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## Criminal Procedure - Comment on Defendant's Failure to Testify

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## Notes

CRIMINAL PROCEDURE—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY—The district attorney in a murder prosecution, availing himself of a special provision amending the California constitution,<sup>1</sup> repeatedly commented upon the failure of the accused to take the stand in his own behalf. Defense counsel failed to convince the California Supreme Court that the defendant had been deprived of any federal right,<sup>2</sup> and appealed the question to the Supreme Court of the United States. *Held*, affirmed. The fifth amendment to the United States Constitution providing, in part, that "no person shall be compelled in any criminal case to be a witness against himself" has not been made applicable to the states by virtue of either the "due process" or "privileges and immunities" clauses of the fourteenth amendment. *Adamson v. People of California*, 67 S. Ct. 1672, 91 L. Ed. (Adv.) 1464 (1947).<sup>3</sup>

Only Georgia retains the common law rule denying the competency of the accused as a witness.<sup>4</sup> Most statutes in conferring the privilege have expressly declared that the failure of the accused to take advantage of it shall not be construed for or against him.<sup>5</sup> Congress has prescribed the same law for the federal courts.<sup>6</sup> The California rule which forbids compulsory testimony but allows infer-

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1. Calif. Const., Art. 1, § 13: ". . . In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or jury." For limitations placed upon this privilege of comment, see (1946) Note 34 Calif. L. Rev. 764 commenting upon the decision of the California court in the instant case.

2. *People v. Adamson*, 27 Cal. (2d) 478, 165 P. (2d) 3 (1946).

3. Justices Murphy, Rutledge, Black, and Douglas dissented, with Justice Frankfurter concurring in the majority opinion. This decision is in accord with the doctrine announced in *Twinning v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908) and *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (holding that the double jeopardy clause of the fifth amendment did not apply to the states). Unquestionably, the most significant point in the case is the storm of controversy centering about the fourteenth amendment and whether or not by its adoption all the Bill of Rights were made applicable to the states. However, any such ramifications in the field of constitutional law are beyond the scope of this note. Attention will be focused only upon the criminal procedure point decided, i.e. that the district attorney could comment upon the failure of the accused to testify.

4. II Wigmore, Evidence (3 ed. 1940) 701, § 579.

5. VIII Wigmore, *id.* at 412, § 2272.

6. 20 Stat. 30 (1878); 28 U. S. C. 632 (1940). *Wilson v. United States*, 149 U. S. 60, 37 L. Ed. 650, 13 S. Ct. 765 (1893).

ences to be drawn in certain instances where the defendant declines to exercise the privilege is decidedly in the minority.<sup>7</sup> But, as noted by Professor Wigmore, this minority is gradually being enlarged.<sup>8</sup> High authorities urge its adoption. Among the foremost are the American Law Institute<sup>9</sup> and the American Bar Association.<sup>10</sup> No less a scholar than Mr. Justice Cardozo has questioned the policy underlying the privilege against self-incrimination.<sup>11</sup> One authority believes that the existence of the privilege accounts for the prevalence of "third-degree" tactics.<sup>12</sup>

An 1886 Louisiana statute<sup>13</sup> first gave the accused the privilege of testifying but specifically declared that his failure to exercise it should not be construed for or against him. This and succeeding acts have been construed in favor of the defendant by the Louisiana Supreme Court. The district attorney's allusion, either directly<sup>14</sup> or indirectly,<sup>15</sup> to the fact that the accused did not testify amounts to

7. The following states allow comment: California, New Jersey, Ohio, Iowa, and Vermont. In Connecticut the judge may comment, VIII Wigmore, Evidence, 413, § 2272, n. 2.

8. VIII Wigmore, Evidence, 412, § 2272.

9. 9 A. L. I. Proc. 218 (1930).

10. 56 A. B. A. R. 137 (1931).

11. "What is true of jury trials and indictments is true also as the cases show, of the immunity from compulsory self-incrimination . . . This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental . . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry, *Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288, 292 (1937).

12. Irvine, *The Third Degree and the Privilege Against Self Incrimination* (1928) 13 Corn. L. Q. 211, 213. For further discussion of the subject of this note: see Reeder, *Comment Upon Failure of Accused to Testify* (1932) 31 Mich. L. Rev. 40; Bruce, *The Right to Comment on the Failure of the Defendant to Testify* (1933), 31 Mich. L. Rev. 226; Shealy, *Comment on Failure of Accused to Testify* (1937) 12 Wis. L. Rev. 361; Taft, *The Administration of Criminal Law* (1905) 15 Yale L. J. 1; VIII Wigmore, Evidence, § 2251 (Policy of the Privilege).

13. La. Act 29 of 1886.

14. *State v. Carr*, 25 La. Ann. 407 (1873) (This was decided before any statute was passed); *State v. Marceaux*, 50 La. Ann. 1137, 24 So. 611 (1898); *State v. Robinson*, 112 La. 939, 36 So. 811 (1904); *State v. Broughton*, 158 La. 1045, 105 So. 59 (1925); *State v. Richardson*, 175 La. 823, 144 So. 587 (1932). See note in (1933) 84 A. L. R. 784. In the few cases in which a new trial was refused it is difficult to believe that the remarks of the district attorney actually amounted to comment on the failure of the accused to testify: *State v. Thompson*, 116 La. 829, 41 So. 107 (1906); *State v. Matthews*, 119 La. 665, 44 So. 336 (1907); *State v. Varnado*, 126 La. 732, 52 So. 1006 (1910). For an excellent discussion of the pertinent Louisiana statutory law and jurisprudence, see Wright, *Comment and Inference on Accused's Claim of Privilege and against Self-Incrimination in Louisiana* (1941) 15 Tulane L. Rev. 125.

