ing in *Coyne* as *amicus curiae* in support of a private party's assertion of the privilege, he argued "for the need of absolute privilege to cover communications such as that of the defendant [a statement of reasons for discharging plaintiff] to expedite the work of the department and encourage full and free disclosures by employers." *Id.*[28]

Consistent with the letter and spirit of the statute, the courts have time and again sustained assertions of the privilege. Information acquired from both employer and employee has been found to be privileged. *Graham* v. *Seaway Radio, Inc.*, 28 Misc. 2d 706, 216 N.Y.S. 2d 52 (Sup. Ct. Jefferson Co. 1961); *Breuer* v. *Bo-Craft Enterprises, Inc.*, 8 Misc. 2d 736, 170 N.Y.S. 2d 631 (Sup. Ct. N.Y. Co. 1957); *Coyne* v. *O'Connor*, *supra*; *Eston* v. *Backer*, 204 Misc. 162, 119 N.Y.S. 2d 273 (Sup. Ct. Queens Co. 1953); *Andrews* v. *Cacchio*, 264 App. Div. 791, 792, 35 N.Y.S. 2d 259, 260 (2d Dept. 1942); *see Conigliaro* v. *New Hampshire Fire Insurance Co.*, 8 Misc. 2d 164, 171 N.Y.S. 2d 731 (Sup. Ct. Kings Co. 1956).

In short, the statement which Chiarella made to the state agency would not have been admissible in evidence against him in any state court action. Chiarella's response detailing the reasons for his discharge was "information acquired from an employee" by the state in an effort to

28. The New York statute created what one commentator terms an "encouragement-type" privilege,

> "designed to encourage citizens to accurately report potentially self-damaging information which they would otherwise hesitate to furnish for fear of the consequences resulting from later uses of such information. While the ultimate beneficiary of this privilege is, of course, the government (in that it receives more accurate information), the privilege is basically designed to protect the immediate interests of the reporting citizen, and thus the privilege is personal, belonging to the reporter [footnote omitted]." Note, *The Required Report Privileges*, 56 Nw. U.L. Rev. 283, 286 (1961).

determine his claim for unemployment benefits and "information" has been held to include an employee's statements made in the course of processing a claim for benefits. *Andrews* v. *Cacchio, supra.* So long as the commissioner is not a party to the action in which the information is to be introduced, that information would be privileged and, upon objection, could not be introduced against Chiarella in the state courts of New York.

The criteria for determining whether this state privilege will be honored in the federal courts are set out in the Federal Rules of Evidence. Federal courts, according to Rule 501,[29] are required to apply the state law of privilege in civil actions where "the State law supplies the rule of decision" "with respect to an element of a claim or defense." In all other actions tried in federal courts the privilege of a witness, assuming it is not one provided for by the federal Constitution, act of Congress, or this Court's rules, "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[30] Simply stated, in other than civil diversity cases, the federal court is required to evolve its own body of privilege law with established federal common law as a guide.

In this case, however, the federal common law as it has developed thus far provides no dispositive answer to the issue at hand. To be sure, there are instances in which

29. The full text of Rule 501 can be found at p. 4, *ante*.

30. The House Committee Report accompanying the draft of Rule 501, eventually enacted into law, discloses that this standard for assessing privilege claims in federal question cases was derived from Rule 26 of the Federal Rules of Criminal Procedure [H.R. Rep. No. 650, 93d Cong. 1st Sess. 8 (1973)] which was itself derived from the standard first announced by this Court in *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934) and *Funk* v. *United States*, 290 U.S. 371 (1933).

federal courts, in federal question cases, have respected the privileged status of information provided to state agencies under a specific state statutory assurance of nondisclosure,[31] but there are examples to the contrary.[32] In any event, these federal cases involved statutory enactments whose language and underlying purposes vary considerably; they are therefore of little assistance in assessing Chiarella's claim. Turning to those reported federal cases addressing §537, we find only two. In *Simpson* v. *Oil Transfer Corp.*, 75 F.Supp. 819 (N.D.N.Y. 1948) invocation of the privilege was sustained and in *Vazquez* v. *Bull*, 91 F.Supp. 518 (S.D.N.Y. 1950) the court, expressly approving of *Simpson*, found the information sought to be disclosed was not "acquired from an employer or employee" and therefore outside the privilege. Thus, Chiarella's claim of privilege finds support in whatever federal law does exist and while those cases may not be dispositive of the issue, the privilege cannot be described, as the Second Circuit did, as one "unknown" to the federal common law (588 F.2d at 1372). Where, as here, the case law discloses no clear-cut answer, a federal court must reexamine the specific privilege asserted with an eye towards the development of federal privilege law. *E.g., In re Grand Jury Impaneled January 21, 1975, supra; see United States* v. *Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975).

