

# The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence

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## I.

In 1641, the English Parliament passed an act abolishing the High Court of Star Chamber,<sup>1</sup> a royal prerogative court whose existence can be traced to the mid-14th century.<sup>2</sup> Star Chamber should have faded into obscurity;<sup>3</sup> in 1719, a report to Parliament indicated that the complete set of official records of Star Chamber's proceedings was missing.<sup>4</sup> Yet our own Supreme Court has resurrected Star Chamber, alluding to the ancient English court in its opinions over 75

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1. 16 Car. 1, c. 10 (July 5, 1641) (Eng.).

2. See CORA LOUISE SCOFIELD, *A STUDY OF THE COURT OF STAR CHAMBER* iii (Burt Franklin ed., 1969) (1900) (finding references to Star Chamber as early as 1356); William Hudson, *A Treatise of the Court of Star Chamber*, in *COLLECTANEA JURIDICA*, 1-241 (Francis Hargrave ed., 1980) (1792) (stating that Star Chamber dates from the Twelfth Century reign of Henry II). Hudson's treatise is circa 1600.

3. Star Chamber was not well understood in its own time. It is not even clear that the name "Star Chamber" always referred to the same thing. Some theories suggest that the name referred to a particular room in which one or different bodies sat. SCOFIELD, *supra* note 2, at iii. Another theory suggests that the name referred to a particular body. William Hudson, a practitioner in Star Chamber, suggests a metaphor of the King as the Sun and the judges as the stars reflecting the King's light. Hudson, *supra* note 2, at 8.

4. *SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER* xi (I.S. Leadam ed., Selden Society 1903) [hereinafter Selden Society].

times in the past two hundred years. It has alluded to Star Chamber thirteen times since 1980, and most recently in 2002.<sup>5</sup> The goal of this Note is to answer two simple questions: what does the Supreme Court find so compelling about Star Chamber, and are its attributions accurate?

Star Chamber was an institution with many functions. Though primarily a judicial body where the King himself, at least in theory, presided, Star Chamber was also used as a forum for announcing royal decrees and greeting foreign dignitaries. Star Chamber derived its judicial authority directly from the King; in post-Conquest England, the King was the fount of all judicial authority.<sup>6</sup> Accordingly, the King and his advisors (later known as the King's Council) were the ultimate arbiters in any legal dispute. Star Chamber emerged from the Council, first as the Council's judicial manifestation, and later as a distinct judicial body.<sup>7</sup> Yet even as Star Chamber developed its own institutional identity, it remained a part of the Council and thus closely identified with the monarchy.<sup>8</sup> Accordingly, it laid claim to the Council's unbounded jurisdiction.<sup>9</sup> Star Chamber could and did preside over almost every type of lawsuit except felony prosecutions.<sup>10</sup>

At first glance, it is difficult to tell what the Court is up to when it drags Star Chamber out of the closet. The Supreme Court has only twice devoted more than a few sentences to Star Chamber.<sup>11</sup> Often, the allusion appears in text taken from an earlier opinion that references Star Chamber.<sup>12</sup> On at least three occasions, both the majority and dissent have invoked Star Chamber's image, yet neither side has

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5. *McKune v. Lile*, 536 U.S. 24, 56; 122 S. Ct. 2017, 2037 (2002) (Stevens, J., dissenting).

6. Hudson states that "all the courts of justice have flowed out of this court, as out of a fountain; the king and his council having distributed these causes to substantial judges for the ease of the subjects and themselves." Hudson, *supra* note 2, at 10. From the King in Council grew the common law and chancery courts, the parliament and the great offices of state. MICHAEL STUCKEY, *THE HIGH COURT OF STAR CHAMBER* 6 (1998).

7. SCOFIELD, *supra* note 2, at 37.

8. *Id.* at 40.

9. *Id.* at 16-24.

10. *Id.*

11. See *Miranda v. Arizona*, 384 U.S. 436, 458-60 (1966); *Ullmann v. United States*, 350 U.S. 422, 446-47 (1956).

12. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 35 n.8 (2000) (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988)); *Pennsylvania v. Muniz*, 496 U.S. 582, 595 (1990) (quoting the same passage in *Doe*).

commented on the other's allusion.<sup>13</sup> This all suggests an almost reflexive use of Star Chamber, as if a reference to the ancient English court satisfies an urge to imbue certain principles with historical meaning and permanence.

On the other hand, the Court has consistently used Star Chamber to develop identifiable themes: brutality, abuse of power, oppressive state might overpowering the helpless individual, and persecution. Star Chamber is usually a foil, contrasted with our own courts and legal system, by adjectives like "hated," "obnoxious," and "opprobrious." The Court has said, for example, that it "thought the privilege [against self-incrimination] necessary to prevent any recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."<sup>14</sup> The Court has also referenced Star Chamber in explaining or justifying the scope of the protections it finds under the Self-Incrimination Clause. The Court stated, for example, that "[t]he importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike. The privilege against compulsory self-incrimination was developed by painful opposition to . . . Star Chamber proceedings."<sup>15</sup>

This Note will examine the role Star Chamber plays in the Supreme Court's self-incrimination jurisprudence. It is in this area that Star Chamber references appear most often and in which they have appeared most recently. Section II will analyze of three specific themes in the Court's self-incrimination jurisprudence. Section II-A will examine Star Chamber as a symbol of brutality, and conclude that Star Chamber is wholly unremarkable—relative to other courts of its time—in its use of physical abuse. Thus, while our Court's allusions to Star Chamber in this context are not inaccurate, the reference to an ancient and obscure English court adds little that a reference to our own colonial courts could not provide. Section II-B will examine Star Chamber's role in illuminating the "testimonial evidence" doctrine, and conclude that allusions to Star Chamber here are inappropriate. In this context, Star Chamber adds nothing to the Court's jurisprudence and in fact, reveals the Court's own misunderstanding of Star Chamber. Finally, Section II-C will examine Star Chamber as a symbol of political and religious persecution and conclude that in this

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13. See, e.g., *Doe v. United States*, 487 U.S. 201, 212, 220 (1988); *Couch v. United States*, 409 U.S. 322, 327, 338 (1973); *Ullmann*, 350 U.S. at 422, 428, 446.

14. *Couch*, 409 U.S. at 327 (quoting *Ullmann*, 350 U.S. at 428).

15. *Michigan v. Tucker*, 417 U.S. 433, 439-40 (1974).

context, Star Chamber is a vital and powerful image.

