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## Levy: Origins of the Fifth Amendment

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ORIGINS OF THE FIFTH AMENDMENT. By *Leonard W. Levy*. New York: Oxford University Press. 1968. Pp. xii, 561. \$12.50.

This volume by Professor Leonard W. Levy, Earl Warren Professor of Constitutional Law and Chairman of the Department of History at Brandeis University, is a scholar's job, with superior writing, readily usable footnotes, a bibliography, and an index. However, Professor Levy's choice of a title is somewhat of a misnomer. Although he calls his book *Origins of the Fifth Amendment*,<sup>1</sup> he

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1. Inferentially he justifies his choice of title by quoting (p. 2) from Chief Justice Warren's opinion for the Court in *Quinn v. United States*, 349 U.S. 155, 163 (1955): "Surely, in popular parlance and even in legal literature, the term 'Fifth Amendment' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination."

does not deal with important provisions of that amendment such as the requirement for indictment by grand jury, the guarantee against double jeopardy, the due process clause, and the prohibition against taking private property for public use without just compensation. Instead, the book deals solely with one of the great characteristics of the Anglo-American legal system: the "right of silence," or, as the bench and bar called it until recent years, the "privilege against self-incrimination."<sup>2</sup>

Professor Levy prefers to call the right of silence "the right against self-incrimination." But "privilege" was not an inapt description of the right of silence during the time of its development. The word privilege derives from the Latin *privilegium* (*privus*, private and *lex, legis*, law), and originally meant a measure of Roman law either against or in favor of a particular individual; it could inflict penalties on a citizen by name without any previous trial or exempt an individual from the operation of a law.

It was in the latter sense that the word "privilege" often came to be used in Anglo-American law. It denoted an advantage enjoyed by a person or class of persons beyond the common advantages of others, such as the freedoms asserted by the British Parliament in its struggles with the monarchy.<sup>3</sup> The term "privilege" probably came into use for the right of silence because of the word's application to confidential communications, such as those between attorney and client, which the law early protected.<sup>4</sup>

Regardless of the terminology that one uses, tracing the origins of the right of silence is an exciting quest. One starting point may be found in Deuteronomy, the fifth book of Moses, which requires at least two or three witnesses in some capital cases.<sup>5</sup> From this require-

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2. Interestingly enough in this connection, Professor Levy describes the appearance of Royal Tyler before the Massachusetts House of Representatives in 1754 (p. 387). When the speaker demanded his confession, Tyler requested counsel. The House refused. Thereafter Tyler parried all questions by invoking his right of silence. The record states: "and the only Answer he would make was, *Nemo tenetur seipsum Accusare*; or, A Right of Silence was the Privilege of every Englishman." Professor Levy terms this "a magnificent free translation" (p. 387).

3. During the struggle between Parliament and the first two Stuarts, James I (1603-1625) and Charles I (1625-1649), the Commons insisted on their privileges while the king held forth about his prerogative. Blackstone in the first volume of his Commentaries, originally published in 1765, described these privileges as "very large and indefinite," and explained: "Privilege of Parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown." 1 BLACKSTONE, COMMENTARIES \*164. Two of the principal privileges were freedom from arrest in civil matters and freedom of speech. *Id.* at \*164-65.

4. A judicial grant of silence to an attorney in order to protect a communication to him from his client was called a privilege as early as 1740. *Rex v. Watkinson*, 93 Eng. Rep. 1072 (Ch. 1740). The attorney-client privilege goes back to the reign of Elizabeth I. *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Kelway v. Kelway*, 21 Eng. Rep. 47 (Ch. 1580); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580).

5. 5 *Moses* 17:6. In *Miranda v. Arizona*, 384 U.S. 436, 458 (1966), Chief Justice

ment, rabbinical judges derived the maxim *ein adam messim atsmo rasha*—the Hebrew equivalent of *nemo tenetur seipsum prodere*, no one is bound to accuse himself.

