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A PLEA FOR WITHDRAWAL OF CONSTITUTIONAL PRIVILEGE FROM THE CRIMINAL

By ERNEST C. CARMAN*

IN this year of sesquicentennial glorification of the constitution of the United States, it requires courage to assail any part of its "bill of rights" as set forth in the first ten amendments adopted almost simultaneously with the ratification of the constitution itself. Millions of words have been written about the glory and grandeur of these amendments and of similar provisions in state constitutions, which it has been almost universally assumed are equivalent in American government to earlier and similar grants, by the sovereigns of Great Britain, with which the authors of our federal constitution were familiar when they wrote it. But listen to the voice of Alexander Hamilton telling the people at that time why no such Bill of Rights was necessary or advisable. Said he:

"It has been several times truly remarked, that Bills of Rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was magna charta, obtained by the barons, sword in hand, from King John. Such was the subsequent confirmations of that charter by succeeding princes. Such was the petition of right assented to by Charles the First, in the beginning of his reign. Such also, was the Declaration of Rights presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights. It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.' This is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our state bills of rights, and which sound much better in a treatise of ethics, than in a constitution of government."[1]

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[1]The Federalist and Other Constitutional Papers 469, by E. H. Scott, Editor.

These views of Alexander Hamilton were supported by two eminent lawyers, both of whom were appointed justices of the United States Supreme Court by President Washington as soon as the constitution was adopted; namely, James Wilson and James Iredell.[2]

This little study leads to the conclusion that experience has demonstrated there was some merit in the views of Hamilton. Wilson and Iredell; at least in respect to the influence of the federal "bill of rights" upon the administration and enforcement of criminal law in the United States during the past one hundred and fifty years and *now*. This article is limited to the development of such thesis. The opposing argument is too well known for review here.

Before proceeding now to point out the reasons why certain provisions of the bill of rights, incorporated for the benefit of the law-abiding citizen of the United States into the early amendments to the constitution, have become wholly unnecessary for that purpose and have been perverted into a bill of wrongs for the benefit of the arch-criminal who now infests this land of the free and the lawyer-criminal who waxes fat upon his loot, it will be proper to say that the limitation of federal constitutional privilege to offenders against the laws of the United States[3] is not a corresponding limitation upon the evil resulting therefrom, because similar provisions in state constitutions will seldom, if ever, be reformed unless their counterparts be first eliminated from the national constitution.

And it may be further observed at the outset that these provisions of the constitution of the United States and of the states are almost never invoked by the small offender—the ordinary citi-

[2]The Federalist and Other Constitutional Papers 885 et seq., by E. H. Scott, Editor.

[3]The so-called "Bill of Rights," as embraced within the first ten amendments to the federal constitution is, in general, a series of restraints upon the federal government and not the states. Brown v. Walker, (1896) 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; Brown v. New Jersey, (1899) 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; Bollin v. Nebraska, (1900) 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382. On the other hand, the fourteenth amendment is, by its express terms, a restriction only upon the powers of the States. Maxwell v. Dow, (1900) 176 U. S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; Virginia v. Rives, (1879) 100 U. S. 313, 25 L. Ed. 667. In the first of the cases cited (Brown v. Walker) it is said: "It is true that the constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable."

zen who occasionally commits a petty offense under the stress of some great emotion or runs afoul of some one of the multitude of laws and ordinances malum prohibitum which plaster the endless pages of verbotens that are considered necessary for regulation of the complex modern life of this age. Such small offender yearns not for the services of the lawyer criminal; nor could afford to pay his price if so minded. Indeed, the petty offender seldom has any desire to conceal the evidence of his guilt; he becomes no menace to society; and his little punishment presents no constitutional difficulties. The discussion now to follow is to be taken, therefore, as limited always to the real criminals—murderers, robbers, kidnapers, rapists and perverts, thieves, racketeers of high and low station, and all their ilk and kind—mortal enemies of organized government and society entitled to no consideration whatsoever but, nevertheless, coddled and encouraged to continue their depredations under their constitutional privilege of always going scotfree if they merely take the precaution to conceal the evidence of their guilt and stand mute in the courts of law when accused of it.

