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Constitutional Law--Self-Incrimination--Disbarment and Judicial Investigations

William J. Davis

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CONSTITUTIONAL LAW — SELF-INCRIMINATION — DISBARMENT AND JUDICIAL INVESTIGATIONS

Spevack v. Klein, 87 Sup. Ct. 625 (1967).

In *Cohen v. Hurley*,[1] a 1961 five-to-four decision, the United States Supreme Court held that an attorney who invoked the privilege against self-incrimination in a judicial investigation of unethical conduct could be disbarred by the state. In reaching its decision, the majority emphasized the interest that a state has in the conduct of those permitted to practice before its courts and the special discipline that the law has placed upon lawyers for centuries.[2] The Court stated that the petitioner was not denied due process because the state's action was fair and reasonable in requiring lawyers to cooperate with the courts in investigations of unethical conduct.[3] Adhering to its earlier decisions,[4] the Court rejected the idea that the fourteenth amendment gave to a person in a state hearing the right to invoke the constitutional privilege against self-incrimination.[5]

Six years later, *Spevack v. Klein*[6] reached the Supreme Court and presented the identical issue raised in *Cohen*. Samuel Spevack, a member of the New York Bar, appealed from a decision of the New York courts disbaring him for professional misconduct.[7] He had failed to honor a *subpena duces tecum* by refusing to produce certain demanded financial records and to testify at a judicial investigation.[8] The petitioner's sole defense was that his testimony and

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[1] 366 U.S. 117 (1961).

[2] *Id.* at 123-24. In Spevack v. Klein, 87 Sup. Ct. 625, 632-33 (1967) (dissenting opinion), Mr. Justice Harlan likewise stressed the great public interest involved in this type of case.

[3] 366 U.S. at 123-24.

[4] *E.g.*, Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908). The express holding of these cases was subsequently overruled. See Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[5] 366 U.S. at 127-28.

[6] 87 Sup. Ct. 625 (1967).

[7] In the Matter of Spevack, 24 App. Div. 2d 653, *aff'd*, 16 N.Y.2d 1048, 213 N.E.2d 457, 266 N.Y.S.2d 126 (1965), *motion to amend remittitur granted*, 17 N.Y.2d 490, 214 N.E.2d 373, 267 N.Y.S.2d 210 (1966), *rev'd sub nom.* Spevack v. Klein, 87 Sup. Ct. 625 (1967).

[8] As a prerequisite to continue practice in New York's Second Department, attorneys must assist the courts in dealing with problems of unethical legal practices. Attorneys are required to keep various records relevant to cases which are based on a con-

the production of his records would tend to incriminate him. The New York courts, relying on *Cohen*, held that the privilege against self-incrimination was not available to the petitioner.[9]

In deciding *Spevack*, a plurality of the Court felt that in light of decisions subsequent to *Cohen*,[10] the New York courts should be reversed and *Cohen* overruled. *Spevack* holds that an attorney cannot be disbarred solely for invoking the fifth amendment privilege against self-incrimination at a judicial investigation of professional misconduct because to do so would make invoking of the privilege costly to the petitioner.[11]

In this area of due process, there would seem to be sound policy arguments on both sides as to whether or not an attorney who exercises the constitutional privilege to remain silent can nevertheless be denied the privilege of practicing law — not because he invoked the privilege but because of his failure to cooperate with the court. On one hand, the attorney's position in society must be considered. Inasmuch as only an attorney can give legal advice and represent the interests of his clients, he is not an ordinary citizen. Moreover, the attorney's license to practice law is conditioned upon his truthfulness and candor to the public, the bar, and the court.[12] With such important interests involved, there is no doubt that unethical lawyers have no right to maintain their high positions of trust. On the other hand, as *Spevack* points out, the duty of cooperation with the court does not outweigh the constitutional provision against self-incrimination to the extent of destroying the constitutional rights of some citizens merely because they are attorneys.[13]

Spevack is an important decision not only because it specifically resolves the conflict of interest between the state and the individual, in favor of the individual, but more significantly because of the

tingent fee. The rules were adopted to protect the general public from certain abuses which had been revealed as the result of a long investigation of malpractice in the Second Department. Spevack v. Klein, 87 Sup. Ct. 625, 632-33 (1967) (Harlan, J. dissenting). It was Spevack's refusal to produce such records, together with his refusal to testify at a judicial inquiry, which led to his disbarment. *Id.* at 626-27.

