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THE LAWYER'S RESPONSIBILITY AND THE FIFTH AMENDMENT

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The paragraph which constitutes the fifth article of our Constitution's Bill of Rights contains within its brief compass a surprising number of our most precious and most effective guaranties of individual freedom against the collective power of the federal government. But in the list of recent events a reference to the Fifth Amendment is not likely to call to mind the guaranty of indictment by a grand jury, the protection against double jeopardy, the prohibition against the taking of private property for public use without just compensation, or even the fundamental assurance that we shall not be deprived of life, liberty or property without due process of law. Today when we hear of the Fifth Amendment, we naturally think of that clause of the Amendment that reads: "No person . . . shall be compelled in any criminal case to be a witness against himself," and it is of course this clause that I mean to discuss.

We are currently hearing much about this privilege against self-incrimination. The privilege was first brought prominently into the spotlight of public attention some four years ago during the investigation of organized crime conducted by the committee headed by Senator Kefauver. The nation's television audiences were treated to the spectacle of a procession of racketeers and hoodlums who one after another carefully intoned the familiar formula, "I respectfully decline to answer on the ground that I might incriminate myself." Although there were occasional breaks in the monotony of this stereotyped response—as in the case of one underworld character who garbled his lines and said, "I refuse to answer on the ground that I might *discriminate* myself"—the American's right not to testify against himself quickly spread beyond the confines of the courtroom and became a part of the public domain. Indeed before the Kefauver hearings were concluded, a witness appeared unaccompanied by counsel and

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faultlessly claimed his privilege. When he was asked if he had consulted an attorney, the witness obligingly revealed that legal advice had not been necessary—he had learned about the privilege by watching television.

More recently we have witnessed the operation of this privilege in a context which offers less in the way of entertainment and much more in the way of cause for concern. The investigations into communist infiltration and subversion conducted by committees of both the House and the Senate in the past few years have revealed a number of once-trusted government officials and employees, of public school teachers and university professors, and even of officers of the court—lawyers—who have refused to answer questions regarding their connections with the communist conspiracy upon the ground that answers would implicate them in criminal activities. The sinister implications of these claims have once again aroused the public interest in the privilege against self-incrimination, *now* as an aspect of the struggle for national self-preservation. More and more people have become directly concerned with this privilege and seek to learn just what a claim of the privilege can fairly be taken to mean. The widely-publicized hearings have served to introduce the layman to the Fifth Amendment, but they have failed to provide him with more than a nodding acquaintance.

That some of the profession, many prominent in the halls of learning, have dealt with the abstract question and paid little or no attention to our obligations as citizens to be loyal to the nation, has not been of any great assistance to the public in trying to understand the question. In the resulting confusion, conflicting public opinion has developed, ranging from questioning the necessity of legislative investigations and the methods employed by state and national investigators to the personalities of the leading figures involved. At one extreme we hear references, made in good faith, I am sure, to Fifth Amendment communists, a phrase that conveys the idea, and is probably intended to, that the only persons who can properly claim the privilege when asked about their communist connections are conspiratorial communists, and so it follows, it is thought, that anyone who seeks refuge behind the privilege supplies by the very act of making the claim conclusive proof that he is guilty of treason or espionage. At the other end of the spectrum there are those who in equal good faith would have us believe that nothing whatsoever can be inferred from the invocation of the privilege against self-incrimination and that anyone who suggests that the exercise of this constitutional right raises

any questions at all is somehow subverting the American way of life. Buffeted from all sides by such sharply differing views, the public is understandably confused.

As the only group in society trained and experienced in the interpretation and application of legal rules, the lawyers occupy a special position in the American scheme of things. Like all good coinage this special position has two sides, an obverse and a reverse, if you will. On one side is our unique privilege to pursue the practice of the arts and skills in which we have been trained. The reverse of this coin, and the concomitant of this privilege, is our obligation to the public to employ our training in the best interests of the community at large. It is, I believe, our clear responsibility to do what we can to explain to the citizenry the legal aspects of the great public issues of the day. Our duty to dispel misconceptions about legal rights is especially heavy when those rights find their origin in the Constitution. A system of government which puts its faith in the courts for the protection of individual liberty must ultimately find the vindication of that liberty in the hands of the lawyers. We must discharge this sobering responsibility by resisting with all our force attacks upon our constitutional freedoms, no matter how well intended the attack and no matter how unpopular the defense. But by the same token we have an equal responsibility, requiring equal courage, to point out the limits of those freedoms and to unmask attempts to twist them into shields for lawlessness.

