SELF INCRIMINATION*

In these days of discontent with the administration of the criminal law, there is a widespread inquiry for the reasons of the apparent inability of public officials, and the courts, adequately to deal with an admittedly serious situation. Many reasons, some sound, and others not so sound, have been assigned for the prevalency of so-called crime waves. But, so far as is readily observable, the possible culpability of the fourth and fifth amendments of the Federal Constitution, for present conditions, although suggested, has not been stressed. Nevertheless, there is some basis for the belief that these amendments, as they are at present interpreted and applied, have come to be something of a plague upon the enforcement of law, order and public decency.

From an experience that begins to be long, I have no hesitancy in saying that the conviction of criminals has become so difficult as to constitute a menace to life and property. That such conclusion is not altogether fanciful would seem to be indicated by a statement recently issued by the Chicago Crime Commission. That document declares that in the midwestern metropolis 991 murders were reported as having been committed over the period beginning January 1, 1921, and ending November 1, 1924. The number of individuals indicted for participation in these homicides was 485, and the number of trials was 480. The latter resulted in the imposition of only 250 penalties or sentences.

If further evidence of lawless conditions be required, it may be supplied through a visit to the streets of New York. There, upon any business day, one can see armored motor cars, with

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*This article is not accompanied by any claim that it is a treatise or an exhaustive dissertation upon the law of self-incrimination. On the contrary, it is merely the product of a rather lengthy and intimate experience with Federal criminal law and procedure. Feeling as I do, that the criminal law administration can, and should be made more efficient than it now is, I make bold to restate that which has been better stated by abler men years and years ago. Almost a decade upon the bench has taught me how slowly fixed legal principles move from the grooves into which they have been laid for a considerable time. Nevertheless, I do wish to protest against certain rules which, to me, seem somewhat inimical to proper law enforcement, and the best interest of the public.

J. C. K.

fully armed guards, transporting valuables through the public streets, notwithstanding that the thoroughfares are policed with officers at almost every corner. The crime records of New York City are proof positive that armored trains are not employed merely for scenic effect. They serve a purpose much more practical and utilitarian—they afford the only reasonable security that exists against holdups and banditry.

Reverting to the subject of the reasons for the existence of this state of affairs, it may be said that the law-breaker of the present day has at his command every aid and facility afforded by the dissemination of knowledge, and the advances in science, which have characterized these latter years.

Given a swift automobile, a repeating pistol, a telephone with which to arrange plans with a confederate, and a requisite amount of nerve, coupled with a knowledge that, in effect, our fundamental law is unduly considerate of criminals, the murderer or the highwayman may proceed to carry out his purposes with a feeling of comparative security. He is aware that he cannot be interrogated against his will; he knows that his house cannot lawfully be searched except with the loss of much time, and the expenditure of great technical effort upon the part of prosecuting officials. He understands that a large portion of the public will have for him, and his bravado, a certain sentimental regard, and that, if apprehended, he may lay store by the certainty that the jurors before whom he will be tried, will be reluctant to rely upon the testimony of police officers and detectives. Under the influence of the novelist, the dramatist, and the writer of scenarios, there is a popular impression that "frameups" constitute the chief occupation of those charged with the detection and punishment of crime. Distrust of police testimony is the result.

In short, the perpetrator of a major crime realizes that his present-day offense, if prosecuted at all, will be disposed of with the ponderous and slow-moving machinery of seventeenth century manufacture, greased only by the mythical oil of modern romanticism.

In passing, it is not to be overlooked that many persons lay some of the failures in the prosecution of criminals at the doors of graft and politics. Undoubtedly, these elements are contributing causes, as is the disposition of jurors to visualize the plight of a defendant rather than that of his victim. But, in my opinion, a not insignificant reason for the inefficiency, of which complaint is long and loud, is the rigidity with which the self incrimination clauses of the Constitution have been interpreted by our meticulous courts.

