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SELF-CRIMINATION PRIVILEGE: "LINKS IN THE CHAIN"

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"According to their [the prosecution's] statement, a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony[1] which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. . . . What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part[2] of a crime which is punishable by the laws."[3]

This pronouncement by Chief Justice Marshall in Aaron Burr's trial has, as Wigmore observes,[4] "ever since been accepted without controversy" as an exposition of the correct principle.[5] But its application in particular cases has certainly not been free of difficulty. It is the purpose of this paper, on the basis of a necessarily rough classification, to examine the more recent federal cases, beginning with *Mason v. United States,*[6] and then venture an appraisal of the current federal trend.[7]

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1. Learned Hand has employed another figure: "All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached." United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940).

2. Speaking precisely, a link in the "chain of *testimony* necessary to convict," is, or may be, quite different from a fact "that would form a necessary and essential part of a crime." The difference is between a subordinate, though relevant, fact and one which is an ultimate or operative fact, one which, in itself, constitutes an essential ingredient of the offense under the substantive criminal law. Actually, the question to the witness in Burr's that was of the latter sort, *viz.*, whether he understood the contents of a certain paper," *i.e.*, whether he had "seen and understood the treasonable matter." But the recent federal cases, as will be seen, reject any such limitation. In many, questions calling for facts, quite colorless in themselves, have, in the circumstances, been deemed criminating.

3. 1 ROBERTSON, TRIAL OF AARON BURR 244 (1808).

4. 8 WIGMORE, EVIDENCE § 2260 (3d ed. 1940).

5. The MODEL CODE OF EVIDENCE, Rule 202 (1942) defines incrimination in these terms: "A matter will incriminate a person within the meaning of these rules if it constitutes, or forms an essential part of, or, taken in connection with other matters already disclosed, is a basis for a reasonable inference of, such a violation of the laws of this State as to subject him to liability to punishment therefor, but will not incriminate him if he has become for any reason permanently immune from punishment therefor."

6. 244 U.S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198 (1917).

7. In his criticism of Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110 (1892), Wigmore refers to the disposition of "latter-day Courts" to treat the privilege "with morbid delicacy" and to expand it into "misty attenuation." 8 WIGMORE, EVIDENCE § 2261 (3d ed. 1940). In the *Counselman* case the Court was called upon to determine the validity of an immunity statute. It held that such a statute, to constitutionally supplant the privilege, must be co-extensive with the privilege. It was thus necessary to delineate the scope of the privilege. The Court said: "It is a reasonable

It appears correct to say that in the *Mason* case, the Court took a fairly strict view of the applicability of the privilege where "a direct answer" to the question could not disclose, in itself, a "necessary and essential part of a crime." Before an Alaska grand jury, Mason and another were asked whether a game of cards was being played (1) at the table where he was sitting and (2) at another table. It was no offense to sit at a table where cards were being played or to play unless the game was played for something of value. The trial judge ruled the questions were not criminating and this determination was affirmed. The trial judge, said the court, is in a much better position to appreciate the essential facts than an appellate court and "he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. . . . The court below evidently thought neither witness had reasonable cause to apprehend danger[8] to himself from a direct

construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him. Emery's Case, 107 Mass. 172, 182." Counselman v. Hitchcock, *supra* at 585. Accordingly the court held ineffective an immunity statute merely forbidding the subsequent use of the compelled testimony. "No statute which leaves the . . . witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution." *Ibid.* While it is clear that no subsequent decision has weakened the doctrine of the *Counselman* case, yet, as will be seen, it does not seem to have been a significant factor in later cases dealing, not with immunity statutes, but with the scope of the privilege where no immunity of any sort was tendered.

8. Where the questions asked "do not on their face appear to call for answers which would tend to incriminate" the witness, it is "incumbent upon him to justify his refusal to answer on the ground claimed by making it appear that his assertion that they would [is] based upon substantial reason so to believe and was not made merely to protect some other person or persons." United States v. Rosen, 174 F.2d 187, 188 (2d Cir. 1949). But, "While it may be that, in certain circumstances, a witness should explain why an answer to an apparently innocent question might tend to incriminate him . . . there can certainly be no such burden upon a witness when the circumstances are such that reasonable apprehension on his part is evident." United States v. Jaffe, 98 F. Supp. 191, 194 (D.D.C. 1951). It would seem that the test is, or should be, not merely whether the witness "apprehends" danger but whether he "reasonably apprehends" danger of crimination. "[T]he danger to be apprehended must be real and appreciable . . . not a danger of an imaginary and unsubstantial character." Cockburn, CJ., in Queen v. Boyes, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (K.B. 1861). Yet in Doran v. United States, 181 F.2d 489 (9th Cir. 1950), the court appears to take the position that the witness was justified in refusing to say whether he knew *G* because "it was believed" *G* was in charge of Communist Party financial affairs in Los Angeles, and in refusing to say if he knew *H* in view of his offer to show that "it was feared" *H* was an officer or representative of the Communist Party of Los Angeles. If the court means to put the matter on a purely subjective basis, it overlooks the established rule that both judge and witness are to participate in the determination of a question's criminating character. "[I]t belongs to the Court to consider and decide whether *any* direct answer *can* implicate the witness. If a direct answer *may* criminate [the witness], then he must be the sole judge what his answer would be." 1 ROBERTSON, TRIAL OF AARON BURR 244 (1808). Also, judicial language is occasionally encountered which seems to mean that the witness is protected not only against reasonable fear of actual crimination by his answer but also of *prosecution*. Thus: "Such statements would reasonably add to the apprehension of the appellants that they were in danger of persecution under the . . . Smith Act." Healey v United States, 186 F.2dd 164 (9th Cir. 1950). "It does not seem in the slightest unreasonable that the defendant would have very grave apprehension that he was in danger of prosecution for an offense against the United States." United States v. Jaffe, 98 F. Supp. 191, 197 (D.D.C. 1951). It is suggested that the true test must be whether the answer,

answer to any question propounded and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion."[9]

Before proceeding to subsequent cases, it can be asserted generally at this point that (1) the later holdings apply a considerably more liberal rule as to what is criminating and (2) the disposition to recognize a considerable discretion in the trial judge, so clearly evident in the *Mason* case, has not been manifested to any considerable extent in the more recent decisions.[10]

"What is your business?"

In *United States v. Weinberg,*[11] the witness, called before a grand jury investigating an alleged conspiracy to violate the Prohibition Act, after being informed that under the Act "he was given immunity from prosecution for any matter arising out of his testimony," was asked what his business was in 1929 and 1930 and whether the signatures on two bank account cards ("Abe Berg" and "Jack Berg") were his. Weinberg refused to answer. "You want me to testify against myself, when they are looking up my income taxes? . . . I can be [prosecuted] on the income tax law. Will you grant me immunity on the income tax law. . . ?" The Court: "[That] can be determined after indictment, if one should be returned for that violation." The trial judge said to Weinberg, however, that he thought "offhand, without having to decide it at this time, that [he] could not be prosecuted for any crime as to which [he] had given evidence under this compulsion, but I am not deciding that." The contempt judgment was affirmed, the Court of Appeals holding that while an immunity statute, to be effective, must be "coextensive with the constitutional privilege," the trial judge could give the witness no assurance beyond what he did. "The actual adjudication of immunity can be made only in a subsequent prosecution of the witness. . . ."[12] But in the course of its discussion, the appellate court had this to say about the claim that the questions were criminating:

> "It is urged that his answers would disclose a violation of the income tax law. To justify silence . . . it must appear that an answer to the question will directly tend to incriminate; a remote possibility of danger will not suffice [citing, among other authorities, *Mason v. United States*]. It may well be doubted whether a statement of

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alone or with other evidence, discloses or may disclose *guilt;* the fact that there may be in the offing a criminal *charge,* has no rational bearing on the *criminating* quality of a particular answer. This is not to say that the danger or imminence of prosecution is completely irrelevant, although its relevancy, it would seem, is limited to affording a basis for an inference of the availability to the prosecutor of additional evidence, thus pointing up the probable or possible criminating character of the answer called for. United States v. Weisman, 111 F.2d 260 (2d Cir. 1940), seems explainable on this basis.

9. Mason v. United States, 244 U. S. 362, 366, 37 Sup. Ct. 621, 61 L. Ed. 1198 (1917).

10. But see Russell v. United States, 12 F.2d 683 (6th Cir. 1926); and Brunner v. United States, 190 F.2d 167 (9th Cir. 1951), *cert. granted,* 72 Sup. Ct. 364 (1952).

11. 65 F.2d 394 (2d Cir. 1933), *cert. denied,* 290 U.S. 675 (1933).

