ARDENT controversy has exaggerated the practical importance of the privilege against self incrimination, and distorted the reality of its actual effect. A common fallacy underlying many attempts to evaluate the privilege has been a disposition to regard it as a unity,1 rather than a group of evidentiary

1. The privilege has been attacked and defended without attempting to distinguish its varying effect in different situations. See Bofarsky, The Right of the Accused in a Criminal Case Not to be Compelled to be a Witness Against Himself (1928, 1929) 35 W. Va. L. Q. 27, 126; Brunken, Making the Accused Testify Against Himself (1920) 5 MARQ. L. Rev. 82; Carman, A Plea for Withdrawal of Constitutional Privilege from the Criminal (1938) 22 MINN. L. Rev. 200; Knox, Self Incrimination (1925) 74 U. of PA. L. Rev. 139; Terry, Constitutional Provisions Against Forcing Self Incrimination (1906) 15 Yale L. J. 127; Comments, Archaic Constitutional Provisions Protecting the Accused (1914) 5 J. Chem. Law & CREM. 16, Some Reasons for the Growing Disrespect for the Law (1911) 1 J. Chem. Law & CREM. 968, (1937) 27 J. Chem. Law & CREM. 746. Other critics have shown more moderation and objectivity. See Rapacz, Rules Governing
rules clustered under the aegis of a constitutional phrase. Distinct situations which the privilege may affect are divisible into three broad categories: the position of the defendant in a criminal trial, the rights of a witness in any proceeding and the specialized problems raised by investigatory proceedings.

I.

The option of the accused in a criminal trial to refuse to testify against himself is traditionally the primary aspect of the privilege. This situation fits most readily into the typical constitutional phraseology. Around it has waxed great controversy. Yet in practical effect it seems to be one of the least important of any of the situations in which the privilege is brought to bear.

Until late in the last century, the privilege of the accused not to testify against himself was coupled with a corresponding disability to testify in his own behalf. Obviously therefore, no inference could be drawn from the necessity of his remaining aloof. The enabling legislation which made him a competent witness generally provided that he need not testify at all, and that no presumption arise against him for failure to offer himself as a witness. Yet if the accused once takes the stand, the fiction of waiver generally operates to leave him completely bereft of the option of refusal to answer incriminating questions, so long as they are otherwise admissible.

In effect, the prisoner at bar is thus faced with a choice of remaining silent while evidence of guilt is perfected before his and the jury's eyes, or taking

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1. The Allowance of the Privilege Against Self-Incrimination (1935) 19 MINN. L. REV. 426; Taft, The Administration of Criminal Law (1905) 15 YALE L. J. 1; Wigmore, Ex-Secretary Hughes on the Privilege Against Self-Crimination (1925) 16 J. CRIM. LAW & CRIM. 165; Wartels and Pollitt, A Critical Comment on the Privilege Against Self-Crimination (1929) 18 KY. L. REV. 18. For an authoritative review of the entire subject, see 4 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2250-2284.

2. U. S. CONST. AMEND. V. The privilege is to be found in the constitutions of all except two states, Iowa and New Jersey. In these two it is part of the common law. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); Parker v. State, 61 N. J. L. 308, 39 Atl. 651 (1898). Variations in constitutional phraseology have not affected interpretation of the scope of the privilege. 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2252. Apparently nothing in the Federal Constitution forbids excision or modification of the privilege in the states. Twining v. New Jersey, 211 U. S. 78 (1908).

3. The wording of the Federal Constitution is typical: "... Nor shall be compelled in any criminal case to be a witness against himself." U. S. CONST. AMEND. V.

4. See note 1 supra. Bruce, The Right to Comment on the Failure of the Defendant to Testify (1932) 31 MICH. L. REV. 226; Dunmore, Comment on Failure of Accused to Testify (1917) 26 YALE L. J. 464; Reeder, Comment Upon Failure of Accused to Testify (1932) 31 MICH. L. REV. 40; Note (1936) 50 HARV. L. REV. 356.

5. Until 1878 the accused was an incompetent witness in the federal courts. The legislation removing his disability is typically worded: "... The person ... charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." 20 STAT. 30 (1878), 28 U. S. C. § 632 (1934).
the witness stand with the duty to answer every admissible question which an imaginative prosecutor can concoct. The choice to testify obliterates the privilege; he who chooses to remain silent usually finds himself convicted. No legislation can prevent the inevitable inference which the human mind must draw from the spectacle of speechlessness in the face of accusation. Inasmuch as such legislation exists, it would at least seem wise to require the trial judge explicitly to instruct the jury that no adverse presumption may arise from silence. Otherwise the statutory provision forbidding an unfavorable inference from failure to testify is not merely unrealistic, but completely meaningless. Such recently was the unanimous opinion of the Supreme Court.

That tribunal has sedulously avoided deciding whether it is violative of constitutional sanction to alter the traditional practice and allow comment by judge or prosecutor upon the prisoner’s failure to testify. When the issue has arisen elsewhere, it has generally been decided that such a change in the usual practice is unconstitutional. This result seems open to question. The normal practice of prohibiting unfavorable comment appears a gratuitous statutory survival of the prisoner’s complete incompetence to testify, rather

6. There are six distinct variations in attempting to fix the extent of the waiver of the accused when he takes the stand. See 4 WIGMORE, EVIDENCE (2d ed. 1923) §2276(2). The best view would seem to be that the waiver extends to all matters relevant to the issue, thus excluding facts merely affecting credibility. State v. Wentworth, 65 Me. 234, 243 (1875). See (1917) 26 YALE L. J. 501.

