

1947

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Recommended Citation

Arthur R. Jr. Seder, Compulsory Fingerprinting and the Self-Incrimination Privilege, 37 J. Crim. L. & Criminology 511 (1946-1947)

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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board
Grant F. Watson, *Criminal Law Editor*

Compulsory Fingerprinting and the Self-Incrimination Privilege

It must be surprising to the public, which has become aware of the extensive fingerprint systems maintained by the FBI and by many municipal police departments, that the propriety of taking an accused person's fingerprints against his will and using them as evidence at the trial is not a closed question. No doubt there are very few defense lawyers who would, at this time, appeal solely on this ground, but occasionally an appellate court must face the question when presented as a subsidiary reason for reversal. Such was the situation in the recent case of *State v. Watson*,¹ where the defendant claimed, among other things, that his fingerprints had been taken without his consent, and that this violated the right against self-incrimination guaranteed him by the federal² and state³ Constitutions. In arguing the case, however, defendant's counsel succeeded in persuading the court that taking a person's fingerprints was analogous to, and should be governed by the rules relating to *confessions*. This made it necessary for the court to find that the "confession" (i.e., the fingerprints) was given "voluntarily" and in this it had difficulty, because the defendant only had the intelligence of an eight-year-old child. The court was also forced to consider whether the defendant had been warned that the prints might be used against him, and whether any threats or promises had been made to him at the time the fingerprints were taken.⁴ After much adroit maneuvering, the court found the act "voluntary," and affirmed the conviction.

An elementary analysis of the problem would have spared the court most of its difficulty. The idea that there is an analogy between taking one's fingerprints and obtaining a confession may be dismissed immediately. A confession, according to Dean Wigmore's definition, is "an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it."⁵ The conclusion that taking an accused person's fingerprints is not within this principle is fully justified by a consideration of the purpose of the rule. A confession is excluded only when it can be shown that it was made as a result of a promise of some benefit, or threat of harm, either of which might induce the accused person to make an untrue confession. But if the circumstances indicate that the confession is true, the confession prin-

¹—Vt.—, 49 Atl. (2d) 174 (1946).

² U.S. Const. Amend. V.

³ Constitution of Vermont, Art. 10, Ch. 1.

⁴ *Supra* note 1 at p. 178.

⁵ Wigmore, *Treatise on Evidence* (3rd Ed. 1940) §821. For cases supporting this definition, see *Ballew v. U.S.*, 160 U.S. 187 (1895); *People v. Savage*, 358 Ill. 518, 193 N.E. 470 (1934); *People v. Porter*, 269 Mich. 284, 257 N.W. 705 (1934).

ciple interposes no obstacle. In other words, threats and promises are important only because they indicate that the confession may be just a "way out" that the accused has taken, rather than a true statement of the facts.⁶ It is obvious, then, that fingerprints, which are unquestionably accurate, cannot come within the confession rule.

The court apparently treated as synonymous with the confession rule the objection that admission of fingerprints violated the defendant's right not to be required to give evidence against himself: *the privilege against self incrimination*.⁷ This error is frequently made, despite the fact that the two doctrines arose over 100 years apart and are governed by differing limitations. Indeed "the sole relationship between the confession rule and the privilege [against self-incrimination] is to be found in the general spirit and caution which the law gradually developed in the interest of accused persons."⁸ How far does the privilege go in protecting an accused person? Should it prevent admission in evidence of a person's fingerprints taken against his will? The privilege was evolved and became ingrained in our law during the bitter days of the Courts of Star Chamber and High Commission in England and of the Inquisition on the continent. It was a popular reaction to the practice of putting a person on oath before a tribunal and requiring that he answer as to matters which might subject him to criminal punishment,⁹ and was unquestionably of the greatest benefit in protecting individual liberty at the time. It should be noted at this point, however, that the privilege is directed only at testimonial compulsion—forcing from a person's lips self-incriminating assertions—and has no application when no attempt is being made to require him to testify as a witness.¹⁰

In applying the policy of the privilege against self-incrimination, as indicated by its history, to the problem of introducing a person's fingerprints into evidence, three questions might be asked: (1) Is there any longer any justification for the privilege at all? (2) Is compulsory fingerprinting within the letter of the privilege? (3) Is it within the policy of the privilege? *First*, it could well be argued that the reasons which justified a protection of individuals against compulsory self-incrimination no longer exist; that inquisitions and star-chamber methods are now merely subjects for judicial rhetoric, and that for this reason the privilege should be abolished. Two observations negative this argument, however. One is that the privilege is contained in the Constitutions of the federal government and 46 of the 48 states and as a practical matter would be impossible to abolish. The other reason is that, according to Wigmore, its abolition would tempt prosecutors to become slack in

⁶ Wigmore, *supra* note 5, §822.

⁷ *Supra*, note 1 at p. 177.

⁸ Inbau, *Self-Incrimination—What Can An Accused Person Be Compelled To Do?* (1937) 28 J. Crim. L. & Criminology 261, at 263. The history of the privilege against self-incrimination is exhaustively treated in Wigmore, *Evidence*, *supra* note 5, §2250. Upon the issue of possible kinship between the confession rule and the privilege against self-incrimination, see McCormick, C. T., "The Scope of Privilege in the Law of Evidence," 16 Texas L. Rev. 447 at pp. 452-457 (1938).

