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ADVERSE COMMENTS BY A FLORIDA PROSECUTOR UPON A DEFENDANT'S FAILURE TO TESTIFY

It may be stated as a general principle of criminal jurisprudence that no person shall be compelled in any criminal case to be a witness against himself, *nor shall his refusal to be a witness serve to create adverse inferences or presumptions in the minds of the jury.*[1]

This principle of law is not easy to understand or apply. Its ramifications and overtones have echoed through our legal system for over eight hundred years, periodically causing twinges of uncertainty in the minds of law-makers, legal writers and jurists. To understand better the intricacies and inconsistencies of this privilege of "standing mute," a brief review of its development would be helpful.[2]

HISTORICAL DEVELOPMENT OF THE RULE

In an attempt to avert a situation threatening to economically and morally weaken English litigants, the dangerous and expensive "trial by combat" and the "trial by ordeal" were replaced by the "trial by compurgation" wherein the party took an oath, accompanied by his oath-helpers, and upon the successful pronouncement of a ritualistic formula, received the decision. While this procedure alleviated the high costs of "litigation" experienced under the former procedure, it did not necessarily result in justice between the parties. In 1236 the ecclesiastical courts in England, acting apart from the "common-law" courts, replaced it by a new procedure wherein a party would be required to answer specific questions asked him by the judge under an oath to speak only the truth. This inquisitional procedure was adopted by the courts of High Commission and the Star Chamber who used it with effectiveness in ex officio proceedings dealing with heresy, sedition, and witch-hunting.

In 1637, John Lilburn was formally charged in the Star Chamber with printing heretical books. Upon his refusal *to take the oath*, he was whipped and pilloried for his "boldness in refusing to take a legal oath" without which many offenses might go "undiscovered and unpunished." Three years later he complained to Parliament of his treatment. Four years subsequent to his complaint, the House of Lords set aside his conviction, "it being contrary to the laws of God, nature and the Kingdom for any

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1. McCORMICK, EVIDENCE §§ 120-136 (1954) (hereinafter cited as McCORMICK).
2. To avoid a painful succession of individual footnotes referring to the same authority, may this writer point out to all those who express interest and curiosity in the development of the privilege against self-incrimination the same impressive and comprehensive authority relied upon by this writer for the material contained in the immediately following sections—8 WIGMORE, EVIDENCE §§ 2250, 2251 (3d ed. 1940) (hereinafter cited as 8 WIGMORE).

man to be his own accuser."[3] That year the courts of High Commission and Star Chamber were abolished, and all ecclesiastical courts were forbidden to administer any oath, ex officio or otherwise, whereby the party might be obliged to become his own *accuser.*

While the *Lilburn* case did not immediately affect the practice of the common law courts of examining the persons charged with crimes, by the early 1700's the principle was accepted that in all proceedings, civil or criminal, not only parties but also witnesses were privileged against compulsion to testify to facts subjecting them to punishment or forfeiture. The principle of the privilege against self-incrimination found early recognition in the American colonies, and was incorporated in the federal constitution as well as in the constitutions of several of the states before the end of the 1700's.[4]

At common law, the criminal defendant, as an interested party, was considered incompetent as a witness. He could neither be called by the government nor could he testify in his own behalf. That rule of incompetency existed until the mid-1800's at which time it gave way to statutory emancipation of such disability.[5] In light of the prevalent constitutional prohibitions against forcing a defendant in a criminal case to testify, these emancipatory statutes enacted in each state *permitted but did not require* the accused to testify,[6] thereby giving the accused an *option* to testify voluntarily or stand mute.

This situation gave rise to a new problem: since the accused was permitted to be a witness, would his refusal to take that opportunity to deny the accusations against him give reason for the jury to infer his guilt?[7] Furthermore, would the inference arising from the defendant's failure to testify tend to force him to become a witness in contravention of the constitutional privilege? Answering these questions in the affirmative, the legislatures in the majority of the states[8] and Congress in respect to the federal courts,[9] enacted provisions, in varying forms, operating to prevent comment by the prosecuting officer upon the criminal defendant's refusal to become a witness.

