But almost as impressive as the result reached in *Wein v. Crockett* was the failure of the Utah court to mention or rely upon the supporting authority of *International Shoe v. Washington.* While that case involved a foreign corporation, the broad sweep of the court's reasoning invites the application of identical criteria in determining the exercise of jurisdiction over both corporations and individuals.[21] Rejected as determinative of jurisdiction were fictional consent, fictional presence, and the power to exclude—the very bases of former distinctions between the two situations; distinctions which are predicated upon no apparent realistic considerations. The two cases, however, are not dissimilar in their approach. Conceding minor differences, both the Utah case and *International Shoe* made "convenience" the determinative factor of jurisdiction rather than employing narrow interpretations of the police power.[22] The doctrinal shortcoming of *Wein v. Crockett* is that it overcame the greatest obstacles, then failed to take the additional step of applying *International Shoe* and merging the corporate and individual cases under a common authority.

EVIDENCE - PRIVILEGE AGAINST SELF-INCRIMINATION - COMPULSORY VOICE EXHIBITION

Taylor, under arrest for rape, and four other men of the same general appearance were compelled by the sheriff

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nonresident as to a foreign corporation. If the mere fact that a corporation does business within a state constitutes a consent to the conditions which the state may properly and does impose, it is hard to see why the doing of business by an individual is not a consent to the conditions which a state may properly and does impose." Scott, *Business Jurisdiction over Nonresidents,* 32 HARV. L. REV. 871, 886 *et. seq.* (1919).

21. In the International Shoe case, Chief Justice Stone spoke of individuals as well as corporations as he said, "historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person . . . . But now . . . due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

22. The main difficulty with the new approach seems to lie in the vagueness of the terms "fair play," "substantial justice," and "minimum contacts" utilized in International Shoe v. Washington. The problem, however, is not wholly unique. For almost a century British courts have been applying with success similar tests in determining the propriety of *in personam* jurisdiction in actions against out-of-state defendants. See Note: *British Precedents for Due Process Limitations on In Personam Jurisdiction,* 48 COL. L. REV. 605 (1948).

to line up with their backs toward the prosecuting witness and repeat specific words, spoken by the rapist at the scene of the crime. By his voice, Taylor was identified as the assailant. Upon appeal from a conviction, the Supreme Court of South Carolina reversed, holding that the admission by the trial court of testimony to the foregoing facts[1] violated the defendant's state constitutional privilege not to ". . . be compelled in any criminal case to be a witness against himself."[2] *State v. Taylor*, —S. C.—, 49 S.E.2d 289 (1948).

Although the privilege against self-incrimination[3] is incorporated into the United States Constitution and virtually all of the state constitutions,[4] the interpretations of its scope are anything but uniform. The area of heaviest conflict regarding the privilege concerns its applicability to evidence identifying the accused secured through his own active assistance.[5] The existence of two interpretations of the privilege explains most of the inconsistencies in the cases. The first, which may be called the narrow-protection, or common law view, excludes from admission incriminating *testimonial* evidence obtained from a *witness* by means of legal compulsion.[6] The

1. See note 19a *infra*.

2. S. C. CONST. Art. I, Sec. 17.

3. The privilege was first evolved in an attempt to check the inquisitorial abuses of the ecclesiastical courts in putting the accused upon his oath to supply the lack of witnesses. Ultimately, the privilege took form as a common law rule of evidence. For an exhaustive discussion of the history of the privilege, see 8 WIGMORE, EVIDENCE Sec. 2250 (3rd ed. 1940); also Corwin, E. S., *The Supreme Court's Construction of the Self-incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1398 (1938); Irvine, *The Third Degree and the Privilege Against Self-incrimination*, 13 CORNELL L. Q. 211 (1927); Wigmore, J., *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1891); Wigmore, J., *The Privilege Against Self-incrimination: Its History*, 15 HARV. L. REV. 610 (1902).

