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THE RIGHT AGAINST SELF-INCRIMINATION

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INTRODUCTION

The appearance of the right against self-incrimination – the guarantee that no person "shall be compelled in any criminal case to be a witness against himself" - was a landmark event in the history of Anglo-American criminal procedure. Prior historical scholarship has located the origins of the common law privilege in the second half of the seventeenth century, as part of the aftermath of the constitutional struggles that resulted in the abolition of the courts of Star Chamber and High Commission. This essay tries to explain that the true origins of the common law privilege are to be found not in the high politics of the English revolutions, but in the rise of adversary criminal procedure at the end of the eighteenth century. The right against self-incrimination at common law was the work of defense counsel.

From the middle of the sixteenth century, when sources first allow us to glimpse the conduct of early modern criminal trials, until late in the eighteenth century, the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent, but rather the opportunity to speak. The essential purpose of the criminal trial was to afford the accused an opportunity

to reply in person to the charges against him. Among the attributes of the procedure that imported this character to the criminal trial, the most fundamental was the rule that forbade defense counsel. The prohibition upon defense counsel was relaxed in stages from 1696 until 1836, initially for treason, then for felony. Although persons accused of ordinary felony began to be allowed counsel in the 1730s, defense counsel did not become quantitatively significant until the 1780s.

In the later eighteenth century and especially in the nineteenth century, a radically different view of the purpose of the criminal trial came to prevail. Under the influence of defense counsel, the criminal trial came to be seen as an opportunity for the defendant's lawyer to test the prosecution case. The privilege against self-incrimination entered common law procedure (together with the beyond-reasonable-doubt standard of proof and the exclusionary apparatus of the modern law of criminal evidence) as part of this profound reordering of the trial. It was the capture of the criminal trial by lawyers for prosecution and defense that made it possible for the criminal defendant to decline to be a witness against himself.

As a convenient shorthand, and with apology for the inelegance of the terms, we shall contrast these two conceptions of the criminal trial as the older "accused speaks" theory and the newer "testing the prosecution" theory. So long as the older view of the purpose of the trial held sway, the defendant's refusal to respond to the

incriminating evidence against him would have been suicidal. Without counsel, the testimonial and defensive functions were inextricably merged, and refusing to speak would have amounted to a forfeiture of all defense. The sources show that criminal defendants did not in fact claim any such self-destructive right. Until the later eighteenth century, for almost criminal defendants, defending meant responding in person to the details of the accusation. Only with the ascendance of defense counsel did the "testing the prosecution" trial developed, and only then did it become possible to speak of a privilege against self-incrimination in common law criminal procedure.

Parts I and II of this essay discuss the several attributes of early modern criminal procedure that combined, until the end of the eighteenth century, to prevent the development of the common law privilege. This is done through the analysis of concrete cases. Part III explains the development of the right in America, since the Colonies in the 17th century, and finally reaching the Fifth Amendment, which, if by itself, did not assure the right as it is known nowadays, was the seed thrown in the American land that resulted in a concept accepted all over the world.

I. THE "ACCUSED SPEAKS" TRIAL

In order for a privilege against self-incrimination to function, the criminal defendant must be in a position to defend by proxy. If the defendant is to have a right to remain silent that is of any value, he must be able to leave the conduct of his defense to others. By constricting the use of defense witnesses and defense counsel, common law criminal procedure in the early modern period effectively closed off most avenues of defense-by-proxy. Preceding the criminal procedure of the early modern trial at common law was a set of rules and practices whose purpose and effect were to oblige the accused to respond to the charges against him.

The "accused speaks" trial was already thoroughly entrenched in the 1550 and 1560s, when the historical sources first allow us to see how English criminal trial were conducted. In the treason trial of Sir Nicholas Throckmorton (1554), the plucky defendant complains of many aspects of the procedure to which he is subjected, but not about the incessant questioning from the bench and from prosecuting counsel. Sir Thomas Smith, in the notable Elizabethan tract, *De Republica Anglorum*, describes a hypothetical criminal trial held at provincial assizes about the year 1565. Smith depicts the defendant engaged in a confrontational dialogue with the victim and accusing witnesses, responding immediately to each new item of prosecution evidence. Functioning without the aid of counsel and speaking unsworn, Smith's criminal defendant replies insistently to the questioning and to the testimony of his accusers. After the victim of a robbery testifies to his version of the events, then "the thief will say no, and so they stand a while in altercation...". This famous image of the accused and accuser "in altercation" about the events exemplifies the "accused speaks" trial, the trial whose purpose was to provide the accused an opportunity to explain away the prosecution case.

A. DENIAL OF DEFENSE COUNSEL

The bedrock principle of criminal procedure that underlay the "accused speaks" trial was that a person accused of serious crime was forbidden to have defense counsel. Various justifications were put forth for this rule.

1. COURT AS COUNSEL

It was a dogma that the court was meant to serve as counsel for the prisoner. In many of the great political cases of the sixteenth and seventeenth centuries, the behavior of the bench scarcely bespoke fidelity to the interests of the defendant. For example, Bromley, the presiding judge in Throckmorton's trial, joins the prosecuting counsel, Stanford, in urging Throckmorton to confess the charges, assuring Throckmorton that "it will be best for you". In John Lilburne's 1649 trial, the presiding judge, Keble, having heard the prosecution case mounted by the attorney general but not yet having heard Lilburne's defense, announces to the jury: "I hope the Jury hath seen the evidence so plain and so fully, that it doth confirm them to do their duty, and to find the Prisoner guilty of what is charged upon him". Most of us would hope that our defense counsel could do somewhat better by us.

The Tudor-Stuart bench had its own problems in this turbulent era. Until 1701, judges held office at the pleasure of the crown; the tradition of secure judicial independence lay in the future. Thus, remarked John Hawles in a

famous tract published in 1689 after the overthrow of James II, the Stuart political trials had revealed that the judges "generally have betrayed their poor Client, to please, as they apprehended, their better Client, the King...".

The judges safeguarded the interests of the accused more responsibly in cases of nonpolitical crime. Because such trials go largely unnoticed in the *State Trials* and other law reports of the period, what is known of these cases of routine crime comes mostly from the problematic pamphlet accounts of Old Bailey trials and Surrey assize proceedings. The ordinary criminal case lacked prosecution counsel as well as defense counsel. Accordingly, it was the task of the trial judge to help the accuser establish the prosecution case as well as to be "counsel for the defendant" in the peculiar and restricted sense being described.

The defendant's supposed entitlement to have the trial judge serve as his defense counsel was limited to matters of law, not fact. "[T]he court...are to see that you suffer nothing for your want of knowledge in matter of law", Chief Justice Hyde told a treason defendant in 1663, explaining the limits of the court's duty "to be of counsel with you". John Beattie captures the matter with great insight, observing that the idea that the court would be counsel for the defendant meant "that the judges would protect defendants against illegal procedure, faulty indictments, and the like. It did not mean that judges would help the accused to formulate a defense or act as their advocates". Indeed, the idea of the court as counsel "perfectly expresses the view that the defendant *should not have counsel* in the sense that we would mean". Consequently, "accused felons had to speak in their own defense and to respond to prosecution evidence as it was given, and as they heard it for the first time. If they did not or could not defend themselves, no one would do it for them".

The judges did intervene on occasion to help the defendant in the realm of fact, mainly by cross-examining a suspicious prosecution witness when the defendant appeared ineffectual. But these initiatives were episodic and unpredictable.. "Judges were only occasionally moved to engage in vigorous cross-examinations...For the most part they took the evidence as they found it...They certainly did not prepare in detail for examination and cross-examination; they were not briefed". Thus, although the judges had no reason to persecute wrongfully accused persons, neither had the judges any particular incentive to be vigilant on behalf of defendants. In fact, the judges had a considerable incentive to conduct trials in a fashion that would not interfere with the orderly processing of their large criminal caseloads.

2. THE ACCUSED AS A TESTIMONIAL RESOURCE

The classic justification for deliberately denying the defendant any assistance of counsel in matters of fact appears in the second volume of Serjeant William Hawkins' hugely influential treatise, *Pleas of the Crown*, first published in 1721.

The defendant needs no counsel, wrote Hawkins, because, if the defendant is innocent, he will be as effective as any lawyer. "[E]very one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer...". If the defendant is guilty, however, "the very Speech, gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them". The words *speak*, *speech* and *speaking* appear four times in this short passage, epitomizing in contemporary narrative the image of the "accused speaks" trial.

Hawkins' insistence that the innocent criminal defendant enjoyed a comparative advantage in defending himself at trial is preposterous. Beattie describes the ineptitude of pathetic prisoners attempting to conduct their own trials:

Men not used to speaking in public who suddenly found themselves thrust into the limelight before an audience in an unfamiliar setting – and who were for the most part dirty, underfed, and surely often ill – did not usually cross-examine vigorously or challenge the evidence presented against them. Not all prisoners were unprepared or tongue-tied in court. But the evidence of the printed reports of assize trials in Surrey suggests that it was the exceptional prisoner who asked probing questions or who spoke effectively to the jury on his own behalf.

Hawkins' message is that it is desirable for the accused to speak, either to clear himself or to hang himself. Allowing counsel to meddle with the fact-adducing process would impair the basic purpose of the trial: to hear the defendant speak, not to listen to the artificial Defense of others. Hawkins was warning that the intermediation of counsel would threaten a fundamental premise of the criminal trial of his day – that the defendant should be routinely available as a testimonial resource.

The purpose of the rule denying defense counsel was, therefore, diametrically opposed to the purpose of the privilege against self-incrimination. We touch here upon a deeper truth: *The privilege against self-incrimination is the creature of defense counsel*. The privilege could not emerge so long as the court required the defendant to conduct his own defense. In the "accused speaks" trial of the early modern period, the testimonial function was merged with the defensive function. The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege.

3. RESTRICTING THE ROLE OF COUNSEL

Even after the judges relaxed the prohibition upon defense counsel in the middle of the eighteenth century, they limited counsel's role in order to continue to pressure the defendant to speak at his trial. The judges permitted defense counsel to examine and cross-examine witnesses, but they did not allow counsel to "address the jury" until legislation authorized that step in 1836.

In 1777 a trial judge explained the practice of the day to a defendant at the Old Bailey: "Your counsel are not at liberty to state any matter of fact; they are permitted to examine your witnesses; and they are here to speak to any matters of law that may arise; but if your defense arises out of a matter of fact, you must yourself state it to me and the jury". In an Old Bailey case two decades earlier, when the trial judge called upon the defendant to make his case at the conclusion of the prosecution evidence, the defendant is recorded as saying: "My counsel will speak for me". Counsel at once corrects him: "I can't speak that for you, you must speak for yourself".

