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The Privilege Against Self-Incrimination as a Human Right

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The history of many fields of science shows a characteristic pattern. There is a time in which the science goes through a philosophical stage in its development, the emphasis is on theory, on general concepts, and on the questioning of the fundamental assumptions and methods by which knowledge has been accumulated. At the end of such a philosophic stage often stands an agreement on some basic assumptions and methods – though not necessarily on all of them –and a shifting of interest to the application of these methods to the gathering of detailed facts.

The philosophic stages in the development of science define the main lines of interest; in the empirical stages these interests are followed up. Philosophical stages in the development of a particular science are concerned with strategy; they select the targets and the main lines of attack. Empirical stages are concerned with tactics; they attain the targets, or they accumulate experience indicating that the targets cannot be taken in this manner and that the underlying strategy was wrong.

Karl Deutsch[1]

A. Summary

This is an attempt at a synthetic presentation of the logical reciprocity between the rule of law and the privilege against self-incrimination.

For the purposes of this paper the privilege against self-incrimination is defined (1) broadly as a bar to any forcible violation of the defendant's concentric spheres of privacy (mind, body, home, car etc.); or (2) narrowly as protecting only the defendant's testimonial evidence.

The preservation of the privilege against self-incrimination – through consistent application of the exclusionary rule – is the central axis of modern criminal procedure. As it subverts the power of logic (i.e. justice) with the 'logic' (i.e. arbitrariness) of power, forced self-incrimination corrupts the rule of law at its roots.

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[1] Karl Deutsch, The Nerves of Government 3 (1966).

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Moreover, forced self-incrimination often establishes a self-referential spiral of state-sponsored violence in which the arbitrary use of executive power legitimises the arbitrary use of legislative power. Such 'justice' amounts to a true Kafkaesque absurd. Logically consistent jurisprudential foundation for the privilege against self-incrimination, on the other hand, requires a logical deconstruction of the whole inquisitorial doctrine of criminal procedure. In terms of procedural policy even the remaining inquisitorial elements in the so-called mixed (Continental) procedure, as clearly illustrated by a recent judgment of the European Court of Human Rights (*Selmouni v. France*, July 1999), critically predispose the criminal justice system towards torture and inhuman or degrading treatment. Both in terms of logical consistency (justice) and in terms of policy (general prevention) strict exclusion of tainted evidence is the only available – but highly effective – remedy (procedural sanction).

Persisting, however, even in modern criminal procedures, there are many inquisitorial elements and attitudes under the pretext of efficacious 'truth-finding' and they obstruct the introduction or the application of the exclusionary rule.

The procedural right of not requiring to testify against one's own interest goes back to Roman Law: *nemo contra se prodere tenetur*. As presumption of innocence (i.e. the right to silence) or in American positive law (Vth Amendment of the US Constitution) the privilege has always been recognised. Inquisitorial criminal procedure, however, represented its complete negation. In the second half of the 20th Century constitutional courts, international courts and monitoring bodies (UN Convention against Torture, *Saunders v. UK* judgment (1996) of the European Court of Human Rights) increasingly recognised the privilege (and its alter ego the exclusionary rule) as a constitutional principle and as a human right of every criminal suspect. Strong inquisitorial elements (incommunicado custodial interrogation, inquisitorial powers of investigating judges, no jury, lax exclusion of tainted evidence etc.) persist in modern criminal procedures.

This leads to Hobbes's war of everyone against everyone (*bellum omnium contra omnes*) and thus the first act of any State must be to outlaw anarchy, i.e. forbid the use of force as a means of conflict-resolution. The second act of a nascent State must be, thereafter, to require its people to resort to peaceful conflict resolution, i.e. to adjudication by the courts. This means that the arbitrary and anarchical 'logic' of force in society is replaced by the force of logic in legal process (justice, rule of law, and orderly legal procedures in which conflicts are resolved). Thus, the relapse into the use of force to obtain confessions within otherwise seemingly legal procedures causes an absurd internal conflict in the very bedrock of the rule of law – and hence in its fundamental legitimacy. This lack of legitimacy contributes, because of the great symbolic value of the rule of law in general and especially criminal processes, to the rise of anomie (political instability, rising crime rates, disorganisation etc.) in society.

Since the police themselves do not legally convict anybody, the privilege is preserved if the evidence tainted with forced self-incrimination is excluded, i.e. if the judge or the jury never learn of it and of its evidentiary by-products. Thus

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as it is preventative, the exclusionary rule is one of the few totally effective remedies.

However, the exclusion of relevant, but tainted, evidence collides with the truth-finding function of criminal procedure. ("The constable blunders and the criminal goes free!") The 'truth' (sheer concordance between major and minor premise) to be established in the criminal process, is not only a description of objective reality but of the State's own power to legally create crimes. Felonies on the books (whether socially functional or not) are major grounds of the State's power to make certain conducts punishable. This is true especially in cases where these major premises are arbitrary and the so-called 'truth' (tû-tû) of criminal convictions is merely a selective interpretation of 'facts' fitting these invented premises. In non-democratic conditions the use power (force) – in order to obtain a conviction concerning arbitrary crimes –may, therefore, establish a self-referential spiral in which power as torture ratifies the State's power to punish: an existentialist absurd described by Kafka in his Process. To some extent, this absurdity is part of every inquisitorial procedure. It goes back to the medieval trials of 'witches'. Today this self-referential spiral is not only especially apparent in the progressive dwindling of personal privacy but also in the prosecutions of political dissidents for imaginary crimes, in stigmatising abuse of psychiatry, in massive-repressive use of punishment in the United States, etc.

B. Introduction

Today we may perceive human rights as self-evident and inalienable subjective legal constituents of every man and woman – as such. This basic ideological premise is protolegal and inherently democratic.[2] Human rights are thus 'democratic' in the usual ideological and political sense of the word but this is only their derivative or secondary, meaning. Historically, these rights are above all 'democratic' ideas in the sense of being a *reactive*[3] negation of 'aristocratic' political and legal premises.

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[2] "La Convention affirme l'existence de droits. Ceux-ci ne sont pas créés par la Convention, mais seulement reconnus par elle: en effet selon l'article 1er de la Convention, 'Les Hautes Parties contractantes reconaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention.' Ce qui signifie que les droits sont protolégals, ont une valeur permanente et antérieure à la Convention qui a un effet déclaratif et non constitutif." G. Pradel & J. Corstens, Droit pénal européen 13, at para. 7 (1999).

[3] The word 'reactive' has negative connotations in Nietzsche, e.g. in his Beyond Good and Evil (1886), On the Genealogy of Morals (1887), The Will to Power (1901) and most other writings. The strong and powerful *act.* The weak, powerless and those who lack incentive and initiative, *react*. The genesis of religion, ideology or any other system of beliefs, however, is almost always *reactive* both in terms of time (against the past) as well as in terms of space (against others). *See*, *for example*, a brilliant presentation of this 'anti-normative' tendency in J. Assmann, Moses the Egyptian (1997).

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As a basic ideological and legal premise human rights – *les droits de l'homme et du citoyen* – are one of the French Revolution's reactive legacies.[4] As an integral part of the Revolution, human privileges were a form of revolt[5] against the fundamental aristocratic assumption that, fixed in their station in life, people were not equal or alike – either in their being or in their human potential. Presumably, therefore, they should not enjoy even the same *initial* prospects in their pursuit of happiness.

In modern constitutional legal terms the adjective 'democratic' translates into *egalitarian* values and principles, whereas 'aristocratic' would imply a *discriminatory* violation of the equal protection of laws.

If it is to implement and sustain itself, any discrimination presupposes power.[6] Conversely, it is the powerless, and not the mighty, who need 'equality' and the 'equal protection of the laws' to offset the *natural* tendency to inequality (discrimination). Needless to say, that, too, requires power, in this case the power of the State and its laws because it is ultimately only this power which is capable of neutralising other strengths (of individual or groups) which lean towards advantage, leverage, superiority, prevalence, domination or supremacy.

Since bio-diversity is not something confined to animals and plants, people in their potential are not equal or identical. Legally speaking *equality*, inasmuch as it necessarily presupposes *identity*, is a cultivated political, ideological and legal fiction. Thus it has to be taken into account at the outset that even *formal* equality balancing *initial* prospects in the pursuit of happiness is a precarious and artificial equalising legal *compensation* for the real and substantive differences between people: their creativity, energy, initiative etc.

Equality, in other words, is not a reality. It is a deontological premise and a practical policy.

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[4] *See* W. Cohen & M. Cappelletti, Comparative Constitutional Law, Cases and Materials (1979). place of publication 1979. In Chapter Three at 25-71, especially at 25-27, Cappellletti explains the reactive post-revolutionary procedural reforms – against the *ancien régime* aristocratic justice. In terms of separation of powers (checks and balances), this meant a permanent reduction in the autonomy of the judicial branch of power all over the Continent. Both abstract and concrete judicial review, for example, which in the United States started with *Marbury v. Madison* in 1803, were introduced in Europe (by Hans Kelsen) only about hundred and ten years later.

[5] For a fascinating cultural dimension of revolt as a creative reaction to anomie, *see* A. Camus, L'homme révolté (1952).

[6] Egalitarianism, of course, is also a question of power. Equality means empowerment of the powerless. The empowerment of the powerless implies neutralization of the powerful – by a yet greater aggregation of power. This greater aggregation (organization) of power is embodied in the State. The criteria of equality, i.e. the legal criteria of non-discrimination, are the constitutional standards of the equal protection of the laws. These are classical issues of constitutional law. *See generally* B. Zupančič, *From Combat to Contract: "What does the Constitution Constitute?",* 1 European Journal of Law Reform 59-95 (1999). This legal (formal) equality, however, is largely counterbalanced by the meritocratic and autocratic corporate and managerial power. *See*, *for example*, D. Barsamian & N. Chomsky, Secrets, Lies and Democracy (1994).

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In consequence of parity being a *democratic* policy it presupposes democratic politics[7], democratic conception of justice, democratic rule of law etc. It follows logically, that both as conscious legal *policy* and as intentional *political* attitude, egalitarianism cannot be left to its own devices and thus requires a continuous, differentiated, goal-oriented, deliberate and balanced consideration.[8] The complexity of this consideration may be illustrated by the voluminous and intricate casework discharged by constitutional and international courts in the battlefield of discrimination and equal protection of the laws.

In his aphoristic and characteristically metaphorical style, Friedrich Nietzsche articulated the precarious nature of equality sooner and better than any legal theorist did. This is what he has to say about the rule of law:

> 'Just' and 'unjust' exist, accordingly, only after the institution of the law (and not, as Dühring would have it, after the perpetration of the injury). To speak of just and unjust in itself is quite senseless; in itself, of course, no injury, assault, exploitation, destruction can be 'unjust', since life operates essentially, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character.
>
> One must indeed grant something even more unpalatable: that, from the highest biological standpoint, legal conditions can never be other than *exceptional* conditions, since they constitute a partial restriction of the will of life, which is bent on power, and are subordinate to its total goal as a single means: namely, as a means of creating *greater units of power.* A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general – perhaps after the communistic cliché of Dühring, that every will must consider every other will its equal – would be a principle hostile to life, and agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness.[9]

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[7] Specifically for the purposes of criminal procedure this political aspect came to the fore in the post-revolutionary prominence of the presumption of innocence, i.e. in Article 9 of *La déclaration des droits de l'homme et du citoyen* (adopted by French National Assembly on 26 August 1789). To this day it has not been clarified whether the impact of the presumption should be limited to (1) the usual narrow procedural effect of any presumption (the reversal of the burden of proof and of the risk of non-persuasion, the right to silence etc.) as in para 2 of art. 6 of the European Convention on Human Rights where the presumption is limited – in contradistinction to the original French text – only to those already 'charged with criminal offence'.

The broader democratic impact (2) of the presumption implies the supposition of innocence *outside* criminal procedure, too, – and hence the protection of his or her privacy *vis-à-vis* the state. Even in narrower legal terms, however, this assumption implies the right to silence – the right not to defend oneself and *a fortiori* the right not to incriminate oneself – i.e. the full privilege against self-incrimination. It is interesting to note that the critical debate concerning the extent of recent reform of criminal procedure in P.R. of China (1997), in which I had the privilege of being one of the foreign experts, centered upon the suspect's right to silence.

[8] The perceptive writings of M. Duverger, De la dictature (1961), La democratie sans peuple (1967), La sociologie politique (1968) are excellent examples of such 'consideration'.

[9] F. Nietzsche, On the Genealogy of Morals (1887), Second Essay, W. Kaufman (trans.), at 76 (1969). Emphasis mine. Of course, this view is part of Nietzsche's general philosophy concerning the will to power etc. and must be taken *cum grano salis* partly as his own intentional provocation

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Precisely because of the persistent precariousness of these 'exceptional conditions', i.e. because of the always imminent regression to the internal or external state of war, human rights have everything to do with the preservation of the State as this 'greater unit of power'. Human rights, equal protection of the laws and the rule of law in general depend on the *organised*[10] force of the State. In Hegelian terms, then, what we have here is a 'dialectical inner contradiction' propelling historical progress.[11] It is indeed a contradiction, because the enforcement of impersonal rules protecting the powerless vitally depends on the greater power of the State. This point is crucial in our argument since it entails, which is somewhat difficult to appreciate, the complete exclusion of power in legal – and especially in criminal[12] – procedures.

Compare Nietzsche's position on this issue with the following modern opinion advanced by the radical democrat Noam Chomsky:

> Jefferson died on July 4, 1826 – fifty years to the day after the Declaration of Independence was signed. Near the end of his life, he spoke with a mixture of concern and hope about what had been achieved, and urged the population to struggle to maintain the victories of democracy. He made a distinction between two groups – aristocrats and democrats. Aristocrats 'fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes.' This view is held by many respectable intellectuals in different societies today, and is quite similar to the Leninist doctrine that the vanguard party of radical intellectuals should take power and lead the stupid masses to a bright future. Most liberals are aristocrats in Jefferson's sense. Henry Kissinger is an extreme example of an aristocrat. Democrats, Jefferson wrote, 'identify with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise, depository of the public interest.' In other words democrats exist today, but they are becoming increasingly marginal.

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and partly as a philosophical, not sociological, metaphor. His reference, however, to the rule of law as an 'exceptional' i.e. *precarious*, phenomenon is important because it implies that the egalitarian ideology of formal equality remains vitally contingent on the maintenance of the State's 'power-complex'. The regression to anarchy and Hobbes's war of everyone against everyone is always a real possibility. *See* Zupančič, *supra* note 6. *See also* M. Mazower, Europe, Dark Continent: Europe's Twentieth Century 73 (1998). The author is describing – without specific reference to him – how Nietzsche's idea of 'greater units of power' was abused by the Nazis.

[10] *Vis-à-vis* the population it governs the power of the State is not superior in terms of sheer physical force but only due to its organization (army, police, secret services etc.) Consequently, all alternative organized forces amount to a 'state within a state' and represent a mortal danger to the maintenance of the State's superiority. Examples include organized crime, terrorist organizations, and even ordinary criminal conspiracies.

