TEACHERS AND THE FIFTH AMENDMENT*

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The steady parade of witnesses who have invoked the Fifth Amendment privilege before congressional committees has focused public interest on this provision of the Bill of Rights. Unfortunately, the growth in public interest has not been accompanied by a corresponding increase in public understanding. Consideration of the subject has generally proceeded in the form of a debate between extremes. On the one hand, it is said that since the privilege is legal its claim is entirely neutral and implies nothing of significance about the witness. On the other, it is urged that the only reason a witness would refuse to answer is that he is "guilty" and that the claim of the privilege should itself automatically disqualify the witness from continuing in any position of public trust or confidence.

With the recent intensification of congressional investigations into education, teachers who claimed the privilege have become embroiled in this problem. One thing seems clear: because of present public attitudes, the teacher who invokes the Fifth Amendment runs the serious risk that he will be discharged from his position and that his reputation will be ruined. What is much less apparent is whether such adverse consequences should flow from the exercise of the privilege. That is the legal and moral problem which is explored here.

The privilege not to be a witness against oneself was an outgrowth of English and Colonial experience with the abuses of an inquisitorial system of justice.[1] The modern significance of the privilege is thus described by Dean Wigmore:

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Readers interested in this subject will also wish to consult Dean Erwin N. Griswold's speech, "The Fifth Amendment," delivered at the Winter Meeting of the Massachusetts Bar Association, February 5, 1954, and published in the Harvard Law School Record, February 11, 1954. Although the Dean's views and those of the writer were developed quite independently, they are closely parallel.

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1. Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 1-23 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 VA. L. REV. 763 (1935). See generally Maguire, *Attack of the Common Lawyers on the Oath* ex officio in ESSAYS IN HISTORY AND POLITICAL THEORY 199 (1936); 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

"For the *preliminary inquisition of one not yet charged* with an offense, the claims of the privilege seem equally valid. . . . [I]t was this situation which gave rise to the privilege. The system of 'inquisition', properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation; and the contest for one hundred years centred solely on the abuse of such a system. In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a system is always certain to be abused. . . .

"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 . . ., the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends. . . .

"The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." [2]

The Bill of Rights states the privilege in simple terms: "No person . . . shall be compelled in any criminal case to be a witness against himself." In order to accomplish its purposes, however, the provision required interpretation by the courts. Comparatively early, it was established that, although the Amendment speaks only of a "criminal case," the privilege applied in any Federal Government proceeding where the evidence thus secured might later be used in prosecuting a federal "criminal case." [3] This, of course, includes congressional committee hearings.[4] For similar reasons, the Amendment au-

2. 8 WIGMORE, EVIDENCE 307-309 (3d ed. 1940).

3. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). See Liacos, *Rights of Witnesses Before Congressional Committees,* 33 B.U.L. REV. 337, 370-379 (1953).

4. United States v. Fitzpatrick, 96 F. Supp. 491 (D.D.C. 1951); Note, 49 COL. L. REV. 87 (1949), Comment, 4 CATH. L. REV. 51, 53 (1954). See Quinn v. United States, 203 F.2d 20 (D.C. Cir. 1952); United States v. Jaffe, 98 F. Supp. 191 (D.D.C. 1951).

thorizes a witness to refuse to give answers which might furnish a link in the chain of evidence or a clue to the discovery of evidence which might be used in a federal criminal prosecution against the witness.[5] The witness must have reasonable cause to apprehend danger from his answer, and he is not excused from answering merely on his own assertion that the answer might create or increase the risk of prosecution.[6] It is, instead, the responsibility of the court, before which the witness is tried for refusal to answer, to determine whether the refusal was justified. But in discharging this judicial responsibility, the court cannot require the witness to disclose the reasons why the answer might furnish a link or a clue,[7] for to require that disclosure would be to deprive the witness of the very protection the Amendment was designed to guarantee.

Judicial determination of the justification for silence is not difficult when the question is incriminatory on its face, that is, when it is apparent that one of the possible answers to the question could provide a link or clue. Thus if, in the context of a Mann Act investigation, a witness is asked, "Did you transport the girl from state A to state B?", it is apparent that one possible answer is "Yes" and that such an answer could provide links or clues in a later Mann Act prosecution. The question is incriminatory on its face. In such a case refusal to answer would be upheld, because the very nature of the privilege precludes judicial probing into the reasons for the claim.

