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LAST year the American Law Institute and the American Bar Association adopted resolutions declaring that when the defendant in a criminal trial does not testify the prosecution should be permitted to comment upon that fact.[1] They urged the overthrow of a rule of law which has prevailed in the federal courts ever since accused persons were first permitted to give testimony, over fifty years ago, and which has governed the courts of forty-two out of the forty-eight states. The discussions which preceded the adoption of the resolutions have been published. In them the advocates of the change do not show adequate knowledge of the history of the existing rule and they do not adequately meet the constitutional question which is involved, while those who sustain the existing, almost universal, rule present reasons which are serious but not necessarily insuperable. Therefore, it seems desirable to regard the proceedings of the Law Institute and the Bar Association as raising important questions but as calling for further and more exhaustive discussion before a generally accepted rule of law is discarded.

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

It is not sufficient to examine merely judicial interpretations of the constitutions. The Constitution of the United States[2] protects witnesses in the federal courts from compulsory self-incrimination, and the constitution of every state except Iowa and New Jersey gives similar protection in the state courts.[3] There is such a provision in Ohio

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[1] 9 Proc. Am. L. Inst. 202-218; 56 Reports of A. B. A. 137-152. The proposition approved by the Law Institute was, "The judge, the prosecuting attorney and counsel for the defense may comment upon the fact that the defendant did not testify." (p. 218.) The Bar Association approved of a resolution "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." (pp. 137, 152.)

[2] Fifth Amendment.

[3] *Alabama:* art. I, sec. 6; *Arizona:* art. II, sec. 10; *Arkansas:* art. II, sec. 8; *California:* art. I, sec. 13; *Colorado:* art. II, sec. 18; *Connecticut:* art. I, sec. 9; *Delaware:* art. I, sec. 7; *Florida:* Dec. of Rights, sec. 12; *Georgia:* art. I, sec. 1, par. 6; *Idaho:*

although an amendment permits counsel to comment upon the silence of the accused.[4] But the courts have seldom had occasion to consider whether the usual provisions by themselves forbid comment upon failure to testify. This is because the accused was nowhere a competent witness before the eighteen-sixties,[5] and the legislation which made him competent nearly always provided that his failure to testify should not create any presumption against him. In view of such statutes it has seldom been necessary for the courts to determine how far the constitutions protect the accused.[6] We should, therefore, consider legislative as well as judicial interpretations of the constitutions; we should see how the laws have developed as well as the way they have been applied in the courts.

The first legislation upon the subject was in 1864. In that year Maine enacted a statute[7] which simply provided that the accused might testify at his own request but not otherwise. This law was followed word for word by California in April, 1866,[8] and in substance by South Carolina in September, 1866.[9] In May, 1866, Massachusetts enacted a statute[10] similar to that of Maine but with the added proviso, "nor shall the neglect or refusal to testify create any presumption against the defendant." In November Vermont [11] provided that "the refusal of such person to testify shall not be considered by the jury as evidence

art. I, sec. 13; *Illinois:* art. II, sec. 10; *Indiana:* art. I, sec. 14; *Kansas:* Bill of Rights, sec. 10; *Kentucky:* Bill of Rights, sec. 11; *Louisiana:* art. I, sec. 11; *Maine:* art. I, sec. 6; *Maryland:* Dec. of Rights, art. 22; *Massachusetts:* part I, art. 12; *Michigan:* art. II, sec. 16; *Minnesota:* art. I, sec. 7; *Mississippi:* art. III, sec. 26; *Missouri:* art. II, sec. 23; *Montana:* art. III, sec. 18; *Nebraska:* art. I, sec. 12; *Nevada:* art. I, sec. 8; *New Hampshire:* part I, art. 15; *New Mexico:* art. II, sec. 15; *New York:* art. I, sec. 6; *North Carolina:* art. I, sec. 11; *North Dakota:* art. I, sec. 13; *Oklahoma:* art. II, sec. 21; *Oregon:* art. I, sec. 12; *Pennsylvania:* art. I, sec. 9; *Rhode Island:* art. I, sec. 13; *South Carolina:* art. I, sec. 17; *South Dakota:* art. VI, sec. 9; *Tennessee:* art. I, sec. 9; *Texas:* art. I, sec. 10; *Utah:* art. I, sec. 12; *Vermont:* c. I, art. 10; *Virginia:* art. I, sec. 8; *Washington:* art. I, sec. 9; *West Virginia:* art. III, sec. 5; *Wisconsin:* art. I, sec. 8; *Wyoming:* art. I, sec. 11.

[4] Art. I, sec. 10, amended Sept. 3, 1912. The amendment was one of forty-two which were proposed by a constitutional convention and submitted to popular vote: H. R. Doc. No. 863, 62d Cong., 2d sess., Ser. No. 6323.

[5] 1 WIGMORE, EVIDENCE, 2d ed., 1008 (1920).

[6] See, e.g., People v. Tyler, 36 Cal. 522 (1869).

[7] Act of March 25, 1864; Laws of Me. (1864) c. 280, p. 214.

[8] Act of April 2, 1866; Statutes of Cal. (1865-6) c. 644, p. 865.

[9] Act of Sept. 19, 1866; Statutes of S. C. (1866) Act No. *4780, sec. 2; 13 S. C. Stats., p. 366(9).

[10] Act of May 26, 1866; Mass. Acts and Resolves (1866) c. 260, p. 245. See also Act of June 22, 1870; Mass. Acts and Resolves (1870) c. 393, sec. 1, p. 302.

