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Origins of the Fifth Amendment: The Right Against Self-Incrimination by Leonard Levy

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expense, justified by the "punishment principle". Dr. Menninger does not attempt to prescribe penalties for specific crimes, but urges that effective, reasonable and humane penalties could be set if public vengeance could be ignored.

The author hopes that his reader will become concerned enough to investigate for himself. He says the criminal justice system "is a creaking, groaning monster through whose heartless jaws hundreds of American citizens grind daily, to be maimed and embittered so that they emerge implacable enemies of the social order and confirmed in their 'criminality'." The high rate of recidivism among criminal offenders has emphasized this point.

In closing, the author reviews the remarkable strides of the last twenty years in the care and treatment of the mentally ill, all of which is a direct result of the public's concern. He predicts that,

[s]omeday, somewhere, the same thing will happen with respect to transgressors and offenders. It will be harder to bring about, for reasons we have given: the public has a fascination for violence, and clings tenaciously to its yen for vengeance, blind and deaf to the expense, futility, and dangerousness of the resulting penal system. But we are bound to hope that this will yield in time to the persistent, penetrating light of intelligence and accumulating scientific knowledge. The public will grow increasingly ashamed of its cry for retaliation, its persistent demand to punish. This is its crime, our crime against criminals—and incidentally our crime against ourselves. For before we can diminish our sufferings from the ill controlled aggressive assaults of fellow citizens, we must renounce the philosophy of punishment, the obsolete, vengeful penal attitude. In its place we would seek a comprehensive, constructive social attitude—therapeutic in some instances, restraining in some instances, but preventive in its total social impact.¹

This book should be read by the public as well as by those concerned with the administration of criminal justice, for it is society which ultimately is harmed by the failure of the system to correct and reform those who pass through our correctional system.

Harold E. Black
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ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION. By Leonard Levy. New York: Oxford University Press, 1968. Pp. 561. \$12.50.

Leonard Levy has once again proved that historians can write legal history and write it well. With this book he has established himself as

¹ K. MENNINGER, *THE CRIME OF PUNISHMENT* 280 (1968).

one of the foremost scholars of Anglo-American law. Furthermore, he has filled one of the multitude of gaps in the history of constitutional development. Finally, he has found something in the American legal tradition for which the more zealous civil libertarians can be thankful.

As the title of his book suggests, Levy has endeavored to give us a definitive history of the origins of the right against self-incrimination embodied in the fifth amendment. Of course he cannot do so without probing into the mysteries of English law, and probe he does. When he is finished with the task of translating English customs into American practice, he posits the thesis that American legalists truly believed in a right against self-incrimination as an adjunct of due process. He emphasizes that the fifth amendment was intended to incorporate a right, not a privilege, and in so doing endorses the view of the most ardent libertarians of the Warren Court. In short, this historian who when he explored the colonial and early national attitude toward freedom of speech and the press, found a legacy of suppression, and who, when he examined Thomas Jefferson and civil liberties, found a persistent, profound and comprehensive darker side, has, in his latest venture into the archives, discovered a more positive tradition of American civil liberties.

Much of Levy's book concerns the rather oppressive procedures of English ecclesiastical tribunals and the efforts of their victims to circumvent them. Not surprisingly, many of the theories underlying the right against self-incrimination came from the mouths of martyrs facing fanatical inquisitors. The Church had invented an oath *ex-officio* whereby a party brought before an ecclesiastical court would have to swear to answer truthfully all questions, no matter how incriminating. Such a device was obviously useful to heretic hunters since, in effect, errant clergy could be forced to condemn themselves without independent investigation and establishment of guilt. The most enterprising of the accused inevitably groped for ways to foil their accusers, and many of them came up with an untested maxim, *nemo tenetur prodere seipsum*, which meant that no man is bound to betray himself. Thus, if the Church was to locate a fresh heretic she would have to do so on her own. Judges were seldom amenable to such arguments, but sometimes alleged recusants did delay or avoid punishment because of their legal ingenuity and their silence.