More than two millennia later, John Lilburne in his controversy with the Star Chamber relied upon the same biblical two-or-three-witness requirement in justifying his refusal to take the oath *ex officio*. While he was in the pillory in 1638 for his refusal to take the oath, Lilburne made a speech to the assembled throng. According to his own account, he stated:

Now this oath I refused as a sinful and unlawful oath . . . . It is an oath against the law of the land. . . . Again, it is absolutely against the law of God; for that law requires no man to accuse himself; but if any thing be laid to his charge, there must be two or three witnesses at least to prove it. It is also against the practice of Christ himself, who, in all his examinations before the high priest, would not accuse himself, but upon their demands, returned this answer, "Why ask you me? Go to them that heard me."<sup>6</sup>

How the Rabbis, hundreds of years before Christ, and Lilburne, hundreds of years after Christ, independently derived the right of silence from Deuteronomy's requirement of two or three witnesses in capital cases is not clear. Although the English people knew the Bible, they were not familiar with the Talmud. But it may be that the accusatorial method of the Hebrew and English peoples was conducive to the development of the right of silence. Justice Frankfurter, writing some twenty years ago, pointed out the intimate relationship between the system that a society uses to deal with deviant persons and the quality of the protections that it accords to the individual defendant:

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.<sup>7</sup>

This comment represents some 800 years of legal history reaching back to the reign of Henry II, a wise administrator who laid the basis for our jury system. Our accusatorial method owes its survival

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Warren in the Court's opinion observed that the right of silence has roots which "go back into ancient times." Then in a footnote he added that Maimonides (1135-1204), the great codifier of the Talmud, "found an analogue to the privilege grounded in the Bible." 384 U.S. at 458 n.7.

6. Lilburne's Case, 3 How. St. Tr. 1315, 1332 (1638).

7. *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

and growth to the existence of our grand and petit jury system; but this system, in a sense, takes us back more than 1,500 years to tribal justice.

Centuries before Charlemagne, European tribal justice was accusatorial in the sense that the public did not prosecute, and hence officials did not question, deviants. The ones who prosecuted offenses were private persons, the injured parties or their kindred, and the modes of proof were not inquisitorial but magical. But in the ninth century in Western Europe, changes in the treatment of deviants slowly began to take place. The state gradually took over the prosecution of offenses and, in the course of time, the accusatorial and inquisitorial systems supplanted the older modes of proof. With the Vikings attacking from the north and the Saracens from the south, tribal society in Western Europe started to become feudal as kinship ties gave way to the lord-man relationship. The authority of the state waxed; that of the kindred waned.

During this period, the Frankish kings broke the bounds of the old tribal customs and, where their finances were concerned, abandoned the older modes of proof. There had been customary moot hill courts with their magical, superstitious procedures—the ordeal, oaths of one's self and one's kindred (called wager of law or compurgation), and trial by battle. Such procedures were no longer good enough for the Frankish kings when it came to their revenues. They established a procedure which had the name of *inquisitio patriae*, more generally known as the *enquête du pays*, the inquiry of the countryside or the inquiry of neighbors. In 829 an ordinance of Louis I, the third and surviving son of Charlemagne, provided that every inquiry with reference to the royal revenue was to be by the *inquisitio*—the inquiry of neighbors.<sup>8</sup>

In the next century the Danes and Norwegians (Northmen), led by Rollo, invaded the West Frankish kingdom; by a treaty in 911 they acquired the territory which became known as Normandy. As dukes of Normandy, Rollo's successors adopted and developed the Frankish *inquisitio*. One of them, William the Conqueror, invaded England, defeated Harold and the English at the battle of Hastings in 1066, and on Christmas day of that year had himself crowned at Westminster. Had it not been for the Normans and their conquest of England, the inquiry of neighbors might long ago have become a matter of interest only to antiquaries, who would have regarded it as no more than an instrument of Frankish fiscal tyranny.<sup>9</sup> Instead, it

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8. See J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 48 (1898).

9. The Domesday Book, a great fiscal record which William the Conqueror ordered prepared, was compiled in 1085-1086 out of just such inquisitions of neighbors. This work contains all manner of details with reference to local customs and the possession, tenure, and taxable capacity of the landowners. The *Anglo-Saxon Chronicle* said of

developed into the jury system and was to be regarded as an agency for the protection of the weak against the strong and of the individual against the state.

