Fordham Law Review

Volume 28 | Issue 3 Article 11

1959

Book Reviews

BOOK REVIEWS

DELAY IN THE COURT. By Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz. Little, Brown & Co., Boston: 1959. Pp. 313. $7.00.

This most stimulating book introduces the lawyer to the research techniques of the social scientist, particularly the technique of measuring or "quantifying" the validity of a proposition. The book is concerned with judicial administration. Nevertheless, the lawyer reading it will find himself lifting his eyes from the page, wondering whether in the development of substantive law, a similar quantifying methodology should not supplant the familiar dogmatism of the bench, that such and such a rule is "just" or that it is "not just."

The book is an outgrowth of studies regarding trial by jury, conducted by the University of Chicago under a Ford Foundation grant, which are now in process of publication in a series of five or six volumes. The problem here presented, delay in litigation, which has been published separately from the series, is of great concern to-day due to the large increase of litigation during recent years.

Although the content of the work is narrow in scope—dealing, as it does, largely with the business of a single court, that of the Supreme Court of New York County—the conclusions nevertheless have at times a universal validity.

In the Supreme Court of New York County, a trial of a case before a judge without a jury takes, according to the authors, 40% less time than a trial of the same case without a jury. However, it is not likely that in the near future juries will be abolished or automobile accident cases tried before an administrative agency. Nor is it likely that we will soon develop a climate of opinion, such as that prevailing in England, under which the bar will itself waive trial by jury for the most part in civil cases. And so, the authors conclude, one cannot reasonably look for such measures of relief (even assuming them to be desirable) from our difficulties.

But something can doubtlessly be done in many jurisdictions toward speeding up jury trials. For some undefined reason, a jury trial of a personal injury case in New Jersey takes, on the average, 40% less time than it takes in New York. This is a matter that bears further study. The pretrial conference as conducted by certain judges in New Jersey has doubtlessly some effect here, in that such judges really induce the lawyers before them to analyze and state, and then to reduce and simplify, their respective factual contentions. But other factors are of importance, such as a practice in certain jurisdictions, including New Jersey, whereby judges are expected, indeed required, to keep a firm hand on the trial, sharply thwarting all attempts on the part of attorneys to adduce cumulative testimony or to clutter the record with technical objections. The authors poke some fun at one estimate that 23 members of the English High Court conducted twice as many trials in a year as their 43 counterparts in the New York Supreme Court in certain counties. But this is rather a matter for sober reflection.

How indeed may we raise the standards of the trial judge so that he will emulate the ideal jurist who courteously sees to it that trials are not unnecessarily prolonged? Should we attempt to establish schools for judges in the manner in which the bench and bar of New Jersey were educated as to the proper function of a pretrial conference, or in the manner of the Institute of Judicial Administration?

Aside from any attempt to increase the efficiency of our judges, the book vouches for two specific remedies, which, to some appreciable extent, have reduced the number of trials. First, there is the use of the impartial medical expert. In the Supreme Court of New York County, the judge, usually the pretrial judge, is empowered to require the plaintiff to be examined by a physician (now paid for by

New York City), who is selected by the court from a panel of experts set up by medical societies. His report is a public record. Either party or the judge may call him as a witness.

Second, the authors refer to the certificate of readiness. In the same court, a case will not be put upon the calendar unless the parties certify that they have completed discovery and discussed the matter of settlement. This device seems to have reduced the commercial calendar. However, the rule has been sharply questioned in the District Court for the Eastern District of New York. Many lawyers, it was discovered, filed such certificates without regard for their truth. Thus it was found that of some 800 to 1000 cases pending for two or more years after the filing of the certificates, discovery had not been completed in a third of the cases.

A pointed question from the judge at the pretrial conference and a pretrial order precluding further discovery would seem to be more effective than a certificate of readiness. But pretrial involves the use of judicial time, and the authors question whether—if one considers solely the matter of settlements—it justifies the use of that time. Some judges obviously have more ability than others in producing settlements at pretrial conferences. But the question then arises whether settlements thus effected are just.

One means of reducing delay in the courts is to require trial judges to turn in records showing time spent on the bench. When this reviewer was sent by Chief Justice Vanderbilt to Washington in 1948, just before the inauguration of the present New Jersey court system, to consult with the then Administrator of the United States Courts on the matter of court administration, he was told by the latter that this was quite out of the question—that is, judges just should not and could not be asked to file time records. But, one may ask, why so? Why should jurists not be held accountable for their time? Such records have been required in New Jersey since 1948.

