SPEAK AND BE NOT SILENT[1]

RECENT DEVELOPMENTS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

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I. INTRODUCTION

1.1 The Purpose of the Article

The purpose of this article is to examine recent developments in the law relating to the privilege against self-incrimination in the context of civil proceedings. The availability of the privilege in this context highlights a conflict within the law: between the interests of an individual not to provide evidence which could be used by the State to assist in his prosecution, and the interests of a private litigant seeking redress in the civil courts. In some jurisdictions the privilege has been upheld upon invocation. In others a solution has been sought to maintain the underlying protection of the privilege by providing immunities against the use of self-incriminatory testimony, and thereby allow the testimony to be given in the civil proceedings. Another tension is thereby created. Should the private litigant obtain redress by using evidence which is denied to the State in its efforts to seek conviction and punishment for criminal behaviour?

This article examines the origins of the privilege and the current approaches toward it taken in Britain, Australia and New Zealand. The article attempts to determine whether there has been a change in how the Courts approach this privilege and seeks to address a number of issues. It addresses whether any benefit can be obtained from seeking a rationale for the privilege in its origins and whether the rationale for the privilege should be sought

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1 Denethor to Peregrine Took in Tolkien, J.R.R. *The Return of the King;* Volume III of *The Lord of the Rings* Book V Chapter 1.

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within the context of the present common law system. It discusses whether there should be a change in approach to the privilege and what the starting point for any change should be. Finally, it assesses the relevance of the privilege in the context of our accusatorial and adversarial criminal justice system.

This article concludes, firstly, that seeking a rationale in history for today's relevance of the privilege is interesting but of limited utility, for it attempts to pare away the privilege from the development of other legal processes of which it has been an integral part. Secondly, the privilege against self-incrimination is an integral and vital part of the accusatorial and adversarial system and must be upheld.

1.2 The Privilege Defined

There are in fact three distinct "rights" or immunities involving silence and elements of the privilege which have developed over a substantial period of time.

1. The "right" to refrain from speaking at all and to speak only voluntarily and not as a result of coercion or torture. This is the basis of the pre-trial right to silence.

2. The so-called "right to silence" at trial, being the immunity from being called as a witness against oneself, developed during the eighteenth century as lawyers became involved in the criminal trial process.

3. The general privilege available to any witness who is compelled to give evidence under oath which may incriminate that witness and lead to the imposition of a penalty, and where failure to answer may attract a penalty which may be imposed by law or by an authority having the power to impose a penalty. This is the privilege against self-incrimination[3] - a privilege reposing in witnesses (other than the accused) who are called to give evidence at a trial or some other hearing or inquiry to refuse to answer questions which may involve self-incrimination.[4]

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3 See *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191, 193; *Triplex Safety Glass Co Ltd. v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, 403 per du Parq LJ, quoting *Lamb v Munster* (1882) 10 QBD 110, 111 per Field J. See also Bisson J in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, 485.

4 An accused facing allegation A may be cross-examined about that charge. He can claim the privilege in respect of cross-examination about allegation B for which he is not facing trial.

1.3 The Scope of the Privilege

The privilege is testimonial and communicative. It may be invoked by a witness who claims that oral or sworn evidence that he or she may be compelled to give is incriminatory. Being asked to produce documents may also justify the invocation of the privilege, although those documents are admissible if proven by other means such as a lawful search. Issues of documentary self-incrimination, as we shall shortly see, generally arise in the context of discovery.

The privilege may be invoked in a non-judicial context where there is an obligation to answer questions, give information or disclose or produce documents pursuant to a statutory requirement. The privilege cannot be invoked to prevent the taking of blood samples or other "real" evidence. In New Zealand and England corporations may invoke the privilege. In the United States it has been held that Fifth Amendment protection against self-incrimination does not extend to corporations, and the High Court of Australia has held that a company cannot invoke the privilege in the context of document production.

II. The Historical Background

Many cases turn to the historical background of the privilege in an effort to find a modern or relevant rationale for it, or alternatively to dismiss it as an anachronism.[5] The latter approach deems the Stuart and Tudor excesses of the State against the individual conscience to be irrelevant in the modern context of civil fraud and the necessity for documentary or interrogatory disclosure.

In my opinion, fascinating though the historical study may be, it approaches the privilege in isolation rather than as an ingredient in an entire legal and political system that was undergoing convulsive changes. Furthermore, such an approach ignores the development of a cluster or interwoven matrix of rights, privileges and procedures surrounding the development of the criminal and civil trial. Finally recent scholarship has challenged some basic historical assumptions about the development of the privilege.

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5 See Lord Templeman in *A.T. & T. Istel Ltd v Tully* [1992] 3 All ER 523, 529.

2.1 The Wigmore-Levy Interpretation

The "traditional" view of the development of the privilege[6] is that it had its origins in the abuses of the procedure of the Star Chamber and the High Commission. In the late Elizabethan and early Stuart period investigations by these bodies were frequently associated with incursions upon freedom of conscience.

At the same time conflicts and rivalry arose between the prerogative courts, utilising civil law concepts and the common law courts which used their own procedures to thwart prerogative court inquiry by allowing utilisation of a form of the privilege. After the Commonwealth and during the later Stuart period it is claimed that the privilege became an accepted principle of the developing law of evidence.

The traditional view of the privilege is essentially "Whiggish" in that it developed as a reaction to the excesses of the Stuarts and was a part of the development of legal and political rights following the Glorious Revolution. This approach has been the subject of recent challenge.

2.2 The Langbein Moglen Interpretation[7]

The starting point for the challenge is from M.R.T. McNair[8] who asserts that the privilege had been recognised in Chancery for some time prior to the seventeenth century, and limitations on self-incriminatory questioning were applied by those courts using Roman-canon procedure. Equity procedure was radically different from that of the common law in that it required a defendant to answer a plaintiff's allegations on oath.

This argument is taken up by Professor Helmholz who traces the origins of the privilege to the canon procedures of the *ius commune* in Europe which were utilised in England for some considerable period prior to the

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6 Propounded by Wigmore J, *Evidence (Vol 8)* McNaughten (rev.ed, 1961), para 2250 et seq; McGuire, Mary Hulme *Attack of the Common Lawyers on the Oath ex officio as Administered in the Ecclesiastical Courts in England*; Wittke (ed) Essays in Honour of Charles McIlwaine (1936), 199-229 and Levy, L *Origins of the Fifth Amendment* (2nd ed, 1986).

7 Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" [1994] 92 Michigan LR 1047. Moglen, E "Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination" [1994] 92 Michigan LR 1086. Professor Langbein is Chancellor Kent Professor of Law and Legal History at Yale University and Professor Moglen is Associate Professor of Law at Columbia.

8 "The Early Development of the Privilege Against Self-Incrimination" (1990) 10 Oxford Jnl of Legal Studies 66.

seventeenth century.[9] His assertion is that there was nothing novel about the privilege and its invocation at the time of the abuses of the Star Chamber and the High Commission.

Quite clearly the privilege was not adopted by the common law until after the fall of the Star Chamber, and it was only after changes in criminal procedure after 1688 that the privilege began to be invoked along with the right to have defence witnesses sworn, the right of an accused to have a copy of the indictment and a limited right to counsel.[10]

Professor John Langbein develops the matter further in considering the part that lawyers played in the development of the privilege and silence in the common law criminal trial. He concludes that the privilege developed not in the context of the high politics of the English revolutions but in the rise of the adversary criminal trial procedure at the end of the eighteenth century which was attributable to the involvement of defence lawyers in the trial process.[11] Langbein describes the criminal trial before lawyers became involved as the "accused speaks" procedure. The unrepresented accused, although unable to give evidence on oath, cross-examined prosecution witnesses and had an opportunity to put a case in person. He had no counsel and in the view of the judges needed none.

The involvement of defence counsel meant that the accused had a proxy. Counsel could challenge not only witnesses but the prosecution's entire case thus providing a foundation for the development of the allocation of proof burdens and standards. The accused literally could sit back and let his proxy speak.

Professor Langbein points out that the privilege was never invoked by an accused at a felony trial or during preliminary examination by Justices of the Peace. The essence of the development of the privilege was that the accused had another to speak on his or her behalf. This became a right in the early nineteenth century.

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9 See Wyatt Rosenson, R " Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune" (1990) 65 NYULR 962.

