THE RIGHT TO SILENCE: MAGISTERIAL DEVELOPMENT

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MODERN LEGAL systems, Continental and Anglo-American, agree that the criminally accused is not bound to confess his crime. Moralists today unanimously hold that this right to silence flows from the fundamental dignity of the human person and is adequately formulated by the ancient maxim *nemo tenetur prodere seipsum*.[1] History has shown that the law of obligatory self-incrimination was not observed in practice because it demanded too much of the individual.

Our present study concerns doctrinal development, one of the most pressing questions in contemporary theology. Taking the insights of Newman and Möhler, modern theologians such as Rahner and Lonergan have constructed theories of development. These attempts to refine the previously inadequate implicit-to-explicit explanation of development, besides possessing intrinsic value, also have far-reaching ecumenical import. Theologians, spurred on by Leo XIII's *vetera novis augere et perficere*, are more and more investigating the complex process of explicitation in a historical perspective. Traditional teachings of the Church are being reconsidered in their various stages of emergence. In the controversial area of contraception, for example, we have a pioneer study by John T. Noonan, who earlier had written on the problem of usury.[2]

In this article we will analyze the development of the right to silence in the magisterial pronouncements of the Church. That this is an intriguing problem can readily be seen from the fact that it was not until 1917, with the appearance of the Code of Canon Law, that the Church officially guaranteed this right of the accused in ecclesiastical trials. In shocking contrast, the right to silence was a working part of English law by the early 1700's and was incorporated into the Federal Consti-

[1] Cf. P. Granfield, O.S.B., "The Right to Silence," THEOLOGICAL STUDIES 26 (1965) 280–98.

[2] Cf. John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge, Mass., 1965); *The Scholastic Analysis of Usury* (Cambridge, Mass., 1957).

tution by the Fifth Amendment in 1791. The restriction of the exercise of the privilege against self-incrimination in Communist Russia, Iron Curtain countries, and some Latin American dictatorships indicates that this problem is of considerable current interest.

What are the significant statements of the teaching authority of the Church relevant to the right of the accused to remain silent when questioned about his crime? What is the historical background and value of these pronouncements? Can we derive from them evidence of a gradual, organic development of an enlightened view of man's rights? These are the questions which we hope to answer in this article. We will begin with a study of seven documents in chronological order.

DOCUMENTATION

"Such is the unity of all history that anyone who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."[3] This is especially true to anyone who attempts to trace the development of a particular doctrine. Therefore, to understand correctly the documents to be given shortly, it is necessary to see them in their proper historical perspective. A few introductory remarks about the background of Church law are in order.

It is understandable why the infant Church used the existing legal system when it could, since many of the ordinary acts of its daily administration were of the same nature as civil actions. Roman law, then, became the supplementary source of ecclesiastical law, and thus the expression *ecclesia viget lege romana*.[4] Pope Gregory I (590-604), for example, ordered that Roman law be used when no ruling in ecclesiastical law was found to answer a disputed question.[5] Later codifications of Church law, both the *Corpus iuris canonici* (the decretal collections) and the *Codex iuris canonici*, are basically Roman in spirit, as is the whole of European law.

In Roman law, under the Empire, criminal procedure took on many inquisitorial features, since the state spared no effort to stamp out crime. The defendant, faced with the absolutist character of law enforcement, was put in a precarious position. No longer could he, as in

[3] F. Pollock and F. W. Maitland, *History of English Law* 1 (2nd ed.; Cambridge, Mass., 1899) 1.

[4] Cf. A. Esmein, *A History of Continental Criminal Procedure* (tr. J. Simpson; Boston, 1913) p. 24.

[5] *Epist.* 13 (*MGH, Gregorii epistolae* 1, 47).

the earlier accusatorial procedure, refuse to reveal his crime and go unpunished. The state by means of torture would force him to confess. Confession became the goal of every judge. Torture, although it was criticized by many jurists, became the usual means for eliciting confession, and it remained an essential part of Continental criminal procedure well into the eighteenth century. One author explains its success when he observes that "it is a mode of procedure so humanly obvious that it would be difficult for one to imagine an age in which it could not be found."[6] There is no provision in Roman law for allowing the accused to remain silent, since in serious crimes the law demanded a confession for conviction.

With this background in mind, we can now proceed to the documents.

The Response of Pope Nicholas I to the Bulgarians, 866

In the middle of the ninth century, Prince Boris of the Bulgarians desired to have his people become Christians. He turned first to Constantinople but, dissatisfied with his discussions with the Church officials there, he sent a delegation to Rome in 866. They presented to Pope Nicholas I a list of 106 questions. On November 13 the responses were given. Response 86 deals with torture, which was used in the courts to get confessions from the accused. Pope Nicholas' reply is a formal condemnation of torture, which he says is against the divine and human law. His language is colorful:

> You say that in your land, when a thief or a brigand has been arrested and denies his guilt, the judge has him struck on the head and pricked in the sides with hot irons until he confesses. But neither divine nor human law can in any way admit this. For confession should be free; it should not be extorted by violence but voluntarily proffered. And then if after using these torments, you fail to discover anything, are you not ashamed and do you not see how impiously you judge? If, on the contrary, overcome by pain, the victim admits a crime he has not committed, on whom, I ask, falls the infamy of so great a wickedness if not on him who has forced the unfortunate man to lie? He who utters with his mouth what is not in his heart, may speak indeed but does not acknowledge guilt. Drop these customs therefore and wholly condemn what hitherto you have done from ignorance.[7]

Pope Nicholas' statement is significant, because it is such an obvious condemnation of the Roman-law tradition advocating torture. While

[6] P. Fiorelli, "Tortura," *Enciclopedia cattolica* 12, 338.

