonetheless, the Court's citation of *Mason*, with the latter's explicit approval of *Boyes* and *Brown*, was initially the subject of some unfounded consternation among lower courts which failed to appreciate both aspects of *Hoffman*.<sup>97</sup>

Had the defendants in *Mason* answered the questions affirmatively, they would have admitted one of three elements necessary for conviction: a game of cards, money stakes, and participation in the game.<sup>98</sup> Given this setting, a post-*Hoffman* court unquestionably would have reversed the contempt citations upheld in *Mason*. Nevertheless, the contradiction between *Mason* and *Hoffman* is only apparent. In requiring the judge to give greater deference to the witness' determination that an answer would be incriminating, *Hoffman* reduced the level of proof required to establish real danger. For both the *Hoffman* and *Mason* Courts, however, the metaphysical quantum of real danger sufficient for a valid invocation of the privilege was identical.

*Hoffman* departed from the stricter proof requirements of previous caselaw in recognition of what might be termed a fifth amendment di-

---

not necessarily the case. See, e.g., *Commonwealth v. Rhine*, 303 S.W.2d 301, 304 (1957) (privilege to be allowed "whenever there is a probability of prosecution in either State or Federal jurisdictions").

<sup>96</sup> See *Garner v. United States*, 424 U.S. 648, 655 (1976) (citing *Mason's* discussion of real danger, the Court states that "the older witness cases reflect an appropriate accommodation of the Fifth Amendment privilege and the generally applicable principle that governments have a right to everyone's testimony."); *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. at 478 (1972). In *Zicarelli*, the witness refused to answer questions on the grounds he feared foreign prosecution. He introduced newspaper and magazine articles condemning him as an international criminal figure. Upholding a contempt order, the Court stated that the one hundred questions were designed to elicit information solely related to activities in the United States and that "appellant was never in real danger of being compelled to disclose information that might incriminate him under foreign law." *Id.* at 480. Citing *Mason*, *Brown*, and *Boyes*, the Court stated that "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities." *Id.* at 478 & n.12. See also *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. at 100 (White, J., concurring).

<sup>97</sup> In discussing *United States v. Greenberg*, 192 F.2d 201 (discussed in note 28 *supra*), the Third Circuit stated:

We regarded this case [*Mason*] as particularly striking, even extreme, in its insistence upon an affirmative showing that an answer innocent on its face had sinister implications; for the normal connotation of a card game in a frontier saloon is not that of a game of Old Maid on a supervised public playground. Moreover, we felt duty bound to regard the *Mason* case as a significant precedent because the *Hoffman* opinion had cited *Mason*, apparently with approval.

For these reasons we thought our *Greenberg* decision was correct and consistent with what the Supreme Court had intended in the *Hoffman* opinion.

*United States v. Coffey*, 198 F.2d at 440.

<sup>98</sup> See notes 17-20 & accompanying text *supra* for a discussion of *Mason*.

lemma. In *United States v. Weisman*,<sup>99</sup> Learned Hand phrased the problem in this way: "Logically, indeed, he [the witness] 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."<sup>100</sup> The only workable solution, according to Hand, "is to be content with the door's being set a little ajar, and while at times this no doubt destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available."<sup>101</sup>

Shortly after *Weisman*, *United States v. St. Pierre*<sup>102</sup> illustrated the dangers lurking in the Hand solution. St. Pierre disclosed before a federal grand jury that a bookmaker had entrusted to him a sum of money due on a bet placed by a businessman and admitted keeping the money for himself. After his refusal to reveal the businessman's name, however, the district court held him in contempt. Despite counsel's statement that St. Pierre had transported the money from New York to Canada, potentially in violation of the National Stolen Property Act,<sup>103</sup> the Second Circuit affirmed, stating, "We must be apprised, in some more dependable manner than a mere statement of counsel, how the answer will incriminate the witness before we can allow the suppression of the truth."<sup>104</sup> When called again to testify, St. Pierre once more refused to reveal the name of the businessman, but, in order to secure the privilege, he disclosed that he had transported the money to Canada. Affirming another district court contempt order, the Second Circuit held that by the additional disclosure St. Pierre had waived the privilege.<sup>105</sup>

*Hoffman* addressed the *St. Pierre* conundrum by liberalizing the real danger proof requirements. The Court began with the *Mason* proposition that a witness may invoke the privilege only where he "has reasonable cause to apprehend danger from a direct answer."<sup>106</sup> Facts sufficing for reasonable cause, however, are presumed to include additional incriminating facts known only to the claimant. Correspondingly, the level of apprehension is presumed to be greater than that

---

<sup>99</sup> 111 F.2d 260 (2d Cir. 1940).

