Texas Law Review

Volume 77, Issue 4, March 1999

Articles

Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903

John Fabian Witt*

---

* Legal History Fellow, Yale Law School; Richard J. Franke Fellow in the Humanities, Department of History, Yale University. Many thanks to John Langbein and Akhil Amar for their guidance in this project. Thanks also to Ariela Dubler, Katie Hazlett, Richard Primus, Henry Smith, Kate Stith, and William Stuntz, who offered exceedingly helpful comments at important stages of the process.

In the past few years, criminal procedure scholars have fundamentally transformed our understanding of the history of the privilege against self-incrimination. In the whiggish treatment of an earlier generation, the history of the privilege appeared as the teleological progression of an indubitable principle derived from the experiences of English religious dissenters in the seventeenth century.[1] Thanks to an outpouring of new

1. Dean Wigmore and Leonard Levy provided the formerly standard accounts. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2250, at 267-95 (John T. McNaughton rev. ed. 1961). According to Wigmore, the common-law privilege had its origins in opposition to the *ex officio* oaths administered by the English prerogative courts to such sympathetic characters as John Lilburne. *See id.* at 282-84, 289-92. The evidence for this claim, however, was remarkably weak. Wigmore wrote merely that the privilege was "immediately communicated, naturally enough" from the prerogative courts to the common-law courts. *Id.* at 289. Professor Levy has recently restated his position in a

scholarship, however, the story now appears to have been far more complex. The privilege against self-incrimination, it turns out, is not native to the common law at all; rather, it was borrowed from the European *ius commune* of the late Middle Ages and Renaissance.[2] Moreover, we now know that as late as the end of the eighteenth century, no effective privilege against self-incrimination existed for the average common-law criminal defendant. Because criminal defendants were rarely represented by counsel, then a right to maintain silence during the course of the trial would have been, as John Langbein has shown, little more than a right not to defend oneself at all.[3]

The revised history of the privilege has provided important new perspective on the place of the Fifth Amendment's Self-Incrimination Clause in American legal practice.[4] Indeed, the Supreme Court has relied on this

---

particularly vitriolic article. *See* Leonard W. Levy, Origins of the Fifth Amendment *and Its Critics*, 19 CARDOZO L. REV. 821 (1997).

2. *See* R.H. Helmholtz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990), *substantially reprinted in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 17 (R.H. Helmholtz et al. eds., 1997) [hereinafter THE PRIVILEGE]; M.R.T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66 (1990). (As indicated, a number of the most important revisionist essays on the history of the privilege have been collected and published separately by the University of Chicago Press. Throughout this Article I cite to the journal editions of the essays rather than the reprinted versions because of their wider availability on-line.) The *ius commune* was the law studied in European universities and applied in continental courts absent local statute or custom to the contrary. *See* Helmholtz, *supra*, at 964 n.12. Variations on the privilege also can be found in Talmudic law. *See* LEVY, *supra* note 1, at 433-41; Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

3. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common-Law*, 92 MICH. L. REV. 1047, 1084 (1994) [hereinafter Langbein, *Historical Origins*] (characterizing the criminal defendant's privilege against self-incrimination prior to the rise of defense counsel as "the right to commit suicide"), *substantially reprinted in* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE, *supra* note 2, 82; *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123-34 (1983) [hereinafter Langbein, *Shaping*]; John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282-84 (1978) [hereinafter Langbein, *Before the Lawyers*]. There is little reason to think that practice was significantly different in colonial North America. The institutional factors that made the privilege unavailable to criminal defendants in eighteenth-century England—namely, the absence of defense counsel and the prevalence of summary jurisdiction—applied with equal, if not greater, weight in the colonies. *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1090-1111 (1994). For a description of the expansion of summary jurisdiction in eighteenth-century New York, see Bruce Philip Smith, Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790-1855, at 132-48 (1996) (unpublished Ph.D. dissertation, Yale University) (on file with the *Texas Law Review*).

4. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857-60 (1995) (asserting that the mid-nineteenth-century history of the privilege supports a narrow immunity requirement), *reprinted in* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 46, 46-49 (1997); Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO. L.J. 1627, 1632-39 (1997) (arguing against a no-inference rule as applied to nondefendant witnesses invoking the Fifth Amendment

new scholarship to hold that the risk of foreign prosecution is beyond the scope of the Clause.[5] Nonetheless, the new history of the privilege has yet to account for the history of the American privilege against self-incrimination in the first half-century of the Republic. As a result, a critically important issue remains poorly understood: How and when did American self-incrimination doctrine become constitutionalized? The answer to this question, of course, seems at first glance so obvious that few have thought even to ask the question at all. It seems rather straightforward that the self-incrimination clauses in most of the early state constitutions and in the federal Bill of Rights constitutionalized the principle that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[6] Yet, as we shall see, the apparently simple language of the constitutional self-incrimination clauses belies a considerably more complicated history.

This Article argues that for almost three quarters of a century after the enactment of constitutional self-incrimination provisions in the United States, the law of self-incrimination was common-law doctrine rather than constitutional law. This common law of self-incrimination looked very different than self-incrimination law today, particularly insofar as it applied to nonparty witnesses. For witnesses, the common-law privilege functioned as a broad per se bar on a wide range of self-damaging testimony. The common-law privilege was not, however, a legal rule grounded in protecting the interests of the witness, dignitary, or otherwise. Rather, it was one manifestation of a much broader approach to fact-finding in the eighteenth- and early-nineteenth-century courtroom. In the late-eighteenth and early-nineteenth centuries, a panoply of common-law disqualification rules, now long abandoned, kept a wide range of witness testimony out of the courtroom, ostensibly on the rationale that such testimony was fatally compromised by the witness's interest in the outcome of the case.[7] It is no easy task to explain the disqualification rules. Nonetheless, it seems safe to say that they formed a distinctive and now difficult to understand approach to fact-finding. In particular, the common-law disqualification rules—along with the common-law privilege against self-incrimination—appear to have been thought by early-nineteenth-century lawyers to serve two interrelated functions in the common-law trial. First, they were understood to promote reliability of outcomes in the fact-finding process

---

on cross-examination); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419-28 (1995); R. Erik Lillquist, Note, *Constitutional Rights at the Junction: The Emergence of the Privilege Against Self-Incrimination and the Interstate Commerce Act*, 81 VA. L. REV. 1989, 1997-2001 (1995).

5. *See* United States v. Balsys, 118 S. Ct. 2218, 2223 n.5 (1998).

6. U.S. CONST. amend. V.

7. *See infra* subpart III(A).

in an age before the institutionalization of cross-examination. Second, they were thought to legitimate those outcomes by protecting the legitimacy of the oath as a guarantor of the reliability of sworn testimony.

Together, the common-law privilege and the disqualification rules covered such a broad range of self-regarding testimonial situations that the constitutional provisions were virtually redundant, hidden from view, and rarely invoked in practice. Over the course of the first half of the nineteenth century, however, the approach to fact-finding that relied on disqualification rules and oaths became the subject of sustained criticism. Accordingly, the common-law rules that attached to witness testimony in both civil and criminal cases—the rules disqualifying interested witnesses from testifying and the broad common-law witness privilege—came to be seen as unacceptable obstacles to fact-finding. The sources of this critique of the old common-law mode of fact-finding are not precisely identifiable. But whatever the sources of the critique of the common-law rules that kept potentially self-regarding testimony out of the courtroom, the fact remains that in the mid-nineteenth century the common-law approach to fact-finding underwent a fundamental reorientation. Courts and legislatures narrowed the scope of the common-law witness privilege and began the work of abolishing the rules of disqualification for interest.[8] In the process, courts and legislatures stripped the constitutional self-incrimination clauses of their protective common-law shell. Thus, the question of the meaning of the self-incrimination clauses was squarely presented for the first time in the 1840s when state legislatures enacted a series of statutes requiring witnesses to give self-incriminating testimony in return for a narrowly defined immunity.[9] Led by New York's newly-organized Court of Appeals, state courts widely upheld the new, narrow immunity statutes and thus in the mid-nineteenth century gave substance to the constitutional privilege against self-incrimination for the first time in American legal practice.

The earliest courts to constitutionalize the privilege interpreted the constitutional self-incrimination clauses narrowly, in keeping with the new theory of fact-finding that had undermined the disqualification rules and the common-law privilege.[10] Proponents of the new approach to fact-finding, however, were unable to develop a satisfactory rationale for any privilege at all, even a narrow one. Indeed, given the option, they would have preferred to read the Self-Incrimination Clause out of the Constitution altogether.

Absent a principled theory of the constitutional self-incrimination clauses, the narrow approach to the privilege was short-lived. In the last

---

8. *See infra* subparts IV(B-C).
9. *See infra* subpart V(B).
10. *See infra* subpart V(C).

decades of the nineteenth century courts abandoned the narrow constitutional self-incrimination rulings of the mid-nineteenth-century state courts. Led by the United States Supreme Court, federal and state courts reached back into the available stock of decisions that were based on the broader common-law self-incrimination rules of the early-nineteenth century to fashion a new set of expansive and often inconsistent constitutional self-incrimination doctrines, unmoored from newly transformed fact-finding methods and rooted instead in a set of tenuous privacy rationales.[11] In the process, courts set off a search for a coherent rationale for the privilege that continues to this day.

Part I of this Article briefly introduces the historiographical controversy surrounding the privilege against self-incrimination and argues that much of the historiographical difficulty finds its origins in the presence of overlapping, but poorly understood, common-law disqualification rules. Part II sets out the distinctive structure of the broad early-nineteenth-century common-law witness privilege. Part III turns to the relationship between the common-law witness privilege and the rule of disqualification for interest. Part IV describes the contraction of the common-law witness privilege during the first half of the nineteenth century and links this doctrinal shift to the broader shift in common-law fact-finding that led to the abolition of the rule of disqualification for interest. Part V then turns to a single jurisdiction—New York—and shows that the passage of a series of narrow immunity statutes beginning in the 1820s and accelerating around 1840 caused the courts to confront the relationship of the common-law rule of evidence to the constitutional self-incrimination clauses. In Part VI the Article describes the late-nineteenth-century movement away from a narrow constitutional privilege and the privilege's re-expansion—this time not as common law, but as constitutional law.

If the history of the privilege has proven to be a highly contentious field of study, so too—and not coincidentally—is current self-incrimination doctrine. Crossing the bridge between historical analysis and doctrinal reasoning can be a risky venture; changes in institutions, practices, and surrounding legal rules make most moves from historical narrative to contemporary legal interpretation exceedingly complicated. Thus, the history of a doctrine can rarely, if ever, be relied on to lead to determinate conclusions about contemporary legal questions. History can, however, offer illustrations and examples of ways to think about particular approaches to legal doctrine—sometimes ways long since forgotten. In this respect, the history of self-incrimination doctrine that follows suggests an alternative approach to the confusing and often internally contradictory contemporary constitutional law of self-incrimination. In particular, Part

11. *See infra* subpart VI(C).

VII suggests that the common-law privilege's role in promoting fact-finding—in guaranteeing the reliability and the legitimacy of criminal trial outcomes—offers a historically based rationale for reorienting contemporary constitutional self-incrimination doctrine.

I. The Mysterious History of the Privilege Against Self-Incrimination

A. The Historiographical Controversy

Scholars have had considerable difficulty explaining the original meaning of the American constitutional self-incrimination provisions—both state and federal. Seven of the eleven early state constitutions included one of several variations on what is now most recognizable as the Self-Incrimination Clause of the Fifth Amendment of the Federal Constitution.[12] The process by which the constitutional provisions were drafted, however, appears to have been remarkably haphazard. At the very least, it was accompanied by startlingly little debate. Leonard Levy argues that the absence of debate reflected the framers' attempt to codify an uncontroversial "old rule of evidence that a man 'cannot be compelled to give evidence against himself.'"[13] According to Levy, simple "bad draftsmanship" accounted for the fact that the Virginia Declaration of Rights, which first constitutionalized the rule against compelled self-

---

12. Connecticut and Rhode Island did not frame new constitutions after independence. Of the eleven remaining colonies, Virginia enacted the first and most important of the self-incrimination clauses:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty, *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

VA. CONST. of 1776 § 8, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3813 (F. Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (emphasis added). Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, and Pennsylvania also enacted self-incrimination clauses. *See* DEL. CONST. of 1776, Declaration of Rights, § 15, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 557, 562; MD. CONST. of 1776, Declaration of Rights, art. XX, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1686, 1688; MASS. CONST. of 1780, pt. 1, art. XII, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1888, 1891; N.H. CONST. of 1784, pt. 1, art. XV, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2453, 2455; N.C. CONST. of 1776, Declaration of Rights, art. VII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787, 2787; PA. CONST. of 1776, Declaration of Rights, art. IX, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3083. For a helpful summary and brief history of the state constitutional provisions, see Ralph A. Rossum, *"Self-Incrimination": The Original Intent*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 273, 273-75 (Eugene W. Hickok, Jr. ed., 1991).

13. LEVY, *supra* note 1, at 405 (quoting George Mason, the author of Virginia's Declaration of Rights).

incrimination, limited its scope to criminal defendants;[14] similarly, carelessness explained the failure of Georgia, New Jersey, New York, and South Carolina to include any self-incrimination provision in their constitutions.[15] More recently, Albert W. Alschuler has focused on the use of the word "compelled" in the state and federal self-incrimination clauses.[16] Alschuler takes the view that the framers understood themselves to be outlawing particular kinds of compulsion, namely "torture and other improper methods of interrogation."[17] In a third interpretation, Eben Moglen argues that the inconsistent promulgation of self-incrimination provisions resulted from Americans' attempts to write into their bills of rights what Moglen calls a "syncretic cluster" of rights associated with the jury trial.[18] In this view, the constitutional language about self-incrimination was an inchoate component of an undifferentiated rhetoric of jury trial rights.[19]

The striking feature of the debate, no matter which view one adopts, is just how little evidence exists for the early meaning of the self-incrimination clauses; scholars have sought to make reasoned judgments about the original understanding of the self-incrimination clauses from a remarkably small number of references to the meaning of the constitutional self-incrimination provisions.[20] And therein lies a clue to the early status of the constitutional self-incrimination clauses.

B. The Source of the Problem: Overlapping Common-Law Rules

The primary difficulty in pinpointing the meaning of the constitutional self-incrimination provisions in the first years of the Republic has been that during the half-century or so following the enactment of the Fifth Amendment, and for close to three quarters of a century after the drafting of the first self-incrimination clause in the Virginia Declaration of Rights, the self-incrimination clauses almost never entered the reported arguments of American lawyers or the reported decisions of American judges. Thus, other than a few cryptic references in the constitutional conventions and ratifying debates, there is remarkably little information on how the clauses worked in practice.

---

14. *Id.* at 407.

15. *See id.* at 405-09.

16. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996).

17. *Id.* at 2631.

18. Moglen, *supra* note 3, at 1120.

19. *See id.*

20. *See* United States v. Balsys, 118 S. Ct. 2218, 2223 (1998) ("[T]here is no helpful legislative history."); *see also id.* at 2241 (Breyer, J., dissenting) (observing that the Self-Incrimination Clause "'has virtually no legislative history'" (quoting Moglen, *supra* note 3, at 1123)).

This is not to say that there were no rules regulating self-incriminating testimony during these years. To the contrary, courts ruled on and litigants fought over an array of doctrines that kept self-inculpatory testimony out of the courtroom. The critical distinction, however, is that the rules pertaining to self-incrimination in these years were common-law rules rather than constitutional mandates.[21] Thus, early-nineteenth-century lawyers seldom had occasion to consider the meaning or purpose of the constitutional self-incrimination clauses. Instead, four common-law rules interacted to establish a common-law approach to silence and confessions that made the constitutional provisions unnecessary and, hence, invisible. The confession rule excluded pretrial confessions from subsequent admission at trial when they had been extracted under oath or by force, threat, or promise.[22] The rule disqualifying parties prevented criminal defendants from testifying under oath altogether.[23] The rule disqualifying witnesses for interest made a witness that was financially interested in a civil suit incompetent to testify on his own behalf and uncompellable to testify against himself.[24] Finally, the common-law witness privilege protected a witness from being compelled by process of the court to make disclosures that might incriminate him or subject him to civil liability or moral disgrace.[25]

Together, these four rules made the self-incrimination clauses wholly superfluous. Consider, for example, the three core situations that today are treated as raising Fifth Amendment Self-Incrimination Clause issues: suspects in pretrial examinations; criminal defendants at trial; and witnesses called to testify before a court or grand jury and asked incriminating questions.

The Suspect at Pretrial Examination.—The common-law pretrial process relied on a system of pretrial examinations of the accused. Justices of the Peace (J.P.s) interrogated the accused (unsworn) and took down any

---

21. This helps to explain the Supreme Court's recent confusion in discussing the early self-incrimination case, *United States v. Saline Bank*, 26 U.S. (1 Pet.) 100 (1828). "[F]or all the sweep" of the opinion, Justice Souter writes, "it makes no mention of the Fifth Amendment." *Balsys*, 118 S. Ct. at 2225.

22. *See* The King v. Warickshall, 168 Eng. Rep. 234, 234, 234-35 (Cr. Cas. 1783) (rejecting evidence of a confession because it was obtained by "promises of favour").

23. *See infra* note 81 and accompanying text.

24. *See infra* notes 81-82 and accompanying text. Note that this Article will generally use the masculine pronoun because the nineteenth-century sources uniformly used the masculine form and because the overwhelming number of litigants and criminal defendants in the nineteenth century were men.

25. On the relationship of the common-law rules pertaining to silence, I follow the lead of Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, *in* THE PRIVILEGE, *supra* note 2, at 145, 146 (describing the disqualification for interest rule, the confession rule, and the witness privilege).

statement made by the accused for introduction at trial.[26] The system was designed to elicit and to use self-incriminating statements. Yet Eben Moglen reports that the constitutional self-incrimination provisions were not understood to mandate changes in the existing common-law confession rule barring admission of confessions elicited under oath or by force, threat, or promise. As a result, even in the second and third decades of the nineteenth century, lawyers and writers of J.P. practice manuals discussed pretrial confessions without making reference to the constitutional provisions that had been so recently enacted.[27]

The Criminal Defendant at Trial.—The rule disqualifying parties, and thus criminal defendants, from testifying under oath at their own trials made the right not to be compelled to testify against oneself a slightly bizarre and even insignificant proposition. The party disqualification rule itself ensured that a disqualified defendant could never be compelled to testify by the prosecution.[28] In this respect, the constitutional self-incrimination clauses appear to have been redundant. At the same time, a rule that prevented defendants from testifying under oath was hardly a safeguard of defendants' rights. The rule allowed the prosecution to build its case with the sanction of sworn testimony and prevented the defendant from being able to rebut that case with testimony of the same gravamen.[29] To be sure, even though formally prevented from giving testimony, criminal defendants consistently spoke in their own defense at trial.[30] Lacking defense counsel in the age before lawyerized criminal proceedings, defendants had no choice but to submit what was effectively unsworn testimony. Yet this de facto need to talk was apparently not the kind of compulsion to testify that lawyers, courts, or commentators understood to implicate the constitutional self-incrimination clauses.[31]

The Nonparty Witness.—Today, of course, the witness who "takes the Fifth" represents one of the paradigm cases of constitutional self-

26. *See* J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 271-72 (1986); Langbein, *Historical Origins*, *supra* note 3, at 1059-62; Langbein, *Shaping*, *supra* note 3, at 81-84; Moglen, *supra* note 3, at 1094-99.

27. *See* Moglen, *supra* note 3, at 1123-29.

28. *See infra* note 81 and accompanying text.

29. After 1702, a criminal defendant in a felony case could call sworn witnesses in his own behalf even though he could not so testify himself. *See* An Act for Punishing of Accessories to Feloneys and Receivers of Stolen Goods and to Prevent the Wilful Burning and Destroying of Ships, 1 Anne 2, ch. 9, § 3 (1701) (Eng.); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 89-90 (1974).

30. *See infra* note 81 and accompanying text.

31. At the very least, no evidence survives indicating that anyone in the early nineteenth century argued that the absence of defense counsel raised self-incrimination issues.

incrimination doctrine. In the late-eighteenth and early-nineteenth centuries, however, a witness's privilege not to incriminate himself did not rest on the constitutional self-incrimination clauses. As today, a witness's testimony under oath was fully admissible against him in subsequent criminal prosecutions;[32] thus, in the late eighteenth and early nineteenth centuries, as today, witness testimony might have been thought to implicate constitutional concerns. Nonetheless, in the years following ratification of the state and federal constitutions, the evidentiary rule that protected a witness from incriminating examination, like the rules that applied to a criminal defendant at trial and a suspect at a pretrial examination, was not based on the constitutional self-incrimination clauses. Time and time again, through the first three decades of the nineteenth century, courts and treatises provided long strings of citations to case law and treatise literature in support of the witness privilege, but made no reference to the constitutional self-incrimination clauses.[33]

There were exceptions to the general pattern of relying on common-law, rather than constitutional, authority to support the exclusion of self-incriminating testimony. One such exception was Samuel Bayard's *Digest of American Cases on the Law of Evidence*,[34] published in 1810 and intended as an American companion to English jurist Thomas Peake's evidence treatise. Bayard's central concern in his section on a witness's "privileges" was far removed from self-incrimination; rather his focus was on the privilege from arrest of a witness entering a state for purposes of testifying.[35] In passing, however, Bayard also mentioned the Fifth Amendment of the United States Constitution as a basis for the privilege against self-incrimination.[36] In addition to the Bayard reference, an 1818

---

32. *See* United States v. Williams, 28 F. Cas. 636, 641 (C.C.D. Me. 1858) (No. 16,707) (holding that witness testimony is freely admissible in subsequent prosecutions when given under oath); Chamberlain v. Willson, 12 Vt. 491, 492-93 (1840) (stating that a witness's self-incriminating testimony "if freely given, may be afterwards used against the witness" and that the court knows "of no rule to exclude the testimony being given in evidence against the witness, even in a prosecution of a criminal nature, although the witness was compelled to testify under the requisitions of a court of justice. . . . The only security of the witness is in silence.").

33. For citations, see the witness privilege cases and treatise sections on the witness privilege cited in Parts II, III, and subparts IV(A)-(D).

34. SAMUEL BAYARD, A DIGEST OF AMERICAN CASES ON THE LAW OF EVIDENCE INTENDED AS NOTES TO PEAKE'S COMPENDIUM OF THE LAW OF EVIDENCE (Philadelphia, William P. Farrand & Co. 1810). Bayard was the presiding judge on the New Jersey Court of Common Pleas for the County of Somerset.

35. *See id.* at 123-25.

36. *See id.* at 124 ("By the fifth article of the Amendments to the constitution of the United States, a witness is privileged from being compelled to give evidence tending to criminate himself." (emphasis omitted)). Bayard's reference is notable because it asserted without argumentation that the Fifth Amendment's Self-Incrimination Clause applied to witnesses as well as criminal defendants, a proposition that would be contested when the constitutional provisions were given more systematic treatment in the 1830s. *See infra* notes 203-07 and accompanying text. In referring to the Self-

Pennsylvania case cited the Pennsylvania constitution's self-incrimination clause along with the common-law authorities.[37] If the constitutional clauses were cited on rare occasions, the fact remains that they were generally ignored.[38]

In the context of the early-nineteenth-century common-law trial, the absence of constitutional self-incrimination doctrines made sense. As we shall see in the next two Parts, the common-law witness privilege operated in conjunction with the common-law rule disqualifying witnesses for interest to insulate most witnesses from ever having to give self-damaging testimony. As long as this set of common-law rules remained in effect, then, the constitutional self-incrimination clauses would receive little attention. The common-law rules attaching to witness testimony, however, came under sustained attack beginning in the 1830s. Hence, the constitutional self-incrimination clauses first emerged as meaningful factors in American legal practice as they applied to the rules governing how and when nondefendant witnesses could be compelled to answer self-damaging questions. Before turning to the attack on the common-law witness testimony rules, however, we must first understand how the common-law witness privilege and its cognate, the rule of disqualification for interest, functioned at the beginning of the nineteenth century.

Incrimination Clause of the United States Constitution, as opposed to those of the state constitutions, Bayard took an approach rejected some two decades later by the United States Supreme Court in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which held that the Bill of Rights did not apply to the states. Although Bayard was in the minority in claiming that the Bill of Rights applied to the states, his view was not uncommon both before and after *Barron*. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1203-12 (1992) (describing early-nineteenth-century cases and commentary claiming that the Bill of Rights applied to the states); *see also* Akhil Reed Amar, *The Bill of Rights as Constitution*, 100 YALE L.J. 1131, 1167-68 (1991) (discussing antebellum sources stating that the Second Amendment placed limits on state governments).

37. *See* Baird v. Cochran, 4 Serg. & Rawle 396, 399 (Pa. 1818) (holding that the state "constitution protects [the witness] no further than in not being obliged to accuse himself, which plainly refers to something criminal, penal or infamous, and not barely to matter of interest"). Other than Bayard's *Digest*, this is the only mention of a constitutional self-incrimination clause that I have located in a court or treatise writer's discussion of the witness privilege. Katherine Hazlett, in a forthcoming article tracing the history of the privilege in federal case law from the 1850s through the 1880s and 1890s, confirms that in the federal system prior to 1854, no case addressed the constitutional self-incrimination clauses even though a number of cases litigated self-incrimination issues. *See* Katherine B. Hazlett, *The Privilege Against Self-Incrimination: Its Nineteenth Century Origins*, 42 AM. J. LEGAL HIST. (forthcoming 1999) (manuscript on file with the *Texas Law Review*).

38. Treatises that discussed the Constitution clause by clause of course referred to the Self-Incrimination Clause. *See, e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 129 (Philadelphia, H.C. Carey & L. Lea 1825); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1782, at 660 (Fred B. Rothman & Co. 1991) (1833). But even in these sources the discussions of the Self-Incrimination Clause are revealing. Rawle merely paraphrased the Clause in a way that was consistent with the common-law rule and that made the Clause broader than it actually was. *See* RAWLE, *supra*, at 129 (contending that "*in no case* shall he be compelled to be a witness against himself" (emphasis added)). Story treated the Clause as a guarantee against extracting confessions by torture. *See* 3 STORY, *supra*, § 1782, at 660.

II. The Common-Law Witness Privilege in 1800

In addition to being common law rather than constitutional law, the American witness privilege at the beginning of the nineteenth century was different from the privilege against self-incrimination that attaches to witnesses today in three significant respects: the means by which it was enforced; the breadth of the testimony it encompassed; and the scope of the immunity required to extinguish it.

A. The Common-Law Witness Privilege as a Court-Enforced, Per Se Rule

Today, the witness privilege is a personal privilege, invocable at the witness's option.[39] And although, as a practical matter, it usually redounds to the benefit of one party and to the detriment of another, it protects the witness rather than any of the parties.[40] In the first years of the nineteenth century, however, a number of courts and at least one treatise writer treated the rule against compelling a witness to incriminate himself as a per se bar on potentially self-incriminating questions; such questions were prohibited, not merely privileged at the witness's option. The per se rule against posing self-accusing questions was set out by Isaac Espinasse, whose *Digest of the Law of Actions and Trials at Nisi Prius* had been reprinted in two American editions by 1801. "It is the general rule," Espinasse wrote, "that a witness cannot be asked any question, the answering of which may oblige him to accuse himself . . . ."[41] In Espinasse's view the rule was not that a witness could decline to answer such questions, but that the questions themselves were forbidden. Judges and counsel, then, could take an active role in preventing potentially self-incriminatory questions from even being asked.

Espinasse's version of the rule appeared in a number of early-nineteenth-century cases indicating that judges were to take an active role in prohibiting incriminating questions.[42] Some, including a fantastic case

---

39. *See* Fisher v. United States, 425 U.S. 391 (1976).

40. *See id.* at 416 ("[T]he protection of personal privacy is a central purpose of the privilege against compelled self-incrimination.").

41. 2 ISAAC ESPINASSE, DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 728 (2d Am. ed. Walpole, N.H., Thomas & Thomas 1801) (emphasis omitted).

42. In 1800 the Federal Circuit Court for the District of Massachusetts held that a witness could not be questioned as to discrepancies between his sworn testimony in court and his prior accounts on the grounds that "he was not bound to criminate himself." Rather than rule that the witness might decline to answer the question, the court "adjudged the question illegal." The Ulysses, 24 F. Cas. 515, 516 n.2 (C.C.D. Mass. 1800) (No. 14,330); *see also* Commonwealth v. Gibbs, 3 Yeates 429 (Pa. 1802) (holding that questions tending to subject a voter to forfeiture were "illegal"); United States v. Quitman, 27 F. Cas. 680, 682 (C.C.E.D. La. 1854) (No. 16,111) (noting that "[i]t was for a time supposed that questions addressed to a witness tending to criminate him, could not be propounded"); State v. Garrett, 44 N.C. (Busb.) 357, 358 (1853) (holding that North Carolina law allowed such questions to be asked, but noting the contrary rule in other jurisdictions); Butler's Case, 1 City Hall

arising out of the aptly named Francisco de Miranda's ill-fated revolutionary plots, even suggested that the potential for being asked self-incriminating questions went to a witness's competence to testify altogether.[43] Other courts held that the trial judge should at least inform witnesses "whether it will be safe to answer or not."[44]

Recorder 66, 67 (N.Y.C. 1816) (noting the court's intervention and statement to counsel that he "ha[d] no right to put [such] a question to the witness").

43. The Circuit Court for the District of Columbia held that a witness who claimed that his testimony would incriminate himself could not be sworn in to testify. The claim of self-incrimination problems effectively went to the witness's competency to testify. *See* Neale v. Coningham, 17 F. Cas. 1266, 1266 (C.C.D.C. 1802) (No. 10,067). Echoing the modern rule, Cranch dissented, reasoning that "[i]t is not an objection to his being sworn, but is a good reason for his refusing to answer any question which may criminate himself." *Id.* (Cranch, J., dissenting). The modern rule bears a trace of the *Coningham* holding: Witnesses generally cannot be compelled to invoke the privilege in front of the jury, and in this sense incriminating questions are prohibited in certain circumstances in the current formulation of the rule. *See* 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 138, at 207-08 (John William Strong ed., 4th ed. 1992); Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 1-2 (1989).

In addition to the issue of self-incrimination, the case involving Francisco de Miranda raised questions of presidential war-making authority and separation of powers. In 1806, Colonel William S. Smith was indicted by the federal government for aiding de Miranda in violation of a statute prohibiting unauthorized war-making against a foreign state. Smith's defense was that President Jefferson and Secretary of State Madison had authorized him to attack Spain. Smith sought to call Madison as a witness to substantiate this defense, and when Madison did not appear in court, he sought an order of contempt and continuation until Madison's testimony could be obtained. The prosecution made a number of responses, but prime among them was an argument grounded in the privilege: Because "witnesses could not be forced to answer questions that might criminate themselves," the prosecution reasoned, "the attendance of those witnesses ought not to be enforced, because the nature of the evidence expected from them is such as would criminate themselves." United States v. Smith, 27 F. Cas. 1192, 1224-25 (C.C.D.N.Y. 1806) (No. 16,342). In the prosecutor's view, even if Madison had authorized the enterprise, Madison could not be compelled to attend the proceedings because the privilege, in effect, rendered him incompetent. *See id.* at 1218-25. The court ultimately sidestepped this thorny, politically fraught issue and held that Madison was not compellable because his testimony was not material. *See id.* at 1224-28. Even if Madison had authorized Smith's activities, the language of the statute and the restrictions on executive branch war-making powers meant that Smith would still be guilty of the offense charged. Madison's testimony, therefore, was "not pertinent to the issue, nor material by way of justification." *Id.* at 1231.

Accomplice testimony created a broad body of doctrine that is beyond the scope of this Article. A number of these cases, however, illustrate the extent to which arguments about self-incrimination were linked to the witness's competence to testify. *See, e.g.*, United States v. Gooseley, 25 F. Cas. 1363, 1364 (C.C.D. Va.) (No. 15,230) (holding, against the objection of the defense, that an accomplice was "competent" to testify as to his knowledge of the defendant's acts, despite the "principle that the witness was not bound to give any evidence which might implicate himself").

44. 1 ESEK COWEN & NICHOLAS HILL, JR., NOTES TO PHILLIPPS' TREATISE ON THE LAW OF EVIDENCE 734 n.515 (New York, Gould, Banks & Co. 1839). The 1819 American edition of Chitty's treatise stated that "[f]ormerly, when a question was put to a witness, the answer to which would have a tendency to criminate him, it was the practice for the judge to tell the witness that he was not bound to answer the question . . . ." 1 JOSEPH D. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 426 (Philadelphia, Edward Earle 1819); *see also* Saltonstall's Case, 1 City Hall Recorder 134, 134 (N.Y.C. 1816) (intervening in a witness's testimony to ask "[c]an you answer that question without implicating yourself?"). The law today gives trial judges considerable discretion in deciding whether to warn a witness about his privilege to decline to answer incriminating questions; their authority to

Even when courts did not treat the rule as a per se prohibition, they often allowed counsel for the parties to object to questions on the ground that the question might incriminate the witness—whether or not the witness had shown reluctance to answer.[45] Although in some cases it is not clear how strictly courts adhered to these practices,[46] trial courts continued into the 1840s to rule incriminating questions illegal rather than merely privileged.[47]

B. The Breadth of the Common-Law Witness Privilege: Civil Interests and Moral Disgrace

Today the privilege encompasses only testimony having the tendency to subject the witness to criminal liability; exposure to civil liability or extralegal sanctions such as moral disgrace does not establish testimony as privileged.[48] The early-nineteenth-century common-law privilege, on the

---

warn a witness, however, "should be exercised sparingly and with great caution." 1 MCCORMICK, *supra* note 43, § 138, at 516.