Professor Levy characterizes the parent of our grand and petit jury as a Norman import (p. 7). In this he reflects the view of Heinrich Brunner, although he does not cite Brunner's works. Brunner sought to demonstrate that our jury system was neither English nor popular, but rather was Frankish and royal.<sup>10</sup> He was right and he was wrong. One will find the jury of neighbors among the Anglo-Saxons as well as among the Franks. It was both popular and royal.

As early as the Wantage Code of Ethelred the Unready and his councillors (c. 997), there is provision for a jury of presentment, the ancestor of our grand jury: "[A] meeting is to be held in each wapentake, and the twelve leading thegns, and with them the reeve, are to come forward and swear on the relics which are put into their hands that they will accuse no innocent man nor conceal any guilty one."<sup>11</sup> If it be suggested that this is a piece of Danish rather than English law, there is a double answer: for one thing, the Wantage Code was issued on English soil; for another, the northern tribes of Europe made use of the accusing jury. While the deciding jury may have been used by the Anglo-Saxons only sporadically, it was used.<sup>12</sup> Thus, when William's successor, Henry II, sought to establish the antecedents of our modern legal system, he was able to take the royal Frankish inquisition and fashion it into our grand and petit jury system among a people to whom this kind of inquisition was familiar as well as congenial. In basing the administration of justice on this institution, he had the support of the body of the population; the great losers were the feudal courts.

Just as the Frankish kings eventually became dissatisfied with the old procedures and modes of proof, so too did the Church. Almost four hundred years after the Frankish kings began to develop the inquiry of neighbors, Innocent III, a great papal legislator, began to devise the inquisitional technique in a series of decretals beginning in 1198 or 1199. The system was perfected in the Fourth Lateran Council, which was called to assemble in 1215. This assem-

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William's inventory of every local holding: "So very narrowly did he have it investigated, that there was no single hide nor a yard of land, nor indeed (it is a shame to relate but it seemed no shame to him to do) one ox nor one cow nor one pig was there left out, and not put down in his record . . ." 2 ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 161 (1955). The information was obtained by a commission which traveled throughout England and made inquiry of sworn groups of responsible neighbors in each district concerning the facts which the commission wished to elicit.

10. H. BRUNNER, *DIE ENTSTEHUNG DER SCHWURGERICHTE* (1872).

11. 1 ENGLISH HISTORICAL DOCUMENTS 403 (1955).

12. See Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, 77 SELDEN SOC. PUB. 51-58 (1959).

bly included clerical leaders from almost every country in Christendom and representatives of many temporal rulers. The canons and decretals which this Council issued totaled seventy in number. One of these perfected the inquisitional system; others abolished ordeals and instituted the practice which came to be known as auricular confession.

Under the inquisitional technique, an official by virtue of his office (*ex officio*) had power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all things he would be questioned about. Innocent, following some traces of the Roman law, provided for three forms of action: *accusatio*, *denunciatio*, and *inquisitio*. In *accusatio* an accuser formally brought suit and was subject to the *talio* in case of failure—that is, he would be obliged to suffer the punishment which he had demanded for the accused. In *denunciatio* a person gave information about an offense to the appropriate official but did not himself become a formal accuser or party to the suit, while in *inquisitio* the inquisitor simply cited a suspect without any denunciation, having him imprisoned if necessary. However, under Innocent's decretals the inquisitor was not supposed to proceed by this third method unless he had some basis in either common report ("*per famam*") or notorious suspicion ("*per clamorosa insinuationem*"). In practice, the third form, the *inquisitio*, became the invariable rule. But at the same time, the safeguards which Innocent III provided were ignored.<sup>13</sup>