It is, I am convinced, our responsibility to speak out to remove the perplexities which belabor the public concerning the Fifth Amendment.

What then, should we tell the public about the privilege against self-incrimination?

To begin at the beginning with the privilege against self-incrimination is not an easy task. The origins of the privilege are obscure. Of this much we can be tolerably certain, however. The privilege appeared as a part of the common law of England sometime during the Seventeenth Century, and found its reason for being in the excesses of the High Commission, the infamous star chamber, during investigations into what was regarded as religious heresy. More basically, it is probably safe to conclude that the privilege arose in part at least in response to the sense of injustice which the techniques of torture, then a part of the prosecutor's standard interrogating procedures, evoked in the minds of free men. But more significant than the origins of the common law privilege is the fact that the individual's right not to

be a witness against himself was thought to be sufficiently fundamental to liberty under law that the American people preserved it both in the Federal Constitution and in the constitutions of all but two of the states.

In any event, the purpose which underlies a legal rule ordinarily contributes more to an understanding of it than its historical sources. The purpose behind the privilege against self-incrimination is the protection of the innocent. The impossibility of divorcing the question of guilt from questions of the fairness of the precedures by which guilt is determined is a fact that lawyers constantly live with. It follows that if we would protect the innocent we must also shield the guilty. There is no easy answer to this dilemma; a choice between ideal efficiency and ideal fairness has to be made. The choice clearly reflected in our legal system is that efficiency must be sacrificed. As Blackstone put it, it is better to allow ninety-nine guilty men to escape than to convict one innocent man. Being committed to that course, we must be ready to tolerate a measure of protection for the guilty. But our rules are nevertheless designed for the benefit of the innocent.

Perhaps this purpose to protect the innocent can be seen more clearly if we take a brief look at two of the subsidiary purposes included within it. First, there is the purpose to protect the innocent members of society at large from the uncalled-for invasions of privacy which would attend the use of indiscriminate periodic inquisitions by the prosecutor as a means of discovering whether crimes might have been committed. The underlying assumption is, of course, that the privilege not to disclose will make wholesale interrogation valueless to the prosecutor, and so will deter him. In this aspect, the privilege against self-incrimination is closely akin to the individual's constitutional right, guaranteed by the Fourth Amendment, to be secure in his property from unreasonable searches and seizures. The great Dean Wigmore explained this purpose of the privilege in these words: "The system of 'inquisition,' properly so called, signifies an examination on suspicion, without prior presentment, indictment, or other formal accusation; and the contest for one hundred years centered solely on the abuse of such a sysem. . . . No doubt a guilty person may justly be called upon at any time, for guilt deserves no immunity. But it is the innocent that need protection. Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; first, the petty judicial officer becomes a local

tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practised by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid."

A second subsidiary purpose of the privilege, and perhaps a more significant justification for it in the present day, is the protection of the innocent from the coercive measures of the overzealous enforcement officer. We have long since abandoned torture as an accepted means of discovering the truth; the rack and the screw are no longer regarded as proper instruments for the implementation of the policy of the law of crimes. By requiring that evidence of crime come from sources other than the mouth of the accused, we remove one temptation from the police to employ coercive means. As an English commentator on the privilege explains this purpose, it is much easier "to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence." The purpose here again is the protection of the innocent man. If every man has his price, so every man has his breaking point, the point where it is easier to give the interrogator the answer he seeks than to insist upon the truth. The high development of the science of brain-washing in the hands of the communists bears eloquent contemporary witness to the wisdom of a rule which recognizes the unreliability of self-accusation.