10 7 William c 3 s.1 (treason) - there was no "right to counsel" in felony cases but counsel became involved *de facto* over the eighteenth century.

11 Langbein supra note 7.

Professor Eban Moglen examines the development of the privilege in the colonies, taking Professor Langbein's thesis further.[12] Professor Moglen emphasises the significance of the jury trial process and the various rights and procedures associated with it which he calls "the trial rights cluster"and of which the privilege was one. These various rights were incorporated in state and federal constitutions, and the Fifth Amendment was utilised by lawyers as a foundation to exclude incriminating statements obtained pre-trial or at committal.

2.3 The Rationale for the Privilege

In *Murphy v Waterfront Commission*[13] Goldberg J enunciated the policy behind the privilege. It was founded primarily upon the "traditional" historical view. The privilege reflects many of the fundamental values in our society: the preference for an accusatorial and adversarial criminal justice system over an inquisitorial one; that self-incriminatory statements should not be elicited by inhumane treatment and abuses; that investigating authorities should not resort to the suspect for proof of offending or suspected offending; that there should be a fair state-individual balance that requires the state to leave a person alone until cause is shown to disturb him; that individuals are entitled to privacy and the inviolability of the human personality[14] and that individuals should not be subjected to the "cruel trilemma" of self-incrimination, perjury or contempt.

Reliability is an issue which justifies the privilege. How reliable is a statement elicited by threats, inducements or violence? Alternatively, a suspect may have an incentive to provide authorities with misleading information which is consistent with innocence. False statements or confessions may be made to avoid embarrassment or as a result of moral shame which is nevertheless not legal guilt. Interrogative susceptibility[15] and internal psychological characteristics may result in false confessions.[16]

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12 Supra note 7.

13 378 US 52 (1964).

14 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 echoed this and pointed out that balanced against this is the wider community interest in information which apprehends and identifies criminals.

15 The willingness of a suspect to accept propositions put during interrogation. See Gudjonsson "Suggestibility and Compliance among Alleged False Confessors and Resisters in Criminal Trials" (1991) 31 Med Sci Law 151.

16 Research establishes that false confessions are not confined to the mentally ill, illiterate or disabled. See Brandon & Davies *Wrongful Imprisonment - Mistaken Convictions and Their Consequences* (1972); Gudjonsson & MacKeith "A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type" (1990) 30 Med Sci Law 3.

In New Zealand, Maori suspects may be susceptible to pressures to make a statement as a result of confusion or a lack of awareness of rights. Cultural shame (whakamaa) may compel a young Maori to seek a quick resolution of an awkward situation.[17]

The privilege also has a basis in the protection of human rights and it is recognised in international conventions.[18] Although the privilege is not incorporated into the European Convention on Human Rights, the right to a fair and public hearing embraces a substantive right to remain silent and to not contribute to incriminating oneself.[19]

All of these reasons may be reduced to the following proposition: that the rationale and the policy for the privilege lies in the fundamental values that underpin the adversarial and accusatorial trial procedure which draws a line between the State and the individual over which the State shall not cross. Associated with that is the aspect of privacy, a zone within which the State is prohibited from venturing. The privilege gives flesh and reality to these values, and I discuss this in greater detail later.

III. Confronting the Privilege

I shall now move to examine the difficulties posed by the privilege and examine the way that those difficulties have been approached in England, Australia and New Zealand. The privilege does not arise automatically. It must be invoked by a witness; however, a court may warn a witness of the privilege where it appears there may be a danger of self-incrimination.[20] The privilege is not available for the asking. Appropriate grounds to invoke must be established and it is in the context of whether a witness may invoke the privilege that the cases have been decided.

3.1 Disclosures in Civil Proceedings

The privilege is frequently invoked when a witness testifies in civil proceedings. The common law scope of the privilege protects witnesses in civil proceedings. Section 4 of the Evidence Act 1908 expressly

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17 Jackson, Moana *The Maori and the Criminal Justice System: A New Perspective: He Whaipaanga Hou* (1988 Dept of Justice, Wellington) 134.

18 The International Covenant on Civil and Political Rights provides that in the determination of any criminal charge a person shall not be compelled to testify against himself or confess guilt.

19 *Funke v France* (1993) 16 EHRR 297.

20 *R v Goodyear-Smith* unreported, High Court, Auckland, 26 July 1993 (T332/92), Anderson J.

preserves the privilege for the testifying *parties* to a civil action. The privilege provides protection against testimonial incrimination[21] and extends to the production of incriminating documents.[22] As yet the New Zealand Courts have not decided whether or not the privilege attaches to the contents of the document as well as to its production.

In the United States the testimonial production requirement is essential to a valid claim of self-incrimination. The act of producing evidence has communicative aspects of its own aside from the contents of the documents.[23] In New Zealand it would appear that self-incrimination invocation is upheld regardless of whether or not testimonial assertions would be involved in the act of production. In limited circumstances the privilege will extend to the compelled production of objects.[24] The testimonial or communicative requirement for the availability of the privilege means that it does not extend to fingerprinting or blood and tissue samples.[25]

3.2 Disclosures at Inquiries

The privilege against self-incrimination may be invoked by a witness before a Commission of Inquiry. Pursuant to the provisions of the Commissions of Inquiry Act 1908, the Commission may require persons to produce documents or information extracted therefrom.[26] It may summon witnesses.[27] It is an offence for a witness to refuse to answer any question that he or she is lawfully required to answer[28] and where a witness refuses to give evidence without offering any just excuse certain powers may be exercised by a Commissioner who is a retired High Court Judge.[29] It is within the areas of "lawful requirement to answer" and "just excuse" that the privilege against self-incrimination may be invoked before a Commission of Inquiry.

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21 Mathieson, (ed) *Cross on Evidence* (4th NZ Ed),(1989) 242.

22 *Taranaki Co-Op Dairy Co Ltd v Rowe* [1970] NZLR 895.

23 *Fisher v United States* 425 US 391 (1976).

24 *New Zealand Apple and Pear Marketing Board v Master & Son Ltd.* [1986] 1 NZLR 191 where it was held that the act of producing an object may have a sufficiently testimonial aspect to enable the privilege to be invoked.

25 *King v McLellan* [1974] VR 773; *Schmerber v California* 384 US 757 (1966).

26 Section 4C.

27 Section 4D.

28 Section 9.

29 Section 13A.

3.3 Tensions Between Civil Proceedings and Criminal Prosecution

The existence of the privilege creates a tension between the civil and criminal procedures. A witness or a party may invoke the privilege thus eliminating what may be crucial evidence from the proceedings to the disadvantage of a litigant. In addition, the evidence is not available to convict a wrongdoer in criminal proceedings although its existence may be made apparent.

The privilege has been described by Lord Templeman as "an archaic and unjustifiable survival from the past".[30] His Lordship considered that the privilege could be justified on only two grounds: that it discouraged the ill-treatment of suspects and the production of dubious confessions.[31] The privilege should not be available to prevent disclosure of documents in the possession of a witness where the documents speak for themselves, thus suggesting that documents may fall into the category of "real" evidence.[32]

This highlights the tension that has arisen as a result of the development of Anton Piller orders and Mareva Injunctions. The privilege may be invoked and thereby prevent discovery and presentation of all available evidence germane to the civil proceeding. The invocation of the privilege in civil proceedings places innocent parties at a disadvantage in the interests of protecting the potential criminal.

The privilege can be circumvented if proper safeguards or immunities are established. This has been done in the context of the Fifth Amendment in the United States[33] and has been attempted in New Zealand[34] and to a limited degree in England.[35] An attempt by the Court of Appeal of New South Wales[36] was disapproved by the High Court of Australia.[37]

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30 *A.T. & T. Istel Ltd v Tully* [1992] 3 All ER 523, 529.

31 Ibid.

32 It remains for this issue to be fully addressed. Given the House of Lords approach to the privilege, legislative intervention will probably be required to remove documents which speak for themselves from the protection of the privilege.

33 *Murphy v Waterfront Commission* 378 US 52 (1964); *Kastigar v US* 406 US 441 (1972); *Ullmann v US* 350 US 422 (1956); *Counselman v Hitchcock* 142 US 547.

34 *Busby v Thorn EMI Video Programmes Ltd* supra note 3.

35 *Istel v Tully* supra note 30.

36 *Reid v Howard* (1993) 31 NSWLR 298.