<sup>100</sup> *Id.* at 262.

<sup>101</sup> *Id.* See *United States v. Burr*, 25 F. Cas. at 40 (discussed in text accompanying notes 15-16 *supra*), wherein Justice Marshall states that when a direct answer might implicate the witness in a crime, the court must refrain from participating in the decision of what the witness is to answer "because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows."

<sup>102</sup> 128 F.2d 979.

<sup>103</sup> Pub. L. No. 246, 48 Stat. 794 § 3 (1934).

<sup>104</sup> 128 F.2d at 981.

<sup>105</sup> 132 F.2d 837. See Wolfram, *supra* note 87, at 134-36 (demonstrating development of *Hoffman* in context of disclosure problem).

<sup>106</sup> 341 U.S. at 486 (citing *Mason v. United States*, 244 U.S. at 365).

which could be aroused solely by the facts made apparent to the judge in order to be granted the privilege. These conclusions flow ineluctably from the Court's statement of its rationale.

[I]f the witness upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.<sup>107</sup>

The *Hoffman* Court fashioned a liberal standard that placed the burden on the defendant to show only a possibility of incrimination before invoking the privilege.<sup>108</sup> In rejecting the likelihood of prosecution test, the appellate courts have erroneously adapted to the question of prosecution probability a standard that evolved as a compromise between tensions inhering in the analytically distinct problem of incrimination probability. The point is that these tensions are nonexistent in the process of evaluating the possibility of prosecution.

Arguably, cases addressing the incriminating quality of the evidence<sup>109</sup> determine the existence of real danger effectively according to a "disclosure-plus" factor: the testimony itself plus the nondisclosed information necessarily assumed incriminating due to the dilemma noted by Learned Hand. Both the disclosed and at least part of the nondisclosed information are necessary to give rise to apprehension of danger sufficient for fifth amendment purposes. In this scheme, the importance of *Hoffman* is its organic alteration of the disclosure-plus factor. Information previously required to be disclosed now need not be. The total amount of disclosure-plus necessary for real danger purposes has remained theoretically constant.

The practical implications of this abstraction have been difficult to appreciate because in the majority of cases resolution of the privilege issue hinges on proof of crimination, which in turn may entail establishing facts less than those constituting real danger. Assessing the probability of prosecution, however, does not entail consideration of a nondisclosed component. The determination is based on objective public factors, including the testimony, other evidence, and the factors relevant to the choice of a prosecutor's office to exercise its discretion.<sup>110</sup> Forgetting the peculiar circumstances which *Hoffman* addressed, federal

---

<sup>107</sup> *Id.* at 486-87.

<sup>108</sup> *Id.* at 488. See notes 25-30 & accompanying text *supra*.

<sup>109</sup> See, e.g., cases cited in notes 28, 32, 39 & 96 *supra*.

<sup>110</sup> See note 42 *supra*.

circuit courts addressing the constitutional relevance of prosecution likelihoods have assumed that facts constituting a *Hoffman* minimum showing would by themselves produce sufficient fifth amendment apprehension. This faulty assumption easily leads courts to the conclusion that "[w]hen a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution."<sup>111</sup>

*Hoffman* and its progeny are not controlling on the acceptability of the likelihood of prosecution test. The lack of guidance provided by *Hoffman v. United States* underscores the need to evaluate the test in light of the rationale for the privilege.

#### THE BURGER COURT AND THE BALANCE BETWEEN STATE AND INDIVIDUAL INTERESTS

Courts and commentators have adduced a multitude of rationales for the privilege. The catalogue offered in *Murphy v. Waterfront Comm'n of New York Harbor* illustrates this diversity:

[The privilege] reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty' is often 'a protection to the innocent.'<sup>112</sup>

Commentators have consolidated these normative considerations into three which are fundamental:<sup>113</sup> privacy,<sup>114</sup> the moral dignity and

<sup>111</sup> *In re Folding Carton Antitrust Litigation*, 609 F.2d at 871.

<sup>112</sup> 378 U.S. at 55 (footnotes omitted).

