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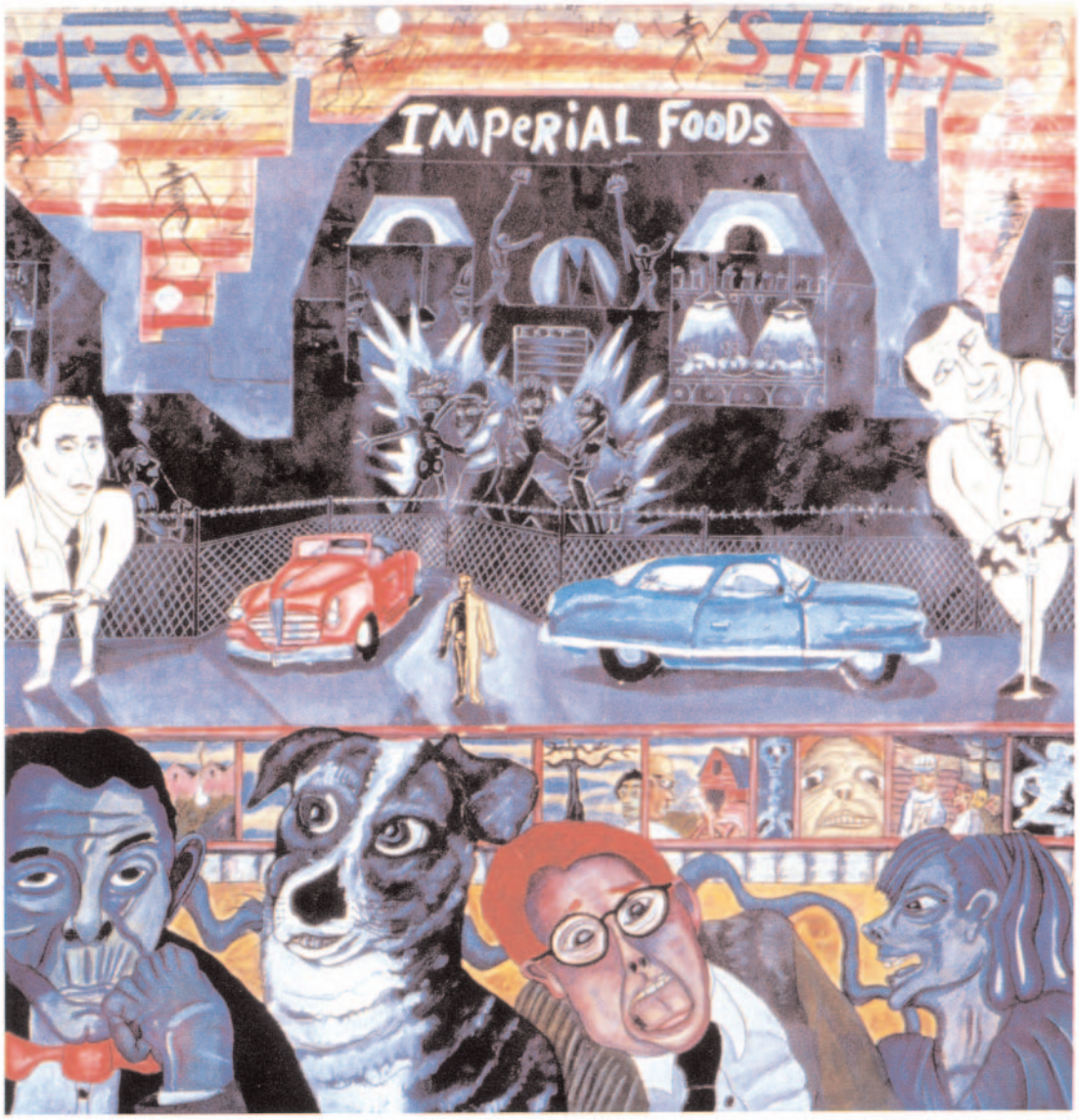