One of the most assiduous prosecutors of theological seditionists was John Whitgift, Archbishop of Canterbury under Queen Elizabeth. Whitgift helped found the High Commission as a tool to establish religious conformity and used it with great effect on the increasing number of English clerics who embraced some form of Puritanism.

Despite his successes, Whitgift did encounter some opposition from Parliament and a great deal from such astute Puritan lawyers and thinkers as Thomas Cartwright, James Morice and Nicholas Fuller. It was only through the personal intervention of Queen Elizabeth herself that Whitgift and his High Commission were able to withstand these assaults which were based, *inter alia*, upon an alleged right against self-incrimination. Even though they usually lost the battles, the learned lawyers of left-wing Protestantism made enormous contributions to the theory of the right of silence, especially when they cleverly, though fallaciously, began to ground their attacks upon the Magna Carta.

The Puritans pursued the battle against self-incrimination and the High Commission with more zeal and profit under the early Stuarts. Increasingly they called upon the common law courts, controlled in large part by their supporters, to enjoin the proceedings of the King's prerogative courts which specialized in the doctrines of compulsory testimony. The fall of the monarchy during the English Civil War removed one obstacle to the sought-after civil liberty, and eventually Englishmen acquiesced in the right to silence, but only after the Puritans enjoyed a period of their own brand of judicial oppression. Levy assigns a good share of the heroics of his study to John Lilburne, a professional dissident of the times, whose repeated appearances before both Stuart and Cromwellian tribunals smacked with such brilliance that it was almost inevitable that the right against self-incrimination would attach itself permanently to the growing body of English civil liberties.

Having established the existence of the right in England by the middle of the seventeenth century, Levy next pursues his quest in the American colonies. There he finds the search more formidable, for colonial legal sources are thinly scattered and often uninformative. From the skimpy evidence which does exist, he concludes that the right of silence was only sporadically observed by seventeenth century American jurists. This is probably because there were too few lawyers and law books in America and thus much of the English law was in an undiscovered state. Sophistication came in the eighteenth century with the rise of a plentiful and educated American bar and the appearance in colonial libraries of an adequate stock of legal treatises and reports. Levy argues that by the middle of this century the right against self-incrimination was firmly fixed in many colonies.

Although the Revolution put strains on civil liberties in general, the specific right of criminal defendants to refuse to bear witness against themselves was expressly embodied into some of the new

state constitutions. After the war with Great Britain, many state tribunals recognized the liberty, some to the extent of applying it to witnesses and to parties in civil disputes. By 1789 there was a viable corpus of state law and custom endorsing the right, and it was therefore somewhat natural for James Madison to include it in his draft of the fifth amendment. Although Levy admits that there is virtually no evidence concerning legislative intent, he does speculate from the language itself that the amendment was designed to be broad in scope and mandatory in application.

Levy's book, although excellent, is not without its weaknesses. The author devotes too much space to the procedural controversies of ecclesiastical tribunals and too little to the status of the common law on the subject of involuntary testimony. Indeed, he hardly broaches the latter topic until midway in his book, although it would seem to be more central to his thesis. In addition, he writes excessively about the religious controversies themselves although they serve only as background to the legal questions involved. In contrast, Levy conveys an impression of hastiness in his treatment of the colonial response to English precedent. Granted the sources are thin, but so, sometimes, is Levy's discussion of them. Finally, the author seems unduly Whiggish in his summary remarks on the supposed dedication of the founding fathers to the right against self-incrimination. That the revolutionary and constitutional patriarchs were so devoted does not seem to follow from Levy's preceding discussion; indeed the early legalists of America seem to have been somewhat uncommitted to many of the fundamental elements of what modernists would call "due process." Despite these errors of emphasis and exaggeration, Levy has given us a brilliant piece of scholarship on a much-neglected subject.

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A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES; PART III:
RIGHTS OF THE PERSON. 2 vols. By Bernard Schwartz. New York:
Macmillan, 1968. Pp. 1018. \$25.00.

Rights of the Person comprises, in two volumes, the third and concluding part of a comprehensive commentary on the United States Constitution.¹ Part I (two volumes) dealt with the powers of govern-

¹ Its publisher styles it "the most comprehensive commentary on the Constitution yet to appear."