Notwithstanding my conviction that we Americans treat our law enforcement agencies disgracefully in respect to compensation and the support of their good work on our behalf, if we are to continue to put fairness above efficiency in the administration of our criminal law, and to protect the individual against the collective power of government, then I think we must reject the proposals of those who would abolish the privilege aginst self-incrimination. The dangers of the police state would loom large indeed if we were without it. Like all our guaranties of liberty, the privilege does handicap the nation in its struggle against the menace of communist infiltration and aggression. But unless we are to lose the fight by the very act of *preparing* to fight, we must stand by our ancient liberties and resist the temptation to adopt the communist's principles in an attempt to combat those principles more effectively.

If we are not ready to repeal the Fifth Amendment, then it seems to me essential that we clear up the confusion which surrounds it, and make certain that the privilege is not misused to

conceal more than is necessary to honor the constitutional liberties at stake. Let me suggest that our thinking about these problems can be clarified if we divide them into classes. First, there are the problems faced by the person who has been summoned to appear as a witness before a court or an investigating body, and who is in doubt as to the scope of his right to refuse to answer and as to the wisdom of invoking that right. In a separate category I would put the problems faced by an employer who learns that one of his employees has for some reason claimed the privilege against self-incrimination. If the reluctant witness happens to be an employee of the government, each of us, as a citizen, of course, shares in this responsibility of the employer.

In the first category of the problems which confront the prospective witness and his lawyer, the basic questions have largely been settled in the courts, and although there may still be trouble along the edges, the general answers are relatively easy. The Constitution of the United States does not leave the protection of the individual to vague and lofty declarations of the rights of man. A freedom stated so broadly that each of us can find in it the meaning he wishes is meaningless as a guide to action in concrete cases. The draftsman of our Constitution wisely chose not to rely on such generalities, but instead provided protection for the individual in the form of specific legal rules, of definite and limited extent, and enforceable in the courts. And so it is with the privilege against self-incrimination. It is not a shield to anyone who for any reason does not choose to cooperate with the duly constituted authorities. It is rather a legal rule that tells us simply that a man cannot be compelled to disclose under oath facts which might be used against him in a prosecution for the commission of a crime.

The witness can properly decline to answer only if there is a danger of a criminal prosecution. That the required disclosures will be embarrassing to him—that they will subject him to criticism or expose him to opprobrium—that they will impair his social standing and cause him to lose his friends, or even that they will cost him his job—all these, separately or in combination, are not enough to entitle a witness legally to refuse to answer. I do not mean to minimize these extra-legal sanctions; they may entail consequences as serious as a conviction for a crime. What I do mean to say is that they have nothing to do with the constitutional privilege against self-incrimination, and that they do not confer a legal right not to make the required disclosure.

A situation which has caused confusion and needs clarifica-

tion is the case of the witness who is willing to answer any questions relating to him and to his own activities, but who is opposed to supplying any information about his friends and associates. He may be understandably reluctant to subject them to the discomfiture of being called before a committee, or to expose them to the risk of prosecution. But the privilege against self-incrimination does not justify his position. The privilege is personal; a witness has no right to refuse to incriminate others. Indeed if the witness knows that his associates have committed a serious crime, the refusal to disclose that fact makes the witness himself guilty of the crime of misprision of felony. The common sentiments of the American people place a high regard upon personal loyalties; the role of the informer is a repugnant one. Loyalty to one's fellows is more immediate and consequently more compelling than the remote and generalized loyalty due to society as a whole. But regardless of these considerations of private morality and personal predilection, the government demands from its citizens their full cooperation in supplying information relevant to the proper concerns of government.

