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Self-Incrimination--Historical Background of the Doctrine

Wendell S. Williams
University of Kentucky

SELF INCRIMINATION—HISTORICAL BACKGROUND OF THE DOCTRINE

The early English history of our present day privilege against self-incrimination is indeed a strange one. It is a long story "woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the courts of the common law and of the church, and of the political and religious issue of that convulsive period in English history, the days of the dictatorial Stuarts."[1] For purposes of discussion, the history and development of the doctrine will be broken down into two distinct periods. First, the history of the opposition to the *ex officio* oath of the ecclesiastical courts; second, the history of the opposition to the criminating questions in the common law courts.

The greatest result of the Norman Conquest was the introduction of precise and orderly methods into the government and law of England. Prior to the coming of William the Conqueror, the bishops under the Anglo-Saxon rule had acted as the judges in the popular courts. But Duke William was quick to change this type of judical system. William, by an ordinance, insisted that the bishops should not transact ecclesiastical business in the popular courts, but should hold their own Christian Courts. From that day to this the Church has maintained its separate system of courts administering canon law. Church and State, which had been inextricably connected in the Anglo-Saxon Age, henceforth were strictly separated. Thus, having become separate systems, it was natural that a hot conflict should develop as to the limits and bounds of jurisdiction between the papal and regal powers. This was the great question during the thirteenth and fourteenth centuries. "The statute 'De Articulis Ceri' settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church courts in England."[2]

Once the jurisdictional point was settled the next question to be faced was: how were the papal courts to proceed in the cases where they had acquired jurisdiction? Under Anglo-Saxon rule,

[1] 8 WIGMORE, EVIDENCE 277 (3d ed. 1940).
[2] *Id.* at 279.

the trial by compurgation, or formal swearing of the party with oath helpers, and the trial by ordeal had been the common methods of ecclesiastical trial and decision. In the early thirteenth century these methods were done away with, and in their stead the inquisitional or interrogatory oath came into being under the auspices of Pope Innocent III.[3] The ancient compurgation oath had operated as a formal appeal to the divine; there was no interrogation by the tribunal; the process consisted merely in daring the accused to pronounce his innocence under oath. But the new interrogatory oath pledged the accused to answer truly, and this was followed by a rational process of judical probing by questions to the specific detail of the affair, essentially similar to the modern examination of witnesses in a trial. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge to reach a personal conviction and decision.

The function of the ecclesiastical courts was to punish for offenses against religion and morals, in a word, to punish sin as such. Their use of the *inquisitio,* or proceeding *ex officio mero,* is probably best known for the role it played in heresy trials. It was in this use that the *ex officio* oath was brought to the peoples' attention, when in the headlong pursuit of heretics and schismatics under Elizabeth and James, it was used by the ecclesiastical courts without even the use of witnesses or of presentment of charges against those brought before the court. An oath which was lawful enough on Innocent III's conditions had degenerated into a merely unlawful process of poking about in the speculation of finding something chargeable.

During the time of Henry IV a statute was passed, which gave temporal sanction to the Church's claims in the field of heresy. This statute voiced no objection to the oath or to the *ex officio* procedure, but rather was a sanction of the Church's usual rule, which it pursued with great vigor for more than a century.[4]

This type of procedure in the ecclesiastical courts was in continuous use with little interruption till the year 1640. More and more it became unpopular. The resistance provoked by the intense unpopularity of this method of procedure brought the whole

[3] WIGMORE, PANORAMA OF THE WORLDS LEGAL SYSTEMS 953 (1936).
[4] WIGMORE, *op. cit. supra* note 1, at 285.

system to the ground. "The Ecclesiastical Courts were totally abolished in 1640 and though they were revived in 1661, their procedure was so much altered, especially by the abolition of the *ex-officio* oath, that they have fallen into almost entire disuse for all practical purposes except the displine of the clergy."[5]

It is interesting to note at this point that the disfavor announced in popular discussion concerning the oath and its use in the ecclesiastical courts was not the fact that a man must *incriminate* himself, but rather the *lack of a presentment or a specific charge.*

