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ORIGINS OF THE PRIVILEGE AGAINST SELF-INCrimination: THE ROLE OF THE EUROPEAN IUS COMMUNE

R.H. HELMHOlz*

Current orthodoxy holds that the fifth amendment's privilege against self-incrimination has its roots in the seventeenth-century triumph of enlightened English common law over the older tradition of continental common law and the English ecclesiastical courts which used this tradition to limit religious freedom. In this Article, Professor Helmholz presents and analyzes documentary evidence demonstrating the inaccuracy of this account. These documents reveal that the continental blend of Roman and canon law known as the ius commune had long recognized the privilege against self-incrimination, and that English ecclesiastical courts first considered arguments for the privilege based on this body of law. Thus, far from being the enemy of the privilege, the continental tradition paved the way for the efforts of the English common lawyers now credited with championing it. In reaching this conclusion, Professor Helmholz details the rich texture of various arguments and counter-arguments within the ius commune concerning the application of the privilege in specific cases.

INTRODUCTION

The privilege not to be compelled to give evidence against oneself and the Latin maxim that encapsulates it—nemo tenetur prodere seipsum1—occupy an honorable place in the history of Anglo-American law. Blackstone regarded the maxim as representative of the development of English jurisprudence,2 and modern authors have continued to bestow praise on the privilege as “one of the great landmarks in man’s struggle to make himself civilized.”3 Even treatises4 and law review articles5 deal-

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1 “No one is bound to betray oneself.”
4 See, e.g., M. Berger, Taking the Fifth 1-23 (1980) (presenting broad analysis of the privilege); L. Mayers, Shall We Amend the Fifth Amendment? 9-19 (1959) (examining present-day workings of the privilege).

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Questions involving the scope of the fifth amendment privilege continue to arise in modern practice, and the privilege's past continues to be brought to bear on them. If there is any truth to the oft-quoted dictum of Justice Frankfurter—namely, that in construing the privilege "a page of history is worth a volume of logic"—study of its origins and early years will continue to figure in current debate. Undoubtedly, it is desirable that the history of the privilege be fully understood. It is the aim of this Article to explore this history.

By all odds, the most influential account of the origins of the privilege is Leonard W. Levy's Origins of the Fifth Amendment. According to Levy, the privilege was born of a contest between two rival systems of criminal procedure. On one side stood the English common law, which upheld, with only occasional backsliding, the rights and liberties of the subject. The traditions and practitioners of the common law forged the right not to be compelled to answer incriminating questions. On the other side stood the traditions of the Roman civil law and the continental inquisition, applied in England by the ecclesiastical courts. Its practitioners fought tooth and nail against the creation of the privilege. The goal and glory of civilian procedure were "the rack and the auto-da-fé."

The reality, however, is not so neat. This Article supplements and amends Levy's account by examining the early history of the privilege in light of evidence from civil law traditions. That evidence shows that focusing, as Levy does, exclusively on the opinions of the seventeenth-cen-

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6 See, e.g., Baltimore City Dep't of Social Servs. v. Bouknight, 110 S. Ct. 900, 908 (1990) (holding fifth amendment privilege not broad enough to protect mother suspected of child abuse from complying with court order to produce child).
9 Id. at 216-18.
10 Id. at 5.
11 Id. at 20. For one representative comment echoing this characterization of the English struggle as a contest between incompatible legal systems, see C. Robbins, Selden's Pills: State Oaths in England, 1588-1714, in Absolute Liberty 65-67 (B. Taft ed. 1982). For a description and assessment of civilian procedure from within the system, see Kelly, Inquisition and the Prosecution of Heresy: Misconceptions and Abuses, 58 Church Hist. 439, 446-51 (1989); Trusen, Der Inquisitionsprozess, 118 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (kan. abt.) 168 (1988).
tury common law judges and reading them against the backdrop of subsequent developments has resulted in a narrow and misleading account of the origin of the privilege. The early years of its history can be understood fully only through an examination of contemporary Roman and canon laws, as understood in the sixteenth- and seventeenth-century context. These twin sources of European law were joined together in most aspects of legal practice in continental countries and were known as the *ius commune*. This *ius commune* regularly was applied in the English prerogative and ecclesiastical courts. It was in these courts, not in those of the common law, that the privilege was first directly asserted in English practice. The *ius commune* itself contained a rule against forced self-incrimination, and the earliest clear statement of the privilege in the legal life of England sprang from this continental source rather than from the immemorial usages of the common law. In particular, this Article illustrates the utility of examining the European *ius commune* from within, instead of relying upon Levy's caricature of it as an engine of legal tyranny. The *ius commune* played a more complex, positive, and ultimately believable role than his account allows.

I

THE HISTORICAL CONTEXT

A. Outline of Levy's Account

According to the account found in Levy's *Origins*, the first unequivocal expressions of the privilege against self-incrimination occurred

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12 Literally "common law," the term denoted the law studied in European universities and regularly applied in continental courts in the absence of local statute or custom to the contrary. See generally M. Bellomo, L'Europa del diritto comune (3d ed. 1989).

13 An Act for the Submission of the Clergie to the Kynges Majestie, 1534, 25 Hen. 8, ch. 19, provided that, until the Reform Commission it established could act, existing canon law should continue in force except where contrary to the laws and customs of the Realm or to the King's prerogative. The Commission's proposals never became law, and this "interim" provision became the permanent law of the English Church. For contemporary comments on the place of the canon law in the English ecclesiastical courts, see T. Ridley (d. 1629), View of the Civile and Ecclesiastical Law, pt. 2, ch. 2, § 5, at 161-62 (4th ed. 1675). For a modern discussion with supporting evidence, see R.H. Helmholz, Roman Canon Law in Reformation England 162-69 (1990).

14 A discussion of the original development of the rule that one could not be compelled to answer an incriminating question is beyond the scope of this Article. The medieval canonists and civilians speak about the matter as if there had been considerable difference of opinion. See, e.g., Antonius de Butrio, *Commentaria* ad X 1.6.54, no. 55; Bartolus, *Commentaria* ad Dig. 12.1.16.1 (*Qui iurasse*), ad Dig. 25.2.11 (*Marcellus*), ad Cod. 2.58.2 (*Cum et iudices*) nos. 32-34. By the sixteenth century, however, the rule seems to have been admitted as the *communis opinio* of civilian proceduralists but treated as subject to a number of exceptions. The questions debated were whether a particular procedure fell within one or another of these exceptions and also whether *praxis* had to conform to the formal law on this point.

during the constitutional struggles of the seventeenth century, specifically in the dispute over the legality of the ex officio oath used by the English ecclesiastical courts. The ex officio oath, called the oath de veritate dicenda in canonical parlance, was administered by the judge at the start of the proceedings. It required parties to swear to answer truthfully all questions put to them. Since defendants in criminal cases did not necessarily know precisely what the questions would be at the time they took the oath, this common practice resulted in their swearing to give evidence against themselves. It permitted ecclesiastical courts to embark on fishing expeditions for evidence of immorality or religious heterodoxy.

Although the ex officio oath could be, and in fact was, used in English practice to secure the punishment of a variety of offenders of the law of the Church, the defendants most immediately caught by the procedure were conscientious dissenters—Puritans and Catholics—who objected to the form of religion established under Queen Elizabeth I. The Puritans wished for a fuller religious reformation, one that would throw off the “dregs of popery.” The Catholics sought the reverse: a return to the rites and beliefs of the Catholic Church. These two parties, enemies in virtually every other aspect of contemporary religious controversy, were united in objection to the oath.

Levy shows that their objections were especially forceful and urgent when dissenters were haled before the Court of High Commission, the tribunal created by the Tudor monarchs to hear and determine serious religious offenses. Unlike the traditional diocesan courts, this new tribunal had immediate power to fine and imprison. It was not limited to imposing excommunication and public penance, as were the older ecclesiastical courts. Nor was the High Commission tied to the geographical boundaries of a particular diocese, as these other courts were. The Commissioners held what many regarded as a roving warrant to ferret out dissent. They exercised it vigorously, requiring any person they cited to take the ex officio oath and then convicting that person “out of his own mouth.”

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17 Act of Uniformity, 1559, 1 Eliz. 1, ch. 2. See generally P. McGrath, Papists and Puritans under Elizabeth I (1967).