[11] *See* A. Kojève, Introduction a la lecture de Hegel, Introduction to the Reading of Hegel (1969). (F. Fukuyama's The End of History and the Last Man (1992), based on Kojève, is a popularization of the complex Hegelian power and prestige dialectic occurring between the master and the slave.) On the notion of 'dialectic' *see*, *for example*, M. Cornforth, Materialism and the Dialectical Method 67 (1971).

[12] This 'exclusion of power' in criminal procedure *is*, as we shall see later, the privilege against self-incrimination. More comprehensively, however, the exclusion of power in this process also entails the complete procedural 'equality of arms', i.e. the *adversarial*, rather than inquisitorial, model of criminal procedure.

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> Jefferson specifically warned against 'banking institutions and monied incorporations' (what we would now call 'corporations') and said that if they grow, the aristocrats will have won and the American Revolution will have been lost. Jefferson's worst fears were realized (although not entirely in the ways he predicted).[13]

Nietzsche did not predict that the 'aristocratic principle' – the autocratic and the meritocratic aspects of corporate management – would implant itself in the business aspect of social life. Today we take it for granted that running a corporation has little to do with equality and democracy.[14] Chomsky, on the other hand, failed to understand that the economic collapse of Communism and socialism occurred precisely for reasons advanced by Nietzsche.[15] However, because the philosophy of human rights entails, *first*, the doctrine of *formal*, not substantive, equality and, *second*, because it establishes only the *minimal* standards of human equality, we do not even have to decide between the two radical positions, Nietzsche's on the one hand and Chomsky's on the other. Formal (or legal) equality boils down to the constitutional equal protection of the laws, i.e. the prohibition of certain egregious forms of discrimination based on sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority and birth or other status.[16] This kind of equality of conditions does not require the impartiality of end results in terms of ultimate likeness of the material conditions of life such as for example postulated by Marx and Engels in their Communist Manifesto (1847): "*to each according to his needs...*". In this sense the attempted *material* parity of socialism was precisely what Nietzsche predicted, i.e. the next sequence in the same direction as the *formal* egalitarianism of the rule of law. The consequences of the socialist 'militant egalitarianism', however, were equally tragic for human rights. The exaggerated material equality – essentially based

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[13] Chomsky, *supra* note 6, at 14-15.

[14] There has been at least one attempt, not entirely unsuccessful, to introduce democracy and equality into the workplace, too. In the early 1950s, the idea was conceived and (legally) introduced by the Yugoslav (Slovene) chief ideologist Edvard Kardelj and it became known as 'self-management'. Significantly, the idea was not followed by any other socialist regime. One reason for this was that it was not compatible with central macro-economic planning *à la* Leontieff's input-output system.

[15] Macro-economically speaking socialist systems lacked private incentive because there was no meritocratic correlation between individual performance and reward. The fatal disincentive was built directly into the Communist formula "each according to his abilities and to each according to his needs." Since economic rewards were not commensurate, people, especially the more able ones, refused to perform according to their ability. In the end, this implied the critical underperformance of the whole economic system and in 1990 its ultimate collapse. Thus, Nietzsche's prophesy about life itself being stifled by too much equality proved to be accurate.

[16] Article 14 of the European Convention on Human Rights. In constitutional law, these are called 'suspect classifications'. Note that there are still two residual references to aristocracy: birth and social origin. The reference to "other status" is intended to cover all other irrational and arbitrary classifications such as those which have no functional basis in the teleological rationality of the law in question. To balance the latter as against the legitimacy of the purpose law in question is the famous 'proportionality' test or 'equal protection test'. The strictness of these tests varies according to the egregious nature of the discriminatory classification in question.

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on class *réssentiment* – degenerated into a dictatorship of the lumpen-proletariat or rather lumpen-bureacracy. This objectionable extreme is just as 'aristocratic' – or rather 'ochlocratic' – as the one in reaction to which equality and human rights emerged in the first place.[17] I do not know whether formal, as opposed to material, equality is a happy medium between the two unacceptable extremes. In purely functionalistic terms, it is probably desirable that the society should maintain a modicum of meritocratic positive correlation between individual merit on the one hand and his or her power (influence) on the other.[18]

The distinction between material and formal equality has never been fully doctrinally established, due to the political and ideological overtones of this question. The debate goes back to the 19th Century and Marx's *The Critique of the Gotha Programme*. Anatole France's aphorism referring to formal equality as the right of both the poor and the rich man to sleep under the bridge, was part of that debate. Fairness in modern constitutional law, however, is no longer purely formal, e.g. in class actions concerning employment discrimination against women, blacks, the handicapped etc. There is, consequently, now a continuum of shades of grey between pure formal and full material egalitarianism.[19]

Law is the great equaliser. Human rights are the rule of law logically extended to the relationship between the individual and the State. The rule of law, as a general barrier to the arbitrary use of power, has precisely the same

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[17] "Criminal justice is merely an adjunct of the investigative and police apparatus. Should the Paris courts one day close their portals for a few months, the only people to suffer would be those offenders already arrested. If, on the other hand, the notorious police brigades of Paris were to stop work for just one day, the result would be catastrophic." E.B. Pashukanis, The General Theory of Law and Marxism (1924), B. Einhorn (trans.) (1978). Current 'transitional' problems of criminal procedures in former Communist countries derive in large part from this Stalinist – brutal, cynical and thoroughly misleading – attitude.

[18] This, of course, leaves open the crucial question as to what is 'merit'. Clearly, this cannot be a matter for legal definition. The determination of what is merit and consequently how much power and influence the individual should have, is a complex, long-term and essentially a self-referential *social* process. The aristocratic power, it should be remembered, too, was initially a product of merit – obtained on a battlefield. The fact that it later degenerated and became socially dysfunctional was a consequence of inbreeding. When this self-referential process grew to be absurd, it led to Revolution. The same will eventually happen to the current corporate economic meritocracy described by Chomsky because every positive feedback system (the expanding spiral) eventually encounters the limits of its expansion.

> A growing organization, and hence also the growing state or government, must be able to change its own patterns of communications and organization, so as to overcome the results of the 'scale effect'.... It must resist the trend toward increasing self-preoccupation and eventual self-immolation from its environment; it must reorganize or transform often enough to overcome the growing threats of internal communication overload and the jamming-up of message traffic.

(Karl Deutsch, The Nerves of Government 251 (1966)).

[19] For the purpose of debating the privilege against self-incrimination, as we are speaking of the quality of arms in the legal-procedural context, the purest formal equality would suffice. The only problem here is that the plaintiff in criminal procedure is the State with its repressive apparatus of power. *See infra* note 67.

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anti-power, anti-discriminatory and egalitarian connotations as human rights.[20] Democracy also implies that all individuals must be treated as subjects, not as objects. In Kantian terms this means that an individual is always treated as an end in himself or herself – and not as a means to an end outside himself or herself. In procedural terms this implies that in all legal controversies – including those in which the State is the plaintiff as in criminal procedure – the 'equality of arms' must be preserved. Democracy, as opposed to aristocracy, is thus inextricably linked to both equality *and* the rule of law, *Rechtstaat*[21]*, état de droit, stato del'diritto...*etc.

The reverse, however, is also true. All power tends to be arbitrary, discriminatory etc. Its use corrupts and its absolutist use corrupts completely.[22] If authority were a matter of logical consistency, it would not be power but justice. Then force and violence would not even be needed.[23]

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[20] In enforcing this egalitarian view, one can stay on the level of *formal* equality (the rule of law, human rights etc.). This is in fact where liberal Western democracies have established their ideology. One can, however, go one step further in enforcing *material*, as opposed to merely formal, equality. *See* K. Marx, The Critique of the Gotha Programme (1875). This idea had in fact been the professed ideology of the Communist and socialist East European regimes: "each according to his abilities and to each according to his needs." Formal equality provides for the equality of *initial conditions* for the success of individuals. Material equality guarantees the equality of *final results*.

The ultimate collapse of East European economies, and consequently of their corresponding political systems, is due precisely to this 'militant egalitarianism' in combination with *réssentiment* and classical peasant values (patriarchy, authoritarianism, insularity and inertia). The final consequence of the communist experiment was thus the disastrous breakdown of the normal meritocratic correlation between ability and power – resulting in Durkheim's anomie and the ultimate collapse of the whole social system. The reason for this is, that egalitarianism in all its forms is always the use of (State) power against the more energetic, the more able etc. Nietzsche pointed that out saying that "too much equality will stifle life itself." Chomsky, for example, disagrees with this and he points out that formal democracy in capitalism is really neutralized by the 'material' autocracy of corporations. However, the economic success of the latter is attributable precisely to this in-equality. *See* Chomsky, *supra* note 6.

[21] Characteristically, the term 'Rechtstaat' is much younger than the term 'rule of law'. It was introduced by R. von Mahl in his Das Staatsrecht des Koenigsreich Wuertenberg (1829).

[22] Nietzsche's position on these issues must not be considered in isolation from the rest of his philosophy; otherwise, one would be led to believe that he advocated autocracy and dictatorship. Moreover, at the time he wrote, there was no way he could have predicted the colossal 20th-century outpouring of scientific and technological creativity issuing from the democratic possibility of *inner* freedom and self-actualisation as well as self-realisation of many individuals guaranteed by the *outer* freedom mantained by the rule of law. This creativity and the corresponding economic advancement transcended many of the 19th-century dilemmas and made them simply inaposite, meaningless…

[23] "If objective values were available to us, if we knew the true good with certainty, and understood all its implications and requirements perfectly, we would not need a method of impartial adjudication. With qualifications, we would content ourselves with a regime of substantive justice, in which rules were unnecessary. The problem of adjudication, as presented in modern jurisprudence, is therefore inextricably linked with the conception that values are subjective and individual". R. Unger, Knowledge and Politics 93 (1976).

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The rule of law, human rights being an integral part of it, replaces the logic of power with the power of logic. Ultimately, of course, it is the Hobbesian State, the Leviathan, which guarantees this *continued* replacement of the 'logic' of power with the power of logic. In other words, under the rule of law, influence (absorbed into the State) is used through logical consistency, logical compulsion[24] and persuasion (justice, equality, non-arbitrariness, non-discrimination, human rights etc.).

Nevertheless, the rule of law itself, while seemingly a pure negation of power, depends on (State) power and is consequently in danger of being subverted by the arbitrary use of power. The precariousness of the independence of the judiciary, for example, as the least dangerous branch[25] – the European Court of Human Rights included – is a constant reminder of the dangerous arrogance of the executive branch of power.

As we shall try to demonstrate, forced self-incrimination, too, is a truly Kafkaesque example of this subversion.

C. The Logic of the Privilege Against Self-Incrimination

Some social critics, such as Michel Foucault, question the fundamental moral legitimacy of the rule of law – and thus the ideology of human rights – because in the last analysis the enforcement of the rule of law depends on the (threat of) violence by the State. The state of peace in society, says Foucault, is founded upon the constant declaration of war. In legal terms, of course, this constant declaration of war is criminal law. Thus in the end, all legal sanctions are based on criminal sanctions.

However, moral legitimacy of the rule of law, even if *ultimately* dependent on the violence of the State, is not the only issue here. That this reliance is a practical, not ideological, question is more evident in international than in national law and it finds its expression in the maxim *ex factis iur oritur*: i.e. the regulation is ultimately based on the ugly realities of power. Such, for example, are the factual implications of the famous *Loizidou* case concerning the Turkish occupation of Cyprus.

Even so, the rule of law strives to maintain at least a relative independence from the arbitrary use of power.[26] If this is true that the whole ideology of

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[24] B. Stroud, *Wittgenstein and Logical Necessity, in* G. Pitcher (Ed.), Wittgenstein Philosophical Investigations 477-496 (1966). Logical compulsion is the equivalent of force in real combat. In empirical science, logical compulsion (empirical and logical proof) is absolute insofar as agreement on axiomatic premises is established. In law, absolute proof is possible only in the given theoretical framework, i.e. in abstracto. Modern constitutional law comes closest to this ideal. The rest is persuasion. *See* C. Perelman, The Kingdom of Rhetoric (1968), where he advances the idea that law evolved, according to Aristotle, out of the art of rhetoric – the latter being an art of persuasiveness.

[25] A.M. Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics (1962).

[26] *See generally*, A. Perenič, Relative Independence of Law (Relativna samostojnost prava), a doctoral dissertation (1976).

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human rights is a negation of the non-logical use of power, the European Convention of Human Rights being a quintessence of this ambition, then the internal legitimacy (this is essential for our purposes here) of any legal process depends on the total prevalence of the power of logic over the logic of power. The *autonomy of legal reasoning*, the maintenance of its independence from the constant threat to fall into regression to political and policy considerations, is the subjective cognitive counterpart of the objective independence of the rule of law from power.[27] The independence of legal reasoning in turn depends on the moral freedom of the judges, i.e. on the level of their moral development attained.[28] Legal processes are subverted the moment the ultimate outcome of the legally processed controversy becomes contingent upon the logic of power (politics, policy etc.) and not on the power of logic. In a sense, the function of the European Court, as the court of last appeal, is to check *internationally* this legitimacy of the power of logic, i.e. *national* justice, inherent in any legal process.

This premise is so elementary that legal thinkers, while taking for granted its implications, tend to overlook it. To repeat: if the legitimacy of the rule of law is to be maintained, then the divorce from the rule of arbitrary power must be absolute. If, on the contrary, the immediate use of power becomes decisive in the resolution of a particular controversy between two individuals or between an individual subject and the State, as for example in criminal process, or even between two states – then the legal process and the rule of law with it have been subverted in their fundamental intent and purpose.

This is easier to understand if we take two private individuals litigating a private claim, say in a Roman *reivindicatio.* The outcome of legal action must depend on legal criteria; i.e. the *praetor* will pronounce his judgment based on logic, precedent and other applicable criteria of justice. But imagine that one of the litigants was to privately repossess the disputed chattel, or worse, that he were to physically force his counter-litigant to admit his claim in court and that the judge would then ratify this physical over-powerment of one private individual by another. I do not think a lawyer can imagine anything more painfully absurd than such a double track 'justice'. That this must have been obvious to Roman jurists is illustrated by the formula *nemo contra se prodere*

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[27] The autonomy of legal reasoning was severely reduced through 19th-century codifications. Strict distinction was enforced after the 1789 Revolution between abstract legislative competence and concrete judicial competence (e.g. art. of *La déclaration des droits de l'homme et du citoyen*, 1789). This untenable abstract-concrete distinction is a constant source of practical trouble in constitutional law, e.g. in distinguishing abstract judicial review from concrete constitutional complaints' jurisdiction. Cappelletti & Cohen, *supra* note 4, at 73-112; *see also* A.Vincent, *L'abstrait et le concrète dans l'interprétation (en lisant Engisch)*, 135 Les archives de philosophie du droit (1972); for English variation on a similar theme, *see* G. Williams, *Law and Fact*, 176 Crim. L.R. 472 (1976). As to the historical source of all this trouble, *see* the truly brilliant defense of judge-made law by F.C. von Savigny (1779-1861), Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Abraham Hayward (trans.), Of the Vocation of Our Age for Legislation and Jurisprudence (1975) reprinted in *European Sociology Series*.

