SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. Harper & Brothers, New York: 1959. Pp. x, 341. $5.00.

This is a scholarly work analyzing the history of the privilege against self-incrimination and its present judicial meaning. The title may mislead, since it suggests a polemic for extensive amendment of a notable constitutional provision. In fact no actual amendment is proffered. Rather the book is an analysis of one only of the fifth amendment privileges, and a critique of recent decisions which the author regards as extending the privilege beyond historical bases and desirable policy, together with an argument for judicial retreat. As such the presentation is doubtless more persuasive, even if less interesting, than would be a tract fulfilling the promise of the title.

There are special merits in the detailed presentation. Particular mention should be made of the careful analysis showing the present wide use of the privilege to encompass matters not historically included therein. Thus, as the author points out, there is today not a single privilege, but the constitutional phrase is now held to embrace several distinct rules of law, each having its independent development, with one group relating to the accused, and another to the witness. The accused does have an absolute right to refuse to testify at trial, as well as when before a committing magistrate or the grand jury. A witness has no such right; but, as developed from a different background, he may refuse to answer incriminating questions—a right which may be abrogated by so-called immunity statutes. Here the present congressional investigations have given the privilege perhaps an unpleasant notoriety. Further, the wide developments of the simple rule of waiver, visiting harsh results on natural answers not made in contemplation of definitive waiver, have tended to press the privilege unduly. But these may well be only temporary phenomena arising out of particular phases of congressional activity and now already largely past.

In one chapter the author quite properly stresses the "Irrelevance of History." Nevertheless his most persistent argument—that a *witness* enjoys no constitutional privilege—is based upon his interpretation of history, an interpretation which has now been consistently rejected by the Supreme Court, by text writers, and by state courts construing analogous state provisions.[1] And this argument leads him to the conclusion that the expanded privileges which he finds accorded a witness can and should be curtailed without resort to constitutional change. This position he has again advanced with further documentation in his article, *The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common Law?* appearing in 4 American Journal of Legal History 107 (1960). He is right in stressing the different rights and their differing origins of what we now find covered generally by the constitutional provision; but his

[1] See discussion and references in Professor McKay's perceptive review in 35 N.Y.U.L.Rev. 1097 (1960). Compare the review by Mr. C. Dickerman Williams in 28 Fordham L. Rev. 574 (1959), and that by Professor Nathanson in 108 U. of Pa. L. Rev. 1243 (1960).

attempt at this late date to withdraw some of them from the constitutional scope is hardly likely to succeed.

Notwithstanding the utility of this dissection and separate treatment of all the privileges now held embodied in the fifth amendment, I must confess that the total effect seems rather flat, if not dull. Actually the parts of the argument seem distinctly better than the whole. And the reason, I expect, is not far to find. It is that adverted to above, namely, that the lively promise of the title is not fulfilled by the text itself. Not without irony, which perhaps points a moral, is the fact that the author never answers in so many words the question framed in his title. Seemingly he has found it far from easy to tangle successfully with an important one of the Bill of Rights. His chief conclusion appears to be that the courts have recently pressed the privilege too far, particularly in the case of the witness, and that they should now retreat. But since they should advance in other directions, notably in protection of the accused from undue police questioning before arraignment or from harsh application of the doctrine of waiver, the reader may be pardoned for finding the result somewhat of a standoff, with the Supreme Court's record not too bad after all, even on the author's own premise.

It must be said that the author's underlying philosophy as to the privilege, here strongly reiterated, does belie this rather meager yield of critical result. True, he vigorously presses the point that the present interpretation of the privilege is an unnecessary hindrance to law administration; this he is at pains to state often even if he is not overclear as to the specific rulings to be reversed or overruled. Another of his points of stress is that there should be no privilege accorded to public officials or those holding positions of public trust. Moreover, he attacks sharply what he considers the opposing philosophy of government and asks for more specific definitions from judges and writers as to the nature of the privilege.[2] And yet to me the interesting fact is that, notwithstanding this reiterated belief in the evil effects of current constitutional interpretation, there seems in the end so little of substance upon which courts so minded could really base a retreat. And they, be it remembered, are the ones to do the amending!

I realize that in stating what seems to me the failure of the author to achieve his declared purpose, I am giving an emphasis which may well be unfair to the book as a whole. For, as I have been at pains to point out, it constitutes a scholarly and useful disquisition in an important field of law. But he has invited this evaluating approach, and his ambivalent position as to the amendment is indeed a matter of some general interest. It suggests the extreme difficulty of even a convinced critic to make a frontal attack upon the privilege which will really persuade or satisfy

[2] The reviewer is one of those called for such cross-examination because of some general references he has made to the amendment in opinions and articles. But the decision of individual cases depends on narrow issues of fact affecting such cases, and indulgence in further generalities as to the philosophy of government will hardly prove useful to the author's purpose.

doubters. And it indicates further that what might be termed the law review method of a critique of individual cases is more useful as a means of reform than is an all-out assault on firmly held beliefs in legal principles now accepted as supporting and protecting individual freedom.

*Charles E. Clark**

LEGAL EDUCATION AND PUBLIC RESPONSIBILITY. By Julius Stone. Association of American Law Schools, West Publishing Co., St. Paul, Minnesota, 1959. XIII, 430 pages, $5.00.

This book may be considered by some as a report of a series of deliberate conversations carried on by a group of eminent men who somehow managed to find a station in the stratosphere from which they were able to look down in Olympian detachment on the world below. To a degree, this may be so. But, although it may not present many immediately practical solutions to the problem of professional responsibility, the account of the Boulder Conference will surely be of ultimate value to the law, lawyers and society.

As the foreword indicates, concern with the ethical standards of the profession and, particularly with its attitude toward public responsibility is no new thing. Indeed, the idea for the conference itself was far from new. Although Professor Mathews is too modest to say so, it really originated with him and it was his address as President of the Association of American Law Schools which first placed the matter before that group. As President-elect at that time, this reviewer had an opportunity to participate in the early stages of the project and remembers well the time, effort and leadership which Professor Mathews contributed.

At any rate, in the fullness of time, some twenty persons gathered at the University of Colorado in August, 1956, to consider the broad problem of the education of lawyers for their professional responsibilities. The group was not confined to legal educators or even lawyers, but included also clerics and philosophers together with the dean of a graduate school. A wandering scholar from Australia (Julius Stone) not only brought to the meeting his very substantial knowledge of Anglo-American legal systems but also prepared the report. This, no doubt, was a harrowing experience, confronted as he was with sharply divergent views presented by highly articulate characters. It seems clear that he performed his service brilliantly although it was necessary for certain participants to file separate statements in amplification of their attitudes.

As would be expected, a principal point of discussion had to do with curricular approaches to the matter. Any group of law teachers will fall upon a curriculum with all the gusto of a pack of wolves which has just downed a wounded caribou. There was talk of special courses in ethics, in responsibility and in decision making. The "pervasive approach" to the problem was strongly advocated. This means that such matters

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