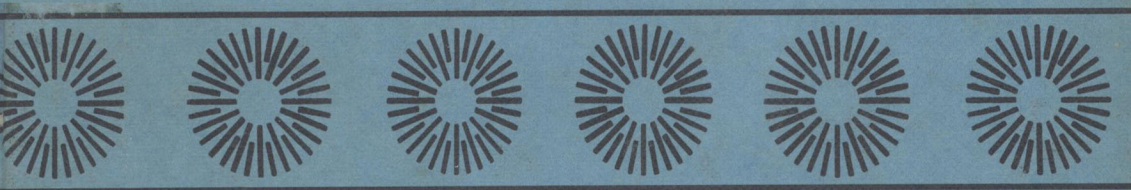
Taking the Fifth

Mark Berger



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Taking the Fifth

The Supreme Court and the Privilege Against Self-Incrimination

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Taking the Fifth

To Kathy, Kerren, and Claire

Preface and Acknowledgments

No person . . . shall be compelled in any criminal case to be a witness against himself.

—United States Constitution, Amendment V

The Fifth Amendment occupies a very special place in the American public consciousness. It was at the center of attention during the McCarthy era when witness after witness invoked the privilege against self-incrimination before congressional committees investigating communist influence in areas as diverse as the State Department, the army, and the Hollywood movie industry. During the 1960s it was again a source of controversy, this time reflected in the bitterly received *Miranda* rules requiring that suspects in a custodial police interrogation be warned of their constitutional rights. Indeed, a unique language has developed around this provision of the Bill of Rights so that simply "taking the Fifth" has come to mean assertion of the self-incrimination clause of the Fifth Amendment of the U.S. Constitution. No other provision of the Constitution is referred to in quite that way.

Considering its illustrious past and controversial present, it is rather strange that the privilege against self-incrimination has not been given book-length treatment for approximately twenty years. Ewrin Griswold's *The Fifth Amendment Today* and Lewis Mayers' *Shall We Amend the Fifth Amendment?*, both written during the 1950s, have not been followed since then with anything of comparable quality or depth. There are of course evidence treatises that consider the privilege against self-incrimination—those by Dean John Wigmore and Dean Charles McCormick being the most helpful—as well as innumerable articles on the subject in legal and nonlegal journals alike. Yet the more generalized emphasis of a treatise on the entire corpus of evidence law and the narrow focus reflected in an article on a particular facet of the Fifth Amendment do not cover every need. Surely there is room for a book on the Fifth Amendment that seeks both an overview of its history, policy, and contemporary application as well as a more detailed treatment of its evolutionary development in the courts. That is the task I set for myself, and it is my hope that the result is valuable to the practitioner, teacher, student, and general reader.

Although this book reflects a broad cross-section of Fifth Amendment issues, it is not and was not meant to be treatise-like in its coverage. Notes have been kept to a minimum, consistent with sound scholarship, in order to avoid diverting the reader's attention. Both the table of cases and the bibliography, however, were intended to assist the researcher in locating the important primary and secondary Fifth Amendment sources. And, although

the subject matter of this book is the self-incrimination clause of the Fifth Amendment, it is variously referred to throughout as "the privilege against self-incrimination," "the Fifth Amendment," and "the right to remain silent." Hopefully, these labels will not prove confusing, particularly with reference to the other protections encompassed by the Fifth Amendment. Additionally, the term *defendant* here denotes parties originally charged with a criminal offense even though the correct label at the appellate level might be "petitioner," "respondent," "appellant," or "appellee." It is hoped that this usage will improve clarity for the general reader. Finally, some of the theories expressed in this book have been the subject of articles previously published by the author in legal periodicals. The articles are cited in the bibliography, but I wish to acknowledge the permission granted by the *Journal of Criminal Law and Criminology* to revise and reprint the article "Burdening the Fifth Amendment," which appears herein as chapter 8.

It is with deep appreciation that I express my thanks for the assistance I received from many sources. Deborah Lane, Peggy O'Hare Scott, and Kerry Myers, students at the University of Missouri-Kansas City School of Law, contributed valuable help as research assistants. Linda Stephenson managed to secure every resource I needed through the magic of interlibrary loans. Jackie Capranica was more patient than I had a right to expect in handling the typing of far too many drafts. And finally, my wife, Kathy, gave me her fullest support and encouragement in this project, assisting in everything from substantive editing of the text to proofreading the manuscript. I hope this book is worthy of so many efforts.