The judicial task becomes more difficult when the question asked appears to be innocuous, as for example, "Do you know X?" This was demonstrated recently when the Supreme Court reversed three different decisions in which the Court of Appeals for the Third Circuit denied the privilege.[8] When a fourth case reached the circuit court, it upheld the claim of the privilege.[9] Judge Hastie said that under the Supreme Court decisions, the refusal to answer should be upheld if (1) it be shown to the court "how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States," and (2) "this suggested course . . . . of linkage [did] not seem incredible in the circumstances of the particular case," and "in determining whether the

5. Counselman v. Hitchcock, 142 U.S. 547, 585 (1892); Blau v. United States, 340 U.S. 159, 161 (1950). See *Constitutional Privileges of Witnesses—The Law*, 24 BAR BULL. (Boston) 304-5 (1953) (Report of Committee on the Bill of Rights).

6. Hoffman v. United States, 341 U.S. 479, 486 (1951).

7. Hoffman v. United States, 341 U.S. 479, 486-7 (1951).

8. Hoffman v. United States, 341 U.S. 479 (1951), *reversing* 185 F.2d 617 (1950); Greenberg v. United States, 343 U.S. 918, *reversing* 192 F.2d 201 (1952); Singleton v. United States, 343 U.S. 944, *reversing* 193 F.2d 464 (1952).

9. United States v. Coffey, 198 F.2d 438 (1952).

witness really apprehends danger . . . the judge cannot permit himself to be skeptical. . . ." [10]

I

Invoking the privilege is not tantamount to admitting criminal guilt, for the privilege may properly be claimed by the innocent person who is reasonably apprehensive that his answer will furnish a clue or a link which might be used in an unjustified criminal prosecution. It is well known, of course, that many innocent persons are prosecuted and that some even are convicted. Questions concerning alleged membership in or association with the Communist Party provide an apt illustration of circumstances in which persons innocent of criminal action might properly invoke the privilege.

It is not a federal crime to be a member of the Communist Party. In fact, the Internal Security Act of 1950 provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of . . . this section or of any other criminal statute." [11] But the Smith Act makes it a crime, among other things, to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; or to become a member of such a group with knowledge of its purposes.[12] Evidence that a person is or has been a member of the Communist Party or that he attended Party meetings or associated with Party members would be links in the chain or clues to the discovery of evidence needed for a Smith Act prosecution. A witness asked questions concerning these matters could therefore properly invoke the privilege—not because he was guilty of violating the Smith Act, but because of a reasonable apprehension that answering the questions might create or increase the risk of unjustified prosecution.[13]

Claim of the privilege with respect to questions concerning present or past membership in the Communist Party thus is not an admission of criminal guilt. Moreover, it may not even be an admission of membership. This is so for a number of reasons.

First, the witness or his lawyer may have believed that the witness is legally entitled to refuse to answer any question concerning member-

10. United States v. Coffey. 198 F.2d 438, 440 (1952).

11. 64 STAT. 992 (1950), 50 U.S.C. § 783(f) (Supp. 1952).

12. 18 U.S.C. § 2385 (Supp. 1952).

13. See, *e.g.*, Brunner v. United States, in which a witness refused to answer whether he had seen the defendant at Communist Party meetings in 1937-1939. The Court of Appeals held that the privilege was inapplicable. 190 F.2d 167 (9th Cir. 1951). The Supreme Court reversed per curiam. 343 U.S. 918 (1952).

ship, whether or not he is apprehensive that the truthful answer would provide a link or a clue. Professor Harry Kalven, Jr., of the University of Chicago Law School, for example, believes that ". . . any witness, whatever his personal situation, however confident he was that he could disprove that he was a Communist, is entitled legally to claim the privilege when asked a question as directly incriminating as the question, 'Are you now a member of the Communist Party?' " [14] Professor Kalven correctly points out that this in fact is the way the rule operates, because when, as in this situation, the question is incriminatory on its face, the court will not question the witness' claim of the privilege. He also urges that to deny the legality of the claim in this situation would be to make the privilege self-defeating because, if a witness can only invoke the privilege when the true answer would have been "Yes," the very act of claiming the privilege would supply the link or clue that the Amendment says need not be furnished.

