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A commentary on Professor Edwin P. McManus' paper, "The Natural Law and the Fifth Amendment," which appeared in the January 1957 issue of THE CATHOLIC LAWYER.

MORALITY AND THE FIFTH AMENDMENT

JOHN R. CONNERY, S.J.†

I HAVE BEEN ASKED to discuss Professor McManus' paper on *The Natural Law and The Fifth Amendment* delivered at the Natural Law Conference of the Guild of Catholic Lawyers.¹ Before beginning the discussion I would like to remark that it is particularly gratifying to see a member of the legal profession interested in the moral aspects of this problem. My past experience has been that the natural law has been to a large extent overlooked by the legal profession in discussing modern problems relating to the Fifth Amendment. Professor McManus deserves credit for pioneering in what is not only a neglected but also a very difficult area of this whole subject.

In the discussion I am quite satisfied to accept the limitations which Professor McManus wisely puts upon the matter. Both of us are concerned only with the problem of the Fifth Amendment in relation to congressional investigations of communism. Neither of us would want to do away with the Fifth Amendment, and we both admit that it is available for use by witnesses in congressional investigations, although Professor McManus is not altogether satisfied with this extensive interpretation of the Amendment.

I would like to center my own remarks around what I consider the three major questions which Professor McManus has brought up in connection with these appeals: 1) the morality of attaching a stigma to a person who makes an appeal to the Fifth Amendment; 2) the morality of an appeal by one who is not presently a Communist; 3) the morality of an appeal by a Communist. In using the term *morality* I extend the discussion into the realm of the natural law.

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¹ 3 CATHOLIC LAWYER 6 (1957).

Is it morally permissible to attach a stigma to a person who appeals to the Fifth Amendment? It is not clear to me from a careful reading of Professor McManus' paper that he would give a blunt affirmative answer to this question, but it is my impression that he would not be completely unsympathetic to such an answer. It should be profitable to discuss the question if only to clarify the issues at stake.

To illustrate his case, Professor McManus pictures an investigation scene in which a witness is confronted with the question: "Are you, right this minute, a Communist?" To clarify the position of the witness he then appeals to an opinion of Chief Justice Marshall in the *Aaron Burr* case in which the Chief Justice maintained that if the declaration that a statement would be incriminating be untrue the one making it would be guilty of perjury.² It would follow, then, that if the witness appealed to the Fifth Amendment, the answer to the above question would be in his case incriminating or else he would be guilty of perjury. In either case it seems that he would be liable to a legitimate stigma.

Before considering the actual case in question it might be advisable to point out in general that to admit that a statement would be incriminating is not to admit crime. The most innocent person may at times be caught in incriminating circumstances. It is not uncommon either for criminals to frame innocent people by planting evidence. To illustrate the distinction between incrimination and crime, moralists cite the example of a question concerning ownership of a gun with which a crime was committed. If the person interrogated actu-

ally owned the gun, a straight answer would be incriminating even though another had committed the crime. They also present the case of a person accused of homicide in a situation where the other party had been killed in legitimate self-defense. If the defendant were asked whether he killed the man, a direct answer would be incriminating even though he was guilty of no crime. One who would jump to a conclusion of guilt in either of these two cases would be guilty of rash judgment. Serious injustice, then, might be done by stigmatizing a person who appealed to the Fifth Amendment to avoid an incriminating answer.

While admitting this conclusion in general one might argue that although an appeal to the Fifth Amendment in the above two cases would not be an implicit admission of crime, it would be at least an implicit admission of ownership of the gun and of killing a man. When one who is asked directly whether he is a Communist invokes the privilege, is there not implicit in this appeal an admission of Communist affiliation? If so, then one may legitimately attach a stigma to such an appeal.

It is not my purpose to discuss the implications of an appeal in the two cases given above. When one is acquainted with all the antecedents of an admission that a statement might be incriminating, it is easy to say what is implicit in it. It is obviously not as easy to work backwards from the admission itself to its exact implications. And in regard to the actual case under discussion Dean Griswold cites a Supreme Court decision which makes it even more difficult to draw any inferences from an appeal to the Fifth Amendment.³ The deci-

² *United States v. Burr, In re Willie*, 25 Fed. Cas. No. 14692e (C.C.D. Va. 1807).

³ Griswold, *The Fifth Amendment Today*, 39 MARQ. L. REV. 191, 198 (1956), commenting upon *Rogers v. United States*, 340 U.S. 367 (1951).

sion in the *Rogers* case would make it very risky to infer present membership in the Communist party from such an appeal. In that decision it was ruled that an individual who had answered the first questions put to her regarding Communist affiliation *ipso facto* waived her right to an appeal in subsequent questioning in that field. Even though one were not now a Communist, then, if he had any reason to believe that subsequent questioning would be incriminating, to protect himself legally he would have to invoke the privilege right from the initial question. To admit that an answer in the present case might be incriminating in this sense would not be an admission of present Communist affiliation. It does not, therefore, deserve a stigma.