18 The definitive work on this court is R. Usher, The Rise and Fall of the High Commission (P. Tyler ed. 1968).

19 See id. at 145-46.
Conscientious dissenters had every motive to resist investigation of their religious beliefs, and they did so by contending that the ex officio oath, upon which the High Commission’s proceedings depended, was itself unlawful. Their first efforts to combat the oath combined Biblical literalism, abstract appeals to the rights of conscience, and invocation of what Levy calls the “initially vague [Latin] maxim” that no one should be obliged to convict him or herself.20 However, only when the dissenters joined forces with the common lawyers, particularly with Sir Edward Coke, were they effectively able to harness the common law’s antagonism toward the courts of the Church and turn the maxim into a rule of law that ultimately became the privilege against self-incrimination. Levy recounts how fearlessly the English judges unleashed writs of prohibition and habeas corpus against the High Commission and other ecclesiastical courts prohibiting them from proceeding on the basis of the ex officio oath.21 The writs stated the principle that English subjects had a right not to be compelled to give evidence against themselves, and ordered officials of the High Commission to respect that right.22

These writs, and the cases that arose from them, contained the first explicit articulations by common law judges of a rule against compelled self-incrimination. The underlying principle took hold quickly, and when the ecclesiastical courts were abolished in the 1640s,23 the ex officio oath sank along with them. The ecclesiastical courts were revived in the wake of the Restoration in 1660, but by that time objection to the oath had become so ingrained that the statute restoring the jurisdiction contained an express clause forbidding “any archbishop, bishop, vicar-general, chancellor, commissary or any other spiritual or ecclesiastical judge, officer, or minister...to tender or administer unto any person whatsoever the oath usually called the oath ex officio.”24 Thus was the privilege born—the consequence of the struggle against Church and King for religious and constitutional liberty and, more broadly, of a contest for domi-

20 L. Levy, Origins, supra note 8, at 330.
21 See id. at 246; works cited in note 15 supra; see also J. Eusden, Puritans, Lawyers, and Politics in Early Seventeenth-Century England 123-26 (1958); C. Hill, Society and Puritanism in Pre-Revolutionary England 344-53, 382-419 (1964) (discussing references to Bible in criticisms of oaths); R. Usher, supra note 18, at 180-221 (describing attacks on High Commission by common law judges).
23 Act for the abolition of the Court of High Commission, 1641, 17 Car. 1, ch. 11. The exact steps by which the ecclesiastical courts were effectively abolished have not been investigated fully, but for preliminary accounts, see M. Ingram, Church Courts, Sex and Marriage in England, 1570-1640, at 369-74 (1987); R. Usher, supra note 18, at 316, 333-34.
nance between English and continental criminal procedure.

B. Difficulties in Levy’s Account

The broad outlines of Levy’s account of the privilege are compelling and correct. However, the account’s very simplicity and clarity also make it seriously flawed. There is much more to the story, and Levy’s account contains as many problems as it solves.

First, the ancient English common law principle forbidding compelled self-incrimination, and the Latin maxim used to express it, actually turn out to be commonplaces taken from the traditions of the European ius commune.25 Indeed, the maxim nemo tenetur prodere seipsum appears in that most basic of medieval guides to the canon law, the glossa ordinaria to the Decretals (1234) of Pope Gregory IX.26 The rule was repeated and endorsed by Innocent IV and Panormitanus, probably the two most influential writers on the medieval canon law.27 It was stated prominently in sixteenth-century compendia of “Common Conclusions” from the ius commune,28 and it figured equally in contemporary continental manuals of civil and criminal procedure.29

Additionally, some of the contemporary objections to the ex officio oath claimed that its usage violated the laws of the Church, not simply that the oath was contrary to common law principles. For instance, in

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25 Professor Levy’s treatment of the source of the Latin maxim appears to be internally inconsistent. In some places, he inclines toward accepting its canonical pedigree. See L. Levy, Origins, supra note 8, at 70, 285. In others, he casts doubt upon the origin, see id. at 95, 329, asserting that the maxim “had never existed in any canon-law text.” Id. at 329. At some points, Levy appears to endorse the maxim as a principle embedded in the English common law. See id. at 161. At still others, he describes it as a “nebulous maxim,” id. at 107, or as one of “mysterious origins.” Id. at 329. Levy is consistent only in treating any canonical precedent against the legality of the ex officio oath as of negligible importance in the privilege’s development. See id. at 96-97, 178-79.

26 “Sed contra videtur quod non teneatur respondere quia nemo tenetur prodere se.” (“But conversely it seems he may not be forced to respond since no one is bound to betray himself.”) Gl. ord. ad X 2.20.37 (Cum causam) s.v. de causis; see also gl. ord. ad Sext 2.9.2 (Si post) s.v. absque rationali causa.

27 See Innocent IV (d. 1254), Apparatus super libros quinque decretalium ad X 1.6.54 (Dudum) no. 11 (1570) (“nemini dicendum est ut se prodat in publicum” ("no one is told to betray himself in public"); Panormitanus (d. 1453), Commentaria in libros Decretalium ad X 2.18.2 (Cum super) no. 16 (1555) (“Videtur enim quod non tenebatur respondere interroga tioni seu positioni criminose quia non debet seipsum prodere.” (“For it seems he was not forced to answer an interrogation or a criminal positio because he does not have to betray himself.”)).

28 Syntagma communium opinionum, Lib. VII, tit. 19, no. 21 (1608) (“Positionibus criminosis aut captiosis per quas delictum aut perjurium detegi posset, nemo tenetur respondere.” (“No one is compelled to answer incriminating or entangling questions by which [his] delict or perjury can be uncovered.”)).

29 See, e.g., Joachim Mynsinger (d. 1588), Singularium observationum judicii imperialis camerae, Cent. VI, Obs. 92 (1595) (“quia nemo se ipsum prodere tenetur” (“no one is bound to betray oneself”)).
1592, the Puritan James Morice argued that the oath was “repugnant to the rules and canons of the Antichristian church of Rome.” Another Puritan controversialist ended a lengthy discussion by contending that the ex officio oath “seemeth to bee against the cannon lawe itself.” Still another, appearing before Archbishop Whitgift in 1591, admitted impugning the oath. However, he justified his objections as lawful, contending that he had been “occasioned thereunto by some of my Lord of Canterbury’s chaplains.” All of these are peculiar arguments coming from men Levy portrays as standing on the rights of conscience or asserting ancient principles of native English law.

Levy’s account is also difficult to square with the absence of real precedent for the privilege in the common law and with the recent showing by Charles Gray that the common law judges issued writs of prohibition against use of the ex officio oath only where other substantial reasons for their issuance existed. Successful assertion of the privilege simply on the basis of common law precedent has always required acceptance of an extremely “creative” use of the common law. The common law contained no privilege against self-incrimination. Rather, it prohibited defendants from testifying under oath at all, even if they wished to give evidence for themselves. Professor Gray’s demonstration of the habitual reluctance on the part of the common law judges, including Sir Edward Coke, to interfere with the jurisdiction of the ecclesiastical courts over their use of the ex officio oath makes it all the harder to see the history of the privilege principally in terms of a clash between rival systems of criminal procedure.

Finally, Levy’s Origins wholly ignores evidence that actual arguments about the oath were being made at the time by ecclesiastical law-

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30 A Brief Treatise of Oaths Exacted by Ordinaries and Ecclesiastical Judges 18 (1592).
31 Lambeth Palace Library, London, MS. 2026, fol. 107v. The Author had also found the oath incompatible with both the English common law and Biblical precedent. See id.; see also The Short Parliament (1640) Diary of Sir Thomas Aston (J. Maltby ed.) Camden Soc. ser. 4, vol. 35, at 67 (1988) (representation of oath as “contrary to lawes humane & divine”); Alexander Leighton, An Appeal to the Parliament; or Sion’s Plea Against the Prelacie 47-48 (1628) (representation that oath was “against the law of nature enregistered in the civill law, Nemo tenetur prodere seipsum”). A seventeenth-century controversialist argued that “the Pope’s law doth only allow it [the oath] in case of heresy.” Folger Shakespeare Library, Washington, D.C., MS. V.b.17, fol. 44. He too coupled this with the contention that the oath was contrary to the laws and customs of England. See id.
32 So contended by Edward Lord, British Library, London, Lansd. MS. 68, fol. 141. He was responding to the question, “w[]hether have you moved or perswaded others to refuse the oath before the Commissioners ecclesiastical?” Id.
34 See 8 J.H. Wigmore, Evidence, supra note 16, § 2250, at 284-89.
35 Id. at 285.
36 See C. Gray, supra note 33, at 353-54.
Manuscript records and reports from the ecclesiastical courts contain a considerable amount of evidence relating to the Roman canon law on the question. It demonstrates that, in litigation before the ecclesiastical courts, strong arguments were being made against the oath that were based upon sources from within the *ius commune*, not the English common law. Manuscript treatises dealing with English ecclesiastical law and procedure from the sixteenth and early seventeenth centuries, which exist in some abundance, also made frequent reference to the maxim *nemo tenetur prodere seipsum.* In other words, English proctors and advocates—the lawyers who spent their careers in the courts of the Church—seem to have regarded the rule against compelled self-incrimination as part of their own jurisprudence. Such evidence, which has been examined before, shows clearly that objections to the High Commission's use of the ex officio oath were taken initially on the ground that the ex officio oath was contrary to the letter of the Roman canon law, not on the basis of supposed rights of conscience or as derived from Magna Carta or as a common law invention, as Levy's account suggests.

This Article looks first at the evidence of practice within the tribunals of the English Church. That evidence shows clearly that objections were being taken regularly against the oath's validity under the law of the Church. The Article then moves to a detailed examination of the arguments made for and against the ex officio oath on the basis of that law. Commentators on the *ius commune* law provided a sophisticated discussion of both the oath's legality in general and of the question whether defendants who had once taken the oath could subsequently refuse to answer particular incriminating questions. This Article will take up these issues in turn. Its aim is to restore contemporary argument from the *ius commune*, virtually absent in Levy's *Origins*, to its rightful place in the history of the evolution of the privilege against self-incrimination.