Contents

1 The Historical Framework

The Fifth Amendment of the U.S. Constitution provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The First Congress proposed the addition of this language to the Constitution as part of the Bill of Rights in order to ensure the existence of a privilege against self-incrimination that would be protected against interference by the newly created federal government. Behind the effort to establish an American self-incrimination privilege, however, lay an Anglo-American legal tradition dating back to at least the thirteenth century. In fact, there exist biblical references to a duty to refrain from subscribing to oaths, suggesting even earlier origins of the concepts underlying the modern privilege against self-incrimination. Clearly the principle derives from an established historical background of substantial duration.[1]

The history of the privilege against self-incrimination is so rich and dramatic and so frequently referred to in court opinions that it simply cannot be overlooked in any treatment of the right to remain silent. There is a danger, however, that the particular abuses that prompted the development of the privilege and dominate its history will be used to define the limits of the privilege today. Indeed, the very repetition of the important historical events behind the development of the privilege in case after case may well serve to reinforce the notion that the self-incrimination clause of the Fifth Amendment is circumscribed by its sources and traditions. In light of the absence of formal standards governing the role of history in the interpretation of the privilege against self-incrimination, the risk of overvaluing the available historical evidence is significant.[2]

There is, however, no inflexible tradition limiting the interpretation of the scope of the privilege against self-incrimination to its historical sources, nor would such an approach be advisable. The obvious consequence of a historical barrier would be to halt further development of the privilege and encourage the government to devise techniques to circumvent existing Fifth Amendment limitations. The ultimate outcome of such a process would be the severe dilution of self-incrimination protection. Elsewhere, the U.S. Supreme Court has recognized the need to retain the ability to adapt constitutional doctrine to contemporary needs in order to both prevent the dilution of constitutional protections and regulate unanticipated government conduct. The Eighth Amendment ban against cruel and unusual punishments, for example, is said to "draw its meaning from the evolving

standards of decency that mark the progress of a maturing society."[3] Similarly, the Supreme Court has demonstrated its willingness to apply the Fourth Amendment's protection against unreasonable searches and seizures to problems not faced by the American colonists, as in the case of wiretapping, and has observed that the "[f]ramers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[4] The same logic is equally persuasive when applied to the Fifth Amendment and strongly supports the view that the privilege against self-incrimination need not be limited to curing the abuses from which it grew. Rather, as Judge Jerome Frank observed, we should view the right to remain silent as a "noble privilege [that] often transcends its origins, . . . account[ing] for some of our most cherished values and institutions."[5]

At the other extreme, it could be argued that the history of the privilege is largely irrelevant to determining its proper scope in contemporary American criminal procedure. Presumably, after eliminating the historical sources of the self-incrimination clause, its interpretation would then rest upon the particular language used by the framers of the Fifth Amendment, a sense of the policy objectives that the right to remain silent seeks to further, and legal precedent. Interpreting the self-incrimination clause without reference to its history, however, would produce results as sterile as those obtained from a decision-making perspective in which history was the sole criterion. The language of and policies behind the privilege against self-incrimination, as well as prior Fifth Amendment decisions, derive much of their content from history and tradition. Eliminating the sources of the privilege from the process of interpreting its scope would leave the doctrine without a firm foundation and more easily subject to manipulation.

In light of the ease with which the historical background of the privilege can be misused, it is important to stress that the privilege's history must be understood as neither a determinant of the contemporary meaning of the Fifth Amendment nor as an academic exercise having no bearing upon the process of interpreting its scope. Rather, the sources of the privilege constitute an important body of evidence upon which the courts must rely in determining the proper role of the right to remain silent. The historical evidence should thus be considered as highly relevant but not controlling. It may well be true, as Justice Frankfurter observed, that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.' "[6] While it is not true that history provides all the answers, it is also not true that the privilege can be understood without a thorough appreciation of the context in which the right to silence arose. Its appropriate role was perhaps best stated by Dean Wigmore, whose views on the privilege have been extremely influential in shaping its development:

> If we can throw the light of history upon this rule from its first appearance down to the time when it received its final shape, we shall be better able to judge how firm is its basis in our system of law, and how strong a claim, merely by virtue of its history and its lineage, it ought to have upon our respect. We may then weigh intelligently the various contesting considerations and be prepared to make a final adjustment of the claims of this principle to the important place which it now occupies. . . . If our verdict is favorable, let us carry the principle to its logical extent and enforce it thoroughly; if unfavorable, let its influence be discouraged and let its operation be modified to the extent which our conclusion may require.[7]

