PRIVILEGE IN MEXICAN AND AMERICAN CRIMINAL LAW

Larry LAUDAN*

Like many others around the world, the systems of criminal justice in Mexico and in the United States recognize a certain category of potential testimony, that of privileged witnesses. These are persons with a knowledge of the crime who, despite that knowledge, are not obliged to tell what they know. On its face, this category of witnesses is an affront to the truth-seeking aims of criminal inquiry. Both Mexico and the US espouse the general principal that those who know something about a crime have a legal duty to tell what they know. As the Mexican Code of Criminal Procedures says in article 242: "Every person who is a witness is required to speak with respect to the facts under investigation. As for anglo-saxon views on this subject we have the verdict of the great evidence scholar Wigmore to the effect that: AFor more than three centuries it has now been recognized (in common law countries) as a fundamental maxim that the public Y has a right to every man's evidence.[1]

This seemingly robust commitment to the truth, however unpleasant that truth may be, sits side-by-side in both countries with rules that explicitly permit certain persons with a knowledge of a crime to say nothing. The most obvious exception to the rule obligating testimony is the defendant himself. Another prominent exception in the United States, is the right against self-incrimination by a witness, although that rule can be circumvented by the grant of prosecutorial immunity. These exceptions will not by the focus of my talk today. Instead, I want to look briefly at how these two legal systems handle and justify what is called privileged testimony.

* Instituto de Investigaciones Filosóficas, UNAM, México.

[1] Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d. ed., 1940, 2192 at 2264.

In both countries, it is a general rule that a witness with knowledge of a crime who refuses to testify is committing a criminal act and may be sent to jail. The idea that a witness could refuse to testify simply because he finds it inconvenient or embarrassing or dangerous would undermine the commitment to the truth that both legal systems share. The impressive power of subpoena was invented in order to underscore the idea that relevant evidence of a crime belongs to the state and that it not within the discretionary power of the individual to share it or withhold it. The category of privileged witness seems to undermine these basic doctrines and to raise doubts about the sincerity of the commitment of these systems to the belief that everyman's evidence belongs to the state. It is that set of tensions I want to explore in my remarks today. I will have more to say about anglo-saxon privileging practices than about mexican ones because I know more about the one system than about the other. I nonetheless thought it might be useful to try to say something about both since they represent starkly different philosophical approaches to the question of privileged testimony.

The first difference between the two systems, and the one that is the easiest to describe, shows up when we compare those persons whose testimony is privileged in each system. I will begin there, even though those differences striking as they are, are by no means the most important differences between the two systems with respect to privileging. Having described those, I will move on to look at two more interesting differences in terms of the theoretical suppositions made by the two systems of criminal justice. One of those two theoretical differences will show up if we ask the question: To whom does the privilege belong? The second theoretical difference will reveal itself when we begin to probe the question: What is the rationale for allowing *this* class of witnesses to be exempted from the overarching rule that those who know something about a crime must give evidence?

The mexican list of privileged witnesses is impressively long. (Overhead) It includes, among others, the spouse of the accused, all his blood relatives, his in-laws to the fourth degree, and any person who is linked to the accused by love, respect, affection or close friendship. Mexican case law suggests that lawyers and priests likewise are privileged, although the relevant federal codes do not explicitly confer the privilege on them. In the United States, there are wide differences among various jurisdictions about which witnesses are privileged and which are not. For

brevity, I will limit my remarks to the privileges as understood in the Federal courts.

Federal common law recognizes five groups of privileged witnesses: the spouse of the accused, his attorney, his priest, his psychiatrist, and his psychiatric social worker. These are the most common categories. I should mention in passing that, in addition to these privileged witnesses, there is also a privilege extended to certain information. Specifically, state secrets are privileged as are the voting preferences of whatever witness. Since these last two privileges are obvious and noncontroversial, I will say nothing more about them, focusing instead on the so called *relationship* privileges.

What specifically is the privilege conferred on these witnesses in the two systems? They are by no means the same. In the mexican courts, the privileged witnesses may simply refuse to testify unconditionally about any matter having to do with the case. This is a obviously very blanket exclusion. In American courts, the privilege, except the spousal one which is total, extends only to certain *forms of communication* between the accused and the person enjoying the privilege. Thus, what the accused *said* to his attorney, or his psychiatrist or his priest is privileged. But if something falls outside the area of communication, it is not. So, if the accused's psychoanalyst sees him committing a crime, he must testify as to what he knows. Likewise his priest, his lawyer, and his social worker. But if what they know was learned by confidential communication from the accused in the course of a professional relationship with him, then their information is privileged. Only the spouse in American courts enjoys the sort of omnibus exclusion that we see extended quite broadly in Mexican law to the family and friends of the accused.

