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## THE PRIVILEGE AGAINST SELF-INCRIMINATION IN NEBRASKA

David Dow\*  
and  
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In the spring of 1964 the United States Supreme Court decided a group of cases which raise serious questions concerning the application of the privilege against self-incrimination in the states.<sup>1</sup> It is the purpose of this article to suggest the changes which were thereby made in the application of the Privilege<sup>2</sup> in Nebraska, and to consider some of the problems that remain for solution. It is not the intention of the authors to deal with these matters in great depth, but rather to provide a quick summary. After all, the literature dealing with the Privilege is so extensive that it should be largely unnecessary to do more than refer to the cases that control and the authorities that do discuss the various issues.

In the first place it is clear that the Privilege is recognized in every American jurisdiction.<sup>3</sup> Until 1964 it was also clear that the application of the Privilege was almost unanimously agreed to be a matter of state concern—that is, each state was free to develop its own rules governing the extent and application of its own Privilege. In other words, the fifth amendment provision of the United States Constitution<sup>4</sup> had never been applied to control state action. It is true some commentators argued that the decisions had never held the fifth amendment was *not* applicable to state procedures (except in very special situations) and many foretold the recent decision in *Malloy v. Hogan*.<sup>5</sup> In that case the Supreme Court specifically held that the fifth amendment

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<sup>1</sup> *Griffin v. California*, 85 Sup. Ct. 1229 (1965); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>2</sup> Hereafter the word "Privilege" will be used to refer to the phrase "privilege against self-incrimination."

<sup>3</sup> 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961).

<sup>4</sup> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

<sup>5</sup> 378 U.S. 1 (1964).

Privilege is applicable to the states through the due process clause of the fourteenth amendment:

We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.<sup>6</sup>

It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.<sup>7</sup>

In order to assess the effect of this holding, it should be a simple matter to compare previous Nebraska holdings with United States Supreme Court holdings and conclude that the one most favorable to the individual person in each situation is now the law of Nebraska. However, it is not quite as simple as it looks, because there is relatively little law in Nebraska and because not all of the federal law is clearly spelled out in Supreme Court opinions. We shall therefore take up the various problems that have arisen, indicating previous Nebraska law (if any), what change is required by the *Malloy* holding, and also what doubts remain. In doing this we will assume that only holdings of the United States Supreme Court are specifically binding on state supreme courts. Holdings of federal district courts or courts of appeal may be persuasive authority, but no more.<sup>8</sup>

## I. WHO MAY CLAIM THE PRIVILEGE?

A. There never seems to have been any question that the Privilege prevented the government from calling the criminal defendant as a witness on its case-in-chief.<sup>9</sup>

B. An individual person *other* than a criminal defendant may be called as a witness by the government, or by any party

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<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Johnson v. Radio Station WOW, Inc.*, 146 Neb. 429, 19 N.W.2d 853 (1945); *First Trust Co. v. Smith*, 134 Neb. 84, 277 N.W. 762 (1938); *Franklin v. Kelly*, 2 Neb. 79 (1873).

In some areas, however, the Nebraska court has indicated that it may consider the decisions of lower federal courts as binding. *Sullivan v. Chicago & N.W. Ry.*, 128 Neb. 92, 258 N.W. 38 (1934) (F.E.L.A.); *Robidoux v. Chicago & N.W. Ry.*, 113 Neb. 682, 204 N.W. 870 (1925) (I.C.C. Act); *Preble v. Union Stock Yards Co.*, 110 Neb. 383, 193 N.W. 910 (1923) (F.E.L.A.); *Wharton v. Jackson*, 107 Neb. 288, 185 N.W. 428 (1921) (Bankruptcy Act).

<sup>9</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2268, at 406.

in a criminal or civil suit. He may then claim his Privilege (assuming it is applicable) when asked any question.<sup>10</sup> Under Nebraska law such witness is required to claim this Privilege at that time or it is waived.<sup>11</sup> The same is true by Supreme Court decision.<sup>12</sup> The extent of such waiver is not so clear and is treated *infra*.<sup>13</sup>

The clear indication of Nebraska opinions is that the Privilege thus claimed by a witness who is not a criminal defendant is not considered to be based on the state constitution<sup>14</sup> but rather on its statute.<sup>15</sup> This is not an unusual holding, since it was not until the latter half of the nineteenth century that courts began to think of the mere witness's privilege as being constitutionally based rather than as being simply a part of the common law. The United States Supreme Court first held the witness's privilege to be within the fifth amendment in *Counselman v. Hitchcock*<sup>16</sup> and has since followed that holding in a number of cases.

Thus the Nebraska law is not changed in this area by application of federal standards, but under *Malloy* Nebraska could not change the rule in the future either by statute or judicial decision.

C. A corporation has no Privilege, either under Nebraska law or federal law.<sup>17</sup>

D. An association such as a labor union has no Privilege under federal law. Since the Privilege is a personal right, it cannot belong to an impersonal entity.<sup>18</sup> The United States Supreme

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<sup>10</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2268, at 402-03.

<sup>11</sup> *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937).

<sup>12</sup> *Rogers v. United States*, 340 U.S. 367 (1951). See cases cited in 8 WIGMORE, *op. cit. supra* note 3, § 2276.

<sup>13</sup> See text accompanying notes 92-109 *infra*.

<sup>14</sup> NEB. CONST. art. I, § 12. "No person shall be compelled, in any criminal case, to give evidence against himself . . . ." *State ex rel. Beck v. Lush*, 168 Neb. 367, 95 N.W.2d 695 (1959); *State ex rel. Wright v. Barlow*, 132 Neb. 166, 272 N.W. 282 (1937).

<sup>15</sup> NEB. REV. STAT. § 25-1210 (Reissue 1964) provides: "When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in section 25-1214." Section 25-1214 permits impeachment of a witness by showing past conviction for a felony.

<sup>16</sup> 142 U.S. 547 (1892). For later cases see 8 WIGMORE, *op. cit. supra* note 3, § 2252.

<sup>17</sup> *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>18</sup> *United States v. White*, 322 U.S. 694, 698-99 (1944). "Respondent contends that an officer of an unincorporated labor union possesses a

Court has not yet spoken on the question of whether a partnership is personal or impersonal in this context. It would be reasonable to assume that this might be decided differently as to different types of partnerships, as indeed it has in lower federal courts.<sup>19</sup> There is no prior Nebraska law.

E. However, under federal law an officer of a corporation or an impersonal association can claim his own Privilege with respect to the contents or whereabouts of corporate books and records not in his possession which might incriminate him.<sup>20</sup> There is no prior Nebraska law.

F. Under federal law one individual cannot claim the Privilege belonging to another,<sup>21</sup> except that an attorney may do so for his absent client with respect to books and records belonging to that client if the Privilege would have been applicable if asserted by the client himself.<sup>22</sup> There is no prior Nebraska law.

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constitutional right to refuse to produce, in compliance with a subpoena duces tecum, records of the union which are in his custody and which might tend to incriminate him . . . . We hold, however, that neither the Fourth nor the Fifth Amendment, both of which are directed primarily to the protection of individual and personal rights, requires the recognition of a privilege against self-incrimination under the circumstances of this case.