[11] Act of Nov. 19, 1866; Vt. Laws (1866-7) no. 40, p. 52.

against him." In February, 1867, Nevada[12] made the accused a competent witness but provided that "in all cases wherein the defendant to a criminal action declines to testify the court shall specially instruct the jury that no inference of guilt is to be drawn against him for that cause." In July, 1867, Connecticut [13] followed the example of Massachusetts but added, "nor shall such neglect be alluded to, or commented upon by the prosecuting attorney or by the court." The Connecticut law was followed in substance by Minnesota in March, 1868,[14] and by Ohio in May, 1869.[15] In 1869 Wisconsin[16] and New York [17] enacted laws similar in substance to that of Massachusetts. In the same year a New Hampshire law[18] declared that "nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify." After legislation in several Territories and in several other States,[19] Congress in 1878 [20] provided for the federal courts that the

[12] Act of Feb. 18, 1867; Statutes of Nev. (1867) c. 18, p. 58. Passed over veto by votes of 17 to 0 in senate and 37 to 1 in house.

[13] Act of July 19, 1867; Conn. Laws (1867) c. 96, p. 101.

[14] Act of March 6, 1868; Minn. Gen. Laws (1867-8) c. 70, p. 110.

[15] Act of May 6, 1869; 66 Laws of Ohio, p. 308.

[16] Act of March 4, 1869; Laws of Wis. (1869) c. 72, p. 70.

[17] Act of May 7, 1869; Laws of N. Y. (1869) c. 678, p. 1597.

[18] Act of July 7, 1869; Sess. Laws of N. H. (1867-71) c. 23, p. 282.

[19] *Colorado:* Act of Feb. 5, 1872, Sess. Laws (1872) p. 95; *Idaho:* Act of Jan. 14, 1875; Rev. Laws of Idaho (1874-5) sec. 12, p. 321; *Illinois:* Act of March 27, 1874; Rev. Stats. (1874) c. 38, sec. 426; *Kansas:* Act of Feb. 21, 1871; Laws of Kan. (1871) c. 118, p. 280; *Maryland:* Act of April 7, 1876; Laws of Md. (1876) c. 357, p. 601; *Missouri:* Act of April 18, 1877; Laws of Mo. (1877) p. 356; *Montana:* Laws of Mont. (1872) pp. 271, 272; *Nebraska:* Act of March 4, 1873; Laws of Neb. (1873) sec. 473, Gen. Stats. 1873, p. 827; *Pennsylvania:* Act of April 3, 1872; Laws of Pa. (1872) p. 34; Act of March 24, 1877; Laws of Pa. (1877) p. 45; see also Act of May 21, 1885; Laws of Pa. (1885) p. 23; *Rhode Island:* Act of March 15, 1871; R. I. Laws (1871) c. 907, p. 134; R. I. Gen. Stats. (1872) c. 203, sec. 39; *Utah:* Act of Feb. 22, 1878; Laws of Utah (1878) p. 151; see also Utah Comp. Laws (1876) p. 505; *Washington:* Act of Nov. 29, 1871; Laws of Wash. (1871) p. 105; *Wyoming:* Act of Dec. 6, 1877; Laws of Wyo. (1877) p. 25; and see Wyo. Comp. Laws (1876) c. 14, sec. 129. In *Florida* the acused might make a statement under oath before the jury: Act of Jan. 16, 1866; Laws of Fla. (1866) c. 1472, sec. 4, p. 36; Act of June 1, 1870; Laws of Fla. (1870) c. 1816, p. 13.

[20] Act of March 16, 1878, 20 Stat. 30; U.S.C., tit. 28, sec. 632 (1926). The act was based upon the Massachusetts law: 7 Cong. Rec., pt. 1, p. 385. Prior to the act of 1878 the accused was not a competent witness. The revised edition of the Revised Statutes was published in the same year. It showed that the only section then in force which apparently established a general rule as to testimony in criminal trials was sec. 858, and that section did not apply: Logan v. United States, 144 U. S. 263 at 299-303, 12 Sup. Ct. 617 (1897). 1 WIGMORE, EVIDENCE, 2d ed., p. 81 (1920). As

the accused "shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." That limitation prevents any unfavorable comments by federal courts upon the failure of accused persons to testify.[21] In 1879, after decisions which will be referred to hereafter, the Maine law was amended [22] by providing that "The fact that the defendant in a criminal prosecution does not testify in his own behalf shall not be taken as evidence of his guilt." And so on through the states. At the present time the laws of forty-two states provide that the failure of the accused to testify shall not create any presumption against him[23] or that it shall not be subject to comment,[24] or contain both such provisions.[25]

explained in Wigmore, the act of 1789 established for the federal courts the common law rules as to the competency of witnesses which were in force in 1789 or when the states were admitted to the Union.

[21] Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765 (1892); Reagan v. United States, 157 U. S. 301, 305, 15 Sup. Ct. 610 (1894).

[22] Act of Feb. 14, 1879; Laws of Me. (1879) c. 92, sec. 1, p. 112.

