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NOTES

Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings

The questions of the extent of an attorney’s right to claim the privilege against self-incrimination during bar disciplinary proceedings and of the consequences of the exercise of the privilege has created a sharp division of opinion.1 The privilege against self-incrimination necessarily involves a conflict between the public’s interest in disclosure and the individual’s interest in privacy and nondisclosure.2 However, the conflict is exacerbated when the individual claiming the privilege is entrusted with important public responsibilities.

Attorney disciplinary proceedings, which are intended to maintain the high standards of the bar, are part of the over-all system of state regulation of the practice of law.3 The state courts have traditionally been held to have an implied or inherent power to discipline the attorneys who practice before them and who serve as officers of their courts.4 Although at one time state supreme courts handled

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3. See Spevack v. Klein, 385 U.S. 511, 523-25 (1967) (Harlan, J., dissenting); Theard v. United States, 354 U.S. 278, 281 (1957); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir. 1967). Disbarment from practice before the state courts does not automatically result in disbarment from practice before the federal courts, although the state proceedings are given great weight by the latter. See Theard v. United States, 354 U.S. 278 (1957). Generally, when an attorney admitted in several jurisdictions is disciplined in one, his right to practice elsewhere is unaffected in the absence of separate disciplinary proceedings in the other jurisdictions. See Florida Bar v. Wilkes, 179 S.2d 193 (Fla. 1965).

4. See, e.g., In re Ratner, 194 Kan. 362, 363-64, 399 P.2d 855, 867 (1965); Ratterman v. Stapleton, 371 S.W.2d 939, 940 (Ky. 1965); In re Connor, 207 S.W.2d 492, 494-95 (Mo. 1948) (court of appeals has sole power to admit and thus inherent power to disbar; circuit court has no jurisdiction to disbar). See also Bradley v. Fisher, 80 U.S. (13 Wall.) 325, 354 (1871); Mattice v. Meyer, 353 F.2d 310, 318 (8th Cir. 1965) (dictum); Hertz v. United States, 18 F.2d 62, 64 (9th Cir. 1927). Statutory provisions cannot limit the court’s inherent power to disbar. In re Bailey, 30 Ariz. 407, 413, 248 P. 29, 31 (1926).
virtually all disciplinary matters themselves, in more recent times the courts have taken the bar into partnership in disciplinary matters and delegated to it the responsibility for preliminary investigation and hearing.  

There has been sharp resistance to the recognition of the attorney’s right to remain silent in these proceedings. In Cohen v. Hurley, the Supreme Court let stand a New York disbarment based on an attorney’s refusal on self-incrimination grounds to allow examination of records relating to his contingent fee cases or to testify at a general investigation of ambulance chasing. Although the New York court’s interpretation of the state privilege was also involved, Cohen was grounded in large part upon the then unavailability of the federal privilege against self-incrimination in state proceedings. In Malloy v. Hogan, the Supreme Court changed its position and held that, under the fourteenth amendment, the fifth amendment’s privilege against self-incrimination is also applicable to state proceedings, but Cohen was not expressly overruled.

An act of the state legislature compelling the court to readmit an attorney was held unconstitutional in In re Cannon, 206 Wis. 374, 378, 240 N.W. 441, 443 (1932). See generally SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT § II (1970) [hereinafter CLARK COMMITTEE REPORT].

5. Potts, Disbarment Procedure, 24 Texas L. Rev. 161, 175 (1946). This is not entirely a modern phenomenon, however. See, e.g., People ex rel. Karlin v. Culkin, 248 N.Y. 465, 469, 152 N.E. 497, 499 (1926): “In the long run the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.” In many states there are several stages of investigation—first by a local bar grievance committee, then by a state bar committee. See CLARK COMMITTEE REPORT, supra note 4, at 30-38. If the charges are not dismissed at either of these stages, the attorney under investigation must be given notice of the charges and an opportunity to appear at a hearing. In re Ruffalo, 390 U.S. 544 (1968). The initial stages of the process are similar in most states, but the degree of delegation of power by the courts in the later stages varies from state to state. In some states the entire procedure is administrative; the bar committee’s findings and recommendations made after the hearing are filed with the state supreme court and become final unless the attorney petitions the supreme court for review. E.g., CAL. BUS. & PROF. CODE §§ 6073, 6081-83 (West 1962); FLA. STATE BAR INTEGRATION R. 11.05, 11.09, 32 FLA. STAT. ANN. (Supp. 1972). In other states, the bar committee must prosecute a suit to have discipline imposed by the court. E.g., LA. STATE BAR ANN., ARTICLES OF INCORP., art. 15, § 6, 21A LA. REV. CIV. STAT. ANN. (Supp. 1973); N.D. CENT. CODE §§ 27-14-05 to -06 (1960). In some states this action is filed in the state supreme court, which refers the case to a commissioner for an evidentiary hearing and a recommendation. E.g., LA. STATE BAR ANN., ARTICLES OF INCORP., art. 15, § 6(b), 21A LA. REV. CIV. STAT. ANN. (Supp. 1973); N.D. CENT. CODE § 27-14-08 (1960). Other states preserve more unusual procedures; in Texas, for example, the attorney may still request a jury trial. TEX. REV. CIV. STAT. ANN. art. 320a-1, § 5 (1959). In Iowa, the supreme court designates a three-judge panel to hear the case, and the attorney general prosecutes. IOWA CODE ANN. §§ 610.23-30 (1950).

6. See note 1 supra.
In *Spevack v. Klein*, a divided court did expressly overrule *Cohen*. It held that an attorney may not be disbarred for exercising his privilege against self-incrimination in a state disciplinary proceeding. In *Spevack*, a referee conducting an investigation into ambulance chasing on behalf of the appellate division of the state court subpoenaed attorney Spevack’s records of his contingent fee cases. Because Spevack, relying on the federal constitutional privilege against self-incrimination, refused to produce the records or to testify, he was disbarred. Although the appellate division assumed that the privilege, if available, would be applicable to the records, it found that the invocation of the privilege was grounds for disbarment. As a result, the Supreme Court would not consider the question of whether the privilege applied to the records, but focused upon the question of whether invoking the privilege could be the sole ground for disbarment.

New York had found that the invocation of the privilege conflicted with the attorney’s duty to divulge all information pertinent to his character and to his fitness to remain a member of the bar. Justice Douglas, writing for four members of the Supreme Court, rejected this position on the grounds that (1) the privilege against self-incrimination guarantees the right to remain silent and to “suffer no penalty ... for such silence,” and (2) disbarment of an attorney who exercises this right is an impermissible penalty. The plurality stated that, for purposes of the fifth amendment privilege, “‘penalty’ is not restricted to fine or imprisonment. It means ... the imposition of any sanction which makes the assertion of the Fifth Amendment privilege ‘costly.’” Justice Fortas joined the plurality in expressly rejecting the contention that the attorney’s special responsibilities necessitated the imposition of certain limitations on the privilege against self-incrimination. He differed from the plu-
rality only in that he distinguished the attorney's right to remain silent from that of state employees and agents, which, he suggested, should be more restricted because of the employees' undivided responsibility to the state.17

Justice Harlan, dissenting, felt that the majority's decision would "be disheartening and frustrating to courts and bar associations throughout the country in their efforts to maintain high standards at the bar."18 He felt that the majority's approach was too absolutist19 and argued that the Court had traditionally determined the proper scope of the privilege by weighing "the history and purposes of the privilege, and the character and urgency of the other public interests involved."20 He noted that the New York rules were reasonably calculated to serve the state's traditional and legitimate effort to ensure the high standards of the bar.21 He suggested that Spevack be resolved in accordance with cases that permit denial of a status or authority—such as a commission as a United States Army officer22—to one whose claim of the privilege precludes assessment of his qualifications.23

Justice White, also dissenting,24 felt that the attorney's interests would be adequately protected by holding that disclosures made under threat of job loss are inadmissible in subsequent criminal proceedings, as was done in Spevack's companion case of Garrity v. New Jersey,25 which involved the prosecution of police officers.26

In the following year the distinction between attorneys and state employees drawn in Justice Fortas' concurrence in Spevack became

[1956], and the policemen in Garrity v. New Jersey, [385 U.S. 493 (1967)] lawyers also enjoy first-class citizenship." 385 U.S. at 516.

17. According to this opinion, a lawyer is not an employee of the state, although he is a licensee of the state and an officer of the court. He does not act as an agent for the state, and thus his responsibility to the state is limited to obeying "its laws and the rules of conduct that it has generally laid down as part of its licensing procedures. The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights." 385 U.S. at 520 (Fortas, J., concurring).