"The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals . . . .

"Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization . . . ."

<sup>19</sup> *United States v. Silverstein*, 314 F.2d 789 (2d Cir. 1963); *United States v. Silverstein*, 237 F. Supp. 446 (S.D.N.Y. 1965); *United States v. Liven Service Council of New Jersey*, 141 F. Supp. 511 (D.N.J. 1956).

<sup>20</sup> *Curcio v. United States*, 354 U.S. 118 (1957). "[H]e cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." *Id.* at 124.

"The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Id.* at 128.

<sup>21</sup> *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>22</sup> *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). *Reisman v. Caplin*, 375 U.S. 440 (1964), implies the same result although it may also be taken to require that the client should be a party or an intervenor.

## II. IN WHAT KINDS OF PROCEEDINGS MAY THE PRIVILEGE BE CLAIMED?

A. Under both Nebraska and federal law the Privilege may be claimed in any judicial proceeding.<sup>23</sup>

B. Under federal law the Privilege may be claimed in a legislative investigation, that is in an investigation by a committee of the legislature.<sup>24</sup> There is no prior Nebraska law.

C. Under federal law the Privilege may be claimed in an administrative investigation or proceeding.<sup>25</sup> There is no prior Nebraska law.

D. Historically it has not been applied, either under Nebraska or federal law, to police investigations.<sup>26</sup>

With respect to C and D, certain additional observations are pertinent:

1. On their face these statements of the law seem inconsistent: Is not a police investigation simply one kind of administrative investigation? Certainly the answer is yes; but the investigative methods are apt to be quite different; the sanctions are therefore different; and so different constitutional, or other protections of individual rights, come into play.

2. When one says that the Privilege does apply in an administrative investigation, what this means is that the witness may decline to answer a question at an administrative hearing, and if the Privilege is applicable, in the sense that the answer tends to incriminate and is not waived, the court will not require an answer when the usual proceeding to require an answer is brought before it.

3. If resort to judicial sanctions were the usual practice in police investigations when the Privilege was asserted, its application would be the same—and so it is when the witness is brought before a grand jury.<sup>27</sup> But the police practice is more often otherwise since a "witness" in a police investigation may be forced

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<sup>23</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2252, at 327.

<sup>24</sup> *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955). See 8 WIGMORE, *op. cit. supra* note 3, § 2252, at 328.

<sup>25</sup> *ICC v. Brimson*, 154 U.S. 447, 478-80 (1893); See 8 WIGMORE, *op. cit. supra* note 3, § 2252, at 328.

<sup>26</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2252, at 328-29.

<sup>27</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

to make incriminating statements through means other than court-contempt sanctions. In this context the admissibility of such statements at a later trial has been customarily dealt with under the rules applied to exclude coerced confessions, and the cases delineating those rules do not talk about the Privilege.

4. When the police investigative process was last considered by the Supreme Court of the United States in *Escobedo v. Illinois*<sup>28</sup> it was again not treated primarily in the terms of the Privilege but rather in the terms of the sixth amendment right to counsel. And yet underlying the right to counsel is the expected advice from counsel that the witness-suspect has a right not to speak—that is, he has the Privilege and cannot be forced to incriminate himself. Presumably, therefore, this right not to incriminate himself is also applicable to any person being interrogated but who has not acquired the right to counsel since he has not become an accused in the police mind. The manner in which this right will be enforced is of course one of the great problems confronting police and prosecutors today. If he answers voluntarily, those answers and the fruits thereof can be used against him. But if he chooses to remain silent it is certainly conceivable that, contrary to the present rule,<sup>29</sup> his silence cannot be used against him.<sup>30</sup>

The Privilege was specifically referred to in *Escobedo*: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his Privilege against self-incrimination."<sup>31</sup> Even the dissenting opinion of Mr. Justice White makes the assumption that the United States Constitution forbids police inquisitions which compel incrimination.<sup>32</sup> And a similar approach is fairly evident in *Malloy v. Hogan* where *Mapp v. Ohio*<sup>33</sup> is cited for the proposition that the fifth amendment Privilege against self-incrimination implemented the fourth amendment (as was held in *Boyd v. United States*<sup>34</sup>) and that it secures "the right of a person to remain silent unless

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<sup>28</sup> 378 U.S. 478 (1964).

<sup>29</sup> *State v. Worley*, 178 Neb. 232, 134 N.W.2d 764 (1965). See *Pierce v. State*, 173 Neb. 319, 113 N.W.2d 333 (1962).

<sup>30</sup> *Ivey v. United States*, 344 F.2d 770 (1965).

<sup>31</sup> *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964). *Crooker v. California*, 357 U.S. 433 (1958) was distinguished because there the individual had been advised by the police of his "constitutional right to remain silent." *Id.* at 491.

<sup>32</sup> *Id.* at 498.

<sup>33</sup> 367 U.S. 643 (1961).

<sup>34</sup> 116 U.S. 616 (1886).

he chooses to speak in the unfettered exercise of his own will."<sup>35</sup>

It thus appears reasonably clear that the United States Supreme Court now considers the Privilege to be applicable in police investigations. It is not, however, quite so clear what effect this will have on the future course of the law. Even before these cases the idea that coerced confessions were to be excluded solely because they were untrustworthy was thoroughly repudiated for both federal and state trials under due process theories.<sup>36</sup> Probably a strict application of the usual Privilege and waiver of Privilege rules would not go as far in keeping confessions out of the trial as the due process and right to counsel rules do now.

At the same time this development can also be viewed as a part of the continuing process of looking at the individual, in his antagonistic relationship to his government, as having a bundle of interrelated and complementary rights to be free from unfair treatment, rather than as having a group of separate rights. The future approach to these problems will be a unifying one, and this may have quite definite effects at both the federal and state levels on the progress of defining waiver (a Privilege concept) and consent (a search and seizure concept), on the effect of the use of trickery in the police investigative process, on the effect of some of the more subtle (or less subtle) devices in administrative investigations, on the full reach of *McNabb v. United States*,<sup>37</sup> or on the rules concerning wiretapping and eavesdropping.<sup>38</sup> It can also be expected to spell the end of the distinction, found in many states, between confessions and admissions.<sup>39</sup> This can hardly stand up under the principles set out in *Malloy* and *Escobedo*.

### III. WHAT DISCLOSURES ARE COVERED?

#### A. ORDINARY TESTIMONY

It is likely that at this point the Nebraska and federal law may be thought farthest apart, and that here *Malloy* may have its

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<sup>35</sup> 378 U.S. 1, 8 (1964).

<sup>36</sup> See the discussion in *Malloy*, *Id.* at 6-9.

<sup>37</sup> 318 U.S. 332 (1943).

<sup>38</sup> This was already demonstrated in *Massiah v. United States*, 377 U.S. 201 (1964), and the strength of *On Lee v. United States*, 343 U.S. 747 (1952), must surely be waning. See also *One 1958 Plymouth Sedan v. Pennsylvania*, 85 Sup. Ct. 1246 (1965).

