BOOK REVIEW

SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. New York: Harper & Brothers, 1959. Pp. x, 341. $6.50.

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Professor Mayers' thorough and realistic examination of the privilege against self-incrimination, both in historical and present practice, concerns itself primarily with the privilege's effect upon the administration of criminal justice. Has it justified the sentimental attachment which some eminent judges and scholars have expressed for it? In general, Mr. Mayers' answer is a resounding "No." He believes that the privilege has contributed little, if anything, to the protection of the innocent and much to the escape of the guilty, and that it even handicaps the vindication of the innocent. Neither can he find much substance in the more ethereal claims for its service in defense of the dignity of man and the fundamental ideals of a free society.

Mr. Mayers examines the operation of the privilege in the various stages of proceedings in which it may appear—before the grand jury, in the hands of the police, before the committing magistrate, at the trial itself, criminal or civil, in legislative inquiries, and so on. He is really not much concerned with its invocation either by the defendant in a criminal trial or by the witness at legislative inquiries. With respect to the latter, he very wisely points out that the use of the privilege has had little effect in seriously handicapping a congressional committee in the pursuit of legitimate functions—the examination of the need for legislation. With respect to the former, he believes that an innocent defendant will almost always take the stand and that the defendant who does not do so is seriously prejudiced, no matter what the rule with respect to comment or consideration may be. Thus it is the effect of the privilege in the various types of preliminary inquiry which Mr. Mayers regards as the crucial question.

This crucial area does not include questioning by the police. Here Mr. Mayers quite correctly says the privilege is technically irrelevant, for even without it the police have no authority to compel answers. But it is not so easily stated that, were it not for the privilege, the police might not be given such authority. It also seems likely that popular belief in the privilege as a basis for refusing to answer police inquiries has some effect in encouraging such resistance. However that may be, Mr. Mayers is not arguing for an increased scope for police questioning; indeed, he is in favor of surrounding such questioning with more effective safeguards against third degree methods, bullying and inaccurate versions of reported con-

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fessions. These include mechanical recordings, more intensive examination by the committing magistrate into the circumstances of every confession, and separation of functions so as to vest in an agency—quite independent of the police—the responsibility for booking, custody and supervision of interrogation. In this connection Mr. Mayers considers but does not espouse the suggestion made by others that any interrogation which is to be the basis of a confession should be before the committing magistrate. He apparently accepts the position of most police administrators that the opportunity for questioning under conditions of privacy is essential to securing a confession in most cases and that many crimes can be solved only by use of this technique.

The discussion of police questioning is a detour from the main path. The principal attack is directed against the use of the privilege in grand jury or similar proceedings. This is where Mr. Mayers believes it has acted most effectively as an obstruction to the enforcement of criminal justice and where it has the least justification as a protection of the innocent. Indeed, he goes so far as to argue that it may frequently impede the vindication of the innocent because it is the guilty who usually will use it to protect themselves at the expense of others. Mr. Mayers does recognize that even before the grand jury there is danger of abuse of the power of compulsory interrogation, such as browbeating, bullying, and confusing by an aggressive and perhaps unscrupulous prosecutor. This he would guard against by giving grand jury witnesses the assistance of counsel "when the witness is or becomes aware that he is so implicated in the matter under investigation that suspicion of his own possible criminality is or may be involved." (p. 58). In order to insure that this would be more than a theoretical right, he would impose an obligation upon the state to provide counsel to the indigent at this stage of the proceeding. One might say that a minor theme running through the whole of Mr. Mayers' approach to the administration of criminal justice is to substitute an effective right to counsel for the privilege against self-incrimination.

But even assuming that the privilege could be withdrawn at the grand jury level, what use may be made of confessions or other damaging admissions elicited during such proceedings? Mr. Mayers is personally quite willing to see them admitted in the criminal trial itself. But recognizing that this is too much to hope for in the foreseeable future, he is ready to settle for a "middle course"—a qualified immunity which prohibits the use of the grand jury testimony at the criminal trial. This has been the law in Canada since the Evidence Act of 1892 and it has not resulted in shocking the conscience of bench or bar.

