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A REAPPRAISAL OF THE IMMUNITY
FROM SELF-INCrimINATION

Nathan April*

Students of the development of our Constitution cannot fail to have noted the contrapuntal aspect of that development. The area of federal power has been expanded far beyond the intent of those who first charted it; and the domain of those personal immunities embraced within the Bill of Rights has been counter-stretched in equal measure to redress the constitutional balance. The Founding Fathers would undoubtedly have been dismayed to learn that they had devolved upon Congress the power to fix the maximum number of hours per week that a factory hand in New York would be permitted to work; they would be equally mystified over the pronouncement of the Supreme Court that the picketing en masse of a factory (an action whose only rationale could be that of a demonstration in force) was nothing more than the exercise of the constitutional right of freedom of speech.

It is not our purpose to develop this contrapuntal theme. Note of the matter is taken here only because it illuminates the dynamics which shaped the judicial interpretation of the Constitution. The central government had to be made stronger than the Constitution had made it if it was to survive; but, just because of that, the bulwarks of our personal liberties had to be hedged with a perimeter of granite. A Judith Coplon case would have been inconceivable to the stalwarts of 1788.

That such a granitic fortress might protect treason and other destructive forces, as well as our freedoms, is a thought which, if it did at times seep into the consciousness of the learned justices, seems to have given them little concern. Let us now fix our attention upon what is perhaps the most curious of our personal immunities.

The 5th Amendment to the Constitution proscribes a number of things, though the gamut of popular discussion about it seems to indicate a belief that the amendment concerns itself solely with the matter of immunity from self-incrimination. However, it is with that phase of it that this article deals. What does it say?

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

Now, there is nothing obscure in the language of this proscription. In criminal cases, a man cannot be compelled to be a “witness”

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against himself. Inferentially, a man may be compelled to be a witness against himself in a civil case. That sort of compulsion is being exercised in our courts every day. What is a "criminal case"? A "criminal case" is the judicial prosecution of somebody upon a criminal charge. When is a person a "witness" in any case? When he is giving evidence in that case.

If the authors of the Bill of Rights meant to ban compulsory self-incrimination at any time or place, then why didn't they say so? Surely, if they wanted to provide that "No person shall anywhere be compelled to answer any question which would tend to incriminate him," it would have been very simple to say just that. The composition of that sentence calls for no special ability in draftsmanship. Why then, did these artists of the written word obfuscate their meaning by a statement that, in a "criminal case" a person should not be compelled to be a "witness" against himself? Could it be that they said what they did say because that is exactly what they meant? Be that as it may, it is clear that what the 5th Amendment literally says, and what the Supreme Court has said it says, are not the same thing. Here is probably another instance of the functioning of the compensatory balance wheel in the dynamics of constitutional interpretation.

Is there a legitimate basis for the doctrine of Counselman v. Hitchcock? The thesis of this article is that there is not. It is submitted that the language of the 5th Amendment expresses nothing more than the Founding Fathers' reaction against the use of judicial torture in the elicitation of evidence in criminal cases.

1. 142 U. S. 547 (1892). The doctrine of this case may be stated as follows: No person may be compelled anywhere or at any time, to answer a question put to him before any court or investigation body or official if he objects to answering such question upon the ground that his answer might tend to incriminate him. In commenting upon the language of the 5th Amendment, the Court said, "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." Id. at 562.

The development of this thesis implicates a challenge to the fundamental assumption expressed in this quotation. It is not at all "impossible" to believe that the draftsmen of the 5th Amendment meant exactly what they said; nor is anything found in the discussion of the Court which even attempts to demonstrate this alleged "impossibility." Moreover the Court does not undertake to supply any historical justification for its further assumption that "[t]he object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."
Torture, as an instrument of judicial or administrative investigation, was not an invention of the medieval inquisition. It was known to Europe long before the 13th century. It was practiced in Athens and in Rhodes in the time of Socrates; and the jurists of Rome learned to appreciate its irrefragable logic. The Papal and Episcopal Inquisitions borrowed it from Rome; as did the states of Europe after the abandonment of such rigorously logical procedures as trial by combat and other forms of ordeal. The chief purpose of torture in the investigation of criminal and religious offenses was not to ascertain the facts, but to extract a confession of guilt from the victim. In an age when witches, horned devils and sainted apotheoses were authenticated apparitions, it was thought that the one sure means of establishing the guilt of the accused was his sworn confession. It mattered not how that confession was procured; for whether it came voluntarily or after the accused had been broken on the wheel, it was equally veracious. The theory was that no man would risk the eternal damnation of his soul by a perjured confession merely to escape mundane torture.