<sup>39</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2266. The right of confrontation has now also been added to that bundle of individual rights protected by the fourteenth amendment. *Pointer v. Texas*, 85 Sup. Ct. 1065 (1965).



most significant impact. We are using the word "law" (as applied in Nebraska) in the somewhat loose sense of "accepted usage" of the bar and bench since we have been unable to find any Nebraska case that clearly pinpoints the kind of statement that will be held to fall within the Nebraska Constitution or statute.

The federal law has undergone a significant change during the past fifteen years. Prior to 1951 the leading Supreme Court decision was *Mason v. United States*<sup>40</sup> in which it was held that the fear of incrimination as a result of the disclosure not only had to be reasonable, but also had to be made to appear so to the judge. The decision was a judicial one.

In 1951, however, the Supreme Court handed down the now controlling decision in *Hoffman v. United States*.<sup>41</sup> Although lip service is paid to the idea that the decision of what incriminates must be made by the judge rather than by the witness, the standard to be applied is more stringent. Before rejecting the claim of Privilege the judge must be satisfied that in the total complex of circumstances there is no possibility of incrimination.<sup>42</sup> And later decisions have made it clear that a very slight possibility will suffice to support the claim of Privilege.<sup>43</sup>

Similarly the concept of what is meant by "incriminate" has been enlarged. It is not limited to a disclosure of an essential element of a crime, but clearly has been applied to any fact which might furnish a clue to other evidence leading inferentially to proof of a criminal act or a part of a criminal act.<sup>44</sup> Nor is it limited to the possibility of conviction—apparently any possibility of prosecution, whether such would seem successful at the moment or not, is included.<sup>45</sup>

In certain situations the fear will not be upheld. If the individual claiming the Privilege has been convicted or acquitted of the crime or has been pardoned, or if the statute of limitations has run, there can be no further incrimination.<sup>46</sup> Also, an effective grant of immunity from prosecution will suffice to do away

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<sup>40</sup> 244 U.S. 362 (1917).

<sup>41</sup> 341 U.S. 479 (1951).

<sup>42</sup> *Id.* at 488; *Counselman v. Hitchcock*, 142 U.S. 547, 580 (1892).

<sup>43</sup> See 8 WIGMORE, *op. cit. supra* note 3, § 2260 n.9.

<sup>44</sup> *Hoffman v. United States*, 341 U.S. 479, 488 (1951); 8 WIGMORE, *op. cit. supra* note 3, § 2260.

<sup>45</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2260.

<sup>46</sup> *Brown v. Walker*, 161 U.S. 591 (1896).

with the Privilege. This matter is discussed at more length below.<sup>47</sup> And of course it is always possible to argue that the Nebraska statute<sup>48</sup> extends the Privilege farther than the fifth amendment, since the witness is protected from disclosing anything that will expose him to public ignominy—a phrase that has never been construed by the Nebraska court. It is true that several justices of the United States Supreme Court have expressed themselves in favor of extending the fifth amendment Privilege in a similar way to include social and economic as well as penal consequences;<sup>49</sup> but this does not at the moment appear likely to be accepted by a majority of the court.

## B. PHYSICAL CHARACTERISTICS

### 1. *Passive Disclosures*

There is little dispute that any person, whether the defendant or a mere witness, may be forced to disclose his obvious physical characteristics for identification, in order to suggest his capabilities or his age, or for any other relevant reason. He may even be required to demonstrate that certain clothes fit him.<sup>50</sup>

The courts have also found no problem in requiring an accused to surrender his clothing for examination (usually shoes, to see if they fit tracks) and subsequently admitting this evidence at his trial.<sup>51</sup> And fingerprinting or photographing have always been held outside of the Privilege.<sup>52</sup>

### 2. *Active Disclosures*

The rationale of the decisions referred to in (1), when not based on waiver, is generally based on the idea that the Privilege protects only against testimonial disclosures; that is, a communication of a person's knowledge. Hence there is some judicial hesitancy to deny the application of the Privilege when the disclosure of physical characteristics or capabilities does involve ac-

<sup>47</sup> See text accompanying notes 110-130 *infra*.

<sup>48</sup> NEB. REV. STAT. § 25-1210 (Reissue 1964).

<sup>49</sup> See Mr. Justice Douglas' opinion in which Mr. Justice Black concurred in *Ullmann v. United States*, 350 U.S. 422, 440 (1956) (dissenting opinion); Mr. Justice Field's opinion in *Brown v. Walker*, 161 U.S. 591, 628 (1896) (dissenting opinion).

<sup>50</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 394.

<sup>51</sup> *Krens v. State*, 75 Neb. 294, 106 N.W. 27 (1905). See generally 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 394.

<sup>52</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 387.

tion on the part of an accused—as where he is required to walk or talk or write,<sup>53</sup> and even though the specific words used are not assertive of guilty facts. Unfortunately neither the United States Supreme Court nor the Nebraska Supreme Court has spoken authoritatively on this question.

### 3. *Extraction of body fluids*

If the theory that the Privilege applies only to testimonial communications is to be logically applied, the Privilege should not bar the extraction, and use at trial, of body fluids, and this has certainly been the rule held by a large majority of the state courts, including Nebraska.<sup>54</sup>

Again we must note that the United States Supreme Court has not spoken on the precise issue.<sup>55</sup> Although prior to *Malloy* the federal Privilege had not been held applicable to the states, still the Court had held that some forcible extraction of body fluids by state officers violated due process.<sup>56</sup> It refused, however, in *Breithaupt v. Abram*<sup>57</sup> to include in this category the taking of blood from an unconscious person. If the extraction involved a violation of fourth amendment concepts, as would be the case of an extraction in connection with an illegal arrest, it would of course be inadmissible under *Mapp*.<sup>58</sup> It may also be seriously questioned whether the extraction of body fluids does not come within the scope of *Escobedo*,<sup>59</sup> requiring the exclusion of evidence thus obtained unless the suspect-defendant had been given the right to consult counsel.

When state courts have been presented with this issue, it has usually been in the context of a "drunk driving" statute. These statutes are upheld either on the theory that the state can require an individual using its highways to consent to a body fluid test, or on the theory that the extraction of body fluids is not the forcing of a communication and so is not protected under the Privilege.<sup>60</sup> In *Prucha v. Department of Motor Vehicles*<sup>61</sup> the

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<sup>53</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 395-99.

<sup>54</sup> *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961); 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 391.

<sup>55</sup> But see *Holt v. United States*, 218 U.S. 245 (1910) discussed in text accompanying note 64 *infra*.

<sup>56</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>57</sup> 352 U.S. 432 (1957).

<sup>58</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>59</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>60</sup> Annot., 46 A.L.R.2d 1000, 1013 (1956).

<sup>61</sup> 172 Neb. 415, 110 N.W.2d 75 (1961).

Nebraska court used both theories.

Each of these theories can be supported indirectly by United States Supreme Court holdings. The consent theory is certainly a part of the reasoning underlying the required records doctrine.<sup>62</sup> It should be noted, however, that this argument is not the same as that of voluntary consent. If the driver suspected of having been drinking voluntarily consents to the extraction of his body fluids, it would seem clear—*Escobedo* issues to one side—that the Privilege is waived, just as fourth amendment protections may be waived by voluntary consent to a police search.<sup>63</sup> But *Escobedo* cannot, of course, be thus easily forgotten, and the voluntariness of the consent may clearly be negated by the fact that the “consent” in a particular case was forced under the threat of losing one’s license to drive.