12. 65 F.2d at 395.

what business the witness was engaged in, or whether a signature on a bank card was his, is not too remotely connected with a possible future investigation of his accounts and a prosecution for income tax evasion to justify his standing mute. Many additional facts have to be assumed before his answer, whatever it may be, can tend to implicate him in a violation of the tax laws."[13]

In the *Camarota* case,[14] the Court of Appeals for the Third Circuit held not incriminating questions to Samuel Camarota before grand jury asking the name of his place of business; whether the witness had sold wire service to "horse rooms"; whether, in 1932, he had any connection with wire service; whether he got wire service in his "horse room"; what kind of work Joe Camarota did, and some others touching the same matters. Said the court:

"In *Mason v. United States,* supra, the appellant was called upon to testify before a grand jury engaged in investigating a charge of gambling against six other men. He refused to answer whether he saw a game of cards played at his own or another table. . . . [The judgment holding him in contempt] was affirmed by the Supreme Court, which ruled that the trial court did not err in holding that the witness did not have reasonable cause to apprehend danger to himself from a direct answer to the questions propounded. We think that the facts of the *Mason* case are essentially similar to those of the case before us. The incrimination which the appellant feared in the case before us was for violation of the federal income tax laws. . . . Most of the questions related to the sale of wire service to 'horse rooms' in various years. A direct answer that appellant was so engaged would not have tended to incriminate him even though answers to subsequent questions as to his receipts from such business might have done so. The same applies to the question as to what work the appellant's nephew did for him."[15]

In the *Hoffman* case,[16] the witness was called before a grand jury investigating "frauds upon the Federal Government, including violations of the customs, narcotics and internal revenue liquor laws of the United States, the white slave traffic act, perjury, bribery, and other federal criminal laws, and conspiracy to commit all such offenses." The "setting": Subpoenas had issued for some twenty witnesses, but only eleven had been served; as the prosecutor put it, he was "having trouble finding some big shots"; several of those who did appear had refused to answer questions until ordered to do so by the court; this witness (Hoffman) had a twenty-year police record and had been publicly described as an "underworld character and racketeer"; the Senate Crime Investigating Committee had placed his name on a list of "known gangsters" from the Philadelphia area who had made Miami Beach their headquarters; Philadelphia police officials had described him as "the King of the shore rackets who lives by the gun"; he had served a sentence on a narcotics charge; "his previous conviction was dramatized by a picture ap-

13. *Ibid.*

14. Camarota v. United States, 111 F.2d 243 (3d Cir. 1940), *cert. denied,* 311 U.S. 651 (1940).

15. 111 F.2d at 245.

16. Hoffman v. United States, 341 U.S. 479, 71 Sup. Ct. 814, 95 L. Ed. 1118 (1951).

pearing in the local press while he was waiting to testify, in which [he] was photographed with the head of the Philadelphia office of the United States Bureau of Narcotics in an accusing pose." Hoffman refused to give his occupation. And his refusal was held justifiable by the Supreme Court in these terms: "The court should have considered, in connection with the business questions, that the chief occupation of some persons involves evasion of federal criminal laws, and that truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity."[17] The Court also said that a "witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." On the other hand, if the witness were required to prove the hazard "in the sense in which a claim is usually required to be established in court, he could be compelled to surrender the very protection" which he is accorded. To sustain the privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' "[18]

In the *Greenberg* case,[19] the witness, when asked whether he used a certain telephone in connection with his business, replied: "Not for my lawful business"; he was then asked the questions: "Do you use it for any other business?" and "What business do you use it for?" He refused to answer. Unjustifiably, said the Court of Appeals. "It must be conceded that some possible answers to a question as to a witness' business may be incriminating under the federal law. The witness may be by occupation an illicit dealer in narcotics, an illicit distiller or a counterfeiter." Nevertheless, the "question is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle." Accordingly, the witness "must show the Court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless. . . . Where, as here, the question was innocent on its face, all that appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal

17. 341 U.S. at 486. The Court said that "If this result adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty. 'The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and punishment of crime'. United States v. White, 322 U.S. 694, 698 (1944)." *Id.* at 489.

18. *Id.* at 486.

19. United States v. Greenberg, 187 F.2d 35 (3d Cir. 1951).

crime if a fact which might be disclosed by a direct answer to the controverted question were added to them." But he made no such showing. "He did not offer any reasonable basis for inferring that the nature of his business, as distinguished from the fact that he was in business of some kind, might be a fact which, with other facts, would incriminate him of a violation of federal law."[20] To defendant's argument that should he answer the question, he then would be pressed for information about his income from the business, his employees and records, which, if given, might tend to incriminate him of violations of the income tax and social security laws, the court responded that such questions "have not been asked." "What we have to decide is merely whether a witness may decline to state his business, although itself not unlawful under the federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business. . . . [T]o approve the appellant's contention would mean that every business man would be entitled to decline to state his business merely because it might be possible that in carrying it on he had infringed the internal revenue laws or some other federal statute."[21] And the court cited the *Weinberg* and *Camarota* cases. The Supreme Court's decision in the *Hoffman* case came down after the decision of the Court of Appeals in the *Greenberg* case. Certiorari was granted in the latter case, and in a brief per curiam opinion, the judgment of the Court of Appeals was vacated and the ease remanded to that court for further consideration "in the light" of the *Hoffman* decision.[22] Upon reconsideration,[23] the Court of Appeals determined that the *Hoffman* case did not require a change in result and adhered to its former conclusion, saying:

> "The facts of the two cases are similar in that both Hoffman and Greenberg were called before the same grand jury and refused to give answers as to the nature of their respective businesses. But here the similarity ends. . . . [T]he whole setting of the Hoffman case raised the strong suspicion that he might be engaged in the narcotics business, . . . with respect to which he was entitled to claim his constitutional privilege against incrimination since engaging in it would have necessarily involved the violation of federal law. The setting and background of Greenberg's case are wholly different. There is in the record no suggestion that Greenberg might be engaged in a business which violates the federal law. On the contrary, everything in the record suggested that the unlawful business in which he might be engaged is the so-called 'numbers' business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend.[24] In the absence of any contention on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in Hoffman's case as wholly inapplicable."[25]

20. *Id.* at 39.
21. *Id.* at 40.
22. Greenberg v. United States, 341 U.S. 944, 71 Sup. Ct. 1012, 95 L. Ed. 1369 (1951).
23. United States v. Greenberg, 192 F.2d 201 (3d Cir. 1951).
24. Citing United States v. Murdock, 284 U.S. 141, 52 Sup. Ct. 63, 76 L. Ed. 210 (1931).
25. 192 F.2d at 202-03. On Jan. 28, 1952, the Supreme Court again granted certiorari in the Greenberg case. 72 Sup. Ct. 365 (1952).

This opinion of the Court of Appeals in the *Greenberg* case is very persuasive. The distinction between the "background" facts in the *Hoffman* and *Greenberg* cases is obvious and need not be labored. If the ruling is sustained the four cases, *Weinberg, Camarota, Hoffman* and *Greenberg,* will together stand for what would appear to be rational and workable doctrine touching business and occupation questions. The rules could be stated as follows:

(1) "Innocent on its face," a question as to business or occupation is not to be deemed incriminating on the mere "say-so" of the witness.

(2) Nor is his refusal to answer justified on the basis of the possibility of prosecution for violation of federal law as it touches his tax liability in respect to the income from his business.

(3) Rather, if it is to be deemed incriminating, the "setting" in which the question is asked must be such as to make reasonable the likelihood that the witness' business, in itself, necessarily involves a violation of federal law.

"Do you know John Doe?"

First, a brief reference to two cases where questions of the sort indicated were held not to call for criminating matter.

In the *O'Connell* case,[26] a grand jury was investigating the "Albany Baseball Pool" in connection with federal lottery statutes. The court: "Many of the questions were merely whether [the witness] was acquainted with certain persons, who presumably were thought by the grand jury to have some connection with the pool. An answer of 'Yes' or 'No' to such questions could have no direct tendency to incriminate him. The danger was much more remote than in *Mason v. United States, supra.*"[27]

In the *Flegenheimer* case,[28] the question arose on Flegenheimer's trial for tax evasion. The indictment charged that "Joseph Harmon" was an alias used by Flegenheimer and that part of Flegenheimer's income was derived from a business for which a bank account was carried in the names of "Joseph Harmon and Rocco DiLarmi." DiLarmi, called as a government witness, when sworn stated he would decline to answer any question about the bank account, and none such was asked him. But he was asked if he knew Joseph Harmon. He was held in contempt for refusing to answer. "[T]o justify silence," said the court, "it must appear that the answer which might be given would have a direct tendency to incriminate." But "whether the witness answered 'Yes' or 'No' to the question could not possibly incriminate him. If

26. O'Connell v. United States, 40 F.2d 201 (2d Cir. 1930).
27. *Id.* at 204.
28. United States v. Flegenheimer, 82 F.2d 751 (2d Cir. 1936).

Joseph Harmon, was as alleged in the indictment an alias of Flegenheimer, an affirmative answer would have been no more than an admission that the witness knew the defendant. The next question might well have been whether he knew the defendant by the name of Harmon. As preliminary to proof of the alias, it was a material and proper question."[29]

On the other hand, questions as to acquaintance were held incriminating in the following cases:

The *Alexander*,[30] *Doran*,[31] *Kasinowitz*[32] and *Healey* cases,[33] from the Ninth Circuit, all concerned witnesses who had refused to answer a number of questions before a Los Angeles grand jury investigating alleged false statements given in connection with the Government's loyalty investigation of Government employees. Some of the questions touched the organization, records and activities of the Communist Party in Los Angeles, and the rulings as to these will be discussed at a later point. However, these witnesses were also asked: "Do you know Dorothy Healey?"; "Do you know Ned Sparks?", etc. In the context, the questions were held to be incriminating. In the *Alexander* case, the court held the question, "Do you know Ned Sparks?" must be deemed incriminating, if the evidence (held improperly rejected by the trial court) should show that Sparks "was a prominent officer of the Communist Party." "These appellants' defense in a criminal prosecution well may be that they knew no one connected with the Communist Party's conspiracy to violate the Smith Act."[34] On the same basis, in the *Doran* case, similar questions were held incriminating provided evidence should be introduced in accordance with rejected offers to the effect that Dorothy Healey "was regarded as the organizing secretary of the Communist Party of Los Angeles County and in possession of its membership roll"; that "it was believed Elizabeth Glenn was in charge of the financial affairs of the Communist Party in Los Angeles County and had remitted 50% of that organization's receipts to the National Communist Party in New York"; that "it was feared that [Mrs. Houdek] was an officer or representative of the Communist Party of Los Angeles"; and that "Sparks was thought to be the Chairman of the Communist Party of Los Angeles County."