[23] *Arkansas:* Ark. Dig. Stat. (Crawford & Moses 1921) sec. 3123; *Colorado:* Colo. Am. Stat. (Mills 1930) sec. 2111; *Louisiana:* Act of 1916; Laws of La. (1916) p. 379 (see La. Code of Crim. Proc. (Dart. 1932) p. 226); *Maine:* Me. Rev. Stat. (1930) c. 146, sec. 19; *Maryland:* 1 Md. Ann. Code (Bagby 1924) art. 35, sec. 4; *Massachusetts:* Mass. Gen. Laws (1921) c. 233, sec. 20; *New Mexico:* N. M. Stat. (Courtright 1929) sec. 45-504; *New York:* N. Y. Code Crim. Proc. (Bender, 1932) sec. 393; *North Carolina:* N. C. Code Ann. (Michie 1931) sec. 1799; *Oregon:* Ore. Code Ann. (1930) sec. 13-929; *South Carolina:* S. C. Crim. Code (1922) sec. 97 (as interpreted in State v. Howard, 35 S. C. 197, 203 (1891)); *Tennessee:* Code of Tenn. (Thannan 1932) sec. 9783; *Vermont:* Vt. Gen. Laws (1917) sec. 2554; *Washington:* Wash. Comp. Stats. (Remington 1922) sec. 2148; *Wisconsin:* Wis. Stat. (1929) sec. 325-13.—The provision in the Louisiana act cited above was not repealed by its omission from art. 461 of the 1928 Code of Criminal Procedure. Only provisions in conflict with the code were repealed by it: art. 582. Those who drafted the code had proposed to authorize comment on the failure of the accused to testify, and consequently had omitted from art. 461 the provision of existing law as to presumption. The senate, by a vote of 39 to 0, and the house, by a vote of 76 to 3, struck out the proposed authorization of comment: Louisiana S. J. for June 13, 1928, pp. 295, 297, 310; H. J. for June 19, 1928, pp. 544, 545.

[24] *Connecticut:* Conn. Gen. Stat. (1930) sec. 6480; *Florida* Fla. Comp. Laws (1927) sec. 8385; *Indiana:* Ind. Ann. Stat. (Burns 1926) sec. 2267.

[25] *Alabama:* Ala. Code (Michie 1928) sec. 5632; *Arizona:* Ariz. Code (Struckmeyer 1928) sec. 5179; *California:* Cal. Pen. Code (Deering 1923) sec. 1323; *Delaware:* Del. Rev. Code (1915) c. 129, sec. 4215; *Idaho:* Idaho Comp. Stat. (1919) sec. 9131; *Illinois:* Ill. Rev. Stat. (Smith-Hurd 1930) c. 38, sec. 734; *Kansas:* Kan. Rev. Stat. Ann. (1923) c. 62, sec. 1420-1; *Kentucky:* Ky. Stat. (Carroll 1930) sec. 1645; *Michigan:* Mich. Comp. Laws (1929) sec. 14218; *Minnesota:* Minn. Stat. (Mason 1927) sec. 9815; *Mississippi:* Miss. Code Ann. (1930) sec. 1530; *Missouri:* Mo. Rev. Stat. (1929) sec. 3693; *Montana:* Mont. Rev. Code (Choate 1921) sec. 12177; *Nebraska:* Neb. Comp. Stat. (1929) c. 29, sec. 2011; *New Hampshire:* N. H. Pub. Laws (1926) c. 336, sec. 36; *North Dakota:* N. D. Comp. Laws Ann. (1931)

The states which do not conform to the general rule are: Georgia, where the accused is not a competent witness;[26] Iowa,[27] New Jersey,[28] and Ohio,[29] where the constitutions clearly do not prevent comment upon the silence of the accused; Nevada,[30] where the court may not comment upon his silence unless he requests it to instruct the jury upon his right to refrain from testifying; and South Dakota, where a rule which had prevailed since 1879 [31] was changed in 1927 [32] to provide that the failure of the accused to testify in his own behalf was a proper subject of comment by the prosecuting attorney. This recent South Dakota law has not yet led to any reported cases. It constitutes the only exception under a normal constitution to the legislative practice of providing that while the accused may testify, his failure to do so shall not create any presumption against him. It furnishes a legislative precedent in support of the position taken by the American Law Institute and the American Bar Association.

sec. 10837; *Oklahoma:* Okla. Comp. Stat. Ann. (Bunn 1921) sec. 2698; *Pennsylvania:* Pa. Stat. Ann. (Purdon 1930) tit. Crim. Proc., sec. 631; *Rhode Island:* R. I. Gen. Laws (1923) c. 342, sec. 5028; *Texas:* Tex. Rev. Code Crim. Proc. (Vernon 1928) art. 710; *Utah:* Utah Comp. Laws (1917) sec. 9279; *Virginia:* Va. Code Ann. (Michie 1930) sec. 4778; *West Virginia:* W. Va. Code (1931) c. 57, art. 3, sec. 6; *Wyoming:* Wyo. Rev. Stat. (1931) c. 33, sec. 801.

[26] Ga. Ann. Code (Park 1914) sec. 1037. See also Act of Dec. 15, 1866, Ga. Laws 1866, p. 138. The fact that a witness claimed privilege against compulsory self-incrimination in one proceeding could not be shown against him in another proceeding: Loewenherz v. Merchants Bank, 144 Ga. 556, 560, 87 S. E. 778 (1915). The court quoted from State v. Bailey, 54 Iowa 414, 416, 6 N. W. 589 (1880). " 'It would indeed be strange if the law should confer upon a witness this right as a privilege, and at the same time should permit the fact of his availing himself of it to be shown as a circumstance against him. It certainly is a privilege of very doubtful character if the effect of claiming it is as prejudicial to the witness as the effect of waiving it.' "

[27] Iowa Code (1927) sec. 13891, provided not only that the failure of the defendant to testify should have no weight against him at the trial but that if the attorney for the state should refer to such failure he would be guilty of a misdemeanor and the defendant would for that cause alone be entitled to a new trial. The Act of March 28, 1929, 43 Gen. Acts, c. 269, p. 311, referred to that section by number and repealed it.