Confessions rarely came voluntarily; in which respect they differed strangely from those currently produced in Moscow and even in some of our own courts. In France, judicial torture was not abolished until the Revolution; in Russia, not until 1801; and in one of the German states, not until 1831.

It is probable that England was the last European country to adopt the use of judicial torture until its recrudescence under the Nazi and Communist regimes. In the days of Queen Elizabeth, a very fine distinction was developed by the common-law judges as to the legality of its use. They said that torture, as the punishment of an offense, was not lawful. It would have redounded more to the honor of English criminal law if it had countenanced the infliction of torture upon the guilty as the punishment of crime, rather than upon the accused as a means of extorting confessions. Later on, English law writers were to say that the criminal law of England did not “recognize” torture. The only possible conclusion, then, must be that if the law did not “recognize” torture, it must have been suffering from a serious case of myopia. The fact happens to be, that even without such recognition, torture, as a means of extracting evidence from its victims, was consistently applied by the judicial and criminal authorities in England from the days of the Plantagenets down to the end of the 17th century.

Edward Coke (1552-1634), that great protagonist of the common law courts, and their doughty champion against Chancery,
Admiralty, etc., seems to have been the first English judge to lay it down that no man could be compelled to be his own accuser. Coke had been successively a member of Parliament, Solicitor General, Speaker of the House, Attorney General and Chief Justice of the King's Bench. As judge, he legislated more common law than ever did Parliament; much of what he declared to be English law became such upon his *ipse dixit*. A contemporary of Coke, and one who looms larger in the story of mankind, was the Lord Chancellor, Sir Francis Bacon. Both were members of the Privy Council, which kept records of their own proceedings in their Council Books. These records are by no means complete, but they will serve our purpose.

In these Council Books are found memoranda of directions issued to the Lord Lieutenant of the Tower, and to various ministers of the law, concerning the administration of torture to suspects imprisoned in the Tower. The Tower does not seem to have been a gaol for the common variety of criminal; it appears that one had to be socially acceptable to find lodging there. It may be supposed that it was for this reason that the application of torture in this exclusive institution was controlled by the Privy Council, whose members probably would have thought it an impertinence to have their attention drawn to the case of a man, accused, let us say, of the capital offense of killing a hare in the royal park.

A record dated February 19, 1619-20 (the uncertainty of the year is very curious), is a letter written by the Privy Council and signed, among others, by Edward Coke and Francis Bacon; it was directed to the Lord Lieutenant of the Tower, the Lord Chief Justice and the Solicitor General, directing them to apply torture to a certain Mr. Peacock who was sojourning in the Tower upon a charge of "vehement suspicion of high treason against his majesty's sacred person." To quote:

"This shall likewise authorize you or any two of you, whereof yourself shall be one, to examine the said Peacock from time to time and put him as there shall be cause for the better manifestation of the truth, to the torture of the manacles or racke. For which this shall be your warrant."

By a statute enacted in 1555, it was provided that any person arrested upon suspicion of felony should be brought before two justices of the peace acting as committing magistrates and questioned by them, the questions and answers to be used as evidence at the trial. Torture was applied in these investigations. Up to the middle of the 17th century, the legality of the use of torture by these committing magistrates was not challenged.
An eminent English barrister, Jardine, has collected the text of over fifty of these Privy Council warrants in his book entitled *Use of Torture in the Criminal Law of England*. What distinguishes the one above quoted from most of the others is the fact that it was signed by the man who, years before that, had fabricated and given currency to the alleged maxim "*Nemo tenetur seipsum prodere.*"

When Coke was officiating as a judge on the King’s Bench, he laid it down, when treating of the immunities of the members of the English nobility, as a "privilege which the law gives for the honor and reverence of the nobility, that their bodies are not subject to torture in *causa criminis laesae majestatis.*" And Bacon, in his treatise entitled *Pacification of the Church*, held that torture, in the judicial procedure of England, was applied "for examination and not for evidence"; a distinction whose falsity is saved only by its fatuity.

Torture, then, was a means lawfully used to elicit a "better manifestation of the truth"; the greatest English lawyers of the early 17th century have said so. And while they were saying this, they were also beginning to say that in England no man could be compelled to be his own accuser. Can there be any doubt as to which of these wholly contradictory declarations expressed the truth?

