

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/Incorporation

Palko v. Connecticut, 302 U.S. 319 (1937)

Frank Palko murdered two police officers when fleeing from a robbery of Gilman's Music Store in Bridgeport, Connecticut. During his state court trial, Palko was convicted of second degree murder. The first degree murder charge failed, in part because the trial judge excluded Palko's confession from the evidence and misstated Connecticut law on the elements of first degree murder. Connecticut law at the time permitted prosecutors as well as defendants to appeal from adverse trial rulings. The prosecutor took advantage of this provision, appealed, and had the verdict reversed. Palko was then retried and sentenced to death. Palko appealed that decision to the Supreme Court of the United States. He claimed that his second trial for the same offense violated the due process clause of the Fourteenth Amendment, which he claimed incorporated the guarantee in the Fifth Amendment that "no person . . . be subject for the same offense to be twice put in jeopardy of life or limb." Had Palko been tried in federal court, the second trial would have violated double jeopardy. According to previous precedents in Fifth Amendment cases, once a jury finds a person either not guilty of any crime or not guilty of a more serious crime, that person cannot be prosecuted again. The issue in Palko was whether a trial that violated the double jeopardy clause of the Fifth Amendment also violated the due process clause of the Fourteenth Amendment.

The Supreme Court rejected this contention by an 8–1 vote. Justice Cardozo's majority opinion maintained that the due process clause of the Fourteenth Amendment protected only freedoms that were "the very essence of a scheme of ordered liberty" and the right to a retrial after a judicial mistake did not rise to the necessary level of injustice. As you read Justice Cardozo's opinion, consider the circumstances under which the justices might not have allowed a new trial. Suppose Frank Palko had been convicted of second degree murder a second time after the trial court erroneously excluded other evidence favorable to the prosecution. What would be the proper result? You might also notice that all the judicial liberals supported the Connecticut prosecutor and that the only dissenter, Justice Butler, was one of most conservative members of the Court. Might this be an indication that, at least during the early New Deal, the right of criminal suspects (who were not victims of Jim Crow) was not a high liberal priority? Imagine you are a lawyer with a client who has just been convicted of second degree murder in a state where first degree murder is punishable by death. If you believe that the trial judge erroneously failed to exclude your client's confession, would you appeal? Remember, if you win your appeal, your client might be sentenced to death on retrial.

JUSTICE CARDOZO delivered the opinion of the Court.

[Cardozo began by noting past precedents that indicated that a defendant could not be convicted of a more serious offense at any new trial which resulted from an appeal by the government.]

. . . [I]n appellant's view, the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California* (1884). The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has

said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey* (1908). . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon* (1937), . . . or the like freedom of the press, . . . *Near v. Minnesota* (1931) . . . ; or the free exercise of religion, *Hamilton v. Regents* (1934), or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama* (1932),. . . . In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining*. . . This too might be lost, and justice still be done. . . .

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These, in their origin, were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed. . . .

This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations, a pervasive recognition of that truth can be traced in our history, political and legal. . . . Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. . . . The hearing, moreover, must be a real one, not a sham or a pretense. . . . For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell*. . . . The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that, in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing.

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry, and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us, and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . .

. . .

JUSTICE BUTLER dissents [without opinion].



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