

Michigan Law Review

Volume 54 | Issue 4

1956

Constitutional Law - Due Process - Privilege Against Self-Incrimination in State Criminal Proceedings

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Recommended Citation

Frank M. Lacey, *Constitutional Law - Due Process - Privilege Against Self-Incrimination in State Criminal Proceedings*, 54 MICH. L. REV. 554 (1956).

Available at: <https://repository.law.umich.edu/mlr/vol54/iss4/7>

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CONSTITUTIONAL LAW—DUE PROCESS—PRIVILEGE AGAINST SELF-INCRIMINATION IN STATE CRIMINAL PROCEEDINGS—In March 1951, defendant, a New York City policeman, was called to testify before a state grand jury investigating the association of city policemen with the criminal element of Kings County. Existing laws required public officers to execute a waiver of immunity to prosecution for matters to which their testimony

related, on pain of losing their positions.¹ The defendant signed such a waiver, and shortly thereafter resigned from the police force. He was called before the same grand jury again in December 1952, and on this occasion was asked whether he had ever accepted bribes while a policeman. He refused to answer, claiming a federal and state constitutional privilege against self-incrimination. When he persisted in his refusal after a judicial determination of the continuing validity of his waiver, he was convicted of criminal contempt. This was affirmed by the state appellate courts.² On appeal to the United States Supreme Court, *held*, affirmed. In a concurring opinion, Chief Justice Warren and Justice Clark reserved questions of law that might arise if the defendant were to be subjected to further questioning by the grand jury. Justices Black and Douglas dissented on the ground that the conviction was a violation of the due process clause of the Fourteenth Amendment. *Regan v. New York*, 349 U.S. 58, 75 S.Ct. 585 (1955).

The privilege against self-incrimination has traditionally been excluded from the elements of due process under the Fourteenth Amendment.³ Perennial dissenters from this view have been Justices Black and Douglas.⁴ The holding in the principal case does nothing to disturb this alignment. However, the questions raised by the concurring opinion indicate a possibility that the broadening concept of due process may yet come to include certain aspects of the privilege against self-incrimination. Specifically, doubts were expressed as to the constitutionality of any future conviction based upon a confession extracted from the defendant by again threatening prosecution for contempt. The admissibility in state criminal trials of evidence obtained by coercion is one of the areas covered by the recent expansion of the due process clause.⁵ Beginning with the proposition that a confession obtained by brutality and violence could not, by itself, support a conviction for murder,⁶ the movement reached a peak in the dictum in *Lisenba v. California* where it was asserted: "The concept of due process would void a trial in which, by threats or promises . . . a defendant was induced to testify against himself."⁷ When confessions are made after long periods of questioning (without physical abuse),

¹ Immunity from prosecution is granted by 39 N.Y. Consol. Laws (McKinney, 1944) §381. Provisions of both the state constitution and city charter require public officers to waive that immunity. N.Y. CONST., art. 1, §6; N.Y. City Charter (Tanzer, 1937) §903.

² 282 App. Div. 775, 122 N.Y.S. (2d) 478 (1953); 306 N.Y. 747, 117 N.E. (2d) 921 (1954); 306 N.Y. 875, 119 N.E. (2d) 45 (1954).

³ *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14 (1908); *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672 (1947).

⁴ See *Adamson v. California*, note 3 *supra*, at 68, where their argument that the Fourteenth Amendment made the Bill of Rights applicable to the states is documented. But see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 STAN. L. REV. 5 (1949).

⁵ See, generally, Green, "The Bill of Rights, the Fourteenth Amendment, and the Supreme Court," 46 MICH. L. REV. 869 (1948); 50 MICH. L. REV. 567 (1952).

⁶ *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936).

