

Review

The Right of Silence

Neill H. Alford, Jr.†

Origins of the Fifth Amendment: The Right Against Self-Incrimination. By Leonard W. Levy. New York: Oxford University Press, 1968. Pp. xii, 561. \$12.50.

“Freeborn” John Lilburne defied his first “establishment” at the age of seventeen. He sued Hewson, the master to whom he was apprenticed, before the Lord Chamberlain of London for showering abuse upon him. During the stormy years which followed, Lilburne tilted with the Star Chamber, committees of the House of Commons, the Council of State and Cromwell’s judicial commissioners. He wore himself out by his determined opposition to those in power at the comparatively early age of forty-three. Had this not occurred, Lilburne certainly would have made Charles II a “gloomy” rather than a “merry” monarch. Perhaps he would have ended his days, not in prison at Dover, but banished to Massachusetts, where those who offended Charles were likely to be sent. There he unquestionably would have contributed to the already considerable discomforts of the Pilgrim Fathers.

When, in 1637, Lilburne was arrested at the age of twenty-three by pursuivants of the Stationers’ Company and tried before the Star Chamber for shipping seditious books from Holland to England, he stoutly refused to take the *ex officio* oath on the ground he should not be made to accuse himself. The Court of Star Chamber consisted of the judicial members of the Privy Council. At the time Lilburne was brought before it, the Court had a reputation for fairness in procedure and speed in decision-making that attracted many litigants to it from the common law courts. In criminal cases over which it had jurisdiction—these being for the most part cases under special statutes

† Doherty Professor of Law, University of Virginia. B.A. 1940, The Citadel; LL.B. 1947, University of Virginia; J.S.D. 1966, Yale University.

or cases which could not be tried satisfactorily by the common law juries—the Court also enjoyed a reputation for diligence in procedure, soundness of decision and restraint in punishment.

In the regular Star Chamber criminal procedure, the defendant was informed of the charges against him and was permitted to reply by counsel. He was then required to swear the *ex officio* oath that he would tell the truth to questions put to him. He was interrogated in private. While he could offer witnesses in his behalf, these also were examined privately under oath. When the evidence was taken, there was a public trial without a jury, the defendant again being entitled to counsel.

The Star Chamber nevertheless tried some cases in summary fashion. The details of these summary procedures varied, but were described generally as procedures *ore tenus* and could be initiated only by the Attorney General. Cases tried *ore tenus* seemed to be those in which the defendant admitted all of the facts or cases in which some matter of state security was involved.

Lilburne had been examined by the Attorney General before being sent to the Star Chamber but had not made a full confession. Nor did his case involve any major matter of state security. Nevertheless, the Attorney General had not provided Lilburne with a bill of complaint setting forth the charges. When the Court sought to put him to the oath, he would have none of it. The procedure was that of the Court of High Commission, an institution which Puritans of Lilburne's day saw not as a court but as an instrument for suppressing dissent.

By the *ex officio* oath as used in the Court of High Commission, the defendant was always sworn before knowing the charges against him and his accusers. If the defendant took the oath, the High Commission would then proceed to question him, perhaps disclosing grounds of prosecution not previously known to the Court or, a matter usually more important, disclosing the persons with whom the defendant conspired or acted. The facts developed by the High Commission might be used as the basis for an indictment and a trial at common law or as a basis for an information in the Star Chamber. Sometimes the matter was one which the High Commission itself could try.

If the defendant refused the oath in the High Commission, he could be placed in jail for contempt. Alternatively, in Lilburne's time, the Court might find the defendant guilty *pro confesso*, on an inference of guilt arising from his failure to swear. The Star Chamber followed a similar procedure if the defendant balked, and for Lilburne's contempt fined him, sentenced him to be whipped, placed in the pillory

and returned to jail until he purged himself. The Court might, at this time, have had him branded or his ears cropped, but even if he had been found guilty, could not have sentenced him to loss of life or limb. The High Commission, by contrast, could pass a capital sentence in an appropriate case within its jurisdiction.