31. *Herman Brothers Pet Supply, Inc.* v. *N.L.R.B.*, 360 F.2d 176 (6th Cir. 1966); *In re Valecia Condensed Milk Co.*, 240 F. 310 (7th Cir. 1917); *Bearce* v. *United States*, 433 F.Supp. 549 (N.D. Ill. 1977); *Tollefsen* v. *Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *In re Reid*, 155 F. 933 (E.D. Mich. 1906).

32. *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *United States* v. *Thorne*, 467 F.Supp. 938 (D. Conn. 1979); *United States* v. *Blasi*, 462 F.Supp. 373 (M.D. Ala. 1979); *United States* v. *King*, 73 F.R.D. 103 (E.D.N.Y. 1976).

The federal court's obligations in this regard can be understood only in light of the stormy history of Rule 501. Unlike most of the other federal rules of evidence, Rule 501 was the creation as well as the enactment of congress. The vast majority of the rules proposed by the Advisory Committee eventually made their way into the present Rules of Evidence. One noticeable exception was Article V, which, as drafted by the Committee, contained thirteen specific privilege rules intended to apply uniformly in all federal actions, civil and criminal, diversity and federal question. Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1972) [hereinafter cited as "Proposed Rules"]. When presented for congressional approval, controversy regarding Article V prompted a legislative redrafting of the federal rules on privileges which resulted in the present form of Rule 501.

There were two basic points over which congress and the Advisory Committee disagreed. The Advisory Committee, convinced that privileges, like the other rules of evidence, were purely procedural, was desirous of establishing a uniform rule of privilege for all federal courts. It promulgated federal rules of evidence which, with two exceptions,[33] paid no heed to state-created privileges. Congress unequivocally rejected this premise. Concerned that rules of privilege involved important policy considerations, congress required the federal courts to respect state-created privileges and the policy determination underlying them in all cases where state law provided the rule of decision.

33. The first, proposed Rule 502, is of particular significance since it directed federal courts to honor state "required-reports" privileges. The second, set out in proposed Rule 510, recognized a state's assertion of the informer privilege. Proposed Rules, *supra*, 56 F.R.D. at 203-4, 255-56.

H.R. Rep. No. 650, 93d Cong. 1st Sess. 8 (1973). Although still free to adopt the Advisory Committee's specific rules of privileges for use in all federal question cases, congress did not. Faced with criticism of the Committee's codification due to its failure to incorporate several of the well-known privileges and its narrow interpretations of others, congress directed the district courts to develop privilege law under a uniform "standard" applicable both to civil and criminal cases. A flexible approach to the federal law of privilege replaced the proposed codification. The federal courts, when not directed to follow the law of the state, were given the responsibility to evolve a federal law of privilege on a case-by-case basis rather than required to interpret the specific rules proposed by the Committee.[34]

The legislative history of Rule 501 would not be complete without noting that congress took pains to point out that it did *not* reject the specific privileges promulgated by the Committee. The Report of the Senate Committee on the Judiciary explicitly stated:

> "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should

34. Detailed discussions of the legislative turmoil concerning Article V of the Rules of Evidence can be found in several commentaries. 2 J. Weinstein & M. Berger, Weinstein's Evidence §501 [01]-501[05], 501-12-501-49 (3d ed. 1977) [hereinafter cited as "Weinstein's Evidence"]; 2 D. Louisell & C. Mueller, Federal Evidence §§200-201, 389-429 (1979) [hereinafter cited as "Federal Evidence"]; Schwartz, *Privileges Under the Federal Rules of Evidence—A Step Forward?* 38 U. Pitt. L. Rev. 79 (1976); Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule Making Power*, 76 Mich. L. Rev. 1177 (1978).