[28] *See generally*, R. Kegan, The Evolving Self (1976).

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tenetur: nobody should be expected to testify against himself. This already is the privilege against self-incrimination in its full articulation.[29]

On the Hobbesian level of discourse, it is an illogical nature to force someone to testify against his or her own interest. If legal process is essentially a surrogate conflict-resolution service both offered and required by the state – the latter having forbidden the war of everybody against everybody – then physical violence by one of the parties has no place in the legal process. Lawful resolution of private controversies is the very antithesis of private physical overpowerment to protect one's interests. Mutatis mutandis, the same applies to procedures in which the State is a plaintiff (criminal procedure) or defendant (administrative law, etc.). In this public law area, however, it took two thousand years for the logic to prevail over the *raîson d'état*. The question whether the rule of law, i.e. the equal protection of the laws as well as the privilege against self-incrimination etc. apply to the relationships between individual *and the state* is typically the question of constitutional law. The issue is the 'equality of arms'[30] in public law litigation.[31]

Does the individual subject have the right to sue his own state in court, i.e. submit the State itself to the rule of its own laws? Today we may take this for granted thanks also to the positive role played in this respect by the European Court of Human Rights in the last fifty years. Nevertheless, this essential aspect of equality, of the fantastic empowerment of the individual *vis-à-vis* his/her own state etc. is quite a recent development. The idea may go back to the English Magna Carta Libertatum (1215) where the confrontation between the Barons and King John resulted in a contract binding the powers of the 'executive branch'. However, it was only in the 20th century that European legal systems recognised this binding power of the constitutions and have given their constitutional courts jurisdiction over controversies between individuals and the state.

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[29] It applied, of course, to private litigation because Roman law was primarily private law, criminal law being only a late and incongruous excrescence on its body. *See generally*, C.L. von Bar, The History of Continental Criminal Law (1916).

[30] On 'equality of arms' *see, for example*, A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L.J. 1149 (1960). Goldstein, however, typically emphasizes that the purpose of (American) criminal procedure is "to resolve the dispute before the court." While this would be ideal if true, but unfortunately, the executive branch of no State would ever forgo its prerogatives ('advantages'), i.e. the power to arrest, detain, interrogate etc.

[31] On the nature of public law litigation, *see* the seminal article of R. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L.R. 1281 (1967). For Chayes, the following are the constitutive elements of *private* litigation: (a) the lawsuit is *bipolar*; (b) litigation is *retrospective*; (c) right and remedy are *interdependent*; (d) the lawsuit is a *self-contained* episode; (e) the process is both *party-initiated* as well as *party-controlled*. Chayes assumes private litigation to be the true litigation. When he speaks of *public* law litigation he says: "The proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called 'judge'."

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D. On the Power to Make Crimes

A mere fifty years ago criminal procedure was perceived everywhere as an instrument of repressive power to be used against and to be applied the 'criminals'.[32] There are others who thought otherwise. Franz von Liszt, the famous German criminal law theorist, for example, maintained that the purpose of (substantive) criminal law was the reverse, that it was the Magna Carta Libertatum of the individual suspected or accused of crime. Even before that, in 1764, similar views were proffered by Cézare Beccaria[33] and nominally accepted by enlightened despots from Leopold of Tuscany to Catherine the Great. However, the basic procedural logic of discrimination of those suspected of having committed a criminal offence – irrespective of the presumption of innocence[1] – was inquisitorial. In the nineteen sixties there occurred a so-called criminal procedure revolution led by the Supreme Court of the United States, notably its Justices Douglas, Warren, Marshall and Brennan. In a series of cases culminating in *Miranda v. Arizona* (1964) the US Supreme Court established what we call the 'equality of arms' starting with the arrest of the criminal suspect. The powerful tool of this revolution was the exclusionary rule taken from the law of evidence.[34]

However, let us return to the principal line of our argument. Another one of Hobbes' aphorisms will help us deconstruct the Kafkaesque paradox we mentioned before. Hobbes said: "Civil laws ceasing, crimes also cease." This sounds simple enough but the idea behind it is typically Hobbesian. What

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[32] The legal position of the 'common criminal' could be described as a consequence of a specific discrimination. Since 'criminals' were perceived as a separate class and the inquisitorial criminal procedure could be seen as a scenario for their discriminatory treatment. In simple terms, this meant that they were no longer equal *subjects* of the State and became its discriminated procedural *objects*. Similar conclusions could *mutatis mutandis* be made about committed mental patients and juvenile delinquents in their respective procedures. *See generally*, J. Katz, J. Goldstein & A.M. Dershowitz, Psychoanalysis, Psychiatry and Law (1967); and A.M. Dershowitz, *Cases and Materials* (unpublished) for the course entitled 'Prediction and Prevention of Harmful Conduct', Harvard Law School, acad. year 1974/74, or later editions. Because of the implicit loss of legal status caused by any of these procedures (criminal procedure, civil commitment, *parens patriae* procedures) the initial legal requirements (probable cause, reasonable suspicion, danger to oneself and others etc.) for this change of status are of such crucial importance: they trigger the loss of privacy, certain constitutional rights etc. The reason why Continental criminal procedure and its theory have never considered this a basic issue lies in the insufficient connection of criminal procedure and constitutional law. With the more independent activity of Continental Constitutional Courts (German, Italian and others) this has begun to change. Criminal procedure is slowly becoming a branch of constitutional law. *See generally*, B. Zupančič *et al.,* Constitutional Criminal Procedure Law (Ustavno kazensko procesno pravo), a casebook (1999).

[33] C. Beccaria, *Dei delitti e delle pene, On Crimes and Punishments*, H. Paolucci (trans.) (1963).

[34] My own contribution to this revolution was the idea that the exclusionary rule is merely a different form, an *alter ego* of the constitutional privilege against self-incrimination because one does not legally incriminate oneself before the police but before the jury: thus, if evidence tainted by forced self-incrimination is excluded the privilege remains intact. *See infra* note 66.

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Hobbes meant was in line with his general theory of state and power, i.e. crimes are not objective phenomena, but emanations of the power of the state.

The state may chose to make, *vel non, something* criminal. However, if the general authority of the state ceases to function, the criminality of conduct incriminated by the state also ceases. This in turn implies that it is power – and nothing but power! – which makes conduct criminal. Furthermore, if we carry this argument to its logical Hobbesian conclusion, the threat and the materialisation of punishments attached to defined modes of conduct, are not only contingent on State power but are from the outset a pure manifestation of the State's supremacy.

On this level the issue is not whether the incrimination of certain conduct is socially, morally etc. indicated, or not. The state's control to incriminate certain behaviour may be used wisely, i.e. in concordance with the enforcement of proper values and *bonos mores* in society. It may be used arbitrarily as in every dictatorship where human rights are repressed by such incriminations and some demeanour is made criminal which in democratic societies amounts to nothing more than the exercise of freedom of speech, association etc. The history of criminal law is saturated with examples of arbitrary and politically motivated incriminations. In times of Emperor Augustus, for example, Roman law incriminated as *laesio maestatis* spitting, the removal of one's clothes or the chastisement of one's slave in the vicinity of the statue of the Emperor.[35] In fact the fateful re-emergence of the old Roman Law Sicilian inquisitorial procedure is closely linked to the Church's repression of schism, blasphemy, witchcraft and other such legal nonsense – all with the intent to maintain a firm grip on Catholicism in Europe.[36] Even today, the leading criminologists and other sociologists are constantly debating the functional appropriateness of many legal incriminations of particular kinds of behaviour.

For our purpose here, however, it suffices if we establish that – arbitrary or not – crimes are made certain by the power of the state. To prove that, we need say no more than Hobbes. Should the power of the state vanish, there would be no crimes.

It follows logically – if we remove ourselves a step away from moralistic considerations we see that felonies are a pure emanation of state power. This is true concerning all sins. However, it becomes painfully obvious when political crimes and other arbitrary and absurd incriminations are in question.

The ideal prototype of this situation, in the language of Max Weber, is exemplified in the incrimination and persecution of witchcraft. The *power* of the Catholic Church was sufficient to make certain kinds of purely imaginary conduct criminal. Then the *clout* to apply torture was used to make suspected women confess to acts, which they never committed. In the end the initial hypothesis of witchcraft was confirmed, therefore the vicious circle of the linkage of power and corruption was complete.

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35 Von Bar, *supra* note 29, at 42, nn. 2 and 4.

36 Bayer, The Pact with the Devil (Ugovor s djavlom) (1964).

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Today we may easily deconstruct this self-referential circle as nothing but one form of control, confirming and reinforcing another. The proof that this self-referential circle was a self-fulfilling prophecy and consequently a collective form of madness, a *folie à million*, lies in the fact that sometimes even the victims of this procedure were led to believe that they were witches. Recent examples of this include stigmatisation of political dissidents in the Soviet Union as schizophrenics, political trials in Eastern Europe in which the accused were tortured and pressured to admit 'wrongdoing' like curtailing freedoms of thought, speech, press and association, incriminations of sheer status such as membership in a 'terrorist' organisation or even 'being addicted to drugs' etc.[37]

Our point, however, is not primarily to show how this self-referential 'logic' tends to lead to entirely irrational creations of what sociologists call a 'myth' – such as witchcraft, blasphemy, schizophrenia, enemy of the people etc.

The use of state power to compel criminal suspects and defendants to testify against themselves is absurd, because it also creates a Kafkaesque circle of the presumption of guilt and there is no stepping out of it: one is guilty because one is guilty. It is interesting to note that all Communist regimes from Yugoslavia in the West to the P.R. of China in the East used the same model of purportedly mixed (inquisitorial-adversarial) criminal procedure. This model suited the dictatorial regimes because it was (and still is) basically inquisitorial and as such enabled these police-based regimes to channel all abuses the regime wanted to legitimise. In other words, the above mentioned logic is not a metaphor or a mere 'cognitive dissonance' but is still alive and well in these regimes even today.[38] The inquisitorial vicious circle of power reconfirming

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[37] Making mere status, without an act, a criminal offence – typically being addicted to drugs, being a terrorist, being a member of a forbidden organization, being a war criminal, being a counter-revolutionary etc. – is unacceptable from the point of substantive criminal law's principle of legality. One of the principle's aspects is the *lex certa* requirement. This requirement was implicit even in Roman Law: *Poena non irrogatur nisi quae quaque lege vel quo alio iure* ***specialiter*** *imposita est. (Digestae 50.16 131) (Punishment should not follow unless it is* ***specifically*** *for that crime imposed by a legislative act or some other form of law.) See also* J. Hall, General Principles of Criminal Law 29, n.10 (1960). An act can be so defined that there remains no doubt as to what is the border between criminal and non-criminal conduct. Being, for example, a drug addict does not lend itself to such a definition and in any event being something, at least in law, is generally a consequence of acting in a particular way: when does doing something translate into being something. Quite apart from that, a criminal act is a specific historical event capable of precise determination, leaving traces in the outside world, lending itself to proofs etc. Thus a legal controversy can be structured around an act, but cannot be structured around a status of e.g. being a drug addict. *See, for example, Robinson v. California,* 370 US 660 (1962). In other words, a prosecution for mere status cannot be sufficiently restricted either in terms of substantive law *(lex certa)* or in terms of procedural safeguards (monocentric evidentiary focus on the subject of controversy).

Art. 7(1) of the European Convention speaks of "any *act or omission* which did not constitute a criminal offence..." Yet the Court has never tackled this issue although some member states do have incriminations of pure status on their criminal codes, e.g. being a member of a terrorist organization etc. Here substantive criminal law's theory of inchoate crimes (conspiracy as a pure agreement but requiring a substantial act in its furtherance) would also have to be considered.

[38] The new absurdity, however, goes in the opposite direction. There has been practically no

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power often masks monstrous abuse of the rule of law and always subverts its basic intent which is to resolve controversies without resorting to power.

The causes of this subversion lie in the constitutional imbalance of power between the judicial branch and the State's executive branch, i.e. its police. The latter uses torture, physical coercion and other forms of pressure during custodial interrogation and without the presence of a lawyer – while the criminal justice system later, during the criminal trial, is pressured to pretend that the evidence was obtained legally, i.e. that the controversy between the individual and the State is now being resolved without resort to power.[39] The judicial branch, while pretending to know nothing of the abuses in the police station, ratifies the abuses and becomes an accomplice of the executive branch.[40] If the separation of powers, here the separation of the judicial branch from the abuses of the executive branch is not consistently carried out, if judges become the accomplices of police abuses, then we have a collapse of the judicial power into the executive power. The consequence is, of course, the disintegration of constitutional legitimacy and of the rule of law.

Both in constitutional terms as well as in procedural 'inquisitorial' terms this subversion of the rule of law is usually justified by reference to the need to find truth about the past allegedly criminal event. The word 'truth' here is crucial.

E. On Truth and Truth-finding

The Egyptians portrayed their goddess of righteousness, Maat, as carrying feathers. In Egyptian symbolism, feathers were a sign of truth. Fact-finding,

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prosecution of those who in previous regimes in Eastern Europe violated every imaginable human right. Such systemic impunity is a consequence of the continuous grip of former *nomeklatura* over police, prosecution and the judiciary. The old *cadres* are still there, except that now they work deliberately and attentively upon such interpretation of (their own) human rights as to nip in the bud every attempt at prosecution of those with blood on their hands. This is done by appointing the right people to the right positions (chief prosecutors, influential university posts etc.) and by using their *cadres* in the media. The short of it is, however, that the needs of impunity are well served by the same inquisitorial system that used to produce guilt upon request before. The resistance to adversarial reforms of criminal procedure in these countries is motivated by the need for continuance of impunity of those guilty of monstrous abuses only a few decades ago. The learned treatise describing this unique reversal of the inquisitorial absurd ("you are not guilty, because you are not guilty") remains to be written.

[39] This was best articulated by Justice Goldberg in *Escobedo* when he said that the whole criminal trial in such situations is mere appeal to what had at that critical stage happened during custodial interrogation at the police station.

[40] For reasons of efficacy and truth-finding, this is happening even in pure adversarial criminal procedure. The higher the crime rates the more difficult it becomes to sustain the time consuming and expensive (jury trial!) adversarial procedural guarantees. Consequently, the liberal State is forced to abandon many of its professed constitutional guarantees. The real reasons for this, however, are not legal but sociological. The rising tide of anomie and alienation have to do with the ever greater discrepancy between institutionalized values on the one hand and the values that would be adequate for the present state of development. *See generally* my *Criminal Law and Its Influence Upon Normative Integration*, 7 Acta Criminologica (1974).

