

**ATTORNEY-CLIENT PRIVILEGE: INCARNATION AND INTERPRETATION**

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**Abstract:** The fallacy of the absolutist nature of attorney-client privilege owes much of its legacy to Lord Taylor's articulation in *R v Derby Magistrates' Court, Ex parte B*.<sup>1</sup> In this 1995 English case, the House of Lords, constituted by Lord Taylor of Gosforth CJ, Lord Lloyd of Berwick, Lord Nicholls of Birkenhead, Lord Keith of Kinkel and Lord Mustill, anchored the doctrine to a 16<sup>th</sup>-century paradigm which held that, once attorney-client privilege attached to a certain communication, the privilege was absolute and could not be breached by any court for any reason. This result left no opportunity to balance the needs of other competing interests against the interest in preserving the confidentiality of privileged communications.<sup>2</sup> Lord Taylor of Gosforth CJ announced:

If a balancing exercise was ever required in the case of [attorney-client] privilege, it was performed once and for all in the 16<sup>th</sup> century, and since then has applied across the board in every case, irrespective of the client's individual merits.<sup>3</sup>

In utilising Jeremy Bentham and John Henry Wigmore's philosophies, this article unveils the historical justification for the existence of attorney-client privilege and introduces some ideas about the way this has shaped contemporary judicial thinking. Exposing the factors which led to Lord Taylor's pronouncement that the privilege was settled once and for all

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<sup>1</sup> [1996] AC 487.

<sup>2</sup> Adrian Zuckerman, *Legal Professional Privilege – The Cost of Absolutism*, 112 LAW Q. REV. 535, 535–6 (1996).

<sup>3</sup> *R v. Derby Magistrates' Court; Ex parte B* [1996] AC 487, 508E (Lord Taylor).

in the 16<sup>th</sup> century, this article concludes that the rule was not an Elizabethan construct, but a product of time immemorial.

## I Attorney-Client Privilege: Historical Underpinnings

*A Wigmore's Hatrick: Best of Three*

The position taken by Lord Taylor CJ that attorney-client privilege was settled in the 16<sup>th</sup> century may logically be attributed to the influence of Wigmore. Contending that the privilege was initially conceived to safeguard the oath and the honour of the lawyer in a society predicated on inequality of rank,<sup>4</sup> Wigmore's rationale supported the traditional justification for the existence of the rule.<sup>5</sup> It is most likely that Wigmore's pronouncement on attorney-client privilege was connected to the evolution of the legal profession throughout the later Middle Ages, reinforcing the fact that the legal profession had established the necessary level of specialisation such that client–counsel communications were entitled to fall under an obligation of secrecy.<sup>6</sup>

‘Characterised as a sacred trust that touch[ed] the very soul of lawyering’,<sup>7</sup> attorney-client privilege allowed lawyers to defend their status by appealing to the public's need for their services and unique area of expertise. This enabled them to morph into important

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<sup>4</sup> Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism: The Adversary System and the Corporate Client's SEC Disclosive Obligations*, 33 HASTINGS L. REV. 495, 496 (1982).

<sup>5</sup> *Developments in the Law: Privileged Communications*, 98 HARVARD L. REV. 1450, 1472 (1985).

<sup>6</sup> Anton-Hermann Chroust, *Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400*, 31 NOTRE DAME L. REV. 4, 566-8 (1956).

<sup>7</sup> Adam Dodek, *Reconceiving Solicitor-Client Privilege*, 35 Q.L.J. 493, 517 (2010).

exemplars of order in medieval society.<sup>8</sup> The value attached to medieval Elizabethan lawyers culminated in the expansion of legal business such that they exerted a far greater influence on how proceedings were conducted. Wigmore interpreted the *theoretical justifications underpinning* attorney-client *privilege* as a status-based exception courtesy of the esteemed nature of lawyering and argued that, under the tenets of oath and honour, the privilege could be waived by the lawyer<sup>9</sup> because it was for the lawyer alone to determine what honour demanded.<sup>10</sup>

An inference may be drawn that the reactionary and parallel evolutionary paths shared by the legal profession and attorney-client privilege would eventually converge and be mutually reinforced.<sup>11</sup> The basis for this proposition lies in the assumption that, as the status of the legal profession grew in prominence, corresponding rules of professional conduct would also emerge to govern client–counsel relations.

Through strictly limiting the operation of attorney-client privilege to communications arising between clients and their lawyers, lawyers were afforded a competitive advantage over other professional groups which ensured they were indispensable to the proper functioning of the legal system<sup>12</sup> and the administration of justice, which could not be advanced if clients were unable to confide in those skilled in law.<sup>13</sup> In limiting the privilege in this manner, relations between lawyer and client were emphasised as conveying special significance and constituted part of the functioning of the law itself. Ensclosed in their

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<sup>8</sup> The author notes, per Richard Helmholz, *The IUS Commune in England: Four Studies, 191* (2001) that while ecclesiastical privilege has been thoroughly documented in the Middle Ages, little to no attention has been devoted to the civil aspect of ‘privilege’, with Blackstone and Maitland concentrating on the clergy’s privileged jurisdictional status.