TORT LAW

Swearing About Taxes

By Neal Nusholtz

In 1754 the Massachusetts Legislature passed a liquor excise tax bill requiring consumers to account to tax collectors on oath, if necessary, concerning the amount spent by them for liquor. John Lovell, a Boston schoolmaster, whose pupils included John Hancock and Sam Adams, called the bill "the most pernicious attack on English liberty that was ever attempted" and alleged that its methods would enslave the country. Others joined the assault and eventually the then Massachusetts Governor William Shirley refused to sign the bill, declaring it to be an unprecedented violation of "natural rights." At first blush it may seem these people feared the power to tax, but actually the Massachusetts colonists feared a totalitarian tool used in the king's courts of England which made for easier convictions. It was called the Oath Ex Officio and required the accused to tell the truth on all matters or be found guilty. Today, all tax returns are filed under oath.

The above episode in Massachusetts tax law is told by constitutional historian Leonard W. Levy in his 1969 Pulitzer Prize winning *Origins of the Fifth Amendment* (Macmillan Publishing Company, Second Edition, 1986), which chronicles the history of the Fifth Amendment right against compulsory self incrimination. Mr. Levy explained in his preface to the second edition that he had written the book because he "wondered why those who had framed and ratified the Bill of Rights had included a provision that seemed to benefit only criminals and enemies of the United States." Mr. Levy begins the book by contrasting reforms made to the court systems of the middle ages and the objectives of those reforms as fostered by two individuals: Henry II in England (1154-89) and Pope Innocent the III in Rome (1198-1216).

According to Mr. Levy, the primitive court system of the middle ages consisted of parties at a community meeting accusing one another and making preliminary statements. The court decided not who was right but how to resolve the dispute and, where appropriate, who would carry the burden. Three choices were available to resolve a dispute and they all anticipated that God would have a hand in the outcome:

- Compurgation (a specified number of sworn statements in a specific form regarding the accusation and, later, the character of the party making the claim or denial, all subject to God's approval or punishment);
- Ordeal (a physical trial for serious crimes—felonies—where a witness was put to his innocence by some miracle of God, like floating tied up in a pool of water); and,
- Battle (originally for all disputes and later limited to serious crimes where God gave might to the right).

The king only held an interest in the disputes over felonies because property of felons was forfeited to the king. Otherwise the king collected taxes and conducted other administrative or financial inquiries through the use of an inquest. An inquest consisted of the king sending his representatives into the counties, summoning members of one hundred households, and, for example, demanding verdicts on who owned what, and how much, for the purposes of making and collecting tax assessments.

Henry II slowly expanded the use of the inquest, and, eventually, it resulted in the modern jury system. In 1164 the Constitutions of Clarendon provided for 12 men

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from the countryside resolving disputes over property rights. In 1166 Henry II instructed his judges to take jurisdiction over certain serious crimes by sworn inquest (the grand jury). He also offered the sworn inquest as an alternative to battle (the trial jury). By 1215, the year of the Magna Carta, the trial jury existed in most civil matters and some years later the grand jury and trial jury system existed in all criminal cases under English common law.

While England had gotten a start on developing its court system, the European continent and the ecclesiastical courts persisted in the old remedies. In 1215 the

Church needed more reliable methods to eradicate heresy, so in 1215 under Pope Innocent III the Fourth Lateran Council in Rome forbade the clergy to administer ordeals and replaced the old system of compurgation or ordeal (church remedies did not include battle) with a three-level system. First was the traditional form, a private accuser undertook proofs and ran the risk of punishment for failure. The second form used a secret accuser in which the judge handled the case ("ex officio mero"). The third form was the "inquisito" where the judge became accuser, prosecutor, judge, and jury. The last form required probable cause, and it seemed to merge with the second form into the most used procedure with the advent of a "promoter," whose job was to accuse people. These changes in the ecclesiastical courts became the Inquisition.