The offensive and archaic provisions of the federal constitution to which reference is here made are found in the fourth, fifth and fourteenth amendments thereto, and may be summarized generally as extending to persons accused of crime (a) the privilege of keeping concealed all their papers and effects from which their guilt or innocence might be easily and directly ascertained, unless some person on oath is able particularly to describe such papers and effects and the place where the same are concealed,[4] so as to procure a search warrant therefor; (b) the privilege of standing mute and silent in court,[5] wholly immune from so much as a single question directly tending to establish their guilt or innocence about which they know more thany any other person in the world, and the further privilege of exemption from any second trial after acquittal once of the offense charged,[6] no matter what subsequent evidence of their guilt may come to light. Unless the public prosecutor convicts the accused in spite of these constitutional barriers, and without infringement thereof, the latter is denied "due process of law" which is guaranteed in the federal courts by the fifth amendment, and required in the state courts by the fourteenth amendment.

[4]Fourth amendment.
[5]Fifth amendment.
[6]Fifth amendment.

To anyone who looks into the historical origin of these provisions, their absurdity in the fundamental law of the land in this day and age becomes at once apparent. For they originated in the necessity for protection of political and religious offenders, of which there are none in the United States now.[7] The provocation of the patriots, if such they were, who called the loudest for the incorporation of these provisions into the early amendments to the constitution was none other than the notorious Court of Star-Chamber[8] established by tyrants who occupied the throne of Great Britain some three hundred years ago, and earlier, into which so-called court consisting of the king's council packed with his judicial yes-men, any person who had incurred the dislike of the king by opposing his tyranny, or otherwise, could be haled for a trial without a jury, or tried without being present at all upon a mere written statement that had been extorted from him containing covert admissions of guilt, and in which alleged court the prisoner if present could be tortured until he "confessed," and then immediately subjected to any penalty short of death—the penalty usually including bodily mutilation of the victim satisfactory to the king.

This court was a particular abomination to the Puritans at the time they migrated for settlement on the savage continent of North America prior to abolition of the court by the Long Parliament in the year 1641; and it had been by no means forgotten when the constitution of the United States was written in 1787, and the bill of rights appended shortly after the constitution was

[7]The federal constitution by the first amendment, and the constitutions of the several states by like provisions, have expressly granted political and religious liberty to every inhabitant; thereby automatically making it impossible for any public offense to be committed in the bona fide exercise of the privileges or rights so constitutionally secured. Hence, there are not and cannot now be, within the United States, any political or religious offenders requiring the protection of the fourth, fifth or fourteenth amendment of the constitution of the United States, or of like provisions in state constitutions, to insure the exercise of their political or religious freedom.

[8]See sketch "Star Chamber" in Encyclopedia Britannica and authorities there cited. For a more uncomplimentary sketch see "Star Chamber," 21, New International Encyclopedia 456, (1920) where it is said:

"As a criminal court, it could inflict any punishment short of death, and had cognizance of all cases that might be brought under the head of contempt of the royal authority. Offenders against the royal proclamations, or religious laws were there condemned . . . forced confessions, pressure, torture prevailed. Admissions of the most immaterial facts were construed into confessions; and fine, imprisonment and mutilation were inflicted on a mere oral proceeding, without hearing the accused, by a court consisting of the immediate representatives of prerogative."—Citing Schofield, Study of the Court of Star Chamber.

adopted. Hence, these constitutional barriers to compelling a man to testify against himself, or to yield up his private papers, or to be tried a second time for the same offense or at all by other than a jury of his peers, and finally the prohibition of cruel and inhuman punishment after conviction.

That there could be no such thing as a star-chamber court, or any similar tribunal, established or operated in these United States now, or at any predictable future time, is too self-evident to merit discussion. And if plain, ordinary, twentieth-century common sense be substituted for political claptrap, it is equally clear that no law abiding person within the four corners of the Union can be erroneously convicted of a crime because he is compelled to disclose what, if any, evidence he controls in respect to it—whether documentary or otherwise.

Let the most ardent advocate of constitutional privilege to the criminal point out a single case in all the annals of American jurisprudence where an innocent man has been, or could have been, convicted because compelled to answer questions about the crime of which he was accused. No such case can be found. And it is probable that not a single case can be found where anyone mistakenly accused of crime has failed voluntarily to take the witness stand in his own defense. Indeed, it is utterly impossible for an innocent person to testify against himself, since the truth is always in his favor; unless, perchance, he is motivated by a deliberate and insane desire to be wrongfully convicted, in which rare case, if any, he could as well take the witness stand voluntarily and lie himself into prison or an insane asylum.