Now it happened that before he ascended the bench, Coke had been retained as the attorney for a man who had been haled before the Court of High Commission which had instituted an inquiry as to his theological orthodoxy. The procedure of this court was modelled upon that of the Episcopal Inquisition. The arrested suspect was put under the "oath ex officio" and then was examined ad lib as to his religious beliefs and practices. Answers deemed to be incorrect were rectified under the educative influences of the rack. Coke’s client was apparently averse to the prevailing routine; and so Coke petitioned the judges of the King’s Bench in his behalf for a Writ of Prohibition to bar the Court of High Commission from taking any further steps in the matter. In support of that petition, Coke cited as a "maxim" of law this Latin concoction: "*nemo tenetur seipsum prodere*" (no man is bound to accuse himself). He argued that, since a man was not bound to betray himself, the Court of High Commission should not be permitted to compel him to do it.

Just where Coke dug up this "maxim" is not known. Up to that moment, it had been unknown to the common law of England. It was not derived from the Civil law; nor can it be traced to the Canonical law. It happened that about that time, and at the solici-
tation of the Court of High Commission, an advisory opinion had been handed down by "Nine Doctors learned in the Civil Law" in support of the legality of their inquisitional procedure, in which opinion this "nemo tenetur se ipsum prodere" phrase formed part of a sentence. The whole import of this expression was that although no one is bound to betray himself, yet, if common report accuses him of an offense, he should come forward to clear himself. Now it may be that Coke lifted this "nemo tenetur" business from the text of the worthy Doctors; and it could be that he manufactured it himself; in either case, it was a novelty in his time.

The dogma that no one is bound to accuse himself seems to have glided more or less surreptitiously into the English corpus juris. If it occurred to anyone to question it, and to ask just why, if one were actually guilty, one wasn't bound to accuse himself, the record of that event has not come down to us. Nor had the redoubtable Dr. Johnson yet developed his famous thesis that no man can know whether or not he has committed a crime until he has been officially informed of that fact by the verdict of a jury.

"Nemo tenetur se ipsum prodere," if pronounced with adequate assurance, has the potency of the very best abacadabra. The incidence of Latin or dog-Latin collocations upon the trends of English law has been marked. Our legal "maxims" are expressed in Latin; Latin denotes learning and learning radiates authority. If one declared in Latin that three and four make nine, he would have made out a good case for that proposition. For example, let us look at "Caveat emptor." "Caveat emptor" is bound to be good law, for is it not in Latin? But suppose this maxim had been expressed in plain English, as "Let the buyer beware"; or with less terseness but with less ambiguity, as, "The buyer who is foolish enough to trust the sales talk of the seller, does so at his own risk"; might there not have been some doubt as to the morality, not to say the Christianity, of this maxim? "Caveat emptor" got itself established in English law before "Caveat venditur" (let the seller beware), an equally imposing bit of Latinity, knocked for admittance; since which time our law reformers have been struggling to inject some ethics into our law of sales.

If, in the year 1600, a man had dogmatized that "no criminal is bound to accuse himself," he might well have met the rejoinder,
"And why not? Is that not the least amends that the rascal should make?"

Perhaps the absence of any critical scrutiny of the credentials of the newcomer was due to the subtle ambiguity of the phrase. Viewed in its literal nakedness, all that it could have meant was that no man was bound to volunteer his self-accusation; no man was bound to come forth to proclaim his own guilt. Thus viewed, the thing was impeccable. This much is certain; the notion that one was not bound to answer a question put to him in open court or before committing magistrates if the answer would tend to incriminate him, would have been regarded as bizarre in Coke's day and for many years thereafter.

The whole subject of immunity from self-incrimination emerges from a thick obscurity into which the Blackstones, the Storeys and the Holmes seem to have been reluctant to penetrate. Warrants of torture furnish an incongruous commentary upon the antiquity of some of our boasted immunities. The latest of these warrants to come down to us is dated 1640.

The fact is clear, however, that at least a qualified immunity from compulsory self-incrimination did finally lodge in English and American basic law. Just how did this happen? The classic account of the matter is by no means lucid or reasonably satisfactory. It may be summarized as follows:

In the early decades of the 17th century, the English system of judicature presented a curious spectacle. Three courts of common law competed for business with the Admiralty court and the Court of Chancery; and all collided at times with the Court of High Commission and the Court of the Star Chamber. Each of these courts was striving to expand the boundaries of its jurisdiction, and jurisdictional disputes were almost as frequent as those between labor unions today.

