TAKING THE FIFTH: RECONSIDERING THE ORIGINS OF THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION

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INTRODUCTION

Modern criminal procedure in the common law jurisdictions has few distinguishing features as significant as the defendant's strong privilege against becoming a testimonial resource in a criminal investigation or trial. This is particularly true in the United States, where the interpretation of the Fifth Amendment's familiar wording[1] guarantees that objects of police investigation will be warned prophylactically against testimonial cooperation with the police and protects against adverse commentary on failure to testify at trial.[2] Perhaps because of its contemporary significance, historical scholarship has tended to locate the origin of the privilege deep in the libertarian tradition of the common law. Our greatest scholar in the law of evidence first set forth these interpretive assumptions, finding the origin of a right against self-incriminatory questioning in the legacy of resistance to the prerogative justice of the Stuart monarchy during the second quarter of the seventeenth century.[3] Following this approach, Leonard Levy traces a line of descent for this "right" from Puritan and Leveller resistance movements in the 1630s and 1640s through the Glorious Revolution, and on to the adoption of the American Bills of Rights in state and federal constitutions of the 1770s and 1780s.[4]

The purpose of this essay is to cast doubt on two basic elements of

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1. Miranda v. Arizona, 384 U.S. 436 (1966), adopted this approach to the Fifth Amendment.

2. *See* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

3. *See* John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1891); John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610 (1902). Wigmore's early work on the privilege was revised, without major substantive alteration, through the successive editions of his treatise. *See* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 267 n.1 (John T. McNaughton rev. ed., 1961).

4. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968).

the received historical wisdom concerning the privilege as it applies to British North America and the early United States. First, early American criminal procedure reflected less tenderness toward the silence of the criminal accused than the received wisdom has claimed. The system could more reasonably be said to have depended on self-incrimination than to have eschewed it, and this dependence increased rather than decreased during the provincial period for reasons intimately connected with the economic and social context of the criminal trial in colonial America.

Second, the constitutional provisions of the late eighteenth century protecting against compulsory self-incrimination were not final acknowledgments of a long-accepted "fundamental right." They were instead reflections of the contentious prerevolutionary constitutional debate, in which North American advocates made sweeping and often antiquarian legal claims protecting or expanding their power to resist Imperial control. The privilege against giving compelled self-incriminatory testimony was one of several common law doctrines to which the Americans gave far more rhetorical than practical respect during this period because it was ancillary to one of their central concerns — the constitutional function of the jury trial in limiting governmental power. The enactment of constitutions containing sweeping endorsements of the privilege seems to have had little or no immediate effect on contrary practice in the new states. By examining the activities of defense counsel, however, we can begin to trace the gradual adjustment of the criminal procedure system in the second and third decades of the nineteenth century.

Taken together, these points suggest a substantial revision of the standard narrative of the privilege in early American legal and constitutional history. The American evidence, in turn, sheds substantial light on other recent scholarly controversy concerning the history of the privilege in English law. Before turning to the consideration of the American evidence, some attention should be given to this wider historiographic context.

I. The Privilege and the Historians — Recent Developments

Recent scholarship has done much to cast doubt on the correctness of the received wisdom concerning the history of the common law privilege. Richard Helmholz and Michael Macnair have demonstrated independently that the antique tag, *nemo tenetur seipsum prodere* — in which the traditional account has descried the root of the common law's unique hostility to "inquisitorial" process — is instead

an expression of the *jus commune.* As such, it was closely identified with developments in late medieval canon law and was adopted into the common law by convergence.[5] Charles Gray has demonstrated that the complex history of jurisdictional confrontation between conciliar and common law courts in the seventeenth century and the sedition actions against John Lilburne and others during the period of the English Revolution have been misread by those seeking to find what Leonard Levy called "the establishment of the right."[6] Finally, John Langbein has drawn upon his own and other scholarship in eighteenth-century English trial records to argue that the privilege against self-incrimination, at least so far as criminal defendants are concerned, is an outgrowth of the epochal change in criminal procedure during the eighteenth century, as defense counsel entered the criminal courts.[7] Counsel, Langbein argues, turned a system directed at getting the defendant to attempt rebuttal of the adverse evidence into one in which the prosecutor was expected to prove his case, beyond a reasonable doubt, in the face of a learnedly uncooperative defense. This reversal of the nature of the criminal trial had as one of its consequences the creation of a right against coercive self-incrimination; it replaced a system in which, Langbein might say, self-incrimination was the whole point.

This revised history of the privilege, like the received wisdom it seeks to replace, must withstand a critical test in the early American records. If, under the received wisdom, the right was recognized in the era of John Lilburne and enshrined in the sequel to the Glorious Revolution, its invocations should be visible in the colonial records of British North America at least in the eighteenth century, and perhaps even in the late seventeenth century. If, however, the English privilege developed in the eighteenth century through intervention by defense counsel and replaced a system structurally biased in the opposite direction, we should see little of the "right" in colonial records so long as defense counsel are absent.

Any account of the history of the privilege based on the changing shape of the criminal trial brought about by defense counsel must also answer another serious question. How did the Americans — whose

5. Richard H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990); M.R.T. Macnair, *The Early Development of the Privilege Against Self-Incrimination*, 10 OXFORD J. LEGAL STUD. 66 (1990).

6. Charles M. Gray, *Prohibitions and the Privilege Against Self-Incrimination, in* TUDOR RULE AND REVOLUTION 345 (Delloyd J. Guth & John W. McKenna eds., 1982). For a discussion of Professor Levy's concept of "the establishment of the right," see LEVY, *supra* note 4, at 368-404.

7. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law,* 92 MICH. L. REV. 1047, 1068-69 (1994).

legal profession was necessarily less highly developed than that of the metropolis in the colonial period — come to treat the privilege as a constitutional right as early as the mid-1770s?

Reconsideration of the American developments is thus crucial to our understanding of the history of the privilege. Much essential research has not yet been done — only for colonial New York do we possess a detailed qualitative reconstruction of the criminal justice system — but the weight of available evidence is strongly against the received wisdom. In brief, the records of the colonial legal orders in the seventeenth century, like those of England, show the predominance of what John Langbein calls the "accused speaks"[8] elements of the old criminal procedure, in which the notion of a defendant's privilege against self-incrimination was anathema. Pretrial process, which effectively determines the possibility of defendants' silence at trial, followed the English models that inhibited rather than furthered the privilege. Counsel infrequently appeared in felony cases until the end of the colonial period even in New York, where the profession reached the highest degree of prerevolutionary development and influence. In misdemeanor proceedings, where counsel were theoretically available, administrative and economic considerations largely precluded defense counsel from having a major effect on investigative and trial procedures.

Yet the Americans did adopt constitutional provisions protecting against coercive self-incrimination at a comparatively early date. The paradox is only apparent. The constitutional provisions were intended conservatively, protecting against practices or institutions that Americans saw as possible innovations by a tyrannical government. The ambiguities surrounding the *nemo tenetur* maxim, the wary attitudes toward oaths held by American sectarians, and the "rights antiquarianism" of the American revolution all contributed to the drafting of such provisions. But the provisions were not treated, at least initially, as requiring variation of existing local practice. In those states that did enact such constitutional provisions, the effect on the existing criminal procedure system is difficult to discern. New Yorkers, who had enacted no guarantee of their own, saw no conflict in recommending such a protection in the federal Bill of Rights. Rather than "baffling" interpretation, as the leading voice of the received wisdom has it,[9] the legal positions of the New Yorkers epitomize the history of the privilege against self-incrimination. It is not the story of a timeless natural right, growing in recognition as society became more "free."

8. *See id.*

9. LEVY, *supra* note 4, at 411.

Instead, the history of the privilege reveals how procedure makes substance, and how legal evolution, like natural selection itself, adapts old structures to new functions. If the revised account is less heroic, it nonetheless brings us closer to the real mechanisms of legal development.

II. Early Modern Criminal Procedure in America

The legal systems of British North America came into existence over a period of more than a century, from the foundation of the Jamestown colony in 1607 through the organization of Georgia in the 1730s. The diversity of conditions of settlement — including religious belief, ethnic composition, and socioeconomic structure — makes it impossible to treat "colonial American law" as an entity. Moreover, the obscurity of the sources increases the difficulties involved in describing those legal systems. Records of criminal justice at the lowest levels are scant in almost all jurisdictions, and even the higher levels are documented in an incomplete fashion. The secondary literature offers many studies of varying utility, which quantitatively assess the performance of the criminal justice system and categorize its effect on different elements of the society,[10] as well as a few careful editorial introductions to printed records;[11] however, we possess only one study attempting to restate the entirety of one colonial system of criminal procedure doctrine on the basis of a comprehensive survey of surviving records.[12] Outside New York, comparative reconstructions of the details of criminal procedure are necessarily tentative. Despite the difficulties, however, the evidence so far unearthed shows important regularities in the conduct of criminal justice in colonial America, regularities against which the competing accounts of the history of the privilege can be measured.

10. *See, e.g.*, Douglas Greenberg, Crime and Law Enforcement in the Colony of New York, 1691-1776 (1976); Philip J. Schwarz, Twice Condemned: Slaves and the Criminal Laws of Virginia 1705-1865 (1988); Donna J. Spindel, Crime and Society in North Carolina, 1663-1776 (1989).

11. *See, e.g.*, 10 American Legal Records, Criminal Proceedings in Colonial Virgina xvi-xxiii (Peter C. Hoffer & William B. Scott eds., 1984).

12. *See* Julius Goebel, Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776 (1944). Further context for the qualitative detail Goebel and Naughton provide, along with a reconsideration of some points in light of later scholarship, can be found in Eben Moglen, Settling the Law: Legal Development in New York, 1664-1776, at 170-208 (1993) (unpublished Ph.D. dissertation, Yale University). A less satisfactory reconstruction for colonial Virginia, based almost entirely on statutory materials, can be found in Arthur P. Scott, Criminal Law in Colonial Virginia (1930).

A. *After English Ways — Roots of Colonial Criminal Procedure*

All of the colonial societies in British North America — despite varying degrees of modification to soothe religious, ideological, or ethnic conflicts over details — proclaimed an intention in principle to provide criminal justice in conformity with the laws of England. We are, however, liable to mislead ourselves if we conceive of this in terms of the "reception" of English law.[13] Charter provisions limiting legislative authority to acts "not contrary or repugnant to the laws of . . . England" had some effect in this regard,[14] as did early experience with attempts to administer colonial societies under qualitatively different rules.[15] But the most potent force in shaping colonial law was probably that which is hardest to specify in technical terms — the desire of settlers in distant, often hostile, territory for the social and institutional structures that helped them see the wilderness as "home."[16] So much is simple, but three primary considerations make it impossible to talk about the "reception" of English criminal justice in British North America in the first century of settlement. First, some Englishmen in North America wanted a home that varied in significant respects from the society they left behind. Second, not all of the communities whose political assent determined the effectiveness of the justice system were English. Third, the material conditions of life and the available social resources of communities differed profoundly throughout North America and, in turn, differed greatly from those in the English countryside. These differences prevent us from speaking of the reception of English law and make the reconstruction of colonial law a process specific to locality and time. But heterogeneity is valuable in the present context because, given the forces militating against uniformity, those basic elements upon which the colonial systems agreed may be taken as the least common denominator of the common law — the essence of Englishness, under colonial circumstances. As we shall see,[17] the "accused speaks" trial and its concomitant practices represented the

13. On the complex context of processes described as "reception" and "Anglicization" in the early legal development of New York, see Moglen, *supra* note 12, at 18-63.

14. MASS. CHARTER of 1628, *reprinted in* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 12 (Nathaniel B. Shurtleff ed., Boston, William White 1853) [hereinafter MASSACHUSETTS BAY RECORDS].

15. Notice, for example, the martial law regime in Virginia from 1610 to 1618. *See* WILLIAM STRACHEY, FOR THE COLONY IN VIRGINEA BRITANNIA; LAWES DIVINE, MORALL AND MARTIALL, & C. (London, Walter Burre 1612), *reprinted in* 3 FORCE'S COLLECTION OF HISTORICAL TRACTS No. 2, at 20 (Washington 1844).

16. On the commitment to "Englishry" in New York's criminal law, see Moglen, *supra* note 12, at 170-209. Compare EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 133-56 (1975), on "settling down" in Virginia, especially the creation of the county courts and related machinery after 1630.

17. *See infra* text accompanying notes 21-55.

common core of English criminal procedure in America during the first century of settlement.

John Langbein has defined the essential elements of the "accused speaks" trial contemplated by early modern English criminal procedure.[18] Throughout the process the defendant was deprived of the assistance of counsel, limited in his ability to call witnesses of his own, and denied access to the adverse evidence before trial presentation, including the charging instrument itself. At trial, he confronted a prosecution unhampered by an explicit burden of proof beyond a reasonable doubt; at pretrial committal, he was examined unsworn by a Justice of the Peace (JP) who was required to take down all evidence against the defendant, including if possible his own confession for admission at trial.[19] The combined effect of these practices was to pit the accused at trial against the prosecution's evidence, including his own unsworn confession — to explain it away if he could, or to dig himself in more deeply by untutored and self-revelatory behavior before judge and jury.

