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This issue presents the first paper delivered at the Fourth Annual Conference of the Guild of Catholic Lawyers of New York, in December 1956. The other paper on the natural law and its application to religious schools under the United States Constitution, by Professor John Cornelius Hayes, will appear in the April 1957 issue.

THE NATURAL LAW AND THE FIFTH AMENDMENT

EDWIN P. MCMANUS*

ALTHOUGH THE TITLE of this address speaks in terms of "The Fifth Amendment," I take it that we all understand that therein we refer not to the entire amendment but to that clause of it which reads: "No person . . . shall be compelled in any criminal case to be a witness against himself." The other sections of the amendment excite little debate and raise few, if any, natural law problems.

Perhaps no subject has been more widely discussed and debated in legal circles during the past three or four years than this one of the invocation of the so-called "self-incrimination clause" of the Fifth Amendment to the Constitution of the United States. The witness before a Congressional committee who refused to answer " . . . on the ground that I might incinerate myself" is well known, and in his case, at least, possibly not so far from the mark.

Yes, the discussions have been many and at times attempts have been made to couple the purely legal aspects of the question with considerations of pertinent natural law principles. I have in mind especially the excellent program sponsored by Marquette University which put on the same platform, at the same time, the Reverend John R. Connery, S.J., Dean Erwin N. Griswold of Harvard Law School and Mr. C. Dickerman

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Williams of the New York Bar. However, my attention has been drawn to no previous instance where a discussion of the legal problems and those related to the natural law has been undertaken by one man.

I am sure that we are agreed that this is a subject of tremendous scope; a subject upon which many more words than I shall, or could, use in this address might profitably be expended. It will be my aim to deal with a few of the problems which are inherent in the subject as a practical man; as distinguished, perhaps fairly, from a university professor. I am aware that there is a well established school of thought which holds that the more an address, or an article, is practical, the less it is scholarly. However I do not subscribe to this view.

EDWIN P. MCMANUS

I should like to hasten to establish a frame of reference. I am sure that we can agree that we must discuss this subject against the background of the Communist conspiracy. Not to do so, I think, would bespeak something less than intellectual integrity. I readily concede that we have had some problems with regard to what this clause meant when used in connection with relatively uncomplicated crimes such as murder. These, however, have been as nothing compared with the tumult and the shouting which has arisen since the general and indiscriminate invocation of the privilege by suspected Communists has become the mode. Surely, it is in this area that attempts have been made, with considerable success, to extend the privilege far beyond its metes and bounds as previously understood.

I hope that we can further agree that none of us would repeal this clause of the Fifth Amendment. To many of you, perhaps to all of you, this may seem a laboring of the obvious. Yet I have read a number of otherwise illuminating articles on this subject wherein so much time and space was given to the establishment of this premise that too little remained for a discussion of the truly provocative questions which arise in an area where reasonable men may honestly differ. Parenthetically, let me say that following a nation-wide television program where I discussed the Fifth Amendment and voiced some opposition to its extension to what I considered to be unreasonable lengths, I was inundated with letters. Most, I am happy to say, were very kind. What surprised me however, was the fact that those which were critical indicated that I had been too moderate in not favoring the abolishment of the privilege. Most of us know that this would run contrary to history, the law and the natural law. However, on the record, a rejection of this position seems necessary.

Finally, before getting to the real core of the problem, I should like to eliminate one other area in which I consider extensive discussion to be unprofitable. May we agree, that where the privilege is available at all, it is available equally in a criminal case, in a civil case or before a Congressional committee? In fact, may we not agree that the net effect of many judicial interpretations culminating in the recent *Quinn* and *Emspak* cases[1] has been effectively to delete the words ". . . in any criminal case . . ." from the meaning of the privilege? I say this very much on a "you can't fight City Hall" basis.

[1] Emspak v. United States, 349 U. S. 190 (1955); Quinn v. United States, 349 U. S. 155 (1955).

I am reasonably certain that this result was not the intention of the framers of the Constitution. I am by no means certain that it would be their intention today. I rather think that it would not. Moreover, I am aware that the most persuasive arguments can be and have been made that this result is wrong. I have particular reference to an article in the American Bar Association Journal by Mr. R. Carter Pittman of the Georgia Bar, which reaches that very conclusion.[2] I confess I am, to some degree, persuaded by a number of Mr. Pittman's thoughtful propositions. However, because I feel that the decisions of the Supreme Court have taken us beyond the point of no return, I think that we must, to be realistic, accept the conclusion that the privilege is as fully available before a Congressional committee as before a United States District Court.

