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Shall We Amend the Fifth Amendment, by Lewis Mayers

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SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. New York: Harper & Brothers, 1959. Pp. 332. $5.00.

The answer given by the author to his provocative title is an enthusiastic and resounding yes, and for a number of reasons. As an original proposition, there is no good reason for the privilege: it "did not acquire constitutional status because it was deemed a palladium of individual liberty; it has become to be deemed a palladium of individual liberty because it has acquired constitutional status." Moreover, whether or not it was wise as an original proposition to insert a provision in the Bill of Rights that no persons "shall be compelled in any criminal case to be a witness against himself," "in its concrete application by the Supreme Court, the point of near-absurdity has frequently been reached." The time has come, says the author, for a re-evaluation of the privilege from two standpoints: "the practical necessities of the administration of justice and the equally practical necessity for shielding the individual from unfairness and oppression." The author concludes that the "practical necessities" call for amending the Fifth Amendment.

Discussing the "practical necessity for shielding the individual from unfairness and oppression" the author early points out that "Experienced prosecutors agree that a witness with a clear conscience almost never invokes the privilege." He then continues to discuss the problems in the context of "a conspiracy of bootleggers to defraud the revenue"; "A witness before a twentieth-century grand jury investigating police corruption or a combination to fix prices"; and the invocation of the privilege "by a public officer asked to account for the discharge of his public trust." Having discredited the individual who invokes the Fifth Amendment protection, the author next makes the point that in any event the privilege is of no use to the accused criminal at any stage of the judicial process. Although the arrested suspect is under no legal compulsion at the initial stage to answer questions asked by the police, "the psychologi-

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cal compulsion, or more, which they are in a position to exert on the suspect under arrest is, of course, often as potent as legal compulsion." At the next, or grand jury, stage the invocation of the privilege only "results in a more thorough investigation than might otherwise be made." At the final, or trial, stage "the prisoner who does not take the stand is doomed" as jurors regard this refusal to testify as evidence of guilt.

Re-examining the privilege from the "practical necessities of the administration of justice," the author concludes that its invocation does much harm. The invocation of the privilege by the guilty co-defendant may greatly hinder the innocent man in clearing himself. Its invocation by witnesses in civil cases and administrative proceedings may result in a fragmented and distorted presentation of facts, and its invocation by witnesses in a criminal trial may result in the acquittal of the guilty.

The above is set forth in a book which begins with a history of trial procedure followed by a series of short chapters relating to the grand jury witness, the suspect in the hands of the police, the prisoner before the committing magistrate, the witness in legal proceedings, the witness in legislative inquiries, and the problem of records and physical objects under the self-incrimination clause. These chapters set forth the numerous and intricate technical rules of self-incrimination as they developed in history and the reasons for and against their application in modern setting. The author's general thesis is that the privilege against self-incrimination has outlived any original validity it may have had, is of no practical use to those who assert it, and is not necessary to protect the accused in light of other modern developments. This reviewer would have found the text more convincing had it been more consistent. For example, the author tells us that the privilege was never deemed a palladium of individual liberty, but later tells us that protection was afforded the witness' privilege because it was regarded as humane. Also inconsistently, he tells us that there is no historical justification for the privilege, but then tells us about the wrongdoings in the Star Chamber. This inconsistency is explained away by saying that those who drafted our Constitutional provisions were unacquainted with history; a startling proposition but irrelevant as he then admits that the use of inquisitorial methods by the royal governor of Virginia in the years immediately before the Revolution drew protests from the then-legislature, some of whose members drafted the first constitutions. The author's statement that the witness needs no protection in the grand jury and on trial is impliedly gainsaid by his statement that some "bullying and browbeating" is inevitable and it is explicitly contradicted by numerous footnote references to current and past protests against inquisitorial treatment given the witness in

these very settings. The footnotes, incidentally, are numerous and textual, and provide an invaluable source of material which will be useful for years to come.

The chapter which most disappointed this reviewer was the one related to the witness in legislative inquiries. As noted by the author, "Current interest in the privilege against self-incrimination stems chiefly from its widely publicized use in recent years by witnesses in Congressional investigations." Yet the author neglects to discuss any of the Fifth Amendment problems besetting the Congressional witness. In the book's shortest chapter, the author contents himself with the statements that the privilege against self-incrimination presents no real obstacle to the collection of information required for legislation as a particular detailed item of information cannot possibly be crucial. As, in the author's opinion, the questions to which the privilege is invoked should not be asked, he apparently does not deem it necessary to discuss the problems which arise when, in fact, the questions are put to the recalcitrant witness. This chapter contrasts sharply with the others, where the problems are set forth in detail and examined sharply.