The common law courts judged ordinary civil and criminal cases; of the three, the King's Bench was the chief. The Court of Chancery exercised a jurisdiction in equity, a branch of law ema-

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3. It should not be forgotten that the doctrine and discipline of the Church of Rome did not disappear with the primacy of the Pope; the Church of England continued in the Catholic tradition under the tutelage of the Crown. Among the institutions of the Church was that of auricular confession. It is true that "sins" were regarded for the purposes of the confessional as offenses against God rather than the State, but it must also have been true that a great many of the confessed sins were also civil crimes. From the standpoint of the moral and religious duty of confession, the distinction between "sins" and "crimes" was indeed finally drawn; at any rate, the climate of opinion in which the performance of such duty was adjured could hardly have been accommodating to the doctrine of "Nemo tenetur seipsum prodere."
nating from the King's conscience which was supposed to ameliorate
the rigors and correct the injustices of the common law. The Ad-
miralty court was concerned, as its name denotes, with maritime
controversies and with the condemnation of prizes captured in war.

The Court of High Commission exercised a supervisory ec-
clesiastical jurisdiction that was exquisitely solicitous of the eternal
salvation of the souls of all British subjects and of the emoluments
and prerogatives of the Established Church, for the attainment of
which worthy purposes it sought to enforce rigid conformity to the
correct line of theological doctrine. "Deviationism" was anathema
long before the Soviets took it up and gave it a new name. The
Court of Star Chamber meddled with many things both civil and
criminal; the boundaries of its jurisdiction were uncharted. It was
chiefly engaged in enforcing political conformity; that is to say, it
had a very sensitive nose for "treason" to the person of the
Sovereign, sedition, seditious libel, etc. Both courts acted upon in-
formation supplied to them by spies and stooges; they arrested
suspects, haled them to their own precincts and there administered
to them what was called the "oath ex officio" as a prelude to an
extended inquisition into their affairs.

The unauthorized administration of this oath "ex officio" is
regarded by some of our lawyers as the starting point of a series
of developments that finally culminated in the principle barring
compulsory self-incrimination. The oath itself was none other than
what is administered in our own courts of civil and criminal jurisd-
cution every day. It was an oath to tell the truth in answer to the
questions about to be put to the witness. This oath was adminis-
tered in the common law courts; its administration there evoked
no opposition from any source.

The oath ex officio had once been an oath of compurgation;
that is to say, an oath taken by an ecclesiastic accused of an offense,
or by his friends, who were called his compurgators, by the magic
of which the accused cleric was purged of the criminal charge
against him. Just how the name of this ancient oath came to be at-
tached to the ordinary oath administered to witnesses in civil and
criminal trials is not clear; but it is quite clear that the taking of
this oath before the High Commission or the Star Chamber was
far from purging the suspect of any charge; on the contrary, it
was the prelude of an inevitable attempt to fasten a charge upon
him. The great objection to the oath, as there administered, was
that it was not administered at a trial but in a proceeding that was
extra-judicial and preliminary to any formal charge. The fact that
committing magistrates were administering this same oath to persons accused of a felony, seems to have been overlooked by these objectants; but then, consistency is not brilliantly exemplified in the story of the development of legal principles.

The case of John Lilburn has been utilized to lend vitality to the theory that opposition to the administration of the oath ex officio was what started the movement towards the immunity from self-incrimination. Lilburn was arrested in 1637 by an officer of the Star Chamber upon information furnished to it that he had sent certain seditious books from Holland into England. After being interrogated without oath, the oath ex officio was read to him, but he refused to take it. He persisted in his refusal for several weeks and was finally adjudged in contempt of court. He was sentenced to pay a fine, to be publicly whipped, to be pilloried and then to be imprisoned until he was ready to take the oath. The sentence was carried out and he remained in prison until 1641, when he was released by the House of Commons under a resolution which declared "that the sentence of the Star Chamber given against John Lilburn is illegal and against the liberty of the subject; and also bloody, cruel, wicked, barbarous and tyrannical."

The matter was then carried to the House of Lords for judgment as to the amount of damages suffered by Lilburn. The Lords inflicted a heavy fine upon the judges of the Star Chamber.

