NOTE

THE RIGHT TO SILENCE

The right to silence, commonly called the privilege against self-incrimination, is much discussed in theology today. Lie detectors, electronic listening devices, brainwashing techniques, and the recent controversy over the Fifth Amendment have focused the attention of moral theologians on the individual's right to remain silent when questioned about his criminal actions. Theologians in the last decade, besides treating the practical ramifications of the problem, have been primarily interested in examining its natural-law foundation. In this article we will investigate principally the nature of the right to silence as it is presented in current theological writings.

BACKGROUND

The background of this problem is complex. It is necessary, first of all, to understand something of the Roman legal system, since this was the law that was familiar to virtually every theologian who wrote on this problem from St. Thomas up to the nineteenth century.[1] In postclassical Roman civil-law procedure, justice was the concern of the state. In any action and at any time in the action, questions were permitted if they were approved by the judge. Judges were instructed to interrogate the parties. Thus, the great jurist Ulpian writes: "Whenever a sense of equity influences a judge, there is no doubt that in the pursuance of justice an interrogatory should take place."[2] If the judge had the duty of questioning the parties, there was also an obligation on the party to answer these questions. The judge had to be competent, of course; the correct legal form of questioning had to be used, and there had to be some proof against the accused. In some instances the judge had to decide the legitimacy of a question,[3] but the general rule seems to have been that the defendant had to answer questions put to him by the magistrate as well as the plaintiff. If he failed to answer, he was considered contumacious.[4] Silence or refusal to answer questions put the accused in a bad light, for as Paulus points out, "He who is silent does not always confess, nevertheless it is true that he does not deny."[5] In later Roman law such silence was taken as equivalent to confession.

[1] Cf. J. M. Aubert, *Le droit romain dans l'oeuvre de saint Thomas* (Paris, 1955).

[2] *Digest* 11, 1, 22, from the *Corpus iuris civilis*, the codification of Roman law by Justinian. It is divided into the *Digest*, the *Code*, and the *Novellae constitutiones*. Cf. also *Digest* 11, 1; *Code* 3, 1.

[3] Cf. *Digest* 11, 1, 6.

[4] Cf. *Digest* 11, 1, 5; 11, 1, 6; 11, 1, 11.

[5] *Digest* 50, 17, 142.

Roman criminal-law procedure was originally accusatorial, and since the burden of proof rested on the accuser, there was no reason for the defendant to answer incriminating questions. A first-century B.C. statute forbade the magistrate to arrest the accused, even after judgment, without allowing him time to escape.[6] If the decision was against him, he could leave Rome, although he was banished by the *aqua et igni interdictio* and could not return without becoming subject to capital punishment.[7] The result was that the death penalty was rarely inflicted on citizens.

Under the Empire, criminal procedure while remaining accusatorial adopted many inquisitorial features.[8] The Empire became absolutist, police systems appeared, and no effort was spared to punish criminal action. Theoretically the burden of proof remained with the accuser, but in fact a suspect was adjudged guilty until he proved himself innocent. The ease with which the state could get witnesses and the fear of the penalties for those who helped the accused made conviction relatively simple for the state. Torture became so much a part of the questioning process that it came to be called *quaestio*. Defined as "torment and corporeal suffering and pain employed to exact the truth,"[9] torture became a common operating technique in the hands of a court seeking to convict the accused. Confession, the queen of proofs, although by no means the only proof, was the aim of every court.[10] Torture, cruel and prolonged, became a recognized expedient in Roman law to obtain a confession of guilt.

Scholastic theologians, cognizant of the Roman-law basis of the Continental legal system, argued the problem for over six hundred years. They may

[6] Cf. E. Levy, *Die römische Kapitalstrafe* (Heidelberg, 1931) p. 19.

[7] Cf. J. L. Strachan-Davidson, *Problems of the Roman Criminal Law* 2 (Oxford, 1912) 23 ff.

[8] An informative series of articles on the Roman inquisitorial procedure can be found in E. J. Urch, *The Evolution of the Inquisitorial Procedure in Roman Law* (1930).

[9] *Digest* 47, 10, 15, 41.

[10] Hence the expression *confessus pro iudicato est*. Cf. *Digest* 42, 2, 1; 42, 2, 3; 42, 1, 56. That jurists were aware of the unreliability of torture as a method for obtaining truth is seen from the following classic text of Ulpian: "Quaestioni fidem non semper nec tamen numquam habendam constitutionibus declaratur: etenim res est fragilis et periculosa et quae veritatem fallat. Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tanta sunt impatientia, ut quodvis mentiri quam pati tormenta velint: ita fit ut etiam vario modo fateantur, ut non tantum severum etiam alios criminentur" (*Digest* 48, 18, 1, 23). One might compare this text with the comments on torture of J. La Bruyère, who wrote a hundred years before any concrete changes were made in French law: "La question est une invention merveilleuse et tout à fait sûre pour perdre un innocent qui a la complexion faible, et sauver un coupable qui est né robuste. Un coupable puni est un exemple pour la canaille; un innocent condamné est l'affaire de tous les honnêtes gens" (*Caractères* [Paris, n.d.] p. 356).

be divided into two divergent groups. One school of thought, which may be termed the traditional opinion, had such supporters as St. Thomas, Cajetan, Dominic Soto, Schmalzgrueber, Salmanticenses, and St. Alphonsus. They argued, following the positive law, that the accused was obliged to answer every legitimate question the judge asked, even if this resulted in the death penalty. St. Thomas, for example, appeals to the virtues of truth and obedience in terms of the common good. The accused is bound to confess his crime if asked a legitimate question, because society requires that criminal acts be punished if peace and prosperity are to be preserved.[11]

The other school of thought, representing a more lenient view, stated that no man is obliged to condemn himself, and that a question, the truthful answer to which would result in a grave punishment, was in fact not a legitimate one. Abbas Panormitanus (1386–1445) was the first theologian to hold this view,[12] and he was followed by Peter of Navarre, Emmanuel Rodriguez, Lessius, Lugo, Diana, Reiffenstuel, and Pichler. These theologians looked beyond the existing civil law and argued for a more basic right in man that would allow him to deny his crime if questioned by a judge. It must be noted, however, that while they taught that the less rigorous opinion could be followed in practice, they attached to it only some probability, never the note *probabilissima* or *sententia communis*. The authority of those holding the traditional view and the weight of the support of the law were too strong, it seems, to permit anything else.