In New Jersey, as the authors note, half as many trial days are lost per year (6.3%) as in New York (26 out of 196 trial days; or 13.4%); and the New Jersey trial day is, on the average 4.5 hours a day, 10% longer than in New York where it is 4.1 hours a day. All told, the New Jersey judge seems to put in 19% more trial time than the New York judge. To be sure, there is some falsification by New Jersey judges of the time records they submit, but not too much.

The authors refer to another matter with an amusement others may fail to discern. In New York, 36 per cent of the total loss of judge-days falls on Fridays, with additional encroachments on Thursdays and even Wednesdays in the week before recess periods. This apparent failure on the part of the judiciary in New York to give a full measure of service in the performance of its duties may be due not only to the lack of a firm centralized administrative control requiring time records, but also to a constitutional system, such as that existing in New York, providing for the selection of judges by party machines, rather than by some more appropriate method as nomination by the chief executive of the State and approval by the Senate, which is in force in New Jersey.

A summer session, which is very unpopular with both the bar and the bench, is another effective means of reducing backlogs. The 1956 summer session in New York County cut down the backlog by 13%, adding, on an average, two court weeks to each judge's year. However, the authors note, these sessions are apparently not being continued in New York.

It is claimed that auditors in Massachusetts and arbitrators in Pennsylvania have almost solved the problem of congestion in those jurisdictions. But the question there-

by raised is whether at the same time such methods have not diluted that quality of justice so jealously guarded by the law.

One other matter in the book calls for some comment. The authors urge generally that deliberate scientifically-conducted experiments be officially undertaken, requiring one group of litigants to use one procedural device and another group to use an alternative type. But there is an obvious limitation upon experiments with *justice*. Procedures may have a practical effect on substantive results. The denial of a jury trial in a personal injury case, if constitutional—or compelling some waivers of such a trial through drastic increases in jury fees—or the use of arbitrators or auditors in place of judges, are all forms of procedure which will affect the amount of the plaintiff's recovery. The law should not tolerate an *experiment* here. It has a duty to exercise judgment, and decide which is the more just mode of procedure, and then adopt that mode if the state can reasonably afford it.

The question is not primarily (as the authors here seem to think) whether the experiment is violative of the equal protection clause. The state, perhaps constitutionally, may sacrifice the concerns of the individual litigant in the interest of securing justice in the long run. But the law is consecrated to the service of the individual. The intellectual skepticism of the law school which encourages such experiments with humans (as with chemicals) is admirable, but only within limits. Only where the experiment can have no effect upon the substantive rights of the parties, as in the case of an experiment with the certificate of readiness, or when it can be said with assurance that, so far as can be judged, both theses being tested will have a like effect on these rights should the experiment be permitted.

Delay in the Court is a suggestive, but not an exhaustive, treatment of the subject. A number of familiar specific remedies are not analyzed. Would litigation be decreased, and a just result obtained, by taxing the loser with the winner's full counsel fees, as in England? Should procedures be devised to compel higher courts to transfer to lower courts with speedier dockets those cases which are probably within the lower court's jurisdiction? Should courts adopt a "get tough" policy on continuances? Should retired judges be required to serve, if able to do so? Should the examination on the voir dire be conducted by the court, with counsel permitted to submit additional questions to be asked by the court, if the court deems it advisable? Should standardized charges be used? Should certain holidays, along with Christmas and Easter recesses, be eliminated? Should motions be scheduled for Saturday morning? Should the attorney general be given a staff which can be loaned to district attorneys in those counties where criminal courts are congested? Many more specific remedies come to mind which are applicable to situations in particular jurisdictions.

Nevertheless, it must readily be agreed, *Delay in the Court* is a very refreshing, most stimulating work.

ALFRED C. CLAPP†

† Dean, Rutgers University School of Law, 1951-1953; Senior Judge, Appellate Division, Superior Court of New Jersey, 1953-1958; presently, Chairman, New Jersey Supreme Court's Rules Committee.

TRIAL BY AGENCY. By E. Barrett Prettyman. The Virginia Law Review Association, Charlottesville: 1959. Pp. xii, 60. $2.00.

