

Shall We Amend the Fifth Amendment? By LEWIS MAYERS. New York: Harper & Bros., 1959. Pp. x, 341. \$5.00.

It is not very easy to say exactly what Professor Mayers offers as an answer to the question posed in his title. His discussion is in fact addressed to the question: Should We Mend Our Ways in Respect of the Privilege Against Self-Incrimination? His answer to this certainly is "Yes." He argues in effect that current interpretations of the fifth amendment have produced a tenderness toward defendants and witnesses which cannot be justified, either "on the merits" or by appeal to the fifth amendment. He thus treats the amendment as interpreted in the courts as one element among many in fashioning proper policy in securing evidence from suspects and from witnesses. I think that Professor Mayers is on the whole skeptical of achieving any express amendment of the fifth amendment, but he believes an equivalent improvement can be achieved if the Supreme Court will desist from the extreme and tortured interpretation it has put upon the privilege.

As we consider his argument, it is in order at once to note his distinction between the treatment of an individual in a criminal investigation and the examination conducted by a legislative committee seeking simply "background" information for possible legislation. It is of course the latter type of proceeding that has been the focus of much recent attention, and for a time the standard proceeding of such committees as the House Un-American Activities Committee and the Senate Internal Security Sub-Committee of the Judiciary Committee was to interrogate persons about their alleged Communist activities or connections and to hold their scalps aloft when they invoked the privilege. On the whole Professor Mayers is not interested in reducing the protection offered by the privilege here, though he would deny it to any public office-holder or other person in a position of public trust. In general, it is Mayers' contention that in trying to find a balance between justice and the protection of individual rights we have gone overboard for the latter. With this general thesis in view he goes in detail through the steps of a criminal proceeding and makes specific recommendations for reducing the impact of the privilege.

The book is not exciting in style, yet its simplicity and sobriety convey a sense of legal reality as the various stages of investigation are considered. Professor Mayers recommends that in the initial treatment of a suspect by the police there be explicit attention to protecting the suspect from abuse, with, at the same time, the earliest possible systematic questioning of the suspect. Noting that of course a suspect need not speak at all, Mayers argues that in fact this right does not actually work especially to protect him. Accordingly, Mayers contends, it would make more sense to require that he answer questions provided adequate forms of protection, notably in the form of counsel, could be available to prevent police unfairness. The same assurance of fair procedure is once again recommended by Mayers in proceedings before the

committing magistrate and the grand jury; and here Mayers declares his support for immunity legislation such as that embodied in the Communist Control Act of 1954. As to the actual trial proceedings, Mayers offers no frontal attack on retaining the privilege for the accused but comments that in fact the privilege is often made unsuitable for the accused to exploit: his right to decline to take the stand is valuable to him only in a "negligible number" of cases.

As a corollary to these suggestions for replacing the accused's right of silence by counsel and other guarantees of "fair play," Mayers argues that the protection of the privilege for the *witness* has been entirely a creation of courts in distinction from the fifth amendment's initial intention. Mayers concedes that "in deference to our accustomed ways of thought [abolition of the right to withhold essential information] . . . could again well be qualified by prohibiting the subsequent use of the witness's testimony as evidence against him in a criminal proceeding."¹ It is here, furthermore, that Mayers comes out for distinguishing the witness who is a public officer from the witness who is on the stand in an "investigation for legislative background," where the non-legal penalties for frank disclosure may be unduly severe.

The book's argument takes the rather familiar route from present abuses to alleged constitutional justifications and thence to alleged "higher grounds." Mayers asserts that obviously the privilege is obstructing justice, that this is because we think the Constitution requires it, and that we think the Constitution requires it because of the underlying philosophy of the Constitution and especially of the Bill of Rights. In fact, he says, the abuses to which the fifth amendment were an answer are not the danger today: we do not threaten those arrested with Star Chamber or High Court tyrannies. The elaborate superstructure to which Dean Griswold and many learned judges appeal is thus, Mayers argues, irrelevant to the hard questions of how to achieve justice and assure that clever guilty people do not escape where the innocent are trapped.