DEVELOPMENT OF THE RULE IN FLORIDA

The Florida Constitution of 1865 affirmed the existence of the privilege against self-incrimination by stating, "No person shall be subject to be

3. Lilburn's Trial, 3 How. St. Tr. (1637-1645), summarized in 8 WIGMORE at p. 291. It is of great interest to note that Lilburn objected to the "ex officio" proceedings, but he never contended that he did not have to testify against himself. The distinction between "accusing" yourself and "testifying against" yourself had been overlooked by the courts, and eventually was entirely ignored.
4. See, Twining v. New Jersey, 211 U.S. 78 (1908).
5. 2 WIGMORE § 488 (containing an exhaustive study of statutory provisions respecting the qualifications of witnesses).
6. *Ibid.*
7. See, *e.g.*, Ruloff v. People, 45 N.Y. 213 (1871).
8. 2 WIGMORE § 488.
9. 18 U.S.C. § 3481 (1958).

twice put in jeopardy for the same offense, *nor compelled in any criminal case to be a witness against himself. . . .*"[10] At the time this constitution was enacted, the specific prohibition against compelling an accused person to be a witness served no apparent purpose, since the criminal defendant under the common law disability of incompetency as an interested party could not be a witness in any instance.

In 1892 the state legislature granted to criminal defendants the right to make a *sworn statement* to the jury "of the matter of his defense or her defense."[11] While the statute was an improvement over the absolute common law disability, it left much to be desired. Yet, it must be admitted that it permitted the defendant an advantage *not* available to him under our modern procedure; the defendant could have made a statement to the jury concerning the facts in issue, and he was not subject to cross-examination by the prosecuting officer.

In 1895 the Florida legislature amended the rights granted the accused under the 1892 law adding:

> In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf.[12]

In one concise statement, Florida removed the common law disability of an accused person as a witness, reaffirmed the privilege against compulsory self-incrimination, and sought to guarantee the defendant freedom from indirect pressures compelling his testimony. The latter was accomplished by forbidding the prosecuting officer from commenting in such a way as to foster unfavorable inferences in the minds of the jurors concerning the accused's refusal to become a witness to deny the accusations against him.

One of the first Florida cases construing the 1895 statute was *Gray v. State*,[13] wherein the prosecuting officer in his closing argument stated:

> Gentlemen of the jury, the evidence as it stands before you, *unexplained and uncontradicted*, although it does not point positively to this defendant, is sufficient to warrant you in finding him guilty.[14]

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10. FLA. CONST. DECL. OF RIGHTS § 12 (Emphasis added.)
11. LAWS OF FLORIDA ch. 2908 (1892).
12. LAWS OF FLORIDA ch. 4400 (1895) (the statute has remained essentially unchanged, except that the right to the opening and closing argument preserved to the defendant who offers no testimony other than his own has been added, as seen in FLA. STAT. § 918.09 (1959)).
13. 42 Fla. 174, 28 So. 53 (1900).
14. *Id.* at 176, 28 So. at 53 (Emphasis added.)

Referring to the legislative prohibition against comments, as contained in the 1895 law, the court observed that:

> [T]he policy of the statute should not be violated, *either directly or indirectly*. The statute does not, of course, prohibit *legitimate* comment on testimony properly before the jury, and, in our opinion, the language used . . . cannot strictly be regarded as a comment upon the failure of the accused to testify in his own behalf. . . . We think the prosecuting officer could comment on the evidence as it existed before the jury, avoiding any reference to the failure of the defendant himself to explain or contradict what had been introduced.[15]

This decision served to delineate the problem arising from the uncertain boundaries between the "no-comment" privilege of the accused and the traditional right of the prosecuting officer to characterize and comment upon the evidence properly introduced before the jury.

The next opportunity given the Florida Supreme Court to interpret further the extent of the "no-comment" privilege arose in *Jackson v. State*[16] in which the prosecutor said, "There was no denial of that accusation, and there is none now." The trial court sustained an objection to the words "and there is none now." The prosecuting attorney, disclaiming any intention of referring to the defendant's failure to testify, and against the objection of defense counsel, was permitted to say to the jury:

> I do not mean for one moment to contend before you that I have the right to argue to you that you should convict this defendant because he has not seen fit to become a witness in his own behalf . . . how in the next breath could I have meant to convey to your minds that you were to be prejudiced against this defendant, or that you were to find him guilty or even to consider it as an element of guilt that he did not go upon the witness stand?[17]

The supreme court held the reference to the lack of testimony to constitute reversible error, *regardless* of the prosecutor's good faith in negating any misconceptions as to his intent or purpose. In so holding the court said that, "The prohibition of the statute is not limited to philippics against the prisoner based upon his failure to testify, but extends to any comment upon such failure."[18]