Deprivation of counsel was the sine qua non of the old criminal procedure in felony cases, as Langbein has shown.[20] Unsurprisingly, American criminal procedure of the seventeenth century largely conformed to English expectations. In addition to the English justifications for deprivation of counsel,[21] the virtual absence of trained professionals from the provincial courts in the first decades of settlement made any other policy impracticable. Indeed, the diversity of American innovation sometimes led away from, rather than toward, the availability of counsel in criminal cases. Religious perfectionism — and a distrust of the legal profession composed half of sad experience with legal persecution and half of the eternal generalized hostility toward lawyers — led the more sectarian of colonial communities to promote stringent regulation. Massachusetts Bay banned the activities of paid counsel in its courts altogether in the initial decades of settlement, thus effectively denying representation to all criminal defendants, not merely those charged with a felony.[22] Elsewhere in British North America, the common law principle that felony defendants might have counsel only to argue matters of law to the court seems to have formed the basis of practice. Virginia permitted counsel in capi-

18. Langbein, *supra* note 7.

19. *Id.* at 1060-62.

20. *Id.* at 1049 n.7.

21. *Id.* at 1050.

22. THE BODY OF LIBERTIES art. 26 (1641), *reprinted in* 7 OLD SOUTH LEAFLETS 265 (1905) [hereinafter BODY OF LIBERTIES]. In Pennsylvania, however, the right of counsel was expressly affirmed after 1701. *See infra* notes 120-22.

tal cases by statute after 1734, but the little evidence we have shows that their participation was infrequent.[23] New York never provided any statutory sanction for the appearance of counsel in felony cases, and the expense of employing a lawyer whose activities were limited to matters of law was almost always prohibitive.[24] New York apparently also followed the common law in permitting counsel in misdemeanor cases as early as 1686,[25] but, for administrative and economic reasons more fully described below,[26] counsel rarely appeared in misdemeanor cases until late in the eighteenth century. So far as the seventeenth century was concerned, and indeed long after, there seems to be no reason to doubt Julius Goebel's conclusion that in New York "[t]he felonies were still a preserve as restricted to defense counsel as were the hunting grounds of the Indian to the colonists, and in the misdemeanor field the lawyers' pickings for a long time were as lean as the quitrents paid to the King."[27] Even the rather libertarian polity of Rhode Island, which passed in 1669 the earliest colonial statute providing access to counsel after indictment, limited itself to declaring the common law privilege of counsel "to plead any point of law."[28]

Early colonial law systems also followed English restrictions on the presentation of defense witnesses. Until 1702, English practice required defense witnesses in felony cases to testify unsworn, assertedly for the repulsively fictional reason that no one could be admitted to swear against the King.[29] Evidence from New York suggests both that the common law rule was observed fully in the seventeenth cen-

23. 4 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 404 (William W. Hening ed., Richmond, The Franklin Press 1820) [hereinafter STATUTES AT LARGE]; *see* SCOTT, *supra* note 12, at 79.

24. A revealing exception is the extension of the privilege of counsel in treason cases provided by the statute of 7 Will. 3, ch. 3 (1696) to the defendants in the famous New York political trial R. v. Bayard, in 1702, despite the fact that the statute did not apply in the colonies. When the political elite of the colony faced capital charges, employment of counsel was worthwhile. *See* R. v. Bayard, 14 A COMPLETE COLLECTION OF STATE TRIALS 471 (Howell ed., London, Hansard 1812) (1702). It should be noted that counsel was also permitted to Jacob Leisler during the trial that ended with his execution for treason in 1691. *See* Public Record Office, Kew Branch, CO (Colonial Office Papers) 5/1037, fol. 1†.

25. *See* R. v. John Vincent, MINUTES OF THE NEW YORK COUNTY QUARTER SESSIONS, 1683/84-1694, at 112 (May 3, 1686) (on file with the New York County Clerk, New York Hall of Records)†.

26. *See infra* text accompanying notes 75-85.

27. GOEBEL & NAUGHTON, *supra* note 12, at xxv.

28. 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 238-39 (John R. Bartlett ed., Providence, A. Crawford Greene & Bro. 1857). Compare LEVY, *supra* note 4, at 356-57, where the restriction is ignored, supposedly showing the early establishment of the "right to counsel."

29. *See* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 29 (London, E. Richardson & C. Lintot, 4th ed. 1762). The English rule was changed by a statute whose benefit was not extended to the colonies. *See* An Act for Punishing of Accessories to Felonies, 1 Anne, stat. 2, ch. 9, § 3 (1701) (Eng.).

tury,[30] and that practice altered in conformity with the change in English practice after the Statute of Anne.[31]

Spotty documentation makes it difficult to say when courts began issuing subpoenas to compel the attendance of defense witnesses. In New York, such orders survive from a few trials scattered through the eighteenth century.[32] If the Justices' manuals and other normative sources correctly depict Virginia procedure, defendants there had limited access to subpoena by the second quarter of the century.[33] But, sworn or unsworn, defense witnesses at trial generally were scarce commodities. The practice papers of John Tabor Kempe, Attorney General of New York from 1759 to the end of the colonial period, contain several dozen notes on trials for which Kempe presented the Crown's case.[34] In a few cases an energetic defense was mounted, most often when the charge permitted counsel and the defendant could afford representation. When there was defense evidence, Kempe made note of it. But the great preponderance of his contemporary notes show that no defense evidence was offered in the cases he prosecuted.

B. *Pretrial Examination — The Accused Speaks*

These elements of colonial criminal procedure demonstrate that American legal systems at the turn of the eighteenth century conformed to the model of the "accused speaks" trial, with which the notion of an accused's right to silence in the face of the evidence was incompatible. But trial itself was only the latest stage in the process, and it was in pretrial proceedings that the full weight of the criminal

30. Thus, defense witnesses testified unsworn in the trial of an indictment for burglary in 1669, according to GOEBEL & NAUGHTON, *supra* note 12, at 562. Rough minutes for the August 1685 New York Quarter Sessions show that defense witnesses were sworn in a misdemeanor prosecution, in this case for violation of the Navigation Acts, in conformity with English practice. *See* Ludgar Qui Tam v. The Pink Charles (n.d.) (unclassified papers on file with the New York Hall of Records)†. On such few indications must our conclusions depend, given the scant documentation of trial protocol, in America as in England, during the seventeenth century.

31. *See* Queen v. Bowen, MINUTES OF THE SUPREME COURT OF JUDICATURE, 1704/05-1709, at 165 (case in which defense witnesses were sworn)†. Subsequent practice is difficult to ascertain because so few indications exist in the records showing whether witnesses were sworn or not before they testified. It seems that practice was similar in Virginia after 1705. *See* GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 135-36 (photo. reprint 1969) (Williamsburg, William Parks 1736).

32. *See* GOEBEL & NAUGHTON, *supra* note 12, at 476-78 (discussing evidence of subpoena use during the eighteenth century). In New York, through the eighteenth century, prosecution witnesses primarily appeared to testify under recognizances, taken at the preliminary examination and providing the Crown with economic leverage to ensure appearance.

33. *See* WEBB, *supra* note 31, at 112.

34. For examples of notes on the defense case, see King v. Lydius (June 23, 1763); King v. John Van Rensselaer (Oct. 26-Nov. 5, 1768); J.T. Kempe Lawsuits (on file with the New-York Historical Society)†.

process was enlisted behind the attempt to induce self-incrimination. In order to understand the nature of that process, it is necessary to begin with a clear grasp of the personnel who administered it and the sources of the law they applied.

1. *The Justices of the Peace*

Without exception, administrators of criminal justice in British North America made use of the process established by the Marian committal statute.[35] In its essence, the statute required a defendant, once apprehended, to be brought before a Justice of the Peace, who was to transcribe all available evidence "material to prove the felony."[36] The JP was assumed to be a lay member of the squirearchy, rather than a professional investigator. In matters of felony or other serious crime, his function was to secure the Crown's evidence for transmission to Quarter Sessions or Assizes. The nonprofessional character of the JP was assumed a fortiori in North America, where the pool of legally trained potential magistrates was minuscule. In New York, English practice was followed to the extent of designating some of the JPs as "of the quorum," though conditions throughout the colonial period were such that even Justices of the quorum were unlikely to possess legal training.[37] Sitting together in the General Sessions of the Peace, these JPs took cognizance of misdemeanors, criminal trespass, and felonies up to and including petit larceny.

2. *The Justices' Manuals*

As John Langbein has written, "one of the fundamental constraints upon a legal system which assigns important roles to laymen is the need to devise modes of instruction to remedy their inexperience."[38] In British North America, as in England, the most important mode of instruction was the Justice of the Peace manuals.[39] These

35. 2 & 3 Phil. & M., ch. 10 (1555) (Eng.). On the drafting and implementation of these crucial reforms, see JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5-125 (1974).

36. 2 & 3 Phil. & M., ch. 10 (1555) (Eng.).

37. William Smith, Jr., who undoubtedly spoke from personal experience, remarked in his history of provincial New York that "[t]here are instances of some [JPs] who can neither write nor read." 1 WILLIAM SMITH, JR., THE HISTORY OF THE PROVINCE OF NEW-YORK 261 (Michael Kammen ed., 1972). John Langbein has argued that the quorum clause had ceased to designate legally trained JPs in England by the end of the sixteenth century. Displacement of felony trial, Langbein writes, allowed the designation to the quorum to be retained as "a petty embellishment of dignity." *See* LANGBEIN, *supra* note 35, at 113-14; *see also* J. H. GLEASON, THE JUSTICES OF THE PEACE IN ENGLAND 1558-1640, at 4 (1969).

38. LANGBEIN, *supra* note 35, at 43.

39. The first manual was William Lambard's *Eirenarcha: or of the Office of the Justices of Peace,* published in 1581-1582. For the history of the editions of Lambard through 1619, see

manuals provided JPs with an alphabetical digest of information relating both to their common law and statutory responsibilities, including forms for the dispatch of the most frequent civil and criminal business. Moreover, the manuals contained basic articles on the subject of criminal investigation and adjudication that changed very little over the years.[40]

The Justices' manuals were not purely primers of criminal procedure, either in Great Britain or in British North America. The genius of locality that formed the eighteenth-century English idea of government meant that the JPs were the primary administrators of the countryside, and the manuals reflected this fact by increasing their bulk in the course of the eighteenth century as Parliament added vastly to the volume and scope of legislation for whose implementation the local worthies were ultimately responsible. But the growth in volume and complexity caused few changes in the basic articles in the manuals on the subject of criminal investigation and adjudication. Dalton's words on the conduct of examination of criminal suspects remain present in Nelson's, Burn's, and other's manuals through the end of the eighteenth century.[41] The most significant change in the phrasing of the English manuals on the core subjects of criminal procedure during the century was the appearance of Sergeant Hawkins's overwhelmingly influential *Pleas of the Crown,* which became the single most authoritative source for characterization of the common law procedures developed in the wake of the Marian legislation.[42]

The English manuals had a significant circulation in the British

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Sweet and Maxwell's 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 229 (2d ed. 1955) [hereinafter LEGAL BIBLIOGRAPHY].

40. Lambard's *Eirenarcha,* after several editions, gave way in English practice to Michael Dalton's *The Countrey Justice* of 1618. LEGAL BIBLIOGRAPHY, *supra* note 39, at 229.

Dalton's *Justice* remained the basic *vade mecum* of the English JP through the seventeenth century, giving way at the opening of the eighteenth to Giles Jacob's *The Modern Justice* and William Nelson's *The Office and Authority of a Justice of Peace. See* GILES JACOB, THE MODERN JUSTICE: THE BUSINESS OF A JUSTICE OF PEACE (London, Sayer 1716); WILLIAM NELSON, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE (London, Sayer, 3d ed. 1710). For the subsequent publication histories of Jacob and Nelson, see LEGAL BIBLIOGRAPHY, *supra* note 39, at 228, 230.

These in turn gave way by midcentury to a series of manuals, the most expansive and widely circulated of which was Richard Burn's two volume *Justice of the Peace and Parish Officer.* RICHARD BURN, JUSTICE OF THE PEACE AND PARISH OFFICER (London, Linton 1755). For the subsequent publication history of Burn, see LEGAL BIBLIOGRAPHY, *supra* note 39, at 225-26.

41. Thus the fifteenth edition of Burn's *Justice,* printed in 1785, after stating that "[t]he examination of the accused, ought not to be upon oath," provides the text of Dalton's c. 164: "But if upon his examination he shall confess the matter, it shall not be amiss that he subscribe his name, or mark to it." 1 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 537 (J. Burn ed., London, Strahan and Woodfall, 15th ed. 1785).

42. Hawkins's treatise, first published in two volumes between 1716 and 1721, went through seven editions in the course of the eighteenth century. LEGAL BIBLIOGRAPHY, *supra* note 39, at 362-63; Langbein, *supra* note 7, at 1053.

