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Constitutional Law -- Extension of the Privilege Against Self-Incrimination

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institutions remain to be seen. Whatever the trend in the rest of the country, *In re Carter* indicates that the North Carolina courts stand ready to remedy any deprivation of due process in the application of the student disciplinary system of the University.[66] As to defects in the system itself, the courts are unlikely to insist that the University establish a microcosm of the common law. They may nevertheless find that the present system in the University lacks some fundamentals of due process to which the student is entitled.[67]

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Constitutional Law—Extension of the Privilege Against Self-Incrimination

The petitioner in *Malloy v. Hogan*[1] was on probation from a sentence imposed after he pleaded guilty to a gambling charge. He was brought before a referee conducting an inquiry into alleged gambling activity in Connecticut and asked questions about the circumstances surrounding his prior arrest, among which were:

> (1) for whom did he work on September 11, 1959; (2) who selected and paid his counsel in connection with his arrest on that date and subsequent conviction; (3) who selected and paid his bondsman; (4) who paid his fine; (5) what was the name of the tenant in the apartment in which he was arrested; and (6) did he know John Bergoti.[2]

After refusing to answer each question "on the grounds it may tend to incriminate me," he was adjudged in contempt[3] and imprisoned until he would cooperate. He applied for a writ of habeas corpus on the ground that the due process clause of the fourteenth amendment granted a privilege against self-incrimination.[4] A lower state court denied the writ, and the highest state court affirmed.[5]

[66] For example, deprivation of due process may result as in *Carter*, where the trial judge found the conviction based upon evidence insufficient to rebut the presumption of innocence.

[67] For example, the courts might find the denial of counsel by a member of the bar to deprive the student of due process. See note 61 *supra*.

[1] 378 U.S. 1 (1964).

[2] *Id.* at 12.

[3] The referee had the same power to commit a witness for contempt as a judge of superior court. CONN. GEN. STAT. § 52-434 (Supp. 1963).

[4] U.S. CONST. amend. V, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." See generally Claflin, *The Self-Incrimination Clause*, 42 A.B.A.J. 935 (1956).

[5] Malloy v. Hogan, 187 A.2d 744 (Conn. 1963).

The state court reasoned that the fourteenth amendment did not protect a *state witness* against self-incrimination and that the petitioner's claim of the state privilege[6] was not justified because he had failed to show any "real and appreciable" danger of self-incrimination.[7]

The Supreme Court reversed,[8] holding that the due process clause of the fourteenth amendment includes the fifth amendment privilege against self-incrimination. It also held that the states must apply the standard used by the federal courts to determine whether a witness's claim of the fifth amendment privilege is justified. In applying this standard, the Court held that petitioner's claim of the privilege was justified because a response to the questioning "might furnish a link in the chain of evidence" for future prosecution.[9]

The decision overruled *Twining v. New Jersey*[10] and *Adamson v. California*,[11] which held the fourteenth amendment did not include a privilege against self-incrimination, by the incorporation of the fifth amendment or otherwise. In these decisions, the Court had characterized the privilege as a "rule of evidence."[12] and said that it was not inherent in "due process."[13] *Twining* left the states free to treat the privilege in any manner they deemed proper.

However, all states did have a privilege against self-incrimination, by either constitutional provision[14] or judicial decision.[15] The

[6] CONN. CONST. art. I, § 9, provides: "In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself . . . ."

[7] See notes 21-22 *infra* and accompanying text.

[8] 378 U.S. at 3.

[9] See note 31 *infra* and accompanying text.

[10] 211 U.S. 78 (1908). *Accord*, Cohen v. Hurley, 366 U.S. 117 (1961); Knapp v. Schweitzer, 357 U.S. 371 (1958); *In re* Citroen, 170 F. Supp. 93 (E.D.N.Y. 1959); Brown v. State, 173 Miss. 542, 161 So. 465 (1935); *In re* Briggs, 135 N.C. 118, 47 S.E. 403 (1904).

[11] 332 U.S. 46 (1947).