Some legal scholars have taken issue with Professor Kalven's interpretation.[15] Fortunately, the controversy need not be resolved here. The simple point for our purpose is that to the extent witnesses fail to answer, not because the answer would have been unfavorable, but because, like Professor Kalven, they believe they are legally justified to refuse to answer, the claim of the privilege concerning questions as to membership does not amount to an admission of membership.

Second, the time when a person left the Communist Party could provide a link or clue, which the Amendment says may be withheld. Let us assume that a witness who left the Party in 1945 is asked, "Are you now a member of the Communist Party?" If he answers this question truthfully, "No," the next question can be, "Were you a member of the Party in 1950?" Again the truthful answer would be, "No." And similarly to the question, "Were you a member in 1946?" But when he is asked, "Were you a member in 1945?", he must either answer truthfully "Yes," thus providing the clue, or claim the privilege, and also thus provide the clue. In order, therefore, not to provide the clue concerning membership in 1945, the witness may properly close the door at the outset of the questioning and refuse to answer questions concerning membership. In this series of questions it is apparent that the refusal to answer the question concerning present

14. University of Chicago Round Table, Aug. 23, 1953, p. 4. See also Kalven, *Invoking the Fifth Amendment—Some Legal and Impractical Considerations,* 9 BULL. OF ATOMIC SCIENTISTS 181 (1953).

15. Meltzer, *Invoking the Fifth Amendment—Some Legal and Practical Considerations,* 9 BULL. OF ATOMIC SCIENTISTS 176 (1953); Meltzer, *Invoking the Fifth Amendment—A Rejoinder,* 9 BULL. OF ATOMIC SCIENTISTS 185 (1953); University of Chicago Round Table, Aug. 23, 1953, pp. 1-12.

membership could not properly support the inference that the answer, if given, would have been unfavorable.

The same thing can be true concerning a question about past membership. Here we shall assume that the witness was never a member of the Party, that he was an innocent member of some organizations listed by the Attorney General as subversive, and that he knew some prominent Party members. He would not be required to provide information concerning these matters because that information might be useful in a Smith Act prosecution. He is asked, "Have you ever been a member of listed organization A?" Answer, "I claim the privilege." He also claims the privilege when asked whether he has ever been a member of listed organizations B and C. He is then asked, "Have you ever been a member of the Communist Party?" The truthful answer, by hypothesis, is, "No." But if he gives this truthful answer, he would thereby provide the prosecution with the clue that he was a member of the organizations with respect to which he had previously invoked the privilege. Since the Amendment authorizes the witness to withhold clues, he may properly refuse to answer the question concerning past membership even though, had he answered, the answer would not have been unfavorable. Again, it is apparent that in this situation the claim of the privilege concerning membership does not justify the inference that the answer, if given, would have been unfavorable.

Third, a witness entitled to claim the Fifth Amendment privilege is not required to exercise it. He may "waive" it. Waiver may take the form of voluntarily answering the question. Waiver will also result if in answering the question the witness discloses an incriminating fact. In that event, says the Supreme Court, "Disclosure of a fact waives the privilege as to details." [16] There is also a broader version of the waiver rule to the effect that although the answer to a question was not damaging, a witness who has answered any question concerning a subject cannot later decline to answer other questions concerning the same subject.[17] Thus a witness, who when asked whether he was a member of the Party, replied, "No," could not later claim the privilege when asked concerning possible attendance at Communist meetings, association with Communist leaders and similar facts which might be useful in a Smith Act prosecution.

Under either version of the waiver rule, it is clear that the witness may decline to give testimony which, although harmless in itself,

16. Rogers v. United States, 340 U.S. 367, 373 (1951).

17. Foster v. Pierce, 65 Mass. (11 Cushing) 437 (1853); State v. Nichols, 29 Minn. 357 (1882). *But cf.* McCarthy v. Arndstein, 262 U.S. 355, 359 (1922). See *Constitutional Privileges of Witnesses—The Law,* 24 BAR BULL. (Boston) 303, 306 (1953) (Report of Committee on the Bill of Rights).

would constitute a waiver. He may, in other words, refuse to open the door to a potentially dangerous line of questions. A witness, fearful that the broader waiver rule would be applied, might therefore claim the privilege when asked concerning membership despite the fact that the truthful answer, "No," would not by itself be helpful to the prosecution. Although the broad waiver rule most likely will not be followed by the Supreme Court, the witness advised by the cautious lawyer will probably refuse any answers concerning potentially dangerous subjects. To the extent that the refusal to answer is based on this fear of waiver, it would again be improper to infer from the claim of the privilege that the answer, if given, would have been unfavorable.