One of the most persistent of the popular misconceptions concerning the Fifth Amendment is the notion that a witness is entitled to invoke it, or indeed that he is morally bound to invoke it, not because of any danger of self-incrimination, but rather as a gesture of protest against the conduct of legislative investigations. Sometimes this notion springs from the oversimplified dogma that the government has no power to inquire into any citizen's political beliefs and loyalties; in other cases the supposed right to resist passively is attributed to unfairness in the operations of a particular legislative committee. This position, however based, carries disturbing implications. If generally accepted and followed, it would go far toward destroying the investigating powers of Congress. It should be self-evident that as the branch of government invested with responsibility for the formulation of national policy and for the determination of how that policy should be effectuated, Congress has not only the power but also the duty to inform itself for the intelligent discharge of its functions. Moreover, as the branch of the federal government most responsive to the popular will, Congress has the right to appeal to the public for support of its policies by making its findings known. A democracy can work only with a well-informed electorate. As Woodrow Wilson said, "The informing function of Congress should be preferred even to its legislative function." To restrict the investigatory power of the legislature, to entangle it in red tape, or to defy the power under the cloak of a spurious

claim of a constitutional privilege can only serve to undermine the principles and practice of limited representative government.

Against this need to let the people know must be balanced the individual's claim to privacy. Traditionally we value freedom of belief as among our most fundamental rights, and we abhor efforts at thought control. It is probably unwise in ordinary times for government to inquire into the political theories espoused by an individual. But these are not ordinary times. When a political belief of a particular kind threatens the violent overthrow of the government, and is backed by a conspiratorial organization within our borders and by a mighty military force poised for action abroad, some inquiry into political beliefs must be tolerated if we are to survive. The Constitution does not compel us to sacrifice the freedom of the nation for the sanctity of an individual's thoughts. Whether in a particular situation the danger that beliefs may be translated into revolutionary action outweighs the individual's claim to privacy must be left primarily to the wisdom of the legislature, with the remedy for unwise choices to be found at the polling places. It is not for the witness to judge, and nothing in the Fifth Amendment permits him to arrogate that function to himself.

It is futile, of course, to insist that legislative investigations have always been scrupulously fair, or that witnesses have never been mistreated. It is not surprising that on occasion the political branch of government behaves politically. Taking into account the laws of human nature, occasional injustices are certainly not improbable. It is crystal clear that unfairness in the conduct of such hearings is not confined to any particular committee, nor to any political party, nor to any era of our history. The abuse of congressional immunity by the investigator does not justify the abuse of the privilege against self-incrimination by the witness. If the witness is convinced that the hearing has gone so far beyond the limits of elemental decency that he should no longer be compelled to cooperate, his course lies in an appeal to the requirements of due process of law, with the attendant risk of punishment if he should be proven to be wrong.

The witness who invokes the Fifth Amendment without a foundation in fact for his claim fails in his obligations as a citizen and abuses a precious constitutional privilege. Beyond this, as Chief Justice John Marshall reminded us almost a century and a half ago, the statement of the witness that he fears a criminal prosecution when in fact he does not, is "in conscience and in law... as much a perjury as if he had declared any other untruth upon his oath."

We now come to the question of who *can* properly claim the Fifth Amendment. Since the witness who is in fact guilty of a crime has a solid basis for fearing that he may incriminate himself, he is clearly correct in law in refusing to answer upon this ground. Theoretically we may deplore this use of the privilege, but as a matter of practice it is unavoidable.

If, as I suggested earlier, the purpose of the privilege is the protection of the innocent, there must, of course, be some situations in which a witness who has committed no crime is legally entitled to refuse to answer. The narrow scope of this constitutional right is illustrated, however, by the limited number of situations in which this is true. If the innocent witness is asked a question which if answered truthfully would disclose one link in the chain of facts necessary to a criminal conviction, the witness, it appears, is legally free to remain silent. Suppose, for example, that a witness is called before a congressional investigating committee and asked the jackpot question, "Are you a member of the Communist Party?" By the Internal Security Act of 1950 it is provided that membership in the Communist Party is not *per se* a violation of any criminal statute. But as the recent decision of Judge Sullivan in the *Lightfoot* case demonstrates, the Smith Act makes it a crime to be a member of the Communist Party if in addition the member knows the purpose of the organization. Thus the answer to the question concerning party membership can be "Yes" without making the witness guilty of any crime if he is so naive and uninformed as to be ignorant of the aims of the Communist Party even as a member. But to reveal his party membership would go far toward establishing a crime, so the witness is constitutionally privileged to refuse to answer.

