Michigan Law Review

Volume 59 | Issue 2

1960

Mayers: Shall We Amend the Fifth Amendment?

B. J. George Jr.
University of Michigan Law School

RECENT BOOKS

SHALL WE AMEND THE FIFTH AMENDMENT? By *Lewis Mayers.* New York: Harper and Brothers. 1959. Pp. x, 351. $5.

Most of the provisions of our federal and state constitutions have a rather clearly-defined history. Naturally their application has been extended to situations which the drafters never envisioned, but there is nevertheless continuity which can be traced, and enforcement of policies not completely inconsistent with the resolution of problems of policy choice which existed at the time the provisions came originally into effect. Some provisions, like the due process clauses, had no precise meaning at their inception, and thus have allowed maximum flexibility of decision to the courts, but even in this instance there is usually a gradual evolution of legal doctrine which is capable of historical and legal analysis and explanation. But such a process of analysis and explanation is extremely difficult in the case of the privilege against self-incrimination, the actual subject matter of Professor Mayers' book, *Shall We Amend the Fifth Amendment?* The privilege is often stated to be one of the traditional bulwarks against arbitrary government invasion of individual liberty,[1] and it is commonplace to cite the excesses of the Court of High Commission, particularly in connection with actions brought against John Lilburne,[2] but the fact is that there is little in the way of historical evidence by which we may trace our common American constitutional language to these historical events.[3] There is no clear indication of what the drafters had in mind at the time of the adoption of the fifth amendment, but from the context in which the self-incrimination provision is found it is rather evident that it was aimed at protecting the defendant in a criminal case against being the source of testimonial evidence against himself. There seems to have been no purpose to create as a constitutional device or to raise to the level of constitutional doctrine an evidentiary witness privilege which arguably may have existed at least in rudimentary form at the time.[4] Indeed, the author suggests that at most the provision was intended to guard against the possible resurgence of purely administrative abuses which some of the earlier royal governors had committed in investigating what was from the point of view of the royal government treasonous or otherwise undesirable conduct.[5] If so, there seems to be no substantial continuity between the present highly technical and extremely

[1] Chapter 11 of the principal work brings together a number of leading examples of such statements.

[2] 3 HOWELL, STATE TRIALS 1316 (1816) (seditious libel — 1637); 4 *id.* 1269 (high treason — 1649). Their significance is summarized in the principal work at page 14 and notes. See also GRISWOLD, THE FIFTH AMENDMENT TODAY 3 (1955).

[3] This forms the theme of the author's discussion in chapter 12, "The Irrelevance of History."

[4] See the principal work at pages 197-215 and 233-241 for the development of the witness privilege in federal practice.

[5] Page 219.

beneficent (to the possible criminal or the exceptionally shy) body of law subsumed under the term "privilege against self-incrimination," and what was probably considered at the time of the adoption of the amendment as a safeguard against administrative abuses which might possibly be revived at a future time.

Even if one rejects as unimportant the question of historical explanation and justification of the doctrine, and considers the problem to be one of balancing standards of personal liberty against the legitimate needs of modern society, it is difficult to make sense out of the present law of self-incrimination. The amendment refers to criminal cases, but it has probably its broadest application in proceedings other than criminal trials.[6] It is stated to rest on the idea that no person should provide the (first) accusation against himself, but in fact it is invoked to prevent a witness having to give the slightest testimony which might have the least possibility of helping the prosecutor along in some for the present hypothetical prosecution.[7] At times it is stated to be designed to prevent torture,[8] yet it is not applied to confessions obtained through police interrogation or, in most jurisdictions, to evidence obtained by means of other methods of police investigation.[9] It is proclaimed as a bulwark of individual liberty, but its partisans ignore its practical impact in preventing some defendants from proving their innocence,[10] or some injured plaintiffs from establishing what outside the courtroom would be felt to be a legitimate claim for compensation,[11] or some prosecuting attorneys or grand juries from establishing the identity of the perpetrators of an offense, the existence of which is beyond cavil,[12] or some legislative committees from determining facts on which needed legislation or legislative changes might rest.[13] Though it is held up as a doctrine

6 Chapters 7 and 8.

7 "In this setting it was not *'perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) *cannot possibly* have such tendency' to incriminate. . . ." Hoffman v. United States, 341 U.S. 479, 488 (1951).