II

EVIDENCE FROM THE ECCLESIASTICAL COURTS

Objections against, and argument about, the legality of the ex officio oath appear regularly in reports of cases heard in the ecclesiastical courts. For example, in a manuscript report of one quite ordinary proceeding shortly before 1610 (now found in the diocesan registry at York), Dr. Wyvell, one of the civilian advocates, argued that the practice of

37 Levy does mention one case in which an English bishop asserted that the privilege was available to defendants before ecclesiastical tribunals, but he ascribes the incident to the bishop's presumed senility. See L. Levy, *Origins*, supra note 8, at 211-12.

38 See note 51 infra.

39 Dr. Wyvell received an LL.B. from Cambridge in 1589; he served as chancellor of the
putting men to their oaths directly upon a presentment by churchwardens was one “that the law doth scarce allow.”\textsuperscript{40} By the word “law,” Dr. Wyvell clearly meant Roman canon law, for in support of his position he cited treatises by Panormitanus (d. 1453), Bartolus de Saxoferrato (d. 1357), and Antonius Gabrielius (d. 1555). The author of the first of these was the greatest of the medieval commentators on the Gregorian Decretals. The second was the most famous medieval writer on the texts of the Roman law; in 1610, he would have been viewed as the leading exponent of the conservative \textit{mos italicus}.\textsuperscript{41} The third, much less well known, was the author of a treatise devoted to restating the “Common Conclusions” of the \textit{ius commune}. These three were mainstream authorities of continental law in every sense, jurists who would have known little or nothing about Magna Carta or English common law.\textsuperscript{42} Citation of their authority in this context simply does not fit Levy’s account of the sources used in opposition to the ex officio oath.

Similarly, in the bishop’s consistory court at Durham in 1609, Nicholas Brigges refused to answer a \textit{positio}, justifying his refusal “because the question posed [was] incriminating.”\textsuperscript{43} His lawyer cited Joachim Mynsinger, a sixteenth-century German writer on the \textit{ius commune}, in support of his client’s refusal.\textsuperscript{44} When Cuthbert Bainbridge was accused of preaching a seditious sermon in the early 1590s, he too maintained that he could not be required to take the oath, using works by

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\item \textsuperscript{40} Borthwick Institute of Historical Research, York, MS. Prec. Bk. 11, fol. 31v (“But Wivell & Blomfied said that the lawe doth scarcely allowe of this practice, vide Gab. Rom. lib. 1, conclus. 1, de testibus, nu. 32; Bart. t. divus, ff. de cust. et exhibit. reorum (Dig. 48.3.6); Abb. c. in omni, 4 de testibus (X 2.20.4.").
\item \textsuperscript{41} Literally “the Italian usage,” the phrase denoted the continuation of medieval habits of looking to glosses and customary practice for sources of law. It is customarily contrasted with legal humanism, which strove to recover authentic Roman law. See 1 H. Coing, Europäisches Privatrecht: Alteres Gemeines Recht (1500 bis 1800) 68 (1985). For the persistence and influence of the \textit{mos italicus} in the early modern period, see 1 A. Wijffels, Qui Millies Allegatur 272-82 (1985).
\item \textsuperscript{42} The most complete guides for bibliographical information on continental jurists are H. Coing, Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte (2 vols. 1973-1975); T. Diplowitzatius, Liber de claris iuris consultis (F. Schulz, H. Kantorowicz & G. Rabotti eds. 1919), reprinted in 10 Studia Gratiana (1968); G. Pancirolius, De claris legum interpretibus libri quatuor (1721); J. Von Schulte, Die Geschichte der Quellen und Literatur des canonischen Rechts (3 vols. 1875). For briefer, but useful, guides in English, see generally J. Derrett, Henry Swinburne (1551-1624): Civil Lawyer of York 39 (1973); J. Smith, Medieval Law Teachers and Writers 81, 94 (1975); W. Ullmann, Law and Politics in the Middle Ages 108, 173 (1975).
\item \textsuperscript{43} Harrison c. Briggs, Dept of Diplomatic and Paleography, University of Durham, DDR XVIII/3, fol. 258v (1616) (“Notwithstanding he refusest to answer the article, quia positio criminalis.”).
\item \textsuperscript{44} See id. (“He alleageth Minsingers Counsails dec. 1 resp. nu. 22.”).
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Julius Clarus (d. 1575), Robertus Maranta (d. 1540), and Johannes Petrus de Ferrariis (fl. 1389) to support his case.45 These three men were Italian jurists, writers of treatises on the Roman canon law of procedure. In a fourth case, the *ius commune* was relied upon to determine whether a party to a probate proceeding could be compelled to say under oath whether he had suppressed a last will and testament by burning.46 The court’s apparent decision, that the act of suppressing was sufficiently criminal to permit invocation of the privilege, was supported by citation to three texts from the Roman law *Digest* and one taken from the *Libri observationum* of Jacobus Cujas (d. 1590).47

Invocation of civilian principle also appears regularly in contemporary manuscript treatises dealing with procedure in English ecclesiastical courts.48 These treatises routinely dealt with the rule against compelled self-incrimination by citation of authorities from the *ius commune*. Many of them assumed the existence of the rule and went on to address questions of greater legal detail, including the scope of the privilege. For example, in a marginal gloss to a copy of Francis Clerke’s work on English civilian procedure,49 the civilian commentator grappled with the question of whether a litigant should suffer any prejudice from having answered an incriminating interrogatory he was not obliged to answer in the first place. The commentator’s answer—that it depended on whether a preliminary formal protestation had been made—was drawn from works by Lanfrancus de Oriano (d. 1488), Octavianus Vestrius (d. 1573), and Panormitanus.50 The first of these men was a doctor of both Roman and canon law, taught at the University of Padua, and wrote an influential treatise on civilian procedure. The second was a Roman advocate

47 See id.
48 The rule that “no one may be compelled to answer an incriminating positio” is found, for example, in “Processus seu modus procedendi in causis correctionum,” Cumbria Record Office, Carlisle, DRC 3/62, fol. 82 (1629), in *marginalia* to a manuscript copy of Francis Clerke’s *Praxis in curiis ecclesiasticis*, Archdeaconry of Nottingham Records, University of Nottingham Library, MS. P 284, p. 10, and in a manuscript called “Summarium processus iudicii in curiis ecclesiasticis huius regni,” British Library, London, Add. MS. 6254, fol. 10 (c. 1600). See also the ecclesiastical formulary used by the High Commission, University Library, Cambridge, EDR F/5/45, pp. 94-95 (“One is not bound to answer to anything upon his oath in the Ecclesiastical Court which if he should confess it would endanger his life. Sir Edward Stanhope; Sir Thomas Crompton.”). Crompton and Stanhope were prominent Jacobean civilians, both chancellors of the diocese of London and vicars-general of the archbishop of Canterbury. See B. Levack, supra note 39, at 222, 270.
49 This work, *Praxis in curiis ecclesiasticis*, published in Dublin in 1666, was written in the 1590s and widely circulated in manuscript. See Derrett, *The Works of Francis Clerke, Proctor*, 40 Studia et documenta historiae et iuris 52 (1974).
50 See Bodleian Library, Oxford, Tanner MS. 112, no. 57.
and writer of an introductory work on practice in the papal court, a work that went through nine printings in the sixteenth century. The third, noted above, was the greatest of the fifteenth-century writers on the canon law.51

Similarly, in a mid-seventeenth-century manuscript now in Wells Cathedral Library, works by Joachim Mynsinger and Lanfrancus de Oriano were used in considering whether a defendant could be held pro confesso for refusing to answer an incriminating question for which a proper foundation had been laid or whether he should instead be punished merely for contempt.52 In a contemporary work found among the muniments of the diocese of Chester, the civilian writer took note of the basic rule against compelled self-incrimination, also citing the work of Lanfrancus de Oriano.53 For these men, it was the European ius commune, not the English common law, that counted.

These treatises of English civilian practice and the case reports that went with them show that the English civilians themselves regarded the privilege as an established rule. It was, however, a rule subject to exceptions and one that raised difficult questions of law. Its exact reach was debatable, its interpretation required knowledge of the intricacies of the ius commune, and there were aspects of the subject open to dispute. What is clear, however, is that none of the treatments approached the question in terms one would expect from reading Levy's account—as a matter pitting English common law against ecclesiastical law or practice.