Tied to a cart and whipped during an ordeal of two miles from the Fleet prison to Westminster, Lilburne there had his neck thrust into the yoke of the pillory. Uncowed, he delivered a fiery speech to the onlookers, condemning the *ex officio* oath and those who required it. Sensing the impact of Lilburne's inflammatory words upon the crowd, a royal officer had him gagged; but not to be suppressed, Lilburne threw pamphlets to his audience, and, when the supply of these was exhausted, stamped his feet to show his defiance.

Returned to the Fleet to remain until he took the oath, Lilburne shrewdly passed his time in writing. Manuscripts detailing the injustices visited upon him and condemning the *ex officio* oath flew from his cell like bats from a cave. Smuggled to Holland and published there, Lilburne's writings were returned to England to be read by a growing army of supporters.

"Freeborn" John Lilburne attracted the attention of Englishmen to his problems with the Star Chamber at a time when the English were discarding feudalism and its legal trappings as the basis for internal order. The English House of Commons and the common law courts had assumed an anti-feudal stance, although both had stemmed indirectly from feudal roots. The prerogative courts, more recent developments from the King's Council, tended to reflect antiquated feudal ideas of kingship. Lilburne and his dissenting associates marshalled major public support for their position and were able to force a royal government, with a basis of power already much eroded, to surrender a number of its important institutions. The *ex officio* oath and the two courts which used it in matters of crime and ill-fame, the High Commission and Star Chamber, were abolished by the Parliament in 1641.

The destruction of legal institutions reflected a broad political conflict in which people and careers also were destroyed. Strafford, the chief minister of Charles I, was hurried to the block in 1641 by an act of attainder—voted to death by a legislative body. Archbishop Laud, the guiding spirit of the High Commission and Star Chamber, shortly placed his neck on the same block. Their master, Charles I, met the same fate in 1649, condemned to death without being permitted to make a statement in his own defense. Thus, very harshly, the royal establishment was extirpated.

Lilburne continued his stormy course in the Commonwealth of Oliver Cromwell. Although the *ex officio* oath was gone, he asserted his right against self-incrimination before committees of the House of Commons. Jailed for breaching the privileges of Parliament, he was more trouble in jail than out. His numerous tracts and pamphlets were a constant threat to the order of the Commonwealth. Tried for high treason in 1649, he successfully asserted his right against compulsory self-incrimination before an Extraordinary Commission of Oyer and Terminer consisting of many of the legal notables of the day. Acquitted by the jury, but his legal troubles by no means at an end, he had, by the end of his life, brought the right against self-incrimination from its status as a defense to the oath *ex officio* in the prerogative courts to an accepted principle in common law criminal procedure.

When Lilburne died in 1657, a year before the death of Cromwell, he could look back on a path strewn with the ruins of courts, procedures, people, and, indeed, of a social fabric. This is not surprising in view of the ability and persuasiveness of this combative dissenter. If he could have looked from his prison at Dover in 1657, he would have observed the dismal tyranny of Cromwell's major generals, certainly not a welcome sight for a man who revelled in dissent. Yet many principles associated with the freedom of individuals spring from the dying gasps of political systems and, as Professor Levy writes:

Lilburne had made the difference. From his time on, the right against self-incrimination was an established, respected rule of the common law, or more broadly, of English law generally.¹

Had Professor Levy confined himself to a description of Lilburne and his times, he would have had a difficult enough task. But not content with this, Professor Levy, who is Earl Warren Professor of Constitutional History at Brandeis University, traces the development of the principle against compulsory self-incrimination from its amorphous thirteenth-century beginnings to its inclusion in the Fifth Amendment to the Federal Constitution. He does so brilliantly, and no one who has attempted to trace a constitutional principle through the morass of medieval, Tudor and Stuart law can fail to appreciate the monumental task which Professor Levy has accomplished. It is not likely that his extensive research upon the subject will be paralleled or most of the conclusions from his study seriously questioned.

1. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 313 (1968) [hereinafter cited as LEVY].