7. No statistical study appears to have been made, except in Ohio where the prosecutor may comment on the failure of the accused to testify. Dunmore, Comment on Failure of Accused to Testify (1917) 26 YALE L. J. 464. But there seems to be general agreement that the silent defendant is usually convicted. See Bruce, The Right to Comment on the Failure of the Defendant to Testify (1932) 31 Mich. L. Rev. 226, 230; TRAIN, FROM THE DISTRICT ATTORNEY’S OFFICE (1939) 98, “Out of three hundred defendants tried by Judge Nott, twenty-three failed to take the stand . . . Of these, twenty-one were convicted, one was acquitted, and as to one the jury disagreed.”

8. Bruno v. United States, 60 Sup. Ct. 198 (U. S. 1939). No technical distinction between inference and presumption seems to have been made, except insofar as the court recognized the impossibility of legislating against the operation of the human mind. Wigmore bases his argument against requiring the judge so to instruct the jury upon this same impossibility. “. . . It is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and disrespect for the law’s reasonableness.” 4 WIGMORE, EVIDENCE (2d ed. 1923) §2272.


than a necessary corollary of the constitutional privilege. But the two have become so associated that it may be said as a matter of judicial action, as distinguished from theoretical accuracy, that the prohibition against comment has generally become a component rule of the privilege, destructible only by constitutional alteration. Permission of explicit unfavorable inference has therefore made its way with difficulty.

Extension to the prosecution of the power to call the defendant as a witness is an extreme which has gained no foothold. Logically such a practice would likewise appear not to violate the privilege, but probably no court would permit it without constitutional amendment. Once under oath, the accused could of course refuse to answer criminating questions, since the most tortuous straining of concept could construct no waiver here. But the claim of privilege before a jury would be tantamount to a formal confession of guilt. The accused would in fact be under extreme pressure to testify fully.

Probably such extensions of the present generally adopted procedure are pragmatically unnecessary and undesirable, despite their solid theoretical basis. Under the present practice the accused is under sufficient pressure to testify. Normally he will refrain only under extraordinary conditions. If he is innocent of the crime charged, and the state's evidence is weak, he may prefer to seek a directed verdict or an acquittal for failure of affirmative proof, rather than risk the prejudice attaching to forced admissions of other extraneous criminal conduct. Even if the case against him is strong, the probably guilty habitual criminal will prefer the slender risk of escape to the comparative certainty of conviction by a jury before whom his guilt of other crimes has been paraded. The existing possibility of the defendant's unavailability for testimonial examination is a safeguard against frivolous prosecutions on insufficient affirmative evidence.

A lingering doubt as to whether the accused can be compelled to exhibit his physical characteristics has happily abated; except for an occasional

11. See note 5 supra. Historically the privilege was limited to preventing direct, actual compulsion. See Ross v. State, 204 Ind. 281, 292, 182 N. E. 865, 869 (1932). For detailed investigations into the historical genesis of the privilege, see 4 Wigmore, Evidence (2d ed. 1923) § 2250; Corwin, The Supreme Court's Construction of the Self Incrimination Clause (1930) 29 Mich. L. Rev. 1; Pittman, The Colonial and Constitutional History of the Prvilege Against Self Incrimination in America (1935) 21 Va. L. Rev. 763.

12. See note 10 supra.

13. The privilege in origin is merely one against compulsion of incriminating answers, not against taking the witness stand. 4 Wigmore, Evidence (2d ed. 1923) § 2250.

14. For the cautious judicial attitude towards coercing the accused to become a witness, see Blair v. Commonwealth, 166 Va. 715, 185 S. E. 900 (1936). (Juror asked for benefit of accused's testimony, and he thereupon took the stand. Held, reversible error).

15. Wigmore argues that "... Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby." 4 Wigmore, Evidence (2d ed. 1923) § 2251.
aberrancy; the law is now settled that the privilege affects only verbal evidence. But verbal evidence is not limited to oral testimony; it includes likewise documentary evidence. Unless the accused is a corporation, he can refuse to produce any incriminating document in his possession.

These rules, in the few cases where they are of any effect whatsoever, would seem on the whole to contribute to the orderliness of criminal procedure without greatly detracting from its efficiency. In the normal case, when the defendant does become a witness, an appreciation of the purpose of the privilege should induce reluctance to extend the doctrine of waiver beyond its proper limits. Questions should not become admissible merely because the witness is on trial for crime. The usual rules of evidence are not waived when he takes the stand. A wise moderation in the trial court is the best preventive of a criminal procedure of accusatory insistence, against which the privilege was sought to guarantee.

Means for complete excision of the privilege of the accused are frequently at hand. One is extension of waiver to include failure to assert the privilege in a previous proceeding concerning the subject of present litigation.

16. Bethel v. State, 178 Ark. 277, 10 S. W. (2d) 370 (1923) (taking of physical examination); People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927) (mental examination). The one great exception is furnished by judicial welding of the privilege with the prohibition against unreasonable searches and seizures. The result is the rule in the federal courts and in a minority of the states holding that the privilege is violated by introduction of evidence illegally acquired. Gouled v. United States, 255 U. S. 298 (1921); Weeks v. United States, 222 U. S. 383 (1914). See Corwin, The Supreme Court's Construction of the Self Inculmination Clause (1930) 29 Micr. L. Rev. 1. The limitations and wisdom of this rule have been thoroughly discussed and are not dealt with in this Comment.

17. Holt v. United States, 218 U. S. 245 (1910); Ross v. State, 204 Ind. 381, 182 N. E. 865 (1932). 4 Wigmore, Evidence (3d ed. 1923) § 2263. Comment (1939) 53 Harv. L. Rev. 285. The privilege is limited to oral or written statements required under process as a witness and is not to be confused with the rule excluding involuntary confessions. For a recent example of such confusion, see Matter of Schmidt v. Dist. Atty of Monroe Co., 255 App. Div. 353, 8 N. Y. S. (2d) 787 (4th Dep't 1938).

18. The rule is well settled everywhere. However, the document must be surrendered for a determination by the court of whether its contents actually are incriminating. Brown v. United States, 276 U. S. 134 (1928); Corretjer v. Dranghorn, 88 F. (2d) 116 (C. C. A. 1st, 1937).