This brings us to the real villain of Mr. Mayers' piece—the United States Supreme Court and particularly its decision in *Counselman v. Hitchcock*,[1] holding that such a qualified privilege as exists in Canada is not sufficient to satisfy the constitutional guaranty. This decision, Mr. Mayers

[1] 142 U.S. 547 (1892).

argues, had no justification in constitutional language or history, rested on a confusion of the witness's common-law privilege with the defendant's constitutional privilege, and reversed the trend of constitutional adjudication with respect to the privilege in the states. Narrowly interpreted, the basis of the decision might have been only that a grand jury proceeding was a criminal case within the meaning of the fifth amendment, but in subsequent development this particular aspect became irrelevant. The case came to stand for the broader principle that no witness in any type of proceeding can be compelled to give answers which may tend to implicate him in criminal activity. In the language of *Counselman* itself: "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." [2] In the language of Mr. Mayers: "Seldom in our constitutional history has so grave an issue been so summarily disposed of." (p. 209).

Apart from the plea for wholesale reconsideration of *Counselman*, the significant questions of public policy posed by Mr. Mayers are whether other qualifications upon the operation of the privilege—such as that anyone who accepts public office thereby surrenders the privilege with respect to authorized inquiry into the conduct of his office—should not be encouraged. Statutory or administrative provisions making invocation of the privilege with respect to official conduct a basis for immediate termination of public employment have now become quite common. Mr. Mayers considers this inadequate because by forfeiting the job the wrongdoer may escape criminal prosecution; he therefore advocates expansion of the condition so as to require waiver of the privilege as a condition of assuming public office. Indeed, he would expand this approach to positions of private trust as well —the guardian in relation to his ward, the corporate director or officer in relation to stockholders, the labor union official in relation to the union, the lawyer and his client, and so on. Finally, it is suggested that the principle might be applied to any licensed profession or occupation and to any transaction requiring government permission, by analogy to the public records doctrine making the privilege inapplicable to records required by law to be kept. Mr. Mayers seems carried away with the promising vistas opened up by this approach. As he says in summing it up:

> "Were the privilege against self-incrimination completely withdrawn, as here urged, from every person occupying a position of trust, public or private, when interrogated as a witness regarding the discharge of his trust, and from every person engaged in a licensed calling or operating a licensed enterprise or establishment, or performing a public contract, when questioned as a witness regarding anything done under his license or in connection with his license or contract, the privilege of the witness would lose much of its present-day practical

[2] *Id.* at 562.

> importance. In this direction, it is believed, lies the best immediate hope for undoing the mischief which the far too generous expansion of the privilege by the courts has worked." (pp. 155-56).

Mr. Mayers recognizes that any hope for acceptance of this solution must rest on acceptance of his fundamental analysis of the privilege itself—that it is largely an historical anomaly which has spread like a noxious weed through the fair garden of our jurisprudence. Thus he undertakes to answer those who, like Dean Griswold, have found in it at least some echo of the fundamental values of our civilization—"an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations." [3] In brief, he finds that such high-sounding generalizations have little appeal when viewed in the light of the nauseating or petty circumstances in which the privilege is often invoked—the narcotics smuggler covering his tracks, the labor racketeer refusing to account to his union, the importer refusing to produce the invoices which will determine the value of his goods. But this rebuttal equates the exercise of the privilege with the crime which it may make more difficult to prosecute or with the criminal who may thus escape punishment. The same evaluation might be made with respect to any of the other constitutional guaranties which impede and sometimes frustrate effective prosecution. If their value is measured by the evil characters who appeal to them or by the crimes which they sometimes allow to go unpunished, they are all unpretty things.

A pragmatic approach, however, will take account of both the good and the bad which the privilege accomplishes and ask whether, on balance, it does indeed serve the higher values of our society. This is what Mr. Mayers is asking us to do and we should not shrink from the assessment simply because the privilege once served our intellectual forefathers in opposing religious or political persecution or because it is enshrined in the Bill of Rights. Presumably even the Bill of Rights will gain in strength only from openminded re-examination of its weaknesses. But as Dean Griswold has more than once remarked, it is at least an interesting coincidence that the privilege should have first achieved prominence in protecting freedom of dissent and should have again become the subject of modern controversy primarily in the area of belief and association.[4] It is doubtless true, as Mr. Mayers suggests, that in its operation before legislative committees the privilege has not interfered with any legitimate or at least significant purposes of legislative investigation. However, it is not so clear that the privilege has not afforded significant protection to individuals in enabling them to withstand or cut off inquiry into their political associations. To some extent even here the privilege has not been a wholly satisfactory defense: its very invocation is something of a humiliation

[3] GRISWOLD, THE FIFTH AMENDMENT TODAY 81 (1955).