Another justification for invoking the Fifth Amendment when a truthful answer to the question asked would not alone be incriminating is found in the doctrine of waiver as recently announced by the Supreme Court in the *Rogers* case. That doctrine, contrary to English law, seems to make the failure to claim the privilege to the first of a line of questions a waiver of any further assertion of the privilege as to subsequent questions directed to the same subject. Under this construction of the law, to avoid the risk of waiving his privilege, the witness may be compelled to claim it even to excuse answers which would not in themselves be incriminating.

A more difficult class of problems created by the present prominence of the Fifth Amendment are those which confront an employer when he learns that an employee has claimed the privilege against self-incrimination.

As you know, it is a rule of general but not universal acceptance that in a criminal case neither the prosecutor nor the judge can properly comment upon the accused's claim of the privilege as an indication of guilt. This prohibition obviously makes good sense in a criminal case, but, of course, has no application when the question is not whether the reluctant witness should be sent to jail but rather whether he should continue in his job. While there is no presumption of guilt in our criminal law, there is also no presumption of moral fitness for every position in the field of private economic relations.

To insist that a claim of the privilege is of no probative value on the question of guilt is to invite the comment of Mr. Bumble in Dickens' "Oliver Twist" that "the law is a ass, a idiot." The employer is entitled to be assured that he does not subvert our constitutional system if he chooses to infer that the witness is guilty.

It does not necessarily follow that even an innocent man who claims the Fifth Amendment is entirely blameless. If he was not in law entitled to invoke the privilege, he has without right obstructed the lawful processes of government. And if he *knew* that his claim was not legally justified, he has perjured himself by making it. If the witness was both innocent and properly entitled to rely upon the privilege not to testify against himself, he at least has admitted the existence of suspicious circumstances which might lead a jury to find him guilty of a crime. It seems not unreasonable to impose upon him the duty of explaining these circumstances to his employer, who has no other basis for deciding between guilt and innocence, if he would avoid the inference which the employer otherwise may properly draw.

It seems fair to conclude that whatever its motivation, the invocation of the Fifth Amendment reflects no credit upon the witness. We have heard a good deal about the extenuating circumstances which may lead a person to refuse to testify without moral culpability. We are told that he may feel that he is being harassed, that he is often confused, and may be unwilling to jeopardize his good relations with others by testifying. I would like to suggest that the witness' employer as well may plead extenuation. If we are willing to excuse a false claim of the privilege because the witness is anxious to protect his good relations with others, can we justly condemn the employer who fires the witness because continued employment would imperil the organization's relations with the public and with its other employees? If we absolve the witness who claims the privilege under the mistaken

belief that he is entitled to use it as an instrument of social protest, must we not also absolve the employer who discharges the employee under the mistaken belief that only the guilty can invoke the privilege?

These matters of private employment are, of course, beyond the present reach of the law, and it seems to me that they belong there. The government should not step in to outlaw the witness who has claimed the privilege against self-incrimination by depriving him of an opportunity to earn a livelihood. Neither should the government restrict the freedom of the employer who chooses to insist that his employees must be, like Caesar's wife, above suspicion.

Common sense indicates that the considerations which control the appropriate consequences of a claim of the Fifth Amendment upon the witness' claim to hold his job vary with the kind of employment involved. Certainly the standards which govern the school janitor should be different from those which apply to a nuclear physicist working in a government project.

I would think it indisputable that a plea of the Fifth Amendment would raise serious doubts about the fitness of a government employee to occupy a position of responsibility.