Thus, even with defense counsel on the scene, the English legal system of the mideighteenth century was telling the criminal defendant that "you must speak for yourself". This aspiration to capture the defendant as a testimonial resource is perfectly understandable. He is, after all, the most efficient possible witness. Guilty or innocent, he has been close enough to the events to get prosecuted for the offense. Modern continental systems continue to emphasize the advantages of treating the accused as the central testimonial resource. But this is not the conception of criminal procedure that we associate with the Anglo-American privilege against self-incrimination. It seems plainly contradictory to assert that there was a right to remain silent in the eighteenth century when eighteenth-century courts were routinely explaining, even to defendants who were presented by counsel, that "you must speak for yourself".

A. RESTRICTIONS ON DEFENSE WITNESSES

The goal of pressuring the accused to speak in his own defense was achieved not only by denying or restricting counsel, but also by impeding defense witnesses. As with the limitations upon counsel, these obstacles to witnesses obliged the defendant to do his defending by himself – that is, by speaking at his trial.

Throughout the seventeenth century the defendant had no right to subpoena unwilling witnesses. Indeed, in the sixteenth century there were prominent occasions on which trial courts refused to hear defense witnesses who were present in court and willing to testify. When defense witnesses were received, they were forbidden to testify under oath, although accusing witnesses were routinely sworn. The defendant always spoke unsworn – he was forbidden the right to testify upon oath until 1898.

Authorities came to view these limitations on the use of defense witnesses as counterproductive, in the sense that the manifest asymmetry of facilitating prosecution witnesses while denying or hampering defense witnesses offended trial jurors. Perhaps that is why John Lilburne, who was straining to provoke the sympathy of the trial jurors in his 1649 trial, insisted on the right to compulsory process that he knew

was not allowed him. According to the *State Trials* report, Lilburne asks for "subpoenas" for witnesses, because some "are parliament men, and some of them officers of the army, and they will not come in without compulsion".

The Treason Act of 1696 granted compulsory process and allowed defense witnesses to be sworn, but only for treason cases. Legislation of 1702 allowed defense witnesses to be sworn in routine felony trials. The courts construed that legislation as impliedly authorizing compulsory process as well.

Thus, throughout the seventeenth century, the period during which the standard historical account supposes the development of the privilege against self-incrimination at common law, the rules of trial hampered the use of the alternative means of proof – those defense witnesses who would have been needed if the accused were to have an effective right to remain silent.

B. THE STANDARD OF PROOF INCHOATE

McCormick pointed out decades ago that the beyond-reasonable-doubt standard of proof was not precisely articulated in English law until the last decade of the eighteenth century. Barbara Shapiro has collected a good deal of authority showing that there were strong intimations throughout the eighteenth century and earlier that the trier should resolve doubts in favor of the criminal defendant. Still, for so long as the beyond-reasonable-doubt standard lacked crisp formulation, the imprecision pressured the defendant to speak. As Beattie observes of the eighteenth century sources, *if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond a reasonable doubt, but that if he were innocent he ought to be able to demonstrate it for the jury by the quality and character of his reply to the prosecutor's evidence. That put emphasis on the prisoner's active role. He was very much in the position of having to prove that the prosecutor was mistaken... When the evidence had been given for the prosecution, the judge turned to the prisoner and said in effect: "You have heard the evidence; what do you have to say for yourself?". The implications of the judge's question were perfectly clear. When one defended responded simply "I am no thief" and the judge told him "You must prove that", he was stating plainly the situation that every prisoner found himself in.*

Thus, the defendant, who already lacked counsel to probe the prosecution case, also lacked the protection of the modern judicial instruction on the standard of proof that encourages jurors to probe the prosecution case. The defendant had only one practical means of defense – responding in his own words to the evidence and the charges against him.

C. HINDERING DEFENSIVE PREPARATION

Most defendants accused of serious crimes were jailed pending trial, and the conditions in the jails were appalling. Pretrial confinement interacted with the rest of the procedure to disadvantage the defendant, effectively preventing the defendant from locating witnesses and developing his defense.

The law also forbade the defendant from having a copy of the indictment specifying the charges against him, not only in advance of trial, but even at trial. Instead, the court clerk summarized the indictment to the defendant upon his arraignment. The Treason Act of 1696 abrogated the rule against allowing the accused access to the text of the indictment, but only for cases of treason. For ordinary felony cases, the rule endured throughout the eighteenth century, and it impaired the defendant's ability to prepare his defense with precision.

Thus, the defendant was not only locked up, denied the assistance of counsel in preparing and presenting his defense, and restricted in obtaining defense witnesses, he was also given no precise statement of the charges against him until he stood before the court at the moment of his trial. The total drift of these measures was greatly to restrict defensive opportunity of any sort other than responding personally at trial to the incriminating evidence. This aspect of the procedure was not disturbing to contemporaries. Responding in person is just what Sergeant Hawkins' treatise insists the defendant ought to do, and just what the trial sources depict the defendant doing. The logic of the early modern criminal trial was to pressure the accused into serving as a testimonial resource. It is difficult to imagine that a system so preoccupied with obliging the accused to reply at trial could

have been simultaneously intent upon constructing the counterprinciple that is embodied in the modern privilege against self-incrimination.

D. THE "ACCUSED SPEAKS" THEORY IN PRETRIAL PROCEDURE

A criminal trial is an occasion for the consideration of evidence that has been previously collected. A truism of the study of criminal procedure is that the connection between pretrial and trial is intimate. We cannot understand the trial procedure of a legal system without knowing something about how the pretrial process collects evidence for trial. Likewise, to understand the pretrial we need to know how the agencies of trial will subsequently employ the materials that are being gathered in the pretrial.

The Anglo-American tradition tends to be too trial-centered, perhaps because of the drama of the criminal jury trial, and surely because of the importance that trial has had in landmark political cases. Yet, even in the Anglo-American systems, the everyday reality is that pretrial is vastly more important than trial. The evidence gathered determines many more outcomes than how it is subsequently presented. The trial is mostly a pageant that confirms the results of the pretrial investigation, and this truth is among the factors that explain why, when the criminal procedural system crumbled in the twentieth century under caseload pressures, the response was to dispense with trial altogether, transforming the pretrial process into the nontrial plea bargaining system.

The pretrial system that reigned in the second half of the seventeenth century was antithetical to any such privilege. By the midseventeenth century there had been in place for at least a century a system of pretrial inquiry that was devoted to pressuring the accused to incriminate himself. The Marian Committal Statute of 1555 required that a magistrate, called the justice of the peace, should conduct a pretrial examination promptly after the defendant had been apprehended. The justice of the peace was customarily a local gentleman active in civic affairs, not a career officer of the state. The Marian statute required the justice of the peace to transcribe anything that the defendant said that was "material to prove the felony". The statute directed the justice of the peace to transmit this document to the trial court, where it could be used in evidence against the accused. The Marian statute also required the examining justice of the peace to bind over the victim and other accusing witnesses to attend the trial and testify against the accused. The emphasis on testimony against the accused was deliberate. The Marian justice of the peace was not the Continental *juge d'instruction*, not, that is, a professional judicial officer meant to gather evidence impartially. The Marian system was designed to collect only prosecution evidence. In crimes of state, the Privy Council and the law officers of the crown conducted comparable pretrial investigations.

In a prominent article published in 1949, the evidence scholar Edmund Morgan remarked on the tension between the Marian pretrial procedure and the supposed privilege against self-incrimination in the modern early period: *There was no thought of advising the accused that he need not answer or warning him that what he said might be used against him. The justice was often the chief witness at the trial of the accused and either used his record of the examination as the basis for his answers or read the record in evidence for the prosecution.*

Not until Sir John Jervis' Act of 1848 – that is, well into the age of modern lawyer-dominated criminal procedure – was provision made to advise the accused that he might decline to answer questions put to him in the pretrial inquiry and to caution him that his answers to pretrial interrogation might be used as evidence against him at trial. Until then, the accused was expected to answer the inquiries of the examining magistrate, and, indeed, any refusal to answer, whether of his own initiative or on advice of another, was reported and stated by the magistrate in his testimony at the trial.

Thus, the pretrial procedure of the sixteenth, seventeenth and eighteenth centuries was designed to induce the accused to bear witness against himself promptly. Having impaled himself at pretrial, the criminal defendant would find that any supposed privilege against self-incrimination available at trial was worth little. If he declined to testify at trial, or attempted to recant upon his pretrial statement, the pretrial statement would be invoked against him at trial. Then as now, pretrial dominated trial.

This systematic extraction of self-incriminatory pretrial statements bears upon the question of whether early modern English criminal procedure meant to recognize a privilege against self-incrimination. Remarkably, Levy

was quite aware of the character of the Marian pretrial process. Levy's passage reads in full text: "By the early eighteenth century, the privilege against self-incrimination prevailed supreme in all proceedings with one vital exception, the preliminary examination of the suspect. In the initial pre-trial stages of a case, inquisitorial tactics were routine" "For all practical purposes", Levy concludes, "the right against self-incrimination scarcely existed in the pretrial stages of a criminal proceeding. This is an important admission. Levy requires us to believe that the seventeenth-century common law courts and their supporting political authorities created a self-evidently schizophrenic criminal procedure – that they enshrined a privilege against self-incrimination at trial while busily gutting it in the pretrial.

E. TRIAL AS A SENTENCING PROCEEDING

The sentencing practices of the later seventeenth and eighteenth centuries were a powerful source of pressure on the defendant to speak at his trial. Our modern expectation is that sentencing occurs in the postverdict phase, after a separate trial has determined guilt. Further, even in jury-tried cases, we expect the judge alone to pass sentence. In former centuries, this division between trial and post-trial, and between jury and judge, was less distinct. The early modern trial jury exercised an important role in what is functionally the choice of sanction, by manipulating the verdict to select a charge that imported a greater or lesser penalty. A vestige of this power to mitigate the sentence survives in modern practice, when the jury convicts of a lesser-included offense, or when it convicts on fewer than all the counts that are charged and proved.

The practice of selecting among convicted persons for the application of diminished sanctions became characteristic of the eighteenth century as alternatives to the death penalty emerged. If the jury convicted a defendant of burglary, the punishment was death; but if, on the same facts, the jury convicted him of mere grand larceny, the sanction of transportation pertained. Another example: The offense of picking pockets was capital if the jury valued the stolen goods at a shilling or more. If, however, the jury wished to rescue the convict from capital punishment and consign him to transportation, it could value the goods below the one-shilling threshold, for example, by finding the culprit guilty of picking the victim's pocket "to the value of ten pence".