19. Around the only serious issue arising under this aspect of the privilege breaks a hopeless conflict of authority. The problem is whether or not the privilege is violated by a notice to the accused in open court to produce an incriminating writing in his possession. It would seem illogical to hold that the privilege is violated before it is asserted. But like the analogy of refusing to permit the prosecution to call the accused as a witness, the better view appears to be a preference for reality rather than logic. Powell v. Commonwealth, 167 Va. 558, 189 S. E. 433 (1937) (cases collected).

20. Some courts appear to have made no effort to limit cross examination of the accused as to his guilt of other crimes. People v. Murel, 225 Mich. 499, 196 N. W. 376 (1923); State v. Hale, 85 N. H. 403, 160 Atl. 95 (1932).

Another is the simple device of classifying the case as a non-criminal action. The defendant then can be called as a witness by the prosecution and compelled to be sworn. Thus, in proceedings involving deportation,22 violation of a city ordinance,23 alien land laws,24 abatement of a public nuisance25 and recovery of a monetary penalty imposed by the state,26 the government has been allowed to call the defendant as a witness. If liability is non-criminal, consistency would appear to require him to answer all proper questions relating thereto, since the answers would not be criminating.27

II.

The defendant in a non-criminal action is in the situation of the ordinary third party witness in a civil or criminal case, whose efforts to utilize the privilege have given rise to a separate set of problems. Whether the constitutional provision was originally intended to include a witness's common law privilege not to criminate himself is highly conjectural.28 But of the complete present fusion of the witness's option with the traditional constitutional guarantee there can be no doubt. Though protected by the identical constitutional phraseology and governed by the same abstract definitions, the privilege of the witness is quite distinct from that of the accused; — in scope, in policy and in the areas of litigious conflict from which the case law has been engendered.

It is now substantially settled that a witness may, under the privilege, lawfully refuse to testify only concerning facts making him presently liable to criminal prosecution in the same jurisdiction. There is no option to decline


27. There has occasionally been a tendency to compromise with consistency. Milwaukee v. Burns, 225 Wis. 296, 274 N. W. 273 (1937). Other proceedings typically called civil are those for the revocation of licenses. In re Bailey, 30 Ariz. 407, 248 Pac. 29 (1926); Johnson v. State Bar of Cal., 4 Cal. (2d) 744, 52 P. (2d) 928 (1936); McIntosh v. State Bar of Cal., 211 Cal. 261, 294 Pac. 1067 (1930); State v. Brown, 218 Iowa 166, 253 N. W. 836 (1934).

response which would reveal a liability only to civil redress. Likewise, no matter how great his moral guilt, a witness has no choice but to answer concerning a crime for which he is now immune from prosecution, because of trial ending in conviction or acquittal, a pardon or statutory immunity, or the running of the statute of limitations. Judicial confusion of the privilege with that which permits refusal to respond when the answer would tend to degrade has occasionally beclouded these settled principles. The latter privilege is one allowable in the discretion of the trial court, and is restricted to questions concerning a "collateral" matter; it has no constitutional sanction.

Whether liability to prosecution in another jurisdiction is an adequate basis for assertion of the privilege is a question which would seem to have been finally settled. The case of United States v. Murdock appears to decide with sufficient clarity that the privilege refers only to criminal liability in the same jurisdiction, so far as the Federal Constitution is concerned. The only difficulty arises in deciding whether the rule is ironclad. If it is based on a limitation of power or jurisdiction, then there would seem to be no possibility of exception. If, on the other hand, language in the opinions be taken literally, the rule may possibly be based on the proposition that the danger of prosecution by another sovereign is too insubstantial and remote to be taken seriously. If the presumption is rebuttable, then in cases where the witness could show to the court's satisfaction that the danger of such prosecution was imminent and substantial, he would be able successfully to assert the privilege and refuse to answer the question. The ambiguity is at least of sufficient substantiality to encourage occasional earnest argument by counsel.

29. See note 27 supra.
33. 284 U. S. 141 (1931).
34. United States v. Lombardo, 241 U. S. 73 (1916); United States v. Portale, 235 U. S. 27 (1914). It was held in Jack v. Kansas, 199 U. S. 372 (1905) that a state immunity statute which did not guarantee immunity from prosecution in the federal courts was not violative of the Fourteenth Amendment. But since the Court has held that eradication of the entire privilege from a state constitution would likewise not violate the Fourteenth Amendment, this case alone would not seem to have the force which some commentators have given it. Twining v. New Jersey, 211 U. S. 78 (1908).
35. Upon a strict application of the doctrine of two distinct sovereignties. King of the Two Sicilies v. Willcox, 7 State Trials (k.s.) 1049, 1068 (Ch. 1859); State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926).
37. See N. Y. Times, Feb. 27, 1940, p. 15, col. 1; Feb. 28, 1940, p. 14, col. 4. Counsel argued that a witness could assert the privilege in an XLRB investigation despite a fed-
Further limitations upon the privilege of a witness are made possible by availability of the familiar doctrine of waiver. While a witness of course cannot, like the accused, be held to have waived the privilege when he takes an oath to testify, since he is under the absolute duty to do that if he is subpoenaed, waiver can be constructed when in previous proceedings he has voluntarily answered the questions to which he now pleads his privilege. The courts employ the doctrine with a varying degree of willingness.\(^{38}\)