Perhaps the most controversial questions raised by the use of the Fifth Amendment have been those in the field of education, both public and private. We have heard much in these discussions about academic freedom, but I venture to suggest that no mention of it will be found in the Constitution. What is meant, I think, is simply this. The teacher's job is basically to seek the truth. With no economic axe to grind, he can afford to be objective and to consider all possible choices. We deplore the communist device of laying down the lines of orthodox theory in such fields as science, art, economics, and religion. We believe that in the long run we will survive only if we are willing to test every principle and tradition in the crucible of reason. We must be careful, then, not to mistake the inquiring mind for a sign of disloyalty. On the other hand, it is the teacher's fundamental obligation to be objective and to accept the truth no matter where it may be found. If he owes a supervening loyalty to a political dogma, and finds his truth in a party decree, he lacks the basic qualification of the teacher. His loyalty is essential in view of the influence he exerts upon the thinking and beliefs of the immature minds committed to his training. The delicate problem posed by these considerations is how to eliminate these grave dangers of disloyal teachers without destroying the spirit of free

inquiry which is the essence of education. But the questions of whether an investigation into the loyalty of teachers should be conducted, and of whether the teacher should cooperate in such an investigation once it is begun, are vastly different. The teacher has no greater privilege than any other citizen to the privacy of his thoughts and beliefs; rather it seems that his dedication to free inquiry imposes a greater obligation upon the teacher to be candid and open in his views. The use of the Fifth Amendment is inconsistent with this duty of candor, and accordingly a claim of the privilege should, as stated by the Association of American Universities, "place upon the professor a heavy burden of proof of his fitness to hold a teaching position."

Even more vital than the teacher to the preservation of liberty under law is the lawyer, and it is entirely appropriate that we should end this discussion with the matter of keeping our own house in order.

It seems to me that we lawyers too frequently lose sight of the fact that to be a member of the bar and to practice law is not a right but a high privilege dependent upon continuous exacting conditions. It is obvious that the distinction between a person's status as an individual and his status as an attorney and officer of the court is of primary importance. The rights of an individual may or may not be consistent with his professional or official status. Where, however, the individual's rights are inconsistent, a choice becomes necessary either to forego the right or relinquish the profession. When the assertion of the constitutional right by one who is also an attorney to seek protection against self-incrimination under the Fifth Amendment is present, this seems to me to be completely inconsistent with his high status as a member of the bar and an officer of the court; and the implications arising therefrom are such as to destroy the privilege of license, they are repugnant to the oath taken at the time of entering the bar, and negate the presumption of the fitness to continue as a lawyer by reason of lack of loyalty as displayed by the inferences and the requirements of frankness at all times.

The choice of the personnel of a bar rests with a state, but the court has a continuing responsibility to re-inquire and redetermine from time to time, and particularly when any suspicious circumstances arise, the fitness of an attorney to continue. And as the Illinois court held in the *Anastaplo* case, a candidate for admission to the bar may properly be disqualified for asserting the constitutional privilege upon inquiry into his loyalty to the Constitution.

It is difficult to conceive any investigation more important to the administration of justice and to the government, both state and national, than whether a lawyer, an officer of the court, a privileged person by reason of his license from the state, is affiliated or is connected with the Communist Party or other subversive organizations or subversive persons. Such an inquiry involves the possible future existence of our nation and the security of all our people. Loyalty to nation alone should be a sufficient incentive to speak truthfully and frankly when properly interrogated, but the inherent loyalty that an individual owes to his country added to the greater responsibility of being an officer of the court, and therefore a trustee of the future privileges of our citizens, certainly compel frankness and truthfulness in this regard. While there is a constitutional right not to testify if a witness in good faith believes his testimony might incriminate him, this right flows to a person as an individual. It never was intended to protect a witness in an office. And it cannot prevent the court from determining whether the witness publicly invoking the Fifth Amendment has not cast such suspicion on his fitness as an officer of the court that he should no longer enjoy the privilege. The court may not only withdraw its certification of him to the public and strike his name from its rolls, but it has the duty under such circumstances to do so.

To summarize, it seems to me clear that the privilege against self-incrimination conferred by the Fifth Amendment does not, properly construed and limited, so hamper our effort to preserve our way of life that it must be sacrificed or abandoned. The danger lies rather in the intentional misuse and the inadvertent extension of the privilege to mask attempts to destroy the government. As informed citizens and particularly as lawyers, we bear a solemn duty to reveal these serious errors and to restore the privilege to its rightful place and scope among our treasured liberties.