Judge Prettyman has sat for fourteen years as a judge of the Court of Appeals for the District of Columbia. That court has, perhaps, a greater number of administrative law matters than any in the country. To deal only with the grist from the Federal Communications Commission, most of whose actions are exclusively appealable to this court, is a constant incitement to reflection on the unruly divigations of administrative law. The judge is a conservative. But he is, at the same time, thoroughly aware that the vast range of complexities of our economic and social life have inevitably brought into being new organs and new procedures for the authoritative creation and enforcement of public policy. He would not compel all solutions to follow the forms which were held to be adequate to the solution of problems of earlier ages. Thus, though he is sympathetic to the demand for judicialization of the adjudicatory processes, he believes that the demand cannot be effectively met by invoking a uniform conception of a court. "You will not be able, I suggest, to put into one tribunal all the adjudicatory functions which the government will have to perform. Even if you have specialized courts, you will have from among the fifty or sixty presently operating agencies many adjudicatory functions which will not fit into that pattern." (p. 57) It is true that the French have devised a single administrative court, the Conseil d'État, but I have the impression that French regulation does not have our scope, intensity or dynamism. The English, on the other hand, have a great number and variety of adjudicatory tribunals, alike only in their devotion to the principles of judicial fairness and impartiality.

Judge Prettyman's opening lecture is devoted to the proposition that "the function of an agency is the administration of law: no more, no less." (p. 5) "We often hear of administrative discretion. There is such a thing. But administrative discretion is no broader or stronger in its field or legislative discretion in its field, or executive discretion in its field." (p. 8) "There can be no discretion outside the law." (p. 9) There is no doubt that there have been periods during the last few decades when the spirit, if not the letter, of these ideas was not only ignored but derided. I agree with the basic importance of Judge Prettyman's proposition and I derive from it the proposition that the scope within which discretion operates is always a question of law to be determined by the courts. But I cannot agree when the judge goes on to say: "If I had my way with the administrative agencies, I would have the assembled staffs roar each morning in unison. 'The operation of this agency is the administration of law.' If they knew that basic theorem and kept it in mind every day in every task, they could easily figure out the rest of it." (p. 11) I am very much afraid that a staff which daily intoned this litany would become more concerned to stay within the limits of the law than to rack their brains for creative solutions to problems. The Federal Communications Act, for example, directs the Commission to further "the public interest" in the field of telecommunications but tells it almost nothing about how to do it. The New Deal's activity gave great currency to the stereotype of the free-wheeling bureaucrat afire to impose his will irregardless of the law. But there has been just as widespread a tradition of the bureaucrat as red-tape bound, no-chance-taking, keep-within-the-law at all costs. It would be hard to say which, over the span of the centuries, is the more true to the fact, but I would venture that it is the latter.

I do not associate myself with the present undiscriminating disenchantment of certain erstwhile enthusiasts of the administrative process. It is the reaction

of the lover whose infatuation began by robbing him of all discrimination and who thought that his new-born angel would lead him down endless paradisal promenades. Yet it must, I think, be admitted that the agencies are at present somewhat committed to sanctified solutions, somewhat lacking creative drive. I don't think that the judge's matutinal exercises would help much.

Judge Prettyman's second lecture gives detailed and useful advice for the preparation of an administrative proceeding. He has in mind, particularly, the "economic" case, e.g., a rate case (as opposed, let us say, to an unfair labor practice or deportation case). He stresses the primary importance of the written record. The traditional pyrotechnical and forensic skills of the lawyer are irrelevant; the triumphant cross-examination almost non-existent. The accolade goes to a careful, complete, far-seeing, constructive analysis embodied in a fully realized record of evidence. Similar skills, however, are equally applicable to judicial proceedings—and to negotiations—involving corporate or trust matters, etc. The chapter's usefulness, therefore, extends beyond administrative proceedings.

The third lecture is a good, short summary of the movement for the reform of administrative organization and procedure which has been sparked by the lawyer demand for judicialization. As indicated above, Judge Prettyman is a conservative moderate. He shares the general aim of the movement. But his experience and his intellectual balance preserved him from undue insistence on the traditional judicial uniformities. Recent events, by the way, suggest that we should for the next little while be more concerned with the infirmities of the independent agency as a policy-maker than its dangers as an adjudicator. We may be in the process of finding out that the two concerns are not inevitably conflicting. Increased separation of function may in some cases strengthen both policy-making and adjudication. Exploration of this hypothesis, I suggest, is the most important item on the current agenda.