First: we will cast the discussion against the background of the Communist conspiracy. Second: none of us would repeal the Fifth Amendment. Third: the privilege against self-incrimination is not limited to criminal cases.

I have heard no one dispute that, of recent years, the interpretations placed upon the amendment by the Supreme Court have greatly expanded it. Whether this has been for good or bad has been much debated but, I think, the underlying fact has not. No longer do we hear courts refer to one who invokes the privilege as "a self-confessed criminal."[3] No longer do we find this defense judicially lambasted as "one not resorted to by honest men."[4] Instead the Supreme Court appears to be telling us, in its latest pronouncements, that the witness who invokes the privilege of the Fifth Amendment, thereby sets in motion some sort of a new and different presumption, running in his favor, which forecloses any of us from drawing any inferences whatever from his conduct. However, even the Court seems to have some doubt as to whether it can accomplish this result. It has shown an awareness that notwithstanding its expressed wishes, the public mind does not slip into neutral when the privilege is invoked. The Court recently said: "[I]f it is true that in these times a stigma may somehow result from a witness's reliance on a Self-Incrimination clause, a committee should be all the more ready to recognize a veiled claim of the privilege."[5] I shall refrain from comment on this remarkable thesis; that because our friends, neighbors and the community may think ill of us for doing something, our right to do it is enlarged. I will confine myself to the observation that, at least, the quotation displays a judicial understanding that a stigma *does* attach to the invocation of the privilege.

Perhaps my principal premise in this address lies in the fact that I have sensed, and I use the word advisedly because I could not put my finger on the source of my feeling, that Catholic lawyers and Catholic law students somehow developed a feeling that there is something morally wrong about arguing against this extension of the Fifth Amendment, and something both morally wrong and illegal about attaching any stigma to the witness who takes advantage of it. I do not hold with such a view and it shall be my purpose to demonstrate that it is neither required nor supported by the natural law.

Let us discuss this stigma and do it, as we proposed, in terms of communism's threat to

[2] *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956).

[3] Brown v. Walker, 161 U. S. 591, 605 (1896).

[4] United States v. Mammoth Oil Co., 14 F. 2d 705, 729 (8th Cir. 1926).

[5] Emspak v. United States, 349 U. S. 190, 195 (1955).

our nation. Let us take, for example, the case of a college professor. I am sure that you are aware that Dean Griswold has written, at length, on this subject. The Dean, as a matter of fact, has developed a new technique in dealing with the problem. He uses the same title no matter what he says. For example if you read "The Fifth Amendment Today" as distributed, gratis, by the Fund For The Republic, and "The Fifth Amendment Today" as it appears in the Winter, 1955-56, volume of the Marquette Law Journal, both by Griswold, you will find yourself reading two quite different articles. At any rate, the Dean shows a degree of consistency. In both articles he suffers and bleeds over the fate of a witness before a Congressional committee. In the latter article the witness is identified only as a "poor devil." In the former the Dean is more specific and identifies his man as a "college teacher." I should like, for purposes of illustration, to borrow Dean Griswold's troubled "college teacher" and I should like also to call him "Professor X." Now, I not only concede, I aver, that the Dean knows this "college teacher" better than I do. He has probably known him for a long time. In fact he may know Professor X2, X3 and X4. It may be this very familiarity which leads Dean Griswold into what, I believe, are wrong conclusions. In any event, I do not know "Professor X," so at least my observations about him will be completely objective, a consummation I should hope, devoutly to be wished. Let us construct a hypothetical case in which "Professor X" plays the leading role, and let us make it completely uncomplicated. We will ask him no devious questions about his past associations. Instead we will put him before a properly constituted Congressional committee and ask him the completely unambiguous question, "Are you, right this minute, a Communist?" As "Professor X" ponders his answer to that question, let us, as we hope the professor will, look at the precedents. Where does the professor find himself?

I suggest that we begin with the opinion of Chief Justice John Marshall in the *Aaron Burr* case.[6] Those of you who have gained a degree of familiarity with this subject may be surprised to find me using this precedent. It is more often cited by those who take a position quite different from mine. Yet, I find considerable solace in it. I am gratified by these words of the great Chief Justice: "If the declaration [that the witness's answer would incriminate him] be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath. . . ."[7] Many other quotations from the Supreme Court to the same effect are readily available, but they are merely cumulative, so I confine myself to just this one.