How great an indication of criminal guilt must be involved in a possible answer before it is within the ambit of the privilege, and in whose hands lies the responsibility for making this decision, are the questions concerning the witness's privilege which have most engrossed the attention of the courts. In their usual statement of the principles which should govern, the illusion of almost complete harmony is preserved. For a statement of the law, the courts invariably turn to the opinion of Mr. Chief Justice Marshall in In re \(\textit{Willie}\), delivered during the course of Aaron Burr's trial. Willie, who was Burr's confidential secretary, refused to answer whether he understood the cipher in which a supposedly incriminating document was written. His contention was that a possible affirmative answer would tend to indicate guilt of misprision of treason. The ingredients of that crime are knowledge of the treason and failure to make it known. Marshall decided that the witness must answer the question, declaring that proof of understanding of the cipher at the time of trial did not support an inference of understanding at the time it was written. In concluding his opinion the Chief Justice "settled" the law:

"The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."\(^{39}\)

To pretend that this statement of the law will automatically determine the disposition of any but the clearest cases is ingenuous; at best it indicates the general immunity provision, because of substantial danger of prosecution by state authorities. The witness was nevertheless compelled to answer, but apparently on the astonishing ground that the federal act gave him immunity from state prosecution. See Shiras, J., dissenting in Brown v. Walker, 161 U. S. 591, 623 (1896).

outlines of a general approach. Attempts to deduce from it a self-operating set of rules have proved futile, in terms of the decided cases.\textsuperscript{40} Two cases in the Supreme Court indicate a contradictory attitude. In \textit{Counselman v. Hitchcock},\textsuperscript{41} it was decided that the privilege included more than the option to refuse to give testimony which itself supplied the necessary and essential link. Silence was permissible if an answer would provide clues whereby the link could be forged. Those states which had held a more stringent view were not slow to alter their course.\textsuperscript{42} A different point of view is furnished by \textit{Mason v. United States},\textsuperscript{43} where the witness had refused to answer questions, an affirmative response to which would have indicated his presence at a gambling table. The grand jury was investigating a charge of gambling against six others. The Court held that the privilege could not be availed of, since the danger of incrimination was “remote and insubstantial.” Further, the Court decided that it should not interfere “unless there has been a complete denial of a right guaranteed.” These two decisions indicate the verbal formulas which can be utilized.

Few jurisdictions have consistently adopted the extreme position of the \textit{Mason} case. A series of decisions following it in the Second Circuit Court of Appeals\textsuperscript{44} seems recently to have been modified.\textsuperscript{45} Most courts follow more closely in the path of \textit{Counselman v. Hitchcock}.\textsuperscript{46} The problem is no doubt normally solved by instinctive decision in the trial court. It is thus impossible to measure the current drift of attitude. Even from those cases which are reported in appellate opinions, it is difficult to develop a conclu-

\textsuperscript{40} See \textit{State v. Thaden}, 43 Minn. 253, 255, 45 N. W. 447 (1890); \textit{4 WORTH, EVIDENCE} (2d ed. 1923) §§ 2261, 2271; see Rapacz, \textit{Rules Governing the Allownce of the Privilege Against Self-Incrimination} (1935) 19 Minn. L. Rev. 426.

\textsuperscript{41} 142 U. S. 547 (1892). The Court decided that a narrowly worded immunity statute was an insufficient substitute for the privilege. Inevitably such decision also decided the scope of the privilege. Immunity must be as broad as the privilege which it supplants.

\textsuperscript{42} \textit{People ex rel. Lewisohn v. O’Brien}, 176 N. Y. 253, 68 N. E. 353 (1903) (cases from other jurisdictions collected).

\textsuperscript{43} 244 U. S. 362 (1917).


\textsuperscript{45} United States v. Zwillmann, 103 F. (2d) 892 (C. C. A. 2d, 1940).

\textsuperscript{46} \textit{Ex parte} Irvine, 74 Fed. 954 (S. D. Ohio 1896); \textit{Ex parte} Berman, 105 Cal. App. 37, 287 Pac. 125 (1930); \textit{Ex parte} Arvin, 232 Mo. App. 796, 112 S. W. (2d) 113 (1937); \textit{Ex parte} Tomassi, 104 Vt. 34, 156 Atl. 533 (1931). But \textit{cf.} \textit{Ex Parte} Bommarito, 270 Mich. 455, 239 N. W. 310 (1935); \textit{In re} Jennings, 154 Ore. 432, 59 P. (2d) 702 (1936) (both parties relied on \textit{In re Willie}).
sion. Each is disposed of in terms of its peculiar facts. The metaphorical phraseology of In re Willie seems to state the law in practically every jurisdiction. Yet few courts, applying it, would compel Willie to answer if the case came before them today. Under the impact of Counselman v. Hitchcock, the chain has become a longer one. A formula more precise is elusive of exact apprehension. 47

Actually most of the cases which appellate courts are called upon to decide arise from a denial in the trial court of the claim of privilege by the witness, and a consequent commitment for contempt on his continued refusal to answer. The course of procedure regularly followed in the court of first instance is indicated more exactly by In re Willie than are the criteria of decision to be employed. The witness must first refuse to answer the question; — for it is the answer, not the question, to which the privilege is addressed. 48

Upon his refusal, it becomes the duty of the judge to decide, on the nebulous standards indicated, whether any direct answer will tend to incriminate the witness. Only if it is clear "as a matter of law" that no direct answer to the question asked could possibly do so, will the court order him to reply. Thus, he who asserts that the response will not point to guilt, has the burden of proof. 49

In view of the scope encompassed in such crimes as conspiracy, 50 the process of decision occasionally requires devious and imaginative research. 51 A careful review of the testimony previously adduced is normally of great relevance. 52 If the court decides that no direct reply can possibly crinate, the witness is ordered to answer. Upon his continued refusal, he is in contempt. Since the facts constituting the contempt have all occurred in

47. "The question is, not whether by his answers the prosecution would be able perhaps to get leads to other witnesses, but whether an answer to the particular question would put the witness in danger." This seems an excellent if general statement of the proper middle ground. In re Doyle, 42 F. (2d) 686 (S. D. N. Y. 1930), rev'd in open court, 47 F. (2d) 686 (C. C. A. 2d, 1931).