> be understood as reflecting the view that the recognition of a privilege found on a confidential relationship and other privileges should be determined on a case-by-case basis." S. Rep. No. 1277, 93d Cong. 2d Sess. 6, 13 (1974).

Nor is this a surprising statement since the federal rules of evidence were the product of years of work by respected practitioners, jurists, and legal scholars. The rules went through several drafts, with the Committee consulting a broad spectrum of legal opinion. Accordingly, the rules promulgated by the Commitee and approved by the Court provide guidance to courts in the development of federal privilege law.[35]

Seen in this light, the test set out in Rule 501 can be succinctly stated. Whether a federal court should grant or withhold an evidentiary privilege requires it to balance competing policies. *United States* v. *Nixon,* 418 U.S. 683, 705 (1974). Consistent with congress' explicit concern for the social objectives sought to be achieved by the creation of privileges, courts must identify the nature and importance of those objectives. Where there is an assertion of a state-created privilege, the identification of those societal goals is facilitated by resort to state law. The court must also assess the federal interests for and against recognition of the privilege since recognition of the asserted privilege under Rule 501 is ultimately a question of federal law. The decision to honor a claim of state

35. While the vast majority of cases and comments share this view, the present significance of the proposed rules is still being debated. *Compare e.g., United States* v. *Mackey,* 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975) *with SCM Corp.* v. *Xerox Corp.,* 70 F.R.D. 508, 522 (D. Conn. 1976). And *compare* Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule Making Power,* 76 Mich. L. Rev. 1177, 1179 (1978) *with* 2 Federal Evidence, *supra* at §202, 428-29.

privilege in a federal court will eventually depend upon a careful balancing of these various interests.

The cases which have sought to apply Rule 501 to a claim of state privilege have made their determinations in accord with this analysis. *E.g., United States* v. *Gillock*, 587 F.2d 284 (6th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3740 (May 14, 1979); *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592-93 (7th Cir.), *cert. denied*, 99 S.Ct. 721 (1978); *In re Grand Jury Proceedings*, 563 F.2d 577, 582-85 (3d Cir. 1977); *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975); *Gulliver's Periodicals, Ltd.* v. *Chas. Levy Circulating, Inc.*, 455 F.Supp. 1197 (N.D. Ill. 1978); *United States* v. *King*, 73 F.R.D. 103 (E.D.N.Y. 1976). And the texts dealing with the new federal evidence rules have uniformly urged the courts to apply a similar analysis. 2 Federal Evidence, *supra* at §201, 411-429; 2 Weinstein's Evidence, *supra* at §501[02], 501-17-501-20.5.

Application of these principles to the instant case strongly supports Chiarella's claim of privilege. We have already discussed the unambiguous language of New York's Labor Law, the underlying advantages to both the individual and the state by granting this privilege, and the rigorous enforcement of the privilege in the state courts. Chiarella's case provides a perfect illustration of how that very policy was effectuated. When directed to explain why he had been fired, his answer was anything but evasive. The state had the accurate information it desired without the necessity of applying its scarce resources for an investigation of the applicant. Suffice it to say, the State of New York has decided that the public

benefit derived from acquiring complete and accurate information needed for the effective administration of its unemployment insurance program outweighs the loss of such reported information in its courts. This legislative judgment should, absent a compelling federal interest, be honored by the federal courts. *See* Krattenmaker, *Testimonial Privilege in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence,* 62 Geo. L.J. 61, 117 (1973).

The federal interests in preserving the confidentiality of Chiarella's statement are closely allied if not directly responsible for the privilege provided by the New York statute. The federal government, in accord with the practice of many states, has, for the same reasons as New York,[36] provided assurances of nondisclosure for those who are required to report information to various federal agencies. *E.g.*, 42 U.S.C. §1306 (Social Security returns); 42 U.S.C. §2000E-5(a) (Conciliation attempts of the Equal Employment Opportunities Commission); 38 U.S.C.A. §3301 (1972) (files and records relating to claims under the Veterans' Administration).[37] Such federally acquired information shielded by an "Act of Congress" would, of

36. This Court, in discussing one such federal regulation prohibiting the use of Internal Revenue records, identified the public policy considerations underlying it:

> "The interests of persons compelled, under the revenue law, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded." *Boske* v. *Comingore,* 177 U.S. 459, 469-70 (1900).

