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CONSTITUTIONAL LAW--DUE PROCESS AND THE BILL OF RIGHTS--SELF-INCRIMINATION

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COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS AND THE BILL OF RIGHTS —SELF-INCRIMINATION—In the course of evolving workable doctrines which give substance and meaning to the skeletal phrase "due process of law" as used in the Fourteenth Amendment to limit state action, the Supreme Court has frequently been called on to determine the scope of the several prohibitions and guarantees of the Bill of Rights of the federal Constitution. This general problem, and more particularly the application of the Fifth Amendment self-incrimination clause to state criminal proceedings, was again presented in a recent case[1] and resulted in a sharp division of opinion within the Court.

Petitioner, convicted of first degree murder in California,[2] challenged the validity of the provision of the California Constitution which permits the court and counsel to comment on the failure of the accused to testify in his own defense.[3] Since petitioner had a criminal record which could be revealed to the jury only if he took the stand,[4]

[1] Adamson v. California, (U.S. 1947) 67 S. Ct. 1672.

[2] The California Supreme Court affirmed the conviction in People v. Admiral Dewey Adamson, 27 Cal. (2d) 478, 165 P. (2d) 3 (1946).

[3] Cal. Const., (1879) Art. 1, § 13 as amended Nov. 6, 1934; Cal. Penal Code (Deering, 1941) § 1323.

[4] Cal. Penal Code (Deering, 1941) §§ 1025, 1093 (1941) and Cal. Code of Civ. Proc. (Deering, 1946) § 2051.

he was faced with the choice of testifying in his own behalf and thus exposing his prior record or of remaining silent and so affording an opportunity for possible adverse comment. Confronted with this dilemma, petitioner chose the latter course, and the prosecutor commented extensively on his silence. Such comment, argued petitioner, violated the privilege against self-incrimination guaranteed by the Fifth Amendment;[5] and that privilege, he contended, is both an incident of national citizenship and inherent in the right to a fair hearing protected by the due process clause of the Fourteenth Amendment.[6]

In sustaining the conviction the Court divided five to four, with Justice Reed speaking for the majority. Assuming *arguendo* that comment on failure of the accused to testify would violate the Fifth Amendment, Justice Reed could find no merit in the petitioner's contentions. The *Twining* case,[7] he noted, had held that freedom from self-incrimination in state trials is a matter of state citizenship, and it had long been settled that in regard to citizenship rights the Fourteenth Amendment did no more than recognize the duality of state-national citizenship without extending national protection to the privileges and immunities of state citizenship.[8] As for the due process argument, the Court might likewise have rested its decision that the Fourteenth Amendment does not encompass the self-incrimination clause solely on the forty-year old authority of the *Twining* case. The majority went further, however, than merely to re-affirm the *Twining* ruling. Due process, Justice Reed admitted, demands that a state grant a fair trial to an accused person, but the fair trial requirement would not necessarily prevent a state from compelling the accused to testify; in any event, it "does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes."[9]

Justice Black, supported by Justices Murphy, Rutledge, and Douglas, took the view that the due process clause of the Fourteenth Amendment made all the guarantees of the Bill of Rights binding on the states.[10] This he believed was the intention of the framers of the amendment as indicated by the historical evidence. In addition, he

[5] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[6] " . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[7] Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14 (1908).

[8] Slaughterhouse Cases, 16 Wall. (83 U.S.) 36 (1872); for a discussion of the background and implications of the decision see 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 533 et seq. (1937).

[9] Adamson v. California, (U.S. 1947) 67 S. Ct. 1672 at 1678.

[10] Id. at 1684 et seq.

argued that the Bill of Rights, rather than the majority's "natural law" theory, should be the criterion in determining whether the due process concept embraces a particular right. Justices Murphy and Rutledge, while agreeing that the Fourteenth Amendment extended the Bill of Rights to the states, did not conceive due process to be as limited as Justice Black suggested; they thought there might be times when the concept should be given a broader scope than indicated by the specific guarantees of the first eight amendments.[11]

The possible implications of the position taken by Justice Black, the wide divergence of the majority and minority views, and the closeness of the decision indicate that the case is of more than ordinary interest and importance. In the light of this case, two related problems merit discussion here: first, the court's treatment of due process in terms of the Bill of Rights, and secondly, the question of self-incrimination, particularly the validity of comment by court and counsel upon failure of a defendant to testify in his own behalf.

