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## THE FIFTH AMENDMENT AND THE LAWYER'S RESPONSIBILITY

Stanley A. Weigel\*

Mr. Loyd Wright advocates disbarment of any lawyer who publicly declines to answer, on Fifth Amendment grounds, questions relating to affiliation with the Communist Party or other subversive organizations or subversive persons.<sup>1</sup>

Mr. Wright's position is that disbarment should be the consequence regardless of whether the right is exercised before a court or before a committee and even in the total absence of supporting evidence of disloyalty.

Mr. Wright advocates policy. The issue is not as to what the policy is, nor, for that matter, what the law is. The issue is—what they ought to be.

In essence, the policy for which Mr. Wright contends is this: Exercise of the constitutional right—that and that alone—shall require summary disbarment.

I could not more emphatically disagree.

The disagreement may be deep and pervasive. Let's explore this.

All thoughtful lawyers, whatever their view on the precise question of the professional consequences of exercise of the constitutional right, are deeply concerned not only with their responsibilities for public welfare, but with the preservation of the American tradition—the preservation, indeed, of our very nation.

The thesis is familiar. We are fighting for survival in a cold war. The main enemy is Communism as a ruthless, sinister conspiracy dedicated to world mastery. The conspirators bore from within. To them, the end justifies the means. Their capabilities and perserverance must not be underestimated. Sound measures, strong measures, must be taken for preservation against the insidious menace.

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<sup>1</sup> Mr. Wright, of course, means that "subversive" means, at the minimum, "disloyalty." He would agree, I am confident, that there is great danger in a loose or vague definition of any standard for disciplinary action implying criminal disloyalty.

On this I agree.<sup>2</sup>

The basic disagreement is upon what sound and strong measures are most effective in repelling the enemy. I hold that they are those which strengthen, not trim, the Bill of Rights, which, in the end, distinguishes us from our ideological enemies. I believe that we surrender to concepts foreign to the American tradition when—however strong the temptation—we water down constitutional rights, or, if this be overstatement, water down the fair implications of constitutional rights.

Having outlined the cleavage in viewpoint, it will be useful, before argument and advocacy in support of my own, to enumerate areas of agreement of Mr. Wright and myself. There are many.

We agree that lawyers “. . . occupy a special position in the American scheme of things,” that, as lawyers, it is “. . . our unique privilege to pursue the practice of the arts and skills in which we have been trained,” and that the privilege carries with it “. . . our obligation to the public to employ our training in the best interests of the community at large.”<sup>3</sup>

We agree that:

. . . The purpose behind the privilege against self-incrimination is the protection of the innocent . . . if we would protect the innocent we must also shield the guilty. . . . 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.<sup>4</sup>

We agree that:

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. . . . 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

<sup>2</sup> I do not share the additional view apparently held by some that the enemy’s arsenal of ideas is much to be feared in competition with our own.

<sup>3</sup> Loyd Wright, *supra* at 575.

<sup>4</sup> *Id.* at 576.

sun hunting up evidence." The purpose here again is the protection of the innocent man. . . .<sup>5</sup>

We agree, although Mr. Wright has not put it in these words, that: Freedom for individuals is an indissoluble element in the free enterprise system; the extent to which personal rights can be curtailed without curtailing property rights is limited; it is implicit in the Bill of Rights that the framers were concerned with protecting both; and the Bill of Rights is that sort of structure which is weakened as a whole when any part is weakened.<sup>6</sup>

While Mr. Wright and I do not agree in detail upon the historical background of the right against self-incrimination, nor upon the standards governing its proper exercise, the differences are ancillary to the main issue. In a footnote will be found some materials useful to those who would search out historical background as well as various concepts governing proper exercise of the privilege.<sup>7</sup>

<sup>5</sup> *Id.* at 577. I would delete the phrase "from the police" or would expand it to read: "from the police, prosecuting attorneys, legislators, judges and all others clothed with the authority of government."