Now, the point made by Lilburn seems to have been missed by some of the historians of the law. He did not contend that the administration of the oath ex officio, anywhere or at any time, was illegal; such a contention would have been absurd. That oath was administered in all the courts of the kingdom. The essence of his claim was that while the oath could be administered to a witness upon a trial, there was no authority to administer it in a proceeding which was purely exploratory or inquisitional. Lilburn was no lawyer and his own narrative constitutes the official report of the case; and it is not surprising that conflicting views are entertained as to its significance.

There is, however, nothing in his case to support the view that in the England of 1637, no man could be compelled to give self-incriminating testimony.\footnote{3 How. St. Tr. 1315 (1637-1645).}

\footnote{5. It has been suggested that the denouement of the Lilburne case furnishes a basis for the contention that in 1641 the common law of England recognized the immunity of the subject from self-incrimination. Such a contention takes note neither of the text of the Parliamentary resolution nor of the context of circumstances in which it was generated. It happens that the Lilburne resolution was one of the early acts of the
It has also been opined that the origin of the immunity from compulsory self-incrimination is to be found in the squabbles over jurisdiction between the common law courts and the High Commission in this matter of administering the oath ex officio. The common law courts maintained that the ecclesiastical courts were authorized to entertain only matrimonial cases and cases concerning testamentary matters, and that therefore such courts had no jurisdiction to conduct inquiries into the moral practices and religious beliefs of the laity and to administer the oath ex officio for that purpose. It is difficult to see what all this has to do with immunity from self-incrimination. The fact is, that the Court of High Commission did have authority to administer the oath in matrimonial and probate cases; that that authority was beyond challenge; and that no witness in a matrimonial case before the High Commission could have refused to answer a question upon the ground that the answer might incriminate him. The theory that places the genesis of the constitutional immunity in the quarrels over jurisdiction among the British courts of the 17th century, attempts a tour de force. Nevertheless it may be as good a theory as any other that is available.

Here history exposes to us another of its serio-farces. At the very time that the English judges were solemnly proclaiming the subject's immunity from compulsory self-incrimination, they were vigorously and with the straightest of faces, subjecting defendants in criminal cases to all sorts of vexatious and self-incriminating questions. Had all the thieves in England joined in extolling the practice of honesty, the situation could not have been more humorous.

The subsequent development of the immunity from self-incrimination in England is not of concern here. The English colonies on the North American mainland developed a characteristic, dogmatic as to basic human rights and constitutional law. The nature of the

Long Parliament under whose aegis two civil wars were conducted; wars which issued in the decapitation of Charles I, and in the establishment of the Commonwealth. It was this Parliament which abolished the Courts of High Commission and of the Star Chamber. The resolution which undertook to free Lilburne had no judicial quality; it was a political act, intended as a slap in the face of the King, by way of the excoriation and condemnation of his agents. It had about the same judicial quality as a Bill of Attainder.

Nor can Lilburne's refusal to take the oath ex officio, be interpreted as a claim by him of constitutional immunity from self-incrimination. The administration of the oath was often followed by the use of judicial torture for "the better manifestation of the truth." In any case, it is one thing to claim that a court had no lawful jurisdiction to administer a certain oath at a given time, and quite another thing to claim the witness could not be compelled to answer a question which he claimed might incriminate him. Such a claim was not made by Lilburne.
struggle for survival in the North American wilderness cancelled out many old customs and institutions; and until almost the close of the 19th century, the American frontier continued to deposit its libertarian leaven. The concepts of the English common law in the realm of property rights and the rights of person against person became part of our own common law; but the rights of the individual *vis-a-vis* his government underwent a special American development. It is not to England that we owe the Constitution of the United States.

The first American documentation upon our theme is to be found in the "Body of Liberties" adopted in the colony of Massachusetts in 1641. Liberty No. 45 reads as follows:

"No person shall be forced by torture to confess any crime against himself or any other; unless it be some capital case where he is first fully convicted by clear and sufficient evidence to be guilty, after which, if the cause be of that nature that there be other conspirators or confederates with him that he may be tortured, yet not with such torture as be barbarous and inhumane."

When the nature of the government that ruled the colony of Massachusetts in 1641 is contemplated, the notion that these grim-visaged, hard-bitten and incorruptible theocrats would have countenanced the doctrine that a man had a right to refuse to answer a question claimed by him to be self-incriminating, verges on the hilarious. The fact is they were somewhat dubious about the reach of their own "Liberty" No. 45, for Governor Bradford, in 1642, addressed to a committee of three of his ministers the following question:

"How farre a magistrate may extracte a confession from a delinquente to accuse himself of a capital crime seeing 'Nemo tenetur prodere seipsum'."

