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Historical Background and Implications of the Privilege Against Self-Incrimination

By ROY MORELAND**

SOONER OR LATER one who writes upon criminal procedure must face the issue of self-incrimination. Continually—and especially currently—those arise who would urge that in the interest of convicting the guilty the constitutional guaranties should be relaxed, restricted, or even disregarded. So, especially, as to the privilege against self-incrimination.

The problem is not an easy one. If this were not already apparent, the use of the Fifth Amendment by those anxious to escape the probings of Congressional committees as to their affiliations with Communism would show it to be. This country has prided itself on the fact that it has an accusatorial as against an inquisitorial form of criminal procedure. And this has been much more than a glib statement of policy. Vigorous efforts have been made to implement and make effective that policy. But recent extensive practices of the police in subjecting suspected persons to protracted “questioning,” the supposed perilous need to question certain individuals as to their connections with Communism, and the general demand to present a more vigorous front to the wide-spread increase of crime generally have led to tremendous pressures on this cornerstone of our civil liberties.

A study of the privilege against self-incrimination, as with other issues involving the law, should begin with a history of the privilege. History is not always helpful, but it often is. In any event it increases one's understanding of the problem, its back-

* This is part of a chapter of a forthcoming book on Criminal Procedure.

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ground and its development. In addition, there may be lessons to be learned from the past; it is unpardonable to repeat errors. And yet, that is a common habit of mankind.

One who attempts to trace the history of the privilege against self-incrimination must keep in mind that there were two distinct, although somewhat parallel, lines of development of the doctrine. The first was the development of the opposition to the *ex officio* oath of the ecclesiastical courts; the second, the history of the opposition to the incriminating question in the common law courts. As Wigmore points out,¹ these were largely, at least in the beginning, independent developments; the first, beginning in the 1200s and lasting well into the 1600s; the second, beginning in the early 1600s and running on for another century.

Prior to William the Conqueror, the bishops sat as judges and heard suits in the non-ecclesiastical courts. But William changed this; he required the bishops to apply ecclesiastical law in cases which they heard; the result was a double judicial system, ecclesiastical and non-ecclesiastical. This led to a battle as to the jurisdictional limits of the two systems. Finally, in the early 1300s, the statute, 'De Articulis Cleri' settled the line of ecclesiastical jurisdiction over laymen by confining it to matrimonial and testamentary causes and this, in the large, prevailed until the end of church courts in England.²

Turning now to the actual development of the procedural device of self-incrimination, it should be pointed out that in the 1200s there was no hostile feeling or objection to the procedure of putting a man to his oath to declare his guilt or innocence. Indeed, this sort of procedure, trial by compurgation, was standard in both the church and popular courts and long had been. It was common not only for the accused to declare his innocence on oath and to call on God to witness it but to supply friends (oath-helpers) who would also proclaim his innocence on oath. Such a proceeding was a direct appeal to the divine and resulted in a positive decision of guilt or innocence through the party's own act—his own affirmative appeal to deity.

But the trial by compurgation was becoming little more than a "farce"³ in the 1200s. The church looked around for a more

¹ 8 WIGMORE, EVIDENCE, sec. 2250, p. 277 (3rd ed., 1940).

² *Id.* at 279. ³ *Id.* at 281.

“modern” and practical procedure. So was introduced in the church courts in the early 1200s an innovation that *did* eventually occasion hostility,—the inquisitional or interrogatory oath. This new oath pledged the accused to answer truly and then was followed by a series of questions which probed his knowledge of the matter in issue, much after the modern manner. So, whereas the former oath had operated simply as a declaration of innocence buttressed upon an appeal to the Almighty, the latter furnished an opportunity to the judge to explore and probe the mind of the accused to discover what he might know. Then from the answers of the accused to the several questions put to him the judge would make his own deduction as to guilt or innocence. As Wigmore says, “this was an epochal difference of method.”⁴

The function of the ecclesiastical courts, naturally, was to punish offenses against religion and morals. In a word, to punish sin. Their use of the *ex officio* oath, the common name for the procedure outlined above, is best known for the role it played in heresy trials. In the beginning the probing and questioning under the new oath was limited to a specific charge against the accused. However, gradually in the head-long pursuit of heretics, a general probing was permitted without a specific charge or presentment, an exploratory procedure. This led to great unpopularity as to the oath *ex officio* and it came to be hotly debated whether it was not wholly unlawful. Finally, the resistance provoked by the intense unpopularity of the procedure brought the whole system to the ground. “The Ecclesiastical Courts were totally abolished in 1640 and though they were revived in 1661, their procedure was so much altered, especially by the abolition of the *ex officio* oath, that they have fallen into almost entire disuse for all practical purposes, except the discipline of the clergy.”⁵