[12] Twining v. New Jersey, 211 U.S. 78, 104-05 (1908).

[13] *But see* Mr. Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947), where he contended that any act which violated the Bill of Rights also violated the fourteenth amendment. See Note, *The Fourteenth Amendment Challenged*, 36 GEO. L.J. 398 (1948). For discussion of the history of the privilege against self-incrimination, see Pittman, *The Colonial and Constitutional History of The Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

[14] *E.g.*, N.C. CONST. art. I, § 11, provides: "In all criminal prosecutions, every person charged with a crime has a right to . . . not be compelled to give self-incriminating evidence." For other jurisdictions, see 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

[15] Koenck v. Cooney, 244 Iowa 153, 55 N.W.2d 269 (1952); State v. White, 27 N.J. 158, 142 A.2d 65 (1958).

point where the majority of the states differed from the federal courts was in the test or standard used to determine whether a claim of the privilege was justified in any particular instance.[16] More specifically, these states differed from the federal courts in the manner a judge decided whether an answer might be incriminating. They used the standard of an early English case, *Regina v. Boyes*,[17] in determining whether a claim of the privilege was justified. That standard was stated as follows:

> The Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger .... The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things —not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contigency, so improbable that no reasonable man would suffer it to influence his conduct.[18]

A trial judge exercised his discretion in determinating whether an answer might be incriminating.[19] If there were no evidence from which a judge could infer a reasonable apprehension, he could require a witness to show a possible danger.[20] The Connecticut court applied this test in finding the petitioner in contempt. It found that petitioner had no "reasonable ground" to fear self-incrimination because: (1) any prosecution that might arise from answering the first five questions was barred by the applicable statute of limitations;[21] (2) petitioner refused "to show" how an answer to the first five questions could possibly incriminate him[22] and (3) Bergoti was not described or identified on the record as having been engaged in or as having been convicted of any type of unlawful activity.

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[16] WIGMORE § 2271.

[17] 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861). *Accord*, McCathy v. Clancy, 110 Conn. 482, 148 Atl. 551 (1930); Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951); LaFountaine v. Southern Underwriters, 83 N.C. 132 (1880). *Contra*, State v. Chitwood, 73 Ariz. 314, 240 P.2d 1202 (1952); Young v. Knight, 329 S.W.2d 195 (Ky. 1959).

[18] 1 B. & S. at 330-31, 121 Eng. Rep. at 738.

[19] WIGMORE § 2271.

[20] See, *e.g.*, *In re* Pillo, 11 N.J. 8, 93 A.2d 183 (1952).

[21] Questions (1) through (5) were directed to the date of his prior arrest for gambling.

[22] Petitioner did not offer evidence that he had left the state during the applicable time so as to stop the statute of limitation from running.

On the other hand, the federal standard as set forth in *Hoffman v. United States*[23] says,

> the privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute. . . . However if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications 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 could result.[24]

Furthermore, it was said in *Hoffman* that in applying this standard the judge must be "perfectly clear" that the answer "cannot possibly" have a tendency to incriminate.[25] But *United States v. Coffey*,[26] quoted with approval by the Court,[27] indicates that a judge rarely can be "perfectly clear," by saying that "in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be apprehended and achieved by obscure and unlikely lines of inquiry."[28] In short, a judge applying the federal standard has little discretion in determining whether an answer might be incriminating.[29] The difference between the prevalent state standard and the federal standard is illustrated by the Court's holding in *Malloy* that petitioner's claim was justified.[30] The Court's reasoning was that petitioner might apprehend self-incrimination if the person who ran the gambling operation was still engaged in

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[23] 341 U.S. 479 (1951).

[24] *Id.* at 486-87. See Aiuppa v. United States, 201 F.2d 287 (6th Cir. 1952).

[25] 341 U.S. at 488.

[26] 198 F.2d 438 (3d Cir. 1952).

[27] 378 U.S. at 13 n.9.

[28] 198 F.2d at 440-41.