Their answers throw a curious light upon the problem posed by the governor. Two of the ministers held, that if the "delinquente" could be made to confess by "inquisition" only, it would be lawful, provided that no torture was used; but the third held that torture could be used where the safety of the state was threatened.

A similar "Liberty" was created in Connecticut. In 1650 its General Court provided:

"It is ordered by the authority of the court that no man shall be forced by torture to confess to any crime against himself."

The syntax here is not impeccable, but the meaning is nevertheless clear. You could not apply torture to compel a man to confess to the commission of a crime.
It is true that almost 150 years were to pass before the 5th Amendment was to be written, a period long enough to develop a new religion or a new political dispensation. But it cannot be gainsaid that these men drew the breath of life from their English homesteads; and that in their Body of Liberties, they were occupying advanced ground. By our standards, they were hidebound conservatives; by the standards of their own times they were liberals in many respects. Their Body of Liberties was intended to safeguard what they conceived to be fundamental rights. This hardly included a right to stand mute before a magistrate who asked a self-incriminating question. The “liberty” they created was an immunity from the application of torture to elude a compulsory confession, and not even an unqualified immunity at that.

In the colonies, the development of the principle of immunity from self-incrimination is exceedingly obscure. Undoubtedly the lawyers on this side of the Atlantic had studied much of the reported case law; else, Otis could not have thundered against the Writs of Assistance. When the Revolution got into full swing, the Continental Congress requested each of the colonies to set up a state organization, and for that purpose to adopt a state constitution. All of the colonies except Rhode Island adopted a constitution, and some prescribed a Bill of Rights. Some of these embraced a provision to the effect that no person could be compelled to be a witness against himself in a criminal case.6

There is singularly little information concerning the authorship of the constitutional amendments proposed to the First Congress, ten of which were adopted and submitted to the states for ratification. Upon James Madison devolved the task of putting them through; and surprisingly enough, he encountered some very determined opposition to some of them. Upon the matter of immunity

6. The provisions were as follows:
Massachusetts: “No subject shall be held to answer for any crime or offense until the same is fully, plainly, substantially and formally described to him, or be compelled to accuse or furnish evidence against himself.”
Pennsylvania: “That in all prosecutions for criminal offenses, no man . . . can be compelled to give evidence against himself.”
Delaware: “No man in the courts of common law ought to be compelled to give evidence against himself.”
Maryland: “That no man ought to be compelled to give evidence against himself in a common court of law or in any other court but in such cases as have been usually practiced in this state, or may be hereafter directed by the legislature.”
North Carolina: “That in all criminal prosecutions every man . . . shall not be compelled to give evidence against himself.”
None of the other constitutions made any provisions banning compulsory self-incrimination.
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from compulsory self-incrimination, a very slight record exists. As originally proposed by Madison, the amendment read:

"No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense nor shall he be compelled to be a witness against himself."

This language followed that of some of the recently adopted state constitutions. Literally it could have been held to apply to civil as well as criminal cases; which was precisely the objection raised by one of the representatives who argued that it contained "a general declaration in some degree contrary to laws passed."

The reference here was to a statute passed by the First Congress which enabled a plaintiff to compel a defendant to answer interrogatories by way of a Bill of Discovery. At any rate, the objector contended that the immunity from testifying against oneself should be confined to criminal cases, and he moved an amendment for that purpose "which amendment being adopted was unanimously agreed to."

The significance of this incident seems to have escaped judicial notice. The amendment to the original proposal makes it clear that those who drafted it and those who adopted it were concerned solely with the problem of the conduct of a criminal case; they refused to extend the immunity from compulsory testimony to civil cases. It would be absurd to gratuitously assume that these skilled lawyers were unaware of the possibility that a self-incriminating question might be put to a witness in a civil case; but it is obvious that they had no intention of immunizing a witness in a civil case.

No published report can be found of a federal judicial decision concerning self-incrimination from the time of the adoption of the Bill of Rights down to 1807. In that year Aaron Burr was prosecuted upon a charge of treason in the Federal Circuit Court for the district of Virginia. John Marshall presided over the proceedings.