18. 385 U.S. at 520-21.
19. See 385 U.S. at 525.
20. 385 U.S. at 522-23.
23. 385 U.S. at 526.
24. 385 U.S. at 530-52.
26. Garrity interpreted the privilege broadly. The Court held that self-incriminating disclosures made by police officers in the course of a state investigation of traffic ticket fixing under threat of being removed from office if they refused to testify were involuntary and therefore inadmissible in a later criminal proceeding. The choice imposed on the officers between self-incrimination and job forfeiture was held to be compulsion in violation of the fourteenth amendment. 385 U.S. at 496-97.
one of major importance in *Gardner v. Broderick.* In that case, Justice Fortas, writing for the majority, appeared to qualify the principle announced by *Spevack* and *Garrity.* Although the Court reversed the dismissal of a New York policeman who had refused to waive immunity from criminal prosecution for his testimony before the grand jury, as would seem to be required by *Garrity,* in dictum it suggested that the reasoning in *Spevack* would not be extended to cover public employees. Justice Fortas suggested that if the policeman "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity" he could have been dismissed. Although Justice Fortas carefully distinguished the case of the attorney, Justice Harlan, concurring in the result, felt that *Gardner* provided a formula that would permit the disbarment of attorneys for refusing to answer specific questions relating to their professional fitness.

*Spevack* itself, although now clearly limited to attorneys, leaves several questions regarding the use of the privilege in disbarment proceedings unresolved. The first deals with the cases in which an attorney may properly claim the privilege: May he claim it when the disclosures sought can be sanctioned only by disbarment, rather than by traditional criminal penalties? Second, if immunity is substituted for the privilege and disclosure compelled, does the immunity prohibit disbarment based on the compelled disclosures? Finally, may an attorney be disbarred solely on the basis of inferences of wrongdoing or lack of candor when he has exercised the privilege during disciplinary proceedings?

I. MAY THE PRIVILEGE BE CLAIMED WHEN THE CONCEALED INFORMATION COULD LEAD ONLY TO DISBARMENT?

*Spevack* dealt only with whether an attorney could be disbarred for properly invoking the privilege against self-incrimination in a disbarment proceeding. The Court did not reach the question of whether the privilege is properly invoked when the disclosures in question can lead only to disbarment. Despite the language of the fifth amendment—"[n]o person . . . shall be compelled in any crimi-

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28. 392 U.S. at 278.
30. Wigmore defines statutory immunity as amnesty provided by a legislative provision "for an individual offender . . . who shall disclose the facts of the offense upon inquiry [that is] effective to remove the criminality of the offense." 6 J. WIGMORE, EVIDENCE § 2281, at 491 (McNaughton rev. ed. 1961) (emphasis original).
31. 385 U.S. at 522 n.1 (Harlan, J., dissenting).
nal case to be a witness against himself—an the courts have traditionally allowed the assertion of the privilege in civil, or administrative, and legislative, as well as criminal, proceedings. However, although the proceeding in which the privilege is asserted need not be criminal, the information for which the privilege is claimed must have the potential of exposing the speaker to a criminal or quasi-criminal charge.

Thus, the question becomes whether disbarment in itself may be characterized as a quasi-criminal sanction for purposes of the privilege. The courts have used two approaches to determine which sanctions are criminal and which are civil. The first is to look to prior legislative history and judicial applications of the sanction in order to determine the appropriate category for all constitutional purposes. For example, in *Trop v. Dulles*, the Court relied solely on a test of legislative intent: "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." The Court held that a statute that took away the citizenship of a convicted native-born American who deserted from the military was penal and thus subject to the constitutional prohibition against cruel and unusual punishment.

In *Kennedy v. Mendoza-Martinez*, the Court focused on prior judicial characterizations as well as on legislative history. Both sources indicated that the statute in question—which revoked the citizenship of individuals who remained outside the United States during wartime in order to avoid military service—was intended to be a penalty. The Court held the statute unconstitutional because it imposed such a penalty without a criminal trial and its accompany...

32. U.S. Const. amend. V.
36. *Ullmann v. United States*, 356 U.S. 86 (1958). The Court held that the privilege against self-incrimination "operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply." 350 U.S. at 431, quoting *Hale v. Henkel*, 201 U.S. 43, 67 (1906) (emphasis added).
38. 356 U.S. at 96.
40. 372 U.S. at 167.
If this approach is applied, disbarment would be characterized as remedial or noncriminal. Traditionally, disbarment has in fact been viewed as either civil or sui generis. Despite the harsh consequences on the disbarred attorney, the courts have defined the purposes of disciplinary proceedings not as punishment, but as protection of the public and promotion of the efficient administration of the court system.

The Supreme Court, however, has often used a second approach, in which the label or characterization placed on proceedings by the legislature or the judiciary in other contexts is not conclusive. Instead, the court may weigh the "'precise nature of the government function involved as well as ... the private interest that has been affected by governmental action.'" This method of analysis is characteristic of the Court's handling of questions of procedural due process generally and has led to the rejection, for example, of the labels of "right" and "privilege."

This was the approach taken by the Court in In re Gault. In determining whether certain due process safeguards are required in the juvenile delinquency setting, the Gault Court expressly disregarded the "'civil' label-of-convenience" and considered instead the individual and governmental interests involved. The Court found that, despite the rehabilitative intentions of the founders of the juvenile court system, the interests of a juvenile are much the same as those of an adult criminal defendant. In terms of effect on the individual, little distinction was found between incarceration in a training school and incarceration in a prison, or between the...
stigma attached to the determination of delinquency and that attached to the determination of criminal guilt. In addition, the juvenile court may waive jurisdiction and allow trial by the normal criminal processes, or may allow the juvenile to be imprisoned with adult criminal offenders.

The Court treated each question of the proper procedure in juvenile proceedings independently and held that notice to the juvenile and to his parents or guardian, opportunity for confrontation and cross-examination, and the assistance of counsel were necessary. In a later case, the Court also held that a standard of proof beyond a reasonable doubt is required.

Gault also held that juvenile proceedings are “criminal” for purposes of the privilege against self-incrimination, particularly in light of the possible incarceration that could result from the proceedings:

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to “criminal” involvement. In the first place, juvenile proceedings to determine “delinquency,” which may lead to commitment to a state institution, must be regarded as “criminal” for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the “civil” label-of-convenience which has been attached to juvenile proceedings.

The balancing approach is flexible. Therefore, a proceeding may be found to be sufficiently “criminal” or “penal” to require certain procedural safeguards, but not “criminal” for other due process purposes. In fact, in McKeiver v. Pennsylvania, the Court, again using the balancing approach, held that trial by jury was not required in juvenile proceedings. The plurality opinion focused on the special purposes of the juvenile court system and concluded that the purpose and operation of an adjudication of juvenile delinquency are

51. 387 U.S. at 50-51.
52. 387 U.S. at 50.
53. 387 U.S. at 31-34.
54. 387 U.S. at 54-57.
55. 387 U.S. at 34-42.
56. 387 U.S. at 49-50.
57. 403 U.S. 528 (1971).
not identical to those associated with a determination of criminal
guilt.\(^{59}\) Jury trial of right would entail "the traditional delay, the
formality, and the clamor of the adversary system and, possibly, the
public trial,"\(^{60}\) while juvenile proceedings are rather to provide an
"aspect of fairness, of concern, of sympathy, and of paternal attention."\(^{61}\)

In *In re Ruffalo*,\(^ {62}\) the Court treated the characterization of disbarment proceedings quite summarily. It stated that "disbarment,
designed to protect the public, is a punishment or penalty imposed
on the lawyer."\(^ {63}\) As a result, it found that disciplinary proceedings
are "adversary proceedings of a quasi-criminal nature" so that ade­quate notice of the charges that might be presented must be given
before the proceedings begin\(^ {64}\) and the charges cannot be amended
later on the basis of the attorney's testimony. The Court did not
define the term "quasi-criminal," nor did it specify other require­ments that may be imposed as a result of this characterization. In
referring to the proceedings as "quasi-criminal," however, the Court
did cite—by the use of "Cf."—the case of *In re Gault*.\(^ {65}\) This may
indicate that the Court feels that the approach adopted in the juvenile
cases is also appropriate to disbarment. However, many state
courts have interpreted *Ruffalo* narrowly and continued to analyze
disbarment as civil or sui generis for purposes other than notice.\(^ {66}\)
The New York court of appeals, for example, commented that *Ruffalo* "hardly stands for an equation of criminal and disciplinary pro­ceedings, a most unlikely view."\(^ {67}\)

Even if the balancing approach is applied, as may have been sug­gested by *Ruffalo*, to determine whether disbarment is a criminal
sanction for the purposes of the fifth amendment privilege, it is not
clear that the courts will answer the question in the affirmative.

