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CRIMINAL LAW AND PROCEDURE - CONSTITUTIONALITY OF A COMMENT UPON DEFENDANT'S FAILURE TO TESTIFY

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CRIMINAL LAW AND PROCEDURE — CONSTITUTIONALITY OF A COMMENT UPON DEFENDANT'S FAILURE TO TESTIFY — For several years there has been agitation in legal and legislative circles to permit comment in a criminal action upon the failure of the defendant to testify.[1] Both the American Bar Association and the American Law

to Complain of Misdeeds Occurring Prior to His Acquisition of Stock," 21 HARV. L. REV. 195 at 200 (1907). See, Jacobson v. General Motors Corp., (D. C. N. Y. 1938) 22 F. Supp. 255.

[32] Summers v. Hearst, (D. C. N. Y. 1938) 23 F. Supp. 986, noted 37 MICH. L. REV. 654 (1938), and 25 VA. L. REV. 100 (1938).

[33] But it is suggested that this provision of the rule might be attacked as unconstitutional. 1 FOSTER, FEDERAL PRACTICE, 6th ed., 810 (1920). And see 68 U. S. L. REV. 169 at 171 (1934).

[34] See Summers v. Hearst, (D. C. N. Y. 1938) 23 F. Supp. 986. The advisory committee on rules for civil procedure adopted rule 27 with but verbal changes as rule 23(b) of the new Rules of Civil Procedure although at least part of the rule appears to be statement of substantive law. FEDERAL RULES OF CIVIL PROCEDURE ANNOTATED 51 (1938).

[1] Ohio's Constitution was amended in 1912 to permit counsel to comment upon the silence of the accused. Art. I, § 10. Several states have considered legislation calculated to attain this result. See N. Y. L. J. 1:4 (Sept. 17, 1935), discussed in 10 ST. JOHN'S L. REV. 66 (1935); 28 PA. B. A. Q. 533 (1936). People v. Carmen, 367 Ill. 326, 11 N. E. (2d) 397 (1937), noted in 36 MICH. L. REV. 1376 (1938), indicates a growing antipathy on the part of jurists toward the harsh application of the old doctrine.

Institute have passed resolutions favoring such legislation.[2] The chief objection to the proposal has been its alleged unconstitutionality.[3] The purpose of this comment is to attempt to rebut such a contention and to show that the advocated change is both constitutional and eminently desirable.

In two recent decisions,[4] the highest courts of Massachusetts and South Dakota turned thumbs down on legislation[5] designed to allow comment on the accused's failure to testify on his own behalf. In each instance the majority of the court held the statute unconstitutional as

[2] 56 REP. A. B. A. 137, 159 (1931): "That by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a witness; and to the jury to draw the reasonable inferences." 9 PROC. AM. L. INST. 218 (1931): "The judge, the prosecuting attorney and counsel for the defense may comment on the fact that the defendant did not testify."

[3] As will be later developed in this comment, the constitutional issue has been limited to the "self-incriminating" clause. In Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908), the Supreme Court decided that an instruction that an unfavorable inference might be drawn from defendant's silence was not prohibited by the due process clause of the Fourteenth Amendment.

[4] In re Opinion of the Justices, (Mass. 1938) 15 N. E. (2d) 662; State v. Wolfe, 64 S. D. 178, 266 N. W. 116 (1936).

[5] The proposed Massachusetts act read: "The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not, except as hereinafter provided, be made the subject of any comment by the prosecution or by the court. If the defendant does not testify but introduces evidence tending to show reasons for his failure to testify, the prosecution may be permitted, in the court's discretion, to introduce evidence in rebuttal and to comment on the failure of the defendant to testify. If the counsel for a defendant who has failed to testify comments on such failure, the prosecution may be permitted, in the court's discretion, to comment thereon. 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 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." 15 N. E. (2d) 662 at 663.

S. D. Sess. Laws (1927), c. 93 [Comp. Laws (1929), § 4879], amending Rev. Code (1919), § 4879, provided: "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of any crime, before any Court or committing magistrate, the 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."

invading the defendant's right against self-incrimination.[6] And in each case there was a vigorous dissent upholding the validity of the act in question.

It can scarcely be denied that the average intelligent juror draws an unfavorable inference from the fact that the accused has not taken the stand to answer charges made against him. That inference, natural and inevitable, is that the defendant cannot refute the case that has been proved against him and that he has something to hide.[7] Though the inference is almost certain to be drawn by the jury, in spite of any attempt by the court to divert its reasoning from such a conclusion, is it sound and truly the result of logic? [8] To answer this question, one naturally poses another: Why else would the defendant reject the opportunity to take the witness stand?