LOUIS L. JAFFE†

HUMAN RIGHTS AND WORLD ORDER. By Moses Moskowitz. Oceana Publications, Inc., New York: 1958. Pp. 240. $3.95.

In 1946, three of the oldest and most important Jewish organizations, (*Alliance Israelite Universelle*; American Jewish Committee; and the Anglo-Jewish Committee), established the Consultative Council of Jewish Organizations. Since March 1947, when this organization was admitted to consultative status with the Economic and Social Council of the United Nations, Mr. Moses Moskowitz, the author of this book, has represented it. For the past dozen years, therefore, he has been an on-the-scene observer of many developments at the United Nations, has been personally associated with its initiatives, and has participated in discussions and negotiations in connection with the Universal Declaration of Human Rights and the draft international covenants on human rights.

Before he had assumed this post, Mr. Moskowitz had specialized in international law and relations at Columbia University; had been on the staff of the American Jewish Committee as its expert on Eastern European affairs; and served as secretary of the same Committee's Institute on Peace and Post War Problems until the advent of World War II and his entrance into the United States Army. Seeing service at home and abroad, Mr. Moskowitz ended his military career (1946)

† Byrne Professor of Administrative Law, Harvard University, School of Law.

as Chief of Political Intelligence, United States Military Government for Wuertemberg-Baden. It was shortly thereafter that he became secretary-general of the Consultative Council of Jewish Organizations.

Although he writes from the vantage point of the post he has filled these past dozen years, the author has not written an official report. He expresses his own opinions and convictions. In so doing, Mr. Moskowitz has centered his sights on human rights as the basis of world order. "It requires no long examination of the Charter of the United Nations to ascertain," the opening sentence reads, "that the promotion and advancement of human rights and fundamental freedoms is one of the pillars on which the international organization has been raised." "However, as we review the efforts of the United Nations to fulfill its Charter responsibilities," says the author in conclusion, "we find that the techniques and methods which have been successfully employed to promote economic and social objectives, have for the most part proved totally inadequate to promote the human rights objectives." (p. 159).

Why this at least partial failure? Mr. Moskowitz locates the trouble spot in the principle of national sovereignty consecrated in Article 2(7)[1] of the Charter. Underlying this Article, the author maintains, lurks a political philosophy of national sovereignty which not only tends to pit state against state, since each is given the status of a supreme power and of a law unto itself, but which also, and more to the point here, implies that the state is the first source and last arbiter of whatever "rights" it may *de facto* grant its citizenry. What redress, then, does a citizen have against his government if it violates basic human rights? Furthermore, argues the author, unless there is a world community based on human rights, rather than on a plurality of independent sovereign states, refugees, especially those fleeing a state which violates human rights, and "stateless" persons have no internationally established juridical means whereby they can render effective their human rights.

What must be done, he insists, is that the human person and not the state must be made the center of international cooperation. "The ultimate common denominator and the point at which all conflicting interests ultimately converge, is man. Man, therefore, and not the state of which he is a member, must become the measure of all international endeavor. In their essentials, man's interests are the same everywhere and they spring from the same inalienable sources." (p. 20). The modern state, Mr. Moskowitz tells us, emerged when the king succeeded in extending his authority directly over the individual subject of his realm. "By the same token, an international order capable of inhibiting the excesses of the different political jurisdictions and of synchronizing the interests of the different geographical areas, can become a reality only in conditions in which the human person is recognized as the immediate object of all international concern." (p. 21).

Concretely, one might ask, how is this to be accomplished? International agreements and the preparation of treaties, conventions and other legal instruments are among the means which the author proposes as available to the United Nations for the promotion of human rights and fundamental freedoms. Such legal instruments which trace with precision the commitments and obligations assumed by governments

1. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

and delineate the limits of power, have the added advantage, he continues, of circumventing the provisions of the domestic jurisdiction clause, Article 2(7).