<sup>6</sup> The question before us provides a fairly good illustration of the inseparable interrelation between personal rights and property rights. The personal right to assert the privilege against self-incrimination is affected if the price of its exercise is sacrifice of the right to make a living in one's chosen profession. This is not to contend that the practice of law is a property right like the ownership of a chattel. It is, however, a thing of value. Nor is it contended that exacting the price of disbarment for exercise of the constitutional right impairs the effectiveness of that naked right. But it does make it pretty naked and it is the exaction of a price.

<sup>7</sup> Eliason, Note of Constitutional Limitations on the State's Power to Regulate Rights and Condition Privileges, 33 *Tex. L. Rev.* 240 (1954); Griswold, *The Fifth Amendment Today* (1955); Hunter, *Self-Incrimination—Witness—Loss of Employment by Asserting the Privilege Against Self-Incrimination: A Professor's Dilemma*, 34 *Neb. L. Rev.* 88 (1954); Huard, *The Fifth Amendment—An Evaluation*, 42 *Geo. L.J.* 345 (1954); Morgan, *The Privilege Against Self-Incrimination*, 34 *Minn. L. Rev.* 1 (1949). During the year 1954 the American Bar Association Journal carried useful and provocative articles, see 40 *A.B.A.J.* 404, 502, 582, 588 (1954); 41 *A.B.A.J.* 307 (1955).

Having ruled out text discussion of concepts governing proper exercise of the privilege, I would fudge a bit by submitting a personal observation. It has been stated, in support of the contention that the right against self-incrimination may be properly invoked only by a guilty witness, that if an innocent witness states, in substance, "I decline to answer on the ground that my answer would incriminate me," the witness is guilty of perjury. This contention strikes me as facile, but unsound. It treats the exercise of the constitutional right as testimony and thus really boils down to a contention that the witness has answered, in ef-

For present purposes, let's join with Mr. Wright in accepting the thesis that the constitutional right may properly be invoked only in these situations: (1) when the answer would in fact incriminate the witness; (2) when the answer by a witness innocent of any crime would supply a link in a chain of facts which might involve the danger of a criminal prosecution, as in conspiracy cases; and (3) when failure to claim the privilege on a first line of questions might constitute waiver of the privilege as to subsequent questions directed to the same subject.

The main issue, to repeat and sharpen it a bit, is fairly stated by this question: Should a lawyer who exercises the constitutional right against self-incrimination be summarily disbarred for no reason whatever except the exercise of that constitutional right?

Mr. Wright, answering yes, divides the lawyer into two persons. It is contended that as a citizen he may invoke the privilege, but that as a lawyer he may not (because if he does, he will no longer be permitted to be a lawyer).

Now, let's apply the microscope of reason to the split-second before and after the lawyer has exercised the constitutional right. And let me exercise the hallowed professional right of assuming a state of facts.

The lawyer before us is a member of the bar in good standing. He has been so for many years. His professional activity has been without blemish. His citizenship has been flawless. He is an innocent man, a reputable lawyer and a good citizen.

Nothing intervening, he now exercises a right guaranteed him by the Constitution of the United States (which he has sworn to uphold).

Presto! This self-same man has now forfeited his right to practice his profession, losing all standing as a lawyer. His innocence is now questionable. His good citizenship is now suspect.

What has led to this sudden change from white to black?

fect, "I refuse to answer because I am guilty." If that be true, those who make the contention are really bordering upon urging, if they do not actually urge, that the constitutional right against self-incrimination is a right only to confess, but with immunity. Acceptance of the contention is not requisite to prevent abuse of the right; that can be controlled without treating the refusal to answer as testimony. Moreover, treating the answer as testimony would seem, on other premises, to render it vulnerable as a conclusion of law.

Disloyal speech? No. Disloyal writing? No. Disloyal action? No. Any other hard evidence of disloyalty? No. Any independent or external facts of any character suggesting disloyalty? No. Even any inescapable inference of disloyalty? No.<sup>8</sup>

How, then, can the cruel consequences of disbarment be justified? We are told that the answer is that the individual has the constitutional right against self-incrimination, but has no constitutional right to practice law.