<sup>113</sup> Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597 (1970); Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 95 (1954); Friendly, *supra* note 45; Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343 (1979) [hereinafter cited as *Demise of Boyd*]; Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970) [hereinafter cited as *Privacy*]; McKay, *supra* note 81; McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affiliation, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L. & C. 138 (1960); O'BRIEN, *supra* note 13.

<sup>114</sup> See, e.g., *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966), where the court stated that "the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by 'our respect for the inviolability of human personality



humanity of the individual,<sup>115</sup> and a fair balance between the state and the individual.<sup>116</sup> The prevailing value will have far-reaching impact on the applicability of the privilege and, of immediate concern, on the constitutional validity of the likelihood of prosecution test.

Privacy taken as an end in itself might allow invocation of the privilege even where there is immunity from prosecution.<sup>117</sup> Under the rationale which seeks to preserve the moral dignity of the individual, the same result might follow on the theory that confession is hard on the individual, even if there is no threat of prosecution.<sup>118</sup> On the other hand, where the privilege is viewed not as valuable in itself, but as instrumental to preserving the balance between the individual and the state maintaining the accusatory system, the privilege probably would not be available absent any danger of prosecution.<sup>119</sup>

The Burger Court has adopted this instrumentalist mode of analysis. Under this view, approximating that of Bentham, even where there is a danger of prosecution, "the scope of the fifth amendment will vary

---

and of the right of each individual "to a private enclave where he may lead a private life" . . . ." See also *Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. at 55; *United States v. White*, 322 U.S. 694, 698 (1944); *Feldman v. United States*, 322 U.S. 487, 489-90 (1944); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

A number of commentators have urged that the privacy rationale lacks historic foundation. See, e.g., O'Connor, *The Right to Privacy in Historical Perspective*, 53 MASS. L.Q. 101 (1968). In defense Judge Jerome Frank urged that these critics, "in their over-emphasis on the history of the Fifth Amendment, overlook the fact that a noble principle often transcends its origins. Creative misunderstandings account for some of our most cherished values and institutions." *United States v. Grunewald*, 233 F.2d at 581.

<sup>115</sup> Bentham referred to this rationale as the "Old woman's reason." "The essence of this reason is contained in the word *hard*: 'tis hard upon a man to be obliged to criminate himself." 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 230 (1827). To be avoided are torture, browbeating, bullying, and the trilemma of harmful disclosure, contempt, and perjury. Where the witness discloses the information sought, "[t]he witness' 'will' will have been broken. Or, put another way, that the witness will have been forced to do a 'multifying' thing." McNaughton, *supra* note 113, at 147. Where the witness perjures himself he commits a crime against God or violates a commitment to truth-telling as a guiding moral principle. *Id.* at 148. In any case, the witness must commit the "unnatural act" of *inflicting injury on himself*." *Id.* (emphasis in original).

<sup>116</sup> According to Bentham, this reason—the "fox hunter's"—

consists in introducing upon the carpet of legal procedure the ideal of *fairness*, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law*: leave to run a certain length of way, for the express purpose of giving him a chance for escape.

5 J. BENTHAM, *supra* note 115, at 238-39 (emphasis in original). This rationale emphasizes preservation of the accusatorial system in which the government "must establish guilt by evidence independently and freely secured and not by coercion to prove its charge against the accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 541 (1960).

<sup>117</sup> See *Privacy*, *supra* note 113, at 88; McKay, *supra* note 81, at 212; O'Brien, *supra* note 113, at 48.

<sup>118</sup> See O'Brien, *supra* note 13, at 44.

<sup>119</sup> See *id.* at 39; *Privacy*, *supra* note 113, at 88.

with judicial evaluation of the degree of personal compulsion and the utility of the privilege relative to the maintenance of a fair state-individual balance."<sup>120</sup> According to the Burger Court, "the fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice."<sup>121</sup> Under this rationale, Professor O'Brien notes that "the fifth amendment confers only a privilege and not a right against self-accusation. That is, the amendment may be extended or contracted depending upon judicial evaluations of its utility in different circumstances for maintaining an accusatorial system."<sup>122</sup> Thus, as the Court molds its notion of a fair balance between state and individual interests, it concomitantly redefines "compulsion" and the context in which a claim may be made. This approach has uniformly resulted in narrowing the scope of protection.<sup>123</sup>