The potentially constructive force of the Universal Declaration of Human Rights, proclaimed by the General Assembly on December 10, 1948, "as a common standard of achievement for all peoples and all nations," was rendered in large measure inoperative, Mr. Moskowitz contends, because it lacked legal enforcement. Of itself, he realizes, it was never meant to have legal consequencs. He finds this easily understandable since, "no member state is willing to submit to a procedure which exposes them to the risk of being arraigned before an international forum where the very definition of human rights, let alone the determination of the facts in a case, is necessarily a political act, and which sets limits neither to the competence of the bodies before which governments must be arraigned, nor to the subject matter of the charges for which they may be cited." (p.80) Education and the formation of public opinion were deemed the best methods of rendering the Declaration effective while avoiding the problem of exposing it to the vagaries of the international political arena. But these methods, the author is convinced, though necessary and helpful, are, of themselves, insufficient to insure the rights of the individual against sovereign states.

He sees, therefore, in the adoption of the covenants on human rights drafted by the Commission on Human Rights during 1948-1954 (and under consideration by the General Assembly ever since), the only procedure by which the principles embodied in the Universal Declaration of Human Rights may be endowed with legally-binding attributes capable of international enforcement. The purpose of these covenants, which would bind only those governments willing to subscribe to them, would be to establish certain international rules of conduct and conscience which would guarantee the observance of the covenanted rights and freedoms.

Along with international legal instruments, equally imperative for the effective promotion and preservation of human rights is a machinery of implementation. And the author readily admits that of the many issues which confronted the Commission on Human Rights the most important and the most difficult related to the need for creating a special agency of implementation. The problem is not so much to obtain the cooperation of the various nations on an international scale. This is presently being done with some measure of success principally in regard to the control of atomic energy for useful and peaceful purposes. But in such a case, even though there must be some diminution of the sovereignty of individual states, state deals with state. The key problem of human rights centers once more on the domestic jurisdiction clause. Mr. Moskowitz finds that in the present draft articles of implementation elaborated by the Commission, the right to initiate proceedings with regard to a violation of human rights is restricted to state parties. Furthermore, no government is compelled to invoke the covenant in case of its violation by another signatory government. Now the point at issue, the author notes, is the protection of human rights which are inherent in individuals. And since individuals would be the victims in case of a breach of the covenant, it would be fitting that they be given an opportunity of seeking redress without the intervention of a foreign government.

"With the exception of the Soviet Union, which has consistently defended the traditional concept of international law as governing exclusively relations between states, the objections to the right of individual petition have been defended on grounds of procedural and administrative considerations, of the implications of this right in an agreement of such scope at the covenant, and on grounds of the political consequences which might flow from the right of individual petition in a world sharply divided." (p. 115). With regard to this last point, the author is well aware

that a hostile government could readily exploit this right for its own purposes, by encouraging dissident groups and individuals in a particular country to harass their own governments by flooding the international body with all kinds of tendentious petitions and complaints. Despite these risks, Mr. Moskowitz maintains, a method must be found, because he is convinced that it is generally accepted today, as part of international law, that protection be afforded the rights and interests of individuals, who are members of a state or stateless, against sovereign states. A method, therefore, must be adopted consonant with the legitimate interests of the state parties, as well as those of the individual and the organized international community, totally free from political pressures and counterpressures.

This method is already at hand, Mr. Moskowitz contends, in a proposal made by the delegation of Uruguay at the fifth session of the General Assembly in 1950. Obviously, it is impossible for this reviewer to summarize this plan since its merit precisely consists in its carefully thought out procedures. Let it suffice to call attention to the fact that Mr. Moskowitz finds it to be the solution of the problem of an international system of procedures for guaranteeing the individual a hearing before a non-political international tribunal. In general, the plan calls for the election of a United Nations Attorney-General (High Commissioner) for Human Rights by the General Assembly, for a period of five years, from among the candidates nominated by states parties to the covenant. This Attorney-General could "receive complaints from individuals, groups and other private bodies and associations alleging infractions of the covenant. He would undertake their preliminary examination and investigation and seek a satisfactory settlement by negotiation with the state party concerned. Where sufficient ground for doing so existed, the Attorney-General would present the case before the Human Rights Committee for examination and determination of the substance of the complaint. As the agent of the international community the Attorney-General would plead not the case of the individual or group, but that of the international community. At the same time, the private petitioner would be assured that in the case of infraction of his covenanted rights, his complaint would be heard without the intervention of a foreign government." (p. 146) Of course, in this Uruguay-sponsored plan, the role of the International Court of Justice would have to receive a more strengthened position than it now has.