[28] Common law forbids compulsory self-incrimination although the constitution does not: State v. Zdanowicz, 69 N.J.L. 619 at 622, 55 Atl. 743 (1903). Defendant may testify if he so desires: Act of June 14, 1898, N. J. Laws, 1898, c. 237, sec. 57, p. 886. Comment on failure to testify is permitted: Parker v. State, 61 N. J. L. 308, 39 Atl. 651 (1898); Twining v. New Jersey, 211 U. S. 78 at 90, 29 Sup. Ct. 14 (1908); State v. Kisik, 99 N. J. L. 385, 125 Atl. 239 (1924).

[29] See note 4.

[30] Act of March 17, 1915, Stats. of Nev. (1915) c. 157, sec. 2, p. 192; Nev. Comp. Laws (Hillyer 1929) sec. 10960.

[31] Act of Feb. 10, 1879, S. Dakota Sess. Laws (1879) c. 16, p. 49.

[32] S. D. Sess. Laws (1927) c. 93, p. 116.

THE DECISIONS

So far as the courts have dealt with unfavorable comment upon the failure of the accused to testify, they have usually, but not always, held that the provisions of the constitutions which forbade compulsory self-incrimination prevented the pressure to testify which would exist if the jury could be told that an unfavorable inference might be drawn from the silence of the accused; or they have held that a statute which permitted such argument or such instruction to the jury would be of doubtful constitutionality. After reviewing the decisions we shall attempt to draw a conclusion from them.

The Supreme Court of the United States has decided that the due process clause of the Fourteenth Amendment does not render unconstitutional the instruction of a state court that an unfavorable inference might be drawn from the silence of the accused.[33] But that decision does not have any bearing upon the provision against compulsory self-incrimination which is contained in the Fifth Amendment and which protects witnesses in the federal courts. In view of the terms of the Act of Congress which makes accused persons competent witnesses — expressly providing that failure to testify should not create any presumption against the accused [34]— the federal courts have not had occasion to consider how far Congress may go constitutionally in dealing with failure to testify.

In California, under the Act of 1866, which said nothing as to comment on the silence of the accused, a trial court permitted such comment The supreme court decided that the constitution forbade it.[35] It said that when a defendant pleads not guilty the burden of proof rests on the People, and that if an inference of guilt were to be legally drawn from his declining to testify he would be deprived of his option of going or not going upon the stand or he would be compelled, if he remained silent, to give rise to an inference which would criminate him in violation of the principles and the spirit of the constitution and the statute.

In Colorado the supreme court held that if inference is drawn from

[33] Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908).

[34] Act of March 16, 1878, 20 Stat. 30; U. S. C., tit. 28, sec. 632 (1926).

[35] People v. Tyler, 36 Cal. 522 (1869). Followed in People v. McGungill, 41 Cal. 429 (1871). A later statute provided that failure to testify should not prejudice the accused. See People v. Brown, 53 Cal. 66 (1878); People v. Sanders, 114 Cal. 216 at 238, 46 Pac. 153 (1896).

silence there is a practical abrogation of the constitutional principle that no man is to be compelled to criminate himself:[36]

> "For if silence is to be taken as evidence of guilt, defendant's option is of but little avail; he is practically forced to testify, and once upon the stand may be required to give the very testimony upon which his conviction shall rest."

In Connecticut the highest court has held:[37]

> "There is nothing in the statutory provision or in our rules of law which requires the jury to disregard the fact that the accused did not testify, nor does it forbid the jury to draw its own conclusion from this circumstance. The requirements of law are fully met when counsel and the court have avoided comment upon the fact that the acused has failed to take the witness stand in his own behalf."

And in another case the same court has held that in a trial to the court, where the statute does not apply, the trial judge may draw inferences from the silence of the accused.[38]

In Georgia the court of last resort has held that the constitution does not permit the fact that a witness refused to testify at grand jury proceedings on the ground of self-incrimination to be shown against him at the trial.[39]

The Maine law of 1864 simply made the accused a competent witness. In a case decided in 1867, it was contended that the jury should not be allowed to consider the fact that the accused did not testify because it might attach too much importance to that fact. The supreme court replied:[40]

> "That an inference does arise is admitted, and is undeniable. It is evidence. The force of it may depend upon circumstances."

Four years later, in *State* v. *Cleaves*, a case in which Thomas B. Reed appeared as attorney general, the court went further and said:[41]

> "The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which

[36] Petite v. People, 8 Colo. 518 at 519, 9 Pac. 622 (1895). See also Brindisi v. People, 76 Colo. 244, 252, 230 Pac. 797 (1924).

[37] State v. Colonese, 108 Conn. 454 at 464, 143 Atl. 561 (1928).

[38] State v. Guilfoyle, 109 Conn. 124, 144, 145 Atl. 761 (1929). See also State v. Ford, 109 Conn. 490, 498, 499, 146 Atl. 828 (1929).

[39] Loewenherz v. Merchants & Mechanics Bank, 144 Ga. 556, 87 S. E. 778 (1916).

[40] State v. Bartlett, 55 Me. 200 at 219 (1867).

[41] 59 Me. 298 at 300, 301 (1871).

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. . . .

"When the prisoner is on trial, and the evidence offered by the government tends to establish his guilt, and he declines to contradict or explain the inculpatory facts which have been proved against him, is not that a fact ominous of criminality? . . . 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 disregard than one can the light of the sun, when shining with full blaze on the open eye. . . .

