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Shall We Amend the Fifth Amendment? by Lewis Mayers

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Book Reviews

SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. Harper & Bros., New York, 1959. 241 pp. $5.00.

This book is no dramatic literary masterpiece; nor will it afford a pleasant evening's reading. But it does contain an understandable contribution to American thinking about an important and controversial problem. It is a detailed examination of the right to silence from a practical and philosophical perspective. The author considers the privilege in all settings: (1) the accused at preliminary hearing, at grand jury investigation, and at the trial; (2) the witness before the grand jury, before various judicial proceedings, and in legislative inquiries; and the special problems (3) of the suspect in the hands of the police and (4) of persons who have breached their duty as holders of positions of trust. In short the author essays to answer a need. He observes that, despite a vast accumulation of judicial and juristic discussion, a citizen seeking light can find no comprehensive, non-technical examination of the present day operation of the privilege in the varied situations in which it is encountered.[1]

The book's subtitle reflects the basic line of inquiry: "Is the right to refuse to testify an obstruction to law enforcement or an indispensable guarantee of liberty?" The author looks hard at the historical and modern support for the privilege in each of its applications. He questions whether there is any danger of abuse and coercion when a witness is *legally* compelled to testify in orderly public proceedings with planned safeguards. He examines the practical uses and abuses of the privilege in refusals to testify when the potential information will implicate others but could not be used subsequently to prosecute the witness. He points out that secret coercive methods are not hindered by the sanction of the privilege and would not be aided by its absence. Extensive journeys into the historical and modern bases for the rule are made throughout the book.

One of the better attributes of the book is its fund of bibliographical materials; and despite its critical appraisal of the rule, frequent reference is made to contrary authority and reasoning. Another significant contribution is the attempt to meet every observed defect

[1] Mayers, Shall We Amend the Fifth Amendment? (1959), hereinafter cited as Mayers.

with a practical suggestion for improvement. Furthermore the author's suggestions seem, for the most part, the result of painstaking investigation.

On the other hand, the book is not free from criticism. The writing, though non-technical, is stiff and tedious. Repetition of phrases and ideas is not infrequent. In places the proof-reading appears hurried.

However, the form of the book presents fewer objections than its substance. Modern arguments supporting the privilege rest primarily upon two grounds: (1) it is a symbol and a safeguard of free man's right to privacy, and (2) it protects innocent men from unjust prosecution. An abundance of eminent authority may be found advancing these arguments favoring the Fifth Amendment. Samples of authoritative opinion would include such men as Dean Wigmore, Dean Griswold, Professor Chafee, Judge Frank, and Justice Douglas.[2] Mr. Mayers strongly attacks both of the arguments listed above. We shall examine his arguments in some detail. As a preface to such consideration, however, two general observations should be made.

First, in seeking to prove the right to silence does not protect the innocent, Mr. Mayers centers his attack toward Dean Griswold and Professor Chafee. Each of these men present hypothetical fact situations to illustrate their argument. Mr. Mayers challenges these hypothetical cases as if the value of the privilege must stand or fall with these assumed situations. He rebuts these cases by assuming further hypothetical facts which could point to a different conclusion. This approach is subject to the criticism that such cases are given only for the purpose of illustration and that Mr. Mayers' hypothetical rebuttal can easily be met by a hypothetical surrebuttal.

Secondly, Mr. Mayers considers, in a disturbingly terse manner, the modern philosophical basis for the privilege as a symbol of the right to privacy. The reviewer cannot escape the feeling that the author is sometimes so engrossed with the details of practical law enforcement as to miss the larger social implications of the privilege. In the chapter entitled "The Grand Jury Witness," the author questions, "Does the Privilege Protect the Innocent?" After citing several cases, Wigmore and Griswold, he states: "Nevertheless, if the privilege in criminal proceedings is to be defended today, it presumably must be on the ground that it protects the innocent; and that it does so has repeatedly been asserted by court and commenta-

[2] Griswold, The Fifth Amendment Today (1955); Chafee, The Blessings of Liberty (1956); Douglas, The Right of the People (1958). See also Mr. Justice Douglas' dissent in Ullman v. United States. 350 U.S. 422 (1956) and Judge Frank's opinions in United States v. Gruenwald, 233 F.2d 556 (2d Cir. 1956) and St. Pierre v. United States, 132 F.2d 837 (2d Cir. 1942).