The Court's decisions in the area of reporting and registration requirements dramatically manifest this restrictive approach. These cases demonstrate the vitality of the real danger doctrine and provide support for the likelihood of prosecution test. In *California v. Byers*,<sup>124</sup> the defendant was convicted under a statute requiring motorists in accidents to stop and identify themselves. The Warren Court had previously struck down a statute requiring registration by individual members of the Communist Party in *Albertson v. Subversive Activities Control Bd.*<sup>125</sup> and in *Marchetti v. United States*<sup>126</sup> did likewise with a statute requiring monthly statements by gamblers concerning their wagering activities. In both of those cases the questions were directed toward a "highly selective group inherently suspect of criminal activities."<sup>127</sup> Upholding the hit-and-run statute, the *Byers* plurality stated that "[t]he disclosure of inherently illegal activity is inherently risky. . . . But disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of

---

<sup>120</sup> O'Brien, *supra* note 13, at 40.

<sup>121</sup> *Garner v. United States*, 424 U.S. 648, 655 (1976).

<sup>122</sup> O'Brien, *supra* note 13, at 40 (footnote omitted).

<sup>123</sup> The Burger Court has restricted the scope of the privilege in both pretrial and trial contexts. *See* *United States v. Apfelbaum*, 445 U.S. 115 (1980); *Garner v. United States*, 424 U.S. 648; *Michigan v. Mosley*, 423 U.S. 96 (1975); *Brown v. Illinois*, 422 U.S. 590 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *Kastigar v. United States*, 406 U.S. 441; *Harris v. New York*, 401 U.S. 222 (1971); *Williams v. Florida*, 399 U.S. 78 (1970).

The Burger Court has sharply curbed the reach of *Miranda*. *See, e.g.*, *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Washington*, 431 U.S. 181 (1977); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976). *See generally* O'Brien, *supra* note 13, at 54-70.

<sup>124</sup> 402 U.S. 424 (1971).

<sup>125</sup> 382 U.S. 70 (1965).

<sup>126</sup> 390 U.S. 39. *See also* *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).

<sup>127</sup> 382 U.S. at 79.

self-incrimination involved in . . . [serious criminal cases]. Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment."<sup>128</sup> Unlike *Marchetti* and *Albertson*, the requirements were not established in an area "permeated with criminal statutes."<sup>129</sup>

Under *Hoffman*, the *Byers* reporting requirement clearly would hazard compelling the witness to provide a link in the chain of evidence leading to a prosecution.<sup>130</sup> Determinative for the Court was the purpose of the requirement, which was not prosecutorial and was both legitimate and important.<sup>131</sup> The Court again stressed the importance of prosecutorial motivation in *Garner v. United States*<sup>132</sup> where the defendant was indicted for conspiracy to fix sports events and transmit bets after reporting his occupation as a professional gambler on his federal income tax return. Holding that failure to assert the privilege at the time of filling out the tax return precluded any claim of compulsion, the Court distinguished the statutes in *Marchetti* and *Albertson* as directed at persons inherently suspect of criminal activities. Thus the Court declined to adopt a "similar presumption that a taxpayer makes disclosures on his return rather than claims the privilege because his will is overborne."<sup>133</sup>

Together *Byers* and *Garner* establish that, absent prosecutorial motivation, compelled disclosure does not disturb the balance embodied in an accusatorial system. The likelihood of prosecution test is consistent with these cases. Although an important factor in *Garner* was the witness' failure to claim the privilege, the witness who claims the privilege, and then is denied it under the likelihood of prosecution test, sits in the advantageous position of having the absence of prosecutorial purpose affirmatively determined specifically for that case. Most indicative, however, of the test's consistency with current Supreme Court doctrine is the increased personal risk which the witness must show when the government is pursuing nonprosecutorial purposes. The Court in *Byers* and *Garner* apparently considered the presence or absence of prosecutorial motive as bearing on the criminating nature of the disclosure rather than on the likelihood of prosecution. In other words, the more permeated the regulatory scheme was with criminal laws, the more likely that a disclosure would be criminating.<sup>134</sup> By manipulating the

---

<sup>128</sup> 402 U.S. at 431. See note 115 *supra*.

<sup>129</sup> 382 U.S. at 79.

<sup>130</sup> 402 U.S. at 439 (Harlan, J., concurring); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 269 (1971).

<sup>131</sup> 402 U.S. at 431.

<sup>132</sup> 424 U.S. 648.