"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 has placed himself in such a situation that he prefers any inferences whch may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."

Another four years passed by, and then in *State* v. *Wentworth*,[42] where the questions were whether liquor had been sold by an employee and whether such sale had been authorized by the accused, the accused took the stand and on cross-examination was asked as to earlier sales by himself. It was held that he could not have the privilege of self-exonerative testimony without incurring the dangers incident to discreditive or criminative cross-examination. This decision, however correct as to the case then before the court, showed that in *State* v. *Cleaves* the situation had not been stated correctly. It showed that a man might be innocent of the offense for which he was then on trial and yet fear to take the stand if he had been guilty of other crimes.

Hardly three years later the state legislature enacted that the failure of the accused to testify in his own behalf should not be taken as evidence of his guilt and that if he did testify he should not be compelled to testify on cross-examination as to facts that would convict or furnish evidence to convict him of any other crime than that for which he was on trial.[43]

[42] 65 Me. 234 (1875).

[43] Act of Feb. 14, 1879, c. 92, p. 112. See also State v. Banks, 78 Me. 490, 7 Atl. 269 (1886); State v. Landry, 85 Me. 95, 26 Atl. 998 (1892).

In Massachusetts, where the act of 1866 had provided that neglect or refusal to testify should not create any presumption against the accused, the court of last resort declared, in an opinion by Chief Justice Gray, that the statute recognized a constitutional privilege. The court quoted with approval from the opinion in an earlier case under the same statute in which the court had held that an equivocal instruction upon the matter entitled the defendant to a new trial, and added, " 'It is important that the courts should carefully guard his constitutional right.' " [44]

In Missouri, without dealing with the constitutional question, the court has said:[45]

> "Guilt is not to be presumed from the failure to disprove any fact. The defendant is presumed innocent until the State establishes his guilt. The burden is not on him to prove his innocence but on the State to show it beyond a reasonable doubt."

In New Jersey, where there is no provision of the constitution against compulsory self-incrimination and no statutory provision against comment on failure to testify, the court has held that such comment is permissible, saying in *Parker* v. *State*,[46]

> "But when the accused is upon trial, and the evidence tends to establish facts which if true would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then his silence would justify a strong inference that he could not deny the charges.
>
> "Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instructions will prevent it. Must a court refrain from noticing that which is so plain and forcible an indication of guilt? In my judgment there is no rule of law re-

[44] Commonwealth v. Scott, 123 Mass. 239 at 241 (1877). See also Commonwealth v. Hanley, 140 Mass. 457, 5 N. E. 468 (1886). In Phillips v. Chase, 201 Mass. 444 at 450, 87 N. E. 755 (1909), a civil case, the court said that but for the statute, comment on refusal to testify could be made in a criminal case. 4 WIGMORE, EVIDENCE, 2d ed., p. 896 (1920), says that the ruling is extraordinary and is based in part on Massachusetts cases which are inapplicable. In Commonwealth v. Richmond, 207 Mass. 240, 93 N. E. 816 (1911), the decision seems to be in accordance with the letter of the statute, but it is doubtful whether it complies with the spirit of the rule laid down by statute.

[45] State v. Snyder, 182 Mo. 462 at 527, 82 S. W. 12 (1904). See also State v. Shuls, (Mo. 1931) 44 S. W. (2d) 94 at 96-97.

[46] 61 N. J. L. 308 at 313-314, 39 Atl. 651 (1898); affirmed 62 N. J. L. 801, 45 Atl. 1092 (1899). See also State v. Gimbel, 107 N. J. L. 235 at 239, 151 Atl. 756 (1930).

quiring it. The rights of the accused are not invaded or denied by proper comment on his silence."

The court added that there might be cases in which the evidence against the accused did not directly affect him, and a reply from him could not necessarily be expected. And in *State* v. *Kisik* [47] it decided that the mere fact that the defendant did not take the stand does not constitute sufficient evidence of guilt.

In New York, in *Ruloff* v. *People*, the court said:[48]

"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 pretence 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 greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarassments 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.

"The Legislature foresaw some of the evils and dangers that might result from the passage of this act, and did what could be done to prevent them by enacting that the neglect or refusal of the accused to testify should not create a presumption against him." [49]

[47] 99 N. J. L. 385, 125 Atl. 239 (1924).

[48] 45 N. Y. 213 at 221, 222 (1871).

[49] On scope of cross-examination see also People v. Tice, 131 N. Y. 651, 30 N.

In Ohio, by a constitutional amendment adopted in 1912, comment may be made on failure to testify, but in *Parker* v. *Village of Dover*,[50] decided four years after the amendment of the constitution, the court felt obliged to say:

> "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. To hold otherwise would be doing violence to that part of the Constitution which says that no person shall be compelled in any criminal case to be a witness against himself. This provision of the Constitution was intended to apply when the state has shown by its evidence certain facts or chain of circumstances to exist, which, unexplained, are such as to overcome the presumption of innocence, and in such case, if the defendant should not take the stand to explain, it would be proper for the court and jury to take into consideration the fact that the one person who could explain had not done so. This provision of the Constitution does not aid the prosecution in this case."