37 *Reid v Howard* (1995) 184 CLR 1.

There is a policy issue which arises: should the resolution of a dispute between private individuals take precedence over criminal proceedings which are instituted for the protection of the wider community? By allowing a private litigant relief by the provision of immunities, self-incriminatory evidence may be available for civil proceedings, but it cannot be used for a criminal prosecution. The alternative scenario is that absent the availability of immunities, and given the existence of the privilege, the evidence is unavailable for either civil or criminal proceedings. The casualties are truth and the perception that justice has been done.

The next section examines how the Courts have attempted to maintain the protection that the privilege provides for witnesses whilst enabling incriminatory testimony to be given.

IV. Varying Approaches to the Privilege

4.1 The English Approach

In England the general judicial attitude is that any changes to the privilege should be made by Parliament. Another feature that complicates the English approach in developing judge-made immunities is that the Courts in their civil jurisdiction are unable to bind those in their criminal jurisdiction. A solution was recently reached but it is neither satisfactory nor reliable.[38]

The starting point in any discussion on recent English developments is *Rank Film Distributors Ltd v Video Information Centre.*[39]

4.1.1 Rank Film Distributors Ltd v Video Information Centre

Video Information Centre was alleged to be involved in the wholesale "pirate" copying of films the copyright of which was held by Rank. An Anton Piller Order was obtained by Rank requiring Video Information Centre to disclose the particulars of the suppliers of the tapes and the customers who purchased them. It was argued by Video Information that by such disclosure they may incriminate themselves. The likely criminal offences which they faced were breaches of the Copyright Act, conspiracy to commit a breach of the Copyright Act and conspiracy to defraud (a common law offence).

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38 *Istel v Tully* supra note 30.

39 [1981] 2 All ER 76.

In holding that the privilege could be invoked Lord Wilberforce observed that the potential offences under the Copyright Act faced by the respondents covered almost precisely the same ground as the basis for civil liability. He was reluctant (and used that language) to hold that in civil proceedings for infringement based on specified acts the defendants could claim privilege against discovery on the grounds that the same acts established a possible liability for a petty offence. The exposure of the respondents to a charge of conspiracy to defraud caused him concern. Much heavier penalties attached and "unless some escape can be devised from this conclusion the privilege must inevitably attach."[40]

Lord Wilberforce pointed to the paradox and emphasised the tension that the privilege created: the more criminal a party's activity may appear, the less effective the civil remedy that may be granted because of the availability of the privilege.[41]

He could not accept that a civil court could bind a criminal one as to the evidence that may be admissible in that Court. Although a discretion resided in the criminal court to exclude evidence that was unfairly prejudicial, a discretion was not as potent a protection as the common law privilege which the defendant could invoke.[42]

He pointed out that there was a statutory immunity provided by s 31 of the Theft Act 1968. A person is required by that Act to answer questions in proceedings for the recovery of property, but no answers are admissible in proceedings for an *offence* under the Act. However, in this case the Theft Act did not apply because infringement of copyright is not theft.

The indication by the House of Lords that it cannot compel a criminal court to exclude self-incriminatory evidence obtained as a result of civil discovery or civil proceedings has created difficulties for the English courts in subsequent decisions[43] although, as will be demonstrated, the *Rank* approach has not been followed in New Zealand.[44] Immediately after *Rank* the Westminster Parliament legislated to provide that defendants in

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40 Ibid, 81.

41 Ibid, 79.

42 Ibid, 81.

43 For example see *Khan v Khan* [1982] 2 All ER 60; *Sociedade Nacional de Combustiveis de Angola & Ors v Lundqvist & Ors* [1990] 3 All ER 283, especially the comments of Browne-Wilkinson VC at 302; *Tate Access Floors Inc v Boswell* [1991] Ch 512.

44 *Busby v Thorn EMI Video Programmes Ltd* supra note 3.

intellectual property actions could not resist production of documents on the grounds of self-incrimination, but the documents so produced cannot be used in any subsequent proceedings.[45] The position has now been reached where the right in England to resist discovery on the ground of self-incrimination only now applies where there is a serious risk of prosecution for conspiracy.[46]

However, the decision in *Smith v Director of Serious Fraud Office*[47] set the environment within which the House of Lords could be more creative in its approach to the privilege.

4.1.2 Redefinition and Subset Analysis

The issue in *Smith* was whether a person charged with fraud by the Police could be compelled to answer questions put pursuant to the powers of the Serious Fraud Office in a concurrent investigation arising out of the same circumstances. The House of Lords upheld his contention although it pointed out that while he could not be questioned about the offence with which he had been charged, he could still be questioned about other suspected offences.

The significance of *Smith* lies in Lord Mustill's redefinition of the right to silence and the privilege against self-incrimination. He did not consider that the "right to silence" embraced any single right, but was of the view that it was a convenient label for a "disparate group of immunities which differ in nature, origin, incidence and importance".[48]

Lord Mustill identified six immunities as follows:

1. A general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions posed by other persons or bodies.

2. A general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

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45 Section 72 Supreme Court Act 1981.

46 *Tate Access Floors Inc v Boswell* supra note 43.

47 [1992] 2 All ER 456.

48 Ibid, 463.

3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

4. A specific immunity possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

5. A specific immunity possessed by persons who have been charged with a criminal offence from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

6. A specific immunity (at least in certain circumstances which it is unnecessary to explore), from having adverse comment made on any failure

   (a) to answer questions before the trial; or

   (b) to give evidence at the trial.[49]

In considering whether Parliament had intended to abrogate the right to silence or the privilege Lord Mustill claimed that the starting point for an inquiry must be to identify the variety of the right being invoked and to ascertain the reasons for believing whether the right in question ought at all costs to be maintained. If one is to adopt this approach, the right is broken down into a number of subsets. One then examines the subset, determines the motive for the existence of the subset and then determines whether or not the conditions exist that justify maintaining the subset or abrogating it.

In dividing the right to silence and the privilege against self-incrimination into subsets, Lord Mustill is saying that personal liberty comprises a number of subsets of activity which may be permitted. To carry the analogy with personal liberty through, in considering the justifications for the right to silence as he later does in his speech, it is as if Lord Mustill were saying that the protection of each subset of personal liberty has to be considered on its own merit and quite apart from any notion of a fundamental right or a fundamental freedom. By following this reasoning it is quite easy to conclude that a subset of a particular right or liberty perhaps is no longer worth protecting or upholding.

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[49] Ibid, 463-4. The last immunity is no longer as absolute in England given the provisions of the Criminal Justice and Public Order Act 1994 where judges may comment on the silence of the accused in certain circumstances and may direct the jury to draw such inferences as appear proper from that silence.

4.1.3 Istel v Tully

Subset analysis of the privilege was applied by Lord Templeman in *Istel v Tully*.[50] He considered Lord Mustill's six immunities and looked at each individual justification for each individual immunity. In *Smith* Lord Mustill had referred to the desire to minimise the risk that an accused would be convicted on the strength of an untrue confession. Lord Templeman accepted this as an important consideration and went on to deliver a stinging attack on the invocation of the privilege in civil proceedings.[51] Lords Lowry and Griffiths, like Lord Templeman, were critical of the invocation of the privilege in civil proceedings.

The facts in *Istel and Tully* were unremarkable, but the approach of the House of Lords was, in the light of *Rank*, innovative but expedient. The case was not significant for the enunciation of any principle or the overturning of *Rank*, but a utilisation of certain facts which will not necessarily be constant in the future but which indicated that in certain circumstances, English courts could be willing to consider abrogating the privilege where there is a protection provided.

The case involved issues of fraudulent management of a company purchased by Istels from Tully. Istels obtained a Mareva injunction requiring Tully to disclose and document certain dealings which was met by the invocation of the privilege against self-incrimination. In the Court of appeal Neil LJ was not prepared to create a judge-made substitution for the privilege, considering that it was a matter for Parliament. He expressed the opinion that the House of Lords may feel able to take such a step.

Before the House of Lords it was revealed that the police had been investigating Tully's activities and had accumulated a considerable amount of evidence. A letter from the Crown Prosecution service was made available claiming that it had enough evidence to proceed absent any incriminating evidence from Tully. There was no jeopardy faced by Tully in making the disclosures required, and the House held that he had to comply with the Mareva Injunction.

