# The Privilege against Self-Incrimination

## *Its Origins and Development*

*R. H. Helmholz*
*Charles M. Gray*
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# PREFACE

In its inception, this book was the product of coincidence. Three of us, all then teaching at the University of Chicago, discovered that we had been examining different aspects of the same subject: the history of the privilege against self-incrimination. After some thought and discussion, we agreed to pool our efforts. We shared a desire to correct one or another of what we regarded as weaknesses in the historical account of the privilege found in Leonard Levy's influential book, Origins of the Fifth Amendment (1st ed. 1968), and we thought that we would be able to improve on it. Our work on the unprinted sources, most of which we were exploring for the first time, put the whole subject in a new and different light. We recognized, of course, that a part of our efforts would be "revisionist" in nature and subject to the dangers of exaggeration that invariably attend this kind of scholarship. But even so, we all hoped that a more coherent picture of the subject would emerge from a collaborative effort. We knew that none of us could accomplish this without the help of others. Chapters 1 through 4 are the result of that decision.

These initial discussions took place several years ago. The interval between our plan's framing and its execution has been longer than any of us hoped or expected. But this delay has not been all misfortune. In the meantime several good things have happened. Most happily, we were able to find co-workers to fill in some of the blanks in the story as we understood it. We first recruited Eben Moglen of Columbia Law School to undertake research into the history of the privilege in early American law; then Henry Smith, at that time a student at Yale Law School, to examine the subject during the nineteenth century, and finally, Albert Alschuler of the Univer-

sity of Chicago Law School to add an evaluation of the present-day status of the privilege in light of its history. Their contributions make up chapters 5 through 7, and the three of us are very grateful for their willingness to join our effort.

Several of us have also published earlier versions of our research in the meantime. They have all been revised in preparing them for this book, both to make them fit together in presentation and to bring them up to date in light of further research. However, their principal conclusions have undoubtedly been anticipated in the earlier articles. In chronological order, they are Charles M. Gray, Prohibitions and the Privilege against Self-Incrimination, in Tudor Rule & Revolution: Essays for G. R. Elton from His American Friends 345 (DeLloyd J. Guth and John W. McKenna eds., 1982); R. H. Helmholz, Origins of the Privilege against Self-Incrimination: The Role of the European *Ius Commune,* 65 New York University Law Review 962 (1990); John H. Langbein, The Historical Origins of the Privilege against Self-Incrimination at Common Law, 92 Michigan Law Review 1047 (1994); Eben Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination, 92 Michigan Law Review 1086 (1994); and Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Michigan Law Review 2625 (1996).

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ONE

# *Introduction*

R. H. Helmholz

## I. THE MODERN PRIVILEGE

The privilege against self-incrimination guarantees that men and women cannot lawfully be required to answer questions that will aid in convicting them of a crime. The privilege is widely regarded as both fundamental to human liberty and venerable in the history of the development of civil rights. Some form of the privilege can undoubtedly lay claim to antiquity, boasting a link with the Latin maxim often used to state it, *Nemo tenetur prodere seipsum,* a phrase reputed to have come from the pen of Saint John Chrysostom (d. 407). The saint's words proclaimed that no person should be compelled to betray himself in public. Put into secular form, those words became a rallying cry in the history of the protection of human liberty, an established feature of Anglo-American law, and a point of departure for developing legal systems.[1]

### A. Current Status of the Privilege

The privilege is very much alive today. English statute law provides that any person charged with a crime "shall not be called as a witness . . . except upon his own application." The statute goes on to state that a failure on his part to give evidence "shall not be made the subject of any comment by the prosecution,"[2] although the continued vitality of the second part of the privilege's reach may be called into question by a 1994 statutory change

allowing judges and juries to draw "such inferences as appear proper" from the defendant's failure to testify.[3] Most former English colonies adopted the privilege against self-incrimination as part of their system of criminal procedure, and almost all of them continue to adhere to the established privilege, though also subject in several cases to statutory modification.[4] Canada, for example, endorsed a strong though modified form of the privilege in its Constitution Act of 1982.[5] Even residents of the Fiji Islands, a British colony from 1874 to 1970, can boast of their legal system's adherence to the basic features of this established rule of law.[6]