This practice of having juries "downcharge" or "downvalue" in order to mitigate the death penalty, immortalized in Blackstone's phrase as "pious perjury", has been much studied in recent years. It is a main theme of John Beattie's great book, in which he uses the term *partial verdict* to describe these mitigating jury verdicts that convict the defendant in a fashion that begets a reduced criminal sanction. In a sample of London cases from the Old Bailey in the 1750s, we see that the juries returned partial verdicts in nearly a quarter of the cases. For a few offenses, like picking pockets, the juries all but invariably downvalued, expressing a social consensus that the capital sanction was virtually never appropriate. At the opposite end of the spectrum were a few property crimes, highway robbery being the prototype, that were regarded as so menacing that juries virtually never mitigated the capital penalty. Across the broad range of property crimes, however, jury discretion held sway. In deciding whether to return verdicts of mitigation, "juries distinguished, first, according to the seriousness of the offense, and second, according the conduct and character of the accused".

1. INFORMING THE JURY'S DISCRETION

The jury's power to mitigate sanctions profoundly affected the purpose of the criminal trial for those many offenses in which the jury might return a partial verdict. Speaking of the London practice in the 1750s, we can say that *"only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In most cases the accused had been caught in the act or otherwise possessed no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction"*.

Because the main purpose of defending such a case was to present the jury with a sympathetic view of the crime and the offender that would encourage a verdict of mitigation, the criminal defendant labored under an enormous practical compulsion to speak in his own defense. Criminal procedure of this period effectively merged the guilt determining function and the sentencing function into a single proceeding, the trial. The procedure foreclosed the defendant from participating in what was functionally his sentencing hearing unless he spoke at trial about the circumstances of the offense and of his life and character. To be sure, character witnesses could and did carry

some of this burden for the defendant in some cases; it was not impossible to remain silent and still obtain jury leniency. But it was a great risk that few defendants had the stomach to undertake.

The partial verdict system abated slowly, toward the end of the eighteenth century and during the early decades of the nineteenth century. The modern system of postverdict judicial sentencing arose in response to many factors. The movement to revise the substantive criminal law by consolidating and rationalizing the categories of offenses invited the grading of sentences according to severity. This movement was deeply connected to the transformation of criminal sanctions, as imprisonment became the routine punishment for cases of serious crime. The older sanctions, death and transportation, had lent themselves to jury manipulation, because they came as "either-or" choices. The new sanction of imprisonment for a term of years was all but infinitely divisible. It invited the concept of sentence range, which effectively transferred from the jury to the judge the power to tailor the sentence to the particular offender. But, throughout the eighteenth century, the jury-driven system of mitigation by means of the partial verdict placed an enormous premium on the defendant's willingness to talk to the jurors at trial.

2. INFORMING THE JUDGE'S POSTVERDICT REVIEW

The trial judges exercised a postverdict discretion to recommend clemency to the crown. In administering the pardon process, the judges depended upon information gleaned at trial for their view of the offender. A main reason that the judges discouraged guilty pleas in seventeenth and eighteenth-century criminal trials was the wish to learn about the offender at trial in the event that a convict sought clemency. A Surrey assize judge sitting in a case in 1751 explained that he hanged a man who had pleaded guilty because the guilty plea had shut the judge "out from all evidence and circumstances favorable and unfavorable which might have appeared". Thus, the clemency aspect of the sentencing process reinforced the tendency of the jury mitigation system, placing the criminal defendant under further pressure to speak at his trial.

A. NO PRIVILEGE IN THE "ACCUSED SPEAKS" TRIAL

We have observed a host of reasons for doubting that the privilege against self-incrimination was in force in the later seventeenth and eighteenth centuries. Denial of counsel and restrictions on defense witnesses and on defensive preparation left the typical defendant with little alternative but to conduct his own defense. The invasive Marian pretrial process, untouched by any supposed privilege against self-incrimination, stacked the deck with self-incriminating evidence for the trial. And a system of draconian criminal sanctions frequently operated to condition escape from the death penalty upon the defendant's contrite participation at trial.

When, therefore, we examine the surviving evidence of how trials actually transpired in this legal system, we cannot be surprised to find that criminal defendants actually claimed no privilege against self-incrimination. In a word, they sang. In the pamphlet reports of London trials "from the 1670s through the mid-1730s I have not noticed a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination".

Beattie, concentrating on Surrey sources for the years between 1660 and 1800, makes a similar observation: "*There was no thought that the prisoner had a right to remain silent on the grounds that he would otherwise be liable to incriminate himself...*" Indeed, "*the assumption was clear that if the case against him was false the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence*".

II. DEFENSE COUNSEL, ADVERSARY PROCEDURE, AND THE PRIVILEGE

The privilege against self-incrimination is an artifact of the adversary system of criminal procedure. Only when the modern "testing the prosecution" theory of the criminal trial displaced the older "accused speaks" theory did the criminal defendant acquire an effective right to decline to speak to the charges against him. The historical bearer of the new criminal procedure was defense counsel, who crept into the ordinary criminal trial almost unnoticed, and who then worked a drastic procedural revolution with consequences that still reverberate through Anglo-American criminal justice.

A. ALLOWING DEFENSE COUNSEL

The prohibition on defense counsel was first relaxed in the landmark Treason Act of 1696, the first comprehensive charter of defensive safeguard in the Anglo-American history of criminal procedure. During the 1690s, it came to be understood that the treason trials conducted under the regime of the later Stuarts had been grievously unfair. Especially during the dozen years from the Popish Plot trials of the later 1670s until the Revolution of 1689, innocent persons of the politically significant classes had been convicted and had suffered traitor's deaths for want of the ability to defend effectively against baseless prosecutions.

Defensive safeguard was a novel topic for English criminal legislation. The preamble to the Treason Act of 1696 announced the proposition that persons accused of treason should be allowed "just and equal means for defense of their innocencies in such cases". The Act provided a package of reforms directed at eliminating many of the procedural disadvantages that occurred in the "accused speaks" trial. The Act allowed the accused a copy of the indictment five days in advance of trial; it granted the right "to advise with counsel" upon the indictment; and it spelled out the right at trial to make "full defense, by counsel" – meaning that defense counsel would be permitted not only to examine and to cross-examine, but also to sum up and to address the jury about the merits of the defendant's case. The Act granted the accused the right to have defense witnesses heard, the right to have them sworn, and the right to have them subpoenaed.

The grant of defense counsel in the Treason Act of 1696 was carefully limited to treason trials, which occurred extremely rarely. There was a sense that treason defendants were specially disadvantaged on account of the hostility of the bench. Because judges were subservient to the crown in prosecutions touching high politics, it was unrealistic to expect them to serve the supposed judicial role of counsel for the defendant. Further, the denial of defense counsel had a special one-sidedness in treason cases, for the crown was invariably represented by counsel. By contrast, in cases of ordinary felony, prosecution counsel appeared exceedingly rarely. The rationale for allowing defense counsel in the Treason Act of 1696 was, therefore, to even the scales.

Defense counsel entered the ordinary criminal trial in the 1730s, not as a result of legislative change, but through the exercise of judicial discretion. Something of the same "evening-up" rationale that lay behind the allowance of defense counsel in the Treason Act of 1696 seems to have accounted for the decision of the courts to admit defense counsel in cases of ordinary felony. There appears to have been a considerable increase in the use of prosecution counsel in the 1710s and 1720s, and "the resulting disparity may have influenced the judges to relax the prohibition on defense counsel". The use of defense counsel remained a relative trickle for another half century, until the 1780s.

B. THE ADVERSARY DYNAMIC AND THE RECONSTRUCTION OF THE CRIMINAL TRIAL

During the second half of the eighteenth century and continuing into the nineteenth century, our criminal procedure underwent that epochal change from the "accused speaks" trial to the modern "testing the prosecution" trial. We have seen how relentlessly the earlier system of trial pressured the criminal defendant to speak. Within the space of a few decades, the expectation that the accused would defend himself disappeared. Defense counsel made possible that remarkable silencing of the accused that has ever since astonished European commentators. As early as 1820 an official French observer, Cottu, reported back to his government that in English criminal procedure prosecuting counsel was "forbidden to question the prisoner... In England, the defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute at the trial".

Writers do not yet have an adequate historical account of the stages by which this transformation occurred, and the historical sources are sufficiently impoverished that they may never recover the events in adequate detail. Nevertheless, the outline seems tolerably clear. Across these decades, defense counsel broke up the "accused speaks" trial. In these developments we find not only the beginnings of a new theory of the trial, but also the real origins of the privilege against self-incrimination.

The initial restrictions on the role of defense counsel at trial suggest that his primary responsibility in the eighteenth century was cross-examining prosecution witnesses. Especially in cases involving reward seekers and crown witnesses, those shady figures whom the embattled London authorities sometimes employed to

compensate for the English reluctance to institute professional policing, vigorous cross-examination often prove decisive. Thus, as Beattie remarks, defense counsel "began to shift the focus of the defense in a fundamental way by casting doubt on the validity of the factual case being presented against the defendant, so that the prosecution came increasingly under the necessity of proving its assertions. There were several strands to this development of the trial as the occasion for defense counsel to test the prosecution case.

First, the concept that we now identify as party production burdens came to be articulated. Prosecution and defense "cases" replaced the spontaneous "altercation" described by Sir Thomas Smith. Smith's defendant replied to each piece of prosecution evidence as it was presented. When defense counsel came to prominence, the concept of prosecution and defense "cases" developed – that is, the idea that the prosecution had to present all its evidence, and be subject to the defense counsel's motion for directed verdict at the end of the prosecution case, before the defendant would present rebuttal evidence.

Second, towards the end of the eighteenth century the presumption of innocence – the beyond-reasonable-doubt standard of proof – was formulated. Coupled with the prosecutor's production burden, the beyond-reasonable-doubt standard encouraged defense counsel to silence the defendant and hence to insist that the prosecution case be built from other proofs.

Third, the law of criminal evidence formed in the later eighteenth and early nineteenth centuries. "In their objections against the admission of certain kinds of evidence, and most especially by their conduct of cross-examination, defense counsel sought to limit the case their clients would have to answer". With the increasing use of lawyers from the 1780s came lawyer's literature, especially the *nisi prius* reports, upon which the evidence treatises of the early nineteenth century would draw for sources.