The limitation of the Privilege to testimonial communications was stated by Justice Holmes in *Holt v. United States*,<sup>64</sup> a case in which it was held not a violation of the Privilege to require defendant, before trial, to put on a blouse and have a witness testify at trial that it fitted. However, the strength of this case as a precedent is substantially blunted by the fact that Justice Holmes also suggested that such evidence was admissible even though it was secured in violation of a constitutional right.<sup>65</sup> The court in *Weeks v. United States*<sup>66</sup> (decided after *Holt*) held that the trial use of evidence illegally obtained did violate the Privilege, and its trial use was barred if defendant properly moved to suppress it before trial. On the other hand, the federal courts of appeal have regularly cited *Holt* to sustain, against the claim of the Privilege, the securing of evidence involving the body of the defendant.<sup>67</sup> But

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<sup>62</sup> Discussed at note 139 *infra*.

<sup>63</sup> See, e.g., *United States v. Como*, 340 F.2d 891 (2d Cir. 1965).

<sup>64</sup> 218 U.S. 245 (1910).

<sup>65</sup> *Id.* at 253: “Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams v. N.Y.*, 192 U.S. 585.”

<sup>66</sup> 232 U.S. 383 (1914).

<sup>67</sup> *Roberson v. United States*, 282 F.2d 648 (6th Cir. 1960) (defendant forced to stand in court for identification); *Bryant v. United States*, 244 F.2d 411 (5th Cir. 1957) (specimens of handwriting—doubted to violate fifth amendment under *Holt*, but held proper because voluntarily given); *United States v. Moses*, 234 F.2d 124 (7th Cir. 1956) (heroin taken from defendant’s car); *United States v. Iacullo*, 226 F.2d 788 (7th Cir. 1955) (fingerprints); *Taylor v. United States*, 222 F.2d

in view of the present approach of the court, interweaving all of the constitutional protections, it cannot be said that the use of force (actual or constructive) to secure something other than mere identifying evidence will not be held to violate a suspect's constitutional rights.

One other facet of this problem is also worth noting. It is not impossible to conceive that a distinction may be drawn between using body fluid evidence in a criminal case for drunken driving or motor vehicle homicide and a proceeding to revoke a driver's license for failure to submit to the test. The latter can be viewed as not involving a criminal penalty, and therefore the Privilege is not violated. It is true that the Privilege applies in any proceeding, whether criminal or not, but only if a criminal penalty may be applied. Since, however, at the time the test is sought a criminal penalty is a not unlikely possibility, the driver would be within his rights in claiming the Privilege—assuming it will be held to apply. If the state thereafter revokes his driver's license, this action would seem to involve a penalty for properly claiming his constitutional rights, and the Court has regularly refused to permit this in recent years.<sup>68</sup>

#### 4. *Psychiatric Tests*

Obviously the problem of psychiatric tests differs from the other kinds of disclosures considered above in that it will invariably involve conscious communication and would therefore be classified within the general kind of disclosures covered by the Privilege. There appears to be no United States Supreme Court case specifically covering the problem. In Nebraska, the court stated in *Wehenkel v. State*<sup>69</sup> that a psychiatrist could testify as

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398 (D.C. Cir. 1955) (on issue of sanity jury can observe defendant, dictum); *Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950) (defendant's hair dyed for identification); *Swingle v. United States*, 151 F.2d 512 (10th Cir. 1945) (defendant can be forced to give his name); *McFarland v. United States*, 150 F.2d 593 (D.C. Cir. 1945) (blood found on defendant's person).

Two federal cases do deny application of the Privilege to things extracted from a person's body. *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957) (medically supervised extraction of narcotics from defendant's anus where he had secreted it was held not to violate the fourth amendment, nor due process; and the Privilege was held not applicable under *Holt*); *United States v. Nesmith*, 121 F. Supp. 758 (D.D.C. 1954) (urine test for alcohol did not violate Privilege under *Holt*).

<sup>68</sup> *Griffin v. California*, 35 Sup. Ct. 1229, 1232-33 (1965).

<sup>69</sup> 116 Neb. 493, 218 N.W. 137 (1928).

to the sanity of the accused, based upon an examination requested by the county attorney, on the theory that the accused had not objected. It should be remembered, however, that such an examination made without the advice of counsel would now undoubtedly violate the principle of *Escobedo*<sup>70</sup> and *Massiah*.<sup>71</sup> Where indigent and non-indigent defendants are treated differently it would also violate due process and equal protection.<sup>72</sup>

The following comments seem pertinent:

a. From time to time courts and writers have advanced various justifications for the rule that a psychiatric examination of a criminal defendant will not violate his Privilege. None is completely satisfactory. Obviously a defendant who freely and voluntarily submits himself to such an examination after having consulted with counsel may be held to have waived his Privilege.

But the question seldom has arisen in that kind of clear cut case. If there were no consultation with counsel it would undoubtedly violate *Escobedo*<sup>73</sup> and any form of compulsion would probably also violate *Malloy*,<sup>74</sup> unless a psychiatric examination is to be treated differently from other forms of verbal communications.

b. The usual reason given for such a differentiation is some form of waiver. If a defendant wishes to raise the defense of insanity he must consent to be examined by a psychiatrist on behalf of the state. Whether such a condition would today be called a "compulsion" is debatable. Of course, it is difficult to imagine how else the state could get intelligent psychiatric diagnosis; and yet in no other kind of defense is it suggested that the defendant must agree to speak for himself.

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<sup>70</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964). It must, of course, be noted that the precise meaning of *Escobedo* still remains to be settled. Nebraska, in line with the majority of state decisions, has required that the accused request counsel at the investigatory stage. *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965); *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965). But once an information is filed, more is required—the accused must be told of his right to counsel and that one will be supplied him if he cannot pay for one himself. *Massiah v. United States*, 377 U.S. 201 (1964); *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

<sup>71</sup> *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>72</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956). See 15 STAN. L. REV. 538 (1963); 1964 WIS. L. REV. 671.