[7] *PL* 119, 1010. The English translation used here is from C. Journet, *The Church of the Word Incarnate* 1 (tr. A. H. C. Downes; New York, 1955) 295.

presuming the necessity of confession and making no allowance for silence, the Pope insists that it should be voluntary. His words about the unreliability of confessions exacted by torture echo the sentiments of the jurist Ulpian three centuries earlier.[8] In condemning the barbaric institution of the *quaestio* (which in time became synonymous with torture), the Pope clearly indicates his unwillingness to allow tribunals to use any and every means to procure confession. In view of his cultural milieu, his is a profound insight into human nature and only one step short of recognizing the moral impossibility of asking a man to condemn himself by his own words.

The Bull Ad extirpanda *of Innocent IV, 1252*

This "one step" unfortunately was not taken for many centuries, and torture, embedded deeply in the juridical structure of Europe, was not to be abolished by a single papal statement. While one may agree with Vacandard that torture "had left too many sorrowful memories in the minds of the Christians of the first centuries for them to dream of employing it in their own tribunals,"[9] nevertheless medieval justice, both civil and ecclesiastical, considered it an indispensable part of court procedure. The ordeal, with its hot iron, molten lead, and boiling water, became commonplace. From the eighth to the thirteenth century it was accepted by many local ecclesiastical courts with the approval of their bishops, who felt that it was a reliable way to discover the *judicium Dei*.[10] The popes, however, never approved of the ordeal and succeeded in finally condemning it in 1215 at the Fourth Lateran Council.[11]

[8] Ulpian, one of the principal authors of the Digest of the *Corpus iuris civilis* of Justinian, warned in a classic passage that evidence obtained through torture is frequently useless; cf. *Digest* 48, 18, 1, 23. Augustine's remarks on torture are likewise of interest; cf. *De civitate Dei* 19, 6.

[9] E. Vacandard, *L'Inquisition: Etude historique et critique sur le pouvoir coercitif de l'église* (Paris, 1907) p. 175.

[10] Cf. A. Michel, "Ordalies," *Dictionnaire de théologie catholique* 11, 1143 ff.

[11] The following popes spoke out strongly against the use of ordeals in ecclesiastical trials: Nicholas I (+ 867), *PL* 119, 1144; Stephen V (+ 891), *PL* 129, 797; Alexander II (+ 1073), *PL* 146, 1406. Canon 18 of Lateran IV reads thus: "Nullus quoque clericus rottariis aut balistariis aut huiusmodi viris sanguinum praeponatur, nec illam chirurgiae artem subdiaconus, diaconus vel sacerdos exerceant, quae ad ustionem vel incisionem inducit, nec quisquam purgationi aquae ferventis vel frigidae seu ferri candentis ritum cuiuslibet benedictionis aut consecrationis impendat, salvis nihilominus prohibitionibus de monomachiis sive duellis antea promulgatis."

The papacy in the thirteenth century, however, faced with the revival of Roman law and the practice of torture in the civil tribunals, and above all anxious at the presence of virulent heresy in the Church, approved the use of torture by the secular arm against heretics. For a long time the Church hesitated in advocating physical coercion in dealing with heretics.[12] In time, the threat of excommunication and other spiritual penalties failed to control the fanatical tendencies of the heretics and more severe methods were deemed necessary.

The heresy of Catharism made this expedient. Catharism first appeared in the eleventh century and soon spread throughout Europe. Described as "an altogether alien and contradictory religion into which some Christian terms had been forced,"[13] Catharism denied the Incarnation, the Resurrection, the Mass, and the sacraments, and was hostile to all ecclesiastical discipline. This heresy so endangered the state and the Church that its supression became a political necessity. Heresy, besides being a serious sin, was also considered a grave offense against civil authority.[14]

On May 15, 1252, the papal Bull *Ad extirpanda* of Innocent IV decreed that civil power is bound to force heretics by torture to admit their error and denounce their accomplices. It was sent to civil and religious authorities of Romagna, Lombardy, and the March of Treviso. Law 25 of the Bull states:

> Since heretics are really brigands and murderers of souls and thieves of God's sacraments and the Christian faith, the secular power or the ruler is bound to force, without loss of limb or danger of death, all heretics he apprehends to expressly confess their errors. He must also force them to reveal other heretics whom they know, their defenders, just as thieves and robbers of temporal things are bound to reveal their accomplices and to confess the evil deeds which they committed.[15]

Innocent IV states explicitly that it is the law for criminals to confess their evil deeds and to reveal their accomplices. He applies this to heretics ("thieves . . . of the Christian faith"). In both cases there is no thought of the accused's appealing to his right of silence. Such a

[12] Many felt that spiritual power alone should be used in punishing heretics; cf. the Council of Reims in 1049 and the Council of Toulouse in 1056 (Mansi 19, 737, 849).

[13] M. L. Cozens, *A Handbook of Heresies* (New York, 1945) p. 60.

[14] Cf. A. S. Tuberville, *The Spanish Inquisition* (London, 1932) p. 3.

[15] *Bullarum, diplomatum et privilegiorum sanctorum Romanorum pontificum Taurinensis editio* 3 (Turin, 1858) 556.

possibility was completely foreign to the legal conscience of the time. The solution proposed is quite simple: the accused must confess his crime; if he does not, then the court must use torture. It is obvious that if the court can torture the accused in order to elicit a confession, then a fortiori the accused must be obliged to confess his crime when legitimately questioned by the judge.[16] Otherwise you would have the paradoxical situation where the court forces someone to do something which he is not bound to do.