Early English Sources

The signing of the Magna Carta by King John in 1215 has been regarded as a momentous event in the development of English law. Yet while King John was forced by the barons at Runnymede to assent to a variety of legal principles, on the whole the document he executed broke little new ground. Rather, the Great Charter was a reaction to the king's legal excesses, and its real importance lay in its reaffirmation of traditional limitations on the authority of the sovereign. Among the issues it addressed were criminal procedure matters such as the requirement in chapter 28 of formal accusation by presentment. No specific mention, however, was made of anything remotely resembling the privilege against self-incrimination. The best argument that can be made for the position that the Magna Carta encompassed a restriction on the power of the government to compel self-incriminatory evidence stems from chapter 29, which ensures freedom from punishment "unless by the lawful judgment of his peers, or by the law of the land." And, while proponents of the principle that an individual should not be forced to accuse himself would later claim the "law-of-the-land" provision of the Magna Carta as the legal authority for their position, history does not support their argument. The evidence suggests to the contrary that the barons who confronted King John were not particularly concerned with the problem of compelled self-incrimination nor was the compelling of self-incrimination an especially widespread practice. Instead, the historical sources of the privilege against self-incrimination reflect a process of development partly predating the Magna Carta but largely independent of it.[8]

At the outset some understanding of the basic features of Anglo-Saxon criminal procedure is necessary to appreciate the evolution of the right to remain silent. The Norman Conquest found a largely informal system of criminal justice prevalent in England, but it was nevertheless a system characterized by accusatorial procedures. The process involved an accusation or charge being made against the alleged offender, followed by a decision as to the form of trial to be employed. During this era such trials as-

sumed three essential modes. "Trial by compurgation" encompassed a sworn oath by the accused attesting to his innocence, supported by the oaths of some number of other persons, the so-called compurgators. However, the latter oaths became merely assertions of the credibility of the accused and did not have to come from people who knew the facts underlying the charge. "Trial by ordeal" required the accused to undergo a physical test to establish his innocence. Carrying a hot iron, inserting one's hand or arm into boiling water, or being bound and then cast into a pool of cold water were the most frequently used techniques. Finally, the Normans added to this array the concept of "trial by battle." Much like trial by ordeal, the system of trial by battle depended upon divine intervention to protect the innocent and was ultimately used in only the more serious criminal cases.[9]

The modes of proof utilized in early Anglo-Saxon criminal procedure were concededly primitive in character. Nevertheless, they were an accurate reflection of the profound religious faith placed in divine intervention and in the sanctity of oaths. They satisfied the need to resolve disputed issues of fact in a manner very much in keeping with the character of the times. Their critical weakness, of course, and the reason for the growth of disenchantment toward their continued use, was the nearly total unreliability of the results produced.

For purposes of the development of the privilege against self-incrimination, however, early Anglo-Saxon criminal procedure is relevant for its overwhelmingly accusatorial characteristics. More particularly, before being put to trial in whatever form, the defendant was the recipient of a public accusation by an identified accuser. The court's role was to determine the mode of trial—it was not to decide guilt or innocence. Finally, the three forms of trial did not exclusively depend upon the presentation of evidence to resolve factual disputes between the parties. Instead, the verdict was based upon the results of the compurgation oath, ordeal, or battle procedures. In the context of such a system, self-incrimination problems were largely irrelevant. Since the procedures of that period did not rely upon factual evidence as such, there was no special need to obtain self-incriminatory admissions from the accused and no effort was made to secure them. The system's indifference to acquiring self-incriminatory evidence was simply part of its general lack of reliance upon evidentiary support for criminal verdicts other than that supplied by the compurgation oath, ordeal, or battle procedures.

The post-Norman Conquest period, extending past the signing of the Magna Carta in 1215, witnessed little change in the accusatorial character of the criminal procedure system. However, the beginnings of an inquest system were developing in the legal structure governing civil matters. But the civil inquest was far different from the full-scale inquisitional proceeding later introduced by ecclesiastical law. Its major characteristic was

the fact that decision-making authority was placed in the hands of a jury and the outcome did not depend upon the result of compurgation oaths, ordeals, or battles. Consequently, there was greater dependence upon the presentation of evidence to support the verdict, but still no effort was made to compel the production of evidence that might be criminally damaging. Nevertheless, the movement toward a procedure of trial by jury, a trend that ultimately reached criminal matters, increased the need for the collection of evidence to be used at trial, and fostered a system in which self-incriminatory evidence obtained from the accused might be especially critical.[10]

While Anglo-Saxon law was developing a system that would accommodate self-incriminatory evidence, canon law had already made the change from an accusatorial format to an essentially inquisitorial mode of procedure. Church law had suffered from the same reliability problems that plagued the early English criminal law system, but the shift to an inquisitorial style does not appear to have been undertaken for the purpose of improving verdict reliability. Rather, the development of the inquisitorial process represented a procedural accommodation to permit the church to more effectively and efficiently pursue its sacred mission of identifying and prosecuting religious heretics.