[9] In the Matter of Spevack, 24 App. Div. 2d 653, 654 (1965).

[10] Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

[11] Spevack v. Klein, 87 Sup. Ct. 625, 627-28 (1967).

[12] Note, 47 CORNELL L.Q. 255, 261 (1962). See ABA CANONS OF PROFESSIONAL ETHICS NOS. 22, 32.

[13] 87 Sup. Ct. at 628. The plurality opinion stated:

> We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words "No person . . . shall be compelled in any criminal case to be a witness against himself"; and we can imply no exceptions. *Ibid.*

broad principle laid down by the Court in expanding what is meant by "costly". In concluding that the invocation of the privilege would be costly to an attorney if disbarment followed, the majority relied on *Malloy v. Hogan*[14] which had undermined the basic principle upon which *Cohen* was decided. *Malloy* held that the fifth amendment self-incrimination clause was made applicable to the states by reason of the fourteenth amendment.[15] The decision states: "The Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to *suffer no penalty* . . . for such silence."[16] The Court followed *Malloy* in its decision of *Griffin v. California*[17] and expanded the scope of "penalty." In *Griffin* the Court held that a penalty is not limited to fine or imprisonment; rather, there is a penalty if the assertion of the privilege would be "costly."[18] In holding that Samuel Spevack was denied due process when he was disbarred, the Court now takes the position that loss of professional reputation, professional standing, and livelihood is a penalty as expanded by *Griffin* and that no such penalty may be imposed by the courts for refusal to disclose information which is protected by the privilege.[19]

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[14] 378 U.S. 1 (1964).

[15] *Id.* at 6. *Malloy* represents a step in the Court's process of incorporating in the fourteenth amendment specific protections of the Bill of Rights. Earlier, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that the fourth amendment prohibition against unreasonable searches and seizures was fully applicable to the states through the due process clause of the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335 (1963) extended to state criminal proceedings the right to counsel guaranteed by the sixth amendment.

[16] Malloy v. Hogan, 378 U.S. 1, 8 (1964). (Emphasis added.)

[17] 380 U.S. 609 (1965). The Court held that the California rule permitting adverse comment by the judge and prosecutor on the defendant's failure to testify in his own behalf violated the fifth amendment privilege against self-incrimination. *Id.* at 615.

[18] *Id.* at 614. It is interesting to note that Mr. Justice Harlan, who wrote a very vigorous dissent in *Spevack*, concurred reluctantly in *Griffin* because of the precedent established in *Malloy*. *Griffin*, however, in Harlan's opinion: "exemplifies the creeping paralysis with which this Court's recent adoption of the 'incorporation' doctrine is infecting the operation of the federal system." *Id.* at 616. (concurring opinion). Harlan, rather than following the "incorporation theory, would want to utilize the "fundamental fairness test" as discussed in Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring opinion). For a further discussion of the "fundamental fairness test," see Adamson v. California, 332 U.S. 46 (1947) and Palko v. Connecticut, 302 U.S. 319 (1937).

[19] 87 Sup. Ct. at 628. Mr. Justice Black presented a similar argument in his dissenting opinion in *Cohen*. In that decision he stated:

> Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly

In reaching its decision in *Spevack*, the majority of the Court does not go so far as to say that a person can suffer no prejudicial consequences whatsoever as a result of claiming the privilege, but it certainly suggests that no onerous consequences, in this case defined in terms of "loss of professional standing, professional reputation, and of livelihood,"[20] may be suffered. Mr. Justice Harlan, dissenting in *Spevack*, pointed out that the Court had never before held, carte blanche, that states were forbidden to allow any unfavorable consequences to befall an individual as a result of his invoking the privilege against self-incrimination. In his view, the Court had instead recognized that consequences could vary both in kind and intensity and that the differences called for an examination of the individual's interests as opposed to the interests of society.[21] For example, there is a line of earlier cases in which the Court upheld the discharge of public employees who had invoked the fifth amendment, not because they had exercised a constitutional privilege but rather because some other legitimate interest of the public outweighed that of the individual.[22] In failing to consider this earlier line of cases, perhaps the majority of the Court no longer considers them controlling in light of more recent decisions.[23]

In deciding *Spevack*, the plurality opinion not only disregarded those cases in which petitioners were permitted to suffer unfavorable consequences but also disregarded a distinction which had previously been made in deciding cases of this nature — namely, whether or not an inference of guilt was drawn from the petitioners' refusal

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> goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land" . . . .

