

# Hook: Common Sense and the 5th Amendment

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## BOOK REVIEWS

*Common Sense and the 5th Amendment.* By SIDNEY HOOK. New York: Criterion, 1957. Pp. v, 160. \$3.00.

This little book by Professor Hook is primarily an answer to another little book by Dean Griswold entitled *The Fifth Amendment Today*. Both books are powerful demonstrations of at least one proposition—that fundamental questions can be significantly discussed in small volumes. Dean Griswold's book was designed to establish two propositions, first that a plea of the privilege against self-incrimination does not always justify an inference of guilt; and secondly that the privilege itself serves a worthwhile social purpose which justifies its retention and safeguarding in our system of law. Professor Hook does not really disagree with either of these propositions.<sup>1</sup> He is striking more at the emanations from Dean Griswold's argument, which he thinks have tended to surround Fifth Amendment pleaders themselves with entirely unjustified halos, and to confuse the public, and the courts too, with regard to the inferences which may legitimately be drawn from the pleading of the Amendment, at least in the absence of other circumstances.

Professor Hook's basic propositions are simply that no one is entitled to plead the Fifth Amendment unless a truthful answer to the question would in fact tend to incriminate him and that, entirely apart from the legal consequences of the plea, the public is entitled to infer from the taking of the plea that a truthful answer would have had a tendency to incriminate. Professor Hook concedes that Dean Griswold is correct in pointing to some circumstances where this inference would be in fact unjustified, or at least, incorrect in fact. The individual may have been ill-advised or untruthful in asserting the privilege. Or he may have feared that if he answers one question, where the answer would not in fact be incriminating, he will eventually be forced, on the ground of waiver, to answer others where the answer would be incriminating. For example, a denial of present membership in the Communist Party may later require an answer with respect to past membership.<sup>2</sup> Nevertheless, says Professor Hook, the invocation of the privilege justifies an inference of some guilty involvement, at least in the absence of an affirmative explanation. The basic thesis is that the fact that such an inference is not legally permissible for purposes of criminal conviction does not make it logically, or morally, or "common-sensically," inadmissible in

<sup>1</sup> Professor Hook does present a rather fulsome attack upon the privilege taken largely from Bentham's Rationale of Judicial Evidence. However, he does not press this attack to the point of urging abolition of the privilege. He uses it only as background for the argument regarding the inferences which may properly be drawn from the assertion of the privilege. This itself is a rather confusing joinder of two different strands of thought.

<sup>2</sup> Dean Griswold himself suggests that this is probably an unsound application of the waiver principle, since a negative answer to the first question would not be incriminating. However, he also recognizes that the law of waiver is extremely uncertain on this point and that counsel for the witness may well hesitate to subject his client to the risks and expense of litigating the issue. See Griswold, *The Fifth Amendment* (1955) pp. 23-24.

the eyes of the general public, or of some private institution, a university for example, with a legitimate interest in the witness's behavior.

If we accept Professor Hook's initial proposition, that no one is entitled to plead the Fifth Amendment unless a truthful answer would in fact tend to incriminate him, there can be relatively little quarrel with his general conclusion. The curious thing is that Professor Hook does not really argue the validity of his basic proposition; he simply assumes it is self-evident. Conversely, it is also true that Dean Griswold does not ever directly challenge the validity of the proposition. Yet this may be where the hardest issue lies. The defendant in a criminal trial is entitled to refuse to take the stand, even though there is not a single conceivable question a truthful answer to which would tend to incriminate. The defendant may be foolish, quixotic, or motivated by a determination to protect some one else, with regard to whom a truthful answer would be incriminating. Nevertheless, there is no substantial doubt that the defendant in such circumstances is legally entitled to assert his privilege not to be a "witness against himself" even though he would in fact and in all respects be a witness for himself, if he were to answer truthfully.<sup>3</sup> The difficult question is does the same principle apply when the witness is not the defendant and therefore is not privileged simply to refuse to take the stand, but must plead the privilege with respect to each particular question. May he say with respect to each question: "This question asks me to be a witness against myself, by inquiring into a subject matter which would be incriminating, if I were to answer in a certain way. It matters not that, in fact, a truthful answer would tend to exonerate, not to incriminate me. Fundamentally, my privilege is the same as that of the defendant in a criminal trial, who may refuse to take the stand irrespective of whether any of his truthful answers would tend to incriminate him."