The author does more than identify and describe the problems centering around the self-incrimination clause as utilized in various and multiple settings. He undertakes the greater problem of suggesting solutions. He suggests that the privilege against self-incriminations should be withdrawn from every person occupying a position of public or private trust—public servants, court-appointed guardians, labor union officials, lawyers, doctors—when questioned regarding the discharge of his trust; and from every person engaged in a licensed calling or operating a licensed enterprise or establishment when questioned about anything done in connection with his license. These persons are to be required to give advance "waiver" of the right to invoke the Fifth Amendment as a condition precedent to their appointment. The author assumes this blanket denial of the right to invoke the Fifth Amendment will have no impact on the anonymous activities of minority groups,[1] as he says "in passing," the numerous inquiries concerning membership in minority groups is not relevant to official conduct. He thereby ignores the facts that state and federal agencies differ from his conclusion and do indeed consider minority group membership relevant when licensing a host of activities. Recent illustrations are the denial of a license to a radio operator for refusal to answer questions as to past and present Communist Party mem-

1. Compare Talley v. State of California, 80 S. Ct. 536 (1960).

bership,[2] and the denial of a drivers' license to a known Communist.[3] But it is not only Communist Party membership which is deemed relevant to "official" conduct. Some states now require applicants to the bar to disclose membership in the National Association for the Advancement of Colored People[4] and other states require this same information from applicants for teaching and other public employment.[5] The author's refusal to face up to these facts seriously weakens the force of his proposal.

Another, and perhaps the major, suggestion of the author is that all witnesses, no matter what their rank or status, be required to testify when offered immunity from criminal prosecution. A number of statutes now on the books presently require a witness to do just this. The Constitution, however, requires that the immunity statutes afford protection equal to that of the Fifth Amendment and protect the witness "against a criminal prosecution which might be aided directly or indirectly by his disclosures."[6] The author's suggested "immunity" would not be so complete, but would merely afford protection against the introduction of any damaging admission during the course of a trial should the witness be prosecuted.

The author supports his suggested remedy with statements that "criminal law is grim business," that "grueling interrogation is often the only process by which crime can be discovered," that "at mid-century we confront a real dilemma in law enforcement," and that "there is more danger that criminals will escape justice than that they will be subject to tyranny." His thesis, as this reviewer understands it, is similar to the thesis of those favoring wire taps, prolonged police detention, and less vigorous application of the Fourth Amendment's prohibition against unreasonable searches and seizures. The danger from criminals is so great that we can no longer afford the niceties of a civilized due process. We must take off the kid gloves, fight fire with fire, meet the criminals on their level with their techniques and sense of values. Underlying this thesis is the assumption that our crime problem will be solved if we can but jail the criminals. There is no solid factual foundation for this assumption. Two respected, experienced federal court of appeals judges recently reached the independent but identical conclusion that the imprisonment of narcotic law violators does nothing to solve the problem of

2. Borrow v. FCC, (D.C. Cir. No. 15473, June 30, 1960).
1960).
3. In re Davis, 29 U.S.L. WEEK 2055 (N.Y. Sup. Ct., August 6, 1960).
4. North Carolina bar application.
5. See, *e.g.*, Carr v. Young, 331 S.W. 2d 701 (Ark. 1960), *cert. granted*, 28 U.S.L. Week 3368 (June 21, 1960).
6. Ullmann v. United States, 350 U.S. 422, 430 (1956).

narcotic use.[7] The Director of Federal Prisons notes that two out of every three released prisoners eventually return to the federal penitentiaries.[8] The explanation given for this in a recent study is that criminal conduct in a high percentage of situations is the result of environmental conditions which remain unaltered by temporary prison sojourns.[9] Nor is there any factual support for the assumption that the only way to jail criminals is to deprive them of the right to refuse to give adverse testimony. The author himself points out that "in some jurisdiction perhaps over 90 percent, the defendant does not exercise his privilege but takes the stand" and that "those who do fail to take the stand are almost invariably convicted nevertheless." The author also points out that in the pre-trial stages of criminal proceedings, the result of invoking the Fifth Amendment pleas is a more searching inquiry of other sources. In short, the author's statement that "lawbreaking tends to increase" has no proven relevance to his suggestion that witnesses be denied the right to invoke the privilege against self-incrimination.