48. Though it appears a witness is not in contempt for refusing to answer a question improper on other grounds, even though an answer might not be covered by the privilege asserted; such is certainly the case if the question is immaterial. Lindquist v. Hayes, 22 Ohio App. 141, 153 N. E. 297 (1926).


52. It is usually impossible to judge whether a question requires an incriminating answer, when removed from its context. For example, previous testimony might have shown that the witness has already been convicted of the crime which he is asked to admit. Conversely, a question apparently innocent when isolated might actually demand a highly incriminating answer. To compel the witness to give his name might conceivably violate the privilege. Previous testimony might have proved that a man of his distinctive name was guilty of a criminal offense. People v. Conzo, 301 Ill. App. 524, 23 N. E. (2d) 210 (1939); United States v. Zwillmann, 108 F. (2d) 802 (C. C. A. 2d, 1940).
open court, summary procedure is permissible.\footnote{53} It would seem wise, however, to require the court to make complete and definite findings of fact, recording the entire transcript of previous questions and answers, so that judicial review may be an enlightened one.\footnote{54} The presumption on appeal is sometimes stated in favor of the trial court's decision,\footnote{55} sometimes of the contemptuous witness's privilege.\footnote{56}

In any case where the option of refusal has been invalidly allowed by the trial court, either party to the litigation should have a right to base an appeal on such error.\footnote{57} That the privilege of the witness is a personal one should not deprive a party of the power to seek redress on appeal if he has been wrongfully denied the right to cross examination, or the benefit of direct testimony in his behalf. If the unwarranted failure to speak resulted in a material omission, a new trial should be permitted.\footnote{58} On the other hand, the witness's failure to utilize the privilege cannot be complained of. The privilege is for his benefit alone, and if he choose not to assert it, neither party can object to his willingness to speak.\footnote{59}

It is obvious that the effect of allowing a witness to decline to answer questions is not necessarily to handicap the prosecution in a criminal trial. The case may be a civil action between two private litigants.\footnote{60} Even if it is a criminal proceeding, the testimony which the witness is permitted to withhold might, if compelled, have aided the defense, not the prosecution.\footnote{61} The privilege of the witness fearful of incrimination represents a mollification of the absolute duty to testify. Like the privilege which protects a client, a penitent, a patient and a spouse, it is a compromise between the right of the judicial process to search for truth and the right of the individual to be let alone. To say that it hampers the discovery of crime would seem naive; such

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\footnote{53. United States v. Flegenheimer, 82 F. (2d) 751 (C. C. A. 2d, 1936).}
\footnote{54. People v. Conzo, 301 Ill. App. 524, 23 N. E. (2d) 210 (1939).}
\footnote{55. Mason v. United States, 244 U. S. 362 (1917); Miller v. United States, 95 F. (2d) 492 (C. C. A. 9th, 1938); Russell v. United States, 12 F. (2d) 683, 692 (C. C. A. 6th, 1926); State v. Beery, 198 Minn. 550, 270 N. W. 600 (1936).}
\footnote{56. People v. Conzo, 301 Ill. App. 524, 23 N. E. (2d) 210 (1939); Ex parte Arvin, 112 S. W. (2d) 113 (Mo. 1937); cf. United States v. Zwillmann, 108 F. (2d) 802 (C. C. A. 2d, 1940).}
\footnote{57. Alder v. Commonwealth, 277 Ky. 136, 125 S. W. (2d) 986 (1939); Brady v. Brady, 71 S. W. (2d) 42, 46 (Mo. 1934); State v. Cox, 87 Ohio St. 313, 101 N. E. 135 (1913).}
\footnote{58. Commonwealth v. Tracey, 8 A. (2d) 622 (Pa. 1939).}
\footnote{59. Nor should either party be permitted to object even if the witness is wrongfully compelled to testify. Parker v. Board of Dental Exam., 216 Cal. 285, 14 P. (2d) 67 (1932); Orum v. State, 38 Ohio App. 171, 175 N. E. 876 (1930).}
\footnote{60. Pennsylvania Tank Line v. Jordan, 341 Ill. 94, 173 N. E. 181 (1930); Brady v. Brady, 71 S. W. (2d) 42, 46 (Mo. 1934).}
\footnote{61. Coile v. United States, 100 F. (2d) 806 (C. C. A. 5th, 1939); Alder v. Commonwealth, 277 Ky. 136, 125 S. W. (2d) 986 (1939); Commonwealth v. Tracey, 8 A. (2d) 622 (Pa. 1939).}
\end{footnotes}
a view attaches a disproportionate importance to the accidental admissions which might be forthcoming if the privilege did not exist. Indeed, the presence of the witness's privilege may benefit the prosecution in many cases. A witness secure in the knowledge that he need not answer incriminating questions will less frequently be hostile, recalcitrant or unavailable.

Yet it would seem equally obvious that a persistence of refusal to speak may work substantial injustice. The law attempts to strike no balance between the need for the testimony and the veniality of the crime of which the witness may be guilty. The hypothetical extreme is that of the sole eyewitness guilty of a trifling infraction. The right to property, liberty or life may depend on his answers, yet any which might tend to prove him liable to present prosecution, he is privileged to withhold. Nor does the law investigate the motive behind the assertion of privilege. There is no sanction against simulation. The sole purpose of refusal may be a desire to pervert the ends of justice, but if the answer would tend to prove guilt, bad faith cannot be a subject of inquiry. Despite the flexibility of the doctrine of In re Willie, the privilege of the witness on occasion presents an unwarranted obstacle to the legal process.

III.

It is in their encounter with the inquisitorial machinery of the state that these rules engender a tangled complex of difficulty. The preliminary investigation by a magistrate or commissioner is still followed in many states by grand jury indictment before trial. In the case of a specific charge against a particular person, such proceedings, whether by information or indictment, are apt to be summary, and largely in the control of the prosecuting officer. The accused is bound over for trial if the prima facie case against him indicates "probable cause."