It has been suggested that a defendant may be of a nervous temperament and involve himself in undeserved difficulties on cross-examination. The remoteness of the possibility of defendant's nervousness actually affecting his testimony to the extent that, even though innocent, he would have served himself better by remaining silent, impels one to ignore its existence.[9] Another reason is suggested in the contention that the defendant may fear that his very appearance and

[6] Mass. Const., Part I, art. 12: "No subject shall be . . . compelled to accuse, or furnish evidence against himself." S. D. Const., art. 6, § 9: "No person shall be compelled in any criminal case to give evidence against himself. . . ."

[7] 4 WIGMORE, EVIDENCE, 2d ed., § 2272 (1923); Parker v. State, 61 N. J. L. 308, 39 A. 651 (1898); dissenting opinion in State v. Wolfe, 64 S. D. 178 at 197, 266 N. W. 116 (1936): "Neither legislative command nor judicial doctrine will close the eyes of jurors to the failure of defendant to deny from the witness chair the inculpatory facts adduced from the state's witnesses; nor can the jury fail to draw an inference therefrom unfavorable to defendant."

[8] Judge Von Moschzisker, late Chief Justice of the Pennsylvania Supreme Court, answered this question quite emphatically in the affirmative in the discussion by the American Bar Association: "It has long been established in the English law that when one is accused of crime and stands silent, that that fact may be offered in evidence in any criminal court. Now why, when one is accused of crime outside of the court room and stands silent, and that may be offered in evidence, why, when he is accused of crime inside the court room, should the prosecutor, and the judge, be denied the privilege of a *common sense* comment that this man or woman who is accused has offered no explanation? The jury must think of that, and why should it not be argued to them? It seems to me *not only the lack of the essence of common sense, but nonsensical.* It is an old rule that arose in different times." 56 REP. A. B. A. 137 at 140 (1931) (italics added). See also State v. Cleaves, 59 Me. 298 (1871); 27 J. CRIM. L. 279 at 281 (1936).

[9] "It is not so much that the mere process of questioning and cross-questioning the accused is liable to perturb his mental operations, and educe from him the words and conduct of a guilty man. Current experience, as shown by the demeanor of defendants who voluntarily take the stand and are acquitted, discredits this." 4 WIGMORE, EVIDENCE, 2d ed., 824 (1923); 22 CORN. L. Q. 392 at 395-396 (1937).

demeanor will influence the jury against him. Again the force of the argument is more than dubious.[10] The jury will have observed the defendant in the court room, and it is not reasonable to assume that by placing himself in the spotlight of the witness stand, he would so add to the jury's bad impression of him that it would be more to his advantage to avoid the center of the stage. In making such a choice, the accused must face the realization that if he fails to testify relative to his innocence, the jury, whether it be permitted by law or not, will notice this and he will be prejudiced thereby.[11] A final and much more serious consideration is that a defendant may fail to testify for the reason that on cross-examination he will be subjected to an exposé of his past criminal record.[12] This evidence of his past criminality is not admitted to show a tendency toward crime, but ostensibly brought into evidence for the purpose of attacking the hapless defendant-witness' credibility.[13] If the accused remains off the stand, this record would never be brought to the jury's attention.[14] It is obvious that a defendant with a serious criminal record might well choose to run the risk of the jury's drawing an unfavorable inference from his silence, rather than have this injurious evidence submitted to it. While this incongruous scope of cross-examination is permitted, the layman's inference as to the reason for defendant's silence is not always sound. Although a discourse on the value, justice, and logic of this test of credibility is not within the purview of this comment, it is submitted that this attack upon a defendant's credibility should be abolished[15] while enacting a statute permitting comment on defendant's silence, thus effecting a needed reform while making almost infallible the inference the jury will draw.

One may well inquire as to the necessity of incorporating into our

[10] "Moreover, the conduct of the accused, even while under the mental strain induced by arrest and incarceration, is not rejected as a source of evidence." 4 WIGMORE, EVIDENCE, 2d ed., 824 (1923).

[11] Citations, supra, note 7.

[12] Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 56 (1932).

[13] 6 JONES, EVIDENCE, 2d ed., § 2440 (1926); 2 WIGMORE, EVIDENCE, 2d ed., § 926 (1923).

[14] People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846 (1898); People v. Mantin, 184 App. Div. 767, 172 N. Y. S. 371 (1918); Benedict v. State, 190 Wis. 266, 208 N. W. 934 (1926).