Of course, no thought or expectation is entertained that the fourth and fifth amendments will be formally modified. From the fate which overtook the Child Labor Amendment to the Constitution, it would seem that for the present, there will be no further tinkering with fundamental law. Any curbing of the criminal instinct, through the limitation of the self-incriminating sections of the Constitution, must be applied by means of judicial decision and legislative enactment. Within certain boundaries, those methods are believed to be both feasible and lawful. By this is meant that the courts are not called upon to make a fetish out of the fourth amendment, nor is Congress, in attempting to carry out the true spirit of the fifth amendment, bound to be maudlinly compassionate toward persons accused of crime.

The mere suggestion that the courts and the Congress have been guilty of such practices may give offense to some persons, who, reading this article, will conclude that the plan here proposed would, through the limitation of constitutional safeguards, endanger the foundation stones of our liberties. The desire is that they should believe that the chief result of a greater latitude in interpreting the amendments, would be the curtailment of the wanton license now exercised by criminals, and the greater safety of the life and property of the law-abiding citizen.

Time and space will not admit of an extended analysis of the origin and history of the fourth and fifth amendments. Suffice it to say, that neither of them had a genesis that can be said to have been prophetic of the great repute they have come to enjoy. My impression is, that so many have been the criminals who have worshipped at the shrine of the amendments, and so

seldom have honest and law-abiding men had occasion to seek their protection, that their adulation by the law-breaker has given the people at large a false conception of their proper breadth and compass.

Unless my recollection be faulty, James Otis himself conceded the legality of special writs directed to special officers, commanding them to search houses specifically set forth upon the oath of the person who suspected that smuggled goods might there be concealed. The argument that Otis made was against general warrants, directed to anybody and everybody, and which might, without restriction, be used by one person to annoy and harass another. Such, too, was the character of the opposition that was voiced by the editors of England whose houses were searched in pursuance of the warrants issued by Lord Halifax in his endeavor to discover the publishers of the North Briton, which had libeled the British crown.

As one reads the history of the fourth amendment, it is difficult to suppress the suspicion that the regard for private security which gave it birth, may, in part, be accounted for by the favor with which some of the early colonists looked upon the ancient and profitable calling of smuggling.

Then, too, the fifth amendment seems to have had one of its roots firmly embedded in the controversies which, in the latter part of the sixteenth century, raged between the ecclesiastical and the law courts. It was in 1615 that Coke held against the administration of an ex-officio oath by an official of the church. The objection, as pointed out by Wigmore in his great work on Evidence, "was not that a person charged with a particular crime might be held to answer, but that he should be charged ex-officio in a cause not testamentary or matrimonial, but penal." Indeed, it was not until the latter part of the reign of King James that the House of Lords decided that the exaction of testimony from Lilburn, the free thinker and free speaker of his time, was illegal and most unjust. But, here again, it must be remembered that Lilburn's objection was limited to being compelled to answer without being charged with a definite crime. It seems not to have occurred to him to contend that he might

properly refuse to answer were he called upon to refute a specific allegation.

But, whatever may have been the source of the amendments, they have been so interpreted in Congress and in the courts, that it is high time for both of these institutions to retrace a part of their steps.

Representative of the class of court decisions which, in my judgment, should be modified, if not entirely relegated to the judicial junk pile, are *Boyd v. United States,*[1] and *Weeks v. United States,*[2] and *Silverthorne v. United States.*[3] Of the Boyd and Weeks cases, which are bulwarks in the defense of guilty men, when the law of search and seizure is involved, Mr. Wigmore says that they are the product of "misguided sentimentality." He feels that their doctrine "for the sake of indirectly and contingently protecting the fourth amendment, appears indifferent to the result of making justice inefficient." "The Boyd and Weeks decisions," he says, "put the Supreme Courts in the position of assisting to undermine the foundation of the very institutions they are set there to protect. They regard the overzealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer." In this statement of Mr. Wigmore, and in his further averment that, "an illegality in the mode of procuring evidence is no ground for excluding it," I record my concurrence.

If an officer of the law in the discharge of what he conceives to be his duty should overstep the bounds of constitutional restraint, and should come into possession of evidence tending to establish the commission of a crime, why should the Government be prejudiced, and not only possibly, but probably, deprived of evidence which it might have obtained through lawful means but for the unauthorized act of a subordinate officer? Would it not be better that the officer be punished and rendered civilly liable, rather than that justice be defeated?

