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Constitutional Law--Self-Incrimination--A New State Standard

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CONSTITUTIONAL LAW — SELF-INCRIMINATION — A NEW STATE STANDARD

Malloy v. Hogan, 378 U.S. 1 (1964).

In 1908, the United States Supreme Court decided *Twining v. New Jersey.*[1] For fifty-six years this decision represented the Supreme Court's view that the federal constitutional privilege against self-incrimination was not applicable to state criminal processes. In *Twining,* the defendant refused to take the witness stand in a criminal action. The prosecutor commented extensively on this failure of the defendant to testify in his own behalf. At that time, New Jersey law permitted a prosecutor to comment on the fact that the defendant had failed to testify in his own behalf from which the jury could draw an inference of guilt.[2] The defendant excepted, asserting that this procedure dissipated his right against self-incrimination. In reversing the New Jersey decision, the Supreme Court of the United States summarized the question as follows:

> The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law.[3]

The Court held that "due process" may impliedly contain a prohibition against self-incrimination, but, that right is not safeguarded by the fifth amendment in state criminal proceedings. In a portent of the future, the Court, in dismissing Twining's appeal, stated:

> It 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.[4]

The hesitant *quaere* announced by the Court has become all but absolute. *Malloy v. Hogan*[5] which made the self-incrimination clause of the fifth amendment applicable to state prosecutions is another landmark decision in the tradition of *Gitlow v. New York,*[6] *Mapp v. Ohio*[7] and *Gideon v. Wainright.*[8] The Court in *Malloy* unequivocally stated their holding.

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1. 211 U.S. 78 (1908).
2. State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743 (1903).
3. 211 U.S. 78, 91 (1908).
4. *Id.* at 99. (Emphasis added.)
5. 378 U.S. 1 (1964).
6. 268 U.S. 652 (1925). (first amendment.)
7. 367 U.S. 643 (1961). (fourth amendment.)
8. 372 U.S. 335 (1963). (sixth amendment.)

> We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.[9]

An analysis of the facts in *Malloy* show that the petitioner, Malloy, was arrested for gambling in Connecticut. Upon registering a plea of guilty, he was fined and sentenced to one year in prison. After his release, the county in which he had been arrested initiated an inquiry into local gambling activity. As a convicted gambler, Malloy was "prevailed upon" to testify at the county's hearing on this matter. The questions put to Malloy were designed to elicit information about his activities at the time of the arrest. The petitioner refused to answer any questions on the grounds that his answers might tend to incriminate him. He was subsequently cited and convicted for contempt. The petitioner's writ of habeas corpus was denied by the lower state court and the Connecticut Supreme Court of Errors affirmed that decision.[10] The issue before the Connecticut court was whether Malloy's refusal to answer was justified under the rules governing the exercise of the privilege.[11] The court reasoned that the test applied in answering a question was simply whether it would incriminate or tend to incriminate. In applying this test to the repeated refusals of Malloy to testify, the court concluded that the anticipated answers to the referee's questions could not have, under the circumstances from which the questions arose, incriminated him. Therefore, he should have answered the questions.

The United States Supreme Court, in reversing the Connecticut court's decision, stated:

> The conclusions of the Court of Errors, tested by the *federal standard,* fail to make sufficient account of the setting in which the questions were asked. . . . An affirmative answer . . . might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal.[12]

The Court's decision in *Malloy* is not surprising. After *Mapp* and *Gideon*, one would not have to be clairvoyant to predict this result. What is surprising, however, and indeed welcomed, is the degree of precision in the Court's opinion.

Unlike *Mapp* there is no question in *Malloy* as to the standard applicable to the states. Prior to *Mapp*, there appeared to be three measures of conduct with respect to criminal procedure. Insofar as state criminal processes were concerned, the due process standard of the fourteenth

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9. 378 U.S. 1, 6 (1964).

10. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744, *cert. granted,* 373 U.S. 948 (1963).