Return with me now to "Professor X." The professor is, we find, in terms of the Fifth Amendment, in something of a spot. In terms of the natural law, as we shall see, he is in even more of a spot. The professor is either a Communist or he is not. If he is, he clearly has a legal right to invoke the privilege, not because being a Communist is in itself a crime, because it isn't, but because an affirmative answer *might* form a "link in the chain" which *might* convict him of something. Please note, that in spite of this rather "iffy" rationale, if the professor is a Communist his right to the privilege is absolute under the law. Now let us examine his natural law position. The natural law recognizes the right to silence. It says that a man may remain silent or give an evasive answer

[6] United States v. Burr, *In re* Willie, 25 Fed. Cas. No. 14692e (C.C.D. Va. 1807).
[7] *Id.* at 40.

when the answer to the question would cause the loss of his life or, in ancient times, would cause him to be sentenced to the galleys, or would result in the loss of all his property, or would result in a complete loss of his reputation. How does "Professor X" stand? Clearly his answer will not cost him his life, nor a sentence to the galleys, nor will all of his property be confiscated. I wish I were more positive that it would result in the complete loss of his reputation. However, it certainly *should* have that effect with all right thinking people so we may assume that the professor has at least a prima facie natural law right not to answer. Thus far, it would appear that his legal and natural law positions are identical. This is not the case. The natural law right to silence is not absolute. It disappears if the withholding of the information would result, for example, in a calamity to the community. So, in order to justify himself under the natural law, the professor will have to ask himself this additional question. Will the withholding of this information result in a national calamity? What is the answer? I should like to leave that question unanswered for a few minutes. We shall deal with it directly.

Return with me again to the professor. This time we will assume that he is not a Communist. The natural conclusion would seem to be that if he is to avoid the charge of perjury under the Marshall definition, he must answer the question in the negative. But, one might say, not so fast. This professor is not a Communist but in the past his boyish enthusiasm led him to join a number of organizations which have now been labeled somewhat subversive by the Attorney General of the United States. The professor is frightened and confused. He is afraid that if he answers "No" these past affiliations will be dragged out and that he will then be prosecuted for perjury. Parenthetically, why is it that hypothetical witnesses are always frightened and confused while the actual ones are assured to the point of arrogance and are invariably flanked by expensive legal talent? Passing that, however, we return to the point. Suppose, on the stated grounds the witness elects to invoke the privilege. He does so at his peril. The propriety of conduct will be measured by objective standards which approximate the "reasonable man" test. Perhaps we can best deal with this question on a *reductio ad absurdum* basis. If I, at some later date, am asked: "Were you in New York on December 15, 1956?", I think we can all agree that I cannot refuse to answer the question merely because I know that a murder took place in New York on that day. It is true that it is *possible,* "Alice in Wonderland" possible to be sure, but *possible,* that I may be connected with the crime and prosecuted, but the probabilities are all against it. Accordingly, I submit, no one would allow me the invocation of the privilege under such circumstances. Now, if the question is: "Were you in the Biltmore Hotel, in New York, on December 15, 1956?" and I know that a murder took place in the Biltmore on that date and I was staying there, the problem changes a great deal. My point is, that in the final analysis, everything turns upon the reasonableness of my apprehension of prosecution. This must be measured by external criteria, quite apart from my subjective determination. This is the positive law. How stands the natural law? The natural law agrees. In fact, again, the natural law goes further. It says that even if my subjective determination is sincere and my apprehension of prosecution is real, the law may punish me if by its standards I am wrong. This is because under the natural law society

has rights as well as the individual, and the fact that an individual may be punished for doing what he subjectively thinks is right, while not a happy result, is a permissible one, justified by the larger interest of the community. The natural law apprehends that were any other standard adopted, were the decision on whether to speak or not to speak left entirely to the subjective determination of the witness, all orderly inquiry, to which society is entitled, would disappear. Once again then, the professor, by whatever standard, must speak or accept the consequences. How shall he evaluate the risks of silence? It seems that since he will have to defend his silence on the basis that it is reasonable, he will have to look at the record to ascertain the extent to which it illuminates the problems of persons in his situation. To the professor, the record will prove alarming if he is bent on silence—no indictments, no prosecutions, no convictions, in fact, to resort to the vernacular, no nothing. How reasonable then is the professor's apprehension? I leave the answer to you.