<sup>9</sup> John Wigmore and Colin McNaughton, *Evidence in Trials at Common Law*, § 2291 (1905).

<sup>10</sup> Justin Leeson, James Watson and Elisabeth Peden, *Historical Foundations of Australian Law: Volume ii – Commercial Common Law*, 136 (2013).

<sup>11</sup> Anton-Hermann Chroust, *supra* 8, 573.

<sup>12</sup> *Baker v. Campbell* (1983) 153 CLR 52, 94 (Wilson J).

<sup>13</sup> Justin Gleeson et al, *supra* 10, 143.

privileges, lawyers could afford to be tolerant; so long as they guarded those privileges well, both barristers and solicitors were indispensable.<sup>14</sup>

Lawyers defended their privileges by appealing to the public's need for their services and unique area of expertise, thereby morphing into important beacons of order in society. Evincing the growing sense that lawyers were becoming increasingly important components within the English judicial system,<sup>15</sup> an inference may be drawn that, in order to advance the best possible case for one's client, a strong sentiment of maintaining client confidences would evolve into a necessary function of the lawyer. This provided additional incentive for clients with something to hide to hire lawyers so as retain control over communications and not to risk their secrets being compromised or divulged.

In the eighth volume of *A Treatise on the Systems of Evidence in Trials at Common Law*,<sup>16</sup> Wigmore announced that the testimonial disqualification enjoyed by lawyers sprang from medieval jurisprudence, with the venerated history of attorney-client privilege dating back to the reign of Elizabeth I. He specifically claimed that the rule had its origins in section 12 of the 1562 *Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury*<sup>17</sup> and anyone who failed to testify upon service of process, or bore false witness, was liable to penalty.<sup>18</sup> "The history of the privilege goes back to the reign of Elizabeth I, where the

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<sup>14</sup> Michael Birks, *Gentlemen of the Law*, 1 (1960).

<sup>15</sup> William Dunham, *Radulphi de Hengham Summae* 4-7 (1932).

<sup>16</sup> John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdiction of the United States, vol iv* (1905). Bentham distinguished *treatises* and *abridgements* as follows: '*treatises* contain, with or without rules, argumentation about rules, while *abridgements* contain alleged rules with or without (though commonly without) the argumentation out of which the rules were spun, and in which they were drowned'. See Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others*, 10 (1882).

<sup>17</sup> Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury 1562, 5 Eliz 1 c 9.

<sup>18</sup> Jonathan Auburn, *Legal Professional Privilege: Law & Theory*, 2-3 (2000).

privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications'.<sup>19</sup>

Erroneously claiming that it arose contemporaneously in response to the then-novel right of testimonial compulsion which officially gained recognition in the 1570s,<sup>20</sup> Wigmore stated that attorney-client privilege already appeared as unquestioned at this time and concluded that it was one of the oldest of the privileges for confidential communications.<sup>21</sup> He later recanted this statement and insisted that attorney-client privilege emerged from the Court of Chancery in the 14<sup>th</sup> century, most likely around the year 1375.<sup>22</sup> In a separate statement, he added:

The policy of the privilege has been plainly granted since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the lawyers must be removed, hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.<sup>23</sup>

In misstating its origins, not once, but thrice, Wigmore failed accurately to report the history of attorney-client privilege and imparted a lasting, albeit erroneous, impression that the privilege first took root in the 16<sup>th</sup> century as a by-product of Elizabethan transformation.<sup>24</sup> For Lord Taylor CJ to accept Wigmore's various statements is to overlook his terminology in which the scholar expressly articulated that the privilege already appeared as unquestioned by the 1570s and was one of the oldest of the privileges

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<sup>19</sup> Attorney-client privilege applies to confidential communications, whether written or oral, between a client and lawyer, where the latter is acting in a professional capacity. The privilege constitutes a guarantee of security in which discussions can take place absent a fear of disclosure. Communications must be made for the purpose of enabling the lawyer to conduct the cause, with the test being whether communications are necessary for the purpose of carrying on the proceeding in which the lawyer is engaged. See Wigmore and McNaughton, *supra* 9, §2290–1.

<sup>20</sup> Jonathan Auburn, *supra* 18, 2–3.

<sup>21</sup> Wigmore and McNaughton, *supra* 9, § 2290–1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Ronald Desiatnik, *Legal Professional Privilege in Australia*, 9 (1999).

for confidential communications, having originated in section 12 of the 1562 *Perjury Act*. An argument may reasonably be made that, if the privilege was already unquestioned by the 16<sup>th</sup> century and was regarded as one of the oldest privileges pertaining to confidential communications, it must have been in use prior to this era.

