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William J. Kenealy, S.J.

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# FIFTH AMENDMENT MORALS

WILLIAM J. KENEALY, S.J.\*

THE HONORABLE EARL WARREN, Chief Justice of the United States Supreme Court, was scheduled to deliver an address on the Bill of Rights. Shortly before his address a group of state employees, charged with the responsibility of determining what announcements could be posted upon the state employees' bulletin board, refused to permit the Bill of Rights to be posted because it was a "controversial" document. A bitter altercation arose; but, after the Governor of the state vouched *in writing* for its non-controversial character, the Bill of Rights was permitted to occupy a place along with routine items of interest. The Chief Justice in his address, commenting upon the incident, stated:

And this happened in the United States of America on the 15th day of December, 1954, the 163rd anniversary of our Bill of Rights, declared by proclamation of President Eisenhower to be Bill of Rights Day. It is straws in the wind like this which cause some thoughtful people to ask the question whether ratification of the Bill of Rights could be obtained today if we were faced squarely with the issue.<sup>1</sup>

The state employees' dispute, of course, centered around the constitutional privilege against self-incrimination. For several years the highly publicized activities of congressional investigating committees have focused public attention and debate upon this clause in the fifth amendment to our Federal Constitution. Nevertheless, many of our people still do not appreciate the meaning and the merit of this vital protection of our civil liberties.

The American Institute of Public Opinion published a recent survey<sup>2</sup> which reported in part as follows:

Each person in today's survey was first asked: 'When you hear or read about the fifth amendment, what does it mean to you?' Here is the way their replies added up: Correct . . . 42%; Incorrect, vague . . . 11%; Can't say . . . 47%.

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\*A.B. (1928), A.M. (1929), Boston College; Ph.D., Gregorian University (1932); S.T.L., Weston College (1935); LL.B. Georgetown University (1939); Professor of Law, Loyola University School of Law, New Orleans, La.; former Dean, Boston College Law School.

<sup>1</sup> New York Times, Dec. 16, 1954.

<sup>2</sup> New Orleans States, May 3, 1957.

All those who could say what the fifth amendment was [sic] were then asked: 'When you hear of a person using the fifth amendment, do you generally think he is guilty, or not?' The vote of *informed* adults: Yes, think he is . . . 71%; No, do not . . . 20%; Can't say . . . 9%.

This survey, as quoted in the cited publication, did not contain the key used in eval-



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uating the answers to the first question; and the second question is somewhat ambiguous. Nevertheless, the report as a whole confirms this writer's conviction that an appalling number of Americans, edu-

cated as well as uneducated, fail to appreciate the value of a great constitutional safeguard of their own liberties; and they fail to appreciate its value because they do not understand its meaning. Its meaning is rooted in its history; and the history of the privilege against self-incrimination is a long and bloody battle for personal dignity and liberty against collective might and governmental tyranny.

In 1535 a great champion died in that battle. Thomas More, saint and martyr, lawyer and judge, humanist and humorist, the first layman to be Lord Chancellor of England, and one of the truly commanding figures of world history, was beheaded in the courtyard outside the Tower of London. He had been summoned before the King's Commission which was investigating disloyal and subversive activity against the reigning Henry VIII. During the investigation, Thomas More resolutely refused to

answer many questions propounded to him. He did so on the ground that the investigators had made no specific accusation against him, and argued that no man could be compelled to accuse himself or to furnish evidence upon which an accusation against him could be made by others. He appealed to an old maxim of the Canon Law, *nemo tenetur se ipsum prodere*, which had become part of the jurisprudence of the common law of England, but which was honored at the time more in theory than in practice. He was taunted with cowardice because he would not "speak even plain out." But his learning routed his inquisitors as his courage defied their tyranny.

The King's Commission failed to force Thomas More to accuse himself, or to give testimony upon which they themselves could frame an accusation against him. Frustrated in the investigatory process, the Commission, nevertheless, sent him to the Tower of London. Subsequently, a formal accusation of treason was concocted and filed against him, based upon false allegations of subversive utterances imputed to him while imprisoned in the Tower. Finally, at the ensuing trial, he was convicted and sentenced to death upon the perjured testimony of others, especially of one Richard Rich, the Solicitor General, for whose perjury he was "sorrier than for his own peril."

It is important to note, however, that at the trial Thomas More took the stand, argued his own case, answered all questions, and replied to every specific allegation made against him.<sup>3</sup> He did not claim the right to be silent in a *judicial proceeding when formally charged with specific accusations of crime*. That right was a later development in the Canon Law of the Church and the common law of England. In 1535 the scope

<sup>3</sup> See CHAMBERS, THOMAS MORE 335-39 (1936).

of the principle, *nemo tenetur se ipsum prodere*, did not extend so far. Yet it did, when honored in practice, protect a man from being forced to accuse himself or to give testimony from which an accusation could be framed against him by others. After the martyrdom of Thomas More, and many others who followed his example, a century and a half of tyranny and torture was to afflict the liberties of Englishmen before the modern privilege against self-incrimination developed and became firmly fixed in our law.