North American dominions.[43] By midcentury, in addition to the manuals, each of the surviving library lists of New York lawyers shows that Hawkins's *Pleas of the Crown* was a required reference; Joseph Murray, John Chambers, and William Smith, Jr. all owned copies.[44] At the other end of the English settlement on the Atlantic littoral, the North Carolina legislature in 1749 statutorily instructed JPs to buy, among other law books, the latest available edition of Nelson's *Justice.*[45]

Along with the transplanted copies of English sources, domestic manuals issued throughout the course of the eighteenth century also informed administrators of the criminal justice system in America. Though often cited by writers on substantive law in colonial America, these works have not received the attention they deserve, perhaps because of their stereotyped and largely repetitive nature.[46]

The American JP manuals can be divided into two primary categories — those that simply reprinted large portions of English works, and those that also contained local material drawn from the acts of particular colonial legislatures. The first of the American manuals, published in 1722 and entitled *Conductor Generalis,*[47] was of the former variety. Drawn entirely from Nelson's *Justice,* the *Conductor* attained, like the English work it recapitulated, a cross-colonial circulation, being reprinted several times in the various cities of British North America. Like Nelson's, Dalton's, and Burn's manuals, and the other English manuals in colonial circulation, the *Conductor Generalis* militated in the direction of uniformity of American criminal procedure by putting in the hands of the system's lay administra-

43. The library of John Montgomerie, Governor of New York from 1727 to 1730, was sold two years after his death in 1732. The sale list shows us the young Chief Justice of the Province, James DeLancey, buying Montgomerie's copy of Nelson's manual. A cash purchaser, whose name was therefore unrecorded, paid more than twice as much for Montgomerie's copy of Dalton, while yet a third buyer acquired the Governor's copy of Hale's *Pleas of the Crown.* PAUL M. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK app. VII at 193-96 (1939). In 1720 the most recent manual in the possession of James Alexander, ultimately the possessor of one of the largest law libraries in North America, was Fleetwood's *Justice of the Peace* of 1658. WILLIAM FLEETWOOD, OFFICE OF A JUSTICE OF PEACE, WITH INSTRUCTIONS HOW AND IN WHAT MANNER STATUTES SHOULD BE EXPOUNDED (n.p. 1658). By 1732 he evidently owned both Nelson and Dalton, however, and, as the first purchaser of Montgomerie's books, declined to buy the Governor's copies.

44. The lists of Alexander's, Murray's, Chambers's, and Smith's libraries are also reprinted in HAMLIN, *supra* note 43, at 171-92.

45. *See* 23 THE STATE RECORDS OF NORTH CAROLINA 346 (Walter Clark ed., 1904). For some scant evidence of the circulation of such materials as George Webb's *Office and Authority of a Justice of Peace* in Colonial North Carolina, see Helen R. Watson, *The Books They Left: Some "Liberies" in Edgecombe County, 1733-1783,* 48 N.C. HIST. REV. 245, 251 (1971).

46. Only one has received the benefit of modern reprinting, and that without much editorial explication. *See* WEBB, *supra* note 31.

47. CONDUCTOR GENERALIS (Andrew Bradford ed., Philadelphia 1722)†.

tors instructional material that presumed the processes of criminal investigation and preparation for trial to be substantially the same regardless of the geographical location of the JP.[48]

Even the second class of American manual, which made substantial reference to local sources or at least made local applicability part of its appeal to readers,[49] nonetheless circulated outside the boundaries to which it nominally applied, increasing the sense of uniformity of colonial practice.[50] Moreover, whether the manuals simply reprinted English writers, as the *Conductor* did Nelson's, or intermingled portions of the English manuals with descriptions of local statutory requirements, as Webb did with Dalton's, the treatment of the JP's responsibility in examining suspected felons was altogether invariable. All sources agreed on three critical points: (1) at the preliminary examination, the defendant was to be questioned unsworn; (2) his statements were to be made a matter of formal written record; and (3) his confession, if any, was to be admissible against him at trial.

The requirement that the defendant testify unsworn was significant, as I will discuss below.[51] In providing for admissibility of confessions, the American sources, particularly after the publication of Hawkins's authoritative *Pleas of the Crown,* routinely state that such confessions are admissible only against the maker and not against any other party. In New York, at any rate, the defendant's testimony at examination was assumed to be an important, if not invariably essential, element in the Crown's presentation, upon which the Attorney General or his deputy relied in framing an indictment, and which the examining Justice was expected to provide on pain of official displeasure.[52] The incentives faced by the examining justice in his relation to the Crown's officials in the colony confirmed the essential fact: the prosecutorial system depended upon the routine of self-incrimination in preliminary proceedings.

The aim of securing self-incrimination in pretrial proceedings affected even those portions of the process apparently intended to guarantee fair treatment to the accused. Most of the manuals directed the JP to note evidence favorable to the prisoner, as well as that favorable

48. For the utility of the English manuals in maintaining a sense of uniformity between English and Virginian legal behavior in the earlier period of Virginia's history, see Warren M. Billings, *English Legal Literature as a Source of Law and Legal Practice for Seventeenth-Century Virginia,* 87 VA. MAG. HIST. & BIOG. 403 (1979).

49. *See, e.g.,* WEBB, *supra* note 31 (first published in 1736).

50. *See* Watson, *supra* note 45, at 251.

51. *See infra* text accompanying notes 60-64.

52. *See* Letter from John Tabor Kempe to JP *in* R. v. Kelly (Aug. 13, 1764) (on file with the New-York Historical Society)†.

to the Crown. Sometime early in the eighteenth century it became the practice in New York, when the defendant was available at the time of examination of the prosecution's witnesses, to confront him with those witnesses at his examination.[53] While this might have afforded some defendants an opportunity to pick holes in the Crown's witnesses, the primary purpose seems to have been to inspire a confession from the accused.[54] Leonard Levy's conclusion that in England "the right against self-incrimination scarcely existed in the pre-trial stages of a criminal proceeding"[55] is equally correct with regard to British North America.

C. *The Limits of Coercion*

Viewing the preliminary examination solely as a prelude to the unequal combat of the jury trial underestimates its importance in colonial criminal procedure. As in England, where JPs sitting alone had substantial summary jurisdiction,[56] colonial criminal justice relied broadly on summary proceedings. In New York, the criminal or quasi-criminal jurisdiction of a single JP included enforcement by fine of the statutes governing fraudulent repacking of meat, sale of unmerchantable flour, violation of weights and measures, and the usual run of public morality enforcement, including offenses such as profaning the Sabbath, swearing, public intoxication, dealing in lottery tickets, and providing liquor to slaves and apprentices. Forms of criminal or quasi-criminal trespass — such as breaking windows and milestones, firing guns or fireworks in the city, and passing counterfeit copper coinage — were similarly punished by summary jurisdiction.[57] In areas of summary jurisdiction, examination was equivalent to trial, and thus the entire process lay within the bounds of what even the most enthusiastic hunter for the privilege concedes to be barren soil.[58] As we shall see,[59] socioeconomic forces militated in favor of expansion

53. Goebel suggests this practice prevailed, with slim evidence as to timing. GOEBEL & NAUGHTON, *supra* note 12, at 633 & n.8.

54. The use of confrontation as an assistance in securing confessions can be seen in full flower in Justice Daniel Horsmanden's account of the investigation of the "Negro Plot" in 1741. *See* DANIEL HORSMANDEN, THE NEW YORK CONSPIRACY (Thomas J. Davis ed., Beacon Press 1971) (1810). As the tenor of the description shows, this was plainly established practice, rather than an adaptation to extraordinary circumstances. *Id.* at 7.

55. LEVY, *supra* note 4, at 325.

56. *See* Langbein, *supra* note 7, at 1059-60 (discussing the jurisdiction and duties of the English JP).

57. For a general view of the JP's miscellaneous summary jurisdiction, see GOEBEL & NAUGHTON, *supra* note 12, at 130-33.

58. *See* LEVY, *supra* note 4, at 325.

59. *See infra* text accompanying notes 74-75.

of summary jurisdiction, or its equivalent, in British North America during the eighteenth century. In this crucial sense, self-incrimination became more, rather than less, important in the administration of colonial criminal justice in the decades preceding independence.

Yet, despite all the energy expended in creating opportunities for the accused to commit himself, there remained important limitations on the degree of coercion employed in the search for the guilty. By all measures, the most important was the distinction separating witnesses from those accused. In the aftermath of Bacon's Rebellion, in 1677, the Virginia House of Burgesses, perhaps pressured by those apprehensive that it would be swept up in Governor Berkeley's measures of pacification and retaliation, stated:

> UPON a motion from Acomack county, sent by their burgesses, *It is answered and declared,* that the law has provided that a person summoned as a witness against another, ought to answer upon oath, but no law can compel a man to swear against himself in any matter wherein he is liable to corporal punishment.[60]

The legislature was declaring what it understood to be settled law, in which the traditional understanding of the *nemo tenetur* tag can be clearly discerned. Witnesses were persons who could be compelled under spiritual and monetary penalties to appear and tell the truth, but they could not be compelled to swear against themselves. Nor could defendants be compelled to do so; however, because their testimony, particularly self-incriminatory testimony, was of the greatest value — even if it consisted of exculpatory falsehoods that showed consciousness of guilt — the solution was not to examine them under oath.

To the modern mind, the oath in the legal process is merely a formal ritual, reminding the witness of the possibility of secular punishment for perjury. But this is merely the last step in the withering away of the Christian world's favored instrument of spiritual coercion. British North American communities in the seventeenth and early eighteenth centuries were even more sensitive to the controversial nature of the oath than the bulk of English society in the time of John Lilburne. For New England Congregationalists of the 1630s and 1640s, oaths were not intrinsically distrusted, as they were for others in North America. New Englanders employed oaths for any number of civil purposes,[61] but the ex officio oath, and its role as an investigative device in the persecution of dissenters under Archbishop Laud, was

60. STATUTES AT LARGE, *supra* note 23, at 422.

61. For example, the Freemen's Oath, recurrently taken by members of the General Court and others. *See* 1 MASSACHUSETTS BAY RECORDS, *supra* note 14, at 354.

more uniformly reprehended than in England. Hence the great codes of Congregationalist New England specifically limited the use and wording of oaths[62] to prevent the use of spiritual coercion. This by no means inhibited Congregationalist judges from attempting to entrap defendants into self-incrimination by questioning so long as, in conformity with the common law as they understood it, no oath was first administered.[63] Similarly, the Friends in Pennsylvania, who altogether denied the propriety of oaths — regarding them as blasphemous invocations of divine interference in worldly affairs — did not conclude that traditional examination practices in the country violated the spiritual privileges of the accused.[64] Tender religious sensibilities in British North America intensified the impression that there was something wrong with forcing men to choose between damnation and secular punishment for crime. But nowhere in the American colonies did this imply that the traditional criminal procedure of the English countryside, with its extensive reliance upon self-incrimination, ought to be changed.

Similarly, the Americans recognized severe limitations on the use of physical coercion to secure testimony, yet upon principles that left the rationale of the "accused speaks" trial, and all it implied, intact. For those seeking, on the basis of the received wisdom, to find among the Massachusetts contemporaries of Prynne, Bastwick, and Lilburne a recognition of the eternal right against self-incrimination, article 45 of the 1641 Body of Liberties is at best a problem:

> No man shall be forced by Torture to confess any Crime against himself nor any other unless it be in 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 it is very apparent there be other conspirators, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.[65]

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62. BODY OF LIBERTIES, *supra* note 22, art. 3; LAWES AND LIBERTYES 43 (Cambridge 1648), *reprinted in* 1 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691, at 3, 49 (John D. Cushing ed., 1976) [hereinafter LAWS AND LIBERTIES].

63. *See* GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 200-02, 283 n.59 (1960) (drawing the distinction and denying that the "modern form" of the privilege prevailed in early Massachusetts).

64. *See generally* CRAIG W. HORLE, THE QUAKERS AND THE ENGLISH LEGAL SYSTEM 1660-1688 (1988).

65. BODY OF LIBERTIES, *supra* note 22, art. 45. HASKINS, *supra* note 63, at 202, believes this provision authorized torture only after judicial conviction, to disclose confederates. This seems to be at odds with the implication that under some circumstances a man might be brought to confess "against himself." Barbara Black, Professor of Legal History, Columbia, in a private conversation, has urged that the provision should be read so as to deny any power to torture for self-incrimination and only to incriminate others if, after a guilty verdict, the defendant refused to name accomplices. I believe "conviction" here means certainty of belief, as in the salvational significance of "conviction of sin," rather than a judicial determination. Black, whose personal familiarity with the records is authoritative, believes that "conviction" in this sense would never

To say, as Levy does, that this provision "provided in somewhat equivocal terms for the right against self-incrimination"[66] is an exaggeration. When not conscripted for the task of supporting the "right," to which it is unsuited, Liberty 45 does, however, reveal something of value. Even among moderate dissenters of the 1630s, the English use of torture seemed in one sense inferior to the Continental pattern, as John Selden pithily remarked:

> The Racke is used no where as in England. In other Countries, it is used in Judicature, when there is *semi-plena probatio,* a half proof against a man, then to see if they can make it full, they rack him to try if he will Confess. But here in England, they take a man & rack him I do not know why, nor when, not in time of Judicature, but when some body bids.[67]

In short, the primary problem with torture was that it was used as a matter of royal discretion and therefore was inherently lawless. Liberty 45 seems to have been intended to resolve that grievance, closely connected with the grievance against the use of ex officio oaths in the prerogative courts, by subjecting all such means to the authority of the traditional criminal law.

