

COMMON SENSE AND THE FIFTH AMENDMENT. By Sidney Hook. New York: Criterion Books. 1957. 160 pages. \$3.00.

For years Professor Hook has waged a public love-affair with the Goddess of Reason. Rival suitors, humbly aware that she does not always requite their passion, may be forgiven when they wonder on what evidence Professor Hook lays exclusive claim to her favors, and by what commission he has annointed himself High Priest of her temple. In recent utterances on political subjects, he has invoked the Goddess ritually against the massed attacking hordes of "ritualistic liberals." It almost seems as though he spent the greater part of his time belying his allies because they get in the way of the blows that he might otherwise strike at their common enemies.

At the start of this slender though repetitious volume, Professor Hook has disarmed criticism and propitiated the Goddess by using "common sense" in the title; by dedicating the work to the memory of Morris Raphael Cohen; by informing his readers that his position "expresses a common-sense truth which can be overlooked only by 'a trained incapacity,' to use Veblen's phrase, to see the obvious in a search for the historically recondite";<sup>1</sup> and by proclaiming his standpoint as "that of unreconstructed liberalism which recognizes the primacy of morality to law, and the centrality of intelligence in morality. . . . Experience has shown that those who, no matter in what cause, are foes of intelligence are the foes of freedom, too."<sup>2</sup> It turns out that the main target of the book is that old archfoe of intelligence, Dean Erwin N. Griswold of the Harvard Law School, who wrote a booklet on *The Fifth Amendment Today*<sup>3</sup> and later dared to take issue with Professor Hook in a polemic in the *New Leader*.<sup>4</sup>

## I

Reduced to brief compass, the grievance against Dean Griswold's booklet seems to be this: the Dean had asserted that the invocation of the privilege against self-incrimination before congressional investigating committees did not raise a conclusive in-

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1. P. 14.

2. P. 15.

3. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955). See Crotty, Book Review, 7 *STAN. L. REV.* 422 (1955); Nossaman, Book Review, 7 *STAN. L. REV.* 429 (1955).

4. 39 *NEW LEADER* 20 (1956).

ference that the witness was guilty. He had put two hypothetical illustrations: college teachers, one an ex-member of the Communist party and the other a sometime member of front organizations but never a member of the party, both innocent of crime and without moral fault (unless, presumably, one insists on the "centrality of intelligence in morality"). He said that both teachers might, without committing contempt, claim the privilege when asked whether they were ever members of the party. And he asserted that an inference from the invocation of the privilege would be "unwarranted";<sup>5</sup> he seemed to mean that an inference of criminal conduct would be unwarranted in both cases and an inference of past membership in the party would be unwarranted in case two (perhaps also unwarranted in case one though it would happen there to coincide with the fact).

To the Dean's denial of a necessary inference Professor Hook retorts with an assertion, repeated dozens of times, that there is a rebuttable inference. The claim of the privilege is not conclusive evidence of anything, suggests the Dean; it is some evidence of something, proclaims the Professor.<sup>6</sup> Has issue been joined? Professor Hook appears to think so.

What is the content of the inference that according to Dean Griswold need not necessarily, and according to Professor Hook should reasonably but rebuttably, be drawn from a claim of the privilege? Suppose a witness is asked whether he has ever been a member of the Communist party, and "takes the fifth." Let us assume for the moment that no necessary inference follows. What is the normal or natural inference that Professor Hook says we ought to be prepared to make? Would it be most reasonable to infer that the witness has been, or believes he has been, a member? That he has committed, or believes he has committed, a crime? That he fears, with or without adequate reason, that a truthful answer would tend to incriminate him (of what?) though he is or

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5. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 19 (1955).

6. So lightweight an inference does not satisfy Mr. R. Carter Pittman, who wrote a history of the privilege, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935), and returned to the subject in *The Fifth Amendment: Yesterday, Today and Tomorrow*, 42 A.B.A.J. 509 (1956). He says, "It is still true that those who claim the privilege against self-incrimination are guilty of that about which they refuse to testify. That is the only respectable reason for claiming it." *Id.* at 510. Can one dissent from this opinion without joining the ranks of those whom, in another connection, Mr. Pittman describes as "the soft-shell egg-heads, the left-threaded screwballs, the pseudo-philosophers, the assorted 'doctors' of this and that, and those simple-minded people who believed themselves 'liberal' and 'broad-minded' when loving every other country except their own . . . ." *Id.* at 592.

thinks he is innocent, or because he is or thinks he is guilty (of what?)?