[29] See WIGMORE § 2271; Falknor, *Self-Incrimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479 (1952). *But cf.* Hoffman, *Whom Are We Protecting? Some Thoughts on The Fifth Amendment,* 40 A.B.A.J. 582 (1954).

[30] Mr. Justice Harlan, joined by Mr. Justice Clark, dissented. 378 U.S. at 14. Mr. Justice White, joined by Mr. Justice Stewart, also dissented. *Id.* at 33. This bare minority was of the opinion that the contempt conviction was proper even under the *Hoffman* standard.

unlawful activity. If this were so, said the Court, a response by petitioner might link him with a more recent crime for which he could be prosecuted.[31] Thus, the real question involved in *Malloy* was whether the federal standard for justifying a claim of the privilege should have been the applicable standard. But, before the federal standard could be applied to the states, the Court had to find that the fourteenth amendment included the privilege against self-incrimination.

In dealing with the constitutional question, the Court emphasized that our system of criminal prosecution is "accusatorial . . . and that the Fifth Amendment privilege is its essential mainstay."[32] The Court looked for support to what it regarded as analogous situations in which the due process clause is held to prohibit the states from using either an accused's coerced confession[33] or evidence obtained by illegal search and seizure.[34] Mr. Justice Goldberg equated the privilege against self-incrimination with coerced confession and concluded:

> Since the Fourteenth Amendment prohibits the States from inducing a person to confess . . . far short of "compulsion by torture" . . . it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.[35]

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[31] The investigation was a "wide-ranging inquiry into crime," and the questions attempted to elicit the identity of the person who ran the unlawful gambling operation. It felt that the state failed to take note of the "implications of the question, in the setting in which it [was] asked." 378 U.S. at 14.

[32] *Id.* at 7.

[33] *E.g.*, Spano v. New York, 360 U.S. 315 (1959). See generally Comment, *The Coerced Confession Cases in Search of A Rationale*, 31 U. CHI. L. REV. 313 (1964).

[34] Mapp v. Ohio, 367 U.S. 643 (1961). See generally Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 So. CALIF. L. REV. 64 (1961).

[35] 378 U.S. at 8. The Court began its analogy by citing Bram v. United States, 168 U.S. 532, 542 (1897), where it said "whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment [privilege against self-incrimination] . . . ." *But see* WIGMORE § 2266, at 400-01, where it is stated that the two principles are easily "blended" because each protects a person from "guilty facts." *Bram* was cited. *Id.* at 401 n.1. Wigmore has stated

Furthermore, the Court accepted dictum from *Mapp v. Ohio*[36] that the fourth and fifth amendments "cojoin" in the fourteenth amendment to prevent an "invasion of the indefeasible right of personal security, personal liberty, and private property" by the states.[37] In so doing, the Court concluded that the due process clause of the fourteenth amendment must provide for the privilege against self-incrimination.[38]

The opinion rejected the idea that the fourteenth amendment applies only "a watered-down, subjected version of the individual guarantees of the Bill of Rights."[39] In holding that the fourteenth amendment privilege was the same as the fifth amendment's and that the standard for determining when it can be invoked is the federal standard, the Court relied upon prior decisions maintaining such uniformity in incorporating the first,[40] fourth,[41] and sixth amendments[42] into the fourteenth amendment. The Court also stated that it would be inconsistent to have two standards determining whether the same privilege might be invoked.[43] The effect of *Malloy* is that a state witness need only say he refuses to answer on the grounds that such might incriminate him, and he then re-

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that it is erroneous in history and in policy to compare the two: (1) they evolved one hundred years apart to meet different needs; (2) the privilege is confined to legal testimony, but the confession protection is not confined to such time and place; and (3) the privilege applied to civil proceedings as well as to criminal prosecutions. *Id.* at 401.

[36] 367 U.S. 643, 646-47, 657 (1961). See generally Corwin, *The Supreme Court's Construction of The Self-Incrimination Clause* (pts. 1-2), 29 MICH. L. REV. 1, 191 (1931).