Assuming that attorney-client privilege was in fact framed in section 12 of the 1562 *Perjury Act*, it would *not* have been a preserve of the common law as is universally agreed, but would have conformed to a statutory provision. Attorney-client privilege cannot be distinctly traced back to any statutory enactment. Rather, this article asserts that it derived its authority and recognition from the common law; through systematic reporting and publication of precedent-driven cases in the early 1500s.<sup>25</sup>

Consider *Lee v Markham*,<sup>26</sup> in which the defendant's counsel was excused from testifying so as 'not [to] be compelled to answer to any interrogation, to [have] ministered unto him which shall touch or concern the discussing of the title'.<sup>27</sup> Similarly, in *Breame v Breame*<sup>28</sup> and *Windsor v Umberville*,<sup>29</sup> the Court proscribed counsel acting in a cause from being examined in that same matter.<sup>30</sup> In *Berd v Lovelace*,<sup>31</sup> the Court of Chancery ordered that Thomas Hawtry, lawyer, should not be examined in relation to communications that had passed between himself and his client. Declaring that Hawtry would 'not be compelled to be deposed, touching the same, and that he was not in danger of any contempt, touching the

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<sup>25</sup> See Geoffrey Hazard, *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978). These 16<sup>th</sup> century cases involved judicial consideration, without guidance of statute.

<sup>26</sup> (1569) *Monro* 375, *Tothill* 48.

<sup>27</sup> *Id.*

<sup>28</sup> (1571) *Tothill* 48. See also Ronald Bridgman, *A Digest of the Reported Cases on Points of Practice and Pleading in the Courts of Equity in England and Ireland and of the Rules and Orders of the Same Courts; from the Earliest Period to the Present Time*, 178 (1829).

<sup>29</sup> (1574) *Monro* 411.

<sup>30</sup> Ronald Bridgman, *supra* 28, 178.

<sup>31</sup> [1577] *Cary* 62.

not executing of the said process',<sup>32</sup> the Court's ruling signified that, while lawyers *were* competent to testify, it would not compel their testimony.<sup>33</sup>

The position enunciated in *Berd v Lovelace*<sup>34</sup> established the rule that a lawyer previously retained to act could not be subpoenaed to testify against a client,<sup>35</sup> either past or present, as this was repugnant to the policy of the law. In addition to ignoring any injury to clients, the early justification ignored protection of any particular professional relationship or the preservation of client–counsel communications. These were not valued as an end in and of themselves.<sup>36</sup>

The rationale that the privilege belonged to the lawyer was carried through in several cases which essentially limited the scope of attorney-client privilege to the exchange of communications between lawyer and client for the purpose of obtaining legal advice.<sup>37</sup> The next of these, in chronological order, is *Austen v Vesey*,<sup>38</sup> in which a solicitor for one of the litigants was discharged and 'not admitted to be examined'. *Hartford v Lee*<sup>39</sup> similarly determined that counsel could not be compelled to testify 'touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled to testify'. In *Kelway v Kelway*,<sup>40</sup> Roger Taylor enjoyed the same privilege when he was excused from

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<sup>32</sup> *Id.*

<sup>33</sup> Jonathan Auburn, *supra* 18, 1. With the passing of the *Common Law Procedure Act 1854* and the *Supreme Court of Judicature Act 1873* (UK), the High Court of Justice assimilated the legal procedures of the Court of Chancery and the Court of Common Law (as well as other courts). Where there was any variance between the old practice of the two courts, the more convenient one would prevail. See William Hastings, a digest of the law of practice under the judicature acts and rules: and the cases decided in the chancery and common law divisions from november 1875 to august 1880, 1-3 (1880) See also Colin Tapper, *Privilege, Policy and Principle*, 121 L.Q.R. 181, 182 (2005).

<sup>34</sup> [1577] Cary 62.

<sup>35</sup> *Id.*

<sup>36</sup> Edward Imwinkelreid, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV.315, 319–20 (2003).

<sup>37</sup> Paul Rice, John Corr and David Drysdale, *Attorney-Client Privilege in the United States*, 6 (2009).

<sup>38</sup> (1577) Cary 63.

<sup>39</sup> (1577) Cary 63.

<sup>40</sup> (1579) Cary 89.

answering any interrogatories touching the secrecy of the title ‘or any other matter which he knoweth as solicitor only’. In the 1579 matter of *Dennis v Codrington*,<sup>41</sup> it was ordered that a lawyer in that suit should not be compelled, by virtue of subpoena or otherwise, ‘to be examined upon any matter wherein he had been counsel, either by the indifferent choice of both parties or with either of them, by reason of annuity or fee’.