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[1] 116 U. S. 616 (1885).
[2] 232 U. S. 383 (1913).
[3] 251 U. S. 385 (1919).

In no way, other than in the enforcement of the criminal law, is the Government held to be a guarantor of the conduct of one of its servants. It disclaims any intention to be such with respect to other activities. Hence, it is, that the citizen suffers, and not the Government, if it be that the citizen's goods be stolen by customs officers while under an unlawful seizure. Should the Collector of Internal Revenue conceive it to be the fact that one of us is improperly withholding an assessed tax, he may issue his warrant of distraint, however unjust and oppressive his actions may thereafter be shown to be. But once let the fourth assistant deputy of a Department of Justice agent find incriminating papers in an "unreasonable search" of the house of the vilest criminal, and our law rises up in its majesty; imputes wrong to its agent, and sacred privilege to him who has violated its commands. It then proceeds to exculpate the latter, sending him hence with words of abject apology. Such was the result in the case of *Gouled v. United States.*[4] The court there held that the secret taking, without force, from the house or office of one suspected of crime, and in the absence of the owner of a paper belonging to him, having evidential value only, by the representative of *any branch or sub-division* of the Federal Government, violates the constitutional guaranty against unreasonable searches and seizures, whether entrance to such house or office be obtained by stealth or *through social acquaintance,* or in the guise of a business call, and whether the owner be present or not at the time of entry.

A fair interpretation of this opinion is that due to the constitutional guarantees, the Government, even for its own protection, may not take advantage of a theft, or of an ungentlemanly act committed by one of its officers, even though unconnected with the prosecuting department. All must admit that the decision reaches the height of idealism, so far as the rights of criminals are concerned. But, while the Government will not be a thief through the agency of one of its own officers, it has no compunction against acting as the *"fence"* for an unofficial thief. Strange as this doctrine may seem, it has been approved

[4] 252 U. S. 298 (1921).

by the Supreme Court in the case of *Burdeau v. McDowell*,[5] decided within four months of the ruling to which reference has just been had. In the Burdeau case, it was held that constitutional guarantees against unreasonable searches and seizure and self incrimintion will not be violated if the Federal prosecuting authorities to whom incriminating papers stolen by private persons have been delivered, retain them with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned, the Government having had no part in the wrongful undertaking.

To this last ruling, Justices Brandeis and Holmes dissented. Their position was that "respect for law will not be advanced by resort in its enforcement, to means which shock the common man's sense of decency and fair play."

May it not be said, in passing, that the sanctity with which we have come to regard the rights of criminals is attributable, at least in part, to the idea long since suggested by Jeremy Bentham, that wrongdoers must be pursued in much the same way that a hunter pursues his game. That is, that the fox must have a fair start and be given a reasonable chance to get away. It is, nevertheless, to be remembered that the fox that is addicted to forages against a particular hen roost is generally regarded as having forfeited the right to sportsmanlike treatment.

Had the Supreme Court been content to adhere to the salutary doctrine announced in *Adams v. New York*,[6] the inconsistency of law, and of morals, existing between the Gouled and Burdeau decisions would not have arisen. The books contain ample authority to support the rule of the Adams case, to the effect that the use of an illegal method of obtaining incriminating papers from a person against whom they are offered in evidence is not a valid objection to their admissibility upon his trial. Unfortunately, both for the dispatch of business, and the clarity of issues involved, in a criminal trial, the purport of the decisions in *Weeks v. United States* (*supra*), and *Amos v. United*

[5] 256 U. S. 465 (1921).
[6] 192 U. S. 585 (1903).

States, the court that tries the defendant must, where a search and seizure is involved, also determine that which should be at best a collateral inquiry. And, if the seizure be open to even a modicum of doubt, the acquittal of the defendant is all but assured.

Under such circumstances, there is no ground for surprise in the fact that, in criminal prosecutions, attorneys for the defense endeavor, upon the slightest pretext, to draw the red herring of "an unreasonable search" across the trial of guilty defendants. And, in all too many instances these latter are the beneficiaries of the efforts of counsel learned in the law.