Perhaps no constitutional principle has had or does have so vexed a life as the doctrine against compulsory self-incrimination. This is because the doctrine, apart from its relationship to freedom of the individual, operates as an obstacle to the intelligence (fact-gathering) processes of the governing elite. The rumbling of complaint has been heard in the past, and is heard today, when a right against compulsory self-incrimination is asserted by the defendant for his personal benefit, blocking in the process the finding of facts concerning conspiracy, subversion or the formation and operations of any combination thought by the public to be of possible danger to the community.

In dealing with the historical background of the self-incrimination doctrine, Professor Levy is dealing with a history of revolutionary technique. The doctrine was and is the major defense of the revolutionist. In establishing it, the revolutionaries pushed the ruling powers from position to position, the rulers compromising in ways which they considered least damaging to them upon the assumption at each position that the *status quo* could be maintained.

Principles important to the rulers tend to be defended until the end—eventually to fall as their power is yielded up. Under the new regime, some of the new principles established in the death of the old elite also die. But, others survive, and it was the fortune of the principle against compulsory self-incrimination, conceded at the last by the Stuarts, to survive not only the Commonwealth of Cromwell, but the Stuart Restoration in 1660 as well.

With conflict of this character and intensity as the breeding ground of the constitutional principle, it is not surprising that Professor Levy emphasizes in the organization of his study a series of battles of underdogs against oppressors. The dramatic way in which the book is organized, as a series of duels in which the underdogs usually, but not always, emerge victorious, may have had a great deal to do with its enthusiastic reception. But the popular appeal of the book should not obscure the sound scholarship that produced it. In his first two chapters, Professor Levy describes the historical background of the Tudor and Stuart contests concerning self-incrimination. He first compares common law and ecclesiastical criminal procedures. He then considers the development and use of the *ex officio* oath in the ecclesiastical and prerogative courts and the use of the oath in securing conformity to the twists and turns of Tudor political and religious policy through the reign of Mary (1553-1558).

Common law criminal procedures were essentially accusatorial. The judge was a referee, the case being decided by a jury which heard facts

offered by a complainant and defendant. Ecclesiastical criminal procedures were essentially inquisitorial. The judge had the initiative in finding facts by interrogating the witnesses. He could commence the case and then hear and decide it.

An independent ecclesiastical court system was introduced into England at the time of the Norman Conquest (1066). Until Henry VIII's Act of Supremacy in 1534, the English ecclesiastical courts were branches of an international court system of the Roman Church. In their procedural developments, the ecclesiastical courts were much in advance of the courts of common law, and ecclesiastical procedures served as models for early common law remedies in the civil field. In the area of crime, however, the ecclesiastical and common law courts took different routes, the ecclesiastical criminal procedures being much affected by the Roman law with certain embellishments contributed by the canon lawyers.

The major canon law embellishment was the *ex officio* oath, so-called because the judge required it by virtue of his office. The oath was formalized at the Fourth Lateran Council in 1215 (the same year as Magna Charta), being designed to assist in the discovery of heretics. The use of the oath became general in the ecclesiastical courts, being used in testamentary and matrimonial matters, for example, although there is no indication of its use to root out heresy or in criminal matters in England until 1246. The oath of which Lilburne so bitterly complained in the Star Chamber thus had ancient roots, and perhaps never would have stimulated such monumental opposition in the sixteenth and seventeenth centuries had it been confined to the usual kinds of criminal cases which were presented to the ecclesiastical courts.

After the Act of Supremacy in 1534, which made Henry VIII head of both church and state, heresy became identified with treason. The *ex officio* oath became the major fact-finding tool of a new group of courts, the prerogative or "conciliar" courts. These developed from the King's Council, as did the courts of common law. Some, such as the Court of Chancery and Star Chamber, antedated the Tudors. But the Tudors reinforced the powers of these courts and assigned them roles of enhancing the efficiency of administration of the royal government and of securing conformity to the new arrangement of church and state in one political head.