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truth-finding has always been closely associated with rendering justice. In adjudication, typically, the logical syllogism performed by a judge is composed of the norm as a major premise and the facts as the minor premise. The logical conclusion is either that the facts fit the given major premise – or that they do not.[41] Since the abstract norm is fixed and given – *iura novit curia* – it is the fact-finding part of adjudication that is usually the problem. In addition, since law deals only with historical events which cannot be repeated and whose existence thus cannot be empirically verified by an experiment (as in empirical science), the truth in adjudication is never fully tested, verified etc. Good adjudication is therefore indeed commensurate with good truth-finding.

Legal truth, however, may be very similar to what the famous Danish philosopher of criminal law, Alf Ross, called *tû-tû*.[42] In legal syllogism the major premise may be purely a caprice of Divus Augustus, i.e. spitting in front of his statue is (indeed, truly, actually etc.) a *crimen laesae majestatis*. Thus to conclude, that somebody who had spat in front of his statue, has truly committed a *laesio maestatis,* amounts to a purely circular conclusion which is what Ross calls a *tû-tû*. [43]

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[41] However, *see* H. Berman, *Legal Reasoning in* 9 Encyclopedia of Social Sciences, at 204 (1968):

> However useful syllogistic logic may be in testing the validity of conclusions drawn from given premises, it is inadequate as a method of reasoning in practical science such as law, where the premises are not given but must be created. The legal rules, viewed as major premises, are always subject to qualification in the light of particular circumstances; it is a rule of English and American law, for example, that a person who strikes another is liable for battery, but such a rule is subject, in practice, to infinite modification in the light of possible defenses (for example, self-defense, defense of property, parental privilege, immunity from suit, lack of jurisdiction, insufficiency of evidence, etc.) In addition, life continually presents new situations to which no [single] existing rule is applicable; we simply do not know the legal limits of freedom of speech, for example, since the social context in which the words are spoken is continually changing. Thus, rules are continually being made and remade. Also the 'minor premises' – the facts of particular cases or the terms of particular legal problems – are not simply 'there' but must be characterized, and this, too, requires interpretation and evaluation. Indeed, the legal facts of a case are not raw data but rather those facts that have been selected and classified in terms of legal categories.

[42] A. Ross, '*Tû-Tû'*, 70 Harvard Law Review 812-825 (1957); *see also* his On Guilt, Responsibility and Punishment (1975).

[43] In empirical science, laws (major premises) are (1) derived from and based on objective reality and (2) there is a continuous feedback from it as they are (a) experimentally tested and (b) while they are technically applied. In law the major premises, too, have some empirical contents, since the definition of murder, for example, is indeed an empirical description of a typical piece of human behaviour. We have no illusions, however, that these empirical constituents of a legal definition, derived from age-long judicial process of deciding controversies, do in any sense validate the legal definition. It does not cross anybody's mind, for example, to say in a legal context (as opposed to a moralistic one) that a particular homicide is 'truly', 'objectively', 'actually' etc. 'murder'. We take it for granted that the 'truth' of legal conclusions is only a *superficial* concordance of a particular legal definition (of murder) and a particular event. Another

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This circular logic applies to 'witchcraft', many victimless and political crimes etc. The objective validity of the laws (major premises), e.g. defining mere 'belonging to a terrorist organisation' as a 'crime', depends on the ability of the State to sustain a consistent prosecution of such 'crimes', to find the 'perpetrators', to torture them and to make them confess that, indeed, 'they belong' etc. If, however, the fight for 'national independence' ('terrorism') grows into a 'civil war' and the former 'terrorists' win it -, then the former 'crime' of 'belonging to a terrorist organisation' may become a reason to be awarded a medal of honour, to receive a pension etc.

Thomas Aquinas postulated that there were two major kinds of truth. On the one hand we had a pure *adequatio intellectus et rei,* i.e. the mere logical concordance of major and minor premises. The value of this truth clearly depended on the validity and meaning of the major premise. If major premise is *tû-tû* then the conclusion itself was a circular self-referential and self-fulfilling prophecy. The truth about this kind of 'truth' is that it is no truth at all. It is merely self-reinforcement and self-validation and legitimisation of the power of repression.

In contradistinction to law, the empirical sciences do not invent their major premises. Once a hypothesis is empirically verified via an experiment it becomes 'a law of science', i.e. an established major premise with an explanatory power that is tested anew in every application. In terms of formal logic, this application of scientific laws is similar to the application of human laws. In science and technology, too, the *adequatio intellectus et rei*, the correspondence between major and minor premises is operative.

This, however, does not explain how scientific laws are discovered. Bertrand Russell said somewhere that, if we knew where ideas come from, science would be moonshine. The ancient Greeks had a name for this kind of unveiling, revelation etc. It was called *aletheia.* Empirical scientists when they discover the new laws of nature discover this kind of truth – which is what Aquinas, too, called *aletheia*.

This type of reality, although not limited to empirical sciences, does not exist in law. Dostoyevsky for example, when he wrote his *Crime and Punishment* had unveiled a part of the truth about human nature; but a judge performing a

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way of seeing this would be to say that legal major premises are deontological, not ontological. The purpose of legal major premises is not to describe reality adequately (ontology), but to change it (deontology). Since the desire to change reality is intimately connected with power, the lawgiver may invent any legal major premise he/she chooses.

In terms of formal logic, an arbitrary major premise (law) without any basis in objective reality may be a contrived definition saying that there is *tû-tû* – 'when it rains heavily'. If, in turn, somebody were to conclude that 'it rains heavily' and that 'therefore' *tû-tû* exists, this would be formally true. This 'truth', empty as it would be, would only prove that so-and-so made up a certain major premise (definition, denotation).

If, however, the person (entity, State, legislature etc.) had the power to 'stand behind' his or her contrived major premise, this would then be 'law'. Certain real consequences could flow – for example, declaring a particular region of the State a 'national disaster area' – from the conclusion that *tû-tû* has occurred at a particular time and in particular place. In any case, however, the only objective reality on which the validity of legal major premises depends, is the reality of power.

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logical syllogism and pronouncing Raskolnikov guilty of murder of the pawn-broker woman, had certainly not discovered a new truth about this historical event *as such.* The lawgiver, who had incriminated murder, did neither discover a 'valid law' amounting to *aletheia.* Objectively speaking the judge had merely enforced the command of the lawgiver that those, who intentionally kill another, must be punished.

This critique of the relativity of legal truth and truth-finding was necessary for the simple reason that everything from torture to other forms of forced self-incrimination has always been justified in the name of 'truth-finding'. It was not our purpose here to discuss the relativity of legal norms and their dependence on power. The only reason, for which we bring up this relativity, derives from the need to challenge the seemingly absolute 'truth-finding' argument used in justifying forced self-incrimination.[44] To say that forced self-incrimination (and other violations of privacy) are justified, because they enable the police and the courts to 'find truth', is logically misleading – to the precise extent to which the very 'truth' while justifying the (ab)use of power (torture) is itself an emanation of power.

Torture as an inquisitorial practice, for example, emerged partly because the IVth Lateran Council of the Catholic Church abolished the participation of priests in ordeals (*ordalia*) – which were essentially an experimental method of ascertaining truth in criminal cases.[45] Thereafter, whenever people were tortured to extract their confessions, the progressively aggressive encroachments on their privacy were being justified on the grounds that this aided in the finding of truth about crimes and criminals etc.

The decline in the protection of human rights in criminal procedure, for example, by the United States Supreme Court before and since *Leon v. United States* (1986)[46] has been led by Chief Justice Rehnquist – purportedly all in the

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[44] The reference is primarily to Justice Rehnquist and the United States Supreme Court since ca. 1986. *See infra* note 51.

[45] Epistemologically speaking an ordeal *(Lat. pl.. 'ordalia')* is an empirical experiment, albeit a mystical one, because it tests the *continuous* existence of transcendental guilt. The underlying belief was, of course, that God himself would assist in ascertaining the guilt of the accused sinner – hence the necessary participation of priests. If the premise of God's presence at the experiment were accepted, then an ordeal would test something (the existence of sin, guilt) that would continue to exist – although the critical event (the offence) was historical, i.e. had lapsed into the past and could not have been repeated. However as we pointed out above, legal procedures always deal with non-repeatable (historical) events. Since no experiment is available, the adequacy of legal fact-finding fatally depends on the *epistemological* adequacy of (adversarial, inquisitorial, or mixed) procedures. Originally, legal procedures were not intended as truth-finding devices. They were devised as conflict-resolution devices, truth-finding having been merely secondary, i.e. only instrumental to the ultimate conflict-resolution goal. However, in mixed (part inquisitorial, part adversarial) European criminal procedures the adversarial 'equality of arms' – even if often incompatible with the truth-finding function – is still subordinated to it. Exclusionary rule, on the other hand, is clearly incompatible with the inquisitorial concept of truth-finding. *See infra* notes 65 and 66.

[46] In *Leon see* especially Justice Brennan dissent in which he accepts the idea that exclusionary rule is not a deterrent to police misbehaviour (an instrumental rule) but is a prescriptive rule, an

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name of the efficacy of truth-finding.[47] In the pragmatic, policy-oriented Rehnquist world of repressive penal policies – resulting in imprisonment of every fifth adult black male in the United States – complex sociological notions such as anomie,[48] alienation, normative integration[49] etc. did not even exist. The crime rates had to be reduced at any cost. Consequently, the liberal implications of the constitutional doctrines of the Warren Court, which because of *stare decisis* cannot be undone, must be restricted to their formal effects.

But this is nothing unusual. Whenever, in the history of criminal law, there was a political desire to make the penal system more repressive, it has always been done in the name of more efficacious 'truth-finding'. 'Truth-finding', after all, was the central premise of the whole Inquisition – and continues to be the declared procedural purpose of many dictatorial regimes on this planet.[50]

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alter ego of the Vth Amendment privilege against self-incrimination.

[47] The reduction of the exclusionary rule to a judge-made policy device for deterrence (general preventative effect) of police's violation of constitutional (human) rights of criminal suspects enabled Rehnquist to engage in a silly 'marginal utility' logic. From case to case, he asked himself whether an additional exclusion of evidence tainted by violation of the suspect's privacy would bring a commensurate deterrence of the police's human rights violations. This utilitarian approach reminds one of the reasons for which Karl Marx has called Jeremy Bentham "the genius of bourgeois stupidity."

[48] *See* R.K. Merton, Continuities in the Theory of Social Structure and Anomie, Social Theory and Social Structure 161-194 (1953). *Reprinted in* L. Radzinowicz & M.E. Wolfgang (Eds.), Crime and Justice, Vol. 1, 442-473 (1971).

[49] *See* the seminal article on this by the brilliant Norwegian legal and criminological theorist J. Andenaes, *The General Preventive Effects of Punishment,* 114 U. Pa. L. Rev. 949, at 949-983 (1966) and my *Criminal Law and Its Influence Upon Normative Integration, 7* Acta Criminologica 55-99 (1974).

[50] This purpose is sometimes explicitly declared in the codes of criminal procedure. The seemingly valid motive of criminal procedure is usually described as (1) to convict all guilty criminals and (2) to acquit all innocent defendants. (In scientific language, this would mean the avoidance of (1) false negatives and (2) false positives). However, this of course is, to say the least, unusual for any normal legal procedure. Legal processes have never been designed for truth-finding. In terms of real epistemology, they are not, whether inquisitorial or adversarial, particularly good fact-finders. The real reason for this prominence of truth-finding in criminal, as opposed to civil and other procedures, has more to do with moral indignation projected into a legal process. *See* Ranulf, *supra* note 56 and H. Lasswell's Introduction, at xiiii. Cf. T. Szasz, Law Liberty and Psychiatry 67 (1963):

> Function of law is also protecting the people from feelings of unconscious or unexplained guilt. It does so by allowing those who are innocent to reassure themselves. They can say something like this: 'We are God-fearing law-abiding citizens. If we were guilty, we would be apprehended, prosecuted and punished. Since this has not happened, we need not feel guilty.' This aspect of the law its psychologically defensive, ego-protective functions and the same thing happens in court where judge, jury, etc. are afraid of being guilty for sentencing somebody – and so they transfer the responsibility on the shoulder of psychiatrists. And that is what they almost always find the defendant mentally ill and irresponsible... **If we wish to have more rational and human jurisprudence we must experience, contain, and tame guilt, not deflect and vent it in substitute action.** (Emphasis added).

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The only issue here is, whose 'truth' and what kind of 'truth' are we speaking about?

In the monocentric context of constitutional judicial review, criminological and penal policy considerations have no place because they clearly belong to the polycentric legislative competence.[51] The instrumentalisation of *prescriptive* constitutional norms, such as the privilege against self-incrimination, is intellectually dishonest even if we do not take into account the relative nature of 'truth' in criminal law. In the end, therefore, the incantation of 'truth-finding' as a pretext for brutal policies of penal repression does not differ so much from the inquisitorial policies of the Catholic Church – i.e. of the (not so) Holy Inquisition – through which the characteristic myth of witchcraft was brutally fabricated by torture. In every dictatorial military regime from Peru to Singapore, from the former Greek colonels' regime to Tito's Yugoslavia etc. the rule of law in criminal procedure is undermined by emphasising the importance of truth-finding.[52] It is curious, incidentally, how even the most sophisticated legal theorists usually fail to recognise and deconstruct this self-referential and circular logic of power behind 'truth' and 'truth-finding' being reconfirmed and reinforced by the same brutal power employed to obtain confessions and other forms of self-incrimination.

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[51] Clearly, the context of autonomous legal reasoning, or more specifically the context of the required logical consistency and the consequent legitimacy of the protection of constitutional and human rights through judicial review, does not lend itself to policy balancing. These kinds of value judgments go far beyond the legitimate teleological interpretation of Constitutions (and international covenants). However, Rehnquist's utilitarian calculus based on consideration of marginal utility is absurd even in terms of policy. How can a Supreme Court calculate the diminution of the exclusionary rule's additional marginal utility effect on the police abuse of constitutional rights? I doubt, however, that Rehnquist himself ever sincerely believed that his utilitarian calculations are anything more than a formalistic cover-up of his authoritarian hierarchy of values.

[52] Thus, 'rule of law' is not only a legal designation. In sociological and criminological terms, the perceived legitimacy of the rule of law ('justice') induces either a positive or a negative identification with the political and legal system. In the positive case, the psychological internalization of legal norms (of being a 'law abiding citizen') is enhanced. This is described as 'normative integration'; it lowers the crime rates, increases political stability etc. In the negative case the perceived discrepancy between 'justice' and 'law in action' produces anomie (devaluation of internalized values) and social disorganization, i.e. the reverse of normative integration. *See* Merton, Andenaes and Zupančič, *supra* note 48 and 49. The capital notion of anomie (normless-ness, valulessness) goes back to Durkheim. For this, *see* Radzinowicz and Wolfgang, Eds., *supra* note 46, Vol. I., at 392. Because values are the glue of social relations (individual and the institutionalized ones) anomie, in its extreme, leads into the atomization of society which, in Durkheim's words, then becomes 'the dust of individuals' – i.e. it leads into alienation. The sociological implication here is clear: the deliberate furtherance of human rights and of the rule of law contributes decisively to social and political stability in society. The social perception of the justice system as fair and legitimate in turn depends decisively on the systemic respect for the privilege against self-incrimination, i.e. on the maintenance of the equality of arms (adversariness) in criminal procedure.