In the process of balancing the governmental and individual
interests involved, the courts should consider the purposes\(^ {68}\) and
history of the privilege. Historical development has been particularly
important in defining the scope of the privilege against self-incrimi­

59. 403 U.S. at 550.
60. 403 U.S. at 550.
61. 403 U.S. at 550.
63. 390 U.S. at 550.
64. 390 U.S. at 551.
65. 390 U.S. at 551, citing 387 U.S. 1, 33 (1967).
66. See Black v. State Bar, 7 Cal. 3d 676, 687, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1972) and cases cited therein.
68. The Court has defined the limits of the privilege as being "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).
nation: "The privilege . . . is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.' " 69 It initially developed as a resistance to the oath ex officio of the ecclesiastical courts of England. 70 The oath was made in ignorance of the charges or evidence against the speaker and consisted of a sworn statement that he would give truthful answers to any questions that might be asked. 71 The questions that followed were designed to compel a confession. 72

Initial opposition to the oath took the form of criticism of the lack of a proper presentment or accusation. 73 Broader objections, including the claim that the oath subjected an individual to the cruel trilemma of contempt, perjury, or conviction, were raised later. 74 In 1641, when the court of High Commission was abolished, the maxim nemo tenetur seipsum prodere—no man is bound to produce against himself—was recognized. 75 This common law privilege was eventually embodied in the fifth amendment. 76

Despite the fact that the privilege is acknowledged to be "'one of the great landmarks in man's struggle to make himself civilized' " 77 and a "'hallmark of our democracy,' " 78 today there is no general agreement about either its basic purpose or its extent. 79 Wigmore identified as many as twelve suggested purposes 80 and stated that this diversity results from the fact that the privilege is "many things in as many settings" 81—it is not only the prerogative of the defendant not to take the stand in a criminal trial 82 but also the option of any witness to refuse to disclose incriminating evidence in a criminal

70. L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 60-82 (1968); § J. Wigmore, supra note 30, § 2250.
71. L. Levy, supra note 70, at 46-47.
72. Id. at 47, 50.
74. See id. at 834-35; L. Levy, supra note 70, at 103.
75. L. Levy, supra note 70, at 95.
76. E. Griswold, supra note 2, at 2-7.
80. § J. Wigmore, supra note 30, § 2251.
81. Id. § 2251, at 296.
82. The defendant may choose not to take the stand, and if he does so choose, the prosecution may not comment upon his failure to testify in his own behalf. Griffin v. California, 380 U.S. 609 (1965).
or civil case or in a proceeding before an administrative board or legislative committee.83

The Supreme Court has recognized that there are a number of policies underlying the privilege against self-incrimination:

our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."84

In fact, the Court has acknowledged that the privilege serves so many fundamental values that it constitutes a "reflection of our common conscience."85

Out of this complex, the Court has singled out several related values that appear to be central. It has emphasized that the privilege is founded on a fear that statements made under compulsion will be unreliable86 and on a fear that oppressive or cruel prosecutorial methods might be used to compel self-incriminatory statements.87

Most fundamentally, however, the privilege is intended to preserve the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulders the entire load"88 and to preserve the "individual's substantive right . . . 'to a private enclave where he may lead a private life . . . .'"89 The Court has gathered the various policies into "one overriding thought": "the

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85. Malloy v. Hogan, 378 U.S. 1, 9 n.7 (1964), quoting E. Griswold, supra note 2, at 73.
86. In re Gault, 387 U.S. 1, 44-48 (1967).
respect a government—state or federal—must accord to the dignity and integrity of its citizens.”

A court using the balancing approach determines which governmental and individual interests should—in light of the policies underlying the privilege—be given weight. The state’s interest in compelling disclosure stems from its need to protect the judicial system and the public from those unqualified to practice as attorneys. The attorney’s dual role as officer of the court and fiduciary of his client requires that he be trustworthy and conform to a higher ethical standard than that required of other citizens. Disbarment may thus be regarded, not as punishment, but as an inevitable consequence of the loss of an attribute necessary to fulfill the attorney’s responsibilities.

In addition, it has been suggested that the position of an attorney as an officer of the court carries with it a special duty of frankness and candor in relations with the court. This duty is thought to require full and honest cooperation with any inquiry into the fitness of members of the bar, even where it calls into question the attorney’s own fitness. Thus, an invocation of the privilege that hinders a court’s investigation has been viewed by some courts as inconsistent with an attorney’s role. It is feared that judicial abandonment of the principle of scrupulous honesty and candor will gradually lead to the lowering of the high ethical standards required of attorneys. It has also been suggested that the well-known requirement that attorneys disclose all information relative to their fitness has discouraged those who might otherwise have sought to become attorneys in order to exploit the judicial system or individual clients and that any rejec-

92. See, e.g., Cole supra note 1, at 820-21.
94. In re Alkow, 64 Cal. 2d 838, 841, 845 P.2d 800, 802, 51 Cal. Rptr. 912, 914 (1965); H. Drinker, Legal Ethics 74-76 (1953).
97. Justice Harlan warned of the danger of encouraging “oncoming generations of lawyers to think of their calling as imposing on them no higher standards of behavior than might be acceptable in the general marketplace.” Spevack v. Klein, 385 U.S. 511, 521 (1967) (dissenting opinion). See also Underwood, supra note 1, at 135.
98. Underwood, supra note 1, at 135.
tion of the requirement of disclosure might encourage these individuals to seek admission to the bar.\textsuperscript{99}

Moreover, the attorney's exercise of the privilege against self-incrimination may place a substantial additional burden on the enforcement of bar discipline, which at present depends heavily on the attorney's voluntary cooperation. Despite the great public interest in bar discipline, present procedures have proved to be ineffective in identifying and sanctioning attorneys who misuse their position. For example, a 1966 New York study found that only 2 per cent of the attorneys who violated generally acceptable ethical norms were processed by the disciplinary machinery and that less than .2 per cent were officially sanctioned.\textsuperscript{100} A 1970 American Bar Association committee report on disciplinary enforcement indicated the existence of "a scandalous situation that requires the immediate attention of the entire profession."\textsuperscript{101} As a result, pressure is building, both inside the bar\textsuperscript{102} and from the general public,\textsuperscript{103} to rid the profession of attorneys who abuse their prerogatives and neglect their responsibilities. It has repeatedly been suggested that, if reform does not come quickly from within, it will be imposed from without.\textsuperscript{104}

At present, disciplinary committees must rely primarily on complaints from laymen to initiate actions\textsuperscript{105} and often lack the professional staff and finances required for extensive investigations.\textsuperscript{106} Thus, one of the few resources now available to the disciplinary machinery is the attorney's own testimony and records. Moreover, much of the information relative to the attorney's conduct will be within his own control.\textsuperscript{107} In such circumstances the attorney's refusal to provide evidence or to testify on the ground that the information disclosed may lead to his disbarment could make effective bar discipline impossible.

Moreover, the bar committees and the courts are often too solicitous of the individual attorney's interest. The record seems to indicate, not unjustified prosecutions, but a failure to enforce discipline

\textsuperscript{99} Id.

\textsuperscript{100} J. Carlin, Lawyers' Ethics 170 (1966).

\textsuperscript{101} \textbf{Clark Committee Report, supra} note 4, at 1. "[T]he present enforcement structure is failing to rid the profession of a substantial number of malefactors." \textit{Id.} at 2-3.


\textsuperscript{103} \textit{See, e.g., Burger, A Sick Profession?, 5 Tulsa L.J.} 1, 1-2 (1968).

\textsuperscript{104} \textit{See, e.g., Clark Committee Report, supra} note 4, at 8-9.

\textsuperscript{105} \textit{Id.} at 60-66. \textit{See} \textit{id.} at 52-53.

\textsuperscript{106} \textit{Id.} at 19-23.

\textsuperscript{107} Niles & Kaye, supra note 1, at 1123.
stringently enough. In this context, procedural safeguards seem less crucial than in the area of criminal law enforcement.

Further, it might be argued that allowing an attorney to invoke the privilege when the compelled disclosures could lead to disbarment would eventually justify the invocation of the privilege when disclosures could lead to denial of admission to the bar. This conclusion results naturally from the Court’s tendency to treat disbarment and admissions cases as indistinguishable for purposes of imposing requirements of procedural due process. Since present bar resources are inadequate to fund independent investigations of even the relatively small number of disciplinary proceedings that arise, extensive inquiry into the qualifications of the many applicants to the bar would be impossible. This would expose the court “to the possible indignity that it may one day have to admit to its own bar ... a lawyer [suspected of misconduct who has thwarted official inquiry] unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking.”