Legal reform came slowly. By the early 1700's the privilege against self-incrimination was a working part of English law.[13] It was not until nearly two hundred years later, thanks in large measure to the humanitarian aspects of the French Revolution, that the Continent adapted this view. Towards the end of the eighteenth century and throughout the nineteenth, the arbitrary character of punishments and their brutal enforcement gave way to a more humane recognition of human dignity. Today nearly all the modern legal codes of Europe acknowledge the rights of the accused.[14]

[11] *Sum. theol.* 2–2, 69.

[12] Abbas Panormitanus, *Commentaria in libros Decretalium* (Venice, 1578), Vol. 2, *De confessis*, cap. 2, n. 17: "... principalis persona non cogitur respondere si ad aliam poenam quam spiritualem agit."

[13] According to J. H. Wigmore, in England by the middle of the seventeenth century the privilege against self-incrimination was a legal fact, but it was "a bare rule of law, which the judge would recognize on demand. The old habit of questioning ... the accused died hard—did not disappear, indeed, until the 1700's had begun" (*Evidence in Trials at Common Law* 8 [revised by J. T. McNaughton; Boston and Toronto, 1961] 291).

[14] The actual term "self-incrimination" is not found in modern European legal codes, but the reality is certainly present. French, Italian, and German law, for example, protect

Ecclesiastical law finally came into conformity with the civil law in 1917 with the appearance of the Code of Canon Law. Canon 1743, 1°, reads: "The parties are bound to answer and to manifest the truth to a judge who legitimately questions them, unless it is a question of a delict they themselves have committed." A person may volunteer such information if he wishes, but he cannot be forced to do so. The judge might rightfully question the party, but he cannot impose any obligation on him to answer, nor can his refusal be taken as a confession.[15]

Contemporary theology took a renewed interest in the problem of the right to silence about a decade ago. Moral theologians all over the world began to re-evaluate the notion of the privilege against self-incrimination mainly because of two factors: the suggested use of narcoanalysis in judicial proceedings and the particular American problem of the Fifth Amendment.

Narcoanalysis, the treatment of psychiatric disorders by the use of drugs, was developed in the Second World War for the treatment of war neuroses.[16] Pentothal or sodium amytal was given to the patient, either by injection or orally, and almost immediately the subject would relive the scene which had

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the accused from compulsory self-incrimination. The French Code of Criminal Procedure of Dec. 31, 1957, expressly states in Article 114 that the examining judge must instruct the accused and explain that he is free to refuse to make any declaration. The judge must establish the identity of the accused and make known to him every fact that is imputed to him. Article 18 of the same Code decrees that the accused party may not be heard unless he expressly renounces this right, and if these provisions are not followed the act itself and the subsequent proceedings are null and void (Article 170). These decrees may be found in *Code de procédure, annoté d'après la doctrine et la jurisprudence* (Paris, 1961). Cf. also *Circulation de 17 février 1961 modifiant l'instruction générale prise sur l'application du Code de procédure penale*, in *Bulletin législatif Dalloz et Recueil Duvergier* 44, no. 5 (Paris, 1961) 178–92.—The Italian Code of Criminal Procedure also protects the defendant from obligatory self-incrimination. Before the trial the judge must make known the charges to the defendant. The latter can refuse to answer any question concerning his guilt (Article 367). At the trial the accused can refuse to answer (Article 441). The Italian law may be found in *I quattro codici* (Milan, 1960).—In the German Federal Republic the accused has the right to abstain from making any statement both during the preliminary hearing and during the trial. German jurists agree that the accused has a right to be heard, but has no duty to speak. The German Code of Criminal Procedure can be found in *Strafrecht und Strafverfahren* (Berlin, 1961).

[15] For further information on canonical procedure one may consult the following: R. Clark, *The Interrogation of Witnesses in Ecclesiastical Trials* (Washington, D.C., 1948); R. Clune, *The Judicial Interrogation of the Parties* (Washington, D.C., 1949); J. W. Dougherty, *De inquisitione speciali* (Washington, D.C., 1945); J. Krol, *The Defendant in Contentious Trials* (Washington, D.C., 1937); C. Magni, *Il silenzio nel diritto canonico* (Padua, 1934).

[16] Cf. C. Launay, "War Neuroses and Infanto-Juvenile Practice," in Peter Flood, O.S.B. (ed.), *New Problems in Medical Ethics* 2 (Westminster, Md., 1954) 67–77.

caused him emotional distress. The soldier who suffered from partial paralysis, motor disturbances, or inability to speak would often, after he had reexperienced the painful events in his life under the influence of drugs, awaken much improved. By experimentation, scientists discovered that the drugs also caused the patient to become free of his emotional tensions and inhibitions and to speak freely about himself and his activities. From this was born the false conception of the "truth drug." Experts deplore this term and insist that, though the drug might ease tension in the patient, the revelations of the patients are frequently mixed with lies and the most improbable facts.[17] A competent psychiatrist is needed to examine the patient in this state and to draw the truth out carefully.