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F. The Privilege and the Exclusionary Rule

Much in our argument depends on how we define the general purpose of adjudication. The principle *nemo contra se prodere tenetur*, i.e. that nobody should be *forced* to testify against himself/herself or his/her own interest, presents no problem in private litigation, where the purpose of adjudication is clear, i.e. to resolve a specific private controversy – in order, generally, to avoid the regression to force or violence. In civil procedure, it is taken for granted that the distribution of the burden of proof between the plaintiff and the defendant satisfies all the needs for fact-finding: *da mihi factum, dabo tibi jus.*[53] Insofar as there is *ex officio* fact-finding at all in private litigation, it is performed in a purely instrumental way i.e. in order to resolve the private controversy. Should the parties at any time choose to settle their controversy we speak of a binding *compromissum* (settlement). The truth then instantly ceases to matter. Since historically private controversy lies at the origin of everything legal[54] this tends to show that normal adjudication is purely adversarial. In this normal procedural context, there is no need whatsoever to emphasise the 'equality of arms' because the plaintiff and the defendant are naturally juxtaposed as procedurally equal parties to the private controversy.

The instrumentality of fact-finding, i.e. its instrumental nature in relation to sheer conflict-resolution makes truth-finding a secondary concern in private litigation. The fact is that the primary function of legal process has always been conflict-resolution. The first act of the Hobbesian State must be to forbid self-help leading to *bellum omnium contra omnes.* Since the State cannot simply abolish the conflicts of private interests but must somehow provide for their non-violent resolution, it follows that the State has no choice but to establish an alternative conflict-resolution service. Thus, law *in statu nascendi* is of necessity *pure procedure* and nothing else. It matters little that, at this initial anthropological point of development of law, there are no established substantive criteria for the resolution of emerging conflicts.[55]

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[53] *"Da mihi factum, dabo tibi jus!"* "Give me the facts and I [the judge] will give you your right/justice!"

[54] L. Gumplowitz, Rechtstaat und Socialismus (1881) as cited in Pashukanis, *supra* note 17 at 80, n. 11 and H.J. Berman, *The Background of the Western Legal Tradition in the Folklore of the Peoples of Europe,* 45 Chic.L.R. 3 (1978).

[55] Cf. H.L.A. Hart, Concept of Law (1961), at 89. "It is, of course, possible to imagine a society without legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of 'custom'."

Hart characterizes these customary rules as 'primary rules of obligation' and goes on to discuss their substantive meaning and import. Here, precisely, he misses the point because the legal issue is not whether in such primitive social erupations there are any articulated and obligatory substantive rules of conduct. These rules, of course, do exist and maintain themselves through all kinds of group pressure.

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If the conflict is successfully resolved without resort to truth-finding, or even on a basis of totally false stipulation of facts e.g. in modern plea-bargains, this presents no fundamental problem in a system geared essentially towards conflict resolution.[56]

Only secondarily has truth-finding, in conjunction with the jury trial in the Common Law tradition, prompted the State to develop an informational filter of relevant evidence with its strict rules of evidentiary admissibility.[57]

The law of evidence, a fact rarely noticed, exists in the Anglo-Saxon legal systems – but does not exist in Continental legal systems. Here there are no

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However, these are anthropological considerations. From a legal point of view the question is how do these customary rules become legally, not psychologically and anthropologically, obligatory. The answer to this is, I think clear. These customary regulations become legal rules once they acquire a direct compulsory nature, i.e. when they are legally *enforced*. This will only happen in the context of legal conflict-resolution. Thus, Hart's 'primary rules of obligation' are in fact secondary to the procedural context in which they become enforceable. It is fatally misleading to consider the substantive rules as the origin of law. This is a trap into which many jurisprudential theorists from Kelsen to Hart have fallen – unaware of the much more modest functional (procedural) origins of everything legal. The jurisprudential hubris at the origin of this pitfall is the unstated (and unconscious) metaphysical premise that Law has to do with something transcendental, i.e. Justice –, rather than 'mere' conflict-resolution.

In fact, however, Hart's 'primary rules of obligation' are a substantive product of the slow procedural crystallization. Von Savigny's theory comes much closer to this reality when he says that 'law perfects its language, takes a scientific direction, and, as formerly it existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community', except that he, too, fails to see the humble procedural origins of this evolution. Von Savigny, *supra* note 27, at 28.

[56] The notorious California trial of O.J. Simpson, regarded by those who do not understand that, as a caricature of the adversarial criminal procedure, is in fact a good example of consistently maintained 'equality of arms' in criminal procedure. The final acquittal in this trial will seem absurd to those who consider criminal procedure as a truth finding device. Such a position, however, has strong moralistic implications. There are persuasive socio-psychological explanations for this moralistic attitude. *See* S. Ranulf, Moral Indignation and Middle Class Psychology (1938). This penetrating study of social attitudes concerning what Ranulf calls "the impersonal demand for punishment" has been almost totally overlooked by legal philosophers who would rather stick to psychological projections of their own middle class moralistic attitudes – contaminating in the process objective jurisprudence with purely subjective moralistic implications. Oliver Wendell Holmes's position to the effect that the criminal is simply sacrificed on the altar of general prevention is much more honest and, in addition, true. Nevertheless, such policy considerations are best kept strictly separate from "autonomous legal reasoning".

[57] The Enlightenment writers, and especially Montesquieu, were very fond of the jury's participation in legal procedures. After the revolution the French have in fact introduced the jury, but have failed to introduce the law of evidence. The consequence was the manipulation of the jury by parties to the extent that the jury aspect of the procedural system collapsed and was effectively abolished. *See* Bayer, The Collaboration of Laymen in Criminal Procedure (Sudjelovanje nepravnika u krivičnom postupku) (1943).

It is perhaps interesting to note here that the reformed Russian criminal procedure introduced the right to a jury trial for serious offences in ca. ten predominantly urban gubernatorial legal districts. The recent reform of the Chinese criminal procedure, while abolishing some inquisitorial aspects formerly received from the Soviet model and advancing human rights of criminal suspects and defendants in many respects, has not introduced the right to a jury trial.

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rules of hearsay, no doctrine of evidentiary presumptions, no rules on admissibility of evidence. It is curious, indeed, that there is on the Continent practically no legal epistemology such as developed in the systems where jury trial is a constitutional right of every defendant. The right to trial by jury is intimately connected with the development of the predominantly adversarial (accusatorial) criminal procedure of the Common Law countries. For obvious reasons, trial by jury is not compatible with the inquisitorial belief in truth-finding.[58] While it would be difficult to speak of democratic traditions in the context of criminal procedure, it is no accident that we find the right to a jury in the 13th-century Magna Carta. As a consequence, the Common Law tradition – except briefly under the Tudors – never experienced torture, i.e. it reversed to the jury trial after the IVth Lateran Council's prohibition of ordeals.[59]

In the American Constitution, in its Fifth Amendment, we find the privilege against self-incrimination as a right not to 'be compelled to testify against oneself'. There is ample constitutional case law on the question, limiting, for example, the privilege to testimonial evidence etc. Despite ample case law, however, the simple logical (jurisprudential) basis for the privilege has never been fully understood. There are prominent legal writers, for example, who openly admit that, 'intuitively', the privilege against self-incrimination seems necessary – but that the underlying logic of this indispensability is not clear.[60]

The exclusion of evidence tainted by the police's violations of a defendant's constitutional (human) rights in American law, however, was judge-made;[61] it

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[58] There are several factors of incompatibility between the truth-finding ideology and the trial by jury method. (1) Jurists' verdicts may be, from the syllogistic point of view, unpredictable and all the more so (2) because the verdicts are not reasoned out (explained). This in turn (3) precludes appeal on substantive (legal or factual) grounds and (4) shifts the emphasis on procedural violations as grounds for appeal. Since one does not know (and does not want to know) how juries decide their cases, this (5) liberates the jury's decision-making process from formal-logical restrictions and *de facto* makes the jury in some cases little *ad hoc* legislatures *pro hac casu*. In a sense trial by jury thus represents an invasion of the truth-finding procedure by democracy. No wonder then, since this democracy has to be bridled, that there was a need for an evidentiary filter of information, i.e. for the development of the law of evidence. But it is clear even at first sight that the right to a jury trial will be unpalatable to every non-democratic regime – if for no other reason than because the career judges can be controlled and made predictable whereas with juries this is practically impossible. The leading sociological study on jury performance (showing that juries in fact perform their functions very well indeed) is by Kalvin and Zeisel, The American Jury. At the root of political rejection of trial by jury, however, lie the less democratic, to put it mildly, political attitudes – translated into inquisitorial preoccupations. On this, *see* B. Zupančič, *The Crown and the Criminal*, 5 Nottingham L.J. 32 (1997). *See infra* note 72. *See also*, M. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. of Penn. L.R. 578-589 (1972/1973) and my critique in *The Privilege Against Self-Incrimination*, 1 Ariz. State L.J. (1981), at 8, n. 10.

[59] *See* M. Damaška, *The Death of Legal Torture,* 87 Yale Law Journal 860 (1978); and J.H. Langbein, Torture and the Law of Proof: Europe and England in the Ancien Régime (1977).

[60] D.D. Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 Iowa L.R. 829 (1969/1970).

[61] ... i.e. was arrived at 'by judicial implication' and not through direct mandate of constitutional norms. Justice Frankfurter in *Wolf v. Colorado*, 338 US 25, 28 (1949). This, of course, is not true

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evolved through cases having to do with violations of other constitutional rights (probable cause,[62] searches and seizures etc.) – i.e. not only through cases having to do directly with forced testimonial self-incrimination.

Yet, practically all invasions of privacy by police make the suspect an unwilling source of evidence against himself or herself. This, after all, is the purpose of these incursions. The privilege against self-incrimination in this broader sense should – at least in American constitutional law – be distinguished from the privilege *stricto sensu*. From *Mapp v. Ohio* to all other cases involving one form or another of self-incrimination, the exclusionary rule evolved and extended its effects through all the concentric circles of privacy.[63] Privacy, defined as the right to be left alone, is clearly the common denominator of many constitutional or human right concerns. Even in the purely positivistic sense, privacy turns out to be the penumbra of many heretofore developed aspects of the Bill of Rights in United States or any other constitutional or international repertory of human rights. The dispensation is specific only inasmuch as it preserves the individual procedural subjectivity of the criminal suspect or defendant. This opportunity preserves his or her independent standing to participate as an equal procedural opponent in his or her conflict with the State. Concomitant to this direct and specific human-rights-effect of the benefit is, as outlined above, the indirect significance it has for the general preservation of the legitimacy of the rule of law.

Still, we would look in vain there for a clear and definite articulation as to the logical *reasons* that make the privilege constitutionally unavoidable. Seemingly the assumption has been all along that the exclusion of evidence obtained in violation of constitutionally prohibited searches and seizures, in violation of the right to counsel etc., was to be explained simply as a deterrent to police. Without a persuasive basic legal, jurisprudential etc. clarification – in addition to this instrumental (policy) role of the advantage and the exclusionary rule – there has consequently never been any persuasive answer to Justice Cardozo's famous (and misleading) aphorism *'the constable blunders and the criminal goes free'*. Absence of *synthetic* jurisprudential articulation and the open-textured nature of the exclusionary rule, arrived at on an *analytical* case-by-case basis and only through 'judicial implication', left the privilege as a

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if one understands that the Vth Amendment's privilege against self-incrimination directly requires the prevention, i.e. the evidentiary exclusion, of self-incrimination. *See infra* note 66.

[62] Probable cause as a bar to arbitrary arrest, detention and accusation was already decreed in Magna Carta's (1215) Section 38; it proscribed the introduction of (criminal) procedure by "lower judicial officials" against a suspect only upon own word and without witnesses to support such allegation(s). It is fair to say that a probable cause as an initial bar to searches and seizures and as constitutional right emanating from the presumption of innocence has been, in Continental constitutional law, rather neglected. *See*, more specifically, *Legitimatio ad Causam: the Comparison of Criminal and Civil Procedures (Legitimatio ad causam: primerjava med kazenskim in pravdnim postopkom)*, *in* B. Zupančič, The Law of Criminal Process (Kazensko procesno pravo) 249-275 (1991).

[63] These circles go approximately as follows: (1) inner mind, (2) body, (3) communications, (4) home, (5) cars etc.

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primary, prescriptive rule vulnerable to a similar case-by-case and step-by-step instrumentalisation and abatement.[64] The benefit as a principle is irreducible in its exclusionary effects and the exclusionary rule, as a mere policy will reduce the privilege to nothing.

In *Miranda v. Arizona,* 384 US 436 the US Supreme Court said:

> We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its truths go back into ancient times. Perhaps the critical historic event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber oath in 1673. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lillburn and John Wharton, 3 HOW. ST. ER.. 1315 (1673). He resisted the oath and he claimed the proceedings, stating:
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> Another fundamental rights I then contended for, was, that no man's conscience ought to be wrecked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretending to be so." Haller and Davies, The Leveller-Tracts, 1647-1953, p. 5 (1944)

On account of the Lillburn trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lillburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty.

Despite later restrictions imposed on the exclusionary rule, chiefly under Justice Rehnquist's misleading 'marginal utility' doctrine, it can be safely

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[64] This is a general problem concerning the open-textured and casuistic judge-made law: legal principles are discovered and judicially established, sometimes categorically as in Miranda, but academic writers in United States almost never search for theoretical reasons and justification for their existence. The anti-intellectual attitude characteristic of American law, what Unger calls 'low level analogy mongering', for example, leaves both substantive criminal law and criminal procedure in the United States utterly deprived of a solid and articulated theoretical justification. Professor Lawrence Freedman, the leading American legal historian, for example defends this general attitude as an 'open-textured' (as opposed to 'close-textured') constant readiness for change, presumably progressive, whereas Bickel, *supra* note 5, maintains that the life-span of a legal principle in constitutional law is one, at most two generations (of judges).

The open- or close-textured approach dialectic in judge-made law deserves a through jurisprudential investigation since the Continental approach is clearly in the other extreme: it is far too close-textured and often too conservative and incapable of progressive change. For historical explanation of this *see* von Savigny, *supra* note 7, who traces this to the 19th-century (Napoleonic) drive for codification and the consequent cutting off of the umbilical cord between the theoretically based (codified) law and 'the life of the nation'. There is probably a happy and equidistant ground between the open-textured anti-theoretical American approach on the one hand and the over-interpreted close-textured European approach on the other. The re-emergence of judge-made sources of law in Europe is probably part of the healthy convergence of the two legal traditions. *See* the delicate wording in *Selmouni v. France*, ECHR (1999-V) Series A, No. 25803/94, where the issue was whether or not explicitly to incorporate the UN Convention against Torture, Art. 1 definition of torture – or to leave the legal perception of torture 'open textured'.