The identical conclusion emerges when one moves from reports and treatises to the official records of the English ecclesiastical courts. Although records by their formal nature exclude reference to treatises or other authority, they clearly show that the oath was objected to as contrary to the law of the Church. For example, before the London branch of the Court of High Commission in 1636, the civilian advocate argued that an interrogatory "might contain some scandalous matter and unfit to be answered."54 The High Commission consequently struck from the interrogatory the part asking whether the witness had been particeps criminis.55 Before the bishop's commissary court at London in 1585, Richard Ramsford, defendant in an ex officio prosecution for fathering an illegitimate child, refused to answer the accusation because, as he put

51 See note 42 and accompanying text supra.
52 Marginalia written c. 1640 by Mark Tabor, Registrar of the Wells Archdeaconry Court, Wells Cathedral Library, uncatalogued manuscript copy of Francis Clerke's Praxis in curulis ecclesiasticis, fol. 226v.
53 Marginalia, Cheshire Record Office, Chester, EDR 6/3, fol. 11v ("Quando respondendum libellis criminosis vide Lanf. de respons. nu. 13." ("On responding to criminal accusations, see Lanfrancus, de responsibus, no. 13.")�).
54 Ex officio c. Bale & White, Public Record Office, London, SP 16/324, fol. 5v (1636).
55 Id.
Edward Midleton, appearing before the High Commission at York in 1598, also refused to take the oath, on grounds that "the offense wherewithal he is charged in this article is a capitall cryme and therefore he believeth he is not bound by lawe to answere thereunto." The parties in these cases contended that they were not compelled to answer incriminating questions and relied upon the *ius commune* in articulating this argument. That law remained the basis for procedure in the English ecclesiastical courts. When defendants there wished to invoke a common law rule, they did so by introducing a royal writ of prohibition that prevented the ecclesiastical judge from taking any action at all. However, such action was often a last resort for defendants. Their first step was to object under the law of the Church itself; refusals to take the oath or to answer specific incriminating questions appear with some frequency in late sixteenth- and early seventeenth-century court records.

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56 Guildhall Library, London, MS. 9064/12, fol. 66v ("dictus Ricardus presens in iudicio noluit respondere sed tantum dixit se non teneri de iure respondere" ("the said Richard appearing in court refused to answer, and said only that he was not bound by law to respond").)

57 Ex officio c. Midleton, Borthwick Institute of Historical Research, York, H.C.P.1597/8 (1597); see also Ex officio c. Udall, I Howell's St. Trials 1271, 1275 (High Commission 1590).

58 See the manuscript copy of Francis Clerke, *Praxis in curiis ecclesiasticis*, Catholic University of America, Washington, D.C., Spec. Coll. MS. 180 (containing contemporary annotations to many sources from the tradition of the *ius commune*). A slightly later but equally illustrative account is given in Henry Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (1685).

59 See, e.g., Ex officio c. Beeke, Lincolnshire Archives, Cj/30, fol. 83 (Lincoln 1639) (defendant argued that "non tenetur de iure ad prestandum iuramentum de fideliter respondendo etc." ("he is not bound by law to honor the oath to answer truthfully etc."); Penrise c. Briscoe, Cumbria Record Office, Carlisle, DRC/3/62 s.d.16 January (Carlisle 1629) (defendant, commanded to take the oath in a defamation case, argued that "de iure non tenetur respondere" ("by law he does not have to answer"); Curtice c. Cox, Wiltshire Record Office, Trowbridge, D 1/39/1/51, fol. 28 (Salisbury 1629) (defendant in defamation suit "dicente se non teneri de iure ad respondendum eidem" ("saying he was not bound by law to answer the same"); Ex officio c. Langdon, Norfolk Record Office, Norwich, ACT/25, s.d. 4 April (Norwich 1577) (defendant objected that requiring his answers was "not warranted by law"). For other cases in which defendants refused to take the oath or to give incriminating answers, see, e.g., Ex officio c. Quarterman, Public Record Office, London, SP 16/434A, fol. 6v (London High Commission 1640); Ex officio c. Brandling, in Acts of the High Commission Court, 34 Surtees Soc. 53 (1857) (Durham High Commission 1633); Ex officio c. Postande & Bridgeton, Devon Record Office, Exeter, Chanter MS. 764, fol. 25v (Exeter 1630); Ex officio c. Birthbye, Hertfordshire Record Office, Hertford, AHH 5/3, fol. 49v (Hertford 1597); Ex officio c. Elliott, University Library, Nottingham, A 11 (pt. 2), pp. 67-69 (Nottingham 1597); Ex officio c. Cobden, West Sussex Record Office, Chichester, Ep I/17/9, fol. 11v (Chichester 1596); Ex officio c. Twyninge, Somerset Record Office, Taunton, D/D/Ca 100, fol. 18v (Bath and Wells 1594); Ex officio c. Fynche, Kent Archives Office, Maidstone, PRC 44/3, p. 109 (Canterbury High Commission 1592); Ex officio c. Morley, Borthwick Institute, York, H.C.AB.11, fols. 52v-53 (York High Commission 1586); Ex officio c. Jones, National Library of Wales, Aberystwyth, SA/CB/1, fol. 11 (St. Asaph 1580); Ex officio c. Walton, University Library, Cam-
Cases like these, most of which involved quite ordinary people, no issue of religious or political moment, and in which legal authority, if any, came from the civilian tradition, stand directly at odds with Levy's depiction of civilian procedure as the implacable foe of the privilege and of English liberties. Indeed, the ius commune appears to be the very source of assertions of the privilege. Particularly in light of the awkward fit between the accepted account of the ex officio oath and the absence of clear authority against the oath within early common law procedure, the manuscript evidence calls for a more extensive examination of Roman canon law on the subject. Such an examination does not produce a simple understanding of the contemporary controversy. Nor does it show that the ex officio oath was always unlawful under the law of the Church. However, the explanation does produce a better picture of a legal question that was more controversial at the time than suggested by the account given in Levy's Origins.

III

ARGUMENTS FROM THE EUROPEAN IUS COMMUNE

The basic question to be addressed is the legality of the ex officio oath under the Roman and canon law as they existed around 1600. Argument about this question was articulated in two ways. One approach asked whether defendants could be obliged to submit to the oath in the first place and, if so, under what conditions and with what safeguards. The other asked whether, and under what conditions, defendants legitimately before the courts and subjected to the oath could be required to answer specific questions which tended to incriminate them. While both analyses questioned the legality of the oath, the two ways of putting the question raised different arguments in contemporary legal thought and were made separately in English practice. Consequently, they will be dealt with separately here.

For both arguments, it is fair to say at the outset that Roman canon law's standard rule inclined in favor of defendants and against the practices used by the Court of High Commission and other ecclesiastical tribunals. Texts and commentators alike appeared to support the argument that no one could be required to take the oath. However, as with so many legal issues found in the traditions of the ius commune, the general rule admitted exceptions and complications. It invited limitations and amplifications. Often the practical result came to look very different from the initial rule. The best way of understanding the question, together with the complexities and subtleties that attended it, is to explore
the arguments against the oath in the High Commission and then to move through the counterarguments that followed.

A. *Nemo Punitur Sine Accusatore* 60

The first argument against the ex officio oath submitted that the whole procedure undertaken by the oath was invalid because it lacked an accuser. An established rule of the *ius commune* held that no judge could initiate, on his own motion, ex officio procedures against any person.61 The law required some initial indicia of guilt or an accusation against the defendant made by someone with a legitimate interest in securing the defendant’s conviction. Sixteenth-century civilians gave two reasons for this rule, the first based on religious precedent and the second on notions of fairness and due process supported by texts from the Roman law.

First, initiating criminal proceedings without an accuser was said to be contrary to divine law and against a specific Biblical precedent: Jesus said to the woman taken in adultery, “‘Woman, where are thine accusers, hath no one condemned thee?’ She said, ‘No one, Lord.’ And Jesus said to her, ‘Neither do I condemn thee.’”62 Dominical authority was weighty authority, and commentators took this example not, as we do, for a condemnation of self-righteousness and a counsel of compassion, but instead as a text making a specific legal point: the woman could not lawfully be condemned without a specific accuser. Jesus’ words were said to demonstrate the illegality of prosecutions and punishments based on mere public gossip in which no specific accuser could be found.63 Second, it was said that permitting ex officio proceedings without a specific accuser perverted the right order of justice, under which the judge stood as an impartial third party between accuser and accused. If no accuser stood on the other side, the judge’s objectivity inevitably was undermined; the practice permitted and even encouraged him to make the cause his own, a practice contrary to texts of the Roman law and principles of natural justice.64 Thus it could be (and in fact was) con-

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60 “No one is punished in the absence of an accuser.”

61 See, e.g., Bartolus de Saxoferrato, *Commentaria ad Dig. l.18.13 (Congruit)*, no. 3 (1570-71) (“Et ista regulariter est prohibita, quia nemo sine accusatore punitur.” (“And this is by rule prohibited, because no one is punished without an accuser.”)).

62 John 8:10-11.

63 See, e.g., Robertus Maranta, *Speculum aureum seu lumen advocatorum . . . praxis civilis*, pt. VI, *tit. de inquisitione*, no. 6 (1565); see also the comment by an English civilian, British Library, London, Lansd. MS. 131, fol. 150 (“Nulla enim aequitas suggerit ut quis debat prodere crimen suum etiamsi de eo sit infamatus cum infamia saepe sit fallax.” (“For fairness does not call for one to reveal his crime, even if he is reputed guilty of it, since repute is often fallacious.”)).