Theologians felt that torture was necessary for the suppression of crime and that individual interests must be sacrificed to the common good. St. Alphonsus (1696-1787), for example, did not object to its use, but he added that it should be used only in serious crimes where complete proof is impossible without a confession.[17] Torture was to be used when all other means failed. However, St. Alphonsus took a more lenient view in solving the practical problem of the confessor's absolving an accused person who is unwilling to confess his crime. He states: "All rightfully agree that if the accused is in good faith, and it may be thought difficult to persuade him to confess his crime when questioned by a judge, the confessor ought to leave him in good faith."[18]

A vexing problem is to reconcile the statement of Pope Nicholas I with the decree of Innocent IV. Vacandard remarks that Innocent IV in recommending the use of torture certainly did not know the existence of the text of Pope Nicholas I and that he was conforming to the

[16] What constitutes a "legitimate question"? According to Cajetan, commenting on St. Thomas' *Summa theologica* 2-2, q. 69, aa. 1-2, for a question to be legitimate one of three conditions must be fulfilled: the accused must be under infamy (*infamia seu clamorosa insinuatio*) for the crime; there must be clear evidence that he committed the crime; and there must exist partial proof (*semi-plena probatio*) against him. Cf. *Sancti Thomae Aquinatis opera omnia, cum commentariis Thomae de Vio Caietani* (Rome, 1897) tom. 9, q. 69, aa. 1-2. These restrictions helped preserve the efficiency of Continental law procedure by admitting to trial only those cases that had genuine value. Once the state agreed to bring a case to court, there was a good possibility that a conviction could be made. Other theologians argue that the accused is not obliged to answer questions that are not legitimate or are not legitimately proposed. Cf. L. Lessius, *De justitia et jure* (Antwerp, 1612) lib. 2, c. 31, dub. 3, n. 8; J. de Lugo, *Disputationes scholasticae et morales* (Paris, 1869) tom. 7, disp. 40, sectio 1, n. 1.

[17] St. Alphonsus Liguori, *Theologia moralis* (ed. L. Gaudé; Rome, 1907) tom. 2, lib. 4, c. 3, dub. 2, art. 3, n. 202.

[18] *Ibid.*, dub. 7, n. 274. Cf. Lugo, *op. cit.*, n. 20.

customs of the times and following the practice of the civil courts.[19] Journet feels that there are two possible approaches to the problem.[20] First, he observes that historians might discover that torture was so much a part of the criminal procedure that it would have been most difficult for the Church to forbid its use. If the Church wanted the help of the secular power in suppressing heresy, it could hardly go against a practice of such long standing. In this supposition the Church would not have approved of torture, but in the light of the circumstances merely tolerated its use, with the hope that more just penal codes in the future would not require it. The other possibility is that historians may find that torture, far from being tolerated as a necessary evil, was positively approved and encouraged. In that supposition, the historian ought to condemn those who supported it and "to denounce a concession made to the powers of evil for which they alone should bear the responsibility before history, before the Church, and before God . . . ."[21] Journet cautions against concluding from the use of torture in dealing with heretics that the sanctity of the Church is affected. "The errors," he writes, "of the canonical power in purely particular decisions, due to the deficiencies of its ministers, do not touch her inner sanctity."[22]

The Catechism of the Council of Trent, 1566

Over three hundred years passed before there was another magisterial statement about the defendant's rights in court. When the Council of Trent met in 1545, there were already many catechisms in existence. However, the need was felt for a better manual of Christian doctrine which could be used by those beginning to study religion. The fathers of the Council ordered that such a catechism be drawn up and appointed St. Charles Borromeo to head a commission of theologians who were to undertake this task. This took place in the eighteenth session, Feb. 26, 1562. The theologians set to work on a catechism that could be used by children and uninstructed adults to prepare them for further religious education by giving them the rudiments of Catholic doctrine. On Sept. 11, 1563, the Council altered the original plan somewhat. They decided to make the catechism more thorough and com-

[19] E. Vacandard, "Inquisition," *Dictionnaire de théologie catholique* 7, 2061.
[20] Journet, *op. cit.*, pp. 297–98. [21] *Ibid.*, p. 297. [22] *Ibid.*, p. 304.

plete, so that it could be used by parish priests in instructing the faithful. The work was completed and approved in 1566 under the title *Catechismus ex decreto Concilii Tridentini ad parochos, Pii V Pont. Max. jussu editus.* Since that time it has been known by many names: the Catechism of the Council of Trent, the Catechism for Parish Priests, the Roman Catechism, or the Catechism of Pius V.[23] Under the Eighth Commandment we find mention of the defendant's obligation:

> In regard to an accused person who is conscious of his own guilt, God commands him to confess the truth if he is interrogated judicially. By that confession he in some way bears witness to and proclaims the praise and glory of God; and of this we have a proof in these words of Josue, when exhorting Achan to confess the truth: "My son, give glory to the Lord the God of Israel."[24]

In this text the accused who is in fact guilty is said to be obliged by the divine law ("God commands him") to confess the truth when he is questioned in court. By his confession he gives glory to God by respecting the virtues of truth and obedience. The Catechism states this in the form of a principle without giving any explanation. What is the exact meaning of "judicial interrogation"? Are there any possible exceptions to the principle? Must the accused confess his crime even when he faces the death penalty?