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inferred from the above quotation that in 1964 the privilege against self-incrimination and the exclusionary rule were thought of as one and the same legal principle. The simple initial logic of the privilege against self-incrimination was the elimination from the eyes and ears of the judicial fact-finder (the jury) of everything that violated the freedom.

The exclusionary rule in this sense – despite its evidentiary origins – cannot be reduced to a simple evidentiary rule geared towards better truth-finding although, paradoxically, it does have that systemic effect – by preserving the adversarial 'equality of arms' and thus the impartiality of the process.[65]

Nor should this regulation be a simple procedural sanction[66] giving teeth to a basic procedural requirement.[67] All of the above side-effects of the exclusionary rule are secondary.

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[65] "An adversary presentation seems the only effective means for combating this human natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, they stand to explore all its peculiarities and nuances." L.L. Fuller, *The Adversary System*, *in* H. Berman (Ed.), Talks on American Law 44 (1971).

"Un bon juge est un bon juge qui doute" ["A good judge is a doubting good judge"] , i.e. impartiality derives from adversariness (ambivalence + passivity of the judge). J.-M. Coulon, *La conscience du juge d'aujourdui*, *in* J.-M. Carbasse & L. Depambour-Tarride (Eds.), La conscience du juge dans la tradition juridique européene 337 (1999).

[66] In procedural law generally, and especially in criminal procedure, it is often forgotten that a rule (a disposition) without a sanction is a *lex minus quam perfecta*, i.e. a mere recommendation. Both in Anglo-Saxon, as well as in Continental criminal procedures, the rules are predominantly such *leges imperfectae*. The exclusionary rule is the only serious exception. In this sense, it is reasonable to say that there is no criminal procedure to speak of unless the exclusionary rule is there to guarantee the respect of its regulations by police, prosecutors and the judges. Without such strict procedural sanctioning the process collapses into substantive law. It then becomes ancillary to the truth-finding goals implicit in substantive law (with all reservations as to the 'truth' described above) and loses its natural conflict-resolution physiognomy. Since the impartiality of the jury or the judge depend on the balancing effect of the two partialities juxtaposed in the context of the procedural 'equality of arms' – the objectivity (fairness, detachment, unbiased or unprejudiced approach) of the truth-finding process also suffer. In the end, we may get the characteristic inquisitorial deformations of fact-finding and even the circular self-referential effects epitomized in the myth of witchcraft.

The traditional Continental reference to procedural law as 'adjective law' – purely ancillary to the 'substantive' law – was theoretically acceptable so long as the constitutional and human rights of criminal defendants were not explicitly recognized as substantive rights, the privilege against self-incrimination amongst them.

Nevertheless, every sanction, substantive or procedural is logically secondary to the disposition (the rule) and secondary in terms of time to the violation of the regulation. Even in pure Hegelian terms the sanction is secondary to the transgression of the rule because it is the negation of the rule's negation i.e. its affirmation. F. Hegel, The Philosophy of Right (1821), at para. 100 *et seq*. The application of the exclusionary rule at an evidentiary hearing out of sight and hearing of the jury, however, is a true *anticipatory prevention* of self-incrimination. (Hegel's negation of negation of the rule's violation would neither prevent self-incrimination nor reinstate the *status quo ante*.) Since the exclusionary formula applies within the virtual reality of the controlled world of orderly procedure this makes the timely **prevention** of self-incrimination possible – something which is impossible in the real world of regulation breaking to which the substantive (criminal,

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The primary function of the barring of evidence tainted by the implementation of force against the defendant is to prevent the subversion of legal legitimacy of the whole idea of adjudication as a legitimate surrogate of the use of might in resolution of controversies. The importance both of John Lillburn's trial in 1637, as well as of *Miranda* (1964) 327 years later, is that they brought into *public* law what has always been taken for granted in *private* law. In other words, these two cases affirmed the lofty principle, spanning literally across centuries, that it should not matter that the plaintiff in criminal law is the State with its repressive *raîson d'état.*

G. Comparative and International Aspects

In the second half of the 20th Century, the exclusionary rule became much better established in American constitutional criminal procedure law; subsequently it penetrated into other legal systems and into international law.

Even in the 1960s, several Continental mixed-type, but predominantly inquisitorial, criminal procedures – introduced this law as a procedural sanction for the police's and prosecutors' violations of the privilege. This transplantation of a typical Common Law institution – the inadmissibility of evidence in a jury trial – required some modifications. In a purely adversary trial all evidence is *orally* presented to the jury, i.e. anything not presented is incapable of influencing the outcome of the trial. In such a trial, there is no *dossier*. In a Continental procedure, the *dossier* presented to the trial judge is the repository

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civil etc.) law generally applies. This is why we say that the exclusionary rule **is** the privilege against self-incrimination. *See* more on that in my article *The Privilege Against Self-Incrimination,* 1981:1 Arizona State Law Journal 1-25 (1981). This doctrine concerning the identity of the exclusionary rule and the privilege against self-incrimination was explicitly adopted by the Supreme Court of Colorado in *People v. Briggs*, 709 P2d 1911 (1985), opinion by Justice Neighbors.

[67] *See* Y. Kamisar, *A Reply to Critics of the Exclusionary Rule*, 62 Judicature 2, at 55-84 (1978):

> A court, which admits the evidence in such a case, manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected to 'believe that the government meant to forbid the conduct in the first place?' (Paulson, The Exclusionary Rule and Misconduct by the Police, 52 Crim.L.C. and P.S. 255, 258, 1969, in Police Power and Individual Freedom 87, 90. Chicago, Aldine, Sowle, Eds., 1962).
>
> Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the 'flagrant' or 'willful' does not allow the court to do so. A court which admits the evidence in a case involving a 'run of the mill' Fourth Amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search or seizure. It demonstrates 'the contrast between morality professed by society and immorality practiced on its behalf.' (Frankfurter, J., dissenting in On Lee v. US, 343 US 747, 759 (1952)).

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of all police and judicial investigation performed during the inquisitorial phase of the procedure.[68] The strict exclusion from the *dossier* would, in fact, prevent self-incrimination. The exclusionary rule incorporated into the 'mixed' criminal practice would additionally mean that the trial judge, while reasoning out his/her judgment, could not refer to tainted evidence. If they did, this would be ground for appeal and the judgment would have to be reversed *ex officio* by the appellate court.

Empirically, however, the introduction of the exclusionary rule in Europe never had the dramatic effect (upon lowering the official abuse of criminal suspects and defendants) it had in American criminal procedure. The reasons for this are not entirely dissimilar to the motives behind instrumentalisation of the exclusionary rule in the United States, i.e. the decree was reduced to its formal effect and it, therefore, failed to deter the police. Both in Europe and in the United States the interests of crime repression, in other words, prevailed over the just and legal issues, i.e. the constitutional rights of defendants.

The minimisation of the effect of the exclusionary statute in Continental criminal procedure had also to do with the fact that it was transplanted from an entirely different (adversary) procedural environment and had no evidence law, no 'principle of orality', no separate evidentiary hearings and no differentiated case-law to support its integration into the criminal system. In the *Wong Sun* case, for example, it was held that derivative evidence obtained on the basis of the original violation of a procedural-constitutional right of the defendant, i.e. secondary evidence that could not have been obtained were it not for the primary violation by police, must *also* be excluded. The definition of the causal, *sine qua non link* between the contaminated primary and the secondary 'fruits of the poisonous tree' – and many other variations on the question of connection between the two – was developed in many Supreme and Circuit Court cases. On the other hand, the exclusionary law in Europe continued to wither as an incongruous and lonely evidentiary rule in a mainly inquisitorial context. As a foreign evidentiary body, the exclusionary rule was thus tacitly rejected by the immune system of the inquisitorial mentality of judges who never in their lives had perceived themselves as arbiters in a conflict between the individual and the State.[69] The latter fact has, of course, to do with an eminent aspect of

[68] Legal theorists speak of two 'principles' here. The 'principle of orality' is juxtaposed to the 'principle of inscription'. The latter prevails in the investigatory phase before the investigating magistrate and its product is the *dossier*. The fiction is then maintained that the 'principle of orality' prevails during the trial phase, i.e. that nothing that is not orally presented to the judge and the assessors is valid evidence. The practical effect, however, is far from this process as the trial judge reads the *dossier* prior to the court hearing and, since he/she is actively involved in articulating the proofs during the trial, he/she selects the proofs which are considered relevant on the basis of prior conjectures. Thus in the end 'the principle of inscription' clearly prevails over 'the principle of orality' even during the presumably oral trial. Lon Fuller's critique of this, *supra* note 65, is fully applicable here.

[69] The investigating judge, the protagonist of the Continental criminal procedure, is a characteristic personification of the inquisitorial mentality. While perhaps less biased and more 'professional' than police investigators, he/she is nevertheless also an embodiment of the presumption of guilt. How can he/she be expected to remain impartial and even to bend over

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democratic and constitutional tradition, i.e. the (insufficient) independence of the judiciary from the executive branch.

For example, Article 15 of the UN Convention Against Torture (hereinafter CAT) explicitly requires all evidence obtained through force to be made inadmissible.[70] The same applies to the 'fruits of the poisonous tree'. As a member of the UN Committee against Torture between 1995 and 1998 I had occasion to observe the empty and formalistic resistance of many State Party delegations to CAT, i.e. the bureaucratic incomprehension of the capital importance of the preservation of the privilege and the exclusionary rule in their respective legal systems. An explicit agreement was articulated in official exchanges with the UN Commissioner for Torture, Professor Nigel Rodley, in Spring 1998, to the effect that the prohibition of corrupted evidence was clearly the most effective way of preventing torture. Yet, the Committee perceived no visible progress on the part of State Parties to CAT in terms of making an effort to reform their criminal procedures. When the question of strict exclusion was raised with certain European countries, we encountered stiff official resentment.

The answer of practically all countries with Continental criminal procedure rules (from Europe to South America to Asia) was that the judges are forbidden to refer to tainted proof – otherwise part of the procedural file (the *dossier)* – when reasoning out their written judgments. From a serious epistemological point of view, however, this is not a serious 'argument'. Firstly, it is obvious that arriving at a ruling is an entirely different matter than *ex post* explaining it.[71] Secondly, for the purposes of appeal, the judgment may be sufficiently explained through using other facts and derivative evidence, i.e. the 'fruits of the poisonous tree'. Thirdly, if we extend the metaphor, once the judge had eaten from 'the poisonous tree', there is no erasure of this effect from his/her consciousness. Fourthly, the career judges are 'professionally deformed' and are capable of filling-in the obvious *lacunae* in the evidentiary material – even if the evidence was in fact deleted from the *dossier* before it reached them, whereas the lay judges, the assessors sitting together with the professional judge, rarely oppose him or her. Many other considerations of similar kinds could be made here – but they would all boil down to one conclusion. The part-inquisitorial, part-adversarial European criminal procedure is unsuitable for consistent protection of the privilege as a human right.

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backward applying the exclusionary rule. In terms of the rather mythical convergence of the presumed 'convergence' of the inquisitorial and the adversarial procedural systems there was at least one theoretical admirer of the institution of the French investigating judge in the United States. *See* L.L. Weinreb, *Denial of Justice* (1977).

[70] The Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (1465 UNTS 85), entered into force on 26 June 1987 and was signed by 74 parties and has currently 141 signatories. It has a sophisticated definition of the application of force (Art. 1) and it requires the State Parties to integrate it into their respective legal systems. Likewise, it also explicitly requires the States to integrate the exclusionary rule into their criminal procedures at least inasmuch as evidence is the direct or indirect product of torture. *See generally*, B. Zupančič and A. Zidar, *Konvencija o torturi,* 1998 Hrvatski ljetopis za krivično pravo.

[71] In philosophy this point was first raised by Bishop Berkeley.

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Another observation from the UN Committee against Torture was, unsurprisingly, that countries with the inquisitorial tradition tend to have a higher incidence of torture and other official abuse. This raises an interesting issue as to what extent do the questioning attitudes of police, of prosecutors and of judges manifest an acute absence of a true democratic tradition. As we have indicated in the Introduction, the rule of law itself, and the privilege as an integral aspect of it, are inherently democratic.[72] In contradistinction to this the inquisitorial process – because it treats the suspect-defendant as an object and places the burden to undo an authoritarian presumption of guilt etc. on him/her – is intrinsically authoritarian.

On an international level – at least inasmuch as torture is the gravest abuse concerned – this point is no longer debatable. Both the privilege and the exclusionary rule are now explicitly required by international law. The problem, therefore, lies in the complex repercussions that the required integration of both should trigger in the respective legal systems. The signatories to CAT probably did not realize that the prevention of applying torture is merely the tip of the inquisitorial iceberg and that CAT – probably as the only UN Convention – directly affects the whole philosophy of criminal procedure. While the eradication of persecution may seem to be a political and cultural ambition, one simply cannot separate this ambition from the procedural context generating the compulsive and authoritarian tendency towards 'truth-finding' and thus the official abuse, the inhuman and degrading treatment by the police towards whom they think guilty of crime/s. The required *effective* exclusion of tainted data, however, simply cannot be merely a political ideal; it requires serious structural and consistent changes in the whole system of criminal procedure.

In very few countries today the police may still act sadistically and abuse criminal suspects simply for the pleasure of it but in many places torture and other forms of official abuse are employed by the police to extract confessions and other information concerning the suspected offence from guilty parties. In all legal systems, adversarial even more than inquisitorial, the police are put into a position in which they must gather information leading to arrest and conviction. Nevertheless, while this is a natural scope of the functions of the police, there is also a natural *time limit* to their powers in any investigation as an *ex parte* activity of the executive branch of government.

As long as these law enforcement instituitions are only trying to find out what happened and as long as their investigation is not yet *focused* on a particular suspect, they are within their proper sphere of duty, because there is yet no prospective defendant and thus there is yet no legal controversy. *Unfocused* investigation means trying to find out 'who's done it', i.e. there is yet no 'passively legitimized' procedural subject.[73]

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[72] More specifically, one speaks here of the attitudes *vis-à-vis* authority. *See* B.M. Zupančič, *The Crown and Criminal: The Privilege Against Self-Incrimination (Towards the General Principles of Criminal Procedure),* 5 Nottingham L.J. 32 (1997) or 9 European Review of Public Law 11 (1997), *supra* note 58.

[73] *Legitimatio passiva* in Continental Roman law tradition is 'passive standing'. It may be

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From the moment, however, the police have zeroed in their attention on a particular suspect and have begun, in a coercive custodial setting, to question him/her as the probable *future defendant* in a criminal case – they are *ultra vires*. Such interrogations must – always and in all legal systems – mean that the police are attempting to use the suspect as a source of evidence against himself/herself. Consequently, such custodial interrogations[74] are of necessity an anticipatory simulation of the future criminal trial.[75] To permit the police in the phase of focused investigation to procure evidence from *other* sources may be judicially acceptable, just like it is admissible in civil procedures for both parties to gather their own evidence, i.e. to carry their future burden of proof.