In *Sykes v. State*,[19] the defendant was sworn as a witness and testified solely to the effect that when he and the codefendant were arrested at a

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15. *Id.* at 177, 28 So. at 54 (Emphasis added.)
16. 45 Fla. 38, 34 So. 243 (1903).
17. *Id.* at 39, 34 So. at 243.
18. However, after holding that the intent of the prosecutor in making reference to the failure of the accused to testify is irrelevant, the court recognized that references may be made in such form so as not to constitute reversible error, as in State v. Mosley, 31 Kan. 355, 2 Pac. 782 (1884). Since that case turned upon the prosecutor's lack of intent in referring to the failure of the defendant to testify, it seems rather contradictory of the holding of the instant case.
19. 78 Fla. 167, 82 So. 778 (1919), overruled by Odom v. State, 109 So.2d 163 (Fla. 1959).

certain hotel he had no room there, nor had he ever lived there. The prosecuting officer made the following comment:

> From the evidence which the state has, I expected the defendant, he being a young man, to come before the court and admit to you gentlemen the whole case, and tell you the truth that he took the car, and that he is a young man, and throw himself on the mercy of the court.[20]

Upon objection, the trial court refused to instruct the jury to disregard such argument. On appeal, the Florida Supreme Court held the prosecutor's comment to be a violation of the "no-comment" privilege. Emphasizing that the defendant did not testify in his own behalf other than denying that he had a room at the hotel where he was arrested, the court said:

> To permit the counsel for the state to comment upon this failure of the defendant to explain his possession of the car or to testify fully in his own behalf violated the spirit and letter of the statute, and should have been excluded from consideration by the jury on the court's instruction when requested by the defendant.[21]

The court cited no cases as authority for its decision, nor did the court include any consideration of the propriety of the prosecutor's remarks when viewed solely as an *evidence* question.[22]

The year 1924 saw one of the broadest constructions of the defendant's privilege against self-incrimination in Florida. In *Rowe v. State*,[23] while prosecuting a first degree murder case, the Assistant State Attorney characterized the indictment as, "There being nothing to deny it, not even the statement of the defendants themselves." Upon objection, the court said:

> Gentlemen of the jury, you will not regard that portion of the argument in reference to the statements of the defendants themselves. Of course, Mr. McNeill, you realize you cannot comment on the failure of the defendants to testify.[24]

Mr. McNeill replied, "Oh, yes. I had no intention in the world of commenting on that."

After referring to other comments made by the state alluding to the defendant's failure to testify, the Florida Supreme Court held such comments to be *incurable*; that since instructions to the jury to disregard the prejudicial comments could not correct the damage done, reversible error occurred immediately upon the utterance of the prohibited comment. Quoting its previous ruling in *Akin v. State*[25] on the effect of improper remarks to the jury, the court said:

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20. *Id.* at 172, 82 So. at 781.
21. *Ibid.*
22. The court apparently construed the term "witness" to be predicated upon the materiality of the testimony given.
23. 87 Fla. 17, 98 So. 613 (1924).
24. *Id.* at 21, 98 So. at 615.
25. 86 Fla. 564, 98 So. 609 (1923).

> The law seems to be well settled that it is the duty of the trial judge, whether requested or not, to check improper remarks of counsel to the jury, and to seek by proper instructions to the jury to remove any prejudicial effect they may be calculated to have against the opposite party. A verdict will not be set aside by an appellate court because of such remarks or because of any omission of the judge to perform his duty in the matter, unless objection be made at the time of their utterance. This rule is subject to the *exception that, if the improper remarks are of such character that neither rebuke or retraction may entirely destroy their sinister influence, in such event a new trial should be awarded regardless of the want of objection or exception.*[26]

The court continued by stating:

> We hold that calling the attention of the jury by the prosecuting officer of the state, to the failure of the accused to testify in his own behalf, it matters not how adroitly he may attempt to evade the command of the statute, or how innocently it may be done, *comes within the exception* and deprives the defendant of the protection the statute was intended to secure, and of his constitutional right to a fair and impartial trial.[27]

The weight of authority in the United States seems to be that comments of the prosecuting attorney on the failure of the accused to testify stand on very much the same footing as other improper argument. Whether they call for a reversal or not depends upon a full consideration of all circumstances, including the action of the judge at the time the comment was made, whether he promptly intervened, ordered the comment stricken and admonished the jury to disregard them.[28] By this decision in the *Rowe* case, the highest court of Florida has aligned itself with the *minority* rule which holds such remarks made in violation of the statute to be so prejudicial as to be incurable by instructions to the jury.[29]

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26. *Id.* at 572, 98 So. at 612 (Emphasis added.)