The Catechism gives no answer. Inevitably, there were theological commentaries on the Catechism which did treat these difficulties. The most famous of these appeared over a hundred years after the publication of the Catechism and was written in 1694 by the Dominican theologian Natalis Alexander, who followed the teaching of St. Thomas and Cajetan. He explains that before the accused can be legitimately questioned by the judge, there must first be some evidence, infamy (public knowledge), or partial proof that the accused committed the crime. When one of these is present, then the accused must confess the

[23] Cf. E. Mangenot, "Catéchisme," *Dictionnaire de théologie catholique* 2, 1917 ff. Pius X, in his Encyclical *Acerbo nimis*, decreed that "catechetical instruction shall be based on the Catechism of the Council of Trent" (*ASS* 37, 621). Joseph Collins, S.S., could write in our own time: "The Catechism of the Council of Trent remains today the primary text upon which all our modern catechetical texts are based" (*Teaching Religion* [Milwaukee, 1953] p. 23).

[24] The Latin text may be found in the edition of Paulus Mantius, *Catechismus Concilii Tridentini ad parochos* (Tournai, 1890) n. 364.

truth "simply and without ambiguities, even though he knows certainly that by this confession he will condemn himself to death."[25]

Theologians of the sixteenth and seventeenth centuries, following the existing positive law demanding confession, agree with the Catechism of Trent. The majority of theologians support the opinion of St. Thomas, who taught that "the accused is in duty bound to tell the judge the truth which the latter exacts from him according to the form of the law (*secundum formam iuris*),"[26] even if this admission would lead to condemnation. The virtue of obedience requires that the accused be bound *sub mortali* to obey the judge. "If he refuses to tell the truth which he is under obligation to tell, or if he mendaciously deny it, he sins mortally."[27] St. Thomas confronts the objection that no one is bound to condemn himself or, as St. John Chrysostom puts it, "I do not say that you should lay bare your guilt publicly, nor accuse yourself before others" (*Hom. 31 on Hebrews*). He says that the accused in court does not lay bare his guilt. Rather, the judge imposes an obligation and he must obey it. Instead of the accused's revealing his own guilt, "his guilt is unmasked by another."[28] The operative phrase in St. Thomas' discussion is "secundum formam iuris." In other words, St. Thomas structures his teaching around the existing positive legislation, which was Roman in origin and required confession. If the law changes, then the corresponding obligation to reply would also change.

Not all theologians accepted St. Thomas' opinion. Yet we do find such men as Cajetan, Dominic Soto, Schmalzgrueber, and Salmanticenses following the Thomistic or traditional view. Others, including Abbas Panormitanus, Peter of Navarre, Emmanuel Rodriguez, Lessius, Lugo,[29] Diana, and Reiffenstuel, opted for a less rigorous teach-

[25] A. Natalis, *Theologia dogmatica et moralis secundum ordinem catechismi Concilii Tridentini* (Venice, 1705) tom. 2, lib. 4, c. 10, art. 3, reg. 3. Cf. also G. Antoine, *Theologia moralis universa* 4 (Avignon, 1818) 335; D. Concina, *Theologia christiana dogmatico-moralis* (Naples, 1773) tom. 4, lib. 5, diss. 4, c. 5.

[26] *Summa theologica* 2-2, q. 69, a. 1 c. [27] *Ibid.* [28] *Ibid.*, ad 1m.

[29] Lugo's teaching on this point presents us with a paradox. On the one hand, he defends the use of torture if there is *semi-plena probatio* against the accused (*op. cit.*, tom. 6, disp. 37, sect. 13, n. 153). On the other hand, he argues that it is too much to require a voluntary confession from an accused man (*ibid.*, tom. 7, disp. 40, sect. 1, n. 16). Lugo teaches that an accused may conceal his crime if he faces the death penalty or its equivalent, i.e., galleys, or a great loss of property or reputation. A law demanding voluntary confession, he states, is not accommodated to human nature and can serve only "ad illaqueandas conscientias" (*ibid.*, n. 15).

ing.[30] They argued that it was inhuman for a man to condemn himself and that under certain conditions, when faced with severe penalties, the accused might deny his crime.

The Provincial Council of Rome, 1725

The next stage in the development of the Church's recognition of the defendant's rights came in 1725, when the Provincial Council of Rome abolished all oaths in ecclesiastical criminal trials. The Council observes that experience has shown that the oath *de veritate dicenda* is no guarantee that the defendant will tell the truth. It is useless, since even under oath defendants "usually deny the crimes of which they are charged." In suppressing this oath, the Council decreed that it could be required of defendants only when they were "examined as witnesses in the trials of *other* individuals." The use of oaths in any other way renders the whole examination null and void. The text reads:

It must not be judged reprehensible that, because of changing conditions of the times and for reasons of necessity and utility, human laws and customs sometimes vary.... Because of this, we consider the practice in some secular and ecclesiastical courts of judges, in the process of examining the defendant in criminal trials, to demand of them the oath *de veritate dicenda* to be well-established, even though the said practice was never established by law. On the other hand, as daily experience shows, no advantage accrues to the prosecution from this practice, and nothing is proven against the defendant by this custom (as the defendants usually deny the crimes of which they are charged).... Hence it is that we, having weighed both sides of the question carefully, and following as closely as possible the practice of the well-organized tribunals, command that all oaths tendered to the defendants in criminal trials be completely abolished and suppressed.... Nor do we wish an oath of this kind to be exacted of the defendants in the future (unless they are examined as witnesses in the trials of other individuals) by any judge or official under any pretext, cause, or artifice; otherwise an examination thus con-

