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Constitutional Law - Due Process of Law - Fifth Amendment Privilege against Selp-Incrimination Protected by Fourtenth Amendment against Abridgement by the States

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION PROTECTED BY FOURTEENTH AMENDMENT AGAINST ABRIDGEMENT BY THE STATES—In the recent case of *Malloy v. Hogan*, 378 U.S. I, 84 Sup. Ct. 1489 (1964), the United States Supreme Court was confronted with the question of whether the Fifth Amendment privilege against self-incrimination was available to a witness in a state proceeding. The Court held that the Fourteenth Amendment did guarantee a witness in a state proceeding the protection of the Fifth Amendment's privilege against self-incrimination.

In the case under discussion, the defendant, Malloy, was arrested by Hartford, Connecticut police and at that time pleaded guilty to the crime of gambling. After serving a reduced sentence, he was called to testify before a state inquiry into gambling and other criminal activities in the Hartford area. At that inquiry, he declined to answer a number of questions relating to the events surrounding his arrest and conviction. His refusal was based on the ground that such disclosure would tend to incriminate him. The Superior Court of Hartford County held Malloy in contempt and sent him to prison until he was willing to answer the questions asked of him at the inquiry. Malloy applied for a writ of habeas corpus, but his application was denied by the Superior Court. The Connecticut Supreme Court of Errors affirmed the denial of the writ,[1] holding that neither the Fifth Amendment nor the Fourteenth Amendment extended to Malloy the right to invoke the Fifth Amendment privilege against self-incrimination in a state proceeding and that, in addition, Malloy had not properly invoked the privilege available to him under the Connecticut Constitution. The United States Supreme Court reversed, holding that the Fifth Amendment's exception from compulsory self-incrimination was protected by the Fourteenth Amendment against abridgement by the States and that Malloy had properly invoked the privilege.

The present day concept of the privilege against self-incrimination had its beginnings in the early days of the common law. In those times the courts, and particularly the infamous Star Chamber, were invested with the power to compel confessions from accused persons, and torture was not infrequently applied.[2] In addition, an oath, called the oath *ex officio*, was widely employed. Those who took the oath swore to tell the whole truth in answer to questions put to them; but a refusal to take the oath or to answer under it was taken as confession of the offense charged.[3]

In the early seventeenth century, the common law courts began to

1 Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963).

2 Corwin, *The Supreme Court's Construction of The Self-Incrimination Clause*, 29 Mich. L. Rev. 1 (1930); Stevens, Sources of the Constitution of the United States 230 (2d ed. 1927).

3 Corwin, *supra* note 2.

recognize that the common law process in England was accusatorial and not inquisitorial.[4] In addition, the people grew increasingly dissatisfied with the abuses associated with the oath *ex officio*.[5] These developments combined to force the abolition of the oath and a cessation of the coercive methods associated with obtaining confessions.[6] By 1688, "the privilege against self-incrimination became so well established as a part of the [English] common law that it was not thought necessary to incorporate it in the English Bill of Rights of 1689."[7]

The English colonists who came to America in pre-revolutionary times brought with them the fear of an inquisitorial system of criminal jurisprudence and also a lingering remembrance of the abuses associated with coerced self-incrimination.[8] Their fears and reservations found expression in the early state constitutions in the form of restrictions on the power of the state to compel incriminatory statements from its citizens.[9] It was within this historical framework and environment that the framers of the Bill of Rights specified in the Fifth Amendment to the United States Constitution that, "No person . . . shall be compelled in a criminal case to be a witness against himself . . . ." The prohibition was clear.

There is found little reference to the privilege against self-incrimination in the early federal court cases.[10] However, during the latter half of the nineteenth century and early part of the twentieth century, the privilege was held to extend to witnesses as well as party defendants and to civil as well as criminal proceedings, "wherever the answer might tend to subject to criminal responsibility him who gives it."[11]

Prior to the adoption of the Fourteenth Amendment, the question of whether the Fifth Amendment privilege was available to parties in a state proceeding was decided by inference when the United States Supreme Court handed down its decision in *Barron v. Baltimore*.[12] In that case, the plaintiff contended that his property had been taken for public use by an instrumentality of the state and that compensation was therefore re-

4 Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 Ky. L.J. 267 (1958).

5 *Ibid.*

6 Corwin, *supra* note 2.

7 Moreland, *supra* note 4, at 272.

8 Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935).

9 See, *e.g.*, Constitution of Virginia 1776—Bill of Rights § 8: "That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation . . . nor can he be compelled to give evidence against himself. . . ."