<sup>133</sup> *Id.* at 657-58.

<sup>134</sup> 402 U.S. at 428, 430. See note 9 *supra*.

*Hoffman* standard in *Byers* and the term "compulsion" in *Garner*, the Court made incriminating information more accessible to the government and increased the chances of such information being used against the witness.

The Court's restriction of real danger proof requirements in favor of important governmental interests suggests that it may be willing to demand more than a speculative possibility of prosecution in favor of the efficient administration of discovery.<sup>135</sup>

Although the Court's construction of the balance between state and individual interests is not inconsistent with the likelihood of prosecution test, the construction is misconceived. This construction leads, in Justice Harlan's words, to "a collection of artificial, if not disingenuous judgments that the risks of incrimination are not there when they really are there."<sup>136</sup> The amendment does more than ensure a fair fight and proper balance between the individual and state; rather it is a definitional component of a fair balance embodying a respect for privacy and the dignity of the individual.

#### THE LIKELIHOOD OF PROSECUTION TEST RECONSIDERED

The history and intellectual foundations of the privilege support this more principled approach. Both Fortas and McNaughton link extinction of authority to require self-incriminatory statements with the seventeenth century revolution in political thought.<sup>137</sup> Hobbes, and later Locke, viewed human behavior mechanistically as a product of the passions. The most powerful passions, the desire for comfortable living and fear of death, reinforce the individual's right to self-preservation. "All the laws of nature and all social and political duties are derived from and subordinate to the individual's right to self-preservation."<sup>138</sup>

Locke departed from Hobbes in his solution to the state of nature:

---

<sup>135</sup> Although perhaps balancing *sub silentio*, the *Byers* Court explicitly premised its holding on an absence of real danger. 402 U.S. at 431. See notes 128-31 & accompanying text *supra*. Supporting a balancing test in dictum, however, the plurality stated baldly that "under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Id.* at 428. Justice Harlan also supported a balancing test, making a majority of the Court. *Id.* at 452-55.

If the Court held that prosecution likelihoods are immaterial to fifth amendment interests, a claimant might prevail in any subsequent balancing. Generally, the government is likely to prevail when there is a strong state interest of the type embodied in a regulatory statute, and when allowing the privilege would completely destroy that interest. See, e.g., *id.* at 451; *Garner v. United States*, 424 U.S. 648; *United States v. Carlson*, 617 F.2d 521 (9th Cir. 1980). The potential impact of the likelihood of prosecution test on the effective administration of the courts may not amount to a strong interest. But see *In re Folding Carton Antitrust Litigation*, 465 F. Supp. at 624 n.4, 625 (discussed in notes 48-60 & accompanying text *supra*).

<sup>136</sup> *California v. Byers*, 402 U.S. at 442 (Harlan, J., concurring).

<sup>137</sup> Fortas, *supra* note 113, at 98; McNaughton, *supra* note 113, at 149.

<sup>138</sup> L. STRAUSS & J. CROUSEY, HISTORY OF POLITICAL PHILOSOPHY 359 (1963).

a democracy with supreme power in the people rather than the all-mighty Leviathan. Submitting to arbitrary rule, according to Locke, contradicted the basic premise that action tends to self-preservation, for this form of government would put man "into a worse condition than the state of nature."<sup>139</sup> Both philosophers agreed, however, that individuals have a social contract with each other to secure their own preservation, and no one can be pressured to contract away rights that would defeat that purpose. Thus, certain rights remain incapable of being assigned through contract.<sup>140</sup> Among those rights, Hobbes notes explicitly, is the right against self-incrimination.<sup>141</sup>

The history of the amendment likewise supports the conclusion that it is more than a policeman of an accusatorial courtroom. In his Pulitzer Prize-winning history of the fifth amendment, Leonard Levy<sup>142</sup> traces its origins to the use of the oath *ex officio* by the English High Commission and Star Chamber in England. The oath was a sworn statement by the accused to give true answers to any question. The defendant was required to swear without knowing the charge, the identity of the accuser, or the nature of the evidence.<sup>143</sup> The English common law courts, procedurally accusatorial, for the most part remained free of the oath.<sup>144</sup> On the other hand, following the inquisitorial model of the Roman canon law, the English ecclesiastical courts, whose supreme body was the High Commission, adopted the oath as early as 1236.<sup>145</sup> The Star Chamber, the judicial arm of the King's council, in turn followed the example of the High Commission.<sup>146</sup>

The High Commission and Star Chamber used the oath first

---

<sup>139</sup> J. LOCKE, TWO TREATISES ON GOVERNMENT § 137 (1821).