[30] A few minor theologians referred to the laxists' moral propositions concerning mental reservation, which were condemned on Mar. 2, 1679 during the pontificate of Innocent XI (cf. Denzinger-Schönmetzer 2126, 2127). De Cardenas favors the milder opinion, stating that some laws and precepts are penal and do not bind in conscience. He concludes that one can understand "how a judge may juridically question and the accused may still not be bound to confess his crime under pain of sin" (J. de Cardenas, *Crisis theologica* [Venice, 1700] pars 4, diss. 19, c. 3, n. 30). J. M. Sbogar follows St. Thomas: *Theologia radicalis* (2nd ed.; Prague, 1708) c. unicum, n. 13. Finally, P. Sporer considers the opinion of Lugo probable and safe: *Theologia super decalogum* (3rd ed.; Salzburg, 1711) tom. 2, tract. 5, in 5 praecept. decalogi, c. 4, sect. 1, n. 14 ff.

ducted and all the oaths of the process shall be null and void and shall lack all binding force against the criminal.[31]

The use of oaths in ecclesiastical courts has a long history. The *Corpus iuris canonici* refers to the *iuramentum calumniae* and the *iuramentum de veritate dicenda*.[32] The former assured the judge of the good faith of the litigants and was given to protect the defendant from possible unjust prosecution of the plaintiff. Both parties took the oath *de veritate dicenda*, which apparently assured the truth of their statements. The judge had the right to question the parties.[33] If the question was legitimate and the accused refused to answer it without a sufficient reason, his refusal would be, depending on the type of question asked, the same as a confession of guilt.[34]

Although the Council of Rome was a provincial council that legislated only for the Italian dioceses, it is important because of the authority of the Roman See and practice. It was not long before diocesan tribunals throughout the world followed Rome's example and suppressed the oath *de veritate dicenda* in criminal trials. In time it became the universal law of the Church.[35]

[31] Cf. E. J. Moriarty, *Oaths in Ecclesiastical Courts* (Washington, D.C., 1937) p. 2. Cf. R. Clune, *The Judicial Interrogation of the Parties* (Washington, D.C., 1949); J. Krol, *The Defendant in Contentious Trials* (Washington, D.C., 1937).

[32] C. 1, X, *de postulatione praelatorum* 1, 5; glossa s.v. *Confessiones*, ad c. 11, X, *de probationibus* 2, 9.

[33] Glossa s.v. *interrogandi*, ad c. 11, C. XXX, q. 5; glossa s.v. *de confessis*, ad c. 3, X, *de confessis* 2, 18; glossa s.v. *interrogationibus*, ad c. 6, X, *de iuramento calumniae* 2, 17.

[34] Medieval canonists used the maxim *Qui tacet consentire videtur*. Cf. C. Magni, *Il silenzio nel diritto canonico* (Padua, 1934); G. Danuti, *Il silenzio come manifestazione di volontà: Studi di Pietro Bonfante* 4 (Milan, 1930) 461–84.

[35] Canon 1744. There is, however, at least one instance after 1725 where the oath *de veritate dicenda* was required in a criminal case. On Feb. 20, 1866, the Holy Office issued an Instruction concerning the Apostolic Constitution of Benedict XIV, *Sacramentum paenitentiae*, dealing with solicitation. The Instruction states: "When these things [previous examination of the witnesses] have been diligently performed, the defendant is brought into the courtroom before the judge . . . and bound by the oath *de veritate dicenda*, he must answer each and every point of the examination and the denunciation" (*Collectanea Sacrae Congregationis de Propaganda Fide* 1 [Rome, 1907] 709, n. 11). This exception applies to this case only, perhaps because of its seriousness. Some theologians say that the Instruction is directive rather than prescriptive and that it is not at all certain that a confessor would be guilty of mortal sin if he refused to admit his crime; cf. D. M. Prümmer, *Manuale theologiae moralis* 2 (12th ed.; Freiburg, 1955) 149; J. A. McHugh and C. J. Callan, *Moral Theology* 2 (New York, 1958) 194.

We cannot conclude from the Council of Rome that the accused was no longer bound to reply to the judge's questions.[36] The Council's intention was to remove the proximate occasion of the sin of perjury, without releasing the defendant from his duty to confess his crime when questioned. The Council's decree is noteworthy, since it indicates a realistic appreciation of the problem that is derived from everyday experience. It points the way to future legislation favoring the defendant.

The Jubilee Decrees of 1749, 1775, 1824

Nearly twenty-five years after the Council of Rome we find a series of papal constitutions that do little to encourage an amelioration of the harsh law of obligatory self-incrimination. In the Jubilee decrees of 1749, 1775, and 1824, three popes reaffirmed the traditional teaching requiring the defendant's confession.

In the Constitution *Paterna caritas*, which was given at Rome on Dec. 17, 1749, Pope Benedict XIV decreed that the Jubilee indulgence could also be gained by certain classes of people who were unable to come to Rome and fulfil the necessary conditions. In the category are nuns, oblates, tertiaries, anchorites, hermits, the infirm, those over seventy years of age, those in prison, those awaiting trial or awaiting sentence, those in exile, and those in the galleys. Benedict XIV goes on to explain the powers that confessors have in dealing with these categories, and he points out the special duty the confessor has toward prisoners. The text is given here:

> Let the confessors thus chosen, having heard diligently the confessions of these people, absolve them from every sin, crime, and delict no matter how grave and serious it may be, even though it is reserved to the Holy See or contained in the Bull *Die coenae domini*. A salutary penance should be given them, and to others the sanctions provided for by the canons should be imposed as well as the rules of proper conduct. The confessors should warn especially those who are in prison and whose case is not yet finished that they are bound by a serious obligation to reveal the truth about their crimes to the judges when they are questioned by legitimate authority. If they do not intend to do this, they would not only receive sacramental absolution invalidly, but greater harm would come to their souls. If they have this intention and have the other dispositions, their sins may be rightly confessed. However, the absolution they will receive from the confessor, while it may be salu-

[36] J. Loiseaux (Piato Montensi), *Praelectiones iuris regularis* 2 (Tournai, 1896) 406.

tary and beneficial and useful in the internal forum, has no effect in taking away the temporal punishments they deserve in the external forum.[37]

According to this Constitution, confessors are directed to warn their penitents who are defendants in criminal cases that they have a serious obligation to make known the truth when they are legitimately questioned. This is an obligation, not a matter of counsel. Unless the penitent intends to do this, sacramental absolution must be denied him. The Pope does not make any qualifications, nor does he mention any milder opinion permitting the accused to refuse to admit his crime.