A century after the severed head of Thomas More was impaled for public view on London Bridge, one John Lilburne was summoned before the Star Chamber on a charge of having imported certain seditious and heretical books. Unlike More before the King's Commission, Lilburne before the Star Chamber was confronted with a specific accusation. Nevertheless, in 1637, he refused to answer or to testify on the grounds of self-incrimination. He was sentenced to be whipped and pilloried precisely because of his refusal to testify, and the sentence was executed. But the cause of civil liberties had progressed since the martyrdom of More. Lilburne carried his fight to Parliament. The House of Commons voted that his sentence was illegal and against the liberty of the subject; the House of Lords voted him an indemnity of three thousand pounds. But even after the victory of the tenacious John Lilburne, a half-century was to pass before the modern privilege against self-incrimination became securely established and generally available in our law.

It may be that the firm establishment and general availability of the privilege was not accomplished until approximately the year 1700. In any event, it is not without significance that the gradual establishment of the

privilege against self-incrimination coincided with the gradual abandonment of the practice of extorting confession by physical torture. They are different but closely related. The establishment of the one and the abandonment of the other are twin triumphs in the inspiring struggle for personal dignity against collective might. The American colonists, no strangers to the struggle, embodied the privilege in their own common law and expressly incorporated it, with verbal variations, into the constitutions of several of the original states. It was written into the fifth amendment, adopted in 1791, as follows: "*No person . . . shall be compelled in any criminal case to be a witness against himself.*"<sup>4</sup> So much for the historical roots. What is the scope of this modern constitutional privilege?

It may be of interest to note, initially, that the scope of the modern constitutional privilege is much narrower than the scope of the corresponding privilege in Canon Law. The ancient canonical privilege, *nemo tenetur se ipsum prodere*, has been widely extended and implemented in modern Canon Law. In Canon Law not only is no one obliged to accuse himself, or to give testimony from which others could frame an accusation against him, or even to answer when formally charged with a specific judicial accusation; but no one, defendant or witness, can be obliged to testify if he fears that his testimony will *incriminate* him, or cause *infamy*, dangerous *vexations*, or other grave *hardships* — either to *himself* or his *relatives*, by *consanguinity* or *affinity*, in any degree of the *direct* line and to the first degree of the *collateral* line.<sup>5</sup>

<sup>4</sup> U.S. CONST. amend. V.

<sup>5</sup> CODEX IURIS CANONICI, Can. 1743, §§1-2; Can. 1755, § 2 n.2.

This reference to Canon Law is not made, of course, to argue or insinuate that the constitutional privilege should be as broad as the canonical. For Church and state are two different societies, with different purposes, different powers, and different problems. The state must meet its own problem of subversive and un-American activities; but the Church too must meet its own problem of subversive and un-Catholic activities. Nevertheless, the tremendously wide scope of the canonical privilege against self-incrimination illustrates and activates the Church's profound deference, in the fulfillment of its eternal purpose and in the exercise of its divine power, to the dignity and inviolability of the individual person — not merely the good and respected, but the bad and despised, and the indifferent and unknown person — that is, the dignity and inviolability of human personality itself. But the state pursues its temporal purpose and exercises its civil power for the benefit of the same persons. Wherefore, within the reasonable limits of its practical problems and within the reasonable demands of its public obligations, a similar deference to personal dignity and inviolability should be exercised by the state. Hence, we return to the question: what is the scope of our modern constitutional privilege?

*First:* the fifth amendment privilege is a *purely personal* one. It does not protect relatives or friends or neighbors or corporations or labor unions, but only the accused or the witness from compulsory testimony.

Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. *Hale v. Henkel*, 201 U.S. 43. . . . Moreover, the papers and effects which the privilege protects must be the private property of the person claiming

the privilege, or at least in his possession in a purely personal capacity. *Boyd v. United States*, 116 U.S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.<sup>6</sup>

*Second:* this personal privilege protects against *incrimination only*. It regards future penal consequences exclusively, that is, either punishments for crimes, or penalties or forfeitures affixed by law to criminal acts. It cannot be invoked as a protection against public infamy, dangerous vexations, or other grave hardships which are not legal punishments for crimes, or legal penalties or forfeitures affixed by law to criminal acts. Hence, if a witness has already been pardoned, or if he has already been punished, or if he is presently protected against future punishment by the terms of an immunity statute, he cannot invoke the privilege and he must testify regardless of the consequences to himself.<sup>7</sup> In *Counselman v. Hitchcock*,<sup>8</sup> an immunity statute which merely

<sup>6</sup> *United States v. White*, 322 U.S. 694, 699 (1944).

<sup>7</sup> *Ullmann v. United States*, 350 U.S. 422 (1956); *Burdick v. United States*, 236 U.S. 79 (1915); *Brown v. Walker*, 161 U.S. 591 (1896); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>8</sup> 142 U.S. 547 (1892).

forbade the *direct use* of compelled testimony in a future criminal prosecution, while failing to prohibit the *indirect use* of the same in uncovering further information to be used as evidence in a future criminal prosecution, was held to be insufficient to remove the constitutional privilege. In *Ullmann v. United States*,<sup>9</sup> the Immunity Act of 1954<sup>10</sup> which prohibits both direct and indirect use of compelled testimony in future criminal prosecutions, was held commensurate with the protection of the privilege, and therefore sufficient to remove the privilege. In this latter case the Supreme Court, despite a vigorous dissenting opinion, decided that the Immunity Act need not protect the unwilling witness against public opprobrium, social ostracism, loss of a job, expulsion from a labor union, ineligibility for federal employment or for work in defense plants, disqualification for a passport, the risk of internment, or any other disabilities or consequences which are neither punishments for crimes nor penalties or forfeitures affixed by law to criminal acts. The witness forced to testify by the Immunity Act will always have the right, of course, to claim that any given sanction, which may be threatened, is criminal in nature. It appears that a witness, compelled to testify under the Immunity Act, may in fact suffer non-criminal disabilities and hardships which he would not suffer if he were free to invoke the constitutional privilege.