This strikes me as an over-simplification, not free of fallacy. I agree that the practice of law is a privilege. It is usually a hard-won privilege. However, this is not to say that the privilege is devoid of attendant definite and valuable rights. Once the privilege has vested, no one can sensibly argue that it ought to be subject to arbitrary revocation.

Is it not arbitrary revocation to destroy the right to practice law on mere inference, rather than hard evidence—particularly where, as is the conceded fact, guilt is not the sole justifiable inference? And doesn't it add to the idea that such revocation is arbitrary when we have in mind that the constitutional purpose of the right is to protect the innocent?

Now, I neither argue nor believe that it is invalid to draw the inference that one who refuses to answer on grounds of self-incrimination might be fully incriminated if he were to answer. Of course, that is a fair and logical inference. I would go further. It is a strong inference. I would go yet further. On logic alone, it is the most compelling inference.

Even so, there is no escape from this: It is only an *inference*. Further, it is not the *only* inference which may be drawn. Finally, we open the door to erosion of personal as well as property rights when we strip men and women of their regular means of livelihood upon the basis of mere inference—not, to paraphrase a bit, the evidence hunted and found in the sun, but a mere inference drawn in the shade.<sup>9</sup>

<sup>8</sup> "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." Loyd Wright, *supra*, at 581.

<sup>9</sup> In our discussion, let us not forget that Mr. Wright would summarily disbar upon the inference—that and nothing more. The case might well be different if there were, in addition, testimony of disloyalty, or other independent facts or evidence logically connecting up to support the inference that guilt underlies the refusal to testify.

"Well and good," it may be said, "but what about the importance of the bar in the scheme of things, including the concept that lawyers, like Caesar's wife, must be above suspicion?" Let's examine this for a moment.

Lawyers *are* important in our scheme of things. But, in the face of the insidious Communist conspiracy, which is the main justification for advocating disbarment on inference, just what American citizens are not important? The professor? The doctor? The clerk? The janitor? All are important. All are American citizens, equal before the law. All are important also because the implications of equality are essential to democracy.

In the present context, all are important for yet another reason.

No American is unimportant to the disloyal Communist conspiracy. A janitor, trained to paste together the torn shreds of paper in the waste basket, conceivably may be more dangerous to the safety of the nation than ten dozen lawyers invoking the right against self-incrimination. So, too, a clerk trained to pick up valuable scraps of information. And so, too, a professor, insidiously molding, as is often suggested, the minds of the young.<sup>10</sup>

When it comes to real sabotage, I suggest that a janitor, more readily than a lawyer, can hide the bomb.

Having posed the possibility of subversion among such citizens as janitors, lawyers, clerks, and professors, I wish to make it clear that no American, who really understands America, should regard any citizen or class of citizens as suspect. I would add that there may be a bit of presumption in lawyers, or members of any other profession or vocation, deeming themselves of a higher order of importance in our American way of life. The janitor's work is as important to him as the lawyer's profession is to the lawyer. There are some people, at least, among us who would mark a secret ballot—and perhaps an open one—indicating their view that the janitor was the more useful citizen.

At this point one hears a voice in opposition saying, "Well

<sup>10</sup> I think this has been worn pretty thin. If professors are to be worth their salt, they must be unafraid of controversy. Those outside of universities have been much too prone to see Communism, which isn't there, in professorial statements which displease or anger them or with which they violently disagree. So far as our university students are concerned, I have not found them lacking in rugged and critical facility; on the contrary, they have shown themselves to be no less competent—often more accurate—than their elders in detecting dissemblance and propaganda.

and good, but you have overlooked the contention that an employer has a right to fire his employee, whatever his occupation—janitor, clerk, professor, or lawyer—if that employee exercises his constitutional right against self-incrimination in matters involving subversion.”

This is neither so well nor so good. Just where is the line to be drawn if there be indiscriminate application of a doctrine that rights are sacrosanct, but privileges relating to gainful work are not? Is it to be drawn at public employment? At the school? At the bar? The dock? The factory? The farm? Perhaps the almshouse?