⁹ *Ibid.*

¹⁰ Another type of testimonial compulsion which is protected against by the privilege is the right not to have to produce self-incriminating documents in response to subpoena or other process. Inbau, *supra* note 8, p. 263.

procuring ample evidence.¹¹ As a British official in India put it, "There is a great deal of laziness to it. It is far pleasanter to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence."¹² But if it is kept in mind that today the sole supporting policy of the privilege is to prevent indolence on the part of prosecutors, and that it enables many guilty criminals to go free for want of other evidence, it must be concluded that the privilege should be severely restricted and should be applied only when it will fulfill its present day reason for existence.

Secondly, the use of fingerprints as evidence does not violate the express provisions of the self-incrimination privilege for two reasons. The privilege is designed to prevent a court from requiring that a defendant make statements or do acts that will "tend to incriminate him." But in the case of fingerprints, the accused person is not "testifying as a witness" nor "delivering any testimonial utterance."¹³ The distinction was enunciated by Mr. Justice Holmes in *Holt v. United States*¹⁴ as follows: ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." It can hardly be claimed that taking one's fingerprints involves a *testimonial* act on his part, but this is the only kind of act to which the privilege applies. A second, and perhaps less satisfactory reason that the privilege does not apply here, is that when one's fingerprints are taken, there is no compulsion exercised. As one court has put it,¹⁵ "No volition—that is, no act of willing—on the part of the mind of the defendant is required. Fingerprints of an unconscious person, or even of a dead person are as accurate as are those of the living. . . . The witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her fingerprints or change them in one line, and therefore there is no danger of error being committed or untruth told."

Thirdly, the policy of the privilege is not violated by admission of fingerprints. Even assuming that its present purpose is to safeguard against inquisitorial methods of prosecution, it can hardly be said that taking one's fingerprints, which is merely a method of identification, is one of the kind of practices which this privilege was designed to prevent. If we accept Dean Wigmore's more realistic theory, that the privilege is useful now only to prevent official negligence in actually solving crimes, it is apparent that this policy is being defeated, rather than aided, by the present application of the self-incrimination principle. As a practical matter, courts have been almost unanimous in refusing to sanction any defense based on the privilege in analogous cases where an accused person is forced to put his foot into a footprint known to have been made by the

¹¹ Wigmore, *supra* note 5, §2251.

¹² Stephen, *History of the Criminal Law*, p. 442 (1883).

¹³ *Magee v. State*, 92 Miss. 865, 46 So. 529 (1908).

¹⁴ 218 U.S. 245, 252 (1910).

¹⁵ *People v. Sallow*, 165 N.Y.S., 915 (1917). See notes in 27 *Yale L. J.* 412 (1918) and 17 *Col. L. Rev.* 633 (1917).

criminal,¹⁶ or to submit to an examination of his body for scars or wounds,¹⁷ or to submit to a mental examination,¹⁸ or is required to stand up in court to be identified by a witness.¹⁹ In the relatively few cases where fingerprints were claimed to be self-incriminatory, most courts have denied the privilege as a defense.²⁰ But several courts, including the Vermont court in the principal case, have indicated that privilege is violated unless the fingerprints are given voluntarily.²¹ It should be noted, however, that in the latter cases, the prints were found to have been given voluntarily, so it is possible to say, first, that the statements were dicta, since not necessary to a decision of the case, and second, that the standards as to what is "voluntary" have been materially altered to meet the practical requirements of the situation.

A reinvestigation of the self-incrimination privilege, its history and present day purposes, plus a practical approach to the every day necessities of law enforcement seem to justify the conclusion that there is no valid reason why fingerprints taken by compulsion should come within the privilege. Although the court in *State v. Watson* arrived at a proper result, it did so only after spending several pages considering matters which were not only unnecessary, but simply clouded the issue, and created other obstacles which the court was hard pressed to overcome.

Arthur R. Seder, Jr.

¹⁶ *State v. Barela*, 23 N.M. 395, 168 Pac. 545 (1917); *State v. Graham*, 74 N.C. 646 (1876).

¹⁷ *State v. Ah Chuey*, 14 Nev. 79 (1879); *State v. Struble*, 71 Iowa 11, 32 N.W. 1 (1887).

¹⁸ *People v. Truck*, 170 N.Y. 203, 63 N.E. 281 (1902); *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077 (1901). This is probably the hardest situation that must be faced in connection with the privilege against self-incrimination, since there is testimonial compulsion of a sort. Faced with the practical necessity of allowing these examinations, however, courts have permitted them, but have avoided a straightforward holding that the privilege does not apply.

¹⁹ *People v. Gardner*, 144 N.Y. 119, 38 N.E. 1003 (1894); *State v. Reasby*, 100 Iowa 231, 69 N.W. 451 (1896); *Commonwealth v. Safis*, 122 Pa. Super. 333, 186 Atl. 177 (1936).

²⁰ *People v. Sallow*, 165 N.Y.S. 915 (1917) is the leading case. Also see *United States v. Kelly*, 55 Fed. (2d) 67 (CCA 2nd 1932) where a realistic approach is taken.

²¹ *People v. Hevern*, 215 N.Y.S. 412 (1926); *People v. Les*, 267 Mich. 648, 255 N.W. 407 (1934) where the judge writing the opinion gave as his opinion that introduction of fingerprints violated no fundamental right, but since the jury had found that the prints were given voluntarily, the point was expressly reserved. The dictum in *State v. Cerciello*, 86 N.J.L. 309, 90 Atl. 1112 (1914) that taking of fingerprints without the accused person's consent violated the self-incrimination privilege was repudiated in *Bartletta v. McFeeley*, 107 N.J.Eq. 141, 152 Atl. 17 (1930).