The inquisitional system spread throughout Christendom and to the organs of the states of the mainland of Europe, beginning in France. Originally, of course, France had taken another path; it was the Frankish kings who had developed the inquiry of neighbors. But by the thirteenth century, King John had lost his southern territories to the French, and the inquiry of neighbors was slowly dying out in France. There it gave away to the inquisitional system of the Church. The point of departure was the Ordinance of 1260, by which St. Louis IX forbade trial by battle in the king's courts and substituted a procedure which he borrowed from the practice of the ecclesiastical courts. Witnesses were to appear before certain

13. For a full description of the inquisitional procedure of the Church, both in theory and in practice, see 1 H. LEA, *A HISTORY OF THE INQUISITION OF THE MIDDLE AGES* 310-440 (1888), reprinted under the title of *THE INQUISITION OF THE MIDDLE AGES* 1-33 (1954). Hinschius also related that in the *inquisitio* procedure the safeguards came to be ignored. P. HINSCHIUS, *6 SYSTEM DES KATHOLISCHEN KIRCHENRECHTS* 68-71 (1897).

Adhémar Esmein found the earliest instance of the *inquisitio* procedure of the church in a decretal of 1198. *HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE*, translated in 5 *CONTINENTAL LEGAL HISTORY SERIES* 80 (1913). But Wigmore, Pollock, Maitland, Tanon, and Hinschius were of the opinion that the first reference to the *inquisitio* procedure as a generic method was in a decretal of 1199. 8 J. WIGMORE, *EVIDENCE* § 2250 n.28 (3d ed. 1940); 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 657 n.4 (2d ed. 1911).

delegates of the judge to be questioned. The judge's delegates were called inquirers (*enquesteurs*) or auditors, and they were to question the witnesses separately and "artfully" (*subtilement*).

The difference between the *inquisitio* of the Frankish and English kings and the *inquisitio* of the Church—between the inquiry of neighbors and inquiry by officials—is subtle yet fundamental. Under the inquiry of neighbors, it was the neighbors who accused and sat in judgment; under the inquisitional system, these functions were performed by some official. The inquiry of neighbors was destined to aid in the development of a fairly independent and relatively mature citizenry and a more or less representative form of government; inquiry by officials was not. Of course, both forms of inquiry were more rational than the old modes of proof. Also, the fact that officials questioned persons in secret was not necessarily an evil; after all, our grand jury proceedings are secret. The vice lay in the use of secret questioning, not by a grand jury, but by a professional class, at a time when safeguards for persons who stood accused had not yet been developed. In England those safeguards did develop, and today constitute part of what we describe as the accusatorial method.

When the Church attempted to introduce inquisitional techniques into the English accusatorial framework, it soon ran into stiff opposition which in the long run proved to be insurmountable. To the people of England, who themselves had a hand in the job of governing and who were accustomed to a system in which an individual was not questioned until after he had been formally and specifically charged, there was something improper about putting a person on oath and questioning him generally. They raised various objections to this procedure: a person was entitled to be presented formally with the charges against him; he was also entitled to be tried in his own vicinity, to know his accusers, and to be protected against questions about the secret thoughts of his heart. Often implicit even in these early objections was a reluctance to inform on others secretly.

Two great legal historians, Pollock and Maitland, have expressed the opinion that England escaped the inquisitional system because Henry II preceded Innocent III and extended the inquiry of neighbors.<sup>14</sup> This in fact seems true. The grand jury system provided a continuation of the accusatorial characteristic of tribal justice—a person was not to be proceeded against without being first formally charged. Officials did not take a person into custody and question him generally. The English people, always having been accustomed

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14. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 604, 658 (2d ed. 1898).



to formal and specific charges before being questioned, insisted on them. However, their escape from the inquisitional system, as Pollock and Maitland admitted, was a narrow one.