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50 Supra note 30.

51 See *Smith* supra note 47 at para. 2.1.3. Lord Templeman was a member of the Court of Appeal in *Rank* and expressed his concern for the privilege even then when he said that the plaintiff was not necessarily defeated and a defendant not necessarily assisted by relying on the privilege in that a civil court could draw conclusions where a criminal court may not *Rank*. [1980] 2 All ER 273, 292.

The Court of Appeal has since cast doubt upon the *Istel v Tully* approach. In *United Norwest Co-operatives Ltd v Johnstone*[52] it was held that the defence of self-incrimination could still be raised where there was no prosecution taking place and even where assurances had been given by prosecuting authorities that the material disclosed in the course of civil proceedings would not be used in any prosecution. It was held that the ability of a defendant to invoke self-incrimination did not depend upon the absence of assurances by the prosecuting authorities that any material disclosed in the course of civil proceedings would not be used in a prosecution. If the civil proceedings have the effect of charging a defendant with a criminal offence then that is sufficient to enable the privilege to be invoked and thus the defendant could refuse disclosure.[53]

The position of the privilege in the context of Anton Piller Orders has been strengthened in England. Where such an order would expose a defendant to a real risk of criminal prosecution for conspiracy, it could only be made and served if it contained a proviso which adequately protected the defendant's right to claim the privilege. The defendant would have to be informed in clear language of the right to invoke the privilege and he would have to expressly decline to invoke it.[54]

4.1.4 Conclusions on the English Approach

It is unlikely that a judicial solution to the tensions raised by the privilege will be reached in England. Even in *Istel v Tully*, where a limited abrogation was allowed, the Law Lords reiterated that changes to the law regarding the privilege were the province of Parliament but they indicated that where an immunity could be provided the privilege need not necessarily be upheld. Certainly the legislative solution has been provided and legislative policy is to preserve the effect of the privilege by providing a use immunity. However, the English legislative approach has been piecemeal, reactive and expedient. The privilege is perceived as a rule requiring modification rather than a significant ingredient of an overall legal process. The potential provided by *Smith* for the approach to the invocation of the privilege does not bode well for the accusatorial and adversarial criminal justice system.

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52 *The Times* 24 February 1994.

53 Clayton, Nigel A, "Problems of Self-Incrimination in Seeking to Obtain Banking Records" [1996] 3 JIBL 115, 122.

54 *IBM v Prime Data International Ltd* [1994] 4 All ER 748.

4.2 The Australian Approach

The Australian courts have confronted the privilege in a number of areas including Commissions of Inquiry[55] and in the area of administrative inquiry.[56] In terms of interpretation of the nature of the privilege, the Australian Courts have put an emphasis upon the privilege that differs from the English approach. As a result of this approach, the High Court of Australia has limited the extent of the invocation of the privilege.

4.2.1 EPA v Caltex and Corporate Invocation

It has long been the view in common law countries that the privilege can be invoked by corporations.[57] In the United States a different view has been developed regarding corporate invocation of the privilege contained in the Fifth Amendment. The privilege is available to natural persons and not corporations.[58] A corporate officer may not withhold testimony or documents on the ground that the corporation may be incriminated.[59] The rationale for the American approach is that the corporation is created by the State of incorporation for public benefit. There is reserved to the State a visitorial power and oversight that is inconsistent with the privilege.[60]

In *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[61] the oil company faced prosecution for offences against environmental legislation. The prosecuting authority sought a notice requiring production of documents which was resisted by Caltex on the basis that the privilege

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55 *Hammond v Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983)152 CLR 281.

56 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486; *Mortimer v Brown* (1970) 122 CLR 493; *Stergis v Commissioner of Taxation (Cth)* (1989) 89 ATC 4442; *Donovan v Commissioner of Taxation* (1992) 34 FCR 355; *De Vonk v Deputy Commissioner of Taxation* (1995) 82 A Crim R 150; Appeal Unreported. Federal Court of Australia Fed No. 994/95; 4/12/95.

57 *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 All ER 613; *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation* [1978] AC 547; *Webster v Solloway Mills & Co* [1931] 1 DLR 831; *Klein v Bell* [1955] 2 DLR 513; *NZ Apple and Pear Marketing Board v Master & Son Ltd.* [1986] 1 NZLR 191.

58 *Hale v Henkel* 201 US 43 (1906); *Wilson v US* 221 US 361 (1911); *Essgee Co v US* 262 US 151 (1923); *Campbell Painting Corp v Reid* 392 US 286,288 (1968).

59 He may refuse to give *oral* testimony if to do so would result in personal incrimination. *Shapiro v US* 335 US 1, 27 (1944).

60 *US v White* 322 US 694 (1944).

61 (1994) 118 ALR 392 - referred to hereafter as *EPA v Caltex.*

against self-incrimination could be invoked. The High Court of Australia rejected that view and decided that the privilege was not available to corporations and could not be invoked to avoid production of documents where such is required either under the rules of the court or a statutory power.

The Court considered a number of matters. Mason CJ and Toohey J were of the view that the privilege was essentially a *human* right protected by *inter alia* an international treaty.[62] Brennan J examined the nature of a corporation and its artificiality as a person to whom the privilege may attach.

The Court also considered the relevant strength of a corporation vis-a-vis the State than the individual. Companies enjoyed resources and advantages many of which stemmed from incorporation which the natural person did not. The complexity of corporate structures and arrangements made corporate crime and complex fraud one of the most difficult areas for the State to regulate effectively. Thus the corporation occupied a different position in terms of the State/individual balance which the privilege protected.

This line of approach seems to assume that all companies are large organisations possessed of considerable resources, ignoring the rationale which found favour before the New South Wales Court of Criminal Appeal and the New Zealand Court of Appeal regarding the proliferation of small companies operating as the alter ego of natural persons.

4.2.2 Issues Arising from EPA v Caltex

EPA v Caltex is not the last word on the subject of corporate self-incrimination. It is significant to note that the facts of the case were limited to the production of documents and not to the issue of testimonial incrimination. This issue will have to be addressed, although the High Court has made itself clear as to the general principle. The full scope of the decision is still undefined. Whether unions or partnerships can claim the privilege has yet to be decided.[63]

Use and derivative use will also have to be addressed. There is no suggestion in the majority decision that the use of incriminating evidence obtained from the corporation is limited to the prosecution of the

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62 Article 14(3)(g) of the International Covenant on Civil and Political Rights.

63 They may not do so in the United States.

corporation itself. A company may be compelled to produce incriminating documents which could be used to bring proceedings against the directors or managers who are required to produce them on behalf of the corporation.[64]

4.2.3 Reid v Howard[65]

Reid was an accountant who had admitted to the Police that he misappropriated funds. His business papers were seized pursuant to a search warrant. Howard commenced proceedings in the Equity Division to protect racing rights. A Mareva Injunction issued with an order, subject to invocation of the privilege against self-incrimination, that Reid disclose his assets. Reid invoked the privilege. Criminal proceedings against him had not been commenced. At first instance his claim was rejected. He had confessed to the Police and was in no greater jeopardy if he made the affidavit.

The New South Wales Court of Appeal restated the law regarding the privilege. It underscored the fact that the privilege covered not only direct but indirect use[66] of material by prosecuting authorities. Furthermore, a trustee or other fiduciary could invoke the privilege in answer to compulsory discovery in civil proceedings brought by a beneficiary. This view was upheld by the High Court of Australia.

Most significantly, however, it held that the court had powers to mould its orders so as to effectively enforce a party's civil rights whilst protecting a witness against the risk of self-incrimination. The exercise of such jurisdiction did not depend upon the agreement of prosecuting authorities because such orders were enforceable by proceedings for contempt of court.

The court considered the approach of the New Zealand Court of Appeal in *Busby*[67] but held that it was not available. The restriction on admissibility would not protect against the indirect use of the information.

The High Court concluded that the orders that were made by the Court of Appeal were vitiated by an error of law. Deane J held that the privilege reflects a cardinal principle which lies at the heart of the administration of

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64 Under a number of Australian statutes managers and directors are automatically deemed guilty of offences committed by the company *virtute officio*.