4. See 8 WIGMORE, EVIDENCE 321-326 for a collection of all the American provisions.

5. *Compare* People v. Hevern, 127 Misc. Rep. 141, 215 N. Y. Supp. 412 (1926), *with* United States v. Kelly, 55 F.2d 67 (10th Cir. 1932) (fingerprints); *compare* Magee v. State, 98 Miss. 865, 46 So. 529 (1908), *with* State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924) (making footprints); *compare* Allen v. State, 183 Md. 603, 39 A. 2d 820 (1944), *with* Holt v. United States, 218 U. S. 245 (1910) (putting on certain clothing). For general discussions see Inbau, *Self-incrimination—What Can An Accused Person Be Compelled To Do?* 28 J. CRIM. L. & CRIMINOLOGY 261 (1937); Comment, *To What Extent Does The Privilege Against Self-incrimination Protect An Accused From Physical Disclosures?* 1 VAND. L. REV. 243 (1948).

6. This view of the privilege is the same as the common law rule of evidence. Cates v. Hardacre, 3 Taunt. 424, 128 Eng. Rep. 168 (1811); Regina v. Garbett, 1 Den. 243, 169 Eng. Rep. 230 (1847); 9 HOLDSWORTH, HISTORY OF THE ENGLISH LAW 197 (1926); 8 WIGMORE, EVIDENCE

second, or broad-protection view, excludes from admission any incriminating evidence obtained from a person by means of legal compulsion.[7]

Although the court in the Taylor case purported to follow the narrow, or common law, view, it in fact went beyond the limits of that interpretation of the privilege.[8] This is borne out by a consideration of the key requisite[9] for the application of that view: the evidence produced must be a testimonial fact.[10] This involves two factors. First, the

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Sec. 2250. Many American jurisdictions approve this concept. *See, e.g.*, McFarland v. United States, 80 U. S. App. D. C. 196, 150 F.2d 593 (1945); Elmore v. Commonwealth, 282 Ky. 443, 138 S. W.2d 956 (1940). See note 10 *infra*.

7. *E.g.*, in these cases the defendant was held privileged (a) even though he was not under oath as a witness: Smith v. State, 247 Ala. 354, 24 So.2d 546 (1946) (standing up before jury); Blackwell v. State, 67 Ga. 76, 44 Am. Rep. 717 (exhibiting leg); Beacham v. State, 144 Tex. Crim. Rep. 272, 162 S. W.2d 706 (1942) (exhibiting voice by speech); Apodaca v. State, 140 Tex. Crim. Rep. 593 (1941) (handwriting exhibition); (b) where the defendents, although on the witness stand (without waiver of the privilege), furnished only non-testimonial evidence: Allen v. State, 183 Md. 603, 39 A.2d 820 (1944) (placed hat on head); Ward v. State, 27 Okla. Crim. 362, 228 Pac. 498 (1924); State v. Thorne, 39 Utah 208, 117 Pac. 58 (1911) (put on clothes, took gun in hand).

8. State v. Griffin, 129 S. C. 200, 124 S. E. 81 (1924), a previous South Carolina case, was deemed controlling in the principal decision. There, the court declared itself to be following the Wigmore narrow-protection view that the privilege is limited to incriminating testimony. But testimony is a solemn declaration under oath for the purpose of proving some fact. O'Brien v. State, 125 Ind. 38, 25 N. E. 137 (1890). By declaring that mere conduct may be testimony, that decision, in effect, obtained the same results as if the broad-protection view were followed. Consequently, the Wigmore view was not validly applied in State v. Griffin. For a criticism of the Griffin case see Note, *Admissability of Non-Testimonial Evidence Extorted From The Accused Person Before And At the Trial*, 5 N. C. L. REV. 333 (1927).

Some reliance in the Taylor Case was placed upon Beacham v. State, 144 Tex. Crim. Rep. 272, 162 S. W.2d 706 (1942), where a pre-trial compulsory voice exhibition resulting in identification was held to violate the privilege. That case was erroneously relied upon for two reasons. Firstly, while the Texas Commission of Appeals decided that admission of the evidence had violated the privilege against self-incrimination, upon rehearing the Court of Criminal Appeals preferred to place its affirmation upon an untrustworthy confession statute which had been construed to cover many acts other than confessions. Secondly, if Beacham v. State is a valid application of the privilege, it represents only an application of the broad-protection privilege.

9. Broken down, the elements requisite for the exercise of the common law privilege are these: (1) Compulsion (2) by agency of the law (3) against a witness (4) resulting in acquisition from the witness (5) of testimonial facts (6) which tend to incriminate the witness; (7) absence of waiver of the privilege by the witness; and (8) absence of immunity of the witness from prosecution for the crime which would be imputed to him. 8 WIGMORE, EVIDENCE Secs. 2250-2284 (Chapter LXXX).

