The Privilege Against Self-Incrimination in Regulatory Proceedings: Beginnings (That Never Began)

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I. INTRODUCTION

The history of the privilege against self-incrimination in criminal law is a relatively well-documented one.[1] From the early writings of John Wigmore[2] to the more recent scholarship of people like John Langbein,[3] the history of the privilege has been traced over several hundred years. The issue has not been devoid of controversy; Leonard Levy, probably the most visible scholar in the area,[4] has been criticized along with Wigmore for locating the origins of the privilege in the wrong century and for attributing its genesis to the wrong causes.[5] But a substantial effort has been made to examine the issue and perform the necessary historical research.

What has not been well documented is the history of the privilege in quasi-

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1 I loosely define the privilege against self-incrimination as the guarantee that no person shall be compelled to be a witness against himself. It is sometimes referred to as the right against self-incrimination or the right to silence. Although I will employ all this terminology interchangeably in the text, it is probably more accurate to speak of a privilege than a right. The language of rights can be too easily associated with constitutional guarantees. I am speaking more generally of the prerogative not to assist the government in proceedings against oneself, recognized in law and social norms.

2 "Nemo Tenetur Seipsum Prodere" (1891) 5 Harv. L. Rev. 71 and "The Privilege Against Self-Incrimination: Its History" (1902) 15 Harv. L. Rev. 610.

3 "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) 92 Mich. L. Rev. 1047 [hereinafter Langbein, "Origins"].

4 *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968).

5 See *e.g.* Langbein, "Origins", *supra* note 3.

criminal regulatory proceedings, loosely defined as proceedings to enforce laws prohibiting otherwise lawful conduct in the public interest.[6] This is not surprising since the right is not as vigorously enforced in such proceedings.[7] But this gives reason to explore the history and discover when and why the difference arose. This paper is an attempt to begin to do just that.

The breadth of this paper is modest. I neither purport to examine an extended period of time, nor attempt to draw any definitive conclusions. Instead, I simply review and discuss the period when the privilege against self-incrimination first intersected with the enforcement of regulatory laws.

Commencing in 1802, a series of British statutes began to regulate the hours and conditions of labour in industrial facilities. These statutes, commonly known as the Factory Acts, were not the first laws regulating labour or industry, but they were the first designed to protect (some) workers from overwork and unwholesome conditions, rather than to lead them from idleness or maintain industrial efficiency and organization.[8] It has been said that the Factory Act of 1833[9] was "a turning point in the history of social policy" since "it acknowledged the right of the state to intervene where there was an overwhelming need to protect exploited sections of the community."[10] The factory legislation of the early 1830s (1831–1833) also marks the first time that it might safely be said that the privilege against self-incrimination intersected with modern regulatory enforcement (at least on paper). There are at least three reasons for this.

First of all, the legislation granted public authorities powers which clearly compromised a privilege against self-incrimination. The law used potential accused, generally the factory owners, as investigatory and testimonial resources, compelling them (and others) to provide information to those enforcing the regulations. For instance, the Act of 1833 granted inspectors investigating labour conditions the right to examine individuals under oath, without providing any assurances that the compelled evidence could not subsequently be used

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6 This definition is adapted from that offered by Cory J. in *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 at 236 (S.C.C.). An alternative definition can be found in the earlier case of *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 at 199 (S.C.C.): proceedings involving "offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public."

7 Compare *R. v. Fitzpatrick* (1995), 102 C.C.C. (3d) 144 (S.C.C.) and *R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.).

8 B. L. Hutchins & A. Harrison, *A History of Factory Legislation* (London: Frank Cass & Co., 1966) at 1–2.

9 *An Act to Regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom, 1833* (U.K.), 3 & 4 Will. IV, c. 103.

10 Derek Fraser, *The Evolution of the British Welfare State: A History of Social Policy Since the Industrial Evolution* (New York: Barnes & Noble, 1973) at 21.

against the individuals in prosecutions for violating the Act.[11] Provisions of earlier factory legislation had only compromised the privilege to a very limited extent, although a law proposed in 1815 would have compromised it significantly.

Second, the Act of 1833 made first provision for the appointment of factory inspectors whose job it was to enforce the Act. This was a significant event because earlier Acts had been rendered essentially nugatory by the lack of any real enforcement. They were frequently ignored with impunity, making any issue of self-incrimination *in practice* almost irrelevant.

Finally, self-incrimination did not become a live legal issue until the 1830s. It has been suggested that the privilege was not truly recognized (in criminal law) until 1848.[12] That year saw passage of the Jervis Acts, one of which mandated that accused persons at preliminary hearings be cautioned that they need not say anything in response to the charge.[13] But the Jervis Acts did not come out of nowhere; the idea of a right to not say anything had been developing over a few decades. The 1830s was not the first time the idea arose, but for various reasons it is dangerous to reach back too much farther and still have confidence that the issue of self-incrimination was sufficiently current to be a real issue both in law and public discourse.

All these factors combine to make the debates of the 1830s particularly relevant to the question under consideration here. Though research into earlier time periods would not be useless, the period of 1831–1833 offers an especially propitious moment for any investigation into the issue of why the privilege against self-incrimination is now honoured differently in criminal and quasi-criminal regulatory proceedings.

Also, the debates of 1831–1833 are well documented. Because of the unusually public nature of the debates (involving, among other things, a Parliamentary Committee[14] and a Royal Commission[15]), thousands of pages of materi-

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11 *Supra* note 9, s. 27.

12 Henry Smith, "The Modern Privilege: Its Nineteenth Century Origins" in R. H. Helmholz et al., *The Privilege Against Self-Incrimination* (Chicago: University of Chicago Press, 1997) at 145–180 (although Smith may be read to argue that 1947 was the pivotal year).

13 *An Act to facilitate the Performance of the Duties of the Justices of the Peace out of Sessions within England and Wales with respect to Persons charged with indictable Offences, 1848* (U.K.), 11 & 12 Vict., c. 42, s. 18.

14 The House of Commons formed a committee in 1832 (commonly known as 'Sadler's Committee' after the name of its Chair, Michael Thomas Sadler) to investigate the conditions of child labour in factories in order to assess the merits of a bill before the House to regulate such labour. The Committee published the minutes of its evidence but (despite the name of the publication) disbanded before producing a report: "Report from the Committee on the 'Bill to regulate the Labour of Children in the Mills and Factories of the United Kingdom,' with the Minutes of Evidence, Appendix and Index" in the Irish University Press Series of *British Parliamentary Papers*, "Industrial Revolution: Children's Employ-

als are available for review. One would assume that if the issue of self-incrimination was going to be raised reference to it would be found there.

In this paper I review the debate and discussion surrounding the enactment of Acts of 1831 and 1833. They were especially contentious and many opinions on their advisability were forthcoming. Interestingly, however, the issue of self-incrimination was not prominent. Indeed, it was hardly mentioned at all. Furthermore, the putative beneficiaries of the privilege against self-incrimination, the factory owners, sometimes ended up supporting legislation that compromised it, while those whose interests the legislation sought to protect, the workers, ended up against the legislation, at least once arguing that their rights to silence were being violated. In retrospect, the reasons for this role reversal and the silence on the issue of silence are not perfectly clear; but I suggest that it had something to do with class conflict and an attempt by the factory owners to maintain their socially advantaged position by abdicating the privilege as part of an endeavour to appease worker unrest.

This paper is divided into four parts. I start in Part I by briefly examining the early origins of the privilege against self-incrimination. In so doing, I hope to show that the privilege, barely in existence in the eighteenth century, was becoming a live issue in criminal law in the early to mid nineteenth century. This will provide the necessary background for an analysis of the privilege at the birth of modern regulatory enforcement in the 1830s. I then move in Part II to a review of the factory legislation in the early 1800s up to and including the Act of 1833. In Part III, I outline and assess the extent to which self-incrimination was an issue in the critical period from 1831 to 1833. Finally, in Part IV I offer some tentative conclusions as to why the privilege against self-incrimination failed to find a home in the area of regulatory law.

II. A DEVELOPING IDEA IN CRIMINAL LAW

Recent scholarship has located the origin of the privilege against self-incrimination in criminal law in the nineteenth century. However, the idea of some sort of right not to provide evidence against oneself existed before 1800. Whatever the accuracy of Leonard Levy's ultimate conclusions, he did fully demonstrate that the idea, *as an idea*, is one that stretches back well into the

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ment", vol. 2, 1831–1832.

[15] The bill considered by Sadler's Committee was not passed. A new bill was introduced in 1833 and the House of Commons this time appointed an extra-parliamentary commission to re-investigate the issue of child labour. It published a main report, a supplementary report, several subsidiary reports and an extensive collection of evidence. All the materials are contained in the Irish University Press Series of *British Parliamentary Papers*, "Industrial Revolution: Children's Employment", vols. 3–5, 1833–1834.

sixteenth century.[16] Thus, at least some people debating the Factory Acts in the 1830s would have known of it. That said, one cannot expect an idea that was not taken seriously, that was not animating legal debate, to have been considered by those debating legislation which impacted on it. What I hope to show here, however, is that the idea sufficiently animated legal debate in criminal matters by the 1830s that one would have expected it to be an issue in the passage of the Factory Acts of 1831–1833.

John Langbein characterized early English criminal trials as 'accused speaks' trials.[17] The accused was not a passive observer to a game played out by others: lawyers, judges and jurors; he was required to be an active participant in the proceedings. Indeed, the essential purpose of the trial was to provide a forum for hearing his unsworn response to the charges against him. This was premised on the idea that the accused's speech—both in its content and in the manner in which it was given—would be the best evidence of his guilt or innocence.[18] The accused was not technically required to speak during his trial, but a number of pressures effectively forced him to do so.

In ordinary eighteenth century felony trials the accused did not have defence counsel. Without a proxy to speak for him, the accused was required to speak to defend himself.[19] The denial of defence counsel was a rule of law until at least the 1730s when judges started to allow counsel to appear. However, it was not until decades later that defence counsel started appearing in any significant numbers; in 1800 less than one-quarter of the accused tried at the Old Bailey were represented.[20] The role of counsel in the eighteenth century was also restricted by judges to, at most, cross-examining witnesses and speaking to issues of law; they could not address the jury.[21] Accused in misdemeanour mat-

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16 Levy, *supra* note 4.

17 "Origins", *supra* note 3 at 1048.

18 *Ibid.* at 1053, citing 2 William Hawkins, *A Treatise of the Pleas of the Crown* (London: Sweet & Maxwell, 1721), c. 39, § 2.

19 *Ibid.* at 1048–1049; see also, John Beattie, *Crime and the Courts in England: 1660–1800* (New Jersey: Princeton University Press, 1986) at 348 [hereinafter Beattie, *Crime and the Courts*]. Langbein made the same point elsewhere when he wrote that "so long as [the accused] was without counsel there was scarcely any possibility of distinguishing [his] role as defender and as witness": "The Criminal Trial before the Lawyers" (1978) U. Chi. L. Rev. 263 at 283 [hereinafter Langbein, "Criminal Trial"].

