Constitutional Law--Self-Incrimination--Applicable for States

Hunter Durham
University of Kentucky

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Constitutional Law—Self-Incrimination—Applicable for States.—The petitioner pleaded guilty to the crime of pool selling, a misdemeanor gambling charge in Connecticut, and his sentence was probated. Later he was ordered by a referee appointed by the Superior Court of Hartford County, Connecticut, to appear and answer questions as to alleged gambling and other criminal activities within the county. Upon refusal to answer any questions on the ground that it might tend to incriminate him, he was adjudged in contempt and committed to prison until willing to answer. His writ of habeas corpus was denied by the Connecticut Supreme Court of Errors but was granted by the United States Supreme Court. The Supreme Court then reviewed the state court's decision. Held: Reversed.

[T]he Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked. Malloy v. Hogan, 378 U.S. 1, 3 (1964).

In so holding, the Court overruled Twining v. New Jersey and Adamson v. California by drawing an analogy to those cases involving coerced confessions by state officers, as in Brown v. Mississippi. In Brown, the Court held that the due process clause of the fourteenth amendment prohibited the states from using the accused's coerced confessions against him; therefore, it should follow that the fourteenth amendment should forbid states "to resort to imprisonment, as here, to compel him to answer questions that might incriminate him." The federal standard to be used in establishing whether the privilege against self-incrimination has been properly invoked is as follows:

it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result.

The Court further elaborated in restating the scope of the rule, as set out in Hoffman v. United States, that the privilege not only extends to answers that would in themselves support a conviction under a fed-

3 211 U.S. 78 (1908).
4 332 U.S. 46 (1947). Holding that the privilege against self-incrimination is not safeguarded against state action by the fourteenth amendment.
5 297 U.S. 278 (1936).
7 Id. at 14.
8 341 U.S. 479 (1951).
eral criminal statute, but also those which would furnish a link in the
chain of evidence needed to prosecute the claimant for a federal crime.
The judge must be "perfectly clear, from a careful consideration of all
the circumstances in the case, that the witness is mistaken, and that
the answer[s] cannot possibly have such tendency' to incriminate."9

Kentucky's Constitution provides "he cannot be compelled to
give evidence against himself. . ."10 which is similar to that of the
Connecticut Constitution.11 The Connecticut Court, however, used a
test that the danger of incrimination must be real, not remote, and
must be claimed as to each specific question;12 whereas, Kentucky's
Court of Appeals in Kinslow v. Carter13 uses the same test as stated
by the Supreme Court in Malloy. Kentucky's Court said, concerning
this constitutional provision, that it "should be accorded liberal con-
struction in favor of the right it is intended to secure."14 The court
has also held that it is not necessary in claiming the privilege that
the answer incriminate him directly,15 and that the protection extends
to investigations before grand juries,16 and they leave it entirely up
to the court to say whether the privilege is justified.17 Since the
Kentucky Court of Appeals reaches the same result through interpre-
tation of the Kentucky Constitution, Malloy will cause no change
other than giving witnesses the extra protection of using the fifth
amendment as applied through the due process clause of the four-
teenth.

Even though witnesses are given more protection in the liberal
approach used in Malloy, it must be criticized on two major points.
First, as Justice Harlan said in the dissent:

the ultimate result is compelled uniformity, which is inconsistent
with the purpose of our federal system and which is achieved either by
encroachment on the States sovereign powers or by dilution in federal
law enforcement of the specific protections found in the Bill of Rights.18

Therefore, many states which had sound and fundamentally fair
tests for the self-incrimination privilege must now fall under the
auspices of the federal cloak, and yet another move toward bringing
the states under federal control has been made by the Supreme Court.

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9 Id. at 488.
10 Ky. Const. § 11.
11 Conn. Const. art. 1, § 9.
13 282 S.W.2d 141 (Ky. 1955).
14 Id. at 143.
15 Young v. Knight, 329 S.W.2d 195 (Ky. 1959).
16 Frain v. Applegate, 239 Ky. 605, 40 S.W.2d 274 (1931).
17 Taylor v. Commonwealth, 274 Ky. 51, 118 S.W.2d 140 (1939); Gorden
v. Tracy, 194 Ky. 166, 238 S.W. 395 (1922).
18 Malloy v. Hogan, 378 U.S. 1, 16-17.
Secondly, the federal test, like that of Kentucky, has all but let the witness invoke the privilege to any question automatically and, without any statement as to why it was invoked, have it accepted by the court. Even though this test provides greater protection, there remains the fear that this privilege may be misused and the general duty to testify when subpoenaed will be greatly hampered.

Hunter Durham

Constitutional Law—Police Power—"The Kentucky Junkyard Act."—Appellants, junk yard operators, instituted this action in the Franklin Circuit Court seeking a declaration of rights and attacking the constitutionality of Ky. Rev. Stat. 177.905-177.990, commonly known as "The Junk Yard Act." The lower court upheld the act as a valid exercise of the police power of the State, and not arbitrary, discriminatory, nor unreasonable. Held: Affirmed. "The State may constitutionally invoke its police power to regulate businesses where the principal objective is based upon aesthetic considerations." Jasper v. Commonwealth, 375 S.W.2d 735 (Ky. 1964).

State regulation of trades and businesses under the police power has been extended over the past fifty years to practically all forms of business activity. In the litigation thus produced by this extension, the laws are attacked as violative of the due process of law clauses of the federal constitution and various state constitutions.

The basic assumption of these attacks is that such regulation is valid only when in the interest of public health, safety, or welfare, and that where such a relationship between the regulation and the interest of the public is lacking, the regulation becomes an unconstitutional interference with the rights of the individual. As a practical matter, the question of validity turns on the extent to which a court will regard the legislative enactment as determinative or indicative of the public interest supporting it.2

In Supreme Court cases, where the attack is based on the due process and equal protection clauses, there is a broad presumption of validity for state economic regulation through its police power. However, where the basis for attack is racial discrimination, violation of the first amendment, or undue restraint on interstate commerce, no such far-reaching presumption supports the state regulation. In

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1 Dykstra, Legislative Favoritism Before the Courts, 27 Ind. L.J. 38 (1951).