I said earlier that it would be important to ask who *owned* the privilege? In the US, the privilege unequivocally belongs to the *accused*. He and he alone can waive it, thereby triggering the obligatory testimony of the otherwise privileged witness. Popular folklore to the contrary notwithstanding, American courts do not recognize that lawyers or doctors or journalists or priests have a right to maintain their silence about the accused. That right, in anglo-saxon law, belongs to the person in the dock. If he waives the privilege, such witnesses have to testify, even if such testimony would violate the ethical codes of the witnesses. The only exception to this principle about the privilege belonging to the defendant rather than the witness occurs with the spousal privilege. This,

uniquely among the privileges, belongs to the spouse and not to the defendant.[2] By contrast, in mexican law, the privilege belongs entirely to the *witness*. Mexican law is quite explicit that if some witnesses in a privileged category desire to offer testimony, they may do so, whether the defendant likes it or not. The choice between exercising and waiving the privilege belongs to them not to him. We will return to this point a little further along, but I want to flag it now as being of considerable importance to understanding the different philosophies of privileging in the two countries.

We must note one further difference before moving on to a more theoretical analysis. In the case of mexican law, the trier of fact, the judge, comes to learn if there were privileged witnesses. That is to say, the judge becomes aware that the state or the defense attempted to obtain testimony from certain persons with a knowledge of the crime and that they refused to tell what they knew. This information about the refusal of relevant witnesses to testify can become a factor in the judges determination of guilt and innocence. By contrast, an american jury does *not* usually learn that there were privileged witnesses since they will typically assert the privilege during a preliminary hearing that excludes the jury (although the federal rules of evidence are silent in this regard, more than 30 states have codes that forbid juries from drawing adverse inferences from a client´s unwillingness to waive the attorney-client privilege). Moreover, the appellate court rulings are quite explicit that the prosecution cannot mention to the jury that there were witnesses with relevant information about the crime whom the defendant would not allow to testify.[3] This piece of information is surely relevant to a jurys verdict but, like much other relevant information in American criminal trials, it never informs a jurys deliberations. This feature feeds back to our earlier point about who owns the privilege. If, as in Mexico, the privilege belongs entirely to the witness, then it would probably be inappropriate for the judge to make a strong adverse inference from the fact that some friend or family member of the accused exercised his privilege not to testify. Such an act could have all sorts of possible causes and cannot be legitimately blamed on the accused. But when, as in the American system, the privilege belongs not to the witness but to the accused, then it seems more plausible

2 See Trammel *vs*. US, 445 US 40, 1980.
3 The most relevant case was Griffin *vs*. California, 380 US 609, 1965.

that an objective trier-of-fact might be inclined, if he knew about it, to draw an adverse inference from the failure of the accused to allow a witness to testify. Unfortunately, because the American system conceals such information from the jury, they are not in a position to make the inference that an objective, fully-informed third party might well make about such matters.

It is time now to take a few steps back from a description of the privileging practices of these two countries to look at their theoretical foundations, in so far as they have any worthy of the name. I intend to be critical of both systems, and I hope that my mexican friends will excuse the harshness of my judgements about their system, since I will offer equally harsh ones of my own.

Let us begin with the mexican rule about exclusion. Clearly, its principal thrust is to enable family and friends of the defendant to avoid giving testimony, if they do not wish to do so. To understand this rule, we must go back to its historical origins in roman law. Medieval courts determined that family and friends of the defendant could not give sworn testimony at all. The justification was that their testimony was probably suspect and unreliable in effect, they had clear motives for lying about the facts of the case so as to protect the accused. Since roman law treated testimony and witnesses as absolutely essential in a criminal inquiry giving no weight at all to physical or circumstantial evidence it was extremely important to screen prospective witnesses to make sure that their testimony would be unbiased and reliable. The blanket exclusion of all the friends and family of the accused was seen as a way of excising biased testimony that might be of dubious value. During the 19th century, mexican criminal law broke sharply with its roman origins. It replaced trial by inquisition with an adversarial system. It admitted the probative value of circumstantial evidence and, most relevantly for our concerns, it came to regard the testimony of eyewitnesses not as a proof of guilt but merely as an indicator, what is known technically as an indicio. Since eyewitness testimony was no longer regarded as essential for conviction, since it was no longer thought to be as probative as it once was, it became plausible to admit the testimony of those whose testimony had once been excluded that is, the testimony of friends and family members of the accused.