In contrast to the state’s urgent need for information relating to an attorney’s fitness, the individual attorney has a strong interest in nondisclosure. Despite the fact that the courts do not intend disbarment to operate as a punishment, it has severe effects upon the individual attorney, whose practice is his means of livelihood. As the Second Circuit commented when considering a petition for injunctive relief against state disciplinary proceedings on the ground that the proceedings violated an attorney’s civil rights: “A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, the loss of which may be greater punishment than a monetary fine.”

In addition, the attorney’s practice represents a substantial investment of time, money, and energy. Justice Black noted:

108. CLARK COMMITTEE REPORT, supra note 4, at 24-26, 167-71.
109. Indeed, this argument has been made. See Underwood, supra note 1, at 134-35.
110. In Cohen v. Hurley, 366 U.S. 117, 213 (1961), the Court stated, “The fact that such refusal [to answer bar committee questions under claim of a constitutional privilege] was here made a ground for disbarment, rather than for denial of admission to the bar, as in Konigsberg and Anastaplo, is not of constitutional moment.” In Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957), the Court stated the rationale of the case in terms equally applicable to admissions or disbarment proceedings: “A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment.”
111. See, e.g., text accompanying note 100 supra.
The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer . . .

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative.114

Not only does the sanction of disbarment permanently prevent the attorney from utilizing this investment and earning his livelihood, but it also deprives him of his professional and personal reputation.115 As in Gault,116 disbarment, even if not intended to be punitive, creates a stigma that is scarcely distinguishable from that resulting from a criminal conviction.

It should be emphasized that the interests involved in disbarment can be distinguished from those involved in admissions proceedings. Although denial of admission also has a harsh effect on one who has spent three years and a large sum to complete his legal education,117 this loss is less severe than that suffered by an established member of the bar, who has a greater investment of time and money and incurs the greater dishonor of having to leave professional life abruptly.

Moreover, despite the tendency to equate the two proceedings,118 the courts have traditionally drawn a distinction between disbarment and admissions in the placement of burden of proof. The applicant for admission to the bar generally has the burden of proving his fitness to serve as an attorney.119 However, once he has satisfactorily established his educational qualifications and good character and has been admitted, the state bears the burden of proving misconduct or lack of the required good character in order to disbar him.120 Although the maintenance of good character is an attorney's continuing obligation, it would be unreasonable to require him repeatedly to produce evidence of his fitness. Thus, even though disbarment pro-

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115. 366 U.S. at 147 (Black, J., dissenting).
116. See text accompanying note 50 supra.
117. "While this [the bar admissions proceeding] is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." Konigsberg v. State Bar, 366 U.S. 36, 40-42 (1961) and cases cited therein; Application of Levine, 97 Ariz. 88, 91, 397 P.2d 205, 207 (1964); H. Drinker, supra note 94, at 46. The inquiry is more limited in the area of beliefs and associations, which are protected by the first amendment. See, e.g., In re Stolar, 401 U.S. 23, 30 (1971); Baird v. State Bar, 401 U.S. 1, 6 (1971). Cf. Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).
118. See text accompanying note 110 supra.
ceedings, like admissions proceedings, raise the question of the attorney's qualifications, his good character as established at the time of his admission is presumed. As in a criminal proceeding, the privilege to remain silent is consistent with the state's obligation to prove misconduct, for the purpose of the privilege is to force the state, in an adversary system, to bear its rightful burden of proof when it seeks to impose a harsh sanction. In admissions proceedings, on the other hand, the privilege of remaining silent is difficult to reconcile with the individual's obligation to prove his fitness. If the scope of the privilege is extended this far, an individual could, by a claim of privilege, shift the burden to the state to justify not finding him qualified.

The interest of the individual attorney in the protection provided by the privilege against self-incrimination is particularly important in view of the fact that the bar's attempt to ensure high ethical standards through self-regulation has produced a uniquely inbred system. Other professions also conduct preliminary investigations and disciplinary hearings, which are subject to judicial review. However, only bar disciplinary proceedings are conducted entirely by members of the party's own profession from investigation through final judicial review. While this situation may actually produce laxness in disciplining personal friends and associates, it also allows participation by individuals who have a personal interest in and knowledge of the profession and may be biased against the individual under investigation, either by personal animosity or by their competitive relationship. Procedural safeguards are thus particularly necessary to ensure fairness in attorney disciplinary proceedings. Certainly the majority of disciplinary proceedings are neither ill-founded nor unfairly han-

121. See text accompanying notes 88-90 supra.

122. For example, in Ohio the state boards of accountancy, OHIO REV. CODE ANN. § 4701.02 (Page Supp. 1972); architecture, OHIO REV. CODE ANN. § 4703.01 (Page 1954); dentistry, OHIO REV. CODE ANN. § 4715.02 (Page 1954); and pharmacy, OHIO REV. CODE ANN. § 4729.01 (Page Supp. 1972), are composed of members of these respective professions. The boards have the authority to suspend or revoke licenses to practice: OHIO REV. CODE ANN. § 4701.16 (Page Supp. 1972) (accountants); OHIO REV. CODE ANN. § 4703.15 (Page Supp. 1972) (architects); OHIO REV. CODE ANN. §§ 4715.30, .36 (Page 1954), as amended, OHIO REV. CODE ANN. § 4715.36 (Page Supp. 1972) (dentists); OHIO REV. CODE ANN. §§ 4729.16-.17 (Page 1954), as amended, OHIO REV. CODE ANN. §§ 4729.16-.17 (Page Supp. 1972) (pharmacists).


124. CLARK COMMITTEE REPORT, supra note 4, at 24-25, 167-71.

125. In Cohen v. Hurley, 366 U.S. 117, 148 n.37 (1961), Justice Black noted in his dissent that "[t]he true nature of the underlying controversy in this case, as a controversy between economically competing groups of lawyers is shown by the fact that four different associations of attorneys filed briefs as amici curiae in the present proceedings—two favorable to petitioner and two favorable to respondent."
died. Nevertheless, history indicates that these proceedings may be misused. Moreover, it is foreign to our constitutional system to force any individual to rely on the good faith of others to ensure his basic freedoms.

It should also be mentioned that classifying disbarment as quasi-criminal has a practical advantage in that the determination of whether criminal prosecution is a substantial possibility need not be made, for the likelihood that the compelled disclosure would lead to disbarment would be sufficient.

Once the competing interests are established, the court must balance those of the individual against the state. In doing this, the court should give careful consideration to the attorney's special responsibilities. Despite its recognition that the state's concern is vital, the majority in Spevack expressly rejected the contention that an attorney is under any special disability as regards his protected right to silence. As the plurality in Spevack stated, "Like the schoolteacher... and the policemen... lawyers also enjoy first-class citizenship." However, this does not necessarily mean that the Court will go so far as to find that disbarment is a quasi-criminal sanction for purposes of the fifth amendment privilege. Such an interpretation, if our reasoning to this point is correct, would prohibit disbarment on the basis of information disclosed under compulsion even though the information in question could not lead to a traditional criminal sanction.

In contrast, the Court suggested in Gardner that public employees in an analogous situation could be dismissed. Furthermore, the Court's attitude toward the attorney's role may have been modified with the changes on the Court since Spevack.

Its new members may return to the position advocated by Justice Harlan, who placed primary emphasis on the protection of the high


128. The privilege against self-incrimination applies to answers that would furnish a link in a chain needed to prosecute the claimant as well as to answers that are sufficient in themselves to support a conviction. The court must determine for itself whether the witness has "reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

129. 385 U.S. at 516.

130. See text accompanying notes 27-28 supra.

131. Two members of the plurality (Chief Justice Warren and Justice Black), two members of the dissent (Justices Harlan and Clark), and Justice Fortas, whose concurrence distinguished attorneys from other state employees, have left the Court since Spevack.
standards of the bar. Or the new members might accept the view suggested by Justice Black in his dissent in Cohen. This view recognizes that the state needs information pertaining to the fitness of attorneys but gives more weight to the notion that it is particularly important that attorneys, precisely because of their important public role, retain all their constitutional rights and safeguards:

[T]he important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment.

Further, an attorney's reliance on the protection of the Constitution, even if it has the effect of hindering the court's investigation of his fitness, should not be viewed as inconsistent with his role as an officer of the court. It seems inappropriate for a court to classify an insistence that it respect a right granted by the Constitution as a breach of duty to that court.