Two other popes in instructions to Jubilee confessors repeat the prescription of Benedict XIV. Pope Pius VI, in *Paterna caritas urget nos* (Feb. 26, 1775), gives the same instructions,[38] as does Leo XII in the Constitution *Studium paternae caritatis* (Oct. 18, 1824).[39] However, in the Jubilees before and after these three popes, there is no mention of this particular restriction. The decrees of the Jubilees of 1700, 1725, 1900, and 1925 are silent on this point.[40]

Theologians made very little use of the Jubilee decrees. Those theologians who prefer the milder opinion do not feel that the decrees present any problem.[41] Pruner, for example, feels that the decree of Benedict XIV should not be taken as a decision in favor of the more rigorous view. The milder opinion, he points out, does not allow one to lie. At the same time, it does not require that one confess everything in court. Pruner interprets the words of the Jubilee decree, "to reveal the truth about their crimes," to mean that the accused is bound to tell the truth in court, but not necessarily the *whole* truth.

[37] Benedict XIV, *Bullarii Romani continuatio* (Florence, 1846) tom. 3, pars prima, 197–98, n. 8.

[38] Pius VI, *Bullarii Romani continuatio* (Florence, 1847) tom. 8, pars prima, 13–17, n. 6.

[39] Leo XII, *Bullarii Romani continuatio* (Florence, 1854) tom. 18, 269–73, n. 12.

[40] The Jubilee of 1700: cf. Innocent XII, Constitution *Regi saeculorum*, May 18, 1699, in *Bullarum, diplomatum et privilegiorum sanctorum Romanorum pontificum Taurinensis editio* 20 (Naples, 1783) 876–81. Jubilee of 1725: cf. Benedict XIII, Constitution *Pontificia sollicitudo*, Jan. 20, 1725, in *Bullarum, diplomatum et privilegiorum sanctorum Romanorum pontificum Taurinensis editio* 22 (Turin, 1871), 122–24. Jubilee of 1900: cf. Leo XIII, Constitution *Aeterni pastoris*, Nov. 1, 1899, in *Leonis XIII pontificis maximi acta* 19 (Rome, 1900) 230–39. Jubilee of 1925: cf. Pius XI, Constitution *Apostolico muneri*, July 30, 1924, in *AAS* 16 (1924) 316–20.

[41] For example, J. D'Annibale, *Summula theologiae moralis* 2, n. 602; Berardi, *Praxis confessariorum* 1, 671, 672; J.-Ev. Pruner, *Bibliothèque théologique du XIXe siècle* 2 (Paris, 1880) 501.

Regatillo and Zalba refer to the Constitution *Paterna caritas* of Benedict XIV when they discuss the rights of the defendant.[42] They attempt to reconcile it with the present Code of Canon Law, which states in Canon 1743, 1° that the defendant in criminal trials is not bound to answer direct questions about his crime. They argue that if Benedict XIV in *Paterna caritas* taught that absolution should be denied those defendants who conceal the truth, then it must be interpreted in the following manner: when the common good requires that the accomplices of the defendant be discovered in order to avoid serious harm to the community which otherwise could not be averted, then the defendant must reveal the names of these accomplices. In other words, he is bound to testify concerning the crime of another, not about his own crime. Regatillo and Zalba seem to read into the papal Constitution a limitation that is not found in the text itself.

The Procedural Norms of the Roman Rota, 1910

In 1910 the Roman Rota published a detailed system of procedural norms to be used in ecclesiastical trials. These norms had a widespread influence, since the Roman Tribunal of the Sacred Rota stood as the model for diocesan curias all over the world. Many of these procedural regulations became the source for what is today the universal law of the Church. Canons 1742-1746, dealing with the interrogation of the parties, follow these rules quite closely in some sections. In other respects, however, particularly concerning the obligation of the defendant to reply, we find some marked differences. Article 109, 1, for instance, decrees in harmony with the 1725 Council of Rome that in criminal trials no oath is to be given to the accused. Articles 137, 138, 139, and 141 concern us more, and they are here given in full:

Article 137. 1. Both parties have the right to draw out of the judicial confession of the adverse party a proof of the facts pertinent to the cause.

2. It is permitted even in criminal causes, and generally in all other causes which have reference to the public good, that the promoter of justice propose interrogations and allegations upon which the defendant is to be examined.

3. In causes which are concerned with the matrimonial bond and the validity of sacred ordination, the defender of the bond enjoys the same privilege.

Article 138. During the examination each party has the right to request that

[42] E. F. Regatillo and M. Zalba, *De statibus particularibus* (Santander, 1954) p. 41. Cf. M. Zalba, *Theologiae moralis compendium* 2, n. 313.

certain interrogations be made and allegations presented with a view to obtaining a confession from the adverse party. But the request must specify the individual counts regarding which an answer is sought from the adverse party.

Article 139. When such a request is accepted by the court, it is the judge who orders the party to reply to the question, or to affirm or deny the presented allegation. If the party flaunts the precept of the judge, then the alleged facts will be deemed as true, and as admitted and confessed by the party.