*Third:* Despite the *in any criminal case* phrase of the amendment, or rather because of it, the privilege may be invoked *in any compulsory proceeding*. The privilege is obviously available to a defendant in a criminal case; but it is also available, by

consistent federal court determinations,<sup>11</sup> to any witness in a criminal case or in a civil case, before a grand jury or before a legislative committee, or in any proceeding in which compelled testimony might lead to future penal consequences for the witness. The efficacy of the privilege demands its availability at the first approach of compulsion. Otherwise, the purpose of the privilege could be evaded and nullified by the use, direct or indirect, of previously compelled testimony as the basis of a future criminal charge and the evidence for a future conviction; whereby the witness, directly or indirectly, but ultimately and effectively, could in fact be *compelled in any criminal case to be a witness against himself*.<sup>12</sup>

*Fourth:* The purpose of the constitutional privilege is not precisely to protect either the actually innocent or the actually guilty, but it is rather to protect the *actually or potentially accused*. The defendant or the witness may in fact be innocent or guilty of the actual or potential accusation; but in contemplation of law he is presumed innocent until proved guilty, and by rule of law he is privileged to abstain from proving his innocence or his guilt. Surely, this is a civilized presumption and a reasonable rule consonant with human dignity and liberty.

*Fifth:* Moreover, the invocation of the

<sup>11</sup> *Watkins v. United States*, 77 S. Ct. 1173 (1957); *Bart v. United States*, 349 U.S. 219 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955).

<sup>12</sup> *But see* McManus, *The Natural Law and the Fifth Amendment*, 3 CATHOLIC LAWYER 6, 7-8 (Jan. 1957). I do not share Professor McManus' regret that the privilege has been judicially interpreted to cover testimony at congressional investigations. In this respect, at least, I have no urge to "fight City Hall" and I am content that the Court has "taken us beyond the point of no return."

<sup>9</sup> 350 U.S. 422 (1956).

<sup>10</sup> 18 U.S.C. §3486 (Supp. II, 1954).

constitutional privilege is quite consistent with innocence of crime. In 1807, Chief Justice Marshall stated that a deliberately false claim of the privilege was perjury: "If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath."<sup>13</sup> Is it logically necessary to conclude, therefore, that one invoking the privilege is either guilty of perjury or of the crime under prosecution or investigation? In 1915, Justice McKenna answered: "not necessarily in fact, not at all in theory of law."<sup>14</sup> As late as 1956, Justice Frankfurter, speaking for the Court in the *Ullmann* case, protested:

Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naive or disregarding of the interests of justice.<sup>15</sup>

A few weeks later, Justice Clark, also speaking for the Court and obviously attempting to dissipate this false interpretation of the privilege, similarly protested:

At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . In *Ullmann v. United States*, 350 U.S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced

to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.<sup>16</sup>

Experienced lawyers are well aware that some innocent clients may be well justified and well advised to invoke the privilege, because of various factors and circumstances, not only in criminal trials but also in investigative proceedings. The man who has killed another by accident or in justifiable self-defense has committed no crime at all; but his admission of the unwitnessed or unproved act of killing will clearly incriminate him by establishing *one element* of a serious crime, furnishing *some evidence* of guilt, rendering the burden of the prosecution lighter, making the task of the defense heavier, and possibly endangering his liberty or his own life. He may be a headstrong fool *not* to invoke the privilege; but if he does invoke it, even unwisely, it would be unwarranted and rash to raise the hue and cry of "fifth amendment murderer!"

Many crimes consist of multiple elements, both physical and mental — overt acts performed with specific intentions or in special circumstances. Overt acts may be quite innocent or indifferent in themselves, being criminal only by reason of the specific intent of the actor or the special circumstances of the action. But an overt act, however innocent, may well be one element of an *alleged* crime. Its proof may well be some evidence of *alleged* guilt. Passing a check, purchasing a poison, publishing an

<sup>13</sup> *United States v. Burr*, *In re Willie*, 25 Fed. Cas. No. 14692e, at 40 (C.C.D. Va. 1807).

<sup>14</sup> *Burdick v. United States*, 236 U.S. 79 (1915).

<sup>15</sup> *Ullmann v. United States*, 350 U.S. 422, 426-27 (1956).

<sup>16</sup> *Slochower v. Board of Educ.*, 350 U.S. 551, 557 (1956).

untruth, shooting a rifle, threatening a man, striking him, driving his car, signing his name, selling his property, picking his peaches, branding his cow, firing his barn, breaking his window, entering his home, taking his baby, killing his wife, or even *joining the Communist Party*: — these are all overt acts which may be, as at times they have been, either guilty acts or innocent acts. They may be, therefore, incriminating facts. But furthermore, in addition to overt acts which are constituent elements of alleged crimes, there are almost infinitely possible fact situations which, while not intrinsic elements of any crime, nevertheless can provide *circumstantial evidence* of alleged crimes, and which can form a *link in the chain of evidence* pointing towards non-existent but *alleged* guilt. In the light of these considerations there seems to be no rational or logical basis for the popular perjury or crime dilemma. Rather it seems to be based upon the emotional drive to find scapegoats for our social evils. Possibly this explains why it is in such high favor with the demagogue. In any event, it is certain that the constitutional privilege extends, not merely to answers which would in themselves support a conviction, but also to all answers which would form a link in the chain of circumstantial evidence needed to prosecute the witness for crime.<sup>17</sup>

*Sixth:* In order to take advantage of the protection of the privilege, the witness must claim it. The claim may be made in any understandable language and does not demand any particular words, ritualistic formula or talismanic phrase.<sup>18</sup> But the claim must be restricted to instances where the

witness has *reasonable* cause to apprehend danger from an answer.<sup>19</sup> The witness has no unlimited or arbitrary right to claim the privilege. In the last resort it is the court which must decide whether, under all the circumstances, the witness' claim and refusal to answer were reasonable or not. The witness at a legislative investigation, therefore, must invoke his claim and refuse to answer at the peril of a subsequent court decision.