A reading of Professor Hook's book gives no answer, because it gives too many clues, to Professor Hook's notion of the content of the normal and natural inference. It is phrased in different passages as "guilt or unfitness *with respect to the issue in question*";<sup>7</sup> "guilt, with respect either to the specific question or to the class of related questions to which answers are refused";<sup>8</sup> "guilty involvement";<sup>9</sup> "guilt";<sup>10</sup> "guilt with respect to the question at issue";<sup>11</sup> "*the fact of membership*";<sup>12</sup> "involvement";<sup>13</sup> "guilt or involvement with respect to the issue under inquiry";<sup>14</sup> "a derogatory conclusion."<sup>15</sup> It is hard to identify the common denotation.

When we come to the context in which, and the purpose for which, the inference is to be drawn, we are faced again with a question to which no easy answer can be given. The many examples with which Professor Hook illustrates his one major point—that a rebuttable inference ought to be drawn—show how unamenable this question is to solution *a priori*. Even after the proper content of the inference is determined, the use to be made of it must depend on such things as the arena (criminal trial, civil litigation, administrative hearing, political campaign, social club, and so on); on the burden of proof properly required to establish whatever fact is to be inferred; on the consequences of establishing that fact (conviction, bail, damages, dismissal, deportation, civil-service unemployment, private unemployment,<sup>16</sup> nonelection, ostracism, and so on); and, as always, on the other evidence available to help ascertain the fact in question.

7. P. 13.

8. P. 30.

9. P. 47.

10. *E.g.*, p. 52.

11. P. 66.

12. P. 78.

13. P. 34.

14. *Ibid.*

15. P. 35.

16. It is now generally thought that the invocation of the privilege by a university professor in response to a question about present, or perhaps also past, Communist party membership justifies administrative inquiry by some official of the university employing him. The presupposition is that the professor may fairly be asked to "tell all" in the privacy of the faculty lounge or the dean's office. If, however, the professor protests that his employer is not a privileged repository of his revelations and would have to repeat them upon congressional demand, should the university abandon the inquiry, discharge the professor, or commit its officials to a promise to go to jail rather than divulge the confidence being solicited? (I owe a debt to Professor Francis W. Coker, Jr., of Yale Law School, for recalling this problem to my attention.)

## II

It is time to reconsider and revise or at least rephrase the assumption, common to Professor Hook and Dean Griswold, that a claim of the privilege raises no necessary inference. Suppose we put it that the claim necessarily implies an alternative proposition, namely, that either the witness is legally entitled to invoke it or he is not; or, in other words, that either the witness has some fear that a truthful answer would tend to incriminate him or he has committed contempt. We are learning from the logicians that tautologies are not necessarily fruitless, and this one serves to bring into focus one aspect of the recent history of the privilege to which neither the Dean nor the Professor devotes much explicit attention.

Professor Hook says that "almost all who invoke the privilege, *independent evidence shows*, were present or former members of the Communist Party."<sup>17</sup> The independent evidence is not appraised in detail or even, except for appended extracts from the transcript of the testimony of three witnesses, exhibited. On the basis of impressions from a reading of a good many transcripts I would invite attention to the following hypothesis, which would have to be tested by research: I suggest that of the witnesses who claimed the privilege when asked about present or former membership, the great majority had not committed espionage, treason, sabotage, or sedition; that almost as large a majority had not violated the Smith Act; that a smaller number, probably still a majority, were present or former members; that a large number, whether or not they were present or former members, feared that a truthful answer would tend to incriminate them or would expose them via "waiver" to the necessity of answering other questions to which the answers would be incriminating; and that a much larger number than seems to be generally recognized were in the strictest possible sense guilty of contempt<sup>18</sup> because they had no honest fear of self-incrimination.<sup>19</sup>

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17. P. 109.

18. Professor Hook does not allude to the probability that this has often been the case. He does mention the fact that if a witness were to claim the privilege without fearing self-incrimination he would be committing "perjury," a term which Professor Hook uses throughout in preference to "contempt."