Fourth, the growing use and effectiveness of defense counsel begot ever greater use of prosecuting counsel. The private associations for the prosecution of felons formed in great numbers from the 1770s and 1780s. These complex organizations served a number of functions, but their central purpose was to defray the victim's costs of investigation and prosecution in certain classes of property offenses. There is evidence for thinking that the surge in the formation of these groups reflects in part the need to prepare prosecution cases better, in order to deal with the new hazards of aggressive defense counsel as the "testing the prosecution" trial came to prevail.

Fifth, the judge declined in importance as counsel for prosecution and defense took over the job of examining and cross-examining witnesses. Cottu, the French observer writing in 1820, thought that prosecution and defense counsel were typical in the practice of provincial assize courts, although not yet in London. He found that "the judge... remains almost a stranger to what is going on", contenting himself with taking notes and summarizing them for the jury at the end of the trial.

Finally, changes in the practice of jury control in this period, highlighted by Fox's Libel Act of 1792, reflect the decline of judicial influence over the trial jury. Counsel's increasing control of the conduct of the trial was inconsistent with the older informal system of jury control that presupposed the casual intimacy of judge and jury.

Defense counsel silenced the criminal defendant in the second half of the eighteenth century for reasons of strategic advantage, as the logic of the adversary procedure unfolded. Counsel welcomed the opportunity to pour this new wine into an old vessel, the maxim *nemo tenetur prodere seipsum*, the centerpiece of the traditional account of the history of the privilege against self-incrimination. By the time that Bentham began complaining about the privilege against self-incrimination in the first decades of the nineteenth century, adversary procedure had become the norm. Defense counsel made the privilege against self-incrimination possible. Defense counsel disentangled the defensive and the testimonial functions that previously had been merged in the hands of the defendant. By assuming the defensive function, and doing it within the structure of the adversary criminal trial, counsel largely suppressed the defendant's testimonial role. Defense counsel must have been delighted to ascribe this radical reconstruction of the criminal trial to a centuries-old maxim of soothing constitutional dignity.

Given the concrete aspects of the development of the right, it's now time to analyze the formal legislative construction through which it was inserted in the American Colonies.

I. THE RIGHT IN AMERICA

A. THE AMERICAN COLONIES IN THE 17TH CENTURY

The right against self-incrimination evolved in America as part of the reception of the common law's accusatorial system of criminal procedure. American constitutions enshrine the various rights that cluster around that system; indeed, the "bills of rights" deal for the most part with such procedural matters as indictment, trial by jury, confrontation, representation by counsel, freedom from unreasonable searches and seizures and from cruel and unusual punishments, bail and habeas corpus. The right against self-incrimination had been, of course, a common-law right since the middle of the seventeenth century. As such it was part of the common-law inheritance.

That does not mean that the right was easily, ritualistically, or uniformly adopted in America. Its reception cannot be taken for granted in any colony. Most rights, in fact, whether recognized by some great English statute as the Petition of Right or the Habeas Corpus Act of 1679, or whether transmitted by common-law tradition like trial by jury, had to be fought for and won in America against England or local authorities or both. Before as well as after its acceptance in England, the right against self-incrimination had to win its way to recognition in every colony.

There is no doubting that England intended her law, the common law included, to be transplanted to her colonies. The first generations of colonists may have been most familiar with the customary law of the local courts of the county, borough, or manor in civil matters, but it was the common law, especially its instrumentalities and procedures, that they knew best and emulated in criminal matters.

The first charter issued to an American colony, that for Virginia in 1606, included a cherished provision that the colonists and their descendants were to "have and enjoy all liberties, franchises and immunities... as if they had been abiding and born, within this our Realm of England, or any other of our said dominions". In time the colonists inferred from these words broad guarantees of civil liberty and self-government, although in 1606 the words imported considerably less. But they did signify trial by jury and whatever related procedural rights the criminally accused then possessed in England. Subsequent charters of Virginia, of New England in 1629, of Massachusetts Bay in 1629, of Maryland in 1632, and of later colonies carried a similar guarantee.

An exact duplication of English common-law criminal procedure did not exist anywhere in the colonies in the seventeenth century, especially not in the earlier decades. Nor was the procedure the same in the various colonies. Significant variations existed among them, as well as between England and them, because of the differences among the colonies and between the new world and the old. The thirteen colonies were settled at different times – the first settlements in Virginia and Georgia were separated by a century and a quarter – under different circumstances by different groups for different purposes. Great distances, frontier conditions, political and religious dissimilarities, and a scarcity of lawyers and law books required improvisation that resulted in some indigenous legal developments from colony to colony, especially on the substantive side of the law. But the common law was so much a part of the colonial inheritance that not even the popular hostility to England during the Revolutionary era could alter that system as the basis of the emergent American law.

After the Declaration of Independence, every state except Connecticut and Rhode Island provided by constitution or statute that the common law of England as previously practiced should remain in force until such time that it might be altered legislatively. What is significant is that the American devotion to the common law was based not on a respect for its crabbed technicalities nor on its many reactionary features, but on its emphasis upon fundamental law and the liberty of the subject. In American thinking, the common law was a repository of constitutional principles that secured individual rights against government intrusion.

The right against self-incrimination, as we have seen, arose as a shield against inquisitions into crimes essentially political or religious in nature. It was an indispensable ally to Lambert's proverb that thoughts be free and need pay no toll, or, rather, was a device of desperation on the part of a Nonconformist to ward off the necessity of responding to incriminating interrogatories that sought to establish his guilt for a crime of opinion. The same conditions that gave rise to the invention of the right in England could reproduce it in America.

Not surprisingly the first American echoes of the English experience with the right against self-incrimination were heard in Massachusetts where puritan statecraft, religion, and intolerance could be practiced in a way never possible in England and where the most widely read book, next to the Bible, was probably Foxe's *Book of Martyrs* with its dozens of instances in which Protestants claimed that no man was bound to accuse himself. The claim first cropped up in Massachusetts in 1637. The protagonist of the Massachusetts affair, which occurred about six months earlier, was the Reverend John Wheelwright, a new arrival in the colony. Wheelwright, who had been deposed from the ministry in England because of his religious heterodoxy, was the brother-in-law of Anne Hutchinson. He shared with her the Antinomian idea that faith alone, rather than good works, was necessary for salvation because everything depended upon God's grace.

Wheelwright's friends were determined that he should receive a fair hearing. They had apprised him in advance of the reason for the examination, and on his appearance the General Court immediately informed him that he had been summoned to account for some controversial passages in his sermon. Wheelwright then refused to answer any further questions. Winthrop defensively explained that the reason for the controversial question "was not to draw matter from himself whereupon to proceed against him" – a tacit recognition of his right not to answer an incriminating question, or, at least, a denial that the court sought to convict him on his involuntary confession.

If there was a limited recognition of the right against self-incrimination in the Wheelwright case, it worked no miracles: the right was no more established in New England because of Wheelwright than in England, in 1637, because of Lilburne. State and church in Massachusetts Bay were too insecure, the opposition too weak.

The Body of Liberties of 1641 and its subsequent explication show more clearly the state of the right in early Massachusetts. That remarkable document, one of the easiest codifications of the law, was intended, at least in part, as a bill of rights or, rather, a bill of restraints on the discretionary power of the magistrates. In 1635 the deputies, Winthrop recorded, "conceived great danger to our state" because the magistrates, "for want of positive laws, in many cases, might proceed according to their discretions..." It was therefore agreed that the colony should have a "body of grounds of laws, in resemblance to a Magna Charta, which... should be received for fundamental laws". After several committees had deliberated over a period of six years, the General Court adopted the revised Magna Carta, or Body of Liberties. Although it was no flaming libertarian document – blasphemy and the worship of false gods were among the capital crimes – there were a number of significant guarantees that matched the best of English fundamental law. Beginning with a paraphrase of chapter twenty-nine of Magna Carta, the Body of Liberties provided for equal protection of the laws, compensation for the public taking of property, the abolition of monopolies, open access to all courts and town meetings with the right to speak and write respectfully, trial by jury, the right to bail, freedom from double jeopardy, freedom from cruel physical punishments, the right of all freemen to vote, a limited freedom from imprisonment for debt, and the right to travel.

In this context Liberty 45 provided in somewhat equivocal terms for the right against self-incrimination: "*No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and suffittient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane*". Clearly Liberty 45 was intended to restrict the use of torture, but just as clearly the purpose of the restriction was to establish, at least partially, a right against self-incrimination, for it completely abolished torture to force a confession of one's own guilt. It permitted torture only for the purpose of incriminating others, and then only after the victim had been convicted in a case where it was obvious that he had had confederates. However chilling Liberty 45 seems to the modern reader, it was comparatively humane in 1641. Yet it most certainly did not recognize a right to remain silent before an incriminating question in a public trial, when the defendant had been duly accused.

The ambiguities in the Body of Liberties perplexed even its authors. The need for clarification arose almost immediately.

The state of the law in early Massachusetts and Connecticut, with respect to the right against self-incrimination, seemed at best to be similar to that of England in 1641. Winthrop's statement meant that Massachusetts lagged

behind England in its development.

Legal practice, or the law in action, tells at least as much as legal ideals. The cases of Samuel Gorton and of the Robert Child remonstrants suggest that the right against self-incrimination held no honored place in Massachusetts legal practice, despite Puritan familiarity with the *nemo tenetur* doctrine. Those cases also suggest that when confronted by obstreperous religious enemies, the Puritan authorities would surrender any standard of criminal procedure in order to insure the triumph of their suppressive objectives.

The Child remonstrants paid heavily for their opinions and daring, but they helped mightily to force the government to accept certain reforms. A law of 1647 extended to nonfreemen the right to vote on local matters, the right to hold local office, and the right to serve on juries. A year later, the legislature superseded the Body of Liberties of 1641 by adopting a far more comprehensive and detailed code, the General Laws and Liberties of 1648. The code of 1648 re-enacted Liberty 45 of the Body of Liberties, outlawing the use of torture to coerce self-incrimination, though permitting torture after conviction to force the revelation of fellow conspirators. Liberty 3 was also re-enacted, forbidding all oaths except as the General Court might require.

