

5-1933

Evidence-Constitutional Law-Self-Incrimination Applied to Method of Identification

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Constitutional Law Commons](#), and the [Evidence Commons](#)

Recommended Citation

(1933) "Evidence-Constitutional Law-Self-Incrimination Applied to Method of Identification," *Indiana Law Journal*: Vol. 8: Iss. 9, Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol8/iss9/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

EVIDENCE — CONSTITUTIONAL LAW — SELF-INCRIMINATION APPLIED TO METHOD OF IDENTIFICATION—It appeared from the testimony of the assistant cashier that the person who robbed the bank had worn a mask and had about a two-day growth of beard on his face. Defendant was held in jail several hours preceding his identification that he might develop a beard to correspond to that worn by the bank robber. When defendant was brought before the assistant cashier, a handkerchief was placed over his face in, as he contends, violation of his constitutional guarantee against being forced to testify against himself. *Held*, defendant was not forced to testify against himself.¹

The Constitutions of the United States² and of Indiana³ guarantee the freedom from compulsory self-incrimination in their respective jurisdictions. The rule, however, originated as a mere rule of evidence in the common law as a protest against the inquisitorial methods of interrogating accused persons which reached their climax in cruelty in the Star Chamber in England.⁴ It has been codified by constitutional or statutory enactments in the United States, which codification is merely declaratory of the common law, neither limiting nor enlarging it.⁵

The privilege has generally been held to protect a person from any disclosure sought by legal process against him as a witness.⁶ Consequently, it would seem that it should apply only to testimonial evidence by word of mouth, and not to physical facts, and the text writers have so expressed

¹ *Supra*, Note 34.

² March 4, 1927, 33 U. S. C. A., § 904.

³ *Supra*, Note 30.

⁴ *Thompson v. Hoch* (Ky. 1895), 33 S. W. 96.

⁵ *Ross v. State* (Ind. Sup. Ct., Oct. 26, 1932), 182 N. E. 865.

⁶ United States Constitution, Amendment V.

³ Indiana Constitution, Article I, Sec. 14.

⁴ 4 Wigmore (2d Ed.), Sec. 2250 (1923); Jones (3d Ed.), Evidence, Sec. 884, (1924).

⁵ *Counselman v. Hitchcock* (1892), 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195; *Emery v. State* (1899), 101 Wis. 627, 78 N. W. 145.

⁶ Wigmore, *op. cit.*, Sec. 2263.

themselves.⁷ The reasons given for the existence of the privilege are that such evidence obtained by threats or false promises is likely to be unreliable and false, and that the prosecution should not be allowed to trust to compulsory self-disclosure as a source of proof. These reasons apply only to oral testimony and not to physical facts which exist regardless of threats or promises made to the witness and which cannot be furnished by him, innocent or guilty. However, in the early history of American jurisprudence, the courts, in a zealous desire to protect the innocent, extended the privilege past its logical limits, and a great conflict in the cases has arisen as to what evidence the privilege protects. The difficulties have arisen in cases where acts of the witness have been claimed to be within the privilege.

The courts have rather uniformly held that for purposes of identification, the defendant may be compelled to stand and face the jury or a witness without violation of his privilege against self-incrimination.⁸ To require the defendant to face the jury is not making him furnish evidence of his guilt. As the Iowa court explained,⁹ the rule contended for, i. e., extending the privilege to such acts, if carried to its logical extreme, would allow the defendant to remain concealed during the entire trial lest his presence might aid in his identification. Even here, however, the courts are not all in accord, and in Alabama and Georgia the privilege seems to have been extended even to this act.¹⁰

It is generally held that the privilege does not extend to forcibly taking shoes of defendant and comparing them with tracks made near or at the scene of the crime in order to connect the defendant with the crime,¹¹ and the testimony of the officer or person making the comparison is admissible.

⁷ Wigmore, *op. cit.*, Sec. 2265; Greenleaf (16th Ed.) Evidence, Sec. 469e (1899).

⁸ *State v. Clark* (1930), 156 Wash. 543, 237 Pac. 18; *State v. Wormack* (1921), 150 Minn. 249, 184 N. W. 970; *State v. Ruck* (1906), 194 Mo. 416, 92 S. W. 706; *State v. Gartrell* (1903), 171 Mo. 509, 71 S. W. 1045; *Beason v. State* (1902), (Tex. Cr. R.), 69 S. W. 165; *People v. Oliveria* (1899), 128 Calif. 376, 59 Pac. 772; *State v. Reasby* (1896), 100 Iowa 341, 69 N. W. 451; *People v. Gardner* (1894), 144 N. Y. 119, 38 N. E. 1003, 23 L. R. A. 669, 43 Am. St. Rep. 741; *People v. Goldenson* (1888), 76 Calif. 323, 19 Pac. 161; *Williams v. State* (1893), 98 Ala. 52, 13 So. 333.