tor. . . . Singularly lacking, however, has been any convincing demonstration of this proposition."[3] Following this statement are Mr. Mayers' arguments which are designed to show that the privilege protects the guilty but does not shield the innocent. The most repeated argument is since no actual case has ever been shown where an innocent man was protected by the privilege, none exists. In considering the non-availability of such cases, he says:

> If an implicated witness before the grand jury who has pleaded the privilege is *not* thereafter indicted, it does not follow that he was innocent. If he *is* indicted and *is* thereafter acquitted, it still does not follow that he was innocent. . . . To state the problem is to establish the near impossibility of solving it. We must conclude that the proposition that the privilege protects the innocent witness before the grand jury not only has not been established but that it is in effect impossible to establish it.[4]

To the reviewer it seems necessary to distinguish between the impossibility of producing a recorded case when the privilege conclusively protected an innocent man and the possibility of producing a hypothetical set of facts "establishing" the proposition. The difficulty of proving factually that innocent men are protected by their right to refuse to testify hardly establishes the contra conclusion of Mr. Mayers that the privilege does *not* protect innocent men, but *does* shield the guilty.

The author seeks to prove his position by stating that *experienced prosecutors* agree that a witness with a clear conscience almost never invokes the privilege and that an innocent witness will almost surely be indicted if he refuses to testify. These arguments are the basis of Mr. Mayers' attack upon the hypothetical situations advanced by Dean Griswold and Professor Chafee.

Dean Griswold says: "Consider, for example, the case of a man who has killed another in self-defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him."[5]

Author's attack:

> One is not subpoenaed out of a clear sky to appear before a grand jury and asked whether he killed some person unknown to him. He is asked the question *presumably* because there is evidence tending to connect him with the violent death under investigation. . . . If he keeps silent, the likelihood in the ordinary case is that the independent evidence against him, combined with his refusal to explain, will move the grand jury to indict him; but if he explains the circumstances fully, and his explanation is consistent with the

[3] Mayers 61.
[4] *Id.* at 64.
[5] Griswold, *op. cit. supra* note 2, at 19 (as quoted in Mayers 64).

> other evidence before the jury, the prosecutor will be likely to advise the grand jury against an indictment. [Emphasis added.][6]

If we must, as Mr. Mayers asserts, *presume* that evidence connecting the witness with the death warrants bringing him before the grand jury, is it realistic to conclude he can explain away the suspicious circumstances at this point? Certainly his refusal to answer may cast more suspicion upon him, but is it not probable that his admission of the act of killing, combined with the evidence produced by the prosecutor, will force his indictment? If he can explain away the suspicion of the prosecutor, would it not have been more feasible to have done so during the *police* investigation prior to the summoning of the grand jury? If it was not feasible to answer prior to examination in the grand jury proceeding, wouldn't an answer here simply furnish more damaging evidence and informative leads which would solidify the prosecution's case? These questions do not lay waste to Mr. Mayers' arguments, but simply question the value of his attempt to destroy Dean Griswold's hypothetical.

The author next attacks an illustration by Professor Chafee where:

> Jones has been killed by a pistol found close to his body. Smith is called as a witness before the Grand Jury. He is innocent, but he was near the scene of the shooting at the time and was bitterly hostile to Jones because of a lost lawsuit. Smith is unpopular in the community and has been in several respects an undesirable citizen. Moreover, unknown to anybody, he had taken the pistol from a neighbor's house to shoot skunks the evening before the crime and returned it unseen the next morning. The case against Smith will be very black if he discloses that he has possession of the pistol when he is asked 'Do you know anything about this gun?' He invokes the privilege.[7]

Mr. Mayers indicates that the invocation of the privilege may make the case "look blacker than if he had given an honest account of his skunk-shooting safari. His invocation is bound to set the prosecutor hot on his trail, with unpredictable results, and to make the grand jury more inclined to indict."[8] Despite the arguments of Mr. Mayers, we still must ask how much "independent evidence" the prosecutor can acquire, and whether an admission of such incriminating circumstances could fail to be more damaging than silence. One remains unconvinced that the privilege never protects innocent men.