37. A list of the numerous federal statutes insuring confidentiality of the information supplied to any number of federal agencies is set forth in 2 Federal Evidence, *supra* at §202 Appendix, 445-60. A sampling of state statutes which serve similar purposes can be found in 8 J. Wigmore, Evidence §2377 (McNaughton Rev. 1961).

course, be inadmissible in a federal criminal or civil trial by the plain wording of Rule 501. *See United States* v. *Caserta*, 199 F.2d 905, 910-11 (3d Cir. 1952).

Where the federal government administers its own unemployment insurance plan (Railroad Unemployment Insurance Act, 45 U.S.C. §351 *et seq.*) it, too, grants confidentiality to the information it receives (45 U.S.C. §362[d])[38] so as to protect the privacy and identity of the reporter. But not only do the federal and New York State legislatures share the same commitment to preserving privacy in the area of unemployment insurance information, the federal government has also manifested its keen interest that all states pass similar laws. Under 26 U.S.C. §3304(a)(16) and (17), a state unemployment insurance statute, in order to meet minimum federal requirements, must provide "safeguards to insure that information [obtained by the state through administration of the state law]" is used solely for the administration of that law and that all privileges conferred by the state statute shall remain in existence.[39]

38. In words reminiscent of the New York Labor Law, 45 U.S.C. §362 provides:

> "(d) Information obtained by the Board in connection with the administration of this chapter shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity: . . ."

Congress goes on to provide three limited exceptions but none of them would have authorized the Board to disclose the information it had obtained to a federal prosecutor.

39. In so doing, the federal government has demonstrated that its interests are directly served by a state statute which, by granting confidentiality, encourages accurate and complete reporting. Surely if this information promotes the efficient administration of state agencies which are required to report to their federal counterparts, the efficient administration of those federal agencies must be furthered by protecting the confidentiality and accuracy of such information.

In this manner the federal government has powerfully demonstrated the strong federal policy in favor of granting confidentiality to required reports in general and unemployment insurance information in particular. The parallel state and federal policies regarding precisely the same subject must weigh heavily against overriding the state privilege when asserted in federal court. Similar comparisons led one court to conclude that a state privilege should be recognized in a federal prosection, reasoning that "principles of federal-state comity—'a proper respect for state functions,' *Younger* v. *Harris*, 401 U.S. 37, 44 . . . (1971), reinforce this conclusion." *In re Grand Jury Proceedings, supra,* 563 F.2d at 583. For the federal government to actively encourage states to provide for confidentiality of required information and then fail to enforce those privileges when threatened in federal courts does not show "proper respect for state functions."

Moreover, there is additional strong indication from non-legislative sources of the federal commitment to respect a state "required-report" privilege in a federal case. Proposed Rule of Evidence 502 as approved by this Court would have required the district court to exclude Chiarella's statement.[40] This proposed rule and the policy behind

40. Proposed Rule 502 provided:

"A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. No privilege exists under this rule in actions involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question." 56 F.R.D. at 234-35.

it argue for sustaining the privilege in this case. One reason is that this rule was not at the heart of the controversy which surrounded the other proposed rules of privileges. It is also very significant in that it represents the one major area where the Advisory Committee, otherwise unconcerned with state law, recognized that state "required reports" statutes "embody policies of significant dimension," and specifically required a federal court to apply state law when it contained such a privilege. Proposed Rules, *supra*, 56 F.R.D. at 235.[41] The confluence of these factors justifies reliance on proposed Rule 502 as declarative of a federal policy in favor of federal recognition of the privilege guaranteed by the New York Labor Law.