Professor Levy gives an able account of the struggle of the English people against inquisitional techniques. Only occasionally is there reason to differ with him, and then only as to detail or matters of emphasis. For instance, Professor Levy gives too much weight to the preliminary examination of accused persons by justices of the peace as an example of incursion by the inquisitional system on the common law. In this connection he refers to two acts passed during the reign of Queen Mary which empowered justices of the peace to take the examination of accused persons and of their accusers (p. 35). These two acts did grant this authority; but there were many prior such acts. Between 1414 and 1503, a series of no fewer than twenty-five different statutes empowered these officials, as well as others, to question defendants and suspects about various specified, but common, offenses.<sup>15</sup> The first and the last in this series of statutes provided for examination on oath. The first, which was Henry V's Statute of Labourers, provided that "the Justices of Peace from henceforth have Power to examine . . . all Manner of Labourers, Servants, and their Masters, as Artificers, by their Oaths, of all Things by them done . . ." <sup>16</sup> The last provision, which was Henry VII's Statute of Retaining, enacted that "the Justices of the Peace at their opyn Sessyons shall have full Power and auctorite to cause all such psons, as they shall thynke to be suspect" to come before them or two of them and "theym to examen of all such reteynours cont<sup>r</sup>y to this acte, or otherwyse name theymsel to be servaunt to any person or of other mysbehavyng contrary to this acte by the discrecion of the seid Justices."<sup>17</sup> Furthermore, the act provided for an informer's suit before "the Chancellor of Englonde or the keper of the Kyng's gret seale in the Sterre Chamber, or before the Kyng in his Benche, or before the Kyng and his Counseill attending," and gave these officials "power to examen all persons defendantes and every of theym, aswell by oth as oderwyse . . ." Even without suit the "Chauncellor or keper of the gret Seale Justices or Counseill" were empowered to bring persons before them and "the same person or persons to examen by oth or otherwyse, by

15. See, e.g., 2 Hen. 5, c. 4 (1414); 2 Hen. 6, c. 7 (1423); 2 Hen. 6, c. 12 (1423); 2 Hen. 6, c. 18 (1423); 6 Hen. 6, c. 3 (1427); 8 Hen. 6, c. 4 (1429); 8 Hen. 6, c. 5 (1429); 11 Hen. 6, c. 8 (1433); 11 Hen. 6, c. 11 (1433); 11 Hen. 6, c. 12 (1433); 18 Hen. 6, c. 4 (1439); 18 Hen. 6, c. 14 (1439); 18 Hen. 6, c. 19 (1439); 23 Hen. 6, c. 12 (1444-45); 33 Hen. 6, c. 7 (1455); 3 Edw. 4, c. 1 (1463); 3 Edw. 4, c. 5 (1463); 4 Edw. 4, c. 1 (1464-65); 8 Edw. 4 (1468); 17 Edw. 4, c. 4 (1477-78); 22 Edw. 4, c. 1 (1482-83); 1 Hen. 7, c. 7 (1485); 11 Hen. 7, c. 3 (1495); 19 Hen. 7, c. 11 (1503); 19 Hen. 7, c. 14 (1503).

16. 2 Hen. 5, c. 4 (1414).

17. 19 Hen. 7, c. 14, § 5 (1503).

their discessions."<sup>18</sup> Other statutes enacted later in the sixteenth century—including the two referred to by Professor Levy—extended officials' power to use inquisitional techniques.<sup>19</sup>

Professor Levy also indicates that as the judicial arm of the Privy Council, the Star Chamber used torture to extract confessions (pp. 34-35). However, if one refers to the Star Chamber as it existed after it became distinct from the Privy Council—in other words the body which the Puritans attacked and before which John Lilburne appeared—one cannot say that it exercised the royal prerogative to inflict torture for the purpose of extracting a confession. Indeed, the Star Chamber had three rules which excluded the use of compulsion in its *ore tenus* examination, the procedure used when the accused person admitted the charge: the private examination should not be on oath; the confession should not be obtained by compulsion; and if the defendant would not acknowledge his confession in court, he was to be remanded and proceeded against in a formal manner by witnesses.<sup>20</sup>

Both Smith<sup>21</sup> and Coke,<sup>22</sup> as well as the antiquary William Lambarde,<sup>23</sup> had a high opinion of this tribunal. Moreover, the Star Chamber at least purported to respect one's right of silence with reference to crimes involving the loss of life or limb. In a Star Chamber trial in 1581 the judges stated:

18. 19 Hen. 7, c. 14, § 7 (1503). Section 8 of the statute provided that the act was to remain in force during the lifetime of King Henry VIII.