That, I believe, is a general but not too inaccurate analysis of the thesis of the book under review. Much of what the author has written is factual background material pertaining to the United Nations. With that general descriptive material, no one would radically disagree. Sharp disagreement would arise over the central question of the book: the problem of domestic jurisdiction of the state vis-à-vis the individual and the world community.

This disagreement would range, I should think, from that of the America-First advocate, who views the whole of the United Nations and any movement toward sources of international jurisdiction with the greatest of suspicion, to that of the person who opts for international order based on international law but finds many thorny problems in the question of jurisdiction. Some might feel uneasy, for example, that nowhere in his book does Mr. Moskowitz define what he means by a "human right." It is certainly clear that he has an aversion for the strictly positivistic legalist. And he does indicate that generically he holds a human right to be a God-given, innate or natural right. For practical purposes, the author appeals to the Universal Declaration of Human Rights as the statement of basic human rights. Those who have read that document and have a working knowledge of law would find those statements extremely general and vague. Concrete meaning would have to be given to those articles in terms of the person(s) interpreting the article involved in a given dispute.

One might fear, then, that an unacceptable construction might be given in a concrete case, especially in view of the abyss which separates the western democracies from Soviet Russia in their political philosophies of human rights and freedoms.

But if I read Mr. Moskowitz correctly, it is precisely in the light of such difficulties that he advocates a treaty by treaty procedure, negotiating clearly and in terms of legal limits and sanctions. While this does not eliminate all dangers, it certainly minimizes them.

In a democracy, truly so called, the political authority rests in the people primarily, but is invested in its form of government. The people feel safe, without reason, that their natural rights will be protected precisely because they have, within limits, a guarantee within the form and structure of their government. The problem at present in setting up international forms of jurisdiction is precisely how to do so and *still* maintain those human rights and freedoms embodied in and protected by law in the democratic West. This again Mr. Moskowitz hopes to obtain through legal instruments as indicated.

My own convictions are that the world will have to move in the direction which Mr. Moskowitz has pointed out so well in his book. But there will also have to be much more public education on the subject to acclimate peoples of individual states to such moves. One very fine approach in this direction has been made by the American Bar Association in its release of the very well-argued and well-documented report on the Self-Judging Aspect of the United States' Domestic Jurisdiction Reservation with Respect to the International Court of Justice. It clearly points out that the self-judging clauses have impaired the effectiveness of the International Court of Justice; and the self-judging clause of the United States has impaired its leadership of the free world. In my own opinion, if there had existed a genuinely structured and legally constituted body with recognized jurisdiction prior to World War II, there would not now exist the still unsettled question of the legal jurisdiction for the Nuremberg Trials.

JOSEPH D. HASSETT, S.J.†

SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. Harper and Brothers, New York: 1959. Pp. 345. $5.00.

The title of this excellent book is a little misleading. The author neither proposes any specific amendment to the fifth amendment nor discusses ways of securing an amendment and the respective advantages and disadvantages of efforts to do so. Rather he analyzes the history of the privilege against self-incrimination and its present application by the courts. He concludes that recent decisions have extended the privilege beyond all historical or other reasons and have thereby gravely handicapped governmental investigation and law enforcement.

Professor Mayers' criticism applies partly to the actual holdings in these decisions. To some extent he criticizes remarks and arguments made in opinions whose final result he approves. The book is not, however, wholly or even primarily criticism. It is rather history and analysis; criticism is incidental.

The work is most scholarly and is devoid of the airy and emotional generalizations which have unfortunately characterized so much discussion of this subject. In the course of his book, Professor Mayers thoroughly establishes that the fifth amendment (in so far as it provides a privilege against self-incrimination) was only intended to provide that in a criminal prosecution the accused could not be required to testify;

† Chairman, Philosophy Department, Fordham University, School of Education.

that while at common law a witness did have a privilege against self-incrimination, this privilege was not embodied in the fifth amendment; that the vice of the Court of Star Chamber was not compulsory interrogation of suspects; that a requisite of the common law privilege was that the judge before whom the claim of privilege was made could realize that an answer to the question might be a "link in a chain" of evidence showing the witness guilty of a crime; that the privilege does not in fact protect the innocent when claimed before an orderly tribunal, as distinguished from police officers using the "third degree"; that the privilege in such progressive and democratic countries as Great Britain and Canada has been sharply limited without noticeable adverse effect; and that, on the contrary, in the United States, the privilege has been greatly expanded.