The strong federal constitutional policy which underlies the Fifth Amendment's right against self-incrimination also favors recognition of Chiarella's privilege in the federal courts. Legislative enactments which require the applicant to make statements as a condition to the receipt of certain fundamental benefits, like unemployment compensation, raise the spectre of compelled self-incrimination. The Advisory Committee note accompanying its draft of proposed Rule 502 clearly recognized the constitutional

41. As one member of the Advisory Committee stated:

"By preserving state privileges for required reports, Standard 502 recognizes that the public benefit derived from acquiring fuller and more accurate information which is needed for effective governmental functioning 'outweighs the loss of the reported information to the federal court.' [Footnotes omitted.]" 2 Weinstein's Evidence, *supra* at §502[02], 502-4.

See Note, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L. Rev. 1287, 1302-04 (1969).

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considerations which necessitate the "required reports" privilege:[42]

> "A provision against disclosure may be included in a statute for a variety of reasons, the chief of which are probably assuring the validity of the statute against claims of self-incrimination, honoring the privilege against self-incrimination, and encouraging the furnishing of the required information by assuring privacy." 56 F.R.D. at 235.

In accord are four members of this Court who, dissenting from a plurality opinion, have recognized that a California statute requiring a citizen to furnish information about a traffic accident violates the Fifth Amendment's prohibition against self-incrimination. *California* v. *Byers*, 402 U.S. 424, 459-78 (1971) (Black, Douglas, Brennan, and Marshall, JJ., dissenting).

Where, as here, the state legislature has removed the danger of self-incrimination with an express proscription against the information it acquires being used in court, that use proscription should, following the dictates of the Fifth Amendment, be enforced in the federal courts. In *Murphy* v. *Waterfront*, 378 U.S. 52 (1964), this Court held that when a state grants one of its citizens "use" immunity and the citizen provides information, the grant is binding on the federal authorities and the information may not be used in any subsequent federal criminal prosecution.

This impressive array of federal interests which support recognition of the privilege in a federal tribunal

42. The Fifth Amendment implications with respect to the government's use of Chiarella's statement were raised by the defense motion for a hearing to test the voluntariness of this statement. The motion was denied without the requested hearing (R.245-48).

surely overrides any federal interest which even arguably supports a different result. There is, as the Second Circuit observed in affirming Chiarella's conviction, a "strong federal policy favoring admissibility in criminal cases" (588 F.2d at 1372), but this policy has no application to this case. The truth-determining process at Chiarella's trial would not have been perverted by the exclusion of Chiarella's privileged statement. The statement, while it had a definite and negative impact on the defense, did not significantly add to the government's evidence. The fact that Chiarella had been fired for violating his employer's policy, was amply demonstrated by other government proof. Indeed, Chiarella's statement is now considered by the government to be "cumulative" evidence of guilt which in its view "could not have affected the result" (Gov. Brief in Opposition to Petit. for Cert. at 11). In short, the federal interest in providing a fact-finder with all relevant evidence does not, in this case, offer a compelling reason to override a privilege which furthers social objectives deemed important by federal and state legislatures, not to mention the United States Constitution.

The prejudicial impact of the district court's failure to sustain the defense's repeated objections to the government's use of this evidence is readily apparent. While the government has continuously labeled any error as harmless due to the claimed cumulative nature of the proof supplied by Chiarella's statement, this argument ignores the dramatic impact of a written confession on the jury. Moreover, the prosecution made sure to highlight the prejudicial impact of this evidence. It not only introduced the confession on its direct case (GX 12; R.275-

77), but also used it to cross-examine the defendant when he testified and made substantial use of it again in summation (R.513-16, 611-14, 659-60). Equally important, however, was the statement's serious consequences on the defense. As trial counsel informed the court, "I feel constrained to advise [Chiarella] to [take the stand] in light of the fact that the statement from the State Unemployment Board was admitted into evidence" (R.334-35). In fact, this Court has itself recognized the powerful effect an improperly admitted statement may have on a defendant's decision to waive his Fifth Amendment rights and testify at trial. *Harrison* v. *United States,* 392 U.S. 219, 223-26 (1968).

Thus, on this record, the erroneous introduction of Chiarella's statement was no mere technical defect which can or should be disregarded. The error profoundly affected the defense and the jurors' deliberations as well.

Conclusion

For the above reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed with instructions to dismiss the indictment.

June 28, 1979

Respectfully submitted,

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