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367 (1951), and to require him to answer if it clearly appears to the court that he is mistaken. *Temple v. Commonwealth*, 75 Va. 892 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.<sup>20</sup>

*Seventh:* Probably the greatest confusion in the public mind, concerning the meaning and scope of the privilege, is caused by the doctrine of "waiver." The privilege gives no one the option of picking and choosing at will among the questions he decides to answer and those he decides not to answer — even among questions which are clearly in-

<sup>17</sup> *Blau v. United States*, 340 U.S. 159 (1950).

<sup>18</sup> *Empak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955).

<sup>19</sup> *Mason v. United States*, 244 U.S. 362 (1917).

<sup>20</sup> *Hoffman v. United States*, 341 U.S. 479, 486 (1951).



criminating. In a criminal trial the defendant may invoke the privilege and decline to take the stand; but if he testifies at all, he "waives" the privilege and must answer all questions relevant to the issue of the trial. The judge is there to see that he *does*, and to see that all questions *are* relevant to the issue.

Unlike criminal trials, however, investigations have no sharply defined issues as measures of relevancy. In the nature of the investigatory process they cannot. Wherefore problems. A witness who answers one question may be held to have waived the privilege as to all "related questions"; one who has given some testimony may be held to have waived the privilege in the same "area of investigation." For instance, a witness who willingly testified that she had been the treasurer of a local communist cell and had transferred the party's records to another person, was held to have waived her privilege and was adjudged in contempt for refusing to name that other person. "Disclosure of a fact waives the privilege as to details. . . ."<sup>21</sup> A dissent in *Rogers v. United States*<sup>22</sup> pointed up a difficulty with the decision by arguing that ". . . today's holding creates this dilemma for witnesses: on the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty knowing when to claim it."<sup>23</sup>

This was undoubtedly the reason why

<sup>21</sup> *Rogers v. United States*, 340 U.S. 367, 373 (1951).

<sup>22</sup> 340 U.S. 367 (1951).

<sup>23</sup> *Rogers v. United States*, 340 U.S. 367, 378 (1951) (dissenting opinion).

Mr. Dave Beck, Sr., recently invoked the privilege when he was asked by the McClellan Committee whether or not he knew Mr. Dave Beck, Jr. The absence of a sharply-defined issue and the delicacy of the waiver doctrine are undoubtedly the reasons why many witnesses at congressional investigations have surprised, bewildered, annoyed and even angered the television audience by their monotonous refusals to answer some apparently simple and innocuous questions. The skillful investigator knows what he is after; he is keenly aware that the privilege may block his way, and that a waiver will clear his path; and he frames his questions accordingly. The witness, anxious to retain his privilege, and fearful that the interrogator may trap him into a waiver, shadow-boxes and dances around defensively to the disgust of the ringsiders who came to see a slugging match with the hope that somebody would get decked, but good!

About five years ago a prominent playwright, who had been summoned by a congressional investigating committee, wrote to the chairman as follows:

. . . I am ready and willing to testify before the representatives of our government as to my own opinions and my own actions, regardless of any risks or consequences to myself. But I am advised by counsel that if I answer the committee's questions about myself, I must also answer questions about other people, and that if I refuse to do so, I can be cited for contempt . . . I am not willing, now or in the future, to bring bad trouble to people who, in my past association with them, were completely innocent of any talk or action that was disloyal or subversive . . . I am prepared to waive the privilege against self-incrimination and tell you anything you wish to know about my views or actions, if your committee will agree to refrain from asking me to name other people. If the committee is unwilling

to give me this assurance, I will be forced to plead the privilege of the Fifth Amendment at the hearing.<sup>24</sup>

The committee chairman refused the offer on the ground that the committee could not permit a witness to determine the conditions or define the limits of her testimony, or be placed in the position of trading with a witness. The witness appeared, invoked the privilege, and declined to testify about herself or others. Assuming that her own activities would not have been personally incriminating, she had no privilege to invoke and no right, of course, to set up a false claim of privilege in order to protect her friends. For the privilege is purely personal. However, assuming that her own activities would have been personally incriminating, in the sense explained above, she had a right to invoke the privilege, even though her ulterior motive was to protect others. For motive and intent are not the same thing: the first regards the *why*, the second the *what*. The fact that the witness was emotionally indifferent to her own fate, and was motivated by a desire to protect others, did not destroy her right intentionally to invoke her own protection. The chairman of the committee, on the other hand, was quite within his authority in refusing to agree to a deal which amounted to trading with a witness. Yet the committee and the country lost whatever benefit, if any, knowledge of the witness' own personal activities would confer.

