Constitutional Law -- Is the Restricted Cross-Examination Rule Embodied in the Fifth Amendment?

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If the transfer were not a voidable transfer or if joint liability were imposed there are still several ways to adjust the liability. It does not seem that the liability should depend on whether payment was in the form of check or cash. If this were payment of an antecedent debt by cash it would not be a valid transfer since such a payment is not for "present fair equivalent value." If joint liability were imposed in this situation the payee creditor would be in a better position than the bankrupt's other creditors. If the bank pays first and has no right of indemnity against the creditor, then the creditor, to the extent of the bank's contribution, will be favored over the other creditors. On the other hand, the bank's loss would be total unless by subrogation it were allowed to participate in the distribution of the bankrupt's estate. The right of subrogation here would depend on whether this transaction was viewed as if the bank, by paying the judgment, had paid the creditor's claim and thus stood in his position as an unsecured creditor. But if the creditor were to pay the entire judgment, he would still be able to share in the bankrupt's estate as an unsecured creditor.

The Court in *Marin* adopted the simplest and most equitable solution in this situation by limiting the trustee to an action against the payee. This would result in the payee bearing the entire loss resulting from distribution by the bankrupt estate. In a situation, as here, where the bank has had no notice of the bankruptcy proceeding this is simply a restoration to the status quo.

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In the historic Supreme Court decision of *Malloy v. Hogan* it was established that the fifth amendment guarantee of freedom from self-incrimination is imposed on the states by way of the fourteenth amendment. The recent case of *Spevak v. Klien* emphasized the scope of this determination by holding that no group or classifica-

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38 See note 9 supra.
39 See, 40 MINN. L. Rev. 499 (1956).
2 U.S. CONST. amend. V provides in part that no person "shall be compelled in any criminal case to be a witness against himself." For ex-
tion of people is without its purview. But an additional problem area remains that may have a significant impact on North Carolina procedure. This is concerned with the rules governing the scope of cross-examination as they affect the criminal defendant who chooses to testify.

North Carolina adheres to the "wide-open" rule of cross-examination. This procedure dictates that the criminal defendant waives his immunity from self-incrimination by the mere act of taking the stand. As a consequence he is subjected to cross-examination on any matter relevant to the issues being tried. The federal courts, however, follow a restrictive rule whereby the defendant technically waives the privilege by testifying in his own behalf, but can be cross-examined only on matters brought out on direct. It is uncertain whether this rule is based on procedural or constitutional con-

amples of other constitutional protections that have been imposed on the states in recent years see e.g., Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment guarantee of the right of confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment bar of illegally seized evidence).

87 Sup. Ct. 625 (1967).
9 Id. at 628.
10 The "wide-open" rule is so designated because it does not confine the scope of inquiry to matters testified to on direct. See McCormick, Evidence §§ 21, 26, 131 (1954).
11 This is established by N.C. Gen. Stat. § 8-54 (1953), which provides in part: In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes the person so charged is, at his request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses.

*Fitzpatrick v. United States, 178 U.S. 304 (1900); United States v. Pate, 357 F.2d 911 (7th Cir. 1966); Simon v. United States, 123 F.2d 80 (4th Cir. 1941); Madden v. United States, 20 F.2d 289 (9th Cir.), cert. denied, 275 U.S. 554 (1927); Tucker v. United States, 5 F.2d 818 (8th Cir. 1925). See also McCormick, Evidence § 26 (1954).
*Some cases merely state that the defendant becomes subject to cross-examination to the same degree as any other witness. This, of course, means the restrictive rule. See e.g., Fitzpatrick v. United States, 178 U.S. 304 (1900).
*The Eighth Circuit Court of Appeals in Tucker v. United States, 5
cepts, but if the Supreme Court should determine that it is a necessary appendage to the fifth amendment protection, the North Carolina practice would become unconstitutional.\textsuperscript{12}

In exploring such a possibility, two considerations may prove controlling. The Court in recent years has not hesitated to expand the number of individual protections available to criminal defendants in state court proceedings.\textsuperscript{13} Moreover, particular attention has been paid to alleviating conditions surrounding the assertion of constitutional privileges that tend to undermine the strength of the right guaranteed. For example, the Court reasoned in *Escobedo v. Illinois*\textsuperscript{14} that guaranteeing a criminal defendant the right to counsel at the trial stage alone is insufficient when the possibility exists that a pre-trial confession rendered when the accused did not have benefit of counsel may negate any advantage of courtroom representation.\textsuperscript{15}

Applying this rationale to the protection of the self-incrimination privilege, cross-examination procedures of the North Carolina variety\textsuperscript{16} in which a defendant who takes the stand "is subject to the same treatment as other witnesses,"\textsuperscript{17} become suspect. The privilege has little value for an accused who deems it expedient to testify but can ill afford broad cross-examination. It is submitted that the existence of such an inherent restraint may lead the Court to consider the "wide-open" rule an unwarranted threat to the exercise of the privilege.

A second consideration is evidenced by the *Malloy* concern for

\textsuperscript{12} North Carolina is not the only state in which such a determination would invalidate existing practice. Arizona, for example, has recently re-stated its position that a criminal defendant who takes the stand to give testimony in his own behalf is "subject to cross-examination as to all matters relevant to the issues being tried." State v. Taylor, 99 Ariz. 85, 407 P.2d 59, 64 (1965). *Accord,* Shelton v. State, 397 S.W.2d 850, 851 (Tex. Crim. App. 1965).

\textsuperscript{13} See note 2 supra.


\textsuperscript{15} 378 U.S. at 486.

\textsuperscript{16} See STANSBURY, NORTH CAROLINA EVIDENCE § 108 (2d ed. 1963).

\textsuperscript{17} *Id.* § 56, at 116.
variations in the implementation of constitutional protections in state and federal forums. The Court reasoned that as the first, fourth, and sixth amendment are enforced according to the same standards in both, it would be incongruous to deny a criminal defendant the same uniformity of application when considering an assertion of a fifth amendment privilege. It is conceded that the Court's attention was focused on claim rather than waiver of privilege, but it must be remembered that the practical effect of the federal limitation on the scope of cross-examination is to make waiver incomplete, leaving a portion of the privilege intact. Thus, whether the restricted rule is considered a part of the privilege or merely a collateral result of its waiver, it is impossible to disassociate one from the other. Both are interwoven in the trial context and become a unit for consideration by an accused who must weigh the advantages of a claim of privilege in light of the consequences of waiver. As this determination may well depend on the forum because of the variance in cross-examination procedure, the Court's propensity for uniformity may render the "wide-open" rule unacceptable.

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Constitutional Law—"Freedom of Association's" Inapplicability to Greek-letter Fraternities

In April of 1965 the brothers of Sigma Chi fraternity at Stanford University issued an invitation of membership to Kenny Washington, a Negro—thereby breaking with century-old traditions. His admittance to the fraternity was contradictory to the "all white" heritage of Sigma Chi. Shortly after Washington's pledging, the national fraternity suspended the Stanford chapter—the first of a

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18 378 U.S. at 10.
19 Id. at 11.
20 United States v. Pate, 357 F.2d 911 (7th Cir. 1966).
21 See notes 19 & 20 supra and accompanying text.

3 Sigma Chi was founded at Miami University, Oxford, Ohio, in 1855. 13 Encyclopaedia Americana 402 (1948).
4 A few weeks after Washington's "pledging," the national president of Sigma Chi predicted that no Negro would ever become a member of the fraternity. N.Y. Times, June 19, 1965, § 1, p. 14.
5 The national executive committee of the fraternity stated that the suspension of the chapter had nothing to do with any membership question.