I

That the framers of the Bill of Rights intended to restrict only the federal government, not the states, is scarcely open to question.[12] Undoubtedly, however, there is some basis in historical fact for the contention that the proponents of the Fourteenth Amendment expected to extend the first eight amendments to the states. It seems clear, for example, that Congressman Bingham, who fathered the Fourteenth Amendment's due process clause, was largely motivated by a desire to nationalize the Bill of Rights.[13] Yet it is equally clear that the Congressional framers were strongly influenced by other motives which were probably of more immediate moment—punishment of the South, strengthening of the national government, and preservation of Radical Republican control of Congress—and that these were the persuasive factors in ratification.[14] Further, it is doubtful that Congress and the country intended that the due process clause should absorb all of the first eight amendments in any literal sense. Justice Black's historical support seems inconclusive at best.

Although the Court has persistently refused to incorporate the entire Bill of Rights into the Fourteenth Amendment, it has frequently

[11] Id. at 1683.

[12] Barron v. Baltimore, 7 Pet. (32 U.S.) 242 (1833).

[13] 3 CONG. GLOBE, 39th Cong., 1st sess., 2542 (1866); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

[14] FLACK, ibid.; COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES (1912); GUTHRIE, FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898). The work by Flack provides a careful survey of newspaper reports as well as Congressional debates.

acknowledged that at least some of the rights specified in the first eight amendments are essential to due process. The recognition of a relationship between due process and specific constitutional guarantees has been especially evident in the Court's treatment of the so-called substantive rights of the First Amendment. Thus in the past twenty-two years the due process clause has progressively assimilated freedom of speech, press, religion, and assembly,[15] so that today the First Amendment is regarded as limiting the states in substantially the same measure that it limits the federal government.

In contrast to the recent but virtually complete assimilation of the First Amendment, the procedural connotations of due process appear at first glance to have developed with constraint and inconsistency. Whether or not justified in theory, the Court in fact has rejected some procedural safeguards of the Bill of Rights as unnecessary to due process, while accepting others as essential. The following instances are illustrative. In 1884 the *Hurtado* case[16] held that due process did not require California to adhere to grand jury indictment (Fifth Amendment), Justice Matthews suggesting that due process should include " . . . any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good. . . . "[17] This unwillingness to restrict state criminal procedures to the confines of the Bill of Rights was reaffirmed in 1900; in sustaining the validity of the Utah eight-man jury in place of the common law jury (Sixth Amendment), the Court remarked that the people of each state "should have the right to decide for themselves what shall be the form and character of the procedure in such trials."[18] Similarly, the Court in later cases was unable to find that the state must observe the prohibitions against self-incrimination[19] and double jeopardy[20] (Fifth Amendment). On the other hand, it has been axiomatic that

[15] Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625 (1925) (speech); Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625 (1931) (press); Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); Everson v. Board of Education, (U.S. 1947) 67 S. Ct. 504 (religion); De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255 (1937) (assembly).

[16] Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111 (1884).

[17] Id. at 537. It was recently reported that Judge Guy A. Miller of the Circuit Court of Wayne County, Michigan, had vacated a 1932 murder conviction which had been based on a prosecutor's information, because he interpreted the Adamson decision as requiring the states to follow the method of indictment by grand jury specified in the Fifth Amendment, DETROIT FREE PRESS, 1:8 (Oct. 2, 1947), 13:1 (Oct. 4, 1947). The majority opinion in the Adamson case, however, offers no suggestion that the Hurtado decision has been overruled.

[18] Maxwell v. Dow, 176 U.S. 581 at 605, 20 S. Ct. 448, 494 (1900).

[19] Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14 (1908).

[20] Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149 (1937).

the state must afford the accused a fair hearing, which demands more than a mere pretense of trial.[21] The requirement of a fair hearing, the Court has said, forbids the state to deprive the accused of the assistance of counsel[22] (Sixth Amendment). In addition, it is hardly likely that the Court would permit a state to indulge in cruel and unusual punishment[23] (Eighth Amendment).

