

## *YOU HAVE THE RIGHT TO REMAIN SILENT. DON'T YOU?*

By: Brett A. Sokolow, JD

The topic is the right to remain silent. My 2001 article on this topic was more about theory. This article has a more practical slant. I would prefer that we marginalize the application of the 5<sup>th</sup> Amendment to campus conduct proceedings. As I interpret it in the college context, many policies voluntarily include the right not to attend hearings, the right to refuse to participate and the right to refuse to answer questions. There is nothing to me as anathema to our efforts to be developmental than to give students (and staff) the right to wholly or partially refuse to participate in the processes we have structured to help them become more mature, reflective members of our communities. Unfortunately, the US Constitution appears to stand between me and complete eradication of the right to remain silent. I want you to consider joining me in a desire--and maybe even an effort--to minimize the anti-developmental impact the right to remain silent has on our campuses, to the extent possible.

### What Are the Guarantees of this Right?

The 5<sup>th</sup> Amendment to the US Constitution creates a right that “no person shall be compelled in any criminal case to be a witness against himself.” Not an unreasonable proposition. Yet, I don’t remember reading the Amendment that guarantees students the right to frustrate our efforts to encourage their development, but many of them are convinced it exists (and so are their lawyer parents). And, campus hearings are by nature civil, not the criminal cases to which the 5<sup>th</sup> Amendment, by its text, clearly applies. Does that mean that the 5<sup>th</sup> Amendment does not apply to campus hearings? Generally, courts do not require colleges to provide a right against self-incrimination within the limited panoply of due process rights that are required. However, the 5<sup>th</sup> Amendment not only protects criminal defendants, but also gives anyone the right not to answer official questions in any civil proceeding, formal or informal, where the answers to the questions *might* incriminate them in future criminal proceedings (McCarthy v. Arndstein).

That word *might* cuts a broad swath of coverage. Many of our complaints *might* also result in criminal charges. But, I have just stated something I think is very important, in narrowing this broad construction. If the act is not potentially criminal, or we know that there will not be a prosecution, there is absolutely no applicability of the 5<sup>th</sup> Amendment. A student cannot come into a hearing in which he is accused of being in the presence of alcohol at a party in a residence hall room, and refuse to answer your questions on the basis of the Constitution. If you grant that right, you do so voluntarily and contractually, not because it is required by the Constitution. Being in the presence of alcohol is not a crime. The accused student could, I suppose, refuse to answer questions about criminal activity that may have taken place in the room during the party, if it would incriminate him, but cannot refuse to answer questions about the alleged violation, which is being in the presence of alcohol. Similarly, I wonder why the right to remain silent is cropping up in so many campus sexual harassment proceedings, when such proceedings cannot give rise to criminal action in most jurisdictions, only civil liability. There is no right to refuse

to answer questions that might get one suspended or fired, but the right to remain silent is being bastardized in that fashion on many campuses. Why? Protecting the accused student should not compromise our developmental objectives.

### The Public College Conundrum

If the goal is to narrow the applicability of the 5<sup>th</sup> Amendment in campus hearings, public colleges are not the ideal venue to attempt such a feat. But, we can discuss the contours of the 5<sup>th</sup> Amendment, and perhaps carve out some breathing room. In a situation where a student's misconduct is the subject of both a campus conduct complaint and a criminal investigation, I believe there are some options to narrow the applicability of the 5<sup>th</sup> Amendment, and here is one example. Suppose that a public college delayed its campus hearing until after the criminal investigation, as is often the case, especially when the prosecutor will not release the investigation file to the campus. Let's assume there was a prosecution and the defendant was found not guilty. The university then held a subsequent campus hearing in which the accused student was compelled to participate and answer all questions. Such a hearing would offer no danger that any of the accused student's statements about the behavior that led to the criminal prosecution could be used to incriminate him/her, because of the double jeopardy rule. The defendant has been tried criminally once for that offense, and s/he cannot be tried again.

Here is another example. If instead of a trial, there was a decision by the prosecutor not to prosecute, there is still little danger that any of the accused student's statements could be used to incriminate him/her in later criminal proceedings, because the prosecutor has already taken a pass. Even if the campus hearing provided new incriminating evidence to the prosecutor, this evidence would likely be suppressed as a confession compelled by a state actor (the college official presiding over the hearing) as long as it was clear that the accused student was not given a choice. Participation was compelled by campus rules. (See, e.g., Garrity v. N.J. and Furutani v. Ewigleben).

Any such efforts would have to be carefully balanced with state constitutional protections, state administrative procedures laws, and some varying federal court cases which seem to favor applying the 5<sup>th</sup> Amendment to campus conduct proceedings in a few jurisdictions. That doesn't mean it is impossible. It is up to you to decide if it is worthwhile to make an effort to craft policies and procedures that provide flexible rights depending on the circumstances, rather than the rigid one-size-fits-all approach that is common on most campuses. So many prosecutors decline to prosecute campus cases that it is a shame to let the rules of the criminal justice system dictate best practices within our educational conduct systems, when the campus hearing often turns out to be the only avenue of redress that is ultimately pursued.

### Compelling Testimony in Campus Hearings – The Negative Inference

There are a few more issues to address. Even if we compel testimony, there is no guarantee that a student will participate, or be forthcoming. If they refuse to answer our questions, or to participate, what should we do? Can we draw a negative inference?