19. The act of 1554 provided that when any person arrested for manslaughter or felony, or suspicion of manslaughter or felony, who wasailable by law, was brought before two justices, they were to "take the xaminacon of the said Prysoner, and informacon of them that bringes him, of the facte and circumstances Thereof, and the same, or asmuche Thereof as shalbee materiall to prove the felonye shall put in writing before they make the same bailem." 1 & 2 Phil. & M., c. 13 (1554-55). The next year another statute extended this procedure to accused persons who were notailable. 2 & 3 Phil. & M., c. 10 (1555). It may be that these two statutes did no more than give legal sanction to a practice which had grown up without express statutory authority, especially in the fifty years since the act of 1503; see 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 219-20 (1883). At any rate justices now had such power by express grant. However, one must remember that in proceedings before justices of the peace one had the benefit not only of specific charges but also of accusers.

20. See BURN, THE STAR CHAMBER 50 (1870). Coke explained that in an *ore tenus* proceeding the person accused "again must freely confess in open court," and if he did not do so "then [the court] cannot proceed against him but by bill or information, which is the fairest way." 4 INSTR. \*63.

21. Smith stated that the effect of the Star Chamber was "to bridle such stout noblemen, or Gentlemen which would offer wrong by force to anie manner men, and cannot be content to demaund or defend the right by order of law." THE COMMONWEALTH OF ENGLAND 120 (1594 ed.).

22. Coke declared: "It is the most honourable court, (our parliament excepted) that is in the Christian world . . ." 4 INSTR. \*65.

23. Lambarde extolled the Star Chamber as "this most noble and praise-worthy Court, the beames of whose bright Justice . . . do blaze and spread themselves as far as the Realme is long or wide." ARCHION, OR A COMMENTARY UPON THE HIGH COURTS OF JUSTICE IN ENGLAND 215 (1635).

Sir Roger Manwhode, the lord chief baron. . . . He alleaged that though the lawe dyd forbydd a man to accuse hymselfe where he was to loose lyfe or lymme, yet in this case yt was not so. Sir James Dier, lord chief justice of the common pleas. He beganne with the reason that the cheif baron first alleaged, saing that in case where a man might leese lyfe or lymme, that the lawe compelled not the partie to sweare, and avouched this place *nemo tenetur seipsum prodere* [no one is bound to accuse himself], which I take to be Bracton's principall. Sir Christopher Wraye, lord chief justice of England. He also beganne with the chief baron's originall; that no man by lawe ought to sweare to accuse hym self, where he might loose lyfe or lymme.<sup>24</sup>

Professor Levy concludes that what Lord Chief Baron Manwood meant was that the Star Chamber, not having jurisdiction over treason or felony cases, could not impose capital punishment or dismemberment (p. 105). But it is interesting to note the comparable statement against use of the oath *ex officio* in matters touching life or limb in the *Mirror of Justices* some three centuries earlier, wholly apart from any jurisdictional conflicts: "It is an abuse that a man is accused of matter touching life or limb *quasi ex officio*, without suit and without indictment."<sup>25</sup>

When Professor Levy turns his attention to the establishment of the right of silence in the American Colonies, he asserts that it would be a gross exaggeration to say that individual efforts to assert the right of silence here duplicated or even paralleled the struggle in England (p. 339). However, his own illustrations belie his conclusion. The Colonists insisted on formal charges, on knowing their accusers, on being tried in their own communities, and on a right of silence.

At times, Professor Levy puts too much emphasis on the instances in which there was a disregard for the right to silence. For example, he prefaces his discussion of two cases in Massachusetts with the comment that these cases suggests that the right of silence had no honored place in Massachusetts legal practice (p. 348). His judgment is too severe, as the report of one of these cases demonstrates.