These ideas of the Massachusetts Bay orthodoxy on the relationship between compulsion and confession can be seen in their clearest form — as so often in the early history of Congregationalist New England — in the dialogue between civil and religious leaders. A perceived outbreak of offenses against public sexual morality in the early 1640s, including one famous case of sexual relations with children and a cluster of cases of bestiality, led the magistrates to consider the problems inherent in punishing capital crimes that by their nature eluded the holy watching of potential witnesses.[68] In the winter of 1641-1642, Governor Bellingham sought counsel from the ministers and magistrates of the towns on a series of questions concerning these

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be coupled with "evidence" in the language of a Massachusetts Bay drafter of the period. *Cf.* LAWES AND LIBERTYES 50, *reprinted in* LAWS AND LIBERTIES, *supra* note 62, at 56. In the absence of any documented use of judicial torture in Massachusetts Bay, we cannot be sure what was intended by the drafter or understood by the judges; it is with great reluctance that I reach an interpretation contrary to those of Haskins and Black.

66. LEVY, *supra* note 4, at 345.

67. JOHN SELDEN, TABLE TALK 133 (Frederick Pollock ed., 1927). Selden saw no objection in law to using deceit or other means to entrap confession in preliminary examination. *See id.* For the theory of half proof and full proof, and all other matters connected, see JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF (1977).

68. HASKINS, *supra* note 63, at 201, refers to "a wave of vicious criminality." His dignified reticence about the nature of the offenses does a slight disservice to our understanding: the colony's leadership saw that sexual offenses, secretive in their nature, raised the problems of confrontation and evidence gathering in their most severe form. When no competent witnesses existed, as in the cases of sexual abuse of children or animals, confession might well be the only available evidence, and the questions whether confession might be extracted, and might support a conviction without corroboration, became critical.

issues.[69] "How far," Bellingham asked, "may a magistrate extract a confession of a capital crime from a suspected and an accused person?"[70] Only two of the original responses to this circular have survived, and of these one is directly responsive to the question of compulsion. Ralph Partrich answered in words perfectly descriptive of the intersection of common law tradition and Congregationalist orthodoxy:

> I conceive that a magistrate is bound, by careful examination of circomstances & weighing of probabilities, to sift the accused; and by force of argument to draw him to an acknowledgment of the truth. But he may not extract a confession of a capital crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishment inflicted or threatened to be inflicted, for so he may draw forth an acknowledgmente of a crime from a fearful innocent. If guilty, he shall be compelled to be his own accuser, when no other can, which is against the rule of justice.[71]

Partrich's conclusion seems to have been that of the ministers at large in 1642; John Winthrop reported the consensus of opinion this way:

> [W]here such a fact is committed, and one witness or strong presumptions do point out the offender, there the judge may examine him strictly, and he is bound to answer directly, though to the peril of his life. But if there be only light suspicion, &c. then the judge is not to press him to answer, nor is he to be denied the benefit of the law, but he may be silent, and call for his accusers. But for examination by oath or torture in criminal cases, it was generally denied to be lawful.[72]

The important features to note in these passages are the placement of questioning under oath and torture in the common category of "violence," and the distinction drawn between such violent means and magisterial "force of argument" directed at securing a confession. The silence of the accused was tolerable only when suspicion was light; otherwise the magistrate should inquire "strictly," and the accused was bound to answer, even at his ultimate peril.

In summary, we can reach several conclusions concerning the formation of systems of criminal procedure in the American colonies in the decades following settlement. First, a broad convergence on tradi-

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69. WILLIAM BRADFORD, OF PLYMOUTH PLANTATION, 1620-1647, at 317-18 (Samuel E. Mirison ed., 1952).

70. *Id.* at 407. This is not a direct quotation from Bellingham, but a paraphrase by his contemporary Ralph Partrich. *See id.* at 318 n.2.

71. *Id.* at 318. Bradford transcribed excerpts from both this response and that of Charles Chauncy into his manuscript. To Bradford and the others involved, the issue was more pressing than academic. In September of 1642, Thomas Granger of Duxbury was executed on his own confession to repeated instances of bestiality, made after examination on the basis of suspicion by neighbors. *Id.* at 202-03.

72. 2 JOHN WINTHROP, HISTORY OF NEW ENGLAND 47 (J. Savage ed., Boston, Phelps and Farnham 1826).

tional English forms had occurred throughout the criminal procedure systems of the British colonies by the end of the seventeenth century, despite diversities of belief, purpose, and the conditions of settlement. The common features included not only the grand and petit juries and other palladia of English liberties, but also the system of preliminary examination, the rules excluding counsel, and the other elements of early modern criminal procedure that had developed from the merger of English traditions of local government and the sweeping effect of the Marian committal statutes. Colonial American criminal justice depended upon self-incrimination in practice precisely because the basic design of the system assumed it would.

At the same time, the American records also disclose a strong array of beliefs concerning the inappropriateness of physical and spiritual coercion to secure evidence of crime. *Nemo tenetur prodere seipsum* was no meaningless tag — it expressed ideas concerning the treatment of witnesses that were older than the system of criminal procedure of which they now formed part. It played a role in the ambivalent debate over the uses of physical coercion, in some respects casting weight onto the scale against the practice of judicial torture. But, however broad the theoretical principle, the real effect of the maxim on the system of criminal procedure might best be described as peripheral, for at the center of that system stood the defendant, friendless and alone, confronting the evidence and his fate. So long as he remained in that condition, and it was the fixed purpose of the system to keep him there, any notion of the defendant's privilege against self-incrimination was but a phantom of the law.

The English system Sergeant Hawkins described was a system the Americans, *mutatis mutandis,* were committed to emulate. In that system, despite its existing features, material existed upon which defendants' counsel, actively engaged in reshaping the criminal trial, could seize in order to save their clients from the snares and pitfalls of examination. English developments do seem to have followed that path.[73] But the systems of criminal justice in colonial America existed in an environment distinctively different in important respects from that of England. The social and economic conditions of criminal justice in eighteenth-century America made adherence to the traditional system more necessary, and emulation of the English developments less likely, as the colonial period came to a close.

73. Langbein, *supra* note 7, at 1067-71.

III. Social Determinants of the Late Colonial Criminal Trial

We have seen that, in the first instance, British North Americans imitated English modes of criminal procedure. But practices and institutions could only survive if they performed their functions under prevailing conditions. The "accused speaks" trial, along with the other modes of procedure associated with it, met the requirements of public order in the social conditions of colonial America reasonably well. It demanded little in the way of resources for criminal investigation. Because it was predicated upon a defendant largely without resources to challenge the prosecution's case, it also economized on prosecutorial energies, allowing a small cadre of lawyers to manage comparatively large numbers of prosecutions. Moreover, because it assumed that defendants either could not or would not be represented, depending on the type of offense charged, it dispensed with the need for any social investment in a criminal defense bar. All of these elements, like the basic dependence on a stratum of local lay judges accorded broad discretion, suited colonial conditions at least as well as English ones.

But colonial conditions in the eighteenth century did not parallel contemporary English ones in all relevant respects. Demographic, economic, geographic, and political forces were at work shaping American criminal procedure in the eighteenth century, and those forces did not militate in the direction of the "testing the prosecution" trial. Indeed, much social energy was directed, even in the comparatively professionalized system of New York, at disadvantaging the defendant. On a practical level, an observer of colonial criminal process in 1770 would not have detected an inclination to increase the privileges of criminal defendants. Julius Goebel's conclusion that the privilege against self-incrimination was an exotic fruit of Westminster Hall, with whose flavor the provincial lawyers were unacquainted,[74] would have seemed not only descriptively correct, but likely to remain so.

The essence of the common law criminal procedure transported to the American colonies was its use of a hierarchy of courts graded to a hierarchy of offenses, allowing local lay judges — acting first alone and then in groups meeting in central locations with quasi-professional advice — to dispose of all but the most serious offenses. These last could then be disposed of by itinerant or centrally located judges of high professionalization, accompanied by a professional cadre of lawyers, responsible for the preparation of the Crown's case. The assumption

74. Goebel & Naughton, *supra* note 12, at 656.

was that all justice other than local summary justice was expensive, and the time of professional judges and counsel was most expensive of all.

Everywhere in British North America, the demographic density was so low, compared to English conditions, that it intensified the difference in expense between summary and professional justice. Outside New England, in particular, and always in a gradient from east to west within the confines of each colony, distance — which we should measure in travel time rather than miles, lest we forget how much the size of our nation has shrunk with time — increased the cost of professional justice. So too did the relatively small size of the professional cadre capable of serving as judges and counsel. Geographical dispersion and a small professional cadre together constituted a strong force for expanding summary jurisdiction in order to achieve necessary savings. Increasing population, although it raised population density, did not relieve the pressure for expansion of summary jurisdiction because increasing population did not always bring a proportionate increase in the resources available for criminal justice.

Other forces also made cheaper, localized summary criminal justice attractive throughout colonial America. American populations were comparatively geographically mobile, young, and male. In rural areas as well as the port cities, those apprehended for crime were more than frequently strangers — indigent and transient. To hold them for trial meant maintaining them at public expense. Every case in which the defendant could not make recognizance to appear — in New York ordinarily £20 with two sureties — was ipso facto a matter of expensive justice. Maintenance of the jails was one of the permanent fiscal burdens on the colonial communities — one which both taxpayers and public officers were particularly loathe to discharge. The records are replete with demonstrations of the gross inadequacy of colonial jails. In New York's Ulster County, for example, the sheriff appears to have complained of the insufficiency of the jail at virtually every Sessions.[75] Even the minutes of the New York Supreme Court reflect the constant complaint of those officers responsible for the safekeeping of defendants.[76] Sheriffs were anxious lest the inadequacy of the jails lead to

75. *See* MINUTES OF THE ULSTER COUNTY SESSIONS, 1738-1750 (on file with the Ulster County Clerk, Kingston, N.Y.)†.

76. *See* MINUTES OF THE SUPREME COURT OF JUDICATURE, 1693-1701, *reprinted in* COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY FOR THE YEAR 1912, at 127 (1913) (noting that, on October 9, 1697, one counsel "move[d] in the name of the Sheriff that the Judges do move to the City, the insufficiency of the City hall & prison"). For similar complaints in other counties, see GOEBEL & NAUGHTON, *supra* note 12, at 337 n.36.

escapes, for which they would be liable.[77] Nor were sheriffs the only source of agitation regarding jail conditions; one scholar located almost 240 complaints from the court records and common council minutes throughout the period.[78] The legislature took occasional action,[79] and there were even attempts to use the machinery of the criminal law itself against public officers who negligently permitted the decay of the jails,[80] but then, as now, jail construction was politically popular only so long as no one had to be taxed to pay for it, and the general public parsimony so characteristic of colonial America ensured that the complaints would never die down. Summary criminal jurisdiction, which affected lower-class defendants rather than taxpayers, was an altogether more acceptable solution.

In light of these pressures, it is not surprising to see eighteenth-century legislative interventions designed to expand the scope of summary jurisdiction. Beginning in 1732, for example, New York repeat-

77. Concerned about a pair of counterfeiters whose arrest in Dutchess County had been reported as imminent, Attorney General John Tabor Kempe wrote to Clear Everitt, the county sheriff, in 1761:

> I know not in what Condition your Goal is in, but trust that you will keep them secure that they may make not their Escape from Justice. The Reason of my mentioning this to you, is because several Criminals have broke Goal & made their Escape lately from some of the Counties . . . and I should be very sorry should you be liable to be punished . . . for the Escape of a Felon.

Letter from John Tabor Kempe to Clear Everitt (May 1, 1761) (on file with the New-York Historical Society).

78. *See* GREENBERG, *supra* note 10, at 168 & n.21.

79. See, for example, the Act of Oct. 17, 1730, ch. 550, 2 COLONIAL LAWS OF NEW YORK 645, 646 (1894), a bill for public works in the city that declared that "WHEREAS . . . the Common Gaols . . . are now very much out of Repair, and it appearing there is an Absolute Necessity not only to repair but also to Enlarge the said Prisons and Gaols," money would be appropriated for new construction. Consider also the Act of June 24, 1719, ch. 373, 1 COLONIAL LAWS OF NEW YORK, *supra*, at 1025, empowering JPs to impose local assessments for the construction and maintenance of jails.