In the *Kasinowitz* case, the court was concerned with questions as to whether the witnesses knew Dorothy Healey, as to Dorothy Healey's address, occupation and whereabouts and as to her husband's occupation. The trial

29. *Id.* at 751-52.
30. 181 F.2d 480 (9th Cir. 1950).
31. 181 F.2d 489 (9th Cir. 1950).
32. 181 F.2d 632 (9th Cir. 1950).
33. 186 F.2d 164 (9th Cir. 1950).
34. 181 F.2d at 486.

court had held immaterial evidence concerning Dorothy Healey's position in the Communist Party: "[I]t is immaterial whether Dorothy Healey is secretary of the Communist Party or is the Communist Party. . . . [It] is no crime to know anybody."[35] Said the appellate court: "This ruling that the questions respecting Dorothy Healey must be answered because 'that is no crime, to know anybody' we think is the basic error underlying the [trial] court's decision in this, the Alexander and the Doran cases. The question which the witness may refuse to answer need not of itself require his admission of the commission of a crime. . . ." While the questions asked were innocent on their face, "the evidence discloses a setting making it likely that the answers concerning Dorothy Healey and her husband may be directly incriminating or, if not, may lead to such evidence. . . . These appellants' defense in a criminal prosecution well may be that they knew no one connected with the Communist Party's conspiracy to violate the Smith Act."[36]

In *United States v. Raley*,[37] defendant was acquitted, in a jury-waived trial, of a charge based on his refusal (before the House Un-American Activities Committee) to answer questions which "relate principally to whether or not the defendant knew certain persons." It appears from the opinion that while it was conceded by the prosecution "that the answer that he did know such persons, or some of them, might under some circumstances be criminating," it was contended that it was the duty of the defendant "to explain why." But the court said:

> "the answer may be found in the setting in which the questions were asked and the privilege claimed. . . . [C]ertain witnesses identified him [Raley] as a member of the Communist Party, active in its affairs, and actively engaged with other members of the Communist Party in furthering its organization. The testimony by other witnesses showed that every one of the persons, concerned whom the questions involved were asked, were members of or affiliated with the Communist Party. With federal statutes then in effect, making it a criminal offense to do the acts, to have the affiliations, or to conspire with others in the doing of such acts, and with numerous other witnesses testifying that this defendant had been thus engaged, it cannot reasonably be doubted that the defendant had good ground to apprehend that he would be prosecuted therefor. Blau v. United States, 340 U.S. 159. In any prosecution in which he be charged with conspiracy with those concerning whom he was asked, it would obviously be relevant and important evidence that he knew them, and that they knew him."[38]

It is evident that the rulings in the second group (*Alexander, Doran, Kasinowitz, Healey* and *Raley*) represent a considerable departure from the

35. 181 F.2d at 637. According to an Associated Press dispatch dated Feb. 8, 1952 (Sacramento Bee, Feb. 8, 1952, p. 7, col. 1), Judge McNamee convicted Joseph J. Aiuppa in the United States District Court in Cleveland of contempt for refusing to answer, before the Kefauver Crime Committee, the question: "Do you know Anthony Accardo?" "The mere fact that he knew Accardo would not have been incriminating, the judge found, no matter what reputation Accardo had."

36. 181 F.2d at 637-38.

37. 96 F. Supp. 495 (D.D.C. 1951).

38. *Id.* at 497-98. See also, United States v. Jaffe, 98 F. Supp. 191 (D.D.C. 1951).

view taken in the *Mason* case. To say that a concession of acquaintance with *A*, even though *A* be shown to be a thoroughly wicked man, gives the witness "reasonable ground to apprehend danger," would doubtless have seemed a completely untenable position to Justice McReynolds, who wrote the *Mason* opinion, and to Chief Justice Cockburn, who gave the opinion for the court in *Queen v. Boyes,* upon which the court relied in the *Mason* case. Of course, any fact may, in the circumstances, be argued to possess some slight circumstantial criminating quality but the traditional view has been that the danger to be apprehended must be *appreciable,* not a danger "of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency," to use Cockburn's language in the *Boyes* case.[39]

Notwithstanding the Smith Act, the New York prosecution of the Communist Party leaders, the pendency of similar proceedings elsewhere and the announced intention of the law officers of the Government to press the pursuit of subversive elements, (which constituted the "setting" in which the questions were asked) it would seem an admission of *mere acquaintance* with a member or functionary of the Communist Party, counts so little toward the aggregate of facts and circumstances nessary to convict, as to miss by a fair margin the requirement of "substantiality" or "appreciableness."[40] At any rate, the Court of Appeals of the Second Circuit in the *O'Connell* and *Flegenheimer* cases, decided as recently as 1930 and 1936, appears to have had no doubts as to the propriety of compelling an answer to this type of question, although of course the type of offense involved in the claim of privilege was quite different from that in the more recent cases. But it is to be noted that in the *O'Connell* case, the court said that the persons inquired about "presumably were thought by the grand jury to have some connection with the pool."[41] And in the *Flegenheimer* case, the witness was asked, in effect, as to his acquaintance with the defendant, then on trial for tax evasion, it being the Government's contention that the defendant's bank account had been carried

39. 1 B. & S. 311, 330, 121 Eng. Rep. at 738. Conceivably even age, martial status, education or residence. As to a claim of privilege to refuse to answer a question as to residence, the Court of Appeals for the Second Circuit has said: "It is impossible to understand how the answer could have had any tendency to incriminate." Abrams v. United States, 64 F.2d 22, 24 (2d Cir. 1933).

40. True enough, as was pointed out in the *Raley* case, acquaintance among the participants is a necessary assumption in a finding of conspiracy or of any concerted action. But it does not follow that proof or admission of the mere fact of acquaintance advances the inquiry to any appreciable extent. The court in the *Doran* and companion cases got at the matter a little differently. It is not asserted that a concession of acquaintance would be criminating because affirmatively tending to establish the offense. Rather it is said that it would have a sort of negative incriminating quality, that is, an admission of acquaintance would tend to negate the witnesses' "defenses to an indictment under the Smith Act [which] well may be that they knew no one connected with the conspiracy to violate the Smith Act." 181 F.2d at 490. This is even weaker. Wigmore refers to the disposition of "latter-day Courts to expand [the privilege] into misty attenuation." 8 WIGMORE, EVIDENCE § 2261 (3d ed. 1940).

41. 40 F.2d at 204.

in the name of the witness and an alias of the defendant. So that, to be realistic about the matter, it would seem that about as strong an argument for the privilege could be made in these cases as in the later ones.[42]

"Did you see John Doe on the night of January 13th? Have you seen him this week? Recently? When did you last see him?"

Did you meet "any of the Groveses" upon your visit to Philadelphia in February, 1941? This was held incriminating, in the circumstances, in *United States v. Cusson.*[43] At the time of the visit to Philadelphia, two men named Groves were under indictment in New York and their trial took place shortly afterwards; before it began, witness went to Mexico, returning soon after its conclusion; witness' refusal to answer was based on the contention that "it might serve as a link in establishing that [the Groves] had told her to go to Mexico so as to avoid being called as a witness . . . and this would tend to prove that she had conspired with them to obstruct justice." The court said: "The reality of this danger depended upon the likelihood that she might be subpoenaed as a witness." While the record did not show she had been subpoenaed, still this offered "no protection to a charge that she had agreed to go beyond the jurisdiction" so that she could not be. It appeared that before she went before the grand jury, the prosecutor asked her whether she had been subpoenaed. This question of the prosecutor, "followed by the effort to learn whether she had talked with the Groveses just before their trial, . . . laid a warm enough scent to make its pursuit genuinely perilous to her. . . . It is obvious that no general principle can be laid down; the question is always whether the danger to be apprehended from an answer is near enough to be real, or whether it is too remote to be substantial."[44]

In *Doran v. United States,*[45] among others, this question was put to the witnesses: "Have you seen Dorothy Healey recently?" and one witness was asked whether he knew Elizabeth Glenn or Mrs. Houdek. The court said: "It appears that subpoenas and bench warrants had been issued for [Healey,

42. The court, in the *Raley* case, appears to feel that the questions as to acquaintance were also objectionable under the rule of the *Counselman* case, as calling for answers likely to furnish criminating "clues" or "sources" of criminating evidence, whether or not criminating in themselves. Thus: "The crux of the question is that he could not be compelled or coerced in admitting he knew them, and revealing the source from which evidence might be obtained that could be used against him. . . ." 96 F. Supp. at 498. And in the *Kasinowitz* case, the court said that even if the questions about acquaintance with Dorothy Healey were not "directly incriminating [they] may lead to such evidence." 181 F.2d at 637. But it is difficult to see how a question which calls for information as to mere acquaintance with a person identified in the question, can turn up a new source of evidence. The matter stands quite differently, of course, in respect to the "Who?" questions, discussed in the succeeding section. In the latter case, the witness is required to identify, in a certain relationship, someone whose identity has not previously been disclosed and thus it can plausibly be said that an answer may furnish "clues" or "sources."

