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Walter T. Dunmore

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## INFERENCE FROM CLAIM OF PRIVILEGE BY ACCUSED.

WALTER T. DUNMORE,

Dean of Western Reserve University Law School.

Proposal number three submitted by the recent Ohio Constitutional Convention to the voters of Ohio for ratification contains the provision that, "No person shall be compelled, in any criminal case, to be a witness against himself, but *his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel.*" This proposal was adopted by a very large majority when submitted.

Before the adoption of this proposal, the Ohio constitution, ratified in 1851, in *Article I, Section 10*, contained, among other provisions, the words, "Nor shall any person be compelled, in any criminal case, to be a witness against himself." The Code of Criminal Procedure adopted by the Ohio legislature May 6, 1869, provided in *Section 140*: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged, shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment made upon, such neglect or refusal." A similar provision is still found in The Ohio General Code of 1910, *Section 13661*.

In view of the fact that nearly all of the states have embodied in their constitutions similar provisions, and that in all but three American jurisdictions there is legislation prohibiting the state from availing itself of any inference by reason of the failure of accused to testify, the question arises whether the change made by Ohio is a defensible one and one which should be made in other jurisdictions.

To answer intelligently this question, it first must be decided whether defendant should be required, in a criminal case, to testify as any other person.

In Volume 2, page 216, of the *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY*, Mr. Charles R. Bostwick takes the position that defendant should be available to the prosecution as a witness. Not a few lawyers now may be found who agree with Mr. Bostwick, and those who do so would doubtless find no fault with the Ohio amendment except that it does not go far enough. One of the most distinguished jurists to take a position against the rule excusing the accused from giving self-disserving testimony was Jeremy Bentham. Many lengthy argu-

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ments relative to this privilege of accused might be restated, but it is believed that a very brief review of the reasons suggested by Bentham will serve to clear the way for the ascertainment of the reason why the privilege remains everywhere so firmly entrenched.

In Volume 7, at page 451 of Bentham's Works, as published by his executor, John Bowring, is found a discussion of what Bentham terms "Pretences for the Exclusion." According to Bentham, these pretences are five in number:

(1) The position is taken by some that the propriety of the rule excusing defendant is too clearly evident to admit of any dispute. There certainly is nothing in the history of the rule as given in Bentham's Works, Volume 7, page 458, to justify the taking of any such position and that many take this position is no argument for its soundness. Bentham clearly was justified in ignoring those on whom all argument would be lost.

(2) "The old woman's reason." This reason is that it is a hardship for the accused to be obliged to incriminate himself. Bentham is easily able to expose the fallacy of such an argument. In fact the courts have taken the position that the privilege is for the benefit of the innocent and not of the guilty,<sup>1</sup> and probably no one would now urge that the hardship in the case of an accused who is actually guilty is any reason why he should not be compelled to testify against himself.

(3) "The fox-hunter's reason." This conception merely introduces into legal procedure the idea of fairness, the idea that accused should be given a sporting chance for his escape by acquittal. The "game" theory of a lawsuit already has too strong a grasp upon our law of procedure and with the numerous safeguards now thrown about accused, even the most conservative probably would not consider this reason as possessing any considerable merit.

(4) "Confounding interrogation with torture." If accused were compelled to testify, the method of extorting confessions to which recourse is so frequently had by police officers would be unnecessary to a very large extent. Far less physical torture would result from the examination in open court than now results from the continued efforts to extract a statement before trial.

(5) "Reference to unpopular institutions." Because confessions were extorted under the Inquisition and in the Court of Star Chamber, therefore one now should never be compelled to incriminate himself. This association has doubtless been of prime importance in giving the

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<sup>1</sup>J. Byles in *Bartlett v. Lewis*, 12 C. B. N. S. 249 at 265, "The rule was intended for the protection of the innocent, and not for that of the guilty."

privilege the dignity of constitutional protection, but nevertheless it is difficult to find therein any real argument for the privilege. It must be kept in mind that this privilege arose at a time when accused was not permitted to testify in his own behalf and that conditions are not at all similar at the present time.

To those who are considering the privilege from a theoretical standpoint, the protection of the accused from judicial questioning at the trial seems indefensible. The rule seems to prohibit the investigator after truth from going to the primary source and to force his reliance upon secondary and less satisfactory evidence. The parent seeking to ascertain whether his child has been guilty of any delinquency prefers to question that child directly, rather than to receive the statements of a number of other children. Everyone feels that the natural way to learn of the guilt or innocence of the accused is to question him directly. The writer has always had difficulty in placing the defense of this privilege upon a logical basis, and if the reasons suggested by Bentham were the only ones in favor of this privilege, it seems that no defense of the rule could be maintained.