Also introduced by the Fourth Lateran Council in 1215 was the requirement that the accused take an oath to tell the truth on all matters or be condemned as guilty. This oath came to be called the "Oath Ex Officio" because it was given by the judge. In 1252 Pope Innocent IV authorized the use of torture to extract confessions of heresy and the names of accomplices. Four years later, the Pope allowed the ecclesiastical judges to grant each other dispensation so that they could perform torture directly.

The inquisitional proceedings of ecclesiastical courts were rapidly emulated by European nations, except for England. In England the use of the Oath Ex Officio was despised and outlawed during the reign of Edward II sometime before 1326. Despite this, it was still employed in England's ecclesiastical courts. Parliament passed statutes to narrow the jurisdiction of those courts. By the sixteenth century a body of English common law had begun to develop trumpeting the phrase "Nemo tenetur prodere seipsum" (No man is bound to produce against himself).

Because of the influence of ecclesiastical courts, the Oath Ex Officio took a foothold in the king's Council (a political body of important people that handled various matters and was the parent of the criminal court called the Star Chamber, so named because it convened in a room with stars on the ceiling). The Oath was considered a prerogative of the king. In 1341 the Commons complained to the king that the Council was summoning people for examination on the basis of mere suggestion. The king responded that henceforth it would not be done without reason. Four years later the Commons complained again, claiming that the practice of compulsory oaths by the Council violated the law of the land. The king relinquished the oath in civil matters but not in criminal matters. A number of petitions were made to the king complaining of the Oath procedure and a series of unsuccessful statutes were enacted directed at stopping the Council from using the Oath procedure.

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The Oath Ex Officio continued for another three centuries in heresy and sedition trials by both the crown and the church. A good portion of Mr. Levy's *Origins of the Fifth Amendment* is a compilation of the torture, smoldering flesh, and general inhumanity one can expect from a court system free to engage in a single-minded purpose. In 1641 the Star Chamber, the High Commission (the crown's ecclesiastical court), and the Oath Ex Officio were finally destroyed by statute because of the popularity and struggle of one man, John Lilburne.

John Lilburne was arrested in 1637 for importing seditious books from Holland into England at the age of 23. At the time of his arrest Lilburne was questioned by an aide to the Attorney General. During questioning Lilburne admitted visiting people in Holland and denied the charges. He became suspicious of the questioner's efforts to ensnare him and refused to speak further. He was put in prison for two weeks and then brought before the Court of Star Chambers where he was asked to take the Oath Ex Officio. He refused and was sent back to prison. About two months after his arrest, Lilburne and his alleged accomplice John Wharton, an elderly book dealer, were brought before the Star Chamber for trial.

Previously John Wharton had been imprisoned no less than eight times for refusing to take the Oath Ex Officio. Both Lilburne and Wharton refused to take the Oath at their trial. After another week of prison they were brought out before the Star Chamber again. Again they refused to take the Oath. This time they were found guilty of contempt, fined, ordered punished in the pillory, and then imprisoned until they complied. Lilburne was ordered whipped through the streets on the way to the pillory. Lilburne was transported to the pillory tied to a cart and stripped to the waist. Every few steps an executioner thrashed Lilburne's back with a three-pronged whip for the two-mile trip. The crowd cheered Lilburne on, and, despite the beating, he gave them a half hour stirring oration when he arrived at the pillory. The warden could only shut him up by gagging him so tightly it caused profuse bleeding. The spectacle made him famous overnight.

The Star Chamber, on report of the warden, ordered Lilburne laid with irons with the basest and meanest sort of prisoners. He was chained to the floor and given no food for five weeks. He got very sick and almost died. Other prisoners kept him alive with food secreted in the floorboards. Lilburne managed to smuggle out published accounts of his torture, all attributed by him to his refusing to accuse himself in court. Lilburne's resistance to tyranny made him a celebrity and, by popular demand, he was freed by the Long Parliament on November 3, 1640, after which his confrontations with the government continued.