[37] 378 U.S. at 8-9.

[38] Mr. Justice Harlan dissented. 378 U.S. at 14. He feared the decision, while rejecting the "wholesale incorporation" idea, as going too far in accepting the fourteenth amendment as "a shorthand directive to this Court to pick and choose among the provisions of the first eight Amendments and apply those chosen, freighted with their entire accompanying body of federal doctrine, to law enforcement in the States." *Id.* at 15. For a discussion of "wholesale incorporation," see Note, *Constitutional Law—Was It Intended That the Fourteenth Amendment Incorporate the Bill of Rights,* 42 N.C.L. REV. 925 (1964).

[39] 378 U.S. at 10-11. Mr. Justice Harlan did not accept the Court's automatic application of the federal standard. He thought that the Court should decide each case individually and, if a state proceeding did not fulfill the requirements of the fourteenth amendment, that the Court should apply some standard of "fundamental fairness." *Id.* at 20-28.

[40] Gitlow v. New York, 268 U.S. 652 (1925).

[41] Ker v. California, 374 U.S. 23 (1963).

[42] Gideon v. Wainwright, 372 U.S. 335 (1963).

[43] 378 U.S. at 11.

ceives the same protection from the fourteenth amendment as a federal witness gets under the fifth amendment.

The Supreme Court considered another aspect of the privilege against self-incrimination in *Murphy v. Waterfront Comm'n.*[44] Petitioners refused to answer questions put to them at a state hearing on the grounds that such might incriminate them. To compel their testimony they were granted immunity from prosecution under state law.[45] Petitioners then refused to answer on the grounds that their answers might tend to incriminate them under federal law from which the states have no power to grant immunity.[46] They were held in contempt, and this decision was affirmed by the state court[47] which said that the only immunity necessary to compel their testimony was the state immunity. The state court reiterated the Supreme Court's holding in *United States v. Murdock,*[48] which is stated thus:

> [T]he lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.[49]

The Supreme Court, however, rejected[50] its previous decisions and held that a state witness is protected by the privilege against incriminating himself "under federal as well as state law."[51] The Court further stated "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connec-

[44] 378 U.S. 52 (1964).

[45] Being a bi-state body, the Commission granted them immunity from prosecution under the laws of New York and New Jersey. *Id.* at 53 n.2.

[46] Jack v. Kansas, 199 U.S. 372 (1905). See Feldman v. United States, 322 U.S. 487, 491-92 (1944); United States v. Murdock, 284 U.S. 141, 149 (1931); State v. Dominguez, 228 La. 284, 305, 82 So. 2d 12, 19 (1955); Dunham v. Ottinger, 243 N.Y. 423, 438, 154 N.E. 298, 302 (1926).

[47] *In re* Application Waterfront Comm'n, 39 N.J. 436, 189 A.2d 36 (1963). The state court upheld the civil contempt conviction, but reversed the criminal contempt on the ground that the dual proceeding deprived the petitioners of the opportunity to show evidence in their behalf.

[48] 284 U.S. 141 (1931). This case was discussed in Grant, *Federalism and Self-Incrimination,* 4 U.C.L.A.L. REV. 549 (1957).

[49] 284 U.S. at 149.

[50] 378 U.S. at 77.

[51] *Id.* at 78.

tion with a criminal prosecution against him."[52] To allow the states to compel self-incriminating testimony under the immunity statute, the Court, by exercising its supervisory powers,[53] prohibited the federal government "from making any . . . use of compelled testimony and its fruits."[54] Although the contempt conviction could have been affirmed, the Court vacated it and remanded the case to the state court on the ground that "fairness dictates that petitioners should now be afforded an opportunity, in light of this development, to answer the questions."[55]

The now discarded rule of *Murdock* flowed from the theory that the federal government and the state governments are dual sovereignties, "separate and distinct . . ., acting independently of each other," even though both exercise their powers within the same geographical limits.[56] The Court emphasized "dual sovereignty" in construing the privilege and consequently held that neither sovereignty had to recognize the possibility of a witness incriminating himself under the laws of the other.[57] To force a witness to testify, the compelling sovereignty had to grant the witness an immunity that was "coextensive" with the displaced privilege,[58] *i.e.*, a protection that was equal in scope to the privilege against self-incrimination.[59] Since a witness was protected only against incriminating

[52] *Id.* at 79.