Burr's secretary had been questioned by the grand jury concerning the authorship of a certain cipher message attributed by the prosecution to Burr. He refused to answer upon the ground of self-incrimination. He was thereupon cited for contempt before Marshall; and upon the hearing, the attorneys for Burr supported the refusal of the witness. After careful deliberation, Marshall handed down an opinion, which contained the following language:

"It is a well settled maxim of law, that no man is bound to incriminate himself. This maxim forms an exception to the general rule which declares that every person is compellable to bear testimony in a court of justice . . . if the question be of such description that an answer to it, may or may not crminate the
witness, according to the purport of that answer, it must rest with himself, who alone could tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact."

This language has been quoted many times by text writers and judges. There are, however, two aspects of the case that seem to have been generally overlooked. One of them is, that despite the fact that Marshall had said that the court could not overrule the judgment of the witness as to the incriminating quality of a question, he did overrule this witness and did order him to answer. The other is, that neither Marshall nor Burr's counsel invoked the 5th Amendment which had been adopted 18 years before. Why not?

The commentators on constitutional law have ignored this aspect of the decision. They have failed to note that when the ablest interpreter of the Constitution sought to establish the rule of immunity from compulsory self-incrimination, he called to his support, not the language of the 5th Amendment, with which he must have been perfectly familiar, but "a well settled maxim of law." He knew that he who invokes a constitutional right stands upon a foundation far firmer than any that can be furnished by a "maxim of law" however "well settled" it might be. A law regulating the conduct or the privileges of witnesses, embodied in some "maxim" could be modified or repealed by Congress overnight. Marshall also knew that a law abridging a constitutional right would be void and of no effect whatever; for he himself had made that momentous declaration. If Marshall did not cite the 5th Amendment, it must have been because he did not regard it as applicable.

In three cases in the District Court in Washington, D.C., between 1821 and 1829, witnesses before the grand jury refused to answer questions upon the ground of self-incrimination. The opinions handed down in these cases furnish no definite formulation of principle. In the first two cases, the witnesses were compelled to answer, but not in the third.

It would seem that the first reported federal case in which the refusal of a witness to answer a self-incriminating question was based unequivocally upon the language of the 5th Amendment, was that of United States v. Three Tons of Coal,\(^7\) decided in 1875. The 5th Amendment had been adopted 87 years before!

Some coal had been seized by the Treasury Department for violation of the revenue laws. The seizure was followed by a civil

\(^7\) 28 Fed. Cas. 149, No. 16513 (E.D. Wis. 1875).
action brought by the Government, in which a judgment was sought legalizing the seizure and directing the confiscation and sale or destruction of the seized goods.

At that time, a statute was in force under which, in such an action, the Government could make a motion to compel the owner of the seized property to produce his papers and books in court for examination by the Government, to enable it to get evidence in support of its case.

The motion of the Government for the owner's production of his books and records, was resisted upon the ground that such an order would violate the 5th Amendment by compelling the owner to be a witness against himself in a criminal case. The district court overruled his objection; it held that an action for the condemnation of merchandise was not a "criminal case"; that the 5th Amendment was restricted to criminal cases; and that in a civil case the witness could be required to answer questions, regardless of whether or not they were self-incriminating.

The significance of this case is twofold. In the first place, the question as to whether the constitutional immunity could be broadened beyond the express language of the 5th Amendment had been squarely raised and just as squarely met. In the second place, the old resort to some "well settled principle of law" had been abandoned as useless by counsel for the defendant; for, if there ever was such a principle, it had been abrogated by this very Act of Congress. Henceforth, the immunity would have to be bottomed on the 5th Amendment; either that, or it simply didn't exist at all.

The modern American doctrine was announced in 1892 by the Supreme Court in the case of Counselman v. Hitchcock. In that case, a witness before the grand jury refused to answer certain questions upon the ground that the answers might incriminate him. He was convicted of contempt of court, and upon appeal, his conviction was reversed by the Supreme Court.

In its opinion in that case, the Supreme Court pointed out that the language of the 5th Amendment included not only defendants in criminal cases but witnesses as well; a "witness" in a criminal case, could not be compelled to testify against himself. The court then said, that a grand jury investigation was not only a "case" but a "criminal case" at that; and that therefore, the appellant was being compelled by the direction of the district court to be a witness against himself in a criminal case.

8. 142 U. S. 547 (1892).
It must be obvious that, if up to this point the Court was right, it need have gone no further. The case presented a situation which came within the literal language of the 5th Amendment. A witness in a criminal case was being compelled to be a witness against himself. Such compulsion was in violation of the 5th Amendment. It was therefore quite unnecessary to the resolution of any issue involved in this case for the Court to go on to say:

"It is an ancient principle of the law of evidence, that a witness shall not be compelled in any proceeding, to make disclosure or give testimony which would tend to criminate him, or to subject him to fines, penalties or forfeitures."