The above is a brief and, I fear, wearisome epitome of this writer's concept of the historical origin, the meaning and scope, and some of the many difficult legal problems of the fifth amendment privilege against self-incrimination. But there are philosophical and moral problems involved

<sup>24</sup> *New York Times*, May 22, 1952, p. 15, col. 1.

too. One illustration may be of some interest. Usually such problems are fictitious or at least fictionalized. The following, however, is frankly a real case with which the writer is personally and closely acquainted.<sup>25</sup> It is also typical of very many similar moral problems.

#### *A Moral Problem*

Some years ago an idealistic young man, motivated by a desire to work for social justice for the negro, joined the Communist Party. He lived in a "segregated" part of the country and was a daily witness of the tragic injustice visited by respectable folk upon their colored neighbors. Mistakenly, although alas! understandably, he thought that the Communist Party was the only organization of consequence interested in laboring for the equal rights and civil liberties of the negro people. While in the Party he recruited a few of his friends who were motivated by the same ideals. During the period of their membership neither he nor his friends had any part or knowledge whatsoever of the subversive activities of the organization. They were assigned to work for and with the negro. Nevertheless, a few years after joining they all quit the Party in disillusionment and disgust, convinced by bitter experience that the Party simply had no *bona fide* interest in the negro at all, but was solely interested in a cynical, albeit futile,<sup>26</sup> attempt to use him as a political

<sup>25</sup> It is understood, I trust, that I did not come by my knowledge as a clergyman. Moreover, the witness involved has personally read the following account of his problem and has gladly consented to its publication.

<sup>26</sup> A record of the Communist Party's futile attempt to recruit substantial numbers of negroes, by promising alleviation of their tragic civil disabilities, would constitute an inspiring tribute to the genuine Americanism of the negro people — an embarrassing tribute, in fact, against the ironical background of the current pandemonium

pawn. In the meantime the young man completed his university and professional education. He frankly revealed his former communist membership and activities to the licensing authorities of his profession and to his employers. A few months ago he was requested to appear before an advance agent of an investigating committee. He spoke with the agent willingly and freely of his activities and experiences in the Party, of the Party's procedures and techniques, and of all he knew about it — except that he did not name his friends indicated above. Shortly thereafter he was summoned by the committee to testify at a televised hearing of the committee itself. Whence the problem: what should he do? What would a lawyer advise? Or a moralist?

He has three possible courses: 1) *He can invoke the privilege and thus protect his friends.*<sup>27</sup> This is what the playwright-witness did. But if he does this, he and his family will certainly suffer public opprobrium and social ostracism; he will surely lose his job and probably the practice of his profession.<sup>28</sup> As a matter of fact the situation is so critical that an extremely close relative has just been categorically notified of automatic loss of position if he (the witness) "takes" the fifth amendment! 2) *He can waive the privilege and expose his friends.* But if he does this, his friends will unquestionably suffer similar, possibly

over civil rights legislation. Such a record would have its amusing aspects too. Frequently in the rural South the only places the negroes could be assembled was in the negro churches; but, to the exasperation of their communist would-be organizers, the negroes would yawn and drowse through dialectical materialism and then wake up and wind up the meetings vivaciously singing spirituals.

<sup>27</sup> *Dennis v. United States*, 341 U.S. 494 (1951); *Blau v. United States*, 340 U.S. 159 (1950).

<sup>28</sup> See *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

worse, retaliations. For their former communist membership and activities are quite unknown to the general public and to their own social, business and professional circles. Having "enticed" them into the Party, he feels responsible for their present precarious positions. They are all extremely frightened; one is close to a nervous breakdown; one is even contemplating suicide in the event of exposure. 3) *He can waive the privilege but still refuse to name his friends.* But if he does this, he and his family will suffer at least some of the evils of the first course, and he will probably or possibly go to jail as well.<sup>29</sup> He is troubled, of course,

<sup>29</sup> This problem arose, and the above lines were written, before *Watkins v. United States*, 77 S. Ct. 1173, which was decided June 17, 1957. It is submitted, however, that even *Watkins* does not dissipate the danger of a striped suit for our witness. It is true that Mr. Watkins testified freely about himself and about others who were, to his knowledge or belief, still members of the Party; and that he refused to testify about others who, to his knowledge or belief, had deserted the Party. And Justice Clark, in his dissent, stated *arguendo* that Watkins was *in fact* seeking "to protect his former associates, not himself, from embarrassment. . . . It is settled that one cannot invoke the constitutional rights of another. *Tileston v. Ullmann*, 318 U.S. 44, 46 (1943)." But Justice Clark did not claim that the majority had reversed the *rule* of *Tileston*, or that the majority had repudiated the *principle* that the privilege is purely personal. The majority opinion is not without some obscurity to me, at least, and I confess to some relief in reading the opening sentence of Justice Frankfurter's concurring opinion: "I deem it important to state what I understand to be the Court's holding." The decision in *Watkins* certainly does not allow a witness, who has waived the privilege, to refuse to name others when the questions asked are not aimed at exposure for exposure's sake, but are clearly relevant to an area of inquiry properly delegated by the Congress. But in *Watkins* the clear relevancy and the proper delegation were found lacking, wherefore the conviction was vitiated by the vice of vagueness repugnant to due process. If I am wrong, the whole matter will be cleared up next semester when my students brief the case.

about his own welfare and that of his family; but his chief concern is for the friends he has unwittingly led into grave danger, and he is repelled by the idea of dragging their skeletons from the closet into public view. He is maturer now by age and education, and wiser by sad trial and experience. And he is completely convinced, as a matter of private but sound judgment, that his friends are utterly innocent of any part or knowledge of any subversive activities, and that neither the disclosure of their names, nor the testimony which might be subsequently demanded of them, would add one iota to the sum total of the committee's *useful*<sup>30</sup> information about the Communist Party or its subversive activities.<sup>31</sup> Now what should he do?