43. 132 F.2d 413 (2d Cir. 1942).

44. *Id.* at 414.

45. 181 F.2d 489 (9th Cir. 1950).

Glenn and Houdek]. The applications charged not only Glenn and Houdek with deliberate avoidance of service of subpoena and obstruction of justice but also that 'various witnesses' for whom subpoenas had issued 'have been following a *common course of conduct* in avoiding service and *impeding the functioning of said grand jury.*' This plainly applied to Healey, Glenn and Houdek. . . . It is to be recalled that appellants themselves were involved in the proceedings that Healey, Glenn and Houdek were charged with obstructing. . . . Answers to these questions well may be impugning. *Cf.* United States v. Cusson, 2 Cir., 132 F.2d 412."[46]

In the *Hoffman* case,[47] in addition to the questions concerning his occupation, the witness (after he had testified he had known Weisberg for "practically twenty years, I guess") refused to answer these: "When did you last see him?" "Have you seen him this week?" "Do you know where [he] is now?"[48] The Supreme Court held the claim of privilege ought to have been sustained.

> "To be sure, the Government may inquire of witnesses before the grand jury as to the whereabouts of unlocated witnesses; ordinarily the answers to such questions are harmless if not fruitless; . . . three [of the questions] were designed to draw information as to petitioner's contacts and connection with the fugitive witness; and the final question, perhaps an afterthought of the prosecutor, inquired of Weisberg's whereabouts at the time. . . . The three questions, if answered affirmatively, would establish contacts between petitioner and Weisberg during the crucial period when the latter was eluding the grand jury; and in the context of these inquiries the last question might well have called for disclosure that Weisberg was hiding away on petitioner's premises or with his assistance. Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy."[49]

The *Cusson* holding seems correct. The witness' trip to Mexico just before the Groves' trial and her return soon thereafter, together with the prosecutor's preliminary inquiry whether she had been subpoenaed, constitute a background against which the interrogation about meeting the Groveses shortly before she left the country takes on a definitely criminating complexion. But it is to be remembered that the criminating character of an affirmative answer arises from *this witness'* apparent evasion of process. In other words, the possible conspiracy to obstruct justice concerns the unavailability or concealment *of this witness.* The danger in the *Doran* and *Hoffman* cases was much more remote; indeed, it appears very speculative. In these cases, the

46. *Id.* at 491.

47. Hoffman v. United States, 341 U.S. 479, 71 Sup. Ct. 814, 95 L. Ed. 1118 (1951).

48. *Id.* at 481. The "Setting": Subpoenas had issued for some 20 witnesses, but only 11 had been served; as the prosecutor put it, he was "having trouble finding some big shots." Several of those who did appear and were called before the grand jury before Hoffman, had refused to answer questions until ordered to do so by the court. The prosecutor had requested bench warrants for 8 of the 9 who had not appeared the first day, one of whom was Weisberg.

49. *Id.* at 488.

obstruction, if any, to justice, arises from the absence not of this witness but of others—those about whom this witness is sought to be interrogated. The possibility of danger can be inferred only from the facts, first that John Doe is missing and second that this witness knows him. To generalize, the *Doran* and *Hoffman* cases seem to stand for the proposition that no witness, who is himself being interrogated in reference to the subject matter of the investigation, can be interrogated as to whether he has seen, recently, absent or missing witnesses who appear to be evading process or disregarding subpoenas. Thus, these holdings appear extreme. To say that because Hoffman knew the missing Weisberg, he could not be asked his whereabouts because it might have disclosed that "Weisberg was hiding away" on Hoffman's premises "or with his assistance" is to justify the suppression of important testimony on a highly speculative basis. This type of holding seems a far cry from the sturdier, more conservative doctrine of the earlier cases requiring a showing of more than "fanciful or imaginary" danger. To put the matter in another way, before the claim is sustained in this kind of context, something more should appear than that the interrogated witness is acquainted with the absent one. One would be less than realistic if he were not to assume that the overwhelming probability is that Hoffman's recalcitrance as to these particular questions arose from nothing but a desire to protect Weisberg.

"Who?"

Three cases from the Second Circuit can appropriately be considered first. In *United States v. Zwillman,*[50] the trial court adjudged the witness in contempt for refusing to answer before a grand jury, "who" his business associates were in the years 1928 to 1932, after refusing to permit examination of witnesses, who it was said, would testify that "tax investigations for the years involved" were being made. In the trial court, defendant's counsel said that defendant had been in the liquor business up to 1933 when the 18th Amendment was repealed. "In view of that statement," said the Court of Appeals in reversing, "and the apparent assumption of all concerned, proof of who were defendant's associates in business might tend to establish a conspiracy to violate the revenue laws by failing to pay taxes, to affix stamps or to make returns. . . . The repeal of the 18th Amendment would not validate violation of the internal revenue laws or conspiracies . . . to effect such violations. The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony. . . ."[51]

The *Weisman* case[52] deserves more than passing attention for a number of reasons: the opinion, written by a distinguished judge, presents a careful

50. United States v. Zwillman, 108 F.2d 802 (2d Cir. 1940).
51. *Id.* at 803.
52. United States v. Weisman, 111 F.2d 260 (2d Cir. 1940) (opinion by Learned Hand).

and illuminating exposition of the scope of the privilege and an application of general principles to questions innocuous on their face but deemed criminating in the particular context; the holding has without doubt exerted great influence upon the course of judicial decision in all circuits; and finally the court's inclusion in the relevant "background" facts of such extraneous matter as contemporary newspaper articles has raised some interesting questions which will be briefly discussed at a later point. Weisman, before a grand jury, was asked whether he had ever received any cables at Murray's restaurant in New York and also whether he knew anyone in Shanghai in the years 1934 to 1939.[53] The questions being "on their face innocent," said the court, it "lay upon the defendant to show that answers to them might incriminate him." But he "may not be compelled to do more than show that the answer is likely to be dangerous to him. . . . All this has been long understood, but it is not so clear to what facts the privilege extends. Does it protect more than those which 'tend' to prove a crime? Does it also cover those which can only be clues to the discovery of other facts which in turn so tend? The doctrine of *Counselman v. Hitchcock* . . . goes as far as the second; though we need not say how far it has been affected by later decisions [citing the *Mason* case]. . . . [N]obody supposes that the privilege is confined to answers which directly admit one [of the definite elements of the crime]. . . . A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary."[54] The court then identified the "setting" in which these questions had been asked: An indictment had been returned in the same district in 1937 charging thirty persons with conspiracy to import narcotic drugs from Shanghai, payment to be made by messenger or cable; cables also being sent from New York advising of the arrival of shipments, upon which arrangements for the next shipment, also by cable, would be made; the grand jury was investigating the importation of narcotics, and the prosecution had obtained three cables from Shanghai, in code, addressed to a person at the address of Murray's restaurant, and to these cables "the question almost certainly referred. . . . An article had appeared in a New York newspaper, declaring that the federal district attorney would soon indict, as a dealer in narcotics, 'the owner of a big advertising agency' who had been the 'one-time partner of a big gangster' and who had been 'in hiding for a month.'" Weisman was the head of an advertising agency and "it had been rumored" that at one time he had been the accomplice of a "gangster." "He had in fact gone to

53. While the witness was not in terms asked "Who?" he knew in Shanghai, it would no doubt be so construed by the witness. At any rate, the explicit "Who?" question would assuredly have followed an affirmative answer to the one put, if the answer did not identify his acquaintances. But however this may be, the question, taken only literally, appears to be in the same category as "Who?"

54. 111 F.2d at 261-62.

Florida under circumstances which suggest that he was trying to hide; and the prosecution had questioned his family about his business between 1934 and 1939 and had secured the books of his business. With this background it is easy to see that the danger from an answer to the first question [about the cables] was real. . . . [The newspaper article] directly pointed to the defendant, and it would certainly have disturbed any but the most hardy." As to the second question (whether he knew anyone in Shanghai during the period mentioned), the "case for the privilege . . . was not so strong; yet strong enough in our judgment. . . . But we are to take the question in its setting, including the other question and the information of which we may reasonably infer the prosecution had possession. . . . The persons in Shanghai with whom the owner of a New York advertising business would be like to be acquainted, were not many, and among them would be the senders, or sender, of any cables received at Murray's restaurant. . . . Again we are to remember that the defendant had been the object of much more than casual interest by the prosecution. These things made it perilous for him to answer. . . ."[55]

In the *St. Pierre* case,[56] the witness testified before a grand jury that money found on his person was given to him by Duke Farina, a bookmaker, to give to a New York business man as the proceeds of a bet placed with Farina by the business man. He then said that, instead of paying the business man, he kept the money. But he refused to name the business man. On the first appeal, the court, in sustaining the contempt judgment, first said that there was no privilege when the answer sought would not tend to show a federal crime. And there was "nothing shown which would render his conduct punishable under any federal statute. True, his counsel, in argument before the trial court and not under oath, asserted that appellant had transported the money to Canada, meaning, we assume, to indicate a violation of the National Stolen Property Act. . . ." But there was "no evidence" of interstate or foreign transportation, and thus the court was left to speculate as to

55. *Id.* at 262-63. The Court also said: "Mason v. United States . . . certainly does make against our conclusion, at least as to the second question. The Alaska statute there in question made it a crime to take part in a game of cards played for money; and the questions were merely asked whether the defendants had seen a game of cards being played, from which of course it does not follow that it was played for money, or that they had taken a hand in it, if it had been. Yet it is also true that an affirmative answer would have been an admission of one of the three elements of which their guilt would be composed: (1) a game of cards; (2) a money stake; (3) the witness a hand in the game. Nevertheless, we think that the decision did not necessarily go further than to hold that not even answers which directly 'tend' to prove the crime are inevitably protected; that there must be some reason to fear that the disclosure will put the witness in pressing danger. Indeed, perhaps in the end we should say no more than that the chase must not get too hot; or the scent, too fresh. In any event, we are satisfied that if the privilege is to be of any value, a situation like that at bar must fall within it." *Id.* at 263.