⁹ *State v. Reasby* (1896), 100 Iowa 331, 69 N. W. 451.

¹⁰ *Wells v. State* (1924), 20 Ala. App. 240, 101 So. 624, *Ex parte State* (1924), 211 Ala. 616, 101 So. 626, where the court held it error to compel defendant to stand to enable witness to testify whether or not his size and build resembled that of the guilty person as being self-incrimination. *Blackwell v. State* (1881), 67 Ga. 76, 44 Am. Rep. 717, forcing defendant to stand to determine where his leg was amputated. Also see *State v. Jacobs* (1858), 50 N. C. (5 Jones) 259. *Contra*, *State v. Garret* (1874), 71 N. C. 85, 17 Am. Rep. 1.

¹¹ *Biggs v. State* (1929), 201 Ind. 200, 167 N. E. 9; *Ricketts v. State* (1923), 23 Okla. Cr. 267, 215 Pac. 212, 37 Harv. L. Rev. 164 (1924); *Goodbarry v. State* (1931), (Okla.), 296 Pac. 985; *State v. Griffin* (1924), 129 S. C. 200, 124 S. E. 81, 34 A. L. R. 1227, 9 Minn. L. Rev. 158 (1925), followed in *State v. Smith* (1925), 133 S. C. 291, 130 S. E. 334; *Chase v. State* (1924), 97 Tex. Cr. R. 349, 261 S. W. 574; *Landry v. State* (1931), 117 Tex. Cr. R. 396, 35 S. W. (2d) 433; *People v. Brien* (1916), 190 Mich. 39, 158 N. W. 142; *Thornton v. State* (1903), 117 Wis. 333, 93 N. W. 1107, 98 Am. St. Rep. 924; *State v. Thompson* (1912), 161 N. C. 238, 76 S. E. 249; *State v. Fuller* (1906), 34 Mont. 12, 35 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; *State v. Sanders* (1906), 75 S. C. 409, 56 S. E. 35; *Krans v. State* (1905), 75 Nebr. 294, 106 N. W. 27; *People v. Van Wormer* (1903), 175 N. Y. 138, 67 N. E. 299; *State v. Graham* (1876), 74 N. C. 646.

Here again, Georgia and Alabama are *contra*.¹² The defendant may also be forced to put his foot into tracks¹³ or may be compelled to make tracks for comparison with others¹⁴ without being forced to testify against himself. Forcing defendant to exhibit his feet to the witness and jury so that the witness might identify the size thereof with the size of tracks near the crime is not self-incrimination.¹⁵ Of course, where the defendant complies voluntarily, no question of self-incrimination is raised since, even if the privilege does exist, it is waived. Evidence by witnesses who had recently examined defendant's feet, is competent on the question of footprints and alleged peculiar structure of defendant's feet.¹⁶

It has been held that it is not self-incrimination to take the defendant to the scene of the crime and compel him to stand outside the window in the same position in which the alleged assailant stood for purposes of identification.¹⁷ Other cases have been found, in one of which a bank robbery was re-enacted by the accused,¹⁸ and in the other the one accused of murder by strangulation was asked to, and did place his hands upon the throat of the deceased, his fingers fitting into the marks,¹⁹ but in both cases, the defendants complied voluntarily so that no question of privilege was raised, waiver taking care of the privilege if it existed. On principle, there is no reason for extending the privilege to these cases, since the defendant is not being forced to testify in his capacity of witness any more than if his boot were used for comparison with tracks or he was compelled to stand in court for identification.

The courts are not so uniform as to whether the privilege protects defendant from being forced to don or remove wearing apparel. However, the present tendency, as shown by courts adopting the broader view of the privilege, is that such testimony is admissible. In *Holt v. United States*,²⁰ Mr. Justice Holmes said that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." A witness was there allowed to testify as to the fit of a blouse which the defendant was forced to put on. A strong case in Nevada²¹ held that forcing accused to roll up his sleeves against his will to show tattooing for identification is not

¹² *Day v. State* (1879), 64 Ga. 668; *Cooper v. State* (1889), 86 Ala. 610, 6 So. 110, 11 Am. St. Rep. 84; *Davis v. State* (1902), 131 Ala. 10, 31 So. 569.

¹³ *Magee v. State* (1908), 93 Miss. 365, 46 So. 529; *State v. Graham* (1876), 74 N. C. 646; *Lansford v. State* (1916), 80 Tex. Cr. R. 413, 190 S. W. 157; *State v. Romero* (1930), 34 N. M. 494, 285 Pac. 497.