27. The court's apparent intention to prohibit *any and all* comments which may convey to the jury the reminder of the defendant's failure to testify was manifested by the court's quotation in the *Rowe* opinion of statements made by the following jurisdictions: Jordan v. State, 29 Tex. App. 595, 16 S.W. 543 (1891); Hunt v. State, 28 Tex. App. 149, 12 S.W. 737 (1889) (statute "is to absolutely inhibit allusion by counsel to the failure of the accused to testify in his own behalf; and that the inhibition is so far mandatory that its violation by a prosecuting counsel will work the reversal of a conviction, although he may have been provoked thereto by the argument of counsel for the defense, and although the court may have sought, by admonition and by instructions to the jury, to control the effect of the same."); Reddick v. State, 72 Miss. 1008, 16 So. 490 (1895) (intention is immaterial); Quinn v. People, 123 Ill. 333, 15 N.E. 46 (1888) (Instructions to jury that remarks are improper is insufficient. "How much did it avail for the court to tell the jury that the remarks of counsel were improper . . . ? As well might one attempt to brush off with the hand a stain of ink from a piece of white linen.")

28. Annot., 84 A.L.R. 784, 795 (1933).

29. *Id.* at 799.

The next case serving to confuse further the scope of the "no-comment" privilege was *Dabney v. State*[30] wherein Justice Buford, speaking for the court, recognized the rule, but added that:

> [I]f a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.[31]

No mention appears in the opinion of the direct conflict created between this case and the *Sykes*[32] case. In both *Sykes* and *Dabney* the defendants testified to substantially the same degree, yet different results appeared in each case. However, the *Dabney* decision appears to be more consistent with the majority view.[33]

The next case dealing with the "no-comment" rule was *Waid v. State*[34] wherein it was held that when the defense counsel comments on his client's lack of testimony and the reason for it, he *invites* rebuttal by the prosecuting attorney. Any remarks included as such rebuttal concerning the defendant's failure to testify would not constitute reversible error.

Charles Way's alleged partiality towards outboard motors eventually led to his appeal in *Way v. State*[35] from a conviction of grand larceny. At the trial, the defense attorney initially objected to the county solicitor's argument wherein the solicitor said, "At the outset, Mr. Warfield [defense counsel] gave no explanation of his defense—." The court stated to the solicitor, "Make no comment on their failure to testify." Subsequently, the county solicitor said in his argument that:

> Mr. Cessna [a witness] said he saw it was an outboard motor and that boat left the beach from in front of Charles Way's house and that evidence that *he* left the beach from in front of *his* house is *unexplained*. There is no *denial* of it. There is no conflict.[36]

Remarking that it had little doubt that the average juror would consider the statement made by the county solicitor as a direct reference to the defendant's failure to testify, the Florida Supreme Court was of the view that "such statement was at least a comment, covertly if not directly" and ordered a new trial. The court also disposed of the Attorney General's

30. 119 Fla. 341, 161 So. 380 (1935).
31. *Id.* at 343, 161 So. at 381.
32. Sykes v. State, 78 Fla. 167, 82 So. 778 (1919).
33. Annot., 68 A.L.R. 1108, 1162 (1930). In Odom v. State, 109 So.2d 163 (Fla. 1959), the court settled the conflict in favor of the *Dabney* ruling and overruled the *Sykes* case.
34. 58 So.2d 146 (Fla. 1952).
35. 67 So.2d 321 (Fla. 1953). Compare the substance of the comments in this case with the comments made in Clinton v. State, 56 Fla. 57, 47 So. 389 (1908).
36. *Id.* at 322 (Emphasis not supplied.)

contention that the Harmless Error Statute[37] should be invoked. The court found as a matter of first impression, that the statute was inapplicable where it was demonstrated that the "no-comment" statute had been violated.[38]