Should we sanction them for failure to comply with the directives of a university official? Ed Stoner and John Wesley Lowery's Model Code (p. 33, footnote 101) references Morale v. Grigel as one case that permitted a public college to draw a negative inference from a student's silence at a campus hearing. In that case, the Director of the New Hampshire Technical Institute upheld a campus hearing finding a student "guilty" of possession of marijuana. One of many factors that supported the evidence of "guilt" was the Director's inference from the accused student's silence. The Morale case doesn't say that the Director inferred "guilt." Perhaps he just inferred lack of a defense, or excuse. It is unclear. Did he use Morale's silence against him? Yes, to some extent. Does it make any sense to grant someone a constitutional right, and then penalize them for exercising it? No, according to the Supreme Court, in Lefkowitz v. Turley. But, the Morale court drew the distinction that the campus hearing was civil, and while a negative inference would be impermissible in criminal court, it is possible in certain civil proceedings, like campus hearings. I think the Morale case is good law not just for New Hampshire, but generally, because it relies on the Supreme Court's decision in Baxter v. Palmigiano. In the Baxter case, a prisoner in a Rhode Island correctional facility was facing a disciplinary hearing for his conduct in the prison. He was not facing criminal charges. The inmate, Palmigiano, exercised his right of silence at the hearing.

The Court held that the self-incrimination privilege of the 5th Amendment does not forbid drawing adverse inferences against a state prison inmate from his failure to testify at prison disciplinary proceedings against him. There is no constitutional violation in allowing an adverse inference from the silence of an inmate who was advised that he was not required to testify at his disciplinary hearing, that he could remain silent, but that his silence could be used against him, where:

- 1) no criminal proceedings were pending against the inmate;
- 2) the state did not seek to make evidentiary use of his silence in any criminal proceeding;
- 3) the state did not insist or ask that the inmate waive his 5th Amendment privilege;
- 4) the inmate's election to remain silent did not result in his automatically being found guilty of the infraction with which he was charged and was not, by itself, sufficient to support an adverse decision;
- 5) the inmate's silence was given no more evidentiary value than was warranted by the facts of the case; and
- 6) in addition to the inmate's silence, the disciplinary board's adverse decision was based on investigative reports, copies of which had been given to the inmate prior to the hearing, and on supplementary reports made by the officials who had filed the initial reports.

These six points are pretty much a roadmap for drawing a negative inference from silence at a campus hearing where a 5<sup>th</sup> Amendment right was extended. But, is it fair to draw a negative inference, even though we can? Justice Brandeis declared in United States ex rel. Bilokumsky v. Tod that "[s]ilence is often evidence of the most persuasive character," and the Supreme Court in United States v. Hale, recognized that "[f]ailure to contest an assertion... is considered evidence of acquiescence...if it would have been natural under the circumstances to object to the assertion in question." I'll buy that.

## The Right to Remain Silent at Private Colleges

Private colleges have broader latitude with respect to the right to remain silent. For a private college, developmental goals can be advanced more readily. Instead of drawing a negative inference, or even proceeding neutrally on the basis of whatever evidence we do have--which will often lead to information insufficient to meet our standard of proof--why not sidestep? If we are not required to extend students in our hearings 5<sup>th</sup> Amendment rights, why not make a rule that accused students and witnesses have to answer our questions, and if they do not, they are in violation of our policy requiring students to comply with the directives of university officials. Then, we can suspend or otherwise sanction them until such time as they do comply. Which often won't take long (or, it gives them a way to temporarily withdraw without penalty, if they are facing criminal charges). Their submission to our developmental aims is not optional. They need to come before us, account for their decisions, explain themselves, and hopefully reflect on their experiences and allow lessons learned to impact their future decisions.

So, I ask you, is this an elegant solution designed to advance important developmental objectives, or am I advocating a railroading of students rights?

## Conclusion

At the very least, this discussion should advance the notion that a procedural grant of an absolute right to remain silent is too broad. Even at a public university, there will be times when such a right is inapplicable, as when the conduct is not criminal or when there is no possibility of criminal proceedings arising from the conduct. It is also important that if you intend to draw a negative inference from a student's silence that you heed the guidance of Baxter, that it is important to inform students of their right to remain silent, and to make sure they are aware that you may draw a negative inference from that silence. Moreover, the six points from Baxter, rewritten to focus on campus hearings (as below) would make a useful training tool for any public university's conduct board. The practice of drawing a negative inference may also help students who are advised by attorneys to make better choices about answering your questions. By stating that you can and will draw a negative inference, we create a situation where refusing to answer will likely only be motivated by a desire to avoid criminal implication, rather than trying to use the silence to deprive your conduct board of information upon which to base its decision. Flexible rules about when and how 5<sup>th</sup> Amendment rights can be exercised might better suit your institutional needs.

## Sample Training Guide

An accused student not required to testify at a conduct hearing. The policy permits an accused student to remain silent, but that silence can be used by the conduct board as information, where:

- 1) No criminal proceedings are pending against the accused student arising from the conduct underlying the campus complaint;
- 2) The state does not seek to make evidentiary use of this silence in any criminal proceeding;
- 3) The state (nor the university) neither insists nor asks that the accused student waive his/her 5th Amendment privilege;
- 4) The accused student's election to remain silent does not result in automatically being found responsible for the violation(s) with which he was accused and is not, by itself, sufficient to support an adverse decision;
- 5) The accused student's silence is given no more informational weight than is warranted by the facts of the complaint; and
- 6) In addition to the accused student's silence, any adverse decision by the conduct board must be based on additional information, including investigative reports, copies of which have been shared with the accused student prior to the hearing, and on supplementary reports made by the officials who had filed the initial reports.

*All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.*

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