Article 141. The decree by means of which the allegations and the interrogations are accepted by the court must contain along with the text of the proposed questions and assertions the warning and threat that, if the party refuses to answer or offers no reasonable excuse for his silence or his absence, the alleged facts will be regarded as true and substantiated by the party's confession.[43]

The Roman Rota, then, as late as 1910, demanded that the parties answer the questions the judge put to them. This applies even in criminal trials, where the oath *de veritate dicenda* is not required. If the party refuses to answer the questions or offers no reasonable excuse, then the point in question is considered true. The regulations do not explain the nature of a "reasonable excuse," nor do they exempt the accused in criminal trials from confessing his own guilt.

The Code of Canon Law, 1917

The *terminus ad quem* of our study in the development of the right to silence is the Code of Canon Law, which went into effect on May 18, 1917.[44] A controversy that had lasted for six centuries was abruptly settled by the Church when it explicitly recognized in its law the privilege against self-incrimination. Canon 1743, 1° reads: "The parties are bound to answer and manifest the truth to a judge who legitimately questions them, unless it is a question of a delict they themselves have committed."[45]

According to the Code, a person may volunteer such information if

[43] *Regulae servandae in iudiciis apud S. R. Rotae Tribunal,* Aug. 4, 1910 (*AAS* 2 [1910] 783–850; tr. in Clune, *op. cit.*, pp. 45–46).

[44] In the *Motu proprio* of Mar. 19, 1904, *Arduum sane,* Pope Pius X announced that a new code of law was to be prepared in which there would be collected "with order and clearness all the laws of the Church, . . . removing all that were abrogated or obsolete, adopting others as far as needed by the customs of the present time, and making new ones according to need and opportunity." The new code was promulgated May 27, 1917, by Benedict XV in the Constitution *Providentissima mater ecclesia.* It went into effect on May 18, 1918.

[45] Canon 1743, 1°: "Iudici legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso."

he wishes, but he cannot be forced in any way to do so. If the public good is involved, the judge has a duty and a right to question the party. Commentators, following canon 19, agree that it is not unlawful to question the accused about even his personal crimes.[46] However, although the judge may legitimately question the party, he cannot impose any obligation on him to answer. Furthermore, if the defendant refuses to answer, as is his right, his refusal or silence cannot be taken as a confession. The Code seeks to protect the accused. It makes no mention of *semi-plena probatio*, fear of severe punishment, or hope of escaping such punishments. The law clearly intends to relieve the accused from his dilemma of being either forced to condemn himself or to lie. To secure this right to silence, canon 1744 states that in criminal cases the judge is not permitted to give the oath *de veritate dicenda* to the accused.[47]

The Code makes other observations concerning interrogation. First of all, the judge must be competent to try the case before his court.[48] The questions asked must be pertinent, and no one, witness or defendant, can be obliged to testify if he fears that his answers will incriminate him or will harm the reputation of, or cause dangerous vexations to, himself or his relatives by either consanguinity or affinity.[49] Professional information is privileged, and information received from a sacramental confession cannot be used in any way.[50]

EVALUATION

1) On the magisterial level, no evidence of an organic development of the right to silence appears in the documents we have studied. Occasionally a progressive element may be noted (e.g., *Responsio* of Nicholas I and the Council of Rome), but subsequent history failed to develop it in any significant way.

Rather, we discover a sudden, abrupt change. The privilege against self-incrimination is officially recognized for the first time by the

[46] Canon 1742, 1°. Cf. F. Roberti, *De processibus* 2 (Rome, 1926) n. 321; M. Coronata, *Institutiones iuris canonici* 3 (2nd ed.; Rome, 1941) n. 1270.

[47] Wernz-Vidal feel that it is cruel and inhuman to force the accused to reveal the truth under oath, since he is torn between telling the truth or facing severe penalties; cf. F. X. Wernz and P. Vidal, *Ius canonicum* 6/1 (Rome, 1927) n. 422 a.

[48] Canon 1559.

[49] Canon 1755.

[50] Cf. J. Noval, *Commentarium Codici iuris canonici* 4, *De processibus:* 1, *De judiciis* (Turin, 1920) n. 432; G. Cocchi, *Commentarium in Codicem iuris canonici* 12 (Turin, 1940) n. 130; Coronata, *loc. cit.*

Church in the Code of Canon Law. In all the pre-Code documents there is either an explicit or implicitly presumed affirmation of the necessity of self-incrimination. This was, as we have seen, supported by the positive law, which was Roman in origin. This practice was too strongly embedded in the cultural world-view of Church law to be easily put aside. The balance, efficiency, and success of Roman-law methods were apparently too revered by the Church to permit contrary customs to gain official approval. It is understandable that the *status quo* continued until powerful and popular forces necessitated a change.

The documents we have examined possess different magisterial value. There is a moral *responsio*, a papal bull, a catechism composed and approved by a general council, a statement from a provincial council, a series of papal constitutions, and some procedural norms of the Rota. In none of them is found a precise, unambiguous dogmatic statement on the right to silence proposed to the universal Church as binding. The very absence of any definitive statement is a strong indication that the Church's stand was conditioned by the existing culture. The Church took for granted that the law of self-incrimination best served the cause of justice and saw no reason to change it.

2) On the theological level, on the other hand, there is a genuine development which was possible only because many theologians considered the magisterial statements as directive, not prescriptive. Since the time of St. Thomas there were two schools of thought on the rights of the defendant. Those advocating a more lenient view argued that the law obliging the accused to confess his crime was unreasonable. Various degrees of probability were attached to this view, but the note *sententia communis* was reserved for the Thomistic position.