20 David Bentley, *English Criminal Justice in the Nineteenth Century* (London: Hambledon Press, 1998), 108. See also, John Beattie, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" (1991) 9 Law & Hist. Rev. 221 at 226–232 [hereinafter Beattie, "Scales of Justice"].

21 Beattie, "Scales of Justice", *ibid.* at 231; Beattie, *Crime and the Courts*, *supra* note 19 at 359–360.

ters were entitled to have counsel, but it would appear that they did not usually employ them.[22]

The standard of proof was not firmly established for most of the eighteenth century. This meant that persons accused could not remain silent and rely upon holes in the prosecution's case to secure their acquittal. The point was well made by Beattie:

> [I]f any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he were innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence. That put emphasis on the prisoner's active role. He was very much in the position of having to prove that the prosecutor was mistaken. And for the most part he had to prove it on his own and by his immediate replies to the charges, rather than through a lawyer.[23]

The accused's speech was a critical factor taken into account when determining whether reprieve would be granted from the unpalatable sentence that often followed conviction on felony. On paper, penalties in the eighteenth century were harsh; many crimes were punishable by death or transportation out of the country. In practice, however, there was room for discretion. Juries, aware of the consequences of conviction, would sometimes convict of a lesser offence for which a lower punishment was available (a practice termed 'pious perjury'). Judges would sometimes recommend clemency when accused were convicted of the more serious offences. But whether such discretion was exercised depended significantly on knowing something about the accused's character and background: whether he was a 'bad guy' or someone respectable who made a mistake. Evidence of this could come from character witnesses but often it had to come from the accused himself, either because he was the only one available or the only one believable. This created a powerful incentive for an accused to speak. In fact, judges often discouraged guilty pleas so as to learn something about the offender at trial.[24]

Probably of most significance for present purposes is the criminal pre-trial system in the eighteenth century, given its obvious connection to the pre-trial investigatory procedures authorized by the Factory Act of 1833. In brief, the system required an accused to speak, or held his silence against him. By virtue of a statute of 1555, a magistrate was required to examine an accused person

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22 Gregory Durston, "The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century" (1996) 5 Griffin L. Rev. 177 at 187. Misdemeanours were frequently disposed of prior to trial by the mediating intervention of a justice of the peace: Beattie, *Crime and the Courts*, *ibid.* at 268–269.

23 Beattie, *Crime and the Courts*, *ibid.* at 341.

24 Langbein, "Origins", *supra* note 3 at 1062–1065; Beattie, "Scales of Justice", *supra* note 20 at 231–232.

brought before him on a felony charge.[25] The magistrate would often later become the chief witness at the accused's trial, reciting the accused's statement. There was little or no thought given to warning the accused that he need not answer or that his answers might be used against him.[26] Indeed, the pre-trial examination was set up as a means of securing evidence against the accused and ensuring his conviction.[27] If the accused refused to make a statement, his refusal would be brought into evidence at trial.[28]

For these and other reasons, the privilege against self-incrimination was not operative in the 1700s. But the idea of a privilege against self-incrimination—the principle that there was something wrong with prosecuting a person out of his own mouth—was beginning to take hold, though arguably the idea did not become truly recognized until 1848.[29]

The evidence suggests that defence counsel appeared on behalf of criminal defendants in felony trials more and more as the eighteenth century wore on.[30] This trend appears to have continued in the nineteenth century (although exact figures are not available).[31] Indeed, starting in 1820 judges occasionally assigned counsel to act on behalf of poor defendants.[32] Counsel also became more aggressive and more protective of their clients' interests.[33] With their greater numbers and new attitude, counsel took greater control over their clients' speech. By the early nineteenth century counsel were sometimes preparing their clients' statements in advance, representing an indirect means of silencing the accused,[34] and by the 1830s counsel were not always letting their clients make a statement at trial.[35] None of this completely silenced the accused, but by the

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25 *An Act whereby certain Offences be made Treasons, and also for the Government of the King's and Queen's Majesties Issue, 1555* (U.K.), 2 & 3 Phil. & M., c. 10.

26 E. M. Morgan, "The Privilege Against Self-Incrimination" (1949) 34 Minn. L. Rev. 1 at 14.

27 Beattie, *Crime and the Courts*, *supra* note 19 at 271; Langbein, "Origins", *supra* note 3 at 1059–1060.

28 Morgan, *supra* note 26 at 18.

29 Some might argue that it was not fully realized until 1898, when accused were first allowed to testify under oath.

30 Beattie, "Scales of Justice", *supra* note 20 at 226–230.

31 Bentley, *supra* note 20 at 108.

32 Bentley, *supra* note 20 at 110–111.

33 Beattie, "Scales of Justice", *supra* note 20 at 229; Durston, *supra* note 22 at 188.

34 David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford: Clarendon Press, 1998) at 50.

35 Bentley, *supra* note 20 at 152, citing *R. v. Malings* (1838), 8 C & P 242.

1830s the idea of an accused having to speak at trial was disappearing.

The privilege was gaining even more acceptance in misdemeanour trials. The turn of the century saw development of the rule that an accused who was defended by counsel in a misdemeanour trial could *not* make a statement. The theory was that it would be confusing for both counsel and client to speak.[36] When one considers that pre-trial examinations of accused did not occur in such cases, the early 1800s saw the advent of a truly silent accused. A statute of 1826 instituted pre-trial examinations of accused in misdemeanours,[37] but (as we shall see) there were already signs that the privilege of an accused not to speak was becoming acknowledged in the pre-trial forum.

Also, defence counsel obtained the right to address the jury on behalf of an accused in 1836.[38] This finally gave an accused the practical opportunity to remain completely silent during the trial proceedings, although his pre-trial statement could still be adduced. The battle over the right to address the jury occurred over 15 years, from 1821–1836.[39] The issue of self-incrimination does not appear to have been a significant factor in the debate, but the fact that Parliament was creating conditions where an accused did not have to speak reflected some recognition of the idea that he might have the right not to speak.

The modern standard of proof in a criminal case, and the associated idea that an accused was innocent until proven guilty, was firmly ensconced in law by the 1830s. Langbein stated that it was articulated by the last decade of the eighteenth century,[40] and Beattie found that the presumption of innocence was commonplace by 1820.[41] The development encouraged the practice of silencing the accused and insisting that the prosecution case be built on other evidence.[42]

Sentencing options and practices changed significantly over the latter part of the eighteenth and early part of the nineteenth centuries. The option of imprisonment became more widely available and sentences of death or transportation became less frequent.[43] As the nineteenth century progressed imprison-

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36 Bentley, *supra* note 20 at 149, citing *R. v. White* (1811), 3 Camp 98.

37 *An Act for improving the Administration of Criminal Justice in England, 1826* (U.K.), 7 Geo. IV, c. 64.

38 The right was granted by legislation in *An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney, 1836* (U.K.), 6 & 7 Will. IV, c. 114.

39 See Cairns, *supra* note 34.

40 "Origins", *supra* note 3 at 1056.

41 "Scales of Justice", *supra* note 20 at 249.

42 Langbein, "Origins", *supra* note 3 at 1070.

43 See Beattie, *Crime and the Courts*, *supra* note 19 at ch. 10.

ment became the routine punishment for serious offences.[44] As a result, an accused no longer felt the same incentive to speak at his trial; the risks were not as great.

As previously stated, the practice of demanding pre-trial statements from accused in felony cases was not formally abolished until 1848. However, before that time there were numerous signs that the idea of seeking evidence from the accused was falling into disfavour. Beattie cited evidence that at the turn of the century counsel would sometimes attend pre-trial hearings and direct their clients to remain silent.[45] Chitty in 1816 observed that it was sometimes wisest for a defendant to say nothing at his examination. He also claimed that it was general practice for an accused to be cautioned that he was not bound to accuse himself and that any admission might be introduced in evidence at trial.[46] Bentley stated that such cautioning could be traced back to 1730 and that by 1800 there was a general feeling that a prisoner under examination ought not to be pressed unduly. He also said that in the 1820s one could find examples of magistrates advising defendants to stop talking when they began to volunteer a confession.[47] One court in 1817 refused to admit the examination of the accused in evidence at trial, stating that it was irregular for magistrates to examine prisoners.[48] That case was subsequently rejected,[49] but it reflected a developing notion nonetheless. By 1838 the Court of King's Bench ruled as follows:

> A prisoner is not to be entrapped into making a statement; but, when a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates before they do so ought to get rid of any impression that may have before been on the prisoner's mind, that the statement may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial.[50]

In all this, we see that the idea of an accused remaining silent and not contributing to the proof of his alleged crime was gradually gaining legal and practical currency by the early nineteenth century. By the 1830s the need for the accused to speak had diminished and recognition of a right to stay silent had increased. The right was not a legal fact until the following decade, but the idea

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44 Langbein, "Origins", *supra* note 3 at 1064.

45 *Crime and the Courts*, *supra* note 19 at 276–277.

46 Joseph Chitty, *A Practical Treatise on the Criminal Law* (Philadelphia: Isaac Riley, 1819) at 68.

47 Bentley, *supra* note 20 at 30–31.

48 *R. v. Wilson* (1817), Holt 597.

49 Bentley, *supra* note 20 at 30.

50 *R. v. Arnold* (1838), 173 Eng. Rep. 645.

of it was sufficiently prevalent in the 1830s to be a live and legitimate issue.

A. Application to Summary Proceedings

It might be objected that the foregoing only relates to felony (and misdemeanour) proceedings and therefore does not apply to offences under the Factory Acts which were almost always to be prosecuted summarily.[51] To some extent, the objection is fair. One cannot assume that ideas percolating in one type of proceeding would have been automatically transplanted to another type of proceeding. However, on the whole the objection is unfounded; no categorical distinction of significance was drawn between summary and felony proceedings, and many of the developments leading to a right to silence in felony were also occurring in summary.[52]

I argued above that the *idea* of a privilege against self-incrimination was alive and animating debate by 1830. The privilege was not developing simply as an unintended outgrowth of process-specific procedural changes made for other reasons. Magistrates and judges were becoming uncomfortable with extracting evidence from an accused, lawyers were starting to silence their clients, the prosecution was compelled to prove its case beyond a reasonable doubt. These developments reflected a change in thought, rather than mere changes in rules, and there was nothing inherent in the new thought that restricted its application to felony.