¹⁴ *State v. Barela* (1917), 23 N. M. 395, 168 Pac. 545; *Johnson v. State* (1922), 91 Tex. Cr. R. 291, 168 S. W. 933.

¹⁵ *State v. Prudhomme* (1873), 25 La. 522. But see *Stokes v. State* (1875), 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72, where it was held that defendant cannot be forced to place his foot in a pan of mud in the presence of the jury to make a footprint.

¹⁶ *Lipes v. State* (1885), 15 Lea (Tenn.) 125, 54 Am. St. Rep. 402.

¹⁷ *State v. Neville* (1918), 175 N. C. 731, 95 S. E. 55. *Contra*, *Aiken v. State* (1915), 16 Ga. App. 848, 86 S. E. 1076.

¹⁸ *People v. Fisher* (1930), 340 Ill. 216, 172 N. E. 743.

¹⁹ *People v. Collins* (1923), 223 Mich. 303, 193 N. W. 858.

²⁰ (1910), 218 U. S. 245.

²¹ *State v. Ah Chuvey* (1879), 14 Nev. 79, 33 Am. Rep. 530.

self-incrimination. The purpose of the rule is to prevent falsehoods from threats, false hopes and promises. Evidence discovered in this manner could not lead to a falsehood. Indiana adopted this broad view in *O'Brien v. State*,²² where the defendant, having refused to be examined, was handcuffed and forcibly examined against his will and was held not to have been forced to testify against himself. Other jurisdictions have likewise adopted the rule,²³ although the court in *State v. Nordstrom*²⁴ attempted to limit it to those portions of his body which are usually not concealed. Defendant may be forced to remove a veil, hat, or other article of clothing hiding his face and thus expose his face to the view of the court, jury and witnesses.²⁵ Other courts have not been required to decide whether or not defendant might be compelled to put on or remove clothing for identification, since they have been able to find that there was no showing of force employed, but that the defendant voluntarily consented to the experiment. Thus, where witness put on certain articles of wearing apparel and a cap and sat in an automobile,²⁶ where accused tried on a pair of shoes,²⁷ where prosecutor was taken to jail in which accused was confined, and a hat was placed on accused's head,²⁸ where a hat was placed on accused and arranged in a certain manner,²⁹ where defendant stood before the jury with a handkerchief over his face and a broad brimmed hat on his head,³⁰ or where defendant grew a mustache and wore certain clothes for identification,³¹ the court allowed the evidence, there being no showing of compulsion. Evidence that after arrest the sheriff took the defendant around town for the purpose of identification was not forcing him to testify against himself.³²

The instant case could be justified, as were the above illustrations, that there was no showing that the defendant did not consent to the identification. However, the court did not stop there, but reaffirmed the broader and, to the writer, more reasonable rule adopted in the *O'Brien* case, *supra*, that the privilege is "freedom from testimonial compulsion."

²² (1890), 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323.

²³ *State v. Miller* (1905), 71 N. J. Law 527, 60 Atl. 202; *Territory v. Chung Nung* (1912), 21 Hawaii 214; *State v. Oschoa* (1926), 49 Nev. 194, 242 Pac. 582, 24 Mich. L. Rev. 617 (1926).

²⁴ (1893), 7 Wash. 506, 35 Pac. 382.

²⁵ *Rice v. Rice* (1891), 47 N. J. Eq. 559, 21 Atl. 286; *People v. Gardner*, (1894), 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 669, 43 Am. St. Rep. 741; *White v. Warwick* (1877), 76 N. C. 175; *Thornton v. State* (1903), 117 Wis. 338, 93 N. W. 1107, 98 Am. St. Rep. 924. But see *Turmon v. State* (1906), 50 Tex. Cr. R. 7, 95 S. W. 553, holding state may not require defendant to place a cap on his head in court room. Compare *White v. State* (1901), 62 S. W. 749, where it was allowed when the act was done in jail before the trial.

²⁶ *Rogers v. State* (1923), 180 Wis. 563, 193 N. W. 612.

²⁷ *People v. Keep* (1900), 123 Mich. 231, 81 N. W. 1097. But see *People v. Mead* (1883), 50 Mich. 228, 15 N. W. 95, where the court, in dictum, indicated that he could not be forced.

²⁸ *White v. State* (1877), 76 N. C. 175; *Crenshaw v. State* (1932), (Ala.) 142 So. 669.

²⁹ *State v. Baccmore* (1927), 193 N. C. 336, 137 S. E. 172.