<sup>73</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>74</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

If the defendant himself testifies to facts from which an inference of insanity at the time of the act is possible, he would be subject to cross-examination, his privilege would be waived, and it would be within waiver principles to require him to submit to a psychiatric examination on behalf of the state. If he seeks to do substantially the same thing by asking his own psychiatrist to report as a witness what defendant told him, it would not be unreasonable to call this also a waiver. One does, however, encounter timing problems since this would involve taking a continuance to conduct the state's psychiatric examination.<sup>75</sup>

In the majority of states the defendant has some burden to come forward with evidence to show his insanity. It is perhaps arguable that if, to support this burden, he uses an expert of his own who only reports his opinion and not what defendant told him, the state will have the right to cross-examine that expert;

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<sup>75</sup> In *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), the Supreme Court of New Jersey held that with possible limitations a psychiatric examination of a criminal defendant, ordered by the trial court after defendant had disclosed his intention to rely on the defense of insanity and incompetence to stand trial, does not violate the Privilege. The court established a series of safeguards for all such examinations in New Jersey designed to limit the nature and extent of the examination to such as may be determined by the psychiatrist to be necessary for proper diagnosis. The defendant is given the right to have his own experts but not his lawyer present at the examination by the state appointed psychiatrist. The state psychiatrist, when testifying at trial, can report fully what the defendant told him including the circumstances surrounding the alleged criminal act, although the jury will be instructed twice that they can consider such testimony on the issue of sanity only and not on the issue of guilt. The Privilege is found not applicable because it would be "anomalous," and would "balance the competing interests unfairly and disproportionately against the public." The court perhaps also rested on some theory of waiver. The waiver theory is most obviously applicable if it is assumed, as the court does, that the defense psychiatrist could report what defendant told him in support of his opinion. This permits the defendant to get his own story before the jury, and long standing principles of waiver should permit the state to attack that story with its own experts and report it to the jury if it chooses to do so, just as it could do by cross-examination if the defendant himself took the stand. The court is obviously limited in the sanctions available to force defendant to cooperate with the state psychiatrist. If he is uncooperative the court provides that the testimony of the defense expert will be limited—at the least he will not be permitted to report what the defendant told him. Whether there are to be further limitations is ambiguous: "If a defendant is capable mentally of cooperating to the extent deemed necessary by the doctors, and he fails or refuses to do so, on motion of the State the defense psychiatric testimony shall be limited to the same extent." *Id.* at —, 210 A.2d at 775.

the state cannot do so without its own psychiatric examination; failing that, the defendant's expert's examination-in-chief will be stricken. But this is still a condition.

c. Professor Weihofen has taken the view that a psychiatric examination is no different from any other kind of physical examination—it is not within the Privilege because it is not testimonial.<sup>76</sup> A psychiatrist's consideration of what the defendant tells him is no different from any observation of objective physical characteristics of a patient. He is not interested in the truth of the utterances but only in the totality of what they reveal about the patient's mental normality or abnormality. So long, therefore, as the psychiatrist only uses what the patient told him as the basis for his medical opinion as to sanity (whatever legal sense is applied) and does not repeat on the witness stand what the defendant told him, he is not using the defendant's utterances testimonially and so has not violated his Privilege. The difficulty, however, with this analysis is that recent court decisions consider the Privilege as representing an absolute right to remain silent.<sup>77</sup>

d. Professor Inbau's position is perhaps similar, but he would not go quite as far as Professor Weihofen.<sup>78</sup> He would limit the psychiatrist's examination to matters not directly connected with the alleged criminal act. If that were the limit of the examination, the Privilege is not violated because the utterances were not connected with the act about which criminality is charged. Otherwise the Privilege would be violated. This theory unfortunately runs contrary to the United States Supreme Court holding in *Hoffman*<sup>79</sup> that any compelled disclosure of information which might be a clue to some incriminating factor is within the Privilege. The significant incriminating factor is of course the mental condition of the defendant at the time he did the act in question.

e. The Wigmore-McNaughton position is simply that the Privilege does not apply because it is not testimonial—there is no real discussion of the problem.<sup>80</sup>

f. The Model Penal Code takes a position much like that of Weihofen.<sup>81</sup> It assumes that the report of the court-appointed

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<sup>76</sup> WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE*, 293-96 (1954).

<sup>77</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964). See also text accompanying note 26 *supra*.

<sup>78</sup> INBAU, *SELF-INCRIMINATION* 52-61 (1950).

<sup>79</sup> *Hoffman v. United States*, 341 U.S. 479 (1951).

<sup>80</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2265, at 399.

<sup>81</sup> WEIHOFEN, *op. cit. supra* note 76, at 293-96.



psychiatrist would not violate the Privilege so long as he does not repeat at the trial anything told him by the defendant which would constitute an admission of guilt of the crime charged. And it limits the report of any other statement made by the defendant to the issue of mental condition.<sup>82</sup>

Again, the fact remains that the issue of mental competency is an integral part of the concept of criminality, and the code so states.<sup>83</sup> However, the code also assumes that the defendant, although committed for examination and diagnosis, may refuse to cooperate.<sup>84</sup> There is no apparent sanction against such refusal, except that it may be so reported at the trial.<sup>85</sup> That itself might violate the rule against comment on the failure to take the stand, or the claim of Privilege.<sup>86</sup> If the defendant did cooperate with the psychiatrist, the principle of waiver could be applied if there had been no compulsion and if there had been adequate advice of counsel.<sup>87</sup>

g. For the same reasons suggested above, the mere use of a separate trial on the issue of mental competency would not avoid the application of the Privilege,<sup>88</sup> if it is applicable at all.

h. The problem has also arisen in a number of cases involving commitment for mental illness or for sexual psychopathy. Here the almost unanimous holding is that the Privilege has no application because the commitment is not penal.<sup>89</sup> If the facts disclosed in no way relate to any crime, or at least to any crime for which the individual might later be prosecuted, then such a holding is obviously correct. Were this a matter of first impression,

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<sup>82</sup> MODEL PENAL CODE § 4.09 (Proposed Off. Draft, 1962). See also 18 U.S.C. § 4244 (1958), which provides for psychiatric diagnosis by court appointed psychiatrist on issue of insanity at time of trial. It is also specifically provided that anything said by defendant to a psychiatrist is inadmissible on issue of guilt.

<sup>83</sup> MODEL PENAL CODE § 4.01 (Proposed Off. Draft, 1962).

<sup>84</sup> MODEL PENAL CODE § 4.05(3) (Proposed Off. Draft, 1962).

<sup>85</sup> MODEL PENAL CODE § 4.07(4) (Proposed Off. Draft, 1962): A psychiatrist "shall be permitted to make a statement as to the nature of his examination . . . ."

<sup>86</sup> See text accompanying note 142 *infra*.

<sup>87</sup> Query: What advice of counsel can be adequate if the person deprived is mentally incompetent?

<sup>88</sup> See 15 STAN. L. REV. 538 (1963) for a discussion of the use of this device in some states.

<sup>89</sup> *Kemmerer v. Benson*, 165 F.2d 702 (6th Cir. 1948); *State v. Madary*, 178 Neb. 383, 133 N.W.2d 583 (1965); Annot., 24 A.L.R.2d 350 (1952). See also *State ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

one might argue that involuntary incarceration in a mental institution is penal in nature; but this seems clearly foreclosed by judicial decisions.<sup>90</sup> On the other hand, if there is a forced disclosure of some criminal acts for which the individual might be prosecuted the mere fact that it was sought to be brought out in a non-criminal proceeding would not take it out of the fifth amendment Privilege.<sup>91</sup>

#### IV. WAIVER

A. We have already suggested that the Privilege does not apply when there is no possibility of prosecution, as by an acquittal or conviction of the crime, by the running of the statute of limitations, or by a pardon.<sup>92</sup>

B. We have also suggested that there may be an implied waiver in certain circumstances. The mere failure to object may also be construed as a waiver.<sup>93</sup> At least this is the holding in the federal courts<sup>94</sup> and also in Nebraska,<sup>95</sup> except on the specific point that the prosecution cannot call the defendant as its witness in his criminal trial.