The newest of the prerogative courts, less than a century old at the time of Lilburne's trial before the Star Chamber, was the Court of High Commission. Historians know less about this court than any

other which the English political system produced, and Professor Levy's book sheds new light upon its work.² The institution originated in a commission granted to Thomas Cromwell by Henry VIII, but did not undertake judicial tasks as a matter of routine until 1557 under a Marian commission. The High Commission was at first under the close supervision of the King's Council. But in 1583, under the leadership of Archbishop Whitgift, it received substantial independence. Enjoying the full confidence of Queen Elizabeth, Whitgift transformed the High Commission into a major investigative and judicial agency geared to the discovery of Catholic and Puritan subversion. Its use of the *ex officio* oath reflected this function.

Professor Levy devotes four chapters to Elizabethan developments relevant to the compulsory self-incrimination issue. Before the reign of Elizabeth I, few of that sombre procession of dissenters who took the final road to Tyburn or to Smithfield had escaped an encounter with the *ex officio* oath. But even fewer seem to have objected to the oath on the ground of compulsory self-incrimination. John Lambert did so in 1532 to the extent that the oath was used to reveal crimes that were unknown or unproved. Tyndale and Christopher St. Germain inveighed against the oath in treatises and pamphlets. But the frantic efforts by Elizabeth and her Council to counter Catholic and Puritan subversion brought the self incrimination feature of the oath into focus.

Under Elizabeth's extended repression of dissent, many lawyers, either Catholics or Puritans, were trapped personally in the toils of the High Commission. The first statement by a common law judge concerning the self-incrimination doctrine as involved in the *ex officio* oath was made in 1568, relative to a writ of habeas corpus to release Thomas Leigh, a Catholic lawyer practicing before the Court of Common Pleas, who had been committed by the High Commission for contempt.³ In the 1590's, James Morice, a Puritan lawyer, grounded opposition to the *ex officio* oath upon Magna Charta, following an

2. The only text is R. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION* (1913). A discussion of the Commission by most legal historians is minimal, usually on the ground of its extensive non-judicial functions.

3. There was a later incursion of the *ex officio* oath into the common law criminal procedure in the case of Nicholas Udall, one of the famous teachers and authors of his time, who was examined before the High Commission and then indicted and placed on trial for his life in the Assizes. He was charged with violation of a statute of 1581 pertaining to seditious libel against the Queen. The Assize Commissioners pressed him to swear under oath whether or not he had written the book which gave rise to the indictment. Udall sturdily asserted his right against self-incrimination.

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earlier statement of the point by Robert Beale, Secretary of the Privy Council. In his "Briefe Treatise of Oathes Exacted by Ordinaries and Ecclesiastical Judges," Morice struck effectively at the procedures of the High Commission. He marshalled for this purpose historical material that later was useful to advocates of Parliamentary supremacy and to those (such as Sir Edward Coke) who asserted the power of the King's Bench and other common law courts to interfere with procedures before the various conciliar tribunals.

Professor Levy observes that at the end of Elizabeth's reign Whitgift and his High Commission were still firmly established despite the new wave of opposition. And indeed Whitgift was! Substantially free from control by the Council and with little risk of interference from a Parliament controlled by Elizabeth, Whitgift and his fellows proceeded from excess to excess. From time to time the Commission did uncover a group of subversives, such as the Conventicle of Separatists in 1587. Such proof that the Commission was performing its role of public security insured its life and cloaked its function as an engine of political and religious oppression.

Frustrated in their efforts in the House of Commons to secure relief from the heavy hand of the High Commission, the Puritans turned to the common law courts. Until 1616, when Sir Edward Coke was removed by James I as Chief Justice of the King's Bench, these courts were the major vehicle for Puritan opposition to the work of the High Commission and Star Chamber. The self-incrimination feature of the *ex officio* oath was an ideal spike by which the fact-finding procedures of both courts could be blocked.