[53] The Court has "supervisory authority" to formulate rules of evidence in the federal courts. *E.g.*, McNabb v. United States, 318 U.S. 332 (1943); Weeks v. United States, 232 U.S. 383 (1914).

[54] 378 U.S. at 79. For discussion of the development of the federal exclusionary rule, see Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio*, 13 W. RES. L. REV. 56 (1962).

[55] 378 U.S. at 80.

[56] Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858). See Feldman v. United States, 322 U.S. 487 (1944); United States v. Robinson, 74 F. Supp. 427 (W.D. Ark. 1947); State *ex rel.* Gibbs v. Gordon, 138 Fla. 312, 189 So. 437 (1939).

[57] See Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A.L. REV. 549 (1957); Grant, *Immunity From Compulsory Self-Incrimination in A Federal System of Government*, 9 TEMP. L.Q. 194 (1935). *Cf.* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Comment, *Double Jeopardy and Dual Sovereignty*, 34 WASH. L. REV. 562 (1959).

[58] Counselman v. Hitchcock, 142 U.S. 547 (1892). See Ullmann v. United States, 350 U.S. 422 (1956); *In re* Watson, 293 Mich. 263, 291 N.W. 652 (1940).

[59] For state immunity statutes, see WIGMORE § 2281; for the federal statute see note 69 *infra*. See generally Note, *The Scope of Statutory Immunity Required by The Fifth Amendment Self-Incrimination Privilege*, 57 NW. U.L. REV. 561 (1963).

himself under the laws of the interrogating sovereignty, he had to be protected only against prosecution by that sovereignty in order to compel him to give self-incriminating statements.[60] Therefore, a state witness could be prosecuted in the federal courts for a crime he had admitted under the compulsion of a state immunity statute.[61]

In *Murphy,* the Court rejected the emphasis on "dual sovereignty" because it felt prior decisions were based on a misconception of English law.[62] A construction of the privilege which recognized and justified a claim of the privilege for fear of subsequent prosecution in another sovereignty was accepted.[63] The Court quoted with approval the statement by Chief Justice Marshall that "a party is not bound to make *any discovery* which would expose him to *penalties* . . . ."[64]

This extention of the privilege to protect a state witness against

[60] United States v. Murdock, 284 U.S. 141 (1931). *Accord,* United States v. Pagano, 171 F. Supp. 435 (S.D.N.Y. 1959); *In re* Ferris, 175 Kan. 704, 267 P.2d 190 (1954); Wyman v. DeGregory, 101 N.H. 171, 137 A.2d 512 (1957); *In re* Pillo, 11 N.J. 8, 93 A.2d 176 (1952); LaFountaine v. Southern Underwriters, 83 N.C. 132 (1880); State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956); State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926). *Contra,* United States v. Di Carlo, 102 F. Supp. 597, 605 (N.D. Ohio 1952) (where the federal investigation concerned violation of state as well as federal law); State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954); Braden v. Commonwealth, 291 S.W.2d 843 (Ky. 1956); Lousiana v. Dominguez, 228 La. 284, 82 So. 2d 12 (1955); *In re* Schniter, 295 Mich. 736, 295 N.W. 478 (1940).

[61] Feldman v. United States, 322 U.S. 487 (1944). Subsequent prosecution would probably be barred if there was evidence of collusion between the federal and the state government. *Id.* at 494 (dictum). Immunity granted by the federal government bars subsequent state prosecution. See notes 69 & 70 *infra.*

[62] 378 U.S. at 77.