Two possibilities presented themselves for the use of narcoanalysis in criminal procedure. The first would be to examine the accused before the trial to discover if he is guilty. The other possibility would be to use the drugs to determine the exact criminal responsibility of the accused when the trial is over, but before the sentence has been given.

The Fifth Amendment to the Constitution of the United States, an "old friend" in the words of Dean Griswold of Harvard Law School,[18] became law on Dec. 15, 1791. It states that "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The Fifth Amendment is a federal law and has application only in federal courts. However, all the individual states confirm this common-law privilege either expressly in their state constitution or by implication. In federal courts it applies also to any witness in a criminal or civil case before a grand jury, a court, or a legislative committee.[19] Government investigations of Communism, corruption in labor, and gambling have made the public aware of the moral implications of "pleading the Fifth."[20]

Contemporary discussion among moralists of the right to silence has two sources: the manuals and the periodical literature. The manuals are characterized by a positive-law orientation, while the articles in periodicals analyze the right to silence in terms of the natural law. These two aspects will now be examined.

POSITIVE-LAW ORIENTATION

In reading modern moral-theology manuals one finds that very little space

[17] Cf. L. Bertagna, "The Myth of the Truth-Drug," *ibid.*, pp. 102–15.

[18] E. N. Griswold, *The 5th Amendment Today* (Cambridge, Mass., 1955) p. 30.

[19] Cf. *Quinn v. United States* (349 U.S. 155); *McCarthy v. Arndstein* (266 U.S. 34); *Watkins v. United States* (354 U.S. 178).

[20] Cf. R. F. Drinan, S.J., "Rights of Citizens before Congressional Committees," *Catholic Mind* 52 (1954) 364–68.

is given to the duties of the defendant. The problem of torture is cursorily settled by reference to the existing civil and ecclesiastical law, which permits the defendant to refuse to convict himself by answering questions about his guilt. There is, as John Lynch, S.J., has noted, "a reluctance on the part of authors to discuss the question on a basis of natural law."[21] The reason for this, Fr. Lynch suggests, is that perhaps the authors "feel that the problem is no longer sufficiently practical to justify the time and space required to treat it."[22] To verify this we refer to a few of the traditional manuals.

Prümmer, in the twelfth edition of his manual of moral theology (1955), gives the usual treatment of the subject. Stating that "it is never strictly demanded by modern civil laws that the accused confess his crime,"[23] Prümmer nevertheless feels that the modern teaching is not contrary to the opinion of St. Thomas. What St. Thomas taught about the duty of the defendant to confess his crime was supported at *that* time by both the Roman and ecclesiastical law. The present teaching is supported by the *current* civil and ecclesiastical law. Clearly, Prümmer is arguing according to the principle that is found in St. Thomas, namely, that the civil law has the power to determine the duties of the defendant.[24] In the time of St. Thomas the law restricted the defendant's right to silence, since this was thought to be the best way to promote the good of society. Today, conditions having changed, the common good can be sufficiently protected without requiring the defendant to confess his crime.

Aertnys-Damen and Iorio give similar explanations. The former gives the general rule that the accused must answer the legitimate questions asked him by the judge, unless they deal with his personal crime. The reason for this exception is that "neither modern law nor canon law after the Code imposes the obligation of confessing one's crime."[25] Iorio refers to the traditional teaching and observes that the modern civil law is based on the axiom *nemo tenetur tradere seipsum.* The key to the whole problem he states is found in St. Thomas' phrase *secundum ordinem iuris.*[26] Since the particular instance of Roman law demanding the accused's confession is no longer operative (the *ordo iuris* having changed), the defendant today can, without sinning, refuse to confess his crime.

[21] J. J. Lynch, S.J., "Notes on Moral Theology," THEOLOGICAL STUDIES 19 (1958) 187–88.

[22] *Ibid.*

[23] D. M. Prümmer, *Manuale theologiae moralis* 2 (12th ed.; Freiburg, 1955) 148.

[24] Cf. *Sum. theol.* 2, q. 69, a. 1 c: "Et ideo ex debito tenetur accusatus iudici veritatem exponere quam ab eo *secundum formam iuris* exigit .... Si vero iudex hoc exquirat quod non potest *secundum ordinem iuris,* non tenetur ei accusatus respondere ...."

[25] J. Aertnys and C. A. Damen, *Theologia moralis* 1 (16th ed.; Rome, 1950) 880.

[26] T. A. Iorio, *Theologia moralis* 2 (3rd ed.; Naples, 1946) 969.

Some theologians refer to the existing legal codes. Cappello, for example, writing in 1958, mentions the Italian Criminal Code and concludes that at present the accused has no obligation to confess. Thus he writes: "Today, according to both canon law and civil law, the judge cannot *legitimately* question the accused about his crime, nor is he permitted to demand from him the oath *de veritate dicenda* or *de veritate dictorum.*"[27] The Spanish theologians Regatillo and Zalba cite the Spanish criminal law and agree that today the accused is always permitted to defend himself by pleading not guilty.[28]

From these few indications it is clear that modern manuals of moral theology rest their case for the right of silence principally on the current civil law. They refer only obliquely to the radical basis of this privilege. The continual references in the manuals to the civil law seem to suggest that the privilege against self-incrimination owes its existence completely to the positive law. Although the moralists cited above do not mention in this context the natural right of an individual to protect his secrets, they are presuming (and treat it at length elsewhere) that a person has a right to secrecy and to his reputation, which rights, however, may have to be sacrificed if the common good genuinely requires it. They would admit that at times the common good might demand that these rights be limited. The position taken by the manualists when dealing with the specific right to silence is colored by their concern over the civil law, and by repeating the law they close the discussion. The civil law, it is true, guarantees, protects, and guards the defendant's right to silence; it does not, however, establish the right which is already his by nature.