[15] See Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 57 (1932). The author apparently concedes that the present scope of discreditive cross-examination is his chief objection to the resolutions of the American Law Institute and the American Bar Association. And see Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 MICH. L. REV. 226 at 232 (1932).

mass of legislative law a provision which could only place legal sanction upon an already existing fact. The answer is twofold. A statute permitting the drawing of the inference would avoid the sorry spectacle of new trials being ordered because the prosecution has made an allusion to defendant's failure to explain the charges levelled against him.[16] The futility of this is apparent when we realize that the jury will critically observe this same fact on its own initiative upon the new trial. Secondly, and on behalf of the defendant, legal sanction and recognition of the inference should be accompanied by protection from the very real harm which the present state of the law quite conceivably inflicts upon innocent defendants. General acceptance of the fact that the jury draws its own irresistible conclusions from the defendant's failure personally to refute the charges against him would and should bring about the desirable limitation upon the scope of the cross-examination referred to above.[17] As the law now stands, the jury may be doing the person on trial a grave injustice by inferring from his decision not to testify that he is guilty.[18] But with cross-examination thus limited, no injustice is done the defendant by the jury's inference, and there is no rational objection to permitting the comment.

Is there any technical objection to such comment? Is it compulsory self-incrimination? Although it is indisputable that the average jury will be prejudiced against the accused's cause solely by his maintaining silence, and that this probably exerts a strong influence toward forcing him to testify, it cannot be conscientiously denied that the added comment on such silence puts increased pressure on the defendant to take the stand. But is this compulsory self-incrimination such as is forbidden by the constitution? The writer will attempt to show that it is not.

[16] In the discussion before the American Law Institute on this problem, the following statement was attributed to the present chief justice of the United States Supreme Court, at that time (1924) Secretary of State Hughes: "It is clear that reversals because a prosecuting attorney has directed the attention of the jury to a circumstance which no intelligent person could help taking into consideration of his own accord should have no place in any well ordered system of criminal procedure." 9 PROC. AM. L. INST. 215 (1931). For cases in which comment was ground for a new trial, see State v. Holmes, 65 Minn. 230, 68 N. W. 11 (1896); State v. Brownfield, 15 Mo. App. 593 (1884); Sanders v. State, 73 Miss. 444, 18 So. 541 (1895). In Angelo v. People, 96 Ill. 209 (1880), and Quinn v. People, 123 Ill. 333, 15 N. E. 46 (1888), comment was held ground for a new trial, even where counsel was admonished by the court and the jury was instructed to disregard the comment.

[17] The English statute of 61 & 62 Vict., c. 36 (1898), parts (e) and (f) (i) (ii), (iii) would form an excellent model for limiting the inquiry into defendant's criminal history. The applicable part of the statute is quoted in Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 57, note 80 (1932).

[18] Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 57 (1932).

The purpose of the constitutional provisions against compulsory self-incrimination is the protection of persons accused of crime from cruel and inhuman extractions of admissions, sometimes true and sometimes false, and from the inquisitorial system of the ill-famed English Court of Star Chamber.[19] Wigmore says that the privilege is a bequest of the 1600's; a relic of controversies and convulsions which have long since ceased.[20]

It will hardly be proposed that the controverted section of the constitution was designed to protect guilty persons, save from a justice armed with unnatural and barbarous weapons of persuasion.[21] It cannot be denied that permitting the inference to be drawn is to stamp with legality a procedure which has a strong tendency to force a defendant to testify. But this is not the kind of force that the framers of the constitutions abhorred and sought to outlaw. As the dissenting judge in the Massachusetts case[22] well puts it, the constitutional provision "has no concern with tactical refinements." Furthermore, it will be noted that an innocent defendant is given a real option. He may take the witness stand and defend himself from the charges brought against him, or he may remain silent. If he chooses to do the latter, the unfavorable inference is drawn. But he has another choice; he may testify, and by our hypothesis his testimony will not be incriminating. It is only the guilty defendant who would be forced to decide between one of two evils.[23] Admittedly, he will be placed in a dilemma. He has the choice of testifying as to the criminating facts, or submitting to an inference which will militate against him. But are we supposed to believe that the constitutional guarantee was designed to shield and protect such a person from legal retribution? A common sense of decency and fair-dealing is repelled at such a notion. It is entirely in accord with justice and the constitutional guarantee to hold that the latter prohibits the use of physical force or mental torture to draw testimony from even a guilty defendant, but to go to the extent of

[19] Kauper, "Judicial Examination of the Accused—A Remedy for the Third Degree," 30 MICH. L. REV. 1224 at 1252 (1932); dissenting opinion in In re Opinion of the Justices, (Mass. 1938) 15 N. E. (2d) 662 at 666-667; Bruce, "The Right to Comment on the Failure of the Defendant to Testify," 31 MICH. L. REV. 226 at 233 (1932), where the writer says: "All that was in the minds of the framers of the constitutional provisions was the desire to prevent injustice and direct compulsion. Theirs was a protest against and a fear of the inquisition of torture which was even then so prevalent on the continent of Europe and which, though denied, has so often accompanied the proceedings of the Star Chamber." See also 25 VA. L. REV. 90 (1938); 87 UNIV. PA. L. REV. 122 (1938).