In Connecticut, where the legal code was influenced by that of Massachusetts, the legislature adopted a liberalized version of Liberty 45 in 1673, omitting the exception to the rule against torture. Although no one could be physically forced to testify against himself, nor by tacit understanding be put to any equivalent of the oath *ex officio*, Connecticut did not prohibit incriminating questions or bullying the prisoner. But even in England at that time, the right against self-incrimination merely vested a lawful option to remain silent; it did not immunize either the suspect or the accused against sharp and intimidating interrogation that aimed at drawing his confession. There is nothing showing a tender regard for the rights of criminal defendants in Connecticut or elsewhere in the mid-seventeenth century. Massachusetts in 1657 gave statutory recognition to the principle that the defendant should be presumed innocent until proved guilty, yet in Massachusetts, as in Connecticut and Plymouth, men were convicted in some cases not because their guilt was proved but because they refused to take an oath of purgation.

Failure to take it had the same incriminating effect as a confession, and in such cases the oath of purgation operated like the oath *ex officio*. In Maryland, however, the testimony of the accused was not taken on oath. In an inquiry of 1647, involving illicit trade, the governor directed his commission to obtain the truth by testimony given under oath, if necessary, by all persons "other than the parties themselves". By the ordinary practice of the common law, the accused was never examined under oath.

Nothing like purgative oaths or the oath *ex officio* was known in Rhode Island. There was an express prohibition against taking the examination of a suspect on oath, yet nothing in the elaborate provisions of the code recognized the right of the accused to be immune from compulsory self-incrimination. Thus, the respect accorded by Rhode Island to common-law procedures and her guarantee of the right of counsel at an early date suggests, in the absence of evidence to the contrary, that progressive Rhode Island may have given to the right against self-incrimination the same recognition as England did in the seventeenth century. But that conclusion is speculative.

The passage of time, greater familiarity with English decisions and law books, and the resentment against the inquisitorial tactics of prerogative courts had the combined effect of making the right better known. In New York under Dutch rule it was not a right at all, but the concept behind the right was not unknown. In Massachusetts a quarter of a century after the Child Remonstrance the judiciary may have routinely respected invocation of the right. In Virginia, shortly after, there is definite evidence of its acceptance.

The only reference to the right in Virginia's long colonial history crops up, perhaps significantly, in 1677, in the aftermath of Bacon's Rebellion. The Grand Assembly, then the supreme judicial body as well as provincial legislature, "declared that the law has provided that a witness summoned against another ought to answer upon oath, but no law can compell a man to swear against himself in any matter wherein he is liable to corporal punishment". This declaratory statement of the law followed a rule of the common law of England which since 1649 had extended the right against self-incrimination to witnesses.

In Pennsylvania, which followed Virginia's example in 1776, the history of the right against self-incrimination is clearer. The fundamental laws of 1682 provided rules for the courts and the conduct of trials; these laws specified the rights of accused persons, yet did not guarantee the right against self-incrimination. Nevertheless, an incident of 1685 is revealing. The episode is significant as the first recognition in America that the right against self-incrimination could extend to a legislative investigation.

News of the Glorious Revolution in England touched off the overthrow of Andros in Boston, followed by a rash of justifications for the event. Among the grievances alleged against Andros's oppressive rule was the charge that persons were summoned from remote counties before the governor and council for examinations which were "unreasonably strict, and rigorous and very unduly ensnaring to plain unexperienced men". Andros had apparently turned the tables on Winthrop's descendants by forcing them to incriminate themselves. The experience inspired a fresh respect for a common-law rule that had become firmly established in England. In 1692, a year after Massachusetts received a new charter restoring a large measure of self-government, an act of the legislature controlling the sale of liquor obligated all persons to give evidence under oath respecting breach of the laws, excepting the accused party, his family, and servants. The act, in other words, exempted him from having to testify against himself and even exempted his dependents.

Although the witchcraft trials seem to disprove the existence of the right against self-incrimination in Massachusetts, they were an exception. They were certainly the product of a frenzy or craze that was extraordinary in procedural as well as in other respects.

In 1698 Connecticut regulated the testimony of witnesses in criminal cases by requiring that witnesses must give sworn evidence under an oath to tell the whole truth, on pain of being imprisoned for refusal, "alwayes provided that no person required to give testimonie as aforesaid shall be punished for what he doth confesse against himself when under oath". Thus, he could be forced to give self-incriminating evidence, but it could not be used against him. In effect the statute extended the right to witnesses, implying its prior existence for criminal defendants. By an act of 1703 the policy of giving immunity was supplanted by vesting in the witness a right to remain silent about matters that might incriminate himself personally. He must take the oath and tell all "so farre as it concernes any other person besides himselfe...". The Pennsylvania Charter of Privileges of 1701 had achieved the same result by specifying, "That all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors".

As the seventeenth century closed, the right against self-incrimination was uncertainly founded in America. There were several colonies, the Carolinas, for example, in which it appears to have been unknown or, to be more accurate, nothing about its existence can be determined from legislative or judicial records. In other colonies, as in Maryland, the right was known by some defendants but received unequal respect from the authorities, especially from the prerogative court of governor and council if not from the judicial courts of the common law. Elsewhere the laws or courts recognized the right, as in Jersey or Connecticut, but it was inconsistently observed, sometimes grossly breached, as in Massachusetts or Virginia; the breaches, significantly, occurred mainly in the prerogative rather than the common-law courts. On the whole, however, despite the silence of the sources, the breaches, the lapses, and the inconsistencies, there had been considerable progress over the course of the century toward the establishment of the right.

B. ESTABLISHMENT OF THE RIGHT IN AMERICA

The right against self-incrimination was but shakily or unevenly established in America by the close of the seventeenth century. But a perceptible change was occurring in the legal development of all the colonies: the English common law was increasingly becoming American law. The degree to which that was true varied from colony to colony, and the pace was not the same in each. But in all, as their political and economic systems matured, their legal systems, most strikingly in the field of criminal procedure, began more and more to resemble that of England. The consequence was a greater familiarity with and respect for the right against self-incrimination.

In view of the fact that the right had by then become entrenched and respected in England, its existence in New York and in other colonies should be expected, its absence would be an astonishing departure from the general

reception of the common law's accusatorial system of criminal procedure. Because England provided the model, English history, English law books, and English criminal practice are at the source of any understanding of the right in New York and the other colonies.

Almost any law book that touched criminal law might be used to prove that information about the right was available to the colonists. In the most widely used English law dictionary of the eighteenth century, written by Giles Jacob, the broad proposition is stated under "Evidence" that "the witness shall not be asked any question to accuse himself". Jacob cited Coke's *Institutes*, Hobbes's *Leviathan*, and the *State Trials* as his authorities. He restated the proposition in his popular guidebook, *Every Man His Own Lawyer*, the seventh edition of which was published in New York in 1768. In a political tract described by Clinton Rossiter as "the most popular statement of English rights during the second half of the colonial period", Henry Care condemned Star Chamber practice as contrary to all law and reason, "For No Man is bound to accuse himself". In *The Security of Englishmen's Lives*, a popular treatise on grand juries, John Somers, the Lord Chancellor of England, declared that it was lawful for witnesses before grand juries "to refuse to give Answer to some Demands which the Jury make; as where it would be to accuse themselves of Crimes". These seventeenth-century books by Care and Somers were reprinted in eighteenth-century America, each for the second time on the eve of the American Revolution.

Even the works of the libertarian Continental jurists, Jean Jacques Burlamaqui and Samuel von Pufendorf, who were read in America not only by lawyers but by political theorists from John Wise to John Adams, contained the principle that a criminally accused person is under no obligation to expose himself to punishment by answering incriminating interrogatories. Pufendorf even concluded that "no Man is bound to accuse himself" in civil as well as in criminal cases. While he approved of putting a defendant to his oath, a practice condemned in English law, he observed that oaths should not be administered if the consequences of confessing the truth entailed capital punishment, "any grievous inconvenience", an offense to conscience, or "very considerable Damage".

The fact must be emphasized that the right in question was a right against *compulsory* self-incrimination, and, excepting rare occasions when judges intervened to protect a witness against incriminating interrogatories, the right had to be claimed by the defendant. Historically it has been a fighting right: unless invoked, it offered no protection. It vested an option to refuse answer but did no bar interrogation nor taint a voluntary confession as improper evidence. Incriminating statements made by a suspect at the preliminary examination or even at arraignment could always be used with devastating effect at his trial. That a man might unwittingly incriminate himself when questioned in no way impaired his legal right to refuse answer. He lacked the right to be warned that he need not answer, for the authorities were under no legal obligation to apprise him or his right. That reform did not come in England until Sir John Jervis's Act in 1848, and in the United States more than a century later the matter was still a subject of acute constitutional controversy. Yet if the authorities in eighteenth-century Britain and in her colonies were not obliged to caution the prisoner, he in turn was not legally obliged to reply. His answers, although given in ignorance of his right, might secure his conviction, but by the mid-eighteenth century the courts, at least at Westminster, were willing to consider the exclusion of confessions that had been made involuntarily or under duress. The lawyers of the colonies, familiar with Gilbert's *Law of Evidence*, knew that a coerced confession was not to be trusted.

That the right first became an issue in New York under English rule as a result of the inquisitorial tactics of the same prerogative court, in a case of 1698 heavy with political implications, fits a revealing pattern. Thus Weaver, who later became attorney-general, and James Graham, Bellomont's attorney-general, explicitly acknowledged that a man might not be forced to testify against himself in a criminal matter, not even by the governor and council.

In 1702 William Atwood, the Chief Justice of New York, and Samuel Shelton Broughton, the new attorney-general, also acknowledged the right in connection with the sensational treason trial of Bayard and Hutchins. After the conviction of the defendants, Bayard's friends petitioned the Board of Trade and charged that an attempt had been made to force Hutchins to incriminate himself in a criminal matter. Sir Edward Northway, Attorney-General of England, informed the Board of trade that "it appears by the warrant for committing Hutchins that the Council required him to produce a libell he is charged to be author of *which was to accuse*

himself and his refusal to produce it is alleged as part of his Crime". The Privy Council ruled that the convictions were illegal and ordered the annulment of the sentences.

In 1707, at the trial of Francis Makemie, a Presbyterian minister charged with preaching without a license, the defendant voluntarily, indeed, eagerly, answered all questions, however technically incriminating. His successful defense was based on the rights of conscience as protected by the Act of Toleration. In the contemporary account of his trial, which Makemie himself probably wrote, there is a heated passage against Governor Cornbury's attempt to induce Makemie's friends to incriminate each other, though not themselves. Several men were examined under oath "to discover what Discourse they had with sundry of their friends". The author of the account rages that "the practice is not to be outdone, yea, scarce paralleled by *Spanish Inquisition*; for no men are safe in their most private Conversations, if most intimate Friends can be compelled upon Oath, to betray one another's Secrets. If this is agreeable to English Constitution and Privileges, I confess, we have been hitherto in the Dark". It is not likely that the author would have regarded involuntary self-accusing in a better light.