Objecting that developments in felony are irrelevant or insignificant to developments in summary, therefore, rests on the assumption that a categorical distinction was drawn between the two types of proceedings that would have resisted the exchange of ideas between them. The evidence suggests that this was not the case. Summary proceedings were undoubtedly viewed differently, and with much more suspicion, than proceedings in felony. They were seen as transgressions on the fundamental right to trial by jury and potential sources of tyrannical abuses of power, especially by untrained and incompetent magis-

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51 A law proposed in 1833 would have made one Factory Act offence punishable as felony perjury. See, *infra*, text accompanying notes 116–117. To that extent, the developments in felony would have had direct application. I placed the reference to misdemeanour in parentheses because the preceding discussion was largely based on felony proceedings. Reference was made to misdemeanour only as an adjunct to the argument concerning felony. The most relevant comparison for the following discussion, therefore, is between summary and felony.

52 An investigation into the matter is complicated by the fact that scholarship on the origins of the privilege against self-incrimination has focused almost exclusively on felony and State Trials (trials concerning affairs of state, such as treason and other matters of general interest: Langbein, "Criminal Trial", *supra* note 19 at 265–266). I failed to locate a single analysis of the issue in connection with summary proceedings. However, reference to contemporaneous sources of general application to summary jurisdiction provides some information and insight.

trates.[53] They were also seen as a simpler, faster and cheaper means of crime control.[54] But summary proceedings were not thought to be of an entirely different species than felony proceedings. On the contrary, if anything, the evidence suggests that summary proceedings were meant to emulate felony proceedings.

Bruce Smith has argued that by the nineteenth century magistrates were expected to observe certain minimal norms of due process.[55] This is evident in the textbooks of the day which addressed summary proceedings. Defendants were to be given the right to hear the evidence against them, test it by cross-examination, and respond to it by additional evidence. Testimony was to be given under oath and charges proven by the prosecution.[56] In essence, magistrates were cautioned to observe the same rules which were applied, if sometimes unevenly, in felony: the rules of natural justice.[57]

The development of due process was partly a result of changing popular expectations and partly a result of judgments of the high court sitting in review by way of *certiorari* and *habeas corpus*.[58] The high court "sought to align summary procedures as much as possible with established precedents of the common law."[59] In other words, summary proceedings were pushed to apply *the same* rules (and ideas) as felony proceedings, not different ones.

One decision of the high court in 1801, *The King v. Stone*, emphasized the lack of distinction drawn between summary and felony proceedings.[60] At issue

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53 See Bruce Smith "Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City, 1790–1855" (Ph.D. Dissertation, Yale University, 1996) at 36, 119–128. This attitude is typified by an 1832 article wherein the author complained of "the busy, meddling parsons, and the small fry of magistrates, who seek to distinguish themselves by their zeal in giving effect to laws, which, in ninety-nine cases out of a hundred, are only tolerable when allowed to sleep": Cawthorn, "A Letter to the Right Honourable Lord Brougham and Vaux, on the Subject of the Magistracy in England" (1832) 4 Legal Observer 339 at 341.

54 Smith, *ibid.* at 93–99.

55 *Ibid.* at 172.

56 See William Paley, *The Law and Practice of Summary Convictions on Penal Statutes by Justices of the Peace* (London: Sweet & Pheney, 1827) at 21–53; Daniel Howard, *A Treatise on Summary Proceedings under the laws of Excise and Customs: Applicable also to Summary Proceedings in General before Magistrates* (London: Butterworth, 1812) at 133–178; Richard Burn, *The Justice of the Peace and Parish Officer* (London: Cadell et al., 1836), Vol. 1 at 690–693.

57 Paley, *ibid.* at 21.

58 Smith, *supra* note 53 at ch. 4.

59 *Ibid.* at 119.

60 1 East 639, 103 E.R. 247.

was whether the prosecutor was compelled to prove, in a charge under the game laws, that the defendant did not have the required qualification to hunt. Proving such a negative was not required in non-summary matters, and in his decision Le Blanc J. said:

> I do not know that there are different rules of evidence in case of proceedings before magistrates from those which apply to actions in the Courts above. And if the Court were to determine that it was necessary for the witness to negative the defendant's qualifications, in order to warrant a conviction by a magistrate in this mode of proceeding, I do not see why it must not be equally necessary to give the same evidence before a Judge and jury in an action for the penalty. Whatever is an authority for the one must I think equally bind the other.[61]

Not all the other judges writing in the case agreed with Le Blanc J., but their disagreement stemmed from a desire to strictly confine the power of magistrates and not from any notion that fundamentally different ideas applied to summary proceedings.

Insofar as a privilege against self-incrimination is concerned, I found no explicit statement that it was recognized in summary proceedings by 1830. This is perhaps not surprising since the privilege was not fully recognized in felony by that time either. But many developments encouraging and/or reflecting recognition of the privilege in felony also seem to have been occurring in summary. In particular, the involvement of counsel was growing, the burden of proof was crystallized, and examinations of accused were falling out of favour. From this we can infer that the idea of the privilege was developing much as it was in felony.

In the early nineteenth century, most defendants in summary proceedings were not represented by counsel.[62] However, lawyers were increasingly trying to insinuate themselves in such proceedings. They were becoming involved on appeal and, although the evidence in support is sparse, it seems they were sometimes appearing at trial as well.[63] Counsel were certainly agitating for the right to appear. Several cases were taken to high court on the issue,[64] and at least one legal periodical supported the cause.[65] Counsel ultimately obtained the right by

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61 *Ibid.* at 655.

62 Bentley, *supra* note 20 at 22; Smith, *supra* note 53 at 230.

63 See Smith, *supra* note 53 at 214–230. The relatively minor potential punishments must have been a disincentive to retaining counsel much of the time: Bentley, *supra* note 20 at 22.

64 Several such cases were reported in the Legal Observer: e.g., *Collier v. Hicks* (1831), 2 Br. & Ad 663, 109 E.R. 1290, 5 Legal Observer 184; *Daubney v. Cooper* (1830–31), 10 B & C 237, 830, 109 E.R. 438, 657, 1 Legal Observer 139.

65 (1831) 2 Legal Observer 135.

statute in 1836.[66] I did not come across any direct evidence prior to 1833 of counsel actively seeking to silence their clients at trial, but it seems likely that counsel would have adopted similar positions in both felony and summary.[67]

The beyond a reasonable doubt standard of proof was established in summary proceedings by the 1830s. An 1812 text explicitly stated that magistrates should acquit if any reasonable doubt existed as to the truth of the matter alleged, and an 1836 text said the same.[68] An 1827 text by Paley stated that a conviction could be registered if there was such evidence as might, in an indictment, be left to the jury,[69] but that statement was clearly made with the standard of review on *certiorari* in mind and was probably not indicative of a lower burden of proof.[70] Paley also indicated that the prosecutor bore the burden to prove the facts alleged.[71]

England had a long history of magistrates examining accused during the course of summary trials, much as it did in the felony pre-trial system.[72] However, matters seem to have been changing in the nineteenth century. The evidence could be better, but none of the standard treatises on summary convictions published in 1812–1836 mentioned examinations of accused.[73] On the contrary, they usually depicted a trial process wherein the prosecutor would adduce his evidence and *then* the accused would be asked to respond.[74] One even quoted from a trial where the accused was asked *if* he had anything to say in response.[75]

Only so much can be made of these treatises, however, since pre-trial examinations in felony were established by statute and many summary conviction

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66 *Supra* note 38.

67 Smith referred to an 1837 case where counsel tried to stop a magistrate's examination of his client, citing "the well known principle that no man is bound to criminate himself": *supra* note 53 at 225. Counsel was not successful.

68 Burn, *supra* note 56 at 692–693; Howard, *supra* note 56 at 178.

69 Paley, *supra* note 56 at 53.

70 A similar statement was made by both Howard and Burn even though they also made explicit reference to the beyond a reasonable doubt standard of proof: Howard, *supra* note 56 at 144; Burn, *supra* note 56 at 692.

71 *Supra* note 56 at 33.

72 Ian Bryan, *Interrogation and Confession: A Study of Progress, Process and Practice* (Aldershot: Dartmouth, 1997) at 44–46.

73 Paley, *supra* note 56; Howard, *supra* note 56; Burn, *supra* note 56; John Nares, *A Summary of the Law in Penal Convictions* (London: Butterworth, 1814).

74 Paley, *supra* note 56 at 44–45; Burn, *supra* note 56 at 691–692.

75 Nares, *supra* note 73 at 50–51.

statutes did not mandate examinations of the accused. That difference is itself potentially significant, and indicates a recognized right to silence; but again the issue is complicated by the fact that some summary conviction statutes did mandate examinations. But it is interesting to note that even some of those statutes were changing. Probably the most significant summary conviction statutes of the early nineteenth century were the Vagrancy Acts. They were a major instrument of petty crime control, particularly in the 1810s and 1820s. They penalized activities such as idle and disorderly conduct, fortune-telling, indecent exposure and possession of various implements with intent to commit a felony.[76] Vagrancy Acts had been in use for many decades and routinely included provisions authorizing examinations of accused.[77] This continued up to 1822,[78] but the Act of 1822 was repealed in 1824 and replaced with a law that eliminated any reference to such examinations.[79] The legislative debates do not explain why this change occurred,[80] but it presumably reflected some sort of recognition of a privilege against self-incrimination in summary trials.

Possibly as significant as any of this, however, was the debate in the early nineteenth century over which party to a summary proceeding bore the burden of proving a qualification (or lack thereof) that made otherwise illegal conduct legal. This issue was mentioned above in connection with the case of *Stone*,[81] but *Stone* was only one case where the issue was debated. All the standard treatises referred to the debate, which was clearly vexing the law of summary conviction at the time.[82] That debate would not have occurred if a right to stay silent was not recognized to some extent. The debate might have been generated by ambiguous statutory language, but its resolution would have been easy if the accused was already expected to speak: the burden of proof would have been

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76 See Smith, *supra* note 53 at ch. 5.

77 See *e.g.* An Act *to amend and make more effectual the Laws relating to Rogues, Vagabonds, and other idle and disorderly Persons, and to Houses of Correction, 1743* (U.K.), 17 Geo. II, c. 5, s. 7.

78 An Act *for consolidating into One Act and amending the Laws relating to idle and disorderly Persons, Rogues and Vagabonds, incorrigible Rogues and other Vagrants in England, 1822* (U.K.), 3 Geo. IV, c. 40, s. 4.

79 An Act *for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds, in that Part of* Great Britain *called England, 1824* (U.K.), 5 Geo. IV, c. 83.

80 The record in Hansard of the debates is not complete. Only three days are reported. U.K., H.C., *Hansard's Debates*, 2nd ser., vol. 10 at 86 (1824); 106–116; vol. 11 at 1081–1086 (1824).