## II.

Star Chamber appears in the Court's self-incrimination jurisprudence in three ways. It appears as a symbol of brutality in cases involving the voluntariness of a confession under the Fourteenth Amendment. The Court also treats it as the historical impetus for the testimonial evidence doctrine and uses Star Chamber to delineate the doctrine's scope. Finally, Star Chamber occasionally appears as a symbol of persecution when the Court (or a dissenting minority) attempts to enlist the Fifth Amendment as an auxiliary to the First Amendment. This section considers each in turn.

### A.

The Court uses Star Chamber to illustrate the basic tension that animates its decisions on the voluntariness of confessions. On the one hand, the Court acknowledges that the State has a basic interest in security, and that in service of that interest, the police must be permitted to question persons suspected of wrongdoing with the aim of eliciting incriminating information and solving crimes.<sup>16</sup> On the other, there is the "basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it."<sup>17</sup> The police may question people suspected of crimes, but may not torture or otherwise brutalize them in order to extract information.<sup>18</sup>

In an effort to strike a balance between these competing interests, the Court has held that the police may elicit confessions so long as the suspect confesses voluntarily.<sup>19</sup> Involuntary confessions are inadmissible.<sup>20</sup> Voluntariness, which is a fact-driven question, thus becomes the inquiry in each case.<sup>21</sup> "A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice."<sup>22</sup> To the

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16. *Culombe v. Connecticut*, 367 U.S. 568, 577-78 (1961).

17. *Id.* at 581.

18. *Id.*

19. *Watts v. Indiana*, 338 U.S. 49, 53 (1949).

20. *Id.*

21. *Id.* at 54. The compulsion inherent in police questioning also provided the impetus for the Court's holding in *Miranda* that the police must warn a suspect of his right to silence before initiating a custodial interrogation. 384 U.S. 436, 457 (1966).

22. *Watts*, 338 U.S. at 53.

extent that the police extract a confession with fists, ropes, rubber hoses or psychological pressures, it is involuntary and inadmissible.<sup>23</sup> The Court uses Star Chamber to illustrate this latter extreme: inasmuch as the police extract a confession in the manner that confessions were extracted in Star Chamber, it is pried from the defendant against his will and is offensive to Due Process.<sup>24</sup>

The Court invoked Star Chamber, for example, in its decision holding inadmissible a confession obtained through torture in *Brown v. Mississippi*.<sup>25</sup> In *Brown*, a mob seized one of the defendants and accused him of having committed a murder.<sup>26</sup> When the defendant denied any involvement, the mob, with the participation of a deputy sheriff, hanged the defendant, cut him down, hanged him a second time and then whipped him.<sup>27</sup> Still, he refused to confess and was released.<sup>28</sup> A day or two later, the deputy and another sheriff appeared at the defendant's home, arrested him and took him into Alabama.<sup>29</sup> There the deputy repeatedly whipped the defendant and told him the whipping would continue until he confessed.<sup>30</sup> The defendant confessed and was prosecuted for the murder.<sup>31</sup> The rope marks on Brown's neck were "plainly visible" at his trial two days later.<sup>32</sup> He was convicted and sentenced to death on no other evidence than the confession the two deputies elicited while whipping him.<sup>33</sup>

Describing the trial transcript as "more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government," the Court reversed the convictions in *Brown*, holding that the conditions under which the deputies had obtained the defendant's confession denied him Due Process.<sup>34</sup> Such "revolting" methods, the Court declared, were "the chief iniquity, the crowning infamy

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23. *Id.*; *Culombe*, 367 U.S. at 575.

24. *E.g.*, *Culombe*, 367 U.S. at 581-82 (comparing modern police brutality to the torture practiced in Star Chamber).

25. 297 U.S. 278 (1936).

26. *Id.* at 281.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 282.

31. *Brown v. Mississippi*, 297 U.S. 278, 282 (1936).

32. *Id.*

33. *Id.* at 281.

34. *Id.* at 282 (quoting *Brown v. State*, 161 So. 465, 470-71 (Miss. 1935) (Griffith, J., dissenting)).

of the Star Chamber.”<sup>35</sup>

The Court has also alluded to Star Chamber in decisions invalidating convictions based on confessions obtained through psychological coercion. “There is torture of mind as well as body; the will is as much affected by fear as by force.”<sup>36</sup> Thus, in *Watts v. Indiana*, the Court held that extended questioning and isolation rendered the defendant’s subsequent confession involuntary and inadmissible.<sup>37</sup> The police arrested Watts on suspicion of assault, and later assault and murder, and interrogated him for five nights, into the early hours of each morning and intermittently throughout each day as well.<sup>38</sup> They kept him in solitary confinement for the first two days of his incarceration and never took him before a magistrate for a preliminary hearing, as Indiana law required, or permitted him to contact an attorney.<sup>39</sup> Watts eventually confessed and was convicted, but the Court reversed his conviction, saying that Watts had not confessed voluntarily.<sup>40</sup> “To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court,” the Court said, “is so grave an abuse of the power of arrest as to offend the procedural standards of due process.”<sup>41</sup>

In *Watts*, there were no fists, ropes or whips, yet the Court still held that the psychological pressures the police exerted were akin to physical torture, and thus that the confession was involuntary. Once again, the Court invoked Star Chamber as an example of the “medieval” practices it decried in *Brown*:

“Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.”<sup>42</sup>

In *Culombe v. Connecticut*, the Court again used Star Chamber to symbolize subtle, duplicitous interrogation techniques that were no less relentless for their softness.<sup>43</sup> There, the police in essence killed

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35. *Id.* at 287 (quoting *Fisher v. State*, 110 So. 361, 365 (Miss. 1926)).

36. *Watts*, 338 U.S. at 52.

37. *Id.* at 54.

38. *Id.* at 52-53.

39. *Id.* at 53.

40. *Id.* at 54.