The developing recognition of the right against self-incrimination in New York had its parallels elsewhere. In 1735 there was a sensational case in Pennsylvania that was unusual for that late date and place. The case involved an ecclesiastical inquiry into heresy, bringing Benjamin Franklin to the defense of the right. Franklin, in an angry pamphlet which quickly sold out, reported that Hemphill had refused to submit his sermons to the commission, because "It was contrary to the common Rights of Mankind, no man being obliged to furnish Matter of Accusation against himself".

The best evidence that the right was honored in Pennsylvania derives from the conduct of the provincial Assembly. In 1756, for example, the Assembly, after debate, resolved: "That no questions be asked the Witness of either Side, which may tend to make them criminate themselves; and that therefore all Questions shall be first proposed to Mr. Speaker, who is to put such of them as he judges not to have that Tendency".

By the mid-eighteenth century the right against self-incrimination was also firmly fixed in Massachusetts law. Like its counterpart in Pennsylvania, the Massachusetts legislature had behaved in a high-handed, even tyrannical manner, seeking to suppress criticism by arbitrary proceedings, but had yielded, if begrudgingly, to a direct invocation of the right against self-incrimination.

In New York, meanwhile, the course of events signaled an ever broadening respect for the right. William Smith, Jr., in 1757, had lent his influence against incriminatory oaths of purgation. In Maryland at about this time the law was settled on the point that a witness in a civil case could not be required to answer questions that might reveal criminal liability.

In the 1760's the opposition to general search warrants gave the right against self-incrimination a tremendous boost, first in England, then in America. The English courts extended the right of silence to prevent the use of general warrants to seize private papers in seditious libel cases. Thus the right against self-incrimination and freedom of the press, with which it was so closely allied in its origins, were linked to a right to be free from unreasonable searches and seizures.

Camden held that neither arrests nor general warrants could issue on executive discretion, and implied that evidence seized on the authority of a general warrant could not be used in court without violating the right against self-incrimination. Clearly, he laid the foundation of the right against unreasonable searches and seizures in order to fortify the already strained principle of the *nemo tenetur* maxim. Never before had it extended to illegally seized evidence. Two centuries after *Entick v. Carrington*, the Supreme Court reaffirmed that the two freedoms – against unreasonable search and seizure and against compulsory self-incrimination – are complementary to, though not dependent upon, each other. At the very least, the two amendments when taken together assure that no man be convicted on unconstitutional evidence.

In America, where libertarian thought, excepting on questions of religious liberty, usually lagged behind English models, the legality of general search warrants had been an earlier target of attack. Yet the American lawyers failed to make as imaginative a use of the right against self-incrimination, even though the warrants they

vehemently opposed were more dangerous, that is, more general, than those associated with the prosecutions of Wilkes and Entick.

The English warrants were general with respect to the objects of the search, but specific as to person, place, and time. In the colonies, the writs of assistance, as the warrants issued to customs officials were called, were general in every respect; on the other hand, they were issued by the courts on the authority of acts of Parliament.

The American argument brought the right against self-incrimination into play in connection with a procedure related to and following the use of writs of assistance. The writ was a device used by customs officials to search for contraband, goods that had been loaded from or smuggled into a colonial port in violation of the revenue acts or the acts regulating colonial trade. At the discretion of the customs officials, suits for penalties and forfeitures in such cases could be brought in the courts of vice admiralty. Those courts followed civil-law, rather than common-law, procedures. Armed with the testimony of informers who might gain one-third of the value of ship and cargo in the event of a conviction, prosecutors initiated cases by merely bringing an accusation or information. No grand jury indictment was necessary. The trial was without a jury. The judge held irregular sessions, used secret examinations and interrogatories, both written and oral, and then issued his decree.

Admiralty procedures, Otis said, in 1764, "savour more of... Rome and The Inquisition, than of the common law of England and the constitution of Great-Britain". Another American propagandist compared the vice-admiralty courts to the "High Commission and Star Chamber courts". These exaggerations seemed true to anyone devoted to the common law, as were all Americans who opposed the revenue measures of the 1760's. When they damned the civil-law procedures of the vice-admiralty courts as violative of the rights of Englishmen, they knew that no jury would return a verdict of guilty against anyone accused of breaking one of Parliament's detested and allegedly unconstitutional revenue acts. In England, moreover, such cases could be tried only by the common-law Court of Exchequer.

Henry Laurens, a wealthy, influential, and very conservative merchant-planter of South Carolina, fell prey to the rapacity of the customs officers and the vice-admiralty judge in Charleston. Within three months in 1767, three of his ships were seized on insubstantial charges. In two of the cases, judge Ejerton Leigh released the vessels on ground that there was no evidence indicating intent to defraud the revenues or breach the acts of trade; yet Laurens was forced to pay court costs, including the judges fees, in amounts exceeding the value of the ships. In the third case, for non compliance with a technical formality of the law, Leigh condemned the ship in addition to assessing exorbitant costs. In one of these cases, he ruled that the searcher of the port, George Ropell, deputy to the collector, had acted without probable cause, leaving him open to a damage suit by Lawrence. In 1768, Ropell retaliated by seizing the *Ann*, one of Laurens most valuable ships, again on a highly technical charge. Leigh decreed an acquittal, though he again charged two-thirds of his fees and costs against Laurens; this time, however, the judge protected Ropell against a counter-suit by ruling that there had been probable cause for the seizure. He further protected Ropell by requiring him to swear an oath of calumny to prove that his actions were not motivated by malice. The oath of calumny brought the right against self-incrimination into play.

Laurens, outraged by the injustice of oppressive suits and expensive fees, decided to expose customs racketeering and the venial admiralty judge. After publishing an article in the local press – newspapers as far away as Boston reprinted it – Laurens wrote an angry tract in 1768 detailing the history of his victimization. He denounced the vice-admiralty courts and extolled the protections of the common law. Of the various admiralty procedures the he found repugnant, none was worse than denial of trial by jury, but another, only slightly less obnoxious, was the willingness of the admiralty judge to abridge the right against self-incrimination. Laurens did not allege that Leigh had sought to force him to testify against himself. Rather, in an effort to support his argument against admiralty or civil-law procedure, he condemned Leigh for having exacted the oath of calumny from Ropell. Confusing the oath of calumny with the oath *ex officio*, Laurens warned against the dangers to liberty from that dread oath. He very effectively quoted Lord Bacon against the practice "whereby Men are inforced to accuse themselves", and in the next sentence alluded to torture. Laurens also quoted "the Learned Puffendorff" on the dangers of oath when punishment or even "grievous Inconveniences" might be the consequences of confessing the truth. For his own part, Laurens added, he would rather have lost the case than have such an oath imposed on Ropell.

Judge Leigh, replying to Laurens's many charges, exposed his accusers confounding the oath of calumny and the oath *ex officio*. Leigh also denied that he had violated the right in question: "the benignity of our law will not suffer any man to accuse himself criminally...". The case of the Ann, however, had not been a criminal one. Admiralty procedure, the admiralty judge observed, permitted the oath of calumny in order to protect the party against either the costs of the suit or a counter-action for damages in the event that probable cause for seizure were not established.

The news of Laurens's ordeal reached Boston in the midst of a prosecution in the vice-admiralty court against another future president of the Continental Congress, John Hancock. In 1768 on the evidence of a confessed perjurer, the customs officer in Boston libeled one of Hancock's ships for smuggling. The *Liberty*, as the ship was faithfully called, was seized, condemned, and forfeited. Then Hancock himself was sued for triple damages in a proceeding that in some respects really did savor of the inquisitorial. He was jailed and then released on bail of three thousand pounds sterling, an amount that would have been inordinately excessive in a common-law action, though in this case it was only one third of the account of the damages sought. Hancock's relatives, friends, employees, and business associates, were privately examined and re-examined on interrogatories over a period of several months. Enemies and strangers, including pimps and informers, were paid to testify against him. His office was searched, his desk rifled, his papers seized. The patriot party launched a newspaper war against the admiralty court and in favor of common-law procedures. A special publication, *A Journal of the Times*, was issued almost daily in Boston as a news service detailing the prosecution, and newspapers in almost every colony copied or summarized its coverage of the case. *A Journal of the Times* obliquely assumed that the court violated the right against self-incrimination, as is evident from the unremitting and extravagant denunciations of "Star Chamber proceedings" by the "inquisitorial" tactics of examining men secretly and by "odious" interrogatories. In the hope that evidence could be "fished up" to sustain the prosecution, the court would stop at nothing, according to the patriot view. There were frequent references to the Laurens case, and the press asked whether the admiralty judge, being able to use interrogatories and the oath of calumny, might not next "put parties or witnesses to the torture, and extend them on the rack?".

John Adams, who was Hancock's counsel, probably provided *A Journal of the Times* with its up-to-date accounts of the case, which dragged on for five months. Yet in his argument before the court, Adams was restrained both in the tone and substance. He referred neither to the right against self-incrimination nor the illegality of writs of assistance, though he did rely heavily on *Magna Carta* to prove that the statute authorizing trial by admiralty-court procedure in cases involving penalties and forfeiture violated the English constitution. He also argued that the case should be tried at common law, by a jury, with witnesses in open court, in the presence of the parties, face to face. "Examinations of witnesses upon interrogatories", he added, "are only by the civil law. Interrogatories are unknown at common law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them". Nevertheless, there is no reference to Hancock's having been examined under interrogatories, nor any real proof that they were used to incriminate the witnesses.

The claim by an eminent historian that Hancock was "compelled to give evidence against himself" rests on the alleged use of his papers against him, though event that is not an established fact. Surely it is a gross exaggeration to claim, even as a probability, "that the constitutional provisions for indictment by a grand jury, trial by jury, forced self-incrimination, confronting witnesses face to face, excessive bail, depriving persons of property without due process of law, and excessive fines found in the earliest state constitutions and embodied in the fifth, sixth, seventh and eighth amendments to the federal Constitution, are there because of the procedures of this case". On the other hand, this constitutional provisions including the one in the Fifth Amendment, were stimulated, at least in part, by the kind of frenzied of injustice, real or feigned, that the Laurens and Hancock cases provoked in the patriot party. They exalted common law procedures of criminal justice as expressions of fundamental law, and when the opportunity was theirs, they ritualistically gave constitutional embodiment to those procedures as if symbolically emancipating themselves from a tyranny, although it scarcely had existed.