80. In an apparent attempt to force implementation of the Assembly's 1719 statute giving JPs the power to impose taxes for spending on the jails, Attorney General Richard Bradley brought informations against Justices in Albany and Queens County in 1723 for failure to levy taxes for the improvement of the jails. *See* MINUTES OF THE SUPREME COURT OF JUDICATURE, Mar. 17, 1723/24 (on file with the New York Hall of Records)†; Parchment 102 G 8 (Sept. 23, 1723) (on file with the New York Hall of Records) (information against Queens JPs)†. Although the Attorney General prudently sought a change of venue to Westchester County and a trial at bar — thus ensuring that trial would occur in the city, under the watchful eyes of the entire court, but with jurymen drawn from Westchester — the defendants in the Queens prosecution were acquitted. *See* MINUTES OF THE SUPREME COURT OF JUDICATURE, Oct. 9, 1723 (on file with the New York Hall of Records)†. The case was finally set down for trial on circuit in 1729 after six-years delay, the defendants were acquitted, and the Attorney General astonishingly sought and was granted leave to file new informations. *See* MINUTES OF THE SUPREME COURT OF JUDICATURE, Dec. 2, 1729 (on file with the New York Hall of Records)†. The case appears again in the minutes, still untried, in August 1734, but no trial appears ever to have taken place. Thus, after at least 15 years, was ended the quixotic experiment with prosecuting the local judges for failing to raise local taxes to support the jails. The incident not only sheds light on the difficulty provincial managers experienced in securing adequate jails — a difficulty severe enough to goad them to such unlikely measures — it also demonstrates graphically the tension between central authority and the JPs.

edly expanded the reach of summary jurisdiction. Two statutes were passed in that year, providing that anyone charged with offenses below the degree of grand larceny who was unable to make recognizance or bail within forty-eight hours might be tried by three JPs, sitting without a jury, and sentenced to corporal punishment "not extending to Life or Limb." The 1732 Acts also defined the evidentiary standard for such convictions, allowing conviction "by Confession or by the oath of one or more credible witnesses."[81] Both the technique and wording of the statutes made clear the element of class justice involved:

> WHEREAS not only Several disorderly Persons inhabiting in the City of New York but many vagrant and Idle persons passing through the same from the Neighboring Counties and Colonies have often Committed divers misdemeanours breaches of the Peace and other Criminal offences . . . who not being able to procure bail to appear at ye General Quarter Sessions . . . and having no Substance of their own have been at great Expence to the Inhabitants thereof in maintaining them in the mean while in Goal, [they could be whipped on their own confession or the oath of a single prosecution witness and let go].[82]

The socioeconomic advantages of limiting trial to those with "[s]ubstance" and standing in the community were easy to grasp; the 1732 Act was revived and extended in 1736 and 1744.[83] In 1762 summary procedure was made available for use against those obtaining goods by false pretenses in New York City.[84] In 1768, for reasons examined below,[85] the Assembly determined that those charged with larceny of goods to the value of £5 might, unless clergy was unavailable, be treated as though they had committed petit larceny.

Precisely as a result of the nature of these proceedings, our records of the employment of summary criminal justice in colonial America are extremely sparse. In New York, we have only the records in New York City between 1733 and 1743, involving about seventy-five

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81. Act of October 14, 1732, ch. 578, 2 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 745, 746; Act of October 14, 1732, ch. 590, 2 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 766, 767. The latter Act covered New York City — where summary jurisdiction was vested in the Mayor, Deputy Mayor, Recorder, Aldermen, or any three of them — and the former conveyed the same jurisdiction to the JPs of the countryside and Albany.

82. Act of October 14, 1732, ch. 590, 2 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 766.

83. Act of November 10, 1736, ch. 635, 2 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 920, 933; Act of November 10, 1736, ch. 643, 2 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 933. The 1736 extension allowed imposition of a fine as well as corporal punishment; the 1744 Act raised the allowable fine to £5 and provided that nonresidents of the colony were to be banished upon conviction. Act of September 1, 1744, ch. 766, 3 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 377.

84. Act of December 11, 1762, ch. 1196, 4 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 669.

85. *See infra* text accompanying note 93.

cases.[86] With one insignificant exception, we have no records whatsoever of the course of summary justice in the New York countryside. Suspicion that the sequence of "examination followed by confession followed by whipping" might sometimes have merged with the sequence of "examination followed by whipping followed by confession" is inevitable, but we simply have no way to know.

The socially discriminatory use of summary justice guaranteed its political acceptability. The political classes were indifferent, or positive, about its use because it was not aimed at them. The first New Yorker to complain that summary procedures violated a common law right was the provincial Attorney General himself, though his objection did not benefit all classes. In 1769, complaint was made by a substantial Suffolk County landowner that three JPs had whipped one of his servants after summary proceedings. John Tabor Kempe wrote in strong terms to the Justices, reminding them that the statute was intended only for vagrants and persons unable to make bail, and that extending its reach to other defendants would "be destructive of that Grand Bulwark of our Freedom and Safety, the Tryal-by-Jury."[87] He plainly threatened that, if the Justices did not observe the distinction between vagrants and the servants of the rich, he would take action against them.

In addition to transient or indigent defendants requiring pretrial confinement, most of the colonial societies contained substantial populations of slaves, for whom all justice and injustice was summary. For offenses against persons other than their masters, summary corporal punishment was the only fitting process, duplicating in the public law the principle of summary corporal punishment that prevailed between the individual master and slave. But the presence of slaves in the population had more far-reaching effects than the addition of another impetus to summary criminal justice. The routine imposition of violent physical coercion that defined the pattern of slave discipline could not be expected to stop at the moment when a slave stood accused of crime. As the most thorough account of slave criminal justice in Virginia sums up the matter: "The nearly absolute power of white officials over slaves could lead to the use of torture in order to 'fix' a case, speed up the questioning process, find further evidence, or force sus-

86. Minutes of the Meeting of the Mayor, Deputy Mayor, and Aldermen of New York City 1733-1743 (bound with Ms. Mins. NYCQS 1722-1742/43 (Rough)) (on file with the New York Hall of Records)†. Representative cases, showing the frequency of confession, or else what the Court called "tacit confession," are summarized in GOEBEL & NAUGHTON, *supra* note 12, at 116 & n.253.

87. Letter from John T. Kempe to Benajah Strong, Selah Strong, and Richard Woodhull (June 9, 1769) (on file with the New-York Historical Society).

pects to reveal the identity of accomplices."[88] When the white communities' fears of servile insurrection were aroused, criminal procedure ordinarily too harsh for use with anyone but a slave might easily spread to the ordinarily more favored classes.[89]

The widespread employment of summary criminal procedure in the colonies reached beyond the defendants directly chargeable under the summary statutes. Misdemeanor defendants at Quarter Sessions in New York, who could not afford to retain counsel under all but the most exceptional circumstances, found themselves at preliminary examination facing what could easily be converted into a summary trial. At the end of such a process, they would be awarded the same whipping likely to result from the formal proceedings to which they were nominally entitled, less the time spent languishing in jail or the expense of recognizance. We should not be surprised, therefore, to find, as Julius Goebel does, that in the City Quarter Sessions from 1691-1776, 248 defendants confessed, 94 pled not guilty and went to trial, and 17 were convicted for want of a plea, for a gross rate of sixty-nine percent confession at preliminary examination.[90]

Material pressures on the traditional criminal procedure system intensified in the 1760s, as colonial America suffered from recurrent large-scale disturbances of public order. Prosecutorial and adjudicative resources were diverted to the trial of riot and related offenses. The beginnings of the Regulation movements in the southern hinterland, like the squatter disruptions on the Vermont frontier and the agrarian violence in the Hudson River Valley, challenged the capacities of the public order systems in several colonies. Douglas Greenberg, in his quantitative study of criminal justice in colonial New York, concludes that between 1750 and 1776 "riots and the like were the single most frequent source of prosecution in the countryside."[91]

Under these and associated pressures, the criminal justice systems began a process of radical adjustment. In New York, less

88. SCHWARZ, *supra* note 10, at 53-54.

89. "In insurrection episodes . . . torture could yield the 'confession' that anxious or angry whites wanted," *id.* at 54, and not necessarily from slaves. In the midst of the 1741 slave conspiracy panic in New York, Chief Justice Daniel Horsmanden used the threat of immediate execution to force testimony incriminating a white man from the white daughter of another convicted conspirator. For the treatment of Sarah Hughson, see THOMAS J. DAVIS, A RUMOR OF REVOLT: THE "GREAT NEGRO PLOT" IN COLONIAL NEW YORK 174 (1985); HORSMANDEN, *supra* note 54, at 289-90.

90. GOEBEL & NAUGHTON, *supra* note 12, at 597. Similar patterns seem to have prevailed in the countryside. *Id.* at 597 n.195. For comparison, Goebel and Naughton report that, in the same period in the Supreme Court, where we see the trial of more serious offenses, the figures are 91 confessions (15 explicitly to secure benefit of clergy), 429 pleas of not guilty, and 54 judgments for want of a plea. *Id.*

91. GREENBERG, *supra* note 10, at 140.

prosecutorial attention was devoted to such traditional concerns as theft offenses in the countryside. Imposition of punishment other than fines for misdemeanor offenses largely vanished; in a connected process, Supreme Court trial rates dropped and plea rates soared.[92]

Expansion of summary jurisdiction was one of the few tools available to the legislature in this environment. The New York Act of 1768,[93] making what had been felonious larceny throughout the history of the common law punishable in summary proceedings, is but the clearest example of the effects of the pressure. Moreover, Imperial disruptions of American public finance, such as the Currency Act of 1764,[94] and interferences with administration of justice, including the closure of the courts of most colonies during the Stamp Act crisis, made the traditional parsimony of colonial taxpayers with respect to the legal system more intense.[95] Far from moving in the direction of more expensive criminal procedure increasingly protective of the defendants' interests, the societies of British North America in the late colonial period were heading in quite the opposite direction.

This is the great apparent paradox in the revised history of the privilege against self-incrimination. How could Americans — who on the evidence of their colonial records employed the early modern "accused speaks" form of criminal procedure throughout the period of Imperial affiliation, and who intensified this pattern for socioeconomic reasons in the closing decades of the colonial era — have adopted constitutions that proclaimed the accused's right to avoid self-incrimination in the criminal process?

IV. Rights, Criminal Procedure, and the American Constitutional Revolution

The explosion of constitutional polemic in British North America after 1760 put in play intellectual forces that led American criminal procedure doctrine in a direction very different from the one taken in the late colonial period. The Americans wound up standing behind broad legal and constitutional positions with which their own historic practices were seemingly in conflict. Fortunately for them, as for most other social groups in a similar situation, the Americans did not feel

92. For more extended consideration of the unraveling of the criminal justice system in prerevolutionary New York, see Moglen, *supra* note 12, at 200-08.

93. Act of Jan. 13, 1768, ch. 1336, 4 Colonial Laws of New York, *supra* note 79, at 969.

94. Currency Act of 1764, 4 Geo. 3, ch. 34 (Eng.).

95. For a review of the effects of Imperial trade and taxation policy on one colonial legal system in the 1760s, see Moglen, *supra* note 12, at 148-69.

themselves immediately compelled to put their principles into practice.

The great constitutional conflict that ended in the dissolution of the first British Empire involved several different clusters of constitutional ideas — about rights, legislative authority, and representation. So far as these clusters of ideas concerned rights, they involved not lists of independent "human rights," following the model of twentieth-century constitutional jurisprudence, but rather closely interwoven meshes of privileges that the Americans believed intrinsic to the common law tradition, unmodifiable by an increasingly sovereign British Parliament.

American constitutional polemic thus focused on historical practices and institutions in the English common law tradition that protected subjects — individually and collectively — against legal innovation destructive of their interests. First among these was the jury, which Americans perceived as having a vital constitutional function in tempering the effect of innovative or foreign legislative decisions. This the jury did by limiting enforcement to the extent palatable to the community itself. So Americans exalted the jury and all the common law rules and maxims ancillary to its function. In so doing, Americans discovered a tenderness concerning the process that extracted confessions. If directed against witnesses, such process short-circuited the accusatory role of the community; if directed against defendants, it deprived them of meaningful jury trials altogether. To follow the American thought process in detail, we must recreate the theoretical context of eighteenth-century constitutional law, which requires us to view in a new light much that we have regarded as familiar.[96]

A. *Constitutional Theory and the Jury*

We must begin by recognizing the full importance of the Americans' claim to their rights as Englishmen.[97] British North Americans

96. In the section that follows, I am deeply indebted to John Phillip Reid, whose ongoing *Constitutional History of the American Revolution* series — including most importantly its first volume, *The Authority of Rights* — has brilliantly evoked the eighteenth-century legal context in which British and American controversy over rights occurred during the era of the Revolution. *See generally* JOHN P. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988) [hereinafter REID, CONCEPT]; JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986) [hereinafter REID, AUTHORITY OF RIGHTS]. Reid's work is by no means unprecedented, but it is invaluable in its sustained attention to the vast literature of constitutional polemic in the 15 years preceding Independence. For an estimation of Reid's significance in historiographic context, see Eben Moglen, Book Review, 9 LAW & HIST. REV. 389 (1991).