Cohen v. Hurley, 366 U.S. 117, 147 (1961) (dissenting opinion).

[20] 87 Sup. Ct. at 628.

[21] *Id.* at 633 (dissenting opinion).

[22] See Nelson v. County of Los Angeles, 362 U.S. 1 (1960), where the discharge of county employees who had invoked the privilege before the House Un-American Activities Committee was upheld on the basis of a state statute which provided for dismissal on the ground of insubordination of any public employee who refused to appear or testify concerning subversive activities before a state or local governing body or a legislative investigating committee after being ordered to do so. In Lerner v. Casey, 357 U.S. 468 (1958), the Court upheld the dismissal of a subway conductor who, when asked if he was then a member of the Communist Party, refused to answer on the ground that it might tend to incriminate him. The discharge was upheld on the ground that the transit authority, which the New York City Securiy Risk Law had designated as a security agency, could remove the petitioner because he had created a doubt as to his trust and reliability which was a ground for discharge under the law.

[23] Tht more recent decisions include: Griffin v. California, 380 U.S. 609 (1965) and Malloy v. Hogan, 378 U.S. 1 (1964).

to testify. The state court, in rendering its opinion upholding Spevack's disbarment, emphasized that he was not being disbarred because of any inference being drawn from invocation of the privilege but rather because he had failed in an inherent duty to the court.[24] The only reference made by the Supreme Court to the line of cases making the distinction of whether or not an inference of guilt was drawn is the citiation to *Slochower v. Board of Educ.*[25] However, the Court in *Spevack* failed to mention those cases distinguishable from *Slochower*, cases in which no inference had been drawn — a category in which *Spevack* would seem to fall.[26] One might conclude, at least for the majority, that whether or not an inference is drawn is only a tenuous distinction which is not determinative of the issue as to whether a person should be allowed to suffer a costly consequence for having exercised a constitutional privilege.

The plurality opinion in *Spevack* not only raises doubts as to the weight now to be given to some of its prior decisions as discussed above but also presents new problems. Professor Wechsler maintains that courts should always arrive at "principled decisions" which rest "on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[27] If *Spevack* is considered a principled decision, questions necessarily appear as to how far the case extends. It should be emphasized what *Spevack did not* decide —

[24] In the Matter of Spevack, 24 App. Div. 2d 653, 654 (1965).

[25] 87 Sup. Ct. at 628-29, citing Slochower v. Board of Educ., 350 U.S. 551 (1956). In *Slochower*, a school teacher was discharged under a New York statute which operated to discharge a city employee who refused to answer questions by invoking the fifth amendment privilege against self-incrimination. The Court held that the built-in inference of guilt was arbitrary and unreasonable and that the petitioner's discharge could not be upheld. *Id.* at 557-59.

[26] See Cohen v. Hurley, 366 U.S. 117, 125-26 (1961) where the Court stated that no inference of guilt was being drawn from the invocation of the privilege against self-incrimination but that the reason for disbarment was solely the attorney's failure to perform his duty of judicial administration. In Nelson v. County of Los Angeles, 362 U.S. 1 (1960) the Court, in distinguishing, *Slochower* said:

> [T]he test here, . . . rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any "built-in" inference of guilt . . . but solely on employee insubordination for failure to give information which . . . the State has a legitimate interest in securing. *Id.* at 7.