Anyone familiar with current prosecutions cannot help but know that there is before the courts today no more important and insistent question than that of the determination of rights between individuals accused of crime, who invoke in their behalf the fourth and fifth amendments, and the public. As was said by Judge Hough in his dissent from the majority of the Court of Appeals, in the case of *Ganci v. United States:* [7]

> "Congress and Legislatures continually increase the output of statutes intimately regulating private conduct, and making crime out of indulgence in sensual gratification (he was speaking of narcotics) which, in former yet recent days, were left by municipal law to punish their own victims by the physical and moral damnation they admittedly produce."

The judge proceeded to remark that in this type of crime we have come to have a professional class of criminals which was "not engendered by the simple, though severe, criminal codes known when the Constitution was drafted."

Referring again to the dissenting opinion in the Ganci case, one reads that:

> "When the mere possession of specified articles of commerce becomes *per se* criminal, the detection and suppression of crime becomes largely discovery and proof of possession, while the criminal invokes the law he professionally violates, by using the citizen's castle, that is, his home, as

[7] 287 Fed. 60 (1923).

> the place of possession, and the means of criminality. To harmonize the voice of a large class of twentieth century statutes with the voice of an eighteenth century constitution is indeed difficult."

The difficulty with which Judge Hough found himself confronted can only be overcome by giving effect to the presence of the word "unreasonable" as it is written in the fourth amendment, and by the cessation of attempts to define the unreasonableness of particular searches in terms of hereditary and traditional opposition to the abuses and impositions of the Tudor and Stuart dynasties.

Courts have no difficulty in determining, from the standpoint of practicality, the existence, in a particular case, of "reasonable time," "reasonable cause" or "reasonable care." Were they to approach the consideration of the reasonableness of a particular search and seizure in much the same way as they decide the reasonableness of anything else, and were they to cease excluding evidence which may have been obtained in an unlawful search, and were proper punishment and liability provided for those who make an unreasonable search, the fourth amendment would not long continue to be the snug harbor for the criminally inclined, and unlawful searches would be no more frequent than they are today.

Having regard for the prevalence of crime as it is seen on every hand, it would appear to me that the Circuit Court of Appeals for the Fourth Circuit in the case of *United States v. Milam,*[8] spoke wisely and well when it said:

> "Every constitutional and statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional provision, and in view of new conditions and circumstances in the progress of the nation and the State."

When courts give due heed to the soundness of the proposition that has just been quoted, many of the criminals, who, with bursts of judicial oratory, are now turned loose upon the community, will be in the jails in which they belong.

[8] 296 Fed. 631 (1924).

In addition to, and beyond, the foregoing reform, which, it is thought, should mark the administration of the criminal law, in the respect to which attention has been directed, there is a feature of practice that, in my opinion, should be eliminated from our jurisprudence. Reference is made to the right of a defendant in a criminal case to stand mute throughout his trial, and then be entitled to an absence of comment by the prosecuting officer upon his failure to take the stand. The elimination of such right would, of course, require an amendment of the Act of Congress of March 16, 1878, where, in providing that a defendant in a criminal case may be a witness in his own behalf, the statute declares that his failure so to do shall not create a presumption against him. According to my view, the law rises to a supreme height of foolishness when it compels a judge, in all solemnity, to instruct a jury that it should indulge in no unfavorable inferences against a defendant because he does not become a witness in his own behalf.