45. In an 1807 prosecution in New Jersey, counsel for the defense cross-examined Thomas Van Orden, a witness for the prosecution. Counsel inquired whether the witness had "been convicted of petit larceny and punished." State v. Bailly, 2 N.J.L. 396, 396 (Sussex County Ct. 1807). Upon the objection to the question by the prosecution—not the witness—defense counsel argued that the "witness having been punished, could not be endangered by the answer." *Id.* The question, he continued, thus went "to his credibility, and not his competency." *Id.* In this case, then, the witness privilege was not a personal privilege so much as it was a tool used by opposing sides to further the interests of their cases. Judge William Sandford Pennington of the court of Oyer and Terminer of Sussex County held that "the great principle of the common law" was that "a witness cannot be compelled to answer a question, the answer to which, tends directly to dishonor and disgrace him." *Id.*; *see also* United States v. Moses, 27 F. Cas. 5, 5 (C.C.D.C. 1804) (No. 15,824) (sustaining an objection by defense counsel to a question asking a witness whether he had sold goods stolen by the defendant); Atherton's Case, 1 City Hall Recorder 159, 161 (N.Y.C. 1816) (noting the prosecutor's objection to a question on the ground that "it was improper to put a question to a witness, the answer to which might tend to criminate himself").

46. The records of trials at City Hall in New York City indicate several occasions on which witnesses were "delivered immediately to the police" for having incriminated themselves by their own testimony. Carpenter's Case, 1 City Hall Recorder 164, 165 (N.Y.C. 1816) (ordering "three witnesses, sworn on the trial, women of ill-fame, be delivered immediately to the Police, to be dealt with according to law"); *see also* Sherman's Case, 6 City Hall Recorder 2 (N.Y.C. 1821) (ordering a witness for the prosecution into custody after he implicated himself in his testimony). It is possible, of course, that the witnesses in these cases incriminated themselves for reasons other than in response to particular incriminating questions.

47. Beginning in the 1820s, a string of New York appellate decisions reversed rulings by trial courts that incriminating questions were prohibited. *See* People v. Bodine, 1 Denio 281, 291 (N.Y. Sup. Ct. 1845); Mitchell v. Hinman, 8 Wend. 667, 671 (N.Y. Sup. Ct. 1832); Southard v. Rexford, 6 Cow. 254, 259 (N.Y. Sup. Ct. 1826); *see also* United States v. Craig, 25 F. Cas. 682, 684 (C.C.E.D. Pa. 1827) (No. 14,883) (distinguishing between questions that are illegal, such as asking an attorney to divulge secrets of his clients, and questions that are privileged, such as those that "disgrace or criminate the witness").

48. *See* Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 559 (1990) (holding that a mother, custodian of her child under court supervision, could not refuse to produce her child pursuant to the court's order by invoking her Fifth Amendment privilege against self-incrimination because the

other hand, also encompassed questions that exposed the witness to civil liability or moral disgrace. In the first years of the nineteenth century, the witness privilege in American practice was repeatedly said to protect witnesses not just from self-incriminating testimony, but from testimony that revealed the witness's infamy;[49] cast "a shade" over the witness's character;[50] subjected the witness to civil liability;[51] or charged the witness with a debt.[52] There may have been, as Henry Smith has argued,

---

court order arose out of a "noncriminal regulatory regime"); Allen v. Illinois, 478 U.S. 364 (1986) (holding that the Fifth Amendment privilege against self-incrimination does not attach to the threat of being found a sexually dangerous person under Illinois's nominally civil Sexually Dangerous Persons Act). The Court has held that compelled disclosures that increase the risk of being sentenced to death fall within the privilege, *see* Estelle v. Smith, 451 U.S. 454 (1981), but that when disclosures merely go to show competency to stand trial, *see id.* at 468, or may lead to the revocation of probation, *see* Minnesota v. Murphy, 465 U.S. 420 (1984), a witness may not claim the privilege.

49. *See, e.g.*, ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES 79-80 (Hartford, Oliver D. Cooke 1810) ("It is also laid down as a maxim, that a witness is not bound to answer questions, the direct object and immediate tendency of which are to degrade, disgrace, and disparage the witness, and shew his moral turpitude and infamy."); *see also* People v. Mather, 4 Wend. 229, 250-51 (N.Y. Sup. Ct. 1830) (distinguishing the witness privilege as it applied to testimony that would subject a witness to moral infamy from the witness privilege as it applied to testimony that would incriminate a witness on the ground that while the privilege attached to degrading testimony only when that testimony would "directly shew the infamy," it attached to incriminating testimony "whether the answer he may give to the question can criminate him directly or indirectly"); Lessee of Galbraith v. Eichelberger, 3 Yeates 515, 515 (Pa. 1803) ("No one will be compelled to be sworn as a witness, whose testimony tends to accuse himself of an immoral act."); Commonwealth v. Gibbs, 3 Yeates 429, 437 (Pa. 1802) ("If [questions] would involve [the witness] in shame or reproach, he is under no obligation to answer them."); JOHN MORGAN, *The Law of Evidence*, *in* 1 ESSAYS † 1, † 9 (Dublin, E. Lynch et al. 1789) (stating that no witness was "to be examined to prove his own infamy").

50. 1 CHITTY, *supra* note 44, at 427 ("It has also at length after much discussion been established, that a witness is not obliged to admit or answer to any matter which tends to throw a shade over his moral character, although it involves no offense for which he could be indicted."); *see also Craig*, 25 F. Cas. at 683-84; *Bailly*, 2 N.J.L. at 396 (both holding that a witness may not be compelled to answer a question tending to his own disgrace); Wheeler v. Dixon, 14 How. Pr. 151, 151 (N.Y. Sup. Ct. 1856) ("A witness is not bound to speak when the answer may subject him to a prosecution . . . or has a tendency to degrade his character.").

51. *See, e.g.*, THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 132 (Philadelphia, Joseph Groff 1802). Peake's proposition generated considerable controversy in the 1806 debate arising out of the impeachment of Lord Melville. *See* Smith, *supra* note 25, at 159-61; *see also* SWIFT, *supra* note 49, at 78, 77-79 (defending the rule that allowed a witness to decline to testify if "his testimony would render him liable to a civil action").

52. *See, e.g.*, PEAKE, *supra* note 51, at 132. The breadth of the witness privilege with respect to protecting a witness's financial interests is evident in the early American case law. In one 1797 case, for example, the plaintiff called a witness who was interested in the event of the suit, but such that his interest was aligned with the defendant. "[T]o this the defendants could not object, because produced by the plaintiff to testify against his interest—but the witness claimed the privilege of being exempted from testifying anything to the contrary to his interest," and the Connecticut Superior Court of New London County held that indeed the witness was "not obliged to disclose what will make against him." Starr v. Tracy, 2 Root 528, 528-29 (Conn. Super. Ct. 1797); *see also* Simons v. Payne, 2 Root 406 (Conn. Super. Ct. 1796) (holding that a witness was competent to testify against the party with whom his interest was aligned and noting the witness's claim "that he was not compellable to testify against his interest," but rejecting this claim on other grounds). Close to ten years later, a similar case in the

certain procedural aspects in which the early-nineteenth-century common-law privilege was narrower than the modern constitutional privilege.[53]

Circuit Court for the District of Columbia came out the same way, but on reasoning grounded in disqualification for interest rather than in the witness privilege. In *Carne v. McLane*, 5 F. Cas. 89 (C.C.D.C. 1806) (No. 2,416), a witness called by the defense objected to being sworn "because [he was] interested as a partner with the plaintiffs." *Id.* at 89. Unlike *Starr*, in which the court had held that interest was no objection to being sworn but would provide the witness with grounds to decline to answer specific questions, the *Carne* court held that the witness could not be sworn to testify against his interest at all. *Id.* Competency and privilege were thus intertwined and implemented to the same effect.

53. Smith notes that the witness privilege in early-nineteenth-century English practice was easily waivable by a witness who foolishly answered other questions. *See* Smith, *supra* note 25, at 161. Under modern constitutional self-incrimination doctrine, a witness can, of course, still waive the right to invoke the privilege by answering other questions, but only if in doing so he has voluntarily disclosed self-incriminating facts without invoking the privilege. *See* Rogers v. United States, 340 U.S. 367, 373-74 (1951) (holding that "[d]isclosure of a fact waives the privilege as to details").

In addition, early-nineteenth-century courts gave conflicting answers to the question of whether an exclusionary rule attached to improperly compelled testimony. Smith has located a line of English cases between 1823 and 1847 that negotiated the application of an exclusionary rule to the witness privilege. Citing *Regina v. Garbett*, 169 Eng. Rep. 227 (Cent. Crim. Ct. 1847), he argues that only in 1847 did an exclusionary rule attach to the witness privilege. *See* Smith, *supra* note 25, at 175. In *Garbett*, the court changed the waiver rule, making it easier for witnesses to claim the witness privilege even if they had already answered questions under oath. *Garbett*, 169 Eng. Rep. at 235-36. By narrowing the waiver element of the witness privilege, the court was forced to resolve what to do with the testimony that had been (now wrongly) compelled under the old, stricter waiver rules. It ruled that the testimony that had been wrongly compelled was inadmissible. *Id.* at 235.

It is not clear, however, that the ruling extended an exclusionary remedy to the witness privilege for the first time. As Smith notes, some of the cases leading up to the *Garbett* decision resulted in exclusion of witness testimony. *See* Regina v. Owen, 173 Eng. Rep. 818 (Stafford Assizes 1839); Rex v. Lewis, 172 Eng. Rep. 1190 (Hereford Assizes 1833); Smith, *supra* note 25, at 171-74. None of these cases, however, appears to have been about what to do with *wrongly* compelled self-incriminating testimony. *See, e.g.*, Rex v. Britton, 174 Eng. Rep. 101, 102 (Winchester Assizes 1833). Instead, these cases grappled with how to deal with the fact that witnesses had given self-incriminating testimony under oath. *See Owen*, 173 Eng. Rep. at 818; *Lewis*, 172 Eng. Rep. at 1190; Rex v. Tubby, 172 Eng. Rep. 1084 (Bury Assizes 1833); Rex v. Haworth, 172 Eng. Rep. 693, 694 (Yorkshire Lent Assizes 1829). Because the confession rule that applied to pretrial examinations made confessions under oath per se inadmissible, a number of witnesses that had incriminated themselves through testimony given in prior trials sought to shelter themselves from their previous statements by arguing for an analogous application of the confession rule. *See* Smith, *supra* note 25, at 153-56, 171-75. The proper question for the historian to ask about the existence of an exclusionary rule for the witness privilege is what happened to self-incriminating testimony given by a witness that had invoked the privilege but whose invocation of the privilege had been wrongly overruled. This is the situation to which the *Garbett* decision attached an exclusionary remedy, but it is not clear from the cases that Smith discusses whether an exclusionary remedy existed before *Garbett*.

On the other hand, a discussion by the Vermont Supreme Court in an 1840 case indicates—although somewhat cryptically—that Smith's point may be correct. In *Chamberlain v. Willson*, 12 Vt. 491 (1840), the court wrote:

> A rule that the testimony should be given in all cases, but should never after be used for the purpose of procuring a conviction of crime, would be much more conducive to the reasonable ends of justice, and at the same time afford full protection to the witness. It is well settled that the testimony, if freely given, may be afterwards used against the witness. But such is not the law. I know indeed of no rule to exclude the testimony being given in evidence against a witness, even in a prosecution of a criminal nature,

But it is the breadth of the witness privilege in these years that stands out most strongly.

C. *The Transactional Scope of the Common-Law Witness Privilege*

After a long and controversial development, the Fifth Amendment Self-Incrimination Clause is today understood to require a grant of what is known as "use plus use-fruits immunity" in order to compel a witness to give otherwise privileged testimony.[54] Under this standard, a person who is compelled under a court's contempt power to incriminate himself "may [subsequently] be prosecuted, but neither the compelled statement nor any evidence it led to ('fruits') can be introduced in the criminal trial."[55]

The current "use plus use-fruits" immunity rule supersedes the broader rule of "transactional" immunity that the Supreme Court established in 1892 in *Counselman v. Hitchcock*.[56] Under this latter rule, legally compelled self-incrimination mandated "absolute immunity" from subsequent prosecution for those transactions about which the witness testified.[57]

---

although the witness were compelled to testify under the requisitions of a court of justice.

It is obvious, then, that the only security of the witness is in silence.

Id. at 493. The suggestion in *Chamberlain* thus is that no exclusionary rule attached even to wrongly compelled witness testimony.

Even so, the question of the scope of the early-nineteenth-century witness privilege does not turn on the presence of an exclusionary rule. The exclusionary rule only became important after a breach of the privilege. So long as courts observed and enforced the witness privilege—and I have indicated above that a number of courts appear to have been zealous in doing so—the availability of an exclusionary remedy was not an issue.

54. *See* Kastigar v. United States, 406 U.S. 441, 457-59 (1972) (holding that in order to compel incriminating testimony, the government must confer immunity (1) from introduction of that testimony in subsequent criminal prosecutions and (2) from introduction of any discoveries made as a result of that testimony); Murphy v. Waterfront Comm'n, 378 U.S. 52, 78-79 (1964) (holding that a witness in a state prosecution may not be compelled to give incriminating testimony unless immunized from the introduction of the testimony, as well as from the introduction of any discoveries made as result of the testimony, in any subsequent federal prosecution).

55. Amar & Lettow, *supra* note 4, at 858. The use plus use-fruits exclusionary rule that attaches to nondefendant witness testimony is broader than the exclusionary rule that attaches to a pretrial suspect's statements under the *Miranda* rule. In the latter case, the fruits of a non-*Mirandized* statement are admissible even when the statement itself is not. *See* Michigan v. Tucker, 417 U.S. 433 (1974) (admitting testimony from a witness to whom police were led by information obtained in a statement by the suspect that was itself inadmissible under *Miranda*); *see also* Oregon v. Elstad, 470 U.S. 298 (1985) (admitting evidence from a subsequent confession despite the inadmissibility of a prior confession under *Miranda*). The scope of the pretrial exclusionary rule—which is the functional equivalent of the scope of the immunity required to extinguish the pretrial privilege, *see id.* at 312 (arguing that an "expansive view" of the exclusionary rule "effectively immunizes the suspect")—has, unlike its nondefendant witness analogue, remained virtually unchanged since the late eighteenth century. *See infra* note 60 and accompanying text.

56. 142 U.S. 547 (1892).

57. *Id.* at 586 ("In view of the constitutional provision, a statutory enactment [abrogating the privilege], to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.").

The *Counselman* rule of transactional immunity was, in turn, a departure from a narrower "testimonial" immunity rule that characterized the constitutional doctrine in leading American jurisdictions in the 1860s.[58] Under the "testimonial" immunity rule, a witness could be compelled to give self-incriminating testimony under the threat of the court's contempt power so long as the witness was granted immunity from the introduction of the testimony itself in any subsequent criminal prosecution.[59] Unlike the "use plus use-fruits" rule, the "testimonial" rule empowered the state to use compelled self-incriminating testimony to build a criminal case against the witness.

Going back still further into the history of self-incrimination doctrine, however, the common-law witness privilege in the first decades of the century carried a broader immunity standard that more closely resembled *Counselman*'s transactional immunity rule. It should be noted that the confession rule that applied to self-incriminating statements by pretrial suspects was characterized by a narrower testimonial immunity as early as the late eighteenth century.[60] Moreover, there was a deep tension between the rule protecting witnesses from questions that would subject them to moral disgrace, on the one hand, and any kind of immunity statute, on the other. If criminal behavior imputed moral disgrace, it would seem that no immunity statute could have extinguished the witness privilege.[61] Nonetheless, both courts and legislatures during this period treated transactional immunity as the required standard.

1. Transactional Immunity Cases.—Two prominent federal cases in this period imply (albeit ambiguously) that the common-law witness privilege was understood to require transactional immunity. In the first, Justice Samuel Chase, sitting in 1800 as circuit judge in a prosecution under the Sedition Act, associated the extraction of self-incriminating testimony with grants of full immunity from subsequent prosecution. Chase stated that "[e]very person . . . is protected by law from compulsion to criminate himself; but, I suppose, if [a witness] give[s] his evidence, the government of the United States is pledged not to institute a prosecution

58. *See* Amar & Lettow, *supra* note 4, at 911-19.

59. *See id.* at 858, 911-12.

60. *See* The King v. Warickshall, 168 Eng. Rep. 234, 235 (Cr. Cas. 1783) (admitting fruits evidence because "although confessions improperly obtained cannot be received in evidence, yet any acts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession"); *see also* AUGUSTIN S. CLAYTON, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 132 (Milledgeville, Ga., S. Grantland 1819) (stating only that improperly obtained confessions are not "to be read against him [the suspect]"), *cited and quoted in* AMAR, *supra* note 4, at 222 n.205.

61. I have not encountered a discussion of the tension between the moral disgrace rule and the immunity standard in the sources of this period. In recent years, the fact that the privilege can be abrogated by conferring immunity on the witness has been understood to undermine privacy-based rationales for the privilege. But there is no evidence of awareness of the problem in the early sources.

against him. Of this he may be assured."[62] In the second case, the litigants in the 1807 treason prosecution of Aaron Burr disputed whether or not a witness who sought to invoke the witness privilege was bound to accept a pardon offered by the government that would have abrogated the witness's privilege. Both sides agreed that, if valid, the pardon would eliminate the witness's claim of privilege. Neither side intimated that a lesser form of immunity could abrogate the witness privilege.[63]

2. Transactional Immunity Statutes.—The immunity statutes enacted in common-law jurisdictions throughout the eighteenth century and into the early nineteenth century offer the best evidence that abrogation of the common-law witness privilege in the early nineteenth century required a grant of transactional immunity. As the United States Supreme Court noted in *Kastigar v. United States*,[64] immunity statutes "have historical roots deep in Anglo-American jurisprudence."[65] An immunity statute

---

62. United States v. Callender, 25 F. Cas. 239, 245 (C.C.D. Va. 1800) (No. 14,709). Chase's comment was in response to counsel for the defense, who had stated that he "understood that some of the witnesses who are to be examined to prove the guilt of the accused, were themselves, in the estimation of the law, equally guilty." *Id.* Defense counsel requested, therefore, that it be made "known to those who were in any degree implicated, that they are not bound to accuse themselves, and may withhold if they think proper, such part of their evidence as has a tendency to criminate themselves." *Id.* Chase's response is somewhat mysterious. If the government were required to offer immunity to all those who responded to questions under legal compulsion, there would be no need to warn witnesses about their privilege to decline to answer questions, nor would there be any dispute over whether a witness could refuse to answer a question. The only legal question would concern the scope of the immunity that the government would be required to grant to a witness after the fact of the witness's testimony. Moreover, if taken at face value, Chase's proposition would lead to an unworkable immunity rule. The rule proposed by Chase would create a strong incentive for wrongdoers to volunteer testimony related to their wrongdoing because the prosecution would be "pledged" to immunize them against subsequent prosecution. Note that Chase not only suggested a transactional immunity remedy, he also agreed to give a prophylactic warning to all witnesses.

63. *See* United States v. Burr, 25 F. Cas. 55, 63-64 (C.C.D. Va. 1807) (No. 14,693). Before Dr. Erick Bollman was called before the grand jury, the government's chief prosecutor, George Hay, addressed the court for the prosecution. Bollman had provided the federal government with considerable evidence, and in return President Jefferson "communicated to [Hay a] pardon," which Hay had offered Bollman. *Id.* at 63. Bollman, however, refused the pardon, sensing that it might be seen as an admission of guilt. *See id.* Thus when the grand jury sought to inquire into his knowledge of the Burr affair, the issue arose whether a witness who was offered a pardon but declined to accept it could refuse to testify before the grand jury on the ground that "no man is bound to criminate himself." *Id.* Bollman's counsel argued that the pardon had been refused and therefore Bollman was not insulated from future prosecution, or, in the alternative, that "no pardon except by statute could protect a party against criminal prosecution." *Id.* at 64. The differing interpretations of presidential pardon power notwithstanding, the salient point is that all parties involved understood a form of transactional immunity to be the necessary antecedent to compelled self-incriminating testimony.

Note that this sequence was not the same one that is usually cited regarding the privilege in Burr's trial. The question of whether Mr. Willie, Burr's secretary, could be compelled to testify to the meaning and authenticity of a letter sent to Burr in cipher has long been discussed as another important early privilege case. *See In re* Willie, 25 F. Cas. 38, 40-41 (C.C.D. Va. 1807) (No. 14,692e).

64. 406 U.S. 441 (1972).

65. *Id.* at 445; *see* 8 WIGMORE, *supra* note 1, § 2281, at 492.

confers immunity on a witness or a class of witnesses in such a way as to extinguish the witness privilege. By insulating the witness from the incriminating impact of his testimony, the immunity statute requires the witness to furnish self-incriminating testimony under the threat of contempt.[66] Thus, since their beginnings, immunity statutes have been employed to prosecute consensual crimes that are otherwise difficult to detect such as illegal gambling, bribery, dueling, and usury.

Today, immunity statutes are constitutionally required to give the witness immunity both from the introduction of the witness's compelled testimony and from the introduction of any evidence derived from that testimony—in other words, "use plus use-fruits" immunity.[67] The earliest immunity statutes, however, consistently conferred "transactional" immunity in order to compel testimony that would otherwise have been privileged. That is, they granted absolute immunity from prosecution for the transaction or transactions underlying the compelled testimony. The first such statute was a 1710 English enactment designed to crack down on gaming.[68] The statute authorized suits for the recovery of gambling losses, either by the loser himself or by any person after three months from the date of the loss, and empowered the latter to sue for treble damages.[69] "[F]or the better discovery of the monies," the act provided that defendants sued under its provisions "shall be obliged and compellable to answer upon Oath such Bill or Bills as shall be preferred against . . . them for discovering the sum . . . so won at play . . . ."[70] But the next section of the statute stated:

> Provided always . . . That upon the Discovery and Repayment of the Money . . . the Person or Persons who shall so discover and repay the same . . . shall be acquitted indemnified and discharged from any further or other Punishment Forfeiture or Penalty which he or they may have incurred by the playing for or winning such Money or other thing so discovered and repaid . . . .[71]

Over the next century, Parliament enacted similar grants of immunity from criminal sanction in connection with a number of crimes that were difficult to detect without the testimony of persons involved in the crimes.[72]

---

66. *See* MCCORMICK, *supra* note 43, § 143, at 219.

67. *See Kastigar*, 406 U.S. at 445.

68. *See* An Act for the Better Preventing of Excessive and Deceitful Gaming, 9 Anne, ch. 18, §§ 3-4 (1710) (Eng.).

69. *See id.* at § 2.

70. *Id.* at ch. 14, § 3.

71. *Id.* § 4; *see generally* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571 & n.13 (1963) (describing the enactment of the 1710 immunity provision).

72. A particularly favored subject for the enactment of immunity provisions was bribery of public officials, for which Parliament enacted immunity provisions in 1725 and again in 1742. *See* 8

The colonial assemblies of New York enacted similar transactional immunity statutes beginning in the 1770s. One act provided that suspects examined under oath by justices of the peace regarding private lotteries were "exempted from . . . Penalty, and from all prosecutions" for their own illegal lottery activities.[73] In another act, gaming winners were made compellable to testify in suits by losers for the recovery of the losses of the latter. Like the English act of 1710, it provided that winners testifying under compulsory process of the court "shall be acquitted, indemnified and discharged from any further or other Punishment, Forfeiture, or Penalty which he or they may have incurred by the playing for or winning such Money."[74] Moreover, in several high-profile colonial cases, colonial assemblies granted transactional immunity to particular witnesses in order to compel self-incriminating testimony.[75]

After the Revolution and into the first two decades of the nineteenth century, a number of American jurisdictions including New York, continued to adopt immunity statutes granting transactional immunity.[76] New

---

WIGMORE, *supra* note 1, § 2281, at 492. The Witnesses Act of 1806, passed in conjunction with the impeachment of Lord Melville, also included a transactional immunity provision. *See* Smith, *supra* note 25, at 159-61 (citing Witnesses' Declaratory Bill, 1806, 46 Geo. 3, ch. 37 (Eng.)). In 1825, Parliament's wholesale reorganization of the law restricting the activities of labor organizations included a clause providing

> that all and every Persons and Person who shall or may offend against this Act, shall and may, equally with all other persons, be called upon and compelled to give his or her Testimony . . . and that in all such Cases every Person having given his or her Testimony or Evidence . . . shall be and is hereby indemnified of, from and against any Information to be laid, or Prosecution to be commenced against him or her, for having offended in the Matter wherein or relative to which he, she, or they shall have given Testimony . . . .

An Act to Repeal the Laws Relating to the Combination of Workmen, and to Make Other Provisions in Lieu Thereof, 6 Geo. 4, ch. 129, § 6 (1825) (Eng.). In 1828, Parliament enacted a statute conferring absolute immunity on financial agents for prosecutions arising out of embezzlements in which the agents

> have disclosed such Act, on Oath, in consequence of any compulsory Process of any Court of Law or Equity in any Action, Suit, or Proceeding which shall have been *bonâ fide* instituted by any Party aggrieved, or if [the agents] shall have disclosed the same in any Examination or Deposition before any Commissioners of Bankrupt.

An Act for Consolidating and Amending the Laws in England Relative to Larceny and Other Offences Connected Therewith, 7 & 8 Geo. 4, ch. 29, § 52 (1827) (Eng.); *see also* An Act to Render More Effective an Act, Passed in the Thirty Seventh Year of His Present Majesty, for Preventing the Administering or Taking of Unlawful Oaths, 52 Geo. 3, ch. 104, § 3 (1812) (Eng.) (enacting a transactional immunity provision). *See generally* 2 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE § 1310, at 1176 (3d ed. London, W. Maxwell 1858) (describing parliamentary enactments rendering the witness privilege "valueless" "by an Act of indemnity").

73. An Act More Effectually to Prevent Private Lotteries, ch. 1542, 1772 N.Y. Laws 674, 676, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 351, 354 (Albany, Lyon 1894) [hereinafter COLONIAL LAWS].

74. *Id.* at 623.

75. *See* LEVY, *supra* note 1, at 383-87.

76. *See* Frazee v. State, 58 Ind. 8, 10 (1878) (comparing two Indiana gaming statutes, one of which provided transactional immunity for more serious offenses); Hirsch v. State, 67 Tenn. (8 Baxter) 89, 90 (1874) (addressing transactional immunity statutes related to gaming that were enacted in 1829

York passed transactional immunity statutes with respect to usury,[77] gaming,[78] and dueling.[79] Very little litigation appears to have been generated by the transactional immunity statutes, perhaps because it was well-settled by the nineteenth century that, like the de facto immunity that resulted from the expiration of a statute of limitations, absolute immunity from subsequent prosecution abrogated the witness privilege.[80]

As we shall see in Part V, mid-nineteenth-century state legislatures began to enact more narrowly drawn immunity statutes conferring testimonial, rather than transactional, immunity. Ultimately these new, narrower immunity statutes forced American courts to come to terms with the relationship between the common-law witness privilege and the constitutional self-incrimination provisions. For now, however, the important point is that through the 1820s, the immunity granted to certain classes of witnesses by Parliament, the colonial assemblies, and the state legislatures of the Early Republic was transactional, conferring absolute immunity from subsequent prosecution.

III. Explaining the Common-Law Witness Privilege: Common-Law Fact-Finding in the Age of Disqualification Rules

The witness privilege of the early nineteenth century, then, was distinguished by four striking features: its breadth, its transactional scope,

---

and 1841); State v. Hatfield, 40 Tenn. (3 Head) 231, 232 (1859) (interpreting a transactional immunity statute); Floyd v. State, 7 Tex. 215, 218 (1851) (discussing an 1848 act conferring transactional immunity on witnesses); Kendrick v. Commonwealth, 78 Va. 490, 495 (1884) (discussing a statute granting witnesses "absolute indemnity and complete amnesty against any possible penalty or procedure against him for any crimination or implication in the offence indicated by the pending prosecution in which he was called to testify"); *In re* Falvey, 7 Wis. 528, 539-40 (1858) (discussing an 1858 Wisconsin transactional immunity statute). The 1710 English gaming immunity statute was held to be in effect under federal common law in *United States v. Dixon*, 25 F. Cas. 872, 873 (C.C.D.C. 1830) (No. 14,970) (Cranch, J.).

77. *See* An Act for Preventing Usury, ch. 13, 1787 N.Y. Laws 365, 367 (providing that persons accused of usury must answer bills of discovery in chancery, and that "upon the discovery and repayment . . . the person or persons who shall so discover, and repay or return the same as aforesaid, with costs of suit, shall be acquitted and discharged from any further or other punishment, forfeiture or penalty").

78. *See* An Act to Prevent Excessive and Deceitful Gaming, ch. 46, 1801 N.Y. Laws 70 (making offenders competent witnesses and discharging them of all penalties). This act was expressly modeled on An Act for the Better Preventing of Excessive and Deceitful Gaming, 9 Anne, ch. 14 (1710) (Eng.).

79. *See* An Act to Prevent Duelling, ch. 45, § 4, [1813] 2 N.Y. Laws 192 ("[A]ny person offending against this act, shall be a competent witness against any other person offending in like manner, and may be compelled to appear and give evidence in said court touching the premises, but shall not thereby be criminated himself.").

80. *See, e.g.*, People v. Mather, 4 Wend. 229, 255 (N.Y. Sup. Ct. 1830) (noting that once the statute of limitations has passed, a witness cannot claim the privilege); *see also* 8 WIGMORE, *supra* note 1, § 2281, at 494-95 (stating that the view that transactional immunity statutes, "by expurgating the crime, remove the privilege, has prevailed wherever the question has been decided, except in the jurisdiction of Tennessee, where some doubt has been expressed" (footnote omitted)).

its treatment as a rule enforceable by courts rather than a personal privilege, and its common-law, as opposed to constitutional, status. This Part suggests that these characteristics of the late-eighteenth-century witness privilege are best explained by reference to the strong parallels between the privilege and the rule that disqualified witnesses for interest in the outcome of the case. Indeed, each characteristic that distinguished the witness privilege of the late eighteenth century from the privilege that attaches to witnesses today is attributable to doctrinal overlap between the witness privilege and the interested-witness disqualification rule: Like the disqualification rule, the witness privilege covered witnesses with merely civil interests at stake; like the disqualification rule, the witness privilege was enforced actively by courts with or without the request of the witness; like the disqualification rule, which could only be circumvented by removing the interest in question, the privilege could only be abrogated by a complete grant of immunity from subsequent prosecution; and like the disqualification rule, the witness privilege rested on a common-law rather than a constitutional basis. As this quick comparison suggests, and as this Part describes in greater detail, a strong connection existed between the late-eighteenth- and early-nineteenth-century witness privilege and the disqualification rules. More broadly, the common-law privilege was linked to an approach to fact-finding that has long since been abandoned—an approach to fact-finding built around oaths, the common-law rules of disqualification, and the common-law privilege.

A. The Witness Disqualification Rules

Prior to the mid-nineteenth century, individuals with a financial interest in the event of a civil suit were disqualified from testifying under oath. Parties were disqualified from testifying on the ground that they were necessarily interested.[81] Similarly, interested nonparty witnesses were neither permitted to testify in furtherance of their own interests, nor were they compellable to testify against their interests.[82]

Lord Chief Baron Jeffrey Gilbert's treatise on evidence, written in the early 1700s, formed the point of departure for systematic thinking about the law of evidence and the rules of disqualification in the late eighteenth and early nineteenth centuries.[83] Though Gilbert's primary focus was on

---

81. *See* 2 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 575, at 804-05 (Chadbourn rev. ed. 1979). Parties, however, were often able to tell their story unsworn while in the process of arguing their case. Indeed, especially when not represented by counsel, this unsworn testimony was critical to the common-law trial. *See* Langbein, *Historical Origins*, *supra* note 3, at 1048-71; Langbein, *Before the Lawyers*, *supra* note 3, at 283-84.

82. *See, e.g.*, 1 SAMUEL MARCH PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 72 (4th Am. ed. New York, Gould, Banks & Co. 1839).

83. *See* ANON. [JEFFREY GILBERT], THE LAW OF EVIDENCE (photo. reprint 1979) (Dublin, Sarah Cotter 1754). Although modern texts most often use "Geoffrey," Michael Macnair has indicated that

written evidence, his central concern with respect to unwritten evidence was the witness that was "totally excluded from all Attestation . . . for want of Integrity and Discernment."[84] The central ground for incompetency was interest in the suit. Interest, according to Gilbert,

> was rather a Ground for Distrust than any just Cause of Belief; for Men are generally so short-sighted as to look at their own private Benefit which is near to them, rather than to the Good of the World that is more remote, therefore from the nature of human Passions and Actions, there is more Reason to distrust such a bias'd Testimony, than to believe it.[85]

As a corollary to this rule, a party could not be a witness in his own cause, for it was "not to be presumed that a Man who complains without Cause, or defends without Justice, shou'd have Honesty enough to confess it."[86] Another class of "Persons excluded from testimony" in Gilbert's exposition of the law of evidence was made up of those who were "stigmatized" by the prior commission of one of "several Crimes that so blemish[ed]" the character as to render their testimony untrustworthy.[87] As with those that were disqualified for interest, those that had been convicted of a "Falsehood and other Crimes against the common Principles of Honesty and Humanity" ("crimen falsi") could not be trusted to give evidence "in Matters of such Importance as all Affairs of Justice are."[88] Religious nonbelievers, too, were disqualified on the theory that the oaths that were viewed as ensuring the truthfulness of testimony would have no meaning for atheists.[89]

---

contemporaries spelled Gilbert's name "Jeffrey." *See* Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 J. LEGAL HIST. 252, 261 n.1 (1994). Macnair further indicates that Gilbert's treatise was written sometime in the first quarter of the eighteenth century, most likely the first ten years, even though it was not published until 1754, close to thirty years after his death. *See id.* at 259-60, 266 n.107. Based on persuasive textual evidence suggesting that Gilbert wrote his treatise between the passage of the Treason Act of 1696, which allowed criminal defendants in treason cases to call sworn witnesses in their own defense, and a subsequent act of 1702, which extended this right to criminal defendants in all felony trials, George Fisher further argues that Gilbert must have written his treatise in this six-year window. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 617 n.161 (1997).