John Lilburn, an obstreperous and forward opponent of the Stuarts, has been accredited with having brought to a culmination the use of the *ex officio* oath. The Star Chamber, a court organized about 1487 and which had broad jurisdiction over all classes of crimes, had charged him with the printing or importing of heretical and seditious books. He denied these charges and refused to make an answer to other like charges. For this he was condemned to be whipped, and the sentence was executed. Lilburn carried his complaint to Parliament, and in 1648 the Lords ordered the sentence to be totally vacated as illegal and most unjust as against the liberty of the subject of the law of the land and the Magna Carta.[6] It is well to note, however, that nothing concerning the privilege is mentioned in the Magna Carta.[7]

Lilburn had never claimed the right to refuse absolutely to answer a criminating question. He had merely claimed a proper proceeding of accusation or presentment.[8] But the trial of John Lilburn[9] had focused the attention of the whole of England upon the proceedings in the Star Chamber, High Commission and other courts using *ex officio* proceedings, wherein persons accused were forced by oath or other compulsion to speak truly and confess their own delinquency. The obstinancy on the part of John Lilburn in refusing to take the oath or to answer against himself was merely representative of a like attitude on the part of hundreds of others who likewise refused to be sworn, or, being sworn,

[5] 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 220 (1883).
[6] 8 WIGMORE, *op. cit. supra* note 1, at 291.
[7] Anderson, *The Privilege Against Self-Incrimination,* 74 N.Y.L. REV. 453, 455 (1940).
[8] 8 WIGMORE, *op. cit. supra* note 1, at 298.
[9] For an account of the trial see, STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 343 (1883).

refused to answer. Thus, amid the loud voices of opposition, Parliament in 1641, by statute, abolished the courts of the Star Chamber and of the High Commission, and the *ex officio* oath to answer criminal charges as used in these courts was swept away with them.[10]

At this point attention will be turned to the common law courts. The seventeenth century in English legal history gave us many of our existent institutions, and it is not strange, therefore, that we should seek in that period some light on the development of a maxim which today has become well rooted in our federal and state constitutions.

Not long after Parliament abolished the oath *ex officio* and its attendant compulsory examinations from the ecclesiastical courts, attention was focused upon the justification for the common law courts to exercise such widespread authority. The result was an increasing general reaction resulting in a strong conviction that no person should be bound to incriminate himself on *any* charge in *any* court. Common law courts began to concede this public distaste, first in criminal trials and later in civil proceedings. The oath, however, continued to be used intermittently and was not finally abolished until after the Revolution of 1688.[11] By the latter part of the seventeenth century the privilege against self-incrimination was so well established that apparently Parliament considered it unnecessary to include it in the Bill of Rights.[12]

While this English doctrine was developing, a contemporary struggle across the Channel in France is in marked contrast by its opposite results. The Council of Louis XIV, in drafting the great *Criminal Ordonnance* of 1670, fixed the French rule of compulsory self-incrimination.[13] By this ordinance Louis XIV crystallized the inquisitorial procedure which had been developing for three centuries under the influence of the example of the church courts, the revived interest in the Roman law, and the increasing powers of the king. It endowed France with the clearest and most vigorous expression of the inquisitorial procedure that the secular courts in Europe had ever known.

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[10] 8 WIGMORE, *op. cit. supra* note 1, at 292, and footnote 69.
[11] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (1883).
[12] Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 774 (1935).
[13] 8 WIGMORE, *op. cit. supra* note 1, at footnote 107.

The settlement of the American colonies took place about the time in English history when opposition to the oath *ex officio* of the ecclesiastical courts was most pronounced, and when the insistence upon the privilege against self-incrimination in the common law courts had begun to have its effect. But contrary to popular belief, the colonists did not immediately adopt the doctrine allowing the privilege against self-incrimination. It remained an unknown doctrine during a whole generation in the Colony of Massachusetts,[14] where, as late as 1685, the interrogatory oath was permitted.[15] But by the time the Union was formed, the doctrine had become accepted as a part of the common law and was firmly entrenched in the hearts and minds of our forefathers. Mr. Justice Moody, in *Twining* v. *New Jersey*,[16] commenting on the early history of the privilege in this country said:

> The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection of the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original 13 States (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judical change by including it in constitutions or bills of rights; . . . and in the remainder of those states there seems to be no doubt that it was recognized by the courts. The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the Ten Amendments which were recommended to the States by the first Congress, and by them adopted. Since then all the states of the Union have from time to time, with varying form but uniform meaning, included the privilege in their Constitutions, except the states of New Jersey and Iowa, and in those states it is held to be part of the existing law.[17]

[14] 1 HART, AMERICAN HISTORY TOLD BY CONTEMPORARIES 382 (1926).
[15] BRADFORD'S HISTORY OF A PLYMOUTH PLANTATION 465 (1899).
[16] 211 U.S. 78 (1908).
[17] *Id.* at 91.