81 See *infra* text accompanying notes 60–61.

82 Paley, *supra* note 56 at 40–43; Howard, *supra* note 56 at 147; Nares, *supra* note 73 at 48–57; Burn, *supra* note 56 at 711.

placed on him. The fact that the solution was not so obvious reflected a legal culture which was at least beginning to question the idea of convicting a person out of his own mouth.

For all these reasons, the issue of self-incrimination was animating legal debate in the 1830s in both summary and felony proceedings. Magistrates might not always have acknowledged a right to remain silent in practice[83] but, to paraphrase Bruce Smith, the evidence reveals a legal framework of statutory rules, judge-made law and popular expectations that was cultivating modern due process.[84] In this context, one would have expected informed members of the public and Parliament to have been alive to the issue of self-incrimination in connection with the exercise of summary jurisdiction.

This raises the question of whether the issue was debated during the early 1830s when Factory Acts seriously compromising the privilege against self-incrimination were being considered. It is to this question that I shall now turn. I start by an examination of the early factory legislation, but we shall eventually see that just as the privilege against self-incrimination was gaining currency in the criminal arena it was being undercut in the emerging regulatory arena.

III. THE EARLY FACTORY ACTS

Late in the eighteenth century, a group of Manchester doctors investigating outbreaks of fevers became appalled at the conditions of children labouring in local cotton factories. They formed themselves into a Board of Health and published resolutions in 1796 outlining their findings and asking for legislative intervention. In brief, they concluded that the large cotton factories were breeding grounds for infection and injurious to the health and well-being of child employees. They cited poor working conditions, excessive hours of labour, and a lack of moral and religious instruction. Sir Robert Peel, a man who had made his fortune with the help of child labour at his own cotton mill, was sufficiently impressed by these and other similar revelations that he introduced a bill to regulate the work of apprentices in textile factories.[85] The bill passed into law without significant opposition in 1802.[86] It established limits on the hours of work of apprentices and prescribed standards for their housing, clothing and education. It also required that cotton factories be cleaned twice a year and properly ventilated.

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[83] See Bentley, *supra* note 20 at 22–25.

[84] Smith, *supra* note 53 at 229–232.

[85] Hutchins & Harrison, *supra* note 8 at 7–11, 13–16; Ursula Henriques, *The Early Factory Acts and their Enforcement* (London: The Historical Association, 1971) at 1.

[86] *An Act for the Preservation of the Health and Morals of Apprentices and others, employed in Cotton and other Mills, and Cotton and other Factories, 1802* (U.K.), 42 Geo. III, c. 73.

Thus begins the story of the Factory Acts. Suffice it to say that the Act of 1802 quickly became useless as factories began employing 'free' children instead of apprentices.[87] Over the ensuing four decades, several other Acts passed reasserting and gradually, if not consistently, increasing legislative regulation of the hours and conditions of child labour in cotton factories.[88]

For purposes of enforcement, the 1802 Act dictated that two "visitors" would be appointed for each region: one justice of the peace and one clergyman. These visitors were granted the power to enter into and inspect the regulated factories and to enlist the assistance of medical professionals to deal with any infectious disorders uncovered. The Act also required mill owners to register yearly with the Clerk of the Peace every mill under his control in which three or more apprentices or 20 or more other persons were employed. Punishment for breaching the Act was a fine, half of which was generally payable to the informer.

As Maurice Thomas explained, the system of enforcement was an abject failure:

> It would have been difficult in any circumstances to exercise any real control when the factories were so remote and scattered, but the inadequate system of inspection by a body of unpaid amateurs made it quite impossible to enforce the regulations. Some attempt was indeed made at first to inspect the mills, but the visitors performed their duties in a most perfunctory manner. They had no incentive to carry out what must have been an onerous and difficult duty, and the owners were at pains to exclude them as far as it lay within their power to do so. The result was that before very long the visitors abandoned the unequal struggle, and any semblance of external control disappeared.[89]

Despite this, the system of enforcement did not substantially change for 31 years.

Although the Act of 1802 arguably could be said to have included provisions interfering with the privilege against self-incrimination, the first real proposal for such a provision was made in 1815 when Peel introduced a new bill to enhance the existing system of regulation. The bill would have required mill

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87 This was a product of the invention of steam power. Factories had traditionally been powered by waterwheels and had therefore had to locate near streams, often in remote locales where labour was scarce. Parish apprentices were consequently brought in to supply the workforce. Steam power allowed mills to relocate to more populous areas where there was an abundant supply of labour, including many children not under apprenticeship. Children were valuable because they were cheap and more amenable to factory discipline, and those not under apprenticeship were not regulated by any law until 1819. See Maurice Thomas, *The Early Factory Legislation: A Study in Legislative and Administrative Evolution* (Westport, Conn.: Greenwood Press, 1948) at 16; W.G. Carson, "The Institutionalization of Ambiguity: Early British Factory Acts" in *White Collar Crime: Theory and Research*, Gilbert Geis and Ezra Stotland, eds. (Beverly Hills: Sage Publications, 1980) at 155.

88 The work of (some) adults was not protected until an Act of 1844.

89 *Supra* note 87 at 12–13 (citations omitted).

owners to deposit with the Clerk of the Peace each year a declaration that, in effect, they had complied with all the provisions of the law.[90] The bill was introduced late in the year, however, and was soon dropped without much consideration.[91] A new law eventually passed in 1819, but it did not alter the system of enforcement.[92]

Another law passed in 1825, but it only marginally breached the privilege against self-incrimination.[93] Children under nine were prohibited from working in cotton mills, and the Act of 1825 required mill owners to record in a book the name of every child who they thought might be under the age of nine, together with the names of the child's parents. Interestingly, however, the owners were not liable when a child turned out to be under nine if the child's parents had signed a statement that the child was older.

The first Act to have significantly engaged the issue of self-incrimination was that of 1831, which sought to restrict the work hours of those under 21.[94] The Act mandated that cotton mill owners keep a time book listing a true and correct account of the time that the factory machinery was in operation each day. The book had to be produced for inspection to any local Justice of the Peace upon written request and could seemingly be used in prosecutions for breaching the limitations on work hours prescribed by the Act.[95] The Act also empowered magistrates hearing a complaint of a breach to summon "any witness or witnesses" to appear and give evidence concerning the complaint.[96] If the witness failed to attend court or give evidence he could be imprisoned for up to three months. Persons breaching the Act were liable to a fine of not less than £10 and not more than £20, half of which was to go to the complainant.

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90 It also provided for paid inspectors (still called visitors).

91 Thomas, *supra* note 87 at 19–20. There does not appear to have been any debate over the issue of self-incrimination in connection with the bill, but it may be advisable to investigate the question further. Given that the bill came so early in the century, however, it might be dangerous to draw any conclusions from the absence of any such debate.

92 *An Act to make further Provisions for the Regulation of Cotton Factories and Cotton Mills, and for the better Preservation of the Health of young Persons employed therein, 1819* (U.K.), 59 Geo. III, c. 66.

93 *An Act to make further Provisions for the Regulation of Cotton Factories and Cotton Mills, and for the better Preservation of the Health of young Persons employed therein, 1825* (U.K.), 6 Geo. IV, c. 63.

94 *An Act to repeal the Laws relating to Apprentices and other young Persons employed in Cotton Factories and in Cotton Mills, and to make further Provisions in lieu thereof, 1831* (U.K.), 1 & 2 Will. IV, c. 39.

95 The wording and structure of the Act leads to that conclusion but it was not specifically stated.

96 *Supra* note 94, s. 20.

Only one penalty was recoverable for each day.

Almost as soon as the Act of 1831 became law, another law was proposed in Parliament.[97] The rapid pace of change in this period reflected both dissatisfaction with existing laws and a new, more turbulent social and political climate.

The Act of 1825 was proposed because the earlier laws had been widely evaded.[98] The Act of 1831 was also inspired by an attempt to curtail evasion,[99] but it was soon said that the Act was universally ignored.[100] To a substantial degree, the problem lay in the lack of any real system of enforcement. Previous laws had relied upon unpaid and untrained inspectors ("visitors") and rewards to informers. We have already seen how and why the system of visitors failed to work. Informers sometimes informed, but the system was heavily dependent on information from workers, as they were the only ones who really knew what was going on inside factories. Workers were generally too scared of their masters to inform on them.[101] One witness before the Committee of 1832 testified that those who informed would be unable to find new employment, as they would be blackballed by all employers in the district.[102] The time was ripe for changes in the law's administration.

In 1830, the Ten Hours Movement emerged.[103] Ostensibly a drive to limit the working hours of children, its real purpose was to limit the hours of all workers, especially adult males.[104] The idea that adult labour should be restricted was repugnant to the individualistic philosophy of the day, so workers groups seized upon the public sympathy that had been aroused for the plight of the young. They campaigned to limit child labour to ten hours a day, knowing full well that children were so integral to the functioning of factories that all work would have to stop once the children left their posts.[105] Not everyone who supported the Ten Hours Movement had such covert designs, of course, but there was a useful association of interest formed between those interested in the

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97 The bill was introduced only three months after the Act had become law on 15 October 1831.

98 Thomas, *supra* note 87 at 27.

99 This was stated by the member of the House of Commons who introduced the bill: U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 2 at 584–585 (1830–31).

100 Henriques, *supra* note 85 at 3.

101 Henriques, *supra* note 85 at 3.

102 *Supra* note 14 at 428–430.

103 The movement can actually be traced back to 1825, but it did not really take hold, especially among the working classes, until 1830: Hutchins & Harrison, *supra* note 8 at 44.

104 Hutchins & Harrison, *ibid.* at 49; Thomas, *supra* note 87 at 34–37.

105 Thomas, *ibid.* at 36–37; Carson, *supra* note 87 at 155–156.

situation of young workers and those who supported the plight of workers generally.[106] The Movement grew to become a powerful force in the 1830s, exercising great pressure on Parliament and the mill owners.

Michael Sadler, a member of the House of Commons from Newark, introduced a 'ten hours' bill on 17 January 1832.[107] Sadler was genuinely concerned with the plight of young workers and wanted to rescue them from their state of suffering and degradation.[108] His bill proposed to limit the hours of work of those under 18 to ten hours a day and 48 hours a week. For purposes of enforcement, it expanded on the ideas of the Act of 1831. Employers were obliged to keep in a time book a record of the hours when machinery was in operation, and they were also supposed to record when children's employment "shall" start and end and the times "for" children's rest and refreshment.[109] The book was to be produced for inspection to any local Justice of the Peace upon written request and every year at the General Quarter Sessions of the Peace, where the acting Justice was required to examine it and see that it conformed to the Act. Penalties for knowingly making false entries were eventually suggested to be up to £100 for owners and £20 for anyone else. Justices investigating complaints retained their right to summon persons to give evidence and commit them to jail for up to three months if they refused.