84. GILBERT, *supra* note 83, at 86.

85. *Id.* at 87.

86. *Id.* at 94. According to Wigmore, the rule of disqualification for interested third-party witnesses was originally a corollary to the rule disqualifying parties from testifying under oath. *See* 2 WIGMORE, *supra* note 81, § 575, at 804-05. By Gilbert's time, however, the relationship between the rules had been inverted: The party-disqualification rule had come to be explained as following from the principle of disqualification for interest.

87. GILBERT, *supra* note 83, at 100-01 ("But where a Man is convicted of Falsehood and other Crimes against the common Principles of Honesty and Humanity, his Oath is of no Weight . . . .").

88. *Id.* at 101.

89. *See id.* at 103. Several historians argue that Gilbert's attempt to sort evidence into rigidly prescribed categories of trustworthy and untrustworthy and his total exclusion of the latter can be understood as the manifestation of a Lockean epistemology that sought to reduce fact-finding to

According to Gilbert, then, the primary rationale for the disqualification rules was distrust of the testimony that the disqualified witness would have given and fear of the harmful impact that such untrustworthy testimony would have on the fact-finding work of the common-law courts.[90] It is not entirely clear, however, that this reliability rationale provided an accurate description of the beliefs of courts and lawyers in the late eighteenth century. By the latter part of the century, the disqualification rules had come to be seen by at least some judges as harmful to the fact-finding mission of the common-law trial. Lord Mansfield, for example, circumvented the disqualification rules by shuttling cases into arbitration in order to obtain party and interested-witness testimony.[91]

If eighteenth-century lawyers and judges doubted whether the disqualification rules promoted reliable outcomes, reliability alone cannot account for these rules. Rather, the disqualification rules appear to have performed other functions in the eighteenth century. Any legal regime that

---

understood as the manifestation of a Lockean epistemology that sought to reduce fact-finding to mathematical formulae. *See* BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 27 (1991); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1155-56 (1990); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 594 (1990) [hereinafter Landsman, *Contentious Spirit*]; Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries, 1600-1850*, 38 HASTINGS L.J. 153, 158-62 (1986). Landsman's analysis presents Gilbert as an exponent of a nonadversarial way of thinking about the law of evidence. Other historians have suggested that Gilbert's exclusionary principles are best understood as emerging out of a common-law trial system that had yet to institute cross-examination as its touchstone for sifting through dubious testimony. *See* WILLIAM TWINING, *The Rationalist Tradition of Evidence Scholarship*, *in* RETHINKING EVIDENCE 37 (1990); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172-76 (1996). This debate over the primacy of institutional context or intellectual currents notwithstanding, the central point is that Gilbert "conflated questions of admissibility and questions of weight, and . . . suggested that both kinds of question could be governed by formal rules." TWINING, *supra*, at 37.

90. Gilbert could not, however, wedge the rule prohibiting wives from testifying against husbands into the reliability principle. Spouses were disqualified from testifying on each other's behalf on the grounds of coverture: "[T]hey are not to be believed, because their Interests are absolutely the same, and therefore they can gain no more Credit when they attest for each other, than when any Man attests for himself." GILBERT, *supra* note 83, at 96. But when Gilbert sought to explain why wives could not be called to testify against their husbands, he was forced to abandon the reliability principle:

> [I]t would be very hard that a Wife should be allowed as Evidence against her own Husband, when she can't attest for him; such a Law would occasion implacable Divisions and Quarrels, and destroy the very legal Policy of Marriage that has so contriv'd it, that their interest should be but one; which it cou'd never be if Wives were admitted to destroy the Interest of their Husbands, and the Peace of Families could not easily be maintained, if the Law admitted any Attestation against the Husband.

Id. Gilbert's treatment of spousal incompetency anticipated the nineteenth-century shift away from Gilbert's own reliability-based best-evidence theory of the disqualification rules and toward a public-policy theory of evidentiary rules. *See* TWINING, *supra* note 89, at 37.

91. *See* Langbein, *supra* note 89, at 1185-86; James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 112-13 (1994).

disqualified so much relevant evidence was bound to have a substantive effect on the kinds of cases that could be brought. Thus, the disqualification rules may have served to discourage frivolous claims or to channel contracts into written form.[92] More importantly for our purposes, the disqualification rules appear to have served, as George Fisher argues, to protect the integrity of the oath and thereby protect the legitimacy of the proceedings themselves.[93] As far back as the ordeals, the common-law trial had placed considerable weight on the sanction of ostensibly divine guarantors.[94] By the eighteenth century, the ordeal had long since been replaced by the oath.[95] But unlike the ordeal, the oath was a fragile guarantor of the reliability of legal determinations: While the result of an ordeal was ostensibly clear-cut, sworn testimony from opposing witnesses might be contradictory. Faced with contradictory sworn testimony, the common law would have been forced to acknowledge the fallibility of the oath and the fallibility of its own determinations. By disqualifying criminal defendants, civil parties, and nonparty witnesses with an interest in the outcome of the case, however, the common law effectively prevented juries from having to face contradictory sworn testimony.[96]

The witness disqualification rules, then, were grounded in the twin principles of guaranteeing the reliability and the legitimacy of trial outcomes. The disqualification rules precluded the placement of compromised testimony before the court under oath, thereby keeping unreliable testimony from being entered into evidence and preserving the idea of the oath as an effective guarantor of truth. The common-law witness privilege was grounded in these same principles of reliability and legitimacy.

B. The Common-Law Witness Privilege and the Disqualification Rules

1. The Conflation of the Witness Privilege and the Disqualification Rules.—To late-twentieth-century eyes, the privilege against self-incrimination and the now-antiquated disqualification rules appear to serve very different purposes. The disqualification rules prevented a witness from testifying, whereas the privilege allows a witness to decline to testify at his option. Accordingly, the privilege appears to protect the person to whom it applies; disqualification rules, on the other hand, are as likely to hurt the person to whom they apply as they are to protect him. In the

---

92. I thank John Langbein, who suggested this explanation to me.

93. *See* Fisher, *supra* note 83, at 590-92.

94. On the ordeals, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON-LAW 113-15 (5th ed. 1956).

95. On the abolition of the ordeals, see *id.* at 118-19. *See also* R. Van Caenegem, *The Law of Evidence in the Twelfth Century*, *in* PROCEEDINGS OF THE SECOND INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 297, 297-310 (Stephan Kuttner & J. Joseph Ryan eds., 1965).

96. *See* Fisher, *supra* note 83, at 624-26.

early- to mid-nineteenth century, however, the distinction between the two kinds of rules was less obvious. Whether or not, from the perspective of the late twentieth century, the disqualification rules ought to have been associated closely with the privilege against self-incrimination, a remarkable number of lawyers and judges in the early nineteenth century conflated disqualification and self-incrimination. As one New York court stated in 1841 while grappling with the relationship between the rule of disqualification for interest and the privilege, "It must be admitted that there is no great difference in principle between calling a party in interest, and calling a witness whose answer may charge him with a debt, or subject him to a civil suit . . . ."[97] Indeed, as late as 1880, an article in the *American Law Review* argued that the testimonial incompetence of criminal defendants at common law had been "part and parcel of the prohibition against compulsory self-accusation."[98]

English jurist Thomas Peake's 1801 evidence treatise exemplified the contemporary conflation of the witness privilege and disqualification for interest. The rule of disqualification for interest attached to persons rather than testimony. It did not distinguish between the different kinds of testimony, whether self-exculpatory or self-incriminating, that the interested witness might give. Rather, it applied to all those who had a financial interest in the event of the suit. By contrast, the witness's privilege in twentieth-century practice attaches to testimony rather than persons. It applies to particular kinds of testimony without regard to the status of the witness as interested or not interested in the suit. Peake's treatise, however, suggests that in 1800 lawyers and judges did not make this distinction between privileged testimony and disqualified persons. Consider the following passage, placed by Peake under the heading "*Of Persons who are privileged from giving Evidence*":

> I observed before, that no one could be compelled to give evidence which tended to charge himself with a crime. It has also been held, that the law protects a man's pecuniary interests, as well as his person; and that therefore he is not compellable to give any answer which may subject him to a civil action, or charge himself with a debt. But as a man cannot, by making his interest the same as that of the party who has a right to his testimony, deprive such party of the benefit of it; so neither can he, by voluntarily acquiring an interest the other way, enable himself to object to give evidence; and therefore where a subscribing witness to a promissory note

97. Cook v. Spaulding, 1 Hill 586, 587 (N.Y. Sup. Ct. 1841).

98. Wm. A. Maury, *Validity of Statutes Authorizing the Accused to Testify*, 14 AM. L. REV. 753, 766, 766-67 (1880).

> afterwards became bail for the maker, he was compelled to give evidence of the execution.[99]

Peake thus conflated the witness privilege with the disqualification rule by including in his discussion of rules ostensibly applying to persons (*i.e.*, the disqualification rules) a reference to rules ostensibly attaching to testimony (*i.e.*, the witness privilege). Indeed, in the passage quoted here, Peake shifted from dealing with disqualified persons to discussing types of privileged testimony and back again. Beginning the passage with a heading referring to "*Persons*" privileged from giving evidence, he first discussed not persons who were privileged but testimony that was privileged: "evidence which tended to charge [the witness] himself with a crime [or which] . . . . may subject him to a civil action, or charge himself with a debt."[100] He then returned to "persons," stating that "a man cannot, by becoming bail, deprive a party of his evidence."[101] Under a heading ostensibly addressing the rule of disqualification for interest, then, Peake discussed both the witness privilege and the doctrine of disqualification, never making any real distinction between the two.

2. Explaining the Conflation of the Witness Privilege and the Disqualification Rules.—The blurred distinction between the disqualification rules and the witness privilege may be traced to one primary conceptual problem: the difficulty of explaining how the disqualification rules promoted truth-seeking when an interested witness gave testimony *against* interest. From the standpoint of enhancing the reliability of the fact-finding process, precluding testimony from a witness whose interest was consistent with the party seeking to introduce the testimony made some sense. A witness was not allowed to give testimony when he had a strong incentive to lie and when the party calling him stood to benefit from that lie. Cases in which the witness's testimony was likely to cut against his interest, however, were considerably more difficult to reconcile with the goal of promoting truth. In particular, two distinct situations were difficult to explain on the basis of the reliability rationale for the rule of disqualification for interest: the practice of disqualifying a witness who volunteered to testify against his interest (*i.e.*, a witness who sought to waive the disqualification rule); and the practice of preventing a party from calling

---

99. PEAKE, *supra* note 51, at 192-93.

100. *Id.* at 132.

101. *Id.* at 132-33. This assertion restated the then-familiar rule that a person could not disqualify himself by voluntarily acquiring an interest in the suit. *See* Starr v. Tracy, 2 Root 528, 529 (Conn. Super. Ct. 1797) ("[A] witness may not deprive a party of his testimony by any voluntary interest he may take upon himself . . . ."); Simons v. Payne, 2 Root 406, 407 (Conn. Super. Ct. 1796) ("The parties have an interest in the testimony of the witnesses, and a witness by his own voluntary act, shall not deprive him of it.").

a witness whose interest in the case was adverse to the calling party's interest (*i.e.*, a party who sought to waive the disqualification rule).

The problem of testimony against interest caused considerable confusion. Some treatise writers either glossed over the problem by simply stating that the witness disqualification rule was a per se rule applying to interested witnesses regardless of whether the testimony favored or disfavored the witness's interest.[102] Several courts, however, resolved the dilemma of whether an adverse party could waive the disqualification rule by holding that when an interested witness was called by the party whose interests opposed the witness's, the party would be allowed to waive the disqualification rule. In *Connor v. Bradey*,[103] a New York appellate court held that a party could waive the disqualification rule when the witness's interest opposed the party's.[104] *Connor* was an action on a promissory note, against which the defendant set up a defense of usury. When the defense in *Connor* called the unnamed real plaintiff in interest to prove that the note was usurious, counsel for the nominal plaintiff objected on the ground that, as the real plaintiff, the witness was interested in the outcome of the suit and thus incompetent to testify under the rule of disqualification for interest.[105] The defense, however, responded that because "this interest would operate in favor of the plaintiff and against the defendant," the defendant might waive the objection.[106] The court agreed and "allowed the witness to be sworn."[107] Under the theory of the *Connor* court, parties could be trusted to self-regulate when calling witnesses whose interests were opposed to theirs.[108]

But the *Connor* court did not stop there. Once the real party in interest was sworn as a witness, the court allowed him to decline to answer questions, citing his "interest[] . . . in the contract from the beginning."[109] The *Connor* court thus allowed a party to waive the disqualification rule, but also permitted the interested witness to invoke the witness privilege to defeat the party's waiver. By allowing the witness to invoke his interest to refuse to answer specific questions, the court collapsed much of the distinction between the witness privilege and the rule

---

102. *See, e.g.*, OLIVER L. BARBOUR, THE MAGISTRATE'S CRIMINAL LAW 380-81 (New York, Gould & Co. 1841) ("It is a general rule of evidence, not to admit the testimony of a witness who is to be a gainer or loser by the event of the cause . . . ."); 2 ESPINASSE, *supra* note 41, at 708-09.

103. 1 Ant. N.P. Cas. 135 (N.Y. Sup. Ct. 1809).

104. *Id.* at 136.

105. *Id.* at 135.

106. *Id.*

107. *Id.*

108. *See id.* at 136; *see also* Baird v. Cochran, 4 Serg. & Rawle 397, 399 (Pa. 1818) (holding that when a witness's interest was aligned with the plaintiff's, the witness was not disqualified when the plaintiff objected to the witness's competence because the "plaintiff . . . could have no reason to object to his testimony").

109. *Connor*, 1 Ant. N.P. Cas. at 100.

of disqualification for interest. The disqualification rule was no longer a per se incompetence rule, but the witness privilege was broad enough to cover testimony against the witness's civil interests.

3. Zephaniah Swift and the Conflation of the Witness Privilege and the Disqualification Rules.—The *Connor* court did not completely collapse the distinction between the witness privilege and the interested witness disqualification rule. Under *Connor*, the disqualification rule was waivable by a party, whereas the witness privilege was waivable by the witness. A different approach to the problem of testimony against interest, however, wholly dissolved the distinction between the two rules. Under this theory, the disqualification rule was waivable not by an adverse party, but by the witness himself. Accordingly, an interested witness could testify willingly against his interests but could not be compelled to do so.

Connecticut jurist Zephaniah Swift was the most articulate advocate of this last approach to the problem of interested witness testimony against interest. Swift had written on the law of evidence in some detail as early as 1796 in Volume Two of his six-volume treatise, *A System of the Laws of the State of Connecticut*,[110] and he subsequently expanded this treatment in his 1810 publication, *A Digest of the Law of Evidence*.[111] Like his contemporaries, Swift maintained that a witness was disqualified for an interest in the lawsuit. He argued that even "if the interest be ever so trifling, provided it be certain, it shall prevent a person from being a witness."[112] For Swift, however, the rule of disqualification for interest was not an absolute prohibition on the testimony of interested persons. Swift clarified that a "person may be admitted voluntarily to testify against his interest, but cannot be compelled."[113]

According to Swift, the rule of disqualification for interest extended only to testimony consistent with the interest of the witness. Witnesses testifying against interest, Swift believed, were not disqualified; they could testify voluntarily, but could not be compelled to testify.[114] In Swift's formulation, the witness privilege and the noncompellability aspect of the disqualification rule were intertwined. Both protected witnesses, not parties, and both were invocable only by the witness.[115]

---

110. 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 233-60 (Wyndham, Conn., John Byrne 1796).

111. SWIFT, *supra* note 49.

112. SWIFT, *supra* note 110, at 241.

113. *Id.*

114. *See id.* Gilbert appears to have supported a similar position on self-defeating interested witnesses: "[I]f a man's swearing for his Interest can give no Credit, he must certainly give most Credit when he swears against it." GILBERT, *supra* note 83, at 99.

115. Swift made this association between the disqualification and witness privilege rules explicit in his 1810 *Digest*. In his treatment of unwritten evidence, which took up most of the book, he first set out the rules relating to witness disqualification "for want of understanding," for religious nonbelief,

For Swift, then, the rule that a witness was disqualified on account of interest did not mean that the witness was wholly incompetent to testify; rather, it meant that no party could force the witness by process of the court to testify against his own interest. Swift reasoned that this principle of witness testimony was made clear by analogy to the testimony of parties:

> It is clear that no party in a suit can be compelled to produce evidence against himself, and the Courts will not grant leave to a stranger, to inspect the books of a corporation, to obtain evidence in his own favour against them. It would be extraordinary to say, that a man may be called as a witness in a suit to which he is no party, and be compelled for the benefit of one of the parties, litigant to disclose a fact, which might subject him to a civil action, when the parties themselves cannot be called upon . . . . It would seem the doctrine, that a party cannot be compelled to produce evidence against himself, must be abandoned, if a witness can be compelled to testify against his interest.[116]

Parties could not be compelled to testify against themselves; neither could they testify in their own favor. Swift thought it would be absurd to say that an innocent third party could be called into an ongoing suit and forced to give testimony that could subject him to a civil action so long as the parties themselves were not compellable to do the same:

> Though a witness voluntarily testifying against his interest, unless he has some other counter-balancing motive, will be entitled to credit; yet if he is compelled to do it, he is placed under such a strong bias, and inducement to prevaricate, that the law will not expose human frailty to so dangerous a temptation.[117]

There were two sides of the disqualification rules. On the one hand, the disqualification rules precluded a witness from testifying on behalf of his own interest. On the other hand, they prevented a witness from being compelled to testify against his own interest. If one side of the witness disqualification rule served to prevent witnesses from testifying even if they wanted to, the other side of the rule was functionally indistinguishable from the witness privilege.[118]

---

for infamy on account of criminal conviction, and for interest. SWIFT, *supra* note 49, at 44, 44-73. Swift then moved on to discuss "persons admitted to testify against their Interest." *Id.* at 44, 77-81. As in 1796, Swift wrote that a witness was not "compellable to testify against his interest, or to answer any question that will render him liable to an action, charge him with a debt, or subject him to a penalty or forfeiture." *Id.* at 77. He clarified, though, that a witness "may voluntarily testify against his interest, in which case he is considered to be the best witness that can be had, and no objection can be made to him by either party." *Id.*

116. *Id.* at 79.

117. *Id.*

118. Swift made the connection between the witness privilege and the rule of disqualification for interest abundantly clear when he placed the "unquestionable maxim in criminal cases, that no man is

4. The Impact of the Conflation of the Common-Law Witness Privilege and the Disqualification Rules.—When the disqualification rule was understood to give the witness the option of whether or not to testify against interest, it was easily assimilable to the witness privilege. The proposition that an interested witness was not incompetent to testify against his interest but could himself decline to give such testimony made its way into the law of Connecticut[119] and New York,[120] as well as the federal common law.[121] Moreover, Swift's association of the witness privilege and the disqualification rule was adopted by the prominent American jurist Simon Greenleaf, who closely associated the maxim *nemo tenetur* with the third-party interested witness disqualification rule[122]—so much so that he led future scholars to suggest he was deeply confused about the relation between the two.[123]

Furthermore, the connection between the rule of disqualification for interest and the witness privilege serves to explain the shape of the witness privilege in the early nineteenth century. As this Article has sought to establish, the late-eighteenth- and early-nineteenth-century witness privilege was common law rather than constitutional law.[124] In this respect, the association of the witness privilege with the common-law rule of disqualification for interest helped to preserve the common law as opposed to constitutional status of the witness privilege. The doctrinal difficulty that occupied treatise writers and courts during the earliest years of the nineteenth century was not the relationship between the witness privilege and

---

bound to criminate himself: *Nemo tenetur seipsum accusare*," under the heading "*Of persons admitted to testify against their Interest.*" *Id.* at 77, 77-79.

119. *See* Starr v. Tracy, 2 Root 528, 528-29 (Conn. Super. Ct. 1797); Simons v. Payne, 2 Root 406, 407 (Conn. 1796).

120. *See* Jackson v. Myers, 11 Wend. 533, 537 (N.Y. Sup. Ct. 1834) (conceding that the plaintiff might have called a witness who was a "party in interest" even though the witness's "interest was against [the plaintiff]," but noting that "such [a] party in interest could not be compelled to testify" and that the party in interest "was not a competent witness for the defendant" with whom his interest was aligned); Mauran v. Lamb, 7 Cow. 174, 177 (N.Y. Sup. Ct. 1827) (ruling that a party directly interested in a case involving debt could not be compelled to testify against her interests); People *ex rel* McCall v. Irving, 1 Wend. 20, 21 (N.Y. Sup. Ct. 1828) (holding that "[a] party in interest cannot be compelled to testify without his consent" and asserting that to allow compulsion of parties without their consent "might lead to great abuses").

121. *See* Carne v. McLane, 5 F. Cas. 89, 89 (C.C.D.C. 1806) (No. 2,416) (ruling that when a defendant calls a witness who is a partner of the plaintiff and the witness objects "to being sworn for the defendants, because interested as a partner with the plaintiffs," the court will not "compel him to swear contrary to his interest").

122. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 330 (Boston, Little & Brown 1842).

123. *See* Smith, *supra* note 25, at 149, 150 (arguing that Greenleaf was "not so careful" in his approach to the distinction between the witness privilege and the disqualification rule and that his conflation of the two was "novel").

124. *See supra* note 33 and accompanying text.

the constitutional self-incrimination clauses, but rather the relationship between the witness privilege and the rule of disqualification for interest.

We have also seen that the late-eighteenth- and early-nineteenth-century privilege encompassed testimony that was against a witness's civil interests or exposed him to moral disgrace.[125] In cases such as *Connor* and for treatise writers such as Swift, the conflation of the two rules supported a broad witness privilege encompassing testimony that was against a witness's civil interests or that indicated moral disgrace, in addition to testimony that was self-incriminating.[126] Indeed, the disqualification-rule doctrine that a witness was incompetent to testify against his civil interests was easily rearticulated as a privilege doctrine allowing the witness to invoke a privilege against so testifying.

Similarly, for those who interpreted the witness privilege as a per se bar on self-damaging testimony, the interested witness who was precluded from testifying—willingly or otherwise—could just as well be said to have possessed an unwaivable privilege from testifying against his interest. Even the transactional scope of the early-nineteenth-century privilege can be explained by reference to the theory of the disqualification rules. For so long as a witness feared that his testimony might lead to his subsequent prosecution, that testimony—like the testimony of an interested witness—would be compromised and subject to the pressures of the witness's self-interested motives.

Yet if the peculiar shape of the early nineteenth-century witness privilege is rooted in its relationship to the disqualification rules, the relationship between disqualification for interest and the witness privilege ultimately contributed to the constitutionalization of the witness privilege. For as lawyers, courts, and legislatures began to question the disqualification rules, the witness privilege, too, came under considerable criticism from those who saw the disqualification rules as obstacles to fact-finding in the common-law trial. As a result, the protective shell of common-law rules that had insulated the constitutional self-incrimination clauses began to be chipped away. And the contraction of these common-law rules forced courts and commentators alike to articulate for the first time the relationship between the constitutional self-incrimination clauses and the common-law witness privilege.

---

125. *See supra* subpart II(B).

126. Swift wrote that "a witness is not bound to answer questions, the direct object and immediate tendency of which are to degrade, disgrace, and disparage the witness, and shew his turpitude and infamy." *See* SWIFT, *supra* note 49, at 79-80.

IV. The Transformation of Common-Law Fact-Finding and the Narrowing of the Common-Law Witness Privilege

A. The Transformation of the Law of Evidence, 1780-1850: The Decline of the Disqualification Rules and the Rise of Cross-Examination

A new approach to fact-finding established itself in common-law courts during the nineteenth century. Courts shifted away from reliance on oaths and disqualification rules and moved toward an approach centered on allowing juries to make credibility determinations with the aid of lawyers' cross-examinations of witnesses.[127] Prior to the critical decades at the turn of the nineteenth century, the common law of evidence was characterized by (1) a focus on written evidence, (2) the exclusion of a great deal of unwritten evidence through the disqualification rules, and (3) a heavy reliance on the power of oaths.[128] Around the turn of the century, however, lawyers and judges began to reorganize the law of evidence around the practice of examination and cross-examination by counsel.[129] At bottom, this transformation appears to have been driven by the increased presence of lawyers in common-law proceedings, especially criminal cases, and the newly aggressive tactics of examination and cross-examination that lawyers developed in the late eighteenth century.[130] As

---

127. *See* C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND 14 (1997) (arguing that "[t]he main problem" of nineteenth-century evidence law is accounting for the shift from "the old exclusionary rules about competency of witnesses" to the "exclusionary, rule-based system that began to govern testimony given in court").

128. *See* Langbein, *supra* note 89, at 1172 (arguing that "the central event in the formation of modern law of evidence was the rapid development of adversary criminal procedure in the last quarter of the eighteenth century"). Scholarship on the history of the law of evidence has long viewed the late eighteenth and early nineteenth centuries as the period from which the vast majority of the rules of evidence derived. *See* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127 (3d ed. 1944); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 2 (Boston, Little Brown & Co. 1898); John Henry Wigmore, *A General Survey of the History of the Rules of Evidence*, *in* 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 694-96 (Ernest Freund et al. eds., 1908). For Wigmore, however, the "spring-tide" of evidentiary rules in the late eighteenth century was the product not so much of changes in the law of evidence as it was the result of changes in the legal literature. According to Wigmore, the appearance of *nisi prius* reports after 1790 generated a medium for the formal establishment of rules of evidence. The new report literature created a "sudden precipitation of all that had hitherto been suspended in solution." Wigmore, *supra*, at 696. The claim of the more recent scholarship, however, is that the emergence of a welter of new evidentiary rules was not "a mere illusion of the historical record," but rather an important turn in the theory and practice of the common-law trial. Langbein, *supra* note 89, at 1172.

129. *See* TWINING, *supra* note 89, at 37; *see also* Langbein, *supra* note 89.

130. *See* Langbein, *supra* note 89, at 1201-02. Other candidates for the cause of the shift in the law of evidence include the influence of Jeremy Bentham's withering, if endlessly repetitive, critiques of the common-law rules of evidence, and the rise of an ostensibly democratic political culture in Jacksonian America. Bentham's role is discussed below, but I see him more as an important player in an already-present trend toward the liberalization of the law of evidence. As George Fisher notes, the argument from Jacksonian democracy is undermined by the shift away from rigid rules of evidence in English practice during these years. *See* Fisher, *supra* note 83, at 661. Fisher discounts the

lawyers came to dominate the common-law trial, the modern law of evidence developed, centered on the practice of cross-examination, with exclusionary rules based on the model of the hearsay rule; "[c]ross-examination replaced oath as the fundamental safeguard for the receipt of oral evidence, defeating the competency regime that had disqualified the parties for interest, and allowing the hearsay rule to assume its ultimate character."[131] Although English treatise writers of the early nineteenth century continued to cite Gilbert with apparent approval, treatises tended more and more to adopt an approach that placed lawyers, cross-examination, and oral testimony, rather than witness disqualification, at the center of the common-law trial.[132] In American practice, the lawyers' literature of the Early Republic similarly reconceptualized the role of the lawyer in the common-law trial. William Wyche of New York, author of a late-eighteenth-century treatise on New York practice, strongly supported careful evaluation of the credit of a compromised witness rather than disqualification. According to Wyche, "[i]t has been the unanimous and rational inclination of great judges, in modern times, to confine the objection to the credit, instead of the competency of witnesses, leaving the

---

"lawyerization" argument, countering that even though lawyers do not appear to have played a significant role in criminal trials prior to the 1780s, there is no good reason to think that they did not play an important role in civil trials. *Id.* at 660-61. If they did, Fisher's argument reasons, the law of evidence could have relied more heavily on lawyers' cross-examinations long before the nineteenth century. *See id.* at 661. Based on the evidence that I have seen, however, the new factor in common-law trials was the emphasis on cross-examination as a means of sifting through contradictory testimony. As explained in the following discussion, practitioners' manuals and periodicals placed new emphasis on cross-examination and the lawyer's role in furthering the fact-finding process. *See infra* notes 132-38 and accompanying text.

131. Langbein, *supra* note 89, at 1194 (citations omitted). To be sure, the nineteenth-century approach to the law of evidence was not completely new; characteristics of the eighteenth-century approach to the law of evidence persisted well into the nineteenth century. *See, e.g.*, *Testimony of Quakers*, 1 AM. JURIST & L. MAG. 141, 141-42 (1829) (framing the law of evidence, much as Gilbert had, as "a wid[e] field for moral and philosophical disquisition"); *see also* TWINING, *supra* note 89, at 71-72 (emphasizing continuity in common-law approaches to the law of evidence since the eighteenth century).

132. In particular, writers like Thomas Peake and William David Evans, expanded greatly upon Gilbert's central focus on the best evidence rule as the principle that explained the law of evidence. *See* TWINING, *supra* note 89, at 42-46. Peake, for example, noted that he had needed to completely revise Gilbert on oral testimony because "the rules of evidence in this respect have been so much altered, and so much light has been thrown on them by modern decisions, that, comparatively, little is to be collected from ancient books that is satisfactory on the subject." PEAKE, *supra* note 51, at xi. Peake noted that "*competence* and *credibility*," which had been "so frequently confounded together," were now, thanks to Mansfield, "accurately defined, and well understood." *Id.* (emphasis in original). Similarly, Espinasse remarked in 1801 that in recent years "great light has been thrown upon the distinction between interest which affects the competency of a witness, and influence which only goes to his credit." 2 ESPINASSE, *supra* note 41, at 710; *see also* R.J. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS app. 128-33 (William David Evans trans., 1826) (discussing the best evidence rule and emphasizing the difference between questions of admissibility and weight), *discussed in* TWINING, *supra* note 89, at 44.

question of their veracity open to such observations as the superior wisdom and experience of the court may justly inforce."[133] Placing his faith in a fact-finder's in-court observations, Wyche was deeply distrustful of the system of disqualification rules and oaths with which the common-law trial had sought to make determinations of fact.[134]

Zephaniah Swift represented a more halting and uncertain transition to the new, lawyer-driven approach to the law of evidence. Swift equivocated between distrust of innovations in the common law and a new instrumentalist approach to judging that freely disowned established rules of law when convenience so dictated.[135] In 1810 Swift wrote:

> The rules of evidence are of an artificial texture, not capable in all cases of being founded on abstract principles of justice. They are positive regulations founded on policy; and though they do not profess to be always able to arrive at the truth, and must admit

---

133. WILLIAM WYCHE, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS 159 (2d ed. New York, T. & J. Swords 1794).

134. In Wyche's view, truth was best determined by allowing the finder of fact to observe witnesses under oral examination and cross-examination. *Id.* at 161-62. Wyche had a concern for the truthfulness of a witness's testimony while under oath, a concern that Gilbert, with his reliance on the oath to generate factual testimony, did not share. Wyche saw that even well-intentioned witnesses were prone to error. "The imperfection of man," Wyche wrote, "will frequently render him liable to deception." *Id.* at 160. "[F]acts are too often seen through a jaundiced eye." *Id.* Thus, Wyche argued, in gauging the credibility of witnesses, the mere fact of the oath is insufficient. Instead, "it is expedient to discuss the opportunities which the witness had of making just observations, and his condition, circumstances, and temper of mind, at the time to which his evidence relates." *Id.* By way of illustration, Wyche recounted the story of "a servant of the Portuguese ambassador [who] was seized and ill treated by the populace [because] a substantial citizen [was] ready to depose, that he saw him throw a fire ball into a house, which instantly burst into flames." *Id.* at 160 n.†. After being confronted with the charge, however, the servant explained that he had merely been following Portuguese custom in returning a piece of bread that had been lying in the street to the shop next door to the house that had burst into flames. When the servant's story checked out, he was released. *See id.* Wyche chalked the episode up to "an easy mistake, the witness being on the other side of the way, and intent on having the supposed criminal secured; to which we may add, that the consternation occasioned by that portentous calamity would prevent an accurate observation." *Id.*

135. At times, Swift adopted a view that welcomed the overruling of "inconvenient" or "unreasonable" rules. 1 SWIFT, *supra* note 110, at 46, 47. Indeed, Morton Horwitz has argued that Swift led the way in the establishment of a new instrumentalist approach to the law in early-nineteenth-century America that freely disowned inconvenient rules. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 23, 25-26 (1977). Yet Swift also argued that "departure from well known, and established rules," could require courts subsequently to "retrac[e their] steps, and recur[] to original principles." SWIFT, *supra* note 49, at viii. Swift wrote that,

> [t]hough in some cases at first view, it might seem that a more perfect rule than the Common-law might be adopted; and this has sometimes seduced Courts to depart from it; yet when such new rule came to be traced through all its consequences, and applied to the various cases that occurred, the wisdom of the Common-law has soon been discovered, and generally acknowledged. It is extremely difficult at a single view, to foresee all the consequences of a new principle. Of course, it is the safest method to follow the guide of experience where it can be found.