64 See Robertus Maranta, supra note 63, at no. 24; Sigismundus Scaccia (d. 1620),
tended by English advocates that, even without considering the precise nature of the oath, the whole procedure of the Court of High Commission was unlawful because it violated established canonical rules.65 This argument was particularly forceful where no copy of the specific charges was first given to the defendant: respectable canonical opinion, supported by a decision of the Rota Romana, held that natural justice required a copy of preliminary process to be furnished to anyone accused of a crime before the oath could be imposed.66

The defenders of the High Commission had answers to these arguments. They seem generally to have ignored the Gospel authority,67 but they had a great deal to say about the alternative ground for the rule requiring an accuser. They pointed out that the rule had never been regarded as absolute under the ius commune. As Richard Cosin, the Elizabethan apologist for ecclesiastical jurisdiction, wrote, the rule “hath many limitations.”68 Robertus Maranta, the sixteenth-century Italian proceduralist, managed to enunciate a stupefying list of sixty-three separate exceptions to the rule.69 Defenders of English ecclesiastical jurisdiction contended that the High Commission fell within an exception that permitted a judge to interrogate on his own authority when public fame circulated that a specific person had committed an offense.70 Under this exception, fama publica could take the place of an accuser, particularly where the crime was by its nature difficult to prove in the external forum, as religious dissent very often must have been.71 Public fame could serve

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Tractatus de judiciis causarum civilium criminalium et haereticalium, Lib. I, c. 68, no. 10 (1648).


66 See Sebastianus Vantius (d. 1570), De nullitatibus processuum, tit. ex defectu processus, nos. 29-30 (1550) (“Naturali namque rationi convenit ut quis prius cognoscat id super quo iudicare [sic; recte iudicari] debet et propterea dicit consuevit quod causae cognitio a iure divino descendit.” (“For surely it comports with natural reason that one first know of what he is being accused, and for that reason it was widely held that natural law demanded knowledge of the charges.”)); cf. Julius Clarus (d. 1575), Practica criminalis, Quest. 45, no. 8 (1661) (disapprovingly noting customary practice to the contrary).


68 Id. pt. II, ch. 7, at 54.

69 Robertus Maranta, supra note 63, tit. de inquisitione, nos. 22-202.

70 See gl. ord. ad X 5.1.17 (Quailler et quando) s.v. exceptis occultis (“Super his inquisitio fieri non debet, sed super illis tantum de quibus infamia praecessit.” (“Inquiry might not to be made into these matters, except to the extent that infamy arose.”))). The argument is found in the comments of English civilians. See, e.g., British Library, London, Lansd. MS. 131, fol. 150 (“Si [crimen] est notorium vel famosum respondere tenetur.” (“If the offense is notorious or famous he must respond.”)) (citing the Commentaries on the Decretals by Panormitanus).

71 See, e.g., Julius Clarus, supra note 66, Quaest. 6, no. 1 (public fame said to “open the
the function of something like probable cause in our legal system, permitting a magistrate to carry out an essentially neutral role in criminal proceedings, acting to discover whether the fame was also the fact.

Second, even admitting for the sake of argument that the procedure might otherwise have been unlawful under the Roman canon law, defenders of the High Commission argued that the court was invested by English statute and royal commission with greater powers than an ordinary ecclesiastical court. One civilian went so far as to assert that systematic use of the ex officio oath was lawful only by the High Commission. The argument was that the royal commission, issued under the Statute of Supremacy of the first year of Elizabeth's reign, gave the Commissioners "full power and authority . . . to determine, according to [their] discretions and by the laws of this realm," all ecclesiastical crimes and offenses. Thus, its defenders contended, the High Commission was not tied to the procedural requirements that bound ordinary spiritual courts. Its powers extended as far as the royal prerogative allowed, and exercise of that prerogative permitted the Commissioners to initiate proceedings against those they legitimately suspected of religious nonconformity without exact regard for traditional canonical rules of procedure.

Civilians arguing the case for opponents of the High Commission answered these points in turn. First, they admitted that there was an exception to the requirement of an accuser where there was sufficient fame publica, but contended that the procedures regularly used by that court did not fall within the exception. To constitute sufficient "opening" to warrant prosecution ex officio, public fame had to meet strict requirements under the ius commune. The fame had to have been the

way for the judge to proceed"; reason given that "[talis] diffamatio succedit loco accusationis" ("such disrepute takes the place of an accusation").

72 "When a man giveth an answear to criminall articles in the High Commission (quoniam in quacunque alia curia non tenetur repondere nisi prius aliqua probatio sit facta). . . ." ("since in any other court whatsoever he is not bound to answer unless some proof has first been made"). Opiniones doctorum, in Suffolk Record Office, Bury St. Edmund, E 14/11/7, fol. 8 (1623) (manuscript dealing with ecclesiastical cases and points of law).

73 See the Commission of 1559, in G.W. Prothero, Select Statutes and Other Constitutional Documents 227-32 (4th ed. 1913). The operative part of the Act of Supremacy, I Eliz. 1, was ch. 1, § 8 (1558) (granting to Elizabeth and her successors right "to exercise, occupy and execute . . . all manner of jurisdictions, privileges and pre-eminences, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction" within the realm).

74 The arguments on this point are well summarized in J. Sommerville, Politics and Ideology in England, 1603-1640, at 212 (1986); R. Usher, supra note 18, at 195-98.

75 "Wee have fownde and shewed that this manner of proceedinge to extorte first our owne othe etc. is repugnante both to the worde of God and Lawe." Lambeth Palace Library, London, MS. 2004 (Fairhurst papers), fol. 71v (concluding discussion about absence of proper grounding for oath).

76 For fuller and more representative discussions of the law's requirements, see Julius
true source of the prosecution; it must not have had its origins simply in malicious rumor-mongering by the enemies of the accused. Moreover, before proceedings could begin, the existence of public fame had to be proved by the testimony of trustworthy persons. It could not simply be assumed to exist. Finally, the public fame had to be so vehement that scandal would be generated by failure to take action upon it. Anything less was legally insufficient to justify the initiation of criminal proceedings.

The English High Commission, its opponents argued, passed none of these tests. The judges of the court were themselves the source of whatever fame there was—their actions were "official" prosecutions in the fullest and worst sense of the term. The judges truly were making the cause their own. Moreover, in practice, the High Commission judges and those in all English ecclesiastical courts were at fault for presuming the existence of the *fama publica*, routinely denying defendants' requests for an inquest into the issue. Finally, if any scandal were involved, it was generated by the actions of the High Commissioners, not by those of the conscientious men and women who were the targets of the Commission's illegal prosecutions.

Second, to the argument that the Statute of Supremacy and the Elizabethan commission allowed the High Commission to ignore established canonical procedures, defendants before the court argued that under the English Constitution the common law judges, not the self-interested ci—
vilians or Commissioners, were the rightful interpreters of parliamentary statutes. Since the common law judges had held that the statute did not permit indiscriminate use of the ex officio oath, the civilians were bound to follow the judges' interpretations. Nonetheless, they were deliberately disregarding the authoritative reading of the statute.

Moreover, opponents of the oath found it objectionable to hear defenders of the High Commission argue that its powers were defined and enlarged by an ambiguously worded English statute. In most contexts, the English civilians argued just the reverse: that their courts should carry on the canonical system inherited from the Middle Ages. Unless expressly compelled to do so by statute, the civilians followed the ius commune. In regard to the oath, they seemed to be talking out of both sides of their mouths, urging expansive application of English statutes when it worked to their benefit, but interpreting the statutes narrowly when it did not. Thus, opponents of the oath concluded, none of the exceptions to the ordinary rule requiring an initial accuser or prima facie proof applied, and the statutory argument was constitutionally invalid.

To these arguments, which they were constrained to admit did raise doubts about the legality of ex officio proceedings, defenders of the High Commission again had an answer. Even accepting for the sake of argument that fama publica theoretically might not always have been sufficient to meet the exception, they responded that under the Roman canon law, where there was doubt about the proper understanding of a rule or law, custom was the surest guide. That was a common principle of construction in the ius commune, and in this case custom was on their side. They could cite direct continental authority on point. Julius Clarus, for instance, whose Practica criminalis canonica was much cited during the controversy, wrote bluntly after expressing his doubts about the legality of the oath: "But certainly whatever may be true de iure, practice demonstrates the reverse." Proceedings ex officio without an accuser or

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82 See William Warrington's case, Free Library, Philadelphia, MS. LC 14/76, fols. 200-01v (C.P. 1609) ("Coke: the question is whether the High Commissioners or the judges of the common ley will have the exposition of the statute of I Elizabeth, and we are all of the opinion that the judges of the common law will."); see also Spendlow v. Smith, 80 Eng. Rep. 234 (K.B. 1615).

83 See note 13 and accompanying text supra.

84 See the argument contained in Lambeth Palace Library, MS. 2004, fol. 70 (even if practice might otherwise be condoned, it could scarcely be urged by civilians because "inimical to the canons").

85 See Guido Papa (d. 1487), Decisiones, Quaest. 1 (1508).

86 "Sed certe quicquid sit de iure totum contrarium docte practica." ("But certainly whatever may be true de iure, practice teaches exactly the opposite."). Julius Clarus, supra note 66, Quaest. 6, no. 1. He was showing that the phrase fama publica praeecedente, com-
sufficient proof of public fame against the accused occurred every day in the courts that Clarus knew, and in tribunals where the practice was regularly admitted, it was not easily dislodged.