Although the church had generally been lax in its efforts to root out heresy, its perspective dramatically changed in the thirteenth century primarily as a result of both the zealousness of Pope Innocent III and what was felt at the time to be a growing danger of mass heresy. However, the traditional accusatorial procedures were inadequate to aggressively root out heretics. The *accusatio* form of prosecution depended upon an individual making the accusation and becoming a party to the prosecution, as well as bearing the risk of being punished if the prosecution failed. The *denunciatio* procedure permitted the judge to exclusively undertake the prosecution after receiving an accusation, which he then kept secret. The fact that the accuser in a *denunciatio* proceeding was not revealed and did not bear the risk of failure nor the burden of prosecution served to encourage the filing of an accusation. Nevertheless, the system was still tied to the willingness of some private person to assume at least the moral responsibility of becoming an accuser.[11]

The church had at its disposal one additional mode of prosecution with a far greater potential for successfully guarding the true Christian faith, the so-called *inquisitio* proceeding. Here the court functioned as accuser, prosecutor, judge, and jury; one individual had the authority to make the charge, determine whether to prosecute it, and assess whether there was sufficient proof of guilt. The absence of a dependence upon any other official or private party meant that there was no barrier to church defense of established doctrine other than providing for the selection of diligent and

loyal judges. In formal terms it was true that the judge was obligated to satisfy himself that grounds for an *inquisitio* proceeding existed in the form of the canon law requirement of *infamia*. However, suspicion or rumor would suffice, and the judge had unreviewable discretion in determining whether the standard was met.[12] Support for the increased utilization of the *inquisitio* procedure, moreover, was given by the Fourth Lateran Council in 1215, ironically the same year the Magna Carta was signed. The council established the oath *de veritate dicenda* to which a suspect was required to swear.[13] The form of the oath was a model of compulsory self-incrimination in that it required truthful answers to all questions directed to the suspect. With the establishment of the oath and given the freedom to conduct a prosecution without waiting for a private complaint, the basic structure of the modern inquisitorial system was complete.

In one sense, the power to investigate possible offenses and the imposition of a requirement that anyone questioned give only truthful answers might not seem out of line with legitimate needs. The reality, however, was that the inquisitorial proceeding coupled with the administration of the oath created an insidious trap for all those unfortunate enough to be ensnared in it. First, the *infamia* requirement presented no real obstacle to subjecting anyone to the *inquisitio* proceeding. Beyond that, once an individual had been chosen as an inquisition victim and presented with the oath, his chances of escaping were slight. The accused was not informed of the charges, his accusers, nor the evidence against him. He was condemned if he refused to take the oath, condemned if he supplied the sought-after admissions, and risked perjury if he failed to tell the truth. In the hands of a skillful interrogator, the inquisitional proceeding and oath were extremely powerful tools and nearly foolproof in securing the conviction of those against whom they were directed.

It was not long before the inquisitorial reforms of the church were introduced into the ecclesiastical law of England. In 1236 upon the marriage of Henry III to his French wife, a number of Catholic clergy migrated to England. Among them was Cardinal Otho, the legate of Pope Gregory IX. Otho convened a meeting of the English bishops and issued a series of constitutions on ecclesiastical matters, including questions of proper procedure to be followed in ecclesiastical courts. Included in the directives was the introduction of the oath *de veritate dicenda*, ultimately better known in England as the "oath *ex officio*" because the judge compelled its execution by virtue of his official office.[14] But, although initially introduced into ecclesiastical procedure, the oath *ex officio* was not limited to use against the clergy. In 1246 Bishop Robert Grosseteste undertook an inquisitorial investigation into immorality in Lincoln and made wide use of the oath. Subjects were intensively questioned about themselves and others, and ultimately protests were lodged against the entire procedure. Henry III

responded by limiting use of the oath against civil subjects to matrimonial and testamentary matters, but the evidence suggests that far wider use continued, even by Bishop Grosseteste.[15]