To consider the important question asked by the book's title, "Shall We Amend the Fifth Amendment?" Although, like Professor Mayers, I believe that the fifth amendment has been erroneously construed in recent years, this can be attributed to a passing phenomenon, viz., the investigations undertaken by congressional committees of teachers and intellectuals who had been involved in Communism.[1]

Rightly or wrongly, these investigations were greatly resented by a substantial element of the liberal intelligentsia. Many teachers and intellectuals invoked the fifth amendment before these committees, which were disposed to regard this use of the amendment as an admission of guilt. That the fifth amendment was glorious then became an article of faith; indeed, it seemed to be the outstanding provision of the Constitution. One could demonstrate his dislike of the congressional committees by admiration for the fifth amendment. This reaction may not have been logical or rational, but it was human. It was also something of a reversal of the liberal position. When investigators questioned monopolists, grafters and other miscreants in preceding decades, enlightened men were scornful of those who invoked the privilege against self-incrimination, or otherwise evaded full disclosure. As late as 1937, the Supreme Court went out of its way to declare in *Palko v. Connecticut*:[2] "Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry." The opinion was written by Mr. Justice Cardozo. Chief Justice Hughes and Justices Brandeis, Stone, Roberts and Black, among others, concurred.

Let me illustrate my theory as to these recent decisions by reference to Mr. Justice Felix Frankfurter and Dean Erwin N. Griswold. I do not want to seem to pick on them, for I have great respect for both. They are learned in the law and are everywhere rightly so recognized. It is rather that the apparent impact of this emotion in favor of a sweeping construction of the fifth amendment upon such outstanding scholars demonstrates its tremendous force.

In 1947, in his concurring opinion in *Adamson v. California*,[3] Mr. Justice Frankfurter thus commented on the earlier opinion of the Court in *Twining v. New Jersey*:[4]

The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an

1. See Williams, Problems of the Fifth Amendment, 24 Fordham L. Rev. 19 (1955).
2. 302 U.S. 319, 326 (1937).
3. 332 U.S. 46, 59 (1947).
4. 211 U.S. 78 (1908).

opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court.[5]

Now the opinion of the Court in the *Twining* case is perhaps the only Court decision relating to the privilege against self-incrimination that is truly scholarly; and the opinion takes a skeptical and narrow view of the privilege. The case held that the privilege was not an essential element of due process required of the states by the fourteenth amendment:

> Searching further, we find nothing to show that it [the privilege against self-incrimination] was then [at the time of the adoption of the Constitution and the first nine amendments, 1787-1791] thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it . . . .[6]
>
> The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient . . . . It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.[7]

Yet in 1956, while discussing the fifth amendment in *Ullmann v. United States*,[8] Mr. Justice Frankfurter failed to mention what he had so recently regarded as an example of the "judicial process at its best . . . one of the outstanding opinions in the history of the Court," that is, *Twining*. On the contrary, he rapturously praised the amendment and quoted with approval Dean Griswold's remark in his brief work, *The Fifth Amendment Today*, that the privilege was "one of the great landmarks in man's struggle to make himself civilized."[9]

Thus, the rule that in 1947 "has no place in the jurisprudence of civilized and free countries outside the domain of the common law" had within nine years become a "great landmark" of civilization.

And *Ullmann* goes on to suggest that the privilege was much on the minds of the "Founders of the Nation": "Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten today."[10] As indicated above, *Twining* regarded the founders as much less concerned with the privilege than this quotation implies.[11] Professor Mayers ably demonstrates the accuracy of *Twining*.[12]

---

5. 332 U.S. at 59.

6. 211 U.S. at 107.

7. Id. at 113.

8. 350 U.S. 422 (1956).