According to Leonard Levy (in his book *Origins of the Fifth Amendment*), it was after John Lilburne that the right against compulsory incrimination became firmly entrenched as a respected rule of English law. A 1656 book *Examen Legum Angliae: Or the Laws of England,* cited the Oath Ex Officio as a violation of the laws of nature. This sentiment was echoed a century later by Governor William Shirley when he refused to sign a bill requiring an oath in the collection of liquor taxes. By the time

the United States Constitution was signed, eight of the states had attached separate bills of rights to their state constitutions, all of which included the right against self incrimination.

Since Lilburne's time the right to remain silent has become an inalienable defense in criminal proceedings. The Fifth Amendment right, as described by Abe Fortas, guarantees that government has "no right to compel the sovereign individual to surrender or impair his right of self defense." ("Nemo Tenetur Prodere Seipsum," Cleveland Bar Association, *The Journal* XXV (April 1954) 91, 98-100.)

The right to remain silent is significant in the area of tax law because income tax returns request a description of the income and there are some taxpayers with illegal income who believe, for good reason, that disclosing their income will incriminate themselves. A potential criminal defendant has five ways to remain silent with regard to reporting illegal income: (1) filing and reporting other income but not reporting illegal income; (2) reporting and mislabeling the illegal income; (3) reporting the illegal income without describing it; (4) filing with a statement that their income is covered by a "Fifth Amendment Privilege"; or (5) not filing at all. These options raise three questions under the Fifth Amendment right to remain silent: (1) whether the Fifth Amendment can be a defense to a charge of nonfiling; (2) whether the Fifth Amendment precludes the use of tax returns in nontax criminal trials; and (3) whether the Fifth Amendment precludes inferences drawn from silence on a tax return in a nontax criminal trial. The answer to these three issues are sometimes, no, and no.

In 1927, fourteen years after personal income taxes were enacted, a taxpayer had claimed the Fifth Amendment as a defense to not filing a return showing illegal liquor income. The Supreme Court denied the defense saying that returns must be filed and the privilege should be raised upon the return. *U.S. v Sullivan,* 274 U.S. 279 (1927).

The next time the issue was raised it was argued that excise returns for gamblers are incriminating. The Supreme Court ruled that excise returns for gamblers were prospective and, therefore, not subject to the Fifth Amendment right which only applies to past acts. *U.S. v Kahriger,* 245 U.S. 22 (1953). The issue with regard to gamblers was raised again in 1968 and the Supreme Court reversed itself holding that statutes requiring the filing of returns in illegal activities, such as occupational taxes for gambling and sales of controlled substances, are unconstitutional where there is a real risk of self incrimination. *Marchetti v U.S.,* 390 U.S. 39 (1968); *T. F. Leary v U.S.,* 395 U.S. 6 (1969).

The Fifth Amendment issue was raised again in 1976 by a defendant who sought to exclude admission of his income tax return in a case involving illegal gambling. In *Garner v U.S.,* 424 U.S. 648 (1976) an illegal gambler indicated his profession on his income tax return. The Court held the disclosure of his profession was voluntary and, therefore, admissible. The Court distinguished *Marchetti* in two ways: (1) the taxpayer in *Marchetti* would have necessarily incriminated himself by raising the privilege on a return, whereas *Garner* would not (at 658, n. 11, and 660), and; (2) the tax returns in *Marchetti* were aimed directly at an illegal activity, whereas income tax returns are neutral on their face (at 660).

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The assertion by the Supreme Court that income tax returns are "neutral" happens to be a legal fiction which has created a double standard. On one hand, courts in failure to file cases have claimed that reporting income while omitting a description of an illegal activity on a tax return is not inherently incriminating. On the other hand, in nontax criminal cases, the courts permit prosecutors to argue that the only reason for omitting a business activity description on a tax return when substantial income is reported is because an illegal activity is involved.