19. For a good portrayal of the necessarily confused advice that counsel would have to offer one type of witness, see Pollitt, *Pleading the Fifth Amendment before a Congressional Committee: A Study and Explanation*, 32 NOTRE DAME LAW. 43 (1956). For an argument belittling the differences between courtroom safeguards and the atmosphere at congressional committee hearings, and shrugging off the notion that Senator McCarthy was discourteous to witnesses, see Williams, *The Fifth Amendment in Non-Criminal Proceedings*, 39 MARQ. L. REV. 205, 215-17 (1956).

The fact that there were hardly any prosecutions for contempt against witnesses who invoked this privilege does not mean that contempt was not very often committed. It may mean only that in the current political circumstances it was more expedient for legislators to pretend that the invocation of the privilege was justified than to vindicate the integrity of their committee procedures by prosecution for contempt.<sup>20</sup> There are grounds for wondering whether at least some witnesses who could be relied on to claim the privilege indiscriminately were asked sensational questions in order that the interrogative mood could be turned into the declarative (more suitable for committee reports and the evening headlines) simply by being bounced against the privilege. There are some grounds for believing also that some legislators and their staff encouraged witnesses to claim the privilege even when the witnesses indicated that they intended rather to answer the questions or to avoid them by reference to some supposed right other than that afforded by the fifth amendment.

### III

Professor Hook spends little space on the matter of waiver, though it bulks large in the literature and in the minds of counsel, as well as of some witnesses even without the advice of counsel, and is important in appraising the correctness of inferences. Many witnesses seem to have invoked the privilege in response to innocuous questions, upon advice or belief that their answers though they would not incriminate would open them up to connected questions to which they would have to give incriminating answers; they would be held to have waived their right to the privilege by failing to claim it before. Dean Griswold points out that in *Rogers v. United States*<sup>21</sup> the Supreme Court expanded the scope of waiver to such a point that pending further clarification "the only safe advice may be to claim the privilege at the earliest possible moment

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One consequence of this is to lower the reliability of an inference that the truthful answer to a given question on which the privilege has been invoked would be incriminating. Another consequence is that even though a witness may, in fear of waiver, invoke the

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20. See Note, 70 HARV. L. REV. 1454, 1456-57 (1957).

21. 340 U.S. 367, 19 A.L.R.2d 378 (1951).

22. GRISWOLD, THE FIFTH AMENDMENT TODAY 24 (1955).

privilege on a question to which a truthful answer may be non-incriminating, the problem of inference is not resolved but only deferred, because at some point along the line of questioning he must either fear incrimination or be committing contempt. One is remitted again to the task of selection among possible inferences; this task, too, requires independent evidence and cannot be solved simply by applying to the claim of the privilege the naked intellect of the inferer.<sup>23</sup>

If the *Rogers* ruling is clarified, we may be able to say that there is no waiver until the witness has given an incriminating answer (as Dean Griswold suggests) and—more important, though much harder to apply—that waiver extends no further than the incriminating effect of answers already given.<sup>24</sup> Such an analysis might increase the proportion of cases in which we might guess that the witness had committed contempt and decrease the proportion in which we might guess that the privilege was justified (legally), but it would not necessarily advance us toward politically relevant inferences.

#### IV

In his sacerdotal capacity Professor Hook sniffs at the logical infirmities of his adversaries. He invites the reader "to see what is wrong with Dean Griswold's logical procedure";<sup>25</sup> he reports that "the methodological error involved here has betrayed not only Dean Griswold but many others";<sup>26</sup> he says that "regnant

23. Professor Hook of course recognizes the necessity of bringing other evidence to bear on the appraisal of the rebuttable inference. The difficulty is that each such recognition tends to weaken the apparent cogency of the inference drawn from the claim of privilege alone.

24. See *Krogmann v. United States*, 225 F.2d 220 (6th Cir. 1955). It is curious that Dean Griswold does not mention waiver as one of the reasons entitling the hypothetical teacher in his case two to claim the privilege where the truthful answer to the question of Communist membership would be "no." He gives two other reasons: first, the fear of prosecution for perjury in the act of saying "no"; second, the fear that, if he says "no," "then in his own interest he may have to undertake to state and explain his membership and activities in the various front organizations." GRISWOLD, *THE FIFTH AMENDMENT TODAY* 19 (1955). The first of these, as he rightly says, is not a proper reason. The second one I should suppose to be improper also, unless the Dean means by it to foreshadow his subsequent discussion of waiver.