<sup>140</sup> L. STRAUSS & J. CROSEY, *supra* note 138, at 359-60, 366, 454.

<sup>141</sup> "If a man be interrogated by the Sovereign, or his Authority, concerning a crime done by himselfe, he is not bound (without assurance of Pardon) to confesse it; because no man (as I have shewn in the same Chapter) can be obliged by Covenant to accuse himselfe." T. HOBBS, LEVIATHAN ch. 21, at 167 (Oxford ed. 1909).

<sup>142</sup> L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1971).

<sup>143</sup> *Id.* at 46-47.

<sup>144</sup> [T]he principal incursion made by the inquisitional system on the common law . . . was the preliminary examination of accused persons. . . .

By the close of the sixteenth century these examinations were becoming quite inquisitorial. . . . Torture, however, . . . was never used in any common law proceeding. Nevertheless, the preliminary examination by the justice of the peace was a common-law equivalent of the secret inquisition used on the Continent.

*Id.* at 35.

<sup>145</sup> Criminal jurisdiction of the ecclesiastic courts reached three categories of offenses: sins of the flesh, offenses against religion, and a miscellany of crimes including usury, defamation, drunkenness, and disorderly conduct. *Id.* at 44.

<sup>146</sup> Initially the Council exercised executive, legislative, and judicial functions. Judicial offshoots of the Council became central common law courts. By the middle of the thirteenth century, the remaining judicial functions were taken up by the Council's prerogative court, the Star Chamber. The court's procedures and jurisdiction were "practically discretionary." *Id.* at 49.

against the protestants, then against the Catholics during Elizabeth I's reign, and later against the Puritans. Recounting the challenges to the oath lying at the root of the privilege, Levy unequivocally demonstrates that the right emerged because it was considered intrinsically valuable, rather than simply protective of the accusatory system. The writings of William Tyndale, which later influenced the Puritan challenges to the High Commission, provided an early example of opposition to the oath as an invasion of the hearts and consciences of men.<sup>147</sup> Tyndale's translation of the New Testament rendered into English for the first time these words of Christ: "agayne ye have herde, howe it was said to them of old tyme, thou shalt not forswere thysilfe, but shalt perform thine othe to god."<sup>148</sup> Tyndale himself wrote that it was "a cruel thing to break up into a man's heart, and to compel him to put either soul or body in jeopardy, or to shame himself."<sup>149</sup> As Robert Gerstein pointed out, "[t]he central point was that an individual ought to be autonomous in his efforts to come to terms in his own conscience with accusations of wrongdoing against him."<sup>150</sup> For legal authority, defendants before the Star Chamber and High Commission would look to the Magna Carta as the source of liberty of the subject. Levy states that "[o]n these two, Magna Carta and conscience, was founded what would become the right against self-incrimination."<sup>151</sup>

The argument based on conscience was combined with an invocation of the law of nature in the 1580 case involving the Catholic defendants William Lord Vaux and Sir Thomas Tresham, accused of harboring a Jesuit awaiting trial for religious crimes.<sup>152</sup> Asked to take the oath, Tresham replied "[a]nd, if I dyd accuse myselfe by my owne othe, I should condemne myselfe, against the lawe of nature and Gods lawe."<sup>153</sup> Levy wrote, "The argument based on conscience would have tremendous force in bringing about the abolition of the oath *ex officio*. But it was Tresham's invocation of the 'law of nature *sepsum prodere*' which had immediately telling effect."<sup>154</sup> Similarly, before the King's Bench in 1607, Nicholas Fuller relied on Aristotle's notion of self-preservation in arguing that the oath violated the law of nature in leading to

<sup>147</sup> See W. TYNDALE, THE OBEDIENCE OF A CHRISTEN MAN, AND HOW CHRISTEN RULERS OUGHT TO GOVERN (1528), reprinted in H. WALTER, DOCTRINAL TREATISES AND INTRODUCTIONS TO DIFFERENT PORTIONS OF THE HOLY SCRIPTURES. BY WILLIAM TYNDALE (1848).

<sup>148</sup> L. LEVY, *supra* note 142, at 63 (quoting ARBER, FIRST PRINTED ENGLISH NEW TESTAMENT 25 (facsimile text)).