It is apparent that the procedural protections which due process demands of the states cannot be determined merely by reference to the federal Bill of Rights. What rationale, then, has prompted the Court to include some rights and exclude others? On what theory can it be said that benefit of counsel is basic to due process while jury trial is not? The classic answer was given by Justice Cardozo in *Palko v. Connecticut*.[24] Certain rights, he maintained, are fundamental; these include the freedoms of the First Amendment and the right to a fair hearing, including assistance of counsel; without them there could be neither justice nor liberty; therefore they have been recognized as limitations upon the states under the Fourteenth Amendment. But other rights, such as jury trial and grand jury indictment, are on a lower plane; they "may have value and importance . . . even so, they are not of the very essence of a scheme of ordered liberty."[25]

It is this interpretation of due process in terms of fundamental rights which Justice Black apparently considers the "natural law" theory and which he vehemently criticizes as a guide to judicial decision. The natural law formula, he contends, "should be abandoned as an incongruous excrescence on our Constitution."[26] His criticism seems neither novel[27] nor persuasive. The fundamental rights doctrine does not appear synonymous with natural law as the latter term is commonly understood,[28] and surely does not leave the members of the Court free to "roam at will in the limitless area of their own beliefs. . . ."[29] It may be conceded that an approach to due process which requires that the Court periodically decide what is "of the very essence of ordered liberty" leaves wide room for the judges' personal predilections and

[21] Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265 (1923).

[22] Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932); De Meerleer v. Michigan, (U.S. 1947) 67 S. Ct. 596.

[23] This was assumed, but not decided, in Louisiana ex rel. Francis v. Resweber, (U.S. 1947) 67 S. Ct. 374.

[24] 302 U.S. 319, 58 S. Ct. 149 (1937).

[25] Id. at 325.

[26] Adamson v. California, (U.S. 1947) 67 S. Ct. 1672 at 1688.

[27] HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930).

[28] Ibid.

[29] Adamson v. California, (U.S. 1947) 67 S. Ct. 1672 at 1696 [dissenting opinion of Justice Black, quoting from Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 at 600, note 4, 62 S. Ct. 736 (1942)].

individual concepts of justice; but the alternative of mechanical reliance on the limited guarantees of the Bill of Rights seems hardly more inviting.[30] In short, the Court's traditional method of developing the due process concept by gradual inclusion and exclusion[31] would appear to gain more in flexibility than it loses in uncertainty. Furthermore, it is unlikely that even a jurist of the positivist school could avoid altogether the difficulties of the natural law approach by using the Bill of Rights as a due process yardstick. The positivist as well as the philosopher is influenced to some extent by natural law ideas;[32] and it would seem impossible to exclude this influence when deciding the practical application of the brief and possibly ambiguous phrases of the first eight amendments. Whatever the approach to interpretation of due process, whether in terms of assimilation or of fundamental rights, the element of judicial choice and assessment of values cannot be avoided.

Finally, the practical objections to treating due process as the equivalent of the Bill of Rights are formidable. As pointed out by Justice Frankfurter,[33] one effect would be to invalidate a sizeable segment of state law and to nullify proceedings completed under them. More than half of the states have allowed accusation of crime by information instead of grand jury indictment; should due process now be construed to mean that the states are bound by the grand jury procedure of the Fifth Amendment, untold numbers of convicts would have a valid claim to release or re-trial. Similarly, the requirement of jury trial in any action for more than twenty dollars (Seventh Amendment) would presumably necessitate re-litigation of claims in the many states which authorize trial without a jury in suits involving larger amounts. Unless we revert to a doctrinaire and mechanical jurisprudence, it is difficult to accept the view that such practical considerations are of no moment.

II

The privilege against self-incrimination had its origins in popular

[30] This is apparently the opinion of one well-known advocate of civil liberties; see Fraenkel, "The Supreme Court and Civil Rights: 1946 Term," 47 COL. L. REV. 953 at 967 (1947).

[31] Moody, J., in Twining v. New Jersey, 211 U.S. 78 at 100, 29 S. Ct. 14 (1908).

[32] "The Analytical School, though formally repudiating natural law, has been influenced at all times by an anonymous natural law in the form of ethical views as to what is fair and just. Positivists do not in fact deny that moral ideas influence the law; they merely contend that ethical rules of conduct are not law until they receive the approval of the lawmaking or law-enforcing agents of the sovereign." HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 322 (1930).