Nor is there any more substantial danger of an innocent person being convicted of any crime because he is compelled to give up papers, however private, which may throw some light upon such crime. And if his desire to withhold his papers be for the concealment of some other crime of which he is not yet accused, even though he be innocent and erroneously accused of the crime under investigation, that certainly affords no reason in law or logic for immunizing him from punishment for the crime of which he is guilty. For as a criminal, he should be entitled to no privileges —constitutional or otherwise—which absolve him from accountability for his wrong doing. And herein is the crux of the whole breakdown and woeful inefficiency of criminal law enforcement in the United States. The courts have forgotten that it was the innocent, law abiding citizen these constitutional provisions were

designed to protect—not the guilty criminal. The law reports reek with judicial eloquence about fair trials and the rights of the criminal. But there never was a fair crime committed; nor a criminal entitled to any rights whatsoever arising from any crime committed by him, although he may still claim the benefit of the wrongs inherent in this archaic constitutional privilege of concealing the evidence of his guilt—of stabbing in the back the very government under which he claims such privilege.

But this privilege is so well established as to bring forth from the Supreme Court of the United States the expression of grandiose sentiments about the criminal—not the innocent victim, but the criminal whose constitutional privilege of concealing the evidence of his guilt had been invaded by the public prosecutor for an outraged government—in this high sounding language addressed, apparently, to all the courts in the United States:[9]

[9]Weeks v. United States, (1914) 232 U. S. 383, 392, 34 Sup. Ct. 419, 58 L. Ed. 652. In this case, it appeared that a United States Marshal, without any search warrant or other process, had broken into the home of defendant and taken therefrom certain documentary evidence which he delivered to the public prosecutor and he, in turn, used it to prove (and it did prove) the guilt of defendant, who was convicted accordingly of the crime charged in the indictment. The trial court had refused to order the papers returned to defendant before trial, and had admitted same in evidence over the objection of defendant. The Supreme Court reversed the conviction upon the sole ground that, in holding the documents and admitting them in evidence, the trial court had committed "prejudicial error." But the Supreme Court would have sustained the conviction if a private person, instead of the United States Marshal, had broken into the defendant's house, stolen the same papers, and delivered them to the same prosecutor, and he had used them in the same way to convict defendant. Burdeau v. McDowell, (1921) 256 U. S. 465, 41 Sup. Ct. 574, 65 L. Ed. 1048. And this, notwithstanding the fact that there was available to defendant in the Weeks case the same legal remedies against the United States Marshal that would have been available against any private person who committed the same offense (56 Corpus Juris, page 1254, sec. 194 and authorities there cited), except, possibly, as to criminal intent which presumably the United States Marshal did not have.

In the Weeks Case, if the public prosecutor had returned the papers to the defendant before trial and then, either by subpoena duces tecum or by search warrant duly issued, had subsequently brought the same papers back into court and used them as evidence against the defendant, the conviction nevertheless would have been reversed by the Supreme Court. Silverthorne Lumber Co. v. United States, (1919) 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319. If there had been no previous violation of defendant's constitutional privileges, nevertheless he could not have been compelled to produce the documents in question any more than to testify against himself. Boyd v. United States, (1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. But, if the defendant had been a law abiding citizen neither guilty nor accused of any crime, he could have been compelled to produce the same papers in court and testify as to their contents in any civil action wherein the same were relevant, even though in doing so he was compelled to disclose his own valuable business secrets and otherwise suffer pecuniary loss. 70 Corpus Juris, page 53, sec. 41, and authorities there cited. The con-

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal constitution, should find no sanction in the judgments of the courts."