In the subsequent cases of *Strelly v Albany*<sup>42</sup> and *Cutts v Armingier*,<sup>43</sup> the Court confined the operation of attorney-client privilege to matters arising from the respective lawyers’ involvement in the case at hand.<sup>44</sup> In *Strelly*, the Court ordered that the lawyer should not be examined in this cause<sup>45</sup> and in *Cutts*: ‘He hath not dealt therein but as a counsellor for the plaintiff; it is therefore ordered, that the said Fuller shall not be enforced to be examined in the cause’.<sup>46</sup>

By the time *Ward v Waldron*<sup>47</sup> came to be prosecuted, the Court permitted counsel to invoke a claim of privilege only to avoid being ‘bound to make answer for things which may disclose the [innermost] secrets of his client’s cause and thereupon he was [unable] to be examined’. The shallow scope of attorney-client privilege was again evident in *Havers v Randall*,<sup>48</sup> where counsel could not be questioned over ‘anything concerning his clynts title’. *Creed v Trap*<sup>49</sup> meanwhile limited the operation of attorney-client privilege to the professional knowledge acquired by the lawyer in relation to his representation of the client; ‘but for any other matter, it shall be lawful for the plaintiff to examine him’.

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<sup>41</sup> (1579) Cary 100.

<sup>42</sup> (1583) Monro 519–520.

<sup>43</sup> (1585) Monro 544.

<sup>44</sup> *Breame v. Breame* (1571) Tothill 48.

<sup>45</sup> *Strelley v. Albany* (1583) Monro 519–520.

<sup>46</sup> *Cutts v. Armingier* (1585) Monro 544.

<sup>47</sup> (1654) 82 ER 853.

<sup>48</sup> (1581) Choyce Cas 149.

<sup>49</sup> (1578) Choyce Cases 121.

Containing principles which were recognised and applied as sound law on the subject of client–counsel communications, these Court of Chancery cases – which together comprised the basis for Wigmore’s ‘honour theory’ of attorney-client privilege – contained principles which were recognised and applied as sound law on the subject of client–counsel communications. As a general precept in early modern English law, these cases demonstrate that attorney-client privilege evolved through the common law as opposed to legislative enactments per Wigmore’s assertion.

These authorities failed to describe the right of a lawyer to ‘avoid compulsory disclosure as a privilege and certainly not as an attorney-client privilege’.<sup>50</sup> This is to say that 16<sup>th</sup>–century English law did not recognise the rule as a means of excusing lawyers from testifying. This view was firmly enunciated in *Bulstrode v Lechmere*.<sup>51</sup> In *Bulstrode*, the defendant allegedly had in his possession an ancient deed belonging to his client, Dingley, which the plaintiff sought to discover by exhibiting a demurrer to a bill.<sup>52</sup> The defendant pleaded that he was a counsellor and it had been agreed between the parties that no information should be disclosed or made use of by the other side.<sup>53</sup> The court ruled that the defendant ‘shall have the privilege of the bar and is *not* obliged to answer’.<sup>54</sup> Furthermore, any information that came to the knowledge of his lawyer *prior* to being retained as counsellor in the conduct of the cause, or upon any other account, should afford him the privilege of the bar and he should not be put to answer.<sup>55</sup>

Unfortunately, the word ‘privilege’ misstated the application of the doctrine, with the English Law Report commenting that the word *not* should have been inserted between

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<sup>50</sup> Justin Gleeson et al, *supra* 10, 132.

<sup>51</sup> (1676) 2 Freeman 5.

<sup>52</sup> Ronald Bridgman, *supra* 28, 179.

<sup>53</sup> *Id.*

<sup>54</sup> *Bulstrode v. Lechmere* (1676) 2 Freeman 5.

<sup>55</sup> *Id.*

*shall* and *have*, so as to actually read: ‘The barrister for the defendant shall *not* have the privilege of the bar and is obliged to answer’.<sup>56</sup> While historical records do not elaborate on precisely how this mistake occurred, it has been suggested that the negative was transposed probably through typographical error.<sup>57</sup> This erroneous version, which gave the privilege an evolutionary advantage, would become the emerging practice as documented in cases for the next two hundred years.<sup>58</sup>

It was not until 1816 that *Parkhurst v Lowten*<sup>59</sup> corrected the erroneous *Bulstrode v Lechmere* judgment, wherein that court held that, with regard to facts known to a lawyer unprofessionally, the claim of privilege could *not* be maintained and ‘refusal to answer was in itself a breach of trust’. This is significant because, prior to *Parkhurst*, any knowledge or information, whether or not independently acquired by the lawyer, mistakenly fell within the scope of the privilege, when in actual fact no privilege should have attached. While the vision for attorney-client privilege reached reasonable clarity only in the 16<sup>th</sup> century, with the value attached to Elizabethan lawyers culminating in an expansion of legal business, it found its origins in the accumulated historical events which preceded it.