Suppose that no informal agreement, such as the "bargain" unsuccessfully attempted by the playwright-witness, can be made with the committee. Suppose also that the witness in question, reluctantly resigned to the consequences to himself and his fam-

<sup>30</sup> Again, the witness' conviction about "*useful*" information was expressed to me, and incorporated into the above text, before *Watkins* and before *Sweezy v. New Hampshire*, 77 S. Ct. 1203 (1957), decided the same day. It is interesting, therefore, to note the following language in *Watkins*: "Their [committee members'] decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor *useful* to it." (Italics supplied.) And in *Sweezy*: "Within the very broad area thus committed to the discretion of the Attorney General [of New Hampshire] there may be many facts which the legislature [of that State] might find *useful*. There would also be a great deal of data which that assembly would not want or *need*." (Italics supplied.)

<sup>31</sup> The foregoing account of our witness' problem is accurate and is not overdrawn. A more detailed picture would show the situation even more distressing, but might lead to the identification of others. What follows, however, is simply supposition. I do not feel at liberty to reveal the actual denouement.

ily, and sincerely willing to give the committee all the *useful* information he has concerning the Communist Party, yet desperately anxious to save his friends the calamity of public exposure, solves his distressing trilemma by choosing the third and last course. Suppose finally that he appears, testifies frankly, but refuses to name his friends; he is cited for contempt, tried in court, and sentenced to jail. In such a supposition, would his refusal, or his sentence, be morally justifiable?

Undoubtedly he has been legally sentenced for a violation of the existing *civil* law.<sup>32</sup> The question now is: has he violated the *natural* law, and has he been sentenced accordingly? The writer does not find the answer easy.

In approaching an answer, and for the purposes of this article, two repugnant theories may be disregarded: first, the positivistic theory that, regardless of abstract justice, *no* civil laws bind in conscience; and second, the equally ghastly theory that, regardless of abstract justice, *all* civil laws bind in conscience. A solution will be attempted in the traditional scholastic philosophy of natural law.

Scholastic philosophers unanimously hold that all true laws, divine or human, natural or positive, ecclesiastical or civil, impose *some* obligation upon the conscience of the subject. But all true laws are mandated by justice and are measured by reason. Therefore an unreasonable law is an unjust law; and an unjust law is, in reality, no law at all, but a species of violence. But mere violence can never touch the human

<sup>32</sup> At least if the delegation of the subject of inquiry and the pertinency of the questions propounded to the witness, in asking for the names, were clear enough to avoid the vice of vagueness which saved Mr. Watkins.

conscience. Therefore an unjust civil law, which is a species of governmental violence, cannot bind the conscience of a citizen any more than banditry, which is a species of private violence, can bind the conscience of a wayfarer. But in view of the communist conspiracy and its grave threat to the civilized world, no one can seriously contend that a civil law is unreasonable or unjust which authorizes a congressional committee to investigate the Communist Party and its activities for the purpose of recommending legislation to protect the security of the country and the welfare of its citizens. Therefore, such a law, with its necessary penal sanctions for those who deliberately refuse to answer relevant questions, is obviously reasonable and just. Hence, it imposes *some* obligation in conscience.

Moreover, it is in the nature of a law to be a general rule for the common good. The legislating *authority* may provide exceptions in the enactment of a law, or may alter a law by enacting them later, but such exceptions merely define or limit, they do not destroy, the essential generality of the rule. But a *subject* cannot trespass upon the generality of the rule by making exceptions at any time, because he has no legislative authority. Therefore our witness in the problem case cannot make an exception for himself or his friends regardless of the consequences.

There is, however, the principle of *epeikeia*<sup>33</sup> to be considered. The principle of *epeikeia* is based upon the fundamental but extremely delicate balance between the individual good and the common good. For the purpose of law is the common good. But

<sup>33</sup> Aristotle's Greek term, whence the Latin *aequitas* and the English *equity*. The principle of *epeikeia*, however, is not to be confused with our own rules of equity which regard authoritative, not private, decisions.

the common good, although it may require individual hardships and at times may even demand the supreme personal sacrifice, has an essential teleological relationship to the individual good. The principle of *epeikeia*, weighing private welfare against public welfare, means this: that a private person, when faced with an extraordinary situation, when recourse to an authoritative decision is impossible, may reasonably conclude, despite the literal wording of a law, that the legislature did not foresee such unusual circumstances, and that the legislation was not intended to apply in such a difficult case, because its application would create the type of private hardship which would militate, directly or indirectly, against the public welfare, which is the purpose of the law itself. In our problem case, however, there seems to be no room for the doctrine of *epeikeia*.