Id.

> testimony which may be doubtful, and reject that which, in the ordinary occurrences of life, might be relied on . . . .[136]

Swift conceded that, despite its faults, the common law of evidence "undoubtedly furnish[ed] the best criterion to ascertain the truth of facts, consistent with the nature of human testimony."[137] Nonetheless, he advocated narrowing the scope of the witness disqualification rules as a reform calculated to improve upon the common law's fact-finding capacities.[138]

Jeremy Bentham presented the critique of eighteenth-century evidence law in its most radical form. Bentham's role in instigating changes in the law of evidence has been questioned in recent years.[139] In particular, as C.J.W. Allen has observed, accounts of the development of evidence law that focus on Bentham's influence have difficulty explaining the rise of the hearsay rule that Bentham vehemently opposed.[140] Nevertheless, although English jurists such as Mansfield, some of the early English treatise writers, and Americans like Swift and Wyche manifested some amount of discomfort with the common-law disqualification rules, it was Bentham who first set out to systematically demolish the whole of the eighteenth-century law of evidence.[141]

For Bentham, the law of evidence, with its hard-and-fast disqualification rules, was an unmitigated disaster.[142] In the practice of everyday life, after all, decision-makers would hardly undertake to evaluate evidence without considering all the relevant data. But this was precisely what the exclusionary rules of the common law provided for. In everyday decision-making, Bentham observed, "[e]vidence is the basis of justice; exclude

---

136. SWIFT, *supra* note 49, at xi.

137. *Id.*

138. *See id.* at 47-51, 53-54.

139. *See generally* ALLEN, *supra* note 127 (arguing that Bentham's influence on the nineteenth-century law of evidence has been exaggerated). Allen suggests, however, that Bentham's influence may have been greater in the United States than it was in England. *See id.* at 10-11.

140. *See id.* at 21-23, 181-86. For examples of the approach that places Bentham at the center of the story, see A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 168, 171 (2d ed. 1914) ("Benthamism exactly answered the immediate want of the day."); H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 21, 31 (1982) ("Bentham's attack inspired the great statutory reforms of the law of evidence of 1843, 1851, and 1898 . . . ."); 13 HOLDSWORTH, *supra* note 128, at 42 (approving Lord Henry Brougham's statement that "the age of law reform and the age of Jeremy Bentham are one and the same").

141. Bentham's primary writings on the law of evidence were written between 1802 and 1812, but not published in English until the 1820s. *See* ALLEN, *supra* note 127, at 18; WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 189 (1985).

142. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (London, Hunt & Clarke 1827) [hereinafter BENTHAM, RATIONALE] (discussing the problems flowing from improper exclusions of evidence); JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 4 (M. Dumont trans., London, J.W. Paget 1825) [hereinafter BENTHAM, TREATISE] (characterizing evidence law as a "fixed design" of "expenses, delays, and vexations").

evidence, you exclude justice."[143] Thus, according to Bentham, "with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded."[144]

American rhetoric in opposition to the disqualification rules existed prior to the English publication of Bentham's writings on the law of evidence. As early as 1805, a bold law reform pamphlet written by Philadelphian Jesse Higgins criticized the rule of disqualification for interest as "expos[ing] to full view the prodigious evil of our jurisprudence, to shew the absurdity of common-law, and to suggest a competent remedy for that evil by a reform."[145] But in the 1830s the vehemence of the attacks on the disqualification rules increased as Bentham's influence made itself evident in the pages of American legal journals.[146] Employing arguments Bentham had advanced, an outpouring of articles picked apart the disqualification rules.[147] Disqualification, it was argued, encouraged

---

143. 5 BENTHAM, RATIONALE, *supra* note 142, at 1.

144. 1 *id.* at 1.

145. ANON. [JESSE B. HIGGINS], SAMPSON AGAINST THE PHILISTINES, OR THE REFORMATION OF LAWSUITS AND JUSTICE MADE CHEAP, SPEEDY, AND BROUGHT HOME TO EVERY MAN'S DOOR: AGREEABLY TO THE PRINCIPLES OF THE ANCIENT TRIAL BY JURY, BEFORE THE SAME WAS INNOVATED BY JUDGES AND LAWYERS, at iv (2d ed. Philadelphia, B. Graves 1805). The difficulty in common-law proceedings "of getting at the truth in court," claimed Higgins, explained the expense and delay plaguing the court system; the rules of the common law were "so contrived as to cut off the very means of getting at the truth." *Id.* at 37. In place of the "intolerable expense, delay, and uncertainty of lawsuits" at common law, *id.* at 38, Higgins proposed a system modeled on the principles of arbitration, in which the fact-finding inquiry would be unhampered by arcane restrictions and exclusions. *Id.* at 31. "[T]he natural and sure way to get out the truth [was] by questioning the parties, and letting them altercate and question each other . . . ." *Id.* at 38. Higgins thus echoed Sir Thomas Smith's famous line from the sixteenth century, "and so they stand a while in altercation." SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1565). The *Sampson* pamphlet, which advocated a wide array of law reforms including codification, is indicative of the extent to which reform in the law of evidence was linked to antebellum law reform generally, and codification in particular.

146. Bentham's influence is palpable in the arguments advanced by the journal articles against the disqualification rules. Just as evident, however, is a certain hesitation to invoke the controversial Bentham by name. An *American Jurist* article advocating the abolition of the disqualification rules stated: "Some distinguished names might be mentioned in support of the principles contended for in this examination, but they are purposely omitted . . . ." *Testimony of Persons Interested in a Suit*, 3 AM. JURIST & L. MAG. 20, 26 (1830).

147. *See, e.g.*, *Competency of Parties as Witnesses for Themselves*, *in* LAW REFORM TRACTS No. 4, at 1 (New York, John S. Voorhies 1855) (decrying the lack of a rationale for the party disqualification rule); *The Evidence of Parties*, 14 MONTHLY L. REP. 229, 229 (1851-52) (arguing that the disqualification rule was "inconsisten[t]" and "absurd[]"); *Of the Disqualification of Parties as Witnesses*, 5 AM. L. REG. 257, 267 (1857) (arguing that many of the disqualification rules should be abolished); *On the Competency of Witnesses*, 3 AM. L. MAG. 333, 350-51 (1844) (noting that with the advent of the jury system reliance on the exclusionary rules is inappropriate and that judges should strive to "open the doors as wide as possible to all facts calculated to assist in attaining equal justice in the controversy"); *Rules of Evidence (No. III)—Incompetency of Witnesses from Interest*, 6 AM. JURIST & L. MAG. 18, 22, 44 (1831) (promoting the adoption of rules allowing interested witness testimony);

fraud, offered a "bounty . . . to the dishonest,"[148] exempted wrongdoing individuals from "liabilities to which they ought to be subject,"[149] and rested on an implausible view of the impact of interest on a witness's veracity.[150] Above all, for the journal writers (as for Bentham) the disqualification rules obstructed the "discovery of truth."[151]

Bentham's role appears to have been to supply a rhetoric that could be put to use in promoting an independently existing opposition to the disqualification rules. As a means of furthering fact-finding in the common-law trial, the journals were considerably more sanguine than Bentham about the role of lawyers. In Bentham's view, lawyers were at the heart of the problem.[152] But according to *The American Jurist and Law Magazine* in 1838, the lawyer alone had both the professional skill and the incentive to draw out the truth from witnesses. "To elicit the whole truth, requires skill, power, and adequate motive. Effective, successful interrogation is the work of labor, and will never be undertaken except when some duty requires it."[153] Just a few years later, American legal periodicals were widely reprinting a short article titled "Golden Rules for the Examination of Witnesses." The article offered the practitioner a series of tips for drawing testimony out of witnesses at trial: "Except in indifferent matters, never take your eye from that of the witness . . . . Be mild with the mild—shrewd with the crafty—confiding with the honest—merciful to the young, the frail or the fearful—rough to the ruffian, and a thunderbolt to the liar."[154] Above all, the focus was on both the capacity and, indeed, the responsibility of the lawyer to cut through obfuscatory testimony by means of effective examination techniques.[155]

Rules of Evidence (No. IV)—Incompetency of Parties as Witnesses at Common-Law, 8 AM. JURIST & L. MAG. 1, 45 (1832) (calling for the clarification of common-law principles governing when a court can compel a witness to testify); *Rules of Evidence (No. VI)—Admission of Parties in Criminal Procedure*, 13 AM. JURIST & L. MAG. 50, 72 (1835) (asserting that a criminal defendant "should be examined, unless guilt on his part, or imbecility on the part of the judge, should be considered as affording valid grounds of exemption"); *Testimony of Persons Interested in a Suit*, *supra* note 146, at 23 (urging courts to "admit persons as competent witnesses on trial, although interested in the event of the cause" (emphasis omitted)).

148. *Rules of Evidence (No. IV)—Incompetency of Parties as Witnesses at Common-Law*, *supra* note 147, at 6.

149. *Rules of Evidence (No. III)—Incompetency of Witnesses from Interest*, *supra* note 147, at 43-44.

150. *See Testimony of Persons Interested in a Suit*, *supra* note 146, at 22-23.

151. *Id.* at 20.

152. *See* TWINING, *supra* note 141, at 75-79.

153. *Hearsay Evidence and Confessions or Admissions of the Party*, 20 AM. JURIST & L. MAG. 68, 73 (1838).

154. David Paul Brown, *Golden Rules for the Examination of Witnesses*, 2 PA. L.J. 174, 175 (1843). The article was reprinted in 10 LAW REP. 475 (1848), published in Boston.

155. "Falsehood," Brown reminded the novice lawyer, "is not detected by cunning, but by the light of Truth . . . ." Brown, *supra* note 154, at 175. Brown conceived of the lawyer as nothing short of the nineteenth-century ideal of the artist-as-creator. Brown ventured that:

By the late 1850s, oral examination by lawyers was seen as far and away the best means of sorting through competing narratives and arriving at determinations of fact.[156] The editors of the *American Law Register* argued that cross-examination was nothing less than "the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals."[157] In the words of the editors of the *Monthly Law Reporter*, the "searching" questions of the effective cross-examiner "pursue[d] the dishonest and reluctant witness through the mists of indistinctness, the errors of incorrectness, the omissions of incompleteness, the evasions of dishonesty, or the falsehoods of intentional mendacity."[158]

B. *Critique and Abolition of the Rules of Disqualification for Interest*

The new focus on cross-examination as the best method for determinating facts was in considerable tension with the common law's traditional reliance on disqualification rules to keep compromised testimony out of the fact-finding process. As a result, courts began to admit the testimony of witnesses who had previously been disqualified. Massachusetts allowed atheist testimony as early as 1818;[159] Michigan became the first state to abolish the rule of disqualification for interested nonparty witnesses in 1846;[160] and Connecticut led the way in admitting civil parties in 1848.[161] The rule disqualifying criminal defendants from being witnesses

---

> [t]he trial of a cause may be aptly compared to the progress of a painting—you first lay your ground-work, then sketch your various figures, and finally, by the power and colouring of argument, separate them, or group them together, with all the advantages of light and shade.

Id. at 176. Or maybe, Brown speculated, the lawyer was best compared to the composer: "[P]erhaps, it may more justly be likened to a complicated piece of music, wherein a single false note may destroy the entire harmony of the performance." *Id.* Either way, as painter or composer, the lawyer was playing a critical role in the common-law proceedings, crafting them virtually from scratch in a solo performance that, at its best, could rise to virtuoso proportions. *See id.* at 175-76.

156. Excoriating the practice of eliciting testimony by written interrogatories in equity, the *Monthly Law Reporter* trumpeted cross-examination as unquestionably the best truth-detecting institution. "Oral interrogation and cross-interrogation . . . [is] the only proper and most efficient mode of extracting the truth from unwilling, willing or indifferent lips . . . ." *Examination of Witnesses in Equity*, 21 MONTHLY L. REP. 705, 707 (1859). "So miserably, so deplorably inefficient [was] the chancery mode of examining witnesses, that the shrewdest solicitors never cross-examine a witness . . . ." *Id.* at 711. The *Law Reporter* was not contrasting cross-examination with the disqualification rules, but in its praise of cross-examination as opposed to interrogatories in chancery, it made clear the central place that cross-examination had come to hold in the fact-finding process.

157. *Of the Disqualification of Parties as Witnesses*, *supra* note 147, at 263-64. The passage is a striking anticipation of Wigmore's famous aphorism. *See* 5 WIGMORE, *supra* note 87, § 1367, at 32 ("[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.").

158. *Examination of Witnesses at Common Law*, 22 MONTHLY L. REP. 577, 580 (1860).

159. *See* Hunscom v. Hunscom, 15 Mass. (13 Tyng) 184, 184 (1818).

160. 22 MICH. REV. STAT., ch. 102, § 99 (1846).

161. An Act for the Regulation of Civil Actions (adopted June 27, 1848) (codified at CONN. REV. STAT., tit. I, ch. x, § 141 (1849)). On the abolition of the disqualification rules see generally Joel N.

in their own trials lasted somewhat longer than the rule of disqualification of interested witnesses and parties in civil cases,[162] in large part because opponents of the reform reasonably feared that the incentive to commit perjury was greater in criminal trials.[163] But by the 1850s, the entire array of disqualification rules silencing potential witnesses that had characterized the law of evidence at common law came to be seen by many as highly anachronistic; by the 1880s the whole panoply of disqualification rules had collapsed.

Indeed, the disqualification rules had become the butt of jokes about the legal system. Dickens, whose scathing critique of chancery practice in *Bleak House* stands to this day as the paradigm *reductio ad absurdum* of legal technicality, was said to have written that the introduction of examination of the parties was "a death-blow given to humor. Nothing can be more humorous than to make a solemn pretense of inquiring into the truth, and exclude the two people who, in nine cases out of ten, know most about it."[164] Common-law practice, then, must have been growing

---

Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91 (1981-82).

162. In 1864, Maine became the first state to abolish the rule disqualifying criminal defendants; other states soon followed, led by California, Massachusetts, South Carolina, and Vermont in 1866. By 1869, 12 states had abolished the disqualification rule for criminal defendants. By 1900, only Georgia retained the rule. *See* Ferguson v. Georgia, 365 U.S. 570, 577 & n.6 (1961); Bodansky, *supra* note 161, at 92-93; Fisher, *supra* note 83, at 658, 668. Fisher has noted a fascinating geographical pattern in the abolition of the disqualification rules. Almost universally, they were abolished in the North before they were abolished in the South. Fisher argued persuasively that the politics of slavery and abolition functioned as "triggers" in the abolition of criminal defendant disqualification rules in Northern states. Northern states, the argument goes, were compelled to admit criminal defendants' testimony to ward off charges of hypocrisy in their opposition to racial disqualification rules in the South. *See id.* at 584. Although this same racial dynamic cannot explain the abolition of the witness and civil party disqualification rules in the North, it can explain the lag between most Northern and Southern states' abolition of the civil party and witness rules. When a Southern state abolished its rule against civil party testimony, it faced an intractable dilemma: It had to decide what to do with cases involving black parties. Allowing blacks to testify against whites did not seem acceptable, but neither did allowing a white party to testify against a black party who was prevented from doing so. *See id.* at 673-74. Rather than face this dilemma, Fisher argued, Southern states simply declined to end the civil party disqualification. *See id.* at 674.

163. *See* Bodansky, *supra* note 161, at 107-11. Fisher argued in addition that the greater incentive for a defendant to perjure himself in a criminal trial posed a greater threat to the integrity of the oath. *See* Fisher, *supra* note 83, at 663-64. The lag between the abolition of the rules disqualifying interested witnesses and parties in civil trials and the abolition of the rules disqualifying criminal defendants proved to be important in determining the route by which the constitutional self-incrimination clauses came to have meaningful roles in American common-law trials. Self-incrimination concerns were voiced by the opponents of admitting criminal-defendant testimony. *See Ferguson*, 365 U.S. at 578; 2 WIGMORE, *supra* note 81, § 579, at 828; Bodansky, *supra* note 161, at 115-17. If criminal defendants had been made competent to testify on their own behalf in the 1840s or 1850s, the first flurry of constitutional litigation would most likely have taken up the question of whether the constitutional self-incrimination clauses barred criminal defendant testimony altogether.

164. This quotation was attributed to Dickens by the anonymous author of an 1855 law reform tract. *See Competency of Parties as Witnesses for Themselves*, *supra* note 147, at 1.

painfully boring for Dickens. As a decision reprinted in New Yorker John Livingston's *Monthly Law Magazine* in 1854 stated:

> [t]he whole tendency of modern decisions is to relax the strict rules of evidence, with a view to lay every thing before courts and juries, which ought to have an influence upon the cases before them, and to leave the objections, as much as is possible . . . to the credit of the testimony and witnesses.[165]

The passage reprinted by Livingston may have overstated the extent to which the nineteenth-century law of evidence presented juries with all available evidence: Even as the common law of evidence was abandoning the rule of disqualification for interest, after all, it was developing the modern hearsay exclusion rule.[166] But this oversight notwithstanding, the rule of disqualification for interest was being eclipsed in the era of lawyerized common-law proceedings.[167]

C. Narrowing the Common-Law Witness Privilege

In the same years in which courts and commentators began to change the way they thought about the disqualification rules and the law of evidence more generally, the witness privilege contracted in several important respects. Courts and treatise writers, who placed new emphasis on the benefits of oral examination and cross-examination, were increasingly skeptical of the disqualification rules that kept probative evidence out

---

165. *Condensed Reports of Recent Cases. Evidence—Impeachment of Witness*, 2 LIVINGSTON'S MONTHLY L. MAG. 595, 596 (1854) [hereinafter *Condensed Reports*] (reprinting State v. Parker, 7 La. Ann. 83, 86 (1853)). One clear example of the shift in emphasis away from rules designed to admit only reliable evidence is evident in an 1860 attack in the *Monthly Law Reporter* on the rule that a party could not impeach its own witness. The rule, as stated by Greenleaf, was rooted in the principle that a party, by calling a witness, vouched for the reliability of the witness. *See* 1 GREENLEAF, *supra* note 122, § 442, at 491. But for the editors of the *Monthly Law Reporter*, the attempt to ensure that all witnesses were trustworthy was an archaic absurdity in a world in which counsel possessed the tools of cross-examination. *See Examination of Witnesses at Common Law*, *supra* note 158, at 586-92.

166. *See* Langbein, *supra* note 89, at 1184, 1186-90. Of course, insofar as the rationale of the hearsay rule was excluding testimony that could not be subjected to effective cross-examination, the hearsay rule was perfectly consistent with the emphasis on cross-examination as a means of getting to truth.

167. It is interesting to note that it was in this same period, the first half of the nineteenth century, that property requirements for jury service and voting were abolished. That these developments were nearly simultaneous suggests something of a convergence of legal reforms abolishing the use of formal property-related criteria to determine the competence of citizens to participate in law-making activities. On jury service requirements, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 877-82 (1994); on voting and the decline of property requirements for white men, see Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 342-48 (1989) and Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 476-81 (1997).

of the common-law trial. Similarly, courts and treatise writers advocated cutting back the scope of the witness privilege, which they perceived as another rule that reduced the amount of evidence that lawyers could subject to cross-examination. Both doctrines—disqualification and the witness privilege—had the effect of keeping potentially valuable evidence out of the spotlight of examination and cross-examination, and in the first half of the nineteenth century both increasingly appeared to be unacceptable obstructions to the fact-finding process of the common-law courts.

The earliest and sharpest contraction of the witness privilege occurred in *Lord Melville's Case* (1806),[168] in which a panel of English judges held that answers to questions subjecting a witness to a civil suit were not protected by the witness privilege.[169] American courts and commentators were well aware of the decision in *Lord Melville's Case*,[170] and though some showed resistance to the holding,[171] it was increasingly adopted into American practice.[172]

Treatise writers and courts also began to require witnesses to give testimony that might subject them to moral disgrace. Courts and commentators argued that the privilege to decline to give answers that would

---

168. 6 Parl. Deb. (1 Ser.) 166 (1806).

169. *Id.* at 223-26. This holding was codified in an act of Parliament in the same year, providing that a witness could not refuse to answer questions on the grounds that the answer might subject him to civil liability. *See* An Act to Declare the Law with Respect to Witnesses Refusing to Answer, 1806, 46 Geo. 3, ch. 37 (Eng.). On *Lord Melville's Case* and the controversy arising out of it, see Smith, *supra* note 25, at 159-61.

170. The *American Law Journal* reprinted the decision in its first volume. *See* Lord Melville's Case, 1 AM. L.J. 223 (1808).

171. *See, e.g.*, Connor v. Bradey, 1 Ant. N.P. Cas. 135 (N.Y. Sup. Ct. 1809). American commentators also criticized *Lord Melville's Case* and held fast to the old rule of a privilege that encompassed civil liability. In *A Digest of American Cases on the Law of Evidence*, Samuel Bayard of New Jersey restated a broad privilege: "A witness is privileged from declaring any thing which will be injurious to his interest." BAYARD, *supra* note 34, at 124 (emphasis omitted).

Swift also resisted the narrowing of the witness privilege instituted by *Lord Melville's Case*. In addition to questions that were incriminating or that had a tendency to degrade, Swift stated that "any question that will render [a witness] liable to an action, charge him with debt, or subject him to a penalty or forfeiture" was one that a witness could decline to answer. SWIFT, *supra* note 49, at 77. Swift conceded that 8 of the 12 judges deciding the question in the impeachment proceedings of Lord Melville had held otherwise, yet he insisted that the "question never has had a deliberate decision before the higher tribunals of this country." *Id.* at 78. Moreover, "at *Nisi Prius* the opinion has been entertained, that a witness cannot be compelled to testify to facts that render him liable to a civil action." *Id.* at 77-78.

172. *See* 2 N.Y. REV. STAT. ch. 7, art. 8, § 71, at 405 (Packard 1829) (enacting the rule that witnesses were compellable to answer questions subjecting them to civil suits); Stewart v. Turner, 3 Edw. Ch. 458, 461 (N.Y. Ch. 1841) ("But that [the witness's] answer may establish or tend to establish that the witness owes a debt or is otherwise subject to a civil suit is no excuse for refusing to answer a question relevant to the matter at issue . . . ."); Poole v. Perritt, 28 S.C.L. (1 Spears) 121, 122-23 (1842) (holding that a witness had a privilege not to answer self-incriminating questions, but noting that possible exposure to civil liability did not give rise to such a privilege).

subject the witness to moral infamy was limited to situations in which the testimony in question pertained merely to collateral issues such as the witness's credit rather than issues directly related to the facts in question.[173]

Similarly, the witness privilege ceased to be a rule enforced by courts, or a principle invocable by the parties, and became a purely personal privilege, invocable and waivable solely at the option of the witness. As noted above, early case law and treatises held self-incriminating questions to be prohibited per se, not merely privileged.[174] Alternatively, the sources suggested that courts were to play active roles in policing self-incriminating questions, or that the rule against compelling testimony against interest could be invoked by counsel.[175] By the third and fourth decades of the century, however, this approach to the witness privilege was roundly condemned by appellate court decisions that restricted to the witness himself the decision whether to decline to answer; as under self-incrimination doctrine today, courts' authority to caution the witness was to "be exercised sparingly and with great caution."[176] While the witness

---

173. *See* 1 COWEN & HILL, *supra* note 44, at 741-47 (discussing the treatment of the moral infamy rule by treatise writers). Chitty's *Practical Treatise* stated that a witness could not refuse to answer questions subjecting himself to civil liability; it did, however, state that witnesses were "not obliged to admit to or answer any matter which tends to throw a shade over [their] moral character, although it involves no offense for which [they] could be indicted." 1 CHITTY, *supra* note 44, at 426; *see also* People v. Mather, 4 Wend. 229, 250, 251 (N.Y. Sup. Ct. 1830) (noting a distinction between the collateral issue of a witness's credit and the testimony material to the case and adding that in order to be privileged on the ground of disgrace, testimony had to "directly shew the infamy").

174. *See supra* subpart II(A).

175. *See id.*

176. United States v. Darnaud, 25 F. Cas. 754, 765 (C.C.E.D. Pa. 1855) (No. 14,918) (declining to give prophylactic warnings to witnesses about their privilege not to incriminate themselves); United States v. Quitman, 27 F. Cas. 680, 682 (C.C.E.D. La. 1854) (No. 16,111) (stating that the "privilege belongs exclusively to the witness" because "[t]he party to the suit cannot claim its exercise, nor object to its waiver by the witness," and noting that the former practice of ruling incriminating questions illegal per se had been abandoned); United States v. Craig, 25 F. Cas. 682, 684 (C.C.E.D. Pa. 1827) (No. 14,883) (stating that incriminating questions are not illegal); State v. Patterson, 24 N.C. (2 Ired.) 244, 253-54 (1842) (holding that although there is much doubt as to whether a witness can be compelled to answer questions that "have a tendency to his disparagement or disgrace," in North Carolina the law is clear that such questions may at least be asked); People v. Carroll, 3 Parker 73, 83 (N.Y. Sup. Ct. 1855) ("A party cannot object that an answer to the question asked may involve the witness in a criminal prosecution. Such an objection must be made by the witness, but not by the party . . . ."); People v. Bodine, 1 Denio 281, 314 (N.Y. Sup. Ct. 1845) (noting that a witness may object to an incriminating question herself); Mitchell v. Hinman, 8 Wend. 667, 671-72 (N.Y. Sup. Ct. 1832) (assuming that the privilege cannot be enforced by the trial court unless the witness objects to answering a question); Southard v. Rexford, 6 Cow. 254, 259-60 (N.Y. Sup. Ct. 1826) (stating that privilege is purely "personal"); *see also* 1 CHITTY, *supra* note 44, at 426 (noting a change from the "former[]" practice of active judicial intervention into incriminating questions); 1 COWEN & HILL, *supra* note 44, at 748 ("It lies, however, with the witness to claim the privilege. The party cannot object to the inquiry. The witness has generally been left to do this without the interposition of the court." (citations omitted)). *But see* State v. March, 46 N.C. (1 Jones) 489, 490-91 (1854) (stating in

privilege had once rendered incriminating questions void, increasingly such questions were treated as voidable at the witness's option.

Finally, as Part V discusses in greater length, the scope of the immunity required to compel a witness to testify to incriminating facts narrowed during these years. Beginning in the 1820s, common-law jurisdictions began to pass immunity statutes that granted witnesses testimonial immunity instead of the transactional immunity that had characterized earlier statutes. And although some courts struck down the testimonial immunity statutes as violative of the constitutional self-incrimination clauses, most state courts would prove receptive to the new, narrow immunity statutes.

D. Justice John Appleton of Maine and the Assault on the Common-Law Witness Privilege

In the United States, no one pushed the critique of the common-law witness privilege further than Justice John Appleton of the Supreme Court of Maine.[177] Appleton, a disciple of Bentham, emerged as an outspoken critic of the rules disqualifying parties and interested witnesses in the 1830s.[178] Appleton arranged the rules in two conceptually distinct classifications: testimony in furtherance of the interested witness's interests, and testimony against his interests.[179] In the case of parties, Appleton made the same bifurcation: the party who offered self-serving testimony of his own accord, contrasted with the party who faced potentially hostile questions from an opponent.[180]

In Appleton's view, it was obvious that a party seeking to give testimony in his own interest should have been competent to testify. If the

---

dicta that North Carolina law should not allow incriminating questions to be put to witnesses); State v. Garrett, 44 N.C. (Busb.) 357, 358 (1853) (noting that North Carolina courts allow incriminating questions to be put to a witness, but that "[j]udges of great eminence have refused to permit a question tending to degrade a witness to be put to him").

177. George Fisher has offered a cogent critique of the idea that Appleton had a forceful, causal role in changing the American law of evidence. *See* Fisher, *supra* note 83, at 666-71. Appleton's contributions were, as Fisher observes, little more than restatements of Bentham. *See id.* at 667. Yet whether or not Appleton can be said to have been an important force in the American law of evidence, like Bentham, he appears to have represented the radical edge of a broader shift in the common-law approach to fact-finding.

178. *See, e.g.*, J.A. [John Appleton], *Admission of Parties in Criminal Procedure*, 13 AM. JURIST & L. MAG. 50, 71 (1835) [hereinafter Appleton, *Admission of Parties*]; John Appleton, *Incompetency of Parties as Witnesses at Common-Law*, 8 AM. JURIST & L. MAG. 1 (1832) [hereinafter Appleton, *Incompetency of Parties*]. Appleton's articles were reprinted as a book advocating reform in the law of evidence. *See* JOHN APPLETON, THE RULES OF EVIDENCE STATED AND DISCUSSED 61, 119 (Philadelphia, T. & J. W. Johnson & Co. 1860). On Appleton's career and contribution to nineteenth-century law and law reform, see DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (1990).

179. *See* Appleton, *Incompetency of Parties*, *supra* note 178, at 11.

180. *See id.* at 11, 17.

testimony were truthful, Appleton reasoned, it would aid the fact-finder in making accurate findings.[181] If the testimony were untruthful, effective cross-examination would uncover its inconsistencies.[182]

The situation in which parties and interested witnesses were compelled to answer potentially incriminating questions under the court's contempt power, on the other hand, presented a more difficult question, because this situation implicated the powerful tradition of opposition to compelled self-incrimination. According to Appleton, the supposed unreliability of interested testimony was a weak rationale for excluding an interested witness or his testimony in this circumstance because the opposing party (or, in criminal cases, the prosecutor) could be trusted not to call a witness who would deceive the court to the opposing party's detriment.[183] In Appleton's view, triers of fact would always be better off with more evidence than with less, even if of dubious reliability,[184] and the parties themselves could be expected to regulate the reliability and trustworthiness of the witnesses called to testify.[185]

Appleton believed that the only plausible objection to making interested witnesses and parties competent to be compelled to give testimony against interest was the "hardness" of the situation in which the questions placed the witness or party.[186] But the "hardness" rationale of the *nemo tenetur* principle was not a sufficient reason to exclude party or interested third-party testimony either. The "hardness" of the situation for the party compelled to testify inhered not in the act of testifying, Appleton argued, but in the punishment the law attached to the party's wrongdoing.[187] The "hardness" argument thus proved too much. It was an argument against punishment, not an argument against compelled testimony. "Just as much as [a witness] would wish to escape punishment, just so far would he wish to avoid saying or doing . . . what might lead to such results."[188] Explicitly echoing Bentham, Appleton suggested that if "the criminals

---

181. *See id.* at 12 ("For if false testimony should not be delivered, . . . no mischief is done.").

182. *See id.* at 16 (noting that if a plaintiff "exaggerates, the defendant has the best means and the strongest inducements to detect and point out these exaggerations, the testimony of each being seen and examined by the other, the parties being mutually interrogated and cross-interrogated"). In addition, Appleton contended that juries would be more likely to scrutinize the testimony of a witness who was interested in the result of the suit, either as a party or otherwise. *See id.*

183. *See* Appleton, *Admission of Parties*, *supra* note 178, at 62.

184. *See id.* at 72 (arguing that a "judge who is fit for his station will never exclude any witness for fear, that after hearing, he may erroneously decide—to do so, would be saying, that he can decide upon the truth of a witness, better *without* than *with* hearing him" (emphases in original)).

185. *See* Appleton, *Incompetency of Parties*, *supra* note 178, at 16.

186. *See id.* at 17 (noting that witnesses required to give evidence against themselves are faced with a great temptation to perjure themselves).

187. *See id.*

188. *Id.* at 67-68.

[were] to frame a code for their own special protection, their first provision would be to protect themselves from all inquiry into their conduct."[189]

Appleton's arguments were directed against both the witness privilege and the rules disqualifying parties as witnesses in civil and criminal cases, but the witness privilege was the object of special scorn for Appleton. "The issue," he wrote, "is between justice and injustice—between right and wrong."[190] Beginning with the Benthamite premise that "there is no inquiry, which is material and relevant, which may not be proposed, and which being proposed should not be answered,"[191] Appleton argued that the witness privilege was nothing more than a "privilege of crime."[192] Only the guilty witness could be protected by the witness privilege, according to Appleton, and innocent defendants would be hurt when culpable witnesses were allowed to remain silent.[193]

Other American lawyers and judges picked up Bentham's arguments against the witness privilege, perhaps through Appleton's work.[194] Judge Campbell of the Federal Circuit Court for the Eastern District of Louisiana, for example, was apparently familiar with Bentham's views of the witness privilege when he decided the case of *United States v. Quitman*.[195] Upholding an order that the defendant, John Quitman, show cause why he should not have to give a bond to ensure his observance of the laws of the United States concerning neutrality between foreign powers, Campbell held that the Fifth Amendment of the United States Constitution was not violated when an adverse inference is made from a person's refusal

---

189. *Id.* at 71. For many of these same points in an article that, although not by Appleton, bore a striking resemblance to Appleton's work (which in turn bore a strong resemblance to Bentham's), see B., *Of the Disqualification of Parties as Witnesses*, 5 AM. L. REG. 257 (1857). David Gold has identified "B." as Irving Browne, editor of the *Albany Law Journal*. *See* GOLD, *supra* note 178, at 187 n.11. Browne drew the distinction between the two elements of the disqualification rule: that parties could not testify on their own behalf on grounds of interest and that they could not be compelled to testify for the opposite party. *See* B., *supra*, at 257-58. Like Appleton, Browne associated the second element with the tag *nemo tenetur*. *See id.* at 258.

190. APPLETON, *supra* note 178, at 246.

191. *Id.* at 253.

192. *Id.* at 247 (emphasis omitted).

193. *See id.* Appleton was careful to distinguish the witness privilege from the privilege accorded to the accused. Maine's constitutional self-incrimination clause was expressly limited to the accused, providing that "[i]n all criminal prosecutions the accused . . . shall not be compelled to furnish or give evidence against himself." ME. CONST. of 1819, art. I, § 6.