41. *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

42. *Id.*

43. 367 U.S. 568, 581-84 (1961).

the suspect with kindness, yet it was a kindness calculated to wear him down over time and ultimately to win a confession from him. Throughout their five-day interrogation, the police bought Culombe dinners at restaurants.<sup>44</sup> They let him drink liquor.<sup>45</sup> They never beat him.<sup>46</sup> Instead, they enlisted his wife and thirteen-year-old daughter to try to convince him to confess.<sup>47</sup> They kept him secluded and prevented him from seeing his lawyer.<sup>48</sup> Such techniques, the Court wrote, were just a more sophisticated version of the “secret inquisitions, sometimes practiced with torture,” which characterized interrogations in Star Chamber.<sup>49</sup> In both cases, the goal was to twist the body or mind of the suspect until he broke.<sup>50</sup>

The image of Star Chamber that emerges from *Brown, Watts* and *Culombe* is of a “medieval” court, with all of the incivility, brutality and crudeness that the moniker “medieval” is meant to evoke. Star Chamber, according to our Court, used inhuman physical tortures and unending, secret interrogations to extract confessions from unwilling defendants. These attributions raise two questions: First, was Star Chamber in fact inquisitorial; and second, did it employ the kind of physical and psychological coercion our Court claims?

1.

Our Court has repeatedly associated Star Chamber with inquisitorial practices. It is undoubtedly true that in Star Chamber litigation, the court actively participated in factual investigation.<sup>51</sup> Yet Star Chamber’s version was distinctly adversarial when compared to the inquisitorial practices used on the Continent, particularly in France,<sup>52</sup> and in any case was common in Star Chamber’s day.

Star Chamber had two modes of proceeding: the usual procedure, which was long and paper-driven, and the exceptional proceeding by *ore tenus*, which was summary. The usual Star Chamber

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44. *Id.* at 608, 616.

45. *Id.* at 608.

46. *Id.* at 622-23.

47. *Id.* at 613.

48. *Culombe v. Connecticut*, 367 U.S. 568, 609 (1961).

49. *Id.* at 582.

50. *See id.* at 584.

51. SCOFIELD, *supra* note 2, at 75.

52. Morris Ploscowe, *The Development of Present-Day Criminal Procedure in Europe and America*, 48 HARV. L. REV. 433, 449 (1935).

lawsuit began with a formal complaint against the defendant.<sup>53</sup> Once properly accused, the defendant had eight days in which to consult counsel, frame an answer, obtain his attorney's signature to the answer, and bring it into the court.<sup>54</sup> The defendant was compelled to answer; a refusal resulted in imprisonment, and (should imprisonment not coax an answer out of him) eventually a judgment against him.<sup>55</sup> Moreover, at the time he filed his answer, he was required to swear to the truth of the things set forth in his answer, and to his willingness to answer questions about the charges.<sup>56</sup> From the filing of the defendant's answer, the plaintiff had four days to write interrogatories and deliver them to an examining judge who then put them to the defendant in private, away from the interruptions of attorneys for either side.<sup>57</sup> If the plaintiff failed to deliver the questions, the defendant was discharged and the case dismissed.<sup>58</sup> Once the court had in hand the plaintiff's interrogatories, it would dispatch an examiner to put those questions to the defendant, under oath, and record his answers—this formed an essential part of the written record upon which the court would later make its judgment.<sup>59</sup> During this questioning, “the defendant [could] have no advice of his counsel; neither may he or his counsel have any sight of the interrogatories to give him any directions.”<sup>60</sup>

Once the examination of the defendant was complete, there were further rounds of pleadings.<sup>61</sup> The parties then produced their wit-

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53. SCOFIELD, *supra* note 2, at 73.

54. Hudson, *supra* note 2, at 161. The defendant was entitled to more time if he lived a great distance from London—an extra day for every 20 miles. SCOFIELD, *supra* note 2, at 73; STUCKEY, *supra* note 6, at 37.

55. SCOFIELD, *supra* note 2, at 74-75.

56. Hudson says that the answer was brought to the clerk of the court: who is to give the defendant his oath; which is, that so much of the answer as containeth his own act and deed, he knoweth to be true; and so much as containeth another man's, he supposeth to be true; and he sweareth likewise, that he shall make true answers to such interrogatories as shall be ministered unto him concerning that cause.

Hudson, *supra* note 2, at 167.

57. *Id.* at 169-70.

58. *Id.* at 168-69.

59. Of the interrogatories, Hudson says that in the time of Henry VIII, “the examinations were taken by the lord chancellor in the court, where the interrogatories were never above six or seven, and those every one a short question.” *Id.*

60. *Id.*

61. Scofield adds that there was apparently a further possible round—“replication” and “rejoinder”—but it was rarely used because neither party was permitted, at that stage, to introduce new issues. SCOFIELD, *supra* note 2, at 75; *see also* Selden Society, *supra* note 4, at xxxiii.



nesses for the court to examine and the witnesses' answers were similarly recorded. With this, the written record for the trial was complete and the court proceeded to a hearing in open court, at which the written record was read, the attorneys for both sides argued points of law and, finally, the judges stood one at a time and delivered their decisions and sentence.<sup>62</sup> The ordinary Star Chamber lawsuit then was paper-driven and time-consuming and, according to one estimate, took between two and three years to complete.<sup>63</sup> It was inquisitorial insofar as the court appointed an examiner to gather facts from the defendant and both parties' witnesses. Yet it was also distinctly adversarial: private parties initiated the lawsuit and controlled the "discovery" process to a significant extent by telling the examiner whom to question and what questions to ask.

The proceeding by *ore tenus* was shorter and less complicated, and involved the Star Chamber judges to a lesser degree.<sup>64</sup> This type of proceeding, which only the King's Attorney-General could instigate, dispensed with the written pleadings and examinations under oaths.<sup>65</sup> However, in order for a case proceeding by *ore tenus* to reach judgment and sentencing, the defendant had to freely confess to the charge, and then affirm his confession in court.<sup>66</sup> The initial confession had to be obtained without oath or compulsion.<sup>67</sup> If the defendant denied his confession in court, "although it be subscribed with his hand, and in the presence of the king's council, which are present to testify the same," then the court remitted the case to be tried by the ordinary procedure.<sup>68</sup>

If there was any procedure that could be abused and turned into an Inquisition similar to that on the Continent, it was the proceeding by *ore tenus*. William Hudson concedes:

[s]ometimes many circumstances are pressed and urged to aggravate the matters which are not confessed by the delinquent; which surely ought not to be urged, but what he did freely confess in the same manner. And happy were it if these might be restrained within their limits, for that this course of proceeding

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62. SCOFIELD, *supra* note 2, at 75-76.

63. Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1, 6 (1961).

64. Hudson, *supra* note 2, at 126. Hudson describes this procedure as being reserved for cases of "some growing mischief, which is like to prove dangerous if it be not nipped in the bud." *Id.* at 126-27.