10. For a sampling of those decisions emphasizing the necessity that testimonial evidence be obtained from a witness, *see, e.g.*, Holt v.

person furnishing the evidence must have acted in the capacity of a witness, i.e., as one bound by oath to speak the truth or bring forth specific evidence which he has been ordered to produce.[11] Secondly, the truth of the matter communicated, or the authenticity of the evidence produced must be inferred from its assertion or production by that person.[12] In the Taylor case the accused was only a party under arrest; at no time did he take an oath so as to fall within the purview of witness. Even if it had been produced by a witness, the voice is like any other physical attribute of the body. Its authenticity is known by the observer without any reliance upon the assertion by the speaker that he is producing his own voice and not that of another. Thus, a person's voice is not a testimonial fact, and under the narrow-protection view, the privilege against self-incrimination is not exercisable to preclude from admission evidence derived from a compulsory exhibition of the voice.[13]

In effect, the court in the Taylor case, by applying the privilege to evidence obtained by one not a witness, adopted the theory of the broad-protectionists. Very probably, where the broad construction prevails, it has devolved from a literal application of that particular state's own constitutional privilege provision, the phrasing of which does not limit protection to testimonial evidence.[14] Obviously, since compulsory incriminating voice exhibition is furnishing evidence against one's self, it would be within the protection

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United States, 218 U. S. 345 (1910); United States v. White, 322 U. S. 694 (1944); People v. One Mercury Sedan, 74 Cal. App.2d 248, 168 P.2d 445 (1946); Boyers v. State, 198 Ga. 838, 33 S. E.2d 251 (1945). Ross v. State, 204 Ind. 281, 291, 182 N. E. 865, 868 (1932): "We do not think that the rule against compulsory self-incrimination properly applies to pre-trial efforts to identify a suspect as the probable perpetrator of a crime." Magee v. State, 92 Miss. 865, 46 So. 529 (1908); State v. Cash, 219 N. C. 818, 15 S. E.2d 277 (1941); McGovern v. Van Ripper, 137 N. J. Eq. 548, 45 A.2d 842 (1946); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945). See also 1 GREENLEAF, EVIDENCE Secs. 469e-f (16th ed. 1899); PHIPSON, EVIDENCE 198 (8th ed. 1942); 8 WIGMORE, EVIDENCE Secs. 2263-2265.

11. 1 WIGMORE, EVIDENCE 398, 2 *id.* Secs. 475-479; 8 *id.* Sec. 2264.

12. See note 11 *supra.*

13. At least two writers and one court clearly regard compulsory voice exposition as without the privilege: Johnson v. Commonwealth, 115 Pa. St. 369, 9 Atl. 78 (1887); Inbau, *supra* note 5 at 281; Comment, 1 VAND. L. REV. 243, 250 (1948).

14. For example, the Alabama and Texas provisions are that the accused ". . . shall not be compelled to give evidence against himself." ALA. CONST. Art. I, Sec. 6; TEX. CONST. Art. I, Sec. 10. Compare with cases cited, note 7 *supra.*

afforded by a literal application of this second concept of the privilege.[15] However, it is suggested that a proper application of the privilege can be made only by a consideration of its underlying purposes. Protagonists of both views of the privilege deem it to be aimed at protection of the innocent by preventing the degeneration of the investigatory machinery of the state.[16] Thus, when law enforcement officers are allowed to trust habitually to compulsory self-disclosure, "The inclination develops to rely mainly upon such evidence and to be satisfied with an incomplete investigation of the other sources . . . ultimately, the innocent are jeopardized by the encroachments of a bad system."[17]

It is difficult to see how this reasoning applies to the type of facts obtained in the Taylor case. Such facts are obviously the most reliable evidence that can be placed before a jury or utilized to detect the criminal since they need no verification and are known to be genuine with reliance upon no person's testimonial responsibility. Since the only purpose of such evidence is to determine the guilt or innocence of a person, its inclusion within the privilege does not protect the innocent, as only their innocence is disclosed. Rather, only the guilty are protected. To deprive the public and their law enforcement officers of the best means of identification of criminals tends to hamper, not improve, the system of criminal investigation.[18] The privilege must not be so mechanically applied as to needlessly exclude evidence vital to the protection of society without a corresponding promotion of the objects of the privilege. Thus, by either view, compulsory voice exhibition however incriminat-

15. Beacham v. State, discussed in note 8 *supra*.

16. "The rule was intended for the protection of the innocent, and not for that of the guilty." Bartlett v. Lewis, 12 C. B. n.s. 249, 265 (1862). STEPHEN, HISTORY OF THE CRIMINAL LAW 342, 441, 565 (1883); 8 WIGMORE, EVIDENCE 316.