And the criminal in that case, as in many another, was turned loose to prey further upon the innocent whom the constitution was made to protect merely because the evidence of his guilt had been unconstitutionally procured. But why? Was he any less guilty than he would have been if the papers unlawfully seized had been inadvertently lost by him and found by the public prosecutor? Why the solicitude of the court for the criminal instead of his victim? If a public prosecutor has done wrong, what is the proper and common sense remedy—to remove him from office or otherwise punish him, or to turn the convicted criminal loose so as to humiliate the prosecutor? Could the sophistry of any intelligent human being in all the world except a judge rise to such heights as to answer this query, in this day and age, by saying that the right course is to turn loose the convicted and guilty criminal? There is nothing in the language of the constitution requiring any such thing to be done. On the contrary, the constitution is entirely silent as to the penalty which shall be imposed upon a public prosecutor, or any other person, for violation of its prohibition against unreasonable searches and seizures without a search warrant supported by oath "particularly describing the place to be searched, and the persons or things to be seized"—nowadays an obvious impossibility, because no dangerous criminal is either so stupid or careless as to permit law enforcement officers to see his papers or other evidence of his guilt, or the place of concealment thereof, so as to be able to describe the same under oath and with particularity.

What else could more conclusively demonstrate the necessity for a constitutional amendment framed to protect the innocent victim instead of the guilty criminal? For in a well ordered society, to speak of the rights of a criminal appertaining to his crime is a perversion of both language and logic. There can be no such thing. A criminal has no such rights under any government worthy of respect until he has first paid the penalty for his

stitutional privilege of refusing to testify or disclose documentary evidence is strictly limited to criminals, since it could not otherwise be *incriminating*. Counselman v. Hithcock, (1892) 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

crime. Until then he is entitled to less consideration than a rattlesnake which warns before it strikes, has no confederates (lawyer-criminals or others), lives in no luxury by the sweat of another's brow, and has never been taught the difference between right and wrong. Not a reptile, but only a fiend in human form can sneak upon his victim in the dark, stab him in the back, rob, plunder, burn, rape defenseless women, and kidnap and murder helpless and innocent children. And it is only such a fiend who is given the constitutional privilege of concealing the evidence of his guilt. No, that is not quite correct. The same constitutional privilege is also extended to the malefactor of great wealth who lives and moves in an atmosphere of apparent respectability. All the criminals of both these types on the opposite ends of society are accorded the same anxious solicitude of the courts in respect to the matter here under discussion.

The very thought of being compelled to disclose his secret communications and answer under oath in the criminal courts, or without immunity before a grand jury, concerning the mysterious and uniform maintenance of exorbitant prices by him and his pretended competitors in business, would make the blood run cold in the veins of many a pillar of ostentatious respectability in the world of finance and commerce.

With no less disfavor and alarm would the common thug and murderer on the other end of the social ladder view the prospect of being compelled to tell what he knows about the crime of which he is accused.

Constitutional liberty—meaning the privilege of concealing evidence of guilt—has become the common shibboleth of the criminal of high and low estate seeking the doorway to immunity from punishment for the injuries which both alike inflict upon the people of the nation. Remove it; make criminal trials a common sense investigation of the guilt or innocence of the accused, about which he knows the most and naturally should be the first to testify and disclose his knowledge; abolish all rules of evidence that are rooted in such constitutional privilege of the criminal—including the illogical presumption that the accused is innocent until proven guilty, which is equivalent to presuming that the grand jurors who indicted him were either stupid or corrupt —and the crime problem will cease to be such.

A tax collector or assessor, state or federal, may always presume the worst against the taxpayer until he proves the contrary.[10]

[10]Typical provisions of this nature are to be found in subdivision (c)

The taxpayer does not have the constitutional protection which the criminal enjoys. There should be no presumption that one accused of crime is or is not guilty in this day and age; and the accused should be the first to testify. A litigant may be cross-examined and compelled to disclose his papers in a civil suit involving property rights;[11] and a bankrupt (whether voluntary or involuntary) may be subjected to the most searching cross-examination in respect to the conditions which brought about his insolvency and the disposal of his property.[12] Why, then, such tender solicitude for the self same person, or any other, when accused of crime? Why special privilege or exemption from accountability in the matter of crime which wrongs all the people, but a different rule in the matter of mere property rights which affect only the litigants?

Abolition of special constitutional privilege to the criminal, beginning with the federal constitution, is the primary prerequisite to any effectual reform of criminal trial court procedure or efficient, common sense enforcement of criminal law.