It goes almost without saying that those who attacked the procedures adopted by the High Commission did not find this particular argument from custom convincing.\textsuperscript{87} They denied the existence of the custom, and they disputed its legitimacy if it did exist. Put another way, the High Commission’s argument asserted that the practice was lawful simply because it was the practice. That sort of reference to custom is capable of justifying the most flagrant abuses, and opponents of the oath argued that exactly this was occurring in the High Commission. These opponents had to admit that custom could be used to interpret the texts of the \textit{ius commune}, but this could not mean that custom could be used to convert a practice that was clearly unlawful into one that had to be accepted as valid law.\textsuperscript{88}

At this point in the legal argument, the two sides to the dispute simply parted company. No intellectual solution was possible, and the dispute became a test of will and ultimately of military strength. The dominant opinion among the English civilians undoubtedly favored allowing initial imposition of the ex officio oath in the High Commission and, indeed, in all other ecclesiastical courts. Civilians who took the contrary view either had to proceed to a second way of making the argument, set out below,\textsuperscript{89} or seek a remedy outside the system of ecclesiastical courts.\textsuperscript{90} They did both. On the first aspect of the dispute over the ex officio oath, argument ended in a stand-off. Might prevailed.

\begin{footnote}
\textsuperscript{87} See, e.g., Bainbridge's Case, British Library, London, Harl. MS. 358, fols. 197-98 (1588) (arguing that if indeed there were any such custom, “yet by lawe yt were nott tollerable bycause yt ys \textit{inimica canonibus}; 2 bycause yt doth \textit{inferre gravamen ecclesiae}; 3 yt ys \textit{nutricula peccati} in the judge, in the party himselfe and in those which doe secretly informe”).
\textsuperscript{88} British Library, London, Lansd. MS. 68, fols. 33v-34 (also arguing that, since custom must be based on the consensus of those using it (\textit{consensus utentium}), English practice must similarly reject it).
\textsuperscript{89} Not all civilians were partisans of the King in the English Civil War. Most were royalist in sentiment, but a few in fact became active Parliamentarians supporting the new regime. See B. Levack, supra note 39, at 196.
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B. Nemo Tenetur Detegere Turpitudinem Suam

The arguments so far outlined attacked the legal validity ab initio of imposing the ex officio oath on defendants accused of religious and political dissent. However, that was not the end of the matter under the ius commune. The ius commune also opened the possibility that defendants could object to individual incriminating questions, even once they had taken the oath. As shown by the evidence described in Section II, many defendants in the English ecclesiastical courts made such objections. This Article now looks at the substance behind the objections. They turn out to be even more directly connected to the evolution of the privilege against self-incrimination than the first half of the arguments made against the oath.

A canonical principle held that "no one is compelled to bear witness against himself, because no one is bound to reveal his own shame." The rule was venerable in the seventeenth century. It had been stated and elaborated upon by the most prominent of the medieval writers on civilian procedure, Guillelmus Durantis. It also had been endorsed by Panormitanus, the greatest of the fifteenth-century canonists, and was repeated in virtually all sixteenth- and seventeenth-century European manuals of procedure. Requiring men and women to answer specific incriminating questions, whereby they risked prosecution under a penal

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91 "No one is bound to reveal his own shame."
92 See notes 39-59 and accompanying text supra.
93 "Nemo tenetur prodere seipsum, qua nemo tenetur detegere turpitudinem suam." See Julius Clarus, supra note 66, Quaest. 45, no. 9.
94 Speculum iudiciale, Lib. II, tit. de positionibus, § 7, no. 40 (1574); see also gl. ord. ad Dig. 12.2.26 (Qui iurasse), additio s.v. acquisiti ("Ista glossa est valde notabilis ad hoc, quod positioni per quam quis detegere delictum suum, quis non cogitur respondere. Et hoc est quod dicitur in practica, ista positio est criminosa; et ideo ei non respondendum." ("This gloss is very noteworthy here, that one is not thought bound to answer a question so as to disclose one's own transgression. And so it is said in practice that such a question is incriminating; and therefore is not to be answered.").) Similarly for the canon law: gl. ord. ad Sext 2.9.2, s.v. absque rationabili causa ("Item super crimine eius contra quem fiunt, non admittuntur positiones." ("Likewise, questions are not permitted of the accused about the offense.").) For a discussion of the interesting parallel with Jewish law, see Rosenberg & Rosenberg, supra note 3.
95 Commentaria in libros Decretalium ad X 2.20.37 (cum causam), no. 13 (1605).
96 See, e.g., Jodocus Damhouder (d. 1581), Praxis rerum civilium, ch. 154, no. 22 (1646) ("Nemo cogitur respondere se criminose esse, quod sane intelligendum est, scilicet de criminibus occultis et ad reipublicae perniciem non pertinentibus." ("No one is compelled to admit his criminality, which is perfectly sensible, especially as to hidden offenses not harmful to the public interest.")); Josephus Mascardus (d. 1588), De probationibus, vol. 3, Concl. 1177, nos. 59-60 (1593) ("Positio criminosa non est admittenda nec ei respondendum est, cum nemo cogatur detegere turpitudinem suam." ("An accusing query is not permitted nor is one to be answered, since no one is compelled to betray his own disgrace."); Lanfrancus de Oriano, supra note 86, tit. de responsionibus, no. 16 ("Decima regula sit ista, positioni criminose non est respondendum." ("Let this be the tenth rule; an incriminating question is not to be answered.").)
statute, as they might in the High Commission, evidently ran counter to this principle.

The authoritative text used most often to justify the rule was an extract from a commentary on St. Paul's Letter to the Hebrews by the great fourth-century Church father St. John Chrysostom. The text, inserted in Gratian's *Decretum* (1140), the standard canonical textbook of the Middle Ages, stated: "I do not say to you that you should betray yourself in public nor accuse yourself before others, but that you obey the prophet when he said, Reveal your ways unto the Lord." Medieval commentators read these words as making a legal point: men and women should confess their sins to God, but they should not be compelled to make their crimes known to anyone else.

Building upon this text from the *Decretum*, commentators gave two reasons of policy for the prohibition against requiring answers to incriminating judicial questions. First, none of us is untainted by crime of some sort; if the truth were fully known, all of us would stand in danger of judgment. To permit public officials to force men and women to reveal their crimes would mean that no man or woman on earth would be immune from public prosecution. No one desired that result. It would be disruptive of social order, and it would confound the penitential with the external forum. Although the commentators did not phrase the objection in the terms most familiar to us, the right to personal autonomy, in a limited fashion they did endorse something like a right of privacy, a sphere of life in which the government should not interfere.

Second, commentators said that obliging anyone to take the oath *de veritate dicenda* and to answer specific incriminating questions provided an occasion, even an inducement, for perjury. The temptation not to tell the truth, either in taking the initial oath or in answering later questions, would be all but overwhelming for most defendants. This is essen-

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97 C. 33 q. 3, Dist. 1 *De penit.* dictum post c. 87, § 6.

98 See, e.g., Hostiensis (d. 1271), Lectura in libros decretalium ad X 1.6.54 (Dudum), no. 30 (1571) ("Unde et dicitur nemo sine crimine vivit, . . . sed nec tenetur quis se prodere." ("Whence it is also said that no one is without taint, but neither is one bound to denounce oneself.").

99 The characteristic formulation is given by the early canonist Huguccio: "Secretorum enim Deus et non homo est iudex" ("God, not man, is the judge of [our] secret acts"), quoted in S. Kuttner, Kanonistische Schuldlehre: von Gratian bis auf die Dekretalen Gregors IX, at 20 (1935).

100 See, e.g., Julius Clarus, supra note 66, Quaest. 45, no. 9 ("mihi certe haec practica nunquam placuit, est enim manifesta occasio perjurii . . . ut quotidie experientia docet" ("certainly this practice has never pleased me, since it is an obvious occasion of perjury, as daily experience shows"); Andreas Gail, Practicarum observationum, Obs. 85, no. 5 ("Lex occasionem perjurii non dare, immo ubi subest periculum perjurii iuramentum prohibere debet." ("Law ought not to give occasion for perjury; on the contrary, where the danger of perjury is greater, it ought to bar the taking of the oath."). For an older statement, see Petrus de Ferraris (fl. 1389), Practica aurea, tit. *forma excipiendi contra positiones § detegentes*, no. 2 (1603).
tially the same argument that has surfaced in our own day as "the cruel trilemma," the unhappy choice among perjury, contempt, or conviction that faces all required to give evidence against themselves. The argument was that courts ought not regularly put men and women to such a test for such doubtful gain. Thus, defendants before the English Court of High Commission reasonably relied on established principles of the *ius commune* in arguing that they should not be forced to answer particular questions that might incriminate them.

To these arguments, the defenders of the High Commission again had answers drawn from the *ius commune*. They distinguished the extract from St. John Chrysostom on the grounds that Chrysostom had not been referring to process in courts of law, but only to truly public utterances. His statement, they said, was therefore not binding in the judicial forum. Further, defenders asserted that the *ius commune* itself recognized several exceptions to the rule against forced self-incrimination. Indeed, some thought these exceptions had all but swallowed the original rule, since it was held not to apply where there was public knowledge that a crime had been committed, where the public had an interest in punishing the crime, and where there were legitimate indicia that the defendant being questioned had committed it. This was an accepted principle in the criminal law. Following its mandate, under principles of the *ius commune*, defendants had no right to refuse to plead or to answer specific questions about their crimes. In the eyes of some civilian commentators, to permit the rule against self-incrimination to become an absolute privilege would have paralyzed the legitimate goal of

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102 See text accompanying note 97 supra.