In a later section of his talk Professor McManus passes from abstract considerations to the concrete situation. The fact is that people do attach a stigma to an appeal to the Fifth Amendment. The unsophisticated employer, unacquainted with all the legal nuances of such an appeal, readily concludes that if his employee were not a Communist he would not have invoked the privilege; he subsequently discharges him. Is he guilty of doing wrong? Professor McManus feels that proof of innocence in this case devolves upon the employee.

In view of what has already been said, I think one would have to admit that the employer would be making a rash judgment in jumping to the above conclusion and dismissing his employee on the score that he is a Communist. I do not say that he is culpable in making this judgment. It is his ignorance of the law rather than any ill will that is responsible for the judgment. It would certainly be to the advantage of the employee to advise him regarding the nature and implications of an appeal to the

Fifth Amendment but I do not think it calls for a positive proof of his innocence.

I would be perfectly willing to admit that an employer, examining into the reasons why an employee was called before the committee to testify, might have ample reason for being suspicious and even for discharging him. I would admit also that employers, at least in certain fields, could legitimately demand that their employees cooperate with investigating committees. In this event, however, an employee should be advised beforehand as to what is expected of him. Since cooperating with an investigating committee goes beyond the call of what an employee would ordinarily consider his duty to the company, it should be clear to him beforehand that it is expected of him. It does not seem quite fair to penalize a man for taking advantage of a right unless a company makes it clear he is expected to forego this right.

It is quite true, also, that the general public might presume, from an appeal to the Fifth Amendment, a Communist affiliation. This would implicate the employer who kept such a person in his employ and might result in loss of business. No employer would be obliged to renew a contract with an employee under such circumstances. It might be an act of charity to do so, but certainly not obligatory. The employee may be a victim of a rash judgment on the part of the general public but the employer is not in any way obliged to absorb the damages resulting from such a judgment.

Although in a given case, therefore, there may be many reasons for discharging an employee who appeals to the Fifth Amendment, it cannot be on the basis of present Communist affiliation. Such affiliation is not implicit in this appeal. The fact

that a stigma does attach to a person invoking the privilege highlights in my opinion the fact that the legislation as it stands does not provide adequate protection to a witness in a congressional investigation. The defendant in a criminal case is in a far better position; he can simply plead *not guilty* to the crime of which he is accused and no one will be tempted to draw any inference from such a plea. The congressional witness is not free to make this plea; his only protection is recourse to the Fifth Amendment with all the risks attached to an admission of incrimination. In this situation the natural law would allow the use of evasive answers or mental reservations as protective measures but according to the civil law these measures leave the witness open to a charge of legal perjury, or contempt. If the witness wants protection, he must admit incrimination.

We can now take up the second question at issue: What is the morality of an appeal to the Fifth Amendment by one who is not presently a Communist. While Professor McManus does not commit himself definitely on this question, he does intimate that such an appeal would not be reasonable and therefore could hardly be justified either from a legal or a moral standpoint.

Certainly, if a person is not a Communist, a statement to that effect would not directly incriminate him. At first sight there seems to be no assignable reason why he should not admit that he is not a Communist. Yet the decision in the *Rogers* case already mentioned makes a straight answer to an inquiry concerning present Communist affiliation dangerous for a person who is not now a Communist but was so formerly, or at least belonged to organizations which have been labeled subversive. If this decision can be taken as a norm, a straight

answer to this question would leave him without benefit of appeal in any further questioning in this field. Though it would not directly incriminate him, therefore, an unequivocal answer would be indirectly incriminating in the sense that it would carry with it an implicit waiver of future appeal. In future questioning he would be faced with the dilemma of giving incriminating answers or of being charged with perjury or contempt.

Professor McManus points out that no one in similar circumstances has ever suffered legally from cooperating with an investigating committee; there have been no indictments, no prosecutions, no convictions. To my knowledge this is perfectly true. But apart from a case where immunity is granted there are no juridical guarantees against legal action; and without such guarantees the experience of the past gives very limited assurance. Moreover, even when immunity from prosecution is granted, as Robert F. Drinan, S.J., points out, it is not a complete guarantee even from a legal standpoint. A witness may be liable to a "charge of perjury or any other accusation not derived, in the government's opinion, from the coerced testimony but in fact the remote fruit of this compelled disclosure."⁴

Moreover, legal penalties are not the sole concern of a witness. To illustrate, let us suppose that a husband has committed a sin of adultery. It is a sin of the past and he is truly repentant for it. We can suppose there is no danger of any kind of prosecution if he reveals it publicly. Can we say that he is unreasonable in being reluctant to do so? The witness before a congressional committee is faced with a similar kind of self-defamation in publicly admit-