This was a very positive development; like any other change that makes more relevant evidence available to the trier of fact, it promoted the truth-seeking aims of the justice system. But this particular Mexican reform was half-hearted. Instead of moving to a system which demanded the testimony of friends and family members who had knowledge of the crime, mexican authorities left that decision to the witnesses themselves. As we have seen, the current policy is that they may give testimony but they don't have to. This is a policy without an evident epistemic rationale. Under the old Roman regime, there was at least a reason for excluding the testimony of such persons: it might be suspect. Having decided, however, they such testimony was relevant even if sometimes biased, mexican law should have moved to eliminating the privileges altogether, insisting that anyone with a knowledge of the crime must testify. Instead, its retention of the privilege, at the discretion of the witness himself, creates a situation in which those with knowledge hostile to the defendant are likely to refuse to testify while those with knowledge helpful to the defendant will give testimony. This is hardly how one would design a system if one's aim were principally to find out the truth about the crime. The dilemma here is particularly sharp: either family members and friends are unreliable witnesses, in which case they should not be allowed to testify; or their testimony is potentially reliable in which they should be obliged to testify. Leaving the choice in their hands can have no epistemic rationale, unless we have reason to believe that those who voluntarily testify are more likely to speak the truth than those who do not. But that hypothesis has no plausibility.

The American case is a bit more complex. Like Roman law in the middle ages, anglo-american law in the 19th century prohibited the sworn testimony of family and friends of the defendant, ostensibly on the grounds of its unreliability. The massive, Benthamite reforms in evidence law in the mid 19th century changed all that. Being a friend of the defendant, being his son or daughter, his mother or father, no longer exempted one from telling what one knew. Only the spousal exclusion survived in american law as a vestige of this practice. All the other privileges in american law, as we have seen, derive from professional relationships between the defendant and his priest, his doctor, his lawyer and his social worker. There is broad agreement that -if we leave aside the lawyer-client relation *none* of these privileges has anything to do with promoting the truth. On the contrary, each sets up an obstacle to discovering the truth in the

name of some *non-epistemic* social good. Thus, the rationale for the psychiatrist-client privilege is that the treatment of mental disease requires full candor between the patient and his doctor. In the religious case, salvation itself may depend on the truthfulness of a confession that a person offers to his priest. Here, the argument for the privilege seems to be that the interests of finding out the truth in a criminal trial are less important than curing neurotic patients or securing a comfortable afterlife. As an epistemologist, I find myself at odds with the decisions about value implicit in giving a priority to mental health or religion over meting out justice. I am also troubled that it is judges, via the common law, who are left to define such privileges rather than legislators, who are better placed than appointive judges to weight the social and legal values at stake in such decisions (the area of privileged witnesses is one of the few where the Federal Rules of Evidence refuse to take a stand and simply defer to common law practices, practices wholly defined by judges and not legislators). But this is not the place to pursue those concerns.

Another concern worthy of mention but not to be further pursued here has to do with the spousal privilege. Although a wife cannot be forced to testify against her husband, the defendant's children, siblings, and parents both can be made to take the stand and to tell what they know. If, as would appear to be the case, the rationale for the spousal privilege is that it is designed to protect the sanctity of marriage as an institution, it is quite unclear why Bin this age of ubiquitous divorce, the relation between husband and wife is singled out by the law for protection when relations with parents and off-spring are not. If we are to extend testimonial privileges to any relatives of the defendant, and I am not saying that we should, it seems the mexican model is more consistent than the north american one.

For our purposes, the obvious feature of all the privileges, whether mexican or north american, with the possible exception of how you voted, is that they pose obstacles to truth seeking. Although often criticized for making it more difficult to convict the guilty (which they frequently do), the privileges likewise work sometimes to convict the innocent. For instance, if Jones is on trial for raping Smith and a priest or analyst learns in a confession or therapy session that Wilson is the rapist, the inability to elicit the privileged information from Wilson's confidant may lead to an incorrect conviction of Jones.

In essence, the relationship privileges seem to say to those guilty of a crime: You can reveal what you did, however horrible it was, to certain persons in the full knowledge that they cannot be made to pass along those revelations in ways that will be harmful to you. The courts say that they privilege such communications because it is Ain the broader public interest to do so. Is this a viable claim? Does it seem plausible that, if I reveal to my social worker that I just robbed the local liquor store, she will be better able to help solve my problems with (say) domestic violence or a slum landlord? Indeed, if I have just robbed the local liquor store, do I even have a legitimate claim on the unstinting confidentiality of my social worker? That seems doubtful.

Perhaps the argument in favor of these privileges has less to do with protecting the guilty and is directed instead at protecting the relationship that *innocent* people have with their social workers. But an innocent person should probably have nothing to fear from telling the truth to his social worker, even if the privilege didn't exist, since nothing he revealed to her would be the sort of thing that would land him in trouble if repeated in a criminal trial. I flatly deny that a social worker can do her work in a way that promotes the public interest only if she can tell her clients that everything they say to her, however revelatory of criminal activity, will be hermetically sealed from legal scrutiny (indeed, social work flourished for more than a century before, in 1996, the Supreme Court invented this privileged category).