In *U.S. v Johnson,* 577 F2d 1304 (5th Cir. 1978) a taxpayer filed blank returns and was charged with a failure to file. The taxpayer claimed a Fifth Amendment right not to disclose illegal income as a defense. The *Johnson* court said:

> *While the source of some of Johnson's income may have been privileged, assuming that the jury believed his uncorroborated testimony that he had illegal dealings in gold in 1970 and 1971, the amount of his income was not privileged and he was required to pay taxes on it. He could have complied with the tax laws and exercised his Fifth Amendment rights by simply listing his alleged illgotten gains in the space provided for "miscellaneous" income on his tax form (at 1311).*

In *U.S. v Barnes,* 604 F2d 121 (2nd Cir. 1979) the prosecutor successfully argued over a Fifth Amendment objection that large amounts of income reported under "miscellaneous" can only be explained by an illegal source of drug income. The Sixth Circuit Court of Appeals has applied the same rule regarding income which is not reported:

> *In this second category of cases, [where a defendant engages in extravagant spending] the evidence of the lack of a federal tax filing (or underreporting) in combination with proof of valuable tangible possession or extravagant purchases creates the inference that the defendant does not possess a legitimate source of income to support his affluent lifestyle, and, therefore, the income must originate from narcotics operations.* U.S. v Carter, *969 F2d 197 (6th Cir 1992).*

To report income without the inference from silence on a return, a potential criminal defendant might mislabel his or her income as something legitimate or write "Fifth Amendment" on the face of the return. Mislabeling income to disguise it as something legitimate, to avoid the result in *Barnes,* can be a crime even if the label has no effect on tax liability. Any intentional misstatement in a tax return is a crime (not if it affects the tax liability but) if it might interfere with an investigation. *U.S. v Fawaz,* 881 F2d 259 (6th Cir. 1989).

Writing "Fifth Amendment Privilege" on a return instead of declaring a source of income might keep the "source" out of evidence in a trial situation, but the statement made on a tax return could either initiate or confirm a criminal investigation when the return is pulled by federal agents. "Pleading the Fifth" during interrogation is not the same as "pleading the Fifth" on a tax return. The refusal to answer by a person already implicated in a crime will merely make the government's case harder

to prosecute and this strikes an acceptable balance under our constitution. By comparison, requiring "Fifth Amendment Privilege" on a tax return in advance of any criminal investigation is a rule which affords Fifth Amendment protections only if the government is properly notified of a crime by April 15th (or at least sometime after the forms are available in January).

Why should the public care if tax returns are used to catch criminals? One consequence is that it means less revenue from the underground economy. Continued use of tax returns as evidence in nontax criminal cases permits taxpayers with illegal income to prove a real risk of incrimination exists and to argue that their desire not to incriminate themselves was a true reason for not reporting income, thereby negating the inference that they had a "willful" intent to evade taxes. Even if such an argument is not available as a defense, taxpayers who know that reporting illegal income will incriminate themselves will choose not to report the income to protect the underlying crime, especially if the reported income signifies an otherwise elusive size or duration of an illegal activity. A general rule that illegal activities do not report their income is implicit in the passage from the Sixth Circuit opinion in *Carter* quoted above.

A second reason the public should be concerned with the use of statements on or omitted from tax returns in nontax criminal proceedings is because it condones the tax power as a Bill of Rights surgical tool. In the historical context set forth by Mr. Levy, the Fifth Amendment defines our criminal proceedings just like the rules of the Fourth Lateran Council, which conceived the Oath Ex Officio, were a definition of criminal proceedings back in the year 1215. In those proceedings in 1215, the Oath Ex Officio could only work to compel testimony if it was used in conjunction with guilty verdicts which were premised upon the refusal of the accused to testify. The original evil devised by the Fourth Lateran Council, from which John Lilburne suffered and which is apparently forbidden by the Fifth Amendment, is extant when a request for testimony under oath coexists with a rule permitting guilt to be derived from the absence of a response. In this sense and with regard to income tax returns, the Oath Ex Officio has not yet met its final demise. ■

Neal Nusholtz is a practicing tax attorney in Royal Oak.