194. As noted above, Professor Fisher cautiously discounts Appleton's influence, rightly noting that Appleton's intellectual contributions were little more than mediocre restatements of Bentham. *See* Fisher, *supra* note 83, at 667. Once again, my point is not that Appleton singlehandedly shifted the American approach to the witness privilege, or even that he had a major causal role in that shift, but rather that—like Bentham—he was at the radical edge of a broader trend to sharply contract the witness privilege during the same years.

195. 27 F. Cas. 680 (C.C.E.D. La. 1854) (No. 16,111).

to testify under oath.[196] Campbell relied upon Bentham's critique of the privilege:

> The profound author of the "Treatise on Judicial Evidence" inquires whether, if all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established? Innocence can have no advantage from it; innocence claims the right of speaking, must speak, while guilt alone invokes the security from silence. The supreme court of Ohio say[s that] . . . "For a witness to refuse to testify, because his testimony may criminate him, is at once to pronounce his own turpitude. Not a man in a thousand would, without reason, venture upon so perilous a situation."[197]

Judge Denio of the New York Court of Appeals shared Campbell's Benthamite impatience with the witness privilege. "[N]either the law nor the Constitution," he argued,

> is so sedulous to screen the guilty as the argument [for a broad witness privilege] supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his own account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law.[198]

American lawyers also read criticisms of the witness privilege in articles reprinted from England. In 1854, the *Monthly Law Reporter*, based in Boston, reprinted an article from the *London Law Review* arguing in favor of the enactment of a generalized immunity statute that would have conferred immunity on all witnesses from the introduction of their compelled testimony into their own subsequent criminal prosecutions.[199] The proposed immunity statute would not, however, have provided immunity from the introduction of the "fruits" of the testimony (*i.e.*, any evidence derived from the compelled testimony).[200] Such an immunity statute

---

196. *See id.* Quitman had been called before a grand jury and refused to answer questions about the violation of United States neutrality laws on the grounds of privilege; in response, the court made him take out a bond to secure his compliance. *See id.*

197. *Id.* (alluding to BENTHAM, TREATISE, *supra* note 142, at 241, and quoting Warner v. Lucas, 10 Ohio 336, 340 (1840)).

198. People *ex rel.* Hackley v. Kelly, 24 N.Y. 74, 83 (1861).

199. *See Self-Crimination-Option of Jury Trial*, 16 MONTHLY L. REP. 121, 121 (1853).

200. *Id.* at 121. The unnamed author wrote:

> We have said that the road to truth and justice is . . . stopped up; and that the road to falsehood and injustice is also thrown open . . . . The innocent is sacrificed that the guilty may escape; for the ground of the rule is, that if the question is answered it may enable a prosecutor to obtain evidence which would convict the witness. Surely so gross an anomaly cannot be suffered any longer to disfigure our law.

Id. at 124-25.

would have abrogated the witness privilege across the board. Ultimately, as Part V discusses, it was precisely this kind of immunity statute that forced courts to articulate the relationship between the constitutional self-incrimination clauses and the common-law witness privilege.

E. The Beginnings of a Constitutionalized Witness Privilege

By the fourth, fifth, and sixth decades of the nineteenth century, courts had substantially undermined the broad common-law rules that had kept self-damaging witness testimony out of the courts. As observers noted, the "whole tendency of modern decisions is to relax the strict [common-law] rules of evidence."[201] It was precisely these rules that had rendered the early constitutional self-incrimination clauses superfluous. Thus, it should come as no surprise that it was the critics of the broad common-law witness privilege and disqualification rules who, beginning in the 1830s, were the first to address the constitutional status of the privilege against self-incrimination. As the passages by Judges Denio and Campbell quoted above suggest, the advocacy of a new and sharply narrower witness privilege prompted courts and commentators to ask whether their reforms had constitutional implications.[202]

Appleton, for example, wrote in 1835 that "principles of common *and constitutional law alike* throw a protection around the accused. *Nemo tenetur seipsum accusare*, translated into our own language, has been inscribed into the constitutional provisions of the land."[203] Indeed, the constitutional self-incrimination clauses created something of a problem for Appleton. He was convinced that the original "object" of the provisions "was to protect entirely" the criminal defendant "from any interrogatories adverse to his own interest."[204] Yet he also firmly believed that this was an indefensible rule:

> Shall, then, the accused, when his own interests are at stake, in his own cause, in his own trial, against his wish, and for the avowed purpose of establishing his guilt by his own answers be compelled, not by the rack or torture, but by the ordinary process of court, and under the ordinary penalties for perjury, to answer any and all pertinent questions relating to the cause on trial, which may be proposed either by the prosecutor or the court?[205]

---

201. *Condensed Reports*, *supra* note 165, at 596 (reprinting State v. Parker, 7 La. Ann. 83, 86 (1853)).

202. Katherine Hazlett believes that Judge Campbell's opinion in *Quitman* represents the first reported federal case in which the privilege against self-incrimination was addressed as a constitutional question. *See* Hazlett, *supra* note 37 (manuscript at 8-9).

203. Appleton, *Admission of Parties*, *supra* note 178, at 61 (first emphasis added).

204. *Id.* at 62.

205. *Id.* (footnote omitted).

Thus, when Appleton mentioned the constitutional self-incrimination provisions in the context of the witness privilege, he was relieved to argue that the constitutional protections were strictly limited to protecting criminal defendants.[206] The Constitution, he contended, referred "only to the interrogation of the defendant in the criminal prosecution to which he is a party," and not to the questioning of a witness.[207]

Appleton's distinction between the constitutional status of criminal defendants and witnesses is a critical moment in the history of the privilege against self-incrimination, but not because he was right or wrong about the "actual intent" of the Framers, nor because the position he took was particularly startling. Appleton's opposition to the common-law rules protecting witnesses from self-incriminating testimony pushed him to articulate an opinion about the relationship between the common-law witness privilege and the constitutional self-incrimination clauses. In other words, Appleton's opposition to the broad common-law protection afforded to witnesses, like the similar opposition of Judges Denio and Campbell, forced him to advance an argument about the constitutional status of the witness privilege. The constitutional self-incrimination clauses were now in play, brought into the debate over common-law fact-finding procedures not by the supporters of a broad constitutional privilege against self-incrimination, but by the strongest opponents of such a rule.

V. The Immunity Statutes and the Constitutionalization of the Witness Privilege

The nascent inquiry into what precisely the constitutional self-incrimination clauses meant—a question first broached by critics of the broad common-law witness privilege such as Appleton—came into focus when state legislatures passed a series of new, narrow immunity statutes. New York State took the lead in enacting these new immunity statutes, and this Part now turns to look specifically at New York. When the new, narrower immunity statutes were challenged in the courts, the question of what the constitutional self-incrimination clauses meant was squarely presented.

A. New York's Early Transactional Immunity Statutes

New York's colonial history has proven fertile ground for controversy over the history of the privilege. The debate among historians has centered on a series of legislative enactments requiring sworn testimony by suspected criminals. In their 1944 book, *Law Enforcement in Colonial New*

206. For the language of the Maine Self-Incrimination Clause, see *supra* note 193.

207. APPLETON, *supra* note 178, at 246.

York,[208] Julius Goebel and T. Raymond Naughton argued that there was no privilege against self-incrimination in colonial New York.[209] In particular, they pointed to a series of colonial statutes instituting oaths of purgation, under which a suspected person could be summoned by a justice of the peace and compelled to testify under oath as to whether he had violated any of a number of regulatory offenses, such as selling liquor to Indians;[210] engaging in unfair trade practices with Indians;[211] harboring fugitive slaves or information about fugitive slaves;[212] trading with the French;[213] or disloyalty to "his Majesties Kingdom & Government in favour of a popish pretender."[214] Refusal to testify under the oaths of

---

208. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) (1944).

209. Goebel and Naughton wrote:

> We think that the existence before the Revolution of a privilege of defendants is an illusion. The fruit grown from the seed of the maxim *nemo tenetur prodere seipso* was an exotic of Westminster Hall, and of it neither the local justices in England nor in New York had eaten, or if they had, they took good care to keep their knowledge to themselves.

Id. at 656.

210. *See* An Act to Prevent Selling or Giveing of Rumm or Other Strong Liquors to the Indians in the County of Albany, ch. 187, 1709 N.Y. Laws 79, *reprinted in* 1 COLONIAL LAWS, *supra* note 73, at 657. In pertinent part, the Act provided:

> [I]t shall & may be lawfull for ye sd Mayor Recrdr or any two Justices of the Peace of the Town or County of Albany who shall Suspect any Person or Persons whatsoever to have offended Contrary to ye intentions of this Act, to send for him Her or them so Suspected & to tendr unto such Person or Persons on oath whether he She or they hath Sold given or other ways disposed of any of ye liquors before mentioned to an Indian or Indians wthin ye sd County of Albany between ye sd first day of June & ye sd first day of Septembr & such Person or Persons not appearing being duly Summond or Confessing upon ye sd oath or refuseing to take ye same shall be thereby Convicted of ye offence & be subject to & Suffer ye same paines & Penalty as if the same had been prooved by oath or affirmation . . . .

Id. at 658; *see also* An Act to Prevent the Selling & Giving of Rum or Other Strong Liquors to the Indians, ch. 317, 1716 N.Y. Laws 112 *reprinted in* 1 COLONIAL LAWS, *supra* note 73, at 888, 889-90 (allowing city or county officials to require those suspected of breaking the law to swear an oath stating that they had not done so); An Act Appointing Comissioners to Let to Farm the Excise of Strong Liquors in the Cities and Countys in This Colony, ch. 463, 1725 N.Y. Laws 138, *reprinted in* 2 COLONIAL LAWS, *supra* note 73, at 243, 245 (requiring suspected offenders to swear their innocence or be held liable).

211. *See* An Act for Encouraging the Indian Trade at Albany, ch. 282, 1714 N.Y. Laws 95, *reprinted in* 1 COLONIAL LAWS, *supra* note 73, at 828, 830 (allowing government officials to compel an oath from those accused of unfair trading practices).

212. *See* An Act for Preventing Suppressing and Punishing the Conspiracy and Insurection of Negroes and Other Slaves, ch. 250, 1712 N.Y. Laws 88, *reprinted in* 1 COLONIAL LAWS, *supra* note 73, at 761, 763-64 (requiring those accused of harboring slaves to swear their innocence).

213. *See* An Act for the Further and More Effectual Prohibiting of the Selling Indian Goods to the French, ch. 425, 1722 N.Y. Laws 128, *reprinted in* 2 COLONIAL LAWS, *supra* note 73, at 98, 98-99 (requiring those accused of trafficking with the French to swear that they had not done so).

214. An Act for Securing of His Majesties Government of New York, ch. 781, 1744 N.Y. Laws 520, *reprinted in* 3 COLONIAL LAWS, *supra* note 73, at 424, 424-25 (requiring those suspected of treason to take a loyalty oath). Further acts instituting oaths of purgation covered infringements on the

purgation was the equivalent of confession.[215] Goebel and Naughton concluded that the oath statutes demonstrated

> that so far as New York Province was concerned there was no attempt made to privilege a defendant or to treat his testimony as incompetent; but on the contrary, a great deal was done to make sure that in one form or other his testimony would be secured and that it would count against him.[216]

Leonard Levy strongly criticized Goebel and Naughton in his 1968 *Origins of the Fifth Amendment*, accusing them of engaging in bald speculation from inadequate sources, thus failing to follow their own methodological strictures.[217] Levy conceded that the privilege against self-incrimination "was indeed an illusion, as Goebel and Naughton declared, under the acts of the Assembly [instituting oaths of purgation] from 1701 to 1759."[218] But Levy also showed that the privilege of a witness to decline to answer incriminating questions under oath had been hotly contested and sometimes upheld in a number of high profile New York cases in the late seventeenth and early eighteenth centuries.[219] Most importantly, Levy argued that Goebel and Naughton had failed to take into account the late-eighteenth-century immunity statutes that were enacted in New York.[220] After 1770, the oath of purgation statutes passed in New York contained provisions granting any witness that was compelled to furnish self-incriminating testimony absolute immunity from prosecution or

---

act encouraging the recruitment of seamen, *see* An Act for Reviving an Act for Encouraging of Seamen, ch. 197, 1709 N.Y. Laws 78, *reprinted in* 1 COLONIAL LAWS, *supra* note 73, at 680, 681, trading with or selling alcohol to slaves, *see* An Act for the More Effectual Preventing and Punishing the Conspiracy and Insurrection of Negro and Other Slaves; for the Better Regulating Them and for Repealing the Acts Herein Mentioned Relating Thereto, ch. 560, 1730 N.Y. Laws 157, *reprinted in* 2 COLONIAL LAWS, *supra* note 73, at 679, 679-80, selling alcohol to servants, *see* An Act to Restrain Tavern Keepers and Innholders from Seling Strong Liquors to Servants and Apprentices and from Giving Large Credit to Others, ch. 651, 1737 N.Y. Laws 190, *reprinted in* 2 COLONIAL LAWS, *supra* note 73, at 952, 953-54, and evading tariffs on commerce with Indians, *see* An Act to Suport the Troops at Oswego and to Regulate the Indian Trade There, ch. 568, 1731 N.Y. Laws 164, *reprinted in* 2 COLONIAL LAWS, *supra* note 73, at 705, 710.

215. *See* GOEBEL & NAUGHTON, *supra* note 208, at 657-58.

216. *Id.* at 659.

217. *See* LEVY, *supra* note 1, at 374. Levy wrote:

> Historians who "cleave to a scintilla of evidence theory" are properly reprimanded by Goebel and Naughton: they disapprove of those who take a proposition as proven with the minimum of citation, who base a rule on a single case, or refer to statutes only when stating a judicial practice. "This is the way of advocacy, not of scholarship. . . . The ends of legal history are not served by the mere establishment of a prima facie case."
>
> The injunction, a sound one, has not been observed by Goebel and Naughton in their discussion of the right against self-incrimination.

Id. (citing GOEBEL & NAUGHTON, *supra* note 208, at xxxi) (footnote omitted) (omission in original).

218. *Id.* at 382.

219. *See id.* at 377-82.

220. *See supra* notes 73-80 and accompanying text.

penalty for the underlying transaction.[221] On the basis of the immunity provisions contained in the New York statutes, Levy concluded that the privilege against self-incrimination in New York practice, at least by the 1770s, matched the privilege that obtained in Westminster Hall.[222]

B. The Immunity Statutes: From Transactional to Testimonial

More recently, Akhil Amar and Reneé Lettow have focused on a later set of New York immunity statutes in their inquiries into the history of the privilege against self-incrimination. In the 1861 case *People ex rel. Hackley v. Kelly*,[223] New York's Court of Appeals was confronted with the question of whether a witness could be compelled to furnish self-incriminating testimony under an immunity statute that provided merely that the compelled testimony itself could not be introduced in the witness's own criminal prosecution.[224] In other words, *Kelly* presented the court with the question of the constitutionality of a testimonial immunity statute, under which the witness was compelled to furnish self-incriminating testimony in return for immunity from the introduction of that compelled testimony into evidence in a subsequent criminal prosecution.

The startling fact about *Kelly* is the narrowness of the immunity statute at issue. The immunity statutes that Levy found in late colonial New York granted absolute immunity from subsequent prosecution for the crimes underlying compelled testimony.[225] And as this Article's discussion of the early-nineteenth-century privilege has noted, the immunity statutes enacted in England and early New York State through the 1810s were broadly drawn transactional immunity statutes.[226] Like Levy's late colonial statutes, they too provided witnesses absolute immunity from subsequent prosecution for the acts underlying their compelled testimony. The

---

221. *See* LEVY, *supra* note 1, at 402-03.

222. *See id.* at 404 ("When the Revolution began, colonies and mother country differed little, if at all, on the right against self-incrimination."). Eben Moglen has updated the Goebel and Naughton versus Levy controversy. In Moglen's view, pre- and post-Revolutionary criminal procedure in New York was incompatible with a privilege against self-incrimination for criminal defendants. In particular, the wide use of summary procedure and the absence of defense counsel in most of the run-of-the-mill criminal cases in the common-law courts meant that there could not have been an effective right to silence for the accused. Summary procedure, with its informal and unprofessionalized tenor, was unlikely to follow the dictates of formal common-law criminal procedure. In fact, it was centered around the interrogation of the criminally accused. Meanwhile, in the common-law courts, the absence of defense counsel in most criminal cases made silence an unattractive option. Thus, according to Moglen, the principles behind the constitutional self-incrimination clauses had little if any effect on actual legal practice in New York or any of the other American jurisdictions of the Early Republic. *See* Moglen, *supra* note 3, at 1091-94.

223. 24 N.Y. 74 (1861).

224. *Id.* at 80-81.

225. *See* LEVY, *supra* note 1, at 401-02.

226. *See supra* notes 68-80 and accompanying text.

statute at issue in *Kelly*, on the other hand, enacted in 1853, took a decidedly narrower approach to immunity. And it was this new narrow statutory approach to self-incrimination immunity that ultimately constitutionalized the witness privilege in American law.

1. The Transformation of the New York Immunity Statutes.—If New York's late-eighteenth- and early-nineteenth-century immunity statutes were transactional, how did New York move to the testimonial immunity statutes at stake in *Kelly*? The New York legislature enacted transactional immunity statutes as late as 1813.[227] But starting in 1820, the legislature began to frame its immunity provisions in a new, narrower fashion that provided witnesses testimonial immunity from the in-court use of their compelled testimony in subsequent criminal prosecutions rather than transactional immunity from subsequent prosecution. The first such statute prohibited champerty and provided that in all civil suits, the plaintiff was compellable to testify at the defendant's option in order that the defendant be able to prove champerty. The act established that "any evidence derived from the examination of the plaintiff . . . shall not be admitted in proof on any criminal prosecution against such plaintiff . . . for a violation of the provisions of this act."[228] Almost two decades later, during the financial crisis of the Panic of 1837, the legislature enacted a statute allowing a defendant in a suit on a note to call the plaintiff in order to establish that the note was usurious.[229] The act provided that any testimony so compelled could not be "used" against the plaintiff so testifying in any subsequent criminal prosecution.[230]

---

227. *See supra* notes 68-80 and accompanying text. In 1813, New York State enacted an ambiguous immunity statute in an act to prevent duelling—a statute that was neither clearly transactional nor clearly testimonial in nature. *See* An Act to Prevent Duelling, ch. 45, § 4, [1813] 2 N.Y. Laws 192, 192 (providing that "any person offending against this act, shall be a competent witness against any other person offending in like manner, and may be compelled to appear and give evidence . . . touching the premises, *but shall not thereby be criminated himself*" (emphasis added)).

228. An Act to Prevent Abuses in Proceedings Before Justices of the Peace, ch. 159, § 2, 1820 N.Y. Laws 140, 141.

229. *See* An Act to Prevent Usury, ch. 430, 1837 N.Y. Laws 486 (dating the passage of the act on May 15, 1837).

230. *Id.* §§ 2, 8. The usury legislation of 1837 was enacted in the midst of a raging controversy in antebellum America over whether credit transactions should be deregulated. *See* Lawrence M. Friedman, *The Usury Laws of Wisconsin: A Study in Legal and Social History*, 1963 WIS. L. REV. 515, 516-21. Emerging proponents of a free market credit regime argued that, as with tangible commodities, no fixed just price for credit existed other than that dictated by the shifting forces of supply and demand. In their view, as John Ramsey McCulloch, a Scottish disciple of Adam Smith and David Ricardo whose work was reprinted widely in the United States, wrote, "whatever may have been the causes of the efforts so generally made to regulate and limit the rate of interest, it is certain that, far from succeeding in their object, they have had a precisely opposite effect." JOHN RAMSEY MCCULLOCH, INTEREST MADE EQUITY 14 (New York, G. & C. Carvill 1826). McCulloch stated that "provided there was no method of defeating" the law prohibiting usurious loans, "there must be an end

In the late 1840s and the 1850s, New York enacted a series of testimonial immunity statutes. In 1853 the legislature created the immunity statute at issue in *Kelly*: a testimonial immunity procedure for use in the prosecution of public officials for bribery.[231] Similar provisions directed specifically at official corruption in New York City were enacted by the state legislature twice during the decade.[232] And in 1855, an act aimed at stamping out public drunkenness included not one but two testimonial immunity provisions. The first immunized persons arraigned for drunkenness in order to draw out evidence about fellow violators of the anti-intemperance act;[233] the second immunized prospective jurors so that they could be compelled to testify as to their own prior violations of the act during the jury selection process.[234]

2. Explaining the Shift to Testimonial Immunity Statutes.—As a general matter, the new, narrow immunity statutes appear to have been passed with the intention of facilitating the enforcement of laws that regulated or prohibited difficult-to-detect consensual activity. A Tennessee court noted that its legislature had enacted an immunity provision for gaming prosecutions because "[t]he vice was of such general prevalence, and often so baffled detection because of the fact that gamblers and persons haunting gaming houses, could alone, as a general thing, give information thereof."[235] Likewise, in New York, the Court of Appeals attributed

---

of all borrowing, except when the market rate of interest was below the statutory rate. . . . Luckily, however, the mutual interest and ingenuity of borrowers and lenders have always proved an overmatch for the enactments of the law." *Id.* at 15. The immunity statute in the 1837 New York legislation, then, appears to have been an attempt to enforce the law of usury against violators' "mutual interest and ingenuity." *Id.* Relevant passages of McCulloch's book are reprinted in DAVID BRION DAVIS, ANTEBELLUM AMERICAN CULTURE 160, 160-61 (1979). The creation of new procedural tools to aid debtors in establishing usury defenses to suits by creditors suggests a qualification to Morton Horwitz's argument that antebellum legislatures steadily restricted the scope and power of traditional prohibitions on usury. *See* HORWITZ, *supra* note 135, at 241-45. As Horwitz observes, however, New York was slower than other states in cutting back on its usury regulations. *See id.* at 244. More work is needed to determine whether other states employed similar procedural mechanisms to increase the enforceability of usury regulations.

231. *See* An Act to Amend the Existing Law Relating to Bribery, ch. 539, § 14, 1853 N.Y. Laws 1012, 1012-13.

232. *See* An Act to Amend the Charter of the City of New-York, ch. 446, § 52, 1857 N.Y. Laws 874, 893-94; An Act Further to Amend the Charter of the City of New-York, ch. 217, § 14, 1853 N.Y. Laws 410, 413 (both amending the city charter to include a testimonial immunity provision aimed at public corruption in New York City).

233. *See* An Act for the Prevention of Intemperance, Pauperism and Crime, ch. 231, § 12, 1855 N.Y. Laws 349, 351 (providing that a person arraigned for drunkenness be examined by a magistrate about further violators, but that "testimony so given shall not in any case be used against [the person arraigned], in any civil or criminal action, except upon an indictment and trial for perjury").

234. *See id.* § 16, at 352 (providing that any juror may be asked about prior violations of the Act, but that "no answer that he may make shall be used against him in any action or prosecution, which may be commenced against him, under any provision of this act").

235. Hirsch v. State, 67 Tenn. (8 Baxter) 89, 90 (1874). The *Hirsch* court was presented with a transactional immunity statute, but the rationale applied equally to testimonial statutes.

immunity statutes to a desire to facilitate enforcement of the law.[236] An interest in prosecuting difficult-to-detect criminal activity, however, cannot by itself explain the shift from transactional immunity statutes to testimonial immunity statutes. Both types of immunity provisions, after all, aimed at facilitating law enforcement. Instead, the reason for the shift from transactional to testimonial immunity statutes appears to have been that legislatures began adopting the new approach to common-law fact-finding procedures that rejected the old evidentiary rules of disqualification.

In Benthamite fashion, commentators supported the new, narrower testimonial immunity statutes and expressed skepticism about the utility of the broad common-law witness privilege and disqualification rules. In 1848 the editors of the *London Law Review* displayed a sentiment increasingly prevalent in American practice when they evaluated a series of civil cases in which apparently wrongdoing witnesses had invoked the witness privilege to the detriment of apparently innocent parties. "Now, what was the effect of the rule of law in each of the above cases?" the editors asked. "[W]as it not to impede the administration of justice? [W]as it not to defeat right and help wrong? [A]nd in each case for the benefit of a wrong-doer?"[237] Opposition to the insidious practical impact of the witness privilege led the editors to recommend enactment of a generalized immunity act that would give courts the discretion to immunize witnesses in order to compel self-incriminating testimony.[238]

The Boston *Monthly Law Reporter* in 1854 employed a similarly Benthamite opposition to the witness privilege to make the case for a generalized immunity statute that would provide the witness testimonial immunity from the admission of compelled testimony in a subsequent criminal prosecution. The witness privilege, argued the *Law Reporter* article

> prevents truth from being arrived at and justice done, and also causes falsehood, and consequent injustice to prevail.
>
> . . .
>
> . . . [T]he road to truth and justice is thus stopped up; and . . . the road to falsehood and injustice is also thrown open . . . . The innocent is sacrificed that the guilty may escape; for the ground of

236. The "plain object" of the immunity statutes, according to the Court of Appeals, "was to enable these various tribunals, whether magistrates, grand juries, courts or legislature, to make their investigations into alleged abuses effectual, and enable them to prosecute their inquiries successfully, and to that end protect witnesses whose testimony might otherwise be withheld, but without which the investigation would fail." People v. Sharp, 14 N.E. 319, 339 (N.Y. 1887). Like the statute at issue in *Hirsch*, the statute in *Sharp* was a transactional immunity statute.

237. *Law of Discovery—Self-Crimination*, 7 LAW REV. 19, 26 (1848).

238. *Id.* at 30. Although the *Law Review* recommended a transactional immunity provision, it argued in the alternative that a generalized immunity provision should: "lay it down as a general rule, that no statement extracted by the pressure of a Court for a civil purpose should ever be admissible as evidence to subject an examinant to any punishment, penalty, or forfeiture." *Id.*

> the rule is, that if the question is answered it may enable a prosecutor to obtain evidence which would convict the witness. Surely so gross an anomaly cannot be suffered any longer to disfigure our law.[239]

The solution offered by testimonial immunity promised to remove the obstacle posed by the witness privilege to determining truth and ensuring justice in the common-law trial. And by limiting the immunity to testimonial, rather than transactional immunity, such an approach would also allow the state to uncover new wrongdoing by compelling witnesses to disclose their own criminal activity. Accordingly, the editors argued that

> [t]he advantage of removing obstacles to the investigation of truth, and preventing falsehood from prevailing, is the direct gain which the proposed alteration of the law would give. The loss which we should incur [i.e., compulsion of the witness's testimony] appears to be only an additional gain. It is said that if the witness is compelled to answer, he may furnish the means of his own conviction. The supposition, therefore, is, that he has committed the offence respecting which he is interrogated. The mischief apprehended is, that he may be punished for it. Is that a loss or a gain to the administration of justice? We apprehend that this alleged loss is only an incidental gain.[240]

Supporters of narrow testimonial immunity statutes thus brought the rhetoric of the antidisqualification-rule reformers to the question of the witness privilege. From the standpoint of fact-finding, both the witness privilege and the solution of broad transactional immunity were highly suspect. Considering the option of transactional rather than testimonial immunity, the *Law Reporter* stated that

> [w]e do not consider this as the fit course to pursue. Such an immunity [i.e., transactional immunity] would be liable to very great abuse. Offenders against whom there existed ample evidence without their own confession, might obtain impunity by getting themselves called as witnesses. . . . The only qualification which can be safely added to the repeal of the rule, is that contained in the bill, that no answer given by the witness or party . . . shall be given in evidence against him upon any prosecution or other proceeding of a criminal nature, save only on an indictment for perjury assigned upon his answer . . . .[241]

---

239. *Self-Crimination—Option of Jury Trial*, 6 MONTHLY L. REP. 112, 124-25 (1853).
240. *Id.* at 125.
241. *Id.* at 128.

Just as the invocation of the witness privilege defeated truth-seeking, so too did grants of transactional immunity threaten to defeat the administration of justice. Narrowly drawn testimonial immunity statutes, on the other hand, promised to reconcile the witness privilege and the use of immunity grants with the fact-finding functions of the common-law trial.

Indeed, the immunity statutes were not only a means of circumventing the witness privilege. They were also partial abolitions of the disqualification rules, targeting particular substantive areas in which party or interested-witness testimony was of particular importance. New York's 1813 legislation creating immunity for those who testified regarding duels, for example,[242] provided that "any person offending against this act shall be a competent witness."[243] Likewise, the 1837 usury legislation abolished the party disqualification rule in usury cases by allowing defendants in contract suits to call the plaintiff as a witness "in the same manner as other witnesses."[244] As legislatures narrowed the common-law witness privilege, they narrowed and enacted limited abolitions of the party disqualification rule.

3. The Field Code and the Immunity Statutes.—Two further testimonial immunity provisions in New York's 1848 Code of Procedure, the famous Field Code, and its subsequent amendments confirm the close ties that existed between the shift to narrower immunity acts and the reforms in the law of evidence that swept away the rule of disqualification for interest.

The antebellum codification debates[245] were closely related to the abolition of the interest disqualification rule. Supporters of codification and proponents of the abolition of the disqualification rule both aimed to eliminate rules that had come to be viewed as anachronistic procedural technicalities, needlessly complicating common-law litigation and obstructing the process of fact-finding.[246] Moreover, both found inspiration in the writings of Bentham, who was perhaps the foremost advocate of both codification and the abolition of the disqualification rules.[247]

---

242. As noted above, *see supra* note 227, the precise scope of the immunity granted in the 1813 act was ambiguous.

243. An Act to Prevent Duelling, ch. 45, § 4, [1813] 2 N.Y. Laws 192.

244. An Act to Prevent Usury, ch. 430, §§ 2, 8, 1837 N.Y. Laws 486, 487-88.

245. The codification debates are often misleadingly referred to as a codification "movement." In fact, codification in the antebellum era represented less a "movement" than a particular installment of a recurring dialectic in American law between popular antilegalism and professional law reform. *See* Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 433-36 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981)).

246. *See* COOK, *supra* note 245, at 138-41.

247. *See id.* at 74-78.

It should not be surprising, then, that the Field Code abolished the rule of disqualification for interest.[248] In addition, while the Code provided that parties remained incompetent to testify on their own behalf,[249] it allowed parties to examine their adversaries as witnesses.[250]

Moreover, one of the central goals of Field and other codifiers was to abolish the fanciful legal fictions that common-law pleading had generated for certain situations.[251] Consequently, the Code of 1848 required that pleadings be verified. The verification requirement, however, created new problems related to self-incrimination. By requiring that pleadings be verified, the Code considerably expanded the breadth of the assertions and denials that a party was required to make under oath. The verification requirement thus included an immunity provision providing "that no pleading [] verified . . . shall be used in a criminal prosecution against the party [] as proof of a fact admitted or alleged in such pleading."[252]

---

248. *See* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF PROCEDURE § 351 (Albany, Charles Van Benthuysen 1848) [hereinafter FIRST REPORT].

249. *See id.* §§ 344, 351.

250. *See id.* § 344 ("A party to an action may be examined as a witness, at the instance of the adverse party."). In their Final Report, the Code Commissioners advocated complete abolition of the disqualification rule for parties as well as for interested witnesses, *see* FINAL REPORT BY THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF PROCEDURE § 1708 and accompanying note (Weed, Parsons & Co., Albany 1849), but the New York legislature did not abolish the disqualification rule for parties testifying on their own behalf until 1857. *See* An Act to Amend Section Three Hundred and Ninety-Nine of the Code of Procedure, ch. 353, 1857 N.Y. Laws 744.

251. *See* FIRST REPORT, *supra* note 248, at iv.

252. *Id.* § 133. In the same section, the Code provided that verification might be omitted when the party "would be privileged from testifying as a witness to the same matter." *Id.* The 1848 Code, in other words, established both that the party need not verify the pleadings when a testimonial privilege was implicated, *and* that testimonial immunity would attach to the pleadings. Because parties had the option of not verifying their pleadings, it hardly comes as a surprise that the testimonial immunity clause appears never to have been litigated. The cases only addressed the question of when a party was permitted to submit unverified pleadings. *See* Maloney v. Dows, 2 Hilton 247, 259-61 (N.Y.C.P. 1858); Wheeler v. Dixon, 14 How. Pr. 151, 152-53 (N.Y. Sup. Ct. 1856); Clapper v. Fitzpatrick, 3 How. Pr. 314, 315 (N.Y. Sup. Ct. 1848).

The verified pleadings requirement had a strange history. In the amendment of the Code in 1849, the provisions regarding self-incrimination were omitted, leaving only the requirement that when any pleadings in a case were verified, all subsequent pleadings (except demurrers) were to be verified as well. *See* FINAL REPORT, *supra* note 248, § 157. Then in 1851 the legislature amended the section yet again to allow omission of verification in cases in which admission of the truth of an allegation would subject the party to a felony prosecution. The legislature also restipulated that no verified pleading was to be used in any subsequent criminal prosecution "as proof of a fact admitted or alleged in such pleading." An Act to Amend the Code of Procedure, ch. 479, 1851 N.Y. Laws 876, 888. Finally, in 1854 the legislature returned to the original language of the 1848 Code, providing simply that omission of verification was permitted "where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading." An Act in Relation to Pleadings in Courts of Record, ch. 75, 1854 N.Y. Laws 153. *See generally* Wheeler v. Dixon, 14 How. Pr. 151, 152-53 (N.Y. Sup. Ct. 1856) (describing the history of the self-incrimination provisions in the Code's verification of pleadings section).