Before we return to our unanswered question may we digress briefly for a practical consideration? What, under these circumstances, is the situation of the employer of "Professor X?" Put aside all of the pious platitudes about what the employer *should* think. What *does* he think? Well, if he is a normal, average man, his mental processes are apt to be extremely uncomplicated. He thinks: "If this fellow isn't a Communist, why did he 'take' the Fifth Amendment? He is either a Communist or a perjurer, and he's fired." What are we to say of this unsophisticated approach? Well, the first thing we can say is that there is an excellent chance that he is absolutely right. But is there a possibility that he is wrong? Yes, there is, if we postulate the confused, frightened witness of our earlier hypothetical case. On the possibility that this may be the situation, must the employer now refrain from discharging the employee, or is it the other way round? Is it not the duty of the employee to demonstrate to his employer that his confusion or fright was the cause of the unfortunate situations? Surprisingly, perhaps, the law of Torts will help us here. In nontechnical language the rule is that where two innocent parties are involved, and where as a result of their innocent conduct damage is threatened, the damage must be borne by the one whose act, however innocent, brought the situation to pass. That the employer would be damaged by retaining this employee is, I think, beyond dispute. It is a fact of life that the average man does make the inference we have described. Whose act created this situation? Certainly not the employer's. Should the employer leave the door open to the employee to explain his conduct and should he retain him upon a satisfactory explanation? Emphatically, yes. But must the employer assume the burden of independently rebutting the inference which has naturally arisen in his mind; of conducting an independent investigation to establish his employee's innocence? Just as emphatically, no. I will agree, however, that the Supreme Court has ruled otherwise.[8] I will say that I think that the ruling is somewhat distinguishable in that the employer there was a political subdivision which the court thought was uniquely able to conduct an independent investigation, but I will hasten to add that to the extent that this distinction does not account for the ruling, the ruling is, in my opinion, wrong. I will thereby put myself in the company of four justices of the Supreme Court.

[8] Slochower v. Board of Higher Educ., 350 U. S. 55 (1956).

And even more importantly, for our purposes, I am honored to say that in so far as the natural law is concerned I have put myself in the company of at least two moral theologians of note, Father Francis E. Lucey, S.J., Regent of the Georgetown Law Center, and Father Robert Springer, S.J., Professor of Moral Theology at Woodstock College. I do not say that *all* moral theologians will agree on this point any more than *all* lawyers will. I merely say that I am entirely satisfied with the company in which I find myself.

At last, we return to the question we have left unanswered. Remember, we have assumed that the professor *is* a Communist. As we have said, under the Fifth Amendment his right to refuse to answer is nonetheless absolute, but under the natural law this is not the case. Under the natural law, we saw, the right disappears in the face of the threat of a national calamity. An examination of the dimensions of this natural law rule would seem appropriate. Need I labor the point that the Communist conspiracy raises the greatest threat of national calamity that our nation has ever known? Communism successful, would destroy freedom of religion, freedom of speech, freedom of assembly, and if it could, freedom to think and freedom to pray. In sum, it would destroy every vestige of the dignity of man; that creature made in the image and likeness of God. We would have no further discussions about the natural law. To mention the words would be a crime against the state. An assembly of this kind would assure all of us a ride in the tumbrel, or worse. I cite no authorities for this view. I feel that I need not. I am confident, that were he here, I could count on Josef Cardinal Mindszenty as a strong ally.

I trust I have made my point. I trust that we are agreed that in terms of national calamity communism represents the ultimate threat. Now if this is so, we have said the natural law right to silence, in connection with questions pertaining to this threat, disappears. This seems almost too simple. Is anything else necessary as a condition precedent to the loss of the right? The answer is "yes." The moral theologian will say that in addition to the enormity of the threat, there must be some degree of imminence. This means that the threat of national calamity must not be completely remote, must not be a phantom to be apprehended only by those who flinch at a shadow. It must be real, something which will furnish a logical basis for apprehension. How then, is this "imminence factor" to be computed? Here we find unanimity among the moral theologians upon one basic and tremendously important point. All agree that in determining the degree of imminence necessary to the loss of the right of silence, consideration must be given to the enormity of the evil. Simply stated, this means that the greater the anticipated evil, the less significant becomes the necessity for imminence. If this sounds familiar to you, it should. It is almost identical with the language first used by Judge Learned Hand[9] and later adopted by Chief Justice Vinson in the *Dennis* case[10] in describing the "clear and present danger rule." Judge Hand said, and the Chief Justice agreed: "In each case they [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion. . . ." In the *Dennis* case, the problem was whether or not the right of free speech should be restrained. The natural law takes

[9] United States v. Dennis, 183 F. 2d 201, 212 (2d Cir. 1950).