[63] The Court cited the following three cases: (1) United States v. McRae, L.R. 3 Ch. 79 (C.A. 1867), where the defendant was an alleged Confederate agent in England. Being questioned about his affiliations, he refused to answer on the ground that he could be made to forfeit his property under an American statute. The Court held that the privilege was properly asserted on the basis that there was a justified fear of imminent prosecution in another jurisdiction. (2) Ballman v. Fagin, 200 U.S. 186 (1906), which held that a federal witness could not be compelled to testify when his refusal was clearly justified by a fear of subsequent state prosecution. At the time the witness was testifying in the federal court, he was being prosecuted by Ohio. (3) United States v. Saline Bank, 26 U.S. (1 Pet.) 100 (1828), where a bill was brought into a federal court to examine the defendant's books. Being an unincorporated bank in violation of a Virginia statute, the defendant refused to answer the questions on the ground of fearing subsequent prosecution in a state court. The Court held that the privilege was properly invoked and the defendant could not be compelled to answer.

[64] *Id.* at 104. (Emphasis added.)

incriminating himself "under federal as well as state law" left the states unable to compel a witness to testify, because, not having the power to grant immunity from federal prosecution,[65] they could not give an immunity "coextensive" with the privilege they sought to take away. The Court recognized that the rule which it set forth would prevent the states from compelling valuable testimony. To accommodate state investigation, the Court provided an exclusionary rule which forbids the use of state compelled testimony in federal courts.[66]

While the Court stated that a federal witness is protected against incriminating himself "under state as well as federal law,"[67] no change in current practice will be required. The Federal Immunity Act[68] already forbids the use in state courts of testimony compelled under its provisions[69] and thereby satisfies the requirement of "coextensive" immunity.

In *Malloy* and *Murphy,* the Court took additional steps toward attaining uniformity in criminal procedure. The Court has now extended most of the Bill of Rights' protections, along with their accompanying federal standards, to the states through the fourteenth amendment's due process clause. Among these are freedom from unreasonable searches and seizures,[70] the right to counsel,[71] freedom from cruel and unusual punishments,[72] and the privilege against self-incrimination.[73] The last major provision of the Bill of Rights which has not been absorbed into the fourteenth amend-

[65] See note 46 *supra.*

[66] 378 U.S. at 79.

[67] *Id.* at 78.

[68] 18 U.S.C. § 3486 (1959), which provides:

> [N]o . . . witness shall be prosecuted . . . on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court.

[69] Adams v. Maryland, 347 U.S. 179 (1954). This federal power was said to be based on the necessary and proper and the supremacy clauses of the Constitution. *Accord,* Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956) (power was based on the war clause); Brown v. Walker, 161 U.S. 591 (1896) (Congress had power to prohibit the prosecution itself through the commerce clause).

[70] Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment).

[71] Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment).

[72] Robinson v. California, 370 U.S. 660 (1962) (eighth amendment).

[73] Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment).

ment is the fifth amendment protection against double jeopardy.[74] The Court rejected the incorporation of this protection in *Palko v. Connecticut*,[75] where it was held that a conviction of first degree murder following a reversal of a verdict of second degree murder at the instance of the state did not violate " 'fundamental principles of liberty and justice . . . .' "[76] In view of the trend towards viewing all Bill of Rights protections as "fundamental principles of liberty and justice,"[77] it is likely that *Palko* will be overruled when the question arises.[78]

There is also a "dual sovereignty" aspect to double jeopardy. It is best illustrated by *United States v. Lanza*,[79] in which it was held that there can be successive federal-state trials and convictions for offenses based on the same act. The result was based on the reasoning that neither sovereignty has to recognize a prosecution by the other.[80] The rejection of "dual sovereignty" as the controlling principle in the "silver platter" situation[81] and in cases involving self-incrimination[82] does not, however, necessarily herald a rejection of it in the *Lanza* situation. In successive trials by both governments, each sovereignty is protecting interests deemed vital to it, and is not capitalizing on "dual sovereignty" to use evidence which is inadmissible in the courts of the other. However, the Court seems

[74] U.S. CONST. amend. V, provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

[75] 302 U.S. 319 (1937).