15. *State v. Sinigal*, 138 La. 469, 70 So. 478, Ann. Cas. 1917D 278n, 280n (1915).

incurable error entitling him to a new trial. The enactment immediately preceding the adoption of the 1928 Code of Criminal Procedure<sup>16</sup> had retained the provision that the defendant's failure to avail himself of the privilege should not create any presumption against him. Its present day equivalent, Article 461,<sup>17</sup> does not specifically outlaw the drawing of an inference. This omission forms the basis of the contention that comment should now be permissible under Louisiana law.<sup>18</sup> Such an argument, however, ignores the legislative history of Article 461. As submitted by the draftsmen of the Code of Criminal Procedure, Article 461 did contain a clause authorizing comment.<sup>19</sup> The legislature struck out this provision with only three dissenting votes, but did not insert a direct prohibition in its stead.<sup>20</sup>

Any statute sanctioning comment may be met with serious constitutional objections. According to the Louisiana Constitution, "no person shall be compelled to give evidence against himself in criminal cases."<sup>21</sup> A similar provision of the South Dakota Constitution has been held sufficient to invalidate an act permitting the drawing of an inference.<sup>22</sup> In an opinion handed down under a Massachusetts declaratory judgments act, the supreme judicial court informed the legislature that a proposed statute allowing comment would be unconstitutional.<sup>23</sup> Later, the Supreme Court of Iowa refused to consider the reasoning of these decisions, holding that such a statute did not deprive the defendant of due process of law.<sup>24</sup>

16. La. Act 157 of 1916 [Dart's Stats. (1939) § 1991].

17. "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness." Art. 461, La. Code of Criminal Procedure of 1928. The corresponding section of Act 157 of 1916 was the same but added: "And his neglect or refusal to testify shall not create any presumption against him."

18. Wright, *supra* note 14, at 134.

19. *Ibid.*

20. La. S. J. for June 13, 1928, pp. 297, 310; H. J. for June 19, 1928, pp. 544, 545. The defeat of this measure is commented upon by Robert L. Reeder in (1932) 31 Mich. L. Rev. 40, 56, and mentioned in *State v. Wolfe*, 64 S. D. 178, 266 N. W. 116; 104 A. L. R. 464 (1936) invalidating a South Dakota statute permitting comment. Apparently, the only case directly in point since the adoption of the Code of Criminal Procedure is *State v. Richardson*, 175 La. 823, 144 So. 587 (1932) in which the court held it was error for the district attorney to allude to the failure of the defendant to testify. Article 461 was not even mentioned and only former jurisprudence was cited in support of the decision. Although the opinion may be weakened somewhat by this fact, it seems very doubtful in view of the legislative history of Art. 461, that a different result would or could have been reached had that article been considered.

21. La. Const. of 1921, Art. 1, § 11.

22. *State v. Wolfe*, 64 S. D. 178, 266 N. W. 116, 104 A. L. R. 464, 478 n (1936).

23. *In re The Opinion of the Justices*, 300 Mass. 620, 15 N. E. (2d) 662 (1938).

24. *State v. Ferguson*, 226 Ia. 361, 283 N. W. 917 (1939).

These cases, while directly opposed in policy and spirit, may be distinguished upon the basis of the language of the constitutional provisions involved. Little authority is to be found on this precise point, for the greater number of state legislatures have not yet enacted such statutes.<sup>25</sup> It is clear, however, that the purpose of these constitutional safeguards was to prevent *physical* compulsion and not the drawing of inferences which reasonable men "can no more disregard than one the light of the sun, when shining with full blaze on the open eyes."<sup>26</sup>

Perhaps the most cogent argument for disallowing comment is the fact that when the defendant takes the stand he becomes subject to the laws applicable to other witnesses—including impeachment.<sup>27</sup> Thus a defendant with several previous convictions, though desiring to testify, may very plausibly decline to do so. The possibility of this injustice has been recognized by the Supreme Court of California and other authorities.<sup>28</sup> Abolition of the law permitting impeachment of the accused by showing prior convictions whenever he takes the stand has been suggested as a possible solution.<sup>29</sup>

Should Louisiana desire to change its present rule to permit comment, such a course would be possible without fear of running afoul of the Federal Constitution. However, a rule allowing comment would be clearly opposed to the settled doctrines of Louisiana jurisprudence and a constitutional amendment would probably be necessary to insure the validity of so sweeping a change.

ROLAND ACHEE

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25. See note in 104 A. L. R. 478 (1936). Two earlier cases might be mentioned. *People v. Tyler*, 36 Cal. 522 (1869) is opposed to permitting comment, but the case did not turn on the constitutional question. In view of the recent California amendment, *supra*, note 1, it would be of no authority in California today. In *State v. Bartlett*, 55 Me. 200 (1867) it was decided in a Maine constitutional provision that the accused shall not be compelled to furnish evidence against himself did not deny the jury the right to take into consideration the fact that he did not offer himself in evidence. However, a Maine statute now forbids comment. VIII Wigmore, *Evidence*, 414, § 2272. This is the rule in Louisiana too. *State v. Louviere*, 169 La. 109, 124 So. 188 (1929).

26. *State v. Cleaves*, 59 Me. 298, 301 (1871).

27. III Wigmore, *Evidence*, 380, § 890.

28. *People v. Adamson*, 27 Cal. (2d) 478, 494, 165 P. (2d) 3, 12 (1946); (1946) 34 Calif. L. Rev. 764, at 765; Bruce, *supra* note 12, at 364; *Right of Prosecuting Attorney to Comment on the Defendant's Failure to Take the Stand* (1936) 22 Corn. L. Q. 392, 395.

29. *Id.*