For criticism of the privilege, see Irvine, *supra* note 2, at 215; Pecora, F., *Are the Criminal Courts Doing Their Duty?* PROCEEDINGS OF THE ATTORNEY GENERALS' CONFERENCE ON CRIME 169, 170 (1934); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 86 (1891).

17. 8 WIGMORE, EVIDENCE 309.

18. 8 WIGMORE, EVIDENCE Sec. 2265; 17 PHIL. L. J. 283, 306 (1938). For an able discussion of the muzzling effect of constitutional restrictions upon the power of society to solve crimes where grounds exist to suspect an individual, but where the evidence is insufficient to charge him with guilt, see Mr. Justice Jackson's dissent in Watts v. Indiana, 69 Sup. Ct. 1347, 1357 (1949).

ing should not fall within the shelter of the privilege against self-incrimination. If identification of a person by virtue of evidence, the source and authenticity of which the observer knows without assistance from anyone, is to be excluded, it must be done upon grounds other than the privilege against self-incrimination.[19]

PARLIAMENTARY LAW

THE CLOTURE RULE

At the beginning of the 81st Congress the Majority leaders in the Senate, anticipating obstruction by "filibusters," proposed to amend the Senate Rules to provide for more effective limitation on debate. A motion was made to take up

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19. If identification by virtue of compulsory voice exhibition is to be disallowed, it must be done upon some other ground, such as:

(a) *Undue prejudice.* The principal case was decided purportedly as a violation of the privilege. Yet, the court in obscure language, indicates that the evidence should have been excluded solely because the specific words were uttered. If the particular words were such as would rouse the passion of the jury, the evidence might be subject to exclusion as unduly prejudicial (6 WIGMORE, EVIDENCE Sec. 1904); but so far as the privilege itself is concerned, the undue prejudice argument is irrelevant. Opposing exclusion on an undue prejudice basis is the fact that the most accurate method of identification is to present the suspect to the witness in as near as possible the same conditions as originally observed. 3 WIGMORE, EVIDENCE Sec. 786a. For valuable discussion see Gorphe, F., *Showing Prisoners To Witnesses for Identification,* 1 AM. J. POLICE SCI. 79 (1930).

(b) *Unreliability of the Identification.* Relatively little research appears to have been done in this area, but see: 27 J. CRIM. L. & CRIMINOLOGY (1936); McGeehee, F., *The Reliability of the Identification of the Human Voice,* 17 J. GEN. PSYCHOLOGY 249 (1937), and comment thereon in 33 J. CRIM. L. & CRIMINOLOGY 487 (1943); McGeehee, F., *An Experimental Study of Voice Recognition,* 31 J. GEN. PSYCHOLOGY 53 (1944). For cases accepting voice identification see 2 WIGMORE, EVIDENCE Sec. 660, n.1.

(c) *Violation of procedural due process of the U. S. Const. Amend. XIV.* To date that evidence which has been excluded by virtue of the due process clause has been only involuntary confessions. However, the scope of procedural due process does not appear to be limited to confessions, in view of its underlying policy: ". . . to prevent fundamental unfairness in the use of evidence, whether true or false." Lisenba v. California, 314 U. S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941); Watts v. Indiana, 69 Sup. Ct. 1347, 1348, n. 2 (1949). But whether this due process fair trial rule will ever be utilized to compel the exclusion of non-confessional evidence is an open question.

(d) *Waiver.* Many courts have avoided a determination of what constitutes testimony by finding that the accused waived his privilege when, as a matter of fact, he had no privilege to waive. *E.g.,* People v. Salas, 17 Cal. App.2d 75, 61 P.2d 771 (1936); State v. Watson, 114 Vt. 543, 49 A.2d 174 (1946); Spitler v. State, 221 Ind. 107, 46 N. E.2d 591 (1943); State v. Cash, 219 N. C. 818, 15 S. E.2d 277 (1941).