Protests against the use of the oath were a part of a larger controversy over the jurisdictional division between ecclesiastical and civil courts. Common law judges resisted the encroachment of ecclesiastical courts by issuing writs of prohibition against proceedings conducted by church officials. Meanwhile the church sought to conduct its affairs pursuant to constitutions such as those issued by Archbishop Boniface in 1272, which threatened excommunication for anyone who refused to swear to the oath or hindered its administration. By the early 1300s this practice led to the statute "De Articulis Cleri," which sought to clarify the jurisdictional reach of the ecclesiastical courts, prohibit their activities beyond the established jurisdictional limits, and bar administration of the oath *ex officio* to laymen other than in matrimonial or testamentary cases. It appears, however, that even parliamentary controls on the oath were not fully respected.[16]

While the ecclesiastical uses of the inquisitional oath generated some opposition, it must still have been readily apparent how powerful and effective the oath procedure was. It provided a means for compelling even the most powerful people to submit to official questioning. There was no implicit obligation to inform the suspect of the charges against him, nor did his accusers have to be named. He could be interrogated about his own activities or be forced to implicate others, or both. And he faced possible penalties for refusing the oath, committing perjury, or supplying incriminating information. Given the advantages of the procedure, perhaps the only flaw from the crown's perspective was that it had been used by ecclesiastical courts in matters over which the crown wished to retain authority.

In fact, in matters over which the king did have jurisdiction, the civil law system began to copy aspects of ecclesiastical procedure, including utilitzation of the inquisitorial oath. This is best illustrated by the activities of the King's Council. The council was an immensely powerful institution that exercised its authority in the name of the king. Its membership comprised the foremost officers of the time, many of whom were church officials who naturally relied upon ecclesiastical procedure. The council exercised executive, legislative, and judicial authority and ultimately evolved into many important British political institutions, including the Court of Star Chamber, a body whose name derived from the fact that the facilities it used were ornamented with stars. During the fourteenth century the council developed procedures for handling its judicial role, which included anonymous accusation, secret proceedings, and examination by oath *ex officio*. Even opposition by Parliament, including charges that the oath violated the law-of-the-land provision of the Magna Carta, was to no avail. Inquisitorial procedures clearly worked too efficiently to be willingly given up.[17]

Resistance to the early ecclesiastical and civil law uses of the oath procedure constitutes a significant starting point in the evolution of the privilege against self-incrimination. Yet the extent of that early resistance was limited. Nothing like the church inquisitions on the continent appeared in England during this early period, and it would have taken more substantial use of the procedure to stiffen opposition. Instead, resistance to the oath at this time was more a means than an end, its role during this era being primarily that of a focal point in the struggles between ecclesiastical and civil courts. Yet all that could readily have changed if a zealous campaign to root out heresy had been undertaken, but that appeared unnecessary in England, at least until the appearance of John Wycliffe and the Lollards in the late fourteenth century.

The spread of Lollardry in England was aggressively fought by the Catholic clergy. They viewed the Lollards as a heretical sect and even petitioned Parliament for its assistance. Parliament responded in 1401 with the statute "De Haeretico Comburendo," providing for the burning of heretics. Opposition was limited, but there were instances in which suspected Lollards challenged their subjection to the inquisitorial features of the oath. In particular, in 1407 Willard Thorpe was ordered to swear to the oath prior to his interrogation, but he refused. Thorpe was therefore questioned without the oath, and in 1408 Archibishop Arundel issued a decree providing that there should be no future challenging of the oath procedure in such cases.[18]

The statutory enactment of 1401 effectively introduced the Inquisition to England. It entailed the utilization of the state's power to support ecclesiastical efforts to control heresy, and it meant the emergence of the oath interrogation as an important, if not dominant, procedural technique. Moreover, much like its counterpart on the continent, the English Inquisition produced its share of martyrs. Professor Leonard Levy has estimated that during the period from 1401 to 1534, when the statute on heretics was repealed, approximately fifty people were burned at the stake while many thousands were subjected to lesser persecutions, including substantial terms of imprisonment. Victims were selected on the basis of suspicion and subjected to a wide-ranging interrogation in which they were forced not only to admit their own guilt but also to provide names for future proceedings. But despite the significance of the oath in the inquisitorial process, it does not appear to have led to widespread resistance. Objection to taking the oath such as that of Willard Thorpe was apparently rare or at least not widely reported. Similarly, only a few writers protested against the oath, and they faced the opposition of the influential Sir Thomas More.[19]

One can only speculate as to what might have happened with respect to resistance to the inquisitorial oath had not Henry VIII broken with the Church of Rome. The king had received a petition from Parliament in 1532