That the claim of the privilege does not necessarily warrant the inference that the witness had something to hide perhaps may best be illustrated by the story of Professor X, a leading American mathematician. X had been named by other professors as having been a Communist, so they believed, when a graduate student at another university some fourteen years previously. They had testified that X had attended meetings of the Communist Party at that time. None of the professors had ever heard X expressing views favorable to the Communist Party or of his having paid dues, and it was admitted that Communist matters were not discussed at the meetings which X attended. X, therefore, might have attended the meetings without realizing that they were of a Communist group. X was subpoenaed by the House Committee on Un-American Activities. He consulted the distinguished Dean Emeritus of Syracuse University College of Law, Paul Shipman Andrews. Dean Andrews, before agreeing to represent X, cross-examined him for ten hours, and thereby became convinced that not only had X never been a Communist, but that he had always been strongly anti-Communist.

Dean Andrews reports [18] that the effect of the accusation upon X was shattering. He faced possible loss of his position, and ostracism from the educational world; he faced also being discredited in the eyes of his children, associates, friends and neighbors. In addition, X feared that if he told the truth under oath, his testimony would contradict the sworn testimony of the other professors and that there might be an investigation and possibly a prosecution for perjury.

In Dean Andrews' words, "By the time he and his attorney reached Washington for the hearing, X was in a state of mental agony. He was quite literally at the end of his rope. His attorney urged him earnestly not to use the Fifth Amendment. But X felt that he

18. Letter from Dean Paul S. Andrews to the N.Y. Herald Tribune, Oct. 26, 1953, p. 14, cols. 3, 4, 5.

could endure no more; could just not face the uncertainty of a possible investigation and prosecution for perjury if under oath he denied ever having been a Communist."

X invoked the Fifth Amendment. One may criticize his judgment. But, again in Dean Andrews' words, "One cannot find in his having resorted to the Fifth Amendment under these circumstances, any reason for assuming that he had anything to hide, or was not telling the truth, when he stated, not under oath, that he had always been intensely anti-Communist and had never been a Communist. And anyone who had been with X during those days of mental anguish could understand his decision."

Dean Andrews closed his report of this incident with the warning, "Let me repeat that using the Amendment is by no means always an indication that the person has anything to hide or is a Communist." Dean Andrews' admonition should be underscored. Claim of the privilege may or may not be an indication of improper conduct. Educational institutions and the public should, therefore, suspend judgment concerning those who claim the privilege until all of the facts have been developed.

The appropriate agency for ascertaining facts concerning a teacher's qualifications, or alleged disqualifications, is not a congressional committee, but the academic institution of which he is a part. A fair and sensible procedure, and one which would protect both the teacher and the institution, would provide for an inquiry by the institution concerning the matters about which the witness had claimed the privilege. If the inquiry develops information which, under accepted principles of academic freedom and tenure, disqualifies the teacher from continuing in his position, he should, and undoubtedly will, be dismissed. If disqualifying information is not developed, he should be retained.

II

There are college presidents and trustees, school superintendents and members of school boards, as well as other public figures, who would say that all this is, at best, narrow and legalistic—at worst, irrelevant. For, they would urge, a teacher, presumably dedicated to pursuit of truth and principles of candor, should never refuse to answer questions put to him by duly constituted authority; and such a refusal, of itself—quite apart from any unfavorable inference which might be drawn from the claim of the privilege—justifies, indeed demands, dismissal.