Of these one-time colonies, none has been more tenacious in its attachment to the privilege against self-incrimination than the United States. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself," and judicial decisions have read this clause as extending a good deal further than its words themselves require. The privilege against being compelled to "be a witness" against oneself may be invoked not only by persons who are being tried for their allegedly criminal conduct, but also by those who might be tried at some time in the future.[7] It applies to witnesses, who are not being subjected to prosecution, just as it does to defendants. It thereby protects men and women against potential as well as present criminal jeopardy. Under current American law, the privilege extends beyond the courtroom and the interrogation room of the police station. For example, it can be invoked by witnesses appearing before committees of the houses of Congress. And the privilege reaches further than forbidding the asking of specifically incriminating questions. It permits anyone being accused of a crime to refuse to testify at all and (at least in theory) to suffer no adverse consequence from that refusal.[8] With reason has the United States Supreme Court described the "spirit of the Self-Incrimination Clause"[9] as an animating principle of American law. It is such an expansive spirit that underlies many of the judicial decisions formulating the reach of the privilege. The privilege is accordingly regarded as a fundamental, even sacred "right to remain silent."[10]

## B. Criticism of the Privilege

Notwithstanding that "expansive spirit" and the lyricism that has sometimes accompanied invocation of the right to remain silent,[11] the privilege has been a subject of controversy from the time it became an effective part of our law. When subjected to analysis instead of celebration, the privilege's

virtues have seemed less obvious to a long chain of critics. Jeremy Bentham, the most famous (and vocal) of its nineteenth-century critics, published a scathing examination of the whole subject in 1827.[12] Bentham came to the conclusion that the privilege was a product of irrational prejudice, one for which no convincing justification could be advanced.[13] The privilege had the inevitable effect of excluding the most reliable evidence of the truth—that which is available only from the person accused—necessarily causing greater weight to be given to hearsay and other inferior sorts of evidence.

Nor, in Bentham's view, would the reasons commonly advanced for the privilege stand any but the most superficial scrutiny. That requiring persons accused of a crime to answer questions that might help convict them would be unduly hard on those who stood in fear for life and limb, he dismissed as the product of misplaced emotion. It was nothing but an "old woman's reason," notable principally for its feeble sentimentalism. That requiring defendants to answer such questions would give an unfair advantage to the prosecutor, he ridiculed with equal vehemence as a "fox-hunter's reason." It confused sport with a search for the truth. To say that the privilege was necessary to protect defendants against judicial torture and ideological persecution, Bentham regarded as a quite fallacious argument from history. The privilege might well have performed that function in past centuries, but it was quite unnecessary under conditions of the nineteenth century. By the 1800s, English law had long since excluded the rack and the strappado. It had other, more effective and less harmful, means of protecting freedoms of thought and belief. For Bentham, it seemed clear that this privilege, which had the inevitable effect of hindering courts from discovering the truth, formed no part of a rational legal system. It was a rule both unnecessary and unwise, perpetuated simply by the "imperturbable complacency" of English lawyers and others who had been "duped and corrupted by English lawyers."[14]

Bentham's analysis and the invective he heaped on the privilege had little actual effect on the legal status of the privilege in the years when he wrote. Indeed his work coincided with the very period when the privilege was assuming its full, modern form.[15] But the long-term effects of his writing cannot be ignored. Serious criticism of the privilege has persisted. At the start of this century, its most accomplished and thorough student, John Henry Wigmore, at first called for outright abolition of the privilege[16] and later (in a more considered judgment) for its confinement within the "strictest limits" consistent with the language of the Fifth Amendment.[17] Wigmore was far from standing alone in this opinion.[18] Even its defenders

have sometimes felt themselves obliged to acknowledge that the traditional justifications for the privilege read more like "empty pomposities" than reasoned judgments.[19] Criticism has been a feature of commentary about the privilege almost as frequently as praise.

Of the modern critics, probably the best known is Henry J. Friendly, the distinguished American judge, who died in 1992. In 1968, Friendly surveyed the then recent developments in the law, finding the lengths to which the privilege had been pushed by American courts unsupported by any coherent rationale.[20] Some of what he said covered the same ground Bentham had, reaching pretty much the same conclusions. Friendly was able, however, to take into account a virtue that was not so obvious during Bentham's era: the right of privacy. In the intervening years, this right had become part of the legal landscape, at least in the United States. It had become widely accepted that the "protection of personal privacy [was] a central purpose of the privilege against compelled self-incrimination."[21] Many commentators agreed that this was the true rationale for the rule, and much contemporary support for the privilege's extension undoubtedly comes from the widespread attractiveness of this concept.[22] That no one recognized it during the nineteenth century need make no significant difference. The law often finds new reasons for old rules; here is a good example.