What is not acceptable, because it is not logical, is to permit one party (the police) to gather evidence through forcible intrusions into the privacy sphere of the other party (the suspect, the future defendant). Both the American and the European models of criminal procedure have this one problem in common.

The question is, therefore, what would a consistent and total application of the 'equality of arms' principle make of criminal practice – whether Continental or American. Such a course of action is not difficult to imagine, as we pointed out several times so far (ancient Roman or a modern one, is a very close approximation indeed of such a consistent 'equality of arms'). It follows that the changes required in the criminal system – in order to reestablish a balance of power between the plaintiff and the defendant – would all have to do with the abolition of prerogatives of the State *qua* State as plaintiff in criminal

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legitimatio passiva ad causam or *legitimatio passiva ad processum*. These civil procedure terms are very difficult to transplant into the criminal process as here the defendant disputes his/her 'passive standing', i.e. he/she must, for example, maintain throughout the trial that the police have not apprehended the right person. The constitutional variance of *legitimatio passiva ad causam* is the probable case test as a bar to unfounded violations of privacy by the police.

[74] 'Custodial interrogation' is a term developed in the series of cases cited *infra* note 75. There are borderline trials in which it is not entirely clear whether the suspect was or was not free to leave, i.e. whether he or she was in fact arrested. From the point of view of the argument developed here, the arrest itself, of course, is force and if the privilege were strictly applied, the confessions and other evidence obtained in custodial settings would all be in violation of this benefit. Again, the prima facie absurdity of such an argument fades if transplanted into the context of a private controversy and civil procedure. What would we say of a civil process in which one party were permitted to arrest and detain the other party and thus obtain the evidence leading to its eventual defeat...?

[75] The distinction between focused and unfocused investigation was developed in *Spano v. New York*, 360 US 336, 1959, a case that preceded, *Escobedo v. Illinois*, 378 US 478 (1964), *Miranda v. Arizona*, 384 US 436, 1966, etc. The latter two cases do not explicitly concern the privilege against self-incrimination, i.e. they refer to the suspect's *right to counsel immediately after arrest*. The presupposition is, that arrest, because of the required probable cause, is a clear sign of a focused investigation. Consequently, incommunicado custodial interrogation by the police is no longer 'trying to find out who's done it'. Rather, such questionings are an attempt at making the suspect an 'unwilling source of evidence against himself/herself'. The right to lawyer at this 'critical stage' is simply a buffer to forced self-incrimination. This trend culminated in the murder case *Brewer v. Williams*, 430 US 387 (1977), where the police first prevented the lawyer from being present and then persuaded – with the so-called 'Christian burial speech' – the deeply religious defendant into showing them the body.

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procedure. These prerogatives, moreover, have already, for the most part, been abolished in the legally controlled modus operandi and its 'equality of arms' (trial).

Even in the mixed formula with strong inquisitorial elements in the judicial investigation phase, human and constitutional rights of criminal defendants are for the most part scrupulously respected. However, all this *post factum* respect means little because of the 'efficiency of police truth-finding'. The duplicity of this procedural 'justice' consists in the schizophrenic split between pre-trial procedure and the trial itself, i.e. in the intentional 'unawareness' of the career judges who ignore and condone all kinds of abuse by the police.[76] This is why Justice Goldberg was so right when he said that unless the rights of the defendant, and especially the right to have the counsel present immediately after arrest, are respected at the stage of focused police investigation – the remaining method is nothing but an appeal to what had happened at the police station. The true 'revolution' in criminal procedure thus consisted in abolishing this schizophrenic split and in the legal recognition of the empirical fact that the controversy between the defendant and the state begins the moment the police have focused in on a particular suspect and have begun to question him/her.

If the police powers were abolished from the moment their investigation hones in upon a particular suspect this would mean that further evidence – and especially everything potentially self-incriminatory – would then have to be gathered in the adversarial context of criminal procedure. Official and legal course of action, in other words, would take over much of what is now happening at the police station. There would be no coercive custodial interrogation. The suspect would still be questioned, but only in adversarial context i.e. in presence of the judge or the jury.[77] One can even imagine the transformation

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[76] Most of these criminal judges, if sincere, would respond that they have little choice but to condone police violation of the privilege if they wish to see the justice done in the specific cases before them. What this really means is that pure adversarial, or even mixed procedure, do not satisfy the repressive needs. In the end the criminal justice system takes away with the left hand what it purports to give with the right hand. Of course, as anomie statistically rises in society these – short term and counter-productive – repressive needs also rise. This triggers political changes and more strict judges are nominated to supreme and constitutional courts. The 'truth-finding' efficiency of the criminal justice system is enhanced, false acquittals are avoided and, in the ideal scenario, all guilty criminals are punished. So, one might say, is there anything wrong with this ideal situation? From the analytical point of view, i.e. on a case by case basis, nothing is wrong. On a synthetical, abstract level of 'society', 'legal system', 'justice' etc. level, however, this repressive success causes a long-term decline in 'normative integration' (sociologically speaking). Since most people refrain from committing crimes because they have internalized institutionalized values, disruption of normative integration really means the relative increase in anomie. Since anomie, social and internalized, is the main statistical cause of crime in society, the long term effect of all this is the rise of crime rates and further rise of repressive needs. The widening spiral of this positive feedback subsystem, of course, is just one 'cause' among many with which it interacts to produce statistically stable crime rates.

[77] The length of police detention immediately following arrest (detention on remand) now varies between 24 and 48 hours in most countries. The shorter this period the lesser the probability of forced self-incrimination. The above mentioned 'duplicity' of the criminal justice system is proven by the fact that every repressive regime tries to lengthen this period because the police

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of the institution of the Continental investigating magistrate into a special judge supervising the 'equality arms' in this pre-trial stage.[78]

In discussing all this one must keep in mind the reason for which the problematic self-incriminatory elements of criminal procedure historically emerged in the first place. Firstly, it is not exactly *natural* for the State, as the absorbent of all physical force in society, to submit to procedural equality, i.e. to an equally powerless status in a legal controversy such as criminal methodology. Nevertheless, the historical trend has been exactly in this direction. There is, secondly, a significant difference between the State's interest in judicial resolution of private controversies on the one hand and repression of crime on the other. As far as private controversies are concerned, the State's attention does not *in principle*[79] lie in such or other substantive outcomes – as long as the controversies are peacefully solved. In criminal matters the State feels directly threatened because crime, to say the least, disrupts social division of labour. The State cannot simply shrug its shoulders and say that it does not have a stake in the arrest, conviction and punishment of all criminals. Additionally, of course, there are social and political pressures to that effect. There is, consequently, an internal contradiction – between human rights and efficacy of repression – built right into criminal procedure, such as does not burden civil practice. This is a contradiction between procedural and substantive justice and thus, the rising curve of procedural justice cuts through the descending curve of substantive efficiency. There is perhaps, superficially speaking, an optimal intersection of the two curves.

The basic contradiction concerning the incompatibility of the two functions, however, persists. We cannot go into this extensively, but there have been many

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know fully well that this is their only chance to use the suspect as an unwilling source of information against himself/herself. The awareness is age old in English law where *habeas corpus (ad subjiciendum)* writ enabled the judicial branch to procure 'the body' of the defendant from the executive branch. *Habeas Corpus Act*, adopted by English Parliament in 1679, is the first comprehensive Act concerning the rights of criminal defendants.

[78] The institution of the 'investigating judge' *(juge d'instruction)* developed out of the inquisitorial *inquirens*, i.e. out of a police function in judicial garb. This tradition as well as functional pressures, unfortunately, collapsed the judicial into the police function. Were it not for that, however, the judicial investigation could very well develop into a *buffer phase* of criminal procedure, except that, this would no longer be an *investigation* by the judge. The burden of proof and the risk of non-persuasion *(in dubio pro reo)* would at this stage, too, be squarely on the shoulders of the State. Cf. Weinreb, *supra* note 70. The term 'investigating judge' is an epistemological contradiction in terms. He/she who actively investigates must of necessity form a hypothesis – here of *guilt*, but that is a different issue – i.e. a tentative decision concerning the subject matter under investigation. A *decision*, even a tentative one, means cutting off the channels of information (evidence, proofs) such as bring information contrary to the nature of the formulation. *Impartiality*, an essential quality of being a judge, however, simply means that *all channels of information remain open as long as possible*. This is nicely indicated by the word '*pre*judice', i.e. jumping to conclusion before all relevant information is presented.

[79] We say 'in principle' because, clearly at least today this is an extreme position; there are many particular civil law situations in which the State has a vested interest in certain outcomes. Moreover, it is, of course, in the general State's interest that 'justice be done' in private controversies, too.

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attempts to transcend this opposition. There was George Herbert Mead's suggestion, in 1914, that the State should adopt a 'friendly attitude' *vis-à-vis* the criminal and then there was also the whole, *Defense Sociale* movement (from Enrico Ferri to Marc Ancel) which is now defunct. What was common to all of these actions was the attempt to take the problem of crime out of the legal context altogether and treat is as a form of individual and social pathology to be treated rather than punished. Unfortunately, all these good intentions paved the path for the worst of both worlds in juvenile justice (*parens patriae* doctrine), in civil commitment of mental patients cases, and, by extrapolation in 'normal' criminal cases. The executive branch of the State, in other words, is not to be entrusted with human rights. To some extent, this is also true of the judicial branch. The only way to protect them is to institutionalize the conflict between the individual and the State. Since the stakes in the outcome (liberty, privacy) are similarly high in civil commitment cases, in juvenile delinquency cases etc., they require the same level of protection against abuse. Imperfect as it is, criminal procedure with its potential for protecting human and constitutional rights still seems to be the optimal solution.

H. Conclusions and Implications

The basic argument we developed here covered the underlying logic of *forcible* self-incrimination.

But the far more acute problem we face today, unfortunately, is no longer only self-incriminating evidence extracted by torture and other ill treatments. Witness the current subversion of all levels of trust[80] in society brought about by many different kinds of self-incrimination and erosions of privacy based on deception and concealment.

None of these intrusive practices derive directly from the force applied to the victim transgressing invasion of his or her privacy. In English and American case law such invasions of privacy have been denoted as based on *guile*. Initially, in the 18th century, judicial cogitation was focused upon protection of property (home) as the *situs* of privacy. As the attention later shifted from the 'territorial' aspect, it became obvious that privacy was about 'people not places'.[81] Everything from eavesdropping, electronic wiretapping and bugging

[80] For an interesting appraisal of 'trust' as 'social capital' *see* F. Fukuyama, Trust, The Social Virtues and the Creation of Prosperity (1995).

[81] "The Fourth Amendment [protecting against unreasonable searches and seizures] can certainly be violated by ***guileful*** as well as by forcible intrusions in a constitutionally protected area [of privacy]". (Emphasis added.) *Gouled v. United States*, 255 US 298, 1921.

The first English case concerning privacy goes back to 18th Century: *Entick v. Carrington and Three Other King's Messengers*, 19 How. St.Tr. 1029, 1765. Lord Camden held there: "By the laws of England every invasion of private property [as a territorial aspect of privacy], be it ever a minute, is a trespass. [...] It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that the search for evidence is disallowed upon

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to different kinds of informants, stoolpigeons, *agents provocateurs* (entrapment by provocation) and many other new 'techniques' – now enable the police (and many others) to procure self-incriminatory evidence covertly and wholly without the use of force.

Moreover, these intrusions into individual privacy are no longer related only to incipient criminal procedure i.e. to self-incrimination proper. We now speak of the massive commercial, political, intelligence and police surveillance of everyone everywhere and consequently of capital diminution of personal privacy. Most of this surveillance never develops into criminal evidence, i.e. the subject of surveillance will never even find out that he/she has been divulging information against his/her interests. He or she does not even know that the knowledge is being used against him/her unless legally accused of anything leading to a criminal trial. Consequently, too, the procedural sanction of evidentiary exclusion is entirely inaposite.

The descent, however, to this massive and progressive loss of separate individuality, erosion of interpersonal trust, destruction of intimacy etc., was marked by a series of decisions made by the Supreme Court of the United States. In these conclusions the compliant and self-referential 'reasonable expectation of privacy' test proved to be a knife that cuts both ways. By this reasonableness test the courts effectively empowered themselves to decide which subjective expectation of privacy is 'objectively' reasonable and which is not.

As in many other constitutional reasonableness tests – increasingly pivotal to American constitutional adjudication[82] feigning judicial 'objectivity' – it simply

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the same principle. Then, too, the innocent would be confounded with the guilty."

Lord Camden's doctrine was then followed-up in the United States in *Boyd v. United States*, 116 US 616, 1886: "It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence, but it is the invasion of **his indefeasible right of personal security, personal liberty and private property [i.e. privacy]** [...] It is the invasion of this **sacred right** which underlies and constitutes the essence of Lord Camden's judgment." (Emphasis added.)

Later on in *Katz v. US*, 389 US 347, 1967, a case in which the police listened on a conversation carried on in a public phone-booth, the Supreme Court developed the doctrine of **reasonable expectation of privacy**, i.e. it abolished physical trespass upon private property as a criterion of violation.

The criterion of 'reasonable expectation of privacy' was adopted by the European Court of Human Rights thirty years after *Katz* in *Halford v. UK*, judgment of 25 June 1997: "There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a **reasonable expectation of privacy** for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case [...]." (Emphasis added).

[82] These tests (standards of judicial review of constitutionality), based on Art. II of the United States Constitution, are so far probably best condensed in *Equality Foundation of Greater Cincinnati Inc. v. Cincinnati*, CA 6, No. 94-3855, decided 5/12/1995), 63 LW 2706 (5/23/95).

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became less and less 'reasonable' for the individual in different private life situations to assume that he or she can expect privacy. People have psychologically internalised their constant exposure, i.e. they are by now sufficiently apathetic to take the progressive erosion of their privacy – often amplified and exploited by the 'free press', for granted. Even suspicious reactions to perpetual surveillance have all but disappeared, as if people have nothing worth to keep intimate any more. If this means that smugness and complacency have replaced personal distinctness, individuality, originality, rebellion and the possibilities for change, there are some ominous implications for human creativity, i.e. for the psychologically and socially indispensable processes called individuation.[83]

The liberal Western State has, by authorising and sometimes exploiting these deceptive incursions into privacy, receded to very un-liberal, sometimes proto-fascist, positions.[84]

Self-incrimination based on force at least leaves the *subject* of torture or ill treatment a choice, i.e. his/her 'consent' to self-incrimination may be forced but it is conscious.[85] Self-incrimination based on guile, however, cannot be said to

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There are three of these criteria (doctrines and they correspond to three different levels of alleged discrimination:

(1) The most stringent or **the strict scrutiny test** applies to judicial review of statues targeting a suspect classification such as race, alienage, national origin etc.: '*The law will be upheld only if it is (a) suitably tailored to serve (b) a compelling state interest*'.

(2) **The heightened scrutiny test** applies to legislative acts burdening a 'quasi-suspect' class, such as gender or illegitimacy (of birth) etc.: '*The law is presumed invalid unless it is (a) substantially related to (b) a sufficiently important government interest*'.