Recent cases suggest that the Court, in evaluating the weight of an individual's interests, has rejected the use of such labels as "right" and "privilege" and will inquire instead as to whether the individual's interest has become "vested" and thus must be balanced against the needs of the state. This approach has been used by the Court in determining that welfare benefits are a matter of statutory entitlement to those qualified to receive them and that constitutional safeguards are therefore applicable to benefit revocation. Likewise, the Court has distinguished between the interests of two types of nontenured schoolteachers on this basis. In the case of an individual who alleged only that he was hired on a one-year contract, procedural due process was inapplicable where the state failed to rehire him. But in the case of a teacher who alleged in addition an in-

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132. See 385 U.S. at 521.
133. 366 U.S. at 136.
formal tenure system, which justified his expectations of continued employment, the state was required to provide him with notice and an opportunity for a hearing to contest the failure to rehire him.\textsuperscript{139} The attorney's right to practice should also be considered to be a matter of entitlement to an individual once he has demonstrated that he has the legal education and good character required for admission to the bar.\textsuperscript{140} Thus, although many courts have characterized the attorney's interest in continuing to practice as a privilege,\textsuperscript{141} this interest should be protected by constitutional safeguards.\textsuperscript{142}

Assuming that the attorney's interest is "vested" in this way, there are strong arguments in favor of classifying disbarment as a quasi-criminal sanction. Such a classification would forward many of the policies behind the privilege against self-incrimination.\textsuperscript{143} This would result in an accusatorial, rather than an inquisitorial form of proceeding and would preserve an individual-state balance in which the state is required to "shoulder the entire load" when seeking to impose a severe sanction. It would protect the privacy of the individual from groundless intrusion by the state. It would force the state to refrain from putting the individual to the kind of impossible choice posed by the traditional "cruel trilemma."\textsuperscript{144} To the extent that the privilege shields the innocent and filters out inherently unreliable statements made under compulsion, it would serve this function in disciplinary proceedings, where the distorting pressure of compulsion may be as strong as it is in many criminal trials.

Further, the history and purpose of the privilege suggest that the public need for disclosure is not as strong here as it would be in a

\textsuperscript{139} Perry v. Sindermann, 408 U.S. 593 (1972).
\textsuperscript{141} E.g., Theard v. United States, 354 U.S. 278, 281 (1957). Cardozo's opinion in In re Rouss, 221 N.Y. 81, 84-85, 116 N.E. 782, 783 (1917), cert. denied, 246 U.S. 661 (1918), is the classic statement of this theory:

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards . . . . Whenever the condition is broken, the privilege is lost . . . . To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.

The privilege theory was also applied to physicians in Barsky v. Board of Regents, 347 U.S. 442 (1954), where a physician's license was suspended for failure to turn over records of the Joint Anti-Fascist Refugee Committee to the House Un-American Activities Committee.

\textsuperscript{143} For a discussion of these policies, see text accompanying notes 77-90 supra.
\textsuperscript{144} See text accompanying note 74 supra.
criminal proceeding. In the criminal trial, although there is a compelling necessity for disclosure both because of the seriousness of criminal conduct and because of the high standard of proof beyond a reasonable doubt, the privilege is fully extended under the fifth amendment. In disbarment proceedings, where the state bears a lower burden of proof,\textsuperscript{146} the public need for compelled testimony appears to be no greater. The privilege guarantees that the individual's interest will be protected even at the expense of lowered state efficiency. As in the case of criminal law enforcement, the state's vital interest in attorney discipline suggests a need for a reallocation of resources to permit efficient discipline, rather than a narrowing of constitutional rights, for, although disbarment is intended to be remedial, rather than punitive, some courts have found that it is a more severe sanction than a short period of imprisonment.\textsuperscript{146} At least one member of the present Court has recognized that some noncriminal sanctions have such a serious effect on an individual that due process requires that certain procedural safeguards generally associated with criminal trials be observed before the sanction is applied. In a concurring opinion in \textit{Argersinger v. Hamlin},\textsuperscript{147} Justice Powell pointed out that, to an individual whose job requires driving, deprivation of a driver's license is a more serious consequence than a brief stay in jail.\textsuperscript{148} He argued that court-appointed counsel is required by due process, not only when imprisonment may be imposed, but in all cases where the "deprivation of property rights and interests is of sufficient consequence" and the indigent is capable of defending himself.\textsuperscript{149} The sanction of permanent disbarment is even more serious than deprivation of one's driver's license, because it forecloses all job opportunities in the attorney's field of training, at least in his home state.\textsuperscript{150}

There is clear precedent for the classification of serious nonimprisonment sanctions as criminal or penal for the purposes of various constitutional safeguards. In certain situations loss of citizenship,\textsuperscript{151} disqualification from the clergy,\textsuperscript{152} permanent exclusion from public employment,\textsuperscript{153} and even exclusion from the federal bar\textsuperscript{154} have all been held to be penal for constitutional purposes.

\textsuperscript{145} See text accompanying note 179 \textit{infra}.
\textsuperscript{146} See text accompanying note 118 \textit{supra}.
\textsuperscript{147} 407 U.S. 25, 44-66 (1972).
\textsuperscript{148} 407 U.S. at 48.
\textsuperscript{149} 407 U.S. at 48.
\textsuperscript{150} Disbarment by a state court does not automatically result in disbarment from federal court or from other state courts. See note 3 \textit{supra}.
\textsuperscript{152} Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).
\textsuperscript{153} United States v. Lovett, 328 U.S. 303 (1946).
\textsuperscript{154} \textit{Ex parte} Garland, 71 U.S. (4 Wall.) 333 (1866).
Additionally, the juvenile analogy from *Gault* provides a precedent for extending the term "quasi-criminal" to cover disbarment.155 Although the *Gault* reasoning suggests that disbarment, like juvenile delinquency proceedings, may be quasi-criminal for purposes of the privilege against self-incrimination, the California supreme court recently seems to have rejected this analogy in *Black v. State Bar*.156 That court held that an attorney in a disbarment case does not have the right of a criminal defendant to refuse to testify at all. *Gault* was distinguished on the grounds that disbarment proceedings, unlike juvenile delinquency proceedings, cannot result in incarceration and that those sanctions that are imposed are designed only to protect the courts and the public, not to punish.157

This method of distinguishing *Gault*, although justified to some extent by that case's emphasis on loss of liberty in its discussion of the privilege against self-incrimination,158 ignores the wider scope of the Court's analysis. The *Gault* opinion, taken as a whole, describes a series of factors—in addition to involuntary confinement—that are common to criminal and juvenile proceedings; these include the attendant social stigma159 and the availability of the juvenile's record to law enforcement agencies, the Armed Forces, social service agencies, and private employers.160

Other cases dealing with the privilege against self-incrimination indicate that incarceration is not a prerequisite for the operation of the privilege. As early as 1886 the Supreme Court held, in *Boyd v. United States*,161 that the privilege against self-incrimination prohibited compulsory production of goods and papers in a nominally civil forfeiture proceeding based on an alleged violation of the customs laws. The Court held that the owner of the goods could not be forced to incriminate himself simply because the prosecutor decided to forgo a criminal prosecution and sue in rem for the goods.162 It noted that the forfeiture and the traditionally criminal sanctions were penalties for the same criminal act.163 The Court concluded that "[a]s, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes . . . of that portion of the Fifth Amendment which de-

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155. See text accompanying notes 44-57 supra.
156. 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972).
157. 7 Cal. 3d at 688, 499 P.2d at 974, 103 Cal. Rptr. at 294.
158. 387 U.S. at 49-50.
159. 387 U.S. at 24.
160. 387 U.S. at 24-25.
161. 116 U.S. 616 (1886).
162. 116 U.S. at 634.
163. 116 U.S. at 634.
clares that no person shall be compelled in any criminal case to be a witness against himself . . . .”

The Supreme Court recently reaffirmed Boyd in United States v. United States Coin & Currency and announced: “From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.” The forfeiture proceedings were characterized as criminal although, theoretically, the individuals who had fraudulently failed to pay the customs fees or used the money in gambling were not even parties to the actions, which had been brought against the goods themselves.

However, juvenile and forfeiture proceedings differ from disbarment in an important respect. The main distinction between Gault, Boyd, and United States Coin & Currency, on the one hand, and disbarment proceedings, on the other, is that the civil remedy sought by the state in the former cases was, in effect, an alternative to a criminal sanction. In Boyd, the customs act provided for a forfeiture proceeding in addition to either fine or imprisonment; the prosecutor waived the indictment and instituted a court action for the goods. In United States Coin & Currency, the statute provided that no property rights existed in property "intended for use in violating the provisions of the internal revenue laws." The forfeiture of the money to be used in gambling was thus the practical equivalent of a fine for the gambling itself. In Gault the court noted that a state juvenile court may waive jurisdiction and allow the child to be tried as an adult. The effect of these cases is to refuse to allow the state, by electing a nominally civil proceeding, to impose a punishment for a criminal act while denying the accused the protection of the privilege against self-incrimination.