³⁰ *Gallaher v. State* (1889), 28 Tex. App. 248, 12 S. W. 1087.

³¹ *Commonwealth v. Bassi* (1925), 284 Pa. 81, 130 Atl. 311.

³² *Stone v. State* (1932), — Tex. Cr. R. —, 50 S. W. (2d) 301.

Taking of fingerprints, Bertillon records, and photographs, although the defendant is forced to do an act which connects him with the crime, are now uniformly recognized as outside the privilege.³³

In cases where the defense of insanity has been raised, thus putting into issue the mental condition of the defendant, the courts allow an examination of the defendant, even over his objection, by the prosecution's physicians and alienists, and hold it to be outside the privilege against self-incrimination.³⁴ A statute authorizing the court to appoint an alienist to examine a defendant raising the defense of insanity is not unconstitutional as requiring self-incrimination.³⁵ The courts, however, begin to differ on other questions of physical examination. Thus, one court upheld,³⁶ another refused to uphold³⁷ a compulsory physical examination of defendant to determine whether he was intoxicated when arrested for driving a motor vehicle. Of course, if the defendant voluntarily submits to an examination by a physician, the latter may testify as to scars, bites, wounds, bruises and scratches which he discovers on his person and which tend to identify him with the crime.³⁸ In rape cases where the prosecutrix has been afflicted with a venereal disease as a result of the assault, the courts have been rather loath to force an examination of the defendant to ascertain whether or not he is so afflicted, and, when a forcible examination has been made, have refused to allow evidence thereof.³⁹ The courts are in accord on the general statement that such evidence obtained by forcible examination is inadmissible and that they have no power to compel it. The question on which they differ, however, is as to what constitutes consent to the exami-

³³ Fingerprints: *Garcia v. State* (1924), 26 Ariz. 597, 229 Pac. 103; *State v. Johnson* (1932), (W. Va.), 164 S. E. 31; *McGarry v. State* (1918), 32 Tex. Cr. R. 597, 200 S. W. 527; *People v. Jones* (1931), — Calif. —, 296 Pac. 317; *People v. Sallow* (1917), 165 N. Y. S. 15, 100 Misc. Rep. 447; *U. S. v. Kelly* (1932), 55 Fed. (2d) 67; *Mabry v. Kettering* (1909), 92 Ark. 81, 122 S. W. 115; *Bartletta v. McFeeley* (1930), 107 N. J. Eq. 141, 152 Atl. 17; 8 Calif. L. Rev. 25 (1919). Bertillon measurements and photographs: *Downs v. Swann* (1909), 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739, 134 Am. St. Rep. 586; *State ex rel. Bruns v. Clausmeier* (1900), 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73, 77 Am. St. Rep. 511; *People v. Carey* (1901), 125 Mich. 535, 84 N. W. 1087; *Shaffer v. United States* (1904), 24 App. D. C. 417.

³⁴ *State v. Genna* (1927), 163 La. 701, 112 So. 665, certiorari denied, 48 Sup. Ct. 22; *Waters v. State* (1928), 22 Ala. App. 644, 119 So. 248; *State v. Spangler* (1916), 92 Wash. 636, 159 Pac. 810; *State v. White* (1920), 113 Wash. 416, 194 Pac. 390; *State v. Cerar* (1922), 60 Utah 208, 207 Pac. 597; *State v. Coleman* (1924), 96 W. Va. 544, 123 S. E. 580; *Blacker v. State* (1926), 92 Fla. 878, 110 So. 547; *People v. Truck* (1902), 170 N. Y. 203, 63 N. E. 281; *Wehenkel v. State* (1928), 116 Neb. 493, 218 N. W. 137.

³⁵ *People v. Strong* (1931), (Calif.) 300 Pac. 84. See Sec. 2291, Burns' Ann. St. (1929), and 4 Ind. L. J. 456 (1929).

³⁶ *Noe v. Monmouth County Common Pleas Court* (1928), 6 N. J. Misc. Rep. 1016, 143 Atl. 750, Aff'd., 150 Atl. 920.

³⁷ *People v. Dennis* (1928), 131 Misc. Rep. 62, 226 N. Y. S. 689.

³⁸ *State v. Struble* (1887), 71 Iowa 11, 32 N. W. 1; *State v. Jones* (1906), 153 Mo. 457, 55 S. W. 80; *State v. Tettaton* (1900), 159 Mo. 354, 60 S. W. 743; *People v. Wittersheim* (1930), 252 Mich. 538, 233 N. W. 407; *State v. Vanderhaar* (1922), 106 Ohio St. 340, 140 N. E. 840; *Hooks v. State* (1924), 97 Tex. Cr. R. 480, 261 S. W. 1053; *State v. Grimmell* (1901), 116 Iowa 596, 38 N. W. 342; *State v. Miller* (1915), 71 N. J. Law 527, 60 Atl. 202.