NATURAL-LAW ORIENTATION

A consensus of theological opinion obtained from a careful examination of the articles dealing with the problem of self-incrimination reveals that the right to silence is rooted in man's nature and is effectively stated by the principle *nemo tenetur prodere seipsum.* It is a natural right that only rarely admits of exceptions. If the moral-theology manuals are reluctant to discuss the natural-law foundations of this right, contemporary moralists, as we shall see presently, by no means share this hesitancy.

Narcoanalysis is not permissible legally or morally according to Jean Rolin writing in 1948. It is immoral to use the "truth drugs" to extort a confession, since it violates a fundamental right of man, the freedom he has over his in-

[27] F. M. Cappello, in P. Palazzini and A. De Jorio, *Casus conscientiae* (Rome, 1958), Casus 216, I, 673.

[28] E. F. Regatillo and M. Zalba, *De statibus particularibus* (Santander, 1954) p. 41. See also M. Zalba, *Theologiae moralis compendium* 2 (Madrid, 1958) 313.

tellect and will. To violate the liberty of the accused is to violate his conscience, and this must be termed "an abominable domination of one man over another."[29] This view of Rolin was seconded a year later by the Irish moralist John McCarthy, who argues that the accused has a right to freedom of his will and that no one, even if he be guilty of a crime, is morally or legally obliged or should be forced by drugs to confess his guilt.[30] In 1950 the American moral theologian Joseph Donavan, C.M., in discussing the legality of narcoanalysis, stated that there is no new moral principle at stake here.[31] He feels that it is morally wrong to extort a confession from the accused, regardless of what method is used. The law of England and the United States, he observes, gives a concrete expression to the natural law when it judges a criminal innocent until he is proven guilty. The same year Marc Thiéfry, writing on narcoanalysis, said that the right of the accused to liberty is more than a convention, an optional choice, or even a legal practice.[32] The right of the defendant to confess his crime freely (or to refuse to) is founded on the very dignity of the human person and must be exercised without restraint. E. Hamel, S.J., repeated this in 1953, when he wrote condemning the use of narcoanalysis.[33]

Perhaps the greatest contribution to the study of the morality of the Fifth Amendment was made by American Jesuit John Connery, who wrote in 1956, 1957, and 1958 three significant articles on this problem.[34] In these articles Fr. Connery treats, among other questions, the obligation of the accused to confess his crime. In the last article he discusses the specific problem of the natural law and silence. He writes that all moralists would admit that there is no obligation in the natural law by which a man must reveal his crime spontaneously or hand himself over for punishment. But what if the man is questioned by legitimate civil authority about his crime? "In other words," Fr. Connery asks, "in the absence of a law demanding confession, would

[29] J. Rolin, "Le pentothal, drogue de l'aveu," *Etudes* 259 (1948) 17.

[30] J. McCarthy, "Notes and Queries: The Morality of the Use of the 'Truth-Drug,'" *Irish Ecclesiastical Record* 71 (1949) 361–65. See also C. E. Sheedy, C.S.C., "The 'Truth Drug' in Criminal Investigation," THEOLOGICAL STUDIES 20 (1959) 396-408.

[31] J. Donavan, C.M., "Questions Answered: Truth Drugs Lawful?," *Homiletic and Pastoral Review* 50 (1950) 1063 f.

[32] M. Thiéfry, S.J., "La narco-analyse et la morale," *Nouvelle revue théologique* 82 (1950) 192–98.

[33] E. Hamel, S.J., "Le sérum de vérité et la théologie morale," *Sciences ecclésiastiques* 15 (1953) 43–56.

[34] J. R. Connery, S.J., "The Right to Silence," *Marquette Law Review* (1956) 180–90 (reprinted in *Catholic Mind* 54 [1956] 491–501); "Morality and the Fifth Amendment," *Catholic Lawyer* 3 (1957) 137–42; "Right to Silence vs. Right to Proof," *Homiletic and Pastoral Review* 58 (1958) 659–69.

there still be an obligation to respond truthfully to a question put by a civil authority concerning a personal crime?"[35] He answers by first referring to the theological development of the problem and observes that in the past the judge could legitimately question the accused only under certain circumstances and that some moralists, even in light of a positive law demanding a confession, maintained that the natural law restricted this obligation. If, for example, there was a severe penalty facing the accused, he was permitted by some moralists to deny his crime. In light of all this, Fr. Connery concludes that if there was no law obliging confession, the accused would have no duty to confess his crime. The accused would be protected by the natural-law right to silence. He makes it clear that even if a natural right to silence is established, it does not mean that the state acts immorally if it demands a confession. The state is within its rights in limiting this privilege. His point is that if there is no particular legislation requiring the accused to confess his crime, the accused is under no obligation to confess. Fr. Connery feels that the many restrictions that surrounded the obligation to confess in Roman law indicate that even the law considered this a limitation of the natural right to silence rather than a determination of a natural duty to confess.