9. Id. at 426.

10. Id. at 427.

11. See 211 U.S. at 107-10.

12. I take the same view as Twining and Professor Mayers. The Bill of Rights was adopted as a result of criticism of the Constitution for lacking such provisions, criticism expressed at the thirteen state conventions held to ratify the Constitution. I have read the complete stenographic minutes of these conventions [not such an ordeal as it sounds; orators were blessedly succinct in those days] and have found no mention of the privilege against self-incrimination in oral debate. The privilege was referred to in written reports at four conventions. The late Professor Zechariah Chafee, Jr., of Harvard Law School,

In *Ullmann,* Mr. Justice Frankfurter also contended:

Too many . . . readily assume that those who invoke it [the privilege] are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.[13]

Only one such patriot expressed himself on this particular issue in any writing presently available to the public. That patriot, John Marshall, Chief Justice during the nation's formative years, was a most active delegate to the Virginia ratifying convention, the tenth convention so held and the first to propose the privilege against self-incrimination as an amendment to the Constitution.[14] Marshall was also a member of the Virginia Legislature when it ratified the Bill of Rights. In *United States v. Burr,*[15] he asserted that a witness was entitled to claim the privilege only when his answer would

complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction. . . . If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath. . . .

Thus, the assumption to which Justice Frankfurter objected seems to do full honor to patriot John Marshall, perhaps the patriot best qualified to express himself on this issue and seemingly the only one who did.

It cannot be said that Dean Griswold has changed his mind about the fifth amendment. I have found no comment by him on that subject prior to speeches made in 1954 and published in book form as *The Fifth Amendment Today.* There would, however, appear to be significance in the fact that not until then had he found the amendment deserving of his attention, at least sufficiently so as to write about it. It was in the early years of this decade that these congressional investigations were most active. Moreover, his book deals largely with the use of the privilege in congressional investigations, especially by two fictional professors, each of whom, Dean Griswold assumes, is, to quote his phrase, "pure in heart." Historically, the privilege has related primarily to criminal prosecutions, and has been invoked by less appealing characters. In his preface, Dean Griswold candidly states that what he has written "is not presented as a scholarly essay." He further says that the problems with which the book is concerned "involve deep emotions, and it is not always easy to consider them dispassionately." This combination of circumstances suggests that a hostile reaction to the congressional investigations may have influenced his approach to the amendment.

So much for the last few years. What of the future?

The congressional investigations into communism are no longer a prominent feature of the national scene. Yet I am fearful that any present attempt formally

characterized "contemporaneous discussion" at the time of the adoption of the Constitution and the Bill of Rights as "meagre and uninformative." Chafee, Jr., How Human Rights Got into the Constitution 8 (1952). Nor have I found elsewhere any evidence that "our forefathers, when they wrote this provision of the Fifth Amendment . . . had in mind a lot of history. . . ." It seems more likely that what they had in mind was the then current rule of procedure that the accused in a criminal prosecution could not be required to testify. As I read Professor Chafee, that is also his conclusion.

13. 350 U.S. at 426-27.

14. 1 Beveridge, The Life of John Marshall 401-80 (1916).

15. 25 Fed. Cas. 38, 40 (No. 14,692) (C.C.D. Va. 1807).

to amend the fifth amendment would merely arouse once more those "deep emotions" which render the problems of the fifth amendment "not always easy to consider dispassionately." Too little time has passed for the liberal intelligentsia to reconsider its views. It is difficult enough to amend the Constitution even when an amendment is overwhelmingly supported by an articulate public opinion.

Meanwhile, however, congressional investigators are turning their attention to labor racketeers, TV quiz cheats and the like—people whose predicaments do not evoke much sympathy. As memories of the congressional investigations into communism fade, evasions by witnesses will arouse the same distaste as formerly. When confronted with controversies over the fifth amendment, the courts can choose between *Twining* and *Palko*, and the more recent opinions. As *Twining* is an example of the "judicial process at its best . . . one of the outstanding opinions in the history of the Court," and as *Palko* expresses what has usually been the attitude of the liberal intelligentsia, one can expect that as times passes, *Twining* and *Palko* will be found to have the greater weight. Such able discussions of the subject as that by Professor Mayers will serve to prepare public opinion for this result. And, after all, there is the deep-rooted human instinct that an honest man caught in ambiguous circumstances will speak up to defend his integrity.

Chief Justice Hughes is reputed to have once declared, "the Constitution is what the judges say it is." Let the fifth amendment in this way be amended, or, rather, restored to its traditional meaning.

C. DICKERMAN WILLIAMS†

† Member of the New York Bar.