11. *Ibid.*

12. Malloy v. Hogan, 378 U.S. 1, 13-14. (Emphasis added).

amendment was, of course, the traditional measure of state action.[13] However in the federal system, the federal supervisory standard established by the Supreme Court was, and is, another measure of conduct.[14] Somewhat more nebulous than either the federal supervisory standard or the fourteenth amendment standard was the conduct required by the Constitution itself.[15] After the *Mapp* decision, there was a great deal of confusion in attempting to ascertain what standard was applicable to the states. Although it was clear that the Court had overruled the rather loose "due process" standard required by the fourteenth amendment, it was not clear whether the Court was applying the constitutional standard of "unreasonableness," or whether the more stringent federal supervisory standard was to be applied in subsequent cases. Fortunately, after *Ker v. California*[16] it was clear, at least with respect to the fourth amendment, that the federal supervisory standard and the standard of conduct required by the fourth amendment were one and the same. Thus, it was only after *Ker* that it could be said with authority that the *Mapp* case applied the federal supervisory standard to the states via the due process clause of the fourteenth amendment.[17] However, the explicit language in *Malloy* avoids a similar dispute. Mr. Justice Brennan, writing for the majority, leaves no room for doubt as to the applicable standard. He states:

> We have held that the guarantees of the First Amendment, Gitlow v. New York[18] ... the prohibition of unreasonable searches and seizures of the Fourth Amendment, Ker v. California[19] ... and the right to counsel guaranteed by the Sixth Amendment, Gideon v. Wainright[20] ... *are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.*[21]

Thus, the notion that the due process standard of the fourteenth amendment presents a "watered-down" guarantee of individual liberty is rejected. Justice Brennan then states that the outcome of a particular case whether

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13. See, *e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937).

14. An example of the supervisory standard in the pre-*Mapp* era was the federal exclusionary rule.

15. With respect to search and seizure, in decisions prior to *Miller v. United States*, 357 U.S. 301 (1957), the Court was explicit in distinguishing standards required by the Constitution and standards set by the Court. Thus, the fourth amendment's prohibition was phrased in terms of "no unreasonable searches and seizures." However, the federal exclusionary rule was not deemed a constitutional requisite.

16. 374 U.S. 23 (1963).

17. A discussion of whether the Court is applying the fifth amendment's prohibition against self-incrimination to the states using the fourteenth amendment as a "funnel" or whether the Court is merely announcing that due process, per se, impliedly contains the privilege in the same degree that it is present in the fifth amendment is fruitless, since the result is the same.

18. 268 U.S. 652 (1925).

19. 374 U.S. 23 (1963).

20. 372 U.S. 335 (1963).

21. 378 U.S. 1, 10 (1964). (Emphasis added.)

governed by the fifth or fourteenth amendment ought to be the same. Hence the fifth amendment is accorded the same role as the first, fourth and sixth amendments. Having established the formula applied to those amendments, the coup-de-grace is effectively administered to the notion of dual standards — one for federal courts and still another for state courts.

> What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities. . . . 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. *Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.*[22]

Thus in one fell swoop all the standards applied in all of the Court's opinions with respect to self-incrimination would seem to be applied to the states.

The changes that this decision will effect in state criminal procedures are immense, but not troublesome. State courts should have little difficulty in adjusting to this change. The "right to counsel" decision in *Gideon* has, and will continue to have, vast economic ramifications with respect to the cost inherent in providing counsel for indigents. The "search and seizure" decision in *Mapp* had a great impact on the effectiveness of law enforcement. The *Malloy* decision, however, presents no economic problem and should cause little more than a ripple with respect to changes in law enforcement. Nevertheless, the *Malloy* decision has a great impact on Ohio criminal procedure.

Ohio is one of the few jurisdictions which allows a prosecuting attorney to comment upon the failure of an accused to testify in his own behalf.[23] The Ohio Constitution as well as the Ohio Revised Code permit a prosecuting attorney to comment upon the unwillingness of the accused to testify. The Ohio Constitution is explicit in providing for this procedure.

> No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel.[24]

The language in the Code is similar.[25]

It is difficult to conceive of a more latent contradiction than that presented by the Ohio Constitution on the matter of self-incrimination. On the one hand, the privilege against self-incrimination is allegedly preserved, and, on the other hand, it is dissipated and rendered of no value. The accused is, therefore, "on the horns of a dilemma." If he chooses to testify he will undoubtedly be subjected to a withering cross-examination.