In a provocative article in 1957, E. P. McManus, professor at the Georgetown University Law School, examined the relationship between the natural law and the Fifth Amendment.[36] His interpretation is very similar to de Lugo's. Prof. McManus argues that the right to silence is recognized by the natural law; the accused may remain silent or give an evasive answer if his reply would result in the death penalty or its equivalent, such as total loss of his property or his reputation, or, in ancient times, a sentence to the galleys. McManus, however, restricts the natural right to silence more than it is restricted in American law. The present law in the United States states that the accused is under no obligation to confess his own crime; this is not dependent on the type of penalty the accused faces. McManus feels that at times there might be a conflict between the legal and the natural-law right to silence. One may have a legal right to remain silent, but would be acting immorally if he exercised it. It would seem, if we follow McManus' principle, that a person would not be acting correctly if he invoked the privilege against self-incrimination when there was no danger of total loss of property or reputation or no fear of a severe penalty. The American law makes none of these conditions. It is true that the older theologians mentioned these conditions, but one must remember that they were writing in a different context. At that

[35] "Right to Silence vs. Right to Proof," p. 665.

[36] E. P. McManus, "The Natural Law and the Fifth Amendment," *Catholic Lawyer* 3 (1957) 6–14.

time there existed an *obligation* to confess in the positive law. Are we to take these same conditions and apply them to the use of the right to silence when in fact the positive law no longer requires the accused to confess his crime?

In the early sixties we find other theological writings. Joseph P. Browne, C.S.C., published an excellent doctoral dissertation on the moral implications of the Fifth Amendment. He concluded that the right to silence is a natural right "which flows from the very nature of the human personality."[37] The French theologian M. Huftier asks if a guilty person must confess his crime if questioned by a superior.[38] He argues that the law today is more in accord with man's liberty and that a guilty person is not bound to denounce himself in court. There is, he feels, probably no obligation for a subject to confess when questioned by his religious superior, if there is a possible penalty. The right of silence would, however, in either case yield to the demands of the common good where an innocent third party would suffer gravely from suspicion or accusation. J. J. Farraher, S.J., commenting on Huftier's article, states that the whole problem of the right to silence "is a question that could stand more research."[39] Apparently speaking of the religious subject who invokes his right to silence, he writes: "I almost feel that it is a natural right, unless the guilty person has himself established circumstances where he shows that he is willing to incriminate himself, as in going to confession."[40]

NATURAL-LAW ARGUMENTATION

Contemporary moralists, in attempting to establish the natural-law foundation of the privilege against self-incrimination, present five principal arguments, which are derived from (1) the right to secrecy, (2) the right to reputation, (3) the rare duty to perform an heroic act, (4) the legitimate love of self, and (5) the dignity of the human personality. We will examine each of these separately.

The first argument is based on the right to secrecy.[41] There is a unanimous consensus among theologians that there is a natural right to secrecy. Although a person can voluntarily reveal his secrets, ordinarily he is not bound to do so. "Everyone," write Salmanticenses, "has a right to his secret, that

[37] J. P. Browne, C.S.C., *Some Moral Implications of the Privilege against Self-Incrimination in the Fifth Amendment to the Constitution of the United States* (Washington, D.C., 1960).

[38] M. Huftier, "Un coupable doit-il se dénoncer?," *L'Ami du clergé*, Jan. 26, 1961, pp. 52–54.

[39] J. J. Farraher, S.J., "Notes on Moral Theology," THEOLOGICAL STUDIES 22 (1961) 638.

[40] *Ibid.*

[41] Cf. Rolin, *art. cit.*, p. 16; Browne, *op. cit.*, pp. 33 ff.; Palazzini, *op. cit.* 1, 695.

he alone may know it or reveal it to one whom he wishes."[42] The most intimate secret is the one that only the individual and God know, and no one is permitted to invade the personal sanctuary of a person's consciousness and to lay bare his secret thoughts. Physical torture as well as moral coercion, trickery, brainwashing, or threats are wrong because they are attempts to violate this right to secrecy. One's secret thoughts are one's personal possessions and one has an inherent right to protect and conceal them.

The usual definition of a secret presupposes that one individual shares another's secret and has the obligation not to reveal it.[43] Yet this definition is not basic enough and does not cover the most fundamental type of human secret, which is known by only one person. The accused criminal often has this type of secret knowledge; he alone knows that he is guilty of a specific crime. Thus the following definition of a secret is adequate, since it includes this situation: "A secret is some hidden knowledge, pertaining to a person by strict right, which another may not lawfully seek to possess, use or dispose of (i.e. reveal), contrary to the reasonable will of the owner."[44]

The right to secrecy may be considered in relation to the virtue of truth and in relation to a person's individual rights. The connection between the law of secrecy and the virtue of truth is explained by St. Thomas in the following way. The virtue of truth exists in a twofold mean: a mean *ex parte objecti* and a mean *ex parte actus*.[45] The former is fulfilled by telling the precise truth without exaggerating or lessening it. The mean *ex parte actus* is observed when one reveals the truth discreetly: one tells the truth only when, where, and in a manner that is fitting. A violation of a secret is sinful and contrary to the virtue of truth, since it is an indiscreet revelation of something true. It is indiscreet because the matter ought to be concealed in order to prevent harm that would come to some person or persons from its revelation.

The law of secrecy is also related to individual human rights. The person has direct dominion over three types of goods: internal goods both of the body and the soul, intermediate goods such as honor and reputation, and external goods such as physical property and money. The right to secrecy is found in man's right over the internal goods of his soul. Man's secret knowl-

[42] *Collegii Salmanticensis cursus theologiae moralis* (Venice, 1724) Tom. 3, tract. 13, cap. 4, punctum 6, n. 83.

[43] Cf. Prümmer, *op. cit.* 2, n. 175: "Secretum. . . subjective vero acceptum est cognitio istius rei occultae atque obligatio cognitionem acceptam non prodendi."