As a matter of practice, the prospective defendant is not generally subpoenaed for questioning. Whether it would be unconstitutional to interrogate him is a problem which has troubled the courts unduly. It would seem clearly that the privilege is not thus violated. Even if the Supreme Court's gratuitous dictum that a grand jury proceeding is a "criminal case" be accepted, the disability of the prosecution to call the accused at trial is not properly imposed by constitutional sanction. The compulsion of reality

63. Though in almost half of them it has completely disappeared. See Dession, From Indictment to Information—Implications of the Shift (1932) 42 YALE L. J. 163.
64. United States v. Edgerton, 80 Fed. 374 (D. Mont. 1897); State v. Kemp, 9 A. (2d) 63 (Comm. 1939); State ex rel. Hemnings v. Coleman, 137 Fla. 80, 187 So. 793 (1939) (cases collected); State v. Gardner, 88 Minn. 130, 92 N. W. 529 (1902); People v. Gillette, 126 App. Div. 665, 111 N. Y. Supp. 133 (1st Dep't 1908).
65. See Counselman v. Hitchcock, 142 U. S. 547, 562 (1892). A witness can, of course, assert the privilege in a civil case. See note 60 supra.
66. See note 13 supra.
which imposes that disability is not present in preliminary proceedings of inquiry.\textsuperscript{67} Having been subpoenaed and sworn, the suspect could of course refuse to answer any question falling within the constitutional penumbra.\textsuperscript{68} If the machinery of preliminary investigatory procedure were made appropriate to the orderly questioning of the suspect, a patent defect in criminal procedure would be remedied. The accused would benefit by an opportunity to rebut or explain the prima facie case against him, and the scope of preliminary investigation would be more purposive. A criminal trial, resulting in expense to the state and disgrace to the defendant, might often be avoided.

That the privilege against self-incrimination invites a use of the third degree is the most vociferous and superficially persuasive argument against it.\textsuperscript{69} Assuming without inquiry that there is an inevitable connection between judicial procedure and police morale, it would seem that attack is more properly directed towards the failure to provide at any stage in criminal proceedings an opportunity for judicial examination of the suspect. Questioning of the man suspected is inevitable.\textsuperscript{70} It would seem more appropriate that such investigation be undertaken in the atmosphere of a court of law rather than in the back room of a precinct station. If such procedure were inaugurated, there would be considerably less pressure upon the judiciary to limit the rule against coercion of confession.\textsuperscript{71}

Since the present procedure does not provide for any orderly judicial investigation of the suspect, it is usually true that he is called to testify only under conditions of abuse.\textsuperscript{72} Summoned, often from jail, to appear and testify before an ex parte and sometimes secret inquisition, without benefit of counsel, uninformed of the charge against him, and ignorant of his option to refuse response, it is not surprising that his plight has induced some courts to call it unconstitutional to subpoena him at all.\textsuperscript{73} But even those jurisdictions which have accepted this emotionally attractive thesis have rarely allowed it to become subject to abuse. Thus if the defendant appear volun-

\begin{itemize}
\item \textsuperscript{67} See note 14 supra.
\item \textsuperscript{68} State v. Kemp, 9 A. (2d) 63 (Conn. 1939). He would have the privilege of an ordinary witness.
\item \textsuperscript{69} See Irvine, \textit{The Third Degree and the Privilege Against Self-Crimination} (1923) 13 CORN. L. Q. 211.
\item \textsuperscript{70} "In actual practice, from the time a man is arrested until arraignment he is quizzed with a view to inducing him to admit his offense or give some evidence that may help convict him." \textit{Train, FROM THE DISTRICT ATTORNEY'S OFFICE} (1939) 36.
\item \textsuperscript{71} This rule is not to be confused with the privilege against self incrimination. See note 17 supra.
\item \textsuperscript{73} See note 72 supra. \textit{Contra}: Williamson v. State, 77 P. (2d) 1193 (Okla. 1933).
\end{itemize}
tarily, he has waived the privilege. If the indictment is brought on distinct and unconnected evidence, there is no right to have it quashed: "An unconstitutional interrogation of an accused does not extend to him either a pardon or a perpetual grant of immunity concerning the crime involved." If he be indicted or presented for perjury before the grand jury, he cannot assert his innocence on the subtle theory that he was not under oath.

Thus limited, the doctrine would appear a useful, if theoretically unsupported technique to rectify iniquities in inquisitorial procedure. Departure from orthodoxy is sometimes justified. One abuse which even orthodox courts usually find means of prohibiting is utilization of the preliminary investigating process to gather evidentiary material for the purpose of independent litigation concurrently in progress elsewhere.

In investigations undertaken, not to connect a particular person with a particular offense, but for the more general purpose of discovering whether crime has been committed, and if so, by whom, those subsequently indicted have occasionally sought to escape trial by the claim that they were called as witnesses during the course of the investigation. Extension of the doctrine to this situation would seem unwise. It would greatly limit the scope of such general investigation, if any witness questioned during its course were immune from prosecution. On the other hand, abuse of such a proceeding is possible. John Doe is sometimes made the object of complaint when the real suspect is known. This use of a purportedly general investigation for the very purpose of evading the absolute prohibition against questioning the known suspect in those jurisdictions where such is the rule would seem to require the same judicial disfavor.

In the case of assertion of his privilege by a witness before such agencies, substantive questions of some difficulty are occasionally suggested. One such may arise if the witness claim privilege in response to questions which he has previously answered before the investigating body, though the questions themselves seem to suggest no possible incriminating response. The claim is based on fear of incrimination of perjury. If the previous answer were false, a true answer now would have such effect. A continued false answer might supply the elements of wilfulness or materiality lacking in the previous testimony. When the issue has arisen, the privilege has been denied. The danger of punishment for perjury before such a body is substantial, especially in a jurisdiction which habitually utilizes the contempt power as an alternative to the more uncertain process of a criminal trial for perjury. Yet denial of the option of refusal appears sound. The privilege would seem properly to refer only to factual matter denoted by the words, not to the act of uttering them. The distinction is a tenuous one, not clearly drawn by the courts which have had to decide the question.