After living with the Florida "no-comment" statute for over half a century, the Florida Supreme Court in *Gordon v. State*[39] strongly implied its displeasure with that legislative mandate. At the trial, the comment was made that "they didn't testify to what happened. . . ." On appeal, the court found (rather regretfully it seems) that the prosecutor violated the defendant's rights to the extent that a new trial was required. In so holding, the court added:

> Whether we as judges deem the rule to be wise and salutary is of no consequence at all and we assume no responsibility for it. The Legislature made the rule and we must follow it, at least until the Legislature changes it. . . .[40] We are not endowed with the privilege of doing otherwise regardless of the view which we might have as individuals.[41]

The attitude of the supreme court, as exhibited in the above case, was not visibly reflected by the District Court of Appeal in *McLendon v. State*.[42] In this case, the prosecuting attorney said to the jury, in referring to testimony relating to a conversation at the scene of the arrest, where a co-defendant pointed to the defendant McLendon and said that McLendon carried the lottery bankroll:

> If you feel that either of us are in error on quoting the evidence, you have the right, later on, *to request to hear the testimony of any witness*, that you didn't understand. What would you have done under those circumstances? Would you have made a remark 'I've been framed, if I'd known this bag and balls was in the house, I wouldn't have been here tonight?' Is that the remark of an innocent person who knows nothing at all about this? . . . And if another man there with you, whom you may or may not know said 'What is the use, he carries the payroll,' and if the officer searched you and found loose in your pocket, not in your wallet, but in your pockets, some seven hundred and some odd dollars, what would you say? *What did he say—nothing.*[43]

Taking into consideration the fact that the appellant neither testified nor offered any witnesses, and pointing to the long line of Florida decisions on the subject culminating with the *Gordon* case, the court remanded the case for a new trial. The court strictly adhered to the construction that a comment by a prosecuting attorney, directly or indirectly, which is *subject to interpretation by a jury* as a comment

37. FLA. STAT. § 54.23 (1959).
38. FLA. STAT. § 918.09 (1959).
39. 104 So.2d 524 (Fla. 1958).
40. *Id.* at 540.
41. *Id.* at 541.
42. 105 So.2d 513 (Fla. App. 1958).
43. *Id.* at 514 (Emphasis added.)

upon the failure of the accused to testify, is an encroachment upon the rights of the defendant, *notwithstanding that such comment is susceptible to a different construction.*[44] In effect, the court seemed to say that unless it appears certain that the language of the prosecutor was *not* subject to the prohibited interpretation, then the court will find reversible error.

Ard v. State[45] raised an interesting question concerning the burden placed upon a possessor of stolen property to explain the circumstances of such possession. In his argument to the jury, the county solicitor stated:

> Another rule of law that the Court will charge you on is this. When you are found in possession of stolen property, then the Burden becomes on you, the burden is on you to make a reasonable explanation of how you got it, and if no explanation is forthcoming that you find reasonable then the law is that the Jury has the right to bring in a verdict of guilty on that fact a person found in possession of stolen property. Now, like I pointed out to you, *that is undenied here that this property was stolen, and it is undenied that this defendant moved two cartons of cigarettes.* . . . [T]he burden is on the State to prove the Defendant guilty beyond a reasonable doubt. That is true, but it is also the law that when a defendant is found in possession of stolen property the *burden then shifts to him to give a reasonable explanation of how he got into it. I ask you today if a reasonable explanation has been forthcoming.*[46]

In finding reversible error, the court explained that the "burden" on the defendant to explain is *not* an obligation to testify in *court.* The "explanation" or "burden to explain" is usually in reference to an explanation at the time of arrest or discovery of such stolen property, such as an innocent man would ordinarily make when faced with the embarrassing discovery of being the proud possessor of "hot" merchandise.

Odom v. State[47] represents the most recent decision substantially contributing to the "no-comment" rule. The defendant had voluntarily become a witness in his own behalf, and was asked only three questions: his name, age (18) and the highest grade he reached in school (7th grade). There was no cross-examination. Although the supreme court found that the prosecutor did comment on the defendant's failure to testify fully,[48] the

44. The court was evidently referring to the italicized phrase in the quoted statement of the prosecutor: "*What did he say—nothing.*" It is capable of two interpretations: (1) that the prosecutor meant to allude to the defendant's failure to deny the accusation at the time of arrest, or (2) that the prosecutor meant to allude to the defendant's failure to deny it at the time of trial.

45. 108 So.2d 38 (Fla. 1959).

46. *Id.* at 39.