[44] R. E. Regan, *Professional Secrecy in the Light of Moral Principles* (Washington, D.C., 1943) p. 3.

[45] *Sum. theol.* 2–2, q. 109, a. 1, ad 2m, 3m.

edge is his to possess and use.[46] Ordinarily no one can demand that a person reveal this knowledge. Thus, Lugo writes: "Nothing is more a man's own than his secrets, of which he is master and possessor."[47] A person's inner thoughts are his own possessions, and an unauthorized violation of the right to secrecy might be called a theft. A person, in most cases, has no duty to reveal hidden knowledge which he knows will ruin his reputation and may even cause him grave physical harm.

This teaching on the right to secrecy is traditional and all theologians would agree to it. Everyone agrees that it is a relative right and must yield to the common good. St. Thomas holds for the right to secrecy, but feels that the accused in court cannot appeal to it. The common good would demand that he confess his crime; the common good imposes a restriction on the right to secrecy. Contemporary authors, however, argue that the right to secrecy is relative but that in most cases the guilty person in court can use it. To oblige one to confess his crime in the present-day judicial procedure would be, in fact, harmful to the common good.

The second argument for the natural-law basis of the right to silence is the right each person has to his reputation.[48] If a person is forced to reveal his secrets, he might very well suffer a loss of reputation. The common good would suffer if the hidden faults of others were openly revealed. On this point St. Thomas remarks: "To take away anyone's reputation is very serious, because among temporal things it would seem that reputation is the most precious."[49] If the hidden crimes of another were revealed, envy, quarrels, and injustices could easily follow.

Theologians feel that if it is wrong to reveal the faults of others because of the right to reputation, it is in most cases wrong to oblige a guilty person to reveal his own crimes. This is true even if one has a false reputation. A criminal ordinarily is under no obligation to destroy his own reputation by revealing his secret crimes. The right to reputation is a relative right and it is possible that the common good might oblige a person to confess his crimes

[46] The positive law protects the individual's right to internal privacy. L. Nizer gives the reason for this: "One's thoughts, emotions and sensations are as much a part of him as his arms and legs. Not all pain, pleasure and profit of life come from physical things; man's spiritual nature, too, requires legal protection" ("The Right to Privacy," *Michigan Law Review* 39 [1941] 528). Cf. also S. Warren and L. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890) 193–220.

[47] J. de Lugo, *Disputationes scholasticae et morales* (Paris, 1869) Tom. 6, disp. 14, sect. 7, n. 104.

[48] Cf. Connery, "Right to Silence vs. Right to Proof," p. 664; P. Palazzini, "Tortura, aspetto morale," *Enciclopedia cattolica* 12, 343; Browne, *op. cit.*, pp. 25 ff.

[49] *Sum. theol.* 2–2, q. 73, a. 2 c.

even though his reputation would be ruined. The greater good would prevail here.

The third argument for the privilege against self-incrimination is based on the fact that usually no one is obliged to a heroic act.[50] Palazzini, for example, remarks that to demand the accused to confess his own crime would be to oblige one to perform a heroic act. In the majority of cases, he writes, this is clearly beyond the limits of duty. To oblige one to confess one's crime is to oblige one to condemn oneself. A law must be humanly and physically possible if it is to be a good and just law. A law that goes beyond the capacity of the normal person cannot benefit the common good. Connery goes to great length to explain this argument and in so doing he follows Lugo rather closely. A law, he says, that obliges the accused to confess remains sterile unless it is reinforced by torture. And yet history has shown that torture is as effective in extorting confessions from the innocent as it is in eliciting them from the guilty. A law, remarks Connery, that "goes beyond human strength ultimately does not serve the common good."[51]

A fourth argument favoring the natural right to silence may be termed the argument from legitimate love of self.[52] The scriptural basis for this is found in Lk 10:27, where Christ says: "Thou shalt love the Lord thy God with thy whole heart, and with thy whole soul, and with thy whole strength, and with thy whole mind; and thy neighbor as thyself." Moralists feel that the law of charity to self protects the accused from obligatory self-revelation and prevents others from forcing him to give evidence of his guilt. Lugo makes use of this argument, at least implicitly, when he gives the reasons against the civil legislation which ordered the accused to confess after partial proof was established. A witness is excused from testifying if there is possible grave danger to himself or his close relatives. Moralists argue that the defendant should not, therefore, be bound to testify against himself. They appeal to the law of charity and argue that a legitimate love of self would seem to free the defendant from the obligation of self-incrimination.

The fifth and final argument for the right to silence is based on the dignity and inviolability of the human personality.[53] Pius XII, in condemning the use of lie detectors and narcoanalysis when used without a person's consent, insists on the natural right to interior liberty. "The right of the person to protect his interior world" is a sacred one, the Pope warns, and to violate

[50] Cf. Palazzini, "Tortura, aspetto morale," *loc. cit.*; Connery, "Right to Silence vs. Right to Proof," pp. 661 ff.

[51] Connery, *ibid.*, p. 662.

[52] Cf. Connery, *ibid.*, p. 666; Lynch, *art. cit.*, p. 189; Lugo, *op. cit.*, disp. 40, n. 15.

[53] Cf. Rolin, *art. cit.*, p. 17; Thiéfry, *art. cit.*, p. 196; Browne, *op. cit.*, pp. 27 ff.

this right by going against a person's will is "illicit" and "immoral."[54] Thus, torture, both physical and psychic, which forces a person to confess is a violation of a natural right.