There is no longer any necessity for a choice between the imaginary evil of a too ardent prosecutor and the real evil of constitutional privilege to the criminal. Let this illogical handicap of the prosecutor be removed and he will cease to be the subject of such criticism. And millions upon millions of taxpayers' dollars will be saved which are now being spent in the investigation and proof of circumstantial facts for no purpose other than the overcoming of such handicap. With universal education and newspaper and radio publicity what it now is, there can be no such thing as a secret trial or an innocent person being misled into admissions of guilt upon his examination under

of sec. 411 and in sec. 568 United States Code, and others are cited in 61 Corpus Juris, 573 (Section 702). All are based upon the principle that the taxpayer knows more about his property than the taxing authorities, hence he can easily disprove the presumptions against himself if he sees fit to do so. The same reasoning applies with even greater force to one accused of crime who knows to a certainty whether he is guilty or innocent and, if innocent, can and always does take the witness stand in his own behalf. It is only the guilty who claim the constitutional privilege of not testifying; hence the constitution is perverted into a shield for the guilty at the expense of the law-abiding citizen who is the innocent victim.

[11]As typical of many others, see sec. 2055, California, Code of Civil Procedure and sec. 277 of Title 28, United States Code, 28 U. S. C. A. sec. 277, Mason's U. S. Code, tit. 28, sec. 277, being sec. 119 of the Federal Judicial Code.

[12]Section 25 of the National Bankruptcy Act. Because of the constitutional provisions above discussed, it is provided that no testimony given by the bankrupt shall be used against him in any criminal proceeding. Hence, if he is a criminal he is privileged; otherwise not.

oath in open court. And, as already pointed out, no person accused of crime can be a witness *against* himself unless he is guilty.

The infringement of privacy in respect to personal papers and effects may be the subject of some abuse; but this can be cured by statutory safeguards much better than by universal privacy as a constitutional right, including the right of the criminal to suppress evidence of his own guilt. There is neither logic nor practical experience to support a more extreme right of privacy in the criminal, or person accused of crime, than is accorded the law abiding citizen in civil litigation; and the latter can be adequately protected by legislation and by the courts without express and unbending constitutional provisions such as the language of the fourth amendment prohibiting any search warrant unless supported by oath *"particularly describing the place to be searched, and the persons or things to be seized."* A man's house may still be his castle without a criminal's house continuing to be his fortress equipped with constitutional guns holding at bay the entire might of the United States Government itself unless someone can be found to describe under oath the contents of such fortress before anyone has been permitted to see it.

As one consequence of such constitutional reform, if effected, no longer will the ordinary citizen behold, to his amazement and bewilderment, a criminal court being conducted, not by the judge, but by the criminal at the bar and his accessory-after-the-fact immunized from personal accountability and glorified with a license to practice law.

The fourth amendment to the constitution should now be further amended to read as follows:

"1. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; but this shall not be so construed as to permit any person indicted or otherwise lawfully charged with crime in any court of the United States or of any of the states to withhold or conceal any evidence relating thereto or escape punishment if convicted by reason thereof.

"2. Congress shall have power to enforce this article by appropriate legislation."

The fifth amendment to the constitution should also be now amended to read as follows:

"No person shall be held to answer for a capital or otherwise infamous crime in any court of the United States unless on a presentment or indictment of a grand jury, except in cases arising

in the land or naval forces, or in the army or militia when in actual service in time of war or public danger; nor be deprived by the United States of life, liberty or property without due process under the laws thereof; nor shall private property be taken by the United States for public use without just compensation."

And as a corollary thereto, notwithstanding declarations by the supreme court that the foregoing amendments are applicable only as restraints upon the United States while the fourteenth amendment is operative only against the states, section 1 of the latter should be also amended to read as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process under the laws of such State; nor deny to any person within its jurisdiction the equal protection of such laws."

With such amendments in force, criminal appeals to the United States Supreme Court would be practically limited to cases arising in the lower federal court where the beneficent example of trials no longer hampered by constitutional privilege to criminals would soon bring about like reforms in the several States; and the power of the states to enforce their own criminal laws without interference by the United States supreme court, as well as all other laws limited in their operation and effect to the confines of the respective States, would be restored subject only to the condition that the same must operate and be enforced without discrimination among the citizens of the United States.

The fourteenth amendment was never intended to have any greater effect; and the clauses in the fourth and fifth amendments here suggested for elimination were originally inserted therein for the protection of political and religious offenders of a species long since extinct. They now protect only the big-time criminals.