65. Barnes, *supra* note 63, at 6.

66. *Id.*; Hudson, *supra* note 2, at 126-27.

67. Hudson, *supra* note 2, at 127.

68. *Id.*

is an exuberancy of prerogative, and therefore great reason to keep it within the circumference of its own orb.<sup>69</sup>

Hudson's statement thus suggests that Star Chamber's judges did occasionally engage in the unbounded, vigorous fact-gathering that our Court decries in *Brown and Watts*.

We should be careful, however, about the conclusions we draw from this statement. First, it suggests that this type of inquisition was a departure from Star Chamber's normal procedures.<sup>70</sup> Second, it illustrates that contemporary objections to Star Chamber's practices were more likely due to its departure from its own settled procedures than to the inquisitorial procedures it ordinarily used. Indeed, Hudson calls the practice an "exuberancy of prerogative,"<sup>71</sup> indicating that when Star Chamber acted this way, it was instantiating the sovereign's prerogative power and not acting as a court. It was likely that Star Chamber's contemporaries considered this an abuse, for inquisition was widely practiced without objection at that time in the common law and ecclesiastic courts.<sup>72</sup> Though we may disdain it now, the inquisitorial method of proceeding was an innovation and an improvement upon the older methods of trial by ordeal or compurgatory oath.<sup>73</sup> It marked a movement towards rational fact-finding in criminal proceedings.<sup>74</sup> The contentious issues among Seventeenth Century Britons were whether the inquisition was administered properly, and whether the procedural prerequisites to its use had been satisfied, not whether it was appropriate for the court to take part in finding facts. Star Chamber's procedures may indeed have been inquisitorial, but in this regard Star Chamber was unexceptional. It is unclear, then, why our Court singles Star Chamber out for reprobation.

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69. *Id.* at 128.

70. Leonard Levy disagrees. He states, "[T]he Star Chamber might scrap all procedural regularity and do just as it pleased, and it did just that in so-called extraordinary cases, those involving matters of state and any others deemed by the Star Chamber, in its prerogative discretion, to be extraordinary." LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 184 (1986). This is probably an exaggeration. As Hudson notes, Star Chamber's members included the two Chief Justices of the common law courts (Kings Bench and Common Pleas), and it acted like any other court for simple reasons of expedience. Hudson, *supra* note 2, at 125. Barnes agrees that Star Chamber observed essentially the same procedure used in the common law courts. Barnes, *supra* note 63, at 3-4.

71. Hudson, *supra* note 2, at 127.

72. A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 290, 294 (1895); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 513-14 (1990).

73. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 273 (John T. McNaughton rev. ed. 1961).

74. *Id.*

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The Supreme Court has also condemned Star Chamber for its barbaric methods. It is unsettled whether Star Chamber actually used or permitted torture to obtain confessions. Hudson refers to the practice of imprisoning those who refused to answer questions, but he never mentions torture.<sup>75</sup> Stuckey claims that there are no documented instances of Star Chamber using torture.<sup>76</sup> Other commentators however, state matter-of-factly that Star Chamber used torture to win confessions from accused heretics.<sup>77</sup> They say that only the King's Council could authorize torture in a particular instance and that Star Chamber, as a part of the Council, did just that. Whether Star Chamber used torture or not, it is clear that Star Chamber sentences were milder than those of the common law courts of its day. The usual punishment Star Chamber meted out was either fine or imprisonment.<sup>78</sup> Star Chamber could order corporal punishment in the form of the pillory, branding or cutting of the nose or ears, but unlike its contemporaries, it could not order death or dismemberment.<sup>79</sup>

When seen against two local lay justices of the peace putting a country wench to the lash in a market place if she was so unfortunate as to bear an illegitimate child, or against the felon whose hand has been severed and nailed to the gallows (upon which he was soon after hanged) for having thrown a stone at the judge, . . . Star Chamber's punishments appear somewhat less barbarous both by reason of incidence and severity.<sup>80</sup>

It is thus hard to justify the statement that brutality was Star Chamber's *chief* iniquity or its *crowning* infamy, at least if the comment refers to contemporary perceptions of Star Chamber.

Even if Star Chamber did use torture to obtain confessions, it acted no more brutally than the common law courts of its time.<sup>81</sup> Torture was a common pretrial "device" in the common law court of

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75. Hudson, *supra* note 2, at 127.

76. STUCKEY, *supra* note 6, at 70.

77. LEVY, *supra* note 70, at 34-35; Ploscowe, *supra* note 52, at 458.

78. SCOFIELD, *supra* note 2, at 76.

79. Barnes, *supra* note 63, at 6-7. This is likely due to the fact that Star Chamber did not have jurisdiction over treason or other felonies, and those were the only crimes that carried the harshest sentences. *Id.* at 7.

80. *Id.*

81. *See id.*; Lowell, *supra* note 71, at 296-97.

King's Bench in the sixteenth and seventeenth centuries.<sup>82</sup> These courts employed torture as a pretrial device as a matter of course at least through Elizabeth's reign (1558-1603) and probably into the reigns of James (1603-1625) and Charles (1625-1649).<sup>83</sup> In fact, the colonial courts of New England expressly sanctioned torture in certain circumstances,<sup>84</sup> and according to one commentator, it was this brutality that inspired the Fifth Amendment's framers to elevate the prohibition of *compelled* self-incrimination to a constitutional protection.<sup>85</sup> Torture in other words, was "prevalent" in that era.<sup>86</sup>

The Supreme Court's references to Star Chamber in this context then, even if accurate, add little to the Court's voluntariness jurisprudence that a simple condemnation of ancient practices could not achieve. There seems to be no reason, other than pedantry, to use Star Chamber to fill a role equally well-served by more recent and less obscure examples. If Star Chamber is to stand for something unique in Supreme Court jurisprudence, therefore, it must be something other than sheer brutality.

## B.

More recently, the Court has used Star Chamber to describe the scope of the testimonial evidence doctrine in its Self-Incrimination Privilege jurisprudence. The historical example of Star Chamber helps to demarcate the boundary between testimonial evidence, which implicates the Fifth Amendment protection, and non-testimonial evidence which does not.

The Fifth Amendment provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."<sup>87</sup> The amendment's text does not identify the ways in which a person might be made a "witness against himself," but the Court has held that a person is a witness against himself when he, "testif[ies] against himself or otherwise provide[s] the State with evidence of a testimonial or communicative nature."<sup>88</sup> Put another way, a person is a "witness"

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82. Lowell, *supra* note 71, at 293, 296-97.