The Court may seize upon this distinction between disbarment proceedings, on the one hand, and juvenile and forfeiture proceedings, on the other, and refuse to extend the scope of the privilege to cover disbarment, for cases dealing with the privilege against self-

164. 116 U.S. at 634-35.
166. 401 U.S. at 718.
169. 116 U.S. at 634.
171. See text accompanying note 166 supra.
172. 387 U.S. at 50-51.
incrimination indicate that, despite the fundamental status of the privilege, the Court has been willing to weigh state interests heavily. In fact, in several cases the Court has expressly noted that the privilege against self-incrimination "has never been given the full scope which the values it helps to protect suggest."

Moreover, in questions involving bar proceedings the Supreme Court has deferred to the states in the interest of federalism. The concept of local control of the bar was firmly established in England and has received continued support in the United States. In the area of bar admissions, for example, the Court has been persuaded by the states' concern for the integrity of their legal process and has on this basis upheld questionable admissions procedures against first amendment challenges. Since each state's interest in the integrity of its own judicial system demands effective regulation of the bar, a federally imposed interpretation of the privilege that constrains the states' disciplinary machinery may constitute unwarranted interference with matters of legitimate local concern.

Despite the strength of an individual attorney's interest and the similarity of this interest to other interests previously held quasi-criminal, on balance it seems fair to say that the Court will be very reluctant to find disbarment to be quasi-criminal if doing so necessarily precludes effective bar discipline. However, the vital importance of the individual interests in this area suggest that the conflict would be better resolved if a method could be devised whereby effective bar discipline could be achieved without the sacrifice of the individual's interests.

A partial resolution might be reached if more resources could be committed to bar discipline, for the bar could then make a more extensive independent investigation and utilize methods that do not require the cooperation and testimony of the accused. For example,

177. Justice Harlan noted that bar admissions practices are "an area of federal-state relations ... into which [federal courts] should be especially reluctant and slow to enter." Konigsberg v. State Bar, 353 U.S. 252, 276 (1957) (Harlan, J., dissenting).
in many cases the attorney represents his client in dealings with third parties, such as the court or the opposing parties in a case. In these situations the other parties could be contacted to verify or supplement the allegations made by the client-complainant. Such evidence, if unrebutted by the attorney who claims the right to silence, would often carry the state’s burden, which is generally described as that of presenting clear and convincing proof, rather than proof beyond a reasonable doubt.\textsuperscript{179}

But there would still be many instances in which even an adequately trained, staffed, and financed disciplinary agency cannot prove misconduct without the records of the attorney. As suggested by Justice Fortas in his concurrence in \textit{Spevack}, in these situations a legal framework for compelling the attorney to produce the necessary records could be provided by the “required records” doctrine. This doctrine was developed in \textit{Shapiro v. United States},\textsuperscript{180} where the Supreme Court held that the privilege against self-incrimination does not extend to “‘records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement or restrictions validly established.’”\textsuperscript{181} The doctrine was applied in \textit{Shapiro} to a wholesale produce dealer’s sales records kept in accordance with the Emergency Price Control Act.\textsuperscript{182}

Recent opinions have identified three interrelated elements of the required records doctrine: “[F]irst, the purposes of the . . . inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed ‘public aspects’ which render them at least analogous to public documents.”\textsuperscript{183} The Court has further limited the necessary “public aspects” to situations in which there is more than a governmental need to obtain information.\textsuperscript{184} The state must also have the authority to regulate or prohibit the basic activity and, thus, to require the keeping of specific records for inspection by an


\textsuperscript{180.} 335 U.S. 1 (1948).

\textsuperscript{181.} 335 U.S. at 33, quoting Davis v. United States, 328 U.S. 582, 589-90 (1946).

\textsuperscript{182.} Ch. 26, 56 Stat. 23.

\textsuperscript{183.} Grosso v. United States, 390 U.S. 62, 67-68 (1968). Although the cases cited in \textit{Grosso} deal specifically with required records only in the federal context, the incorporation of the fifth amendment privilege into the fourteenth amendment’s requirement of due process, in \textit{Malloy v. Hogan}, 378 U.S. 1 (1964), makes the required records doctrine equally applicable in state proceedings. See text accompanying notes 8-9 supra.

\textsuperscript{184.} Marchetti v. United States, 390 U.S. 39, 57 (1968).
This rule could easily be applied in the regulation of the bar. The bar has long been subject to the states' power to regulate, and the type of detailed information that might be required to be disclosed, such as that relating to the handling of client's funds, should generally involve little more than the record-keeping expected of a conscientious fiduciary.

The records to be required should be carefully defined in order to avoid any conflict with the attorney-client privilege. However, any inroad that the adoption of this doctrine may make upon the attorney-client privilege would be small in comparison to the inroad presently made by the broader requirement that the attorney disclose all requested information relevant to his fitness.

A limited use of the required records doctrine could minimize the encroachment on the attorney's right against self-incrimination while protecting the interests of his clients and society. In some cases, it is true, neither independent investigation nor the use of the required records doctrine may develop evidence sufficient to carry the state's burden of proof. It is suggested that this situation is precisely that in which the primary purpose of the privilege—forcing the state to shoulder the entire load and respect the privacy of the individual—dictates that the individual's interest be protected by the fifth amendment.

If the required records doctrine is held applicable, so that the state's interest is sufficiently protected, the courts may find that the individual's interest in nondisclosure is such that the policies and history of the privilege compel classification of disbarment as quasi-criminal.

II. DOES IMMUNITY PROHIBIT DISBARMENT BASED ON THE COMPELLED DISCLOSURES?

A second question regarding the attorney's privilege against self-incrimination is whether the immunity that may be offered in exchange for a waiver of the privilege prohibits disbarment, as well as criminal sanctions, based on the compelled disclosures. The Supreme Court long ago established that statutes that grant immunity are not incompatible with the privilege against self-incrimination, for they

186. See notes 3-5 supra and accompanying text.
188. The attorney-client privilege prohibits the compelled disclosure by either attorney or client of communications made in confidence by the client when legal advice was sought from a professional legal adviser in his capacity as such, unless the client waives the privilege. See generally American Bar Association, Code of Professional Responsibility, Canon 4 (1970); 8 J. Wigmore, supra note 30, §§ 2290-2292.
“seek a rational accommodation between the imperatives of the privilege and the legitimate demand of the government to compel citizens to testify.”

Thus, the government may constitutionally compel an individual to divulge self-incriminatory information by granting him immunity from criminal sanctions based on the disclosure. However, this immunity is adequate only if it is as broad as the protection of the privilege that it replaces.

The breadth of any particular immunity depends upon the intent of the legislation under which it is conferred. In practical terms, it seems fair to assume that in most cases the legislature intends its immunity statutes to be only as broad as is required by the Constitution.

Thus, the question becomes whether the Constitution requires that the immunity granted protect the attorney from disbarment on the basis of compelled disclosures.

In *Ullmann v. United States*, a majority of the Supreme Court held that the government may constitutionally impose, or permit the imposition of serious, though noncriminal, sanctions based on disclosures made under a grant of immunity. In *Ullmann* the petitioner was given immunity in order to testify before a federal grand jury about his knowledge of and participation in espionage and about his and others' membership in the Communist Party. He claimed that the immunity statute involved was not broad enough because of disabilities, “such as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium,” that might still be imposed by the state and federal authorities, as well as by the general public. The Court reiterated its frequent holding that immunity, to be constitutionally valid, need only remove the sanctions that generate the fear that justifies the invocation of the privilege—that is, criminal sanctions.

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194. 350 U.S. at 430.
195. 350 U.S. at 431. The dissent in Ullmann, 350 U.S. at 440-55 (Douglas & Black, JJ., dissenting), suggests an alternative analysis, which would require that immunity, to be constitutionally adequate to compel self-incriminatory disclosures, must leave the individual in the same relative position vis-à-vis the state as before disclosure. This requirement would not, of course, place any burden on the state to prohibit sanctions (for example, loss of employment) imposed by private third parties. It would, however, prevent the state from imposing sanctions normally used in addition to criminal sanctions—e.g., loss of the vote, passport eligibility, and/or eligibility for various licensed professions—to punish, in effect, the individuals for the activities disclosed.