[33] Adamson v. California, (U.S. 1947) 67 S. Ct. 1672 at 1683.

reaction to the abuses of the inquistorial oath and the Star Chamber.[34] Although apparently an accepted principle of common law in both England and the American Colonies before 1700, the privilege could not be found in any major constitutional document[35] until the Virginia Bill of Rights of 1776. Such conspicuous absence from the Petition of Right and the English Bill of Rights has led some historians to suggest that the privilege was not generally considered of constitutional importance prior to the adoption of the federal Constitution.[36] Yet the colonists seem to have thought otherwise, for the privilege was expressly named in the constitutions or bills of rights of seven states[37] some years before the Philadelphia Convention of 1787.

Today the constitutions of forty-six states contain prohibitions against self-incrimination;[38] and in the other two states the privilege has been recognized by judicial decision.[39] In view of this universal acceptance, the debate as to whether due process of law extends the privilege clause of the Fifth Amendment to the states may seem somewhat academic. The federal and state constitutional provisions, however, are invariably brief, offering little aid to the courts in deciding what is meant by privilege against self-incrimination. Evidently it was the intention of the framers of the Constitution to restrict the constitutional right to testimonial compulsion, as distinguished from search and seizure or other procedures which might incriminate.[40] Even so, there may be problems of interpretation. One such problem is involved here—whether court and counsel may comment on the failure of the accused to testify in his own behalf.

During nearly a century after establishment of the privilege as a constitutional right, the question of comment on the silence of the defendant did not arise, since nowhere was the accused a competent witness in his own defense until after the Civil War.[41] Even after the

[34] 8 WIGMORE, EVIDENCE, § 2250 (1940); Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America," 21 VA. L. REV. 763 (1935).

[35] The one exception was the Scotch Claim of Rights of 1689.

[36] 8 WIGMORE, EVIDENCE, § 2250 (1940); Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14 (1908); but compare Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America," 21 VA. L. REV. 763 (1935).

[37] Virginia (1776); Pennsylvania (1776); Maryland (1776); North Carolina (1776); Vermont (1777); Massachusetts (1780); New Hampshire (1784).

[38] See 8 WIGMORE, EVIDENCE, § 2252 (1940) for a list of the various provisions.

[39] State v. Height, 117 Iowa 650, 91 N.W. 935 (1902); State v. Zdanowicz, 69 N.J.L. 619, 55 A. 743 (1903).

[40] 8 WIGMORE, EVIDENCE, § 2250 (1940); Pittman, "The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America," 21 VA. L. REV. 763 (1935).

[41] The first state to permit the accused to testify was Maine in 1864; see Reeder, "Comment Upon Failure of Accused to Testify," 31 MICH. L. REV. 40 (1932).

accused was given the right to testify, he might still choose to remain silent. This raised the issue whether any inference might properly be drawn from his self-imposed silence. It was apparent that failure to take the stand should not raise a presumption of guilt; but it was also unrealistic to suppose that the jury would completely ignore the possible inference of guilt stemming from the defendant's conduct. Most jurisdictions recognized that it would be undesirable to instruct the jury to disregard such an inference, since "to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness."[42] The question remained whether, in view of the constitutional privilege against self-incrimination, the court and counsel might properly comment on the defendant's decision not to take the stand.

The state courts have disagreed as to the propriety of such comment. The New Jersey court in *Parker v. State* expressed the view that comment is legitimate:

> "But when the accused is upon trial, and the evidence tends to establish facts which if true would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then his silence would justify a strong inference that he could not deny the charges.
>
> "Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt? . . . The rights of the accused are not invaded or denied by proper comment on his silence."[43]

Whatever the merits of the New Jersey opinion, it was not the position of the majority. The Tennessee court expressed the prevailing sentiment when it said:

> "No inference of guilt can be drawn from the failure of a defendant to testify for himself. Were it otherwise, a defendant on trial might be put in the awful situation of being required to commit perjury to avoid the consequences of his failure to avail himself of the privilege extended him by the statute. The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself."[44]

[42] 8 WIGMORE, EVIDENCE, § 2272 at p. 416 (1940).