Aside from considering the validity of Mr. Mayers' attack on these particular hypothetical cases, there are a few general observations which should be made. It is normally a person connected with

[6] Mayers 62, 63.
[7] Chafee, *op. cit. supra* note 2, at 186 (as quoted in Mayers 64).
[8] Mayers 64.

law enforcement who calls for an actual instance where the privilege afforded protection to an innocent person, and who vigorously demands the withdrawal of the privilege. Such a person, however, may find himself in a dilemma when he tries to prove that the privilege protects the guilty but not the innocent. Innocent persons do not always possess convincing explanations. If, as Mr. Mayers assumes, the most plausible lies of the guilty will not be persuasive, will the true testimony of the innocent inevitable be more persuasive?

The author states, "As things now stand, of two lawbreakers committing identical offences, one may go to jail because the evidence against him is sufficient without the aid of his own interrogation, whereas the other, who could be convicted were it possible to interrogate him, escapes scot free. If this a civilized result?"[9] The reviewer sees no reason why the same conclusion should not apply to two *innocent* men charged with identical offenses. The privilege of silence may save one from conviction. If this is true, the question is not the simple "either-or" proposition of Mr. Mayers' sub-title: "Is the right to refuse to testify an obstruction to law enforcement or an indispensable guarantee of liberty?" The real question becomes, is it a "civilized result" to provide a right which may protect some innocent suspects and some guilty suspects? Historically, we have believed it better that a hundred guilty go free than to convict one innocent man. Perhaps this sacrifice in efficiency is no longer justified, but isn't this the real question? Is it not evading the question to argue that the right to silence never benefits innocent men?

In chapter eleven, the author considers the philosophical bases for the privilege. Here he denounces the argument that the privilege is a symbol of the individual's rights of privacy and liberty from the collective force of the state. In the brief thirteen pages devoted to this aspect of the privilege, one sometimes gets the feeling he is reading the statements of a "practical" man who is impatient with the "theorists" whom he considers on such an abstract plane as to be divorced from reality. As presented by the author the philosophical bases for the privilege are the right to privacy and the social contract.

The Right to Privacy

The earliest statement which the author considers here is a passage from a dissenting opinion of Mr. Justice Field that:

> [T]he proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and culti-

[9] *Id.* at 168.

> vated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom.[10]

Two later articulations of the same idea from the pen of Judge Jerome Frank are also presented:

> [1.] The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique 'private worlds,' leaving a 'public world' only, a la Orwell's terrifying book, *1948* [sic]. They boast of the resultant greater efficiency in obtaining all the evidence in criminal prosecutions.[11] [2.] They [speaking of the Fourth Amendment as well as the Fifth] express the high value our democracy puts on the right to privacy. . . . At any such right of privacy, be it noted, the despotic rulers of totalitarian regimes sneer. They denounce all privacy, since it blocks efficient enforcement of criminal laws. Their position, which logically renders asinine any privilege not to testify, necessarily justifies them logically in subjecting their subjects to constant spying and snooping, for such despotic surveillance plainly aids in the detection of those who violate the laws. Our democratic concern with privacy, they call characteristic of our decadent culture. Before we accept their criticism and sacrifice all our other values to effective law enforcement, we should reflect on the brutal consequences of the totalitarians' alleged efficiency in pursuing suspected criminals.[12]

The Social Contract

The author gives a somewhat lengthy excerpt from Abe Fortas' article[13] for this basis of the privilege. In summary, his position is that the individual is a sovereign entity who deals with the state, another sovereign entity; that the seventeenth century social compact basis of government forever renounced absolute power in governments; that governments are instruments of the people whom they serve; that:

> A sovereign state has the right to defend itself, and within the limits of accepted procedure, to punish infractions of the rules that govern its relationships with its sovereign individuals. But it has no right to compel the sovereign individual to surrender or impair his right of self defense. . . .[14]

Mr. Mayers' Attack

In reference to both bases, the author points to our free neighbor, Canada, which virtually abolished the privilege nearly seventy years

[10] Mr. Justice Field's dissent in Brown v. Walker, 161 U.S. 591, 637 (1896), as quoted in Mayers 160.

[11] United States v. Gruenwald, 233 F.2d 556, 581-82 (2d Cir. 1956), as quoted in Mayers 161.

[12] United States v. Gordon, 236 F.2d 916, 920 (2d Cir. 1956), as quoted in Mayers 165.

[13] Fortas, "The Fifth Amendment: Nemo tenetur prodere seipsum," 25 Cleveland Bar Ass'n J. 91, 98-100 (1954).