⁷ 314 U.S. 219 at 237, 62 S.Ct. 280 (1941).

decisions on their admissibility seem to vary with the fact situation and the composition of the court.⁸ Perhaps the most significant feature of the trend was the establishment of the principle enunciated in *Palko v. Connecticut* that only such provisions of the Bill of Rights as are "implicit in the concept of ordered liberty" are secured against state interference by the Fourteenth Amendment.⁹ If this broad standard is the substance of due process, differences in the kind of pressure employed in obtaining confessions would seem to be less significant than if the concept were better defined.¹⁰ The Supreme Court has never said that, in the absence of an adequate immunity statute, a state may punish a witness for refusing to answer self-incriminating questions. The result reached in the instant case does not jeopardize that principle, since New York had an immunity statute and Regan was protected by it except in so far as he waived that protection. His contempt conviction is consistent with the numerous holdings that immunity statutes may be substituted for the privilege against self-incrimination, thus compelling witnesses to testify.¹¹ This analysis only moves the problem back one step, the question then being to what extent irregularities in the application of immunity statutes make their use a violation of due process. There would seem to be no doubt that states may provide for waivers of immunity¹² or set qualifications for public office.¹³ When the two operations are combined, however, they may produce results not contemplated by either. If an employee must waive immunity or lose his job, he is deprived of both the right to refuse to testify and the immunity that is supposed to replace that right. He may then be forced, by threat of imprisonment, to give self-incriminating testimony. Whether this is contrary to the "concept of ordered liberty" is another matter. If there is a federal privilege here, it is possible that a state may be prohibited from violating it by conditioning the retention

⁸ Finding a violation of due process: *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944); *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716 (1954). Finding no violation of due process: *Stein v. New York*, 346 U.S. 156, 73 S.Ct. 1077 (1953). See, generally, 39 CORN. L. Q. 321 (1954).

⁹ 302 U.S. 319 at 325, 58 S.Ct. 149 (1937).

¹⁰ But see 3 WIGMORE, EVIDENCE, 3d ed., §823 (1940). If, as Dean Wigmore suggests, the sole principle behind the exclusion of such evidence is a want of trustworthiness, the possibility of finding a violation of due process in the use of evidence "coerced" by a waiver of immunity is considerably lessened.

¹¹ *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644 (1896); *United States v. Murdock*, 284 U.S. 141, 52 S.Ct. 63 (1931).

¹² See 39 N.Y. Consol Laws (McKinney, 1954) §2446, which authorizes the filing of voluntary waivers of immunity, and which has been in force since 1912. The provisions of the New York Constitution (cited in note 1 supra), relating to the dismissal of public officers for refusing to testify or waive immunity, were added in 1938. Their constitutionality has never been tested.

¹³ See *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E. (2d) 972 (1940); *Wilson v. North Carolina*, 169 U.S. 586, 18 S.Ct. 435 (1898); 30 COL. L. REV. 1160 (1930). On the use of N.Y. City Charter (note 1 supra), to effect the dismissal of public school teachers for invoking the privilege against self-incrimination, see *Daniman v. Board of Education*, 306 N.Y. 532, 119 N.E. (2d) 373 (1954), noted in 54 MICH. L. REV. 126 (1955).

of state privileges upon its renunciation.¹⁴ On the other hand, this seems to be precisely what is done with this privilege by statutes governing certain commercial records and accident reports. It has been consistently held that one may not refuse to supply required information by claiming a privilege against self-incrimination.¹⁵ Yet in spite of the difficulties that may be encountered in distinguishing these situations, the present opinion, supplemented by what can be known of the Court from previous announcements on the subject,¹⁶ warns that there may soon be another extension of the due process clause in the direction indicated by the concurring opinion.¹⁷

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¹⁴ Cf. *Terral v. Burke Construction Co.*, 257 U.S. 529, 42 S.Ct. 188 (1922).

¹⁵ *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913); *State v. Davis*, 108 Mo. 666, 18 S.W. 894 (1891).

¹⁶ A majority of the Court has shown a tendency to permit a broader interpretation of due process: Chief Justice Warren and Justice Clark here; Justices Black and Douglas here and elsewhere; Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 69 S.Ct. 1357 (1949).

¹⁷ A further suggestion made by Chief Justice Warren was to treat the use of waivers against those no longer holding public office as violations of the equal protection clause of the Fourteenth Amendment. For New York's handling of "duration" in waivers of immunity, see *Berson v. Goldstein*, (Sup. Ct. 1953) 124 N.Y.S. (2d) 452; *People ex rel. Hofsaes v. Warden of City Prison*, 302 N.Y. 403, 98 N.E. (2d) 579 (1951).