10 Corwin, *The Supreme Court's Construction of The Self-Incrimination Clause*, 29 Mich. L. Rev. 1 (1930).

11 McCarthy v. Arndstein, 266 U.S. 34, 40, 45 Sup. Ct. 16, 17 (1924). For other cases applying and extending the privilege, see Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524 (1886); Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195 (1892); Empsak v. United States, 349 U.S. 190, 75 Sup. Ct. 689 (1955).

12 7 Pet. 243, 8 L. Ed. 672 (1833).

quired to be paid in accordance with the Fifth Amendment.[13] The Court held, however, that the Fifth Amendment must be understood as restraining the power of the federal government only, and not applicable to the states. It follows, therefore, that the Fifth Amendment privilege against self-incrimination is not available to parties in a state proceeding by operation of the Fifth Amendment alone.

Subsequent to the passage of the Fourteenth Amendment, the question again arose in the case of *Twining v. New Jersey*.[14] In *Twining*, the defendant was convicted of a misdemeanor in a state criminal proceeding. The trial court charged the jury that it could draw inferences unfavorable to the defendant because of his failure to take the witness stand. Twining appealed, contending that the charge violated the privilege against self-incrimination, and consequently abridged his privileges and immunities as a citizen of the United States and denied him due process of law. The Court held that the exception from compulsory self-incrimination was not a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment nor was it protected by the Fourteenth Amendment's due process clause. The Court, in so holding, said:

> [I]t is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action because a denial of them would be a denial of due process of law.[15]

However, in regard to the privilege against self-incrimination, the Court stated:

> There seems to be no reason whatever, for straining the meaning of due process of law to include this privilege within it, because perhaps we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so.[16]

The same theme was echoed forty years later in *Adamson v. California*.[17] Adamson was tried and convicted for murder in the first degree. On appeal, he contended that certain provisions of the California Constitution[18] and California Penal Code,[19] which permitted comment upon his

13 [N]or shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

14 211 U.S. 78, 29 Sup. Ct. 14 (1908).

15 Twining v. New Jersey, 211 U.S. 78, 99, 29 Sup. Ct. 14, 19 (1908).

16 *Id.* at 113, 29 Sup. Ct. at 26.

17 332 U.S. 46, 67 Sup. Ct. 1672 (1947).

18 "No person shall . . . be compelled in any criminal case to be a witness against himself . . . but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or jury." Calif. Const. art. I, § 13.

19 "The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel." Calif. Penal Code § 1323.

failure to testify, were invalid under the Fourteenth Amendment. In affirming the conviction, the Court cited the *Twining* decision and observed that the Fifth Amendment's privilege against compulsory self-incrimination was not protected against state action "on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of men that are listed in the Bill of Rights."[20] The Court further observed that:

> The Fourteenth Amendment's due process clause does not protect . . . the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment.[21]

It was clearly indicated in *Adamson*, however, that the Fourteenth Amendment forbids compulsion to testify by fear of hurt, torture, exhaustion or any other type of coercion that falls within the scope of due process.

In the principal case, Mr. Justice Brennan, speaking for the Court,[22] stated that, "the Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its framers when they added the Amendment to our constitutional scheme."[23] He further pointed out that since the decisions in *Twining* and *Adamson*, the Court has tended to depart from the view expressed in those cases. This departure, it was suggested, reflected a recognition that, "the American system of criminal prosecution is accusatorial not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."[24]

The majority opinion further reasoned that since the American system of criminal prosecution is accusatorial, then both state and federal governments are constitutionally required to "establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[25] The Court, while expressly reaffirming the prevailing view that the Fourteenth Amendment does not incorporate the first eight, concluded that:

> The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence.[26]

20 Adamson v. California, 332 U.S. 46, 51, 67 Sup. Ct. 1672, 1675 (1947).

21 *Id.* at 54, 67 Sup Ct. at 1676. For similar statements, see Cohen v. Hurley, 336 U.S. 117, 81 Sup. Ct. 954 (1961); Snyder v. Massachusetts, 291 U.S. 97, 54 Sup. Ct. 330 (1934).

22 In the 5-4 decision, Justices Harlan, White, Clark and Stewart dissented.

23 Malloy v. Hogan, 378 U.S. 1, 5, 84 Sup. Ct. 1489, 1492 (1964).

24 *Id.* at 7, 84 Sup. Ct. at 1493.

25 *Id.* at 8, 84 Sup. Ct. at 1493.