The right to secrecy, the right to one's reputation, the nature of law, the legitimate love of self, and the dignity of the person all point to the natural-law foundation of the right to silence. The validity of these arguments is strengthened by the fact that they themselves are based on something that is solid and unchanging. In other words, they flow from a common-sense evaluation of the individual man living in a society. These arguments are effective and share a common element. They all reveal different aspects of the intrinsic worth of the human person.

RESTRICTION OF THE RIGHT TO SILENCE

Granted that the right to silence is a natural-law right, the question may now be asked: how is the right to silence limited? Moralists teach that the right to silence is a limited right and that in certain circumstances it must be given up in favor of a greater good. The two possible sources of conflict are the rights due to an innocent third party and the rights of the common good.

In regard to an innocent third party, the common teaching of contemporary moralists is that a criminal can refuse to incriminate himself, even if he knows that an innocent third party will be convicted, as long as he is not the efficacious, formally unjust cause of this false accusation.[55] Thus, a murderer would not be bound *ipso facto* to reveal his crime, even though he knew that an innocent man would be blamed for the crime. Moralists say that the innocent party suffers not because of the knowledge of the real criminal, but because of the error of the judge that convicts the innocent party. This error the genuine criminal is not obliged to correct unless he is the formally unjust cause of the harm suffered by the third party. One is the formally unjust cause of another's harm when he purposely arranges that the innocent party will be suspected or convicted, or when he gives false testimony against the party. In such a case it is clear that the guilty party is bound in justice to use the necessary means to free the innocent victim, even if this means revealing his own crime.

The second possible restriction of the privilege against self-incrimination is in the area of the common good. Certain rights must be sacrificed to the common good, which may be best described as the peace and prosperity of human society. The right of private property, for example, might on occasion give way to the common good in the case of eminent domain. This is not to

[54] Pius XII, *AAS* 50 (1958) 227.

[55] Cf. Regan, *op. cit.*, pp. 105 ff.; Thiéfry, *art. cit.*, p. 197; Browne, *op. cit.*, pp. 48 ff.

say that the society has complete power over the individual. Some rights are inalienable and cannot be infringed upon. If the state limits some of the individual rights of its citizens, it is for the proper maintenance of the common good. Pope Pius XII emphasized this when he stated: "The complete political and economic activity of the state is directed to the permanent realization of the common good."[56]

St. Thomas clearly states that no secret is lawful that is contrary to the common good.[57] This also applies to the right of silence as long as there is a proportionate benefit to the good of society that would allow such restriction of the individual's rights. The majority of the older theologians held that the common good always required that the accused confess his crime; contemporary theologians say that only rarely would a person be obliged to confess. The freedom of the accused in court to deny his crime is a natural right, but a relative natural right; there are limits to the exercise of this right. A person, for example, has an obligation to avoid the condemnation of an accused to the extent that he repair the harm he has caused and stop an evil that he began and that is still in force. Thiéfry states: "One is able to conceive of cases where the guilty person, practically speaking, has no other course but to confess if he is to fulfil his obligations which bind in conscience."[58]

Prof. McManus gets down to particulars when he considers the right to silence against the background of the Fifth Amendment and congressional committees investigating Communism. As we saw earlier, McManus believes that the right to silence is a natural right, but he gives it a rather narrow interpretation. To exercise this natural right to silence, there must be a fear of a serious punishment or grave loss of property or reputation. The right to silence, McManus feels, is also limited by the demands of the common good. He argues that the right to silence ceases if refusal to answer the judge's questions would cause considerable harm to the community. This harm, however, must be great and imminent. There is no doubt that Communism is a serious evil, a threat to the freedoms of speech, religion, and assembly. The imminence of any danger may be evaluated according to the following axiom: ". . . the greater the anticipated evil the less significant becomes the necessity for imminence."[59] McManus believes that Communism is so great an evil that rarely could one invoke the natural-law right to silence when questioned about it. The only possible case would be when the "imminence factor" is exceptionally minimal. However, one must always take into consideration the person being questioned. If, for instance, the President or the Secretary of State were asked about their connections with Communism, McManus in-

[56] Pius XII, *AAS* 35 (1943) 13.
[57] *Sum. theol.* 2-2, q. 68, a. 1, ad 3m.
[58] Thiéfry, *art. cit.*, p. 197.
[59] McManus, *art. cit.*, p. 12.

sists that they "would *never* have a natural law right to remain silent, yet, please note, that their right under the Fifth Amendment is absolute."[60] McManus feels that the very position of these officials in the government supplies sufficient imminency. By "absolute" McManus means that the Fifth Amendment does not have the same restriction that the natural-law right to silence does. Therefore one can legally appeal to the Fifth Amendment, although morally he would not be able to do so.

Fr. Connery, commenting on McManus' opinion, agrees with him that the right to silence is a natural right, but he gives a much more liberal interpretation.[61] He makes a distinction between one who is innocent but has knowledge of the crime, and one who is guilty of the crime. A person who knows that some grave harm will come to the community is bound to make this known to the proper authorities. St. Thomas says that one is bound to accuse another if he can prove that the sin of this person will cause great spiritual or bodily harm to many in the community.[62] If, for example, an individual, though not involved himself, knows of a plot against the state, he is bound to report this, even if it means some harm to himself. At times this is the only way to avert a calamity that would cause great harm to the state.

The person who is guilty of the crime does not ordinarily have the obligation to reveal his own crime. Fr. Connery points out the difference in reporting another's crime and revealing one's own criminal activities. The primary obligation of a criminal is to forgo his criminal intentions, not to reveal his crime. In the case of the Communist before a congressional committee, his first duty is to give up Communism and to become a good citizen. The Communist must break his connections with Communism; he acts wrongly because he fails to do this, not because he has failed to denounce himself. The common good, of course, must be protected, but it does not follow that the criminal must always reveal his crime. The common good is protected if he reforms his life and makes reparation for his crimes. McManus and Connery differ in their application of the right to silence. McManus believes that the Communist must confess his crime where the good of the community is at stake; his individual demands yield to the greater good. Connery feels that the Communist's first obligation is to reform and this ordinarily is sufficient for the common good.