47. 109 So.2d 163 (Fla. 1959).

48. At the trial, the court reporter made no record of the arguments of the state attorney or the defense attorney, no request for such recording having been made. Upon motion for a new trial, the comments were related by the reporter as well as he could remember, and the record of the reporter's testimony was adopted by the Attorney General and defense counsel for the purpose of the appeal.

court did not consider it to be in error. The court characterized the defendant's limited testimony as a strategy of defense to seek mercy because of the defendant's tender age and lack of schooling. The court further remarked that the case was similar to the *Waid*[49] case, where that court held that if counsel for the defense remarked to the jury upon the lack of defendant's testimony and the reason for it, then the prosecutor could comment upon it in rebuttal.

Counsel for the defense maintained that since the accused was asked only three questions, entirely innocuous in nature, the accused should be sheltered as if he had not testified at all, as was done in the *Sykes* case.[50] The court answered this by saying:

> Were the contention accepted by this court, we would put our imprimatur upon the procedure of asking a defendant just enough questions to furnish an introduction to a plea for sympathy or mercy, then reverse the judgment, because of the inhibition of the statute, when sympathy or mercy had not been forthcoming. We do not adopt the view and, furthermore, we do not think that invocation of the statute depends on the quantity and quality of the testimony of a defendant once he has become a witness for himself.[51]

The court, remarking on the defense counsel's reliance on the *Sykes* case, found the *Sykes* opinion in conflict[52] with "many on the general subject" and specifically in conflict with *Dabney v. State*.[53] The court preferred to adhere to *Dabney* and recede from *Sykes*. However, no other authority or reasoning was given for the court's decision on this point.

THE "NO-COMMENT" RULE: HELP OR HINDRANCE?

The cases discussed in the preceding section serve to reflect to a limited degree the long-lived controversy existing in the United States today concerning the relative advantages, disadvantages, logic or lack of logic inherent in the "no-comment" rule.[54]

Although many different theories, reasons and solutions have been put forth over the years by legal writers, philosophers and jurists, the following arguments represent what is believed by this writer to be the *basic* arguments; basic both in respect to chronological formation and in respect to logical development.

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49. Waid v. State, note 34 *supra*.
50. Sykes v. State, note 19 *supra*.
51. Note 47 *supra* at 165, referring to FLA. STAT. § 918.09 (1959) (that if the defendant becomes a witness he should be subject to examination as *any other witness*).
52. See MCCORMICK § 26 (partial testimony waives privilege).
53. 119 Fla. 341, 161 So. 380 (1935).
54. For several excellent articles on the rationale behind the "no-comment" rule, see: Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932); Reeder, *Comment Upon Failure of Accused to Testify*, 31 MICH L. REV. 40 (1932).

ARGUMENTS OPPOSED TO THE "NO-COMMENT" RULE

In 1827, while in the process of a vigorous and painfully logical attack upon the rationale used by the courts in excluding the criminal defendant's compulsory testimony, the brilliant legal philosopher Jeremy Bentham observed:

> The essence of this reason is contained in the word 'hard'; 'tis 'hard' upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished: but did it ever occur to a man to propose a general abolition of all punishments with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that and no more, is there in his thus being made to criminate himself. . . .[55]

In 1871, the blunt logic of Bentham's argument was polished to a more brilliant lustre by Chief Justice Appleton, an ardent disciple of Jeremy Bentham, in *State v. Cleaves*:[56]

> The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence.
>
> The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance.
>
> Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the perils of a conviction for a new offence incurred.
>
> But the defendant, having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused?
>
> The silence of the accused, — the omission to explain or contradict, when the evidence tends to establish guilt is a fact, — the probative effect of which may vary according to the varying conditions of the different trials in which it may occur, — which the jury must perceive, and which perceiving they can no more

55. 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 452 (Bowring's ed. 1827).
56. 59 Me. 298, 300-301 (1871).

> disregard than one can the light of the sun, when shining with full blaze on the open eye.
>
> It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. 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 had 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.

Despite the razor-like logical protestations of Bentham and Appleton, the "no-comment" rule was granted almost universal affirmation by the legislatures of the individual states of the union.[57] Whether this was the result of a rational analysis of the relationship between proper evidentiary material and the basic concepts of criminal jurisprudence, or whether it was the result of an emotionally immature but well-meaning society is disputable. Nevertheless, the tide seems to be turning about, and the arguments in favor of the perpetuation of the "no-comment" privilege are receiving closer inspection than ever before.

