6-1992

A Sleeping Giant: §2 of the Kentucky Constitution

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Our Specialty is Criminal Defense Litigation

The Kentucky Department of Public Advocacy (DPA) is a state-wide public defender program that was established at the recommendation of Governor Wendell Ford by the 1972 Kentucky General Assembly. There are over 100 full-time public defenders in 16 offices across the state covering 60 counties. Another 250 attorneys do part-time public defender work in 80 of Kentucky's 120 counties. DPA is an independent agency located within the state's Protection and Regulation Cabinet for administrative purposes. A Public Advocacy Commission oversees the Department. Yearly, DPA represents in excess of 101,000 poor citizens accused of crimes for offenses ranging from DUI to capital murder. Day in and day out our attorneys and staff bring life to the individual liberties guaranteed by our United States and Kentucky Constitutions.
FROM THE EDITOR:

We see ourselves as standing out in all of history as a people who cherish and protect freedom more than any other people. Our individual freedoms are insured through our Bill of Rights of the United States Constitution and subsequent constitutional amendments like the 14th amendment with its due process and equal protection rights, and through the Bill of Rights of our Kentucky Constitution. December 15, 1997, is the 301st Anniversary of the United States Bill of Rights. September 28, 1992 is the 101st Anniversary of the Kentucky Constitution’s Bill of Rights.

SPECIAL RECOGNITION AND A LIBERTY RESOURCE

This very special issue of our magazine celebrates those defining values, reminds us of the historical reasons for the development of these specific individual protections, and brings together rich resources and thinking for current and future use by those of us who know of no current Kentucky resource of this magnitude which brings together so much information on our liberties. In addition to our regular criminal justice readers, this issue of our magazine goes to every Kentucky school, over 1,000. Hopefully, it will be used for many years as a ready resource for our education system. Together, we need to work to remind ourselves and to remind the future beneficiaries and implementers of the origin and importance the guarantees of our fundamental freedoms.

WHEN IS LIBERTY MOST AT STAKE?

The raw power of government vs. a person’s liberty takes on its most dramatic battle when the state, through a prosecutor, seeks to imprison or kill a fellow citizen for conduct claimed to be criminal. The extent to which that criminal process is fair is the extent to which we really value liberty in our society.

WHO IMPLEMENTS OUR RIGHTS?

Rights on paper are meaningless. They must be put into effect by someone. A criminal defense attorney or a public defender stands representing a citizen-accused against the state’s desire to take the liberty or life of one of its own. Defenders are the persons who implement the Bill of Rights, perhaps more than any other person in our society, when they stand up and defend an individual against the power of government. Let’s recognize this, appreciate it, and remind others of how much we appreciate those who are willing to stand up for the poor, the outcast, the marginalized, and even the guilty and defenseless. The degree to which the state can take liberty from one of the least of us is the degree to which our real liberty is at risk. As Martin Luther King has reminded us in his Letter from the Birmingham Jail, “Injustice anywhere is a threat to justice everywhere.” Someone this year paid a Bill of Rights pardon on the back and thank them for fostering our freedoms. The liberty we enjoy is a product of their efforts.

PRODUCED THROUGH MUCH GENEROSITY

This issue is published through the enormous generosity of two donors: 1) an individual who prefers to remain anonymous, and who was attracted to donating $7,500 because of the special nature of this issue and its distribution to Kentucky’s schools; and 2) The Kentucky Bar Foundation which has given DPA a $2,800 grant. The Kentucky Bar Foundation is committed to improving the administration of Justice, educating the public about the legal system and enhancing the image of the profession. Its officers are: Carroll M. Redford, Jr., President; Robert W. Kellerman, President-Elect; William J. Kavanaugh, Jr., Vice President; Thomas E. Turner, Secretary/Treasurer; Carol M. Palmore, Immediate Past President. The opinions expressed are those of the authors, and do not necessarily represent the views of the Bar Foundation or our anonymous donor.

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A SLEEPING GIANT: SECTION II OF THE KENTUCKY BILL OF RIGHTS

Allison Connelly

The constitutional history of Section 2 has been shaped as much by historical accident as by judicial interpretations. Under Section 4 of the Kentucky Constitution, all supreme power rests with the people. Any power given to the state is expressly limited by Section 2. However, in the early nineteenth century, the people only included white males over the age of twenty-one. Thus, the Kentucky Constitution of 1849, the third constitutional try, designed Section 2 so that it only applied to "free men." In fact, the entire 1849 constitution was built around the protection of slavery. Consequently, after slavery was abolished by the passage of the 13th, 14th, and 15th amendments to the federal constitution, Kentucky was forced to update and modernize its constitution. For this reason, a new constitutional convention was held in 1890. Still, Section 2 remained the same. As a result, it has been left to the courts to interpret Section 2 and give meaning and effect to its expansive and beautiful words.

II. THE MEANING OF SECTION TWO

Christened the "great and essential principle of liberty and free government...which is indispensable to the happiness of an enlightened people," Turner v. United States [1887] 164 U.S. 1, 16 S. Ct. 1, 40 L. Ed. 853 was a landmark decision in the interpretation of Section 2. The decision declared that Section 2's protection of "liberty" extended beyond personal liberty to include the right to a fair trial. The case turned on the issue of whether the defendant, a black man, was entitled to the rights guaranteed under Section 2.