(3) The least strict is **the rational relationship test** applicable to social and economic discrimination issues: '*[It] inquires whether the classification at issue is (a) rationally related to (b) a legitimate government interest*'.

[83] Karl Jung describes this as a process of 'individuation', i.e. an individual's self-actualisation, self-realisation, the attainment of his or her particular subjectivity, individuality etc. Michel Foucault uses the word *subjectivation* derived from *subjectivité: Se dit de ce qui est individuel et susceptible de varier en fonction de la personnalité de chacun;* or, in Shakespeare's words "But above all else, my son, to thy own self be true."

Both of these processes, whatever they are called, are inextricably in tandem when it comes to original creativity, i.e. **there is no original creativity without original subjectivity**. If we reverse this commentary to sociological parlance, we get "the hegemony of dominant social consciousness", a term introduced by Antonio Gramsci in his Prison Notebooks – 1929 to1935 (1975), resulting in what Erich Fromm of the Frankfurt School called "the prototypical character."

[84] *See* Chomsky, *supra* note 6.

[85] Even the rudimentary legal psychology recognizes that a valid consent must have its cognitive and is volitive constituent. Perhaps the most interesting American case dealing with these aspects of consent is *Schnecloth v. Bustamonte*, 412 US 218, 1973. "Except where a person is unconscious or drugged or otherwise lacks lacks capacity for conscious choice, all incriminating statements–even those made under brutal treatment- are 'voluntary' in the senseof representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' [sine qua non] cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." P.M. Bator & I. Vorenberg, *Arrest, detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66. Colum.L.Rev. 62, at 72-73 (1966).

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have anything to do with 'consent' of any kind. The *object* [86] of eavesdropping etc. does not even know that he/she has been giving out information which could be used against him/her in a court of law. Even in purely legalistic language, consent to anything may be vitiated unless there is free volition and full cognition. Torture subverts volition because it makes the subject consent to something, e.g. confessing, giving information, which he/she would not give out without this kind of pressure.

In terms of respect for personal dignity, however, deception, is doubly subversive because it wholly eliminates cognition and consequently precludes all willed resistance to intrusion. In other words, while torture only *distorts* volition, guile *eliminates* both the surveyed victim's cognition as well as volition.

Thus the first question to raise is, why does the basic logic precluding forcible self-incrimination not preclude guile, deception etc.

The answer to that is short and clear. Historically, as a system, the rule of law has always been a very basic substitute for force *alone*. In other words, law as a social antidote for brute physical power and force merely *shifts the criteria* for conflict-resolution from a natural combat to artificially enforced logic. Its original, rather primitive, teleology does not go much beyond that, i.e. substantive justice and the ethics associated with it are very much, as we said before, a secondary by-product to the primary Hobbesian state-pragmatism.

Layer after historical layer of these secondary ethical deposits created an illusion, albeit imbued with culture and civilisation that law is not only about procedural fairness but also primarily about what is in fact secondary and derivative: substantive justice, ethics, honesty, substantive fairness etc.

The simple jurisprudential impossibility along with immense societal repercussions for privacy, lead to the conclusion of guile being incompatible with the rule of law and thus a disturbing sign of the ethical barrenness of the historical and etiological foundations of the State and its rule of law.

As indicated by the relationship between positive law and equity or by the adage *summum jus summa injuria* – the relationship between formal logic (legal formalism) and substantive justice, too, has always been somewhat uneasy. Justice by formal logic has always been highly susceptible to abuse – by the parties, by the judges and by others. Law is not an exact empirical science where deception is quickly offset by the objective feedback of empirical experiment. Ruling by law has, even in the time of sophists, always, not only made dishonesty possible, but has also positively encouraged chicanery, trickery, guile, deceit, cunning, duplicity and other forms of non-violent behaviours. As physical combat was replaced by verbal combat in front of judicial and other authories, the advantage has always been on the side of the cunning and the deceptive. This was to be expected and is entirely understand-

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[86] We use the term 'object' rather than 'subject' because the individual here, if anywhere, is no longer an end in himself/herself. In terms of Kantian categorical imperative he/she has clearly become an **object** used for purposes other than himself/herself. I. Kant, The Foundations for the Metaphysics of Morals (1785) and The Critique of Practical Reason (1788).

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able. The likelihood of 'perversion of justice' largely derives from the necessary legal coding and decoding of minor premises ('facts') to make them fit the selected legal major premises ('norms').[87] Hence, the derisive, hostile and at best ambivalent, attitude we witness in all cultures *vis-à-vis* the sophist and counter-intuitive effects of legal formalism as a means of resolving personal conflicts in the State-sponsored framework of the rule of law.[88]

In basic anthropological terms we could say that the great Leviathan may have made civilisation and peaceful division of labour possible by substituting intelligence for brutal force – but that guile and chicanery unfortunately, are also part of this 'intelligence'.

In the second half of the 20th Century, there emerged the technology expanding the former semantic predilection for fraud inherent in the rule of law to qualitatively new technical possibilities for abuse. In ethical terms, the legal immune system has always been capable of protecting society primarily against brute force, torture etc. This immune system, however, based as it was on non-force, almost automatically led to guile. In this sense it could be said that the whole Western civilisation continues to function through all kinds of laudable surrogates of force – but also through deception.[89] To put it differently, law is immuno-deficient as far as deception is concerned.

Nevertheless, cases such as *Katz v. US* (1967) and *Hallford v. UK* (1997) do indicate that the constitutional and human rights' aspects of privacy are not entirely foreign to the rule of law – partly, of course, because the underlying logic of law as a surrogate of force has never been articulated.

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[87] For a description of this coding and decoding, *see* Berman, *supra* note 41. For reasons why this is inevitable, *see* Unger, *supra* note 23. I vividly remember a conversation I had as a young lawyer around 1976 with the late international law professor Myers McDougal. He said to me: *"If as a lawyer you cannot find a [legal] hook to hang your [factual] hat on, you're not worth the money they're paying you...!"*.

[88] There are innumerable cultural examples devoted to this ambivalence from Fyodor Dostoevsky's *Crime and Punishment* and *Resurrection*, Camus's *Stranger*, Kafka's *Process*, Strindberg's *Father*, Miller's *The View from the Bridge* to many others in which lawyers are negative heroes and the legal process is interpreted as a falsification of reality. Even in the Anglo-Saxon cultural context where law is better regarded we have Samuel Johnson saying that "it is perhaps good to study law, but it is not good to practice it". 'The current fashion of 'lawyer bashing' in the United States, however, did not induce legal writers to look for true reasons for this ubiquitous hatred of everything legal. Consider this ambivalent defense of legal formalism by a famous 19th-century German philosopher of law: "The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but … a clear derangement of the relationship between form and content. Precisely because his vision is directed to the core of things, … this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that inspires the whole institution of form and results therefrom – all this, I say, must make a disagreeable and repugnant impression on him. … Yet we are here concerned with a manifestation which, just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples." *2* R. Von Ihering, Der Geist Des Römischen Rechts 478-479 (1883) (Von Mehren, trans.).

[89] Freud's pessimistic views, for example, are evident in his *Civilisation and its Discontents* (Das Unbehagen in der Kultur (1929)). *See also* C.K. Clarke, Freud – A Biography (1997).

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The question emerges, therefore, whether deviousness subverts the rule of law the same way force corrupts it. Clearly, however, the subversion of the process of justice by guile – if it can be said to exist – does not occur on the same level as the subversion by force.

Significantly, perhaps, no one ever speaks of law as an emanation of honesty, i.e. non-deception.

If, in its inception, the rule of law simply means 'law and order', i.e. the eradication of *physical* violence as a means of conflict-resolution – does that not imply commitment to *moral* solutions of all kinds social and individual controversies and conflicts in society? Does that mean that 'justice' and the rule of law are not, on some even deeper level, an emanation of moral consistency, honesty, principled attitudes etc.? Are we as a civilisation ready to go beyond the Hobbesian premise implying that the rule of law is merely the secondary positive side of the far more important primary negative repudiation of physical violence? Or, in Hegelian language, have the quantitative (evolutionary) changes accumulated in the procedural historical phase of the development of the reign of law accumulated to a sufficient degree that we may be ready for a qualitative (revolutionary) jump to a truly ethical conception of the rule of justice?

The ingress of modern technology and its progressive encroachment of privacy have forced these neglected ethical issues on us. The question of the relationship between virtue and law must be reconsidered. This re-evaluation, however, can be neither ideological nor moralistic; it must be, in the best Hobbesian tradition, refined in its intelligence and brutal in its realism.

It is a simple historical and anthropological fact that legal *procedures* in all cultures were, first, 'invented' as a surrogate solution to anarchy and that, second, substantive criteria of 'justice' only *accumulated later* through this primary 'procedural' practice. This primary process did not, in itself, even require that the secondary substantive 'justice' be either logical or honest. Historically, logical consistency, *stare decisis* etc. were simply 'natural' in the sense that externally the *system* could not function and be credible unless it internally made some logical sense.

This internal logical integration of the justice system is similar to what psychologists, referring to the internal integration of human consciousness, call 'cognitive consonance'. If the rule of law is seen as an aspect of social *consciousness* (not conscience!), as a cloud of virtual reality that is relatively independent of social 'reality' – then 'justice' is simply 'cognitive consonance' *within* this system.

However, 'cognitive consonance' – while in tandem with relative 'justice' – does not in any sense imply 'honesty', 'virtue' etc. Cicero's dictum to the effect that law is the art of good and just *(Jus est ars boni et aequi.)* has never been taken quite so seriously. For similar reasons, the so-called 'natural law' has never really taken root in Western legal cultures. The relationship between law and morality is at best tenuous and is usually illustrated with two, only partly overlapping circles. Moreover, whenever in history the relationship between the rule of law and (someone's) morality was too intense, there have always been

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serious deformations.[90] The inherited procedural marring of the inquisitorial modus operandi derives from the 'morality' of the Catholic Church barring apostasy, blasphemy, schism etc.[91] In other words, law as a system derives from logic and experience, not from morality or ethics.[92]

Let us, therefore, restate the question here. Is it possible – irrespective of all kinds of policy, ideologies etc. – to compel the logical conclusion that guile, as opposed to force, is inherently incompatible with the rule of law?

In the context of autonomous legal reasoning the answer to this question is 'no' – and the empirical fact that invasions of privacy based on guile have proliferated out of control in the last decade would seem to confirm this answer. In our search of the answer to these ethical questions, we would have to delve much deeper into the nature of human association. In the end, I am afraid, we will not find an answer within the current jurisprudential frame of referenceas a thorough reassessment of even more 'primary' links between the rule of law and morality are required. Fortunately, in law, the lack of such theoretical answers is not an insuperable impediment either to judicial or purely ethical, considerations in cases concerning privacy or to be honest legislative policies.

The privilege against self-incrimination as a right to be left alone by the state is only one aspect of privacy as the right to be left alone of everybody by everybody.

In modern law, privacy is clearly an endangered species. It is constantly diminished by the State, by corporate interests, by the media etc. The autonomous subjectivity of the individual is put under pressure, his or her most basic and natural right to be what he or she chooses to be, is ignored and violated by social, political and business interests. What is left of that which is original and individual – is being raped by the collective interests of society or individuals. The hegemony of the dominant social consciousness and its indoctrinating effects threaten to produce psychological clones, Erich Fromm's 'prototypical characters' interacting in a *folie à million*.

However, one has to keep in mind that creativity is always individual, never collective. Creativity is inextricably linked to – we are tempted to say 'caused by' – genuine individuality.

Moreover, there is no moral development, beyond the conventional levels, without the freedom to become what one is meant to be.[93] There is no such thing as a 'collective morality', unless we are referring to inhibitions based purely on the fear of the Leviathan. This is what Foucault meant when he referred to peace under the constant declaration of war. Does it not surprise anybody that the current regressions of whole societies to mass murder and other atrocities are not wholly shocking?

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[90] For a recent, and failed, attempt at revival of natural law *see* J. Finnis, Natural Law (1985).

[91] *See* Bayer, *supra* note 36.

[92] Oliver Wendell Holmes's venerated article *The Path of the Law,* 10 Harvard Law Review 457 (1897), for example, makes this abundantly clear, as does Lon L. Fuller's book, The Morality of Law (1964).

[93] *See supra* note 28.

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This may have a double negative effect. The leveling of individualized moral development[94] – as a consequence of the hegemony of the dominant social consciousness – may lead to political inertia and the society of sheep being led anywhere.[95] In such a context, not only does the notion of democracy become meaningless but the presumed connection between democracy and the rule of law, too, is irreparably ruptured.[96] The recent example of such mass 'democracy' devoid of the rule of law in Serbia, induced as it was by the mass media, should be a warning sign to all of us.

The second negative effect of the advanced extinction of privacy has to do with the complexity of the division of labour in society. Today, the mere maintenance of this intricacy requires an ever increasing input, not of simple and routine work, but of creativity. Original new ideas are constantly needed merely to avert the effects of progressive entropy.[97] A decrease in originality (technical, scientific, artistic, humanistic etc.) may have disastrous effects as predicted by Lester Thurow in his *Future of Capitalism*.[98]

As the French jurist Maurice Duverger has shown in his *De la dictature*, there is an inherent reciprocity between freedom and ingenuity. The recent collapse of the Communist system is empirical proof of that. Human rights in general, and especially the right to be left alone, are not an indulgence or a benevolent concession of the liberal State. Freedom is a systemic attribute of modern society and is indispensable in the world so highly dependent on individual creativity and originality.

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[94] We do not use the term 'moral development' as a moralistic or deontological term, but as *terminus technicus* referring to Kohlberg's theory which derives from Piaget's evolutionary psychology. *See supra* note 28.

[95] The Serbian mass psychosis, for example, has been caused wholly by the Yugoslav mass media. However, this effect would have been avoided if the individual *moral resilience* to this hegemony were superior to what Kegan calls the "level of interpersonal matrix", i.e. the lowest normal level of moral autonomy. On this inferior level people distinguish between right and wrong by reference to 'what others say is right or wrong', i.e. the individual has no moral autonomy *vis-à-vis* the collective. *See also* W. Goldhagen, Hitler's Willing Executioners (1998).

[96] For an excellent presentation of this rupture, *see* F. Zakaria, *The Rise of Illiberal Democracy,* 76 Foreign Affairs 6 (1997).

[97] One compelling example of this is the pervasive presence in the environment of chemicals that mimic hormones. *See* T. Colborn, D. Dumanoski & J. Meyers, Our Stolen Future: Are We Threatening Our Fertility, Intelligence, and Survival? – A Scientific Detective Story. Introduction by Vice-President Al Gore, (1997). Unless original new solutions will be thought up soon we shall see disastrous demographic declines all over the planet.

[98] L. Thurow, The Future of Capitalism (1995). From a purely economic point of view Thurow, an economics professor at M.I.T., examines the current trends and predicts a slow relapse into the Middle Ages and the loss of civilisational potential – unless the social system becomes capable of generating new ideas and new challenges for itself.