Sadler's bill was spoken to on a number of occasions in the House of Commons before it was eventually referred to a Select Committee of Parliament for study. The Committee, headed by Sadler himself, heard evidence over 43 days but never published a report. Parliament dissolved before it completed its work and Sadler failed to win a seat in the ensuing election. His bill died on the order paper.

The Minutes of Evidence heard by Sadler's Committee were published on 8 August 1832. They created a huge sensation.[110] The picture they offered of factory life was bleak. Henriques wrote that the Committee heard from "a procession of operatives [workers], medical men, and crippled children [who] testified to the cruelties of masters and overseers and the hardships of the factory sys-

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[106] I do not suggest that the workers groups were entirely cohesive and of one mind. It was once described as a "strange combination of Socialists, Chartists and ultra Tories" (Hutchins & Harrison, *supra* note 8 at 46, quoting from the Leed's Mercury, 23 March 1844). But for varying reasons, they were all led to fight for ten hour days.

[107] "A Bill to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom", *British Parliamentary Papers*, 1831–32 (46.) II. 1.

[108] Thomas, *supra* note 87 at 39.

[109] The words in quotations are taken directly from the bill. They make it unclear whether an employer was to record the hours when children actually worked and rested or just when they were supposed to work and rest.

[110] Thomas, *supra* note 87 at 40.

tem."[111] Thomas wrote that "the lame and the deformed children exhibited their tortured limbs, parents related the agonies of their children, and medical men testified to the evils of the system."[112] The mill owners reacted with fury,[113] starting their own campaign to demonstrate that the conditions of children were not nearly so bad. The debate was now in full swing.

Shortly after the new Parliament convened in 1833, Lord Ashley took up Sadler's cause and introduced a new bill for regulation of the age of employees and their hours of work.[114] Ashley was a strong-willed man, devoutly religious and widely sympathetic to the human condition. He had almost no personal knowledge of factory conditions, but he eagerly embraced the views of the Ten Hours Movement.[115]

Ashley's bill was in many respects similar to Sadler's, but there were some important changes in connection with the issue of self-incrimination. Mill owners were still to be required to keep a signed record of the time when machinery was in operation during the day, and the record was to be produced for inspection to any Justice of the Peace upon written request. Now, however, it was also to be produced before any Justice before whom an Information regarding an offence under the Act was laid. The record also had to be delivered to the county clerk four times a year, where it would be available for inspection by anyone upon payment of one shilling. The maximum penalties for false entries remained the same, but minimums were introduced (£50 for owners and £5 for anyone else). Justices could still summon people to give evidence before them and commit them to jail for refusal.

Most significantly, however, the bill reintroduced the idea proposed in 1815 of owners providing declarations that they had complied with the Act. Every three months an owner was to deliver to the county clerk a signed certificate of declaration stating that he had honoured the work hour restrictions of the Act, had inquired into the ages of his employees and had not, to the best of his knowledge and belief, employed anyone under nine, and had "in all other respects fully conformed to provisions of the Act."[116] The certificate was deemed

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[111] *Supra* note 85 at 8.

[112] *Supra* note 87 at 40.

[113] Henriques stated that the manufacturers mobilized the electorate in the December election to help secure Sadler's defeat: *supra* note 85 at 8.

[114] U.K., H.C., "A Bill to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom", introduced 5 March 1833: *British Parliamentary Papers*, 1833 (48.) II. 263. Like Sadler's bill, it prohibited the employment of persons under nine years of age.

[115] Thomas, *supra* note 87 at 43.

[116] Section 26.

to have the force of an oath and any wilful misstatement was punishable as perjury. Wilful neglect to deliver the certificate was punishable by a fine of £50-100. Other breaches of the Act were punishable by fines that doubled on second conviction and tripled on the third. A third or subsequent offence was also punishable by three to twelve months in jail.[117] Only one penalty was recoverable in any one day, however, if the offender proved at the next session that the offences were no longer being and would no longer be committed.

Ashley's bill was debated several times in the House, but the idea was quickly raised that a new committee should be appointed to re-examine the situation of child labourers. Petitions from the mill owners (and others) asked for such a committee in order to clear their names.[118] It was pointed out that Sadler's Committee had not had time to hear from the manufacturers and that fairness demanded they be given a chance to be heard.[119] Proponents of the bill saw the owners' request as an attempt to delay. In a very close vote on 3 April,[120] the House decided to accede to the request and appointed an extra-parliamentary royal commission to re-investigate.[121]

The appointment of the Commission was greeted with scorn by the workers groups. They felt that it was a means to whitewash the owners and prevent factory reform. They refused to cooperate in any way with the Commissioners and even organized wide-scale resistance. Mass demonstrations were held and the sick and the lame pulled out for public view.[122]

The Commission managed nonetheless to conduct its investigation over the spring of 1833 and eventually produced several reports and a voluminous record of evidence. The Commissioners were clearly hostile to the Ten Hour Movement[123] but they did conclude that the welfare of children was being compro-

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117 Women were exempt from the jail penalty but were liable to an even greater fine.

118 U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 16 at 970–973 (22 March 1833), 1001–1003 (March 25); vol. 17 at 79 (3 April 1833).

119 Sadler's Committee heard from workers and medical experts first. Plans had been made to hear from the owners, but the parliamentary session ended before they testified and the Committee disbanded. By deciding to publish the minutes of evidence anyway, Sadler laid himself open to the charge of producing a biased report: Thomas, *supra* note 87 at 40.

120 The final tally was 74-73.

121 U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 17 at 79–115 (1833).

122 Thomas, *supra* note 87 at 48–50; Henriques, *supra* note 85 at 8.

123 They concluded that the movement was not truly motivated by a concern over the welfare of children but rather by the desire to restrict the hours of adult labour. See "First Report of the Central Board of her Majesty's Commissioners appointed to collect Information in the Manufacturing Districts, as to the Employment of Children in factories, and as to the Propriety and Means of Curtailing the Hours of their Labour" in the Irish University Press Series of *British Parliamentary Papers*, "Industrial Revolution: Children's Employment", vol. 3

mised by excessive hours of work and the conditions in which it was performed. They eventually recommended that child labour be restricted to eight hours per day but rejected any proposal to limit the hours of adult labour. Recognizing the interconnection of child and adult labour, they proposed that children be worked in shifts. They also recommended that children be given regular schooling.

In the area of enforcement, the Commissioners concluded that the current system was inadequate. Neither workers, supervisors nor owners had much incentive to enforce the law and getting witnesses to come forward had proven extremely difficult. The Commissioners consequently recommended that three professional inspectors be appointed who would exercise jurisdiction over the Act concurrently with magistrates. As for their powers, the Commissioners recommended as follows:

> ... each inspector should have the right of entering all manufactories where children are employed, and of ordering machinery to be fenced off, and directing arrangements of a sanitary nature, compatible with the execution of the manufacturing processes; and he should also have cognizance of the arrangements for the education of the children employed. He should have the power to hear and determine all complaints of infraction of the provisions of the law, to give directions with relation to them to peace officers, and fine for neglect.[124]

The House resumed debate on Ashley's bill in July 1833. The proposal to limit the hours of work of those as old as 18 proved especially contentious. Some members worried that this would effectively force mills to close after ten hours. The proposal was eventually put to a vote on 18 July and defeated by a margin of 238 to 93. Ashley admitted defeat and abandoned his bill.

On behalf of the government, Lord Althorp brought in a new bill on 9 August. It met with little resistance and passed into law 20 days later.[125] The law had been drafted by a leading member of the Royal Commission and, not surprisingly, it adopted many of the Commission's recommendations. In terms of enforcement, it allowed for the appointment of four inspectors and an indeterminate number of sub-inspectors. The inspectors were given a number of powers, including the power:

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at 33–47 (1833).

[124] *Ibid.* at 68. The Commission's discussion of enforcement generally is at pp. 64–72.

[125] *Supra* note 9.

> ...to enter into any Factory or Mill [covered by the Act], and any School attached or belonging thereto, at all Times and Seasons, by Day or by Night, when such Mill or Factories are at work, and having so entered to examine therein the Children and any other Person or Persons employed therein, and to make Inquiry respecting their Condition, Employment, and Education; and such Inspectors or any of them are hereby empowered to take or call to their Aid in such Examination and Inquiry such Persons as they may choose, and to summon and require any Person upon the Spot or elsewhere to give Evidence upon such Examinations and Inquiry, and to administer to such Person an Oath.[126]

The inspectors were also given several other powers that engaged the issue of self-incrimination:

- The power to make binding regulations "as may be necessary for the due Execution" of the Act;
- The power to order owners to "transmit ... any Information with relation to the Persons employed or the Labour performed in [a mill] that such Inspector may deem requisite to facilitate the Performance of his Duties or any Inquiry made under the" Act.[127]
- The power (and sometimes the duty) to require registers be kept of children employed in a factory, their hours of attendance, their absences on account of sickness, their vouchers of attendance at schools,[128] and any other information in relation to the performance of labour within the mill that the inspector deemed necessary for the due enforcement of the Act or the regulations made thereunder;
- The power to take copies of any such registers or other records kept pursuant to the Act, which were to be open at all times to the inspectors.

Penalties for breaching the Act varied, but they generally ranged from £1 to £20, half of which was normally to go to the complainant.[129] Only one penalty per day was recoverable for each type of offence, and a complete discharge was possible if the offence was neither wilful nor grossly negligent. Inspectors as well as magistrates were empowered to hear and determine summarily charges under the Act. Both were given the power to summon and require evidence from witnesses, although the power now extended to investigations under the Act and not just hearings into complaints. Factory owners, their agents and servants were all liable to prosecution for offences, as were the parents of child employees.

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[126] *Ibid.*, s. 17. The Act, for the first time, applied to 'free' labourers in factories other than cotton mills.

[127] *Ibid.*, s. 18.

[128] The Act required that children obtain and produce weekly vouchers attesting to their attendance at school for the required numbers of hours.

[129] Offenders could be imprisoned for non-payment of fines.

IV. SELF-INCRIMINATION AND THE DEBATES OF 1831–1833

The factory legislation, passed and proposed, of the 1830s seriously raised the issue of self-incrimination. Every bill sought to rely upon potential accused as investigatory and testimonial resources, compelling them to provide information to those administering the regulations. Indeed, one proposed to require factory owners to periodically declare to the government, under oath and on penalty of prosecution for perjury, that they had not violated any provision of the law, a proposal totally antithetical to a privilege against self-incrimination. That proposal was never made law, but the Acts of 1831 and 1833 included requirements that were almost as strong.

The question naturally arises whether the legislation met with any resistance on the basis that it infringed a privilege not to incriminate oneself. We have seen that the idea of such a privilege was a matter of legal debate in criminal law in the 1830s. One would assume, therefore, that the issue would have been considered during the debates over the Factory Acts.