There are some instances when the accused must reveal his crime. Such cases are, however, exceptions rather than the rule. An example of such a case would be a person with homicidal tendencies who has been a menace to society. He finds that he cannot control his criminal desires. His primary obli-

[60] *Ibid.*, p. 13. [61] Connery, "Morality and the Fifth Amendment," pp. 144 ff.
[62] *Sum. theol.* 2–2, q. 68, a. 1 c.

gation would be to give up his criminal activities and perhaps to commit himself to a mental institution. Yet he may find that he cannot do this alone and that he must report his crime and seek help. Another example would be a member of a subversive group that is planning to overthrow the government. He might find that self-accusation is necessary to put an end to the conspiracy. Only when serious harm to the community cannot be averted in any other way, must the criminal denounce himself.

CONCLUSION

Historically the law demanding confessions was *de facto* not observed. Lessius wisely observed that scarcely one man in a hundred would not deny his crime if he thought he could avoid the death penalty. The law of obligatory self-incrimination was not followed because it asked too much. The moral impossibility of observing such a law caused the state to resort to torture to force the accused to confess, with the result that many abuses were fostered. People lost their respect for authority and were driven to any subterfuge to avoid apprehension and condemnation.

Contemporary theologians, as we have seen, recognize the value of the right to silence and argue that this right, although based on the natural law, can be restricted for the good of society. They use the concept of the common good as the criterion for limiting or extending the right to silence. This criterion, however, in current theology, is a somewhat vague, largely unexamined concept, a part of the Scholastic legacy that finds little understanding or acceptance in modern legal theory. In order to obtain greater precision, the notion of public order may prove more helpful than that of the common good.

The jurist Pillet describes public order in the following manner, laying great stress on the elements of social necessity and permanence:

> What, exactly, is public order? It is the order in the state, that is to say, a certain arrangement of diverse social forces, an arrangement that is regular, normal, lasting, and planned in such a way that each one might see his essential rights respected, and might develop in complete security and freedom his physical and intellectual faculties. More briefly, it is the application of certain rules indispensable to the conservation of the state.[63]

Maximal public order is the full prosperity of a society in which public good and private good are in harmony. Minimal public order is that radical element which may be called the security of the state and which is fundamental to law and order. Where there is anarchy, there is no effective re-

[63] A. Pillet, *De l'ordre public en droit international privé* (Paris, 1890) p. 30.

straint on criminal acts, and citizens lead uncivilized and perilous lives. Without minimal public order, the exercise of even the most basic human rights is rendered almost impossible.

How does all this relate to the right of silence? We may say that minimal public order is possible, at least for a time, without the state's respecting the natural-law right to silence. Authoritarian regimes illustrate this. For example, in Nazi Germany, Fascist Italy, Communist Russia, and various Latin-American countries there has been at least minimal order without any real exercise of the privilege against self-incrimination. The crime pattern in these countries is unusual in that the rate of homicides, robberies, sex crimes, and larcenies indicates a "law-abiding profile" when compared to the United States, France, and England.[64] In the totalitarian states, where there is fear of internal unrest and foreign intervention, the police-to-population ratio is higher than in democratic countries. There are various restrictions of liberty, such as movement controls, spying, examination of mail, informing, and illegal search and seizure.

Maximal public order, however, seeks more than mere peace. It looks to the perfect fulfilment of man's potential. It attempts to create an atmosphere in which men can truly live well in accord with the highest aspirations of their nature. This kind of public order can be realized only if the state respects the human and civil rights of its citizens. It must allow its citizens, for example, the right to legitimate assembly, the right to worship, the right to free speech, and, not least of all, the right to silence. In principle, then, maximal public order is not possible unless the state recognizes and protects the individual's privilege against self-incrimination.

For the good of public order, the right to silence may be limited. This would be an exceptional thing and would be allowed only if there was a sufficiently grave reason to justify it. However, if the security of the state were seriously imperiled in such a way that no other suitable means to prevent impending disaster were available, then perhaps the right to silence might be waived in favor of a greater good. Such a situation would be unusual and would have to be judged on its own special merits.

In brief, the best argument for the right to silence is the fundamental dignity of man as God's superb creation, destined to perfect himself in a society. Man, endowed with liberty, has a certain dominion over his inner world. He has a right to his private and personal life. The sphere of law must recognize man's right to privacy. The legal structure of society is de-

[64] Macnamara, "Crime Patterns in Democratic and Totalitarian Society," *Journal of the Association for Psychiatric Treatment of Offenders*, October, 1957, quoted in M. G. Paulsen and S. H. Kadish, *Criminal Law and Its Processes* (Boston, 1962) p. 78.

signed to help man, not to dominate but to serve him. The law must secure balance and concord in society by protecting individual rights. Totalitarianism is evil because it fails to do this. It denies the citizen any effective participation in political decision-making. It extends the state's power into every field of human activity in such a way, as Pius XII observes, that this attitude "in theory and in practice destroys the quality of all persons before the law and leaves juridical decisions to the whim of changeable collective instinct."[65]

Catholic University of America PATRICK GRANFIELD, O.S.B.

[65] Pius XII, Address to the Roman Rota, Oct. 2, 1945; *AAS* 37 (1945) 257.