When John Wheelwright was summoned before the authorities of Massachusetts Bay Colony in 1637, a half year before Lilburne was taken into custody in England, he demanded to know whether he was sent for as an innocent or a guilty person. He was told as neither, but as a suspect. Then he demanded to know his accusers. It was explained to him that his accuser was one of his sermons and that since he acknowledged it, "they might thereupon proceed, ex

24. Quoted in Bayne & Dunham, *Introduction*, in 75 SELDEN SOCIETY PUBLICATIONS, SELECT CASES IN THE COUNCIL OF HENRY VII, xciv-xcv n.6 (1958).

25. 7 SELDEN SOCIETY PUBLICATIONS, THE MIRROR OF JUSTICES 172 (Whittaker ed. 1895).

officio." But "at this word great exception was taken, as if the Court intended the course of the High Commission, &. It was answered that the word *ex officio* was very safe and proper . . . seeing the Court did not examine him by any compulsory means, as by oath, imprisonment, or the like . . ." At length, on the persuasion of some of his friends, Wheelwright agreed to answer questions; but as soon as he was asked something which did not relate directly to the sermon, he refused to answer, and "hereupon some cried out, that the Court went about to ensnare him, and to make him to accuse himself."<sup>26</sup>

Similarly, in 1642 Deputy Governor Richard Bellingham of Massachusetts Bay Colony wrote to Governor William Bradford of Plymouth Plantation and propounded the following question, among others: "How farr a magistrate may extracte a confession from a delinquente, to acuse him selfe of a capitall crime, seeing *Nemo tenetur prodere seipsum*."<sup>27</sup> Bradford referred the question to some of his elders, three of whom replied.<sup>28</sup> All three were opposed to the use of an inquisitional oath.<sup>29</sup>

To the Puritan mind, as the answers of these elders indicate, requiring a suspect to take an inquisitional oath was a form of torture and an even worse one than physical compulsion—the third elder would not have permitted an inquisitional oath although he would have allowed the use of a certain amount of physical compulsion to obtain a confession in exceptional circumstances.

It is true that royal governors in the Colonies, patterning themselves after the king in England, frequently exercised what they regarded as their prerogative: they summoned suspects before them and their councils and tried to induce confessions. If they were successful such confessions were then used subsequently at trial.

26. ANTIMONIANISM IN THE COLONY OF MASSACHUSETTS BAY 194, 195 (C. Adams ed. 1894). In November of the same year Anne Hutchison, who shared Wheelwright's views, was summoned before Governor Winthrop and the elders. The governor in an opening explanation told her that she was called before them as a disturber of the peace of the commonwealth and the churches. She responded: "I am called here to answer before you, but I hear . . . no things laid to my charge." 1 P. CHANDLER, AMERICAN CRIMINAL TRIALS 11-12 (1841).

27. W. BRADFORD, HISTORY "OF PLIMOUTH PLANTATION" 465 (1898).

28. *Id.* at 465-74.

29. The first said: "That an oath (*ex officio*) for such a purpose is no due means, hath been abundantly proved by ye godly learned, & is well known." The second answered: ". . . he may not extracte a confession of a capitall crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishmente inflicted or threatened to be inflicted, for so he may draw forth an acknowledgement of a crime from a fearful inocente; if guilty, he shall be compelled to be his owne accuser, when no other can, which is against ye rule of justice." The third responded: "The words of ye question may be understood of extracting a confession from a delinquente either by oath or bodily tormente. If it be mente of extracting by requiring an oath (*ex officio*, as some call it,) & that in capital crimes. I fear it is not safe, nor warented by God's word, to extracte a confession from a delinquente by an oath in matters of life and death." *Id.* at 466, 467, 472.