8 "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being." GRISWOLD, *op. cit. supra* note 2, at 7.

9 Chapter 5. Compare the application of the rule so as to prevent any questioning by the magistrate at the preliminary hearing, discussed in chapter 4.

10 See pages 30 and 117-121.

11 Page 123. Chapter 10, "The Holder of a Position of Trust," is also worthy of note as it points out that protection is accorded the person who has violated a public or private trust to the degree that it often becomes difficult to call him to account.

12 The author at page 68 cites the Emmett Till lynching case as an excellent example.

13 Chapter 8.

for the protection of the private citizen about to be caught in the toils of the law, an almost medieval doctrine of waiver is applied by many courts which manages to deprive those persons who perhaps need it most of any effective protection.[14] The discussion of these vagaries and inconsistencies forms a large portion of the principal work, and constitutes a welcome addition to a field in which much of the writing rather uncritically accepts the present state of law governing the privilege as historically sound and of unimpeachable desirability in today's social and legal situation.

The author's conclusion is that amendment of the federal constitutional provision is the only way to restore some degree of balance between the desire of the individual to keep private information which he may have and the needs of the legal system to have a systematic development of relevant facts in judicial, administrative and legislative hearings. He advocates constitutional amendment of the privilege to approximate the present coverage of Canadian law,[15] and cites the example of the New York Constitution to illustrate the fact that state constitutions can be amended successfully in this area.[16] But in considering the need for and propriety of amending the various privilege provisions, the chief thing to keep in mind is the fact, which the author points out at several places, that the present body of law covering the privilege (s) against self-incrimination is purely one of judge-made doctrine, the inception of which for practical purposes is the case of *Counselman v. Hitchcock in* 1892,[17] and the chief development of which has been in the hands of many of the present Supreme Court Justices. So long as the Supreme Court of the United States and at least some of the state supreme courts are willing to extend to the utmost degree in favor of private appellants an inherently vague concept of human freedom, dignity or right of privacy, created by them without reference to the actual language of the constitutional provisions, to constitutional history

[14] Pages 49-51.

[15] "(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence." Canada Evidence Act, CAN. REV. STAT. ch. 307, § 5 (1952).

[16] In 1938 Article I, § 6, of the NEW YORK CONSTITUTION was amended to include: ". . . providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

[17] 142 U.S. 547 (1892).

and to the existence of troublesome facts inconsistent with, and therefore apparently irrelevant to, the conditions of orderly law enforcement which they have stated on numerous occasions to have been achieved by their judicially-created rules, amendment of a constitutional provision is not likely to make much difference; the same idea will only appear in a different form under another constitutional provision.

An example of this may be found in recent decisions of the Michigan Supreme Court. Some years ago the court took the unorthodox position that the privilege against self-incrimination prohibited the acquisition of any evidence from a non-consenting subject and thus prevented the police from ordering the physical examination of a rape suspect.[18] After the lapse of a number of years the court was asked to strike down a conviction based in part on evidence consisting of photographs taken shortly after the defendant had been arrested for rape, showing scratches on his body.[19] It refused to consider the point on the ground that the matter had not been properly raised, but indicated in passing that the concept of privilege was held by most modern writers not to be properly applicable to anything but testimonial utterances. Finally, in a recent case it held it would confirm the usual rule to this effect.[20] But within a short period of time it held,[21] without analysis of the facts or consideration of its earlier decisions defining the scope of proper search and seizure by police, that the search and seizure provision of the Michigan Constitution created a general right of privacy which was unconstitutionally invaded when a hospital employee took a blood sample from an unconscious defendant and turned it over to a state trooper, and further and most significant, that the summoning of the officer as a witness for the plaintiff in a civil action arising out of the defendant's apparently negligent conduct was error, though not such as to require reversal in light of the ample evidence in the case.[22] Thus Michigan may have been brought within the usual rules covering the privilege against self-incrimination, but the Michigan court's hypersensitive concern for the

[18] People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928).