There is no reasonable doubt about the foresight of Congress and the intent of its legislation in authorizing committee investigations of the Communist Party and communist activities. Congress foresaw full well, not only generically but probably with considerable particularity, that such investigations would result in acute embarrassments and great hardships for many people, and even innocent people. If there were ever any doubt about this, it has long ago been dispelled by the repeated resolutions of Congress to continue the investigations over the past several years when, as a matter of public knowledge, the resulting embarrassments and hardships have occasioned even suicides. The courts, which are the final and authoritative arbiters of legislative intention, would dismiss a plea of hardship as legally frivolous. And granting that our problem witness is absolutely correct in his conviction that the naming of his friends

would not add one iota to the sum total of the committee's *useful* information about the Communist Party or its subversive activities, yet the public law cannot allow private judgment, however sincere and sound, to make that decision. There cannot be one law for the saint, and another for the sinner; or one law for the seer, and another for the fool. The principle of *epeikeia* is no open sesame to a haven beyond the burdens of just civil law. Our problem witness cannot invoke it.

Our witness, then, has deliberately violated a just civil law. He is legally guilty. But is he morally guilty? Is legal guilt always and necessarily moral guilt? On this question scholastic philosophers split into two opposing schools of thought, sometimes for convenience called the Thomists<sup>34</sup> and the Suarezians. It is impossible in this short article to expound the differences and the reasons which separate the two schools.<sup>35</sup> However, the Thomists hold that *all* just civil laws impose a *direct* moral obligation of obedience upon the conscience of

<sup>34</sup> It should be noted that this use of the term "Thomist" is a very narrow one, confined to intramural use among scholastics, and denoting this one narrow point of controversy. In the ordinary and more general use of the term, most "Suarezians" are also "Thomists," that is, they follow the general philosophy and method of Thomas Aquinas. Thomas Aquinas (1225-1274), a Dominican, and Saint and Doctor of the Church, is unquestionably the greatest philosopher-theologian of history. Francis Suarez (1548-1617), a Jesuit, is one of the great legal philosophers of history; one of his books, incidentally, was burned in London and banned in Paris (1614) because it advocated limited powers of government. This controversy, however, is *not* a Dominican-Jesuit dispute; members of both Orders cross party lines with utmost abandon.

<sup>35</sup> An excellent book, devoted exclusively to this particular controversy, is *The Nature of Law*, by Thomas E. Davitt, S.J. (1951). Illustrating an observation made in the last note, the Jesuit Father Davitt prefers the Thomist to the Suarezian theory.

the subject. The Suarezians, on the other hand, hold that *some* just civil laws may impose only an *indirect* moral obligation, *i.e.*, an obligation in the alternative: either to perform the act commanded (name the names) or to accept the penalty (go to jail) for refusing to do so. Both schools, of course, hold that all just civil laws impose *some* moral obligation upon the conscience of the subject, and therefore of our witness.

This writer timorously suggests that the Thomist must logically hold either 1) that the law is unjust, which would surprise the Court; or 2) that the law does not apply to the witness, which would surprise the Congress; or 3) that in deliberately violating the law the witness has committed a moral wrong however slight, which would surprise the witness. If the Thomist decides that the witness is guilty of a moral wrong in deliberately violating an applicable just law, he may logically conclude that the penalty inflicted was morally justified. It would seem, therefore, that the Thomist would have advised our witness to confine himself to one of the first two choices in his trilemma: either claim your privilege and protect your friends, or waive your privilege and expose your friends. But the Thomist could not advise or sanction the third possible solution: waive your privilege but refuse to name your friends.

The Suarezian, on the other hand, may logically hold both 1) that the penalty inflicted was morally justified and the witness is morally bound to fulfill it, because it was inflicted for the deliberate violation of a just civil law; and 2) that the witness, nevertheless, did not commit any moral wrong in violating this applicable just law, because this particular law imposed only an indirect or alternative obligation on his conscience,

*i.e.*, either name the names or accept the penalty.<sup>36</sup> The Suarezian, therefore, could advise or sanction the choice taken by our problem witness. But which theory is right, or at least more probably right, the Thomist or Suarezian?

This writer, lacking the courage and the competence to be apodictical, softly suggests the Suarezian. He does so because, although there are metaphysical difficulties involved in both theories, the Suarezian theory fits better whatever he knows about the jurisprudence of our own civil law.

A definition should fit the thing defined. To avoid sheer conceptualism, we must begin *a posteriori* with a merely nominal definition indicating generically the class of beings to be defined (*v.g.*, those "beings generally called men"; those "rules generally enforced by the courts"), but excluding for subsequent scrutiny the few bizarre and dubious members of the class (*v.g.*, the few

monsters; the few clearly unreasonable rules enforced by the courts). Then, inspecting the members who clearly belong to the class, we arrive by a process of abstraction to a metaphysical definition of all members of the class (*v.g.*, "rational animals"; "ordinance of reason authoritatively promulgated for the common good"). Finally, we apply our definition to the few bizarre and dubious members of the class to see whether they belong or not (*v.g.*, monsters do; unjust rules do not). A similar *a posteriori* process should be applied to the controversy between the Thomists and the Suarezians as to the existence of *purely* penal law.

The Thomist theory, that *all* true civil laws impose a *direct* moral obligation, would seem either 1) to exclude from the concept of civil law a vast number of reasonable and necessary rules daily enforced by the courts for the common good; or 2) to place upon the conscience of the citizen a burden which the *sensus communis* of good men considers non-existent, and which the jurisprudence of our civil law does not require. The Suarezian theory, on the other hand, that *some* true civil laws may impose only an *indirect* moral obligation, excludes from the concept of civil law only the palpably unjust rule, and does not place upon the conscience of the citizen such a burden. The latter theory shuns the ivory tower for the work-a-day world of the courts.