The final three chapters of the book (The Privilege on Higher Ground, The Irrelevance of History, and The Constitutional Position) seek to demonstrate that the privilege against self-incrimination was intended to apply only to those charged with crime, not to mere witnesses in criminal proceedings, and certainly not to parties or witnesses in civil proceedings. He refers to the fact that during our early history, the courts protected the right of witnesses and parties in civil suits from giving self-incriminatory evidence on the authority of judicial decisions without reference to the constitutional provisions. (This reviewer and most practicing lawyers also slight statutory citation in favor of judicial opinions.) He refers to the fact that early textbook writers nowhere mentioned that the Fifth Amendment protects the witness, as contrasted with the criminal defendant. (Subsequent editions of the same treatises also fail to mention this, despite intervening Supreme Court decisions expressly upholding the right of witnesses in civil proceedings to invoke the Fifth Amendment protection.) Primarily, however, the author approaches the problem of Constitutional interpretation by way of "gram-

7. Edgerton, Sentences in Narcotics Cases, Statement at the District of Columbia Circuit Institute on Sentencing, April 1960; Bazelon concurring in Hawkins v. United States (D.C. Cir. No. 15514, July 28, 1960).

8. Estram, *Crime and Poverty,* Washington Post and Times Herald, B1, July 21, 1960.

9. Estram, *Crime and Poverty,* series of daily articles in the Washington Post and Times Herald, July 21-23, 1960.

mar and dictionary." Pittman,[10] Griswold,[11] and other leading scholars have given meaning to the constitutional provision in a historical context. All this learning is either ignored or deprecated on the theory that it was not known to those who adopted and ratified the constitution. The words of the constitution are that no person "shall be compelled in any criminal case to be a witness against himself," ergo, concludes the author, the words apply only to the defendant in a criminal case. This "grammar and dictionary" approach creates somewhat of a dilemma, however, as the author earlier points out that at the time the constitution was adopted, the defendants in criminal cases were not permitted to testify at all. It therefore makes no sense to give them a right to refuse to testify. The author resolves this dilemma by asserting that "protection against inquisitorial methods on the part of the *executive* rather than in the courts was in the minds of the draftsmen." This conclusion, of course, requires abandonment of the "grammar and dictionary" approach, and reliance on the same history elsewhere rejected. Moreover, the author himself comments that Patrick Henry deplored the absence of a Bill of Rights in the proposed federal Constitution because without it Congress might authorize the use of inquisitorial methods in the federal *judiciary*. Henry said nothing about inquisitorial methods on the part of the federal executive.

An Appendix (The Expansion of the Privilege of the Federal Witness) reviews the Supreme Court decisions on the Fifth Amendment and these decisions lead the author to conclude that "on its concrete application by the Supreme Court, the point of near-absurdity has frequently been reached." Here, as elsewhere, the textual material is not supported by the footnotes. The author restates the rule that a witness cannot refuse to answer a question on grounds of self-incrimination without "some reasonable ground for apprehending danger," and then says that "in the last decade the Court has excused witnesses whose apprehension of danger could be due only to an overactive imagination." The author's lead-off illustration is a witness with a twenty-year old police record who had been publicly labeled an "underworld character and racketeer" and a "known gangster." This witness invoked the privilege against self-incrimination when asked to give his present occupation, and the Supreme Court said this was his right. The reviewer leaves it to the reader to decide whether it needs an "overactive imagination" for a "known gangster" to apprehend danger in an answer revealing his present occupation.

10. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 736 (1935).

11. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

Perhaps, more than anything else, this reviewer objects to the vantage ground of the author. The Fifth Amendment provision is examined only from an evidentiary view: is the withheld information reliable, probative material? If so, the witness should be compelled to answer. When the question does not ask for information the author deems crucial, as in the situation of the Congressional committee witness, the use of the Fifth Amendment is permissible. The author says nothing about the broader concepts and purposes of the Fifth Amendment, i.e. as part of a total and unified Bill of Rights designed to protect unpopular minorities from oppressive majorities. As stated by Mr. Justice Black; the founders of our federal government "were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecutions. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments. If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished."[12]

This reviewer has been somewhat lengthy in his criticism because the book generally has been hailed favorably as a valuable contribution to the learning on the Fifth Amendment. But this reviewer deems the book the work of a scholarly advocate, rather than of a scholar, and an advocate, moreover, whose partisanship blinds him to important considerations.

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EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE. By John MacArthur Maguire. Boston: Little, Brown and Company, 1959. Pp. xi, 295. $12.50.

The appearance of a book by Professor Maguire must always be an occasion for throwing of hats into the air, and the present book is no exception. All who remember *Evidence: Common Sense and Common*

12. Feldman v. United States, 322 U.S. 487, 501-2 (1944).

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