ARGUMENTS IN SUPPORT OF THE "NO-COMMENT" RULE

The year in which Chief Justice Appleton of Maine delivered his opinion in opposition to the "no-comment" privilege also bore witness to the publication of Justice Allan's opinion in *Ruloff v. People*[58] supporting the privilege. Criminal defendants were not permitted to testify in New York courts until 1869 when the common law disability was removed by statute.[59] In obvious mistrust of any statute allowing the defendant the privilege of testifying as a witness, the court said through Justice Allan:

> The act may be regarded as of doubtful propriety and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretense of impeaching him as a witness, all the incidents of his life brought to bear with great force against him. He will be examined under the embarrassments incident to his position, depriving him of his self-possession and necessarily

57. 8 WIGMORE § 2272 n.2.
58. 45 N.Y. 213 (1871).
59. N.Y. Laws 1869, ch. 678.

> greatly interfering with his capacity to do himself and the truth justice. . . . These embarrassments will more seriously affect the innocent than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness for himself, under all the disadvantages surrounding him. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness against himself. *The Constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated.*[59a]

This argument has received extensive approval.

The constitution of South Dakota specifies that, "No person shall be compelled in any criminal case to give evidence against himself."[60] In 1927 the legislature added to the state code the provision:

> [T]he person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to testify in his own behalf, is hereby declared to be a proper subject of comment by the prosecuting attorney; provided, however, that if such comment is made by the prosecuting attorney in his closing argument, without any previous reference thereto having been made in argument either on behalf of the state or the defendant, the attorney for the defendant may thereafter, if he so request the court, argue upon such comment for such time as the court shall fix.[61]

The court, in *State v. Wolfe*,[62] held the provision to be unconstitutional. However, in a dissenting opinion, Judge Bakewell observed:

> If it is moral coercion for a prosecutor to comment on the obvious fact that the accused has not testified, it is certainly the very extreme of moral coercion to confront him with his accusers and tempt him to deny their accusations. All the mechanics of a criminal trial are a form of moral coercion tending to force testimony from the unwilling lips of the defendant.[63]

Two years after the *Wolfe* case, the Massachusetts legislature submitted to the state supreme court for an advisory opinion a proposed amendment to its general laws, providing that:

> If the defendant fails to testify and if the court is satisfied at the close of the evidence that it would be in the power of the defendant, if not guilty, truthfully to contradict by his testimony material evidence as to his guilt introduced by the prosecution, the court may in its discretion instruct the jury that, while the

59a. Ruloff v. People, 45 N.Y. 213, 223 (1871).
60. S.D. CONST. art. VI, § 9.
61. S.D. Sess. Laws 1927, ch. 93.
62. 64 S.D. 178, 266 N.W. 116 (1936).
63. *Id.* at 194, 266 N.W. at 125.

> prosecution could not have called the defendant as a witness, he might have elected to be a witness in his own behalf and that in weighing the evidence it may take into consideration his failure to testify.

Predicating its advisory opinion on the state's constitutional mandate that "no subject shall . . . be compelled to accuse, or furnish evidence against himself,"[64] the Supreme Judicial Court of Massachusetts, finding the proposed law to be unconstitutional, held that the defendant's failure to testify cannot be the basis for any presumptions.[65]

In 1951 the highest court of Louisiana concurred with this argument,[66] saying that:

> [I]f such comment were to be permitted, it would, in effect, amount to an infringement of the constitutional right of the accused to abstain from taking the witness stand or to give testimony in the trial of his own cause. We are fortified in this view by the fact that in those states where comment obtains, experience has shown the defendant is, in fact, pressed to testify.[67]
>
> Any other view would indeed make the constitutional privilege against self-incrimination an idle gesture, for everyone accused of crime would be faced with the dilemma of being forced to either take the stand in his own defense or have a inference of guilt attach merely because he does not do so.[68]

Aside from the constitutional argument, a second and perhaps more realistic argument concerns itself with the danger to the defendant who, prompted by the "penalty" imposed upon him for refusing to testify, voluntarily becomes a witness and thereby subjects himself to cross-examination which could expose the defendant's prior convictions of similar offenses.[69] While some may say the defendant should acknowledge his criminal record on direct examination, rather than have it dramatically elicited from him on cross-examination, it is still quite probable that the jury would be greatly prejudiced against the person who is revealed as an "ex-con," especially when the prior offenses were of a similar nature with the current offense.