⁴ Drinan, *The Right to Silence*, 95 AMERICA 106, 107 (1956).

ting past Communist affiliation. Apart from the embarrassment which such confession would mean, there are also, as in the case of adultery, the unpredictable civil penalties not covered in any way by immunity from criminal prosecution. As Father Drinan points out: "Once a person in our society has confessed that he was or is a Communist, life can never be quite the same for him."⁵

In dealing with this question Professor McManus put the emphasis on the legal security of the witness. I do not feel that he has made sufficient allowance for the more social hazards that accompany the testimony of witnesses. In a concrete situation, with a view to the stigma that is likely to attach to an appeal to the Fifth Amendment, I think I would advise a witness to take a chance on a candid admission of past affiliation, but the hazards attached to such an admission would prevent me from imposing any obligation. Actually, I am inclined to agree with Father Drinan that the Compulsory Testimony Act, in spite of the legal immunity it grants, raises certain moral problems.⁶

We can consider now the obligation of the actual Communist before a congressional committee. Professor McManus grants that according to the civil law he has an absolute right to invoke the Fifth Amendment. But the natural law allows this witness only a limited right of self-defense. Where the good of the community is at stake Professor McManus maintains that the natural law demands the individual sacrifice his own convenience and admit guilt in spite of the personal consequences.

It is quite true that the common good

is superior to the good of the individual. It follows logically that the good of the individual must at times be sacrificed to protect the community. If, for example, I know that someone is plotting against the community and there is no other way of averting harm from the community, I would be bound to reveal the culprit even though it might mean the death penalty for him. I might be bound to report him to the proper authorities even if it meant serious harm to myself. Granted that revelation is the only way to avert the harm from the community, I would have the obligation to reveal the responsible party whatever the consequences to the individual.

But there is an important distinction to be made between the obligation to reveal the crime of another and the obligation to reveal one's own criminal intent. Since one does not have control over the will of another, reporting crime may be the only way to prevent it. This can hardly be true when the danger to the community comes from personal criminal intentions. Except in the rare case where the individual has no control over his own impulses, it would be difficult to see how self-accusation before the public authorities would be the only means of protecting the community. There is always the alternative of foregoing his criminal intentions. If he failed to do so, it is here that he would be at fault rather than in failure to accuse himself before the public authorities. The obligation of the Communist before the community, then, is to abandon his subversive activities rather than reveal them; and his sin is his failure to abandon these activities rather than his appeal to the Fifth Amendment.

Certainly, if a witness is questioned regarding the activities of another, he would

⁵ *Ibid.*

⁶ *Ibid.*

ordinarily be obliged to cooperate by the natural as well as the positive law. And this obligation would prevail even at the cost of serious personal loss if a greater good of the community were at stake.

Before concluding the discussion I would like to comment on one other point in Professor McManus' paper. He speaks of the right to silence on the part of a witness as the exception rather than the rule if considered from the standpoint of the natural law. This is quite true of a witness in a criminal case, or even in a civil case. But the term *witness* is used in a very broad sense in connection with congressional investigations. As I have already mentioned elsewhere in dealing with this subject, a person called before the committee, besides playing the role of witness, finds himself at times in the role of a defendant, at times in the role of one expected to report unknown crimes.⁷ Certainly, when he is playing the role of a witness in the strict sense, that is, testifying to actions of others against whom a charge has been made, the right to silence will be the exception rather than the rule. But when questioned about crimes committed by himself, or at least about incriminating circumstances, the right to silence is the rule rather than the exception.

In earlier times, when civil legislation demanded a confession from a defendant if the court was in possession of a partial proof of the crime, moralists held that the

⁷ Connery, *The Right To Silence*, 39 MARQ. L. REV. 180, 181 (1956).

moral law would not bind a defendant to confess when his own life or an equivalent loss were at stake. This was by way of exception; but the exception was to the current civil law, not to the natural law as such. If one were limited to the natural law apart from any determination by the civil law, I do not think one could prove an obligation to confess personal crime; otherwise, I find it hard to explain the axiom: *nemo tenetur tradere seipsum* (no one is obliged to betray himself). This is one of those areas in which civil law must determine the obligation. It is my own personal opinion, moreover, that a law which does not impose an obligation to confess is more in accord with the natural law than one which would impose such an obligation. As far as the natural law is concerned, moralists have had trouble even establishing the liceity of self-defamation.⁸ If there is any obligation to confess under present legislation, then, it is the exception rather than the rule.

In conclusion, let me say that I share Professor McManus' fear of communism. Anyone who knows communism must fear it. I would regret very much, too, if this discussion of his very excellent talk were in any way to lessen his zeal in pursuing communism and Communists. My only hope is that it will serve to make the fight against communism more effective by clarifying somewhat the principles upon which it must rest.

⁸ Cf. LUGO, DE IURE ET IUSTITIA, disp. 14, §10.