In discussing the "higher ground" on which Dean Griswold and others have upheld the wide recognition of the privilege, as well as in considering the constitutional interpretation of the fifth amendment, Professor Mayers recurrently gives the impression that he finds no validity whatever in either of these forms of analysis. Yet he has, inevitably, his own theory of the merits of the privilege, or rather, his theory of the forms which are important in assuring justice. Thus we find him asserting that a small group of provisions in the Bill of Rights, designed to protect a citizen charged with a criminal offense, "immediately strike one as basic and fundamental. . . ."² He picks out as particularly basic "the crucial provisions governing the conduct of the trial":³ "trial by jury, at which he is to be informed of the charge against him . . . to be confronted with the witnesses against him . . . and is to have compulsory

¹ P. 230.

² Pp. 216-17.

³ P. 217.

process for obtaining witnesses in his favor."⁴ He adds somewhat grudgingly that one may, if he accepts the reasons advanced for it, include the right of the accused not to be a witness against himself in the fundamental law of the land. In this last sense one may say that Professor Mayers is willing not to struggle for an amendment to the fifth amendment.

As for the witness, as distinct from the accused, however, Mayers insists "the privilege . . . is hardly of so basic a character, the dangers to be guarded against are hardly of so horrendous a nature, that the right must be jealously shielded from all legislative regulation."⁵ What we need is "a maturely developed code of statutory regulation rather than a vague constitutional mandate. . . ."⁶

For all his objection to "a vague constitutional mandate," Mayers does not seriously propose to ignore such a mandate nor indeed to ignore such reasoning about it as may issue from what he calls a "higher ground." It is true that he finds no particular persuasiveness in Griswold's arguments, or in, for example, the *Ullman* dissent of Mr. Justice Douglas⁷ which, *inter alia*, speaks about the injury to human dignity of compulsory self-accusation. But in Mayers' own argument there is little more than an appeal to one's intuition of what is "basic," or somewhat "less basic," or simply prudent. Again, there is an appeal to the assertion that law-enforcement is difficult business these days, but this broad and important assertion hardly is brought to intimate terms with the needs of prosecutions in actual cases. Indeed at times Mayers is perilously close to the proposition that compulsory testimony is not offensive when the person compelled is known to be an unsavory character. If the latter is in fact established, without the power to compel disclosure, then human wit ought to find the way to a legal proof of it in satisfactory terms.

Mayers' distinction between accused and witness seems, from this point of view, particularly hard to maintain with conclusive firmness. One may grant that when the framers wrote the Bill of Rights they did not clearly include within the privilege the witness as explicitly contrasted with the accused. But the logic of their position clearly leads, I should say, to the protection of anyone whose evidence could make him the accused. In fact, if a crime has been committed, it is a little arbitrary, as any detective story reader knows, to regard only the formally charged individual as suspect. The continuities in the developing situation make each person close enough to be questioned as a potential culprit. If there is to be any recognition of the accused's right not to help the prosecution against himself, then any witness must, surely, have the same right with regard to his own security.

Given these objections to the course of Mayers' argument, and with due deference to his concern for assurance of due process of law toward defend-

⁴ P. 216.

⁵ P. 217.

⁶ *Ibid.*

⁷ *Ullman v. United States*, 350 U.S. 422, 440 (1956).

ants and witnesses alike, what can one say at the theoretic level about the merits? Is the privilege, as Dean Griswold says, our especial mark of being civilized, or is it, as Mayers seems to suggest, rather a shred of sentimentality? A number of propositions are, it seems to me, reasonably persuasive in themselves, though of course their general plausibility must be left, as Mayers leaves his argument, to the reaction of the general reader.

(1) There is a difference in status between such rights as freedom of political thought and expression, on the one hand, and the privilege against self-incrimination on the other. The former contributes to the self-government of the society; the latter protects a private interest. This is not to say that private interests are not important, but it is to assert their subordination to public purposes.

