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Dismissal of State Employee Without Hearing Upon His Claiming Privilege Against Self-Incrimination Held Illegal

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The dissent's formula would seem to be the better rule of law and one more conformable with the general view. *Industrial Commission of Ohio v. Ahern,* 119 Ohio 41, 162 N. E. 272 (1928); *Schneider v. United Whelan Drug Stores,* 284 App. Div. 1072, 135 N.Y.S.2d 875 (3d Dep't 1954). All activity cannot be deemed a community or a business risk but neither is it practicable to attempt to catch all possible fact situations within one net of law. The better rule would seem to be a reasonable man test, *Lewis v. Knappen Tippetts Abbett Engl. Co.,* 304 N. Y. 461, 108 N.E.2d 609 (1952), or, as stated in *Masse v. Robinson Co.,* 301 N. Y. 34, 37, 92 N.E.2d 56, 57 (1950), compensable activity should be limited to that which the "man on the street" would associate with the employment.

Richard O. Robinson

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Petitioner, a professor in a city college, was dismissed summarily pursuant to a city charter provision which provided in effect that a city employee who utilized the privilege against self-incrimination in refusing to answer questions of a duly authorized legislative committee would be discharged from such employment. N. Y. CITY CHARTER §903 (1936). The state interpreted the statute to mean that invocation of the privilege without more was equivalent to a resignation. *Daniman v. Board of Education of City of N. Y.,* 306 N. Y. 532, 119 N. E. 2d 373 (1954). On petitioner's proceeding to annul his dismissal, held (5-4): the statute as interpreted and applied was violative of the Fourteenth Amendment "due process" clause as being arbitrary and patently discriminatory. *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956).

While a state has broad powers in selection and discharge of its employees, *Adler v. Board of Education of City of N. Y.,* 342 U. S. 485 (1951); *Garner v. Board of Public Works,* 341 U. S. 716 (1950), the protection of the Fourteenth Amendment extends to such public servants when exclusion from pubic employment is pursuant to a statute. *Wieman v. Updegraff,* 344 U. S. 183 (1952). It is well established that there is no precise definition of the requirements of due process; however, one requirement is that a judicial action not be patently arbitrary or discriminatory. *Twining v. New Jersey,* 211 U. S. 78 (1908); *Hurtado v. California,* 110 U. S. 516 (1884). If the invocation of the privilege against self-incrimination should not in and of itself produce a stigma upon the claimant's character, then the requirements of due process will not have been met under a summary dismissal, for both the innocent and guilty will be dismissed without a fair hearing to determine guilt.

To uphold the proposition that a sinister meaning should be attached to the invocation of the privilege, it would be necessary that there be only two possible conclusions that could be inferred from such invocation; either that the answering of the question would have tended to prove the claimant guilty of a crime, or that the claimant committed perjury in falsely invoking the privilege to avoid answering the question. If only these two conclusions could be inferred, due process requirements would certainly have been met in dismissing for invocation without more. See *Hatch v. Doms,* 69. F. Supp. 788 (D. C. D. C. 1947). In either case there would be an admission of an act which could be viewed as below a required ascertainable standard, and there would be no discrimination against innocent persons. However, the proposition fails when another inference is established as flowing from the invocation of the privilege—the inference that a witness, innocent in fact of any wrongdoing, because of mistake or because of a reasonable fear of prosecution, has invoked the privilege. That such an inference could be drawn from the invocation of the privilege has been recognized by the Supreme Court. *Ullman v. United States,* 350 U. S. 422 (1955); *Hoffman v. United States,* 341 U. S. 479 (1950). In such a case the claimant woud not have been guilty of a wrongdoing previous to the invocation, nor would he have committed perjury for the intent to defraud required by statute would not be present. *United States v. Otto,* 54 F. 2d 277 (2d Cir. 1931). When this third inference is recognized as present, and both the innocent and guilty are dismissed alike, it becomes evident that due process requirements are not met for the claimant is not protected against arbitrary action. *Twining v. New Jersey, supra; Hurtado v. California, supra.*

The dissent contended that the invocation of the privilege may be taken as an admission of unfitness to hold public office. They did not feel that the possible inferences were material in that a state may discharge its employees for impairing the full disclosure of facts by authorized investigators. But while the statute may be explained in this manner, the motives underlying it stem from an assumption that the invoker is guilty of some wrong which would warrant his dismissal. Recognizing this basic premise the analysis of the case must proceed along the reasoning presented by the majority, that, while a state may dismiss an employee for refusing to testify in a proceeding relative to his employment, *Garner v. Board of Public Works, supra,* there can be no summary dismissal based upon a mere invocation of the privilege in a proceeding completly divorced from his employment.

If a stigma be allowed to attach itself to the invocation of the privilege, a constricted application of it will result, and this is to disrespect the very ideals of the Constitution. *Ullman v. United States, supra.* By holding that a state may not equate the invocation of the Fifth Amendment privilege in and of itself to a si-

multaneous admission of sub-standard ability, the Court has strengthened its conviction of the dignity which should adhere to all Constitutional guarantees.

Thomas H. Rosinski

Self-Incrimination: Statute Discovered After Claim

Defendant appeared before a special grand jury microscoping crime in the New York City garment and trucking industries. He testified extensively, stating that he paid gratuities to certain persons but refusing to state to whom and in what amounts, first upon ground that it would hurt his business and that persons paid would never admit having received any money, and later, after brief consultation with counsel, on the ground that his answers would tend to incriminate him. On appeal from a finding of contempt, held (2-1): defendant not guilty of contempt since answers to further questions would have supplied leads to possible conviction under the Internal Revenue Code. *United States v. Courtney,* 236 F.2d 921 (2d Cir. 1956).

There has not been deep controversy over the legal and historical origins of the privilege against self-incrimination. The best writings on the subject have been created to explain how the privilege arose, and how the popular judgment took root that it was better for an occasional crime to go unpunished than that the prosecution should be able to construct a criminal case, in whole or in part, with the aid of forced disclosures by the witness. See WIGMORE, EVIDENCE §§2250-2266 (3d ed. 1940); Morgan, *Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949); GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). Nor has there been serious disapproval over the power of the court to decide whether any direct answer to a question would implicate the witness. *United States v. Burr (In re Willie),* 25 Fed. Cas. 38, No. 14,692e (C.C.D. Va. 1807); *Ellwell v. United States,* 275 Fed. 775 (7th Cir. 1921); *cf. Ex parte Irvine,* 74 Fed. 954 (C.C. S.D. Ohio 1896).

Strong differences of opinion, in which the privilege has been treated both as a vestige and a commandment, have centered around the questions concerning the extent of the privilege, when it must be raised, and when it is waived. It has been said that its invocation in certain instances has been tantamount to an admission of guilt. See O'Connor, *The Fifth Amendment: Should A Good Friend Be Abused?,* 41 A.B.A.J. 307-10, 369-70 (1955). On the other hand, its invocation is viewed as a protection of innocence. *Maffie v. United States,* 209 F.2d 225 (1st Cir. 1954), with a penetrating analysis by Chief Judge Magruder. Courts have attempted to map out only the broad, hazy outlines in each problem area. Decisions of great importance have, unfortunately, been delivered at times when the climate