There are ominous undertones in any philosophy which demands economic hardship, or personal disgrace, or both, as the price of exercise of constitutional rights. This sounds more like Communism than Americanism, more totalitarian than democratic.

We lawyers, who know the ugly dangers of substituting inference for evidence, must be the last, not the first, ever to accept surmise as a complete substitute for evidence.<sup>11</sup> We should be the first to insist, for ourselves as well as others, that evidence, facts, actions, must be produced before anyone may be penalized and stigmatized.

Indeed, in some situations, I am not sure that those who resort to the privilege solely to protect innocent third persons merit castigation. What I have in mind (and I do not indiscriminately impugn legislative committees) is the spectacle of browbeating witnesses, of disregard for reputations and of playing to the gallery heedless of the full truth. We have seen these spectacles

<sup>11</sup> As a reverent admirer of Mr. Justice Holmes, I venture to suggest that he would never have said in *McAuliffe v. Mayor of the City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,” had he known that his sentence, so reasonable in the full context of the particular case, was destined to be tortured by some into guiding gospel for watering down constitutional rights of which he was so notable and eloquent a champion. In *McAuliffe*, the policeman violated a perfectly sensible rule that “No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever.” He was discharged after a hearing in which it was determined that he was guilty of violating the rule. He was not discharged upon mere inference or surmise. Had that been the case, I suggest that the great Justice’s decision and words would have been very different; that his words would have had a righteous ring no less noble than his many eloquent stands for freedom which are too well and widely known among lawyers to call for repetition here.

altogether too much of late and would be naive if we were unaware that there are those in our midst who would be happy to present more.

These ugly circuses, these headline heydays may well justify yet another rational deduction to be drawn from exercise of the privilege against self-incrimination. That is the deduction that while the witness may be willing to answer for himself, he is not willing thereby to open the door to exposure or harrassment of others who are innocent and to whom he may owe such hardly un-American loyalties as spring from family devotion, life long friendship, or mutual respect.

A good deal of our soul-searching about the right against self-incrimination stems from careless accusation by legislative committees or subcommittees—sometimes subcommittees of one. The witness may be uninformed of any charge against him. If there be accusing documents, or persons, or evidence, he may be kept in the dark. He is unprotected by the traditional safeguards of court procedures. Under these circumstances, a single base and baseless question sullies his reputation, forcing him to spend the rest of his life trying to clear it.

That is evil enough. It is compounded if the witness has scruples against being the instrument of visiting the same fate upon innocent third parties. Then he is torn between his scruples and such vindication as a negative answer would provide for him alone.

The constitutional right against self-incrimination does not stand by itself in the Fifth Amendment. It is bracketed—significantly, I suggest—within the same clause as these words: “nor be deprived of life, liberty or property without due process of law.” In this age of television, radio, and tomorrow’s newspaper today, the accusation implied in any such question as “Do you belong to the Communist Party?” is in itself enough to damage the reputation of the person to whom it is put. While reputation may not be property in a physical sense, many value it more than chattels. I am not too sure that the constitutional guarantee against self-incrimination, coupled, as it is, with the due process clause, should be deemed to provide no foundation whatever for an honorable refusal to answer by a person unwilling to be the instrument of wanton damage to the reputations of innocent third persons.

Of course, the better remedy would be some very substantial improvement, by Congress and other legislative bodies themselves,

in the procedures of their committee hearings. Long overdue, that may come about in time. Meanwhile, the innocent victim has a hard choice.

All of which returns me to the title, "The Fifth Amendment and the Lawyer's Responsibility," chosen for this answer to the point of view expressed by Mr. Wright. The transposition in the title was intentional. In the long run, it seems to me that the Fifth Amendment is primary; the lawyer's responsibility secondary.

In the context of the Fifth Amendment's guaranty of the right against self-incrimination, I think we must agree that it is, indeed, "this safeguard against tyranny," the words recently used to characterize it by the Chief Justice of the United States.<sup>12</sup> I think, too, that we will agree with Professor Huard, of the Georgetown University School of Law, that the privilege "is both an expression of our opposition to justice administered by inquisition and, at the same time, the bulwark of our protection from inquisitorial practices."<sup>13</sup>

If such be the character and significance of the constitutional right, then, I submit, the lawyer's responsibility is clear.