97. *See* REID, AUTHORITY OF RIGHTS, *supra* note 96, at 9-15.

in the eighteenth century claimed to be entitled to all the rights of English subjects on numerous grounds, including charter, statute, and purchase by the hardship of trans-Atlantic migration — but it was precisely for English rights that they contended. The Constitution of the British Empire, they argued, guaranteed them equality of treatment with the King's English subjects, who enjoyed a constitution more protective of rights than any (as they saw it) in the world.

The protection of the Englishman's rights began with protection of the most important rights of all — the rights to security and property. These rights were the ends of government, and their protection separated the free government of Britain from the despots of the rest of the known world.[98] The British Constitution protected security and property because it provided liberty — that is, government under law.[99] The law, by which British North Americans meant English common law, confined all authority, especially the sovereign. If Parliament claimed the power to make absolute law, then parliamentary sovereignty was destructive of liberty. In this respect, which is hard to grasp beneath the conflicting uses we have made of the same constitutional vocabulary in the past two hundred years, British North Americans claimed a constitutional right to the common law.[100]

As British North Americans brought this constitutional theory to the climactic confrontations with Parliament and the Crown, American liberty seemed increasingly threatened by the same forces that earlier generations of Englishmen had resisted. Because liberty was government under law, attention was again directed at those basic institutions of law that protected liberty. One institution stood out from all the rest: the jury trial. But, when Americans spoke of the fundamental law role of the jury, they referred to an entire cluster of rights, including claims to traditional common law privileges of indictment, venue, representation, confrontation, and a general verdict.[101] As John Reid says:

> The right to trial by jury, unlike the rights of property, security, and eighteenth-century government, is a right we think we know. We do,

98. *See id.* at 27-46.

99. This complex of ideas, and its role in the literature of the Revolution, has been further explored in REID, CONCEPT, *supra* note 96.

100. *See* REID, AUTHORITY OF RIGHTS, *supra* note 96, at 23.

101. Readers should note the technical meaning of the phrase *fundamental law* in eighteenth-century British constitutional thought. To an educated Englishman of the age, an "unconstitutional" act (for example, the maintenance of a large army in peacetime) was not therefore an illegal one. Only certain elements of the constitution had the additional status of "fundamental law," which the King-in-Parliament might not alter. Magna Charta, the Petition of Right, and the Protestant Succession would have been primary examples of fundamental law. These, unlike other constitutional rules, were inalienable. *See id.* at 3, 76-77.

> but only in an attenuated form. We no longer know the right as it existed in the age of the American Revolution. Certainly we cannot recapture the extreme euphoria of British and colonist alike when they thought of jury trial.[102]

The problem in understanding what the jury trial meant to British North Americans is that we are distracted by the analytic overlay of subsequent constitutional development, which broke down the clusters of rights under law into individual components, of which the jury right was merely one. To see the contents of the rights cluster centered around the institution of the jury, we can do no better than heed the words of the Continental Congress. After the passage of the Quebec Act,[103] which provided for the continuation of civil law in one portion of the King's North American dominions, the Congress addressed the Quebecois, hoping to impress upon them the degree of discrimination implied in the denial of jury trial. The right of trial by jury, the Congress said:

> provides, that neither Life, Liberty, nor Property, can be taken from the Possessor, until twelve of his unexceptionable Countrymen and Peers, of his Vicinage, who from that neighbourhood, may reasonably be supposed to be acquainted with his Character, and the Characters of the Witnesses, upon a fair Trial, and full inquiry Face to Face, in open Court, before as many of the People, as choose to attend, shall pass their Sentence upon Oath against him; a Sentence that cannot injure him, without injuring their own Reputation, and probably their interest also . . . .[104]

Congress, expressing the official colonial position, was telling the Quebecois something we must grasp ourselves — that polemics about the right of jury trial included within their scope questions that we have tended to sever into multiple constitutional pigeonholes. Just as the institution of the jury protected other, even more fundamental rights, it was in turn protected by a series of legal rules concerning when, where, and how juries were convened, what evidence they heard, and what they did about it. Americans considered it beyond the constitutional authority of Parliament to alter these rules. As an English pamphleteer, writing *On the Perversion of Law from its Constitutional Course*, put it in 1771, the right to a jury uncontrolled by the judge "is so essential a part of our constitution, that the liberty of the subject is violated, whenever the least attempt is made to break through this sacred rule, which will admit of no exception."[105] This

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102. *Id.* at 47.

103. Quebec Act of 1774, 14 Geo. 3, ch. 83 (Eng.).

104. Address to Quebec (Oct. 26, 1774), *in* JOURNAL OF THE FIRST CONGRESS 60†.

105. REID, AUTHORITY OF RIGHTS, *supra* note 96, at 49 (quoting 9 THE POLITICAL REGISTER; AND IMPARTIAL REVIEW OF NEW BOOKS 189 (London 1771)).

was certainly an exaggerated picture of the freedom of the English jury, but the distortion emphasizes the importance attached to the principle.

As the constitutional crisis of the 1760s and 1770s deepened, the cluster of rights surrounding the central institution of the jury became more important for two reasons. First, and most directly, Imperial measures to counteract increasingly violent colonial political dissent — ranging from the use of Vice Admiralty to try revenue offenses, to the shotgun form of general writs of assistance, to Parliamentary threats to apply the Treason Act of Henry VIII, to the closure of the Massachusetts courts — employed legal processes the Americans considered tyrannical and unconstitutional innovations.[106] Second, and more important, Americans attached a unique constitutional importance to jury trial: it provided a check against overweening power, and particularly a local check on the authority of Parliament, which was without political accountability to the objects of its colonial legislation. The local jury, hearing the evidence for itself, provided an alternate source of authority to the judges, who might be appointed by the Crown from among a cadre of imperial officials unsympathetic or hostile to American liberties. Interference with jury trial, the voters of Boston said during the Stamp Act crisis, when Imperial legislation enforcing internal revenue measures in Vice-Admiralty was first imposed, "deprives us of the most essential Rights of Britons, and greatly weakens the best Security of our Lives, Liberties and Estates; which may hereafter be at the Disposal of Judges who may be Strangers to us, and perhaps malicious, mercenary, corrupt and oppressive."[107] Thus, a group of grievances and anxieties concerning the "unconstitutional" and oppressive use of the criminal procedure system became a part of the constitutional history of the American Revolution, and the colonial remedies for the grievances and preventives for the anxieties embedded themselves in the state and federal constitutions. Among them were various restatements of the traditional *nemo tenetur* maxim, which was specifically related, by history and logic, to colonial concerns.

B. *Constitutional Theory and the Privilege*

Among the colonial grievances to which the idea cluster symbolized by the right to jury trial — let us call this the *trial-rights cluster* —

106. *See* LAWRENCE H. GIPSON, THE COMING OF THE REVOLUTION, 1763-1775, at 28-39, 223-25 (1962).

107. *To the Honorable James Otis, Esq.; Thomas Cushing, Esq.; and Mr. Thomas Grey,* MASS. GAZETTE & BOSTON NEWS-LETTER, Sept. 19, 1765, at 2.

responded was the perceived expansion of prerogative courts.[108] The problem was that Vice Admiralty, acting without juries, no longer protected natural or positive rights, as Englishmen had a right to expect. As the voters of Providence put it during the Stamp Act resistance, "we look upon our natural Rights to be diminished in the same Proportion, as the Powers of that Court are extended."[109] In this fashion, the Americans, objecting to an employment of prerogative courts in North America with Parliament's sanction, began to adopt rhetoric concerning the unconstitutionality of prerogative justice, first employed against the King in the period of personal rule by Charles I. While the Court of High Commission had been the primary target in the earlier era, Admiralty became the focus of hostility in America, primarily because of its alleged employment of the ex officio oath for coercive purposes.

Admiralty had not always inspired such detestation in British North America. Admiralty provided one of the few fora for the effective adjudication of certain kinds of intercolonial trade disputes, and, during the long period of Imperial confrontation in Atlantic waters, the prize jurisdiction of the Admiralty courts had helped to make many a privateer, and more than a few lawyers and judges, rich. But, in the aftermath of unqualified British victory over France in North America, Admiralty justice lost many of its attractive uses, and the American hostility to prerogative justice grew apace.[110] The ex officio oath and the abuses of Star Chamber procedure again became staples of the pamphlet literature. A Boston pamphleteer drew an explicit connection between Vice Admiralty jurisdiction and the use of coercive self-incriminatory oaths in imagining satirically what would befall Samuel Adams should the customs commissioners sue him in Admiralty.[111] Once he was sworn, he should expect: "Pray Sir, when did you kiss your maid Mary? — Where? and in what manner? . . . Did you lay with her in a barn? or in your own house?"[112] An English electoral polemic of 1769 made the same point more in anger than in satire, arguing that the use of Admiralty to try revenue offenses com-

108. After taxation without representation, Boston instructed its representatives in 1769 that "the Jurisdiction of the Admiralty, are our greatest Grievance." Instructions of May 8, 1769, *reprinted in* 16 RECORD COMMISSIONERS OF THE CITY OF BOSTON, A REPORT CONTAINING THE BOSTON TOWN RECORDS, 1758-1769, at 287 (1986).

109. *Copy of the Instructions Given by the Town of Providence on 13th of August, 1765, to their Deputies in General Assembly,* BOSTON EVENING-POST, Aug. 19, 1765, at 2.

110. For an extended consideration of the role played by Admiralty in the commercial system and economic health of New York City before 1763, and the alteration of the 1760s, see Moglen, *supra* note 12, at 127-69.

111. *John English,* BOSTON EVENING-POST, Jan. 2, 1769, at 2.

112. *Id.*

mitted on land "is a great and dangerous breach of the constitution. Attempts have been made in times past to introduce the civil law; the rack which now lies in the tower was brought in for a beginning of it, but these attempts were repelled by our ancestors."[113] As the Admiralty grievance rose in intensity after 1765, the idea of a fundamental law privilege against coercive testimonial pressure further embedded itself in the language of constitutional debate.

Concern about the "unconstitutional" imposition of prerogative justice in America reached the boiling point after the Parliamentary output of 1774. The Quebec Act's provision for nonjury trial in a portion of British North America,[114] along with the Massachusetts Administration of Justice Act,[115] suggested that Parliament might institute any system of criminal justice it pleased in the American dominions, regardless of the traditional usages of the common law. Thus was heard again in North America the Englishman's most comprehensive denunciation of oppressive government: "They will make Frenchmen of us all."[116]

Less often noted in the secondary literature, but of incalculable effect on Americans, particularly lawyers, during the revolutionary era, was a step Parliament merely threatened: the adoption of an address to the Crown recommending the application of the Treason Act of Henry VIII in North America.[117] The threat to revive Tudor approaches to political justice left an indelible mark on the men whom it threatened with transportation to England for a trial in the venue of the Crown's choice, in which proof of "constructive treason" under the statute of Edward III would end in speedy execution.[118]

In addition, less obviously, the Act's application would have deprived its American objects of the protections of the Treason Act of 1696,[119] a monument of Whig constitutionalism in the aftermath of the political abuse of criminal justice by Charles II and James II. The

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113. William Bollan, *The Free Briton's Memorial, to all the Freeholders, Citizens and Burgesses, who Elect the Members of the British Parliament, Presented in Order to the Effectual Defence of their Injured Right of Election* 21 (London, 1769)†; *see also* Letter from the Continental Congress to the British People (Sept. 5, 1774), *in* 43 LONDON MAG. 630 (1774).

114. 14 Geo. 3, ch. 83, § 17 (1774) (Eng.).

115. 14 Geo. 3, ch. 39 (1774) (Eng.).

116. Letter from Isaac Watts to James Napier (Dec. 14, 1764), *in* NEW-YORK HISTORICAL SOCIETY COLLECTIONS 1928, at 318†. For a description of the context of Watts's particular outburst, see Moglen, *supra* note 12, at 162.

117. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 175-76 (1974).

118. *See* 25 Edw. 3, stat. 5, ch. 2 (1352).

119. An Act for Regulating of Trials in Cases of Treason and Misprison of Treason, 1696, 7 Will. 3, ch. 3 (Eng.).

1696 Act was the source of much reformist criminal procedure in the eighteenth century, including the right of defendants to counsel and a copy of the charges, and judges extended the protections, which it originally accorded only to the political classes, to other defendants charged with felony offenses under the common law. By threatening to deprive Americans of its benefits, Parliament, in American eyes, proposed to do to the American political classes what they themselves did to the vagrants, strangers, and slaves in their own communities.