56. United States v. St. Pierre, 128 F.2d 979 (1942); 132 F.2d 837 (1942), *cert. granted*, 318 U.S. 751, 63 Sup. Ct. 768, 87 L. Ed. 1127 (1943), *dismissed*, 319 U.S. 41, 63 Sup. Ct. 910, 87 L. Ed. 1199 (1943).

the "existence of an essential element of the crime."[57] After serving his sentence, the witness was again called before the grand jury, again asked to identify the "business man," again refused, was again adjudged in contempt, and again appealed. "This time, however, it appears that the money which he embezzled he took outside the State of New York, and that supplies the element lacking before." The court held that the privilege protects against disclosure of a fact which will " 'tend' to incriminate, whether or not the answer would be an admission of one of the constitutive elements of the crime." The name of the victim would certainly so tend; it will furnish a witness whose testimony will assist the prosecution, whether or not it uses the respondent's confession. "He need not therefore [as he did] invoke the doctrine that a witness' corroboration is necessary to make a case against him [to establish independently the *corpus delicti*], or persuade us that his confession is admissible against him. [The privilege] protected him against divulging the name of his victim, regardless of anything else; and the only issue is that." But the majority held, notwithstanding, that he had waived the privilege by confessing all the elements of the crime. Having gone so far, "he may not withhold the details"; and "the disclosure of the identity of [his] victim was only a detail of what he had already confessed."[58]

In the *Greenberg* case,[59] after the witness had affirmatively answered the question: "Do you know any numbers writers around there [referring to 1133 West Diamond Street, Philadelphia], men who are in the numbers business?", he was asked "Who?" Not incriminating, said the Court of Appeals for the Third Circuit. "As we have already indicated, the sole basis advanced by appellant to support his fear of incrimination was that his answers might tend to show him guilty of the violation of the internal revenue laws. [He] has not pointed out to us and we are unable to understand how disclosure by the witness of the names of the number writers whom he admits that he knows could form a link in the chain of evidence which would convict him of the violation of any of the federal statutes to which he refers."[60] It will be

57. 128 F.2d at 981.

58. 132 F.2d at 838, 840. Judge Frank dissented. He thought there can be no waiver as to a particular question unless previous voluntary testimony has put the witness in danger of punishment. And here there was no danger without disclosure of the name of the victim. There was available no substantial independent evidence of the *corpus delicti*. If the prosecution can get the name of the victim, he said, such evidence will be available. In the United States v. Gates, 176 F.2d 78 (1949) the Court of Appeals for the Second Circuit affirmed a judgment holding Gates (one of the Communist Party leaders on trial in New York) in contempt for refusing to identify, on cross-examination, the persons who, as he had testified on direct, had prepared under his supervision a pamphlet entitled, "Who Ruptured Our Duck?". It was held his voluntary testimony on direct constituted a waiver of any privilege as to this question. However, in passing, the court said: "How the disclosure of their identity could incriminate the appellant it is impossible to perceive, since the pamphlet contains nothing on its face violative of federal law; indeed, it was introduced for the very purpose of negating the charges made in the indictment." 176 F.2d at 80.

59. United States v. Greenberg, 187 F.2d 35 (3d Cir. 1951).

60. *Id.* at 37, 40.

remembered that the judgment of the Court of Appeals was vacated by the Supreme Court and the case remanded to the Court of Appeals for reconsideration in the light of the Supreme Court's decision in the *Hoffman* case.[61] On reconsideration, in so far as this question is concerned, the Court of Appeals merely had this to say: "The Hoffman case did not involve questions of this sort and the ruling in that case is not applicable to them. . . . We adhere to [our former conclusion] and need add nothing to what we . . . said [in the prior opinion]"[62]

The *Weisman* decision appears unassailable, except for what appears to have been an unnecessary reference to a newspaper article, which has been expanded in a number of subsequent cases, into doctrine which, from a theoretical standpoint at least, appears difficult to justify, as will be suggested later. Quite aside from the newspaper item, the evidence would seem to have been ample to support the claim of privilege under the most rigorous tests.

The *Zwillman* and *Greenberg* cases treat differently essentially the same situation. Greenberg, it was said, must disclose the identity of the numbers-writers, whose business is not federally unlawful, even in the face of his claim that such disclosure might tend to criminate him of violation of federal revenue laws. But Zwillman need not disclose his associates in a business not federally unlawful because the disclosure might incriminate him of violation of the federal revenue laws. Moreover, the *Weinberg*[63] and *Camarota*[64] cases, previously discussed (the *Weinberg,* like the *Zwillman* case, from the Second Circuit), can scarcely be squared with *Zwillman.* If one must disclose his lawful business, notwithstanding fear of incrimination respecting federal tax law violations touching the income from that business, it would seem to follow that he must identify his business associates in a federally lawful business where his only apprehension is of the same sort.

So far as the *St. Pierre* case is concerned, any other result would be completely unjustifiable. To say, as the dissent appears to, that the witness, although voluntarily admitting all elements of the crime, may stop short at identifying the victim because until that disclosure has been made he is in no practical danger of prosecution or conviction is to confuse feasibility of prosecution with conceded guilt. It would be very strange doctrine to hold that the privilege against "incrimination" is not waived by voluntary disclosure of complete guilt. Whether his victim was *A* or *B,* he nevertheless has already completely "criminated" himself. The existence of technical rules about *"corpus delicti"* and "corroboration" cannot affect the fact of his concession

61. Greenberg v. United States, 341 U.S. 944, 71 Sup. Ct. 1012, 95 L. Ed. 1369 (1951).
62. United States v. Greenberg, 192 F.2d 201, 203 (3d Cir. 1951).
63. 65 F.2d 394 (2d Cir. 1933), *cert. denied,* 290 U.S. 675 (1933). See note 11 *supra.*
64. 111 F.2d 243 (3d Cir. 1940), *cert. denied,* 311 U.S. 651 (1940). See note 14 *supra.*

of guilt. Nor does this criticism of the dissent in the *St. Pierre* case require a quarrel with the *Counselman* rule.

Inquiries Concerning Activity in Behalf of or Membership in the Communist Party

In *(Patricia) Blau v. United States,*[65] decided December 11, 1950, the Supreme Court held that Mrs. Blau, called as a witness before a federal grand jury in Denver investigating various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigations, was justified in refusing to respond to questions which asked the "names of the State officers of the Communist Party of Colorado . . . . [T]he table of organization of the Communist Party of Colorado," whether she had been employed by the Communist Party of Colorado, whether she had had in her possession the books and records of that party, a description of the books, to whom she had delivered the books, and who then had them. Calling attention to the Smith Act, "making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; to be or become a member of such group with knowledge of its purposes," the Court concluded that "she reasonably could fear that criminal charges might be brought aginst her if she admitted employment by the Communist party or intimate knowledge of its workings. Whether such admissions by themselves would support a conviction under a criminal statute is immaterial, . . . [because her answers might very well furnish] a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act."[66] And in *(Irving) Blau v. United States,*[67] the Court arrived at a similar result in respect to questions "concerning the activities and records of the Communist Party of Colorado,"[68]

65. 340 U.S. 159, 71 Sup. Ct. 223, 95 L. Ed. 170 (1950).

66. *Id.* at 160-61. In Rogers v. United States, 340 U.S. 367, 71 Sup. Ct. 438, 95 L. Ed. 344 (1951), the Court held that where the witness had testified voluntarily that she held the position of Treasurer of the Communist Party of Denver until January, 1948, that by virtue of her office, she had been in possession of membership lists and dues records of the party, that she had turned them over to another and no longer had them, she was required to identify the person to whom she had delivered them. The Court said: "But when petitioner was asked to furnish the name [of this person] the court was required to determine . . . whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures." There must be "real danger" of further crimination. After her voluntary admissions, "disclosure of acquaintance with her successor presents no more than a 'mere imaginary possibility' of increasing the danger of prosecution." *Id* at 374-75.

67. 340 U.S. 332, 71 Sup. Ct. 301, 95 L. Ed. 306 (1951).