Three years after the initial promulgation of the Code, a second immunity provision was attached to it. The 1851 amendments to the Code included a change to the provision requiring judgment debtors to appear before a judge and be examined under oath with respect to the payment of the debt. The amendment stated that no person was excused from answering merely because the examination would tend to convict him of fraud. In order to extinguish the privilege in this instance, the amendment included a testimonial immunity clause providing that the judgment debtor's answer was not to be used as evidence against him in any criminal proceeding or prosecution.[253]

4. Testimonial Immunity Statutes as the Standard.—Over the period of only a few decades, then, legislatures in New York shifted to narrow testimonial immunity provisions, away from the broad transactional immunity provisions that had characterized immunity statutes as late as 1820. New York was hardly alone in this; during these same years a number of states adopted narrow testimonial immunity statutes,[254] as did England.[255]

At the federal level, Congress collapsed the move from transactional to testimonial immunity into five short years. In 1857 Congress debated an act conferring transactional immunity on witnesses testifying before congressional committees investigating political corruption.[256] Over the strenuous objections of Senator Lyman Trumbull, who argued that

---

253. *See* An Act to Amend the Code of Procedure, ch. 479, § 292, 1851 N.Y. Laws 898. In a variation on the disqualification reforms enacted by the legislature, another 1851 amendment to the Code provided that one codefendant or coplaintiff could be called by another "as to any matter in which he is not jointly interested or liable," but that "the examination thus taken shall not be used in behalf of the party examined, unless he is examined at the instance of the adverse party." *Id.* § 397, at 903.

254. Compare, for example, two antebellum Pennsylvania gambling statutes. In 1847 the state legislature enacted a transactional immunity provision to facilitate the enforcement of its gambling laws. *See* An Act for the Suppression of Gambling, ch. 79, § 4, 1847 Pa. Laws 111. In 1860 the legislature repealed the 1847 Act and enacted in its place a narrower testimonial immunity provision. *See* Act of Mar. 31, 1860, ch. 374, § 58, 1860 Pa. Laws 382. Many cases of the period address this new form of testimonial immunity statute. *See* Pleasant v. State, 15 Ark. 624, 649-50 (1855); State v. Quarles, 13 Ark. 307, 308-10 (1853); Kneeland v. State, 62 Ga. 395, 398-99 (1879); Higdon v. Heard, 14 Ga. 255, 258 (1853); Bedgood v. State, 17 N.E. 621, 623-24 (Ind. 1888); State v. Enochs, 69 Ind. 314, 317 (1879); Wilkins v. Malone, 14 Ind. 153, 156 (1860); Commonwealth v. Emery, 107 Mass. 172, 181-86 (1871); *Ex parte* Buskett, 17 S.W. 753, 754-55 (Mo. 1891); State v. Nowell, 58 N.H. 314, 315-16 (1878); Currier v. Concord R.R. Corp., 48 N.H. 321, 333 (1869); LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133, 140-44 (1880); Smith v. Crane, 12 Vt. 487, 490-91 (1840); Temple v. Commonwealth, 75 Va. 892, 900-01 (1881); Cullen v. Commonwealth, 65 Va. (24 Gratt.) 218, 221 (1873).

255. *See* 2 TAYLOR, *supra* note 72, § 1310, at 1176-77 (describing the enactment of transactional immunity statutes through the 1820s, but noting the shift to testimonial immunity statutes beginning in the 1850s); *see also* Queen v. Leatham, 121 Eng. Rep. 589, 591 (Q.B. 1861) (holding that a witness can be compelled to give incriminating testimony when guaranteed testimonial immunity).

256. CONG. GLOBE, 34th Cong., 3d Sess. 426-32, 434-45 (1857).

transactional immunity would allow even "the greatest criminal" to escape,[257] Congress enacted the broad immunity act extending transactional immunity to all persons compelled to furnish self-incriminating testimony before either house of Congress or any congressional committee.[258] The act was subject to almost immediate abuse,[259] and in 1862 the act was amended in accordance with Senator Trumbull's original recommendation to provide only testimonial immunity.[260] Finally, in 1868, Congress passed an additional immunity act extending the reach of the 1857 act, as amended in 1862 to provide only testimonial immunity, to judicial proceedings.[261] Congress thus reproduced, albeit in an abbreviated time frame, the transformation of the immunity statutes in New York and other American jurisdictions during the middle decades of the nineteenth century.

C. *Constitutionalizing the Privilege in New York State: Litigating the Immunity Statutes*

Although the attacks on the broad common-law witness privilege launched by John Appleton and others had begun the process of forcing American lawyers and judges to address the question of the witness privilege's constitutional status, it was only with a series of cases litigated under the newly narrowed immunity statutes that the witness privilege emerged as a significant constitutional rule.

---

257. *Id.* at 437 (statement of Senator Trumbull).

258. *See* An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony, ch. 19, § 2, 11 Stat. 155 (1857).

259. *See* CONG. GLOBE, 37th Cong., 2d Sess. 428-29 (1862) (describing abuses of the transactional immunity rule by witnesses seeking to indemnify themselves against criminal prosecution). Senator Trumbull described the consequences of the transactional standard as follows:

> The statute of 1857 was passed hastily; we all recollect that it grew out of a particular matter, and was known to be imperfect when it passed. It has operated so as to discharge from prosecution and punishment persons who were brought before these committees and testified touching matters that they might have been prosecuted for. In fact this holds out an inducement for the worst criminals to appear before our investigating committees. Here is a man who stole two million in bonds, if you please, out of the Interior Department. What does he do? He gets himself called as a witness before one of the investigating committees and testifies something in relation to that matter, and then he cannot be indicted.

Id. at 428 (statement of Senator Trumbull). On the background of the federal immunity statutes, see J.A.C. Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMP. L.Q. 57, 63-64 (1934); Hazlett, *supra* note 37; and Note, *supra* note 71, at 1571-78.

260. *See* An Act Amending the Provisions of the Second Section of the Act of January Twenty-Fourth, Eighteen Hundred and Fifty-Seven, Enforcing the Attendance of Witnesses Before Committees of Either House of Congress, ch. 11, 12 Stat. 333 (1862).

261. *See* An Act for the Protection in Certain Cases of Persons Making Disclosures as Parties, or Testifying as Witnesses, ch. 13, § 1, 15 Stat. 37 (1868).

1. The Usury Cases.—Prior to the enactment of the 1837 usury act that conferred testimonial immunity on plaintiffs in suits at law on notes alleged to be usurious,[262] a defendant seeking to make a defense of usury in a common-law action on a promissory note in New York's courts was prevented by both the disqualification rule and the witness privilege from compelling the testimony necessary to substantiate the usury defense. Under the disqualification rule, the plaintiff was not compellable to testify and thus could not be called by the defendant in order to establish the fact of usury; under the witness privilege, even if the defendant could call the original payee on the note in order to prove the usury, the payee could not be compelled to incriminate himself.[263] Moreover, when the defendant at law sought discovery by filing a bill in equity, he was precluded from avoiding the debt altogether by the equitable maxims "he that will have equity must do equity" and "equity will not enforce a penalty."[264]

In New York's 1829 Revised Statutes, the legislature sought to make it easier for defendants in suits at law on usurious notes to prove the usury in a parallel action in chancery. The Revised Statutes provided that it was not necessary for a defendant at law to pay or offer to pay any interest on the sum loaned in order to compel discovery in chancery.[265] The legislature's amendment of usury law procedure prompted the chancellor in the 1832 case of *Livingston v. Harris*[266] to address the extent to which the legislature could change equitable discovery rules. With respect to the rule that a party seeking equity must do equity, the chancellor held that the legislature could amend or abolish even this cardinal rule of equity jurisdiction because it "relate[d] merely to the principles upon which this court acts in the exercise of its general jurisdiction."[267] But then the court turned to a question that had not theretofore arisen in reported cases in New York State: What was the relationship between the rule obtaining both at common law and in equity, under which a witness could not be compelled to disclose testimony that would expose him to a penalty, and the constitutional self-incrimination clause? According to the chancellor, the Constitution had

---

262. *See supra* note 244 and accompanying text.

263. *See* Cloyes v. Thayer, 3 Hill 564, 566 (N.Y. Sup. Ct. 1842); Burns v. Kempshall, 24 Wend. 360, 362-63 (N.Y. Sup. Ct. 1840), *aff'd*, 4 Hill 468, 469 (N.Y. 1842); Mauran v. Lamb, 7 Cow. 174, 177-79 (N.Y. Sup. Ct. 1827); Connor v. Bradey, 1 Ant. N.P. Cas. 135, 136 (N.Y. Sup. Ct. 1809); *see also* Livingston v. Harris, 3 Paige Ch. 528, 532 (N.Y. Ch. 1832) (noting the difficulty of "establish[ing] the fact of usury by the ordinary modes of proof adopted in courts of common law").

264. *Livingston*, 3 Paige Ch. at 533.

265. *See* 1 N.Y. REV. STAT. ch. 4, tit. 3, § 8 (Packard 1829).

266. 3 Paige Ch. 528 (N.Y. Ch. 1832).

267. *Id.* at 533-34.

> wisely provided that a party shall not be compelled in any criminal case to be a witness against himself. And this principle, by the common law, was extended to proceedings in civil cases, where the witness was called upon to make a disclosure which might subject himself to forfeiture, or penalty, or to any loss in the nature of a penalty. It would therefore be inconsistent with this principle of the common-law, and with the spirit of the Constitution, to compel a defendant to be a witness against himself, where the effect of the disclosure which he was required to make would be to subject him to a forfeiture of the money actually loaned, and to which no other person had any equitable claim.[268]

The court thus concluded that the legislature could not compel a discovery that would subject a witness to a forfeiture or penalty. The chancellor's analysis seemed to recognize a distinction between a constitutional self-incrimination clause limited to criminal cases and a more expansive common-law rule covering civil forfeitures and penalties. Yet arguing that the broader common-law rule was consistent with "the spirit of the Constitution," the court enforced the broader common-law rule against the legislature.

The chancellor's analysis in *Livingston* largely evaded the question by glossing the common-law rule as consistent with the "spirit" of the constitutional clause. With the enactment of the 1837 testimonial immunity provision for usury cases, however, usury litigation took a distinct constitutional turn that forced courts to clarify *Livingston*'s impressionistic equation of the common-law and constitutional privileges.

The New York usury act of 1837 provided that defendant-borrowers in actions on usurious notes could compel plaintiff-lenders to testify (either at law or equity) in order to establish the usury and conferred testimonial immunity on the plaintiff-lender.[269] *Perrine v. Striker*[270] was the first case decided under the act. The complainant in *Perrine* sought a permanent injunction against the bringing of a suit on an allegedly usurious note and requested discovery under the 1837 act to prove the usury.[271] Demurring to both the request for discovery and the injunctive relief sought by the bill, counsel for the lender argued that "[t]he act of 1837, requiring the defendant to answer on oath, for the purpose of enforcing a forfeiture against him, is in conflict with the provision of the constitution, which declares that no person shall be compelled, in any criminal case, to be a

---

268. *Id.* at 534.
269. *See supra* notes 229-30 and accompanying text.
270. 7 Paige Ch. 598 (N.Y. Ch. 1839).
271. *Id.* at 598-99.

witness against himself."[272] The chancellor rejected the constitutional claim on the ground that although the constitutional privilege required that the lender be immunized from the admission of his compelled testimony in any subsequent criminal case against him, it did not require that the lender be insulated from subsequent prosecution:

> The objection that the discovery sought by the bill may subject the defendant to a crimnal [*sic*] prosecution is not well taken. The eighth section of the act of May, 1837, to prevent usury, expressly provides that the answer of a defendant in such a case shall not be used against him before any grand jury, or on the trial of any indictment against him. Whether any criminal prosecution can be instituted in any form against the usurer, it is not material to inquire; for the legitimate construction of the section must be . . . that his answer shall not be received as evidence on the trial of any criminal prosecution against him.[273]

The court went on to state that the common-law witness privilege had been broader than its constitutional analogue:

> By the common law, a defendant in a suit in this court could not be compelled to answer any charge, or interrogatory, which might subject him to a penalty or forfeiture, or any loss in the nature of a forfeiture. And this principle was also applicable to witnesses in suits at law; who could not be compelled to disclose the fact of usury, where such disclosure would have the effect to deprive them of the recovery of the whole debt.[274]

The common-law privilege, then, had encompassed a wide range of self-damaging testimony. But only the constitutional privilege placed limits on the legislature, and in the chancellor's view, the instant proceeding was not a criminal case within the meaning of the constitutional privilege:

> The seventh section of the seventh article of the constitution declares, that no person shall be compelled in any criminal case to be a witness against himself. But I am not prepared to say that this is a criminal case, within the meaning of this provision of the constitution; although the effect of the discovery sought must necessarily be to prevent a recovery of the money actually lent, and is therefore in the nature of a forfeiture.[275]

The constitutional self-incrimination clause, in this view, attached only to testimony in criminal cases. As a result, an immunity statute that

---

272. *Id.* at 600.
273. *Id.*
274. *Id.* at 601.
275. *Id.* at 602.

precluded the introduction of compelled incriminating testimony into evidence in a subsequent prosecution was consistent with the constitutional privilege.

Four years later, the question of whether a real plaintiff-in-interest could be compelled to testify under the act of 1837 came before what was then New York's highest court—the Court for the Correction of Errors—in *Henry v. Bank of Salina*.[276] "It is true," wrote Chancellor Walworth, that

> by the common law, a witness was not compelled to answer any question, nor was a party to a suit in chancery bound to discover any matter, which would subject him to any loss in the nature of a penalty or forfeiture. *But the constitutional provision for the protection of the rights of parties and witnesses is not so broad.* It is, therefore, in the power of the Legislature to change this humane principle of the common law, so far as it can be done without violation of the Constitution.[277]

Walworth thus drew a distinction between the threat of criminal sanctions, which brought testimony within the scope of the constitutional self-incrimination clause, and the threat of mere civil penalties and forfeitures, which he viewed as falling within the protection of the common-law witness privilege but not within the scope of the constitutional self-incrimination clause. As for the question of the threat of criminal prosecution for usury, Walworth held that the 1837 usury act satisfied the requirements of the constitutional self-incrimination clause by conferring testimonial immunity on plaintiffs who were compelled to testify under its auspices.[278]

In addition to the usury statute, several of the other testimonial immuity statutes enacted by the New York legislature prompted courts in New York to decide on the scope of its constitutional self-incrimination clause.

---

276. 5 Hill 523 (N.Y. 1843). Under the 1837 Act, "plaintiffs" could be compelled by the defendant to testify as to the fact of the usury. In cases such as *Henry*, plaintiffs sought to evade the Act by having their case prosecuted by some third party. They argued that the real plaintiff-in-interest was no longer "the plaintiff" within the meaning of the 1837 act and thus was no longer within the grant of immunity provided by the testimonial immunity provision of the Act. Therefore, the argument went, the real plaintiff-in-interest could not be compelled to testify as to the self-incriminating fact of the usury.

277. *Id.* at 526 (emphasis added).

278. *See id.* at 525. The act, Walworth wrote, "remove[d] the constitutional difficulty, in compelling [plaintiffs] to answer, by declaring that the testimony given by any plaintiff . . . under the provisions of that Act, shall not be used against such person before any grand jury, or on the trial of any indictment against him." *Id.* The chancellor thus understood the 1837 act to extend to usury cases the proposition established in England in 1806 by *Lord Melville's Case*. *See id.* at 526.

Wheeler v. Dixon[279] held that the verification of pleadings provision in the amended Field Code did not violate the state constitutional privilege.[280] And in *People v. Quant*,[281] decided in 1855, a three-judge panel rejected a constitutional attack on the 1855 anti-intemperance act and its testimonial immunity provision.[282]

In each of the cases, especially the usury cases, the courts sharply distinguished the common-law privilege from the constitutional privilege on the ground that the former protected against civil penalties and forfeitures, whereas the latter was limited to some more narrowly defined class of criminal sanctions.[283] In addition, the usury cases strongly intimated that testimonial immunity alone was sufficient to satisfy the requirements of New York's constitutional self-incrimination clause.

2. People *ex rel.* Hackley v. Kelly *and the Constitutionalization of Testimonial Immunity.*—The New York Court of Appeals settled the question of the scope of immunity required by the constitution in *People ex rel. Hackley v. Kelly*,[284] decided in 1861. Andrew Hackley had been summoned before a New York City grand jury investigating corruption in the city council.[285] Hackley refused to answer the grand jury's questions, citing both the "ancient common-law rule, that no man is held to accuse himself,"[286] and the state constitutional self-incrimination clause, the "sixth section of the first article of the Constitution of this State."[287]

---

279. 14 How. Pr. 151 (N.Y. Sup. Ct. 1856).

280. *Id.* at 153. In a showing of inconsistency that indicated the newness of the distinction between the common-law and constitutional privileges, the *Wheeler* court ignored the 1843 holding of the Court for the Correction of Errors in *Henry* and in dicta cited the New York Constitution's self-incrimination provision for the proposition that "[a] witness is not bound to speak when the answer may subject him to a prosecution for a crime or misdemeanor, or to any penalty or forfeiture, or anything in the nature of a penalty or forfeiture, or has a tendency to degrade his character." *Id.* The court thus reconflated the common-law and constitutional privileges, attributing the broad characteristics of the former to the latter.

281. 12 How. Pr. 83 (N.Y. Sup. Ct. 1855).

282. *See id.* at 88. The court might more properly be said to have skirted the constitutional question raised by the testimonial immunity provision because that particular provision was not implicated in the case at bar. Referring to the section of New York's 1846 Constitution containing the self-incrimination clause, the court noted: "It will be perceived that no part of this section has any application to the question presented by this appeal. . . . If other parts of the act conflict with this or any other section of the constitution, it will not affect the validity of those provisions free from such objections." *Id.*

283. The *Livingston* case, it will be remembered, distinguished between the common-law and constitutional rules, but enforced both against the legislature. Livingston v. Harris, 3 Paige Ch. 528, 534 (N.Y. Ch. 1832).

284. 24 N.Y. 74 (1861).

285. *Id.* at 76. Hackley was asked, "What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to fifty thousand dollars?" *Id.*

286. *Id.*

287. *Id.*

Under the testimonial immunity provisions of the acts to prevent public corruption enacted in 1853 and 1857, all offenders against the acts were competent witnesses to testify and their testimony was inadmissible "in any prosecution, civil or criminal, against the person so testifying."[288] Thus, as Judge Hiram Denio wrote, "[t]he question to be determined" was "whether these provisions are consistent with the true sense of the constitutional declaration, that no person shall be compelled in any criminal case, to be a witness against himself."[289]

Denio's answer was a resounding yes. Like the courts in the usury cases, Denio distinguished between the "common-law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime,"[290] on the one hand, and the constitutional self-incrimination provision on the other. The latter only provided that the state could not "compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences."[291] "If the case is so situated," Denio stated, "that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged."[292]

After *Kelly*, New York had firmly distinguished between the common-law witness privilege and the constitutional Self-Incrimination Clause. The former offered the witness shelter from a range of self-accusing testimony, including testimony exposing him to civil penalties or moral disgrace. The latter was narrowly limited to protecting the witness—whether he was a party to the case at bar or a third-party witness—from being compelled to give testimony that could subsequently be introduced in a criminal case against him.[293]

---

288. An Act to Amend the Existing Laws Relating to Bribery, ch. 539, § 14, 1853 N.Y. Laws 1012, 1013.

289. *Kelly*, 24 N.Y. at 81.

290. *Id.* at 82-83.

291. *Id.* at 83.

292. *Id.* at 83-84.

293. It should be noted that some scholars have claimed that the application of the Fifth Amendment's Self-Incrimination Clause to witnesses, as opposed to defendants and suspects in pretrial proceedings, was a doctrinal innovation of the late nineteenth century. *See* Hazlett, *supra* note 37 (manuscript at 1); Lewis Mayers, *The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law?*, 4 AM. J. LEGAL HIST. 107, 139 (1960); Nesson & Leotta, *supra* note 4, at 1637-39. It is true that the witness privilege was not understood as a constitutional rule in the first half of the nineteenth century. But as I have argued here, the constitutional privilege against self-incrimination was simply never invoked in early-nineteenth-century American legal practice due to overlapping common-law doctrines. Moreover, as *Kelly* demonstrates, when the state analogues of the Fifth Amendment finally did become factors in American legal practice, it was at least in part to witnesses that they were first applied. Hazlett accurately observes that the early federal case law simply ignored the Self-Incrimination Clause, but her claim that the first cases to consider the constitutional

VI. Constitutionalizing the Common Law: The Return to Early-Nineteenth-Century Common-Law Standards in Late-Nineteenth-Century Constitutional Self-Incrimination Doctrine

After *Kelly*, the constitutional self-incrimination clauses had been definitively interpreted and brought into American legal practice as narrow constraints on the government's capacity to compel the production of self-regarding testimony. Indeed, *Kelly* quickly became the majority rule in state and federal courts alike.[294] By the end of the nineteenth century, however, the newly defined constitutional self-incrimination clauses had been expanded dramatically. In part, the re-expansion of the late-nineteenth-century privilege was the result of the ready availability of a body of common-law privilege cases that gave a broad reading to the scope of the privilege. But the late-nineteenth-century courts were also reacting to a real dilemma created by the proponents of a narrow constitutional rule. The broad common-law privilege of the early nineteenth century had made sense as part of a distinctive approach to fact-finding in the courtroom.

---

provision excluded witnesses from its scope is less certain. *See* Hazlett, *supra* note 37 (manuscript at 7). The *Quitman* case cited by Hazlett, *see* United States v. Quitman, 27 F. Cas. 680 (C.C.E.D. La. 1854) (No. 16,111)—a case discussed above, *see supra* notes 195-97 and accompanying text—is ambiguous. The court in *Quitman* stated that

> [t]he Constitution of the United States does not allow *the examination of a witness in any criminal case against himself*, except with his consent. The common-law of evidence extends the exemption, and he is not required to answer in any case either as a witness or a party, the effect of which answer might be to implicate him in a crime or misdemeanor, or subject him to a forfeiture.

Quitman, 27 F. Cas. at 682 (emphasis added). In my view, the *Quitman* case is best understood as applying the Self-Incrimination Clause to witnesses. The critical question is whether the word "witness" in the first sentence refers to a criminal defendant testifying as a witness in his own case, or to a nonparty witness whose testimony (*i.e.* "examination") was subsequently submitted as evidence in a criminal case against him. Two factors militate for the latter view. It is not clear how a criminal defendant could "consent" to be examined in his own criminal case before the abolition of the rule disqualifying criminal defendants from testifying. Moreover, the use of the phrase "witness or party" in the second sentence suggests that the first sentence's use of the word "witness" may have specifically excluded parties.

294. *See In re* Counselman, 44 F. 268, 270 (C.C.N.D. Ill. 1890), *rev'd sub nom* Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. McCarthy, 18 F. 87, 89 (C.C.S.D.N.Y. 1883); *In re* Krueger, 14 F. Cas. 870, 871 (D. Mass. 1872) (No. 7,942); United States v. Williams, 28 F. Cas. 670, 671-72 (C.C.S.D. Ohio 1872) (No. 16,717); *In re* Strouse, 23 F. Cas. 261, 261 (D. Nev. 1871) (No. 13,548); United States v. Brown, 24 F. Cas. 1273, 1275 (D. Or. 1871) (No. 14,671); Stanwood v. Green, 22 F. Cas. 1077, 1079 (S.D. Miss. 1870) (No. 13,301); United States v. Mathoit, 26 F. Cas. 1197, 1200 (D. Or. 1870) (No. 15,740) (dicta); Pleasant v. State, 15 Ark. 624, 649-50 (1855); State v. Quarles, 13 Ark. 307, 310 (1853); Kneeland v. State, 62 Ga. 396, 398-99 (1879); Bedgood v. State, 17 N.E. 621, 623 (Ind. 1888); State v. Enochs, 69 Ind. 314, 315-17 (1879); Wilkins v. Malone, 14 Ind. 153, 154-55 (1860); Commonwealth v. Emery, 107 Mass. 172, 182 (1871); *Ex parte* Buskett, 17 S.W. 753, 754-55 (Mo. 1891); State v. Nowell, 58 N.H. 314 (1878); Currier v. Concord R.R. Corp., 48 N.H. 321, 332 (1869); LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 133, 141 (1880); Temple v. Commonwealth, 75 Va. 892, 895-96 (1881); Cullen v. Commonwealth, 65 Va. (24 Gratt.) 624, 632-33 (1873); *see also* Queen v. Leatham, 121 Eng. Rep. 589 (Q.B. 1861) (validating an act compelling a witness to give incriminating testimony when guaranteed testimonial immunity).

But as the old model of common-law fact-finding was abandoned in favor of a model driven by counsel and cross-examination, the privilege came to appear increasingly anachronistic. Thus, even as judges and legislators argued in favor of a narrow constitutional privilege, they found it exceedingly difficult to articulate a principled basis for even their narrow version of self-incrimination rules. By their lights, the new mode of fact-finding in the common-law trial left no real basis for the privilege; their narrow reading of the self-incrimination clauses was in large part an attempt simply to read out of the state and federal constitutions a provision that no longer made sense to them.

In the absence of a principled account of the self-incrimination clauses, the door was left open for the subsequent re-expansion of the privilege under a new theory. Accordingly, under the aegis of a broad constitutional right to privacy, late-nineteenth-century courts reworked the broad common-law rules of self-incrimination and put them to new use.

A. The Dilemma of the Narrow Mid-Nineteenth-Century Privilege: Finding a Rationale for the Constitutional Privilege

As we have seen, judges such as Appleton, Campbell, and Denio, who were instrumental in distinguishing the common-law privilege from the constitutional self-incrimination clauses, interpreted the constitutional clauses narrowly.[295] Indeed, in their view, the constitutional clauses were something of an embarrassment, to be explained away in narrow readings of the constitutional provisions. Appleton, for one, had been a leading figure in the abolition of the disqualification rules and in the reorientation of the common-law approach to fact-finding. To him the self-incrimination rules were little more than holdovers in a new age of liberal witness competency rules and cross-examination.[296]

Leading lights in the mid-nineteenth-century Congress exhibited the same deep ambivalence about the self-incrimination clauses. Like Appleton, Campbell, and Denio, they resisted broad readings of the federal Self-Incrimination Clause, but failed to advance a rationale that could account for the clause. Thus, when Senator Lyman Trumbull of Illinois protested that the transactional immunity statute of 1857[297] went "too far" and would allow "the greatest criminal [to] escape" merely by giving "testimony on some immaterial point,"[298] he conceded that a "witness should not be prosecuted for an offense by himself which his own

295. *See supra* text accompanying notes 194-207 and 285-93.
296. *See supra* text accompanying notes 203-07.
297. *See supra* notes 256-60 and accompanying text.
298. CONG. GLOBE, 34th Cong., 3d Sess. 437 (1857) (statement of Senator Trumbull).

testimony alone discloses."[299] But Trumbull articulated no principled reason for this concession other than a need to avoid rendering the constitutional provision wholly meaningless.

Senator Charles Sumner made explicit the dilemma of the new view of the self-incrimination clauses. Sumner, like his friend and correspondent Appleton, was a strong opponent of the common-law rules excluding particular classes of witnesses from testifying under oath. Thus, when Sumner fought to abolish the exclusion of black witnesses from testifying under oath in federal courts in 1864, his critique of the racial disqualification rule was implicitly a critique of other disqualification rules as well.[300] "In the early Common-law," Sumner argued to his Senate colleagues, "numbers [of witnesses] were excluded who are now admitted to testify."[301] However, he continued, "the plain tendency of recent legislation, and also of judicial decisions, in England and in the United States, has been to limit the exclusion of witnesses, allowing the court and jury, on hearing their testimony, to estimate its weight and value."[302] Citing to Bentham and Appleton, Sumner observed that the "whole system of exclusion" had come to be "covered with ridicule."[303]

Sumner, then, was deeply committed to abolishing the rules of disqualification.[304] Like the disqualification rules, the common-law witness privilege and broad transactional immunity requirements kept evidence out of the hearing of judge and jury and prevented finders of fact from sifting through evidence to make reliable determinations of fact. Accordingly, in 1862, when Trumbull proposed to amend the 1857 immunity act from a transactional standard to a testimonial standard, Sumner led the debate on the Senate floor in favor of Trumbull's amendment.[305] But like Trumbull some five years before, Sumner did not advance a rationale for the privilege itself, only a rationale for reading it narrowly. Indeed, Sumner admitted that but for the Self-Incrimination Clause, he "should not be disposed to follow the common law at all."[306] "[T]he jurisprudence of other civilized countries, derived from the Roman law," he argued, "on

---

299. *Id.* (statement of Senator Trumbull).

300. Professor Fisher's work brought Sumner's views to my attention. *See* Fisher, *supra* note 83, at 676-78.

301. CHARLES SUMNER, *Exclusion of Witnesses on Account of Color*, *in* 11 CHARLES SUMNER: HIS COMPLETE WORKS 2, 27 (Negro Univ. Press 1969) (1900).

302. *Id.*

303. *Id.*; *see also* CHARLES SUMNER, *Opening the United States Courts to Colored Witnesses*, *in* 11 SUMNER, *supra* note 301, at 389, 394 ("Let the witness always be admitted to testify, leaving the jury to be judges of his credibility.").

304. *See* SUMNER, *supra* note 303, at 395 (announcing his support for abolition of the rule disqualifying civil parties).

305. *See* CONG. GLOBE, 37th Cong., 2d Sess. 429 (1862).

306. *Id.* (statement of Senator Sumner).

this question is preferable to the . . . common law. There is no other jurisprudence, under which a witness is not expected to answer any question that is put to him, no matter whether it impeach his character or his honor, or even may render him criminal."[307] Because of the text of the Constitution, Sumner conceded that some privilege against self-incrimination was necessarily the law of the land, but he refused to "consent that it shall receive any expansion, especially when such expansion may interfere with the public interests."[308]

The real weakness of the narrow mid-nineteenth-century view of the privilege against self-incrimination, then, was its failure to articulate principled grounds on which the courts and Congress could interpret the constitutional self-incrimination clauses. The privilege had come to be seen as little more than an historical anomaly imposed on American law by concerns that were no longer clearly understood and that certainly were no longer pressing. As the government would argue in the case of *McAlister v. Henkel*[309] several decades later, "every consideration of a proper protection of the rights of the body politic demand[ed] that the privilege should not be extended beyond the limits which are to be fixed by reference to its historical origin."[310]

This failure to articulate more than an ad hoc rationale for the privilege raised two critical problems for the narrow view of the self-incrimination clauses. If the privilege were an anomaly best limited to its "historical" scope, the history of the common-law privilege from the early part of the century offered a wealth of precedents supporting a remarkably broad privilege. Case law from the early part of the century could be found supporting a privilege that was more than merely personal to the witness, that encompassed a witness's civil interests and protected him against moral disgrace, and that could only be abrogated by a grant of transactional immunity.[311] Moreover, absent a coherent theory of the principles underlying the self-incrimination clauses, the field was wide open

---

307. *Id.* (statement of Senator Sumner).

308. *Id.* (statement of Senator Sumner). Senator Benjamin Wade concurred in Sumner's estimation of the constitutional provision: "Like the Senator from Massachusetts [Sumner], I have never been able to see the wisdom or the justice of such a rule existing even at the common-law, and I believe the civil-law rule was infinitely better." *Id.* (statement of Senator Wade). Accordingly, Wade advocated limiting the immunity provided by the Self-Incrimination Clause to a narrow testimonial scope. *See id.* (statement of Senator Wade).

309. 201 U.S. 90 (1906); *see also* Hale v. Henkel, 201 U.S. 43 (1906) (companion case to *McAlister*).

310. Brief for the United States at 15, *McAlister* (No. 341). The government explained that although "[t]he privilege has become deeply fixed in our system of jurisprudence" and would "never be abolished," "the progress of Anglo-Saxon civilization and the enlightened administration of justice . . . have made it less and less necessary for the protection of the rights of persons." *Id.*

311. *See supra* Part II.

for the development of a new rationale to explain and rejuvenate those broad common-law precedents.

B. The Common-Law Alternative and the Search for a New Rationale

Even as *Kelly* and similar cases were articulating the scope of the constitutional self-incrimination clauses by distinguishing the constitutional provisions from the common-law privilege, another view of the clauses began to emerge. Contrary to *Kelly*, this interpretation held that the broad common-law rules governing self-damaging witness testimony were wholly constitutionalized by the self-incrimination clauses.

The view that the self-incrimination clauses constitutionalized the common-law privilege had a weak antebellum pedigree. Joseph Story, for one, had claimed that the Fifth Amendment's Self-Incrimination Clause was "but an affirmance of a common-law privilege."[312] But because of the overlapping common-law rules of privilege and disqualification, antebellum lawyers and judges had no occasion to work out in any systematic way the relationship between the common-law rules and the constitutional provisions.[313] As legislatures began to enact narrow testimonial immunity statutes in the mid-nineteenth century, however, some legislators began to articulate a robust relationship between the common-law rules and the constitutional provisions. Representative Humphrey Marshall of Kentucky, for example, argued that the Fifth Amendment Self-Incrimination Clause, properly understood, constitutionalized the principle that no person was compellable to testify to that which "render[s] him infamous."[314] Likewise, Senator John P. Hale of New Hampshire argued that the self-incrimination clauses in the state and federal constitutions "protect[ed] a witness from answering to matters which shall criminate or disgrace himself."[315] The implications of this view were startling and, in some ways, even broader than the early-nineteenth-century common-law witness privilege. If Marshall and Hale were right that the constitutional self-incrimination clauses protected a witness from being compelled to give testimony that would disgrace him, then not even transactional immunity might have been sufficient to extinguish the witness's privilege. The privilege would have become a true right to silence.[316]

In the post-Civil War years, it became routine for courts to claim that the constitutional self-incrimination clauses constitutionalized the common-

312. 3 STORY, *supra* note 38, § 1782, at 660.