103 See, e.g., Antonius Gomezius (d. 1562/1572), Variorum resolutionum, Lib. III (*De delictis*), ch. 12, no. 5 (1693) ("quia intelligitur extra judicium vel etiam in iudicio nulla praecedente diffamatione vel iusta causa" ("because this is to be understood [as referring to] extra-judicial matters, or if to judicial matters, [only] when there is no pre-existing public fame or just cause").

104 This answer was summed up by the commonly used phrase: "Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur... innocentiam suam ostendere et seipsum purgare." ("Although no one is bound to betray himself, nonetheless someone betrayed by public fame is bound to demonstrate his innocence by purging himself."). See, e.g., the opinion of nine English civilians, temp. Jac. I, Trinity Hall, Cambridge, MS. 43/2. For a modern comment, see Kenealy, *Fifth Amendment Morals*, 3 Cath. Law. 341-42 (1957).

105 Jodocus Damhouder (d. 1581), Praxis rerum civilium, ch. 154, no. 22 (1616). The parallel case of the canonical presumption of innocence is also instructive. See Fraher, *Ut nullus describatur reus prius quam convincatur*: Presumption of innocence in medieval Canon law?, in Proc. Sixth Int'l Congress Medieval Canon Law 493 (1985).
punishing known criminals.

This seemed a forceful point. The existence of exceptions to the rule was admitted by all participants in the English debate. The force of the exceptions shows that, however much sixteenth-century arguments resembled some of the modern reasons given for the privilege against self-incrimination, the privilege did not then have an absolute character. Civilians did not regard a defendant's refusal to answer incriminating questions as the exercise of a fundamental personal right, never to be abridged. They regarded it instead as a protection against the exercise of overly intrusive powers by public officials seeking to pry into the private lives of ordinary men and women.

This understanding of the rule against self-incrimination left the English opponents of the ex officio oath with a window of opportunity. Despite the existence of many exceptions, the rule *nemo tenetur prodere seipsum* still applied in the absence of public notoriety indicating that an accused had committed a crime, and it still applied to prohibit judicial fishing expeditions to search out defendants' private faults. Opponents argued that this sort of expedition was exactly what the Court of High Commission routinely undertook. Certainly the oath itself opened up the possibility that defendants in that court would be questioned in inappropriate ways.

Whether this was an accurate characterization of the court's conduct depended on the view one took of the nature of that tribunal. Its victims alleged they were being prosecuted for their private religious beliefs. As proof, they pointed to the long series of interrogatories about their opinions with which they routinely were confronted. Defenders of the court countered that its actions were being undertaken simply to secure outward conformity with the laws of England. The court did not prosecute mere private opinion, but only dissent that had public consequences. In their view, beliefs that caused men and women to absent themselves from their parish churches, or to revile the English clergy publicly, were not simply private opinions. They were public actions and subversive of good order.

Contemporary argument, however, did not end there. Even conced-

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106 See Julius Clarus, supra note 66, Quaest. 6, no. 2 (arguing that before undertaking any proceedings, the judge must take care to compile "informationes super infamia rei" ("knowledge of the matter's infamy").

107 See the attitude of Lord Burleigh, cited in L. Levy, Origins, supra note 8, at 137. The argument was sometimes stretched slightly, as in the case of a prosecution based on an allegedly seditious public sermon. Opponents of the Court of High Commission contended that questioning was unlawful without first establishing the existence of *fama publica* that an offense had been committed. See British Library, London, Harl. MS. 358, fols. 196-200.

108 These two perceptions are well articulated, on the basis of contemporary controversial literature, in B. Levack, supra note 39, at 156-57; R. Usher, supra note 18, at 121-48.
ing the intrusive character of the ex officio oath, defenders of ecclesiastical jurisdiction pointed to another exception to the rule against self-incrimination under the *ius commune*. They did not cite the most famous exception, that for heresy, in which the enormity of the offense was thought sufficient justification for requiring anyone to answer.\textsuperscript{109} Few convented before the High Commission were accused of heresy. Instead, defenders cited an exception that depended on the supposedly "medicinal" character of proceedings within the ecclesiastical courts. The canonical exception held that, where the purpose of an incriminating question was to secure the punishment of the party, the rule applied, and the defendant did not have to answer. However, where the aim was not punishment, but rather reformation of the offender, the rule did not apply.\textsuperscript{110} It may be wrong to force men and women to incriminate themselves if punishment is the judge's aim, it was thought, but if improvement of the accused is the goal, no defendant could reasonably object. In the latter case, canon law thus allowed a judge to question defendants about any crime he or she might have committed,\textsuperscript{111} and it was contended that correction, not punishment, was the aim of the English High Commission.

To the objection that forced self-incrimination encouraged perjury, defenders of the ex officio oath responded that Roman canon law specifically prohibited a later charge of perjury based on a false answer to an incriminating position.\textsuperscript{112} Defendants enjoyed an immunity from subsequent prosecution, and therefore, these civilians argued, they had no reason to fear any punishment not merited by their actual crimes.\textsuperscript{113} On that account, the danger of perjury gave defendants no substantial cause for objecting to being compelled to take the oath.

The first of these two points was the principal focus of argument in contemporary discussion among English civilians. Against the argument

\textsuperscript{109} See, e.g., Julius Clarus, supra note 66, Quaest. 6, no. 7 ("Item scias, quod predicta conclusio non habet locum in crimine haeresis, . . . propter enormitatem delicti." ("Know then that a predetermined outcome has no place in a charge of heresy, because of the enormity of the offense.")).

\textsuperscript{110} See Trinity Hall, Cambridge, MS. 43/2, fol. 10v-12 ("Because penances enjoyned by the ordinary are not to be taken in law to be poenae, but medicine tending to the reformation of the delinquent, the example of others and satisfaction of the church, therfore they are not to make such scruple to discover themselves after fame."); see also British Library, Harl. MS. 358, fol. 224 ("The proceedings beinge onelie for matters towchinge the sowles health of the parties summoned.").

\textsuperscript{111} Trinity Hall MS. 43/2, fol. 10v-12. See generally P. Bellini, *Denunciatio evangelica e denunciatio judicialis privata* (1986).

\textsuperscript{112} See Julius Clarus, supra note 66, Quaest. 45, no. 10 (stating that there could be no punishment in public courts for perjury).

\textsuperscript{113} That this immunity existed in practice is shown in R. Marchant, *The Church Under the Law: Justice, Administration and Discipline in the Diocese of York, 1560-1640*, at 4-6 (1969).
that defendants enjoyed an immunity from prosecutions for perjury, critics of the oath sensibly said that it was wrong to encourage people to perjure themselves, even if they could not actually be prosecuted for the crime. Eventually they would have to answer before God for having committed the perjury, whatever their immunity from formal proceedings in the external forum of the ecclesiastical courts. They ought to be spared that more serious (and more final) judgment.

Meeting the argument about the purpose of the prosecution was the more important matter in the English context. It was on precisely this point that the High Commission was particularly vulnerable. Ordinary English ecclesiastical courts might, with some small color of truth, be said to have been in the business of improving those they were prosecuting. However, that argument was very hard for the High Commission to make. The diocesan courts had only the power to impose spiritual penalties, excommunication and public penance upon those they convicted. By contrast, High Commissioners had and regularly exercised the power to imprison, fine, and punish corporally. It required a considerable stretch of the imagination to see how being cast into prison or having one's purse confiscated could be said to improve an offender. These seemed to be—and undoubtedly were—real punishments. Among the spiritual tribunals, that kind of punishment was the monopoly of the High Commission.

Moreover, critics of the High Commission contended that, where there was any doubt, the *ius commune* required that judges be sensitive to the dangers inherent in forcing men to reveal their secret vices, and abstain from putting the incriminating question. As Andreas Gall (d. 1587) put it, "[j]udges should be circumspect in this matter, lest a party be harmed by any prejudicial response." To their critics and victims at least, the English Commissioners seemed to be doing just the opposite, resolving all questions of doubt in favor of their own usages and doing so in order to impose severe punishments on honest and God-fearing people.

Of course, the defenders of the High Commission saw the matter

114 See id.
115 See, e.g., Antonius Gomezius, Variarum resolutionum, Lib. III, ch. 12, no. 5 (holding that men should always prefer punishment—even death—to perjury, but acknowledging that in practice most men made the opposite choice).
116 See note 21 supra.
117 Observationes practicae, Lib. I, Obs. 82, no. 12 (1595) ("Debet tamen iudex ea in re circumspectus esse, ne pars praiejudiciali aliqua responsione gravetur, quo casu etiam ad ius commune recurrendum et pars ad respondendum non compellenda [est]." ("Still, a judge ought to be circumspect in this matter lest a party be burdened by any prejudicial response, in which case there is no need for recourse to the *ius commune* nor any requirement that the party respond.").)
quite differently. They regarded their actions merely as following cus-
tomary practice against men who had violated the legitimate laws of the
realm. This disagreement led to a stand-off, as did the previously dis-
cased objection to the oath. It ended the possibility of rational dis-

course and called instead for a test of strength. Exactly such a test
resulted: the English Civil War. In that struggle, the animosities di-
rected against the courts of the Church played a part, leading ul-

timately to legislation abolishing use of the ex officio oath in the
ecclesiastical courts. That proscription lived on after the restoration
of the monarchy and episcopacy in England in 1660. This, however, is
part of the later history of the subject. The evidence from the traditions
of the European ius commune presented here bears on it only remotely.