### *B Bentham, Rome and the Origins of Attorney-Client Privilege*

English utilitarian philosopher Jeremy Bentham dominated English legal thought of the 18<sup>th</sup> and 19<sup>th</sup> centuries with his ‘truth theory’ of adjudication. Bentham insisted that the

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<sup>56</sup> Id.

<sup>57</sup> See English Law Reports: (1557–1865) 22 ER Equity Cases Abridged, Volume 2 in which it is stated: ‘The negative has obviously been here transposed; probably through a mere typographical error. With respect to facts known by a barrister, or attorney, unprofessionally, the claim of privilege can not be maintained’. See also John Beames and William Halstead, *The Elements of Pleas in Equity: with Precedents of Such Pleas* (Halstead, 1824) 279.

<sup>58</sup> While no direct correlation exists between the *Bulstrode* and *Derby* judgments, Lord Taylor CJ pronounced in *Derby* that when claimed, attorney-client privilege ‘could not be overridden’. This parallels the fallible *Bulstrode* ruling that the lawyer ‘shall have the privilege of the bar and is *not* obliged to answer’.

<sup>59</sup> (1816) 36 ER 589.

overriding objective of the judicial system was the ascertainment of truth.<sup>60</sup> Attaching priority to rectitude of decision, he opposed exclusionary rules which defeated access to probative evidence.<sup>61</sup> He argued: ‘Evidence is the basis of justice: exclude evidence, you exclude justice’.<sup>62</sup> In contrast to Wigmore, who claimed the privilege was formed in the 16<sup>th</sup> century, Bentham paid homage to the Roman origins of English jurisprudence when he stated that attorney-client privilege was grounded in the Roman legal maxim that no one was bound to accuse himself.<sup>63</sup>

Noting that these ‘principles and rules were of such high antiquity that the time cannot be assigned when they did not have an existence and use’,<sup>64</sup> Bentham cautioned against the propensity to forget that ‘both Roman and English systems of law were in use in England’,<sup>65</sup> with English law having been, in its first concoction, imported from ancient Rome.<sup>66</sup> While Bentham noted an evolutionary connection, he differentiated between the severity of exclusion created by the privilege and observed differences between the effects of the Roman law and those cemented in later English practice.

Where the Roman objective was to keep secret as much client–counsel evidence as possible, the English rule was confined to complex causes.<sup>67</sup> According to Bentham, the degree of refinement accorded the rule constituted no small improvement, with England’s interpretation of the ancient Roman privilege excluding not only client–

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<sup>60</sup> Edward Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 *Univ. Pittsburgh L. Rev.* 145, 150 (2004).

<sup>61</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, Vol V, 227 (1827). See also William Twining, *Theories of Evidence: Bentham and Wigmore*, 70 (1985).

<sup>62</sup> *Id.* 227.

<sup>63</sup> Jeremy Bentham And John Bowring, *The Works Of Jeremy Bentham, Published Under the Superintendence of His Executor, John Bowring*, Vol Vii (1843).

<sup>64</sup> Jeremy Bentham, *Codification of the Common Law: Letter of Jeremy Bentham, and Report of Judges Story, Metcalf and Others*, 29 (1882).

<sup>65</sup> Bentham and Bowring, *supra* 61.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

counsel relations, but extraneous witness testimony.<sup>68</sup> As a result, the mischief produced by the English rule was not nearly as damaging as that produced under Roman law, in which the systematic concealment was so unnatural to justice and so unpalatable to the general complexion of the English judicature that it required justification in the sight of English lawyers when it was planted in English soil.<sup>69</sup>

According to Bentham, the roots of contemporary attorney-client privilege were clearly traceable to the era of Roman jurisprudence ‘which provided the organisational and legal framework’ for the rule to seep into later legal practice.<sup>70</sup> He excoriated the judiciary for failing to consider that ‘English precedents have been grounded on original Roman law’<sup>71</sup> and limiting their reflections to English precedents for attorney-client privilege. Notwithstanding the fact that the ancient Romans ‘failed to develop distinctive standards of professional conduct, professional organisations or disciplinary standards’,<sup>72</sup> Roman law faintly foreshadowed the beginnings of a distinctive and prestigious legal profession,<sup>73</sup> with Roman orators and lawyers forming the earliest legal profession in any sense of the term.<sup>74</sup>

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<sup>68</sup> This was not limited to client–counsel communications, but also excluded testimony based on the characteristics of impropriety, inconsistency and mischievousness. Bentham and Bowring, *supra* 61.