³⁹ *State v. Newcomb* (1909), 220 Mo. 54, 118 S. W. 405; *State v. Height* (1902), 117 Iowa 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 323.

nation, one line of cases adopting the view that mere silence and failure to object is not consent,⁴⁰ the other adopting a more liberal view as to waiver,⁴¹ and one case⁴² held that testimony of physicians who examined defendant that he was suffering from a venereal disease was admissible, when there was no showing whether or not there was consent. The state may not force the prosecutrix to submit to a physical examination to ascertain whether or not she has been leading a virtuous life when defendant in a rape case contends that she has not.⁴³ There may be some ground of public policy on which the evidence should be inadmissible, or the power to compel it within the discretion of the court, but it should not be refused on the ground that it is self-incrimination since the facts disclosed are present whether the defendant is innocent or guilty, and he is certainly not making evidence against himself.

In *Johnson v. Commonwealth*⁴⁴ the court held that where defendant consented to arising and repeating certain words so that witness might identify his voice, he had waived any privilege against self-incrimination. The Court went further, however, and stated, in dictum, that even had he objected, the mere repeating of words for identification purposes would be a "strained construction" of the clause against self-incrimination.

Statutes requiring operators of cars to stop in case of an accident and give their names, licenses, etc., have been held constitutional,⁴⁵ although Ohio refused to uphold such a statute where it required the full report of the accident.⁴⁶ The rationale of these cases has been, however, that such requirements are a proper exercise of the police power of the state.

Some writers have advocated a complete abandonment of the privilege.⁴⁷ That, however, could not be expected, nor would it be wise. However, with a view to the "crime wave" and the recognized difficulties of convicting notorious criminals, it would seem wiser to limit the privilege to its reasonable and logical bounds, i. e., testimonial evidence. An examination of the physical person of the defendant for identification or connection with the crime, Bertillon records, finger prints, photographs, the making of tracks, assuming positions, donning clothes, repeating words for identifica-

⁴⁰ *State v. Horton* (1913), 247 Mo. 657, 153 S. W. 1051; *State v. Matsinger* (1915), 130 S. W. 856; *Bethel v. State* (1928), 178 Ark. 277, 10 S. W. (2d) 370, 243 Ill. Rev. 487; *Blackwell v. State* (1881), 67 Ga. 76; *People v. Akens* (1914), 25 Cal. App. 373, 143 Pac. 795.

⁴¹ *Spicer v. State* (1881), 69 Ala. 159; *Waters v. State* (1928), 119 So. 248; *People v. Glover* (1888), 71 Mich. 303, 38 N. W. 874; *People v. Gorder* (1928), 244 Mich. 274, 221 N. W. 309,—notes in 29 Colum. L. Rev. 214 (1929), and 27 Mich. L. Rev. 471 (1929), criticize the extension of the privilege to examination since it is not testimonial evidence; *Garcia v. State* (1929), 35 Ariz. 35, 274 Pac. 166.

⁴² *Martinez v. State* (1923), 96 Tex. Cr. R. 138, 256 S. W. 239.

⁴³ *Rettig v. State* (1921), 90 Tex. Cr. R. 142, 233 S. W. 839; *Thomas v. Commonwealth* (1920), 133 Ky. 509, 222 S. W. 951.

⁴⁴ (1887), 115 Pa. St. 369, 9 Atl. 78.

⁴⁵ *Woods v. State* (1916), 15 Ala. App. 251, 73 So. 129; *People v. Rosenheim* (1913), 209 N. Y. 115, 102 N. E. 430, Ann. Cas. 1915A 161, 46 L. R. A. (N. S.) 977; *State v. Sherring* (1916), 78 N. H. 220, 98 Atl. 482; *Ex parte Kneedler* (1912), 243 Mo. 632, 147 S. W. 983; *State v. Razyey* (1929), 129 Kan. 328, 282 Pac. 755, 66 A. L. R. 1225.

⁴⁶ *Rembrandt v. City of Cleveland* (1927), 28 Ohio App. 4, 161 N. E. 364, criticized in 28 Colum. L. Rev. 971 (1928) and 13 Minn. L. Rev. 150 (1929).

⁴⁷ 71 U. of Pa. L. Rev. 69 (1922); 35 W. Va. L. Quart. 143 (1929).

tion of voice and writing name for comparison of signature were never intended to be included in the privilege. No coercion, nor hope, nor fear can change the physical facts obtained by such comparison.

P. C. R.