26 *Ibid.*

It was contended, however, that the availability of the federal privilege to a witness in a state proceeding should be ascertained by reference to a less stringent standard than is applicable in a federal proceeding. The Court disagreed, pointing out that it would be "incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court"[27] and that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."[28]

A vigorous dissenting opinion was written by Mr. Justice Harlan, who felt that the question presented in the *Malloy* case was not whether a specific provision of one of the first eight Amendments was violated, but whether there was a denial of due process under the Fourteenth Amendment. He reasoned that what the Fourteenth Amendment requires of the states does not basically depend on what the first eight amendments require of the federal government, and therefore, the majority's holding that the Fourteenth Amendment secures against invasion the same privilege that the Fifth Amendment secures against federal invasion, is unnecessary and inappropriate. He objected to incorporation of the first eight amendments into the Fourteenth by "snaches," and stated:

> If, however, the Due Process Clause is something more than a reference to the Bill of Rights and protects only those rights which derive from fundamental principles, as the majority purports to believe, it is just as contrary to precedent and just as illogical to incorporate the provisions of the Bill of Rights one at a time as it is to incorporate them all at once.[29]

In summary, the United States Supreme Court has once again added to the ever expanding scope of the Fourteenth Amendment's Due Process Clause. The *Malloy* decision clearly indicates that the Fifth Amendment's privilege against compulsory self-incrimination is available to both defendants and witnesses in state proceedings, and that the federal standard will be employed to determine whether the privilege is properly invoked. Noteworthy is the prophetic observation made 56 years ago by Mr. Justice Harlan in his dissent in the *Twining* case. He stated:

> I cannot support any judgment declaring that immunity from self-incrimination is not . . . a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action . . . . And the Court having heretofore, upon the fullest consideration, declared that the compelling of a citizen of the United States, charged with crime, to be a witness against himself, was a rule abhorrent to the instincts of Americans, was in violation of universal American law, was contrary to the principles of free government, and a weapon of despotic power which could not abide the pure atmosphere of

27 Malloy v. Hogan, 378 U.S. 1, 10, 84 Sup. Ct. 1489, 1495 (1964).
28 *Ibid.*
29 Malloy v. Hogan, 378 U.S. 1, 27, 84 Sup. Ct. 1489, 1504 (1964).

political liberty and personal freedom, I cannot agree that a state may make that rule a part of its law and binding on citizens, despite the Constitution of the United States.[30]

T.F. LYSAUGHT

WITNESSES—PRIVILEGE AGAINST SELF-INCRIMINATION—FEDERAL OFFICIALS BARRED FROM USING TESTIMONY ELICITED UNDER STATE IMMUNITY STATUTE—The United States Supreme Court, in the recent case of *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 Sup. Ct. 1594 (1964), was confronted with the problem of whether a state could compel a witness, who had been given immunity from prosecution under its laws, to give testimony which might be used to convict him of a federal crime. The Court overruled its prior decisions[1] by holding that compelled testimony and its fruits, elicited under a state immunity statute, may not be used in any manner by federal officials in a criminal prosecution against the witness.

This case must be considered in conjunction with the case of *Malloy v. Hogan*,[2] decided the same day, which held that the Fifth Amendment privilege against self-incrimination was fully applicable to the States through the Fourteenth Amendment "due process clause" and that the state standard must be the same as the federal standard in determining whether a witness is justified in refusing to answer on the grounds that it might tend to incriminate him.

In the *Murphy*[3] case, the petitioners were subpoenaed by the Waterfront Commission of New York Harbor to testify in regard to a work stoppage at certain piers located in New Jersey. The petitioners were

30 Twining v. New Jersey, 211 U.S. 78, 126-27, 29 Sup. Ct. 14, 31 (1908).

1 United States v. Murdock, 284 U.S. 141, 52 Sup. Ct. 63 (1941); Feldman v. United States, 322 U.S. 487, 64 Sup. Ct. 1082 (1944); Knapp v. Schweitzer, 357 U.S. 371, 78 Sup. Ct. 1302 (1958).

2 378 U.S. 1, 84 Sup. Ct. 1489 (1964). Malloy had been arrested for the crime of pool selling, and after pleading guilty had served 90 days in jail. Sixteen months after his plea of guilty, he was subpoenaed to testify at an inquiry into alleged gambling and other criminal activities in Hartford County, Connecticut. Malloy refused to answer questions designed to ascertain for whom he worked when arrested for pool selling. The Connecticut Supreme Court of Errors had held that the Fifth Amendment was not applicable to the States and that Malloy was not justified in refusing to answer because of the defenses of double jeopardy and the running of the one year statute of limitations on misdemeanors (pool selling), so that his answers could not possibly subject him to prosecution under any state law. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963). The United States Supreme Court reversed holding that Malloy could invoke the Fifth Amendment in a state proceeding and refuse to answer because to answer might subject him to federal prosecution and that the disclosure of the name of the man for whom he worked might furnish a link in a chain of evidence which might connect him with a more recent crime for which he might be prosecuted.

3 Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 84 Sup. Ct. 1594 (1964).