C. *The Privilege and the State Constitutions*

From these and other related causes grew the American inclination to treat elements of common law criminal procedure as fundamental law, protecting against legislative innovation or tyrannical suppression. To all American Whigs, the trial-rights cluster was a prominent object of concern; every state constitution, whether or not it contained a bill of rights, protected the entitlement to jury trial. But it is of cardinal importance that, throughout the constitutional debate, the trial-rights cluster denoted principles that the Americans believed Parliament had trampled or would trample in the future if left unchecked. Americans sought to protect their practices against tyrannical innovations, claiming that what they did themselves fully conformed to what they believed the ancient constitution to require. It is in this context that we must read section 8 of the Virginia Declaration of Rights, in which George Mason provided the model for constitutional expression of the trial-rights cluster, adopted with few alterations in all the state bills of rights of the 1770s and 1780s:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.[120]

Mason's compressed drafting reflects the fact that these procedural guarantees, including the privilege against self-incrimination, were part of a cluster of legal rules, conceived not primarily as independent, free-standing rights, but rather as part of the constitutional system for protecting *all rights* by ensuring that government activity met the fundamental check of juries subject to law. Mason's language encapsulated the constitutional history of the trial-rights cluster, from Magna

120. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3813 (Scholarly Press, Inc. 1977) (1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

Charta to the Treason Act of 1696. Significantly, it did not include a right to be represented by counsel before the law of the land and the judgment of one's peers. This development was too recent to be an element of timeless right.

The Virginia Declaration passed on June 12, 1776 and had been published in Philadelphia newspapers even before the Continental Congress voted for independence at the beginning of July. It traveled with the delegates into the rest of the states and became a model for constitutions soon being drafted all along the Atlantic coast. By late September, the Pennsylvania convention had drafted a constitution prefaced by a Declaration of Rights, itself published by the end of August and closely modeled on Mason's. Section 9 repeated Mason's section 8, but with one critical addition: "That in all prosecutions for criminal offenses, a man hath a right to be heard by himself and his council."[121] Benjamin Franklin had tightened Mason's prose, but the addition of a right to counsel was neither inadvertent nor farsighted; Pennsylvania had recognized the right to counsel since 1701, as a consequence of William Penn's contemptuous familiarity with the failings of English criminal procedure.[122] For Pennsylvanians, counsel was as much a part of the trial-rights cluster as the other procedural protections familiar to George Mason. But Pennsylvanians did not think they had one more right than Virginians — both groups thought they enjoyed all the rights of Englishmen and no more.

The swift process of constitution drafting produced a few inflections of the style in which the *nemo tenetur* principle was made fundamental law. Less than a month after Pennsylvania's Declaration was adopted, and even before the Pennsylvania Constitution was finished, Delaware had adopted a Bill of Rights using the Pennsylvania text as a model.[123] The Delaware convention's committee broke the independent clauses of Pennsylvania's section 9 into separate articles, so that section 15, read in its entirety, stated: "That no man in the courts of common law ought to be compelled to give evidence against himself."[124] To Leonard Levy, this "subtle but crucial change" corrected the "bad draftsmanship" of George Mason by "extend[ing] the right

121. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 3083.

122. Penn, in § 5 of the Charter of Privileges provided: "That all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." *Id.* at 3079. William Penn and his early brethren in Truth gave the "accused speaks" trial a meaning unique in English legal history. *See* HORLE, *supra* note 64, at 116.

123. Max Farrand elegantly shows in parallel columns the textual descent of the Delaware Bill from the Pennsylvania Declaration and the subsequent modeling of the Maryland document on the Delaware version in his original publication of the unprinted Delaware Bill. Max Farrand, *The Delaware Bill of Rights of 1776,* 3 AM. HIST. REV. 641 (1897).

124. *Id.* at 646.

against self-incrimination to witnesses, as well as parties, in civil as well as criminal cases."[125] Perhaps Levy is correct, although one might as well argue that it reduced the scope of the privilege from all criminal prosecutions to those at common law, specifically denying the right to defendants in summary proceedings. We can only speculate on the motives of the draftsmen, for the Delaware convention adopted the committee draft without recorded debate.[126] Some confirmation for the latter view may be provided by the action of the Maryland convention, which modified the Delaware provision in turn, declaring: "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 practised in this State, or may hereafter be directed by the Legislature."[127] In this provision the concern to except summary proceedings was made explicit.

Not all the states adopted a constitutional formulation inspired by Mason's Virginia Declaration. South Carolina, Georgia, New Jersey, and New York all included clauses proclaiming the fundamental right to jury trial; none specifically adopted language invoking the *nemo tenetur* concept.[128] It may indeed be "baffling" or "inexplicable" how particular phrases entered into, or were left out of, the American constitutions, ultimately to be explained by the "bad draftsmanship" of George Mason or the "careless" and "thoughtless" behavior of Thomas Jefferson, who would have replaced Mason's words on compelled self-incrimination by a ban on the use of judicial torture.[129] But, once the anachronistic vision of a catalog of independent rights is put aside, to be replaced by the American Whig vision of a syncretic cluster of fundamental law principles embedded in common law practice, the historian need no longer adopt such weak explanations. Section 8 of the Virginia Declaration was a concise epitome of the history of criminal procedure in the British Constitution, from Magna Charta through the Treason Act of 1696 and its eighteenth-century corollaries, such as the right to counsel in felony and treason. Among the elements of that fundamental law history was a belief in *nemo tenetur prodere seipsum,* for if a future legislature or tyrannical executive

125. LEVY, *supra* note 4, at 407, 409-10.

126. *See* PROCEEDINGS OF THE ASSEMBLY OF THE LOWER COUNTIES ON DELAWARE 1770-1776, OF THE CONSTITUTIONAL CONVENTION OF 1776, AND OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1776-1781, at 212 (Claudia L. Bushman et al. eds., 1986).

127. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 1688.

128. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 785 (Georgia constitution); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 2598 (New Jersey constitution); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 2637 (New York constitution); 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 3264 (South Carolina constitution).

129. LEVY, *supra* note 4, at 406-08.

could impose ex officio oaths or judicial torture, then the constitutional function of jury trial — to provide the local community with a check on governmental power — could not be preserved.

But it cannot be sufficiently stressed that the constitutional provisions were primarily devices to protect existing constitutional arrangements as Americans saw them, rather than a program of law reform. This we can see explicitly in the Maryland legislature's decision to qualify the provision that no man in any court should be compelled to give evidence against himself by providing for exceptions "in such cases as have been usually practised in this State, or may hereafter be directed by the Legislature."[130] New Yorkers, who had not adopted a state bill of rights, had no difficulty perceiving that they needed protection against a federal government that might adopt innovative and fundamental departures from the common law trial practice; hence the suggestion of the New York ratifying convention in 1788 that a federal bill of rights include the provision that "in all criminal prosecutions, the accused . . . should not be compelled to give evidence against himself."[131] Compulsory self-incrimination was what happened in Star Chamber or in France, not what occurred every time the JPs entered a summary conviction under the larceny of goods by False Pretenses Act of 1762, for instance, which the revolutionary legislature saw no difficulty in extending in operation through 1780.[132]

D. *The Fifth Amendment*

The delegates to the Federal Convention of 1787 did not adopt a declaration of rights to accompany their new plan for federal government of the United States. But, as the ratification process took shape in the state conventions, popular pressure for a bill of rights in the now conventional form began to be heard, while the halfhearted Federalist claim that no bill was necessary because the proposed constitution delegated no power to infringe individual liberty died of its own weight and inconsistency with the document itself. Ultimately more than half the ratifying states recommended amendments, and four recommended entire bills of rights. These four — Virginia, New York,

130. *Id.* at 410. It would be particularly interesting, in light of this provision, to have a detailed study of the uses of summary procedure in Maryland before 1776. Levy's suggestion that this exception concerned only cases of pardon or grant of immunity, *id.*, is unsupported by any evidence. Unfortunately, we have no significant studies of criminal procedure at any level in colonial Maryland.

131. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (Jonathan Elliott ed., 2d ed. 1861) [hereinafter STATE CONVENTIONS DEBATES].

132. *See* Act of Dec. 30, 1769, ch. 1408, 5 COLONIAL LAWS OF NEW YORK, *supra* note 79, at 10.

North Carolina, and Rhode Island — included versions of section 8 of the Virginia Declaration of Rights, containing language constitutionalizing the privilege.[133] Debate over the meaning or propriety of section 8 is almost entirely absent from the records of the state conventions. Twice, however — once in Massachusetts and once in New York — anti-Federalist delegates supported inclusion of a bill of rights by pointing to the potentially oppressive use of the criminal justice system by the new federal government. In Massachusetts, Abraham Holmes warned his colleagues that the guarantee of jury trial in Article III might be rendered empty because the mode of trial was not determined.[134] Counsel or confrontation of witnesses might be denied; indeed, Congress might institute "the Inquisition."[135] In a similar vein, Thomas Tredwell of New York urged that Congress might establish criminal proceedings at odds with the common law, preferring the "civil, the Jewish, or Turkish law."[136] The Star Chamber and the Inquisition also figured in his dark imaginings. While both speeches are primarily examples of Richard Hofstadter's "Paranoid Style" (Protestant variant), whose rhetorical effect on auditors was doubtless minimal, they remind us once again of the intrinsically conservative context in which the privilege was discussed in the era of constitutionmaking. Common law procedure, however dependent in practice on self-incrimination, was not the object of reforming zeal. The goal of even the most enthusiastic advocate was to prevent sovereign authority from overturning the traditional forms of jury trial, instituting "foreign" or "innovative" means of coercion that would bypass the jury. The rack in the Tower, not the JP flogging a vagabond defendant, was emblematic of the need for a guarantee against coerced confession.

James Madison's proposed Bill of Rights, presented to the First Congress in June 1789, diverged substantially from any of the proposals submitted by the state conventions. Madison proposed an article containing a series of guarantees surrounding jury trial as well as a more general article concerning judicial process but not limited to jury proceedings in criminal cases. This provision read:

No person shall be subject, except in cases of impeachment, to more than

133. For the language of section 8, see 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 3813. The crooked and uninformative track of the movement for bills of rights in the state conventions can be followed in the five volumes of STATE CONVENTIONS DEBATES, *supra* note 131. The material relevant to the privilege is accurately summarized in LEVY, *supra* note 4, at 416-21.

134. *See* 2 STATE CONVENTIONS DEBATES, *supra* note 131, at 110-11.

135. *Id.* at 111.

136. *See* 3 *id.* at 400, 447-52.

> one punishment or trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without just compensation.[137]

The placement of this provision was novel, for it was separate from other criminal trial rights and combined with matters of more general import. Unfortunately, the nature of Madison's reasoning process is inaccessible to history; he left no document and made no recorded comment on the principles behind his drafting.

The House Select Committee that first passed on the Bill of Rights made no change in Madison's provision concerning the privilege, and there was no debate in the Committee of the Whole. Saying that it was "a general declaration in some degree contrary to laws passed," John Laurence of New York moved that the language be limited to criminal cases.[138] There seems to have been no opposition to the amendment, and the clause as amended was unanimously adopted.[139] The Senate, while collecting the trial-rights provisions into what became the Sixth Amendment, made no further change in the article containing the privilege against self-incrimination. Unless one cares to spin complex theories from a skein of negative evidence, the legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege.

E. *After the Fifth — The Privilege in Practice*

The constitutionalization of the self-incrimination privilege, completed by the First Congress, was part of the larger process by which a diverse collection of criminal procedure doctrines became fundamental law in the United States. Those rules were components of the common law's structure for protecting subjects' rights under the British constitution. Once conceived as fundamental law, the rules — originally subsidiary or ancillary doctrines of uncertain scope — themselves became rights that individuals could invoke. Jury trial was a right, but it also was a process for protecting other, more basic rights, such as security and property. The jury trial right was protected by

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137. UNITED STATES CONGRESS, DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 434 (Washinton, D.C. 1834) [hereinafter 1 ANNALS OF CONG.]†.

138. 1 ANNALS OF CONG., *supra* note 137, at 753†.

139. 1 ANNALS OF CONG., *supra* note 137, at 753†. The *Annals* do not report a vote on Laurence's motion to amend, but it appears that Madison had no objection to the amendment. LEVY, *supra* note 4, at 425-26, speculates that Laurence's comment about conflict between Madison's phrasing and "laws passed" refers to the proposed section 15 of the Judiciary Act of 1789, then in the process of passage, which provided the federal courts with equity's traditional power to compel production of documents. There is no direct evidence, but this seems to be a sensible, if somewhat narrow, conjecture.

other rules preventing the sovereign from instituting inquisitions that would trump the community's right to find the facts and nullify the law. One of those rules, or rather many somewhat inconsistent rules, could be summarized by the maxim *nemo tenetur prodere seipsum.* That rule, too, became something independent of its context and could be called a right.

But fashioning fundamental law meant constraining the new governments to behave in traditional ways, within the context of common law expectations. The Maryland convention had said explicitly what context and language also indicated elsewhere: the new constitutional provisions were expected to inhibit future tyrannical innovations, not to alter existing institutions or procedures. As Leonard Levy himself has said:

> As for the self-incrimination clause in Section 8, [of the Virginia Declaration] there is no evidence that it was taken literally or regarded as anything but a sonorous declamation of the common-law right of long standing. . . . Thus the great Declaration of Rights did not alter Virginia's system of criminal procedure . . . . The practice of the courts was simply unaffected by the restrictions inadvertently or unknowingly inserted in Section 8.[140]

Levy implied that the eternal right to be free from self-incrimination continued to be observed more fully than the language of the Declaration required. The conclusion is wrong, but the observation on which it is based — that the courts of Virginia and other parts of the new nation did not change their practice in response to the new constitutional provisions — seems to be right. The records of immediate post-revolutionary criminal justice have been, if anything, less studied than those of the late colonial period. If any generalization is licensed by current knowledge, however, it is that comparatively little change occurred in direct response to the new constitutions.