As it turns out, the opposite is true. The issue of self-incrimination was barely mentioned; debate focused almost entirely on other issues, such as the true conditions of child labour. There was some discussion of the best means for enforcing the laws, but they were practical debates, hardly touching on philosophical issues and even then only rarely on a right to silence. What is even more interesting is that the putative beneficiaries of the right, the manufacturers, ended up in favour of a system of factory inspection while those whose interests the legislation sought to protect, the workers, ended up against such a system, at least once arguing that their rights to silence were being violated.

The House of Commons debated the various bills proposed in 1831–1833 on numerous occasions. Many debates were relatively brief, but some were quite lengthy. In all that time there was only one explicit mention of the issue of self-incrimination. That came on 5 July 1833, during the debate on Ashley's bill. After criticizing the enforcement system then in existence which had depended on informers, Mr. Hyett made the following comments:

> The noble Lord [Ashley] had recourse also to the expedient of the time-book—a log-book for the entry of the extraordinary crimes and misdemeanours—made by the provision of this bill, and kept for the purposes of self-conviction—a provision, in his [Hyett's] humble apprehension, not much in harmony with the spirit of our laws, and which, however excessive might be the pains and penalties attached to it, was by no means more likely to escape evasion, nor to be more effective than the informer himself. Moreover, it was so peculiarly inquisitorial, arbitrary, and obnoxious, that he sincerely believed it would go far to drive the most respectable and humane manufacturers—and he was speaking the sentiments of that respectable and humane part of them, against whose manufactories there never had been a shadow of complaint—it would go far to drive the more respectable manufacturers who were anxious to observe the laws of their country, but who would be beaten by those who evade them—it would drive

> them out of their establishments, which would fall, by degrees, into the hands of the less scrupulous and the less humane.[130]

Several other members of the House spoke after Hyett, some for and some against the bill, yet not one of them took up or responded to Hyett's comments on the issue of self-incrimination. Hyett himself made the issue only a small part of his speech. He raised it mid-way through a long and diverse argument against the bill.

The issue of enforcement was not ignored during the debates. Some members expressed concern over the severity of proposed penal provisions, but they never spoke about it on a philosophical level. A number of members commented on the need for effective enforcement, and a few specifically supported the idea of appointing inspectors.[131] Only once was an issue raised as to the breadth of their powers, however. On the last day the House considered the Act of 1833, one member proposed a small curtailment. *Hansard* does not record the ensuing debate (if there was one), but the amendment was voted down by a substantial majority. The nature of the proposed amendment is not terribly clear from the available record, but it certainly did not strike at the heart of the self-incrimination issue. It left undisputed, for example, the power of inspectors to examine people under oath during the course of their investigations.[132]

Reviewing eight pamphlets published in 1833–1834 on the question of factory legislation reveals a couple of references to the self-incrimination issue.[133] In an 1833 letter to Lord Ashley from "a Lancashire cotton spinner", Henry Ashworth made the following comment regarding the requirements in Ashley's bill to keep a time-book and to swear compliance with the law every three months:

> This, my Lord, is a novelty in British Legislation—to compel a man to provide a registry of his own offences, upon which to procure convictions against himself contrary to every principle of British Law; and we question the right of parliament to enact such a regulation; and, I ask, are we, as Englishmen, bound to obey it?[134]

The comment was but a brief one, one paragraph in a 33-page letter that focused on other arguments. The only other reference to self-incrimination is contained in an October 1833 publication by a workers group. It is of more interest but also more conveniently considered below.

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[130] U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 19 at 237–238 (1833).

[131] *Ibid.* at 223–224, 884–885, 909–910.

[132] *Ibid.*, vol. 20 at 583 (1833).

[133] The pamphlets are reproduced in *The Factory Act of 1833: Eight Pamphlets, 1833–1834* (New York: Arno Press, 1972).

[134] "Letter to the Right Hon. Lord Ashley, on the Cotton Factory Question and the Ten Hours' Factory Bill" (30 March 1833) in *ibid.* at 6.

No mention of self-incrimination was raised during the proceedings of Sadler's Committee in 1832. This might not be terribly surprising. As noted above, manufacturers and their supporters never got to testify before the Committee and the proceedings certainly gave the impression that witnesses were tightly controlled, presumably to ensure that evidence as to (poor) working conditions was obtained.[135]

In the hundreds of pages of materials produced by the Royal Commission of 1833, there are but three references to the issue of self-incrimination. A letter from D. McLean, the Chairman of a committee of Gloucestershire manufacturers, called the time-book a "very vexatious departure from the principles of English legislation, as compelling a man to bear witness against himself".[136] McLean also commented that the requirement for such a book, and for a quarterly declaration of statutory compliance, was unnecessary: if penalties were inflicted for violating the law, employee informants would act as a sufficient check on the actions of manufacturers. The second reference is in the response from a manufacturer to a questionnaire asking about the issue of enforcement.[137] William Henshall opined that if owners were "brought under any inquisitorial power beyond what now exists with the magistrates, it will tend very greatly to injure the employer and the employed."[138] The last reference is found in a report from one of the Commission investigators, John Drinkwater, who commented that the idea of a time-book was proper, but that compelling its production before a Justice hearing a charge under the Act "is going a long way towards compelling [a mill owner] to become his own accuser."[139] Strangely, Drinkwater did not think to comment on the requirement for a quarterly declaration of statutory compliance.

It is surprising to find so few comments on the issue of self-incrimination in the Commission's materials. The subject of enforcement was part of the Commission's mandate: it was appointed, in part, to determine "in what respect the laws made for the protection of [factory] children have been found insufficient"

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135 Although it is difficult to tell from simply reading the minutes of evidence, it may be fair to say that Sadler was determined to use the proceedings to get the evidence he needed to support his bill.

136 "Observations on the objectionable Clauses of the Factory Bill", *British Parliamentary Papers*, vol. 4, Appendix to the Reports of Messrs. Horner and Woolriche (Western District), B.1 at 98 (17 May 1833).

137 The questionnaires and the responses to them will be discussed in more detail below.

138 *British Parliamentary Papers*, 1834, vol. 5, Supplementary Report Part II, B.1 at 67.

139 "Mr. Drinkwater's Report on Yorkshire", *British Parliamentary Papers*, vol. 3, C. 1 at 174 (7 June 1833).

and what may be "the further provisions necessary for their protection."[140] We have already seen that the Commission made recommendations on enforcement. Indeed, it made what was at the time a rather revolutionary recommendation to appoint professional, paid inspectors. This was a bold suggestion,[141] and one would have expected Royal Commissioners studying enforcement to have considered its potential ramifications. However, the only objection they considered was that of the potential expense.[142]

The answer to this puzzle may lie in the fact that the Commission did not explicitly suggest that inspectors be given powers to compel the testimonial cooperation of potential accused in investigations; as reflected above, it defined the powers of inspectors in terms of the ability to search factories and make directions for improvement. But some of the wording of the recommendation implied that the Commission was contemplating that inspectors would have the right to obtain information from potential accused.[143] For example, it recommended that inspectors "have cognizance of the arrangements for the education of the children employed". Presumably, this knowledge would come, at least in part, from asking people about the arrangements. Of even more significance is the fact that within about one month of the publication of the Commission Report one of the Commissioners drafted the law of 1833 which clearly included provisions compromising the privilege against self-incrimination.[144] This certainly suggests that at least one Commissioner contemplated such provisions when writing the Report. If so, he did not think to comment on them.

It is also curious that almost no one else who participated in the Commission, either as investigator or witness, thought to comment on the issue of self-incrimination. Witnesses were directed to address the issue of enforcement. Manufacturers across the country were required to complete a questionnaire as if they were under oath. One of the questions (#78) asked if they could suggest "any other scale of penalties, or any other means which would secure obedience to the present law, or any other legislative provisions for regulating" the hours and general treatment of child labourers.[145] This question did not specifically ask for comments on the issue of self-incrimination, of course, but it certainly

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[140] The quote is taken from the first page of the Commission's first report: *supra* note 123 at 1.

[141] One author has remarked that it contributed to "the beginning of economic regulation as we know it today": Howard Marvel, "Factory Regulation: A Reinterpretation of Early English Experience" (1977) J. Law & Economics 379 at 380.

[142] *Supra* note 123 at 68.

[143] The wording is reproduced, *supra*, in the text accompanying note 124.

[144] The Report was ordered to be printed on 28 June 1833. The bill drafted by the Commissioner was introduced into the House of Commons by Lord Althorp on 1 August 1833.

[145] *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 3 (1834).

provided an opening. One must also recall that the law in force at the time included a provision compromising a right to stay silent: the requirement to keep a time-book and produce it upon request. The bill before the House at the time went even further, proposing that manufacturers swear declarations of compliance with every aspect of the law every three months. This rather extreme proposal certainly had the potential to produce a reaction from those who would be subject to it. Yet none was forthcoming.

It is possible, of course, that many manufacturers did not know the law (passed or proposed). There is no indication that they were sent copies of Ashley's bill or the Act of 1831 along with the questionnaires, and some specifically stated in their responses that they did not know what the law was. But at least some respondents were relatively informed. One commented that the "proposed penalties under Lord Ashley's Bill" will never be enforced.[146] Another stated that few would submit to the "penal clauses annexed to the proposed bill."[147] Three made specific reference to a part of the bill relating to employer liability in the case of accidents.[148] One argued that "the time-book proposed" would not be of the least service.[149] Another made reference to "the time book as proposed in Mr. Sadler's Bill", without commenting on it.[150] A number opined that the present law was sufficient.[151]

The absence of any serious consideration of self-incrimination in the Commission materials is interesting, but possibly of more interest is the fact that it was the manufacturers themselves who suggested and supported the institution of a system of professional paid inspectors. This was stated in the Commission Report:

> Several eminent manufacturers have represented to us, that the only certain method of ensuring obedience to any legislative measures on this subject would be by the appointment of officers charged with the powers and duties requisite to enforce their execution. The necessity of some appointments of this nature has indeed been urged from all parts of the country.[152]

A review of the supporting materials confirms the accuracy of this claim. At

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146 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 154 (1834).

147 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 85 (1834).

148 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 77, 85, 119 (1834).

149 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, B.1 at 89 (1834).

150 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 38 (1834).