On the non-ecclesiastical or popular court side, a similar development was going on. The Court of Star Chamber followed ecclesiastical rules of procedure, so it employed the *ex officio* oath. Coke, himself an opponent of the *ex officio* oath procedure, at least on the ecclesiastical side,⁶ participated in its use and in the application of torture in its administration.⁷ Wigmore cites

⁴ *Idem.*

⁶ 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 220 (1883).

⁷ Griswold, The Fifth Amendment Today, 2 (1955).

⁷ *Idem.*

three specific cases where he was a consenting party in the Star Chamber in the early 1600s.⁸ Indeed Dean Griswold points out that it was apparently standard practice not only to make suspected persons give evidence against themselves but to use torture to make them speak.⁹ So comes to the surface the inevitable concomitant of the use of self-incrimination—torture in one form or another.

The tension and opposition in the popular courts mounted. Finally, it came to a head in the trial of "Freeborn John" Lilburne,¹⁰ the man to whom we primarily owe the privilege against self-incrimination today. John was an obstreperous individual, one who would fight for what he considered to be his rights—the sort of person to whom society owes most of its basic liberties. Lilburne was haled into the Court of Star Chamber in 1637 on the charge of having imported certain heretical and seditious books. He specifically denied these charges when questioned while under arrest, but he was "further asked as to other like charges."¹¹ The further questions he refused to answer, saying that since the specific charges against him could not be proved, this was but an attempt to get other possible instances of guilt out of his oral examination and so secure a conviction. "But," it was suggested to him, "everyone takes the oath and it will be wiser for you to do what other do." He still refused. Later, when examined before the Star Chamber itself, he again refused to answer further than as to the offenses with which he had been specifically charged. So, the Council of the Star Chamber condemned him to be whipped and pilloried for his "boldness in refusing to take a legal oath," without which many offenses might go "undiscovered and unpunished."¹² In April, 1638, the sentence was carried out.

But Lilburne did not give up. He filed a petition with Parliament and on May 4, 1641, the House of Commons voted that the sentence was "illegal and against the liberty of the subject" and ordered reparation. Later, the House of Lords concurred, order-

⁸ 8 WIGMORE, EVIDENCE sec. 2250, 290, fn. 64 (3rd ed., 1940).

⁹ GRISWOLD, THE FIFTH AMENDMENT TODAY, 2 (1955); PLOSCOWE, THE DEVELOPMENT OF PRESENT-DAY CRIMINAL PROCEDURES IN EUROPE AND AMERICA, 433, 458 (1935).

¹⁰ Lilburn's Trial, 3 How. St. Tr. 1315 (1637-1645).

¹¹ 8 WIGMORE, EVIDENCE, sec. 2250, 291 (3rd. ed. 1940).

¹² *Idem.*

ing that the sentence be wholly vacated “as illegal, and most unjust, against the liberty of the subject and the law of the land and Magna Charta.”¹³ Further, the House granted him £3000 in reparation, a very large amount in those days.

This case was enough, practically of itself, to focus the attention of the whole of England upon the evils of the *ex officio* oath. The Court of Star Chamber was abolished in 1641 and Lilburne’s battle bore enduring fruit in the incorporation of the fundamental principle for which he strove in the common law. It should be pointed out, however, that Lilburne at no time objected to questions concerning the specific charges against him, only as to questions involving matters for which there was no presentment. Those who were prosecuted under the oath *ex officio* up to and including Lilburne were accustomed to questioning. It was questioning which went *beyond* the offenses specifically charged that raised their particular ire.

It is hard to say what this proves. History is not clear on the point. There *are* those who argue that it proves that a society does not object to inquisitorial procedure as such—only to its abuse. However, it is the writer’s opinion that while the radical change from the compurgation oath to *ex officio* procedure created no outward hostility at first, opposition in the English breast was present from the beginning, gradually mounting, particularly with the extension of the application of the procedure to matters not within the presentment, until, at last, the growing resentment finally exploded in the trial of Lilburne and the resulting notoriety connected therewith.