What we should focus on is the one privilege in American criminal law which is supposed to have an epistemic rationale. I refer, of course, to the attorney-client privilege. This is an old privilege in Anglo-Saxon law, dating back to the 18th. century. Its rationale, as you all know, is this: in an adversarial system, it is the obligation of defense counsel to provide the best defense for his client that is possible. In constructing that defense, it is important for counsel to know as much about the details of the crime as his client does. Hence, candor between attorney and client is important. But, so the argument goes, that candor would be impossible if the defendant believed that whatever he said to his attorney might show up as evidence in the trial against him. Hence, the attorney-client privilege ultimately promotes the end of a truthful verdict by giving the attorney the information he needs to mount the strongest case that the facts will permit.

Is this a telling argument? When confronted by puzzles like this one, it is always helpful to begin by asking the question: who stands to gain most from the rule, the guilty defendant or the innocent one? Or do both gain equally? Although one can readily imagine exceptions, it seems fair to say that a guilty party who spoke candidly to his lawyer (whose testimony could be subsequently subpoenaed) would be put at much greater risk of conviction than an innocent party would. Indeed, under such circumstances, guilty defendants would say very little to their lawyers while innocent parties would say more. It is true that guilty defendants would probably be less robustly defended than they now are if this privilege were to vanish. But a legal system must be judged by how far it goes to protect the innocent from conviction not by whether it makes the guilty especially difficult to convict. In sum, abandoning the rule of lawyer-client confidentiality would have the predictable result of more convictions of the truly guilty without significantly increasing the number of convictions of the truly innocent. Accordingly, eliminating this rule would increase the number or proportion of true verdicts. That, in turn, implies that there is no compelling intellectual rationale for preserving attorney-client privilege. In the long run, it is an obstacle to discovering the truth just as the notorious exclusionary rules are.

The unavailability to the jury of relevant, privileged information is bad enough. That problem is exacerbated by the fact that, in many jurisdictions, jurors are not allowed to be informed when a potential witness has invoked the privilege. In other jurisdictions, which permit the invocation of the privilege in front of the jury, jurors are instructed that they can draw no adverse inferences from the invocation of the privilege. Even if there were a justification for recognizing certain classes of privileged relationships (and I am not persuaded of that), no compelling evidential rationale exists for failing to inform jurors when a witness has invoked a privilege or for obliging them to repress any memory of its occurrence. The only hint of an argument relating such privileges to truth finding involves the claim that no legitimate adverse inference could ever be drawn from a witness choosing to invoke one of these privileges. If, for instance, an analyst steadfastly refuses to answer all questions about the content of his conversations with his patient, or if a priest refuses to say anything about what happened in the confessional, what inference could the jury legitimately make concerning the guilt or

innocence of the patient or the penitent? We cannot blame the defendant, after all, for the testimonial recalcitrance of some third party.

The antidote to this form of self-deception is to remind ourselves who *owns* the privilege in question. The right to the privilege belongs *not* to the analyst but to his patient, the *defendant*. It belongs not to the priest but to the penitent. If it belonged to the analyst or the priest, then its exercise could sustain no adverse inferences against the defendant. But, belonging as it does to the defendant, the privilege can be waived by him, allowing the analyst or priest to respond freely to the prosecution's questions. If the defendant chooses not to remove that muzzle, and the jury is informed of that fact, the jury may well conclude that this is because he wants to hide something that he fears his analyst or priest will reveal. This is why a jury, in certain circumstances, may be inclined to draw adverse inferences from the assertion of a testimonial privilege. Because that inference will often be a rational one to make, that is likewise why juries should be both informed if witnesses have asserted the privilege and allowed to make of that what they will.

It is hard to fault Jeremy Bentham's (only mildly overstated) observation that the belief that relevant evidence can be legitimately excluded if it might create unpleasant consequences for various human relationships is one of the most pernicious and most irrational notions that ever found its way into the human mind.[4] In the balancing act between society's joint interests in justice being done and certain interpersonal relationships fostered, courts have fairly consistently sacrificed the interest in justice to the larger social good, even though (as in the case of the social worker-client relation) they have only the most tenuous empirical evidence that the relationship in question would be undermined if the privilege were to vanish. Perhaps the last word on this subject belongs to McCormick, who remarks, in his classic text on evidence, apropos the marital privilege:

We must conclude that, while the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony is at best doubtful and marginal.[5]

[4] Bentham, J., *Rationale of Judicial Evidence*, pp. 193 and 194, London, J. S. Mill, 1827.

[5] *McCormick on Evidence*, 5th. ed., para. 86, 1999.

That is to say that privileging certain forms of testimony exacts an *undeniable* epistemic cost in the name of *possibly* conferring certain social benefits. That is a tradeoff that is dubious at best. There may be situations in which silence is golden. A criminal proceeding is *not* among them.