It is difficult to improve on Alan Barth's conclusion that this proposal is an "outright folly" and that it is "an abdication of academic independence for any university to serve indiscriminately as the executor of punishments arbitrarily imposed by a congressional committee." [19]

The automatic-dismissal approach violates the basic principle of academic freedom that a teacher who has earned a tenure status shall be removed from his position only if he has been found to be incompetent, has been convicted of a serious crime, or has been guilty of such grave moral delinquencies as unfit him for association with students. There can be no doubt that however much one may deplore the widespread use of the Fifth Amendment, the exercise of this constitutional privilege is not in every instance an indication either of criminality or moral delinquency. Nor is it a reflection on the witness' competency as a teacher.

The proper exercise of the privilege is instead the result of a choice made within the limits of the law. The fact that one may wish that the choice had been otherwise is irrelevant. For it is exactly that freedom to follow one's conscience within the law which is the essence of academic freedom. Yet, if it is proper for university administrators and trustees to impose their moral code on teachers in this respect, it is difficult to see why they may not do so in other instances. The automatic discharge of teachers for the legitimate exercise of a constitutional privilege thus can become the precedent for other invasions of academic freedom. Purges once begun know no stopping place.

It is worth emphasizing at this point that academic freedom and tenure do not exist because of a peculiar solicitude for the human beings who staff our academic institutions. They exist, instead, for the same reasons the Constitution guarantees the tenure of judges and freedom of expression for all citizens: in order that society may have the benefit of honest judgment and independent criticism which otherwise would be withheld because of fear of offending some dominant social group or transient social attitude. If these basic conditions of free inquiry are to be maintained, teachers cannot be cast into the stifling mold of conforming their moral judgments to the moral judgments of others.

Dismissals of bygone days for allegedly heretical views on such subjects as religion, evolution, free silver and German-United States relations are now recognized by all thoughtful persons as violations of academic freedom—the result of prejudice and emotion rather than

19. Barth, *Universities and Political Authority*, 39 AMER. ASSOC. OF UNIV. PROFESSORS BULL. 5, 10 (1953).

of reason and judgment. Sober historians of the present era will undoubtedly record a similar conclusion concerning many contemporary dismissals.

III

An additional argument advanced by critics of those who invoke the privilege is that, although unfavorable inferences perhaps should not invariably be drawn and although the automatic discharge approach may have defects, certainly a teacher who claims the privilege without legal justification should be dismissed. In support of this conclusion they would urge that many witnesses refuse to testify not because they are apprehensive of criminal prosecution but because of other motives, including the following: (1) The witness believes it is unethical to give testimony concerning third persons who, in his opinion, were completely innocent of any wrongdoing. Because of the operation of the waiver rule, however, such a witness cannot answer concerning himself and refuse testimony concerning others; therefore, he is forced to claim the privilege at the outset. (2) The witness sincerely opposes the investigation, believing that it is not a genuine inquiry but public defamation intended to extirpate from the colleges not subversion but dissent; he therefore invokes the Amendment. (3) The witness is unwilling to make a public admission of past mistakes, especially in light of the strong public reaction which association with Communism evokes today. (4) The witness fears that his truthful answers might conflict with testimony of others who have appeared before the committee and thus result in a perjury prosecution.

Do not such witnesses misuse the privilege and does not that misuse justify or require discharge?

The answer is that if in fact the witness has reasonable cause to apprehend danger from his answer, his claim of the privilege is proper. On the other hand, in the language approved in a leading case, "a mere imaginary possibility of danger" [20] will not justify the claim. Undoubtedly, there have been witnesses who would have been willing to run the risk of a later Smith Act prosecution had one or more of the motivating factors mentioned above not been present. But, as Judge Jerome Frank has pointed out, the fact that there is a complex of motives does not defeat the privilege.[21] In the case in which Judge Frank spoke, a witness, when asked why he refused to testify, said that it was ninety-five percent fear of revenge and five percent fear of self-incrimination. Judge Frank said this did not deprive the witness of his privilege.[22]

20. Mason v. United States, 244 U.S. 362, 366 (1917).
21. United States v. St. Pierre, 128 F.2d 979 (2d Cir. 1942).
22. United States v. St. Pierre, 128 F.2d 979, 980 (2d Cir. 1942).