C. When the defendant voluntarily takes the stand in his own defense, this is generally held to waive any objection he might make to otherwise proper cross-examination. The precise extent of such a waiver is variously stated. In Nebraska the waiver is clearly extended to the substantive fact issues about which he testified<sup>96</sup> and to the showing of convictions of past crimes<sup>97</sup> (which would not be covered by the Privilege) but not to

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<sup>90</sup> Compare *One 1958 Plymouth Sedan v. Pennsylvania*, 85 Sup. Ct. 1246 (1965), holding a "civil" forfeiture proceeding to be sufficiently criminal in nature to permit the application of *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>91</sup> *People v. Cornelius*, 392 Ill. 599, 65 N.E.2d 439 (1946); cf. *United States v. Andreadis*, 234 F. Supp. 341 (E.D.N.Y. 1964). See text accompanying note 10 *supra*.

<sup>92</sup> See note 46 *supra*.

<sup>93</sup> See note 11 *supra*.

<sup>94</sup> *Rogers v. United States*, 370 U.S. 367 (1951); *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>95</sup> *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937).

<sup>96</sup> *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955); *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953); *Seiner v. State*, 138 Neb. 130, 292 N.W. 112 (1940).

<sup>97</sup> NEB. REV. STAT. § 25-1214 (Reissue 1964), provides that a witness may be interrogated as to previous convictions for felonies. This rule applies to a defendant who takes the stand in his own behalf. Grand-

other prior criminal acts offered on the theory that they would impeach.<sup>98</sup>

D. A problem of waiver which has never received much judicial consideration is involved in determining the admissibility of a confession. The question is to what extent does a defendant waive his Privilege by voluntarily testifying solely as to the circumstances surrounding his alleged confession or admission. Of course he waives the Privilege to the extent of those circumstances, and he may be cross-examined thereon, but there has been very little authority as to further waiver. What there is supports the proposition that he does not waive so as to be cross-examined about the crime or so as to be later subject to being called as a witness by the state.<sup>99</sup>

The case of *Jackson v. Denno*<sup>100</sup> brought the problem to the forefront by forcing a number of states to reconsider their procedural rules with respect to determining the admissibility and weight of confessions and admissions. The *Jackson* case held that fourteenth amendment due process requires a separate judge determination of admissibility. In a footnote the court supported its other reasons for this holding by suggesting that a defendant would be deterred from testifying on the issue of coercion if he feared impeachment or cross-examination before the jury.<sup>101</sup> Following *Jackson* several states have made it clear that the defendant may testify before the judge on this issue without waiving his Privilege,<sup>102</sup> but none has yet dealt with the question of

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singer v. State, 161 Neb. 419, 73 N.W.2d 632 (1955); Latham v. State, 152 Neb. 113, 40 N.W.2d 522 (1949); Denker v. State, 106 Neb. 779, 184 N.W. 945 (1921).

<sup>98</sup> Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955); Crawford v. State, 116 Neb. 629, 218 N.W. 421 (1928); Coxbill v. State, 115 Neb. 634, 214 N.W. 256 (1927); cf. O'Connor v. State, 123 Neb. 471, 243 N.W. 650 (1932); Redmon v. State, 150 Neb. 62, 33 N.W.2d 349 (1948), modified in Sherrick v. State, 157 Neb. 623, 61 N.W.2d 358 (1953).

<sup>99</sup> Brown v. State, 111 Neb. 486, 196 N.W. 926 (1924) (dictum); Cross v. State, 142 Tenn. 510, 221 S.W. 489 (1920). The paucity of authority may be due to the fact that it is assumed he does not waive, or it may be that in such cases the defendant ordinarily testifies voluntarily as to the crime.

<sup>100</sup> 378 U.S. 368 (1964).

<sup>101</sup> *Id.* at 389 n.16.

<sup>102</sup> State v. Burke, — Wis. —, 133 N.W.2d 753 (1965); People v. Walker, — Mich. —, 132 N.W.2d 87 (1965); Lopez v. State, 384 S.W.2d 345 (Tex. Cr. App. 1964). The New York Court of Appeals failed to consider the problem in People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

whether after the judge has found no coercion, the defendant can, without waiving his Privilege, testify before the jury for the purpose of affecting the weight to be given his reported statements, or whether his testimony before the judge can be read to the jury for the same purpose without a waiver.

E. If we are dealing with a mere witness, as opposed to the defendant on trial, a voluntary disclosure of some incriminating facts should have a similar waiver effect, although the matter is hardly free from doubt. In *Rogers v. United States*<sup>103</sup> the witness was before a grand jury, and the waiver was held to apply to a question which the Court found could not require an answer which would place the witness in greater jeopardy than she had already exposed herself to. In *Brown v. United States*,<sup>104</sup> however, the United States Supreme Court went much farther and held that the opening up of an area waived the Privilege for a thorough investigation on cross-examination even though the original testimony did not disclose any incriminating information—it was merely a denial of any criminal facts.<sup>105</sup>

It is anomalous to note that while the United States Supreme Court has been lenient in favor of the individual when interpreting the Privilege, it has been far from lenient on the issue of waiver. As a matter of fact this position on waiver is often blamed for the excessive leniency of cases following *Hoffman v. United States*<sup>106</sup> because a witness can never be sure how far the waiver will extend.<sup>107</sup>

F. Two other general propositions are clear under federal decisions. If a witness waives the Privilege in one proceeding he may claim it in a different proceeding.<sup>108</sup> But the report of a disclosure previously made (as at a grand jury or preliminary

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<sup>103</sup> 340 U.S. 367 (1951).

<sup>104</sup> 356 U.S. 148 (1958). See Annot., 72 A.L.R.2d 830 (1960).

<sup>105</sup> But compare *Coil v. United States*, 343 F.2d 573 (8th Cir. 1965). In a narcotics case a government witness testified to the purchase of morphine from defendant. On cross-examination he was asked about two other instances involving the purchase of narcotics and for which he was then charged in the state court. His claim of Privilege was upheld since the point was relevant only on the issue of his credibility, nor was it necessary to strike his direct examination.

<sup>106</sup> 341 U.S. 479 (1951).

<sup>107</sup> For a recognition of this see *Malloy v. Hogan*, 378 U.S. 1, 13-14 (1964).

<sup>108</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2276(4), at 470-72. See Annot., 36 A.L.R.2d 1403 (1954).

hearing) may be admitted at a trial.<sup>109</sup> There is no prior Nebraska holding.