[14] *Ibid.*, as quoted in Mayers 165.

ago. But in this context it is relevant to note that Canada has a complete immunity statute which prevents such testimony from being used in any later prosecution—a situation entirely consistent with the social compact argument, though it may be inconsistent with our ideas about the right to privacy. But the question of whether the need for a right to privacy in the United States justifies such a privilege must be decided by the conditions here, not the conditions in Canada, a country with a different political and social setting.

The second argument of Mr. Mayers is that our government ruthlessly invades our citizens' privacy in many other contexts, and that:

> Had Judge Frank issued a plea for greater respect on the part of the law for personal privacy in general, one might well sympathize, perhaps agree; but when he selects as the particular area of privacy entitled to special, nay, constitutional, protection, the right to keep concealed from the authorities the evidence of one's illegal activities, few will feel deeply stirred.[15]

One might point out that as shown in one of Mr. Mayers' own excerpts Judge Frank *was* considering something broader than the right to silence; that is, the Fourth Amendment's guarantee that one's home shall be safe from invasion unless the invaders are accompanied by a search warrant issued upon probable cause from an officer of the court. It is quite possible that had Judge Frank been writing a general essay, rather than a judicial opinion concerned with the questions of law before him, he would have issued a general plea for more privacy from government in America. But if not, we see no reason for Mr. Mayers discarding an argument, whose possible validity he admits, just because Judge Frank failed to enunciate it. Certainly there are eminent voices making the plea, and surely the author cannot contend that wrongful, but legal, governmental invasion of privacy in other areas justifies invasion here.

We suspect the real foundation for Mr. Mayers' strong belief can be found in his examples where the privilege has been abused, and consequent to the abuse, substantial areas of collective, unlawful conduct go unchecked. He points out that the privilege is being abused in various settings, some of which apparently have serious consequences to society. In the reviewer's opinion, this involves the real question confronting us as Americans. Is the price too high? Of how much value is the privilege in practice, and as a symbol, in its present extended state? What is the cost to our society from its deterrent effect on law enforcement? Mr. Mayers' book does point out enough instances of abuse to raise doubts, and serious ones, in the minds of most of us. Despite the reviewer's critical

[15] Mayers 162-63.

approach, the book raises problems which should not, indeed cannot, be ignored by thinking Americans. If it is justifiable to allow a health inspector to search without a warrant homes suspected of harboring rats, as held in the *Frank* case,[16] it may be time to examine carefully how beneficial the right to silence is to intelligent, organized criminal groups, and how threatening these criminal groups are to our country. Perhaps the privilege is an enshrined constitutional myth which is used to undermine the very freedom that it was designed to protect. However, it would seem that such an established principle deserves at least a presumption of its validity—a presumption rebuttable only by facts produced from a scientifically objective investigation. The arguments advanced by Mr. Mayers seem insufficient to meet this requirement. A partial solution might be afforded by having a congressional subcommittee tackle the problem of gathering large scale factual data.

In termination, the reviewer would like to present one of Mr. Mayers' last forays with Dean Griswold:

> Dean Griswold also summons to his aid the words of Justice Field, already quoted: "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one and needs no illustration." Yet the essential and inherent cruelty of the procedure does not prevent its use in every department of life except the law. Suppose that evidence were laid before Dean Griswold warranting the suspicion that one of his students, called upon to submit an essay to satisfy the requirements of the faculty, had employed another person to prepare the essay and had submitted it as his own. Would the Dean regard it as an essential and inherent cruelty [sic] to demand of the student that he explain away the evidence? Would not the dean regard the student's refusal to offer an explanation as of itself sufficient ground for his expulsion from the school—a fearful penalty.[17]

The analogy is inaccurate. Alleged criminal conduct punishable by the state is not the same as conduct in private affairs among persons and institutions. Yet, it could well be that the spirit of the privilege should be weighed for application in private affairs. In making such a determination, one must remember there are weighty differences between public and private sanctions and public and private resources for investigation. If, after such determination, the privilege is found inapplicable in private affairs, one still observes that the student in Mr. Mayers' example is under no legal compulsion to answer. He simply bears the risk of added suspicion because of the refusal, much like the silent witness in legal proceedings.

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[16] Frank v. Maryland, 359 U.S. 360 (1959).

[17] Mayers 168.