Thus, the issue is whether the witness' apprehension is, on the one hand, reasonable, or on the other, is "a mere imaginary possibility." In days gone by one might fairly have concluded that the fear of prosecution was "imaginary." But these are not ordinary times. They are, instead, times of fear and repression. As America's great jurist, Learned Hand, tells us, "[W]e seem able to think of nothing better than repression; we seek to extirpate the heresies and wreak vengeance on the heretics. We have authentically reproduced the same kind of hysteria that swept over England in the time of Titus Oates and during the French Revolution, and over us ourselves after the Civil War and the First War, except that in our own case we have outdone our precedents." [23]

In this milieu, I submit, many conscientious witnesses will be apprehensive of the possibility that a zealous and ambitious prosecutor might later seek to prosecute. Their refusal to answer would therefore be proper, and the fact that other motives contributed to the decision not to testify would not defeat the privilege. Put in other words, the witness entitled to invoke the privilege must determine whether or not to do so. In deciding whether to claim or to waive the privilege, it certainly is not unlawful or improper for him to consult his conscience to determine whether he should or should not testify. Whatever his decision, he has made a choice within the limits of the law. Though some segments of society may disapprove his choice, their disapproval is not controlling, for, as already noted, it is exactly the freedom to follow one's conscience within the law that is the essence of academic freedom.

We now come to the witness who has claimed the privilege under circumstances which most lawyers would say did not provide legal justification for the claim. He has, for example, invoked the privilege when in fact he knew that his answers would not provide a link or a clue. Is it not proper to banish such a person from the family of scholars?

I venture the judgment that the answer to this question is not invariably "Yes."

First, the harsh sanction of dismissal, with its probable consequences of complete banishment from the teaching profession, should be imposed only after ascertainment of all the facts relevant to the claim of the privilege and careful appraisal of those facts and of the individual's entire record as a teacher and a scholar. If the reason for the alleged improper claim of the privilege lay in the witness' mis-

23. HAND, *At Fourscore* in THE SPIRIT OF LIBERTY 253, 256-257 (Dilliard ed. 1952).

understanding of the law or in confusion or fear produced by the investigation, the teacher should not be dismissed. And if the claim of the privilege were motivated solely by a conscientious desire to record opposition to government activity regarded as gravely immoral by the teacher or to avoid being compelled to disclose embarrassing information concerning third persons who the teacher believes are innocent, the harsh sanction of discharge and banishment would not always be appropriate. This would be particularly true if the teacher's prior record demonstrated his fitness to continue in the family of scholars. In such a case, invoking the privilege might be regarded as misconduct but not such grave misconduct as would warrant dismissal.

Second, and more important, determinations of alleged illegal conduct should be left to the courts and the due process of the law. Judge Charles E. Wyzanski, Jr., one of the nation's most distinguished judges and President of the Board of Overseers of Harvard University, has put this thought with his usual eloquence:

> "A university is the historical consequence of the mediaeval *studium generale*—a self-generated guild of students or of masters accepting as grounds for entrance and dismissal only criteria relevant to the performance of scholarly duties. The men who become full members of the faculty are not in substance our employees. They are not our agents. They are not our representatives. They are a fellowship of independent scholars answerable to us only for academic integrity.
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> "We undertake the responsibility for handling infractions of university codes occurring within the times and places where our certificate operates. On these matters we possess the best available evidence, we have familiar canons to apply, and we have established processes of judgment and punishment.
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> "What faculty members do outside their posts, we should leave to outside authority. . . .
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> ". . . .
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> ". . . [A university] is not and must not become an aggregation of like-minded people all behaving according to approved convention. It is the temple of the open-minded. And so long as in his instruction, his scholarship, his relations with his associates and juniors a teacher maintains candor, and truth as *he* sees it, he may not be required to pass any other test." [24]

IV

The solution is, then, hardly a dramatic one. Either extreme can be stated with more popular appeal. But the fact is that some claims

24. Wyzanski, *Sentinels and Stewards,* Harvard Alumni Bulletin, Jan. 23, 1954, p. 316.

of the privilege are used to conceal harmful information while others are not. A teacher's claim of the privilege before a congressional committee is not a colorless act of no concern to his academic institution. Neither is it tantamount to an admission of guilt. Nor does it justify automatic dismissal. The specific cases can be distinguished from each other only by careful and painstaking investigation. Judgments about individuals must be made individually. A responsible institution in a free society can be satisfied with no less.