

LETTER TO THE EDITORS

October 7, 1969

Board of Officers
 University of Pennsylvania Law Review
 3400 Chestnut Street
 Philadelphia, Pa. 19104

Dear Sirs:

In the March issue of Volume 117, *University of Pennsylvania Law Review*, Mr. Justice Arthur Goldberg attempted to reply to some of the attacks recently launched against the Supreme Court's decisions involving the fifth amendment. To those of us who feel that the fifth amendment should be preserved intact, the Article was a disappointing rejoinder to the proposal submitted by Judge Henry Friendly in *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

The Court's detractors accuse the justices of being overly solicitous of a suspect's interests. Through most of the article, the best that Justice Goldberg can do is repeat and enlarge upon his explication of the privilege in *Murphy v. Waterfront Commissioner*, 378 U.S. 52 (1964). In that opinion he suggested that the constitutional immunity from compelled self-incrimination reflects, *inter alia*, the American people's "unwillingness to subject those suspected of crime to the cruel trilemma of perjury, self accusation or contempt" *Id.* at 55. But disinclination to cruelty was not the primary moving force in the establishment of the fifth amendment. As Judge Friendly has pointed out, this is no more cruel than requiring a mother to take the stand to accuse her own son.

Justice Goldberg's article is not a defense of the right to remain silent, but an apology for it. The privilege must be defended on the attacker's battlefield and with his own weapons. To defend a citizen's right to shun the snooperies of a McCarthy is to joust at windmills, for today's challenge comes not from the House Un-American Activities Committee, but from responsible men, many of whom are deeply concerned about crime in our society.

Inherent in our Constitutional framework is a presumption that the accused is innocent until proven guilty. The suspect's right to stand mute is the mechanism through which that presumption operates. If forced to choose between self-accusation and perjury, many defendants would proclaim their innocence and suborn perjury. Juries, well aware

of the pressure upon the accused, would tend to disbelieve defense testimony to a greater degree than they do now. Thus, compelled testification would reduce ineluctably the fundamental presumption of innocence.

Firm adherence to the presumption of innocence requires that jurors not be urged to draw inferences from the defendant's silence. Where the prosecutor inveighs against the exercise of the privilege and comments upon the defendant's refusal to testify, he emasculates the presumption.

Records of all corporations including one-man corporations are not subject to the fifth amendment privilege, while the corporate officer's testimony is. Distinctions based upon the surrender of the fifth amendment privilege in exchange for the advantages of corporate form are specious. Since business records cannot be as easily falsified as an individual's testimony, a jury is not unduly skeptical of their reliability as objective evidence. When forced to produce these records the holder has no opportunity to perjure himself; thus no presumption of guilt arises. The inconsistent treatment of corporations and natural persons is otherwise unjustifiable.

Viewing the fifth amendment as a corollary to the presumption of innocence obviates reliance upon the amendment where only an overly loose construction will yield a desired result. A semantic demonstration that a criminal defendant has in some way been "compelled to be a witness against himself" may not be convincing. The argument is purely formal; thus it may be stalemated by an adversary's refusal to construe the words of the amendment quite so broadly.

Let us not, then, call the fifth amendment a concession to the criminal in us all. The privilege does not reflect an attempt to give the criminal a sporting chance in his battle with the oppressive forces of law and order. It is, rather, the essence of American criminal justice.

LAWRENCE KRAMER
Columbia Law School, '71