This is one of those basic legal questions to which there obviously ought to be a clear and straightforward answer, just as Professor Hook assumes there is. A moment's reflection will suggest, however, that it is exactly the kind of question to which the law itself is not likely to provide a direct answer. Once the witness pleads the privilege, the legal inquisitor, be it court, legislative committee, or administrative agency, is not entitled to find out what the answer would be. Consequently, it can never be in a position to determine whether a truthful answer would in fact have been incriminating. Therefore, it can never resolve the question whether the privilege has been properly pleaded by inquiring into what a truthful answer would have revealed. That is why it is so difficult for a judge to determine whether the privilege has been properly pleaded. He cannot ask the witness, in confidence, so to speak, what a truthful answer would be, and then determine whether the plea is justified. Instead he must determine the justification for the plea from the question itself, in the light of what is already a matter of record. Conceivably, independent evidence might later establish that a truthful answer would in fact not have tended to incriminate, but rather to exonerate the witness of any wrongdoing. However, I am not aware of any decision hold-

<sup>3</sup> I suppose it might reasonably be said that whenever the defendant is forced to take the stand and subjected to hostile examination, he is being forced to be a witness against himself, even though all his truthful statements would tend to exonerate him. He may become confused and make mis-statements of fact which are damaging or his demeanor alone may count against him. Conceivably, the same might be partially argued with regard to the witness who is not a defendant, who really has nothing to hide, but who is nevertheless afraid of the confusing effects of hostile cross-examination.

ing that, in such circumstances, the witness may properly be punished for contempt of court, or for perjury, on account of unjustifiable assertion of the privilege. This is not the same as saying that there are no expressions in judicial opinions or treatises which support Professor Hook's hypothesis. Indeed there are such expressions of the highest authority.<sup>4</sup> Nevertheless, the nature of the question is an ideal one to excite a variety of philosophical opinion, since the answer need never be tested in the crucible of decisions of concrete cases.

This does not mean that Professor Hook is not entitled to his opinion on the question, or even that his opinion is unsound. As a matter of fact I am inclined to agree with Professor Hook's basic propositions, even though I consider them much more uncertain and debatable than he seems to assume. I am inclined to agree that a witness, who is not the defendant in a criminal proceeding, is entitled to plead the Fifth Amendment only if a truthful answer would in fact tend to incriminate him. I would make this distinction between the defendant in a criminal proceeding and a witness who is not a defendant, on the ground that the privilege is being extended beyond the boundaries of the criminal case on the theory that the witness may some day be the defendant, and his statements may be used against him. But this can happen only if those statements do in fact tend to incriminate him. Consequently, the Amendment serves its purpose if it protects the witness only when a truthful answer would have such an effect. I would also agree that the general public or the special public, such as an interested employer, is entitled to infer from the assertion of the privilege that the answer to this or a related question would probably be incriminating. However, I would also remember that my underlying assumption is not so iron-clad as Professor Hook assumes. The witness may have been advised otherwise and I cannot prove that his lawyer was utterly unjustified in so advising him. Furthermore, I would remember that the legal proposition relied upon is one that has never been vindicated by actual court decisions, and is quite likely to remain a philosopher's football, rather than a rule of decision. Consequently, I would urge both the general public and the interested employer to consider, not so much the invocation of the privilege, as the refusal to disclose the requested information. If the inquiry is with regard to a subject matter concerning which the public or the interested employer—the university for example—is entitled to full and frank disclosure, then the public may properly scorn, and the university may properly discharge, the individual who refuses to make such a disclosure.

At this point it may be asked whether there is any significant distinction between emphasizing the plea of the privilege against self-incrimination as opposed to the duty of making full disclosure. However, Professor Hook himself brings out the significance of the distinction when he discusses the case of *Slochower v. Board of Higher Education*,<sup>5</sup> in which the Supreme Court held

<sup>4</sup> Professor Hook's position is supported by Chief Justice Marshall's statement in *United States v. Burr*, *In re Willie*, 25 Fed. Cas. 38, 40 (1807); by Wigmore, *Evidence* § 2272, at 409-410 (3rd ed., 1940); and by Williams, *Problems of the Fifth Amendment*, 24 *Fordham Law Review* 19 (1955). However, even Wigmore recognizes the apparent inconsistency of saying that the privilege may be pleaded only if a truthful answer would in fact tend to incriminate, and yet also saying, as many courts do, that no inference may be drawn from the claiming of the privilege, even when the privilege is asserted by a witness, rather than by the defendant. He explains the inconsistency by suggesting that, although the inference cannot be denied, it can be legally ignored.

<sup>5</sup> 350 U.S. 551 (1956).