The colonists, however, resisted this practice and protested vigorously.<sup>30</sup>

In spite of the fact that Professor Levy often emphasizes various kinds of official oppression that have been used in efforts to abrogate the right of silence, there is reason to look upon America as "a maturing society"<sup>31</sup> and to be optimistic about the future of the fifth amendment. Seventy years ago, when the Supreme Court tied the inadmissibility of a coerced confession of the fifth amendment's right of silence in *Bram v. United States*,<sup>32</sup> Professor Wigmore concluded that the decision "reached the height of absurdity in misapplication of the law."<sup>33</sup> Yet this identification of the self-incrimination provision with an exclusionary rule, castigated by Dean Wigmore as "erroneous, both in history and in practice,"<sup>34</sup> laid the foundation for the Supreme Court's extension of fifth amendment protections to police questioning in *Miranda v. Arizona*.<sup>35</sup>

It is true, of course, that law in action often lags behind a good court decision. When the Supreme Court excluded a confession obtained by torture in *Brown v. Mississippi*<sup>36</sup> some thirty years ago, use of the third degree by police did not come to an end; even *Miranda* cannot guarantee that the right of silence will always be respected in the station house.<sup>37</sup> However, we may look ahead to a time when any confession which a defendant repudiates in court will for that reason alone be held inadmissible in evidence. Indeed, Justice White prophesied—and deplored—this result in his dissent to *Escobedo v. Illinois*,<sup>38</sup> categorizing the decision as "another major

30. One of the charges against Governor Andros of New England and New York in the New England revolution of 1689, following the flight of James II from England, was that Andros would too frequently

fetch up persons from very remote Counties before the Governor and Council at Boston (who were the highest, and a constant Court of Record and Judicature) not to receive their tryal but only to be examined there, and so remitted to an Inferior Court to be farther proceeded against. The Grievance of which Court was exceeding great. . . . But these Examinations themselves were unreasonably strict, and rigorous and very unduely ensnaring to plain unexperienced men.

*Narrative of the Proceedings of Andros*, in *NARRATIVES OF THE INSURRECTIONS* 237, 246 (Andrews ed. 1915).

In 1696 when the governor of Massachusetts summoned Thomas Maule before him and his council to question him about a book in which Maule criticized both clerical and lay officials and their conduct in the witchcraft prosecutions, Maule refused to answer any questions and successfully demanded to be tried by a jury of his peers in his own country. 1 P. CHANDLER, *AMERICAN CRIMINAL TRIALS* 143-49 (1841).

31. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (separate opinion: Chief Justice Warren joined by Justices Black, Douglas, and Whittaker).

32. 168 U.S. 532 (1897).

33. 3 J. WIGMORE, *EVIDENCE* § 821 n.2 (3d ed. 1940).

34. 8 *id.* § 2266 (3d ed. 1940).

35. 384 U.S. 436 (1966).

36. 297 U.S. 278 (1936).

37. See Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 *MICH. L. REV.* 1347 (1968).

38. 378 U.S. 478 (1964).

step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not.”<sup>39</sup> But this is as it should be; when we reach the conclusion that a defendant who pleads not guilty may insist that the state prove its case from sources other than his own mouth, we shall have complied with the spirit of our accusatorial method as well as fulfilled its implicit promise.<sup>40</sup>

Professor Levy's book is an historical mainstay not only for those who welcome extensions of the right of silence, but also for those who are working to strengthen due process requirements in the rapidly expanding area of administrative investigations. We are currently in the midst of an inquisitional trend, and have been for a century. Inquisitions by officials occur at both state and federal levels; the number of administrative and executive officials with inquisitional subpoena powers has increased steadily. A person who is subpoenaed to appear before such officials should be accorded certain rights as a matter of due process: the right to counsel whose role is not limited to ear-whispering; a guarantee of appraisal of the nature of the inquiry and the subject matter about which he will be questioned; a copy of his testimony and of any documentary material he supplies; and immunity from prosecution unless he waives the right of silence with full understanding.<sup>41</sup> Professor Levy's book will furnish the important historical background for positions taken by attorneys representing clients both in court proceedings and in inquisitions by administrative officials; it should be frequently cited, and extensively quoted as well.

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39. 378 U.S. at 495.

40. For a fuller presentation of the writer's point of view, see Rogge, *Proof by Confession*, 12 VILL. L. REV. 1 (1966).

41. Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations* (pt. 1), 47 MINN. L. REV. 939, 943-85 (1963), (pts. 2, 3), 48 MINN. L. REV. 557, 1081 (1964).