In the case of *Brown* v. *Walker*, Mr. Justice Brown said:

> So deeply did the inquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.[18]

In conclusion, it is well to keep in mind not only the original purpose of the doctrine or privilege,[19] but also the policy which is thought to justify its existence at the present time. As to the policy behind the rule, it is contended that it exists as a protection for the innocent; that it forces a more diligent search for extrinsic evidence; that it is a protection against overzealous young district attorneys; and that any system of judicial administration which permits the prosecution to habitually trust to compulsory self-disclosure as a source of proof must itself suffer morally thereby. On the other hand, it is as strongly objected that the privilege protects the guilty by unduly hampering criminal prosecution, and leads to the mischief of immunity statutes in order to secure otherwise unobtainable evidence.[20] It has ever been contended that the privilege has outlived its usefulness.[21]

Around the privilege against self-incrimination a long and violent controversy has raged. Undoubtedly, the privilege protects the guilty. Yet to say that it should be eradicated for that reason is naive. The law does not recognize subjective innocence or guilt; both are matters of objective proof. On the other hand, those who would defend it need not conjure up the spectre of the conviction of the innocent. That is an unreal nightmare.[22]

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[18] 161 U.S. 591, 597 (1896).

[19] "The main purpose of the provision was to prohibit the compulsory oral examination of provisions before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime." People v. Gardner, 144 N.Y. 119, 38 N.E. 1003, 1005 (1894).

[20] It may also become an additional incentive for law enforcement officers ". . . to sit comfortably in the shade rubbing red pepper into the poor devils eyes rather than go about in the sun hunting up evidence." STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 442, fn. 1 (1883) quoting the observations of a British officer concerning a practice of native police officers of India.

[21] See BENTHAM, RATIONALE OF JUDICAL EVIDENCE, B. IX, PT. IV c. III, as cited in 8 WIGMORE, *op. cit. supra* note 1, at 305.

[22] United States v. Garsson, 291 Fed. 646, 649 (1923).

And yet, the privilege in most of its aspects seems well worth preserving. It is best defended, not as an unchangeable principle of universal justice, but as a doctrine proved by experience to be expedient in most cases.[23]

WENDELL S. WILLIAMS

HOLOGRAPHIC CODICILS INCORPORATING BY REFERENCE AND REPUBLISHING INVALID NON-HOLOGRAPHIC DOCUMENTS

The result reached in a recent case in Oklahoma, *Johnson* v. *Johnson*,[1] suggests the need of re-examining the status of the law as to holographic codicilliary incorporation by reference and republication.

The case was briefly this: The testator typed numerous bequests and devises on a single sheet of paper. This typewritten portion was not dated, nor did the testator sign his name at the conclusion thereof, nor was it attested by two witnesses. At the end of the typewritten portion and on the same page the testator wrote the following in his handwriting: "To my brother James I give Ten Dollars only. This will shall be complete unless hereafter altered, changed or rewritten." He signed and dated the latter, but it was not attested.[2]

The Oklahoma Supreme Court[3] held that the written portion of the instrument constituted a valid holographic codicil which incorporated the typewritten portion by reference and republished and validated it as a valid will, as of the date of the codicil. The court, in upholding the entire sheet of paper as a valid will, relied on the general principle of law that a codicil which is validly executed will operate as a republication of an earlier will regardless of defects which may have existed in the execution of the earlier document.[4] In order to apply this doctrine to the case, the Oklahoma court concluded that the earlier typewritten portion was a will although not signed, that the written portion being

[23] See Twining v. New Jersey, 211 U.S. 78, 113 (1908).

[1] 279 P. 2d 928 (Okla. 1955).
[2] *Id.* at 929.
[3] Although the decision was styled as a Per Curiam decision, it was rendered by a 5-3 vote upholding the validity of the will.
[4] *Supra* note 1, at 931.