[43] 61 N.J.L. 308 at 313, 314, 39 A. 651 (1898); although New Jersey does not have a constitutional provision against self-incrimination, the quoted opinion is fairly representative of the minority view of those jurisdictions which do have such a provision; selected quotations from other courts may be found in Reeder, "Comment Upon Failure of Accussed to Testify," 31 MICH. L. REV. 40 (1932).

[44] Staples v. State, 89 Tenn. 231 at 233, 14 S.W. 603 (1890).

Most legislatures appear to have accepted this view, for in a large majority of states comment on the silence of the accused is now prohibited by statute.[45]

There is some doubt that the present Supreme Court regards the privilege against self-incrimination as a constitutional bar to comment. In the federal courts comment by counsel has not been allowed, but this resulted from construction of the federal statute[46] which forbids any presumption of guilt from the defendant's silence, rather than from interpretation of the Fifth Amendment. The validity of comment in the state courts has been passed upon directly only in the *Twining* case and the *Adamson* case now under discussion. In both instances the Court assumed, but did not decide, that comment would violate the self-incrimination privilege. The *Twining* decision, however, indicates that the Court made this assumption simply to dispose of the larger issue of the possible application of the Fifth Amendment to the states. At the close of his long opinion, Justice Moody noted that "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption."[47] And in the *Adamson* case the same assumption was weakened by Justice Reed's remarks on the construction and effect of the California provision which allowed comment to be made. He pointed out that the scope of permissible comment was very narrow. While permitting inferences to be drawn, the provision did not seem unfair to the accused since it did not create any rebuttable or irrebuttable presumption of guilt or even of the truth of any fact.[48] Even if the Fifth Amendment were applicable to the states, the *Adamson* opinion indicates that a majority of the present Court would not consider comment in state trials to be barred by the federal self-incrimination clause, provided such comment is kept within narrow and well-defined limits.

Aside from the Fifth Amendment, comment by court and counsel does not seem of such fundamental importance that it can be regarded as depriving a defendant of his constitutional right to a fair trial. The policy arguments in favor of permitting comment are strong.[49] The

[45] 8 WIGMORE, EVIDENCE, § 2272 (1940).

[46] 28 U.S.C. (1940) § 632; Wilson v. United States, 149 U.S. 60, 13 S. Ct. 765 (1893); see also United States v. Fleenor, (C.C.A. 7th, 1947) 162 F. (2d) 935.

[47] Twining v. New Jersey, 211 U.S. 78 at 114, 29 S. Ct. 14 (1908).

[48] Adamson v. People of California, (U.S. 1947) 67 S. Ct. 1672 at 1677.

[49] The arguments for and against allowing comment are well presented in Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 MICH. L. REV. 226 (1932), and Reeder, "Comment Upon Failure of Accused to Testify," 31 MICH. L. REV. 40 (1932); see also the discussion of policy factors in 8 WIGMORE, EVIDENCE, § 2272 a (1940).

innocent defendant will ordinarily wish to speak in his own behalf; the objection that he may refrain because of timidity or nervousness seems specious at best. If, therefore, the silence of the accused suggests guilt, there would seem to be little injustice in allowing this inference to be brought to the jury's attention. The chief objection to comment is the rule of impeachment, for even the innocent accused may hesitate to take the witness stand out of fear of disclosure of past crimes. In the *Adamson* case the California Supreme Court admitted that fear of disclosure "is a plausible explanation of his failure to take the stand to deny or explain evidence against him."[50] The court agreed that the impeachment rule weakened the inference which might be drawn from the defendant's silence, but pointed out that the trial court could not explain this weakness to the jury without prejudicing the defendant by revealing the criminal record which the defendant wished to conceal.[51]

As long as the accused must face the risk of revealing an unsavory record if he chooses to testify, it may justifiably be contended that comment on his failure to take the witness stand is undesirable. The solution, however, would seem to be to eliminate this risk by barring disclosure of past crimes, rather than to prohibit comment altogether. Provided the defendant is afforded this protection, there seems little valid objection to comment. The Maine court stated in 1871:

> "If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."[52]

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[50] People v. Admiral Dewey Adamson, 27 Cal. (2d) 478 at 494, 165 P. (2d) 3 (1946).

[51] Ibid.

[52] State v. Cleaves, 59 Me. 298 at 301 (1871).