While the battle lines were drawn by the earlier Puritan opposition to the High Commission, there had been a long history of conflict between the common law and ecclesiastical courts. The two procedures used by the common law courts to block the work of the High Commission were the writs of prohibition and habeas corpus. By the writ of prohibition, proceedings before the High Commission could be halted; and by the writ of habeas corpus, a defendant committed for contempt could be released. In 1607, Nicholas Fuller, a lawyer who represented many Puritans, provided the first major test of the common law procedures. In seeking a writ of habeas corpus for a client imprisoned by the High Commission, Fuller made slanderous remarks before the King's Bench concerning the High Commission, and was imprisoned by the Commission for his intemperate statements. The argument which he would have made to a joint session of the common law judges (had he not been in prison) was published, and was a

major contribution to the later arguments of Coke and Lilburne. Professor Levy writes:

[T]he struggle for the right against self-incrimination was intimately connected with, and in some respects triggered, the greater struggle for constitutional liberty by the Commons and the common-law courts against an unlimited royal prerogative. Coke owed much to Fuller who, in turn, was indebted to Beale and Morice. All four relied on Magna Carta to combat the inquisitorial procedures of the ecclesiastical courts. The Great Charter first emerged as a "liberty document" in their opposition to the oath *ex officio*.⁴

A final example of the struggle between the common law and conciliar courts occurred in Coke's last year in office (1616), in which he decided *Burrowes and Others v. The High Commission*. Coke held the High Commission limited to the use of the oath only in testamentary and matrimonial cases, declaring that even if the High Commission had jurisdiction, they could not examine on oath in a criminal case because that would "make one thereby to subject himself to the danger of a penal law." He declared illegal both the *ex officio* oath and a denial to the defendant of the articles upon which he was to be examined.

Coke's fall from grace in 1616 signalled a temporary end to major controversy concerning the *ex officio* oath. Professor Levy suggests several reasons for this. Apart from the issue of Coke's personal prestige, which had rested upon his success in driving home his points concerning High Commission procedures, the use of prohibitions subsided because the lawyers of the common law courts, who had used the writ of prohibition to acquire ecclesiastical practice and that of other prerogative courts, had virtually destroyed ecclesiastical jurisdiction in the most lucrative areas. Ecclesiastical supervision over the administration of estates, for example, had completely broken down. It may well have been that the interest of the lawyers of the common law courts in increasing their practice in civil areas was just as important as the opposition of the Puritans to the *ex officio* oath and the High Commission in maintaining the common law pressure upon the church court system. Perhaps Coke had prolonged this pressure for his own personal interest after the general support by the bar of his court had diminished.

With the Stuart talent for fanning fire from smouldering embers,

4. LEVY 235.

Charles I and Archbishop Laud revived the controversy concerning the oath. With no royal control over the House of Commons, the controversy now centered there. In the mid-1630's Laud brought the Star Chamber into a close relationship with the High Commission as a state security agency, and both courts were then convenient targets for Lilburne and others who could count on substantial Parliamentary support. The arguments concerning compulsory self-incrimination had been spelled out by Morice, Fuller, and Coke. Lilburne and his colleagues carried the principle, once a weapon against the High Commission, into the courts of common law where it was established as part of a common law constitutional tradition.

Professor Levy considers the steps by which the right against self-incrimination was secured as part of the unwritten English constitution in the late seventeenth and early eighteenth centuries, and then examines the seventeenth-century American colonial experience. He encounters here the obstacle baffling all legal historians of seventeenth-century America—the lack of records. He nevertheless considers it likely that the right against self-incrimination was recognized in some of the colonies. He differs in this respect from Professors Goebel and Naughton, who argue that in colonial New York, at least, no such right existed.⁵

The matter is much complicated by conflicting theories concerning the degree to which the common law applied in the colonies. The experience of each colony was also different. It is the reviewer's opinion that so long as the common law jury was used extensively, the defendant probably would not be *required* to offer incriminating evidence against himself, and that the jury would be alerted not to draw inferences from the failure of the defendant to testify. Whether a judge would view the right as founded in common law or simply as elemental fairness in a case in which no conspiracy or subversion was suspected we will never know. But the reviewer is inclined to side with Professor Levy.