65 Supra notes 36 and 37.

66 This is referred to in the United States as use or derivative use.

67 [1984] 1 NZLR 461. For discussion see infra Section 4.3.1.

the criminal law. He observed that it can be modified by the legislature. Otherwise it is unqualified and in particular should not be modified by judicially devised exceptions or qualifications. Unless the invocation of the privilege is unsustainable, it cannot be disregarded or overridden by the courts absent statutory warrant. The majority[68] of the High Court said:

> it is inimical to the administration of justice for a civil court to compel self-incriminatory disclosures, while fashioning orders to prevent the use of the information thus obtained in a court vested with criminal jurisdiction with respect to the matters disclosed. Nor is justice served by the ad hoc modification or abrogation of a right of general application particularly not one as fundamental and as important as the privilege against self-incrimination.[69]

4.2.4 Conclusions on the Australian Approach

EPA v Caltex is a departure from what has been a relatively rigorous approach to the privilege by the Australian Courts. By casting the privilege as a human right, and by reference to International Convention, the first step to limit the invocation of the privilege to natural persons has been taken. The High Court was very careful not to address the issue of the abrogation of the privilege, but was considering only the first step - whether or not it could be invoked.

In Australia the privilege has been the subject of legislative abrogation, and the Courts have been careful to examine the abrogating statute to ensure that abrogation or modification is by express legislative stipulation or necessary implication. As a result of the decision in *Reid v Howard* it is clear that any judicially created protection that is co-extensive with the protections afforded by the privilege will not be countenanced, notwithstanding such approach may be pragmatic or expeditious. The issue of abrogation is clearly a legislative one.

4.3 The New Zealand Approach

The New Zealand Court of Appeal departed from the propositions advanced in *Rank* in a remarkably similar case. Indeed, the approach of the Court of Appeal has been to treat the privilege as an evidential rule akin to the rule against hearsay, and therefore capable of judicial modification.

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68 Toohey, Gaudron, McHugh & Gummow JJ.

69 Supra note 37 at 17.

4.3.1 Busby v Thorn EMI Programmes Ltd

The approach that the Court of Appeal adopted in *Busby* is a solution that is not entirely satisfactory. It was held that information should be obtainable under Anton Piller orders, but if a defendant was required to provide information or documents which might include evidence of criminal offences, it should be on condition that they were not used for prosecuting him. A ruling was made that the documents and answers properly compelled under the Anton Piller order would not be admissible in criminal proceedings for an offence relating to intellectual property or other subject matter of the action in which the order had been made. The plaintiff was required to undertake that it would neither directly nor indirectly use:

i) any document which was the subject of an order; and

ii) any information obtained from such document; and

iii) any answers by the defendant under the order for any criminal prosecution of the defendant, nor make the same available to the Police for any purpose.

The approach is custom-made for New Zealand conditions and, like the result in *Istel v Tully*, has a flavour of expediency about it without addressing real issues of principle. The New Zealand conditions referred to were:

1. Unified administration of civil and criminal trials and no separate divisions of the Court of Appeal

2. Wider judicial control over criminal trials in New Zealand. The inherent jurisdiction of the Court prevents abuse of process by the avoidance of unfairness

3. The field of evidence is one which the Court of Appeal has been ready to adapt to meet New Zealand conditions.

These issues persuaded the majority to supply a remedy rather than leave the matter to the legislature. Cooke J said that the Court could hold as a general rule regarding matter of criminal evidence that the documents would not be admissible in criminal proceedings for intellectual property offences. If there was self-incrimination for an offence not connected with intellectual property, the ordinary privilege could be claimed. Thus abrogation of the privilege was limited to the matters before the Court.

Certain comments give cause for concern. One of the arguments advanced for the appellants was that the Chief Justice at first instance had applied the wrong test in asking whether there was a mere faint possibility of a prosecution or a realistic chance of one. Cooke J held that he might have been entitled to ignore the possibility of a summary prosecution under the provisions of the (then) Copyright Act not because the offences on first conviction were comparatively trivial but:

> [B]ecause the smallness of the penalties compared with the potential profits, and the fact that prosecutions provide in essence many ancillary remedies for copyrighters, mean that the possibility of such prosecutions could reasonably be dismissed in the present cases as too remote. So could the possibility of some charge of theft.[70]

This can be taken to mean that the nature of a possible prosecution or the nature of the penalties are matters which should be taken into account in considering whether or not the privilege should be invoked. The fact of the matter is that the privilege against self-incrimination goes not to the quantum of the penalty but to the fact that the deponent faces the jeopardy that a criminal prosecution may be brought, which will result in a penalty be it large or small. The inference can be drawn, as a result of Cooke J's comment in *Busby*, that the *de minimis* nature of the penalty should result in an abrogation of the privilege.

In making these observations Cooke J left some doors open. There was no threat to the public interest. The case involved private property rights. The law enforcement agencies of the State had no interest in prosecution and the public peace and protection of citizens from violence was not involved.

Somers J considered that judicial modification in the field of evidence did not apply to the privilege which he described as a fundamental cornerstone of the law. It went beyond mere issues of evidence. This is recognised by the High Court of Australia in *EPA v Caltex* when it classifies the privilege as a basic human right, citing international conventions in support. Somers J observed that the legislature had, in the past, been careful when abrogating the privilege, to consider whether or not safeguards should be provided for the witness. Judicial abrogation could not, with a broad formula, cater for the variety of individual situations which might arise.

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[70] [1984] 1 NZLR 461, 470.

Neither solution is entirely satisfactory. Legislative abrogation may or may not provide safeguards and immunities.[71]

4.3.2 Natural Gas v Grant

The apparent shortcomings in the *Busby* approach were encountered by Barker ACJ in *Natural Gas Corporation Holdings Ltd v Grant.*[72] The first defendant had been arrested and charged with criminal offences which were concerned with matters which were the subject of the plaintiff's proceedings. The plaintiff had issued a Mareva injunction together with interrogatories. The defendant sought the protection of the privilege.

Barker ACJ said that he was bound to follow the general thrust of the decision in *Busby* and hold that with certain safeguards the defendant had to make the affidavit. He distinguished *Busby* on the basis that in that case there was no prosecution in contemplation. He referred to *Istel v Tully* observing that it was held that there was no reason for the defendant in civil proceedings to rely on the privilege where his or her own protection was adequately secured by other means. As an added safeguard to the defendant Barker ACJ held that he needed some intimation from the Crown Solicitor or Solicitor-General along the lines of the letter given by the Crown Prosecution service in *Istel v Tully.* Once such an intimation was to hand the defendants were required to comply with the order in a very short time.

In *Busby* the majority felt that use or derivative use issues were adequately protected by the Court's supervisory jurisdiction or by the making of undertakings. Barker ACJ seemed to move away from that very liberal approach towards a more conventional view of privilege abrogation. Although he adopted the method advanced in *Istel v Tully* he did not adopt the "litmus test" approach of Lord Templeman in using Lord Mustill's disparate group of immunities to see whether the privilege applied or not.

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[71] Consider the use immunities provided by *inter alia* s106 Commerce Act 1986; s22 Gas Act 1992; s116 Electricity Act 1992; s248 Electoral Act 1993; the very limited use immunity provided by s27 Serious Fraud Office Act 1990 and the absolute abrogation with no immunities or protection in the English legislation governing Securities and Department of Trade and Industry investigations demonstrated in *Re Arrows (No 4)* [1993] 3 All ER 861; *Hamilton v Naviede* [1995] 2 AC 75; *Re Jeffrey S. Levitt Ltd* [1992] 2 All ER 509; *R v Kansal* [1992] 3 All ER 844; *Re London United Investments plc* [1992] 2 All ER 841.

[72] [1994] 2 NZLR 252.

4.3.3 Radisich v O'Neil

In *Radisich v O'Neil*[73] the privilege was raised in the context of the Matrimonial Property Rules 1988. An order for discovery had been made in the Family Court. One of the reasons advanced for resisting discovery was that disclosure of the appellant's financial affairs would breach the privilege. It was argued that he would be liable to the risk of prosecution by tax authorities and the imposition of substantial penalties.

Thorp J held that the privilege could not be invoked. The Inland Revenue Act required the compulsory disclosure of such information. In such a case it was conceded by counsel that the claim for the privilege could not stand.

In the course of argument, the respondent indicated that she would be prepared to give non-disclosure undertakings as were approved in *Busby* and in *Grant*. The Judge observed that these were not guarantees of confidentiality but would reduce any disadvantage from discovery to the minimum.