(2) In principle the public authorities can rightly decide when and whether a defendant or witness may be required to speak under penalty of contempt. The easiest way to explain this is to acknowledge, as Mayers does, that an accused person will need to have others testify or, more fundamentally, that any person's testimony is potentially relevant to securing justice. There is no right "against society" which justifies a man in deciding when he will and when he won't talk in court. No man has the right, by his silence, to permit an innocent party to suffer legal punishment.

(3) From this point of view Professor Mayers is on sound ground in arguing in principle for the assurance of due process by confrontation, presence of counsel and other time-honored procedural devices, rather than for a brute Hobbesian recalcitrance on grounds of individual self-preservation. Whether or not one makes a social compact the center of his political theory, it seems clear that citizens do agree in fact to put up with punishment, including death, as a condition of civilized existence. To draw back when the law breathes down one's neck, and to say, "now I am aware I didn't agree to testify about myself," is palpably self-contradictory.

(4) Nevertheless, if a defendant, actual or potential, may not, as a matter of indefeasible right, employ the privilege, it may with much force be contended that a public authority ought not to demand that he accuse himself. Or rather, it ought not to compel him to accuse himself. The compulsion, of course, is never totally compelling—he can go stubbornly to death without speaking. But normally he can be and is made to speak in a way that brings about his undoing; he can be threatened with as much of a penalty for silence as he would suffer for speaking. It is this compelled testimony that Mr. Justice Douglas denounced in his *Ullman* dissent as offensive to human dignity, and I suppose that in so doing Mr. Justice Douglas is practically arguing against the sharp distinction above suggested between political speech and the speech involved in self-incrimination. He is saying that as human speech it has a sanctity that requires it not be subject to external compulsion.

Mayers clearly does not find the above argument intuitively persuasive. I

think it can be given somewhat greater plausibility if it is stated in a form close to Mayers' own announced goal of due process. What strikes the civilized taste as offensive is, I think, the compulsory aspect of the testimony, and this is a direct reflection of the normal inequality of power in the legal proceeding. Lewis Carroll only took to an extreme the dilemma of the witness in his example of the wretched battlefield prisoner who, when ordered to identify his leader by captors he didn't know, could only gasp out "Rilchiam!" The testimony afforded under threat is corrupt. It is objectionable not because it will lead to the defendant's undoing, but because the conditions of its appearance are inconsistent with that fair and even exchange on which achievement of truth depends. It is here that continuity is asserted, whether correctly or not, with the Star Chamber and its threats of torture.

To this analysis Mayers in effect affirms assent, if I understand him correctly, since what he offers to the defendant and witness is the assurance of procedural safeguards which restore the balance between official social agencies and the individual under pressure to testify. In effect, such safeguards would be intended to convey assurance that no harm could come to the witness from telling what he knew, even though that revelation might cause him to be indicted.

From the above I would not conclude that the witness never could be compelled to testify against himself, or alternatively, subjected to the impact of an immunity statute. Conceivably such a statute would be in order in cases involving espionage or the setting of bombs in highly crowded metropolitan areas. The demands of fairness and of that equality in communication which may be peremptorily required do not convey with equal peremptoriness all the forms which such fairness and equality must take. By the same token, compelling social necessity (however dangerous it is to invoke) can justify abrogation of any particular provision to assure such fairness.

This is not to argue for amending the fifth amendment, but it does amount to a case for the formulation of certain waivers of immunity under extreme conditions. Those conditions were not, it seems to me, reached in the *Ullman* case, and indeed I believe I would have Mayers' support in challenging the propriety of the kind of considerations that underlie the immunity provisions of the 1954 Act. Certainly it extends agreement in principle with Mayers' argument for assuring counsel and other safeguards to defendants and witnesses. I am, I think, not altogether satisfied that on his program of so equalizing the forces in the situation enough effort would be made to strengthen the suspect or witness. Indeed, expensive though it may be, it would appear that a hard-pressed police and judiciary should receive a greater share of society's resources rather than be themselves coerced into that sort of severity which inevitably breeds disrespect for human dignity.

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