68. *Id.* at 333. Specifically, according to the court of appeals, 179 F.2d 559, 563 (10th Cir. 1950) Blau was asked "whether . . . he had collected dues from the membership of the Communist Party for a meeting of any kind." The court of appeals said that "perusal

which were put to Mrs. Blau's husband.[69] Prior to the decisions of the Supreme Court in the *Blau* cases, the Court of Appeals for the Ninth Circuit, in the *Alexander,*[70] *Doran*[71] and *Kasinowitz*[72] cases, had held within the privilege questions very similar to those propounded to Mr. and Mrs. Blau. All three cases were heard *en banc,* the court dividing 4-3.

The Court of Appeals of the Fifth Circuit had likewise come to a similar result in the *Estes* case[73] although it is to be noted that the *Estes* case involved questions which the court thought, at least indirectly, tended to show not that the witness was an officer, employee or functionary of the Party (as in the *Blau, Alexander, Doran* and *Kasinowitz* cases) but merely that he was a Communist or had attended Communist meetings. The witness was testifying before an immigration inspector at a hearing to ascertain the right of an alien to be and reside in the United States. The witness was asked if he knew whether the alien was a member of the Communist Party; if he knew whether the alien contributed funds to the Party and if he knew whether the alien attended Party meetings. In holding the witness entitled to refuse to answer, the Court of Appeals said:

> "The answers to these questions in themselves may not have even tended toward the incrimination of appellant, but they may have been links in a chain of circumstantial evidence strong enough to convict him of a number of crimes; or such answers might well provide the means whereby such evidence could be discovered. . . . There is no statute that makes it a crime to be a member of the Communist Party, but the very object of the investigation . . . was to ascertain whether the aliens in question were members of or affiliated with the Communist Party and therefore, subject to deportation under [the statute] which provides for the deportation of any aliens who are members of or affiliated with any organization . . . that believes in, advises, advocates, or teaches, the overthrow by force or violence of the government of the United States. . . . It is palpably inconsistent, in one breath, to urge that being a Communist is a ground for deportation for belonging to a group that encourages the overthrow of the government by force, and, in the next breath, to argue that it may not incriminate one to be compelled to testify that he is a Communist, knows Communists, or has attended a meeting of Communists. . . . He could hardly know whether the alien attended meetings without being present there in person, and evidence of appellant attending such meetings would tend to show that he was a Communist. . . . If affilia-

of his entire examination before the grand jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party." The court then held that having "without objection, answered at least one question showing [his] connection with the Communist Party, [he] thereby waived [his] privilege under the Constitution and [was] thereafter required to answer the questions propounded to [him]." *Id.* at 564. The Supreme Court did not deal with the question of waiver.

69. Blau was also asked "the whereabouts of his wife . . . and whether or not she held any official connection with the Communist Party." *Id.* at 563. The Supreme Court held that he could not be compelled, against a claim of the privilege protecting confidential communieations between husband and wife, to disclose the whereabouts of his wife. On this point, Justices Minton and Jackson dissented.

70. 181 F.2d 480 (9th Cir. 1950). See note 30 *supra.*

71. 181 F.2d 489 (9th Cir. 1950). See note 31 *supra.*

72. 181 F.2d 632 (9th Cir. 1950). See note 32 *supra.*

73. Estes v. Potter, 183 F.2d 865 (5th Cir. 1950).

tion with the Communist Party is sufficient ground for deportation of an alien for the reasons urged, it is a reasonable ground for a citizen to fear a prosecution for conspiracy."[74]

In *Brunner v. United States*,[75] the Court of Appeals for the Ninth Circuit held not criminating ,in the circumstances, questions to a government witness in a perjury trial asking whether he was a member of the Communist Party in Pasadena in 1937 and 1938 and whether (after the witness admitted he knew defendant) in the years 1937 through 1939 he had ever seen defendant at meetings of the Communist Party. There was no present danger to the witness, said the court. The chances of incrimination were remote. "The trial judge must necessarily be the arbiter and weigh the good or bad faith of the witness in his refusal and whether there is a bare possibility of legal peril or, on the other hand, reasonable ground to apprehend danger sufficient to require that the witness be afforded protection." And the court noted that "there was no Smith Act" in 1937 and 1938. "It is, of course, possible," said the court, "that a prosecution could be brought against Brunner for conspiracy to overthrow the Government of the United States, but the answers to the questions here propounded would not have connected him with a conspiracy. No conspiracy to violate the terms of the Smith Act could be prosecuted for those years. It is true that a conspiracy . . . might have existed then and, if proven to have continued to the present time, could be prosecuted now. Membership in the party alone would not constitute a link in that chain. . . . We find the trial judge exercised sound discretion in requiring the witness to answer . . . ."[76] The Supreme Court has granted certiorari in the *Brunner* case.[77]

74. *Id.* at 867-68. The court also said: "Appellant was not asked concerning things that he might have heard or been told. He was not asked if he knew the alien's reputation for communistic activities. The distinction is a significant one. He could not know the crucial things that he was asked about without furnishing a link in the chain of evidence that might be needed to convict him." *Id.* at 867.

75. 190 F.2d 167 (9th Cir. 1951).

76. *Id.* at 169. *Cf.* United States v. Dennis, 183 F.2d 201, 231-32 (2d Cir. 1950), where Judge Learned Hand speaking for the court said: "[The trial judge] charged the jury that they should use no declarations against any defendant, save those made by him himself, unless they were made within the period laid in the indictment. There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid. Whether they are relevant depends upon how far they form a rational support for believing that the conspiracy continued to 1945; but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed. . . . The same doctrine applies to evidence occurring before the acts charged had become a crime at all: *e.g.*, in the case at bar the visits of some of the defendants to Moscow before 1940 [the year of the passage of the Smith Act]. Just as in the case of events occurring before the dates laid in the indictment, so events occurring before the conspiracy had become a crime, may have logieal relevancy to the conclusion that the conspiracy continued until after 1940. It is *toto coelo* a different question whether we are treating them as *Media concludendi*, or as the factum itself. . . . We are not in accord with [the reasoning of Wolf v. United States, 259 F. 388, 393 (8th Cir. 1919) and Haywood v. United States, 268 F. 795, 806 (7th Cir. 1920)]; and it follows that we regard the admission of evidence of

In the present context, there can scarcely be doubt of the criminating character of interrogation calculated to disclose employment of the witness by the Communist Party, or that he holds an office or that he is otherwise active in its management. The Smith Act, the New York prosecution and conviction of the national party leaders, the affirmance of this conviction which necessarily required a holding sustaining the validity of the Smith Act, the pendency of similar prosecutions in various parts of the country and in Hawaii of the members of regional "second teams," constitute a "setting" and background, which certainly puts any officer, organizer or functionary of the party in a perilous position indeed.

But the matter stands not so clearly so far as mere Party membership is concerned. Interrogation calling for no more than a concession of membership has not yet been directly and specifically forbidden by the Supreme Court.[78] The *Blau* cases dealt only with questions concerning employment by the party and organizational activity,[79] although it is to be noted that Justice Black in the *Patricia Blau* case said that "the holding below was in conflict" with the *Estes* and *Alexander* cases, thus implying that the problem was essentially the same in all three cases; and certainly the *Estes* case is a square holding that questions which tend, even indirectly, to show the witness' membership in the party or his attendance at party meetings, must be deemed criminating in the present circumstances.

Nevertheless, the step from a holding that the questions to the Blaus were criminating to one stigmatizing questions as to membership alone, is not an inconsiderable one. This is certainly not to predict it won't be taken. The point merely is that it is perhaps arguable whether, even in the present posture of affairs, mere membership in the Communist Party ought to be deemed a "link in the chain of testimony" necessary to convict or a "rung of the rational ladder" by which the witness may be convicted of the crime of being a member of a group devoted to the violent overthrow of the government with knowledge of its purposes.

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what any of the defendants did before the Smith Act was passed as competent and relevant. Indeed, it would have been equally so, had its use not been confined, as it was, to the individual defendants concerned; that is, it would have been, had the judge concluded, as well he might, that already all the defendants were engaged in the same enterprise that was charged against them in the indictment." See, also, Zwillman v. United States, note 50 *supra*.

77. 72 Sup. Ct. 364 (1952).

78. See Falknor, *Evidence* in 1950 ANNUAL SURV. AM. L. 804, 810-12 (1951).

79. There appears to have been considerable popular misunderstanding on this point. For example, in a Washington dispatch published in the New York Times of Dec. 17, 1950, § 4, p. 10E, col. 2, it is stated that "to reach [the *Blau* decision] the Court had to find, in effect, that a mere admission of membership in the Communist party might provide a 'link in the chain' leading to criminal prosecution." And Norman Thomas said that "the Supreme Court . . . unanimously upheld the right of a witness, a Mrs. Patricia Blau, to refuse to answer an inquiry as to her membership in the Communist party on the grounds that she might incriminate herself." Thomas, *Civil Rights but not Conspiracy*, N.Y. Times Mag., Jan. 7, 1951, p. 42.