## V. IMMUNITY STATUTES

A. In order to avoid the claim of Privilege, the federal government and the states have adopted the device of enforced waiver by a grant of immunity from prosecution. In order to satisfy the limitations of the fifth amendment the United States Supreme Court early held that the immunity must be complete.<sup>110</sup> An early statute which merely provided that the testimony given by a witness could not be used against him in any future criminal proceeding was held not adequate to provide the complete protection required by the Privilege.<sup>111</sup> A later statute which provided that the witness could not be prosecuted for any crime he was thus required to disclose was held sufficient protection.<sup>112</sup>

These immunity bath statutes are quite numerous and are applicable under varying circumstances. So far as the federal government is concerned it is clear that the Privilege must be originally applicable and must be specifically claimed by the witness.<sup>113</sup> Some statutes then leave the discretion to order disclosure and grant immunity to the judge or other presiding officer (in an administrative or legislative examination) while others require specific authorization from some other executive officer to grant immunity.<sup>114</sup> Our research has not disclosed any Nebraska decision under such statutes.

For many years practical difficulties have arisen when disclosures to one sovereign government have involved facts incriminating under the statutes of another. The underlying theory applied by the United States Supreme Court was usually thought to hold that the Privilege was limited to the particular sovereign body—sovereign A was not required to protect a witness before it

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<sup>109</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2276(5), at 472-74. This statement obviously assumes that the hearsay rule can be circumvented. If the previous statement happens to be that of the defendant on trial the exception for declaration of the opposing party applies. Note, however, that the defendant's testimony at a preliminary examination cannot be used against him at trial if he was not represented by counsel. *White v. Maryland*, 373 U.S. 59 (1963); *State v. Snell*, 177 Neb. 396, 128 N.W.2d 823 (1964).

<sup>110</sup> *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

<sup>111</sup> *Ibid.*

<sup>112</sup> *Brown v. Walker*, 161 U.S. 591 (1896).

<sup>113</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2282, at 515-19.

<sup>114</sup> See *Ullmann v. United States*, 350 U.S. 422 (1956).

from incriminating himself under the statutes of sovereign B.<sup>115</sup> And thus an immunity statute was only required to cover subsequent action by the same sovereign. Not all of the states agreed with this theory under their own constitutional provisions.<sup>116</sup>

As applied prior to 1964, the following propositions were established by United States Supreme Court decisions:

1. The federal government could, under the supremacy clause, prevent state use of information forced by the federal government.<sup>117</sup>

2. It did so by preventing use of the precise testimony.<sup>118</sup>

3. It could, and did in several areas, prevent state prosecution for state crimes disclosed by a witness's forced testimony. That is, the federal government had the power to grant immunity from state prosecution if Congress determined it was necessary to do so "for the more effective exercise of a granted power."<sup>119</sup>

4. Congress did not, however, have to do so.<sup>120</sup>

5. A state grant of immunity could not bar federal prosecution for federal crimes disclosed in state proceedings.<sup>121</sup>

B. It is true that several United States Supreme Court decisions showed clear indications of dissatisfaction with these rules, and in a decision handed down the same day as *Malloy* the dissatisfied judges won the battle. *Murphy v. Waterfront Commission of New York*<sup>122</sup> overruled *Feldman v. United States*.<sup>123</sup> The specific holding in *Feldman* was that the federal government could use information obtained from disclosures forced from the now federal defendant by the State of New York under a grant of immunity from New York prosecution. *Murphy*, however, was not before the Court on the issue of whether the federal government could use the information forced by New Jersey; the question was whether New Jersey could punish *Murphy* for refusing to answer questions which incriminated him under federal

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<sup>115</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2258.

<sup>116</sup> See cases cited in 8 WIGMORE, *op. cit. supra* note 3, § 2258 n.6.

<sup>117</sup> *Ullmann v. United States*, 350 U.S. 422 (1956).

<sup>118</sup> *Adams v. Maryland*, 347 U.S. 179 (1954).

<sup>119</sup> *Reina v. United States*, 364 U.S. 507, 511 (1960).

<sup>120</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>121</sup> *Feldman v. United States*, 322 U.S. 487 (1944).

<sup>122</sup> 378 U.S. 52 (1964).

<sup>123</sup> 322 U.S. 487 (1944).

law.<sup>124</sup> Since such compelled disclosure would (under the *Murphy* holding) violate the fifth amendment, the Court could have applied one of two possible sanctions: The state could never force such testimony or the federal government could not use it. The Court chose the latter rule, thus permitting the state to get vital information and leaving the federal government in no worse position than if the information had never been forthcoming. But, in following language in *Counselman* they articulated a rule less strict than has usually been provided in immunity statutes. The federal government is not barred from prosecuting the witness so forced to testify by the state if it can prove that its evidence is not the fruit of the poisoned tree—that is, that it had an “independent, legitimate source for the disputed evidence.”<sup>125</sup>

As is so often the case, *Murphy* leaves several questions unanswered. It might, for example, permit Congress to change the effect of various immunity statutes. However, the handling of the *Counselman* case in *Murphy* does leave some doubt as to whether the federal government could itself question witness X under immunity and subsequently prosecute X for a crime he then disclosed, even though all the evidence used at the trial was secured before the questioning. Mr. Justice White's concurring opinion was directed specifically at the question of the meaning of *Counselman*, and he was not willing to go so far.<sup>126</sup>

One may also ask what has become of *United States v. Murdock*<sup>127</sup> in which the Court had required a witness to answer a federal inquiry over the objection that he might disclose facts incriminating under Illinois law. Mr. Justice Goldberg, (in *Murphy*) speaking for four judges, certainly went as far as one could go in disapproving that decision without specifically overruling it, which of course he did not have to do.<sup>128</sup> Since Congress can, and has in many areas, granted immunity from state as well as federal prosecution this may not be a very pressing problem; but at least it seems likely that the Court will hold that state immunity must

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<sup>124</sup> *Knapp v. Schweitzer*, 357 U.S. 371 (1958), held the state could do so.

<sup>125</sup> *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 n.18 (1964).

<sup>126</sup> *Id.* at 92, 104-07.

<sup>127</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>128</sup> “[W]e now accept as correct the construction given the privilege by the English courts . . . . We reject—as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in *United States v. Murdock* . . . and *Feldman v. United States* . . . .” 378 U.S. 52, 77 (1964).

come from somewhere. Perhaps in this area it will be enough if Congress were to pass a general act granting immunity to the extent of the fruit of the poisoned tree doctrine. Or if not, the Court itself may require a state to exclude any poisoned fruit.

C. Interstate application of *Murphy*: None of the cases in the United States Supreme Court has yet dealt with the perhaps more complicated problem of the right of a witness in State A to decline to answer questions which might incriminate him under the laws of State B. It does, however, seem reasonably clear that the theory of both *Murphy* and *Malloy* can only lead to the conclusion that a witness does now have that right. According to these cases the Privilege is to be applied uniformly according to federal standards, and the underlying historical and policy factors supporting *Murdock* and *Feldman* are repudiated.<sup>129</sup> If this be so it establishes law in Nebraska which had not been determined before and which presumably had been thought to be otherwise.

It still remains to be determined how the immunity doctrine will be implemented at the interstate level. Presumably the United States Supreme Court would approve permitting Nebraska to force a witness to disclose facts incriminating under the law of Iowa if Iowa could make no use of that disclosure either directly or indirectly under the same formula as that applied against the federal government in *Murphy*. It is conceivable, of course, that each state could enact legislation to provide precisely such limitations, but practical politics suggest that such uniformity of state action within a reasonable length of time is a dream.