There is a conceivable circumstance, by the way, in which the fear of prosecution for perjury would be a valid ground for invocation of the privilege. Suppose that a witness has previously sworn that he was a member. If the true answer is "no," then giving the true answer now will tend to incriminate him by furnishing evidence toward a conviction of *prior* perjury. This freak situation also shows that it is possible that the privilege may be properly claimed though waiver is disregarded *and* the true answer to the question would be "no."

25. P. 32.

26. P. 33.

doctrine about the self-incriminatory provision . . . is based upon an egregious fallacy."<sup>27</sup> He beholds the mote but considers not the beam.

For example, he discusses the case of two students at Harvard Law School who had invoked the privilege when asked whether they had held Communist meetings or collected Communist dues in their rooms at Harvard and writes:

. . . . What could be inferred from the testimony of the Harvard twins? This: that the probability that they conducted Communist activity at "Harvard or Cornell" is *at least* as great as the probability that they conducted such activities at Cornell or that they conducted such activities at Harvard. It is this inference which is relevant to the purposes of the inquiry.<sup>28</sup>

To a reader who lacks Professor Hook's technical equipment, it would seem that such an inference does not follow from anything that the two students did or said or did not do or say but is merely a loose version of an example of the "special addition theorem." The probability that Professor Hook and I conducted fascist activities at "Harvard or Cornell" is at least as great as the probability that we conducted such activities at Cornell or that we conducted such activities at Harvard, no matter whether we deny, confess, claim a privilege, or stand mute.

For another example, Professor Hook quotes Dean Griswold to the effect that "to rely only on 'common sense' in the administration of justice would leave us not far removed from some of the People's Courts in other lands" and says, in the course of what purports to be a retort; "sometimes we need to go *beyond* common sense but we cannot do *without* it."<sup>29</sup> To a reader lacking Professor Hook's technical equipment it would seem that Dean Griswold had acknowledged this not very startling truth by using the word "only."

Finally, Professor Hook says that the meaning of the privilege "will be more comprehensive or less depending upon how the justices of the Supreme Court in the future interpret it. And since some of the opinions which have extended its meaning have been five to four decisions, it may very well be only one man who will fix its meaning in a given period."<sup>30</sup> What technical term would

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27. P. 47.

28. P. 36.

29. Pp. 16-17.

30. Pp. 22-23.

Professor Hook use for the fallacy involved in the supposition that the camel's back is broken by the last straw, or that the game is won by the player who kicks the odd point after touchdown?

V

All this does not mean that Professor Hook ought to be driven from the Temple of Reason, or even unfrocked. He has taken many words to prove but little; he has understated the complexity of the problem of selecting a reasonable inference among those that could be drawn from a claim of the privilege, neglected the importance of waiver, insufficiently particularized the many possible contexts and purposes of inference, and (in my view) overestimated the uniformity of the states of mind of present and past members of the Communist party; and he has displayed a certain want of charity toward his fellow-suitors. Yet he is no foe of freedom, or of intelligence, and I hope that the Goddess will show him more mercy than justice.

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THE JOINT VENTURE AND TAX CLASSIFICATION. By Joseph Taubman. New York: Federal Legal Publications, Inc. 1957. xvii + 493 pages. \$15.00.

This is a scholarly and thought-provoking book, partly a history, partly a description and analysis of tax and legal problems of combining for joint-venture activity. For the practicing attorney, it will review and sharpen his knowledge of certain concepts and principles which are a part of his stock-in-trade. For the oil-and-gas attorney, it will add little to what must already be known as a basis for competence in oil and gas. For the legal philosopher and the law professor, it is an attempt to define and classify "joint venture" as a separate legal concept rather than a subclassification of partnership.

A joint venture, as defined by Mr. Taubman, is "an association of two or more natural or juridical persons to carry on as co-owners an enterprise, venture, or operation for the duration of that particular transaction or series of transactions or for a limited time."<sup>1</sup>

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1. P. 83.