This argument suggests that the attorney should not be placed between the rock and the whirlpool by the operation of an immunity statute. That is, if he testifies and incriminates himself, he stands to lose his practice, which is probably his most valuable possession, as well as his honor. If he chooses to cling to silence, he stands to be held
Thus, in order to establish that a grant of immunity, to be constitutionally valid, must prevent the imposition of a given sanction, the individual must prove that the particular sanction is criminal. Under the Ullmann rationale, which has been reaffirmed by the present Court, 196 disbarment on the basis of testimony given under immunity would be impermissible only if the disbarment itself is viewed as a criminal sanction.

The New York courts have followed this reasoning and have repeatedly found that disbarment based on testimony compelled under a grant of immunity is permissible. 197 In reaching this conclusion, they have relied primarily on the fact that the Supreme Court had not found disbarment proceedings to be criminal. The New York courts then found that the privilege, which is literally limited to criminal proceedings, does not apply to disbarment and that, therefore, no immunity from disbarment need be granted.

in contempt, possibly imprisoned. Such a willful contempt citation may serve as a ground for disbarment. See, e.g., In re Daly, 291 Minn. 488, 189 N.W.2d 176 (1971); In re Iserman, 9 N.J. 269, 87 A.2d 503 (1952), cert. denied, 345 U.S. 927 (1953). If, under these pressures, he lies, he will have committed perjury and may again not only be imprisoned but also be disbarred. E.g., People v. Gibbons, 157 Colo. 357, 403 P.2d 434 (1965); Silver v. Goldner, 15 App. Div. 2d 358, 222 N.Y.S.2d 864, aff'd., 14 N.Y.2d 593, 195 N.E.2d 262, 248 N.Y.S.2d 894 (1964), cert. denied, 379 U.S. 959 (1965). Thus, it can be argued that an immunity statute that protects the individual only from criminal sanctions subjects him to the cruel trilemma that the privilege against self-incrimination attempts to prohibit.

However, the present Court appears unlikely to accept this argument. In addition to citing Ullmann with approval, it rejected an analogous argument by Justice Marshall in Kastigar v. United States, 406 U.S. 441, 467-71 (1972) (Marshall, J., dissenting), that an individual could not be put in a worse practical position vis-à-vis the government by the use of an immunity statute. In Kastigar Justice Marshall argued that it may be impossible to prove that evidence used to convict resulted from the use or derivative use of the compelled testimony, rather than from an independent source. Even if the state bears the burden of proving that the source was untainted, it may meet this burden with mere assertions unless the individual asserts some contrary proof. Thus, the protection of the individual from the use of his compelled testimony is placed in the hands of individuals whose main duty is to convict such persons. 406 U.S. at 468-69 (Marshall, J., dissenting).

196. Zicarelli v. New Jersey Investigating Commn., 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972). The Court held that transactional immunity, which completely prohibits prosecution for any offenses disclosed by testimony under immunity, though permissible, was not constitutionally required. The purpose of the privilege against self-incrimination—to avoid compelling disclosures that could furnish a link in the chain leading to prosecution—is satisfied if the disclosure itself and any evidence obtained by the use of the disclosure is excluded from subsequent criminal proceedings. In order to compel disclosure the immunity need be only as broad as the privilege.

However, if the analysis suggested in section 1\textsuperscript{198} is adopted, and disbarment is treated as quasi-criminal for purposes of the privilege, the immunity exchanged for the privilege should also prohibit disbarment based on the compelled disclosures.\textsuperscript{199} This approach, however, raises the possibility that an attorney whose admitted conduct has demonstrated that he is unfit will be permitted to continue to practice. This prospect appears so objectionable that it alone might justify a refusal to change the accepted classification of disbarment as a civil sanction for purposes of both questions, so that neither the privilege against self-incrimination nor immunity would bar the compulsion of disclosures or the use of disclosed information in disciplinary proceedings.\textsuperscript{200} Even in the criminal context, however, every instance in which immunity is extended results not only in social benefit from the use of the testimony compelled, but also in the social cost of foregoing the punishment of the individual.\textsuperscript{201} There is always some potential harm if the individual is allowed to go unpunished, for he may continue to engage in the conduct revealed under immunity. The problem presented by an attorney's testifying under immunity is no different qualitatively than that presented by the operation of immunity statutes in general, although it may differ quantitatively: The potential for harm to third persons is multiplied because the attorney is allowed to continue—with the apparent approval of the state—in the fiduciary position that he has misused in the past.

This, however, does not necessarily justify rejecting the over-all classification of disbarment as a penal sanction. Rather, it is but one factor in determining whether to grant immunity to a given attorney. Under the present system the social cost involved in foregoing punishment is weighed against the benefits to be gained by compelling testimony in each case; if the social cost is too high, the immunity is with-

\textsuperscript{198} See text accompanying notes 31-188 supra.

\textsuperscript{199} This analysis is consistent with \textit{Ullmann}, which expressly provided that the petitioner could avoid the sanctions that he alleged might be imposed by successfully showing them to be criminal. 350 U.S. at 431.

\textsuperscript{200} In a similar situation, Judge Cardozo concluded: "[W]e will not declare, unless driven to it by sheer necessity, that a confessed criminal has been intrenched by the very confession of his guilt beyond the power of removal." \textit{In re Rouss}, 221 N.Y. 81, 85, 116 N.E. 782, 783 (1917), cert. denied, 246 U.S. 661 (1918). The courts have achieved the most flexibility in the area of bar discipline by carefully defining the purpose of their proceedings as nonpunitive and thus civil or sui generis. Thus, in addition to the fact that testimony given under immunity could be used to disbar, it has been held that neither pardon nor acquittal of a criminal offense would bar discipline and that no statute of limitations applies to a disciplinary proceeding. See \textit{In re Nilva}, 266 Minn. 576, 583, 123 N.W.2d 805, 808-09 (1963); \textit{In re Pephin}, 46 N.J. 401, 428-29, 433-34, 177 A.2d 721, 735, 738 (1962); \textit{In re Schildhaus}, 29 App. Div. 2d 182, 189 N.Y.2d 631 (1955); H. Drinker, supra note 94, at 63-83.

\textsuperscript{201} Immunity statutes were intended to serve as a method of balancing various social costs and benefits. Compare \textit{Kastigar v. United States}, 406 U.S. 441, 464 (1972) with 8 J. WIGMORE, supra note 30, § 2281, at 402.
held. The fact that it is undesirable to allow an attorney who has admitted conduct that demonstrates his lack of fitness to continue practicing law only indicates that the social cost of granting immunity will often be too high. It does not alter the conclusion that, if immunity is granted, disbarment should be classified as a penal or quasi-criminal sanction so that the disclosures made under immunity cannot be used to disbar.

### III. May the Attorney's Claim of the Privilege Be Used as Evidence of His Lack of Fitness?

The final question deals, not with the extent of an attorney's privilege against self-incrimination, but with the effect of its use in a disciplinary proceeding. *Spevack* held that an attorney could not be disbarred solely on the basis of his exercise of the privilege. May the state nevertheless, through comment or inference, point to his silence as one indication of his guilt? Or may the state disbar the attorney on the ground that his refusal to answer demonstrates that he lacks the candor and cooperativeness required of attorneys?

#### A. Comment on and Inference from the Use of the Privilege

In a criminal proceeding, a comment by the prosecutor or the court to the effect that the defendant's exercise of his privilege against self-incrimination indicates his guilt itself violates the defendant's privilege. In *Griffin v. California*, the Supreme Court held that such a comment by a prosecutor was improper because it made the assertion of the privilege "costly." The trial court may not "solemnize the silence of the accused into evidence against him." The Court distinguished this impermissible conversion of the privilege into evidence of guilt from the permissible and natural presumption of guilt that may flow from evidence uncontroverted by the defendant.

The state courts have divided on whether the *Griffin* principle should be applied to disbarment proceedings. The question was answered in the negative in *State v. Postorino*, where the Wisconsin supreme court interpreted *Spevack* as indicating only that "the taking of the fifth amendment is not in itself a ground for disbarment." The court relied on a state statute and state judicial precedent that

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202. It may, for example, be more dangerous to allow a self-confessed murderer to remain at large unpunished than it would be to allow an unfit person to continue practicing law. The traditional solution to the problem presented by the murderer would be to decide not to extend immunity, rather than to reclassify imprisonment as a nonpenal sanction.

203. See text accompanying notes 10-24 supra.

204. 380 U.S. 609 (1965).

205. 380 U.S. at 614.

206. 53 Wis. 2d 412, 193 N.W.2d 1 (1972).

207. 53 Wis. 2d at 416-17, 193 N.W.2d at 3 (emphasis added).
characterized disciplinary proceedings as civil and concluded that in such a proceeding the fifth amendment does not foreclose the court from drawing an inference of guilt or an inference against the interest of the attorney who claims the privilege. In that case, there was sufficient evidence without the inference to support the finding that the attorney was not fit.