That the right against self-incrimination was an illusion in New York is disproved by the sensational McDougall case, which occurred at this time. In December of 1769 a handbill addressed "To the betrayed inhabitants of New York", signed by a "Son of Liberty", was broadcast throughout the city. The author, criticizing the legislature for having voted to supply provisions to the king's troops, called upon the public to rise against unjust

measures that subverted American liberties. The legislature condemned the handbill as a seditious libel and offered a reward for information leading to discovery of "Son of Liberty's" identity. A journeyman printer in the shop of James Parker, publisher of the *New York Gazette: or, the Weekly Post-Boy*, betrayed his employer as the printer of the broadside.

Parker, who accepted the offer of a pardon to identify the author of the handbill, confessed both his role and McDougall's authorship. He was then sworn and his examination taken down.

McDougall, a popular leader of the patriot party during these years of controversy with Britain – subsequently he was a delegate to both continental congresses and then a major-general during the Revolution – was arrested for seditious libel in jail when he refused to pay bail. He turned his arrest into a theatrical triumph, consciously posing as America's Wilkes while the Sons of Liberty converted his prosecution into a weapon for the patriot cause.

When Parker, the principal witness for the crown, died, the trial of McDougall was postponed a number of times. Finally, the legislature, impatient for revenge, resolved to punish him on its own authority, and summoned McDougall before the bar of the House on December 13, 1770. Charged with having written "To the Betrayed", he was asked whether he was in fact the author. McDougall refused to answer, claiming his rights both against self-incrimination and against double jeopardy. The minutes of the assembly's proceedings show his reply, in part to be: "That as the Grand Jury & House of Assembly had declared the Paper in Question to be a Libel, he could not answer to the Question".

In a letter to the press written from prison, McDougall more fully reported his statements as follows: "First, that the Paper just read to me, had been declared by the Honorable House to be a Libel; that the Grand Jury for... New York, had also declared it to be a Libel, and found a Bill of Indictment against me as the Author of it; therefore that I could not Answer a Question that would tend to impeach myself, or might otherwise be improper for me to answer". Because of McDougall's insistence that the Assembly could not try him on a criminal charge still being prosecuted in the courts, they voted him guilty of contempt and remanded him to prison for the remainder of their session, which continued for nearly three months. About a week after his release, the Sons of Liberty met to celebrate the anniversary of the repeal of the Stamp Act. One of the many toasts on that festive occasion was to Alexander McDougall; another was, "No Answer to Interrogatories, when tending to accuse the Person interrogated". McDougall's case not only popularized but made respectable the right against self-incrimination.

Similar cases occurred in all colonies. When the Revolution began, colonies and mother country differ little, if at all, on the right against self-incrimination.

C. THE FIFTH AMENDMENT

In 1776 several states elevated the common-law right against self-incrimination to the status of a constitutional right. The tie with Britain having been severed by war and the Declaration of Independence, the colonies professed the quaint belief that they had been thrown back into a state of nature. Consciously acting out the social compact theory, they adopted written constitutions to provide for permanent state governments and a paramount law which, as Virginia declared, would secure the inherent rights of the people as the basis of government. Virginia blazed the trail with her celebrated Declaration of Rights as a preface to her constitution. Its author, George Mason, gratifyingly recalled, "this was the first thing of the kind upon the continent, and has been closely imitated by all the States." To Mason belongs the credit for initiating the constitutionalization of the old rule of evidence that a man cannot "be compelled to give evidence against himself". Mason not only enshrined the rule in the fundamental law; at the same time he expressed it in an ambiguous way.

Out of context, the phrase had a Lilburnian resonance, proclaiming the broad principle of the *nemo tenetur* maxim. In context, it guaranteed far less than the ordinary practice of the common law. Section 8 of the Virginia Declaration of Rights stated:

That in all capital or criminal prosecutions a man hath to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; *nor can he be compelled to give evidence against himself*; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

The italicized words appear in the midst of an enumeration of the rights of the criminally accused. Therefore the constitutional right against self-incrimination was not extended to anyone but the accused, nor to any proceedings other than a criminal prosecution. Since 1677, however, the law of Virginia had required that witnesses for the prosecution must give testimony under oath, "but noe law can compel a man to swear against himself in any matter wherein he is liable to corporal punishment". That language protected witnesses and parties in civil, as well as criminal, proceedings against the necessity of giving testimony that might expose them to criminal penalties.

The right applied to all stages of all equity and common-law proceedings and to all witnesses as well as to the parties. It could be invoked by a criminal suspect at his preliminary examination before a justice of the peace, by a person testifying at a grand jury investigation into crime; by anyone giving evidence in a suit between private parties; and, above all perhaps, by the subject of an inquisitorial proceeding before any governmental or non judicial tribunal, such as a legislative committee or the governor and counsel, seeking to discover criminal culpability. If one's disclosures could make him vulnerable to legal peril, he could invoke his right to silence. He might even do so if his answers revealed infamy or disgrace yet could not be used against him in a subsequent prosecution. The law of Virginia at this time, as in England, shielded witnesses against mere exposure to public obloquy. The right against self-incrimination incorporated a protection against self-infamy and was as broad as the jeopardy against which it sought to guard. Yet the Virginia Declaration of rights, though vesting a testimonial rule with the impregnability of a constitutional guarantee, provided only a stunted version of the common law.

As for the self-incrimination clause in Section 8, there is no evidence that it was taken literally or regarded as anything but a sonorous declamation of the common-law right of long standing. Other common-law rights that had been entirely overlooked by Virginia's constitution-makers, including such vital rights as habeas corpus, grand jury indictment, and representation by counsel, continued to be observed in daily practice. Thus the great Declaration of Rights did not alter Virginia's system of criminal procedure nor express the totality of rights which actually flourished. The practice of the courts was simply unaffected by the restrictions inadvertently or unknowingly inserted in Section 8.

Section 8, nevertheless, became a model for other states and for the United States Bill of Rights. Indeed the Virginia Declaration of Rights became one of the most influential constitutional documents in the history of the country. Excepting the corporate colonies of Rhode Island and Connecticut which stood pat with their old colonial charters, the other states followed Virginia's example of framing a state constitution. Eight of them, including Vermont which was technically an independent republic from 1776 until her admission to the Union in 1791, annexed separate bills of rights to their constitutions.

Everyone of the eight protected the right against self-incrimination, and every one in the language of Virginia's Section 8, because each followed the basic formulation that no man can be "compelled to give evidence against himself". Pennsylvania in 1776 adopted Section 8 in entirety, adding only the right to be represented by counsel and retaining the self-incrimination clause verbatim.

Of the four states – New Jersey, New York, Georgia and South Carolina – that did not preface their constitutions with a separate bill of rights, none secured the right against self-incrimination. All, however, guaranteed some rights, even if only a few, at various points in their constitutions.

In its enumeration of rights, New York's constitution was framed in an incredibly haphazard fashion, like New Jersey's, with no discernible principle of selection. The same observation applied to the constitutions of South Carolina and Georgia, neither of which protected the right against self-incrimination.

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process was a diligent or systematic one. Those documents which we uncritically exalt, were imitative, deficient and irrationally selective. In the act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalog of rights that seemed to satisfy their urge for a statement of first principles – or for some of them. That task was executed in a disordered fashion that verged on ineptness. The inclusion or exclusion of any particular right neither proved nor disproved its existence in a state's colonial history.

Twelve states, including Vermont but excluding Rhode Island and Connecticut, framed constitutions before the framing of the United States Bill of Rights. The only right universally secured was trial by jury in criminal cases, unless freedom of religion be added to the list even though some states guaranteed only religious toleration and others, no less than five, constitutionally permitted or provided for an establishment of religion in the form of tax supports for churches. Two states passed over a free press guarantee. Four neglected to ban excessive fines, excessive bail, compulsory self-incrimination, and general search warrants. Five ignored protections for the rights of assembly, petition, counsel, and trial by jury in civil cases. Seven omitted a prohibition on ex post facto laws, and eight skipped over the vital writ of habeas corpus. Nine failed to provide for grand jury proceedings and to condemn bills of attainder. Ten said nothing about freedom of speech, while eleven – all but New Hampshire – were silent on matter of double jeopardy. In view of this record, the fact that every state having a separate bill of rights protected the right against self-incrimination is rather impressive. And for all their faults, the state bills of rights adopted before the federal Bill of Rights were achievements of the first magnitude compared to anything in the past, on either side of the Atlantic. The remarkable thing perhaps is that in time of war the constructive and unprecedented task of constitution-making was successfully carried out.

Revolution and war may engender handsome statements of libertarian principle but are scarcely propitious circumstances for the nurture of personal liberties or closing the breach between profession and practice. Everywhere there was unlimited freedom to praise the American cause, but criticism of it invited a tarring and feathering by the zealots of patriotism. A Tory, after all, as Jefferson himself said, had been "properly defined to be a traitor in thought, but not in deed". Throughout the years of controversy that lead to the war, enduring the war itself, the patriots denied to those suspected of Tory thoughts and sympathies the rights they claimed for themselves. The maxim congenial to the spirit of liberty, let justice be done though heaven fall (*fiat justitia ruat coelum*), yielded to the maxim that in time of war the laws are silent (*inter arma silent leges*).

The case of George Rome in 1773 probably foreshadowed the eclipse of the right against self-incrimination during the war. Rome was a Rhode Island Tory who wrote a private letter scathingly criticizing the Assembly and the judiciary. The letter fell into the hands of the patriot party and appeared in the *Providence Gazette*. The Assembly arrested him for "vil abuse" of the government. Summoned before the bar of the house, he refused answer to the question whether the opinions expressed in the letter were his own. "I do not think", he replied, "on the privilege of an Englishman, that the question is fairly stated, because I do not consider I am to be called here to accuse myself". Rome persisted on this ground, and the Assembly, showing no respect whatever for the right against self-incrimination, voted him guilty of contempt and imprisoned him for the remainder of its session.

During the war, Virginia imprisoned persons on mere suspicion that they might aid the enemy during some future emergency, kept them in jail without charges or a hearing, passed a bill of attainder and outlawry, and punished traitorous opinions as well as deeds. Respect for the right against self-incrimination or for other rights would have meant to the revolutionists that their declaration of rights was an instrument of their destruction.