This language was not only irrelevant, but self-destructive. It is one thing to speak of a constitutional mandate, and another, "of a principle of the law of evidence." If immunity from self-incrimination is merely a principle of the law of evidence, then, whether that principle be regarded as procedural or substantive, it is subject to alteration and abolition at the will of Congress. If, on the other hand, the immunity comes within the coverage of the 5th Amendment, then it is impregnable; Congress can do nothing to impair it.

Later, in the case of *Twining v. New Jersey,* the Court modified its views somewhat. It came to the conclusion that the immunity from self-incrimination was not a part of the common-law heritage which the colonists brought with them from England; any state could, if it so chose, refuse to recognize such a right in its own criminal procedure. So far as it affected the National Government, the sole basis of the immunity was the language of the 5th Amendment. The same question came up in the case of *Adamson v. California,* and the Court there reiterated that position.

The judicial literature on the 5th Amendment and similar language in state constitutions is extensive but monotonously repetitive. As a general rule, state courts have taken the same position as that announced by the Supreme Court in *Counselman v. Hitchcock.*

The history of the immunity from self-incrimination has been traced in order to better judge the logic of its judicial development. When, in the light of that history, the nature of the evils sought to be corrected by the 5th Amendment is considered, the conclusion must be reached that the broad gamut given to the privilege by the Supreme Court was warranted neither by the actual text of the 5th Amendment, nor by any apparent purpose of its draftsmen. What

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had been abhorrent to the British practice was not the self-incrimination, but the nature of the compulsion which had been used in obtaining it, regardless of its truth or falsity. It was not intended by the constitutional mandate to prevent the disclosure of the truth; the purpose was to prevent the ostensible search for the truth from being perverted, as in the case of the Salem “witch” confessions, into an instrument of oppression. To prevent such a consummation, it was declared that, in a “criminal case” a defendant was not to be subjected to any questioning.

Nor should the incidence of the rule which barred a defendant in a criminal case from testifying in his own behalf be ignored, a rule which was so thoroughly established in the common law that the possibility of its abrogation was not likely to be contemplated by the draftsmen of the 5th Amendment. The rule against compulsory self-incrimination would function as a counterweight to redress the balance of justice. If a man could not take the witness stand in his own defense, then the most primitive instincts of justice demanded the abolition of the practice of making him testify to his own conviction.

It is found that the interpretation put upon the language of the 5th Amendment by the Supreme Court has no historical justification; its ethical and social vindication is even more dubious. Do the precepts of accepted morality require that a man bear witness to the crimes of his mother, his brother or his son, but not to those committed by himself? Is there any social utility in the suppression of the truth? Is the toll of crime lessened by immunizing the criminal against self-disclosure? Do we maintain courts of justice for the same uses to which we devote our sports arenas, i.e., for the exhibition of action-dramas played in strict accordance with established rules? It is true that in the law of evidence there are numerous rules of exclusion; but these rules are designed for the promotion of truth, not its suppression. Not all of them accomplish this result, but such as do are not gradually fading into limbo. The day is not too far distant when any testimony which is relevant, material and capable of cross-examination will be admissible.

In a civil action, a defendant is no longer shielded from the compulsion of giving evidence against himself. Such evidence may result in the deprivation of his home, or of the custody and companionship of his children, or of all his earthly possessions. It may result in an injury to him far more serious than any jail sentence. But the public interest no longer permits us to immunize him from these catastrophies. The *sine qua non* of all justice is the ascertain-
ment of the truth and of the whole truth; it is becoming clear that the security of the country against internal as well as external assault requires that the sanctuary created by the 5th Amendment be contracted to the proportions designed by those who erected it.11

11. Lest the charge be made of unwillingness to follow the rigor of my own logic, my meaning must be further articulated. It is my view that the doctrine of United States v. Three Tons of Coal, see note 7 supra and text thereto, must be reverted to. More bluntly, the refusal of a witness to answer a relevant question put to him before a competent tribunal upon the ground of self-incrimination, cannot be countenanced unless that question is put to him in the proceedings of a criminal case. If, instead of discussing constitutional interpretation, constitutional amendment were the subject, I would be on the side of those who advocate the repeal of the germane portion of the 5th Amendment. While this may sound brash and radical, it must be realized how radically different were the relevant conditions environing the genesis of that amendment from those of today.