unconstitutional a provision of the Charter of the City of New York terminating the employment of any officer or employee of the city who refused to testify regarding the "property, government or affairs of the city" on the ground that his answer would tend to incriminate him. The Court held that it was a violation of due process to discharge a teacher at one of the colleges of the City, who was entitled to tenure under state law, solely and summarily on the basis of the claim of privilege before a congressional committee with regard to questions about previous Communist party membership, without any opportunity for hearing. Professor Hook is exorcised not so much by the result in the case as by the reasoning of Mr. Justice Clark's opinion for the Court, which he characterizes as "one of the most intellectually scandalous opinions ever handed down in the history of the Court."<sup>6</sup> This criticism of the opinion is based primarily upon two grounds: (1) "its refusal to recognize the common place truth that there is a legitimate inference of guilt from the invocation of the privilege"<sup>7</sup> and (2) its failure to recognize that the charter provision was "based only on the premise that any employee who refuses to co-operate with the public authorities who employ him in a relevant inquiry into official conduct, is no longer qualified for public service."<sup>8</sup> The first point is aimed at sentences in the opinion which suggest that the Court is not so clear as Professor Hook that the privilege may be legitimately invoked only if a truthful answer would in fact tend to incriminate.<sup>9</sup> However, Mr. Justice Clark, like Dean Griswold, does not explicitly reject Professor Hook's underlying premise. He apparently goes only so far as to suggest that the circumstances tending to incriminate might have been consistent with ultimate innocence of any crime, if fully explained or rebutted. Second, with regard to the duty to disclose, Mr. Justice Clark says that "the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions."<sup>10</sup> The exact meaning of this statement is not clear, but it is at least consistent with the idea that it is one thing to insist that the employee must never plead the privilege with regard to his official conduct, and another to insist that the employee must "cooperate with the public authorities who employ him, in a relevant inquiry into official conduct."

The possible aftermath of a plea of the privilege against self-incrimination is not of course limited to the loss of a position in public employment. It may also involve loss of private employment. Against such a consequence there can hardly be any form of legal protection and the crucial considerations are not legal, but moral, psychological, and perhaps political. Nevertheless the rationale of the privilege itself and judicial attitudes toward its exercise may be of considerable influence in determining the public reactions and private consequences of the plea. Professor Hook is frankly concerned that the effect of Dean Griswold's writing has been to corrupt the judicial mind and confuse the public mind with regard to the proper basis of the plea and, therefore, with regard to the inferences that may legitimately be drawn from its exercise. He finds examples of this not only in Mr. Justice Clark's opinion for the Court in the *Slochower* case,

<sup>6</sup> P. 92.

<sup>7</sup> P. 94.

<sup>8</sup> P. 95.

<sup>9</sup> The sentences are: "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." 350 U.S. 551, 557 (1956).

<sup>10</sup> *Ibid.*, at 558.

but also in the dissenting opinion of Mr. Justice Douglas and Mr. Justice Black in *Ullman v. United States*,<sup>11</sup> where the Court sustained the most recent federal immunity statute. Mr. Justice Douglas expressed his concern that the immunity statute could not protect the witness from the infamy which "the government . . . brings on the head of the witness when it compels disclosure."<sup>12</sup> Professor Hook argues that this is exactly the kind of infamy against which the Fifth Amendment is not supposed to protect a witness and against which it cannot protect him, so long as the public retains its robust common sense, uncorrupted by Dean Griswold and the judges who reflect his views. On the particular point in issue, I believe that Professor Hook is right and Mr. Justice Douglas wrong. However, I suspect that the danger of corruption, as the majority decision in the *Ullman* case itself illustrates, is much less than Professor Hook fears. The main burden of Dean Griswold's argument was that a justifiable invocation of the privilege may be completely consistent with innocence of any wrong-doing. This is a proposition which Professor Hook cannot effectively refute and which is still worth remembering. On the other hand, it is also true that some people, perhaps even some judges, have been so carried away by the force of the Dean's argument, that they have come to harbor the notion that it is somehow immoral or unconstitutional to draw any inferences at all from the invocation of the privilege. For those inclined to take this additional step, Professor Hook's analysis should provide a valuable antidote.

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<sup>11</sup> 350 U.S. 422 (1956).

<sup>12</sup> *Ibid.*, at 454.

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*Woe unto You, Lawyers!* By FRED RODELL. 2d ed., New York: Pageant Press, 1957. Pp. ix, 184. \$3.50.

*Woe unto You, Lawyers!* was first published in 1939 by Reynal & Hitchcock. The author became Professor of Law at the Yale Law School in the same year, although there was probably no connection between the two events. Professor Rodell explains in his foreword to this new edition that the book has been unavailable for more than a decade although there is still a demand and a very considerable need for it. The present edition was published to supply this demand and need. The text is identical with the first edition except for the author's foreword to the new edition and an introduction by Judge Jerome N. Frank, in which Judge Frank compares Rodell, unfavorably, with Jeremy Bentham.

The legal trade "is nothing but a high-class racket" says Professor Rodell. The concepts of the law such as consideration, and offer and acceptance, are nebulous; the rules of the law are too abstract to be applied with any useful degree of certainty to specific legal situations as they arise. The lawyer's "racket" is that he exploits the situation either knowingly or unknowingly instead of throwing the whole job up as hopeless.

Professor Rodell's suggestion is to throw the whole job up as hopeless. He would go straight after justice in the settlement of any specific question that comes up, since certainty in the law is impossible anyway. However, he realizes that in some situations people have different ideas of what is fair and right. In