Judge Friendly, however, found the privacy-based argument unconvincing. The privilege prevents the disclosure of evidence relating to a good deal of conduct that cannot by any stretch of the imagination be described as private. At the same time modern law does require disclosure of much that is decidedly private in nature. And in any event, under established law no one doubts that the government may violate any person's right to privacy, thus requiring that person's testimony, simply by giving him immunity from future prosecution.[23] Even if one concedes the desirability of an ample right of privacy, therefore, to Judge Friendly the privilege against self-incrimination seemed to have little to do with achieving that result.

Thus has the privilege remained controversial.[24] It continues to produce hotly contested cases in the courts,[25] a disputatious literature in the law reviews,[26] and strong reactions—indignant, laudatory, and puzzled—among informed observers.[27] Even where the rationale underlying the privilege has been agreed on in principle, the practical conclusions drawn from that rationale have not always been harmonious. Much of the case law has also seemed internally contradictory to responsible critics.[28] And disagreement about the wisdom of these decisions has often been sharp.

### C. Historical Treatments of the Privilege

In much of the controversy surrounding the privilege, the starting point has been its history. Answers to present dilemmas are sought in the privilege's past. Although it has sometimes been contended that the "noble principle" animating the privilege "transcends its origins,"[29] this has never meant that the subject's history has been dismissed as irrelevant. It was with regard to the privilege against self-incrimination that Justice Felix Frankfurter once borrowed a favorite aphorism of Oliver Wendell Holmes, to the effect that "a page of history is worth a volume of logic."[30] Many judges and lawyers have followed that lead. A fuller historical understanding of the subject, surely desirable for its own sake, may also be relevant to present-day controversies, and this live possibility has led men and women who might not otherwise have done so to look into the subject's past.

Unfortunately, the understanding has proved elusive.[31] Despite repeated calls for a satisfactory historical treatment,[32] none has been written. Wigmore's great treatise on the law of evidence did not pretend to give a complete account.[33] Wigmore misunderstood some of the early evidence, he was obliged to leave many aspects of the subject unexplained, and he himself had reservations about some of his conclusions.[34] Leonard Levy's Origins of the Fifth Amendment,[35] although widely treated as a definitive account,[36] has not in fact met the need. Levy's work too often overlooks the legal context of the evidence and concentrates too exclusively on famous "show trials." The consequence is that he does not do full justice to the complexity of the privilege's actual development. A product of the era of McCarthyism in the United States, Levy's work made a strong argument for the vitality of the privilege as a basic civil liberty. That approach does not necessarily make for the most accurate history, however. Today something else is needed.

This book is intended to supply a better understanding of the history of the subject. It provides a fuller and (we hope) more realistic understanding of the privilege as it existed at various stages in the history of Anglo-American law. Our law has indeed long known a rule based on the *Nemo tenetur* maxim, but that rule has not always meant the same thing. Nor has it always been effective in practice. Although there have been continuities, overall it is surprising how differently the maxim has been interpreted and used at various times in the past.[37] The centrality of the oath and its connection with the privilege in earlier times have been particularly hard for mod-

ern writers to understand. Thus chapter 6 draws a distinction between the full privilege as we know it today and the rules about silence that had previously existed in the common law. These differences make it impossible to speak of the privilege as a coherent right that has always existed and has gradually won recognition by the courts. In fact it has served different purposes.

Admittedly, the chapters that follow do not fill all the gaps in our knowledge. Each of the contributions acknowledges that questions remain. However, a good deal of new evidence has been turned up by the authors of this book—enough to provide a more complete account than has so far existed. Above all, the authors have tried to look at the evidence within its contemporary legal context. Doing this makes one conclusion certain. The evidence shows repeatedly how halting, how slow, and how controversial have been the steps by which the modern privilege against self-incrimination became an accepted part of our law. Despite its reputation as a foundation stone of common law jurisprudence,[38] and despite the existence of some form of a rule against compelling sworn testimony in every period covered, the privilege as we know it is actually the product of relatively recent choice.