[19] People v. Placido, 310 Mich. 404, 17 N.W. 2d 230 (1945).

[20] Berney v. Volk, 341 Mich. 647, 67 N.W. 2d 801 (1955).

[21] Lebel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958).

[22] The court did not consider it necessary or appropriate to examine the question of why the officer's conduct was illegal or unconstitutional, or how police conduct might be regulated in the future by the judicial device of excluding evidence in a civil case brought to recover compensation for harm done to a blameless citizen through the defendant's illegal and negligent conduct. For a criticism of other "visceral" decisions in the area of search and seizure handed down recently by the Michigan Supreme Court, see Waite, Comment: *Search and Seizure — Suppression of Evidence — Judicial Attitude Toward Enforcement,* 58 MICH. L. REV. 1044 (1960).

[23] Less changeable, in the sense that MICH. CONST. art. II, § 10 (1908) has been twice amended to carve out exceptions to the exclusionary rule of evidence earlier adopted by the Michigan Supreme Court. This no doubt supports the court's belief that it is laying down pure constitutional doctrine in its sweeping extensions of its control over police

"right of security of (the) person" has merely burgeoned in a different, and less readily changeable,[23] way.

Justice Holmes said that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[24] But to the reviewer it is equally revolting that no better reason can be laid down for a rule than that the court's decision is required by standards of human dignity, decency, privacy or whatever.[25] Too often such statements are considered as a more than adequate substitute for examination of constitutional precedent and consideration of the actual results which may be expected to flow from the adoption of each of several available rules, including questions of what benefits or deprivations other groups in society will experience if a particular group, *e.g.*, witnesses in civil cases or before legislative committees, is singled out for especially considerate treatment. Too often, decisions resting on broad constitutional platitudes are capable of being interpreted as based in fact on the unstated assumption that the judiciary, rather than the executive or legislative branch, is best able to determine the direction which government should take and what resolution of conflicting policies is best for the future of the nation, and that

arrest and search activities in the guise of enforcing the constitutional prohibition against unreasonable searches and seizures by excluding evidence obtained by the police.

[24] *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[25] The following quotations illustrate the point:

". . . And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Boyd v. United States, 116 U.S. 616, 631 (1886).

"The effective enforcement of a well-designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy . . . ." Feldman v. United States, 322 U.S. 487, 489 (1944).

"The privilege against self-incrimination is a right that was hard-earned by our forefathers. . . . The privilege, this Court has stated, 'was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions.' Co-equally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure.' . . . To apply the privilege narrowly or begrudgingly — to treat it as an historical relic, at most merely to be tolerated — is to ignore its development and purpose." Quinn v. United States, 349 U.S. 155, 161 (1955).

"I heartily agree that the Fifth Amendment should be preserved, not diluted by doubtful interpretation — preserved more for the benefit of those of us who would demonstrate a true belief of democracy and the potent power of our democratic institutions than of the immediate beneficiaries of its claim. . . ." Clark, C. J., concurring in United States v. Trock, 232 F.2d 839, 844 (2d Cir. 1956).

these determinations and resolutions are unassailable if bottomed on "sacred" constitutional principles.[26] Professor Mayers' book provides a needed and realistic look at what to the reviewer is one of several manifestations of an all too prevalent contemporary judicial attitude which borders on the arrogant.

B. J. George, Jr.,
Professor of Law,
University of Michigan

[26] ". . . Of course, the courts ought to be cautious to impose a choice of values on the other branches or a state, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear. That I suggest is all that self-restraint can mean and in that sense it always is essential, whatever issue may be posed. The real test inheres, as I have tried to argue, in the force of the analysis. . . ." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 25 (1959).