It is much more feasible to spell out such a provision from the federal level. This could come before the United States Supreme Court in much the same way that the *Murphy* case came up, and there is no reason to suppose that a single case would not be sufficient to establish a rule which would be uniform throughout the country. Whether the Court would adopt such a rule as opposed to merely prohibiting Nebraska from forcing the disclosure of Iowa criminality at all would undoubtedly depend on its being persuaded that the same reason applied at the interstate level as was found applicable in *Murphy* at the state-federal level. The reason was that New Jersey's investigation would benefit New Jersey and would not place the federal government in any substantially worse position than if there had been no New Jersey disclosure. The federal government is obviously in a somewhat worse position since it must bear the burden of proving that none

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<sup>129</sup> *Ibid.*



of its evidence is tainted—and the same would be true of Iowa at the interstate level. It might be that the different nature of state criminal laws would lead to the conclusion that Iowa's burden would be unreasonable when compared with the advantage to Nebraska, or that this is a decision that Iowa should make rather than the United States Supreme Court. Or it might also be concluded that the effect of Nebraska's disclosure on Iowa's impetus to prosecute would be more significant at the interstate level. In any event, it cannot be assumed that the United States Supreme Court would make the same choice of alternatives it did in *Murphy*.

It is also possible to establish an effective rule by Congressional action, which would be permitted under section five of the fourteenth amendment.<sup>130</sup> This approach might well be more politically palatable: It would provide every state an opportunity to be represented in the decision; and it would permit the formulation of a rule within acceptable limits, such as one making the type of crime being investigated or disclosed significant.

## VI. APPLICATION TO DOCUMENTS

Here again there appears to be a dearth of Nebraska authority. There is no dearth of federal authority, but it can hardly be said to be entirely clear.

A. We start with the basic proposition that the Privilege protects a person from being forced to produce self-incriminating documents that are possessed and owned by him in his personal capacity—that is, he may properly object to complying with a subpoena duces tecum.<sup>131</sup> Documents may, however, be secured by the state through search and seizure which complies with fourth amendment limitations.<sup>132</sup> Documents secured by a seizure which does not comply with fourth amendment limitations will be excluded at trial (of the person from whom they are seized) as violating the Privilege.<sup>133</sup>

B. Documents which are not possessed and owned in a person's individual capacity, but which are in fact the property of a corporation, or some similarly impersonal entity, may be secured

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<sup>130</sup> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. AMEND. XIV § 5.

<sup>131</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>132</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2264, at 380.

<sup>133</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

by subpoena duces tecum, but the possessor may not be required to testify with respect to them or their whereabouts if the documents or the testimony will incriminate him.<sup>134</sup> Nor may the corporation object since the Privilege does not apply to such entities.<sup>135</sup>

Documents possessed by *A* which belong to *B* (an individual) may incriminate either *A* or *B*. If they incriminate *B* it is generally assumed that *B* is not protected by the Privilege.<sup>136</sup> However, if *A* is *B*'s attorney then a combination of *B*'s attorney-client privilege and his self-incrimination privilege should prevent disclosure if *B* himself could not be forced to produce them.<sup>137</sup>

If such documents incriminate *A*, it is clear that *A* is being forced to incriminate himself by producing them in answer to a subpoena or other order. But if the government could get them through *B*, or through a replevin action or the like by *B* if necessary, the implications of some federal cases are that *A* cannot successfully claim his Privilege.<sup>138</sup> The matter is hardly, however, free from doubt, and the doubts are substantially greater when both *A* and *B* would be incriminated.

C. Required records: In 1948 the United States Supreme Court established one further rule with respect to documents: It is not a violation of the Privilege to force disclosure of records required by law to be kept, insofar as those records are reasonably necessary to help enforce a law constitutionally regulating or prohibiting a particular activity.<sup>139</sup> Although the rule had many state cases to support it<sup>140</sup> (none so far as we can find in Nebraska) the commentators have had a great deal of difficulty supporting it in theory and have differed widely in the reasons which they find appealing. Some of these reasons are: The documents have somehow become "public"; the individual has con-

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<sup>134</sup> *Curcio v. United States*, 354 U.S. 118 (1957).

<sup>135</sup> *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>136</sup> 8 WIGMORE, *op. cit. supra* note 3, §§ 2259, 2264.

<sup>137</sup> *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963) uses language to the contrary, but there the papers were not shown to belong to client *B*. See also *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), suggesting that *B* might under some circumstances be protected by the fourth amendment.

<sup>138</sup> See *United States v. White*, 322 U.S. 694 (1944); *United States v. Field*, 190 F.2d 554 (2d Cir. 1951).

<sup>139</sup> *Shapiro v. United States*, 335 U.S. 1 (1948).

<sup>140</sup> 8 WIGMORE, *op. cit. supra* note 3, § 2259(c), at 363.

sented by his application for a license; he has impliedly waived the Privilege because he knew what would be required in the way of reports or records; if the government can prohibit an act, anything less than prohibition is valid; the sentiments underlying the Privilege are not very strong, when compared with the public necessity. Two courts of appeal have refused to apply the rule to a required *report* of a single illegal transaction as distinguished from the regular and continuing business entries involved in *Shapiro v. United States*.<sup>141</sup>

## VII. COMMENT ON EXERCISE OF PRIVILEGE

Nebraska, by statute,<sup>142</sup> specifically provides that no comment shall be made on the criminal defendant's refusal to testify. The federal statutes contain a provision similarly construed,<sup>143</sup> as well as a provision giving the defendant the right to have the jury instructed that his refusal to testify shall not be considered against him. The United States Supreme Court now holds that the fifth and fourteenth amendments bar any comment by the prosecutor on the accused's silence or any instruction by the judge that silence may be taken as evidence of guilt.<sup>144</sup>

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<sup>141</sup> 335 U.S. 1 (1948). See *Dugan v. United States*, 341 F.2d 85 (7th Cir. 1965); *Russell v. United States*, 306 F.2d 402 (9th Cir. 1962). But the Ninth Circuit itself, and others, have limited the holding. See, e.g., *Frye v. United States*, 315 F.2d 491 (9th Cir. 1963), *cert. denied*, 375 U.S. 849 (1963); *Sipes v. United States*, 321 F.2d 174 (8th Cir. 1963). The distinction between being tried for the crime of not registering a gun (Privilege sustained) and for the crime of possessing a non-registered gun (Privilege denied) seems hardly worthy of a major constitutional issue. And it fails to note that, at the time of not registering, prosecution for either crime is a possibility.

<sup>142</sup> NEB. REV. STAT. § 29-2011 (Reissue 1964).

<sup>143</sup> 18 U.S.C. § 3481 (1952). See cases collected construing this statute in 8 WIGMORE, *op. cit. supra* note 3, § 2272 n.2.

<sup>144</sup> *Griffin v. California*, 85 Sup. Ct. 1229 (1965). See also *Grunewald v. United States*, 353 U.S. 391 (1957), holding that an accused's silence before the grand jury cannot be shown at his trial to impeach his trial testimony since that constitutionally guaranteed right to remain silent cannot be taken as inconsistent with his trial testimony denying criminal conduct.