<sup>69</sup> *Id.*

<sup>70</sup> The *Corpus Iuris Civilis* was the body of civil law incrementally introduced from 529 to 534 on the orders of Justinian I and bearing his name: Wise or fortunate is the prince who connects his own reputation with the honour or interest of a perpetual order of men. The defence of their founder is the first cause, which in every age has exercised the zeal and industry of the civilians. See also Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (1846).

<sup>71</sup> Jeremy Bentham, *Rationale Of Judicial Evidence: Specially Applied To English Practice*, Vol VII, 848 (1843).

<sup>72</sup> Anton-Hermann Chroust, *Emergence of Professional Standards and the Rise of the Legal Profession: The Graeco-Roman Period*, 36 B.U.L. REV. 587, 58 (1956).

<sup>73</sup> James Brundage, *The Medieval Origins Of The Legal Profession: Canonists, Civilians And Courts*, 11 (2008).

<sup>74</sup> *Id.* 58.

An ancient variation of attorney-client privilege can be traced back to the prosecutions of Herennius and Hortensius in 116 BC and 70 BC respectively.<sup>75</sup> In the first case, Gaius Marius<sup>76</sup> was charged with *ambitus*; the offence of electoral corruption<sup>77</sup> for which he would later be acquitted.<sup>78</sup> The prosecutor, of which history records no name, sought to compel Gaius Herennius to testify against Marius; who had been a client of the House of Herennii.<sup>79</sup> Under Acilian law, consul Manius Acilius Glabrio decreed that no one could be ordered to give evidence if they are their ancestors are past or present clients of the defendant or of his ancestors, or if they or their ancestors are, whether now or in the past, *patrons* of the defendant or of his ancestors,<sup>80</sup> including anyone pleading the case of the defendant.<sup>81</sup> This highlights that Herennius' objection to testifying was partially based on an assumed duty of loyalty and servitude towards his client.

By contrast, the 70 BC proceedings against former Sicilian governor Gaius Verres on a charge of extortion,<sup>82</sup> invited early discussion of 'honour' in connection with men who engaged in the practice of law. This concept was adopted throughout the Ciceronian period, in which Cicero lamented his inability to summon Verres' defence counsel, Quintus Hortensius Hortalus, to testify against his client.<sup>83</sup> Declaring that counsel was feigning ignorance as to 'what our experience at the Bar has repeatedly shown to us',<sup>84</sup>

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<sup>75</sup> Max Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928).

<sup>76</sup> Abel Greenidge, *The Legal Procedure in Cicero's Time*, 484 (2013).

<sup>77</sup> Id; *Plutarch, Lives: Demetrius and Antony. Pyrrhus and Gaius Marius*, Vol IX, Bernadotte Perrin Trans, 5 (1920).

<sup>78</sup> Plutarch, supra 77, 475.

<sup>79</sup> Id; Greenidge, supra 76, 484.

<sup>80</sup> The significance of 'ancestry' rested on the virtuous displays of excellence achieved by past generations of men for the benefit of ancient Rome. Providing structure by operating within a shared behavioural code, an integral feature of the *mos maiorum* was the duty to increase the level of glory for one's family which lasted in perpetuity. See *Sarolta Takacs, The Construction Of Authority In Ancient Rome And Byzantium: The Rhetoric Of Empire* (2009).

<sup>81</sup> *Avalon Project, Acilian Law on the Right to Recovery of Property Officially Extorted*, 122 BC Yale Law School <[http://avalon.law.yale.edu/ancient/acilian\\_law.asp](http://avalon.law.yale.edu/ancient/acilian_law.asp)>.

<sup>82</sup> Max Radin, supra 75, 487.

<sup>83</sup> Id.

<sup>84</sup> Marcus Cicero, *Verrine Orations 2 – Second Pleading Speech on Gaius Verres* (C. D. Yonge Trans, 149 (1903).

Cicero noted that he could not ignore the duty to prosecute ‘so flagrant a plunderer as Verres was commonly believed to be’,<sup>85</sup> particularly in an era when it was becoming increasingly difficult for Roman citizens to obtain justice:

*For indeed, in these days, no surer means of securing our country’s welfare can be devised than the assurance of the Roman people that – given the careful challenging of judges by the prosecutor – our allies, our laws, our country can be safely guarded by a court composed of senators; nor can a greater disaster come upon us all than a conviction, on the part of the Roman people, that the Senatorial Order has cast aside all respect for truth and integrity, for honesty and duty.*<sup>86</sup>

Cicero commented that only a lawyer in his representation of an accused was exempt from bearing witness against him<sup>87</sup> on the grounds that he cannot give testimony in the case he was conducting: ‘Only [the] patronus is exempted from giving evidence’. Cicero’s rationale corresponded with the Herennian decision of 116 B.C. This is significant insofar as it demonstrates that it was merely customary, rather than mandatory, that a lawyer not bear witness against his client.