Thorp J indicated clearly that his decision did not purport to establish any broad principle about or limit on the right to claim the privilege in Family Court proceedings. That was a matter of such broad significance that it were better resolved by legislation rather than by curial determination. Although Counsel advanced the argument that the necessity for disclosure in matrimonial property proceedings superseded the normal rules relating to the privilege, Thorp J did not decide that point and indeed indicated that he would have had to give the matter further consideration. Yet Thorp J did not, as has elsewhere been suggested[74], step away from the approach that was adopted in *Busby* or *Grant* other than observe that the cases showed a widespread judicial belief that the privilege in civil proceedings is profoundly unsatisfactory and is as likely to prevent as to promote injustice.

4.3.4 The Winebox Inquiry

The privilege was advanced in the course of the hearings of the Commission of Inquiry into Certain Matters Relating to Taxation (the

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[73] (1995) 13 FRNZ 170.

[74] Mahoney, R "The Privilege Against Self-Incrimination" [1996] NZLR 69.

Winebox Inquiry). Objection was taken by certain witnesses to answering questions. By doing so they exposed themselves to liability for prosecution in the Cook Islands. Indeed, in certain circumstances, the giving of the evidence would amount to an offence under Cook Islands law. The issue was whether the privilege could be invoked regarding evidence given in New Zealand when it may incriminate the witness for offences in another jurisdiction.

4.3.4.1 The Commission's Approach

The Commissioner delivered his decision on 27 September 1995. He held that there were several reasons why the common law privilege did not arise. In summary:

1. It had to be established that there are penal consequences in the foreign jurisdiction. That could only be determined by resolving the conflict between New Zealand and Cook Islands law with respect to answering questions in New Zealand.

2. The privilege normally arises where conduct has occurred and the right to be silent about that alleged conduct arises. It does not normally arise where the act of answering is said to be an offence.

3. If the first two approaches were incorrect, the balance of authority was against the privilege applying with respect to foreign law. One authority[75] held that the privilege did apply to penal consequences in a foreign jurisdiction; two held otherwise.[76]

On this issue the Commissioner concluded that there is no and never has been a privilege known to New Zealand law of refusal to give evidence on the grounds that to give evidence in New Zealand would be contrary to the provisions of foreign state law. The privilege against self-incrimination was limited to incrimination in respect of offences which had already been committed by the witness in New Zealand. The privilege had to be claimed in respect of acts already done, not in respect of something which the witness was currently required to do, namely to give evidence in New Zealand.

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75 *US v McRae* (1868) 3 Ch App 79.

76 *King of the Two Sicilies v Willcox* (1851) 1 SIM(NS) 301; 61 ER 116; *In re Atherton* [1912] 2 KB 251. The conflict of authority lead to the passage in England of the Civil Evidence Act 1968 which provides that in legal proceedings the privilege applies only as regards criminal offences under the law of the United Kingdom. Conflict of authority in Australia was also cited. See *Adsteam v The Queesnland Cement and Lime Co Ltd* (1985) 1 Qd R 127 and *FF Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd* (1990) 96 ALR 468.

4.3.4.2 The Court of Appeal Approach

The Court of Appeal in the majority accepted that the privilege was restricted to previous conduct and that to allow foreign law incrimination would be to extend the privilege. The Court resolved the conflict of authority essentially on a policy basis, but only Cooke P was prepared to enunciate that policy. He held that the New Zealand public interest was the justification for so holding. In reality what he was saying was that:

1. since there was no suggestion that the witnesses would be prosecuted for a crime in New Zealand; and

2. since the Winebox Inquiry involved issues regarding the efficiency of authorities in detecting and prosecuting tax evasion; and

3. since the only likely prosecution may be initiated in the Cook Islands; then

4. therefore the interests of achieving the goal of the Inquiry in New Zealand overrode the likelihood of prosecution of the witnesses in a foreign jurisdiction, such that the privilege should not apply.

The oblique reference to "the public interest" in *Busby* loomed large in the decision. Cooke P said "I think the cases can be disposed of on a broad and relatively simple ground, namely the New Zealand public interest."[77] He made reference to an earlier "winebox" appeal[78] saying "the law will not protect confidential information if publication complained of is shown to be in the overriding public interest."[79] In considering the development of a tax haven, Cooke P sounded a warning that older doctrines such as the privilege will not necessarily be apt when dealing with this sophisticated modern phenomenon. The public policy or interest of the country of the forum may properly require a different approach. A further reference to public policy was contained in the claim that by answering questions or providing documents the witness was at risk of prosecution under Cook Island law. The ground for this claim was rejected. The observation was made that the issue may be arguable if the privilege extended to incrimination under foreign law and after a very brief consideration of the conflicting authorities, Cooke P held unequivocally that for New Zealand law the privilege or immunity does not extend that far.

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77 *Controller and Auditor General v Davison* [1996] 2 NZLR 285.

78 *European Pacific Banking Corporation v Television New Zealand Ltd* [1994] 3 NZLR 43.

79 Ibid.

On one of the appeals McKay J dissented. After considering the conflicting authorities he observed that there seemed to be no distinction in principle between incrimination under domestic or foreign law where there was a reasonable likelihood that a charge will be preferred. He preferred the *McRae* view, observing that the US Supreme Court took that view in *Murphy v Waterfront Commission.*[80] Cooke P correctly dismissed reliance on *Murphy* because that case dealt with conflict of laws between the federal\state jurisdictions. It seems that argument was not based upon the only case where the US Supreme Court heard argument on the invocation of the privilege where a witness fears foreign prosecution. In *Zicarelli v New Jersey State Commission of Investigation*[81] the Court refused to uphold the witness's objection to six questions, not because the privilege was not available but because the questions did not seek answers concerning foreign involvement or criminal activity, did not relate to criminal acts, nor could the answers form a link in an evidence chain.

The American jurisprudence recognises that it cannot bind a foreign government by use or derivative use immunities. Thus the privilege can be invoked if certain criteria are fulfilled. These are that a prosecuting government:

1. must obtain custody of the witness;

2. gain access to his self-incriminating testimony or evidence derived from it;

3. criminally prosecute the witness; and

4. use the testimony or evidence derived from it to further the prosecution.

If any of these events cannot occur the likelihood of testimony aided prosecution is so low that the privilege cannot be invoked.[82]

4.3.5 Conclusions on the New Zealand Approach

The approach in Britain where the conflict between the same authorities arose was to resolve the issue of foreign law incrimination by legislative amendment, and one is forced to wonder whether the Court took this approach as a validation for what it did.

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80 378 US 52 (1964).

81 406 US 472 (1972).

82 For a detailed discussion of this issue see Bovino, Scott "A Systematic Approach to Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared" (1993) 60 University of Chicago LR 903.

By returning to basics, the answer is this: the privilege protects against the *use* of testimony and not the *fact* of testifying. If the witnesses had demonstrated that the *content* of their answers could be used as *evidence* in foreign prosecutions then the privilege would have to be considered and the issues raised by *Zicarelli* would have to be addressed. With respect Richardson, Henry and Thomas JJ approached the privilege from the correct stand-point. Regrettably, they did not distance themselves from the warning that was sounded by Cooke P as to the possible future relevance of the privilege.

The New Zealand developments in this area over the last 12 years have demonstrated that judge-made modifications to the privilege are acceptable, whereas such an approach has been eschewed in Australia and has been approached gingerly in England. Although Thorp J was of the view that the solution to the problem in *Radisich v O'Neil* was legislative, nevertheless his expressed inclination to give the matter further consideration were he required to address the broader issue, indicated a willingness not to discount a judicial solution outright.

The consequences for the privilege in New Zealand are that it may well suffer erosion by judicial activity rather than legislative consideration, and that expedience may well dictate the outcome rather than principle. What Cooke P has done in the Winebox appeal is to advance a rationale based on public policy for declaring the privilege unavailable. This sounds an ominous warning for the future of the privilege which in New Zealand can be clearly abrogated by judicial fiat.

V. Immunity, Options and Attitudes to Change

Is the provision of an immunity from prosecution a satisfactory solution to the problems posed by the privilege? If an immunity is to be provided should it be restricted to the use of the testimony for prosecutorial purposes? Should there be an immunity for what is referred to as derivative use: that is a signpost given by testimony which leads to evidence which incriminates the witness? The provision of use or derivative use immunity poses significant ethical problems. The law is quite accustomed to balancing competing interests in reaching a resolution.