Perhaps this second argument is the best answer to the logic of Bentham and Appleton. It has been said before that Bentham's argument is irrefutable as long as one presumes that the defendant is guilty, but fails

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64. MASS. CONST. pt. I art. 12.
65. *In re* Opinion of the Justices, 300 Mass. 620, 15 N.E.2d 662 (1938).
66. State v. Bentley, 219 La. 893, 54 So.2d 137 (1951).
67. *Id.* at 900, 54 So.2d at 141. MCCORMICK § 130 n.40, and 8 WIGMORE 426 point to a survey of the experiences of judges in five states where comment is allowed, conducted in the 1930's, which revealed that an overwhelming majority of the judges believed that the allowance of comment had promoted a more just enforcement of the law.
68. *Id.* at 901, 54 So.2d at 142.
69. See Ruloff v. People, 45 N.Y. 213 (1871).

when the defendant is presumed to be innocent.[70] However, the possible motives suggested for the innocent defendant's refusal to testify were, at best, rather unsubstantial.[71] The dangers of cross-examination in reference to the defendant's past offenses, conducted under the cloak of impeachment, furnish the proponents of the "no-comment" rule with a very real and definite reason for the continuation of the privilege: *i.e.*, unless the scope of discreditable cross-examination were limited, it would be impossible to draw any valid inference from the defendant's refusal to testify.[72]

Conclusion

The principal objection to the initiation of a rule permitting the prosecution to comment upon the defendant's failure to testify is apparently based upon the theory that a valid inference of guilt cannot exist since an innocent defendant may have reason to refuse to testify if he had been convicted in the past of other crimes (*especially* where the past convictions were for offenses similar in nature to the offense charged). It appears that this objection would have no application in Florida. Under Florida decisions, when the accused becomes a witness, the prosecutor may cross-examine him as to whether he had been convicted of a criminal offense. However, he may not be required to disclose the *particular* crime, unless it was for perjury.[73] Further, a Florida prosecutor may always introduce evidence of prior crimes committed by the accused to establish the element of intent or motive.[74] Since the defendant is substantially protected against being required to reveal the details of his past offenses on cross-examination, and the prosecution has the right in its affirmative case to introduce the details of the defendant's past offenses to prove the element of knowledge or intent, it is difficult to perceive what additional risk the defendant can possibly face by testifying.

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70. 8 WIGMORE § 2251 at 300.

71. McCORMICK § 132 at 280. If there exists any flaw in this logic, it might be that an innocent defendant may have *other motives*, in addition to concealment of past convictions, which would give him good reason for refusing to testify. Perhaps the defendant's fear that he would create a bad impression on the jury by his behavior or appearance on the witness stand, or a desire to protect another person, or some other possibility would be present.

However, where the risk to the defendant is obscure, or merely fanciful, as in the case where the defendant fears he would be a "bad" witness, or is afraid he would become "rattled" on cross-examination, there could hardly be objection to compelling the defendant to testify by facing him with the risk of an adverse inference arising from his refusal to testify.

It seems that any imagined prejudice the defendant may be faced with by taking the witness stand should be balanced against the value of a full and complete exposure of all relevant facts which the jury is traditionally entitled to know and consider in the interest of a fair and just verdict.

72. Both Professors Reader and Bruce, cited note 54 *supra*, while disagreeing on the value of the "no-comment" privilege, agree on this point.

73. Steele v. State, 160 Fla. 616, 36 So.2d 212 (1948); 13 FLA. JUR. *Evidence* § 146 (1957).

74. Singer v. State, 109 So.2d 7 (Fla. 1959); Zalla v. State, 61 So.2d 649 (Fla. 1952); 13 FLA. JUR. *Evidence* § 148 (1957).

In the opinion of this writer, the relative value, if any, of the "no-comment" privilege does not justify any further adherence to the rule. A need for specific legislation to correct the matter is clearly indicated. Furthermore, the language used in *Gordon v. State*[75] readily lends itself to an inference that the Florida Supreme Court would look favorably upon legislation designed to permit comments on the defendant's refusal to testify. As a progressive state with a progressive legal system, it seems appropriate for Florida to now abandon this "rule from the grave."

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75. See note 39 *supra* and accompanying text.