Our responsibility is to insist that the privilege be respected to the full, not watered down. It is to convince ourselves and others that democracy is not so impotent in the face of tyranny—Communist or otherwise—as to call for diluting the essences of democracy, one of which is the right against self-incrimination. It is to recognize that the defense of the United States and of the free world against tyranny, however pervasive and dangerous, does not hinge upon—indeed is not served by—any abandonment of the presumption of innocence nor any permitting of mere inference to be a complete substitute for solid evidence. Our responsibility, I suggest, is to shout these truths from the housetops—and to live them—unpopular as they may be at any given moment in our history.

Are there many among us who, in a calm time, would condone, let alone advocate, that American citizens should be stripped of the means of pursuing their chosen professions or vocations in the absence of hard and preponderant evidence? Do we not

<sup>12</sup> Address of Chief Justice Earl Warren at Washington University. Feb. 19, 1955, from the text reported in 101 Cong. Rec. A1557-A1559 (March 8, 1955).

<sup>13</sup> Huard, *The Fifth Amendment—An Evaluation*, 42 *Geo. L.J.* 345 (1954).

reveal doubts as to the strength of our Constitution and its principles if we retreat because the times are perilous? Is the American tradition of fair play only for fair weather?

Most of us, I suggest, would not interpret or act upon the Constitution in one way while all is serene, but in another when the winds howl.

The Chief Justice of the United States distilled his own wisdom with that of colleagues past and present when, earlier this year, he said:

The times in which we are living are not normal times. Powerful forces are at work in the world—both to preserve liberty and to extinguish it. The interplay of hope and fear, belief and doubt, determination and frustration, keeps the affairs of mankind and minds of people in a state of turbulence—a turbulence that destroys perspective and clouds the vision. Such times call for constant reflection and reappraisal. . . .

There are some who regard our freedoms merely as their birthright which they may simply take for granted. There are others who would never shrink from the loss of little freedoms—by the other fellow, of course. And there are also those who would procrastinate until the deluge. The fact remains, however, we do have a battle today to keep our freedoms from eroding, just as Americans in every past age were obliged to struggle for theirs. Many thoughtful people are of the opinion that the danger of erosion is greater than that of direct attack.

Departures from the letter and spirit of our constitutional principles are not the product of any one person or any one group of persons. They are more properly chargeable to the entire body politic; to the suspicion, hatred, intolerance, and irresponsibility that stalk the world today; and also to a lack of appreciation of the age-old struggle of mankind to achieve our present day blessings of liberty. Government, whether national, state or local, is not the sole culprit in this matter. For it does not operate in a vacuum. In the last analysis it only reflects the mores, the attitudes, the state of mind of the dominant groups of society.<sup>14</sup>

The Chief Justice reemphasized the threat of erosion of our traditional rights and posed two questions which, it seems to me, we lawyers must face and answer:

I have suggested that if there has been damage done to our traditional rights it has been accomplished by a process of erosion. Are the privileges and immunities summed up in our Bill of Rights in danger of loss through subtle changes in our climate of opinion? Is distrust of our fellow countrymen wearing away our traditional concept of the innate dignity of man?<sup>15</sup>

<sup>14</sup> Warren, C.J. *supra* note 12 at 1557, 1558.

<sup>15</sup> *Id.* at 1558.

Our responsibilities as lawyers will best be acquitted, I submit, if they are underscored with our firm determination to trust our fellow countrymen and our refusal to encourage suspicion of our colleagues at the bar. For suspicion is born of fear. And fear and suspicion, now as in past eras of tension, gnaw at our Bill of Rights.<sup>16</sup>

<sup>16</sup> Strong conviction leads to strong statement. While I hope my statement has been strong enough for the conviction underlying it, I hope equally that it neither will nor can be interpreted as challenging the motives of those who hold different views.