[10] Dennis v. United States, 341 U. S. 494, 510 (1951).

an almost identical position with regard to the right of silence. In these terms, if we make the evil to be apprehended equal infinity, and I think that is fair, is it not obvious that the "imminence factor" virtually disappears from our formula? But what am I saying? Am I upholding the proposition that there is *never* a natural law right to remain silent if the question pertains to communism? Not quite; but I am very close to that position. I will agree that there could be a case, where even though the witness is a Communist, his connection with the conspiracy is so minimal as to remove altogether the "imminence factor" which we have said is necessary. Even in this case however, I would point out that such a witness faced with the question "Are you a Communist?" is in quite a different situation than would obtain if the question were "Are you a bookmaker?". In the latter case his natural law right to remain silent is clear; in the former his right is, to say the least, less clear. By the same token, I trust that it is evident that we have only to change the nature of the witness somewhat, and it becomes obvious that he has no right to silence. To go to the extreme, suppose that the witness is the President of the United States or the Secretary of State. Clearly there is no natural law right to silence now, because the positions which these officials hold supply all the imminence which is required. These men would *never* have a natural law right to remain silent, yet, please note, that their right under the Fifth Amendment is absolute.

Drawing the line is not easy. Deciding when a witness, by virtue of his position or other characteristics has supplied the necessary "imminence factor" is beset with difficulties. I submit however, that all doubts should be resolved in favor of the duty to testify because under the natural law, as well as under the positive law, the right to silence is an exception to the general rule, and accordingly, in both places, is to be narrowly construed. I submit further that with every day that passes, with every tick of the clock, we come closer to the point where, unless the history of the last half century suddenly reverses itself, we will have reached a situation where no one, whatever his station in life may be, will have a natural law right to be silent to this vital question. My justification is that knowing how many Communists there are, without more, may well prove of the utmost importance in containing this threat.

You may have gained the impression that communism frightens me. If you have, you are right, it does. Further, I do not believe that leaning back, in a gallus snapping pose, and with an avuncular air pontificating, "I am confident that we can deal with communism," supplies my answer. Yes, communism frightens me. What is now happening in Hungary, Poland and the Middle East, frightens me. Scorn my cowardice if you will, but understand please, that what I am trying to do is to lay hands on the bomb while it still has a long fuse. That the bomb exists, and that the fuse is lighted, is beyond dispute.

I have said that I have sensed a feeling among Catholic lawyers and Catholic law students that to take a position that the privilege of the Fifth Amendment was not to be extended was somehow morally wrong. I have tried to demonstrate that, at least in some cases the extension has gone beyond the natural law. It is obvious that the natural law does not compel such an extension. In some cases, such as the hypothetical situation of the Secretary of State as a witness,

the natural law would *deplore* his putting his personal safety above the national safety. Accordingly I repeat, that this feeling, if it does exist, is not well founded.

Of course we want to retain the Fifth Amendment and not one of us would be without it. To the extent that the Fifth Amendment is used to protect, even the guilty, it is good. To the extent that it is used as an instrument for overthrowing our form of government, it is bad. The distinction is not always easily made. Therefore, do not be too quick to condemn the employer who acts upon the inferences which his intellect presents to him, or those segments of the public whose views are compelled by similar natural inferences. The natural law is instinctive, and they may both have instinctively hit upon correct natural law conclusions. Further, you will find that they are not without legal friends. Were they sufficiently fluent, they might have expressed their views as a Federal Court once did when it said:

> It is a principle of human nature – and every man is conscious of it, I apprehend, – that if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct (of) a man who is conscious that he has done an act which is innocent, right and proper. The truth is – and it is a scriptural adage – "that the wicked flee when no man pursueth, but the righteous are bold as a lion." [11]

[11] From the charge to the jury in Starr v. United States, 164 U. S. 627 (1897), as set forth in *Problems of the Fifth Amendment*, by C. D. Williams, 24 FORDHAM L. REV. 19, 39-40 (1955).

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