Unbiased defenders of this privilege, however, recognize that it is practical considerations which must constitute their defense. Undoubtedly this privilege is highly advantageous to the guilty, but we must remember that some of those placed on trial are innocent. Sir James Stephen in his *History of the Criminal Law of England*<sup>2</sup> says that the fact that the prisoner cannot be interrogated "stimulates the search for independent evidence." That this is true cannot be questioned. Professor Wigmore after a careful consideration of the history and policy of this privilege concludes,<sup>3</sup> "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."

In the rush of criminal business the prosecution would depend more and more upon its ability to build a case upon defendant's own testimony. The prosecutor would be strongly tempted to seek by clever questioning the answers which would help toward establishing the guilt of the accused. The abolition of the privilege, in actual practice, tends to place in jeopardy the safety of the innocent person charged with a criminal offense by leading to a careless examination of sources of proof other than the testimony of the accused. American lawyers who have attended a criminal trial in France or have read a full report of such a trial seldom urge that the method of questioning accused leads to a more

<sup>2</sup>Vol. I, p. 442.

<sup>3</sup>Vol. IV, Sec. 2251, p. 3097.

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fair and dignified trial. One has but to read an account of a French prosecution such as that of the Monk Léotade<sup>4</sup> to have raised in his mind serious doubts as to the practical wisdom of abolishing the privilege in question. The time may come when attorneys for the state will be so little partisan that innocent defendants will need no such protection as now exists, but the writer believes that the experience of other countries does not warrant the present abolition of this privilege which now exists in every American jurisdiction.

If the privilege against compulsory self-disclosure should be retained, the question remains whether there is any justification for a change which would permit an inference from the claim of this privilege by the accused.

A logical justification for such an inference might be made by taking the ground that the position of the accused as a defendant and as a witness is a dual one, and that the failure of accused to produce himself as a witness is the same as his failure to produce any other witness. The dual position of accused is frequently recognized in other connections. If accused does testify voluntarily, the state is usually permitted to prove the commission of other crimes by accused to attack his credibility as a witness, although such evidence of other crimes is clearly inadmissible in proof of his guilt of the crime charged when guilty knowledge is not involved. Strictly speaking, it is difficult to see how the personal privilege not to testify is violated so long as accused is not actually required to testify. However, in justifying a change in reference to a privilege so universally granted, something more than a mere technical justification must be found.

As before stated, it appears that the privilege against compulsory incrimination can be defended only by reason of practical considerations. It has seemed to nearly all courts and text-writers that exactly the same practical considerations should prevent the making of any inference when accused avails himself of his privilege. If requiring accused to testify directly would cause the prosecution to rely for proof upon the testimony of defendant rather than upon a careful investigation of other sources of evidence, would not the same result be reached if prosecution could rely either upon the testimony of accused or upon the inference of guilt which would be urged strongly upon the jury when accused failed to take the stand? It must be admitted that the difference in the evil involved between compelling accused to testify, or in permitting an inference from his failure so to do is after all only

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<sup>4</sup>An account of this case is given in Sir Stephen's History of Criminal Law, Vol. III, p. 466.

a difference in degree. To a certain extent the prosecution would doubtless rely upon the advantage given it by virtue of the inference. Nevertheless, it seems clear that the prosecution could rely far less upon the inference than it could upon a right to call accused as a witness for the state. The prosecution, even when inference is permitted, has no benefit therefrom until a sufficiently strong case has been presented to the tribunal to warrant the submission of the case to the jury. The prosecution must make an investigation thorough enough to reveal evidence, other than testimony of accused, sufficient to make out a *prima facie* case and to sustain its burden of proof. The prosecution in France may bring a defendant to trial with hope of success, even when there is little evidence of his guilt obtained from sources other than the accused, because of reliance upon the right to examine him, but the state under the Ohio amendment must in the first instance at least produce substantial evidence of guilt without the aid of defendant's testimony. It seems, therefore, that this difference in degree is such a substantial difference that there is no reason to expect the same evils from merely permitting an inference as would probably result from permitting prosecution to rely upon testimony of accused as part of its evidence in chief.

We unhesitatingly admit as evidence the conduct of accused out of court when charged with crime and from the point of view of logical relevancy, there is no possible objection to permitting an inference. In fact, it is inevitable that the jury will make the inference. Allowing counsel to comment upon failure of accused to take the stand and thus to emphasize the inference will take away from a guilty defendant a protection to which he is not entitled, without a corresponding danger to an innocent accused because of a failure properly to investigate his case.

The writer believes that the weight of practical considerations is all that makes it expedient to continue the privilege against compulsory self-disclosure in criminal cases, that these practical considerations have not the same weight in connection with the inference from claim of privilege and that, in view of the extreme need in America of more certainty of punishment, the inference permitted by the Ohio amendment will be of decided value in criminal prosecutions.