Those who would urge that history does not show any resentment to the use of questioning as such, so long as it is limited to matters relating to a specific charge, far overshoot the mark, in the opinion of this writer.¹⁴ This is indicated, it is submitted, by the fact that with the explosion in the Lilburne case and the resulting repudiation of the *ex officio* oath the principle which became in-

¹³ 8 WIGMORE, EVIDENCE, sec. 2250, p. 291 (3rd. ed. 1940).

However, it should be pointed out that nothing concerning the privilege is mentioned in the Magna Charta. Pittman, *The Colonial And Constitutional History Of The Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 764 (1935).

¹⁴ And see Pittman, *The Colonial and Constitutional History Of The Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 769 *et seq.* (1935). The article is illuminating.

corporated in the common law was much broader than that for which Lilburne had contended. It went the whole way. The inquisitorial procedure was totally repudiated and it has remained outlawed in the English and American systems to this day. But not so on the continent. There the reader of history may see the workings of the inquisitorial system in the history of France and in the unspeakable horrors behind the judicial scene in Germany and Russia under Hitler and Stalin. And so, the great contrast between the two diametrically opposed procedures, one accusatorial and the other inquisitorial!

But the repudiation of the *ex officio* oath did not occur overnight in the English common law courts. After Parliament had abolished it in the ecclesiastical courts and the Court of Star Chamber had been put out of existence, an increasing general reaction arose to the use of inquisitorial procedure in *any* court. After all, the celebrated Lilburne case had become common knowledge. The common law courts began to concede this public distaste. The oath continued to be used intermittently, however, and was not finally discontinued completely until after the Revolution of 1688.¹⁵ By that time the privilege against self-incrimination had become so well established as a part of the common law that it was not thought necessary to incorporate it in the English Bill of Rights of 1689.¹⁶

Thus, it may be stated broadly that the privilege against self-incrimination having become embodied in the English common law came to this country as a part of the legal heritage of our early settlers.¹⁷ That is fundamentally true. The settlement of the American colonies took place about the time that opposition to the inquisitorial procedure as practiced in the ecclesiastical courts and in Star Chamber was becoming pronounced in England. And co-incidental with the settling of the American colonies the privilege was developing as a part of English common law. The abolition of the *ex officio* oath in the ecclesiastical courts and the abolishment of the Court of Star Chamber occurred long before the *separation* of the colonies from the Mother Country and

¹⁵ I STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 440 (1883).

¹⁶ Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 774 (1935).

¹⁷ GRISWOLD, *THE FIFTH AMENDMENT TODAY* 4 (1955).

the Revolution. Also, long before that time the privilege had become an accepted part of the common law of England.

But, aside from all this, the colonies had their own troubles with inquisitorial procedures in addition to bringing here a remembrance of suffering from such practices in England. So, a large part of the American Constitutional privilege against self-incrimination is thoroughly American in origin. It must be kept in mind that while colonization was going on in America the old procedures still existed, or were remembered. Indeed, there are instances of the use of the compurgation oath in this country!¹⁸ There are, of course, numerous instances of the use of inquisitorial procedure in America, so the colonies had their own experiences with high-handed prerogative courts.¹⁹ One could cite the notorious Salem witch-trials—which were not trials in fact²⁰—where questioning and even torture were accepted procedure in support of this statement, but there are more normal and regular instances. The story of the growing hatred of the practice of questioning those suspected of crime and the gradual recognition of the privilege against self-incrimination during the 1600-1700s have been recounted by R. Carlton Pittman in his valuable historical article in the *Virginia Law Review*.²¹ It is his conclusion that the Puritan mind placed the ecclesiastically created *ex officio* procedure in the same category of “tortures” as the rack, the boot and the thumbscrew.²² An illustration of the temper of the time is found in the trials in 1637 of Anne Hutchinson and John Wheelwright. A contemporaneous account of Wheelwright’s Trial contains this passage: “He demanded whether he were sent for as an innocent person, or as guilty? It was answered neither, but as suspected onely; Then he demanded, who were his accusers? It was answered, his Sermon; (which was there in Court) being acknowledged by himselfe they might thereupon proceed, *ex officio*: at this word great exception was taken, as if the Court intended the course of the High Commission.”^{22a} The High Com-

¹⁸ Pittman, *The Colonial And Constitutional History Of The Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 776, fn. 57 (1935).

¹⁹ INBAU, SELF-INCRIMINATION—What Can An Accused Person Be Compelled To Do? 5 (1950).