IV
COMMON LAW JUDGES AND THE IUS COMMUNE

The evidence from the European ius commune also sheds light on
the early history of the privilege against self-incrimination within the
common law. The manuscript reports and records of practice before the
English ecclesiastical courts suggest a different understanding of the Eng-
lish judges' actions and attitudes than that found in Leonard Levy's Ori-
gen's. These records demonstrate that, where the common law judges
intervened to prevent use of the ex officio oath, they were in effect enfor-
cing one interpretation of a rule of ecclesiastical law upon the ecclesiasti-
cal courts themselves. It could be said that the English civilians were
violating their own law by imposing the oath, and the common law
judges were stepping in to make them obey it. This was not, of course,
all that the common law judges were doing. They also invoked rules and
precedents from the common law to justify their intervention. It is diffi-
cult to know their motivation fully, but it is undeniable that what the
common law judges were doing was consistent with a strict enforcement
of the European ius commune.

There are advantages to viewing the early years of the privilege's
development in this light. It makes better sense of a good deal of the
surviving evidence found in the early common law reports. It helps, for
example, to reconcile the clear statements of the rule nemo tenetur
prodere seipsum found in common law reports with the halting and reluc-

118 See text accompanying notes 39-47 supra.
119 For the part played by hostility to episcopacy and the ecclesiastical courts in leading to
the outbreak of the English Civil War, see C. Hill, The State Ecclesiastical, in 2 The Collected
Essays of Christopher Hill 51 (1986); R. O'Day, The Debate on the English Reformation 38,
120 See text accompanying note 23 supra.
121 See text accompanying note 24 supra
tant intervention in ecclesiastical court jurisdiction that Charles Gray shows to have characterized so many of the actions taken by the English judges.\(^1\) Wigmore long ago noted that many contemporary statements on the subject by the English judges, even Sir Edward Coke, could only be called "ambiguous and shifting."\(^2\) In fact, it is wholly understandable that they should have been. The privilege of the *ius commune* was not a defendant's unqualified right to refuse to answer any and all questions about his past conduct. It was a protection against intrusive questioning into one's private conduct and opinions by officious magistrates.\(^3\) Whether or not any particular use of the ex officio oath would have violated the rule under the *ius commune* was therefore often a close question, open to doubt and argument. In this light, it is natural that early statements of the question should seem "shifting" from a modern perspective, accustomed as we are to having the privilege put in more absolute terms.

Moreover, looking at the early years of the privilege in light of the European *ius commune* helps to explain some of the arguments against the ex officio oath that were made by common lawyers at the time. The source of many of them has always been something of a puzzle for legal historians,\(^4\) and the *ius commune* provides the clue. The oft-repeated maxim *nemo tenetur prodere seipsum* clearly came from canonical sources,\(^5\) and other ideas apparently drawn from commentaries on the *ius commune* figure in some common law opinions. For example, the argument that the ex officio oath inevitably involved the encouragement of perjury was made by counsel in a King's Bench case of 1607.\(^6\) He used the canonically correct term *interrogatorii captiosi*\(^7\) in making his point. Another common lawyer maintained that the oath was invalid as contrary to the law of nature, even making use of the Biblical story of the woman taken in adultery that figured so prominently in continental treatises as an ornament for his argument.\(^8\) In several of the common law cases, one finds the point made that either *fama publica* or an accuser

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\(^1\) See C. Gray, supra note 33, at 345.
\(^2\) See 8 J.H. Wigmore, Evidence, supra note 16, § 2250, at 287.
\(^3\) See text accompanying notes 104-05 supra.
\(^4\) See 9 W. Holdsworth, History of English Law 197-203 (1926).
\(^5\) See, e.g., Rochester v. Mascall British Library, Stowe MS. 424, fol. 160v (C.P. 1608), ("Quod per legem terrae nemo tenetur in causis criminalibus prodere seipsum." ("For under the law of the land no one is bound to betray himself in a criminal case.")
\(^6\) Maunsell & Ladd's Case, British Library, Add. MS. 25206, fol. 55 per Fuller (1607).
\(^7\) The phrase meant "entangling interrogatories," that is, questions designed to ensnare the unsophisticated defendant required to answer them. For commentary, see Guillelmus Durantis, Speculum Iudiciale, supra note 94, Lib. II, tit. De positionibus § 7, no. 33.
\(^8\) Maunsell & Ladd's Case, fol. 56v per Finch, discussed in C. Gray, supra note 33, at 360-62; see also text accompanying notes 62-63 supra.
was necessary to justify proceedings in an ecclesiastical tribunal.130 In others, the objection to the oath was put in terms of its intrusiveness into men's private lives and secret thoughts,131 and one common law case even made the canonical point that all men deserve punishment in conspectum Dei.132 These arguments seem at least to have been drawn from the ample storehouses of the ius commune.

That these arguments came, either directly or indirectly, from continental sources is not inconceivable. Many common lawyers knew something about the Roman canon law, though few of them could have been called truly expert. Recent research has shown that there was regular interchange between them and the civilians.133 The view that common lawyers were "wholly insular" in knowledge and outlook can no longer be maintained.134 Sir Edward Coke's library, for example, contained a considerable quantity of civil and canon law books;135 the nemo tenetur rule would have been found stated in many of them. Lawyers have long chosen good ideas wherever they have found them. They press them into service in the short-term interests of their clients. It may be that the initial battles over the ex officio oath owe much to that longstanding lawyerly habit.

**CONCLUSION**

None of the evidence presented here means that we owe the modern privilege against self-incrimination directly to the Roman and canon laws. The privilege became a part of our law because the common law-

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131 See Edward's Case, 13 Co. Rep. 9, 10, 77 Eng. Rep. 1421, 1422 (1608); see also Jennor's Case, British Library, Stowe MS. 424, fol. 159v ("Quod nullus liber homo per leges terre compelli debent (sic) ad respondendum de cogitatione sive secretis cordis etc." ("No free man, by the law of the land, can be compelled to testify on his own thoughts, or the secrets of his heart.")).

132 Glover v. Pipe, Cambridge Univ. Library, MS. Ff.5.4, fol. 303v per Tanfield (K.B. 1586).


134 Compare J.G.A. Pocock, The Ancient Constitution and the Feudal Law 56 (1957) ("Coke's mind, it is clear, was as nearly insular as a human being's could be.") with J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Reissue with a Retrospect 262-63 (1987) (acknowledging that the English "could have known a good deal about other systems of law").

yers took up its cause, embraced, and expanded it. In this sense, Levy is of course right to focus on the English common law. However, the evidence does require a fuller and more nuanced account than that found in Levy's Origins. The European *ius commune* played an important part in early formulations of the privilege against self-incrimination, and it is appropriate that this contribution be acknowledged. For this, Levy's account simply leaves no room. His story is of a straightforward rivalry between opposing systems of law: the common law on the side of civil liberties, and the civil law on the side of tyranny. This dramatic juxtaposition, compelling and comforting though it may be, is an oversimplification of the historical reality. It depends upon a caricature of the civil law, it ignores the surviving evidence from the courts that applied the *ius commune*, and it misrepresents the contemporary arguments that were made against the ex officio oath.

Whether a more complete understanding of the privilege's origins has implications for today's controversies about the scope of the fifth amendment is possible, but by no means certain. The "lessons" of legal history are often ambiguous, and so they prove in this instance. On the one hand, the privilege in its civilian form was not the absolute bar to compelling parties and witnesses to give evidence advocated by the privilege's strongest supporters. The evidence can be read to support a "balancing test," in which the interests of society, the nature of the existing evidence, and the intrusiveness of the questioning are all weighed against the interests of the person under interrogation.

On the other hand, the historical record also shows how traditional rules often are shaped by both historical precedent and contemporary needs. In the hands of common law judges,136 the maxim *nemo tenetur prodere seipsum* ultimately became something it had never been in the courts where it was first applied. And it is their product we have inherited. Perhaps the lesson to be drawn is that we must make up our own minds. History does not compel modern lawyers to take account of the privilege as it existed in the European *ius commune* in forging a law for today. It does ask that they recognize the complexity of the way in which the privilege evolved.

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136 The steps by which the privilege was accepted within ordinary common law practice have not yet been fully investigated. Probably it occurred only after the rise of lawyers as defense counsel. See J. Beattie, Crime and the Courts in England, 1660-1800, at 356 (1986); Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263, 263-64, 300-14 (1978). Certainly its effective adoption in ordinary criminal trials occurred long after the events described in this Article. During the earlier period, the common law judges used it as part of their attempt to control the ecclesiastical courts, quite a different matter than enforcing the privilege within the common law courts. These two realities ought to be kept separate.
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