5.1 The Offender Walks Free for Evidence Given

A defendant is required to respond to interrogatories. By doing so he will incriminate himself. He invokes the privilege. The Court recognises the privilege but provides an "immunity" whereby the incriminating testimony

cannot be used for the purposes of prosecution. The defendant provides the answers. He has to, because they will no longer incriminate him. The protection that the Court's immunity has given him is co-extensive with the protection he would otherwise receive from the privilege. In addition the Court has directed that the fruits of such testimony — signposts that an investigating authority could follow to obtain evidence — cannot be put before the Court. Thus, a potential criminal avoids prosecution. The real paradox that devolves from this is that the evidence is available and in existence. It simply cannot be used. To many ordinary citizens and the judiciary included, this may seem to be an absurdity.

5.2 Revisiting the Tensions Caused by the Privilege

The difficulties are further complicated by the tensions created by the privilege and to which I have referred. In balancing interests, the provision of use or derivative use immunity by the Court favours the private litigant over the interests of the community and the state in seeing that those who break the law are charged and convicted. In today's climate where the merits of "restorative justice" are being promoted, such a result may be seen to be quite consistent.

In civil proceedings at the interlocutory stage where recovery of misapplied funds is sought the balance is not entirely clear. On the one hand, the courts are anxious to protect the rights of those accused of fraud. On the other, a plaintiff has a different need: to see that his moneys are not dissipated.[83] If the courts hold that the privilege outweighs the need to preserve funds then the plaintiff could be out of pocket.[84] The provision of an immunity would protect the plaintiff and require the evidence to be given.

The anomaly still exists. The issue is whether the interests of the private civil litigant should supersede those of the State,[85] especially since it is the duty of the State to protect the rights of life, liberty and the pursuit of happiness and property by prosecuting and punishing those who, by fraud,

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83 *Cloverbay Ltd v BCCI SA* [1991] Ch 90; *Derby & Co Ltd v Weldon* [1990]1 WLR 1156.

84 Although in England the issue could be addressed by inspection under the Bankers Books Evidence Act 1879 and Bankers Trust Orders - see Clayton supra note 53.

85 It is significant to note that Cooke J in *Busby* did make reference to matters of public interest and to serious crime. One wonders whether the Court would have been so ready to decide in the way that it did if serious crime had been involved. It is also to be noted that no formal "use immunity" was provided.

coercion or other interference, prevent citizens pursuing or enjoying those rights. The power of the State to compel citizens to testify is a long-standing one in Anglo-American jurisprudence.[86] By 1742 it was a general common law principle that "the public has a right to every man's evidence."[87] The privilege presents a substantial impediment to that process.

In *Busby* Somers J observed that from time to time Parliament had legislated to limit or amend the scope of the privilege. Certain statutes which compel testimony actually provide a specific use immunity. The legislation clearly states that compelled self-incriminatory answers are not admissible in evidence in criminal proceedings save on a charge of perjury or making a false statement in respect of testimony. Given this legislative background, and the fundamental nature of the privilege as a principle of law, Somers J considered that the judicial function would become legislative if judge-made abrogations and co-extensive protections were to be advanced. A similar view was expressed by Deane J in *Reid v Howard.*

There are a number of options open if legislative change is to take place. One is to abolish the privilege entirely. A second is to abolish the privilege and set in place certain legislatively prescribed immunities that apply in certain circumstances. A third is to recognise the privilege, provide for compellability of testimony or disclosure in certain situations and provide use or derivative use immunities.[88] A fourth is to limit the scope of the privilege to provide that a person's pre-criminal trial statements can never be introduced at a prosecution, but that the fruits of such information can be. Thus an accused will never be a witness *contra se* but the fruits of the compelled words will be.[89] A fifth is to recognise the privilege, provide for compellability or disclosure and, in the circumstances pertaining to the particular legislation, provide for no immunities for use or derivative use.[90]

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86 Wigmore, supra note 6, para 2190; 5 Eliz 1 c 9 para 12 (1562); *Countess of Shrewsbury's Case* (1612) 2 How St Tr 769, 788.

87 See the remarks of the Duke of Argyle and Hardwicke LC in the debate on the Bill to Indemnify Evidence; (1812)12 T Hansard, Parliamentary History of England, 675, 693.

88 As is the case in certain statutes in New Zealand.

89 This is an extension of the current situation under the Serious Fraud Office legislation. For a detailed discussion of this option see Amar and Lettow "Fifth Amendment First Principles: The Self-Incrimination Clause" (1995) 93 Michigan LR 857.

90 As is the case in certain Securities, Insolvency and Department of Trade and Industry legislation in Britain.

5.3 Rights Talk

A matter of concern is how change will be approached. The privilege has generated a large amount of angst for a considerable period of time.[91] Even though it has been described as a fundamental right, it may not be treated as such, especially since governmental focus in many areas appears to be upon economy of outcome. Such rationale can easily be applied to the criminal justice system. The disposition of the criminal trial would certainly be speeded up if there were substantial abrogations to the privilege against self-incrimination. Rights are seen as an impediment. Speaking of the situation in Britain, Gerard McCormack said:

> As a generalisation it would be fair to suggest that the culture of rights in this jurisdiction is not particularly strong. Judges are not generally happy with rights talk. In an ideal world we would have a written constitution incorporating a bill of rights with express protection for the privilege against self-incrimination. But that, at the very least, is a long way off if not completely in the realms of fantasy. At the moment one might hope for express legislative consideration of the self-incrimination issue when entrusting investigatory powers to corporate regulators etc. On the other hand, legislating by sleight of hand may be preferable to administrators since it deflects attention away from the issue. Also, alleged corporate malefactors may not be the most meritorious of claimants for our attention. Against that, upholding their self-incrimination rights may forestall wider abridgments of their rights. Corporate wrongdoers might be pursued down other paths. One cannot say that the privilege against self-incrimination is the only obstacle between such persons and the prison gates.[92]

I suggest that there is a similar discomfort in New Zealand towards fundamental rights and freedoms.

5.4 Judicial Attitudes to the Privilege

Judicial pronouncements in Britain reveal an impatience with the privilege. The comments of Lord Templeman suggest that the privilege is relevant only in the police station or in the face of official investigative questioning.[93] Sir Nicolas Browne-Wilkinson VC (as he then was) expressed some very serious reservation about the implications of the

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91 Consider Bentham's commentary in the 1820's in *A Rationale of Judicial Evidence.*

92 "Self-Incrimination in the Corporate Context" (1993) Journal of Business Law 425, 442 - 443.

93 *Istel v Tully* supra note 30. See also Templeman LJ as he then was in *Rank* [1980] 2 All ER 273, 292.

invocation of the privilege in corporate fraud cases, calling upon Parliament to remove the privilege in relation to all civil claims relating to property including damages, but providing for a use immunity of evidence or documents in criminal proceedings.[94] Lord Nolan justified the wide powers given to the Serious Fraud Office in strong language:

> The type of fraud which led to the passing of the Criminal Justice Act 1987 is an exceptionally pernicious form of crime, and those who commit it tend to be as devious as they are wicked. It is not in the least surprising that Parliament should have entrusted the Serious Fraud Office with the power to call upon a suspected person to come into the open, and to disclose information which may incriminate him. It would be highly regrettable if the power has, in fact, been created in terms which go significantly wider than was intended. But that is a matter which only Parliament can debate and, if necessary, resolve.[95]

Essentially Lord Nolan is suggesting that fundamental rights can be put aside depending upon the nature of the evil that is to be addressed. In addition, if the power given was wider than was intended, the Courts should not "peg it back."

5.5 The Privilege in Context

The proper way to approach any change to the privilege, be it judicial or legislative, is not to consider it as simply a rule of evidence but to view it within the total context of the criminal justice system.

Erwin Griswold described the privilege as expressed in the Fifth Amendment as a symbol when he said:

> In considering these problems, the Fifth Amendment can serve as a constant reminder of the high standards of the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by communists, and thus may well be regarded as one of the signs which

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94 *Sociedade Nacional de Combustiveis de Angola & Ors v Lundqvist & Ors* [1990] 3 All ER 283 supported by Lord Donaldson in *Re O (Disclosure Order)* [1991] 1 All ER 330 and in the Court of Appeal in *Istel v Tully* [1992] 2 All ER 28. See also *Tate Access Floors Inc v Boswell* [1990] 3 All ER 303 and Dillon LJ in *Bishopsgate Investment v Maxwell* [1992] 2 All ER 856; *Re Arrows(No. 4)* [1993] 3 All ER 861.