²⁰ Pittman, *The Colonial And Constitutional History Of The Privilege Against Self-Incrimination In America*, 21 VA. L. REV. 763, 782 (1935).

²¹ The article is cited in note 20, *supra*. ²² *Id.* at 779.

^{22a} As quoted, GRISWOLD, THE FIFTH AMENDMENT TODAY, 4 (1955).

mission was, of course, the court which was to be abolished four years later (1641) in England, largely for its use of the *ex officio* oath.

It may be concluded, then, that the American people have, as a part of their heritage from the common law, a recognition of the fundamental principle that no man should be forced by question and answer to convict himself out of his own mouth. The recognition of that principle is the result of historical experience in England. But also, that principle, as we know it in America today, is buttressed upon our own unhappy experience in the early years of the Colonies. Self-incrimination was tried in this country and found wanting. Their *personal knowledge* and fear of the practice were the *primary motivations* behind the insistence of our forebears that the privilege against self-incrimination be incorporated in the federal and state constitutions.

Before concluding, re-iteration should be made of the historical fact that experience has shown that torture is always an inevitable concomitant of self-incrimination. There are those who suggest that the principle of self-incrimination could be re-introduced into the English system of law without torture. We are civilized today! Decent people do not inflict torture! What rubbish. One has only to review the very recent exhibitions of cruelty and sadistic brutality in World War II and in Korea to know that people have not changed in their willingness to use torture. Indeed, they have developed new, exquisite methods of torture—such as Chinese and Russian brain washing!

There are also those who urge that it is only on the Continent that self-incrimination and torture have been linked. That torture is alien to the English and American nature. History does not support such a statement. Griswold, in discussing the period in England around the latter part of the 16th Century says, "Over the next fifty years (following 1589), it was apparently standard practice not only to make suspected persons give evidence against themselves, but also to use torture to make sure that the accused would speak."²³ Again, later in his discussion, he states, ". . . the establishment of the privilege (against self-incrimination) is closely linked historically with the abolition of torture."²⁴ And,

²³ GRISWOLD, *THE FIFTH AMENDMENT TODAY*, 2 (1955).

²⁴ *Id.* at 7.

Morris Plescowe quotes as follows from a book of the time:

‘The racke is us’d no where as in England. In other Countries tis us’d in Judicature, when there is a *semi-plena-probatio*, a halfe prooffe against a man, then to see if they cann make it full, they racke him to try if hee will Confess. But here in England, they take a man & racke him, I doe not know why, nor when, not in time of Judicature, but when some body bids.’ Table Talk of John Seldon (Pollock ed. 1927) 133.²⁵

Let us consider another phase of the relation between the infliction of torture and the privilege against self-incrimination. There are those who would use the inquisitorial procedure if it were limited in its exercise to open court. The specific suggestion usually made is that a magistrate be permitted to question one accused of a crime at the preliminary examination. Those who advocate this procedure are of the opinion that it would engender no danger of torture since the proceeding would be public. Further, they are careful to distinguish confessions secured from those in confinement from the exercise of the privilege against self-incrimination, which is strictly a rule of procedure having to do with the *trial* of the case. Admitting the danger of torture from *secret* questioning while the suspected person is in *confinement*, they argue that no such danger would arise from an inquisition in public.

It is true that the privilege against self-incrimination and the rule having to do with voluntary confessions represent separate and distinct—although over-lapping—principles, as pointed out by Wigmore.²⁶ They had a separate development. And, admittedly, the danger of torture to one who is in confinement and whose confession is being sought in secret is greater than in the case of an inquisition held in public at an examining trial. But a potential danger exists in the latter situation also. Torture does not have to be inflicted in public to be effective. The questionee can be “softened up” in private for his public appearance. The Russians have shown how effective this sort of thing can be. Men in public—without the slightest indication of torture—with the questioner

²⁵ Plescowe, *The Development of Present-Day Criminal Procedures In Europe And America*, 48 HARV. L. REV. 433, 458, note 68 (1935).

²⁶ 8 WIGMORE, EVIDENCE, sec. 2266 (3rd. ed. 1940).

speaking quietly and in a low—almost sweet—voice, admit all sorts of crimes. But the scene was set beforehand! What has happened in Russia is but a repetition of historical examples to be found in England, France, or in the early colonies in the United States, where inquisitorial procedure has been used.