## II. THE STAGES OF DEVELOPMENT

There are several chapters in the history of the creation of an effective privilege against self-incrimination, and although there are points of continuity, there are also real differences among them. Each of them is treated separately in this book. Chapters 2 through 5 take the reader from the end of the Middle Ages up to the adoption of the Fifth Amendment to the United States Constitution. Then, in chapter 6, the story moves into the nineteenth century, when the privilege in its modern, fully protective sense made its appearance. Chapter 7 assesses the current status of the privilege in light of its history.

### A. The Medieval Privilege and the *Ius Commune*

Chapter 2 deals with the medieval *ius commune,* the immediate source of the maxim *Nemo tenetur prodere seipsum.* The term *ius commune,* translated literally as "common law," refers to the combination of the Roman and canon laws that was the product of the revival of juristic science in the twelfth century and was more fully developed in the centuries that fol-

lowed.[39] The Latin term remains in use in order to distinguish it from the English common law. The basis for legal education in all European universities, including the English universities, before the Age of Codification, the *ius commune* was applied in Continental courts where no local statute or custom directed the contrary. It also provided the basic rules that governed practice in the English ecclesiastical courts, where the privilege's early history in England was played out. The *ius commune* itself recognized a rule against compelled self-incrimination.

The nature of that rule—of both its reach and the exceptions to it within the jurisdiction of the church—is the subject of chapter 2. Of the existence of a privilege against self-incrimination in the *ius commune* there can be no doubt. The chapter examines the nature of the rule as it was understood by the early jurists. It also reviews the evidence of the rule's assertion in practice within the courts of the English church. The chapter shows that in the *ius commune* the rule served principally as a guarantee that men and women would not be required to become the *source* of their own public prosecution. The privilege was a check on overzealous officials rather than a subjective right that could be invoked by anyone who stood in danger of criminal prosecution. In practice, the rule thus seems to have served something like the function "probable cause" does in modern American law. It served, in other words, to ensure that the canon law's fundamental purposes would be upheld. It was designed to guarantee that only when there was good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions. That was not a negligible safeguard for ordinary men and women, but it was admittedly a far cry from the modern privilege.[40]

### B. The Early Modern Privilege and Interjurisdictional Law

Chapter 3 takes up the subject in the late sixteenth and early seventeenth centuries, a time when the maxim could be used as a weapon by English common law judges. In some of their opinions one finds the first clear statements of the principle. The statements did not, however, occur within the context of common law trials. They occurred in the context of judicial attempts to prevent the ecclesiastical courts from acting beyond the scope of their jurisdiction. The English royal courts had long claimed a right to police the boundaries that separated the spheres of jurisdiction that belonged to church and state. They accomplished this by issuing writs of

prohibition and of habeas corpus, writs that kept the courts of the church from proceeding in cases in which they had overstepped the boundary line. In the late sixteenth century, opposition to the religious policies of the church coalesced with an expansive view of the supervisory powers of the common law judges to produce arguments that writs should issue to keep the ecclesiastical courts from requiring defendants to answer incriminating questions.

The common law judges sometimes accepted these arguments, but, it seems, only in egregious cases, mostly those in which interests of the common law courts themselves could plausibly be described as threatened by the actions of the ecclesiastical courts. The common law judges were being asked to serve as superintendents of a mixed system of justice. They recognized that each of the two jurisdictions had a legitimate part in that system. On that account, the judges were reluctant to go too far in interfering with the procedures of the ecclesiastical courts. To have seized on every opportunity that arose to curtail the jurisdiction of the church's courts would have upset the balance. That they did not wish to do. Indeed the judges' actions were not greatly at odds with the legal principles of the *ius commune* surveyed in chapter 2. It is too much to say, therefore, that they established an effective privilege against self-incrimination, even within the spiritual courts themselves. Only a statute of 1640 brought to an end the practice of interrogating defendants under oath in those courts,[41] and most of the common law judges of this era were very far from averring that the privilege had any particular relevance to the day-to-day operation of their own system of criminal justice.

### C. Common Law Criminal Procedure to the Mid-Eighteenth Century

The privilege's status in the common law courts is the subject of chapter 4. This chapter takes the reader inside the ordinary criminal trial in early modern England. When one examines what happened in practice, it becomes evident that English criminal procedure made it virtually impossible for a privilege against self-incrimination to be asserted effectively by persons charged with a crime. The impossibility was the indirect result of the common law's refusal to allow criminal defendants to be represented by a lawyer and of the restrictions placed on other rules regarding silence on the part of the accused, rules that did not begin to be relaxed until the eighteenth century. Without professional assistance, persons accused of a crime had