83. *Id.* at 293; Ploscowe, *supra* note 52, at 458.

84. R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 776 (1935).

85. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651-52 (1996).

86. WIGMORE, *supra* note 72, at 287 n.89.

87. U.S. CONST. amend V.

88. *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (internal quotations omitted).

against himself when he “reveal[s], directly or indirectly, his knowledge of facts relating him to the offense or . . . share[s] his thoughts and beliefs with the Government.”<sup>89</sup> The privilege does not protect a suspect from being forced to give non-testimonial, or physical, evidence.<sup>90</sup> Thus state officers may collect the latter evidence without concern for a suspect’s Fifth Amendment privilege against self-incrimination,<sup>91</sup> but they may not “extort” the former.<sup>92</sup>

In *Pennsylvania v. Muniz*, for example, the Court used a drunken suspect’s slurred words to police to distinguish testimonial from non-testimonial evidence.<sup>93</sup> A police officer arrested Innocencio Muniz after observing Muniz driving drunk.<sup>94</sup> At the police station, officers asked Muniz a number of questions, including his name, address, height, weight and eye color.<sup>95</sup> They also administered a number of sobriety tests, and asked him the date of his sixth birthday.<sup>96</sup> Muniz’s verbal responses, which the police videotaped, were confused and his speech was slurred.<sup>97</sup> His performance on the sobriety tests was no better.<sup>98</sup> Muniz was convicted of driving under the influence.<sup>99</sup>

The Supreme Court took Muniz’s case to determine whether his responses to the police officers’ questions were testimonial and thus protected under the Fifth Amendment.<sup>100</sup> The Court distinguished between the “delivery and the content” of Muniz’s responses, holding

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89. *Doe v. United States*, 487 U.S. 201, 213 (1988).

90. *Muniz*, 496 U.S. at 589; *Schmerber v. California*, 384 U.S. 757, 763-63 (1966); *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

91. The officers may not, however, violate the suspect’s Fourteenth Amendment Due Process rights in obtaining evidence. *Rochin v. California*, 342 U.S. 165, 172 (1952).

92. *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

93. 496 U.S. 582 (1990).

94. *Id.* at 585.

95. *Id.* at 586.

96. *Id.*

97. *Id.* at 590. There was no question that Muniz was in custody when the police asked him these questions, and that the questions were likely to elicit incriminating responses. Further, the police did not administer Muniz his *Miranda* warnings until later in the encounter. *Id.* at 586. *Cf. Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (holding that to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights to remain silent and to have the assistance of counsel during custodial questioning, among others). Thus, the only question was whether the Fifth Amendment protected Muniz’s responses.

98. *Muniz*, 496 U.S. at 590.

99. *Id.* at 587.

100. *Id.* at 584.

the former to be non-testimonial and the latter testimonial.<sup>101</sup> Thus Muniz's slurring, stumbling and other indices that he lacked muscular coordination, were admissible against him.<sup>102</sup> Muniz's answer to the "sixth birthday question," however, was testimonial and inadmissible because it relayed a factual assertion.<sup>103</sup> The content of Muniz's answer communicated to the police a fact that he knew.<sup>104</sup>

Muniz's response to the "sixth birthday question" was testimonial, the Court concluded, because in the moment before he answered the question, he faced a "cruel trilemma."<sup>105</sup> He could remain silent and incriminate himself by answering that he did not know the date, or hazard a guess and thereby "lie" about the fact that he did not know the correct answer.<sup>106</sup> None of these options was attractive: the "inherently coercive environment created by the custodial interrogation precluded the option of remaining silent,"<sup>107</sup> self-incrimination carried its own obvious consequences, and lying would have been at least moral perjury. "At its core," the Court wrote, "the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt that defined the operation of the Star Chamber."<sup>108</sup>

As the allusion to Star Chamber in *Muniz* demonstrates, the Court views Star Chamber as the historical impetus for the Fifth Amendment's protection against compelled self-incrimination, and thus it returns to Star Chamber in its effort to describe the privilege's scope:

This definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of . . . the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover

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101. *Id.* at 592, 598.

102. *Id.* at 592.

103. *Muniz*, 496 U.S. at 599.

104. Or in *Muniz*'s case, a fact he didn't know; *Muniz* was unable to calculate the date of his sixth birthday. *Id.*

104. *Id.* at 597.

106. *Id.*

107. *Id.*

108. *Id.* at 596 (internal quotations omitted).

uncharged offenses, without evidence from another source.<sup>109</sup>

The salient aspect of Star Chamber, as the testimonial evidence doctrine illustrates, appears to be orality. It is the cruel expedient of making the accused talk about the crimes with which he is charged that singles out Star Chamber for the Court's scorn. Indeed, the testimonial evidence doctrine is quite narrow: all it prohibits is compelling the accused to make statements, either out loud or in writing, about his crime.<sup>110</sup> It does not prevent collection of physical evidence,<sup>111</sup> or even the use of an accused's own statements to other people.<sup>112</sup>

Star Chamber's example, the Court feels, directs that the testimonial evidence doctrine be so narrow:

Perhaps the critical historical event shedding light on [the privilege's] 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 1637. The oath would have bound him to answer all questions posed to him on any subject . . . . On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation.<sup>113</sup>

The self-incrimination privilege, in the Court's view, was a reaction to this practice of questioning the accused. Indeed, it was this practice, the Court intimates, that made Star Chamber hated in its own day. The privilege's guarantee of silence in the face of questioning, then, is meant to preclude such interrogations.

Was it really the case Star Chamber's practice of making the accused speak to the charges against him exercised seventeenth-century England? The answer is, simply, no. To the contrary, the Court's concern for orality shows that it fundamentally misunderstands Star Chamber and the legal context in which it existed. In the seventeenth century, the accused regularly spoke in his own defense because, at that time, he was presumed guilty until he proved himself innocent. He was thus forced by the operation of the system itself to speak on his own behalf.

In the centuries leading up to the development of Star Chamber

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109. *Muniz*, 496 U.S. at 595-96 (internal quotations omitted).

110. *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990).

111. *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting); *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (voice); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (blood).

112. *Couch v. United States*, 409 U.S. 322, 328 (1973).