[4] See *id.* at 8-9; Address by Dean Griswold, *The Right To Be Let Alone*, Northwestern University, May 13, 1960.

which no amount of rationalization on a philosophical level can entirely dispel. Neither has there been any really effective protection against indirect sanctions, such as loss of employment as a result of pleading the privilege. It may be that there should be other ways of protecting against the abuse of the legislature's investigatory power—that freedom of speech and association or the inherent limits of legislative power would be more appropriate legal barriers. But the fact of the matter is that such alternate protection has not been available; the law does not always develop in such neat categories that the punishment fits the crime or that the protection exactly fits the abuse of power. Unless one is prepared to be as much a martyr as Dr. Uphaus,[5] one must either cooperate with an investigation as ridiculous and obnoxious as that case illustrates or else fall back upon the privilege itself. It should also be noted that it is what Mr. Mayers calls the privilege of the witness, rather than the privilege of the criminal defendant, which is applicable in such investigations. Consequently, unless the principle of *Counselman v. Hitchcock* is accepted in its full sweep—an acceptance to which Mr. Mayers so strenuously objects—there would be no constitutional protection at all in this area. Conceivably some respect might be paid to the privilege even in legislative investigations, simply as a common-law rule of evidence. In England, where some common-law rules are treated as practically equivalent to fundamental principles of the unwritten constitution, this might work very well. But can anyone seriously doubt that, in the United States, the acceptance of this view would make the privilege, for all practical purposes, inapplicable to legislative investigations?

This brings us back to consideration of Mr. Mayers' middle course, the Canadian solution, which treats only the use of the witness's incriminating statements themselves in a criminal prosecution as a breach of the privilege. It would be interesting to know whether, in actual practice, there is any substantial difference between the American and the Canadian systems. It is rather difficult to believe that a promise of immunity in fact so qualified, or at least so understood by the beneficiary, would be effective in obtaining valuable information which would not otherwise be forthcoming. Of course, when the immunity is constitutionally sufficient, the compulsion to testify is legally operative. But if the chances are good that the legal compulsion to release the information sought can be evaded by perjury, it would seem that the theoretical bargain of information for qualified immunity would have to be sweetened by informal promises of complete immunity in order to extract truthful cooperation. And conversely, where the chances of proving perjury are high, it would follow that the evidence obtained is not likely to be crucial to successful prosecution. Consequently, to one admittedly inexpert in the intricacies of criminal law enforcement, it seems at least doubtful that there is really as significant a difference between Canadian and American treatment of the privilege as Mr. Mayers assumes. Nor do I find that he has grappled directly with this

[5] Uphaus v. Wyman, 360 U.S. 72 (1959).

question or collected any data which might contribute to a more informed judgment.

More promising and less objectionable qualifications upon the exercise of the privilege seem to be opened up by the *Shapiro* principle of required records,[6] which, applied with judicious restraint, is less offensive to the values protected by the privilege. For example, even if the *Shapiro* doctrine were carried to the extent mentioned with apprehension by the dissenters—to the financial records underlying our tax returns—it is doubtful that many of us would be shocked or feel our privacy intolerably invaded upon finding that the records must be produced if our returns are seriously questioned.[7] Indeed, most people probably operate upon the assumption that this is already the law. So too the principle may doubtless be extended to various types of public or even private trust, so as to impose a heavy burden of disclosure with respect to information relevant to the trust upon all those who accept fiduciary responsibilities. This is not an invitation to carry the requirements to unnecessary and abusive lengths, and the reasonableness of the requirements would always remain open to challenge not only upon policy but also upon due process grounds. Taking into account this possibility of extension of *Shapiro*—as well as, on the one hand, the possibility of greater judicial restraint upon frivolous uses of the privilege and, on the other, the larger purposes which the privilege still serves—it does not seem that Mr. Mayers, despite the breadth and depth of his analysis, has made a convincing case for significant amendment of the privilege itself.

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[6] Shapiro v. United States, 335 U.S. 1 (1948).

[7] See Meltzer, *Required Records, The McCarran Act and The Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 715-19 (1951).

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