The Suarezian theory fits more realistically the accepted jurisprudence of our civil law. Many fundamental distinctions, deeply imbedded in our law so indicate: the distinctions, for instance, between crimes *mala in se* and *mala prohibita*; between crimes which require a *mens rea* and those which do not; between crimes involving *moral turpitude* and those which do not; between crimes for which *bona fides* is a

<sup>36</sup> The above is an oversimplified statement of the Suarezian theory. Suarezians differ among themselves on the intimate nature of the obligation involved. Among other explanations, some maintain a disjunctive (either or) obligation (some a conditional (if not) obligation. To the extent that the disjunctive (either or) theory implies a legislative indifference, as to the act or the penalty, it seems unrealistic. Insofar as the conditional (if not) theory implies a legislative intent that the law be obeyed, but imposes a merely "juridical" obligation to the act and a conditional (if not) moral obligation to the penalty, it seems preferable. Nevertheless, whether the obligation to the act be called "juridical" or something else, it is not a direct moral obligation.

Incidentally, since income tax evasion is frequently a red herring which distracts from the merits of the Thomist-Suarezian controversy, I would like to protest that my personal opinion is that income tax laws are *not* purely penal. Income tax evasion, at least in contemporary society, seems to me to be a violation of contributive (sometimes called legal) justice which casts an unfair burden upon others and is properly classified as a crime involving moral turpitude.

defense and those for which it is not; between ordinary criminal offenses and the so-called *public welfare offenses*.<sup>37</sup> This is not to argue, by any means, that the Suarezian distinction between "penal" and "purely penal" offenses coincides neatly and exactly with the distinctions instanced above. It does not. It does, however, share with them the spirit and genius of our law. It fits.

For example: what about an immigration statute which provides for the deportation of aliens upon conviction of crimes involving *moral turpitude*, but not upon conviction of *other punishable* crimes? Such a statute, and there are many such, seems to postulate the Suarezian distinction in both theory and practice. Moreover, what about the multitudinous "public welfare offenses" in which *bona fides* is no defense because a *mens rea* is simply not an element of the crime? This very important segment of our criminal laws seems quite amenable to the Suarezian theory. Finally, it has been explicitly held by the United States Supreme Court that the deliberate refusal to answer pertinent questions asked by a duly authorized congressional committee does not involve moral guilt, but the refusing witness may be punished nevertheless. Justice Pierce Butler, writing for the Court, put it this way:

The gist of the offense is refusal to answer pertinent questions. *No moral turpitude is involved. Intentional violation is sufficient to constitute guilt.* There was no misapprehension as to what was called for. The re-

<sup>37</sup> See *Morrisette v. United States*, 342 U.S. 246 (1952), in which the late Justice Jackson, speaking for the Court, enunciates the jurisprudence of our criminal law, stressing its fundamental roots in moral responsibility, but showing also the reasonableness and necessity of the "public welfare offenses" which penalize where there is no moral culpability.

fusal to answer was deliberate. The facts sought were pertinent *as a matter of law*, and [the statute] made it appellant's *duty to answer*.<sup>38</sup>

Accordingly, this solution of our problem is offered for whatever it is worth: that the witness committed no objective moral fault in deliberately refusing to reveal the names of his friends to the congressional committee investigating the Communist Party, but that he is morally obliged to accept the penalty for his refusal to do so. The civil law deals in an external forum for the common good. In the pursuit of its purpose and in the nature of its forum, it cannot avoid the hardships which many cases impose upon individuals.

In view of the emotional temper of the times, and lest there be too much misunderstanding, it might be the part of prudence for the writer to state in conclusion that he has never been accused of being a communist, or a communist sympathizer, or a communist dupe.<sup>39</sup> Atheistic communism is the most viciously false doctrine corrupting the minds of men. The communist conspiracy is the most diabolically organized evil threatening the civilized world. We would be dullards to ignore its falsity, and fools to neglect its threat. The virtues of both religion and patriotism demand that we fight communism with every legitimate weapon at hand. But neither religion nor patriotism affords us the weapon of hating people, not even communists, and much less ex-communists. Neither religion nor patriotism persuades us that the end justi-

<sup>38</sup> *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (emphasis added).

<sup>39</sup> Except, I must confess, in some anonymous and abusive, though highly amusing letters from crackpot racial segregationists, I reserve the right to enjoy, and not to count, anonymous letters.



fies the means. Neither God nor country will be well served if, tragically and ironically, we embrace the basic policy of communism in order to fight it.

In repudiating the communistic end-justifies-the-means policy, and in shaping our own anti-communist policy, the United States Supreme Court plays a vital part. The Court vindicates the authority of the legislature to investigate all matters within legislative power, the authority of investigating committees to inquire into all matters within their delegated power, and by all questions relevant to the delegated scope of inquiry. On the other hand, the Court protects the individual from investigations beyond legislative authority, from investigating committees acting beyond delegated authority, and from questions irrelevant to the delegated

scope of inquiry. The decisions concerning the self-incrimination clause of the fifth amendment make fascinating reading for the student of law and of morals. Despite our arguments and disagreements — and the billingsgate which disfigures the contemporary civic scene — these decisions constitute proud proof of the integrity, the intelligence, the industry, and the independence of the United States Supreme Court. And they illustrate strikingly the tremendous task of the law in its constant attempt to adjust the delicate balance between authority and liberty, between order and freedom, between public and private welfare, between the demands of society for the common good and the demands of the individual for the dignity and privacy of human personality.