313. Story, for example, merely indicated that the Constitution codified the common-law privilege's protections against "torture in order to produce a confession of guilt." *Id.*

314. CONG. GLOBE, 34th Cong., 3d Sess. 431 (1857) (statement of Representative Marshall).

315. *Id.* at 434 (statement of Senator Hale).

316. In 1896 four justices of the Supreme Court came to precisely this conclusion. *See infra* note 357.

law rules, especially in cases requiring the courts to rule on immunity statutes and the new rules of witness competency.[317] Like the narrower interpretation adopted by the *Kelly* court and by Appleton, Trumbull, and Sumner, however, this approach to the constitutional self-incrimination clauses suffered from serious weaknesses. As we have seen, self-incrimination doctrine in the early nineteenth century made virtually no reference to the constitutional self-incrimination clauses and gave little indication that they re-enacted the common-law privilege.[318] Indeed, the proponents of the view that the self-incrimination clauses constitutionalized the common-law failed to recognize that the early-nineteenth-century common-law rules relating to a witness's self-regarding testimony had changed significantly over the course of the first half of the nineteenth century. The privilege, for example, had moved from being a per se bar on self-damaging testimony to being a personal privilege invocable by the witness; so, too, had the witness privilege ceased to encompass a witness's civil interests. Neither change, however, had prompted any objection that narrowing the common-law rules posed a constitutional problem.

Moreover, those who took the view that the constitutional clauses codified the common-law privilege also faced a difficult challenge in articulating a new set of principles to account for self-incrimination doctrine. In the early nineteenth century, the common-law witness privilege against self-incrimination had been one of a panoply of rules that structured the common-law courts' approach to fact-finding. But by the post-Civil War years the common-law approach to determining issues of disputed fact had undergone a fundamental reorientation. Thus, the proponents of a constitutionalized common-law privilege advocated a constitutional rule that was now out of step with common-law fact-finding. As a result, the courts and lawyers who moved toward the broad constitutionalized privilege in the last decades of the nineteenth century began to advocate a theory of the privilege that previously had played a minimal role in the history of the privilege in every-day American practice. In place of the early-nineteenth-century conception of the privilege as a rule promoting fact-finding, the late-nineteenth-century privilege was increasingly rationalized as the guarantor of a broadly conceived right to privacy.

---

317. *See, e.g.*, Bram v. United States, 168 U.S. 532, 545 (1897) ("[A] maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.") (quoting Brown v. Walker, 161 U.S. 591, 597 (1896)); Counselman v. Hitchcock, 142 U.S. 547, 574 (1892) (observing that the interpretation of the Fifth Amendment Self-Incrimination Clause "corresponds with the common law maxim, *nemo tenetur seipsum accusar*"); Rogers v. Superior Court, 78 P. 344, 347 (Cal. 1904) (discussing the "settled policy of this country and England that no one shall be compelled to be a witness against himself in a criminal proceeding"); *see also Ex parte* Boscowitz, 4 So. 279, 280 (Ala. 1888); State v. Thaden, 45 N.W. 447, 447 (Minn. 1890) (both failing to distinguish between the common-law and constitutional privileges).

318. *See supra* subpart (I)(B).

C. *The Late-Nineteenth-Century Re-expansion of the Privilege Under the Privacy Rationale*

In the last decades of the nineteenth century, advocates of a broad constitutional privilege modeled on the common-law privilege turned to privacy as the primary rationale for the self-incrimination clauses.[319] To be sure, in the 1850s and 1860s, opponents of immunity statutes had suggested the privacy rationale for the privilege in congressional debate.[320] But Congress rejected the privacy argument in the 1860s when it enacted narrow testimonial immunity statutes. That argument, however, became central to self-incrimination law beginning with the Supreme Court's decision in the 1886 case of *Boyd v. United States*.[321] The Supreme Court reasoned in *Boyd* that the protection of "the sanctity of a man's home and the privacies of life"[322] explained the Fifth Amendment Self-Incrimination Clause. Self-incrimination doctrine, the Court explained, existed "for the security of person and property"[323] against the "arbitrary power" of the state.[324]

After *Boyd*, privacy became the privilege's dominant rationale. In the Court's late-nineteenth-century Self-Incrimination Clause jurisprudence, it was held that "the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employ[ee]s of the sanctity of a man's home, and the privacies of his life."[325] These, the Court held, were the "principles of humanity and civil liberty, which had been secured in the mother country [England] only after years of struggle."[326]

The Supreme Court's privacy rationale for the privilege quickly proved to be enormously influential, as lower federal courts and state courts adopted it to reinterpret the constitutional law of self-

---

319. On the rise of privacy as the central rationale of the privilege in the late nineteenth century, and on the centrality of the *Boyd* case, *see infra* notes 321-27 and accompanying text, I follow Stuntz. *See* Stunz *supra* note 4, at 418-28; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1048-54 (1995).

320. *See* CONG. GLOBE, 37th Cong., 2d Sess. 430 (1862) (statement of Senator James Bayard) (proclaiming the importance of not "permit[ting] a man to be subjected to the torture of being obliged to give evidence against himself"); CONG. GLOBE, 34th Cong., 3d Sess. 442 (1857) (statement of Senator George Pugh) (arguing that no "tribunal should be empowered . . . to torture a witness, and compel him to the alternative of perjury, or exclusion from the regard of his fellow-men" and that such a policy represents the excesses of "a wanton curiosity, or of a desire to oppress and ruin the witness").

321. 116 U.S. 616 (1886).

322. *Id.* at 630.

323. *Id.* at 635.

324. *Id.* at 630.

325. ICC v. Brimson, 154 U.S. 447, 479 (1894).

326. Bram v. United States, 168 U.S. 532, 544 (1897); *see also* Brief for Appellant at 74, Hale v. Henkel, 201 U.S. 43 (1906) (No. 340) (arguing that under English law "any invasion of the right of privacy [was] a trespass" and that the Fourth and Fifth Amendments constitutionalized that principle as a matter of constitutional criminal procedure).

incrimination.[327] Most importantly, the privacy rationale supplied a basis for renewed expansion of the constitutional privilege. As a result, the courts reinvigorated variations on the old common-law doctrines that had characterized the privilege in the first years of the nineteenth century.

1. "Person": Corporations and the Privilege.—By the middle of the nineteenth century, the common-law privilege had become a personal privilege, invocable only by the witness to decline to give testimony that was personally incriminating.[328] But the late nineteenth century witnessed the return of the idea that the privilege was something other than purely personal. In particular, American courts flirted with extending the privilege so as to allow corporate officers to invoke it not only in their personal capacity, but also on behalf of their corporate employers.[329] Indeed, a number of courts apparently assumed, while not directly holding, that corporations could claim self-incrimination clause privileges.[330] The Supreme Court had held, after all, in *Santa Clara County v. Southern Pacific R.R.*,[331] that corporations were persons under the Fourteenth Amendment. Wigmore, moreover, had stated unambiguously that corporations were covered by the constitutional privilege.[332] Accordingly, several courts took the readily apparent next step of squarely holding that corporations could invoke the privilege against self-incrimination through their officers.[333]

---

327. *See, e.g.*, *Ex parte* Chapman, 153 F. 371, 374-75 (C.C.D. Idaho 1907); *In re* Hale, 139 F. 496, 503 (C.C.S.D.N.Y. 1905), *aff'd*, *In re* Hess, 134 F. 109, 111 (E.D. Pa. 1905); *Hale*, 201 U.S. at 43; Gindrat v. People, 27 N.E. 1085, 1086 (Ill. 1891) (all discussing self-incrimination in terms of privacy and citing *Boyd*); *Ex parte* Wilson, 47 S.W. 996, 1000 (Tex. Crim. App. 1898) (applying the Texas Constitution's self-incrimination clause to "private books and papers" and citing *Boyd*).

328. *See supra* note 176 and accompanying text. For a restatement of the proposition in contemporary law, see *Fisher v. United States*, 425 U.S. 391, 402 (1976).

329. The best discussion of the relation between the late-nineteenth-century privilege and corporations is Stuntz, *supra* note 4, at 427-31.

330. *See In re* Knickerbocker Steamboat Co., 136 F. 956, 959 (S.D.N.Y. 1905) (assuming that the privilege could have been invoked "by the corporation itself" but holding that it had been improperly invoked by corporate counsel); Wertheim v. Continental Ry. & Trust, 15 F. 716, 728 (C.C.S.D.N.Y. 1883) (observing that courts may compel corporations to produce papers, but only subject to the "same duties and privileges as an individual"); Southern Ry. v. Bush, 26 So. 168, 174 (Ala. 1899) (assuming that a corporate officer could have claimed the privilege on behalf of the corporation); State v. Strait, 102 N.W. 913, 913-14 (Minn. 1905) (approving the disclosure of documents to a bank trustee because the privilege belonged to the bank and because the documents were semi-public); *see also In re* Moser, 101 N.W. 588, 593 (Mich. 1904) (holding that the clerk of a non-corporate employer cannot constitutionally be subpoenaed to produce the books and records of his employer).

331. 118 U.S. 394 (1886).

332. *See* 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2259, at 3116 (1st ed. 1905).

333. *See* Central Stock & Grain Exch. v. Board of Trade, 63 N.E. 740, 743 (Ill. 1902) (allowing a corporate party to decline to produce documents "on the claim of constitutional privilege"); People *ex rel.* Morse v. Nussbaum, 67 N.Y.S. 492, 499 (App. Div. 1900) (holding, in an action to annul

To be sure, the expansion of the privilege to include corporations was short-lived. In the 1906 case of *Hale v. Henkel*[334] the Supreme Court held that corporations were unable to claim the privilege because the privilege was personal to the witness testifying and, thus, a corporate officer could not claim the privilege on behalf of the corporation.[335] But the privacy rationale for the privilege had supplied strong support for extending the privilege to corporations. The appellants in *Hale* argued that it would be a "wanton assault upon the right of privacy" to preclude corporations from the shelter of the Self-Incrimination Clause.[336] And two dissenting justices, quoting from *Boyd*'s broadly worded privacy rhetoric, argued that, properly understood, the Self-Incrimination Clause did apply to corporations.[337]

2. *"Criminal Case":* Boyd *and the Constitutionalization of Civil Interests.*—If the privacy rationale had the effect of pushing the limits of self-incrimination doctrine toward the protection of corporations, it also had the effect of re-invigorating self-incrimination doctrine's protection of nominally civil interests. And while the Court ultimately retreated from the implications of extending the privilege to corporations in *Hale*, the extension of the privilege in the context of civil interests had a lasting impact on self-incrimination law. We saw in Part IV that by the mid-nineteenth century the common-law witness privilege had been narrowed to exclude the protection of a witness's civil interests. In 1874 Congress enacted a provision requiring any person suspected of customs fraud "to produce . . . book[s], invoice[s], or paper[s]"[338] at the request of the government. Any books, invoices, or papers so produced were admissible to prove allegations of customs fraud in civil forfeiture cases brought by the government.[339] Interpreting the Self-Incrimination Clause consistently with the common-law witness privilege that now protected only against criminal sanctions, the lower federal courts uniformly upheld the statute on

---

corporate contracts, that officers could decline to testify on grounds of the constitutional privilege despite a state immunity provision indemnifying officers from criminal sanctions); Davies v. Lincoln Nat'l Bank, 4 N.Y.S. 373, 373 (Sup. Ct. 1888) (holding that because an examination of a corporate officer "is . . . an examination of the defendant [corporation] itself," it is impermissible to "obtain testimony which will subject the [corporation] bank to a penalty or forfeiture").

334. 201 U.S. 43 (1906).

335. *Id.* at 69-71; *see also* McAlister v. Henkel, 201 U.S. 90, 91 (1906) (holding that the privilege "is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for refusal to answer").

336. Appellant's Brief in Reply at 21, *Hale* (No. 340).

337. *See Hale*, 201 U.S. at 83-89 (Brewer, J., dissenting).

338. An Act to Amend the Customs-Revenue Laws and to Repeal Moieties, ch. 391, § 5, 18 Stat. 187 (1874).

339. *See id.*

the grounds that in rem forfeiture proceedings were not "criminal case[s]" within the meaning of the Fifth Amendment.[340]

In 1886, however, *Boyd* marked a departure from the rule of the lower federal courts and a return to the earlier common-law protection of a witness's civil as well as criminal interests.[341] Stating that the Fourth and Fifth Amendments together served important privacy interests,[342] the Court held that the Self-Incrimination Clause applied to proceedings that, "though they may be civil in form, are in their nature criminal."[343] "If the government prosecutor," asked the Court, "elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect . . . and extort from [the claimants] a production of their private papers . . . ?"[344]

The *Boyd* Court's holding proved highly influential, and it was soon taken up by state courts to expand the protections offered by state constitutional self-incrimination provisions. In New York, for example, the constitutional self-incrimination clause was held to bar the state from treating a liquor dealer's failure to deny charges that he had violated the liquor law as presumptive evidence of guilt and grounds for revocation of the dealer's liquor tax certificate.[345] As in *Boyd*, the powerful new rhetoric of privacy and the ready availability of broad common-law precedents sustained

---

340. *See* United States v. Mason, 26 F. Cas. 1189, 1191 (N.D. Ill. 1875) (No. 15,735) ("[T]his is not a criminal offense."); United States v. Three Tons of Coal, 28 F. Cas. 149, 153-54 (E.D. Wis. 1875) (No. 16,515) (distinguishing in rem forfeiture proceedings from criminal cases for Fifth Amendment purposes); United States v. Distillery No. Twenty-Eight, 25 F. Cas. 868, 869 (D. Ind. 1875) (No. 14,966) ("This proceeding is entirely independent of any criminal prosecutions . . . ."); Mayers, *supra* note 293, at 135 n.95 (discussing *United States v. Thirty-Five Cases of Plate Glass*, an unreported 1885 case in which the Circuit Court for the Southern District of New York rejected application of the Self-Incrimination Clause to a forfeiture proceeding based on a fraud charge); *see also* United States v. Hughes, 26 F. Cas. 417, 418-19 (C.C.S.D.N.Y. 1875) (No. 15,417) (holding that an act of 1868, providing that no evidence obtained by means of any judicial proceeding from any witness could be introduced into evidence in a criminal case against the witness, did not abrogate the act of 1867 allowing customs officers to seize books and papers in support of customs fraud forfeiture proceedings, in part because such proceedings are not criminal cases); *In re* Platt, 19 F. Cas. 815, 817 (S.D.N.Y. 1874) (No. 11,212) (upholding the compelled production provision on the grounds that (1) the provision was consistent with historical practice in customs enforcement, and (2) the provision's ends were legitimate and its means were appropriate).

341. Boyd v. United States, 116 U.S. 616, 631-34 (1886).

342. *Id.* at 630 ("In this regard the Fourth and Fifth Amendments run almost into each other.").

343. *Id.* at 634.

344. *Id.* Although the owner of the goods was "not the nominal party," the Court reasoned, he was "the substantial party to the suit . . . and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offence." *Id.* at 638.

345. *See In re* Peck, 60 N.E. 775, 776-77 (N.Y. 1901); *see also In re* Cullinan, 81 N.Y.S. 567, 568-70 (App. Div. 1903) (reaching the same result even after the legislature removed the requirement that the liquor dealer's denial be verified under oath).

the expansion of the constitutional privilege into the domain of ostensibly civil interests.[346]

3. The Scope of the Privilege: Counselman *and the Constitutionalization of Transactional Immunity.*—The most significant of the expansions of the late-nineteenth-century privilege concerned the scope of the immunity required to abrogate the privilege. Once again, the late-nineteenth-century courts returned to early-nineteenth-century common-law standards, and once again, the rationale for this return to broader standards was the privacy interest served by the privilege.

The critical case in expanding the scope of the immunity doctrine was *Counselman v. Hitchcock*[347] in 1892. As noted above, Congress in 1868 had enacted an immunity statute excluding testimony obtained in any judicial proceeding from subsequent introduction in a criminal case against the witness or party producing that testimony.[348] The statute, in other words, conferred testimonial immunity in order to compel witness testimony. Like those state courts following the rule of the *Kelly* case,[349] the lower federal courts had unanimously upheld the immunity statute.[350] But when the statute was challenged at the Supreme Court for the first time in *Counselman*, the Court struck it down as failing to provide immunity as broad as the Self-Incrimination Clause required.[351] "[A] statutory enactment," the Court wrote, "to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."[352]

The Court relied in part on the broad holding of *Boyd*, decided just six years earlier, to support *Counselman*'s broad requirement of transactional immunity.[353] Most of all, the Court relied on language that Chief Justice

---

346. See, in addition, the case discussed by Stuntz, *Boyle v. Smithman*, 23 A. 397 (Pa. 1892), in which the Pennsylvania Supreme Court held that forcing an oil merchant to disclose statutorily required records relating to the storage of oil would violate the privilege against self-incrimination. *Id.* at 398. *See generally* Stuntz, *supra* note 319, at 1051-52; Stuntz, *supra* note 4, at 424.

347. 142 U.S. 547 (1892).

348. *See* An Act for the Protection in Certain Cases of Persons Making Disclosures as Parties, or Testifying as Witnesses, ch. 13, 15 Stat. 37 (1868).

349. *See supra* note 294.

350. *See In re* Counselman, 44 F. 268, 270 (C.C.N.D. Ill. 1890), *rev'd sub nom* Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. McCarthy, 18 F. 87, 89 (C.C.S.D.N.Y. 1883); *In re* Krueger, 14 F. Cas. 870, 871 (D. Mass. 1872) (No. 7,942); United States v. Wilson, 28 F. Cas. 670, 671-72 (C.C.S.D. Ohio 1872) (No. 16,717); *In re* Strouse, 23 F. Cas. 261, 261 (D. Nev. 1871) (No. 13,548); United States v. Brown, 24 F. Cas. 1273, 1275 (D. Or. 1871) (No. 14,671); Stanwood v. Green, 22 F. Cas. 1077, 1079 (S.D. Miss. 1870) (No. 13,301); United States v. Mathoit, 26 F. Cas. 1197, 1200 (D. Or. 1870) (No. 15,740) (dicta).

351. *Counselman*, 142 U.S. at 585-86.

352. *Id.* at 586.

353. *Id.* (citing Boyd v. United States, 116 U.S. 616 (1886)).

John Marshall had used to describe the common-law privilege in the case of *United States v. Burr*.[354] Marshall had described, in language adopted by the *Counselman* Court, a privilege whose scope suggested the need for a broad immunity that would protect the witness against, at minimum, the use and the use-fruits of compelled testimony:

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction.[355]

In turning to the early-nineteenth-century common-law privilege and to *Burr*, the *Counselman* Court brought together the available body of broad early-nineteenth-century common-law precedents and the Court's new privacy rationale for the Self-Incrimination Clause.[356] The privilege against self-incrimination had come full circle, returning to its early-nineteenth-century scope, but now removed from the early-nineteenth-century structure of fact-finding and possessed of a new constitutional status.[357]

---

354. 25 F. Cas. 38 (C.C.D.Va. 1807) (No 14,692e).

355. *Counselman*, 142 U.S. at 566 (quoting *Burr*, 25 F. Cas. at 40).

356. It should be noted that the language from *Burr* quoted in *Counselman* is not precisely in support of *Counselman*'s holding insofar as the excerpt from *Burr* was not about immunity at all. *See* AMAR, *supra* note 4, at 223 n.206. Moreover, as Akhil Amar notes, despite the Chief Justice's broad language in *Burr*, the witness was required to answer the question at issue on the ground that his current possession of potentially incriminating knowledge did not justify an inference of such knowledge at the time of the criminal act. *See id.* Yet the broad language was susceptible—even if mistakenly—to being applied to the issue of immunity. Chief Judge Cardozo so applied it in the case of *Doyle v. Hofstader*, 177 N.E. 489 (N.Y. 1931), when he held for the New York Court of Appeals that because compelled testimony "may still supply the links whereby a chain of guilt can be forged from the testimony of others," the "immunity is not adequate" unless "the risk of prosecution is ended altogether." *Id.* at 491; *see also* People *ex rel* Lewisohn v. O'Brien, 68 N.E. 353, 356 (N.Y. 1903) (citing the language in *Burr* to support a requirement of transactional immunity). It should be remembered, moreover, that an immunity issue did arise during the *Burr* trial, and that the court's language on this issue suggested a broadly construed rule of immunity. *See supra* note 63 and accompanying text.

357. In *Brown v. Walker*, 161 U.S. 591 (1896), the Court came within a single vote of using the new rhetoric of privacy and the available body of broad common-law precedent to hold that even transactional immunity was insufficient to compel a witness to testify. In *Brown*, the Court held by a bare 5-4 majority that the transactional immunity statute enacted in *Counselman*'s wake passed constitutional muster. *Id.* at 594-610. In one sense, the dissenters' argument that the privilege was "absolute," *id.* at 630 (Field, J., dissenting), was broader than the common-law rule. The common-law rule, after all, had been characterized by a long-standing practice of transactional immunity statutes. *See supra* sections II(C)(2); V(B)(1). On the other hand, the dissenters drew upon the broad common-law precedents of the early nineteenth century, especially those indicating that the privilege protected against

Like the *Boyd* case, *Counselman* had an immediate impact on self-incrimination law in the state courts.[358] With the Supreme Court's stamp of approval on a broad constitutional law of transactional immunity, state constitutional case law established the same transactional standard in these years.[359] New York was no exception. *Kelly* was overturned *sub silentio* in 1894[360] and finally reversed explicitly in 1903.[361]

VII. Some Beginning Thoughts on the Implications of Constitutional Self-Incrimination Doctrine's Common-Law Origins for Self-Incrimination Clause Jurisprudence

This Article has argued that the history of the witness privilege across the nineteenth century looked something like an hourglass. A broad witness privilege at the turn of the nineteenth century contracted sharply in the middle decades of the century only to expand once again at century's end. The privilege, however, was now constitutional law rather than common law. Moreover, whereas in 1800 the privilege had, along with the disqualification rules, functioned to facilitate the fact-finding process, by 1900 the common law had reoriented its approach to fact-finding, abandoning the disqualification rules and the broad common-law privilege. Accordingly, the constitutional privilege—even a narrow constitutional privilege—was a rule in search of a rationale.[362] And by the late nineteenth century, judges had used the self-incrimination clauses to constitutionalize a broad constitutional right to privacy. In cases like *Boyd* and *Counselman*, courts

---

compelling a witness to give evidence tending to subject him to moral disgrace. *See Brown*, 161 U.S. at 633-37 (Field, J., dissenting) (citing, inter alia, Lessee of Galbreath v. Eichelberger, 3 Yeates 515 (Pa. 1803) and Respublica v. Gibbs, 3 Yeates 428 (Pa. 1802)); *see also supra* notes 49-52 and accompanying text (describing the early-nineteenth-century rule extending the witness privilege to questions that would subject the witness to civil liability or moral disgrace).

358. The Court had not yet incorporated the Fifth Amendment's Self-Incrimination Clause against the states and indeed would expressly decline to do so in *Twining v. New Jersey*, 211 U.S. 78 (1908). Accordingly, the Court's influence was by way of example rather than as binding authority.

359. *See, e.g.*, *Ex parte* Cohen, 38 P. 364, 365 (Cal. 1894); *Ex parte* Clarke, 37 P. 230, 231 (Cal. 1894); State v. Drew, 124 N.W. 1091, 1093 (Minn. 1910); *Ex parte* Carter, 66 S.W. 540, 541-44 (Mo. 1902); *In re* Beer, 115 N.W. 672, 673-75 (N.D. 1908); Commonwealth v. Frank, 48 A.2d 10, 11-13 (Pa. 1946); *In re* Hearing Before Joint Legislative Comm. of House and Senate Created by Joint Resolution No. 622, 196 S.E. 164, 166-71 (S.C. 1938); Miskimins v. Shaver, 58 P. 411, 417-20 (Wyo. 1899). It should be noted that prior to the decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), state constitutions that had built-in testimonial immunity provisions continued to be governed by a narrower testimonial immunity rule. *See, e.g.*, State v. Rodrigues, 52 So. 2d 756, 758 (La. 1951); Commonwealth v. Cameron, 79 A. 169, 169 (Pa. 1911); *In re* Kelly, 50 A. 248, 249 (Pa. 1901).

360. *See* People *ex rel.* Taylor v. Forbes, 38 N.E. 303, 306 (N.Y. 1894) (holding that "nothing short of absolute immunity from prosecution" sufficed to circumvent New York's constitutional self-incrimination clause, but not addressing the conflict with *Kelly*).

361. *See Lewisohn*, 68 N.E. at 357 (repudiating the holding in *Kelly*).

362. *Cf.* Amar & Lettow, *supra* note 4, at 922 (characterizing the Fifth Amendment Self-Incrimination Clause as "a mandate in search of a meaning").

were able to draw on a readily available stock of broad common-law precedents from the early nineteenth century, but in doing so they failed to distinguish—as their mid-century predecessors had—between the Constitution and the common-law.

A. What Does It All Mean for Contemporary Constitutional Criminal Procedure? A Diagnosis

The difficulty with the late nineteenth century's re-expansion of the privilege was that it anachronistically put old, broad common-law doctrines to a new and theoretically unprincipled use. As many commentators have pointed out,[363] and as the Supreme Court has now agreed,[364] the privacy rationale offered for the privilege made little sense. Even as the *Boyd* Court announced the importance of protecting "the sanctity of a man's home and the privacies of life,"[365] courts were allowed—without apparent objection—to compel a person to testify to matters deeply personal but noncriminal.[366] Moreover, the capacity to compel testimony through immunity statutes indicated that even the broad late-nineteenth-century privilege did not effectively serve privacy interests as such.[367] Indeed, the privacy rationale's insurmountable difficulty was the inconsistency of its application, both internally to the law of evidence as well as across different substantive areas of the law.[368] Worse yet, the late-nineteenth-

---

363. For recent critiques of the privacy rationale, see Amar & Lettow, *supra* note 4, at 890-91; David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1107-37 (1986); Stuntz, *supra* note 319, at 1018-19.

364. *See* United States v. Balsys, 118 S. Ct. 2218, 2232-34 (1998) (rejecting the privacy rationale for the privilege).

365. Boyd v. United States, 116 U.S. 616, 630 (1886).

366. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 689-90 (1968). As Judge Friendly suggested,

> it is a far graver violation of privacy for a defendant in an annulment suit to be obliged to testify as to inability or unwillingness to engage in intercourse or insistence on the use of contraceptives, or for a mother to have to reveal her son's possession of a murder weapon, than for a motorist to be required to admit that he exceeded the speed limit.

Id. at 689.

367. Justice Souter brings out this point in *Balsys*. *See Balsys*, 118 S. Ct. at 2232. Of course, if one more justice had voted with the dissenters in *Brown v. Walker*, 161 U.S. 591 (1896), the privilege would have been absolute, and the privacy rationale would at least have made sense internally to the structure of the privilege. Even then, however, inconsistencies with other doctrines in the law of evidence and with other areas of the law would have seriously undermined the capacity of the privacy rationale to provide an adequate account of the privilege.

368. For a revealing example of the inconsistent applications of late-nineteenth-century privacy rhetoric, compare Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281-82, 314-23 (1992) (describing the expansion of restrictive regulations of abortion and contraception over the second half of the nineteenth century), with Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150-73 (1996) (describing the ways in which the judicial recognition of the value of privacy during the late nineteenth century effectively immunized the perpetrators of domestic abuse).

century turn to privacy constitutionalized broad self-incrimination doctrines, thus overturning over half a century of democratic lawmaking and short-circuiting subsequent legislative deliberation over proper procedures of law enforcement.[369]

Fifth Amendment Self-Incrimination Clause jurisprudence in our own time still bears the traces of many of these difficult-to-justify privacy protections,[370] though this may change after the Court's decision in the *Balsys* case.[371] And yet to the extent that the Court has chipped away at its own broad self-incrimination doctrines, it has articulated few guiding principles capable of explaining the law of self-incrimination.[372] Thus, the ad hoc limitations on self-incrimination clause jurisprudence have in one sense reproduced the dilemma of mid-nineteenth-century judges and lawyers who were unable to develop an adequate account of the state and federal self-incrimination clauses. Today's self-incrimination doctrine is thus characterized by an inconsistent combination of difficult-to-justify broad rules and a hodgepodge of miscellaneous exceptions. Consider, for example, that physical evidence is compellable regardless of any claims of constitutional privilege.[373] Except when it is the fruit of privileged testimony.[374] Unless that testimony took place in the station house rather than the court room.[375] Records a person is required by the government to keep are not protected by the privilege.[376] Unless the government's records requirement is aimed at precisely those activities that are least defensible.[377] Suspects are told they have a right to stop police

---

369. On the feedback effects that partial judicial regulation of criminal justice can have for democratic politics, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 73 (1997).

370. *See* Stuntz, *supra* note 319, at 1048-60 (describing the tension between the privacy rationale of the privilege against self-incrimination and the basic functions of the post-New Deal regulatory state).

371. *See Balsys*, 118 S. Ct. at 2232-34 (holding that the Self-Incrimination Clause does not reach concern about foreign prosecutions and rejecting the privacy rationale for the Clause).

372. *See* Dolinko, *supra* note 363; Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 6-10 (1986); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988) (all lamenting the absence of a rational explanation for the privilege).

373. *See* Schmerber v. California, 384 U.S. 757, 762-63 (1966).

374. *See* Kastigar v. United States, 406 U.S. 441, 445 (1972).

375. *See* Oregon v. Elstad, 470 U.S. 298 (1985) (holding that the fruits of non-*Mirandized* testimony are admissible).

376. *See* Shapiro v. United States, 335 U.S. 1, 32 (1948) (holding that the government "can constitutionally require the keeping of particular records, subject to inspection"); *see also* Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 556, 555-56 (1990) (holding that an order requiring a mother to produce a child to a social welfare agency did not violate the privilege against self-incrimination because the act of production "is required as part of a noncriminal regulatory regime"); California v. Byers, 402 U.S. 424 (1971) (upholding a state requirement compelling accident witnesses to remain at the scene and give authorities their name and address).

377. *See* Marchetti v. United States, 390 U.S. 39, 57 (1968) (reversing a conviction for failing to register and pay an occupational tax for being a professional gambler on the grounds that the

questioning.[378] Yet the very rules that require such a warning give police a strong incentive to violate that usually remedy-less "right."[379]

B. Sketching a Remedy Rooted in the History of the Privilege in American Legal Practice: Reliability, Legitimacy, and the Privilege as a Guarantor of the Fact-Finding Process in Criminal Cases

History rarely yields determinate answers to particular contemporary interpretive problems in the law. As Robert Gordon has argued, more often than not the lawyer and the historian engage in two different projects.[380] Whereas the lawyer seeks to extract patterns and trends from a useable past, the historian finds multiplicity and indeterminacy in historical experience.[381] This is not to say, of course, that history offers nothing to the lawyer. The prominent place of historical arguments in American law and American legal scholarship makes that abundantly clear.[382] At their best, historical studies of the law can, as Gordon suggests, historicize the present: reveal existing ways of looking at legal institutions and doctrines as contingent rather than inevitable, open to new understandings rather than necessarily set in stone.[383]

For Fifth Amendment self-incrimination doctrine, the history of the common-law privilege offers just such an alternative way to think about an existing set of legal rules. If the privacy rationale that emerged so strongly in the late nineteenth century offers little help in constructing a principled basis for self-incrimination doctrine, we may instead be able to learn a good deal from the common-law approach to self-incrimination that the constitutional law of the late nineteenth century left behind. This is not to say that the broad doctrines of the common-law privilege ought to be grafted wholesale onto modern constitutional self-incrimination law. The

---

registration requirement singled out "'a selective group inherently suspect of criminal activities'" (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965))); *see also* Haynes v. United States, 390 U.S. 85, 95-101 (1968) (reversing a conviction for possessing a sawed-off shotgun that had not been registered as required by federal law).

378. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

379. *See* Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1 (detailing the police practice of continuing interrogations in violation of *Miranda*).

380. *See* Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1055 (1981).

381. For more sustained recent considerations of the relationship between historical inquiry and legal interpretation, see Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351, 359-61 (1996); William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1103-08 (1997); Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995).

382. On the recent resurgence of historical interpretation in legal scholarship, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 139-60 (1996).

383. *See* Gordon, *supra* note 380, at 1048.

common-law privilege, as this Article has argued, functioned alongside the disqualification rules as part of a distinctive eighteenth-century approach to fact-finding. Our own fact-finding procedures—though perhaps arcane and complicated themselves[384]—have long abandoned the reliance on disqualification rules and oaths that characterized the eighteenth-century trial. As a result, any attempt to reinvigorate the old rules of the common-law privilege would suffer from the same difficulties encountered by the late-nineteenth-century courts when they read an anachronistic set of doctrines back into the Self-Incrimination Clause. Nonetheless, the principles underlying the operation of the privilege in the early nineteenth century, if properly "translated"[385] for the late twentieth and twenty-first centuries, offer coherent and sound grounds for rebuilding the law of self-incrimination on the basis of guaranteeing the fact-finding process in criminal trials.

In part, guaranteeing outcomes requires that they be reliable. This requirement sounds both in liberal political theory and in democratic legitimacy. On the one hand, liberal principles of justice cannot be reconciled with the conviction of persons for crimes they have not committed.[386] On the other hand, democratic self-government requires some minimum standard of accurate determination of facts to which enacted laws may be applied.[387] And indeed, much of the structure of the early-nineteenth-century common-law witness privilege makes sense as an attempt to give effect to a now-abandoned and seemingly peculiar theory of how best to achieve reliable results in the trial process.