151 E.g., *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, B.1, at 45; C.1 at 19, 28; D.1 at 32, 144 (1834).

152 *Supra*, note 123 at 68.

least 15 respondents to the questionnaires recommended appointment of inspectors. The respondents came from all different parts of the country.[153]

It is difficult to know whether the manufacturers were contemplating a system which would interfere with a privilege not to incriminate oneself. As stated above, a professional inspectorate was a new concept, and the owners might not have appreciated its potential implications. On the other hand, the idea of inspectors interfering with the privilege could not have been entirely overlooked. We have already seen that at least a few manufacturers objected to the inquisitorial nature of the factory legislation. Furthermore, there were a few respondents to the questionnaires who commented more or less specifically (but always favourably) on the idea of inspectors (of some sort) being able to question people in the course of their investigations. One recommended that the sheriff or chief magistrate annually visit the factories "to investigate, by an examination of workers or otherwise".[154] Another specifically approved of the proposals in Ashley's bill for a time-book and a sworn certificate of compliance.[155] A third opined that inspectors should be able to "procure information from all quarters respecting the condition of the operatives."[156] Another said inspectors should be given the power to "visit and collect evidence, and summarily ... punish cases of cruelty and oppression".[157] This is not a lot of evidence, to be sure, but it certainly gives the impression that at least some manufacturers understood that a system of inspection might compromise a right to silence.

As interesting as the fact that the manufacturers suggested a system of inspection is the fact that workers generally opposed it. Workers groups from across the country condemned the Act of 1833 as a piece of legislation drawn up by and for employers: it appeared to throw some crumbs in the direction of the workers but was actually entirely unworkable.[158] Their invective was extreme, although Thomas argued that the workers really were upset because the Act regulated the work hours of children but left the working hours of adults

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153 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 77, 85, 119, 140, 144, 146, 149, 154, 185, 192; B.1 at 108; C.1, p.37; D.1 at 5, 29, 83 (1834).

154 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 192 (1834).

155 *British Parliamentary Papers*, vol. 4, Appendix to the reports of Messrs. Horner and Woolriche (Western District), B.1 at 97 (1833).

156 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 140 (1834).

157 *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, B.1 at 108 (1834).

158 Thomas, *supra* note 87 at 70–72; "Address to the Friends of Justice and Humanity, in the West Riding of York, from the Meeting of Delegates of the Short Time Committees, Established to Promote the Legislative Adoption of the Ten Hour Factory Bill" (28 October 1833) in *supra* note 133 at 10–12.

unrestricted.[159]

Of particular note is an 1834 publication by a workers group in the West Riding of York. The group expressed great disdain at the inspection system established under the Act and criticized the inspectors as incompetent and unacquainted with the factory system. It also took great exception to their "unconstitutional" and "despotic" powers:

> By clauses 17, 18, &c., of this Act, they have the following powers:
>
> 1. To enter any factory, or mill, or school attached thereto, at all hours, day and night, when the same is working, and to examine on oath, any person on the spot or elsewhere.
>
> ...
>
> 5. They are empowered by clause 38 to summon whom they please *"forthwith to appear"* by day or by night, with notice or without notice, and if anyone so summoned does not "appear," or "submit," or if he "resists" they may commit him to prison for two months.
>
> Now we appeal to the public whether it is not fair to presume, that an Act framed by three Commissioners, (or more properly "Omissioners," who were appointed, superintended, and guided ... by *"a bit of a Parliament"* of large mill owners throughout), is it not fair to presume, that such an Act will bear lightly on "the Order" who procured it? And further, that those who got the Act adopted, have influenced the appointment and will control the conduct of the four inspectors? But it will be best seen in its own working. We, however, who know the Factory System and its innate tyranny, have no need of the gift of prophecy to anticipate what its effects will be. It allows of *instantaneous* summonses, which are found exceedingly convenient in Inquisitions: so will they be in Factories, and the effect will be, *intimidation*, involuntary contradiction, defective evidence, and for transgressors—ESCAPE ... .[160]

Here we see the workers protesting the infringement of their rights to silence, even though they were supposed to be the ones protected by the Act.

In the end, neither side was happy with the Act of 1833. Although the owners had been generally happy with the Commission Report, some objected to details of the Act, arguing that it was impractical, unduly restrictive, overly punitive, and inimical to the successful operation of mills.[161] All criticisms were to no avail, however, since the Act remained the law of Great Britain for another eleven years.

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[159] *Supra* note 87 at 70.

[160] "Address to the Friends of Justice and Humanity," *supra* note 158 at 18–19 (emphasis in original).

[161] Thomas, *supra* note 87 at 72–73. It does not appear that the criticisms were related to the issue of self-incrimination, but more research needs to be performed to make sure.

V. INTERPRETING THE EVENTS OF 1831–1833

Why was there such a paucity of debate over the issue of self-incrimination in connection with the factory legislation of the 1830s? The legislation (both proclaimed and proposed) clearly compromised the privilege against self-incrimination. It sought to compel a potential accused to become a regular source of information for enforcement of the Act. Why was almost no one talking about that? Furthermore, why were the putative beneficiaries of the privilege advocating the idea of an inspection system, while those intended to be protected by that system (the workers) were denouncing it, at least partly based on its effect on their rights to silence?

Below, I will canvass several possible answers to these questions. My conclusions will generally be tentative; much research still needs to be done, particularly in relation to the years between the Act of 1833 and the next Act of 1844. But I suspect that at least part of the answer lies in the idea that the owners conceded the privilege in the interests of maintaining their 'privileged' social position in the face of working class revolt.

Part of the reason for the absence of debate is obviously that reformists, who believed the enforcement provisions were necessary to implement the regulations, were not interested in reasons why the provisions should not be adopted. But this is only part of the answer. It does not explain why the anti-reformists would not raise the issue of self-incrimination. Nor is it likely that every reformist was so committed to the enforcement provisions that he would not even want to discuss possible arguments for modifying them. Much more of an explanation is still needed.

The easiest explanation for the lack of debate is that a privilege against self-incrimination was not really an issue animating public thought. We have seen that it was an issue animating *legal* discourse, but it might be supposed that the general public was not alive to the issue. It does not seem implausible that the courts were out of touch with (or, if you prefer, ahead of) common opinion.

This is not an adequate explanation because during the debates there were people expressing concerns outside of the courts over the issue of self-incrimination. Their number was certainly small, but they represented a variety of different groups: manufacturers, workers and legislators. Their opinions did not simply reflect the views of an elite group of intellectuals. Furthermore, one must assume that at least some people in the legislature—those charged with making the laws—would have been familiar with, or at least apprised of, the current state of the law. It would have reflected an astounding abdication of responsibility if only one member of two Parliaments had bothered to concern himself with a legal issue raised by the Factory Acts.

Hutchins and Harrison argued that the factory debates were largely factual rather than philosophical. They revolved around disputes over the true nature of factory conditions rather than abstract ideas of individual freedom or laissez-

faire.[162] Hutchins and Harrison did not advance this claim in reference to the issue of self-incrimination, but perhaps it can be applied to that issue. Maybe the right to silence was a non-issue because the debate was not a theoretical debate.

I am also inclined to reject this explanation. Although the debate was unquestionably focused on facts—facts about the effects of factory work on child health and of regulation on economic health—there were also substantial overtones of philosophical thought. Hutchins and Harrison themselves cited examples when the debaters spoke of the right of the state to protect its most vulnerable citizens.[163] Several objections to regulation as an interference with things like the "liberty of the subject" could be found in the manufacturers' responses to the 1833 Commission's questionnaire.[164] But more important than these examples was the simple reality that no debate on such a fundamental issue as industrial regulation could occur on purely factual grounds, even if it purported to do so. Philosophical views influenced and affected factual beliefs and findings. Indeed, Thomas, who spoke of the logical and scientific attitudes of the Commissioners of 1833, also wrote that their conclusions were emblematic of their Benthamite views.[165] Given this, I find it unlikely that the issue of self-incrimination was simply treated as too idealistic to be worthy of debate.

In addition, there were incentives for the anti-reformists to raise the issue of self-incrimination. The debate over the early Factory Acts was contentious and heated; the reformists employed vitriol and hyperbole throughout. Some evidence of this can be seen in the passage quoted above from the workers group publication of 1834.[166] The group spoke of the "tyranny" of the factory system and the "despotic" powers of the inspectors. It ended the main part of the publication by asking "O how long shall the clammy hand of Avarice be allowed to press down Poverty to the dust"?[167] It was certainly not alone in using such language. Many examples of it can be found throughout the period,[168] including in Parliamentary debates. On 16 March 1832, for example, Sadler gave a long and emotive speech in the House in support of his bill in which he compared the condition of child labourers unfavourably to that of imprisoned criminals, West

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[162] *Supra* note 8 at 12–13 and 87–93.

[163] *Ibid.* at 93–95.

[164] See *e.g.*, *British Parliamentary Papers*, vol. 5, Supplementary Report Part II, A.1 at 115, 128, 149; B.1 at 147 (1834).

[165] *Supra* note 87 at 46–51.

[166] See, *supra* text accompanying note 160.

[167] *Supra* note 158 at 12.

[168] See Thomas, *supra* note 87 at 48–50, 70–72.

Indian slaves and "the brutes".[169] Faced with such statements, it is surprising that opponents of the legislation did not grasp the issue of a 'right' to silence for their own ends. They certainly were not afraid to use emotive language,[170] and the idea that the Acts breached a basic right of every Englishman could have been a selling point. There was no question that it alone would not have been enough to win the battle; the anti-reformists had to attack the basic premise that factory conditions were odious. But the argument could have been another arrow in the quiver. By 1833 there had been significant evidence gathered as to the appalling nature of factory conditions—principally by Sadler's Committee—and mass petitions in support of the reform bills were being filed in the House.[171] You would think that those who wished to maintain the status quo would have employed every weapon they had.

Another explanation could be that the manufacturers did not care much about the issue of self-incrimination because they simply planned to evade the law. Obviously not every manufacturer would have felt this way, nor was there a large conspiracy afloat. But it is possible that prior experience with factory legislation had left employers unconcerned about enforcement. No question, earlier laws were evaded on a large scale. The evidence is simply overwhelming: numerous witnesses testified to the fact before Sadler's Committee,[172] Parliamentarians spoke of the notoriety of evasion,[173] and even the Commission of 1833—the one supposedly friendly to the manufacturers—concluded that the laws were openly disregarded.[174] Interestingly, some pamphlets published in 1833 *by manufacturers* explicitly suggested that other manufacturers were not concerned about Ashley's bill because they planned to evade it.[175] Owners perhaps assumed they could control the inspectors charged with enforcing the law. The manufacturers had asked the Commission to recommend the inspectors be local

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169 U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 11 at 379–381 (1832).

170 See *e.g.*, Thomas, *supra* note 87 at 72–73.

171 For example, on 27 June 1832, Lord Morpeth introduced a petition in favour of Sadler's bill signed by 138 652 names: U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 13 at 1054–55 (1832).

172 *Supra* note 14 at, *e.g.*, 249, 316, 381–382, 436, 451, 524.

173 See *e.g.*, U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 11 at 204 (14 March 1832), 350–351 (March 16); vol. 19 at 228 (5 July 1833).

174 *Supra* note 123 at 32.