A remarkable change took place in the middle of the nineteenth century. Theologians began to teach that the defendant was not bound to confess his crime when questioned by the judge. They presented their position positively and not simply as an opinion that *may* be held. It was not proposed in opposition to the law, but supported by it. The *ordo legis* had changed and with it theological thought.

Francis Patrick Kenrick, following American legal norms, affirms that the accused can plead "not guilty" without lying. He refers to the traditional theological opinion and concludes that "since our form of trial is different, we do not feel it is necessary to spend any more time

discussing this opinion."[51] The Italian moralist Berardi is even more explicit. He holds that the natural law and the common good cannot force one to confess, and "regardless of any interrogation of a civil judge, he is not bound to do so."[52] Noldin and Génicot, both writing before the Code, agree that the accused is not bound to confess.[53] Génicot makes the accurate observation that the only controversy concerning this problem is found in canon law, where the older opinion is still in force.

3) Ultimately it was a change in civil law that influenced theological and magisterial opinion. The privilege against self-incrimination evolved slowly in civil law. Although it was well established in English law by the beginning of the eighteenth century, it took another century and a half before Continental law adopted it. Before that time brutal and cruel mutilations were often given for petty crimes; the court was all-powerful and the individual had little or no security against unjust persecution. The public, accustomed as they were to the situation, were apathetic to such abuses and there was no general interest in reforming the law.

The first humanitarian reactions appeared on the Continent in the 1700's, and popular attention was drawn to the movement of legal reform by the writings of Montesquieu, Voltaire, and Beccaria.[54] Toleration, reason, and humanity was the rallying cry against the barbaric judicial system.

In France in 1788, the States General met and by means of *cahiers*, written recommendations of the constituents to their delegates, public opinion made itself felt. Some of the more important demands were: (1) equal rights before the law and mitigation of the cruel penal system; (2) suppression of discretionary powers of the judge; (3) abolition of oaths imposed on the accused; (4) abolition of torture.[55] Many of these suggestions are found in the law of Oct. 8–9, 1789, which was enacted by the Constitutional Assembly. Oaths and torture were abolished,

[51] F. P. Kenrick, *Theologia moralis* 1 (Philadelphia, 1841) 387.

[52] A. Berardi, *Praxis confessariorum* 1 (2nd ed.; Bologna, 1887) 672.

[53] H. Noldin, *Summa theologiae moralis* 2 (5th ed.; Innsbruck, 1905) n. 721, 1; E. Génicot, *Theologiae moralis institutiones* 2 (6th ed.; Brussels, 1909) 13.

[54] For a complete treatment of this problem, cf. M. T. Maestro, *Voltaire and Beccaria as Reformers of Criminal Law* (New York, 1942).

[55] Cf. Esmein, *op. cit.*, pp. 379–402.

and Article 13 decreed that when the accused first appears before the judge the complaint must be read to him and the name of the denunciator given. The judge must appoint a counsel for the accused if he does not have one. The Code of Criminal Examination of 1808 also provided for counsel for the accused.

In 1880 the French Code of Criminal Examination was reformed and an explicit reference is made to the defendant's obligation to reply. Article 85 states that at the first interrogation the following practice must be followed: "The examining magistrate establishes the identity of the prisoner, makes him cognizant of the facts charged against him, and receives his statements, after having warned him that he has the right to refuse to reply to the questions put to him."[56]

Legal reform in France and the writings of Voltaire and Beccaria had a wide influence throughout Europe. Frederick II of Prussia, in the years 1754–56, abolished torture and corrected many of the unjust severities of his criminal system. Empress Catherine II of Russia drew up an outline of a new criminal code that was based on Beccaria's principles, and although a war against the Turks prevented the full realization of her plan, the most obvious abuses were remedied. In Italy, the Grand Duke Leopold of Tuscany issued in 1786 a new criminal code favoring the defendant. At the time of the unification of Italy in 1859 many local legal codes had improved greatly, and the Italian Criminal Code of 1865 has a decided humanitarian orientation.[57]

4) The present position of the Church on the right to silence as seen in the Code of Canon Law is not a spontaneous achievement but the result of a long theological history. Many factors have contributed to this movement, which may be called, in Lonergan's term, transcultural. It is a process from one way of thinking to another, from one highly particularized world-view to another. In other words, one experiential priority has been replaced by another.

The traditional teaching of medieval theology on the right to silence was possible only in a culture that did not recognize fully the rights of the individual. The overmastering role of the state and the common good were emphasized to such a degree that the correlative rights of man were often neglected. In defense of this position it must be admit-

[56] *Ibid.*, p. 511.

[57] Cf. C. L. Calisse, *A History of Italian Law* (Boston, 1928) pp. 477 ff.

ted that any restriction was made in the cause of justice. Torture, moral coercion, and obligatory self-incrimination were advocated (some would say tolerated) because it was felt that in the long run they promoted the greater good of the community.

The development of the right to silence does not follow the classical example of Christological development. In the latter we have in a relatively short time a movement from the concrete, graphic descriptions of Christ in the New Testament to the metaphysical, abstract analysis of the *mysterium Christi* by the fathers of Nicaea. The right to silence did develop, but not, at least on the official magisterial level, by a gradual, organic process. The Church's recognition of this right was sudden and long overdue.

It was the presence of a persistent contrary theological opinion and a dramatic change in the civil law that finally influenced the Church. Germinally, the final solution goes back to the fifteenth century. The dissenting opinion, however, while openly taught, was always presented in deference to the long-standing traditional opinion. A sense of urgency was given by the change in the civil law. It was not long after that the Church, moved by the Spirit "who breathes where He will," acknowledged the right of man to refuse to condemn himself by his own words.