<sup>149</sup> *Id.* at 63-64 (quoting W. TYNDALE, *supra* note 147, at 187, 203, 335).

<sup>150</sup> *Demise of Boyd*, *supra* note 113, at 347 (citations omitted).

<sup>151</sup> L. LEVY, *supra* note 142, at 178. See *id.* at 165, 178, 180, 196, 214, 246-47.

<sup>152</sup> *Id.* at 100-07.

<sup>153</sup> *Id.* at 104.

<sup>154</sup> *Id.* at 105.

self-destruction.<sup>155</sup> Levy concludes his chapter on Fuller and Coke with the observation that, although arguments from religion, conscience, and considerations of procedural fair play were critical in the development of the privilege, "more and more people were beginning to think that to coerce a man to testify against himself, with or without oath, was simply unjust—an outrage on human dignity and a violation of the very instinct of self-preservation."<sup>156</sup>

Accepting that at the root of the privilege is a concept of government whose power is limited by the compact creating it, Fortas states:

The principle that a man is not obliged to furnish the state with ammunition to use against him is basic to this conception. Equals, meeting in battle, owe no such duty to one another, regardless of the obligations that they may be under prior to battle. A sovereign state has the right to defend itself, and within the limits of accepted procedure, to punish infractions of the rules that govern its relationships with its sovereign individuals. But it has no right to compel the sovereign individual to surrender or impair his right of self-defense.<sup>157</sup>

Contrary to the suggestion of one commentator, the privilege thus conceived does not serve merely instrumentally "as a policy objective of accusatorial systems;"<sup>158</sup> rather, it limits the power of the state in its

---

<sup>155</sup> *Id.* at 235.

<sup>156</sup> *Id.* at 263. The privilege obtained general currency in the aftermath of Lilburne's trial before the Star Chamber in 1637. In addition to invoking the arguments based on conscience, the law of nature, and the "law of the land," see *id.* at 277, 305, Lilburne sought to educate the public on the relation of liberty to fair play in criminal procedure. *Id.* at 302, 313. The right as secured after Lilburne's trial "did not prohibit inquiry nor even incriminating interrogations, but it did permit a refusal to answer without formal prejudice or penalty." L. LEVY, *supra* note 142, at 313.

The privilege first appeared in America in Liberty 45 of the Massachusetts Body of Liberties, which, although intended to abolish torture, did not recognize the privilege at public trials and left unanswered the discretion of the magistrate to extract confessions in capital cases. By 1667, however, the Grand Assembly of Virginia, the state's supreme judicial body and legislature, declared that "[t]he law has provided that a witness summoned against another ought to answer upon oath, but no law can compel a man to swear against himself in any matter wherein he is lyable to corporal punishment." *Id.* at 358.

The scope of the right as it existed in both America and the colonies during the eighteenth century was narrower than today. The right was against *compulsory* self-incrimination, and almost always had to be claimed by the defendant. The suspect's incriminating statements at preliminary examinations or arraignment could be used against him at trial. Nor were the authorities under any obligation to warn the defendant of his rights. *Id.* at 406. Nevertheless, the application of the right was expansive. The right applied to witnesses and parties at all stages of all equity and common law proceedings. Grand jury witnesses could invoke the privilege as could parties and witnesses in private actions and witnesses before legislative tribunals. *Id.* Madison's proposed amendment reflects that breadth: "[n]o person shall be compelled . . . to be a witness against himself." Speech of Madison, Jan. 8, 1789, I ANNALS OF CONGRESS 434. By the beginning of the eighteenth century in England, and later that same century in the colonies, the privilege apparently did extend in some instances to questions tending merely to disgrace the witness. L. LEVY, *supra* note 142, at 406.

<sup>157</sup> Fortas, *supra* note 113, at 98-99.

<sup>158</sup> O'Brien, *supra* note 13, at 37.

relationship with the individual. The principles governing the relationship between man and state, which are derived from the individual's right to self-preservation, assure a fair fight. One of these principles is the privilege against self-incrimination.