Some Miscellaneous Questions

An involuntary bankrupt filed schedules of liabilities and assets under oath but when interrogated concerning these, refused to answer. The filing of the schedules, said the Supreme Court, did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might incriminate.[80] "It is impossible to say from mere consideration of the questions propounded . . . that they could have been answered with entire impunity."[81] But a bankrupt will not be excused from filing schedules because he believes "that the same may tend to incriminate or degrade" him.[82] Here, except for the witness' statement, "there [were] no facts or circumstances of any kind whatever from which the [trial] court could determine whether the refusal was based on merely fanciful grounds or upon some imaginary fear or arbitrary reason or, on the other hand, upon some ground which fairly opened up the right of the defendant" to claim the privilege. "It is plain that there are many questions which can be answered without a remote possibility of subjecting the bankrupt to a tendency to incriminate."[83]

Nor can one refuse to file an income tax return because the form calls for answers within the privilege.[84] That would be pressing the privilege too far. He must make the return, raising his objection in the return to particular questions. And in response to the contention that answers to questions in the return might disclose gains from illicit traffic in liquor, the court said: "It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return . . . . He could not draw a conjurers' circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."[85]

In the *Elwell* case,[86] the Court of Appeals for the Seventh Circuit held that the city editor of a Chicago newspaper must answer before a grand jury a question as to the authorship of an article in that paper. The court emphasized the circumstance that "the plaintiff expressly refused to give any information which would enable the Court to determine whether his answer . . . would tend to place [him] in peril."[87]

80. Arndstein v. McCarthy, 254 U.S. 71, 41 Sup. Ct. 26, 65 L. Ed. 138 (1920).
81. *Id.* at 72.
82. *In re* Arend, 286 Fed. 516 (2d Cir. 1922).
83. *Id.* at 517-18.
84. United States v. Sullivan, 274 U.S. 259, 47 Sup. Ct. 607, 71 L. Ed. 1037 (1927).
85. *Id.* at 263-64.
86. Elwell v. United States, 275 Fed. 775 (7th Cir. 1921).
87. *Id.* at 779.

The victim of an alleged violation of the Mann Act (transportation of the witness from San Francisco to Klamath Falls, Oregon, for immoral purposes) refused to testify before a grand jury as to the circumstances of the trip and whether she worked as a prostitute after her arrival at Klamath Falls.[88] She conceded her answers could not tend to show her guilty of a violation of the Act, but contended they might tend to show her guilty of a conspiracy with the transporter to violate the Act. The case went to the court of appeals on the judgment roll alone, without a bill of exceptions. She must answer, said the court of appeals. "It cannot, however, be said that appellant's answers . . . must necessarily have tended to show her participation in such a conspiracy. . . . Whether there was or not a reasonable probability" that her answers would have tended to show her participation in a conspiracy, "was a question of fact to be determined upon the evidence received at the trial." But the evidence was not before the appellate court. And it "might have shown either that appellant merely acquiesced or that she was forcibly abducted or that she had been pardoned. . . . Not having the evidence before us, we must indulge the presumption that it justified the trial court's conclusion."[89]

Before a hearing commissioner of the Civil Service Commission, conducting an investigation of possible violations of the Hatch Act, witnesses were asked whether they had been "requested by any official or employee of the Division of Forestry to make a contribution to the Democratic State Campaign Fund"; and one witness was asked whether she had made such a contribution and had signed a statement to that effect. They must answer, said the Court of Appeals of the Sixth Circuit.[90] The Act does not penalize the making of a contribution. "It penalizes the solicitation of contributions under the circumstances detailed therein."[91] Whether direct answers were criminating in the sense that they could have tended to establish a conspiracy to violate the act, was not discussed.

In *United States v. Rosen*,[92] the court of appeals held criminating, questions to a witness before a grand jury investigating charges against Alger Hiss, which were calculated to disclose the witness' purchase of an old Ford car from Hiss in 1936, which was within the period Chambers testified Hiss had been engaged in "substantive federal crimes including among them violations of the laws relating to espionage."[93] In the circumstances, said the court, Rosen was privileged to refuse to answer.

88. Miller v. United States, 95 F.2d 492 (9th Cir. 1938).
89. *Id.* at 494.
90. Wages v. U.S. Civil Service Comm., 170 F.2d 182 (6th Cir. 1948).
91. *Id.* at 183.
92. 174 F.2d 187 (2d Cir. 1949), *cert. denied*, 338 U.S. 851 (1949).
93. *Id.* at 191. Hiss had testified that in 1935 he turned the car over to Chambers incidental to Chambers' subletting of his apartment. Chambers denied the subletting or

"He knew that the disposition by Hiss of this Ford car which he had used while engaged in such unlawful activities had become a matter material to the investigation being conducted by the grand jury. . . . He knew . . . that there were peculiar and unusual circumstances regarding his connection with the car and that the grand jury was seeking evidence to show just what they were and what they signified. . . . The evidence which tends to show that Hiss was guilty of criminal conspiracy may also show . . . that the appellant was, and perhaps is, a co-conspirator in that or related conspiracies for which he may be prosecuted. . . . The questions asked Rosen appear to involve him in these charges [against Hiss]. Under these circumstances Rosen was justified in believing that he was in a precarious situation and in view of the authorities cited [*Counselman, Brown, Mason, Zwillman, Weisman, Cusson*] he had the right to refuse to answer questions which might connect him with the Ford car, or might lead to the discovery of evidence connecting him with it, or otherwise link him up with an alleged conspiracy."[94]

This case is very difficult to understand. The apparent holding that an admission of the purchase of a car from Hiss, would furnish a significant link in the chain of testimony necessary to convict Rosen of a conspiracy with Hiss to commit espionage against the Government, seems completely out of line with the traditional doctrine requiring that the danger must be substantial and appreciable. The "danger," if any, in respect to the questions to Rosen, so far as possible "guilt" is concerned, appears to have been of a very remote and speculative sort. Purchase of a car from Hiss could constitute only an extremely tenuous connection with Hiss' activities. Unless the court means to put the matter on a completely subjective basis, *viz.*, Rosen's fear, aside from a substantial basis for it. And there is language in the opinion which seems to put the emphasis on what Rosen "knew" and on the fact that he "believed he was in a precarious situation." But it is insisted that this cannot be the test. The criterion should be whether the answer calls for information which criminates, which tends to establish guilt, not whether the witness fears prosecution or is apprehensive that the grand jury is breathing down his neck.[95] It seems appropriate also to observe that on the basis of the "setting" disclosed in the opinion, one can scarcely avoid the conclusion that Rosen's recalcitrance was motivated not by fear for himself, but by a desire to protect someone else.

Consideration of Newspaper Articles in Determining "Danger"

It will be recalled that the court in the *Weisman* case[96] gave consideration to a newspaper article asserting that the district attorney "would soon indict[97]

the receipt or purchase of the car. A certificate of title had been recorded in Washington which purported to show that the title to the car had been transferred to Rosen upon his signed application therefor and his signature appeared to have been acknowledged before a notary public.

94. 174 F.2d at 191-92.

95. See note 8 *supra.*

96. 111 F.2d 260 (2d Cir. 1940). See note 52 *supra.*

97. Evidence of the announced plans of the prosecution to pursue the witness and others similarly situated has been deemed important in a number of cases. See, *e.g.*,

. . . 'the owner of a big advertising agency' who had been the 'one-time partner of a big gangster' and who had been in hiding for a month." The evidence apparently established that Weisman was the head of an advertising agency, that "it had been rumored that at one time he had been the accomplice of a 'gangster,' " and that he had gone to Florida under circumstances "which suggest he was trying to hide." The court said that the newspaper article "directly pointed to the defendant, and it would certainly have disturbed any but the most hardy."[98] And in a number of subsequent cases, attention has been accorded to contemporary newspaper items.

In the *Hoffman* case,[99] the Court called attention to the fact that Hoffman had served a sentence on a narcotics charge and that "his previous conviction was dramatized by a picture appearing in the local press while he was waiting to testify, in which [he] was photographed with the head of the Philadelphia office of the United States Bureau of Narcotics in an accusing pose."[100]

The main opinion in the *Kasinowitz* case[101] laid stress on an article in the Los Angeles Examiner headlined "Officials Plan 'All-Out' Red Inquiry Here" and which went on to say that Communist groups and activities in the area were due for a "top-to-bottom" investigation by the grand jury, this being indicated by "high Government officials" and that the United States Attorney had declared that contempt judgments against ten grand jury witnesses were "only the opening gun in the Government's inquiry into subver-

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Healey v. United States, 186 F.2d 164 (9th Cir. 1950), where the main opinion emphasizes the issuance of a press release by the Department of Justice in which the *Alexander* and *Kasinowitz* [contempt] cases were described "as a part of the Department's record of 'Prosecution . . . against Communists in the United States.' " Judge Pope in his concurring opinion said that the witness' "privilege is not dependent upon the current intention of the prosecutor which might change the next day. Reasonable cause for apprehension existed by reason of (1) the existence of the Smith Act, plus (2) the fact that indictment of others had been returned under the 'affiliation' clause of that Act. It was therefore unnecessary to bolster these facts with evidence of the Department's press releases." 186 F.2d at 171. And in his concurring opinion in the *Alexander* case, 181 F.2d 480 (9th Cir. 1950), Judge Pope questioned the propriety of examining the district attorney as to the purpose of the investigation. "My own opinion," he said, "is that it would be an intolerable interference with the work of the United States Attorney if he must be subjected to an inquisition as to his plans and purposes in respect to future prosecutions merely because some recalcitrant witness chooses to test his . . . privilege. I think this is not in the public interest." Although, he continued, a witness urging his privilege "should not be required to prove that the Government had a presently formed plan to prosecute him. When the witness has shown reasonable apprehension of danger, he has shown all that is required of him." 181 F.2d at 488. In the *Zwillman* case, 108 F.2d 802 (2d Cir. 1940), the trial court sustained an objection to an attempted interrogation of the assistant United States Attorney as to the purpose of the grand jury investigation. The court of appeals said the Government "was not obliged to . . . state the purpose of the inquest or whether prosecution of the [witness] was proposed." 108 F.2d at 803. In the *Hoffman* case, 341 U.S. 479, 71 Sup. Ct. 814, 95 L. Ed. 1118 (1951), the purpose of the Attorney General, in conducting the investigation, as explained by the presiding judge in his charge to the grand jury, appears to have been considered a relevant circumstance. See also United States v. Jaffe, note 38 *supra*.