Whether refusal to claim the privilege operates as a waiver in subsequent proceedings raises problems which have been considered. A more difficult issue is suggested by successful assertion of the privilege. If at trial the witness, now a defendant, denies his guilt in answer to questions to which he has previously claimed the privilege, proof of his previous claim has been admitted to impeach. The practice inflicts a severe penalty upon him who asserts a constitutional right, yet the doctrine of waiver would seem to make the practice permissible on cross examination.

Vexatious problems of procedure also arise when the witness asserts his privilege before the grand jury. The investigation is conducted in seclusion, yet it is the judge who must decide whether the answer sought is within the ambit of the privilege. Upon his initial refusal to answer, it is necessary, therefore, to bring the witness before the court for preliminary disposition. If it is decided that no possible answer will incriminate, he is returned to the grand jury room with instructions to answer the question. If his contumacy continues, he is presented for contempt.

83. See note 81 supra. An immunity statute does not extend to perjury. Glickstein v. United States, 222 U. S. 139 (1911).
84. See note 38 supra.
86. This procedure is uniformly indicated in the reported cases. See, e.g., Abrams v. United States, 64 F. (2d) 22 (C. C. A. 2d, 1933).
The procedure at the subsequent hearing is confounded by irreconcilable principles, not always perceived by the courts. The contempt is undoubtedly criminal, still not in open court. Therefore a hearing in the nature of a criminal trial must be had. The witness has a right to be informed of the charge against him and to the advice of counsel. He must be proved guilty beyond a reasonable doubt, and he cannot be required to criminate himself. Such a procedure would seem to require that in order to manipulate the formula of In re Willie the court must be scrupulously informed of every detail of testimony which the witness delivered prior to his assertion of privilege, and to the substance of all other relevant evidence which had been adduced. Yet the secrecy of grand jury proceedings is traditionally inviolable. The dilemma is thus complete. If secrecy is preserved, a proper hearing cannot be had, unless the witness accuse himself, which he cannot be required to do.

Most courts have solved the problem by ignoring it. But in the reported cases, it is generally grand jury secrecy which sub silentio has been sacrificed. This would seem a proper result. The grand juror's oath of silence has been called a conditional one. The proceedings in which he participates are subject to judicial scrutiny when the interests of justice require. An impelling reason for the traditional refusal to permit inspection of grand jury

94. There has been but slight discussion of the difficulties caused by this conflict of doctrine. See United States v. Zwillmann, 108 F. (2d) 802, 803 (C. C. A. 2d, 1940); Spector v. Allen, 281 N. Y. 251, 253, 22 N. E. (2d) 360, 363 (1939); O'Connell v. United States, 40 F. (2d) 201, 207 (C. C. A. 2d, 1930) (dissenting opinion).
minutes would appear to be judicial reluctance to implement the arsenal of technicalities by which indictments may be quashed. That consideration is absent in the case of a witness presented for contempt. If there are impelling reasons in an individual case why the grand jury's secrecy should not be violated, then the witness ought not to be committed for contempt.

Whatever its utility as an instrument of formal indictment, the grand jury has largely recaptured its vigor as a body of general inquiry. The restrictions above might at first appear substantially to reduce the effectiveness of its broad powers of investigation. In actuality, the problem has been largely met. The potential obstruction of the privilege to general investigation has been overcome by immunity statutes, withdrawal of the privilege from corporations and publicity.

Grant of legislative immunity is usually accorded to erase the privilege in cases inevitably the subject of general investigation. A witness offered immunity from prosecution cannot refuse to speak, so long as the immunity is "as broad as" the privilege surrendered in exchange. Thus since Counselman v. Hitchcock he must be assured that no clues uncovered by his testimony form the basis of a future prosecution for any matter to which he testifies. But immunity need not, and probably cannot, prevent prosecution by another sovereign. The phraseology of the statutes is uniform, and their interpretation fairly consistent. There is a tendency to liberality of construction when the witness is claiming his privilege; to stringency when he pleads

100. Where the grand jury has been entirely abolished, other agencies have been given its broad investigative functions. See Dession and Cohen, The Inquisitorial Functions of Grand Juries (1932) 41 YALE L. J. 687.
101. Misdeeds perfected without outcry, such as conspiracy and bribery, are typically subjects of general investigation. Immunity is almost invariably granted to witnesses testifying to this type of wrong. See 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2231 (immunity statutes collected). Crimes of violence and of more forthright dishonesty will normally come to light without investigatory proceedings.
103. See note 36 and accompanying text supra.
104. The phraseology approved in Brown v. Walker, 161 U. S. 591, 593 (1896) has become a model: "No person shall be excused from attending and testifying . . . But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence . . ." Modern statutes usually make this alteration: "concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence." See, e.g., NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935) § 11 (3), 29 U. S. C. 161 (3) (1939).
105. Ex parte Critchlow, 11 Cal. (2d) 751, 81 P. (2d) 966 (1938); Matter of Seymour v. Larkin, 254 App. Div. 215, 4 N. Y. S. (2d) 428 (4th Dep't 1938); cf. United
his immunity in bar. It would seem that there must be a claim of privilege before immunity be granted; without assertion, the privilege is waived. Immunity is given only in exchange for express surrender, even though it be mandatory. It is not intended as a gratuity. Cases deviating from this principle are few, and are based often on discrepancies in statutory phraseology.