The ancient incarnation of attorney-client privilege was not the subject of honour concomitant with the practice of law as Wigmore alleged. It was instead grounded in the notion of slavery, with the privilege belonging to the client. This view gains currency when one accepts that the concept of not speaking against one’s client was rooted in an equally old and powerful feeling that a servant must keep his master’s secrets.<sup>88</sup> Within the framework of traditional Roman views, there was an expectation that a promise between lawyer and client created a natural obligation whereby the unifying principles of fidelity and piety would be obeyed by members of the legal fraternity who were conceived of as servants and helpers.<sup>89</sup> In the following section, a selection of academic opinion is

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<sup>85</sup> Frank Cowles, *Gaius Verres: An Historical Study* (PhD thesis, 1917).

<sup>86</sup> Cicero, *supra* 77, 125 [4–5].

<sup>87</sup> *Id.* See also Greenidge, *supra* 76, 484.

<sup>88</sup> Radin, *supra* 75, 487.

<sup>89</sup> *Id.*

considered in order to discern whether the majority of cited authorities echoed Benthamic or Wigmorean sentiments regarding the absorption of Roman legal principles into later English law. This will aid in determining which view prevailed and eventually influenced Lord Taylor in *R v Derby Magistrates' Court; ex parte B*.<sup>90</sup>

## II Genesis of the Privilege: Contrary Academic Views

Albert Alschuler succinctly stated that ‘the history of the privilege ... is almost entirely a story of when and for what purpose people would be required to speak under oath’,<sup>91</sup> while William Twining wrote that attorney-client privilege had ‘a rich and complex history that stretched back at least as far as classical rhetoric’.<sup>92</sup> Geoffrey Hazard noted that ‘the historical record is not authority for a broadly stated rule of privilege’ and commented that it was ‘rather, an invitation for reconsideration’.<sup>93</sup> Eben Moglen noted that the history of attorney-client privilege revealed how procedure made substance and how legal evolution, like natural selection itself, adapted old structures to new functions, bringing us closer to the real mechanisms of legal development.<sup>94</sup> It is of relevance to note that Wigmore made a striking, albeit similar, concession when he stated:

If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form and leaving it with its vigour of life unabated and its legal orthodoxy untainted, it is this rule.<sup>95</sup>

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<sup>90</sup> [1996] AC 487.

<sup>91</sup> Albert Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent* 94 MICH. L. REV. 2625, 2641–2 (1995–96).

<sup>92</sup> William Twining, *supra* 61, viii.

<sup>93</sup> Geoffrey Hazard, *supra* 25, 1070.

<sup>94</sup> Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev 1086, 1090 (1994).

<sup>95</sup> John Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harvard L. Rev. 1, 71 (1891).

Frederick Pollock and Frederic Maitland who, as historians of English law, distinguished themselves through their ‘insights and superb historical sense’,<sup>96</sup> stated that Roman law failed to exhibit a face of authority in the English courts.<sup>97</sup> They perceived the 16<sup>th</sup>-century form of attorney-client privilege as distinct from the privilege practised in the preceding Roman and medieval eras, and offered grounds to support their contention. Firstly, Roman legal principles were not received into later English law, with every shred of evidence belonging to Roman law crushed, thrashed and forced to give up its meaning.<sup>98</sup> Secondly, labelling Roman law a product of time and circumstance, an historical artefact rather than a body of universally valid legal wisdom,<sup>99</sup> they claimed that the duty to uphold client confidences was the result of primitive custom, rather than a natural extension of a formally constituted legal profession governed by a code of conduct.

This assertion stands in contrast to arguments advanced by William Holdsworth, Charles McCormick and Lord Brougham, each of whom affirmed the Benthamic pronouncement that the loyalty owed by a lawyer to his client was deeply rooted in Roman law.<sup>100</sup> Pollock and Maitland concluded that the absence of a fully formed legal profession in Roman times precluded the need to accord special protection to the client–counsel relationship and fixed 3 September 1189 as the date at which English law began to speak clearly, articulately and

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<sup>96</sup> Pollock revered Maitland as ‘a man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field’. Indeed, Maitland used medieval law as a tool to ‘open ... the mind of medieval man and to reveal the nature and growth of his institutions’. Pollock, on the other hand, exhibited ‘commanding qualities of mind and character’, and overwhelmed with the sweep of his learning and knowledge of facts. Robert Schuyler, *The Historical Spirit Incarnate: Frederic William Maitland*, 57(2) *American Hist. Rev.* 303, 303 (1952).

<sup>97</sup> See also Richard Hurd, *Moral And Political Dialogues: Being The Substance Of Several Conversations Between Diverse Eminent Persons Of The Past And Present Age, Digested By The Parties Themselves* 232 (1759).