98. 111 F.2d at 262.

99. Hoffman v. United States, 341 U.S. 479, 71 Sup. Ct. 814, 95 L. Ed. 1118 (1951).

100. *Id.* at 489.

101. 181 F.2d 632 (9th Cir. 1950).

sive and disloyal groups." The court said that they were "not in accord with the contention that a Grand Jury witness cannot possibly form a reasonable apprehension from matters stated in the press that answers to questions may incriminate him. Here the report is in the press of the city of the prosecution and the statement reported is of the prosecutor himself about the nature of the Grand Jury proceedings."[102]

In his concurring opinion in the *Alexander* case Judge Pope said that the approval by the main opinion "of the offer of newspaper articles is particulary unfortunate. I know," he said "that in [the *Weisman* case] the Court paid attention to newspaper articles, but I think it did so only in passing, and after commenting upon the evidence that this particular defendant had himself been investigated. In any event, I do not subscribe to any such rule of evidence, particularly in a case where the matter is unnecessary to the decision."[103]

If the hearsay rule is to be completely relaxed in formulating the "setting" or "background" against which the danger to the witness is to be determined, the consideration of newspaper items is of course unobjectionable in so far as they are relevant to show the signifieance of the questions and the existence and availability of other criminating evidence. But it is suggested that it will not do to say that evidence of newspaper accounts escapes the hearsay rule because, while not admissible as proof of the truth of the assertions contained therein, they are relevant as showing the witness' belief in their truth and

102. *Id.* at 633.

103. 181 F.2d 480, 488 (1950). Two District Court decisions deserve mention. In United States v. Emspak, 95 F. Supp. 1012, 1019 (D.D.C. 1951) the court said "the use of newspaper clippings has been sanctioned as admissible to show a reasonable apprehension of incrimination [citing *Alexander* and *Weisman*], yet this type of evidence must be received with caution. It will certainly not be noticed judicially but must be introduced subject to objections as to relevancy, authenticity, and the usual objections to documentary evidence." In United States v. Jaffe, 98 F. Supp. 191, 194-95 (D.D.C. 1951) the court said: "While, of course, newspaper articles and comments are not admissible in evidence as proof of the facts contained therein, it is clearly recognized that such published articles are admissible to show comments that may have reasonably caused apprehension to a person that he is in danger of being prosecuted for an offense, and thus justify him in claiming privilege in refusing to answer questions which might tend to incriminate him [citing *Weisman* and *Alexander*]. The flood of such newspaper publicity for many weeks immediately prior to the testimony of this defendant with refcrence to his connection with the Amerasia case, his reputed connection with communist activities, and association with persons engaged in furthering communist objectives is abundantly revealed in exhibits filed in the instant case. [Here the court listed these exhibits, consisting of 29 news items or stories from March 7, 1950 to June 17, 1950, in many papers including the New York Times, the New York Journal American, the Herald Tribune and the World Telegram and a booklet entitled, "The Shocking Story of the Amerasia Case," published by the Scripps Howard papers.] It was revealed in such published articles that a federal grand jury in the Southern District of New York was at that time investigating action of the Government in connection with the prosecution and disposition of the defendants in the Amerasia case, and the testimony in the instant case shows that Mr. Roberts Morris, Assistant Counsel for the Sub-Committee . . . did appear as a witness before such grand jury. Among the published articles . . . is one in which Senator McCarthy, the author of the Senate Resolution pursuant to which the Sub-Committee was conducting the investigation, is quoted as having urged the Sub-Committee to subpoena this defendant and other persons, and saying, 'As to Field, Browder, Jaffe and Stachel—I'd either make them indict themselves or perjure themselves.'"

thus his fear or apprehension of danger. A witness may be very fearful and skittish about the results of the interrogation; indeed, his fear of true bill at the hands of this grand jury may be a very reasonable one, yet that is not the issue. As Marshall put it, "it belongs to the Court to consider and decide whether *any* direct answer *can* implicate the witness."[104] And certainly one may fear, even reasonably, that he may be suspected, perhaps prosecuted, for an offense as the result of his answers yet at the same time not actually be "implicated," that is, "involved deeply," thereby so far as guilt is concerned. Of course, the point made is applicable not only to newspaper articles but to a considerable array of other types of hearsay which appear to have been considered in the more recent cases. Perhaps in these situations, and by the nature of the case, the hearsay rule had better be put aside, but it would seem best to do it more forthrightly. The attempt to avoid the hearsay rule by talk about the witness' state of mind accentuates a discernible tendency to put the whole matter on a subjective basis, thus impairing what seems to be the sounder view of the earlier cases that the claim of privilege will be sustained only where the *judge* finds danger of *actual implication.*

CONCLUSION

The holdings in the Ninth Circuit cases that a witness may not be compelled to say if he knows *A* if "it is believed" or "is feared" that *A* is a functionary of the Communist Party seem to represent a wide departure indeed from the doctrine of the *Mason* case; and if it was Justice Holmes' opinion that "it would be an extreme and extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime,"[105] it is a very good guess that it would have seemed to him an equally extreme and extravagant application of the constitutional provision to allow Hoffman to refuse to say when he had last seen Weisberg, the missing witness, and if he knew where he then was, because of the possibility that his answers might "establish contacts between [Hoffman] and Weisberg during the crucial period when the latter was eluding the grand jury" and of the possibility that the question about Weisberg's present whereabouts might "have called for disclosure that Weisberg was hiding away on [Hoffman's] premises or with his assistance."[106]

In other words, a good many of the recent federal holdings appear to rest on extremely remote and speculative possibilities of danger. Not only that: it seems a fair inference that in a good many of these cases, the claim of privilege was motivated, not really by fear of self-crimination, but by a desire to protect someone else. It appears justifiable, therefore, to suggest that there

104. See note 8 *supra.*
105. 274 U.S. 259, 263-64, 47 Sup. Ct. 607, 71 L. Ed. 1037 (1927). See note 85 *supra.*
106. 341 U.S. at 488.

is evidence of a tendency to overlook Cockburn's admonition that "the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."[107] Departure from this sound doctrine constitutes more than mere theoretical heterodoxy—each time relevant evidence is suppressed, society suffers, concretely and palpably. So there is something quite substantial to be said for a reasonably cautious and conservative interpretation and application of this privilege.

Justice Black said in his dissent in the *Rogers* case that "some people are hostile to the privilege; they consider the provision as an outmoded relic of past fears generated by ancient inquisitorial practices that could not possibly happen here. For this reason, the privilege to be silent is sometimes accepted as being more or less of a constitutional nuisance which the courts should abate whenever and however possible."[108] Such an end, he observed, may be achieved by a narrow construction of the scope of the privilege and by a broad construction of the doctrine of waiver. He deprecated such an attitude as improperly limiting the Fifth Amendment's safeguards.

But one, though not "hostile" to the privilege and though not deeming it necessarily a "nuisance,"[109] may still believe that opposing social interests dictate the exercise of care against extreme and overly-generous interpretation and application. To interpret and apply the privilege without regard to the public interest and without striving to accommodate that interest, as far as may be done without doing violence to the privilege, within its traditional scope, would be unrealistic and doctrinaire. And it seems extreme to say, or to imply, that a reasonably conservative approach to the problem will make likely the institution here of the "ancient inquisitorial practices."

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107. 1 B. & S. at 330, 121 Eng. Rep. at 738.

108. 340 U.S. at 375-76. There is, of course, a difference of informed opinion about the justification for the self-crimination privilege. Professor McCormick in *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 511 (1938) had this to say: "That curious survival, the privilege not to testify against oneself, will finally be seen for what it is, and will then disappear. It derives from a political counter used by the Parliament party against the Crown in the sixteen hundreds. Until then the accused had regularly been interrogated in common law criminal trials, but indignation at overefficient administration of the heresy laws in the ecclesiastical and administrative courts dominated by the king's party, made it necessary to find a slogan to discredit them. That shrewd legalist, Coke, was able to turn against the canonists a canon law maxim which seemed to forbid the very system of inquisition on which the procedure of those courts was founded. Apart from the exigencies of political struggle, the notion that there is anything unfair when a person is suspected of wrong, in making inquiry of that person himself and expecting him to answer, is quite repugnant to common sense. We do not act on it in the ordinary affairs of life, and juries do not act on it in criminal trials."

109. And agreeing with Judge Kirkland that "even Satan" should get a "fair trial in the American courts." (Associated Press dispatch dated Feb. 12, 1952, Oakland Tribune, Feb. 12, 1952, reporting the acquittal of Steve Nelson of a charge of contempt based on his refusal to answer questions before the House Un-American Activities Committee.)