113. *Miranda v. Arizona*, 384 U.S. 436, 458-59.

as an institution, it had always been the duty of a defendant, once properly accused, to clear his name.<sup>114</sup> A proper accusation was in itself considered to be proof of guilt.<sup>115</sup> If a properly accused person refused to speak to the charges, his silence was considered a confession and he was adjudged guilty.<sup>116</sup> The defendant did not enjoy a presumption of innocence until much later, perhaps even as late as the early nineteenth century.<sup>117</sup> In this context, the accused naturally spoke in his own defense.

Lilburn's case, to which our Court alludes in *Miranda*, helps illustrate this point. In 1637, John Lilburn was arrested for shipping seditious books into England, and his case was taken to Star Chamber.<sup>118</sup> There was no question as to Lilburn's guilt; his name was on the manifest accompanying the books.<sup>119</sup> For some reason, the King's Attorney General could not produce a formal complaint against Lilburn and thus was unable to initiate suit against him.<sup>120</sup> Nor could the Attorney General proceed by *ore tenus*, because Lilburn would not confess.<sup>121</sup> Without an accuser or a voluntary confession, the prosecution was stymied. The judges in Star Chamber nonetheless sought to administer the oath to Lilburn, presumably hoping to elicit sworn testi-

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114. WIGMORE, *supra* note 72, at 284-86. In ancient times, the defendant discharged this burden either by ordeal or oath. The oath was a declaration of innocence in the form of an incantation. The incantation was supposed to invoke a supernatural force that itself acted as an arbiter of truth. If the defendant could repeat the incantation without any mistakes or slips of tongue, then this was deemed a message from God that he was innocent and he was acquitted. This method, Ploscowe says, "would infallibly separate the guilty from the innocent. If these methods . . . seem incomprehensible today, it is because the early faith in the interference of God in human affairs is lost. The religious element permeated every method of proof." Ploscowe, *supra* note 52, at 439. By the end of Star Chamber's era, the oath by itself was not enough to warrant acquittal. Rather, the defendant swore only to answer truthfully any questions put to him, and the oath acted as a guarantee of the defendant's veracity. As a 1586 petition to Parliament stated, the oath "to a conscience that feareth God is more violent then anie racke." LEVY, *supra* note 70, at 151. In any case, oaths were commonplace and unobjectionable in themselves. The primary objections to oaths were based on who could administer them and under what conditions. WIGMORE, *supra* note 72, at 272-78. See also, William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995).

115. WIGMORE *supra* note 72, at 284-86; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1057 (1994).

116. Langbein, *supra* note 113, at 1057.

117. *Id.* at 1056-57.

118. LEVY, *supra* note 70, at 273.

119. *Id.*

120. WIGMORE, *supra* note 72, at 274-76.

121. *Id.*



mony about the offense upon which they could base a conviction.<sup>122</sup> Lilburn refused to swear, insisting that he was not bound to do so until he was properly accused.<sup>123</sup> Lilburn was, of course, correct; in seeking to administer the oath before properly accusing him, the judges were attempting to skip the critical first step of a lawsuit.

It is important to understand the function Lilburn's obstinacy served, for it is easily misunderstood as an objection to giving oral testimony.<sup>124</sup> Rather, it was a refusal to assume the burden of defense without first being properly accused. The accusation was the critical first step in any case, and a proper accusation functioned to shift the burden to the defendant to exonerate himself of the offenses charged. By refusing to take the oath, Lilburn was refusing to permit Star Chamber to proceed as if that burden had shifted to him when in fact it had not. Lilburn's own account of the proceedings affirms this interpretation. He said (in response to the Earl of Dorset):

Sir, I know you are not able to prove, and to make that good which you have said.—I have testimony of it, said he. Then, said I, produce them in the face of the open court, that we may see what they have to accuse me of; and I am ready here to answer for myself, and to make my just defense.—With this he was silent; and said not one more word to me.<sup>125</sup>

Lilburn's words demonstrate that his objection was not to speaking in his own defense, but to defending himself prematurely. Indeed, he was by his own admission willing to take the oath and be examined if only the court could show that he had been properly accused: "if I had been proceeded against by a Bill, I would have answered and justified all that they could have proved against me."<sup>126</sup> Lilburn objected not to speaking, therefore, but to speaking out of turn. It was for this reason that Parliament nullified his contempt conviction, resolving "[t]hat the Sentence of the Star-Chamber given against John Lilburn is illegal, and against the Liberty of the subject; and also bloody, cruel, wicked, barbarous, and tyrannical."<sup>127</sup> Lilburn could not be convicted of contempt for refusing to do what Star Chamber's judges had no cause to ask of him.

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122. John Lilburn, *The Trial of John Lilburn and John Wharton, for Printing and Publishing Seditious Books*, in 3 COBBETT'S STATE TRIALS 1322-26 (Thomas Bayley Howell, ed. 1809).

123. *Id.*

124. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436, 458-59 (1966).

125. Lilburn, *supra* note 120, at 1322.

126. *Id.* at 1332.

127. *Id.* at 1342.

This conclusion is consistent with what we know of criminal procedure in the common law courts as well. According to John Langbein, the “accused speaks” model of trial, in which the defendant is compelled to speak in his own defense (by his desire not to be convicted automatically), was the norm in England until at least the middle of the eighteenth century.<sup>128</sup> It was also common practice in the American colonies.<sup>129</sup> Eben Moglen argues that America’s sparse population and few professional attorneys or judges necessitated a more summary form of justice that relied heavily on compelling the defendant’s participation.<sup>130</sup> Not until the ideas of innocence and a burden of proof emerged, and the number of lawyers increased, did the idea of silence in the face of accusation evolve. Yet this was centuries after Star Chamber had been abolished.<sup>131</sup>

Indeed, antipathy towards compelling the defendant to speak to the offenses charged, which is today fundamental to our scheme of liberty, is a comparatively modern concept.<sup>132</sup> If our Court’s complaint, then, is that the practice of “compelling” the accused to speak in his own defense is what made Star Chamber so despised by the liberty-loving consciences of seventeenth-century Englishmen, the Court is mistaken. If instead it is that Star Chamber’s practices offend our more modern “sense of right and justice,” then the charge amounts to a condemnation of an older system of justice, but not of Star Chamber specifically.

The Court is thus correct that defendants in Star Chamber spoke on their own behalf. However, as with the charge of brutality, Star Chamber was wholly unremarkable in this element of its procedure, and our Court might as easily find the same symbolism in the colonial courts of this nation. While there may be reason to applaud the protections our system now affords accused persons, including the right to remain silent in the face of accusation, it is clear that Star Chamber’s use of the inquisitorial method was just as much an advancement over the primitive ways of its past as our present methods are an advancement over Star Chamber’s.