It is the experience of each of us in our homes, in our offices, in our every day activity, when accusation rests against someone over whom we exercise authority, to ask that person for any explanation he may wish to make with respect to the subject matter concerning which we may enquire. If he be content to maintain silence in the face of direct accusation, or of incriminating circumstances, we immediately conclude that he cannot exculpate himself. In ninety-nine cases out of a hundred, we know that such conclusion is justified. Why, then, should men, when they gather together in a court for the purpose of administering justice, act contrary to the experience and practice of each and every one of them in the ordinary affairs of life? The only answer that I can formulate is, that the law, in seeking to be properly sensitive to the rights of a culprit, has developed a callousness for those of the public. A trial is had for the purpose of ascertaining a set of facts concerning which issue has been joined between the litigants. And when, in a criminal case, the evidence which has been adduced by the State,

or the Government, is of such character as to withstand a motion to dismiss the indictment, my work upon the bench forces me to believe that the failure of a defendant to explain his connection with the matter in hand, usually constitutes a pertinent circumstance in the case. And that circumstance, like every other one of relevancy and materiality, should be the subject of comment, and should be duly weighed by the jury. But, it is said, any such rule of procedure would compel a defendant to incriminate himself, and that is unconstitutional. The decision in *Twining v. State of New Jersey*,[9] and to which references will hereafter be made, will justify a denial of the assertion. It would still be optional with a defendant as to whether or not he would testify. If a defendant should choose not to take the stand, the rule would merely require that in determining his guilt or innocence, the jurors should consider an additional fact for the creation of which the defendant alone would be responsible.

In *Wilson v. United States*,[10] Mr. Justice Field, in an attempt to justify the existence of the present practice, said:

> "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than allay prejudice against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

[9] 211 U. S. 78 (1908).
[10] 149 U. S. 60 (1892).

Search as one may through the reports of judicial decisions, he will fail to find any such generous consideration of which an innocent witness may avail himself.

No such boon is granted to the timid and modest woman who, by accident, may happen upon the commission of a crime, or who, through no effort of her own, becomes acquainted with some of its embarrassing details. The law shows her no chivalry or favors. She must, under compulsion, go upon the witness stand and tell her story. If it be that her testimony proves particularly damaging to the defendant, she will be subjected to a cross-examination designed to impeach her veracity and character, to say nothing of the imputation that will be made against the honesty of the motives which led her to become a witness. Should she become confused and contradict herself, counsel for defendant, in addressing the jury, will tear her evidence to shreds with no serious thought of exhibiting towards her any tenderness or compassion. Nor can the court, under the law as it stands, do anything other than undertake, in a more or less perfunctory manner, to mitigate the assaults made upon the witnesses for the prosecution.

Of course, the thought behind the enactments under which defendants enjoy special privileges is that the innocent may be protected from imposition. Like many other theories, it does not, save to a negligible degree, serve its intended purpose. I mean that, so far as my recollection goes, innocent men charged with crime, however timid and retiring they may have been, insisted upon taking the stand to repel unjust accusation. But the man with a police record, the culprit who has no defense and who ought to be convicted, usually demands and demanding, obtains every privilege the law affords. As a result, justice often miscarries, and guilty men walk out of courts with their tongues in their cheeks.

Several of the States, either in their constitutions or by legislative enactment, have provided that defendants in criminal cases are competent witnesses in their own behalf, and have imposed no limitation or restriction prohibiting comment upon the failure of the accused to avail himself of the privilege accorded

him. Such States are Maine, North Carolina, Ohio and New Jersey. The Supreme Court of the latter State, in the case of *Parker,*[11] has specifically held that when facts have been testified to by witnesses for the prosecution, which, if true, establish defendant's guilt, which facts concern the actions of the defendant, and if not true, may be disproved by him, the failure to offer himself as a witness may be considered and commented upon. And, in this connection, it may be well to quote from the syllabi to the decision of the Supreme Court of the United States, in *Twining v. State of New Jersey, supra,* to the effect that "exemption from compulsory self incrimination did not form part of the law of the land" prior to the separation of the colonies from the mother country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States, or an element of due process of law, within the meaning of the Federal Constitution or the Fourteenth Amendment thereto. In so holding, the court took pains to say that even though it had assumed for argumentative purposes, that comment upon the failure of a person accused of crime to testify in his own behalf was an infringement of the privilege of self incrimination, it did "not intend . . . to lend any countenance to the truth of that assumption."