In contrast, the Michigan supreme court, in *State Bar v. Woll*, held that the fifth amendment prohibited a prosecutor's comment, in a disbarment proceeding, that an attorney's exercise of the privilege in the course of the proceeding indicated that he had engaged in misconduct. The court stated that Michigan had long considered disbarment proceedings to be quasi-criminal in character and noted: "While not strictly a criminal prosecution, it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal."

These conclusions are contrary primarily because of the difference in the respective state precedent regarding the characterization of disciplinary proceedings. Both opinions are based on the premise that in a civil case an opposing party's comment or a trier of fact's negative inference based on a failure to testify would not violate the privilege against self-incrimination. There is substantial authority in support of this position from courts that have interpreted the *Griffin* and *Spevack* cases as not going "so far as to absolutely proscribe the visitation of any and all consequences upon one who invokes the Fifth Amendment." One court reasoned that "[t]he administration of justice and the search for truth demands that an inference may be drawn. . ." However, it is also possible to read the *Spevack* and *Griffin* language, which forbids penalties that make the exercise of the privilege "costly," more broadly so as to preclude adverse comment or inference in all civil cases. At least one court has accepted this reading and prohibited comments on the exercise of the privilege in civil cases generally.

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208. 53 Wis. at 417, 193 N.W.2d at 3.
Even if disbarment is characterized as civil for this purpose and the state in question generally permits adverse comments or inferences in a civil proceeding, disbarment proceedings may be distinguished from other civil actions. Although the courts may not be convinced that the severity of the consequences of disbarment is sufficient to characterize disbarment as a criminal proceeding, this severity does suggest that disbarment is more costly than other civil sanctions, such as dismissal of a cause of action\(^{215}\) or the striking of pleadings\(^{216}\) or testimony,\(^{217}\) where the greatest potential loss or penalty for asserting the privilege is generally a money judgment.

In addition, in disbarment proceedings it is the state, rather than a private party to a civil suit, that seeks to turn the privilege into evidence of misconduct. This is the sort of direct state action against which the fifth amendment privilege clearly protects.\(^{218}\) In civil cases, the state action is more indirect, for it consists only of allowing the private party to make negative comments about the assertion of the privilege while enforcing his rights through the state judicial machinery.\(^{219}\)

In addition, when the privilege to remain silent is asserted in a civil proceeding the adverse private party is prejudiced. Arguably, he ought to be allowed to compensate for the evidence made unavailable by his opponent by commenting upon or drawing an inference from the other’s silence.\(^{220}\) It is less unjust to refuse to allow the state, refused to answer complaint responsively, claiming privilege; default judgment held unconstitutional penalty for assertion of privilege).


\(^{218}\) Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. . . . The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . . Malloy v. Hogan, 378 U.S. 1, 8 (1964).

\(^{219}\) Enforcement of private rights through state judicial machinery may constitute state action for the purposes of the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1 (1948).

\(^{220}\) Kaminsky, Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis, 39 Brooklyn L. Rev. 121, 127-28 (1972) (emphasis original): It is often said that the rationale underlying the privilege is not protection of the innocent, but rather preservation of the integrity of our legal system in which the prosecution must bear the full burden of proof and in which all citizens are guaranteed a “zone of privacy” from the government. Whatever relevance these metaphysical concepts may have with respect to governmental inquiries, they are meaningless in the context of private litigation and damage claims being waged by two private citizens. The privilege was conceived as a protection for the accused against an inquisitorial-like system of accusers; it should be remembered and applied as such. In civil cases involving only private parties, the government is
which is intended to be limited by the privilege, to use such a compensating device in disbarment proceedings.

Furthermore, even though the majority of courts that have considered the problem have ruled that a plaintiff who claims the privilege in a civil action may be subject to severe disabilities, including the dismissal of his action,221 at least two courts have refused to allow any inference to be drawn from the defendant’s claim of the privilege.222 Allowing a party who actively seeks the aid of the court to insist on the nondisclosure of essential aspects of the case seems more unfair than allowing a party to assert the privilege while resisting liability.223 The attorney in a disciplinary proceeding is in the latter position.

Thus, even if disbarment is characterized as civil, it may be distinguished from other civil proceedings for purposes of prohibiting inferences of guilt from the attorney’s assertion of the privilege.

B. Disbarment for Lack of Frankness

Even if the state’s counsel in a disbarment proceeding may not urge directly that the exercise of the privilege indicates guilt of the conduct charged, may the state nevertheless conclude that the accused attorney’s silence in itself indicates a lack of the frankness and candor required of an officer of the court? And may such a finding of lack of frankness and candor constitute grounds, alone or in conjunction with other evidence, for disbarment?

There is a practical incompatibility between the duty to speak candidly and the privilege to remain silent without penalty. Since the mid-1950’s there have been a number of split decisions on this question that have involved public employees; some decisions place priority on the individual’s interests that are protected by the privilege, while others give priority to the state’s interest in having frank and candid employees.

The first such decision was *Slochower v. Board of Education*,224

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which held that due process requirements were violated by the dismissal of a New York city college professor who refused to answer questions put to him by a federal congressional committee about his membership in the Communist Party. The New York court of appeals found that no inference of guilt had been drawn; it held that the discharge was permissible because it had been done in accordance with the city charter, which validly imposed as a condition of employment the requirement that city employees not invoke the privilege before a legislative committee.

The Supreme Court reversed, finding that the employee's silence had, in effect, been treated as a confession of guilt and made the basis of his discharge. The board of education had contended in its brief that only two inferences could be drawn from the professor's assertion of the privilege against self-incrimination: first, that his answers would tend to prove his guilt; or, second, that he had falsely asserted the privilege in order to avoid answering and had thus committed perjury. The Court found that the board had "seized upon his claim of privilege . . . and converted it through the use of § 903 [of the New York City Charter] into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge [must fall] of its own weight as wholly without support." The Supreme Court thus rejected the New York court's conclusion and independently determined that the effect of the charter provision was to treat silence as an admission of guilt—a "sinister" inference.

In the late 1950's and early 1960's, however, the Court retreated from the full implications of *Slochower* and emphasized instead *Slochower'*s reference to a "sinister inference" of guilt. Retreating from its willingness to determine the effect of a state statute independently, the Court upheld several statutes that provided for disclosure or dismissal on the ground that in each case the state had interpreted the statutes as basing dismissal solely on a violation of the duty of frankness and candor, rather than on any evidence of guilt or wrongdoing. In *Beilan v. Board of Education*, *Lerner v. Casey*, and *Nelson v. County of Los Angeles*, the Court approved the dismissals of, re-

227. 350 U.S. at 558.
228. 350 U.S. at 556-57.
229. 350 U.S. at 559.
231. 357 U.S. 468 (1958). The Court also held the federal privilege against self-incrimination inapplicable to a refusal to answer in a state proceeding. 357 U.S. at 478. This view was overruled in *Malloy v. Hogan*, 378 U.S. 1 (1964).
spectively, a school teacher, a subway conductor, and a social worker on the basis of this reasoning.

The Spevack opinion, which did rely on Slochower,233 neither distinguished nor mentioned Lerner, Beilan, or Nelson. However, Spevack overruled Cohen and reversed a New York court of appeals decision, both of which relied in part on the violation of the duty of frankness and candor.234 In Spevack the focus was not on the type of inference permitted—either of guilt or of lack of the required candor and frankness—but on the effect on the privilege. Imposition of disbarment as the price for asserting the privilege was impermissible because it had the effect of watering down the protection of the privilege.

Thus, under present case law the Spevack decision, though not fully applicable to all public employees,235 is the controlling precedent for attorneys. In spirit, if not by holding, it appears to preclude the use of an attorney's exercise of his privilege to disbar him, even if the state justifies its action, not on exercise of the privilege per se nor on a sinister inference of wrongdoing, but simply on a failure to fulfill a duty of candor. However, the membership of the court has changed significantly since the Spevack opinion; most significantly, Justice Fortas, the major proponent of the distinction between attorneys and other public employees, has left.

Whether comment or inference of unfitness should be permitted when it is based on lack of candor, rather than on actual guilt of the offense charged, depends on the outcome of the balancing test that the Court characteristically uses to determine the scope of the privilege against self-incrimination.236 It would seem that, if the public interest cannot justify compelling disclosure in the first instance, it cannot justify reaching the same effect by converting privileged refusal to speak into evidence of a new misconduct. Thus, if the Spevack rule itself is to be maintained, it should not be undermined by allowing adverse comment or presumptive inference to be based on the assertion of the privilege.

233. 385 U.S. at 516.
235. See text accompanying notes 27-28 supra.
236. See text accompanying notes 43-61 supra.