175 Kirkman Finlay, "Letter to the Right Hon. Lord Ashley on the Cotton Factory System and the Ten Hours' Factory Bill" (March 1, 1833) in *supra* note 133 at 17; Ashworth, *supra* note 134 at 30–31.

residents, presumably more controllable than outsiders,[176] and the workers groups certainly assumed the inspectors would simply be pawns of the owners.[177]

There is some intuitive appeal to this argument, but it is too simple, if not entirely inaccurate. As stated above, the idea of an inspectorate was a new one. The Act of 1833 did not simply represent a modification of the *status quo* in terms of enforcement. It represented a new concept: the idea of centralized state administration of the enforcement machinery. It would have been risky for manufacturers to simply assume they could ignore or control this system of enforcement much as they had the previous one. Furthermore, why would they have themselves suggested an inspectorate if they had simply planned to ignore or control it? Surely that would have been asking for trouble. It would have been much easier to accept new requirements for time-books and the like and rest easy on the knowledge that no one had an interest in checking them. Why suggest that the government appoint a paid inspector? It may be that the owners were trying to avoid the somewhat draconian elements of Ashley's bill (including the sworn declaration of compliance on penalty of perjury), but even those elements would have had less teeth without someone paid to enforce them.

A part of the explanation for the events of 1831–1833 might lie in the fact that people simply saw a difference between enforcement of criminal laws and enforcement of regulatory laws, such that they did not easily transpose ideas from one to the other. This view remains clearly prominent today,[178] so maybe it was accepted back then.[179]

Regulatory offences are said to be *mala prohibita* and not *mala in se*. The acts are illegal not because there is something inherently wrong with them but because they are undesirable by-products of otherwise lawful, and sometimes socially beneficial, activity. Whatever the merits of this distinction, it is used to justify different rules for regulatory proceedings than criminal proceedings, the most obvious being the application of strict liability in the former. It is also used to justify differential attitudes towards offenders. Regulatory offenders are treated not as criminals but simply as individuals who breached a technicality. As such, they do not require the same protections in law as criminal defendants.

There is some evidence that such thinking was in operation in connection with the Factory Acts. Most obviously, the potential penalties under the Acts

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176 The Commission rejected the proposal.

177 Hutchins & Harrison, *supra* note 8 at 55–56.

178 See *e.g.*, *Wholesale Travel Group Inc.*, *supra* note 6.

179 This is a variation on the earlier-discussed argument that people may have distinguished between felony and summary proceedings. Here the distinction is not based on the method of procedure but on the kind of law being enforced.

were relatively minor compared to criminal penalties of the day, which still included the death penalty for numerous crimes. Most offences were punishable by fines, although imprisonment was possible for non-payment and, under the Act of 1833, for repeat offenders. Even then, members of the House of Commons were heard to complain that the penalties were too high.[180] The simple fact that regulatory laws so seriously compromising the privilege against self-incrimination were accepted is also evidence that a distinction was being drawn, although it may be dangerous to make too much of that.

As appealing as it is, I cannot accept that this offers a complete explanation for the events. The distinction between regulatory and criminal laws was simply never discussed. In an age that had yet to see much regulatory legislation (at least of the modern kind), it would be surprising if the distinction was so obvious that it was simply assumed without comment. Furthermore, there is evidence that some people considered factory offenders to be criminals. For every legislator who argued the penalties should not be too high there was another who thought they should not be too low.[181] Factory owners were repeatedly branded as miscreants; the founder of the Ten Hours Movement, Richard Oastler, once said they were worse than barbarians.[182] The people who took this position were not likely to be concerned about the rights of the owners, but an obvious response to their claims would have been that factory offenders should receive the same protections as criminals if they were to be branded as criminals. Most importantly, the proposed laws sometimes treated violators as criminals: under Ashley's bill, wilful misstatements in the declarations of compliance were treated as perjury. No distinction from criminal law could have been drawn in relation to that provision.

The most appealing explanation for the events of 1831–1833 is that the privilege against self-incrimination was sacrificed by the dominant class to help appease the working class on which its welfare depended. Douglas Hay has argued that the ruling class in the eighteenth century willingly sacrificed some security of property in order to maintain acquiescence in its right to rule. The elite resisted reforms which would have made the criminal justice system more certain, and consequently their property more secure, because they wanted to retain their ability to dispense majesty and justice to the lower classes through pardons and other means of forgiving crime. That ability helped portray the ruling class as wise, venerable and thus deserving of authority.[183] Randall

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[180] U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 11 at 398 (16 March 1832); vol. 16 at 880 (20 March 1833).

[181] U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 11 at 396–398 (16 March 1832).

[182] Thomas, *supra* note 87 at 34, citing the Leed's Mercury, 16 October 1830.

[183] "Property, Authority and Criminal Law" in Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (New York: Pantheon Books, 1975), especially

McGowen has argued that the ruling class had to sacrifice the aristocratic criminal justice system in the nineteenth century in order to maintain support for the existing political order in the face of mounting civil unrest. By overturning practices which could imply that inequality influenced the operation of the law, it sought to create a more pleasing (and therefore more commonly acceptable) image of justice.[184] I suspect that a similar process was going on in relation to the factory system.

The Ten Hours Movement was a powerful and potentially revolutionary political force. It has been described as one aspect of the working class awakening of the 1830s and 1840s.[185] The manufacturers, of course, depended on the labour of the working class to fuel their vast factory investments.[186] Fortunes were to be won or lost, but only by the owners. In these circumstances, it would not be surprising for manufacturers and their allies to make concessions in order to secure their economically advantaged position. No grand design existed, no master plan to abdicate certain 'privileges' in order to undercut popular unrest. It was simply that the practical reality of the situation demanded changes that would have been apparent to any self-interested factory owner all on his own. The aggregation of these individual but similar reactions to this reality would have produced class action.

This idea offers an appealing explanation for why the issue of self-incrimination never gained prominence. The owners never took up the issue because they did not want to. It was an acceptable concession, among several, in the fight to retain control. The right to silence was not cherished at that time. It was just a burgeoning thought animating some debate; as such, it was easy to concede. The anticipated cost of doing so was also acceptably low. Evasion of the law had been easy in the past and might continue to be in the future. This was not guaranteed, of course, especially with a new system of enforcement, but it was certainly conceivable. Even if offenders were caught the potential penalties were not too high to bear. As stated above, they were generally in the nature of a fine, and not a terribly high one at that. The maximum under the Act of 1833 was £20. Higher fines were to be exigible under Ashley's bill, but that produced (ultimately successful) calls in the House of Commons for lowering the fines.[187] Jail was a possibility and a matter of concern, but the own-

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184 "The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England" (1983) 32 Buff. L. Rev. 89.

185 Henriques, *supra* note 85 at 5.

186 Thomas outlined the enormous sums manufacturers expended on factories: *supra* note 87 at 14–15.

187 See *e.g.* U.K., H.C., *Hansard's Debates*, 3rd ser., vol. 16 at 880 (20 March 1833).

ers could count on the fact that they were the respectable members of society who did not belong among the common riff-raff in the jails. Furthermore, under the 1833 Act only one penalty per day was recoverable for each type of offence and a complete discharge was possible if the offence was neither wilful nor grossly negligent.

Arguing the issue of self-incrimination would have also been ineffective. There was no point talking of rights to the oppressed when the rights would have really only benefited the oppressors. This explains why debate over the Factory Acts was based more on facts than theory. Facts showing the plight of workers to be not so bad had the best chance of appealing to a general public which had more in common with the workers than the owners.

The idea of class appeasement also offers the best explanation for why the owners suggested the system of professional inspectors. Although it is unlikely that they fully appreciated the potential consequences of the suggestion, the owners must have known they were taking a risk, endangering, among other things, their rights to silence. This was a risk they were willing to take if they could mollify the working class. Indeed, making the suggestion, to a relatively friendly Commission, held out the chance that the owners would appear reasonable and willing to compromise. It also allowed them some control over the final form of the enforcement regime, which could have been a lot worse (witness the required declaration of compliance in Ashley's bill).

In their submissions to the Commission of 1833, the manufacturers did not generally offer any explanation as to why they supported the institution of an inspectorate other than as an effective means of enforcing the law. One might wonder whether those restricted by the law would truly have such altruistic motives. The Commission commented in its Report that the idea of inspectors had been "most urgently stated by those manufacturers who have had chiefly in view the restriction of the hours of labour in other factories to the level of their own."[188] This is an explanation grounded in class warfare, albeit of a more limited kind.[189] The fact that a Commission that was relatively disposed to the owners came to this type of conclusion is particularly telling.

The idea of conceding the right to silence was not a highly tactical one. Clearly some manufacturers were reluctant to make the concession; that is why the occasional protest was made. Undoubtedly some manufacturers, for religious or other reasons, were also moved by the plight of the young workers.[190]

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[188] *Supra* note 123 at 68.

[189] Howard Marvel has argued that the Act of 1833 as a whole was designed by leading textile manufacturers to have a differential and unfavourable burden on smaller mills: *supra* note 141.

[190] See Robert Gray, *The factory question and industrial England, 1830–1860* (Cambridge: Cambridge University Press, 1996) at 109–121.

But the idea of making the concession was a natural outgrowth of a necessary decision to make concessions on enforcement and on the idea of regulatory legislation as a whole. If the owners were going to accept government intervention and tighter scrutiny in the interests of class peace, why would they risk the compromise by insisting upon a right that would so obviously undercut the proposed reforms?

The idea of class conflict also goes some way towards explaining the position of the workers groups. As putative beneficiaries of the Act of 1833, one would expect them to have supported it, despite its impact on the owners' privilege against self-incrimination. But they were engaged in class struggle and controlled by the dictates of that fight. The Commission of 1833 was perceived to be a puppet of the owners. As such, legislation inspired (and, indeed, drafted) by it had to be distrusted. Thus one group ended up seeing the enforcement provisions which engaged the issue of self-incrimination as an attack on workers. Even though workers were unlikely to be prosecuted under the Act, the group foresaw workers' rights being violated by an inspectorate controlled by the owners. This fear could also be parried into an argument for legislation that was more favourable to worker interests.

VI. CONCLUSION

This paper has traced the history of the privilege against self-incrimination in its first intersection with modern regulatory enforcement. One sees that from the very beginning the privilege did not receive recognition in the regulatory context, in contrast to the criminal arena where the early to mid-nineteenth century marked the birth of the privilege. I suggest that the best explanation for why this difference arose lies in class conflict and a voluntary concession of the privilege as part of the fight, although research needs to be done relating to a more extended period of time to see if this explanation holds true. One thing, however, remains clear: the history of self-incrimination and the early Factory Acts reveals the essentially political and pragmatic nature of the development of legal rights. The early dismissal of the right to silence in regulatory proceedings was not a product of incisive intellectual debate. Indeed, it was not a product of debate at all. It was a product of relationships and circumstances in a particular time and a particular place.