[76] *Id.* at 328.

[77] See notes 70-73 *supra*.

[78] Henkin, *"Selective Incorporation" in The Fourteenth Amendment*, 73 YALE L.J. 74 (1963). The Court should also apply the standard used in the federal courts in determining when jeopardy attaches. This uniform standard would eliminate the variation in state standards. See generally Note, *Criminal Law—Double Jeopardy*, 24 MINN. L. REV. 522 (1940).

[79] 260 U.S. 377 (1922). See also Abbate v. United States, 359 U.S. 187 (1959) (defendant convicted in successive federal-state prosecutions for conspiracy to destroy property); Bartkus v. Illinois, 359 U.S. 121 (1959) (defendant acquitted by a federal jury for robbing a bank but subsequently convicted in a state court for the same robbery); State v. Harrison, 184 N.C. 762, 114 S.E. 830 (1922) (holding that a federal conviction for a liquor violation does not prohibit a state conviction for the same offense).

[80] See note 57 *supra*.

[81] The Court has discarded the "silver platter" doctrine whereby a state court could use evidence obtained by an illegal search and seizure by federal officers, and *vice versa*. Mapp v. Ohio, 367 U.S. 643 (1961) (dictum); Elkins v. United States, 364 U.S. 206 (1960). See generally Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 So. CALIF. L. REV. 64 (1961).

[82] Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

alarmed by the hardships imposed on a defendant by double prosecution and should be ready to re-examine *Lanza*.[83]

COMANN P. CRAVER, JR.

Constitutional Law—Obscenity

Two recent decisions of the Supreme Court of the United States continue the case by case development of the constitutional standards to be applied in obscenity cases.[1]

In the first case, the manager of a motion picture theatre was convicted of violating the Ohio obscenity statute[2] by possessing and exhibiting a French film, *The Lovers*.[3] He waived jury trial and his conviction by a court of three judges was affirmed by the Ohio Court of Appeals[4] and the Supreme Court of Ohio.[5] The Supreme Court reversed the conviction in *Jacobellis v. Ohio*.[6]

[83] In Pennsylvania v. Nelson, 350 U.S. 497 (1956), the Court held that through the passage of the Smith Act Congress has occupied the field of sedition so as to preclude enforcement of state laws on the same subject. This opinion indicated that the Court is looking for congressional intent to pre-empt the field so as to avoid the harsh burden of double prosecution. However, in 1959, the Court reiterated the *Lanza* doctrine in Bartkus v. Illinois, 359 U.S. 121 (1959). Mr. Justice Black, joined by Mr. Chief Justice Warren, and Mr. Justice Douglas, dissented. *Id.* at 150. Black emphasized that state prosecution should be upheld only when the federal government had no vital interest in preventing the crime and if there were a conflict of interests, state prosecution should be pre-empted so as to avoid double prosecution. Pre-emption seems too harsh. It predicates state subordination and diminishes the prerogatives of the states. A more suitable solution would be for legislatures of both governments to enact pleas in bar whereby a former prosecution for the same act would prohibit a second trial.

[1] For a criticism of the Court's failure to establish a definite test in obscenity cases, see Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 835 (1964) [hereinafter cited as Gerber]. The opposite view is taken in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 121 (1960) [hereinafter cited as Lockhart & McClure].

[2] "No person shall knowingly . . . exhibit . . . or have in his possession or under his control an obscene, lewd, or lascivious . . . motion picture film . . . ." OHIO REV. CODE § 2905.34 (Supp. 1963).

[3] "'The Lovers' involves a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene." Jacobellis v. Ohio, 378 U.S. 184, 195-96 (1964).

[4] State v. Jacobellis, 86 Ohio L. Abs. 385, 175 N.E.2d 123 (Ct. App. 1961).

[5] State v. Jacobellis, 173 Ohio St. 22, 179 N.E.2d 777 (1962).

[6] 378 U.S. 184 (1964).