22. *Id.* at 11. (Emphasis added.)
23. See Annot., 171 A.L.R. 1267 (1947); Annot., 104 A.L.R. 478 (1936).
24. OHIO CONST. art. I, § 10.
25. OHIO REV. CODE § 2945.43.

If he chooses to exercise his *privilege* not to testify, he will be subjected to a base innuendo which is expressly sanctioned by the Ohio Constitution.

The United States Supreme Court has, in federal prosecutions, condemned the practice of commenting on the failure of the accused to testify. In 1893, the Court held in *Wilson v. United States*[26] that the failure of an accused to testify in his own behalf *"shall not create any presumption against him."*[27] The Court then stated that permitting counsel to comment could not be tolerated.

> To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.[28]

Thus, the Court enunciated the federal supervisory standard condemning the practice of comment. Again in 1943, the Court in *Johnson v. United States*[29] inveighed a prosecutor's comment on the exercise of the privilege by an accused. While the Court in *Wilson* was primarily concerned with an adverse effect on a jury, the Court in *Johnson* related the practice of comment directly to the privilege against self-incrimination, stating:

> When it [the court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. *That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers.*[30]

Therefore, it is apparent that the practice of commenting on the failure of an accused to testify in his own behalf has, for a considerable period of time, been declared antithetical to the fifth amendment privilege against self-incrimination. Yet, prior to *Malloy*, this federal standard had not been imputed to the states via the fourteenth amendment. In *Adamson v. California*,[31] the petitioner argued that the prosecutor's comment on his failure to testify abridged his fifth amendment protection against self-incrimination. After indicating that this practice was forbidden in federal courts, the Court apologetically answered the petitioner's urgings.

> It is *settled* law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection 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 man that are listed in the Bill of Rights.[32]

26. 149 U.S. 60 (1893).
27. *Id.* at 65. (All italicized in original.)
28. *Ibid.*
29. 318 U.S. 189 (1943).
30. *Id.* at 199. (Emphasis added.)
31. 332 U.S. 46 (1947).
32. *Id.* at 51. (Emphasis added.)

Hence, the court in *Adamson* declared that the practice of commenting on the failure of an accused to testify, although prohibited in federal courts, was inapplicable to state criminal prosecutions. Conversely, Mr. Justice Black, dissenting in *Adamson*, believed that the federal standards were applicable to state procedure. Providing a lucid historical analysis,[33] Justice Black's establishment of a solid legal basis for future extensions has been ignored by the present Court. Justice Black concluded that the historical events surrounding the passage of the fourteenth amendment as well as the expressions of the proponents of the amendment made it clear to him

> that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish *was to make the Bill of Rights, applicable to the states.*[34]

Following the reversal of *Twining* and *Adamson* by *Malloy*, no other conclusion can be reached but that the proviso of the Ohio Constitution authorizing a prosecutor to comment on the failure of an accused to testify is unconstitutional in light of the proscriptions in the *Malloy* case.

Malloy v. Hogan[35] represents no more than an anticipated result emanating from the spirit of *Mapp v. Ohio.*[36] The decision will produce joy in the camps of those who decry a state-federal dichotomy of process, and only additional sorrow for those who bemoan the loss of autonomy in state criminal courts. The Supreme Court has taken another step forward (or backward depending on one's viewpoint) to the almost certain eventuality of including the entire Bill of Rights in the fourteenth amendment.

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33. *Id.* at 92-123. (dissenting opinion)

34. *Id.* at 70-72. (Emphasis added.) It is unfortunate that Mr. Justice Brennan did not see fit in *Malloy* to adopt Mr. Justice Black's dissenting opinion in *Adamson*, at least with respect to Justice Black's analysis of the fifth amendment's applicability to state criminal procedure. At present, *Malloy* offers state courts no guidance in cases with facts not similar to those in that case. Admittedly the Supreme Court, *de jure*, renders only case by case determinations. However the far-reaching effect of a Supreme Court opinion extends beyond narrow fact similarities. Had the Court adopted, even in dictum, the broad scholarly base outlined by Justice Black, states would have been provided with an indication of what the standard will be in the future.

35. 378 U.S. 1 (1964).

36. 367 U.S. 643 (1961).