[27] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). In this article Professor Wechsler states:

> To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposite interest, in evaluating any principle avowed? *Id.* at 15.

namely, it did not reach the question as to whether *Shaprio v. United States*[28] and the required records doctrine be overruled.[29] The Court did not have to reach this issue since all the proceedings up to the New York Court of Appeals[30] had proceeded on the assumption that Spevack could claim the privilege as to the records which he refused to produce. On the authority of *Cole v. Arkansas*,[31] the Supreme Court stated that it could not affirm the court of appeals' alternative holding that the petitioner was required to produce the records and as to them could not invoke the privilege.[32]

It is doubtful to what class of persons or professions *Spevack* applies. The plurality opinion, for example, stated that they did not reach the question as to whether a police officer who invokes the privilege in a disciplinary proceeding may be discharged for refusing to testify.[33] However, if *Spevack* is a principled decision, a distinction between the lawyer as a private employee and the policeman as a public employee would seem to make little sense.[34] If the policeman claims the privilege in regard to something to which he is expressly assigned, perhaps he may be liable to discharge. By the same token, an attorney who is hired by a state agency and refuses to furnish legal advice to that agency, basing his refusal on the privilege against self-incrimination, may likewise be liable to discharge — not because he has invoked the privilege but "upon the inability or unwillingness of the person involved to perform the very functions for which he has been employed."[35] On the other hand, if a police officer is called to testify before a committee concerning a subject for which he was not assigned, such

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[28] 335 U.S. 1 (1948).

[29] 87 Sup. Ct. at 629. The required records doctrine means that the privilege against self-incrimination does not protect a person from being made to produce records which are required to be kept by law. See Shapiro v. United States, 335 U.S. 1, 5-7 (1948).

[30] In the Matter of Spevack, 24 App. Div. 2d 653 (1965).

[31] 333 U.S. 196 (1948).

[32] 87 Sup. Ct. at 629-30. In *Cole* the Court found a denial of due process when the state supreme court to which the defendant had appealed following conviction on a criminal charge upheld the verdict and judgment on the ground that the evidence sustained a finding of guilt under another section of the statute for violation of which the defendant had not been tried or convicted. 333 U.S. at 200-01.

[33] 87 Sup. Ct. at 629 n.3.

[34] While the plurality opinion made no distinction between a public employee, and a private employee, this difference is highly significant in Mr. Justice Fortas' view. He "would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties...." *Id.* at 630 (concurring opinion).

[35] Reply Brief for Petitioner, p. 4, Spevack v. Klein, 87 Sup. Ct. 625 (1967).

as an investigation into the bribing of police officers, it would seem that the same rationale applied in *Spevack* should apply to him. Certainly there is great public interest in seeing that there are ethical police officers, but there is no less interest in seeing that there are ethical lawyers. While the plurality opinion does not resolve the issue concerning the police officer, Mr. Justice White expressed in dissent that the Court's reasoning applied with equal persuasiveness to public employees.[36] This would seem to be the logical result based on the rationale of the plurality opinion, at least where the investigation did not concern the particular function for which the policeman or other public employee was hired.

Another area which raises some problems concerning the purview of *Spevack* is admission to the bar. Mr. Justice Harlan's dissent expressed concern that, in light of the majority decision, there seemed to be no distinction between "admission" and "disbarment."[37] In deciding other first amendment cases regarding admission to the bar, the Court has said that a state may require evidence of good character and place on the applicant the burden of furnishing such evidence.[38] *Spevack* would not seem to require a different result. However, if denial of admission to the bar is deemed a "penalty," as construded in light of *Spevack*, then due process may require that the applicant not be denied the opportunity of showing good character simply because he had invoked the constitutional privilege.

Spevack raises doubts as to the weight to be given to some of the Supreme Court's earlier decisions. More importantly, the decision expands what due process requires in dealing with the fifth amendment privilege. If the case is considered to be a principled decision, the rationale that loss of reputation, standing, and livelihood is a penalty which should not be suffered for invoking the privilege seemingly applies not only to lawyers appearing before a judicial

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[36] 87 Sup. Ct. at 637 n.*.

[37] *Id.* at 631. Mr. Justice Harlan stated: "[*Spevack*] exposes this Court . . . to the possible indignity that it may one day have to admit to its own bar such a lawyer [one suspected of professional misconduct] unless it can somehow get at the truth of suspicions, the investigation of which the applicant has previously succeeded in blocking." *Ibid.*

[38] See *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961). In this latter case, the Court held that while the first *Konigsberg* decision, 353 U.S. 252 (1957) precluded the state from drawing any inference of bad character from a refusal to answer certain questions, the state constitutionally could deny the petitioner's admission to the bar for his refusal "to provide unprivileged answers to questions have a substantial relevance to his qualifications." Konigsberg v. State Bar, 366 U.S. 36, 44 (1961).