In his dissenting opinion in *United States v. Wade*,<sup>159</sup> Justice Fortas underscored the intrinsic value of the privilege and offered a model for its application. Fortas agreed with the majority that exhibiting the accused in a lineup is incidental to the state's power to arrest, and therefore not violative of the privilege. He disagreed, however, with the majority's conclusion that the state could compel the accused to speak the words uttered by the person who committed the crime. Whereas the former "does not require that the accused take affirmative, volitional action," the latter "is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historic perimeter of the privilege against compelled self-incrimination."<sup>160</sup> Following Fortas, Dann argues for the availability of the privilege "[w]henever an accused has it within his power to alter the evidence so as to affect its probative value on the issues of guilt or innocence."<sup>161</sup> When the accused does have control over the evidence, "the prohibited psychological trilemma"<sup>162</sup> between harmful disclosure, contempt, and perjury is present.

The validity of the likelihood of prosecution test under the approach of Fortas and Dann, however, cannot rest solely on the concept of volition. The matter is not one of determining the testimonial nature of evidence, but rather whether evidence over which the witness does have control is extracted in the arena of conflict between the state and the individual. The battle—to use Fortas' term<sup>163</sup>—begins when the individual commits an act which the state punishes as criminal, and certainly at the time the act is brought to the attention of the prosecuting attorney. The variables which make prosecution likely or unlikely are for the government to revel or despair in, but for the individual to give his opponent added artillery just because victory appears assured would be irrational and flatly contradicts an understanding of the privilege as protecting the individual's right to refrain from volitional acts of self-destruction. Thus, witnesses in either criminal or civil proceedings should not be compelled to testify where there is a possibility of criminal liability, irrespective of the likelihood of prosecution.

---

<sup>159</sup> 388 U.S. at 259 (Fortas, J., dissenting).

<sup>160</sup> *Id.* at 260.

<sup>161</sup> Dann, *supra* note 113, at 612.

<sup>162</sup> *Id.* at 630.

<sup>163</sup> Fortas, *supra* note 113, at 98. See note 157 & accompanying text *supra*.



Under this concept of balance between the state and the individual, "real danger" would be any danger of prosecution. The rationale thus articulated demonstrates that the privilege protects against having to engage in unnatural acts of self-destruction. At what point the individual feels personally violated depends on his perception of the circumstances. Speculation about objective quanta of real danger necessary to trigger the privilege is thus a meaningless undertaking because, as Justice Harlan pointed out, real danger must be assessed from the individual's point of view.<sup>164</sup> The practical impossibility of assessing individuals' perceived risk necessarily precludes a likelihood of prosecution test. Justice Harlan put the matter succinctly in *Byers*: "What we are really talking about, then, is either a standard for risks of self-incrimination which protects all personal judgments which are not patently frivolous, or a grant of immunity . . . ."<sup>165</sup>

### CONCLUSION

Ascertaining the constitutional validity of the likelihood of prosecution test in testimonial compulsion cases raises the larger question of the meaning of "real danger." Real danger is danger of prosecution. *Hoffman* and *Mason* together suggest that real danger is a theoretically determinable quantity comprising some portion of the universe of relevant circumstances known to the witness and the court. If the witness were forced to disclose circumstances constituting real danger, however, he would disclose his guilt and thereby render moot his claim to the privilege. *Hoffman* resolved this dilemma by reducing the witness' burden of proof and requiring only a showing of a possibility of incrimination.

If this analysis is correct, prosecution likelihoods are relevant to privilege determinations. The prosecuting attorney's interest in pursuing the witness is one factor among others constituting the danger of prosecution. Thus a court conceivably could conclude that even though a witness satisfied *Hoffman* by showing a possibility of incrimination, he is not entitled to the privilege because the improbability of prosecution demonstrates the absence of real danger. Moreover, the adoption of this test would not be inconsistent with the Burger Court's policy orientation toward the privilege. Confronted with the issue, the Court might conclude that a mere possibility of prosecution does not lend sufficient inquisitorial taint to allow the witness the privilege.

This analysis, however, is at odds with the history and purpose of the amendment. The error is the focus on the danger of prosecution. The history and purposes of the amendment demonstrate that although

---

<sup>164</sup> *California v. Byers*, 402 U.S. at 438 (1970) (Harlan, J., concurring).

<sup>165</sup> *Id.* at 442.

the privilege is concerned with the consequences of disclosure, it is also concerned with the act of disclosure itself. That a person should commit an act of self-destruction is unnatural. Under this mode of analysis, real danger depends on the perceptions of the claimant. The personal nature of the privilege and the difficulty of uncovering the perceptions of the claimant show that the test is contrary to the fifth amendment.

JOHN L. HINES, JR.