In Pennsylvania in *Commonwealth* v. *Green*,[51] comment by counsel resulted in a new trial. The court quoted with approval an opinion by the superior court of that state which said:

> " 'This privilege of the defendant would be of little value if the fact that she claimed its protection could be made the basis of an argument to establish her guilt.' "

In Rhode Island in *State* v. *Hull*,[52] the court said:

> "It was the defendant's privilege as well as right, not only to remain silent herself, but also not to offer any testimony in her defense, but to rely upon the presumption of innocence which obtained in her favor, and the insufficiency of the evidence produced by the State, to convict her. In other words, the State was bound to prove her guilty, without any assistance, either active or passive, on her part. To assume in argument, therefore, that testimony for the defense, if offered, would show, more plainly than that put in

E. 494 (1892); People v. Fitzgerald, 156 N. Y. 253, 260, 50 N. E. 846 (1898); People v. Martin, 184 App. Div. 767, 770, 172 N. Y. S. 371 (1918).

[50] 18 Ohio N. P. (N. S.) 465 at 472 (1916).

[51] 233 Pa. 291 at 294, 82 Atl. 250 (1912).

[52] 18 R. I. 207 at 211, 212, 26 Atl. 191 (1893).

by the State, that the defendant was guilty, was certainly going somewhat beyond the limit of legitimate inference."

In South Carolina the statute allowed the accused to testify if he desired to do so, and not otherwise. It did not say that no presumption should arise from failure to testify. The supreme court, however, has held that such a rule followed from the statute.[53] Ten years later, in *Town Council* v. *Owens*,[54] the court reversed a judgment in a case in which the accused was the only witness sworn, and it did not appear that he had either asked to be sworn or had objected to taking the stand. The court said:

"Because the defendant made no objection to his being sworn and no objection as to his testifying, does not alter his constitutional right. . . . It is not in accord with the orderly administration of justice to swear a defendant as a witness against himself in any Court; indeed, as we have seen, the Constitution forbids it. If a defendant asks to be sworn when charged with a crime, that presents a different question, he certainly may be sworn as a witness in his own behalf. But in the case at bar, the defendant was the only witness sworn for the prosecution, and it does not appear that he asked to be sworn."

In 1929 in *State* v. *Browning*,[55] it said:

"It is true, also, that the defendant did not take the stand to deny or explain the evidence adduced against him, and that he did not offer any evidence in his behalf. Defendant's able counsel may have been so certain of their position as to error in the introduction of the indictment, and, for that reason, so sure of a reversal of an adverse judgment against their client, that they deemed it unnecessary and unwise to offer testimony in his behalf. The defendant had the constitutional right to adopt these courses if he chose to do so, and neither the lower Court nor this Court have the right to punish him for the exercise of either of those rights. And even if the defendant chose to remain silent at his trial, that fact did not reverse the usual rule of the law that the burden of establishing the defendant's guilt still remained on the State."

In Tennessee in *Staples* v. *State*,[56] where comment by the state's attorney caused the supreme court to grant a new trial, that court said

[53] State v. Howard, 35 S. C. 197, 14 S. E. 481 (1891).
[54] 61 S. C. 22 at 24, 39 S. E. 184 (1901).
[55] 154 S. C. 97 at 102, 151 S. E. 233 (1929).
[56] 89 Tenn. 231 at 233, 14 S. W. 603 (1890).

that the provision of statute that failure of the accused to testify should not create any presumption against him

> ". . . is in accord with the bill of rights, wherein it is provided that in all criminal prosecutions the defendant 'shall not be compelled to give evidence against himself.' No inference of guilt can be drawn from the failure of a defendant to testify for himself. Were it otherwise, a defendant on trial might be put in the awful situation of being required to commit perjury to avoid the consequences of his failure to avail himself of the privilege extended him by the statute. The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself."

In Utah, in *People* v. *Hart*,[57] the court held that the evidence was not sufficient to convict the defendant and in such case no adverse presumption could arise from his failure to testify. In *State* v. *Hillstrom*,[58] it declared that the state was required to show the defendant's guilt beyond a reasonable doubt, but it added:

> "But the defendant, without some proof tending to rebut them, may not avoid the natural and reasonable inferences deducible from proven facts by merely declining to take the stand or remaining silent. . . . Here the commission of the offense is proved beyond all doubt. That is conceded. Other facts also are shown from which natural and reasonable inferences arise that the defendant was one of, and the active, perpetrator of the offense. The probative effect of them and the natural and reasonable inferences deducible from them cannot be avoided by the defendant remaining silent or refusing to take the stand and offering no proof to rebut them. While the proven facts and inferences against him are neither strengthened nor weakened by his mere silence or failure to take the stand, yet when he, with peculiar knowledge of facts remains silent, or has evidence in his power by which he may repel or rebut such proven facts and inferences, and chooses not to avail himself of it, he must suffer the consequences of whatever the facts and inferences adduced against him tend fairly and reasonably to prove."

In Vermont, in *State* v. *Cameron*,[59] where a new trial was awarded because of comment by counsel, the court said,

> "The respondent's omission to testify, not only by law creates

[57] 10 Utah 204, 37 Pac. 330 (1894).
[58] 46 Utah 341 at 357, 150 Pac. 935 (1915).
[59] 40 Vt. 555 at 565-566 (1868).

no presumption against him, but it permits no such presumption in fact. The statute permitting a prisoner to testify for himself is a mere statute of privilege. . . . In the great body of cases no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge. The very fact that he testifies as if with a halter about his neck, that he is under such inducement to make a fair story for himself, his character and his liberty if not his fortune and his life being at stake, is enough to usually deprive his testimony of all weight in his favor, whether it be true or false. This is the case even when his manner upon the stand is unexceptionable . . . . It is true that a clear intellect and perfect self-possession may enable an unscrupulous rogue to run the gauntlet of a cross-examination and make something out of this privilege, and the same qualities will be still more likely to help an innocent man to some advantage from it, but the true application of the statute is only to those rare cases, when a word from the prisoner, and him only, will manifestly dispose of what otherwise seems conclusive against him."