In New York, where the Tories were numerically strongest, a committee "for detecting and defeating conspiracies", organized at the suggestion of Congress, used short-cut procedures in the mass trial of suspects. The function of the committee was to examine persons, and their papers, who appeared dangerous to the safety of the state, to administer loyalty oaths, and to convict the guilty. About one thousand persons were tried and

sentenced and another six hundred released on bail. The legislature ignored petitions of grievance like the one stating that "*the Star Chamber Court* of commissioners for detecting and defeating conspiracies ought to be abolished".

Four years after the Treaty of Peace that ended the war, the constitutional convention met in Philadelphia to form a stronger national government. No bill of rights introduced the finished work of the delegates. Only a few days before adjournment, Mason of Virginia almost perfunctorily wished "the plan had been prefaced with a bill of rights", because it would "give great quiet to the people", and he offered to second a motion "if made for the purpose". His belated speech persuaded Elbridge Gerry of Massachusetts to make the motion, which Mason seconded. But the delegates voting in state units, defeated it ten to zero. Not a man present opposed a bill of rights, but having been in session for four months, the delegates were weary and eager to return home. Moreover, they had planned a government of limited, enumerated powers, making unnecessary, they reasoned, a list of restraints on powers that did not exist. When, for example, there was another motion to insert a clause declaring that "the liberty of the Press should be inviolably observed", Roger Sherman of Connecticut objected, "it is unnecessary. The power of Congress does not extend to the press". The framers were also skeptical of the value of "parchment barriers" against "overbearing majorities", as Madison put it knowing that even an absolute constitutional prohibition, as experience had proved, dissolved in the case of an emergency or public alarm.

The usually masterful politicians who dominated the Convention had seriously erred. Their arguments were plausible but neither convincing nor politic. A bill of rights could do no harm, and as Jefferson said, might do some good. The contention that declaring some rights might jeopardize others not mentioned was specious, inconsistent, and easily answerable as the Ninth Amendment showed. But there was no answer to Mason's point that a bill of rights would quiet the fears of the people. Supporters of the constitution were trapped by the fact that their principal point, "why declare that things shall not be done which there is no power to do?", might arguably apply to freedom of religion or freedom of speech, but could have no bearing on the rights of the criminally accused or personal liberties of a procedural nature. The new and, too many, very frightening national government would operate directly on individuals and be buttressed by an undefined executive power and a national judiciary to enforce the laws made by Congress, and Congress had the authority to define crimes and prescribe penalties. Finally, the alleged needlessness of a bill of rights could not be squared with the fact that the proposed Constitution did not explicitly protect certain rights. It tightly defined treason provided for jury trials in criminal cases and for the writ of habeas corpus in the national courts, and banned both *ex post facto* laws and bills of attainder. No national argument – and the lack of a bill of rights created a hyperemotional issue that was not amenable to rational argument – could possibly ease the fear that guaranteeing a few rights left in jeopardy others that were equally familiar and cherished but ignored.

Criminal defendants might be assured of trial by jury, but what prevented the national government from seizing evidence against them by the use of general search warrants, and would they have the benefit of indictment by grand jury, a trial by a jury of the vicinage, representation by counsel or freedom from compulsory incrimination, excessive bail, and cruel punishments? Security lay in the certainty of express protections, rather than the *bona fides* of the defenders of the Constitutions.

In Pennsylvania, the second state to ratify, started, during the ratifying convention, the willingness to accept the Constitution on condition that a number of amendments be approved. This willingness was defeated.

Massachusetts, the sixth state to ratify, was the first to do so with recommended amendments. One of their spokesman, Abraham Holmes, focused on the alleged dangers surrounding the national judicial power and, worse still, there was nothing to prevent Congress from establishing that diabolical institution, the Inquisition. What was needed, Holmes advised, was something to prevent Congress from passing laws that might compel a person, accused or suspected of a crime, from furnishing evidence against himself. Without such a check, if the worst did not come to pass, "it would be owing *entirely*...to the goodness of the men, and not in the *last degree* owing to the goodness of the Constitution".

The Reverend Samuel Stillman, in defense of the Constitution, reminded the convention that Congress was a representative body, elected by the people of the states. "Who are Congress, then? They are ourselves; the men of our own choice, in whom we can confide... Why is it then that gentlemen speak of Congress as some foreign

body, as a set of men who will seek every opportunity to enslave us?" Stillman observed that not even a perfect Constitution could secure the liberties of the people "unless they watch their own liberties. Nothing written on paper will do this". Knowledge and freedom were inseparable. If education were widespread and Americans remained enlightened people attached to liberty, the cause of tyranny had no hope. When John Hancock and Samuel Adams, the most influential men in the convention, threw their support to Stillman's voice of reason rather than to Holmes's hysteria, there was no chance for amendments.

Every state convention thereafter urged amendments to the Constitution, but, inexplicably, only the last four to ratify recommended comprehensive bills of rights. As a result many crucial rights received the support of only these states. All four of them urged a self-incrimination clause. The first of these four to ratify was Virginia. On such reasoning, Patrick Henry, the demagogic idol of the people, suggested that the states adopt amendments to the Constitution prior to its ratification, including a bill of rights modeled on Virginia's of 1776.

The convention adopted Henry's proposals, but only in the form of recommended amendments. Nothing in the proceedings provided any illumination of the meaning of the self-incrimination clause in Virginia, except perhaps that it applied to the criminally accused and barred torture.

Among the proposed amendments offered by the New York ratifying convention was one issuing "that in all criminal prosecutions, the accused... should not be compelled to give evidence against himself". The debates are fully reported through July 2, 1788, when a bill of rights was mentioned for the first time in a speech by Thomas Tredwell, an Anti-Federalist delegate who expressed apprehension about the danger of tyranny on the part of the new United States courts. None could say, he declared, whether their proceedings would be according to the common law or the "civil, the Jewish or the Turkish law", and he warned darkly about the history of inquisitions in the Star

Chamber Court of England. Tredwell's is the last reported speech on any subject. The proceedings of the convention are thereafter in brief minutes. We know little more than that on July 7, John Lansing, one of the Anti-Federalist leaders, reported a proposed bill of rights, that it was debated on the 19th, and was passed on the 26th.

The other two states recommending amendments that included a self-incrimination clause were North Carolina and Rhode Island. Both states used the Virginia formula.

In the First Congress, Representative James Madison redeemed a campaign pledge to fight for a bill of rights as soon as the new national government went into operation. Although he had originally opposed a bill of rights for the usual Federalist reasons, Madison, even if still somewhat skeptical of the efficacy of such a bill, had become a convert to the cause. He realized that amendments allay the apprehensions – misapprehensions he thought them – of a large part of the American public. He meant to prove that the new national government was a friend of liberty. He even included a proposed amendment to prevent the *states*, which opponents of the Constitution had represented as guarantors of personal freedom, from infringing the rights of conscience, freedom of the press, and trial by jury. This, he declared, was "the most valuable" of all his proposals. Madison also understood that the adoption of his amendments would do more than reconcile the people who had been frightened by the anti-Federalist cry that "they're taking away our liberties!". His amendments, if adopted, would make extremely difficult the subsequent passage of proposals, so close to the hearts of the opposition party, that were intended to hamstring the substantive power of the national government. He argued that his amendments would raise a standard of conduct for government to follow and provide a basis for judicial review on behalf of civil liberties: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive; they will be naturally led to resist encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights".

As originally proposed by Madison, the Fifth Amendment's self-incrimination clause was part of a miscellaneous article that read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be

necessary for public use, without a just compensation". This proposal reflects the research and novelty that characterized Madison's work. No state, either in its own constitution or in its recommended amendments, had a self-incrimination clause phrased like that introduced by Madison: "No person... shall be compelled to be a witness against himself".

The language of his proposal revealed an intent to incorporate into the Constitution the whole scope of the common-law right. From the very meaning of its terms, Madison's proposal seemed as broad as the old *nemo tenetur* maxim, in which it had its origins, while at the same time it virtually amalgamated that maxim with another that was different in origin and purpose: *nemo debet esse testes in propria causa* (no man should be a witness in his own case).

Madison's proposal certainly applied to civil as well as criminal procedures and in principle to any stage of legal inquiry, from the moment of arrest in a criminal case to the swearing of a deposition in a civil one. And not being restricted to judicial procedures, it extended to any other kind of governmental inquiry such as a legislative investigation.

Moreover, the unique phrasing that none could be compelled to be a witness against himself, was far more comprehensive than a prohibition against self-incrimination. By its terms the clause could also apply to any testimony that fell short of making one vulnerable to criminal jeopardy or civil penalty or forfeiture, but that nevertheless exposed him to public disgrace or obloquy, or other injury to name and reputation. Finally, Madison's phrasing protected third parties, those who were merely witnesses called to give testimony for one side or the other, whether in civil, criminal, or equity proceedings.

Madison's proposed amendments were sent to a select committee of which he was a member. The committee, when reporting to the House, made no change in his positioning or language of the clause protecting persons from being witnesses against themselves. The report was taken up by the Committee of the Whole after Madison fought off further delaying tactics, and debate followed seriatim on each proposed amendment. There was no debate, however, on the clause in question. Only one speaker, John Laurence, a Federalist lawyer of New York, addressed himself to what he called a proposal that "a person shall not be compelled to give evidence against himself". Interestingly, he restated Madison's phrasing in the language of the more familiar clause deriving from Section 8 of the Virginia Declaration of Rights, as if they were the same. Laurence thought that it should "be confined to criminal cases", and he moved an amendment for that purpose. The amendment was adopted, apparently without discussion, not even by Madison, and then the clause as amended was adopted unanimously. Taken literally, the amended clause "No person shall ... be compelled in any criminal case, to be a witness against himself", excluded from its protection parties and witnesses in civil and equity suits as well as witnesses before non judicial governmental proceedings, such as legislative investigations. It now applied only to parties and witnesses in criminal cases, presumably to all stages of proceedings from arrest and examination to indictment and trial.

In the Senate, the House's proposed amendments to the Constitution underwent further change. However, the senate accepted the self-incrimination clause without change.

The clause by its terms also protected against more than just "self-incrimination", a phrase that had never been used in the long history of its origins and development. The "right against self-incrimination" is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him. the clause extended, in other words, to all the injurious as well as incriminating consequences of disclosure by witness or party.

The previous history of the right, both in England and America, proves that it was not bound by rigid definition. After the adoption of the Fifth Amendment, the earliest state and federal cases were in accord with that previous history, which suggests that whatever the wording of the constitutional formulation, it did not supersede or even limit the common-law right.

The framers of the bill of rights saw their injunction that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty.

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