It appears, however, that immunity must be granted by formal statutory enactment. Other attempts to compel response by withdrawing the danger of future prosecution have been held insufficient. Such inflexibility seems unwarranted. When objects of investigation unforeseen by the legislature arise, the inquisitor is powerless in the face of persistence in silence. The solution would seem to be a statutory grant to the investigator, and to the prosecutor at trial, of power to extend immunity to any witness asserting his privilege. To forestall potential abuse, permission of the court might well be required.

The second great lubricant to investigation is the complete withdrawal of the privilege from corporations. The theoretical basis for excluding them from protection is questionable; its practical necessity is apparent. Evidence of corporate wrongdoing is usually to be found only in corporate records. Their exclusion from the protection of the privilege is limited to the case of a subpoena requiring the corporation to produce its books. However, States v. Weinberg, 65 F. (2d) 394 (C. C. A. 2d, 1933); People v. Rockola, 346 Ill. 27, 178 N. E. 384 (1931).


111. See McKenna, J., dissenting in Wilson v. United States, 221 U. S. 361, 386 (1911).

112. Dreier v. United States, 221 U. S. 394 (1911); Wilson v. United States, 221 U. S. 361 (1911). Though of course a corporate officer when called upon to testify could not plead the corporation's privilege even if one existed, since the privilege is a personal one. McAlister v. Henkel, 201 U. S. 90 (1906); Hale v. Henkel, 201 U. S. 43 (1906).
the limitation seems narrower than it is. Through such books the individual guilt of many can be investigated. An issue is raised in the situation of a corporate officer required to testify only in identification of the corporation's records which have been subpoenaed. It would seem that a recent case holding his prosecution was barred by an immunity statute is erroneous. No matter how broad the statute, it should not apply. Immunity statutes can have no effect upon a corporation. If the privilege is absent, such a statute is irrelevant. Since the officer personally was required to testify to nothing criminating, the statute could not protect him. Immunity is purchased only by expressly foregoing the privilege. On the other hand, it would seem ridiculous to allow divestment of the privilege merely because the witness was called "as a corporate officer."

A final weapon in the hands of the investigator is public opinion. If those under investigation lay claim to even the slightest rectitude in the community, reluctance to assert the privilege will vary in direct ratio to the amount of public interest in the investigation. Claim of privilege reeks of the police court and the jail. By the same token it is usually possible to secure an express waiver of immunity, if such a statute would otherwise apply.

There have been recently more formal reflections of the low popular regard for the claim of privilege. In California, its assertion by a police officer was held a sufficient basis for his removal. In New York, a constitutional amendment has made waiver of immunity a condition of tenure of public office.

An appellate court of that state recently held that claim of privilege by a lawyer in a proceeding investigating unethical practices was an adequate ground for disbarment.

These tools are all at the disposal of administrative tribunals. Such agencies are therefore rarely troubled by the restraining influence of the privilege. They are invariably equipped with immunity statutes. Typically, they are concerned with regulating corporations. Unlike a grand jury, which must find a way of escaping its tradition of secrecy, they are adopted to take full

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113. The privilege is withdrawn even from records of a defunct corporation in possession of those under suspicion of guilt. Wheeler v. United States, 226 U. S. 478 (1913); cf. Grant v. United States, 227 U. S. 74 (1913).
117. This is the invariable practice in anti-trust prosecutions. Communication to YALE LAW JOURNAL from Dept of Justice, Anti-Trust Division, March 1, 1940.
advantage of the compulsion of publicity. Other escapes from the privilege belong peculiarly to administrative agencies. If information is collected without the aid of a subpoena, the privilege is usually held not to apply, even though punitive sanctions against withholding the information are compelling.\textsuperscript{123} If records or reports are required to be kept, or filed with the agency, there can on familiar analogies be no claim against the use of incriminating evidence which such records may subsequently reveal.\textsuperscript{124} Administrative penalties have been called civil,\textsuperscript{125} and the agency itself non-judicial,\textsuperscript{120} for the purpose of escaping the incidents of the privilege.

Use of every possible device to avoid entanglement of administrative agencies with any aspect of the privilege against self crimination would seem justified. Their purpose and form are not amenable to its injunctions. The ideal of an expert personnel, utilizing untried sanctions to the end not of punishment, but protection and regulation, is foreign to the atmosphere which begot the privilege.\textsuperscript{127} Paucity of litigation would indicate that escape from entanglement has been successful.

Around the privilege against self crimination has sounded a long and violent controversy.\textsuperscript{128} Its clamor has been out of all proportion to the controversy's significance. By its terms the privilege protects only the guilty. Yet to say for that reason that it should be eradicated is naive. The law does not recognize subjective innocence or guilt; both are matters of objective proof.\textsuperscript{129} On the other hand, those who would defend it need not conjure up the spectre of the innocent man convicted. That is an unreal dream.\textsuperscript{130} Where the privilege might have caused substantial harm, it has been avoided. Correction of the injustices that it continues sometimes to cause can be made by legislative adjustment. On the whole the privilege itself, in most of its many aspects, seems well worth preserving. It "is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient."\textsuperscript{131}

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\item 123. Sherwin v. United States, 268 U. S. 369 (1925); Cannan v. United States, 19 F. (2d) 823 (C. C. A. 5th, 1927) (the subsequent use of evidence in criminal trial is barred by rule against involuntary confessions); cf. People v. White, 124 Cal. App. 548, 12 P. (2d) 1078 (1932).
\item 125. See note 27 supra.
\item 127. See Lilienthal, \textit{The Power of Governmental Agencies to Compel Testimony} (1926) 39 Harv. L. Rev. 694.
\item 128. See note 1 supra.
\item 129. See People \textit{ex rel. Taylor v. Forbes}, 143 N. Y. 219, 38 N. E. 303 (1894). The court there assumed that the witness was innocent, but permitted him to refuse testimony which might build a circumstantial case against him.
\item 131. See Twining v. New Jersey, 211 U. S. 78, 113 (1908).
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