In the later eighteenth century, lawyers trained in the Inns of Court should have brought a sharp appreciation of the common law position concerning compulsory self-incrimination into the jurisprudence of the colonies. The work of these professionals, and the increasing circulation of English law books, make it quite likely that the right against self-incrimination was recognized in many of the

5. J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* 656 (1944).

colonies in the years immediately preceding the Revolution. The right was certainly nothing new to the men who framed the first state constitutions and the federal Fifth Amendment, most of whom were products of the colonial legal experience.

The shortest and last of Professor Levy's chapters deals with the framing of the state and federal constitutional provisions and the debates that led to the very restrictive wording of the right in the Fifth Amendment. Professor Levy writes:

The Fifth Amendment, even with the self-incrimination clause restricted to criminal cases, still put its principle broadly enough to apply to witnesses and to any phase of the proceedings.

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. But this inference drawn from the wording of the clause enjoys the support of no proof based on American experience, as distinguished from English, before the nineteenth century. Clearly, however, to speak merely of a right against self-incrimination stunts the wider right not to give evidence against oneself, as the Virginia model put it, or not to be a witness against oneself, as the Fifth Amendment stated. 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.⁶

Professor Levy thus argues that the common law history of the right against self-incrimination is essential to the construction of the self-incrimination clause of the Fifth Amendment. Whether or not this argument is fully accepted, his book, with its wealth of detailed information, will clearly be of value to lawyers. But there is a lesson here for the non-lawyer citizen as well.

Professor Levy deals only episodically with the intelligence processes

6. LEVY 427-28.

of the various establishments under attack and perhaps was not greatly interested in this aspect of the problem. Thus, the relationship of the *ex officio* oath and the self-incrimination problem to the domestic intelligence processes of the Tudor and Stuart governments appears only in flashes here and there in the book. There would, however, have been no High Commission if the Tudors and Stuarts had been able to obtain an adequate and reliable flow of domestic intelligence from other sources. The sheriffs and justices of the peace, once good information sources, had been brought under the control of the House of Commons, an institution from which little sound information was passed to the Council. The old General Eyre, which had been a major information source, had fallen into disuse. The Privy Council relied increasingly for information upon paid informers, such as Chilliburne, whose information led to the arrest of Lilburne, upon the prerogative courts, and especially upon the High Commission. The Church knew what people were thinking and the High Commission was at the apex of the Church intelligence system. Attacks upon the *ex officio* oath, either in the High Commission or in lower ecclesiastical courts were, from one point of view, attacks to block the flow of intelligence to the Crown.

When Lilburne attempted arguments against forced divulgences of information before a House of Commons committee shortly after abolition of the *ex officio* oath, the High Commission and the Star Chamber, he received a practical demonstration in prison of the determination and power of a "new" establishment that needed information and was going to get it. Perhaps even the concession to Lilburne by the Cromwellian Commissioners in Oyer and Terminer was by yet another "new" establishment that had well-rooted information sources in a new military and political organization and could afford generosity on the point.

The common law courts, dealing to a great extent with peasants who are notoriously reticent to give any information, had long before the time of the High Commission gone over to a "do it yourself" type of jurisprudence. Juries found facts and made decisions. If peasants would not talk to officials, they would sometimes talk to one another. One is reminded of Arthur Koestler's description in *Darkness at Noon* of the Soviet interrogator, Gletkin, who sought to obtain the peasant's corn by preaching patriotism—while the latter stood silently and unhearing, picking his nose. We are all peasants under the skin, hostile to tax collectors and edgy around the police, and governments thus have to deal with millions of peasants "picking their noses."

A reader concerned with events of the future, rather than with the sentiment and excitement of past opposition, will see in our current federal government a complex of institutions whose domestic intelligence resources, despite their computers, are producing much information of little reliability. Poor intelligence sources are being tapped or information is not reported reliably. It may be that the people who know will not talk. This is not precisely the problem confronted by the Tudors and Stuarts, but so far as governmental response is concerned, the pattern is likely to be the same. An establishment that cannot obtain accurate information will not survive; and before it is starved for facts it will establish its "High Commission." This may be the major lesson which Professor Levy's book should teach, and if the lesson taught is true, many of us may live to see the Fifth Amendment severely tested.