<sup>98</sup> Frederick Maitland, *Why the History of English Law is Not Written*, *An Inaugural Lecture Delivered in the Arts School at Cambridge* on 13<sup>th</sup> October 1888, 5 (1888)5.

<sup>99</sup> William Bouwsma, *Lawyers and Early Modern Culture* 78(2) *American Hist. Rev.* 303, 326 (1973).

<sup>100</sup> Charles McCormick, *Mccormick On Evidence* 175 (1972). See Also William Holdsworth, *A History Of English Law*, Vol IX, 98 (1944); University of Northern Iowa, *Review: Life and Character of Henry Brougham*, 33(72) *Nth. American Rev.* 227, 247 (1831).

continuously.<sup>101</sup> Brougham noted that the English common law underwent many additions and alterations in the process of time, with parts collected from a variety of ancient Roman codes.<sup>102</sup> Plainly acknowledging the correlation between Roman and Elizabethan principles of confidentiality, Max Radin<sup>103</sup> and James Gardner<sup>104</sup> claimed that traces of Roman law could be found in the procedures of English courts and the reality, whether or not we care to admit it, is that Roman and medieval attitudes are very much “in our bones”.<sup>105</sup>

The effects of Roman law did not disappear entirely, with medieval lawyers deriving much of their law from Roman sources,<sup>106</sup> while courts and jurists adopted the Roman tradition of preventing lawyers from testifying in proceedings in which they were professionally engaged.<sup>107</sup> Bentham stated that this was born of ancient Roman influence. Wigmore discounted its Roman origins and made several conflicting statements in which he variously contended that the privilege came into existence in 1375, was born of the 1562 *Perjury Act*, stated that it did not gain recognition until the 1570s and asserted that the policy of the privilege was granted in the latter part of 1700. Wigmore’s pronouncement lacks the evidential foundation to support it, but his contention proved sufficiently persuasive to convert mainstream thinking into adopting the 16<sup>th</sup> century as the birthplace of the doctrine.

Attorney-client privilege did not arrive in English law on a certain footing. Its way was paved by successive historical steps, including a series of largely isolated responses to

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<sup>101</sup> Frederick Maitland, *supra* 98, 4.

<sup>102</sup> University of Northern Iowa, *Review: Life and Character of Henry Brougham*, 33(72) NTH. AMERICAN REV. 227, 247 (1831).

<sup>103</sup> Max Radin, *supra* 75, 487–8.

<sup>104</sup> James Gardner, *A Re-evaluation of the Attorney-Client Privilege (Part I)* 8 VILL. L. REV. 279, 289 (1963).

<sup>105</sup> Max Radin, *supra* 75, 493.

<sup>106</sup> James Brundage, *Vultures, Whores and Hypocrites: Images of Lawyers in Medieval Literature*, 1 Roman Legal Tradition 56, 57 (2002).

<sup>107</sup> Guillaume Durand, *Speculum Iudiciale*, Sandra Hindman Ed, (2013). See also James Brundage, *supra* 106, 325.

particular problems at different times'.<sup>108</sup> A more appropriate phrasing of its evolution might be that attorney-client privilege, rather than serving as a quaint remnant of an ancient legal system, enjoyed a reassertion of its status, whereby it finally achieved formal recognition in the common law. Attorney-client privilege was boldly articulated in the 16<sup>th</sup> century, but it was not a phenomenon of Elizabethan England. Despite the doctrine coming to prominence in this era when the Court of Chancery issued precedent-making pronouncements on this subject matter, England did *not* give birth to the concept of attorney-client privilege. This is significant because the House of Lords in *Derby* recognised English law as the relevant starting point and consequently overlooked other historical edicts in which the privilege was narrowly construed, with suppression of confidential communications requiring justification rather than being granted automatically.<sup>109</sup>

### III Conclusion

This article has analysed the rationales underpinning the historical justification for attorney-client privilege according to the perspectives of Jeremy Bentham and John Henry Wigmore. The first defining attribute of the privilege was a moral underpinning informed by the concepts of servitude and loyalty rather than profession and honour. The foundations of not speaking against someone with whom one had a particular relationship were embedded in the ancient rationale whereby lawyers were proscribed from testifying against clients.

Wigmore denied the struggles and achievements of his legal predecessors and obscured the ancient common law application of the privilege. This article has demonstrated that, through adopting a Wigmorean view of the history of attorney-client privilege, Lord

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<sup>108</sup> William Twining, *supra* 61, 1.

<sup>109</sup> *Id.*

Taylor's pronouncement in *R v Derby Magistrates' Court; Ex parte B*<sup>110</sup> fails to withstand detailed scrutiny and obfuscates the true heritage of the doctrine.

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<sup>110</sup> [1996] AC 487.