Yet reliability is not the only consideration in guaranteeing the outcome of the criminal trial. Reliability alone certainly cannot account for the structure of the common-law self-incrimination rules in the early nineteenth century. The fact-finding process of the criminal trial relied

---

384. *See* MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 7, 7-25 (1997) (providing a comparative perspective on the "peculiar" common-law fact-finding process).

385. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371-75 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426-38 (1995) [hereinafter Lessig, *Understanding*]; Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165, 1171-73, 1189-1211 (1993); (all describing "translation" as the process of taking a text out of its original context and placing it in another). In Lessig's terms, the task of translating the Fifth Amendment Self-Incrimination Clause raises an "Erie-effect" problem in that the transformation in common-law fact-finding that I have described represents a transformation of uncontested discourse, or "a fundamental change in the nature of how some activity in law is perceived within the law." Lessig, *Understanding*, *supra*, at 435.

386. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[It is a] fundamental value determination in our society that it is far worse to convict an innocent man than to let a guilty man go free.").

387. *See* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1426 (1997) ("When a jury convicts a defendant who violated a law passed by the legislature, it vindicates the larger democratic process.").

heavily on obtaining information from the mouth of the accused. Pretrial questioning of the accused was the pervasive practice in the late eighteenth and early nineteenth centuries, and that evidence was often a critical part of the prosecution's case against the accused at trial.[388] Moreover, the absence of defense counsel from criminal trials in the late eighteenth century meant that defendants—although unsworn because incompetent to testify on their own behalf—were required to engage in a considerable amount of talk during their trial in order to mount any kind of defense.[389] Consequently, despite the existence of deep anxieties about the reliability of confession evidence in the late eighteenth and early nineteenth centuries,[390] the common-law privilege cannot adequately be explained solely by concern for the reliability of self-regarding testimony.

This does not mean, however, that the principles underlying the early-nineteenth-century common-law privilege were either wholly unrelated to reliability or wholly unrelated to furthering the fact-finding process.[391] A critical part of any fact-finding process is that its results not only be reliable but that they be seen as legitimate in the eyes of the community.[392] And the common-law privilege, like the disqualification rules, served to preserve the legitimacy of the fact-finding process.[393] Like the common-law disqualification rules, the privilege precluded testimony from persons having a strong interest in disregarding the sanction of the oath. The consequence of these rules, then, was to avoid having to reconcile contradictory sworn statements that might threaten the legitimacy of the oath as a guarantor of the outcome of the common-law trial.

---

388. *See* Langbein, *Historical Origins*, *supra* note 3, at 1059-62; Moglen, *supra* note 3, at 1094-99.

389. *See* Langbein, *Historical Origins*, *supra* note 3, at 1052-56; Moglen, *supra* note 3, at 1105-11.

390. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *357 (describing confession evidence as "the weakest and most suspicious of all testimony").

391. The reliance of the eighteenth- and early-nineteenth-century criminal trial on evidence from the mouth of the accused has prompted Donald Dripps to claim that the history of the privilege cannot possibly be rooted in reliability concerns and must instead be found in concerns for protecting political and religious dissent. *See* Donald Dripps, *Akhil Amar on Criminal Procedure: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1624-25 (1997). While it would indeed be incorrect to argue that the common-law privilege against self-incrimination rested entirely on a deep concern for the reliability of evidence taken from the mouth of the accused (and it should be noted that it is not clear that anyone—least of all Amar—has made such a claim), it is not true that if the rationale for the privilege cannot be found in promoting reliability alone, it must reside in concerns outside the fact-finding process altogether.

392. By the phrase "legitimate in the eyes of the community" I mean to employ the Weberian account of legitimation rather than a competing idea of legitimacy as something to be found in moral or political philosophy. That is, I use the idea of legitimation here as referring to the possibility that legal rules or institutions will lead to "[a]ction . . . [that is] guided by [a] belief in the existence of a legitimate order." 1 MAX WEBER, ECONOMY AND SOCIETY 31 (Gunther Roth & Claus Wittich eds., 1978).

393. *See* Fisher, *supra* note 83, at 624-26.

Since the mid- to late nineteenth century, and for the foreseeable future, American law has substituted the jury determination of fact for the oath as the legitimator of the results of the criminal trial.[394] And, indeed, the jury in its role as guarantor of the result of the trial functions remarkably like the common-law witness privilege and the disqualification rules once did. In part, the jury is designed to promote truth seeking. Thus, for example, we require unanimity in criminal trial jury verdicts, arguably because unanimous jury verdicts promote accuracy in the determination of issues of fact.[395] Yet if reliability and accuracy were all we wanted out of our finder of fact, we might not choose a jury at all; we might quite reasonably choose to entrust the fact-finding process to a professional expert, trained in the weighing of competing claims.[396] We do not, of course. And we do not because the criminal jury serves the important function of legitimating the outcome of the criminal case,[397] especially in those cases in which a conviction results in the state exercising its power to take away a person's liberty.[398]

There should be few illusions about the capacity of broad principles, such as "legitimacy" or "reliability," to lead conclusively to particular interpretive results. Holmes, after all, taught us long ago that "[g]eneral principles do not decide concrete cases."[399] Yet legitimacy and reliability are hardly new principles to the constitutional law of criminal procedure.

---

394. *See id.* at 698.

395. *See* Primus, *supra* note 387, at 1453-54.

396. This, after all, is the method used in Western European law. *See* DAMASKA, *supra* note 384, at 32.

397. The jury, of course, can also be said to serve other interests that are less directly related to the jury's role as finder of fact—for example, promoting political participation on the part of the jurors. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 219 (1995).

398. The absence of a directed verdict of guilty means that it is only the jury that can convict a defendant. The possibility of a directed verdict of acquittal means that an acquittal need not be accompanied by the legitimating power of the jury. It should be noted that the jury legitimates outcomes in at least two different, though related, ways. First, the jury functions as a safeguard against abuse of power by law enforcement authorities. In this first sense, the jury legitimates outcomes by functioning as a delegation of the people in the criminal trial. *See id.* at 218. The jury also legitimates outcomes in a second sense insofar as they blunt the inevitable anger that will accompany particularly unpopular outcomes. In part, this may explain why juries are unaccountable for their determinations and why their decisions are largely unreviewable. Thurman Arnold had this second sense of legitimation in mind when he wrote that

> the contradiction between the ideal of permanent unyielding law which must be enforced without respect to persons, and the ideal of justice, which can never ignore persons . . . is resolved as most conflicts are resolved, by inventing a devil who can be blamed for the inconsistencies of the system. In the American trial the part of the devil is taken by the jury.

THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 144 (1935). Arnold argued that "the reason for the existence of the jury is to absorb the criticism of the numerous unsatisfactory results in the trial of cases, and thus to deflect it against the judicial system itself." *Id.* at 144-45.

399. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Reliability, of course, is one of the touchstones of criminal procedure.[400] In turn, reliability is often taken to be a critical component of the legitimacy of criminal proceedings.[401] Legitimacy concerns, however, also exist independently of the reliability of criminal proceedings in our constitutional law.[402] Indeed, neither reliability nor legitimacy appears to be a sufficient condition in the establishment of a just and workable criminal law enforcement system. A concern for the appearance of legitimacy alone would, in the short run at least, sanction mass trickery on the part of law enforcement officials. And no system of criminal law could long survive based solely on reliability without legitimacy in the eyes of the community.

Even so, the legitimacy principle is subject to several objections that ought perhaps be discussed at the outset. One objection would concede that the continued legitimacy of the criminal law enforcement apparatus is in fact an important interest that constitutional criminal procedure should account for, but would claim that allowing a defendant to decline to testify at his trial is simply not one of the rules on which the legitimacy of the system hangs. In essence, this is an empirical objection that denies that people in fact believe that the privilege is critical to the legitimacy of criminal law enforcement.[403] The Fifth Amendment, on this view, is just

---

400. *See In re* Winship, 397 U.S. 358 (1970) (holding that due process requires the application of the "beyond a reasonable doubt" standard in criminal verdicts).

401. *See, e.g., id.* at 364 (explaining that the reasonable doubt standard is "indispensable to command the respect and confidence of the community in applications of the criminal law").

402. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (distinguishing "basic fairness" from "the appearance of fairness so essential to public confidence in the system"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion) (reasoning that "the means used to achieve justice must have the support derived from public acceptance of both the process and its results").

403. *See generally* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 389-400 (critiquing contemporary views of whether legitimacy exists in the American legal system). Someone making this objection might also point to the absence of a self-incrimination rule in European criminal procedure. Criminal law enforcement does not face a legitimation crisis in Western Europe merely because Continental countries do not have robust self-incrimination rights for criminal defendants. Civil-law jurisdictions permit a broad array of testimonial privileges in civil litigation, often broader than common-law jurisdictions' privilege against self-incrimination. *See* DAMASKA, *supra* note 384, at 12-13. But in criminal cases in civil-law jurisdictions, the presiding judge fires questions directly at the defendant, often resulting in great psychological pressure. The questioning may continue, even though the defendant refuses to answer, but there is no possibility of holding the defendant in contempt for doing so. As one authority puts it, "Enfin, la personne poursuivi peut toujours se refuser à répondre si elle estime cette attitude plus conforme aux intérets de la défence et sous réserve, pour les magistrats et jurés, du droit de tirer de cette attitude toute conséquence utile à la formation de leur conviction." BOYER MERLE AND ANDRE VITU, TRAITÉ DE DROIT CRIMINAL: PROCÉDURE PÉNAL, para 152. Many thanks to Professor John Spencer of Felwyn College, Cambridge for helping me with the civil-law rules.

This comparative perspective led the Supreme Court to decline to incorporate the privilege against self-incrimination until 1964. *See* Twining v. New Jersey, 211 U.S. 78, 113 (1908) ("[The privilege] has no place in the jurisprudence of civilized and free countries outside the domain of the common-law . . . ."), *rev'd*, Malloy v. Hogan, 378 U.S. 1 (1964).

as likely to create disrespect for the law insofar as it blocks accurate outcomes.[404] Moreover, this critique suggests that it is a common intuition that those who take the Fifth are guilty.[405] How, then, could requiring a defendant to testify in his own defense seriously threaten the legitimacy of the criminal law?

The answer to this objection is that, properly understood, the Self-Incrimination Clause need not create insuperable obstacles to accurate outcomes. Even if criminal defendants are not required to testify at trial, they might be subject to a pretrial examination, the fruits of which could be used against them.[406] Furthermore, it is not at all clear that the public's common intuition is in fact that criminal defendants who decline to testify are guilty. It is likely that the nonparty witness who takes the Fifth will be seen as hiding guilt. But this does not appear to be nearly as true in the case of a defendant who refuses to testify. People believe that O.J. did it, but they do not hold that view because of his refusal to testify.[407] Indeed, it appears that there are good common-sense reasons why an innocent criminal defendant would not wish to testify.[408]

A second objection to the legitimation argument is conceptual rather than empirical. On this objection, the legitimating function of constitutional criminal procedure rules can never become part of the rules' rationale. This is so because if the ultimate touchstone of a rule of constitutional criminal procedure is its function as a legitimator of outcomes in the eyes of the community, the rule ought not be a constitutional rule at all. By hypothesis, such a rule properly serves its

---

404. *See* Dolinko, *supra* note 363, at 1088.

405. *See id.*

406. *See infra* section VII(C)(1); Amar & Lettow, *supra* note 4, at 858-59.

407. Detective Mark Fuhrman's invocation of the Fifth, on the other hand, appears much more damning. On Fuhrman and the legal implications of the "privilege against cross examination," see generally Nesson & Leotta, *supra* note 4 *passim* (proposing that juries be allowed to draw inferences from invocation of the privilege by a nondefendant witness on cross-examination). The data presented by David Dolinko to support his argument that the privilege does not serve a legitimating function does not undermine my argument. Dolinko observes that during the 1950s some 68% of survey respondents believed that those who took the Fifth in congressional anticommunist investigations were, in fact, communists. *See* Dolinko, *supra* note 363, at 1089 n.140 (citing Harold W. Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 STAN. L. REV. 438, 448-49 (1954) (citing Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498, 513 n.103 (1953) (citing BOSTON DAILY GLOBE, Nov. 19, 1952, at 36))). First, those that invoked the Fifth during these investigations were overwhelmingly witnesses as opposed to defendants. Second, there is an important distinction between a belief about the likelihood of guilt and a belief about the legitimacy of the proceedings in which a person claims the Fifth Amendment. Factors promoting legitimacy can be, but need not be, reliability-enhancing. *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren & Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983) (contending that some reliability-enhancing procedures "also articulate[] fair process norms that have value independent" of their instrumental value). Third, data gathered during the highly charged anti-communist investigations hardly seems to create a reliable basis for judgments about the function of the privilege in ordinary criminal trials.

408. *See infra* section VII(C)(2).

function only so long as it is seen by the majority of the community as a required element of the criminal process. If ever the rule falls out of democratic favor, it will no longer sustain its own rationale. And, if it remains in democratic favor, it need not be a constitutional rule at all.[409] Consequently, on this view, the legitimacy rationale cannot account for the constitutional and thus antimajoritarian status of criminal procedure rules.

This critique is a powerful one, but its critical mistake is to assume that the relevant community for which the outcomes of criminal trials must be legitimated is society as a whole. In fact, the relevant community might better be said to consist of the groups most directly affected by criminal law. In particular, three distinct if overlapping groups are particularly relevant: the offenders themselves; the communities disproportionately victimized by criminal activity; and the communities that identify themselves as disproportionately likely to contain potential criminal defendants. It is legitimization of the criminal process in the eyes of each of these groups with which self-incrimination doctrine should concern itself.

The relentless fact of contemporary criminal law is that all three of these groups in the criminal process are overwhelmingly poor and disproportionately minority.[410] This is an enormous crisis for our nation and our criminal law—one that hardly can be said to turn on the Self-Incrimination Clause alone. Nonetheless, the fact that criminal law disproportionately affects discrete communities has important implications for the conceptual critique of the legitimation argument. For if it is true that the legitimation function is aimed at not society as a whole, but rather at particular communities within society, then the objection that legitimation is not properly a constitutional rationale is wide of the mark. Legitimation would remain an important rationale to be pursued through constitutional law because it is not necessarily the majority of Americans who must see the system as legitimate; rather, it is those groups of Americans most affected by criminal law enforcement who must see the system as legitimate.

---

409. This objection, of course, is hardly specific to criminal procedure. It would be an effective critique of any constitutional rule that was said to be sustained by the rationale that, in fact, the people wanted it. The point is that if the people really want the rule, they will have it regardless of its status as a *constitutional* rule. And if they do not really want it, then the rationale that has been offered for it makes no sense.

410. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 22-23 (1997) (reporting that in 1992 blacks made up 44.8% of those arrested for violent crimes and, by the early 1990s, actually outnumbered in absolute terms whites in prison); MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995) (estimating that in 1995 one in three black men between the ages of 20 and 29 was under the supervision of criminal justice authorities); Richard Klein, *The Eleventh Amendment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 379 n.102 (1993) ("Eighty-five percent of criminal defendants in the District of Columbia financially qualify for court-appointed counsel." (citation omitted)).

Of course, the further objection might arise that if some of the groups most affected by crime are those communities in which the ravages of criminal activity are most abundant, it is precisely such communities for whom a truth-defeating privilege might be most objectionable. But this objection reveals exactly why furthering the legitimacy of criminal law enforcement offers such promise as an interpretive principle for self-incrimination clause doctrine. For the legitimacy principle cuts both ways: It supplies a rationale for the privilege as well as a rationale for limiting the scope of the privilege. The privilege against self-incrimination, properly understood, would thus not entail insuperable obstacles to fact-finding. If built around a theory of fact-finding, the constitutional privilege would give real attention to reliability and accuracy concerns. The rule that the defendant is not required to testify against his will, with all of its power to legitimate outcomes, need not be inconsistent with truth-seeking in criminal law enforcement.

C. Applications

With two principles drawn from the common-law witness privilege of the Early Republic—furthering reliability and promoting legitimacy in criminal law fact-finding—this Article returns once again to the three Fifth Amendment situations discussed at the opening: the suspect at pretrial examination, the criminal defendant at trial, and the nonparty witness.[411]

1. The Suspect at Pretrial Examination.—The history recounted in this Article has focused on the privilege in the courtroom rather than in the pretrial examination. In part, this is because the extension of the Fifth Amendment's Self-Incrimination Clause to include the pretrial examination is a relatively recent phenomenon.[412] Nonetheless, reliability and legitimacy offer a cogent critique of Self-Incrimination Clause doctrine in the pretrial examination.

From the perspective of promoting reliability, the law of self-incrimination in the interrogation room as it has evolved since *Miranda* makes a good deal of sense. Rather than preserving its truth-defeating use plus use-fruits immunity rule in the pre-trial context,[413] the Court has held that the fruits of an illegal interrogation in the police station context are admissible in any subsequent criminal trial of the suspect.[414] But

---

411. *See supra* subpart (I)(B).

412. *See* Miranda v. Arizona, 384 U.S. 436 (1966). *But cf.* Bram v. United States, 168 U.S. 532 (1897) (discussing the Fifth Amendment in a pretrial confession case).

413. *See* Kastigar v. United States, 406 U.S. 441 (1972).

414. *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985) (holding that a confession subsequent to a *Miranda* violation is admissible, in part because excluding such a confession would not serve the "goal of assuring trustworthy evidence"); Michigan v. Tucker, 417 U.S. 433, 449 (1974) (holding that

from the perspective of promoting the legitimacy of the criminal law enforcement process, the law of self-incrimination in the examination room appears to have done little to curb police abuse. Lies and deceit are common practice in the police station, often with the law's blessing.[415] Moreover, the absence of effective monitoring techniques allows physical abuse to persist with few realistic checks.[416]

The difficulty encountered by current self-incrimination doctrine appears to be a conflict between the goal of reliability and the principle of legitimacy. The rules narrowing the scope of the exclusionary rule for illegal police station interrogations[417] have exacerbated the problem of abuse even as they advanced the goal of truth-seeking. By decreasing the incentives to obey *Miranda*, the law of self-incrimination has led to pervasive violations of its own propositions. Police appear routinely to tell suspects of their rights to counsel and to stop questioning at any time, only to violate those rights should the suspect choose to invoke them.[418] Indeed, in one California police training video, an assistant district attorney for Orange County announces to police trainees that when they continue questioning outside the scope of *Miranda*, they are "not doing anything

---

testimony that is the fruit of an illegal interrogation is admissible because there is "no reason to believe that [a nonparty's] testimony is untrustworthy simply because [the suspect] was not advised of *his* right to appointed counsel" (emphasis in original)); *see also* Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 226 (1971) (both holding that a statement made pursuant to a *Miranda* violation may be admitted for impeachment purposes).

415. *See, e.g.*, Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir.) (holding that a confession was voluntary despite the fact that the police falsely told the defendant that his fingerprints were at the scene of the crime), *cert. denied*, 118 S. Ct. 1684 (1998); Green v. Scully, 850 F.2d 894, 904 (2d Cir. 1988) (holding a confession voluntary and, thus, admissible despite "scare tactics, false representations . . ., good cop/bad cop routine, and . . . [a] reference to the 'chair'"); State v. Smith, 573 N.W.2d 515, 519 (S.D. 1998) (holding that a defendant's confession was voluntary despite false reports regarding the evidence against him and assurances that he would be able to leave and see his girlfriend after talking to the police). *But see* United States v. Baldwin, 60 F.3d 363, 365 (7th Cir. 1995) (Posner, J.), *vacated*, 517 U.S. 1231 (1996); United States v. Rutledge, 900 F.2d 1127 (7th Cir. 1990) (Posner, J.) (both arguing for a rational choice approach to the voluntariness inquiry that would prohibit police misrepresentation).

416. For proposals of more effective monitoring in order to root out police violence, see Amar & Lettow, *supra* note 4, at 898-900 (proposing magistrate examinations in which the defendant could be compelled to testify as an alternative to the current practice of police station interrogations in which the accused ostensibly has a right to remain silent); Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486-98 (1995) (proposing the videotaping of interrogations as an alternative to *Miranda* procedures). On abusive physical force by the police, see generally POLICE VIOLENCE (William A. Geller & Hans Toch eds., 1996); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); *see also* Stuntz, *supra* note 319, at 1064-68 (arguing that the law of criminal procedure's focus on privacy has had the effect of distracting courts from the real problem of police abuse).

417. *See supra* note 414.

418. *See* Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights*, N.Y. TIMES, Mar. 29, 1998, at 1 (describing the increasing prevalence of police ignoring the requirement that an interrogation stop at the suspect's request or at the suspect's request for a lawyer).

unlawful . . . not violating any statute . . . not violating the Constitution . . . not violating [the suspect's] civil rights."[419] The result is a law of self-incrimination that licenses its own violation.

One of the signal achievements of *Miranda* was that it required the police to announce to the criminal suspect that the police considered themselves bound by legal rules and procedures. In turn, "'[t]he great advantage of police compliance with the law is that it helps to create an atmosphere conducive to community respect for officers of the law that in turn serves to promote their enforcement of the law.'"[420] *Miranda* warnings served to establish for the suspect that the police were not renegades acting without regard to the rule of law. But the systemic violation of *Miranda*'s guarantees because of the absence of a meaningful deterrent has precisely the opposite result, subverting the rule-of-law values of the *Miranda* process.

Reconceived from the perspectives of reliability and legitimacy, the law of the pretrial examination might look considerably different. The proposal by Amar and Lettow for a pretrial hearing presided over by a magistrate or judge would go a long way toward furthering these goals.[421] In the pursuit of reliability, Amar and Lettow's magistrate hearing would preserve or even expand the application of the narrow testimonial exclusion rule. Moreover, the magistrate hearing would place new emphasis on monitoring the examination itself so as to prevent police abuse, thereby protecting the legitimacy of criminal law enforcement.

The legitimacy principle, however, suggests one departure from Amar's theory of the Self-Incrimination Clause as applied to the pretrial suspect. Under the Amar approach, the Self-Incrimination Clause has very little to say about torture in the pretrial examination process. Because the core of the violation occurs when the torture is applied to the suspect, torture is something that Amar would deal with mostly under the aegis of the Fourth Amendment.[422] As a result, the approach advocated by Amar would permit the use of the fruits of confessions compelled by torture as evidence in a prosecutor's case in chief against the confessee.[423] The

---

419. *When the Warning Is Little More Than a Speed Bump*, N.Y. TIMES, Mar. 29, 1998, § 1, at 40.

420. Roger J. Traynor, *Lawbreakers, Courts, and Law-Abiders*, 41 J. ST. B. CAL. 458, 478 (1966), *quoted in* City of Oklahoma City v. Tuttle, 471 U.S. 808, 843 n.33 (1985) (Stevens, J., dissenting).

421. *See* Amar & Lettow, *supra* note 4, at 898-900.

422. *See* AMAR, *supra* note 4, at 251 n.43 (asserting that the use of a coercive measure, such as forcibly pumping a suspect's stomach against his will and without justification, is a Fourth Amendment violation when the search is performed, not at a later time); Amar & Lettow, *supra* note 4, at 927.

423. *See* AMAR, *supra* note 4, at 70, 76-77. Instead of an exclusionary rule for the fruits of torture, Amar would remedy police abuse by punitive damage awards and administrative discipline. *See id.* at 221 n.199.

legitimacy-based approach, on the other hand, provides a basis for excluding the fruits of confessions compelled by torture. Torture as a mode of evidence gathering is beyond the pale in contemporary law enforcement. Reliability factors notwithstanding, no legitimate criminal law enforcement procedures can rest on torture as a mode of developing the prosecution's case.

2. The Criminal Defendant at Trial.—If reliability were the central concern in criminal procedure, it might militate for allowing prosecutors to examine defendants at trial. Indeed, this might seem to be the final step in the process begun in the mid-nineteenth century, by which interested witnesses and then civil parties were made competent witnesses who might be compelled to testify. Completing the abolition of the incompetency rules by allowing prosecutors to call defendants at trial might have the attractiveness of creating a certain symmetry in the criminal trial.[424] The defendant, after all, is free to call the victim or the person that filed the complaint to the stand. Moreover, insofar as the jury is one of our primary guarantors of legitimacy,[425] it might appear that providing the jury with more information with which to make its determination would have the salutary effect of enhancing the legitimacy of the outcome.

The problem is considerably more complicated than this, however. The mid-nineteenth-century development of cross-examination as the central means by which the finder of fact can sift through contradictory testimony represents a major advance from the eighteenth-century common-law trial's reliance on oaths and disqualification rules. Yet cross-examination has its shortcomings as well, not the least of which is its capacity to confuse the awkward or uneducated defendant caught in the vice of a powerful and potentially obfuscating cross-examination.[426] Thus, allowing defendants to decline to take the witness stand may in some

---

424. On symmetry as a goal of the privilege against self-incrimination before the abolition of the criminal defendant disqualification rule, see AKHIL REED AMAR, THE BILL OF RIGHTS 116 (1998). On symmetry in criminal procedure generally, see Jesse Furman, The Ideal of Symmetry in Constitutional Criminal Procedure (May 5, 1998) (unpublished manuscript, on file with the *Texas Law Review*).

425. *See supra* notes 394-98 and accompanying text.

426. *See* 8 WIGMORE, *supra* note 1, § 2251, at 310 ("The privilege protects the innocent defendant from convicting himself by a bad performance on the witness stand.") (quoted in Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)); *see also* United States v. Wade, 388 U.S. 218, 257 (1967) ("If counsel can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be [counsel's] normal course."); AMAR, *supra* note 4, at 68, 84-87, 92 (discussing the problem of the innocent but awkward defendant). As Professor Amar observes, the problem of the awkward but innocent defendant was more significant in a pre-*Gideon* world, *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing the constitutional right of indigent defendants in noncapital felony cases to have counsel appointed), but it continues to have force today. *See* AMAR, *supra* note 4, at 85.

cases actually serve the goal of reliability.[427] This would be all the more true if the system were capable of gathering reliable evidence from the defendant at the pretrial examination without resorting to abusive means.

The case of the defendant at trial implicates legitimacy concerns as well as reliability concerns. The basic structure of the criminal trial in which the defendant need not take the stand has become one of the core markers of legitimacy in American legal culture. In other words, the privilege against self-incrimination is built in to our American ideas about criminal proceedings. Thus, for better or for worse, the notion that "our system prefer[s] an accusatorial rather than an inquisitorial system of criminal justice"[428] is so ingrained that a great deal of the legitimacy of criminal proceedings may now rest upon it.

3. The Nonparty Witness.—The tension between the demands of reliability and the privilege is most glaring in the case of the nonparty witness. The criminal activity protected by the nonparty witness's privilege may be directly related to the ongoing proceedings (indeed, in the extreme case the nonparty witness may be the real perpetrator), or it may be wholly unrelated to the matter at hand. Either way, the nonparty witness's privilege hinders the reliable resolution of the proceedings, especially when that witness is able to claim the privilege outside the hearing of the jury.[429]

Still, good reasons exist for a narrow privilege against self-incrimination in the case of the nonparty witness—reasons that once again harken back to the interests of reliability and legitimacy. The reliability interest is less obvious in this case, but to the extent that a nonparty witness is provided with some form of immunity for his testimony, that testimony is likely to be more reliable. The witness's incentive to perjure himself will be decreased that much further. The concern for perjury alone, however, does not adequately support a witness privilege: In many other circumstances, after all, we admit questionable or interested testimony and rely on vigorous cross-examination to separate the wheat from the chaff.

Legitimacy, however, does appear to provide a rationale for establishing the limited testimonial immunity set out by the New York Court of

---

427. To the extent that the problem is cross-examination's capacity to confuse a witness, there might be a range of intermediate responses such as regulating the ways in which prosecutors are able to cross-examine defendants. As dangerous as cross-examination may be to a flustered and frightened innocent criminal defendant, however, we do rely on it to sort out untruthful testimony. Allowing criminal defendants to take the stand without facing withering cross-examination would give carte blanche to good storytellers to try to weave a sympathetic story to the jury. *See* DAMASKA, *supra* note 384, at 80 (noting the epistemic and symmetry interests underlying cross-examination).

428. *Murphy*, 378 U.S. at 55.

429. *See* Amar & Lettow, *supra* note 4, at 902; Tague, *supra* note 43, at 3-6.

Appeals in *Kelly* in 1861.[430] In the federal system, a witness's grand jury testimony is admissible in a subsequent prosecution of the witness, even in cases in which the witness is subpoenaed to testify before the grand jury because he is already suspected of wrongdoing.[431] Thus, absent such immunity, an aggressive prosecutor could easily circumvent the rule allowing criminal defendants to decline to testify in their own criminal case. The prosecutor would simply call a prospective defendant before a grand jury[432] and require him to testify at pain of contempt in order to introduce the transcript of the questioning at the defendant's subsequent criminal trial.[433] Such a maneuver might or might not share the reliability problems that attached to the problem of the awkward and confused innocent witness at trial.[434] But it would create a considerable legitimacy-related concern to allow prosecutors so easily to circumvent the defendant's trial privilege to decline to testify.

Moreover, the legitimacy principle supplies a ceiling as well as a floor for the witness privilege. By themselves, the legitimacy concerns prompted by a prosecutor's power to circumvent the criminal defendant's trial privilege do not decisively mediate between a narrow testimonial immunity standard and a broader use plus use-fruits standard, or even a transactional standard. As we noted above, however, the legitimation principle cuts both ways: criminal law enforcement maintains its legitimacy in the eyes of the public not only by observing certain restrictions but also by maintaining a certain level of effectiveness.[435] When people like Oliver North are allowed to evade prosecution because of a broad immunity rule, not only are the guilty allowed to walk free in plain sight, but public

---

430. *See supra* section V(C)(2).

431. *See* United States v. Washington, 431 U.S. 181, 182, 186 (1977); United States v. Mandujano, 425 U.S. 564, 566, 580-82 (1976); United States v. Myers, 123 F.3d 350, 359-62 (6th Cir.), *cert. denied*, 118 S. Ct. 611 (1997); United States v. Slone, 833 F.2d 595, 601 (6th Cir. 1987). The grand jury testimony is treated as an admission by a party opponent. *See* FED. R. EVID. 801(d)(2)(A). There are a number of states in which the rule is the contrary. *See* Culbreath v. State, 113 So. 465 (Ala. App. 1927); People v. Cochran, 145 N.E. 207 (Ill. 1924); State v. Corteau, 270 N.W. 144 (Minn. 1936); State v. Fary, 117 A.2d 499 (N.J. 1955); People v. Laino, 176 N.E.2d 571 (N.Y. 1961).

432. Note that the limitation on post-indictment evidence gathering by the grand jury would require that the prosecutor summon the suspect to the grand jury prior to the initiation of formal criminal charges. *See* United States v. Doss, 563 F.2d 265, 275 (6th Cir. 1977) (en banc).

433. Consider, for example, the scenarios envisioned by Professor Amar under which a prosecutor might simply recess a criminal trial, walk across the street or into a different room, and compel the trial defendant to testify at pain of contempt in order to introduce that testimony into evidence upon the recommencement of the criminal trial. *See* AMAR, *supra* note 4, at 128-29, 206 n.55.

434. Presumably the extent to which a flustered defendant's awkward performance was evident on the face of a dry record would vary from case to case.

435. *Cf.* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 395 n.158 (1997) (observing that overly aggressive enforcement of criminal procedure rights may result in "greater distrust of [law enforcement] by law-abiding members of the community").

confidence in law enforcement is also undermined.[436] Because the legitimation principle cuts both ways, the narrow testimonial immunity standard appears to strike the optimal balance between promoting effective law enforcement and preserving a meaningful trial privilege for the criminal defendant.

VIII. Conclusion

The historiography of self-incrimination in Anglo-American law has been preoccupied with the extraordinary trial and the politicized prosecution, beginning with the political trials of the seventeenth century[437] and continuing into our own era with the anticommunist witch hunts of the 1950s.[438] Moving away from the history of exceptional proceedings, however, provides the key to accounting for the peculiar place of the privilege in American legal practice. In the Early Republic, self-incrimination doctrine was just one part of a broader common-law approach to fact-finding. The constitutional self-incrimination clauses were thus rarely invoked in legal practice. Instead, self-incrimination was a broad common-law doctrine that closely resembled the common-law witness incompetency rules. But in the mid-nineteenth century, common-law courts developed a new approach to fact-finding that abandoned the common-law witness incompetency regime. As a result, lawyers and judges were required for the first time to determine the meaning of the constitutional self-incrimination clauses.

The history of the Fifth Amendment Self-Incrimination Clause since the late nineteenth century has been in large part the story of attempts to make sense of the privilege against self-incrimination under a new regime of common-law fact-finding. Controversy and heated rhetoric have abounded; rationales have been advanced and discarded; and the Supreme Court has issued bold decisions only to undermine or overturn them. A return to fact-finding as the central function of self-incrimination doctrine would face considerable obstacles, not the least of which is over a century of case law that has frequently pointed in very different directions. Such a return to fact-finding might, however, serve us well.

---

436. *See* United States v. North, 910 F.2d 843 (D.C. Cir.), *withdrawn in part and superseded in part*, 920 F.2d 940 (D.C. Cir. 1990).

437. *See* LEVY, *supra* note 1, at 271-79 (describing the trial of seventeenth-century religious dissenter John Lilburne).

438. *See, e.g.*, ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 10-13, 14-18 (1955) (defending the privilege against self-incrimination in light of McCarthy-era anticommunism).