The exact effect that the application of the New Jersey rule has had upon the efficiency of criminal procedure in that State is, of course, more or less speculative. But, it is none-the-less a matter of common knowledge, that, for some reason or other, the swiftness and efficiency of "Jersey justice" have become somewhat proverbial. Can it be that one of the reasons for this is the existence of the rule to which I have just referred? But whether it be or not, my conviction is that the namby-pamby attitude of tenderness that we have assumed towards defendants should be abandoned. It is my belief that men, who, by the responsibility of a grand jury, have been put to their defense, should enjoy no privileges superior to those of the witnesses upon whom the Government must depend for a vindication of

[11] 61 N. J. L. 308, 39 Atl. 651 (1898).

its law. If it be that the States and the Government cannot, by reason of constitutional guarantees, make a major advance against the stronghold of intrenched criminality, let us at least so frame our statutory law that the forces operating for the safety of the public must not continually sound retreat.

There is another matter which would appear to have some relation to the subject under discussion. It is the so-called "third degree" to which suspected criminals are frequently subjected. This procedure upon the part of police officers, it must be realized, is not of uncommon practice, and it is of real concern. There are some fair-minded persons who feel the practice is an outgrowth of the fifth amendment, and of its repetition in State Constitutions. What cannot lawfully be done is sought to be accomplished through unlawful means.

Police officers, particularly when they have, at the risk of their lives, taken a suspected criminal into custody, and are satisfied that he is guilty, are anxious to see that he is convicted and punished. Their previous experience has taught them the uncertainties and technicalities of the law. Too often have they been called upon to hear the sneers and jibes of men guilty of serious crimes who have been turned loose upon the community through the inefficiency of the law. They desire, of course, to avoid a recurrence of such occasions. As a consequence, we have, I fear, within certain police departments, a court of the star chamber, with which is connected the torture chamber of the Spanish Inquisition. Several years ago in company with a certain detective, I was, as an assistant United States Attorney, examining a young man whom we believed possessed information with respect to a number of prosecutions in which I was then engaged. The man under examination firmly protested his lack of knowledge as to the wrongdoing of certain individuals, including himself. While somewhat uncertain of the truth of his statements, I was prepared to close the examination. Not so with the detective. He had become enraged at the repeated denials to which we had listened and, to my amazement, he suddenly gave the young man a vicious and violent blow in the face, following it up with a flow of profanity. This was my first

and last contact with actual physical brutality, although I had previously heard that it existed.

Since then, however, I have listened to many circumstantial accounts of the frequency and severity with which torture takes place. I have been told upon good authority that very often suspected defendants confess to the commission of crime under the prompting of pain inflicted with a piece of rubber hose. This is used, I am informed, for the reason that it leaves no very permanent bruise. Then, too, I have seen defendants who plainly showed physical injuries, and who have told me that they were inflicted by policemen in an effort to extort admissions. In such instances, I have taken testimony to ascertain the facts, and it is a rare occurrence when an officer admits that he assaulted a defendant. Should he do so, this admission is usually accompanied by a statement that the defendant attempted to escape, and that force was required to frustrate the effort.

The length to which officers will sometimes go in inflicting torture is to be seen in the report of the case of *Wan v. United States.*[12] There, it will be recalled, a confession was obtained by police officers at a time when the prisoner was very ill and in intense pain, and after he had been unable to eat for several days. In addition to this, he was subjected to constant questioning for more than a week. Notwithstanding illness, pain and suffering, and despite defendant's protestation of physical inability to answer, the interrogations continued. At last, outraged nature could stand no more and the man confessed. Had it been possible under the law for that poor Chinaman to have been arraigned before a responsible magistrate, and there examined, under humane conditions, concerning his alleged connection with the crime of which he was charged, the Government, without resort to police testimony, might have had advantage of any statement he saw fit to make, and it would have been saved the shame and degradation of putting a man to the rack. By such means, also, the Government might have secured the valid conviction of a man, who in all probability is a murderer, and who should either be

[12] 266 U. S. 1 (1924).

incarcerated for life or be put to death. As matters stand it is very likely that Wan, if he has not already done so, will soon join the goodly company of guilty men in whose ears have sounded the sweetest words known to crime, and which are embodied in the phrases, "Not Guilty as Charged" and "Judgment of Conviction Reversed."

Jno. C. Knox.

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