Perhaps the best general evidence of the absence of change in local criminal procedure after the adoption of the new constitutions is provided by the Justices' manuals. The issuance of JP manuals was frequent in the 1780s and 1790s, and, in keeping with the general post-revolutionary mood of independence from English manners, the manuals tended to proclaim themselves renewed and shorn of English disadvantages. The title *Conductor Generalis* was revived by James Parker in a new manual first published in Patterson, New Jersey in 1788, for example. Patterson's *Preface* urged readers to prefer American to English manuals for studying the JP's duties because the English manuals had by this time grown too full of unnecessary matter,

140. LEVY, *supra* note 4, at 409. For the text of section 8, see 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 3813.

inapplicable to American (but not merely Jerseyite) situations.[141] Despite the gallant proclamation of the difference between American and English practice,[142] Parker's *Conductor* was actually nothing more than a pared-down edition of the then-current edition of Richard Burn's *Justice of the Peace and Parish Officer.* Shorn of its "unnecessary matter," Burn's manual could be reduced from four volumes to one, but the section on "Examination," along with the other basic articles of criminal procedure, remained as in Burn's. No citation of any constitutional provision, local or federal, appeared in Parker's *Conductor.*

The tendency to describe American criminal procedure in traditional English terms was not disrupted by the debate over the federal Constitution or the adoption of the Bill of Rights. The next edition of the *Conductor,* printed by Robert Campbell at Philadelphia in 1792, adopted Parker's 1788 text but added a new Preface, describing the changes brought by the Constitution:

> On the adoption of the New Constitution, a considerable part of that power & authority which had hitherto belonged to each of the States respectively, was, for the common good, wisely transferred to the general government. In consequence of which several acts have been passed, which do not affect any one State in particular, but pervade the whole union. Of these the most generally interesting are, the laws for the regulation of the militia, and the excise — and these the Editor has here inserted.[143]

In its hypothesis that the most remarkable changes for local JPs brought about by the adoption of the new Constitution were congressional legislation concerning taxation and military service, the *Conductor* conforms to the pattern of early Republican manuals of instruction, as it does in the complete absence of citations to any state constitutional provision in the text. The rudiments of criminal procedure, in particular, continued to be provided to the new nation's local judges by Dalton, Hale, Hawkins, Nelson, or Burn, in their own right or as copied by American "editors." Practice may have changed more rapidly than the JP manuals, to be sure, but it should be observed that the JPs themselves were even more durable than the manuals, and, given the broad intrinsic discretion of local Justices, continuity of personnel is an important determinant of continuity of practice.

The practice papers of lawyers conducting criminal representation in the first decade of the new regimes likewise show no sweeping alter-

141. JAMES PARKER, CONDUCTOR GENERALIS (Patterson, N.J. 1788)†.

142. Significantly, it treated American practice as one, rather than a multiplicity, in line with the prerevolutionary tendency.

143. JAMES PARKER, CONDUCTOR GENERALIS (Robert Campbell ed., Philadelphia 1792)†.

ation in procedure. In New York, the Constitution of 1777, though it did not include a provision concerning the privilege, did guarantee that all criminal defendants could be heard through counsel "as in civil actions."[144] Notwithstanding this provision, expansion of the criminal defense practice was slow. The leading figures of the post-revolutionary New York Bar, such as Alexander Hamilton and Aaron Burr, infrequently engaged in the criminal process, in comparison with their active and profitable civil practices.[145] When counsel were involved, it was often without fee, presumably as a mixture of public service and advertising.[146] In this context, defense counsel neither sought nor acquired much leverage over the conduct of pretrial examination. But it was the lawyers in postrevolutionary America, like those in England, who began the slow process of refashioning the criminal trial.

In ironic confirmation of the proposition that the new constitutional provisions had little effect on American criminal procedure, lawyers' arguments for limitation of the scope of incriminatory pretrial examination were nonconstitutional. Beginning in the 1790s, one can detect in the sources a nonconstitutional argument against the admission of pretrial statements, which based the privilege on a revealing form of Republican antiquarianism. Perhaps the first expression of this idea in the formal sources appears in the 1795 edition of Hening's *Virginia Justice,* which, after giving the traditional rules concerning the examination of suspected felons, adds:

> [I]t should be observed, that this examination of the offender, being taken in pursuance of the statute of England of 1 & 2 P. & M. c. 13 which is not in force in this country, the trial of a criminal, in this State, must be governed by the rules of the common law, and our own acts of Assembly; neither of which will justify his own examination in order to commit him.[147]

According to one instructional source, then, the Revolution returned the law of criminal procedure to its pre-Marian state because Republi-

144. N.Y. CONST. of 1777, art. XXXIV.

145. On the infrequency of criminal business in Hamilton's practice, see 1 JULIUS GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 687-88 (1964).

146. Alexander Hamilton, according to his cash books, received fees from defendants in only four criminal cases throughout the entire duration of his practice. *Id.* at 692. This may well reflect the idiosyncracies of his practice more than the uniformly prevailing approach; the New York Bar was highly specialized even before the Revolution, and some pre-War New York lawyers of eminence — William Smith, Jr., for example — eschewed criminal practice in general for the same reason Smith declined the provincial Chief Justiceship in 1763: it did not pay well enough. *See* Moglen, *supra* note 12, at 229-30.

147. WILLIAM W. HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 132 (Richmond, Va., T. Nicolson 1795).

can lawyers could now find that the central statute of English early modern procedure had never been in force in America anyway.

The argument that pretrial examinations could not be evidence at trial because the ancient common law, rather than the law as modified by the Marian statutes, determined American criminal procedure seems to have been disseminated widely, at least south and west of Virginia, as a consequence of its presentation in Hening's manual. Hening's passage appears verbatim, for example, in Henry Hitchcock's *Alabama Justice of the Peace* of 1822.[148] The absence of even a supporting citation, as late as the third decade of the nineteenth century, to the relevant state and federal constitutional provisions indirectly confirms that the constitutional language was thought to do no more than express the common law position.

But what was the common law position? This, rather than the effect of the constitutional provisions, seems to have formed the subject of lawyers' ruminations. A revealing example may be found in the trial notebooks of Thomas Rodney, Territorial Judge in the Mississippi Territory, from the Jefferson County Circuit in March 1808.[149] In the trial of one Fulgum, charged with stealing a young slave, the local magistrate who had examined and committed the defendant according to form testified to the incriminating statements then made by the accused. Fulgum's lawyer, identified in Rodney's notes only as F. Turner, objected to the admission of this testimony:

> [W]hile Col. Burnet (Who Examined and Committed the Prisoner) was giving in Evidence Of the Voluntary Confessions the Prisoner had Made before Him — Mr. F. T. Objected, that any Confessions of The Prisoner Should be given in Evidence — That it was not legal and that Such a thing was never heard of before — The Court Informed him That he Must be Mistaken in This position — He replied he was not & defied any one To find a Case in all the books to authorise it — The Court asked him if an Examination Taken [in] writing by the Justice who Committed Prisoner Could Not be admitted in Evidence? He replied Certainly not — The Court replied that he was Certainly Mistaken. He called On the Court if there Was any Such Law To Shew it — Judge Rodney replied To him — That if he Asserted the Law was different from what the Court apprehended To be It was his business To produce the authorities that Supported the position he had Taken — He Then Turned To his books and Every book he Cited Contradicted the position he had avowed and Justified the Opinion of the Court but he said it was

148. HENRY HITCHCOCK, THE ALABAMA JUSTICE OF THE PEACE, CONTAINING ALL THE DUTIES, POWERS AND AUTHORITIES OF THAT OFFICE 98 (Cahawba, Ala., William B. Allen 1822).

149. ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES 366 (William B. Hamilton ed., 1953).

> Statute not Comm. Law — whereupon he acquised — and Col. Burnet proceeded. . . .
>
> The Statutes however on this head are made in affirmance of the Common Law — and the Practice in america has always been conformable thereto and Especially in this Territory.[150]

Turner may have been what Rodney obviously supposed him to be — an ignorant backwoods lawyer. Rodney, brother of a signer of the Declaration of Independence and a Delaware Federalist lawyer, certainly gave the correct traditional argument, as the justification passage in his notes shows. But Turner's argument, even as noted down by the judge he had evidently outraged, bears a more sophisticated interpretation. His comment that the adverse authority concerned statutory, not common, law precisely tracks the argument elsewhere advanced in the formal sources — that the admissibility of defendants' statements in pretrial examination derived only from the Marian statutes and was not law in the United States unless enacted by the legislature.

How widespread this position may have been, or how many defense counsel in the early Republic argued this position before the courts in an attempt to exclude their clients' incriminating statements, we cannot know because the records of trial process in the period are scant. Ultimately, of course, the more genuinely traditionalist argument represented by Rodney prevailed. When the constitutional provisions, state and federal, do begin to appear in the instructional sources during the second decade of the nineteenth century, they do so in confirmation of the traditional doctrine. Augustin Clayton's *Office and Duty of a Justice of the Peace* of 1819 provided for Georgia JPs appendices containing the state and federal constitutions,[151] and in his section on evidence he offered, without citation to other authority, a neat combination of the new language and the old ideas: "No man shall be compelled to give evidence against himself. Hence it is held that if a criminal be sworn to his examination taken before a justice, it shall not be read against him."[152] The concern with the coercive power of the oath was directly embodied in the constitutional language, without the intervening filter of citation to Dalton, Nelson, or Hawkins. But, even as defense counsel in the new Republic acted to temper the effect of old procedural doctrine on their clients by seeking to exclude their incriminating statements, no one seems to have argued that the constitutional provisions themselves effectively altered the

150. *Id.*

151. AUGUSTIN S. CLAYTON, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE (Milledgeville, Ga., S. Grantland 1819).

152. *Id.* at 132.

balance. The presence of counsel, rather than the new constitutional language, was putting pressure on the traditional strategy of prosecution.

CONCLUSION

The early history of the privilege against self-incrimination in American law is rather different than the received wisdom has declared. American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial. Americans, like Englishmen, understood the common law to prohibit torture in the search for evidence, and at least some Americans exceeded the English concern with the coercive power of oaths. On both sides of the Atlantic, witnesses and criminal defendants were sharply distinguished in the legal process — practices thought necessary to entrap the felon in the toils of the law were regarded as inappropriate in the treatment of witnesses.

But the social and economic context of criminal justice in colonial America favored the widespread employment of summary criminal justice even more strongly than English conditions because it was aimed primarily at the economically dependent or socially marginal elements of the society. Summary procedure, largely unconsidered in the traditional account of the privilege, was the purest version of "accused speaks" criminal justice, to which the privilege was irrelevant.

The constitutional polemic of the latter eighteenth century brought Americans to a pitch of rhetorical enthusiasm for jury trial and its legal ancillaries, which for the Americans represented a strong constitutional check on the centralizing tendency of imperial authority. In the process of separating themselves from Imperial rule, the Americans wrote constitutions that restated — as "fundamental law" immune from legislative alteration — elements of the common law tradition upon which they had depended in their constitutional controversy with Great Britain. Among those elements were protections against tyrannical "innovations" in the system of criminal procedure. Rather than a program for the reform of the criminal law, these constitutional provisions, including the expressions of the privilege against self-incrimination, were aimed conservatively, against future deviations from existing practice. As the instructional sources that informed local Justices of the Peace — the real administrators of criminal justice — show, the new constitutional language was largely

irrelevant to the development of criminal procedure in the new Republic.

But the expanding activities of criminal defense counsel brought about changes in the system, paralleling the development in Great Britain. Lawyers began to put pressure on the traditional strategy of the criminal prosecution, seeking to exclude from the trial the incriminating statements made by their clients in the process of investigation or committal. Initially these efforts depended not on constitutional language, but rather on the Republican uncertainty about the relation between new American and old English law. The constitutional provisions, to the extent they were involved at all, represented embodiments of the common law tradition, and it was the nature of this tradition about which, in time-honored fashion, common lawyers argued. The important fact was that they were present to argue at all: counsel, not the constitutions, were remaking criminal procedure.

In this refashioning process, the language of the constitutions, like the *nemo tenetur* tag and the history of John Lilburne, were available pegs on which to hang new arguments. Old parts of the system came to serve new functions — the new procedural environment adapted prior doctrine in the typical Darwinian fashion of the common law. Creative reinterpretation serves in our legal history the same purpose as the random underlying variation in Darwin's natural world, and the selective pressures of the social environment determine which of the reinterpretations survive. As one of our greatest historians of the common law tradition puts it:

> The life of the common law has been in the abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. . . . If the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.[153]

But this process requires the agent of creative reinterpretation — the lawyer. The history of the privilege against self-incrimination in American law, like so much else in our criminal procedure, cannot be told without a recognition of the epochal alteration that began with the large-scale entrance of defense counsel into the process.

153. S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 6 (2d ed. 1981).