Dr. Thomas Clark concludes that Kentucky's first Constitution—that of 1792—was an "incongruous mixture of fear, doubt, faith and hope." T. Clark, A History of Kentucky, at 95 (1966). This description could easily apply to Section 2 of Kentucky's present Bill of Rights. This section broadly proclaims:

Section 2: Absolute and Arbitrary Power Denied. Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority.

The history of this unique constitutional protection against the exercise of arbitrary official power, reflects Kentucky's own search for a political, economic and social identity. Indeed, it is the ultimate irony that Section 2, intended to safeguard the right of white males to hold slaves, now embodies Kentucky's due process and equal protection guarantees. Thus, while Section 2 was born from the fear that slavery would be outlawed, and from the doubts and mistrust that state and local officials could not safeguard the rights of their citizens, it has grown into a powerful tool that limits arbitrariness in the exercise of state power. Consequently, with faith and persistence in the obligation of our state courts to correct wrongs, this section contains the seeds of hope for the future in ensuring a fair and just criminal justice system.

Despite its sweeping language, until recently this powerful section has largely been ignored by criminal law practitioners. For example, while cases abound finding oppressive governmental action with respect to property rights, there is only one criminal case that equates Section 2 with an accused's right to a fair trial. Dean v. Commonwealth, 477 S.W.2d 900 (1972). Even Justice Stephens has noted, "while there are numerous cases which have been decided on the basis of this bulwark of individual liberty, the number is relative few, in view of its potential importance to our jurisprudence." Kentucky Milk Marketing v. Kroger, Ky., 691 S.W.2d 893, 899 (1985). Clearly, it is time to wake this sleeping giant and use it to challenge arbitrary practices by police officers, prosecutors, judges, correctional officials, and other state actors, who exercise any power over the lives and liberty of accused and convicted citizens. Accordingly, in this time of shrinking constitutional protection at the federal level, we must rediscover our state constitution to champion the cause of life and liberty and give it meaning. Moreover, such an approach makes good legal and practical sense. While the U.S. Constitution defines the minimum rights guaranteed an individual, state constitutions may grant more expansive constitutional protections to their citizens. Prewitt v. Kentucky, 419 U.S. 374 (1980). Indeed, as a threshold matter, Kentucky courts must first determine the validity of the law or action under the Kentucky Constitution before resorting to its federal counterpart. Fanney v. Wilt­ lant, Ky., 655 S.W.2d 480 (1983).

What follows then is an overview of Section 2, its history, purpose, scope and application. It is hoped that by seeing where the section has come from, and how it has been judicially interpreted to reflect society's changing values, we will be equipped to tap into its vast and untapped potential in the future.

I. HISTORY AND PURPOSE OF SECTION 2

The constitutional history of Section 2 has been shaped as much by historical accident as by judicial interpretations. Under Section 4 of the Kentucky's Constitution, all supreme power rests with the people. Any power given to the state is expressly limited by Section 2. However, in the early nineteenth century, the people only included white males over the age of twenty-one. Thus, the Kentucky Constitution of 1849, the third constitutional try, designed Section 2 so that it only applied to "free men." In fact, the entire 1849 constitution was built around the protection of slavery. Consequently, ...
Moreover:

No board or officer vested with governmental authority may exercise it arbitrarily. An action taken rests upon reasons so unwise or unreasonable as to shock the conscience of an act by which to prevent the rights of persons against the Board of Education, Mercer Co., 289 S.W.2d 492, 494 (1956).

Although emotionally compelling, such language is not legalistic rhetoric. These words are the realistic background of philosophy, Section 2, yet, crim­

linial authority. Still, constitutional rights can change, the scope of their expansions or contracts to meet new and changing conditions. The wisdom and necessity of laws, regulations and practices which, as applied to existing conditions, was so hotly, so passionately sustained, would now probably be regarded as arbitrary and oppressive. We are not so chary as at the past with new and creative solutions. Section 2 is not a dead letter from the past. We must make it our own. We must define it and use it to advance progress, so that its words grow, live and give meaning to our pre­

culus constitutional rights.

IV. APPLICATION OF SECTION TWO.

In applying Section 2, the function of the courts is to decide a case on the basis of all the relevant factors. Skinner v. Oklahoma, 316 U.S. 605 (1942), and on equal protection grounds. City of Ashland v. Hecks, Ky., 375 S.W.2d 253, 258 (1963). It is even broader than the 14th amendment.

A review of Section 2 reveals it has been construed to embody many of our most precious con­

stitutional rights. Section 1, through the due process and equal protection clauses, guarantee rights to education,housing, free speech, free press, free assembly, and free association.

Section 2, in effect, denies to the state power to infringe rights of life, liberty, and property.

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Section 2 was enacted as a safeguard to the individual in respect to his life, lib­

erty, and property and has no connection with the federal government. "A review of federal cases, 56 Commonwealth v. John­

son, 242 Ky. 204, 233 S.W. 851 (1921), and on equal protection grounds. City of Ashland v. Hecks, Ky., 375 S.W.2d 253, 258 (1963). It is even broader than the 14th amendment.

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