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128. Langbein, *supra* note 113, at 1048.

129. Pittman, *supra* note 83, at 775-89.

130. Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1105-11 (1994).

131. Langbein, *supra* note 113, at 1071.

132. WIGMORE, *supra* note 72, at 286.

## C.

The third guise in which Star Chamber appears in our Court's jurisprudence is as a symbol of political and religious persecution. In such instances, individual Justices have used Star Chamber to argue that the Self-Incrimination Clause was meant to protect freedom of conscience by denying the government access to an individual's thoughts and beliefs.<sup>133</sup> This is an appropriate use of Star Chamber's spectre, yet also a very limited one that does not support the majority of Star Chamber references.

Seventeenth-century Britons resented what they viewed as illegal extension of the monarchy's prerogative power; in particular its efforts to suppress religious and political dissent, and to impose taxes without the consent of Parliament. Star Chamber was an integral part of both endeavors, and thus it became a focal point of resistance to the monarchy. Star Chamber's close association with the monarchy and its flexible institutional role made it an ideal instrument, Britons felt, in the monarchy's attempts to usurp Parliament's powers and impose absolute royal authority.<sup>134</sup> English monarchs had long used Star Chamber to impose heavy fines on those who displeased the monarch or committed minor offenses.<sup>135</sup> This transparent method of raising money illegally deprived Parliament of its constitutional role in approving taxes.<sup>136</sup> Adding to this injustice, Star Chamber occasionally punished sheriffs who were less than vigorous in collecting these fines or other taxes.<sup>137</sup> The monarchy also used Star Chamber as a forum in which to announce royal decrees.<sup>138</sup> Through these proclamations, the monarchy could effectively legislate without consulting Parliament.<sup>139</sup> It also used Star Chamber to punish juries who returned verdicts against the Crown in cases in the common law courts.<sup>140</sup>

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133. See, e.g., *Kimm v. Rosenberg*, 363 U.S. 405 (1960); *Ullmann v. United States*, 350 U.S. 422 (1956).

134. SCOFIELD, *supra* note 2, at 77.

135. James I once fined a theater owner £1000 for hosting a play that was critical of the Church. Though there was no proof that the theater owner knew of the play's content before it played, he was fined for not rushing in to stop the play once its disrespectful message became apparent. The King also fined the owner's wife, brothers, and all who heard the play (and applauded). *Id.* at 47, n.4.

136. *Id.* at 49.

137. *Id.*

138. *Id.*

139. SCOFIELD, *supra* note 2, at 45.

140. *Id.*

Star Chamber also became engaged in the monarchy's war on political and religious dissent. In 1534, Henry VIII united church and state under his supreme leadership, thereby making "any deviation from the new religious order a threat to royal supremacy."<sup>141</sup> "The expression of dissent blended heresy and treason into indistinguishable crimes. Those who continued to support the authority of the pope, Henry VIII sent to the executioner's chopping block; those who preached new doctrines he sent to the fires at Smithfield."<sup>142</sup>

Star Chamber was an integral part of this effort. Although it was not empowered to hear treason cases or to order capital or corporal punishment,<sup>143</sup> it created the crimes of conspiracy, sedition and subversion,<sup>144</sup> and it worked with an ecclesiastical body, the High Commission, to prosecute accused heretics as treasonors.<sup>145</sup> Star Chamber provided a secular forum in which to prosecute the offenses the High Commission punished, and it was not uncommon for Star Chamber to attempt prosecution after the High Commission failed.<sup>146</sup> Though each monarch after Henry VIII used heresy prosecutions to squelch political opposition, few (with the possible exception of Elizabeth) were as determined and ruthless as James I and his successor Charles I.<sup>147</sup> Under Charles, in whose reign Star Chamber was abolished, "the government embarked on an anti-Puritan policy which, combined with the personal and arbitrary rule of Charles, embittered great segments of the nation."<sup>148</sup> This bitterness, combined with the popular sentiment that Star Chamber was engaged in the monarchy's attempts to usurp Parliament's powers, ultimately led to its abolition.<sup>149</sup>

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141. LEVY, *supra* note 72, at 69.

142. *Id.*

143. SCOFIELD, *supra* note 2 at 71; Barnes, *supra* note 63, at 6-7.

144. Ironically, the common law courts resented Star Chamber for creating these new crimes, yet they continued to punish those crimes long after Star Chamber's demise. Thomas G. Barnes, *Star Chamber and the Sophistication of the Criminal Law*, 1977 CRIM. L. REV. 316, 317.

145. SCOFIELD, *supra* note 2, at 48.

146. *Id.* at 46-47.

147. LEVY, *supra* note 70, at 266.

148. *Id.*

149. The Act for the Abolition of the Court of Star Chamber listed several abuses of which Star Chamber was guilty. Among them were that Star Chamber's judges "have undertaken to punish where no law doth warrant, and to make decrees for things having no such authority, and to inflict heavier punishments than by any law is warranted . . ." 16 CAR. I c. 10 (July 5, 1641) (Eng.). Later that year, Parliament again addressed its reasons for having abolished Star Chamber. In *The Grand Remonstrance*, Parliament wrote:

The Court of Star Chamber hath abounded in extravagant censures, not only for

This suggests that Star Chamber's greatest contribution to the Supreme Court's jurisprudence may be as a symbol of religious and political persecution. It was therefore an appropriate allusion in *Kimm v. Rosenberg*<sup>150</sup> and *Ullmann v. United States*,<sup>151</sup> both cases in which the defendants were punished for their political beliefs. The defendant in *Ullmann*, for example, was called before a grand jury and questioned about his affiliations—and his friends' affiliations—with the Communist Party.<sup>152</sup> Though the government gave him immunity (in order to compel his testimony), he refused to speak and was sentenced to 6 months imprisonment for contempt.<sup>153</sup> A majority of the Court upheld his sentence, reasoning that the prosecutor's grant of immunity removed the danger of self-incrimination.<sup>154</sup> Once the "reason for the privilege ceases," the majority wrote, "the privilege ceases."<sup>155</sup>

Justices Douglas and Black dissented, arguing that, "[t]he guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well."<sup>156</sup> The example of Star Chamber, Douglas wrote, showed that the Fifth Amendment was meant not only as a protection against prosecution, but also as an auxiliary to the First Amendment.<sup>157</sup> "Some of those who came to these shores were Puritans who had known the hated oath *ex officio* used both by Star Chamber and the

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the maintenance and improvement of monopolies and their unlawful taxes, but for divers other causes where there hath been no offense, or very small; whereby His Majesty's subjects have been oppressed by grievous fines, imprisonments, stigmatisings, mutilations, whippings, pillories, gags, confinements, banishments; after so rigid a manner as hath not only deprived men of the society of their friends, exercise of their professions, comfort of books, use of paper or ink, hut even violated that near union which God hath established between men and their wives, by forced and constrained separation, whereby they have been bereaved of the comfort and conversation one of another for many years together, without hope of relief, if God had not by His overruling providence given some interruption to the prevailing power, and counsel of those who were the authors and promoters of such peremptory and heady courses.

CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 202 (Samuel Rawson Gardiner, ed. 1906), available at <http://www.constitution.org/eng/conpur043.htm>.

150. 363 U.S. 405 (1960).

151. 350 U.S. 422 (1956).

152. *Id.* at 425.

153. *Id.*

154. *Id.* at 438-39.

155. *Kimm v. Rosenberg*, 363 U.S. 405, 439 (1960).

156. *Id.* at 445.

157. *Ullman v. United States*, 350 U.S. 422, 445 (1956).

mony about the offense upon which they could base a conviction.<sup>122</sup> Lilburn refused to swear, insisting that he was not bound to do so until he was properly accused.<sup>123</sup> Lilburn was, of course, correct; in seeking to administer the oath before properly accusing him, the judges were attempting to skip the critical first step of a lawsuit.

It is important to understand the function Lilburn's obstinacy served, for it is easily misunderstood as an objection to giving oral testimony.<sup>124</sup> Rather, it was a refusal to assume the burden of defense without first being properly accused. The accusation was the critical first step in any case, and a proper accusation functioned to shift the burden to the defendant to exonerate himself of the offenses charged. By refusing to take the oath, Lilburn was refusing to permit Star Chamber to proceed as if that burden had shifted to him when in fact it had not. Lilburn's own account of the proceedings affirms this interpretation. He said (in response to the Earl of Dorset):

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Lilburn's words demonstrate that his objection was not to speaking in his own defense, but to defending himself prematurely. Indeed, he was by his own admission willing to take the oath and be examined if only the court could show that he had been properly accused: "if I had been proceeded against by a Bill, I would have answered and justified all that they could have proved against me."<sup>126</sup> Lilburn objected not to speaking, therefore, but to speaking out of turn. It was for this reason that Parliament nullified his contempt conviction, resolving "[t]hat the Sentence of the Star-Chamber given against John Lilburn is illegal, and against the Liberty of the subject; and also bloody, cruel, wicked, barbarous, and tyrannical."<sup>127</sup> Lilburn could not be convicted of contempt for refusing to do what Star Chamber's judges had no cause to ask of him.

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123. *Id.*

124. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436, 458-59 (1966).

125. Lilburn, *supra* note 120, at 1322.

126. *Id.* at 1332.

127. *Id.* at 1342.

forts to rid itself of heretics. He wrote:

It is exceedingly interesting to note that the clock has come full circle: that the battleground is again the question whether a man should be compelled to answer as to his beliefs and affiliations. In the days when the privilege was born, it was a crime to be a heretic . . . . Deviation and dissent were considered dangerous to the state, then as now.<sup>164</sup>

If Star Chamber is an appropriate symbol in cases like *Ullmann* and *Kimm*, it is clearly inappropriate in cases like *Muniz* or *Miranda*. As discussed above, the defendant in *Muniz* was charged with drunk driving, and went all the way to the Supreme Court on the issue of whether the police violated his self-incrimination protections when they asked him the date of his sixth birthday.<sup>165</sup> The Court's comparison of *Muniz's* situation to that of suspects in Star Chamber who "were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury"<sup>166</sup> is strained at best. While *Muniz's* knowledge of a particular date may certainly be a fact, there can be no serious analogy between *Lilburn's* 'private thoughts' about his religion and politics, and *Muniz's* 'private thoughts' about his birthday. Indeed, to whatever extent *Muniz's* case bothers us it is not because we feel that the government has no business punishing drunk driving. The right to silence here is not acting as a proxy for resistance to substantively bad laws, and thus Star Chamber is an inappropriate image.

The same is true of *Ernesto Miranda*, who was convicted of kidnapping and rape.<sup>167</sup> We would hardly call his prosecution "persecution," yet again the Court raised the spectre of Star Chamber in its decision holding that *Miranda's* confession was obtained in violation of his Fifth Amendment rights.<sup>168</sup> Whatever the merits of *Miranda's* constitutional claim, there can be no serious argument that his "private thoughts" about his crimes were deeply held or religious beliefs of the type that were at issue in *Lilburne's* case. His objection was not an unspoken protest against the substance of the statutes that made kidnapping and rape criminal, it was a purely procedural objection to the manner in which the police obtained his confession. The Court's references to Star Chamber here, as in *Muniz*, seem to lack

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164. Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 95, 101 (1954).

164. *Pennsylvania v. Muniz*, 496 U.S. 582, 595-600 (1990).

166. *Id.* at 596.

167. *Miranda v. Arizona*, 384 U.S. 436, 492 (1966).

168. *Id.*

the high purpose and significance they have in cases like *Ullmann* and *Kimm*. They seem to utilize less of Star Chamber's power as a symbol of the dangers of religious persecution, and rely more instead on myths about its cruelty.

#### IV.

The Supreme Court has used the spectre of Star Chamber to develop several themes in its self-incrimination jurisprudence: brutality, inquisition, the danger of making the accused talk about the charges against him, and the wickedness of official ideology. A closer examination of Star Chamber and the historical and legal context in which it existed show that our Court sometimes misunderstands Star Chamber. Star Chamber may well have employed more brutal and inquisitorial procedures than are acceptable in our current system, but it was unexceptional in this regard. Indeed, its only distinguishing feature is that fewer people are familiar with Star Chamber than are familiar with our own colonial courts, reference to which could serve the Court's purpose equally well. The same is true of Star Chamber's practice of requiring the accused to speak in his own defense. It is only as an example of suppression of political and religious dissent that references to Star Chamber make a unique contribution to Supreme Court jurisprudence. In this context, Star Chamber stands out as an enduring symbol of state power employed to enforce conformity in matters of belief, and a warning to governments of the danger of institutionalizing ideology.