In the Virginia case of *Price* v. *Commonwealth*,[60] the court said,

"The sole purpose of this enactment [the act of 1882], it is obvious, was to give to the accused, who alone could know the true state of the case and the explanation of many of its seemingly inculpatory circumstances, the opportunity to testify or not as his interests might dictate. Before the passage of the statute the accused had the right to deny his guilt and to rely upon the legal presumption of innocence which attaches to every person charged with crime until proved to be guilty, and the statute was not intended to deprive him of that right. It can never be made a means for depriving the prisoner of this presumption of innocence, as it inevitably will be if the courts and their officers are permitted to comment upon the failure of the accused to testify." [61]

In Washington, in *State* v. *O'Hara*,[62] where the testimony brought forward by the prosecution was inadequate, the accused testified and the prosecution relied upon testimony brought out on cross-examination, judgment was reversed. In the same state a statute required the trial courts to instruct juries that no inference of guilt should arise out of the failure of the accused to testify.[63] The supreme court attempted

[60] 77 Va. 393 at 395 (1883).

[61] See also Wilson v. Commonwealth, 157 Va. 776, 162 S. E. 15 (1932).

[62] 17 Wash. 525, 50 Pac. 477, 933 (1897).

[63] Act of Nov. 29, 1871, Laws of Wash. (1871) p. 105; Wash. Comp. Stat. (Remington 1922) sec. 2148.

to abolish this as a compulsory requirement,[64] relying upon a statute which merely authorized the court to prescribe rules of procedure.[65] The court, however, later on conceded that the accused was entitled, if he so requested, to a charge that his silence did not give rise to any inference of guilt.[66]

In West Virginia, in *State v. Chisnell*,[67] the court said,

> "Under the benignity and mercy of our law he has a right to be silent, and to call on the prosecution to prove him to be guilty. Often, indeed generally, it is the best policy for him to remain silent, even if innocent, and the exercise of this sacred privilege should by no means be even faintly alluded to, to his prejudice."

And in *State* v. *Taylor*,[68] where the accused testified but his wife did not, it was held that the prosecution might not comment upon her failure to testify. The statute applied equally to the accused and to his wife. In the course of its opinion the court said,

> "One of the most excellent principles of the common law was that the State took upon itself the burden of proving the guilt of the prisoner. It, in no manner, permitted confessions to be extorted from him. It was in no sense inquisitorial. A judgment could not stand upon a confession unless it was voluntary. If not voluntary, confessions were not admissible in evidence. So the law, having brought the prisoner into court against his will, did not permit his silence to be treated or used as evidence against him. Before the assistance of counsel was allowed, prisoners were at liberty to make statements to the jury, and, upon their voluntarily doing so, they were sometimes questioned by the attorney general, but were at liberty to stop at any time and remain silent, and, in that event, their silence was not permitted to raise any inference or presumption against them. Cooley's Cons. Lim. 442 to 449. This principle of the common law having been embodied in our Constitution as a guaranty of the liberty of the citizen, the legislature, in raising the common law privilege from a mere statement on the part of the prisoner in his own behalf, to the dignity of evidence under oath, still does not, and cannot, permit the exercise of that privilege to so operate as to compel him to testify against himself by conduct or otherwise."

[64] Rule 9 of rules adopted January 14, 1927, 140 Wash. xli; see also 159 Wash. lxiii (1930).

[65] Laws of 1925, extraordinary session, c. 118, p. 187.

[66] State v. Mayer, 154 Wash. 667 at 670, 671, 283 Pac. 195 (1929).

[67] 36 W. Va. 659 at 671, 15 S. E. 412 (1892).

[68] 57 W. Va. 228 at 235, 50 S. E. 247 (1905).

In Wisconsin, in *Montello* v. *State*,[69] where the defendant did not go upon the stand, the supreme court held that the evidence was insufficient to convict him. The law requires proof beyond reasonable doubt, and until such proof has at least prima facie been adduced by the state the defendant is not called upon to offer testimony in his defense.

And in Wyoming, in *Anderson* v. *State*,[70] where the prosecuting attorney commented on the failure of the accused to testify, the supreme court granted a new trial, saying,

> "And we think it necessary to so construe the statute to avoid defeating its purpose and to preserve the constitutional right of the defendant to decline to testify against himself, especially as such restrictions would be implied for the reasons stated, if omitted from the statute.
>
> "Without an express statutory prohibition of unfavorable references to or comments upon a failure to testify, it is generally held that they would be improper under the provision permitting the defendant to be sworn and examined as a witness only at his own request or if he so elect, and for the reason, mainly, that they disregard the presumption of innocence to which a defendant is entitled throughout the case, and violate his constitutional right aforesaid."

CONCLUSIONS

We have seen that the prohibition against compulsory self-incrimination is firmly embedded in the constitutions of the United States and of most of the states;[71] that, in order to give full effect to such provisions, the legislatures, which "are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," [72] have almost uniformly restrained the drawing of unfavorable inferences from failure to testify; and that the courts have almost uniformly shown the same attitude toward the silent defendant. Therefore, the plans which the Law Institute and the Bar Association were induced to approve would have difficulty in running the gauntlet of the legislatures and the courts.