95 *Re Arrows (No 4)* [1994] 3 All ER 814, 828.

> sets us off from communism.[96]

We find that there are similar values expressed within the accusatorial and adversarial criminal justice system. "Accusatorial and adversarial" is a descriptive phrase identifying two essential aspects of the Anglo-American criminal justice system. The word "accusatorial" deals with the values and norms upon which the system is based. The word "adversarial" identifies the process by which results are reached and within which the values and norms of the system are a vital part.

The basis of the values of the accusatorial system arise from a recognition of a social equilibrium in which the State is viewed as reactive rather than pro-active to criminal activity. The accusatorial system assigns great social value to keeping the State out of disputes, especially when there is a likelihood of stigma or sanction. The State can only act if an accusation has been made, and if there is evidence to substantiate the accusation. The person who alleges the crime cannot rely upon an assertion alone to place upon the accused the obligation of proving his or her innocence. The accuser must present reasonably persuasive evidence of guilt. Thus the presumption of innocence is at the heart of the accusatorial system. The accused is treated as if he were innocent and need give no assistance to those who seek his or her conviction.

The adversarial process is a means of conflict resolution. The prosecution and the defence perform mutually antagonistic roles in interpreting legal doctrine, adducing and testing the evidence. The judge acts as an impartial and disinterested referee, ensuring that there is compliance with the rules of evidence and that there is proper instruction in the law applicable to the case. The State maintains its essentially reactive role.

The accusatorial system places value upon the individual above that of the State. In addition to the complex matrix of presumptions, proof burdens and allocations, the nature of the offence (the actus reus accompanied by the requisite mental element) not only addresses issues of capacity but also of the value of choice in analysing the allocation of responsibility for behaviour. This emphasises the concept of individual free will.

The ultimate scenario of crime control in the Statist society would pre-empt criminal behaviour by making *contemplated* criminal conduct culpable without an accompanying *actus* or behaviour. Except in the limited example of conspiracy, such a concept is foreign to an accusatorial and reactive justice system.

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96 *The 5th Amendment Today*, Chapter 3 (1955) 81.

Another significant ingredient of the accusatorial system is the value placed upon fairness and the integrity not only of outcome but also of process. The quality of the outcome is judged by the quality of the process. The process commences when the authorities apprehend a breach of the law. Evidence generally originates from sources other than the suspect. The suspect generally is the last port of call. Thus it is inherent that within this process the State as its accuser must make its case without the co-operation of the accused.

This process developed over the centuries as the various ingredients, available procedures and forms of action were utilised by the lawyers as they and the judges weaved the tapestry of the common law basis of and values for our present day criminal justice system.

5.6 Recent Legislative Activity Tells a Story

If there is to be legislative activity, it will probably be to limit the scope and applicability of the privilege. In New Zealand and Britain the Serious Fraud legislation was adopted virtually without demur. In the debate on that Bill, Mr. Paul East, currently Attorney-General, suggested that Parliament should consider the right of silence not just in terms of corporate fraud and serious fraud, but also in the wider criminal context.

In Britain the right to silence at trial and in the face of police questioning has been the subject of significant change in the Criminal Justice and Public Order Act 1994.[97] Sections 23(4) and 25 of the New Zealand Bill of Rights Act 1990 have been limited in their scope and certainly do not provide the protection of the privilege afforded by the Fifth Amendment to the Constitution of the United States. Thus, recent legislative activity suggests a restrictive rather than an expansive approach to the privilege.

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[97] The changes effected deal with the way in which the exercise of silence by a suspect at the police station or an accused at trial may be utilised at trial. First, both the prosecution and the judge may comment unfavourably about the defendant's silence or failure to mention a relevant fact during police questioning. Second, the court and prosecution can comment unfavourably on the accused's failure to go into the witness box and give evidence in the courtroom. Third, the court and the prosecution may invite the jury to draw adverse inferences from the defendant's failure, at police questioning, to explain marks or substances satisfactorily (blood on clothing, scuffs on shoes, traces of explosive on hands). Finally, if the suspect failed to give a satisfactory explanation of his or her presence at the crime scene when questioned by the police, the court or prosecution may invite the jury to draw adverse inferences. For a useful summary of the legislation see Zander, M "You Have No Right to Remain Silent: Abolition of the Privilege Against Self-Incrimination in England" (1996) 40 St Louis University LJ 659.

In New Zealand's legal environment the answer to a legal problem is to legislate a solution. Should the solution appear unsatisfactory or fraught with difficulty the solution again is to amend the legislation. The difficulties caused by the privilege are therefore easily solved. Replace the privilege with a statutory framework or, as has been the practice with specific pieces of legislation in the past, include a statutory immunity against use of compelled testimony or information in criminal proceedings.

Recent Parliamentary attitudes towards fundamental rights seem less than committed. None of the recent "rights-based" legislation — the Human Rights Act 1993 and the Bill of Rights Act 1990 — is entrenched. Indeed, although the Bill of Rights Act is perceived as "Constitutional" legislation, it is not. It is subject to specific legislation and it does not provide a "litmus" test against which specific legislation can be tested. It is hedged by the justifiable limitations clause and finally, it can be repealed virtually overnight. The only solace in such an eventuality is that unless Parliament specifically said so, the common law "fundamental rights" would remain.

The comments of Lord Mustill in *Smith* seem to suggest a possible statutory framework, whereby the privilege can be replaced with a number of immunities. In such a situation the invocation of the immunity could be tested against the category or subset thereof.

If Parliament were to abolish the privilege and replace it with a statutory regime, the consequences of repeal of the statutory structure would be that the privilege would no longer be a part of the law. It is unlikely that Parliament would entrench a statutory regime of self-incriminatory protection if it has not entrenched legislation as "fundamental" as the Bill of Rights Act.

VI. Conclusion

To seek a rationale in history for today's relevance of the privilege is interesting but of limited utility, for it attempts to pare away the privilege from the development of other legal processes of which it has been an integral part.

If there is a common thread with history it involves the contest between the rights and inviolability of the individual and the interests of the State. In the seventeenth century the privilege was invoked in cases of conscience against a background of the development of the modern State. Today the power of the State is greater, more sophisticated and more intrusive. The "conscience" of the religious and political dissenters of the seventeenth century has become the "privacy" of the twentieth.

Today the privilege against self-incrimination is more than a symbol. It is an integral and vital part of the accusatorial and adversarial system. It embodies and realises the values expressed in the word "accusatorial". It is a part of the process described as "adversarial". Whatever its origins or its early rationales, it is an integral part of the matrix of values and procedures that underpin the Anglo-American criminal justice process. That being so, it is impossible to isolate the privilege and "deal with it" without doing violence to the entire process and all its values and presumptions. Although the criminal process has developed to its present point in disparate ways and in response to different stimuli it is a settled matrix of fundamental principles.

Therefore, if we profess allegiance to the values and presumptions of the accusatorial and adversarial system, we must maintain allegiance to the privilege against self-incrimination, for the modern rationale for the privilege is the accusatorial and adversarial system of justice. If there is to be any abrogation, protections co-extensive with the privilege must be provided as they are at the moment. It is incorrect to say the wrongdoer will go unpunished, for by providing evidence which exposes him to civil liability means that restoration by way of damages will follow, notwithstanding that the State is unable to use that evidence in a prosecution. But if the State has other evidence and need not rely upon that given in the civil forum, it may still seek to prove the criminal act, for the co-extensive protection is not an immunity from prosecution but an immunity from the use or derivative use of the testimony.

For those who seek a more fundamental change to the status of the privilege, inquiry should be directed not to the privilege, but to the system of justice. As Brennan J said:

> To no small extent, legal professional privilege, like the privilege against self-incrimination, is an established facet of our adversarial system of justice. In the context of the complicated electronic and sophisticated forms of criminal activity which pervade modern society, it may be arguable that the adversarial system of administering criminal justice itself requires re-examination and at least some modification.[98]

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[98] *Carter v Northmore, Hale, Davy & Leake & Ors* (1995) 129 ALR 593.