[20] 4 WIGMORE, EVIDENCE, 2d ed., § 2251 (1923).

[21] Ibid., at p. 824.

[22] In re Opinion of the Justices, (Mass. 1938) 15 N. E. (2d) 662 at 667.

[23] 4 WIGMORE, EVIDENCE, 2d ed., § 2272, at p. 900 (1923).

maintaining that the constitutional guarantee is so literally all-inclusive as to prohibit the drawing of an inference from his silence is to impute to our forefathers a love of criminals that this writer refuses to believe they had.

It should here be emphasized that the drafters of our national and state constitutions could not have been seeking to prevent the drawing of an inference from the defendant's failure to exercise his privilege to testify. At the time of the inception of most of these instruments, an accused was not a competent witness.[24] In 1864 Maine enacted a statute which provided that the accused might testify at his own request, but not otherwise.[25] As Maine went, so went the nation.[26] It was not until 1864, then, that our question presented itself. It was theretofore unknown.

In addition to the foregoing, some of those who object to legalizing the comment have been influenced in their conclusion as to its unconstitutionality by what they view as a practical difficulty involved therein. Professor Wigmore's principal objection to judicial recognition of the natural inference is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.[27] If we accept the proposition that the inference will in all probability be drawn, whether judicially frowned upon or not, it is difficult to see how legal recognition of that inference would have the dire consequences that the opponents of the proposal suggest. Prosecutors would hardly rely any more upon the inference under a law sanctioning it than they do now.[28] It is submitted that a proper judicial administration of the rule permitting the drawing of an inference would have no tendency toward incomplete investigations of the other probative facts. The right to make the comment should not become available until the state has made out a case against the defendant. Were it otherwise, his silence could not reasonably be interpreted as indicative of his guilt.[29]

[24] 1 WIGMORE, EVIDENCE, 2d ed., § 579 (1923); Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 41 (1932).

[25] Me. Laws (1864), c. 280, p. 214.

[26] See Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 41-42 (1932).

[27] 4 WIGMORE, EVIDENCE, 2d ed., 824, 900 (1923); and see 25 VA. L. REV. 90, note 22 (1938).

[28] Dunmore, "Comment on Failure of Accused to Testifv," 26 YALE L. J. 464 at 469 (1917).

[29] Reeder, "Comment upon Failure of Accused to Testify," 31 MICH. L. REV. 40 at 58 (1932); 10 ST. JOHN'S L. REV. 66 at 75 (1935); 22 CORN. L. Q. 392 at 396 (1937); Parker v. Village of Dover, 18 Ohio N. P. (N. S.) 465 at 472 (1916). Ohio has the following constitutional provision (Art. I, § 10): "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to

The writer is not prepared to dispute that the decisions in the Massachusetts and South Dakota cases reached the right result. It is possible that the scope of discreditive cross-examination in those states was uppermost in the courts' minds when they pondered this question. And it is possible that they were deterred from recognizing the validity of the statutes by a fear that they would have a tendency to change the burden of proof. The first of these two motivating factors is quite valid; the second one would appear to be an exaggeration of constitutional difficulties.[80] However, the general tenor of both opinions indicates an antipathy toward recognizing as constitutional any reference to defendant's silence even though it be accompanied by the above-mentioned safeguards. The decisions proceed upon the theory that the self-incrimination clauses refer to physical, moral, and tactical persuasion, indirect as well as direct.

It is to be hoped that those who have seen too much of "justice tampered with mercy"[81] will continue the worthy fight to have the inevitable inference recognized as such by the legislatures and courts of our various states. No court has as yet passed upon the constitutionality of a statute permitting comment upon the failure of the accused to testify, which also includes provision for limited cross-examination. In this fact lies the hope for the future recognition of the inference and legitimization of the comment on the defendant's failure to testify.

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testify may be considered by the court and jury, and may be made the subject of comment by counsel." The court in the Parker case, supra, had this to say in reversing a decision in which comment had been made by the prosecution in relation to defendant's silence: "This provision of the Constitution was not intended to and does not lessen the proof required on behalf of the prosecution before a conviction can be had in a criminal case, nor does it change the well settled rule of procedure that, before the defendant can be called upon to produce his defense, the state must prove every essential element of the crime charged."

[80] Ibid.

[81] Wigmore credits this parody to an unnamed wit. 4 WIGMORE, EVIDENCE, 2d ed., 830 (1923).