It will be remembered that the plans provide broadly that when the accused does not testify, that fact may be commented upon and the rea-

[69] 179 Wis. 170, (State v. Smith) 190 N. W. 905 (1922).

[70] 27 Wyo. 345 at 365, 196 Pac. 1047 (1921).

[71] On the necessity for such prohibition see 1 WIGMORE, EVIDENCE, 2d ed., pp. 824, 827 (1920).

[72] Missouri, K. & T. Ry. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638 (1904).

sonable inferences be drawn.[73] Their advocates claim that an innocent defendant cannot have any reason for refusing to testify, in spite of the fact that in many states if the accused takes the stand he may be subjected to a cross-examination which is not limited to the offense for which he is then on trial.[74] They cite language used by the highest court of Maine some sixty years ago but ignore later developments in that state.[75] They cite recent legislation in Louisiana as permitting comment and as indicating a trend in favor of such conduct of the trial, whereas, in fact, the proposed change was defeated by a vote of 39 to 0 in the state senate and by a vote of 76 to 3 in the house of representatives.[76] They cite English legislation as lending moral support to their plan but ignore the vitally important conditions upon which comment upon failure to testify is permitted in that country.[77] And other arguments which they advance will not stand careful examination. But it is not desirable to give further consideration to such arguments here. It is sufficient to consider whether the proposed legislation, if adopted, could be sustained, and, if not, whether legislation somewhat similar in scope could be so framed as to come within the requirements of the normal constitutions.

The plan proposed is obviously unconstitutional in the case of federal legislation under the Constitution of the United States and in the case of state legislation under the normal state constitutions if the effect of such a provision is to force the accused to take the stand or to suffer a real detriment if he does not do so. And, on the other hand, if the jury is to be aided in drawing a natural inference from the silence of the defendant, it is obviously necessary to provide safeguards to insure that only a natural inference will be drawn. For example, as already pointed out, a man who is entirely innocent of the crime charged may fear that discreditive cross-examination would bring out evidence concerning another offense[78] which could not be considered by the jury if

[73] See note 1.

[74] See note 78.

[75] See notes 42, 43.

[76] See note 23.

[77] See note 80.

[78] See, for example, Rice v. State, 195 Wis. 181, 217 N. W. 697 (1928); State v. Hopkins, 147 Wash. 198, 265 Pac. 481 (1928); State v. Steele, 150 Wash. 466, 273 Pac. 742 (1929); State v. Schultz, 34 N. M. 214, 279 Pac. 561 (1929); Hendricks v. State, 162 Tenn. 563; 39 S. W. (2d) 580 (1930); Harrold v. Territory, 18 Okla. 395 at 401, 89 Pac. 202 (1907); State v. Cloninger, 149, N. C. 567 at 572, 62 S. E. 154 (1908); cf. State v. Hollister, 157 Wash. 4, 288 Pac. 249 (1930); Harris v. Commonwealth, 129 Va. 751, 105 S. E. 541 (1921); State v. Shockley, 29 Utah 25 at 48-50, 8 Pac. 865 (1905); State v. Crawford, 60 Utah 6, 206 Pac. 717 (1922).

he did not take the stand,[79] and which might so injure him in the eyes of the jury as to bring about his conviction. Unless the scope of discreditive cross-examination were limited it would not be possible to draw from failure to testify any legitimate inference which would be worth drawing. The subjecting of the accused to unfavorable comments for silence under such circumstances would unquestionably be in derogation of his constitutional rights.

Parliament recognized the privilege of the accused to protection from compulsory self-incrimination when, in enacting the law which made the accused a competent witness, it carefully limited the scope of cross-examination.[80] In this respect the statute might well form a model for the framing of American legislation. The Act of Parliament is so limited that it cannot be cited as fully supporting the plans proposed by the American Law Institute and the American Bar Association but it does show the conditions under which such plans might probably be transformed into constitutional projects.

With that possible objection to taking the stand disposed of, consideration should be given to the circumstances under which the accused may rightfully be expected to testify. It should be made clear that until the government has made out a case which calls for a reply, until it has done far more than make out an accusation, the defendant is not called upon to produce any witnesses and he is not subject to any unfavorable inferences if other witnesses can be produced who will sufficiently meet the case made out by the prosecution. There is good

[79] People v. Fitzgerald, 156 N. Y. 253 at 260, 50 N. E. 846 (1898); People v. Mantin, 184 App. Div. 767 at 770, 172 N. Y. S. 371 (1918); Benedict v. State, 190 Wis. 266 at 272, 208 N. W. 934 (1926).

[80] 61 & 62 Vict., c. 36 (1898) provides,

"(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination nothwithstanding that it would tend to criminate him as to the offense charged;

"(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offense other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offense is admissible evidence to show that he is guilty of the offense wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offense . . . . "

reason to fear that if comment upon failure to testify is permitted the prosecution will often try to prove its case by the accused. It should, therefore, be made as clear as the English language can make it that the burden of proof is always on the prosecution, that the accused is never obliged to testify, and that the only inference which may be properly drawn from a failure to testify is that which a competent person would naturally draw under all the circumstances.

It may be said that, except as to discreditive cross-examination, the points suggested are merely restatements of existing law. The trial courts have not always so recognized the law; and, moreover, until the legislatures feel convinced that such is the law and that the power to refer to the silence of the defendant will not be misused but that only fair inferences will be drawn, the legislatures are not likely to change the statutes which now safeguard the rights of defendants in criminal trials.†

† NOTE: A comment on Mr. Reeder's article will appear in a later issue.—*Ed.*